

# The European Taxonomy Regulation as a Driver for a Sustainable Financial System

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## **Abstract:**

The aim of the EU Taxonomy Regulation is to define sustainable economic activities. This goal makes it the centrepiece of sustainable finance regulation and the central legal act for the sustainability transformation of the financial and real economy per se. However, its complex and detailed regulatory approach exposes it to the accusation of lacking operability; at the same time, its decidedly ecological approach falls short in terms of the social dimension of sustainability. In view of these shortcomings, this article examines whether the EU Taxonomy Regulation is at all suitable as a driver of a sustainable financial system and also looks at its relationship with thematically related legal acts.

## **Keywords:**

Sustainable Finance, Taxonomy Regulation, Sustainability Reporting

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## **I. Introduction**

The EU Taxonomy Regulation (TR) of 18 June 2020 is the centrepiece of European legislation to promote a sustainable financial system and is at the heart of the European sustainable finance debate.<sup>1</sup> Its core objective is to make sustainable economic activities and financial products recognisable as such for market participants: To this end, it provides a definition framework that is further fleshed out by delegated regulations from the EU Commission. The regulatory technique of the TR in conjunction with the Commission's delegated regulations that concretise it and other European legal acts to promote sustainable economic activity is highly complex and not always clear.<sup>2</sup> The relationship between the various thematically related legal acts in particular raises questions

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<sup>1</sup> See Recital 6 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13 of 22 June 2020, see Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, Mohr Siebeck 2022, 213.

<sup>2</sup> Ipsen/Röh ZIP 2020, 2001 et seq.; Gerdes ZG 2023, 138 (158); Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, 2021, section 18 margin no. 12.

with regard to their respective objectives, but also provides answers when carefully systematised. Against the backdrop of a multi-layered transformation process, this article traces the objectives and development of the TR to date and discusses if it can actually fulfil the requirements that must be placed on the engine of a sustainable financial and real economy.

Based on the particular importance of a sustainable financial system for the sustainability transformation of the real economy (II.), the article is dedicated to the regulatory concept of the TR (III.). Central to this is the question of how it has been organised to date, also in the light of its relationship to delegated regulations and related legal acts. On this basis, an assessment and forecast are prepared (IV.).

## **II. Objective: The Importance of a Sustainable Financial System**

### **1. The role of the financial sector in the sustainability transformation**

Sustainable finance is booming. Since the publication of the European Action Plan on Financing Sustainable Growth in 2018, the topic has been prominently on the agenda of EU legislators.<sup>3</sup> However, the European Commission is not pursuing the goal of sustainable finance for its own sake, but also sees sustainable finance as a milestone on the way to a sustainable real economy.<sup>4</sup> The sustainability transformation of the economy as a whole requires the involvement of financial institutions, both in their role as companies and as providers of capital to traditional companies. In principle, there is consensus on the leverage effect of the financial sector for the promotion of sustainable economic activity. However, in addition to positive effects, functional mechanisms of market economy systems can also be observed that run counter to the guiding principle of sustainability. As the global financial crisis of 2007/2008 revealed, the financial sector plays both a central and ambivalent role in the development of a sustainable economy, which it can both promote and hinder.<sup>5</sup> Its role is also crucial because the industry has changed in recent decades: from a sector that served the real economy to one that increasingly dominates the real economy and, with its financial institutions and rating agencies, has had a decisive influence on the creditworthiness of

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<sup>3</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018.

<sup>4</sup> Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final of 6 July 2021, 5 et seq.; Mittwoch, Nachhaltigkeit und Unternehmensrecht, 209.

<sup>5</sup> The extent to which the financial crisis has contributed to the market growth of sustainable investments is disputed in the literature, Dichtl, *Finanzwirtschaft, nachhaltige Entwicklung und die Energiewende*, Springer 2018, 84; in any case, it has exposed inadequacies in the financial sector and shifted the focus of political actors and regulators towards promoting long-term investments, with regard to the EU, for example, Ahlström Sustainability 11 (2019), 499.

companies and countries alike and has significantly influenced the entire corporate governance debate. In this respect, the concept of 'financialisation' is a defining term.<sup>6</sup>

At the same time, this development has fueled the debate on the moralisation of financial markets; the promotion of sustainable finance has been a key challenge since the signing of the Paris Agreement<sup>7</sup> and the publication of the UN 2030 Agenda<sup>8</sup> in 2015; the European Green Deal<sup>9</sup> and the European Climate Law<sup>10</sup> emphasise its importance. The EU is pursuing the transformation to a sustainable economy with numerous regulatory projects; sustainable finance has a key role to play here.<sup>11</sup>

The key finding is that unsustainable economic activity harbours considerable financial risks, which are already being felt in the European internal market.<sup>12</sup> However, the concept of sustainable finance goes beyond risk avoidance and includes the promotion of 'impact'. The main purpose of impact investing is to invest in organisations that seek to achieve a positive social or environmental impact, while at the same time generating financial returns.<sup>13</sup> The global market for impact-oriented investing has enjoyed continuous strong growth for several years. Over the last decade in particular, investors interest in the environmental or social purposes of their investments has risen sharply in addition to their financial interest.<sup>14</sup>

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<sup>6</sup> Aalbers, Corporate financialization, in: Richardson/Castree/Goodchild et al. (eds.), *The International Encyclopedia of Geography*, 2017; Soppe, *New Financial Ethics. A Normative Approach*, Routledge 2017, 3; Zumbansen Osgoode Hall Law School Research Paper No. 24/2010, 3 et seq. and 15 et sqq.; id. CLPE research Paper, 06/2009.

