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The Taxonomy Regulation and its Implementation

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The Taxonomy Regulation and its Implementation¹

Professor Christos V. Gortsos² and Dr. Dimitrios Kyriazis³

Abstract

The EU Taxonomy Regulation (TR), adopted in 2019, is a key milestone in defining legally sustainable activities. It should be viewed within the context of the climate and energy targets set by the EU for 2030 in order to become climate-neutral by 2050, and constitutes, along with the Sustainable Finance Disclosure Regulation (SFDR) and the Low Carbon Benchmarks Regulation (LCBR), the regulatory ‘trilogy’ implementing the CMU Action Plan in relation to sustainable finance. It substantially builds on the 2020 Report of the Technical Expert Group on Sustainable Finance (TEG), which developed the “EU taxonomy” classification system to determine whether an economic activity can qualify as environmentally sustainable. The system of its rules is anchored in the definition of six specific environmental objectives, which constitute the benchmark on the basis of which an economic activity can be assessed to qualify as environmentally sustainable and, hence, the degree to which a financial investment is environmentally sustainable is established. The main purpose of this Chapter is as follows:

First, it thoroughly analyses the subject matter and scope of the TR, with an emphasis on its environmental objectives. It sets out the primary EU law limits within which it applies, while also explaining its contribution to internal market-making as a harmonisation measure. *Second*, it examines the criteria for determining whether an economic activity qualifies as environmentally sustainable, while also delving deeper into the requirements of the technical screening criteria. *Third*, and in connection to the above, the Chapter assesses the Delegated Acts adopted on the basis of the TR and mentions those yet to be adopted. It also discusses the Commission’s Communications in relation to said Delegated Acts. *Fourth*, the Chapter presents in detail the disclosure requirements for environmentally sustainable investments, and sets out the role played by, *inter alia*, the Platform on Sustainable Finance and the Member State Expert Group on Sustainable Finance. *Finally*, it remarks on the impact of the TR so far and on the next steps forward, while also briefly commenting on TR-related litigation before the EU Courts, which is already under way.

Keywords: EU Sustainable Finance Law, Taxonomy Regulation, Sustainable Finance Disclosure Regulation, Low Carbon Benchmarks Regulation, Capital Markets Union, Action Plan on Financing Sustainable Growth, Corporate Sustainability Reporting Directive, Climate Delegated Act, Disclosures Delegated Act, environmental objectives, environmentally sustainable economic activities, environmentally sustainable investments, substantial contribution to environmental objectives, delegated acts, nuclear energy, CJEU litigation

¹ Forthcoming as a Chapter in: Danny Busch, Guido Ferrarini and Seraina Grünewald (eds.): *Sustainable Finance in Europe* (2nd edition, Palgrave Macmillan, 2023). The cut-off date for information included in this article is **18 February 2023**.

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A. Subject matter and scope of the Regulation – environmental objectives

1. Subject matter

1.1 Introductory remarks

(1) On 18 June 2020, the European Parliament and the Council (hereinafter the European Union (EU) “co-legislators”) adopted, pursuant to the ordinary legislative procedure,⁴ **Regulation (EU) 2020/852** “on the establishment of a framework to facilitate sustainable investment and amending **Regulation (EU) 2019/2088**”⁵ (‘Taxonomy Regulation’, **TR**). This legislative act, adopted on the basis of **Article 114 TFEU**,⁶ entered into force on **12 July 2020**,⁷ is binding in its entirety and directly applicable in all Member States and is consistent with the principles of subsidiarity and proportionality.⁸ Along with the legislative act it amends, namely **Regulation (EU) 2019/2088** of the co-legislators of 27 November 2019 “on sustainability-related disclosures in the financial services sector”⁹ (‘**Sustainable Finance Disclosure Regulation**’, **SFDR**, which in principle applies from 10 March 2021), and with **Regulation (EU) 2019/2089** of 27 November 2019 (as well) “amending Regulation (EU) 2016/1011¹⁰ as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks”¹¹ (‘**Low Carbon Benchmarks Regulation**’, which applies from 10 December 2019), the TR constitutes the ‘regulatory trilogy’ implementing – in relation to sustainable finance – the (European) Commission’s **2015 Action Plan** “on Building a Capital Markets Union”¹² (**CMU**).

‘**Sustainable finance**’ is defined as the aggregate of financing and related institutional and market arrangements that contribute to the achievement of strong, sustainable, balanced and inclusive growth, through supporting directly and indirectly the framework of the Sustainable Development Goals (**SDGs**).¹³

⁴ Treaty on the Functioning of the European Union (**TFEU**, Consolidated version, OJ C 202, 7.6.2016, pp. 47-200), Article 289(1).

⁵ OJ L 198, 22.6.2020, pp. 13-43.

⁶ The TR’s contribution to internal market-making renders **Article 114 TFEU** a valid legal basis thereof. On this TFEU Article see, by means of mere indication, **Wyatt, D. (2009)**: Community Competence to Regulate the Internal Market, in Dougan, M. and S. Currie (2009, editors): *Fifty Years of the European Treaties: Looking Back and Thinking Forward* Hart Publishing, Oxford, **Weatherill, S. (2016)**: *Law and Values in the European Union*, Oxford University Press, Oxford, pp. 356-361 and **Craig, P. and G. de Búrca (2020)**: *EU Law: Texts, Cases, and Materials*, Seventh edition, Oxford University Press, Oxford – New York, pp. 649-654.

⁷ **TR**, Article 27(1).

⁸ *Ibid.*, last sentence, and recital (60).

⁹ OJ L 317, 9.12.2019, pp. 1-16. This legislative act is analysed **in this volume below (Busch, D.: Sustainability Disclosure in the Financial Sector)**.

¹⁰ **Regulation (EU) 2016/1011** of the co-legislators of 8 June 2016 “on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (...)”, OJ L 171, 29.6.2016, pp. 1-65.

¹¹ OJ L 317, 9.12.2019, pp. 17-27. These benchmarks are defined in Article 1(1), inserting new points (23a) and 23b) to Article 3(1) Regulation (EU) 2016/1011. Certain of its provisions were further specified by three Commission Delegated Regulations of 17 July 2020 (Regulations (EU) 2020/1816, (EU) 2020/1817 and (EU) 2020/1818 of 17 July 2020 (OJ L 406/1 [2020] pp. 1-11, 12-16 and 17-25).

¹² COM/2015/468 final.

¹³ See **G20 Sustainable Finance Study Group (2018)**: *Synthesis Report*, July, available at: http://www.g20.utoronto.ca/2018/g20_sustainable_finance_synthesis_report.pdf. Sustainability and the

(2) It is noted in this respect that in its **Communication** of 8 June 2017 on the “Mid-Term Review of the [CMU] Action Plan”¹⁴ the Commission set *nine priority actions* concerning *seven issue-areas*, which should constitute the basis for the foundation of the CMU by 2019.¹⁵ **Priority action (6)** of this Review concerned a concrete follow-up to the recommendations of the High-Level Expert Group (**HLEG**) on Sustainable Finance, which was set up by the Commission in December 2016 with the mandate to develop an overarching and comprehensive EU strategy on sustainable finance,¹⁶ addressing climate-related and environmental risks.¹⁷ This illustrates how the TR forms part of the EU’s broader green financial strategy of the past decade.¹⁸

The Commission submitted, accordingly, proposals aimed at improving disclosure and integrating sustainability as well as environmental, social and governance (**ESG**) considerations fully in rating methodologies and supervisory processes, as well as in the investment mandates of institutional investors and asset managers. It also committed to developing an approach for taking sustainability considerations into account in upcoming legislative reviews of financial legislation. In this respect,

transition to a safe, climate-neutral, climate-resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the EU economy (**TR**, recital (4)). On the EU sustainable finance action plan more broadly, see **Busch, D. (2022)**: The future of EU financial law, *Capital Markets Law Journal*, Volume 17, pp. 52-94, Section 3.

¹⁴ COM/2017/292 final.

¹⁵ The consolidated set of measures is laid down in the Annex to the Communication. The Commission’s Q&As on this Review are available at: [http://europa.eu/rapid/press-release MEMO-17-1528 en.htm](http://europa.eu/rapid/press-release_MEMO-17-1528_en.htm). The most recent Action Plan on this field, amidst the pandemic crisis, is contained in the **Commission Communication** of 24 September 2020 “A Capital Markets Union for people and businesses – new action plan” (COM/2020/590 final). The measures to support, *inter alia*, a green recovery, are contained in Section 1 (Actions 1-6).

On the evolution of the CMU project, see by means of mere indication the various contributions in **Busch, D., Avgouleas, E. and G. Ferrarini (2018)**, editors): *Capital Markets Union in Europe*, Oxford EU Financial Regulation Series, Oxford University Press, United Kingdom, **Lannoo, K. and A. Thomadakis (2019)**: *Rebranding Capital Markets Union: A market finance action plan*, CEPS-ECMI Task Force Report, Centre for European Policy Studies (available at: <https://www.ceps.eu/wp-content/uploads/2019/06/Rebranding-Capital-Markets-Union.pdf>), the Final Report of the **High-Level Forum on the Capital Markets Union** of June 2020 “A New Vision for Europe’s Capital Markets” (at: [https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report en](https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en)), the Special Report 25/2020 of the **European Court of Auditors** of 11 November “Capital Markets Union – Slow start towards an ambitious goal” (at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=57011>), and **Gortsov, Ch.V. (2022)**: *The foundation of the European Capital Markets Union (CMU): From the 2015 to the 2020 CMU Action Plan and their implementation*, available at: <https://ssrn.com/abstract=4005259>.

¹⁶ Its Report of 31 January 2018, titled “Financing a Sustainable European Economy”, called for the creation of a technically robust classification system at EU level to establish clarity on which activities qualify as ‘green’ or ‘sustainable’ (**TR**, recital (5)) (available at: [https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report en.pdf](https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf)). On the work of the HLEG, see **Alexander, K. (2019)**: *Principles of Banking Regulation*, Cambridge University Press, United Kingdom, pp. 366-369.

¹⁷ On these risks, which combine two main risk drivers (i.e., physical and transition risk), see by means of indication **European Central Bank (2020)**: “Guide on climate-related and environmental risks: Supervisory expectations relating to risk management and disclosure”, 27 November, pp. 10-15 (at: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.202011finalguideonclimate-relatedandenvironmentalrisks~58213f6564.en.pdf>).

¹⁸ See **Brühl, V. (2021)**: Green Finance in Europe—Strategy, Regulation and Instruments, *Intereconomics*, Volume 56, pp. 323-330.

inter alia, the Regulations governing the European Supervisory Authorities (**ESAs**,¹⁹ namely, the European Banking Authority (**EBA**), the European Insurance and Occupational Pensions Authority (**EIOPA**) and the European Securities and Markets Authority (**ESMA**)) were amended by virtue of **Regulation (EU) 2019/2175** of the co-legislators of 18 December 2019,²⁰ which clarified and strengthened the ESAs' powers, while also attributing to them new powers in targeted areas, including to take into account sustainable business models and the integration of **ESG factors** when acting within its scope and carrying out its tasks.²¹

All these initiatives have to be understood within the broader context of the EU Green Deal, the EU's flagship strategy placing the environment at the epicentre of all EU action. In its Communication announcing the Green Deal on 11 December 2019,²² the Commission, *inter alia*, recognised the need for green finance and green investment,²³ as well as the imperative of ensuring a just transition. In the European Green Deal Investment Plan,²⁴ which followed in January 2020, the Commission was also adamant about positioning sustainable finance "at the heart of the financial system" of the EU.²⁵

(3) Reverting to the TR *per se*, it is noteworthy that it builds on the work of the HLEG and is also substantially based on the Report of the Technical Expert Group on Sustainable Finance (**TEG**) set up by the Commission in line with its legislative proposals of May 2018²⁶ to assist it in developing, *inter alia*, the so called "EU taxonomy", meaning a unified EU classification system to determine if an economic activity is environmentally sustainable, which was published in March 2020.²⁷ In this

¹⁹ For a consideration of the role of climate change in the ESAs' mandate, see **De Arriba-Sellier, N. (2021)**: Turning Gold Into Green: Green Finance In The Mandate Of European Financial Supervision, *Common Market Law Review*, Volume 58, pp. 1097-1140.