<sup>7</sup> United Nations Paris Agreement of 12 December 2015.

<sup>8</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* of 25 December 2015, UN Doc. A/RES/70/1/L.1, available at <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

<sup>9</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *The European Green Deal*, COM(2019) 640 final of 11 December 2019.

<sup>10</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243/1 of 9 July 2021.

<sup>11</sup> See also Bueren ZGR 2019, 813 (814 et seq.) et passim.

<sup>12</sup> Thus centrally the EU Commission, *Action Plan: Financing Sustainable Growth*, COM(2018) 97 final of 8 March 2018, 3 et seq.; Sjøfjell University of Oslo Faculty of Law Research Paper No. 2020-18, 2020, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3637969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637969); *this*, ECFR 2021, 190 (196 et sqq.); World Economic Forum, *The Global Risks Report 2020*, 2020 in particular chapters 3 and 4; on the integration of climate risks into financial risk management from a German perspective, recently Hertel ZBB 2021, 337; on sustainability risks for credit institutions: Kumpan/Mistereck ZBB 2023, 1.

<sup>13</sup> Rodin/Brandenburg, *The Power of Impact Investing*, Wharton School Press 2014; Clark/Emerson/Thornley, *The Impact Investor. Lessons in Leadership and Strategy for Collaborative Capitalism*, Jossey Bass 2014; OECD, *Social Impact Investment – Building the Evidence Base*, 2015. On the associated legal issues Scharlau, *Socially Responsible Investment*, De Gruyter 2009.

<sup>14</sup> See the Global Sustainable Investment Reviews published twice a year by the Global Sustainable Investment Alliance (GSIA) since 2012, available at <http://www.gsi-alliance.org/>. According to these reviews, the global market for impact investing grew by 34% to around USD 30.7 trillion between 2016 and 2018 alone, see GSI Review 2018, 3; by 2020, further growth of 15% to around USD 35.3 trillion was recorded, see GSI Review 2020, 5. For the first time, there was a decline in global growth due to a decline in investments by the USA despite other increasing investments, see GSI Review 2022, 10. In Europe, the volume of social impact investing was already estimated at EUR 9.8 billion in 2013, see the European SRI Study 2014 conducted by Eurosif, 21. In

The political goals are far-reaching: Recital 10 of the TR puts it in a nutshell: 'the financial system should be gradually adapted in order to support the sustainable functioning of the economy. To that end, sustainable finance needs to become mainstream'. This may also require methodological paradigm shifts; for example, the traditional objectives of capital market law currently have to accept the question of a reassessment in view of the European promotion of sustainability.<sup>15</sup>

The TR plays a key role in this transformation situation, as it provides the basic definition framework – it determines which economic activities are sustainable. This information is of central importance for (financial-)market participants: they need to know what is meant by a sustainable economic activity or investment or by a sustainable financial product. If the TR is to become the driving force behind a sustainable financial system, its sustainability concept needs to be comprehensive and operational.

## 2. What sustainability of the financial system?

Anyone who talks about the principle of sustainability owes a definition; this is particularly true for legal scholarship, which works with definitions as a central focus. Despite the wide range of terminology, there is a consensus at United Nations (UN) level regarding the content of the sustainability concept. For almost four decades, the UN has consolidated the concept of sustainability introduced in 1987 with the Brundtland Report<sup>16</sup> as a triad of ecological, economic and social dimensions, linked by the principle of intergenerational equity.<sup>17</sup> Today, this triad is differentiated in the form of the 17 Sustainable Development Goals (SDGs).<sup>18</sup> The UN always underlines the equal value of the three dimensions of environmental, social and economic sustainability.<sup>19</sup> This is also the case in EU primary law: According to Art. 3(3) TEU, the EU shall work towards the sustainable development of Europe based on balanced economic growth, a highly competitive social market

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Germany and Austria, too, there was a decline of 48% in impact investment in 2022 compared to 2021, although this reached a significant high in 2021 with an increase of 206% compared to the previous year, see Forum Nachhaltige Geldanlagen, Marktbericht Nachhaltige Geldanlagen 2023, 26.

<sup>15</sup> Klöhn/Jochmann KlimaRZ 2022, 12 and 13; already assuming a paradigm shift, Stumpp, *Nachhaltigkeitsratingagenturen*, Mohr Siebeck 2022, 236.

<sup>16</sup> UN General Assembly, Report of the World Commission on Environment and Development of 11 December 1987, UN Doc. A/RES/42/187 or WCED, our Common future, 43. Reasoning 2: Hauff (ed.), *Unsere gemeinsame Zukunft. Der Brundtland-Bericht der Weltkommission für Umwelt und Entwicklung*, German version, 1987, 46; Hardtke/Prehn (eds.), *Perspektiven der Nachhaltigkeit: Vom Leitbild zur Erfolgsstrategie*, 2001, 58; Epiney/Scheyli, *Strukturprinzipien des Umweltvölkerrechts*, 1998, 24 et sqq.

<sup>17</sup> UN General Assembly, Report of the United Nations Conference on Environment and Development, Annex I., Rio Declaration on Environment and Development of 12 August 1992, UN-Doc. A/CONF.151/26 (Vol. I); for more details on the Rio Earth Summit and the subsequent summits, see Gehne, *Nachhaltige Entwicklung als Rechtsprinzip*, 2011, 34 et sqq.

<sup>18</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* of 25 December 2015, UN Doc. A/RES/70/1/L.1, available at <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

<sup>19</sup> The preamble to the final declaration of the United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* of 25 December 2015, UN Doc. A/RES/70/1/L.1.

economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.<sup>20</sup>

The equivalence of the three dimensions also forms the central application dilemma of the sustainability principle, illustrated by the inherent contradictions of the various SDGs: For example, Goal No. 13 (climate action) and Goal No. 8 (decent work and economic growth) obviously conflict. Jurisprudence alone cannot resolve this dilemma. An interdisciplinary perspective is needed: Today, the concept of planetary boundaries has become established to operationalise sustainability.<sup>21</sup> This scientific concept identifies nine ecological subsystems and their limits, which must not be exceeded if humankind wants to maintain a state of the Earth that is safe for human behaviour – including any economic activity. All nine limits have been quantifiable since autumn 2023, six of them having already been exceeded.<sup>22</sup> The planetary boundaries relate to climate change, overloading with new substances, ozone depletion, the integrity of the biosphere, ocean acidification and changes to freshwater systems, changes in land use, disruption of biogeochemical cycles and aerosol pollution in the atmosphere. They can be combined with a social foundation that has been developed in more detail in the social sciences and, particularly, includes key fundamental and human rights.<sup>23</sup> Combining planetary boundaries and social foundation creates a corridor that provides a framework for safe and just operating space or, to put it another way, for sustainable human behaviour and entrepreneurial activity. Inherent conflicts between the economic, environmental and social dimensions of sustainability can be resolved in this way, at least at the macro level. This model of the planetary boundaries forms the basis of Germany's Sustainable Development Strategy,<sup>24</sup> as well as the Federal Environment Ministry's Integrated Environmental Programme 2030<sup>25</sup> and the final

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<sup>20</sup> See Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, 2022, 73 et seq. with further references.

<sup>21</sup> Fundamental Rockström et al. *nature* 461 (2009), 472; Rockström et al. *Ecology and Society* 14 and Leach/Raworth/Rockström, *Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity*, in: UNESCO ISSC, *World Social Science Report: Changing Global Environments*, 2013, 84 et sqq. From a legal perspective Sjøfjell/Bruner, *Corporations and Sustainability*, in: id. (eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2020, 3, 7 et sqq.; Callies ZUR 2021, 323 (329 et sqq.); most recently Buser, *Von der Nachhaltigkeit zur Resilienz und einem planetaren Grundgesetz*, *Verfassungsblog* of 20 June 2023, available at: <https://verfassungsblog.de/von-der-nachhaltigkeit-zur-resilienz-und-einem-planetaren-grundgesetz/>; Whiteman/Walker/Perego *Journal of Management Studies* 2013, 307.

<sup>22</sup> Persson et al. *Environmental Science & Technology* 56 (2022), 1510.

<sup>23</sup> Leach/Raworth/Rockström, *Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity*, in: UNESCO ISSC, *World Social Science Report. Changing Global Environments*, 2013, 84; Raworth *Oxfam Discussion Papers* 2012, 9; id., *Doughnut Economics*, 2017, Chapter 1 et passim. See also Griggs et al. *Nature* 2013, 305 (306).

<sup>24</sup> German Sustainability Strategy, further development 2021, available at <https://www.bundesregierung.de/resource/blob/974430/1940716/8943e3f421a7a0d8bcd06a1cc66e92d0/2021-07-26-gsds-en-data.pdf?download=1>.

<sup>25</sup> Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, *Shaping ecological change, Integrated Environmental Programme 2030*, August 2016, available at [https://www.bmu.de/fileadmin/Daten\\_BMU/Pool/Broschueren/integriertes\\_umweltprogramm\\_2030\\_en\\_bf.pdf](https://www.bmu.de/fileadmin/Daten_BMU/Pool/Broschueren/integriertes_umweltprogramm_2030_en_bf.pdf).

report of the German government's Sustainable Finance Advisory Council.<sup>26</sup> It is therefore also of particular interest with regard to the TR.