²⁰ OJ L 334, 27.12.2019, pp. 1-145.

²¹ **ESAs Regulations**, Article 1(3). 'ESG factors' are defined as ESG characteristics, that may have a positive or negative impact on the financial performance or solvency of an entity, sovereign or individual (see the EBA Report, of **26 June 2021**, "On management and supervision of ESG risks for credit institutions and investment firms", **EBA/REP/2021/18**, available at: <https://www.eba.europa.eu/eba-publishes-its-report-management-and-supervision-esg-risks-credit-institutions-and-investment>).

²² COM/2019/640 final. On the European Green Deal's contribution to the EU's democratic integration, see **Van Zeben, J. (2020)**: The European Green Deal: The future of a polycentric Europe? *European Law Journal*, Volume 26, pp. 300- 318.

²³ *Ibid.*, Section 2.2.1.

²⁴ COM/2020/21 final.

²⁵ *Ibid.*, Section 4.1.

²⁶ See at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en.

²⁷ On the TEG, see at: https://ec.europa.eu/info/publications/sustainable-finance-technical-expert-group_en. Its Report provides recommendations relating to the TR's overarching design, as well as guidance on making disclosures using the taxonomy. It contains technical screening criteria (TSC) for seventy climate change mitigation and sixty-eight climate change adaptation activities, including criteria for do no significant harm to other environmental objectives, as well as a methodology section to support the recommendations on the TSC (see **Section C below**). The Report is available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf.

context, of relevance is also the Commission **Communication of 8 March 2018** on an “**Action Plan on Financing Sustainable Growth**”;²⁸ Action 1 called for the establishment of the EU taxonomy.²⁹

(4) The practical significance of the TR³⁰ and its positive acceptance by those directly and indirectly affected emerged relatively early. In January 2021, the United Nations Environment Programme (UNEP) and the European Banking Federation (EBF) presented a Report entitled “Testing the Application of the EU Taxonomy to Core Banking Products: High Level Recommendations”,³¹ which evaluated the extent to which the EU taxonomy of sustainable activities could be applied to core banking products for labeling or disclosure purposes. It is noteworthy that this Report was drawn up in collaboration with 26 major credit institutions and banking associations, incorporating thus both their experience and their concerns. On the basis of its conclusions, credit institutions judged the TR to be a positive initiative to strengthen sustainable financing, through the achievement of coherence and transparency in the sector. Building on this Report, in January 2022 the UNEP and the EBF published a new one setting out practical approaches to applying the EU Taxonomy to bank lending.³²

1.2 The confines set by primary EU law

(1) The TR applies within the confines set by primary EU law. More specifically, the provisions of the Treaties that principally “frame” sustainable finance law are **Article 3** of the Treaty on European Union (TEU)³³ and **Articles 3, 4, 11** and **191 TFEU**. In particular:

*First, according to **Article 3(3) TEU**, the EU “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”*³⁴

²⁸ COM/2018/097 final.

²⁹ A main objective set out therein is the reorientation of capital flows towards sustainable investments to achieve sustainable and inclusive growth; in that respect, the most important and urgent action envisaged is the establishment of a unified classification system for sustainable activities. Since the shift of capital flows towards more sustainable activities must be underpinned by a holistic understanding of the environmental sustainability of activities and investments, the Action Plan considers that, as a first step, clear guidance on activities that qualify as contributing to environmental objectives would help inform investors about the investments funding environmentally sustainable economic activities, while further guidance on activities contributing to other sustainability objectives (e.g., social ones) might be developed at a later stage (TR, recital (6)).

³⁰ For an assessment of the purely corporate law consequences of the TR, see **Mittwoch, A.-C. (2021): Sustainable Finance in the EU – A Revolution of Company Law Through the Back Door?**, University of Oslo Faculty of Law Research Paper No. 2021/14, available at: <https://ssrn.com/abstract=3867150>.

³¹ Available at: <https://www.unepfi.org/wordpress/wp-content/uploads/2021/01/Testing-the-application-of-the-EU-Taxonomy-to-core-banking-products-Final-v2.pdf>.

³² **UNEP FI and European Banking Federation (EBF) (2022): “Practical Approaches to Applying the EU Taxonomy to Bank Lending”**, available at: <https://www.unepfi.org/wordpress/wp-content/uploads/2022/02/Practical-Approaches-to-Applying-the-EU-Taxonomy-to-Bank-Lending-2022.pdf>.

³³ Consolidated version, OJ C 202, 7.6.2016, pp. 13-45.

³⁴ On this TEU Article, see by means of mere indication, **Becker, U. (2019): Artikel 3 des EUV**, in Schwarze, J., Becker, U., Hatje, A. und J. Schoo (2019, Hrsg.): *EU-Kommentar*, 4. Auflage, Nomos Verlagsgesellschaft, Baden-Baden, pp. 53-59 and **Craig, P. and G. de Búrca (2020), op. cit.**, pp. 424-427.

Second, pursuant to **Articles 3-4 TFEU**, environmental protection is, for the most part, a **shared** competence (except for the conservation of marine biological resources under the common fisheries policy, which is an exclusive EU competence).³⁵ **Article 11 TFEU** is arguably the most important environmental provision in primary EU law,³⁶ since it has established a **horizontal** principle, namely that “*environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development*”. Finally, **Article 191 TFEU** sets out the aims that environmental legislation must pursue and the limits thereto.³⁷

Article 37 of the Charter of Fundamental Rights of the EU³⁸ is also of relevance, stating that “*a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*”.³⁹

(2) Since secondary EU law, such as the TR, needs to fully respect primary EU law and be interpreted in its light, potential legal challenges to the TR’s validity before the EU courts will reveal whether the TR fully complies with all above-mentioned provisions.⁴⁰

1.3 The considerations set out in the Regulation on harmonisation of rules, the disclosure framework and private sector initiatives

(1) In accordance with its title, the TR establishes “*a framework to facilitate sustainable investment*”. The establishment of a classification system for environmentally sustainable economic activities at EU level, which could also serve as the basis for other economic and regulatory measures, was considered as a necessary condition to enable the development of future EU policies in support of sustainable finance, including EU-wide standards for environmentally sustainable financial products and the eventual establishment of labels that formally recognise compliance therewith (‘**eco-labels**’). Hence, uniform legal requirements for determining the degree of investments’ environmental sustainability, based on uniform (as well) criteria for environmentally sustainable economic activities, are necessary as a reference to facilitate investments’ shift to such activities.⁴¹

³⁵ Accordingly, if the EU has acted, Member States are preempted from acting; on the concept of shared competences, see, by means of mere indication, **Weatherill, S. (2016): *Cases and Materials on EU Law***, 12th edition, Oxford University Press, Oxford, p. 238. On Articles 3-4 TFEU, see further, also by means of mere indication, **Pelka, S. (2019): Artikel 3-4 des AEUV**, in Schwarze, J., Becker, U., Hatje, A. und J. Schoo (2019, Hrsg.), *op. cit.*, pp. 449-455 and **Craig, P. and G. de Búrca (2020), op. cit.**, pp. 107-115 (*inter alia*).

³⁶ On this TFEU Article, see, by means of mere indication, **Nowag, J. (2018): Article 11 TFEU and Environmental Rights**, in Bogojević S. and Rayfuse R. (2018, editors): *Environmental Rights in Europe and Beyond: Swedish Studies in European Law*, Hart Publishing, Oxford, p. 157 *et seq.* and **Käller A. (2019): Artikel 11 des AEUV**, in Schwarze, J., Becker, U., Hatje, A. und J. Schoo (2019, Hrsg.), *op. cit.*, pp. 471-478.

³⁷ On this TFEU Article, see, by means of mere indication, **Käller A. (2019): Artikel 191 des AEUV**, in Schwarze, J., Becker, U., Hatje, A. und J. Schoo (2019, Hrsg.), *op. cit.*, pp. 2436-2452 (with extensive further references to primary and secondary sources).

³⁸ OJ C 303, 14.12.2007, pp. 1-17.

³⁹ On this Article, see, by means of mere indication, **Käller A. (2019): Artikel 37 der GRC**, in Schwarze, J., Becker, U., Hatje, A. und J. Schoo (2019, Hrsg.), *op. cit.*, pp. 3495-3496.

⁴⁰ On ongoing litigation, see **Section F below**.

⁴¹ **TR**, recital (16).

(2) Within this conceptual framework, the TR sets out the criteria for determining whether an **economic activity** qualifies as environmentally sustainable for the purposes of (also) establishing the degree to which an **investment** is environmentally sustainable as well.⁴² The harmonisation (at EU level) of these criteria aims at both removing barriers to the functioning of the internal market with regard to raising funds for sustainability projects and preventing the future emergence of barriers to such projects.⁴³ It was expected that this would allow economic operators “*to find it easier to raise funding across borders for their environmentally sustainable activities, as their economic activities could be compared against uniform criteria in order to be selected as underlying assets for environmentally sustainable investments*” and, hence, facilitate cross-border sustainable investment in the EU.⁴⁴

(3) **Recital (10)** sets out the following consideration: “*In view of the scale of the challenge and the costs associated with inaction or delayed action, 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 and consideration needs to be given to the sustainability impact of financial products and services*”. Hence, the channeling of private investments towards sustainable investments is considered (correctly so) as a precondition for achieving the **SDGs**, as laid down in the 2015 United Nations (**UN**) global sustainable development framework (“The 2030 Agenda for Sustainable Development”⁴⁵), which covers sustainability’s three dimensions, namely economic, social and environmental. An effective way for achieving this is to make available financial products which pursue environmentally sustainable objectives.⁴⁶

Member States and the EU are required to use a common concept of environmentally sustainable investment when introducing requirements at national and EU level regarding financial market participants or issuers⁴⁷ for the purpose of labelling financial products or corporate bonds that are marketed as environmentally sustainable in order to promote the functioning of the internal market.⁴⁸ National requirements that financial market participants or issuers have to comply with in order to market financial products or corporate bonds as environmentally sustainable should build on the above-mentioned uniform criteria for environmentally sustainable economic activities to avoid market fragmentation and harm to the interests of consumers and investors as a result of diverging notions.⁴⁹

⁴² *Ibid.*, Article 1(1).

⁴³ On preventive harmonisation in general, see **Klamert, M. (2015)**: What We Talk About When We Talk About Harmonisation, *Cambridge Yearbook of European Legal Studies*, Volume 17, pp. 360-379.

⁴⁴ **TR**, recital (12).

⁴⁵ Available at: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

⁴⁶ **TR**, recital (11), first sentence. See also **Bose, S., Dong, G. and A. Simpson (2019)**: *The Financial Ecosystem: The Role of Finance in Achieving Sustainability*, Palgrave Studies in Impact Finance, Palgrave Macmillan, Cham – Switzerland.

⁴⁷ On the definition of these terms, see **below, under 2**.

⁴⁸ On the situation concerning national labelling schemes in place and the need to establish uniform criteria to incentivise economic operators to access cross-border capital markets for the purposes of sustainable investment, see the considerations in recital (11), fourth to last sentences.

⁴⁹ *Ibid.*, recital (14), first and second sentences.