### III. Regulatory Concept of the Taxonomy Regulation

The sustainability concept of planetary boundaries and social foundation can actually be found in the regulatory concept of the TR. However, the EU legislator was faced with the Herculean task of developing a standardised version of this model, which has not yet been completed. In view of the high level of complexity and detail and the associated challenges for the addressees of the regulation, its success may well be in doubt.

#### 1. History of origin

The TR was adopted at almost the same time as the Sustainable Finance Disclosure Regulation<sup>27</sup> and the amendment to the Benchmark Regulation<sup>28</sup>. The Commission had already proposed this regulatory triad in 2018 in its Action Plan on Financing Sustainable Growth.<sup>29</sup> To implement the Paris Agreement and the UN Agenda 2030, it had already set up a group of experts in December 2016 to develop and evaluate various options for developing and promoting sustainable finance. Its final report in January 2018<sup>30</sup> was followed by the Action Plan in March 2018. As announced in Art. 20 TR, a European Platform on Sustainable Finance was also set up in October 2020 to advise the Commission on the details of the legal infrastructure – especially on the development of more specific technical screening criteria and their updating.<sup>31</sup> Five delegated acts have already been adopted that concretise the TR.<sup>32</sup> Despite the extensive body of standards, the technical screening criteria are still

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<sup>26</sup> Shifting the Trillions. A sustainable financial system for the great transformation, 31 Recommendations of the Sustainable Finance Committee to the German federal Government, 2021, available at [https://sustainable-finance-beirat.de/wp-content/uploads/2021/03/210319\\_SustainableFinanceCommiteeRecommendations.pdf](https://sustainable-finance-beirat.de/wp-content/uploads/2021/03/210319_SustainableFinanceCommiteeRecommendations.pdf).

<sup>27</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317/1 of 9 December 2019; see Bueren WM 2020, 1659 (1660); Glander/Lühmann/Jesch BKR 2020, 485 (545).

<sup>28</sup> Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, OJ 317/17 of 9 December 2019.

<sup>29</sup> Commission Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018, 8 et seq.

<sup>30</sup> Final report of the EU High-Level Expert Group on Sustainable Finance, 'Financing A Sustainable European Economy', available at: [https://finance.ec.europa.eu/document/download/2e65cb1e-bd47-4441-816a-d89ec61eef45\\_en?filename=180131-sustainable-finance-final-report\\_en.pdf](https://finance.ec.europa.eu/document/download/2e65cb1e-bd47-4441-816a-d89ec61eef45_en?filename=180131-sustainable-finance-final-report_en.pdf); see also Mittwoch, Nachhaltigkeit und Unternehmensrecht, 2022, 208 et seq. with further references.

<sup>31</sup> [https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance\\_en](https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en).

<sup>32</sup> Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 specifying the two climate-related environmental targets; Commission Delegated Regulation (EU) 2021/2178 of 6 June 2021 specifying the reporting obligations; Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors; Commission Delegated Regulation (EU) 2023/2485 of 27 June 2023 amending Delegated Regulation (EU) 2021/2139 with regard to economic activities

lacking for numerous economic activities. Therefore, in a lot of cases – and even with regard to entire sectors – it is not even possible to assess these activities under the requirements of the TR so far. Their sustainability-promoting effect is therefore still limited and their development is far from complete.<sup>33</sup>

## 2. Subject matter and scope of application

The aim of the TR is to establish a standardised understanding of sustainable economic activities. The reference point for determining sustainability is therefore the individual activity. Art. 3 TR contains criteria for their binary categorisation as ecologically sustainable or not ecologically sustainable. These need to be concretised by delegated regulations of the Commission. The TR is therefore a framework act.

Its scope of application is broader than it initially appears: Of course, it applies to financial market participants that provide financial products (Art. 1 para. 2 lit. b TR). In addition, it applies to all national or European requirements for environmentally sustainable financial products and thus ensures uniformity throughout the internal market (Art. 1 para. 2 lit. b TR). However, according to Art. 1 para. 2 lit. c TR, it also applies to all companies that are subject to the reporting obligation pursuant to Art. 19a or 29a of the EU Accounting Directive.<sup>34</sup> The group of these companies does not differentiate between the financial and real economy and was significantly expanded by the adoption of the Corporate Sustainability Reporting Directive (CSRD)<sup>35</sup> at the end of 2022: While currently, on the basis of the Non-Financial Reporting Directive (NFRD),<sup>36</sup> large capital market-oriented corporations with an annual average of more than 500 employees are subject to the non-financial reporting obligation, the CSRD also obliges parent companies of large groups and capital market-oriented SMEs to report on sustainability. A listing on European capital markets is sufficient for the application of the reporting obligations; companies do not need to be established in the EU for this. Alternatively, it is sufficient if third-country companies operate to a significant extent in the EU. Non-capital-market-orientated SMEs are at least encouraged to voluntarily apply the SME standards.<sup>37</sup> This expansion of the scope of application is expected to result in a four- to five-fold increase in the

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in certain energy sectors; Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023 to further specify the four non-climate-related environmental targets and to revise the reporting.

<sup>33</sup> Critical in this respect Müller BB 2024, I (editorial).

<sup>34</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182/19 of 29 June 2013.

<sup>35</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014 and Directives 2004/109/EC, 2006/43/EC and 2013/34/EU as regards corporate sustainability reporting, OJ L 322/15 of 16 December 2022.

<sup>36</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L330/1 of 15 November 2014.

<sup>37</sup> Allgeier NZG 2023, 95 and Allgeier/Feldmann NZG 2023, 491 on the indirect or de facto liability of SMEs.



number of companies subject to reporting requirements, with an increase of more than thirty-fold expected in Germany.<sup>38</sup> The scope of application of the TR is expanding accordingly, which certainly harbours transformation potential.

### 3. Definition of sustainable economic activities

The criteria for determining whether an economic activity or investment is environmentally sustainable can be found in Art. 3 TR. The development of a standardised classification system for sustainable economic activities has an indirect effect on these activities. This is not done through explicit prohibitions and bans, but indirectly in the form of so-called nudging, by setting appropriate incentives, particularly at the level of corporate financing.<sup>39</sup> As a nudging effect, the Commission hopes to influence entrepreneurial decisions to be made autonomously in favour of promoting sustainability.<sup>40</sup>

#### a) The criteria of Art. 3 Taxonomy Regulation

According to Art. 3 TR, the classification of an activity as sustainable or non-sustainable comprises four elements and follows the so-called 'Do No Significant Harm'-Approach:

To be sustainable, the economic activity must firstly make a significant contribution to the realisation of at least one of the environmental objectives listed in Art. 9 TR (Art. 3 lit. a TR). Secondly, it must not significantly harm any of these environmental objectives (Art. 3 lit. b TR, which is concretised by Art. 17 Taxonomy Regulation). The environmental objectives are climate protection, adaptation to climate change, sustainable use and protection of water and marine resources, as well as the transition to a circular economy, the reduction and prevention of pollution and the protection and restoration of biodiversity and ecosystems. In terms of content, they largely coincide with the planetary boundaries of the internationally recognised sustainability concept outlined under II. 2. Thirdly, it is crucial that the categorisation of an activity as a significant contribution is based on technical screening criteria (TSC). The TSC are defined in the form of delegated acts on the basis of Art. 23 TR (Art. 3 lit. d TR, see below).

Fourthly, the activity must be carried out in compliance with the minimum (social) protection set out in Art. 18 (Art. 3 lit. c TR). These are procedures that companies must carry out to ensure that certain social standards are followed. These standards include the OECD Guidelines for Multinational

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<sup>38</sup> There is no official source that covers all companies in Germany that are subject to reporting requirements; the various relevant sources and studies of recent years assume that there are between 459 and 548 companies; see Schmotz/Schwedler/Barckow DB 2021, 797 for an overview and further details.

<sup>39</sup> Fundamental Thaler/Sunstein Constitutional Political Economy 19 (4) 2008, 356; also Möslein/Sørensen European Company Law 15 (2018), 221.

<sup>40</sup> Cf. Recital 8, 17 Taxonomy Regulation, also Lanfermann in: Nietsch (ed.), Corporate Social Responsibility Compliance, 2021, Section 12 para. 1, Kment/Weininger DVBl 2023, 377 with further references.



Enterprises,<sup>41</sup> the UN Guiding Principles on Business and Human Rights,<sup>42</sup> the Core Labour Standards of the ILO<sup>43</sup> and the International Bill of Human Rights.<sup>44</sup> Thus, the TR does take the social dimension of sustainability into account, but to a very limited extent in relation to the environmental dimension.

#### b) Minimum social requirements: Concretisation through CSRD and CSDDD

Due to the subordinate importance of the social dimension, the TR's sustainability concept is not in line with the UN Sustainability Strategy, which the activities of the EU legislator ultimately serve to implement. Corresponding criticism of the sustainability concept of the TR was already voiced at the proposal stage.<sup>45</sup> Precisely because the Sustainable Finance Action Plan also mentions the Paris Agreement on climate change as a central starting point, a stronger emphasis on the social dimension of sustainability in the taxonomy was a logical step. This would also be more compatible with the objective of sustainable development under EU constitutional law, which stipulates the inclusion of all dimensions of sustainability in the cross-cutting clause of Art. 3 para. 3 sentence 2 TEU. The Commission has not yet honoured its intention to also develop a social taxonomy.<sup>46</sup>

One reason for this omission may be the complexity and increased labour and time required to incorporate a comprehensive sustainability approach into the Union's (financial) economic law infrastructure. At the same time, the particular urgency of climate change is a central argument.<sup>47</sup> A

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<sup>41</sup> OECD, Declaration on International Investment and Multinational Enterprises, 21 June 1976, adopted by the OECD member states; OECD Guidelines for Multinational Enterprises of 25 May 2011, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>; see in detail Weidmann, *Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte*, 2014; also Spießhofer, *Unternehmerische Verantwortung*, 2017, 181 et sqq.