In that respect, ‘**environmentally sustainable investment**’ means an investment in one or more economic activities that qualify as environmentally sustainable under the TR.⁵⁰

(4) Apart from setting out the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable, the TR lays down a **disclosure framework**,⁵¹ which supplements the disclosure requirements laid down in the SFDR.⁵² By setting requirements for marketing financial products or corporate bonds as environmentally sustainable investments, including requirements set by Member States and the EU to allow financial market participants and issuers to use national labels, it aims at enhancing investor confidence⁵³ and awareness of the environmental impact of these financial products or corporate bonds and at creating visibility.⁵⁴ It also intends to alleviate the burden on investors’ own due diligence regarding products’ environmental sustainability and to address concerns of ‘greenwashing’, i.e., the practice of gaining an unfair competitive advantage by inaccurately marketing a financial product as environmentally friendly or “green”, when in fact basic environmental standards have not been met.⁵⁵

(5) It is, finally, noteworthy that in view of achieving the SDGs in the EU, the creation, *inter alia*, of a **European Fund for Strategic Investment** has been effective in contributing to the channeling of private funds towards sustainable investments alongside public spending.⁵⁶ The Fund, which

⁵⁰ From a global perspective, of relevance is also the Report of 29 June 2017 “Recommendations of the Task Force on Climate-related Financial Disclosures” (at: <https://www.fsb.org/wp-content/uploads/P290617-5.pdf>) adopted by the Task Force on Climate-related Financial Disclosures (TCFD), which was set up by the Financial Stability Board (FSB), following a request made in April 2015 by the G20 Finance Ministers and Central Bank Governors. These recommendations refer to consistent, comparable, reliable, clear, and efficient climate-related financial disclosures by companies. On the TCFD’s most recent Status Report (October 2022), see at: <https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf>.

⁵¹ On the wider legal debate surrounding the TR’s merits and limitations, as well as on its effects on corporate governance and the market for sustainable financial products, see **De Oliveira Neves, R. (2022)**: The EU Taxonomy Regulation and Its Implications for Companies, in Câmara, P. and F. Morais (2022, editors): *The Palgrave Handbook of ESG and Corporate Governance*, Palgrave Macmillan, Cham – Switzerland, pp. 249-265.

⁵² **TR**, recital (55), first sentence (see also **Section D below, under 1 (2)**). In accordance with Article 1, the objective of that legislative act is to lay down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products.

⁵³ On the SFDR’s and the TR’s effectiveness in terms of increasing investor confidence to invest in sustainable economic activities, see **Van Oostrum, C. (2021)**: Sustainability Through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852, *European Company Law*, Volume 18, pp. 15-21.

⁵⁴ On how the TR could further galvanize the employment of environmental impact assessments, see **Dusík, J. and Bond, A. (2022)**: Environmental assessments and sustainable finance frameworks: will the EU Taxonomy change the mindset over the contribution of EIA to sustainable development?, *Impact assessment and project appraisal*, Volume 40, pp. 90-98.

⁵⁵ **TR**, recital (11), second and third sentences.

⁵⁶ **Regulation (EU) 2015/1017** of the co-legislators of 25 June 2015 “on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal (...) – the European Fund for Strategic Investments” (OJ L 169, 1.7.2015, pp. 1-38) specifies a 40% climate investment target for infrastructure and innovation projects under the Fund (see recitals (2), (9) and (17)).

essentially amounted to a 500 billion-plus euro programme, was shown to have been successful in removing, *inter alia*, environmental barriers to investment.⁵⁷ Furthermore, **recital (8)** considers that, in accordance with **Decision No 1386/2013/EU** of the co-legislators of 20 November 2013 “on a General Union Environment Action Program to 2020 ‘Living well, within the limits of our planet’”,⁵⁸ private sector funding for climate-related and environmental expenditure should also be increased. This could, in particular, be achieved by introducing incentives and methodologies that stimulate companies to measure the environmental costs of their business and profits derived from using environmental services.

2. Scope

On the basis of the above-mentioned considerations, the system of rules laid down in the TR is anchored in the definition of six environmental objectives,⁵⁹ which constitute the benchmark on the basis of which an economic activity can (be assessed to) qualify as environmentally sustainable⁶⁰ and, consequently, the degree to which a financial investment is environmentally sustainable is established.⁶¹ Its field of application covers:⁶²

first, any legislative or other **measures** adopted by Member States or by the EU that set out requirements for financial market participants⁶³ or issuers⁶⁴ in respect of financial products⁶⁵ or corporate bonds that are made available as environmentally sustainable;

⁵⁷ See **European Investment Bank (2021): *The European Fund for Strategic Investments: The Legacy***, available at: https://www.eib.org/attachments/thematic/efsi_the_legacy_en.pdf.

⁵⁸ OJ L 354, 28.12.2013, pp. 171-200.

⁵⁹ See just below, **under 3**.

⁶⁰ See **Section B** below.

⁶¹ On the importance of the signaling effect of the TR, see **Torsten E., Gao, D. and F. Packer (2021): *A taxonomy of sustainable finance taxonomies***, BIS Papers No 118, p. iii, available at: <https://c2e2.unepccc.org/wp-content/uploads/sites/3/2021/10/bis-bis-papers-no-118-a-taxonomy-of-sustainable-finance-activities-12-october-2021.pdf>.

⁶² **TR**, Article 1(2), points (a)-(c), respectively and recital (14), third sentence.

⁶³ The term ‘**financial market participant**’ is defined (*ibid.*, Article 2, point (2)) with reference to Article 2, point (1) SFDR and includes, *inter alia*, credit institutions which provide portfolio management (point (1)(j)). Accordingly, the TR (and the SFDR) do not *directly* apply to credit institutions as to their lending activity. Nevertheless, the EU taxonomy classification system, which constitutes the core of this legislative act, has been taken over in other sources of EU financial regulation, which apply to credit institutions (as well as to investment firms, investment fund managers, and insurance companies). See by means of mere indication **Alexander, K. and P.G. Fisher (2018): *Banking regulation and sustainability***, available at <https://ssrn.com/abstract=3299351>, **Alexander, K. (2019), *op. cit.***, pp. 357-364 and **Gortsos, Ch.V. (2023): *Sustainable Finance under EU Law: the Gradual Shift from Capital Markets to Banking Regulation***, in Alexander, K., Garagantini, M. and M. Siri (2023): *The Cambridge Handbook on EU Sustainable Finance – Regulation, Supervision and Governance*, Cambridge University Press, Cambridge (forthcoming).

⁶⁴ The term ‘**issuer**’ is defined (*ibid.*, Article 2, point (4)) with reference to Article 2, point (h) of the **(Prospectus) Regulation (EU) 2017/1129** of the co-legislators of 14 June 2017, OJ L 168, 30.6.2017, pp. 12-82).

⁶⁵ The term ‘**financial product**’ is defined (*ibid.*, Article 2, point (3)) with reference to Article 2, point (12) SFDR, meaning all of the following: a portfolio which is managed in accordance with Article 2, point (6); an alternative investment fund (**AIF**); an ‘insurance-based investment product’ (**IBIP**); a pension product; a pension scheme; an undertaking for collective investment in transferable securities (**UCITS**); or a ‘pan-European Personal Pension Product’ (**PEPP**).

second, **financial market participants** that make available (environmentally sustainable) financial products; and

third, **undertakings** which are subject to the obligation to publish a non-financial statement or a consolidated non-financial statement pursuant to **Articles 19a or 29a**, respectively, of **Directive 2013/34/EU** of the co-legislators of 26 June 2013 “on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (...)”⁶⁶ (hereinafter the ‘**Accounting Directive**’) and issue environmentally sustainable corporate bonds.⁶⁷

3. Environmental objectives

For the purpose of determining the environmental sustainability of a given economic activity, and on the basis of the recommendations contained in (above-mentioned) TEG’s final Report, the TR contains an exhaustive list of six environmental objectives. These are the following:⁶⁸

First, **climate change mitigation**, meaning the process of holding the increase in the global average temperature to well below 2 °C and pursuing efforts to limit it to 1,5 °C above pre-industrial levels, as laid down in the **Paris Agreement**.⁶⁹ This environmental objective should be interpreted in accordance with relevant EU law, including **Directive 2009/31/EC** of the co-legislators of 23 April 2009 “on the geological storage of carbon dioxide (...)”⁷⁰.⁷¹

Second, **climate change adaptation**, meaning the process of adjustment to actual and expected climate change and its impacts.⁷² This objective should be interpreted in accordance with relevant EU law and the “**Sendai Framework for Disaster Risk Reduction 2015-2030**”.⁷³

⁶⁶ OJ L 182, 29.6.2013, pp. 19-76.

⁶⁷ Articles 19a and 29a were inserted by **Directive 2014/95/EU** of the co-legislators 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 L 330, 15.11.2014, pp. 1-9), the ‘Non-financial Reporting Directive’, ‘**NFRD**’. This legislative act is broadly governed by the ‘comply or explain’ principle; see **Helleringer, G. (2021): EU vs. Greenwashing: The Birth Pangs of Transparency, Comparability, Cooperation and Leadership, Oxford Business Law Blog**, 5 July, at: <https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/eu-vs-greenwashing-birth-pangs-transparency-comparability-cooperation>).

⁶⁸ **TR**, Article 9, and recital (23). Given the systemic nature of global environmental challenges, environmental sustainability should be approached on a systemic and forward-looking basis, addressing growing negative trends, such as climate change, the loss of biodiversity, the global overconsumption of resources, food scarcity, ozone depletion, ocean acidification, the deterioration of the fresh water system, and land system change as well as the appearance of new threats, such as hazardous chemicals and their combined effects (*ibid.*, recital (7)).

⁶⁹ *Ibid.*, Article 2, point (5). In the EU, the Paris Agreement was approved by **Council Decision (EU) 2016/1841** of 5 October 2016 “on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the UN Framework Convention on Climate Change” (OJ L 282, 19.10.2016, pp. 1-3). Article 2(1), point © of the Paris Agreement aims to strengthen the response to climate change by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, *inter alia*. In that context, on 12 December 2019, the European Council adopted conclusions on climate change, in light of which the TR represents a key step towards the objective of achieving a climate-neutral EU by 2050 (**TR**, recital (3)).

⁷⁰ OJ L 140, 5.6.2009, pp. 114-135.

⁷¹ *Ibid.*, recital (24), third sentence.

⁷² *Ibid.*, Article 2, point (5).

⁷³ *Ibid.*, recital (25), second sentence. The Sendai Framework was adopted at the Third UN World Conference in Sendai, Japan, on 18 March 2015 and is the outcome of stakeholder consultations initiated in March 2012

*Third, sustainable use and protection of water and marine resources.*⁷⁴

Fourth, transition to a “circular economy”; circular economy means an economic system whereby the value of products, materials and other economic resources is maintained for as long as possible, enhancing their efficient use in production and consumption, thereby reducing the environmental impact of their use, minimising waste and the release of hazardous substances at all stages of their life-cycle, including through the application of the waste hierarchy.⁷⁵

Fifth, pollution prevention and control; the term ‘pollution’ has a threefold meaning:⁷⁶ (i) the direct or indirect introduction of pollutants⁷⁷ into air, water or land as a result of human activity; (ii) in the context of the marine environment, pollution as defined in Article 3, point (8) of **Directive 2008/56/EC** of the co-legislators of 17 June 2008 “establishing a framework for community action in the field of marine environmental policy” (the **Marine Strategy Framework Directive**);⁷⁸ and (iii) in the context of the water environment, pollution as defined in Article 2, point (33) of **Directive 2000/60/EC** of 23 October 2000 “establishing a framework for Community action in the field of water policy”.⁷⁹

Finally, protection and restoration of biodiversity and ecosystems (healthy ecosystem). In this respect: ‘biodiversity’ means the variability among living organisms arising from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and includes diversity within species, between species and of ecosystems; and

and inter-governmental negotiations from July 2014 until March 2015, supported by the UN Office for Disaster Risk Reduction at the request of the UN General Assembly (its text is available at: https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf). On this Framework, see, by means of mere indication, **Aitsi-Selmi, A., Blanchard, K. and V. Murray (2016):** *Ensuring Science is Useful, Usable and Used in Global Disaster Risk Reduction and Sustainable Development: A View Through the Sendai Framework Lens*, Palgrave Communications, Vol. 2, available at: <https://ssrn.com/abstract=2780391>.