<sup>42</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf); see Resolution 17/4 of 6 July 2011, UN Doc. A/HRC/RES/17/4 and the Annex to the Report of the UN Special Representative of 21 March 2001, UN Doc. A/HRC/17/31; contextualisation under international law in Dörr, *Unternehmensverantwortlichkeit im Völkerrecht*, in: Reinisch/Hobe/Kieninger/Peters (eds.), *Unternehmensverantwortung und Internationales Recht*, 2020, 133, 152 et seq. et passim; Weidmann, *Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte*, Duncker & Humblot 2014.

<sup>43</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998.

<sup>44</sup> United Nations, General Assembly Resolution 217 A (III). Universal Declaration of Human Rights of 10 December 1948, UN Doc. A/RES/217 A (III).

<sup>45</sup> Cf. the statements by the civil society organisations Share Action and Profundo, available at <https://mailchi.mp/6c1b2572fd0d/profundo-expert-views-october-issue-1158869?e=0b2107c730>; Möslein/Mittwoch, *WM* 2019, 481 et seq.

<sup>46</sup> So far there is only a first draft for a 'Social Taxonomy', available at: [https://finance.ec.europa.eu/system/files/2021-07/sf-draft-report-social-taxonomy-july2021\\_en.pdf](https://finance.ec.europa.eu/system/files/2021-07/sf-draft-report-social-taxonomy-july2021_en.pdf); including the feedback, available at: [https://finance.ec.europa.eu/system/files/2022-08/220228-sustainable-finance-platform-finance-report-social-taxonomy\\_en.pdf](https://finance.ec.europa.eu/system/files/2022-08/220228-sustainable-finance-platform-finance-report-social-taxonomy_en.pdf); comments: Rodriguez/Shen/Ulz/Schneider-Maunoury, *Contribution to the Optimization of a Social Taxonomy*, Working Paper May 2023; brief overview: Reich AG 2021, R328; id. AG 2022, R105 et sqq.

<sup>47</sup> See Recitals 6 and 7 of the Taxonomy Regulation; see also: Commission Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018, 5 et seq. based on the final report of the High-Level Expert Group 'Financing A Sustainable European Economy', in particular 9 et seq.

comparison of the relevant legal acts and Commission initiatives to date reveals a considerable degree of silo thinking with regard to the respective objectives, despite increasing efforts to achieve coherence.<sup>48</sup> In contrast to the ecological focus of sustainable finance, other legal acts reveal different priorities: NFRD and CSRD dedicate only one of five non-financial aspects that companies have to report on to environmental concerns. Instead, they focus on the social dimension of sustainability, which business managers must address with information on labour and social issues, respect for human rights and the fight against corruption and bribery.

The same applies to the Corporate Sustainability Due Diligence Directive (CSDDD) as European supply chain act.<sup>49</sup> This act is intended to promote sustainable business practices along the entire value chain and obliges companies to implement a corresponding due diligence duty. In addition to environmental concerns, compliance with human and labour rights is required in particular. The reason for emphasising the social over the ecological component is that the content of the supply chain regulation is strongly inspired by international soft law regulations such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Accordingly, the legal support for these projects has also been strongly influenced by international law.<sup>50</sup>

Although these comparative considerations can go some way to explaining the shortcomings of the TR with regard to promoting a comprehensively sustainable financial system, they cannot eliminate them. The Commission is called upon to place the social dimension of sustainability more strongly at the center of the TR in the future and to strive for equivalence between social and environmental sustainability in the medium and long term. Until then, there are two ways of further development:

A delegated act to concretise compliance with the minimum social standard has so far been completely absent. However, Art. 18 para. 2 TR refers to the principle of 'avoidance of significant adverse effects' in accordance with Art. 2 no. 17 of the Disclosure Regulation for the implementation of minimum protection. The EU has defined a list of 'indicators for social and employee, respect for human rights, anti-corruption and anti-bribery matters' in Annex 1 to Delegated Regulation (EU) 2022/1288<sup>51</sup> to ensure compliance with this principle. However, some are currently under review by

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<sup>48</sup> Sjøfjell/Ahlström, University of Oslo Faculty of Law research Paper No. 2020-03, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3529259](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529259); Gammage et al., Nordic & European Company Law LSN Research Paper Series No. 20-11 (at 6.), available at file:///Users/annemittwoch/Downloads/SSRN-id3596036.pdf.

<sup>49</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final of 23 February 2022.

<sup>50</sup> See again the references in footnote 44.

<sup>51</sup> Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports, OJ L 196/1 of 25 July 2022.

the European Supervisory Authorities EBA, EIOPA and ESMA, which have also revised them. The indicators are:

- Violations of the UN Global Compact principles and the OECD Guidelines for Multinational Enterprises;
- Lack of processes and compliance mechanisms to monitor adherence to the UN Global Compact principles and the OECD Guidelines for Multinational Enterprises;
- Unadjusted gender pay gap;
- Gender diversity in management and supervisory bodies;
- Involvement in controversial weapons (anti-personnel mines, cluster munitions, chemical and biological weapons).