⁷⁴ This environmental objective should be interpreted in accordance with the sectoral legislative acts laid down in **recital (26)** and the Commission Communications of 18 July 2007 on “Addressing the challenge of water scarcity and droughts in the European Union”, of 14 November 2012 on “A Blueprint to Safeguard Europe’s Water Resources” and of 11 March 2019 on “European Union Strategic Approach to Pharmaceuticals in the Environment”.

⁷⁵ *Ibid.*, Article 2, point (9). ‘Waste hierarchy’ has the meaning laid down in Article 4 of **Directive 2008/98/EC** of the co-legislators of 19 November 2008 “on waste and repealing certain Directives” (the **Waste Framework Directive**, OJ L 312, 22.11.2008, pp. 3-30) (*ibid.*, Article 2, point (8)). This environmental objective should be interpreted in accordance with relevant EU law in the areas of the circular economy, waste and chemicals, and with the Commission Communications of 2 December 2015 on “Closing the loop – An EU action plan for the Circular Economy” and of 16 January 2018 on “A European Strategy for Plastics in a Circular Economy” (*ibid.*, recital (27)).

⁷⁶ *Ibid.*, Article 2, point (12).

⁷⁷ ‘Pollutant’ means a substance, vibration, heat, noise, light or other contaminant present in air, water or land which may be harmful to human health or the environment, which may result in damage to material property, or which may impair or interfere with amenities and other legitimate uses of the environment (*ibid.*, Article 2, point (10)).

⁷⁸ OJ L 164, 25.6.2008, pp. 19-40.

⁷⁹ OJ L 327, 22.12.2000, pp. 1-73. This environmental objective should be interpreted in accordance with the sectoral legislative acts set out in **recital (29) TR**.

‘ecosystem’ means a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit.⁸⁰

B. Criteria for determining whether an economic activity qualifies as environmentally sustainable

1. General overview

(1) For each of the environmental objectives, the TR should lay down uniform criteria to determine whether economic activities substantially contribute to it, including the avoidance of significant harm to it. The objective is to avoid that investments qualify as environmentally sustainable where the economic activities benefitting from those cause harm to the environment to an extent that outweighs their contribution to an environmental objective. Such criteria should take into account the life-cycle of the products and services provided by each economic activity in addition to the environmental impact of the economic activity itself, including taking into account evidence from existing life-cycle assessments, in particular by considering their production, use and end of life.⁸¹

(2) On the basis of these considerations, for the purposes of establishing the degree to which an investment is environmentally sustainable, the TR provides⁸² that an economic activity qualifies as environmentally sustainable if four criteria are met cumulatively: *first*, it substantially contributes to (at least) one or more environmental objectives in accordance with **Articles 10-16**; hence, a direct link is established between the environmental objectives and the *substantial* contribution of economic activities to each of them; *second*, it does not significantly harm any other environmental objective in accordance with **Article 17**; *third*, it is carried out in compliance with the safeguards laid down in **Article 18**; and *fourth*, it complies with applicable technical screening criteria (TSC) set out in the Commission’s delegated acts, which supplement the TR.⁸³ Accordingly, “**taxonomy alignment**”⁸⁴ is achieved if there is compliance with the substantial contribution to the environmental objectives, the “do no significant harm” principle, the minimum safeguards, and the TSC.

(3) These criteria must be applied by Member States and the EU to determine whether an economic activity qualifies as environmentally sustainable for the purposes of any measure setting out requirements for financial market participants or issuers in respect of financial products or corporate bonds made available as environmentally sustainable.⁸⁵

⁸⁰ *Ibid.*, Article 2, points (15) and (13), respectively. The term ‘**ecosystem services**’ is defined to mean the direct and indirect contributions of ecosystems to the economic, social, cultural, and other benefits that people derive from those (*ibid.*, Article 2, point (14)). This environmental objective should be interpreted in accordance with the sectoral legislative acts and the Commission Communications set out in **recital (30)**.

⁸¹ *Ibid.*, recital (34).

⁸² *Ibid.*, Article 3.

⁸³ See, respectively, below in **this Section**, under 2, 3 and 4 and in **Section C**.

⁸⁴ For a top-down method of estimating the greenness of financial portfolios, in terms of alignment to the EU Taxonomy for sustainable activities, see **Alessi, L. and S. Battiston (2022)**: Two sides of the same coin: Green Taxonomy alignment versus transition risk in financial portfolios, *International Review of Financial Analysis*, Volume 84, pp. 102319 *et seq.*

⁸⁵ **TR**, Article 4. This does not apply to certificate-based tax incentive schemes, which existed prior to the entry into force of the TR and set out requirements for financial products that aim to finance sustainable projects, without prejudice to the respective competences of the EU and the Member States with respect to tax provisions, as set out by the Treaties (*ibid.*, Article 27(3), and recital (58)).

2. Substantial contribution to environmental objectives

2.1 Substantial contribution to climate change mitigation

2.1.1 Means for meeting this criterion

(1) An economic activity meets this criterion where it substantially contributes to the stabilisation of greenhouse gas concentrations in the atmosphere,⁸⁶ at a level which prevents dangerous anthropogenic interference with the climate system consistent with the long-term temperature goal of the Paris Agreement of limiting the global temperature increase to 1.5 degrees Celsius above pre-industrial levels. This can be achieved either by avoiding or reducing greenhouse gas concentrations or by enhancing greenhouse gas removals, through process or product innovations, *via* any of the following means: *first*, by generating, transmitting, storing, distributing or using renewable energy (e.g., through extension of the grid) in accordance with **Directive (EU) 2018/2001** of the co-legislators of 11 December 2018 “on the promotion of the use of energy from renewable sources”;⁸⁷ *second*, by improving energy efficiency,⁸⁸ except for power generation activities;⁸⁹ *third*, by increasing clean or climate-neutral mobility, as well as the by use of environmentally safe carbon capture and utilisation (CCU) and carbon capture and storage (CCS) technologies, which deliver a net reduction in greenhouse gas emissions; *fourth*, by switching to the use of sustainably sourced renewable materials; *fifth* by strengthening land carbon sinks (e.g., through avoiding deforestation and forest degradation, restoration of forests, sustainable management and restoration of croplands, grasslands and wetlands, afforestation, and regenerative agriculture); *sixth*, by establishing energy infrastructure required for enabling the decarbonisation of energy systems; *furthermore*, by producing clean and efficient fuels from renewable or carbon-neutral sources; or *finally*, by enabling any of the above activities in accordance with **Article 16**.⁹⁰

2.1.2 Enabling and transitional activities

(1) An economic activity qualifies as contributing substantially to this (or any other⁹¹) environmental objective if it *directly* enables other activities to make a substantial contribution to one or more of those objectives as well. Such ‘**enabling activities**’ should not lead to a lock-in of assets that undermine long-term environmental goals (considering their economic lifetime) *and* should have a substantial positive environmental impact based on life-cycle considerations.⁹²

(2) An economic activity for which there is no technologically and economically feasible low-carbon alternative is considered to qualify as contributing substantially to climate change mitigation if it

⁸⁶ The term ‘**greenhouse gas**’ is defined with reference to Annex I to **Regulation (EU) No 525/2013** of the co-legislators of 21 May 2013 “on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change (...)” (OJ L 165, 18.6.2013, pp. 13-40) (*ibid.*, Article 2, point (7)).

⁸⁷ OJ L 328, 21.12.2018, pp. 82-209.

⁸⁸ ‘**Energy efficiency**’ means the more efficient use of energy at all the stages of the energy chain from production to final consumption (**TR**, Article 2, point (17)). For the purposes of the TR, this term is used in a broad sense and should be construed by taking into several sectoral legislative acts of the co-legislators, as well as the implementing measures adopted by the Commission (*ibid.*, recital (33)).

⁸⁹ On this, see **Section C below, under 2 (2)**.

⁹⁰ **TR**, Article 10(1), and recital (24), first and second sentences.

⁹¹ See below, **under 2.3-2.6**.

⁹² **TR**, Article 16, and recital (42).

supports the transition to a climate-neutral economy consistent with a pathway to limit temperature increase to 1,5⁰C above pre-industrial levels (e.g., by phasing out greenhouse gas emissions, in particular emissions from solid fossil fuels) *and*, in addition, meets the following conditions: has greenhouse gas emission levels corresponding to the best performance in the sector or industry; does not hamper the development and deployment of low-carbon alternatives; and does not lead to a lock-in of carbon-intensive assets, considering their economic lifetime (**‘transitional activity’**).⁹³

2.2 Substantial contribution to climate change adaptation

An economic activity meets this criterion in two (alternative) cases:

The *first* case applies if the economic activity includes adaptation solutions, which either substantially reduce the risk of the adverse impact of the current and expected future climate on that economic activity *or* substantially reduce that adverse impact, without increasing the risk of an adverse impact on people, nature or assets. Such solutions must be assessed and ranked in order of priority using the best available climate projections and, at a minimum, prevent or reduce either the location-specific and context-specific adverse impact of climate change on the economic activity; or the potential adverse impact of climate change on the environment within which the economic activity takes place.

The *second* case applies if the economic activity provides adaptation solutions which satisfy the conditions set out in **Article 16** and, in addition, contribute substantially to preventing or reducing the risk of the adverse impact of the current and the expected future climate on people, nature or assets, without increasing the risk of an adverse impact on them.⁹⁴

2.3 Substantial contribution to the sustainable use and protection of water and marine resources

An economic activity meets this criterion if it substantially contributes *either* to achieving the ‘good status’⁹⁵ of bodies of water (including bodies of surface water and groundwater) or to preventing the deterioration of bodies of water that already have good status, *or* to achieving the ‘good environmental status’ of marine waters⁹⁶ or to preventing the deterioration of marine waters that are already in good environmental status. This can be achieved by means of any of the following (including through enabling activities): *first*, by protecting the environment from the adverse effects of urban and industrial waste-water discharges, including from contaminants of emerging concern, such as

⁹³ For this purpose and for the establishment of TSC pursuant to **Article 19** (see **Section C below, under 2**), the Commission must assess the potential contribution and feasibility of all relevant existing technologies (*ibid.*, Article 10(2)). This is a typical ‘sunset clause’: if an economic activity were to be recognised in the “EU Taxonomy Climate Delegated Act” (on this, see **Section C below, under 5.2 (1)**) as ‘transitional’, that regime will have an expiration date, since it may be added to its scope by its amendment. Until then, it will be deemed as meeting the first environmental objective, provided that the other conditions are also complied with.

⁹⁴ *Ibid.*, Article 11(1)-(2), and recital (25), first sentence.

⁹⁵ **‘Good status’** has the following meaning: for *surface water*, having both ‘good ecological status’, as defined in Article 2, point (22) of **Directive 2000/60/EC** and ‘good surface water chemical status’, as defined in Article 2, point (24) thereof; and for *groundwater*, having both ‘good groundwater chemical status’, as defined in Article 2, point (25) of that **Directive** and ‘good quantitative status’, as defined in Article 2, point (28) thereof (*ibid.*, Article 2, point (22)). In this respect, the terms ‘surface water’ and ‘groundwater’ have the meaning as defined in Article 2, points (1) and (2), respectively, of that Directive (*ibid.*, Article 2, points (19)-(20)).

⁹⁶ The term **‘good environmental status’** has the meaning as defined in Article 3, point (5) of **Directive 2008/56/EC** and the term **‘marine waters’** the meaning as defined in Article 3 point (1) thereof (*ibid.*, Article 2, points (21) and (18), respectively).

pharmaceuticals and microplastics, e.g., by ensuring the adequate collection, treatment and discharge of urban and industrial waste-waters; *second*, by protecting human health from the adverse impact of any contamination of water intended for human consumption, ensuring that it is free from any micro-organisms, parasites and substances that constitute a potential danger to human health as well as increasing people's access to clean drinking water; *third*, by improving water management and efficiency (e.g., by protecting and enhancing the status of aquatic ecosystems), by promoting the sustainable use of water through the long-term protection of available water resources (*inter alia*, through water reuse), by ensuring the progressive reduction of pollutant emissions into surface water and groundwater, by contributing to mitigating the effects of floods and droughts, or by any other activity protecting or improving the qualitative and quantitative status of water bodies; or *finally*, by ensuring the sustainable use of marine ecosystem services or by contributing to the good environmental status of marine waters (e.g., by protecting, preserving, or restoring the marine environment) *and* by preventing or reducing inputs in the marine environment.⁹⁷

2.4 Substantial contribution to the transition to a circular economy

An economic activity qualifies as substantially contributing to the transition to a circular economy, including waste prevention, re-use and recycling, by any of the following means (including through enabling activities): *first*, it uses natural resources (such as sustainably sourced bio-based and other raw materials) in production more efficiently, including by reducing the use of primary raw materials or increasing the use of by-products and secondary raw materials or by resource and energy efficiency measures; *second*, it increases the durability, reparability, upgradability, reusability and recyclability of products (including the recyclability of individual materials contained in them); the use of secondary raw materials and their quality, including by high-quality recycling of waste; the preparation for the re-use and recycling of waste; and the development of the waste management infrastructure needed for prevention, preparing for re-use and recycling, while ensuring that the recovered materials are recycled as high-quality secondary raw material input in production (avoiding thus downcycling); *third*, it substantially reduces the content of hazardous substances and substitutes substances of very high concern in materials and products throughout their life-cycle, in accordance with the objectives set out in EU law, including by replacing such substances with safer alternatives and ensuring traceability; *fourth*, it prolongs the use of products, including through reuse, design for longevity, repurposing, disassembly, remanufacturing, upgrades and repair, and sharing them; or *finally*, it prevents or reduces waste generation, including the generation of waste from the extraction of minerals and waste from the construction and demolition of buildings, minimises the incineration of waste and avoids the disposal of waste (including landfilling), in accordance with the principles of the waste hierarchy, or it avoids and reduces litter.⁹⁸

2.5 Substantial contribution to pollution prevention and control

An economic activity meets this criterion *first*, by preventing or (if that is not practicable) reducing pollutant emissions into air, water or land, other than greenhouse gasses, or by preventing or minimising any adverse impact on human health and the environment of the production, use or disposal of chemicals; *second*, by improving levels of air, water or soil⁹⁹ quality in the areas where the economic activity takes place, while also minimising any adverse impact on human health and the

⁹⁷ *Ibid.*, Article 12(1).

⁹⁸ *Ibid.*, Article 13(1), and recital (28).

⁹⁹ **'Soil'** means the top layer of the earth's crust situated between the bedrock and the surface, composed of mineral particles, organic matter, water, air and living organisms (*ibid.*, Article 2, point (11)).

environment or the risk thereof; *third*, by cleaning up litter and other pollution; or *finally*, through enabling activities.¹⁰⁰

2.6 Substantial contribution to the protection and restoration of biodiversity and ecosystems

An economic activity meets this criterion where it substantially contributes to protecting, conserving or restoring biodiversity or to achieving the good condition of ecosystems¹⁰¹ or to protecting ecosystems already in good condition by any of the following means: *first*, by nature and biodiversity conservation (including by achieving favourable conservation status of natural and semi-natural habitats and species or preventing their deterioration where they already have favourable conservation status) and by protecting and restoring terrestrial, marine and other aquatic ecosystems in order to improve their condition and enhance their capacity to provide ecosystem services; *second*, by sustainable land use and management, including adequate protection of soil biodiversity, land degradation neutrality and the remediation of contaminated sites; *third*, by sustainable agricultural practices (including those contributing to the enhancement of biodiversity or to the halting or prevention of the degradation of soils and other ecosystems, deforestation, and *habitat* loss), as well as by sustainable forest management;¹⁰² or *finally*, through enabling activities.¹⁰³

3. No significant harm to any other environmental objective

(1) An economic activity must also meet the “**do no significant harm**” principle, referred to in **Article 2, point (17) SFDR**, by virtue of which an activity substantially contributing to one of the environmental objectives must also do no significant harm to any of the other objectives. Hence, an economic activity should not qualify as environmentally sustainable if it causes more harm to the environment than the benefits it brings. Taking thus into account the life-cycle of products and services provided by an economic activity (including evidence from existing life-cycle assessments), this is considered to significantly harm:

the *first* environmental objective (climate change mitigation), where it leads to significant greenhouse gas emissions;

the *second* objective (climate change adaptation), where it leads to an increased adverse impact on the current and expected future climate, on the activity itself or on people, nature or assets;

the *third* objective (sustainable use and protection of water and marine resources), where it is detrimental *either* to the good status or the good ecological potential of bodies of water,¹⁰⁴ including surface water and groundwater, *or* to the good environmental status of marine waters;

the *fourth* objective (circular economy), where: *first*, it leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources such as non-renewable energy

¹⁰⁰ *Ibid.*, Article 14(1).

¹⁰¹ ‘**Good condition**’ means, in relation to an ecosystem, that this is in good physical, chemical and biological condition or is of a good physical, chemical and biological quality with self-reproduction or self-restoration capability, in which species composition, ecosystem structure and ecological functions are not impaired (*ibid.*, Article 2, point (16)).

¹⁰² The term ‘**sustainable forest management**’ should be construed by taking into account the factors laid down in recital (32).

¹⁰³ *Ibid.*, Article 15(1), and recital (31).

¹⁰⁴ The term ‘good ecological potential’ is defined with reference to Article 2, point (23) of Directive 2000/60/EC (*ibid.*, Article 2, point (23)).

sources, raw materials, water and land at one or more stages of products' life-cycle; *second*, it leads to a significant increase in waste generation, incineration or disposal, with the exception of the incineration of non-recyclable hazardous waste; or *third*, the long-term disposal of waste may cause significant and long-term harm to the environment;

the *fifth* objective (pollution prevention and control), where it leads to a significant increase in the emissions of pollutants into air, water or land, as compared with the situation before the activity started; and

the *sixth* objective (protection and restoration of biodiversity and ecosystems), where it is significantly detrimental to the good condition and resilience of ecosystems or detrimental to the conservation status of habitats and species, including those of EU interest.¹⁰⁵

(2) In the course of assessing an economic activity against the above criteria, both the environmental impact of the activity itself and the environmental impact of the products and services provided by it throughout their life-cycle must be taken into account, by considering the production, use and end of life of those products and services.¹⁰⁶

4. Compliance with minimum safeguards

(1) Taking into account the joint commitment of the European Parliament, the Council and the Commission to pursuing the principles enshrined in the **European Pillar of Social Rights** in support of sustainable and inclusive growth,¹⁰⁷ and recognising the relevance of international minimum human and labour rights and standards, economic activities qualify as environmentally sustainable upon the condition that they are also compliant with the 'minimum safeguards' referred to in **Article 18 TR**.¹⁰⁸ These are **procedures** implemented by undertakings carrying out economic activities to ensure compliance with the OECD "Guidelines for Multinational Enterprises" and the UN "Guiding Principles on Business and Human Rights",¹⁰⁹ including the 1988 "Declaration on Fundamental Principles and Rights at Work" of the International Labour Organisation (**ILO**);¹¹⁰ the eight fundamental conventions of the ILO 1998 (defining human and labour rights to be respected by undertakings); and the "International Bill of Human Rights".¹¹¹ When implementing these procedures, undertakings must adhere to the "do no significant harm" principle and take into account the regulatory technical standards (**RTSs**) adopted pursuant to the SFDR.¹¹²

¹⁰⁵ *Ibid.*, Article 17(1), with reference to Article 3, point (b).

¹⁰⁶ *Ibid.*, Article 17(2).

¹⁰⁷ See at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

¹⁰⁸ **TR**, Article 3, point (c).

¹⁰⁹ Available at: <https://www.oecd.org/corporate/mne>.

¹¹⁰ Available at: <https://www.ilo.org/declaration/lang-en/index.htm>.

¹¹¹ **TR**, Article 18(1), and recital (35), first and second sentences. The International Bill of Human Rights was adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948 (available at: <https://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf>). Several of these international standards are enshrined in the **Charter of Fundamental Rights of the EU**. The minimum safeguards are without prejudice to the application of more stringent requirements related to environmental, health, safety and social sustainability as set out in EU law, where applicable (*ibid.*, recital (35), third and fourth sentences).

¹¹² *Ibid.*, Article 18(2), and recital (35), last sentence.

(2) On 11 July 2022, the Platform on Sustainable Finance¹¹³ published its **draft Report** on minimum safeguards based on Article 18,¹¹⁴ which aim to specify their content and provide advice on how compliance with them could be assessed. The Platform suggests two criteria that would render companies non-compliant with the rules: the absence of due diligence process on human rights and the lack of the implementation of such processes.

C. In particular: requirements for Technical Screening Criteria (TSC) – delegated acts adopted and to be adopted

1. The considerations set out in the Regulation

(1) In order to determine whether an economic activity qualifies as sustainable, the Commission must adopt delegated acts establishing TSC.¹¹⁵ With regard to these criteria, the following considerations are set out in the recitals:¹¹⁶

First, given the specific technical details needed to assess the environmental impact of an economic activity and the fast-changing nature of both science and technology, the TSC should be regularly adapted to reflect such changes. In addition, in order to ensure that they are up to date, based on scientific evidence and input from experts as well as relevant stakeholders, the conditions for ‘substantial contribution’ and ‘significant harm’ should be specified with more granularity for different economic activities. Accordingly, the Commission must establish granular and calibrated TCS for the different economic activities, based on technical input from the Platform on Sustainable Finance.

Second, given that the potential capacity to contribute to one or more environmental objectives can vary across sectors,¹¹⁷ the TSC should ensure that relevant economic activities within a specific sector can qualify as environmentally sustainable and are treated equally if they equally contribute to one or more environmental objectives. However, within each sector, they should not unfairly disadvantage certain economic activities over others if all contribute to the environmental objectives to the same extent.

Third, to avoid overly burdensome compliance costs on economic operators, the TSC must provide for sufficient legal clarity, be practicable and easy to apply, while, in order to avoid unnecessary administrative burden, verification of compliance therewith within reasonable cost-of-compliance boundaries should also be granted.

Furthermore, if sufficiently practicable and necessary, the TSC could require carrying out a life-cycle assessment.

Finally, to ensure that private investments are channeled towards economic activities that make the greatest positive impact on the environmental objectives, the Commission should prioritise the establishment of TSC for economic activities that potentially contribute most to such objectives.

¹¹³ On this Platform, referred to in Article 20, see **Section E below, under 1.1**.

¹¹⁴ Available at: https://finance.ec.europa.eu/system/files/2022-10/221011-sustainable-finance-platform-finance-report-minimum-safeguards_en.pdf.

¹¹⁵ The legal basis are **Articles 10(3), 11(3), 12(2), 13(2), 14(2) and 15(2) TR**. See below, **under 2**.

¹¹⁶ **TR**, recitals (38), (45) and (47)-(48).