This concretisation via the Disclosure Regulation therefore also has an effect within the TR; however, it does not yet create harmony between environmental and social objectives. The CSDDD could make a more significant contribution in the future: According to Art. 1 para. 2 lit. c TR, it applies to all companies that are obliged to report on sustainability based on the CSRD. The scope of CSDDD and CSR are also synchronised regarding the transparency obligations in Art. 11 para. 1 TR: All companies that fall within the scope of both directives are only required to prepare one sustainability report. This means that a significant proportion of the addressees of the TR will be obliged to comply with human rights due diligence obligations under the CSDDD anyway. As the CSDDD emphasises the social dimension of sustainability much more strongly than the TR as part of its due diligence model, a significant proportion of sustainability reports will go well beyond the minimum social requirements of Art. 18 TR. The final report of the Sustainable Finance Platform from October 2022 also shows that it would be consistent to closely link the future specification of the TR with the due diligence approach of the CSDDD. Here, the platform proposes that the minimum social requirements of Art. 18 TR should not be fulfilled if companies have implemented no or only inadequate human rights due diligence. Thus, even without a special social taxonomy, minimum social protection concerning risk management can be handled if it is linked supply chain regulation.

However, this approach is no substitute for a social taxonomy equivalent to the environmental taxonomy, which the EU legislator must create in the medium and long term. Only on such a basis would the identification and assessment of the social impact of financial instruments beyond risk management be conceivable at all. Finally, the CSDDD lacks the approach of the technical screening criteria and therefore falls far short of determining environmentally sustainable economic activities. Socially sustainable due diligence in companies can therefore not fully replace a social taxonomy in the style of the environmental taxonomy. The EU legislator still has a long way to go here.

#### c) Environmental goals: Concretisation through Technical Screening Criteria (TSC)

After some delay, all six of the environmental objectives guaranteed in Art. 9 TR are now being concretised by delegated regulations. Within the framework of the TR, the EU Commission develops individual performance criteria for individual economic activities with the TSC. The delegated

regulations thus precisely spell out the significant impairments of and significant contributions to the individual environmental objectives regarding individual economic activities. This is intended to increase the legal certainty and user-friendliness of the taxonomy, while at the same time allowing a more flexible response to the need for change; thus, the recitals of the TR expressly provide for regular updates.<sup>52</sup> According to Art. 20 TR, the Sustainable Finance Platform and thus experts from academia, practice and civil society as well as representatives of the European Supervisory Authorities (ESAs), the Investment Bank and the Environment Agency support the content of the criteria. Art. 19 TR contains general requirements for the content of the TSC, while specific requirements for the respective environmental objectives can be found in Art. 10-15 TR. Following the entry into force of the TR, the development of the TSC initially focused on the two climate-related environmental objectives; the other four environmental objectives were not finalised until November 2023.

On 9 December 2021, a first delegated act on sustainable measures to mitigate climate change and adapt to the objectives of the EU taxonomy ('Climate Delegated Act') was published.<sup>53</sup> It has been applicable since 1 January 2022. Its TSC refer to thresholds or performance levels that economic activities should achieve in order to be considered a significant contribution to one of the two climate targets. Annexes I and II contain the TSC defining the conditions for activities in the areas of forestry, environmental protection and remediation, manufacturing, energy, water supply, sanitation and waste management, transport, construction, information and communication, and provision of professional, scientific and technical services.

A supplementary delegated act on climate followed on 15 July 2022. It includes certain nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy under strict conditions and applies from January 2023.<sup>54</sup> According to the Commission, the criteria for the specific gas and nuclear activities are in line with the EU's climate and environmental objectives and are intended to help accelerate the transition from solid or liquid fossil fuels, including coal, to a climate-neutral future. This approach has not gone unchallenged: various NGOs, including the WWF and the German Federation for the Environment and Nature Conversation, filed a lawsuit against the Commission on 18 April 2023 in order to obtain an internal review.<sup>55</sup>

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<sup>52</sup> See Recitals 41 and 53 of the Taxonomy Regulation.

<sup>53</sup> Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, OJ L 442/1 of 9 December 2021, cf.: Kment/Weininger DVBI 2023, 377 (378 et sqq.).

<sup>54</sup> Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, OJ L 188/1 of 15 July 2022.

<sup>55</sup> Further information can be found at <https://www.euractiv.com/section/energy-environment/news/ngos-sue-commission-for-absurd-inclusion-of-gas-in-eu-green-taxonomy/> and on the respective websites of the NGOs.

The long-awaited delegated act on non-climate-related environmental targets was finally published on 21 November 2023.<sup>56</sup> The Commission had already adopted it on 27 June 2023, but the adopted texts still had to be examined by the European Parliament and the Council. The four annexes contain the TSC on the four non-climate-related environmental objectives and address a range of economic activities.

With regard to the sustainable use and protection of water and marine resources, these are activities in the areas of manufacturing and production of goods, water supply, wastewater and waste disposal, disaster prevention and information and communication.