¹¹⁷ On the possibility of considering sustainable finance as an autonomous objective of financial regulation in the EU, see **Colaert, V. (2022)**: The Changing Nature of Financial Regulation: Sustainable Finance as a New EU Policy Objective, *Common Market Law Review*, Volume 59, pp. 1669-1710.

(2) In establishing and updating the TSC for the environmental objective of climate change mitigation, the Commission should take into account and provide incentives for the ongoing and necessary transition towards a climate-neutral economy in accordance with **Article 10(2)**. In addition to the use of climate-neutral energy and more investments in already low-carbon economic activities and sectors, the transition requires substantial reductions in greenhouse gas emissions in other economic activities and sectors for which there are not any technologically and economically feasible low-carbon alternatives. These transitional economic activities should qualify as contributing substantially to climate change mitigation if their greenhouse gas emissions are substantially lower than the sector or industry average, do not hamper the development and deployment of low-carbon alternatives and do not lead to a lock-in of assets incompatible with the objective of climate-neutrality, considering the economic lifetime of those assets. Furthermore, the TSC should ensure the existence of a credible path towards climate-neutrality and should be adjusted accordingly at regular intervals.¹¹⁸

(3) Finally, appropriate TSC must be established for the transport sector, including for mobile assets, which should take into account that this sector, including international shipping, contributes close to 26% of total greenhouse gas emissions in the EU. As stated in the 2018 “**Action Plan on Financing Sustainable Growth**”¹¹⁹ the transport sector represents about 30% of the additional annual investment needed for sustainable development in the EU, e.g., to increase electrification or to support the transition to cleaner transport modes by promoting modal shift and better traffic management.¹²⁰

2. The provisions of Article 19

(1) On the basis of the above considerations, TSC must meet the following eleven requirements:¹²¹

(a) identify the most relevant potential contributions to the given environmental objective, while respecting the principle of technological neutrality, considering both the short- and long-term impact of a given economic activity;

(b) specify the minimum requirements to be met in order to avoid significant harm to any of the environmental objectives, considering both the short- and long-term impact of each economic activity;

(c) be quantitative and, to the extent possible, contain thresholds; otherwise be qualitative;

(d) where appropriate, build upon EU labelling and certification schemes, methodologies for assessing environmental footprint, and statistical classification systems, and take into account any relevant existing EU legislation;

(e) to the extent feasible, use existing sustainability indicators as proposed by the European Parliament in its Resolution of 29 May 2018 on sustainable finance and referred to in **Article 4(6) SFDR**, in order to ensure the reliability, consistency and comparability of sustainability-related disclosures in the financial services sector;

¹¹⁸ TR, recital (41).

¹¹⁹ See **Section A above, under 1.1 (2)**.

¹²⁰ TR, recital (49).

¹²¹ *Ibid.*, Article 19(1).

(f) be based on conclusive available scientific evidence and if scientific evaluation does not allow for a risk to be determined with sufficient certainty, the **precautionary principle** should apply in accordance with **Article 191 TFEU**,¹²²

(g) take into account the life-cycle, including evidence from existing assessments, by considering the environmental impact of both the economic activity itself and of the products and services provided by that economic activity, in particular by considering the production, use and end of life of those products and services;

(h) take into account the nature and scale of the economic activity, including whether it is an enabling or a transitional one as referred to in **Articles 16 and 10(2)**,¹²³

(i) take into account the potential market impact of the transition to a more sustainable economy, including the risk of certain assets becoming stranded as a result of such transition and that of creating inconsistent incentives for investing sustainably;

(j) cover all relevant economic activities within a specific sector and ensure that those are treated equally if they equally contribute towards the environmental objectives in order to avoid distorting competition in the market; and

(k) be easy to use and set in a manner facilitating the verification of their compliance.

(2) The TSC must also include criteria for activities related to the clean energy transition consistent with a pathway to limit the temperature increase to 1,5 °C above pre-industrial levels (in particular **energy efficiency** and renewable energy) to the extent that these substantially contribute to any of the environmental objectives; ensure that power generation activities using solid fossil fuels do not qualify as environmentally sustainable;¹²⁴ and include criteria for activities related to the switch to clean or climate-neutral mobility (e.g., through modal shift, efficiency measures and alternative fuels, to the extent that these substantially contribute to any environmental objective).¹²⁵

3. Specific provisions

(1) **Articles 10-15** contain specific provisions regarding the TSC set out therein. In particular, the Commission must adopt a delegated act in accordance with **Article 23** to supplement: *first*, **Article 10(1)-(2)** by establishing TSC for determining the conditions under which a specific economic activity qualifies as contributing substantially to climate change mitigation; *second*, **Article 11(1)-(2)** by establishing TSC for determining the conditions under which a specific economic activity qualifies as contributing substantially to climate change adaptation; *third*, **Article 12(1)** by establishing TSC for determining the conditions under which a specific economic activity qualifies as contributing substantially to sustainable use and protection of water and marine resources; *fourth*, **Article 13(1)** by establishing TSC for determining the conditions under which a specific economic activity qualifies as contributing substantially to the transition to a circular economy; *fifth*, **Article 14(1)** by establishing TSC for determining the conditions under which a specific economic activity qualifies as contributing substantially to pollution prevention and control; and *sixth*, **Article 15(1)** by establishing TSC for

¹²² On this requirement, see also recital (40), third and fourth sentences. On Article 191 TFEU, see **Section A above, under 1.2**.

¹²³ On these Articles, see **Section B above, under 2.1.2**. The TSC must clearly indicate that fact that the economic activity belongs to one of these categories.

¹²⁴ On this aspect, see also **Section B above, under 2.1.1 (1)**.

¹²⁵ **TR**, Article 19(2), (3) and (4), respectively.

determining the conditions under which a specific economic activity qualifies as contributing substantially to the protection and restoration of biodiversity and ecosystems.¹²⁶

(2) In all cases, the delegated act must also supplement **Article 17**¹²⁷ by establishing, for each relevant environmental objective, TSC for determining whether an economic activity causes significant harm to one or more of those objectives.¹²⁸

4. Obligations imposed on the Commission

(1) When establishing and updating the TSC, the Commission should assess whether their establishment would give rise to stranded assets, result in inconsistent incentives or have any other adverse impact on financial markets.¹²⁹ It must also take into account:

first, **Regulations (EC) No 1221/2009** of the co-legislators of 25 November 2009 “on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (...)”, and **(EC) No 66/2010** “on the EU Ecolabel”,¹³⁰ its own **Recommendation 2013/179/EU** of 9 April 2013 “on the use of common methods to measure and communicate the life-cycle environmental performance of products and organisations”¹³¹ and its **Communication** of 16 July 2018 on “Public procurement for a better environment”;¹³²

second, the statistical classifications in the environmental goods and services sector in order to avoid inconsistencies with existing classifications of economic activities for other purposes;¹³³

third, existing environmental indicators and reporting frameworks, developed (*inter alia*) by itself and the European Environment Agency, as well as existing international standards,¹³⁴ such as those developed (*inter alia*) by the OECD; and

finally, the specificities of the infrastructure sector, as well as environmental, social and economic externalities within a cost-benefit analysis, taking into account several related sectoral **Directives** of the co-legislators,¹³⁵ standards and current methodology, as well as the work of

¹²⁶ *Ibid.*, Articles 10(3), point (a), 11(3), point (a), 12(2), point (a), 13(2), point (a), 14(2), point (a) and 15(2), point (a).

¹²⁷ See **Section B above, under 3**.

¹²⁸ **TR**, Articles 10(3), point (b), 11(3), point (b), 12(2), point (b), 13(2), point (b), 14(2), point (b) and 15(2), point (b).

¹²⁹ *Ibid.*, recital (46).

¹³⁰ OJ L 342, 22.12.2009, pp. 1-45 and OJ L 27, 30.1.2010, pp. 1-19, respectively.

¹³¹ OJ L 124, 4.5.2013, pp. 1-210.

¹³² COM/2008/400 final.

¹³³ These include the classification of environmental protection activities (**CEPA**) and resource management activities (**CRema**) pursuant to **Regulation (EU) No 538/2014** of the co-legislators of 16 April 2014 “amending Regulation (EU) No 691/2011 on European environmental economic accounts” (OJ L 158, 27.5.2014, pp. 113-124).

¹³⁴ On the relationship between the entire EU Sustainable Finance Package and the relevant international standards, see **Zetzsche, D., Bodellini, M. and M. Consiglio (2021)**: The EU Sustainable Finance Framework in Light of International Standards, available at: <https://ssrn.com/abstract=3984511>.

¹³⁵ **Directive 2001/42/EC** of 27 June 2001 “on the assessment of the effects of certain plans and programmes on the environment” (OJ L 197, 21.7.2001, pp. 30-37), **Directive 2011/92/EU** of 13 December 2011 “on the assessment of the effects of certain public and private projects on the environment” (OJ L 26, 28.1.2012, pp. 1-21), and **Directives 2014/23/EU, 2014/24/EU and 2014/25/EU** of 26 February 2014 “on the award of

international organisations, such as the OECD; the TSC should promote appropriate governance frameworks integrating ESG factors as referred to in the UN-supported **Principles for Responsible Investment (PRI)**¹³⁶ at all stages of a project's life-cycle.¹³⁷

(2) Prior to adopting these delegated acts, the Commission must consult the Platform on Sustainable Finance regarding the TSC. The TSC referred to in **Articles 10-15** must each be adopted in one delegated act, taking into account the requirements of **Article 19**.¹³⁸ The Commission must also regularly review the TSC and, where appropriate, amend the relevant delegated acts in line with scientific and technological developments.¹³⁹

5. Delegated acts adopted and to be adopted

5.1 The provisions of Article 27(2) TR

To allow relevant actors to familiarise themselves with the criteria for qualification as environmentally sustainable economic activities and to prepare for their application, the TR provides that the disclosure obligations set out therein should apply twelve months after the establishment of the relevant TSC, depending on the environmental objective they relate to. In particular, **Articles 4-7** and **8(1)-(3)** should apply in respect of the first two **climate-related objectives** from 1 January 2022; and in respect of the other four environmental objectives from 1 January 2023.¹⁴⁰

5.2 The 2021 “EU Taxonomy Climate Delegated Act”

(1) In accordance with the TR,¹⁴¹ the Commission adopted on 4 June 2021 a delegated act on the first two climate-related objectives (i.e., climate change mitigation and adaptation). This so-called “**EU Taxonomy Climate Delegated Act**”¹⁴² establishes TSC for determining *on the one hand*, the

concession contracts”, “on public procurement (...)” and “on procurement by entities operating in the water, energy, transport and postal services (...)” (OJ L 94, 28.3.2014, pp. 1-64, 65-242 and 243-374, respectively).

¹³⁶ The PRI is a leading proponent of responsible investment, working to understand the investment implications of ESG factors and to support its international network of investor signatories in incorporating these factors into their investment and ownership decisions. It acts in the long-term interests of its signatories, as well as of the financial markets and economies in which they operate (see at: <https://www.unpri.org>).

¹³⁷ TR, recitals (43)-(44) and (46).

¹³⁸ *Ibid.*, Articles 10(4)-(5), 11(4)-(5), 12(3)-(4), 13(3)-(4), 14(3)-(4) and 15(3)-(4); on Article 19, see **above, under 2**.

¹³⁹ *Ibid.*, Article 19(5), first sentence. Before amending or replacing a delegated act, the Commission must assess the implementation of those criteria taking into account the outcome of their application by financial market participants and their impact on capital markets, including on the channelling of investment into environmentally sustainable economic activities. To ensure that economic activities as referred to in **Article 10(2)** remain on a credible transition pathway consistent with a climate-neutral economy, the Commission must review the TSC for those activities at least every three years and, where appropriate, amend the delegated act referred to in **Article 10(3)** in line with scientific and technological developments (*ibid.*, Article 19(5), second and third sentences).

¹⁴⁰ *Ibid.*, Article 27(2), first sub-paragraph and recital (57).

¹⁴¹ *Ibid.*, Articles 10(3) and 11(3).

¹⁴² **Commission Delegated Regulation (EU) 2021/2139** of 4 June 2021 “supplementing [the TR] by establishing the [TSC] for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining

conditions under which an economic activity qualifies as contributing substantially to the first two climate-related objectives; and *on the other hand*, whether an economic activity causes no significant harm on any other environmental objective. This act, with two Annexes (respectively), applies from 1 January 2022.¹⁴³ In this respect, the following is briefly noted:

First, the TSC set out in this delegated act for determining whether an economic activity contributes substantially to climate change mitigation or climate change adaptation refer to thresholds or performance levels that the economic activity should achieve in order to qualify as contributing substantially to one of those climate objectives. Moreover, the TSC for “do no significant harm” ensure that the economic activity has no significant negative environmental impact. Furthermore, the criteria should build, where relevant, on existing EU law, best practices, standards, and methodologies, as well as on well-established standards, practices and methodologies developed by internationally reputed public entities. Where objectively there are no viable alternatives for a specific policy area, the criteria can also build on well-established standards developed by internationally reputed private bodies. Finally, in order to ensure a level playing field, the same categories of economic activities should be subject to the same TSC for each climate objective.¹⁴⁴

Second, Annexes I and II set out the TSC for determining the conditions for the activities in the fields of, *inter alia*, forestry, environmental protection and restoration, energy, water supply, sewerage, waste management and remediation, information and communication, and human health. They define an economic activity’s substantial contribution to climate change adaptation and/or mitigation and set out the criteria for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

(2) The publication of the EU Taxonomy Climate Delegated Act followed the adoption, on 21 April 2021, by the **Commission of Communication** on “EU taxonomy, corporate sustainability reporting, sustainability preferences and fiduciary duties: Directing finance towards the European Green Deal”.¹⁴⁵ This soft law instrument is based on the “Transition Finance Report” adopted by the Platform on Sustainable Finance in March 2021¹⁴⁶ and aims at delivering key messages on how the sustainable finance toolbox facilitates access to finance for the transition. More specifically, it clarifies how the sustainable finance ecosystem is part of a wider strategy to achieve change and ensure a just transition to reach the EU’s sustainability goals, by increasing transparency and providing tools for investors to identify sustainable investment opportunities. It also explains how it would enable a number of future tools, such as the EU ecolabel for retail financial products and the EU Green Bond Standard, to be developed.

whether that economic activity causes no significant harm to any of the other environmental objectives” (OJ L 442/1-349).

¹⁴³ TR, Articles 10(6) and 11(6).

¹⁴⁴ EU Taxonomy Climate Delegated Act, recitals (4)-(6).

¹⁴⁵ COM/2021/188 final.

¹⁴⁶ Available at: https://finance.ec.europa.eu/system/files/2021-03/210319-eu-platform-transition-finance-report_en.pdf. This Report represents the Platform’s advice to the Commission on transition financing, since the latter had identified that more work was needed on how the TR could enable inclusive transition financing for companies and other economic actors working to improve their environmental impact.

5.3 The 2022 “Complementary Climate Delegated Act”

(1) On the basis of **Article 8(4) TR**, the Commission adopted on **6 July 2021** the so-called “**Disclosures Delegated Act**”, which is further discussed in **Section D** below.¹⁴⁷ Furthermore, on 9 March 2022, it also adopted the so-called “**Complementary Climate Delegated Act**”,¹⁴⁸ which amended both the **EU Taxonomy Climate Delegated Act** and the **Disclosures Delegated Act** and applies from 1 January 2023.¹⁴⁹ It includes, under strict conditions, specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy. The criteria for the specific gas and nuclear activities are in line with EU climate and environmental objectives and will help accelerate the shift from solid or liquid fossil fuels, including coal, towards a climate-neutral future. This delegated act builds on the (just) above-mentioned Commission Communication and on the assessment of nuclear energy.¹⁵⁰

(2) This Delegated Act was adopted, *inter alia*, on the basis of the Final Report of the TEG of March 2020,¹⁵¹ where it was stated that “*nuclear energy generation has near to zero green-house gas emissions in the energy generation phase*” and “*evidence on the potential substantial contribution of nuclear energy to climate change mitigation objectives was extensive and clear*”. The key reasons underpinning its adoption were that a number of Member States’ plans included nuclear energy along with renewable energy in the energy sources to be used to meet climate targets. Moreover, by providing a stable baseload of energy supply, nuclear energy facilitates the deployment of intermittent renewable sources and does not hamper their development. In the Commission opinion, this meant that nuclear energy related activities should be considered as complying with **Article 10(2) TR**.¹⁵²

5.4 The unfinished agenda

As already noted,¹⁵³ it was expected that the Delegated Act(s) on the other four environmental objectives would have been adopted by the Commission in 2022 and would apply from 1 January 2023.¹⁵⁴ However, this has failed to materialise.

¹⁴⁷ See **Section D below, under 4 (2)**.

¹⁴⁸ **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, 15.7.2022, pp. 1-45.

¹⁴⁹ *Ibid.*, Article 3.

¹⁵⁰ It is noted in this respect that in 2020 the Commission launched in-depth work to assess whether nuclear energy should be included in the EU taxonomy of environmentally sustainable activities. As the first step, the Commission’s in-house science and knowledge service (Joint Research Centre, **JRC**) drafted a **science for policy** Report on Technical assessment of nuclear energy with respect to the ‘do no significant harm’ criteria of the TR (available at: https://finance.ec.europa.eu/system/files/2021-03/210329-jrc-report-nuclear-energy-assessment_en.pdf). This JRC Report aims to provide evidence-based scientific support to the decision making process, does not imply a policy position of the Commission and was reviewed by the Group of Experts on radiation protection and waste management under **Article 31 of the Euratom Treaty** and by the Scientific Committee on Health, Environmental and Emerging Risks on environmental impacts.

¹⁵¹ Available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf.

¹⁵² **Complementary Climate Delegated Act**, recital (6).

¹⁵³ See **above, under 5.1**.

¹⁵⁴ **TR**, Articles 12(5), 13(5), 14(5) and 15(5).

D. Disclosure requirements for environmentally sustainable investments

1. Considerations and relationship to the SFDR

(1) In order to avoid harming investor interests and as already noted,¹⁵⁵ the TR introduces specific disclosure requirements for environmentally sustainable investments. In this respect, **recital (18)** makes the following considerations:

First, fund managers and institutional investors that make available financial products should disclose how and to what extent they use the criteria for environmentally sustainable economic activities to determine the environmental sustainability of their investments.¹⁵⁶ The information disclosed should enable investors to understand the proportion of the investments underlying the financial product in environmentally sustainable economic activities as a percentage of all investments underlying it, thereby enabling them to understand the degree of investments' environmental sustainability.

Second, if these investments are in economic activities that contribute to environmental objectives, the information to be disclosed should specify the objective or objectives to which these investments contribute, as well as how and to what extent they fund environmentally sustainable economic activities. The information should also include details on the respective proportions of enabling and transitional activities.

Third, the information that needs to be disclosed should be specified by the Commission and should enable national competent authorities (NCAs) to easily verify compliance with that disclosure obligation and to enforce such compliance in accordance with applicable national law.

Finally, in cases where financial market participants do not take the criteria for environmentally sustainable investments into account, they should provide a statement to that end. In order to avoid the circumvention of the disclosure obligation, this should also apply where financial products are marketed as promoting environmental characteristics, including financial products that have as their objective environmental protection in a broad sense.

(2) The disclosure obligations laid down in the TR supplement the rules on sustainability-related disclosures laid down in the SFDR.¹⁵⁷ In particular, to enhance transparency and provide an objective point of comparison by financial market participants to end investors on the proportion of investments

¹⁵⁵ See **Section A above, under 1.3**.

¹⁵⁶ On this aspect, see also the analytical considerations in recital (13) **TR**.

¹⁵⁷ See in this respect also **Commission Delegated Regulation (EU) 2022/1288** of 6 April 2022 “supplementing [the SFDR] with regard to [RTSs] specifying the details of the content and presentation of the 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, 25.7.2022, pp. 1-72). The RTSs set out in the above delegated act as regards the content and presentation of information in relation to disclosures in pre-contractual documents and periodic reports for financial products investing in environmentally sustainable economic activities were amended and corrected by **Commission Delegated Regulation (EU) 2023/363** of 31 October 2022 (OJ L 50, 17.2.2023, pp. 3-27), which is based on draft RTSs submitted to the Commission by the ESAs. The amendments are confined to those adjustments of the existing regulatory framework that were deemed necessary to align the disclosure framework to the **Complementary Climate Delegated Act** (discussed in **Section C above, under 5.3**).

that fund environmentally sustainable economic activities, the TR supplements the rules on transparency in pre-contractual disclosures and in periodic reports set out in the SFDR.¹⁵⁸

(3) In exceptional cases relating to economic activities carried out by undertakings not required to disclose information under the TR and for which complete, reliable and timely information cannot be obtained, financial market participants can make complementary assessments and estimates on the basis of information obtained from other sources. In order to ensure that the disclosure to end investors is clear and not misleading, financial market participants should clearly explain the basis for their conclusions and the reasons for having to make such complementary assessments and estimates.¹⁵⁹

2. The provisions of Articles 5-7

2.1 Disclosure of environmentally sustainable investments in pre-contractual disclosures and in periodic reports

When a financial product as referred to in **Article 9(1), (2) or (3) SFDR**¹⁶⁰ invests in an economic activity that contributes to an environmental objective within the meaning of **Article 2, point (17)** thereof, the information to be disclosed in accordance with **Articles 6(3) and 11(2)** thereof must include the following: *first*, the information on the environmental objective(s) to which the investment underlying the financial product contributes; and *second*, a description of how and to what extent the investments underlying the financial product are in economic activities qualifying as environmentally sustainable pursuant to **Article 3 TR**, which must specify the proportion of investments in environmentally sustainable economic activities selected for the financial product, including details on the proportions of enabling and transitional activities referred to in **Articles 16 and 10(2)**,¹⁶¹ respectively, as a percentage of all investments selected for that product.¹⁶²

2.2 Disclosure of financial products that promote environmental characteristics in pre-contractual disclosures and in periodic reports

The (just) above-mentioned **Article 5 TR** is also applicable, *mutatis mutandis*, where a financial product as referred to in **Article 8(1) SFDR**¹⁶³ promotes environmental characteristics. For “non-

¹⁵⁸ The definition of the term ‘sustainable investment’ in the SFDR includes investments in economic activities that contribute to an environmental objective which, *inter alia*, should include those into ‘environmentally sustainable economic activities’ within the meaning of the TR. Moreover, the SFDR only considers an investment to be sustainable if it does not significantly harm any environmental or social objective as set out therein (**TR**, recital (19)).

¹⁵⁹ *Ibid.*, recital (21). Economic operators not covered by the TR may be encouraged to publish and disclose information on their websites on a voluntary basis on the environmentally sustainable economic activities they carry out, which will assist financial market participants to easily identify which economic operators carry out environmentally sustainable economic activities and facilitate the latter to raise funds for their environmentally sustainable activities (*ibid.*, recital (15)).

¹⁶⁰ **Article 9(1) SFDR** refers to financial products whose objective is sustainable investment and contain an index designated as a reference benchmark; **Article 9(2)** refers to financial products with the same objective, but no index has been designated as a reference benchmark; and **Article 9(3)** refers to financial products whose objective is a reduction in carbon emissions.

¹⁶¹ On these Articles, see **Section B above, under 2.1 (1), in finem**, and (2).