The regulations are very detailed. Companies whose economic activities are listed in the annexes of the delegated regulations usually cannot decide on their taxonomy conformity on the basis of the mere lecture of the delegated acts. Instead, they must often follow complicated chains of references to other legal acts with technical specifications. Above all, the effectiveness of the TR depends on a sufficient number of economic activities being covered by the TSC in the first place; only if an economic activity is included in the criteria is it taxonomy-compliant at all, i.e. it can be assessed on the basis of the Regulation and its delegated acts and subsequently labelled as sustainable or non-sustainable. As the Commission, contrary to its original intention, did not provide all six environmental objectives of the TR with TSC in the form of delegated acts until the end of 2023, the practical effectiveness of the taxonomy has hardly been able to unfold to date. This will improve in the near future. Nevertheless, the delegated regulations by no means cover all conceivable economic activities. There is therefore still potential and a need for further development.

#### **4. Reporting requirements**

With regard to the result of the assessment of whether an economic activity is environmentally sustainable and therefore taxonomy-compliant, Art. 5-8 TR stipulate transparency requirements. Art. 5-7 TR primarily concern the relationship between the TR and the Disclosure Regulation. They contain transparency requirements for environmentally sustainable investments and financial products offered by financial market participants in the EU. This particularly affects the pre-contractual area, i.e. capital market communication. In this respect, the purpose of Art. 5-7 TR is primarily to concretise the transparency obligations of the Disclosure Regulation with regard to the so-called 'Art. 8 and Art. 9 products of the Disclosure Regulation' – according to this, the extent to which the TR was used in the design of the financial products must be disclosed.

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<sup>56</sup> Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Commission Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, OJ L of 21 November 2023, 1. L of 21 November 2023.

Of particular interest is Art. 8 TR, which links sustainability reporting in accordance with Art. 19a and 29a of the Accounting Directive with transparency obligations relating to the TR: Here, companies must explain how and to what extent their activities are linked to economic activities that are considered environmentally sustainable as defined by the TR. In particular, non-financial companies must disclose the proportion of their revenue that is generated from products or services associated with environmentally sustainable economic activities. The same applies to capital expenditure for such activities. In accordance with Art. 8 para. 3 in conjunction with Art. 23 TR, the reporting is in turn specified by a delegated act of the Commission. It was published in the Official Journal of the EU on 10 December 2021 and has been applicable since 1 January 2022.<sup>57</sup> This delegated act specifies the content and presentation of the information to be disclosed by companies that fall under Art. 19a or 29a TR and determines the methodology for fulfilling this disclosure obligation.

The synchronisation of sustainability-promoting legal acts under the umbrella of the Accounting Directive does not end here. According to Art. 11 CSDDD, the reporting obligations of the CSDDD are also to be linked to sustainability reporting under the CSRD in future. These are quite extensive, as they cover numerous aspects of transnational corporate supply chains. The scope of application of the CSDDD will also be synchronised with that of the CSRD for consistency purposes.

It can therefore be stated that the Union legislator is definitely striving for coherence between the various legal acts of business law that promote sustainability. In the area of transparency obligations, complexity for companies is at least reduced to some extent, as sustainability aspects of very different origins are combined in one report.

#### **IV. Assessment and Outlook**

In its conception, the TR certainly has what it takes to drive a sustainable financial system. However, the devil is literally in the detail.<sup>58</sup> Due to its high degree of complexity via delegated regulations, the taxonomy is currently hardly user-friendly. More problematic is the fact that the delegated regulations do not yet comprehensively cover the economic activities that need to be assessed. As a result, too few activities can claim to be environmentally sustainable – the steering effect for private capital desired by the Commission has thus not yet materialised to any significant extent. However, the need for development is certainly accompanied by a corresponding potential: if, on the one hand, the TR is further developed as planned, by including further activities in the delegated regulations and by developing a social taxonomy, and on the other hand, efforts are made to achieve greater

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<sup>57</sup> Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Article 19a or Article 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation, OJ L 443/9 of 10 December 2021; see Hombach/Meringdal/Nienaber/Nienhaus IRZ 2023, 329 (330 et seq.).

<sup>58</sup> Müller BB 2024, I (Editorial): 'A real molloch, which also causes a lot of collateral damage' (translation by the author).

coherence with related sustainability-promoting legal acts, there is certainly hope for the desired 'shifting the trillions' effect. This is demonstrated by the analysis of both the scope of application and the regulatory approach to defining sustainable economic activity.

The focus of the EU legislator promoting sustainability is currently increasingly on regulating the value chain. The TR is also being integrated into all other EU reporting obligations to a greater extent than before. Contextualisation and coherence between the various (also delegated) legal acts are therefore the order of the day. It is crucial for the success of the sustainability transformation that markets are put in a position to evaluate sustainable corporate behaviour. The aim and long-term benefit of the TR is to support this significantly. It is on the right track here, not least because it basically follows the sustainability approach of planetary boundaries and translates this into a legal infrastructure for companies. The method is good in principle, but implementation is still inadequate. However, it would be wrong to discard the regulatory approach due to over-complexity. Transformation takes time. This is also demonstrated by the results of the first round of taxonomy reporting. In this respect, intensive work on the TR is worthwhile so that it can become the driving force for a sustainable financial and real economy in line with the Commission's intentions.