¹⁶² **TR**, Article 5.

¹⁶³ **Article 8(1) SFDR** refers to financial products which promote, *inter alia*, environmental or social characteristics, or a combination thereof, provided that the companies in which the investments are made follow good governance practices.

sustainable” products the TR introduces in this case a requirement to include a statement confirming that the investments underlying the product do not fully take into account the EU criteria for environmentally sustainable economic activities. Hence, the information to be disclosed in accordance with **Articles 6(3) and 11(2) SFDR** must be accompanied by the following statement:

“The “do no significant harm” principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities. The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities.”¹⁶⁴

2.3 Transparency of other financial products in pre-contractual disclosures and in periodic reports

If a financial product is not subject to any of the above-mentioned (under 2.1 and 2.2) SFDR Articles, the information to be disclosed in accordance with the provisions of sectoral legislation referred to in **Articles 6(3) and 11(2)** thereof must be accompanied by the following statement:

“The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities.”¹⁶⁵

3. Competent authorities – measures and penalties

(1) The monitoring of financial market participants’ compliance with the requirements laid down in **Articles 5-7 TR** has been assigned to the NCAs referred to in **Article 14(1) SFDR**. These must have all the necessary supervisory and investigatory powers for the exercise of their functions under the TR, cooperate and provide each other, without undue delay, with such information as is relevant for the purposes of carrying out their duties.¹⁶⁶

(2) Furthermore, in order to enforce compliance, Member States must lay down rules on effective, proportionate and dissuasive measures and penalties applicable to infringements of **Articles 5-7 TR**.¹⁶⁷ NCAs and the ESAs should exercise the product intervention powers laid down in three relevant Regulations of the co-legislators¹⁶⁸ also with respect to mis-selling practices or misleading disclosures of sustainability-related information, including the information required under the TR.¹⁶⁹

4. The provisions of Article 8 on non-financial reporting

(1) The TR imposes additional requirements on undertakings, which are covered by the field of application of the **Accounting Directive**, as in force.¹⁷⁰ In particular, any undertaking which is subject to an obligation to publish non-financial information pursuant to **Articles 19a or 29a** of that legislative act must include in its non-financial statement or consolidated non-financial statement

¹⁶⁴ **TR**, Article 6.

¹⁶⁵ *Ibid.*, Article 7.

¹⁶⁶ *Ibid.*, Article 21, and recital (55), second sentence.

¹⁶⁷ *Ibid.*, Article 22, and recital (55), third sentence.

¹⁶⁸ Notably: **Regulation (EU) No 600/2014** of 15 May 2014 “on markets in financial instruments (...)” (OJ L 173, 12.6.2014, pp. 84-138, **MiFIR**); **Regulation (EU) No 1286/2014** of 26 November 2014 “on key information documents for packaged retail and insurance-based investment products (PRIIPs)” (OJ L 352, 9.12.2014, pp. 1-23); and **Regulation (EU) 2019/1238** of 20 June 2019 “on a pan-European Personal Pension Product (PEPP)” (OJ L 198, 25.7.2019, pp. 1-63).

¹⁶⁹ **TR**, recital (55), fourth sentence.

¹⁷⁰ See **Section A above, under 2.**

information on how and to what extent its activities are associated with economic activities qualifying as environmentally sustainable under **Articles 3 and 9 TR**.¹⁷¹ The information to be disclosed, which is considered as useful to investors interested in companies whose products and services contribute substantially to any of the environmental objectives, contains two pillars: *first*, the proportion of turnover derived from products or services associated with economic activities that qualify as environmentally sustainable; and *second*, the proportion of capital expenditure (**CapEx**) and of operating expenditure (**OpEx**) related to assets or processes associated with environmentally sustainable economic activities.¹⁷²

(2) As already noted,¹⁷³ on the basis of **Article 8(4) TR** the Commission adopted, on **6 July 2021**, the so-called “**Disclosures Delegated Act**”.¹⁷⁴ This specifies the content and presentation of the information to be disclosed by undertakings subject to Articles 19a or 29a of the Accounting Directive concerning environmentally sustainable economic activities, as well as the methodology to comply with that disclosure obligation. The Act’s recitals clarify that, to enable investors and the public to properly assess the proportion of environmentally sustainable economic activities of non-financial undertakings, the latter are required to disclose which of their economic activities are Taxonomy-aligned. In addition, it is necessary to disclose to which environmental objectives those activities contribute substantially. Non-financial undertakings should therefore also provide for a breakdown in the key performance indicators of the proportion of Taxonomy-aligned activities based on each environmental objective to which those activities contribute substantially.

In this respect, the Commission has also issued an array of soft law. More specifically:

First, on 6 October 2022, it published a Notice on the interpretation of certain legal provisions of the Disclosures Delegated Act on the reporting of eligible economic activities and assets.¹⁷⁵ This is a frequently asked questions (FAQs) document, aimed to clarify the content of that delegated act to aid its implementation.

Second, on 19 December 2022, it also published a Draft Notice on the interpretation and implementation of certain legal provisions of the Disclosures Delegated Act on the reporting of Taxonomy-eligible and Taxonomy-aligned economic activities and assets.¹⁷⁶ This Draft Notice is also comprised of FAQs. *Inter alia*, the FAQs state that non-financial undertakings should disclose both eligibility and alignment of nuclear energy and fossil gas related activities as of 1 January 2023, in respect of the 2022 financial year. The FAQs also state that reporting eligibility and alignment by non-financial undertakings for the remaining four environmental objectives is not expected in 2023, since the Commission has not yet published the delegated act with the TSC for those objectives. The FAQs, however, do not specify when that delegated act will be published.

¹⁷¹ This requirement is based on **Commission Communication of 20 June 2019** “Guidelines on non-financial reporting: Supplement on reporting climate-related information”, which recommends that certain large companies report on certain climate-related key performance indicators (**KPIs**) on the basis of the TR framework (*ibid.*, recital (22), first sentence).

¹⁷² *Ibid.*, Article 8(1)-(2). If an undertaking publishes non-financial information pursuant to the above-mentioned Articles 19a or 29a in a separate report pursuant to **Articles 19a (4) or 29a (4)**, this information must be published in that separate report (*ibid.*, Article 8(3)). Smaller companies may voluntarily decide to publish such information as well (*ibid.*, recital (22), last sentence).

¹⁷³ See **Section C above, under 5.3 (1)**.

¹⁷⁴ **Commission Delegated Regulation (EU) 2021/2178**, OJ L 443, 10.12.2021, pp. 9-67.

¹⁷⁵ 2022/C 385/01.

¹⁷⁶ Available at: <https://ec.europa.eu/finance/docs/law/221219-draft-commission-notice-disclosures-delegated-act-article-8.pdf>.

(3) It is also noted in this context that, on the basis of its **Communication** of 21 April 2021 “EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal”,¹⁷⁷ the Commission tabled a proposal for a so-called Corporate Sustainability Reporting Directive (**CSRD**), which would amend, *inter alia*, the reporting rules laid down in the Accounting Directive (as introduced by the NFRD) on corporate sustainability reporting.¹⁷⁸ This Directive was adopted on 28 November 2022¹⁷⁹ and amends, *inter alia*, the reporting rules laid down in the **2013 ‘Accounting Directive’**¹⁸⁰ as regards corporate sustainability reporting. Under this legislative act, the scope of application was extended to cover all large companies and all companies listed on regulated markets (except micro-enterprises). In addition, reported information will now be audited, a requirement to report according to mandatory EU sustainability reporting standards was imposed, and the reported information will now have to be digitally ‘tagged’ to feed into the European single access point (**ESAP**) for financial and non-financial information publicly disclosed by companies as envisaged in the (above-mentioned) 2020 CMU Action Plan.¹⁸¹ With the adoption of the CSRD, the EU has now harmonised sustainability reporting with financial reporting. From 2024, the new framework will be implemented gradually.

E. Other provisions

1. Advisory bodies

1.1 The Platform on Sustainable Finance

1.1.1 Rationale, composition, constitution

(1) When developing the TSC, the Commission should carry out appropriate consultations in line with the **Better Regulation Agenda**,¹⁸² while the process for their establishment and updating should involve relevant stakeholders and build on the advice of experts who have proven knowledge and experience in the relevant areas.¹⁸³ Based on these considerations, the Commission should set up of a multi-stakeholder “Platform on Sustainable Finance” (the **Platform**), which is, indeed, operational since **October 2020**.¹⁸⁴

(2) The Platform is chaired by the Commission¹⁸⁵ and is composed, in a balanced manner, of experts representing both the public and private sector as well as the civil society: *public-sector experts* include representatives of the European Environmental Agency, the ESAs, the European Investment Bank (**EIB**) and the **EU Agency for Fundamental Rights**; *private sector experts* include

¹⁷⁷ COM/2021/188 final.

¹⁷⁸ COM/2021/189 final.

¹⁷⁹ **Directive (EU) 2022/2464** of the co-legislators of 14 December 2022, OJ L 322, 16.12.2022, pp. 15-80.

¹⁸⁰ **Directive 2013/34/EU** of the co-legislators of 26 June 2013 “on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (...)” (OJ L 182, 29.6.2013, 19-76), which is in force as amended by **Directive 2014/95/EU** of 22 October 2014 “(...) as regards disclosure of non-financial and diversity information by certain large undertakings and groups” (OJ L 330, 15.11.2014, pp. 1-9, known as the ‘Non-Financial Reporting Directive’, ‘**NFRD**’).

¹⁸¹ See **Section A above, under 1 (2)**.

¹⁸² See below, **under 2**.

¹⁸³ **TR**, recital (50), first and second sentences.

¹⁸⁴ See at: https://ec.europa.eu/info/publications/sustainable-finance-platform_en.

¹⁸⁵ **TR**, Article 20(4), first sentence.

representatives of financial and non-financial market participants and business sectors, representing relevant industries, and persons with accounting and reporting expertise; and *experts representing civil society* include experts in the field of environmental, social, labour and governance issues. Further members of the Platform are experts appointed in a *personal capacity*, with proven knowledge and experience in the areas covered by the TR, as well as of experts representing *academia*, including persons with global expertise.¹⁸⁶

(3) The Platform is constituted pursuant to the horizontal rules on the creation and operation of Commission expert groups, including regarding the selection process, which should aim to ensure a high level of expertise, geographical and gender balance, as well as a balanced representation of relevant know-how, taking into account the Platform's specific tasks. During the selection process, the Commission should perform an assessment based on those horizontal rules to determine whether potential conflicts of interest exist and should take appropriate measures to resolve any such conflicts. In that context, the Commission may invite experts with specific expertise on an *ad hoc* basis.¹⁸⁷

1.1.2 Role

(1) The main role of the Platform is to advise the Commission on the development, analysis and review of TSC, including the potential impact of such criteria on the valuation of assets that qualify as environmentally sustainable assets under existing market practices, and on the potential need to update them. Its advisory role is further extended to the following issues: where appropriate, on the possible role of sustainability accounting and reporting standards in supporting the application of the TSC; on the possible need to develop further measures to improve data availability and quality; on the usability of the TSC in future EU policy initiatives aimed at facilitating sustainable investment, taking into account the objective of avoiding undue administrative burdens; on the possible need to amend the TR; on the evaluation and development of sustainable finance policies, including with regard to policy coherence issues; on addressing other sustainability objectives, including social objectives; and on the application of **Article 18** (on the functioning of minimum safeguards¹⁸⁸) and the need to supplement the requirements thereof.

Furthermore, the Platform must analyse the impact of the TSC in terms of potential costs and benefits of their application; assist the Commission in analysing requests from stakeholders to develop or revise TSC for a given economic activity; as well as monitor and regularly report to the Commission on trends at EU and Member State level regarding capital flows into sustainable investment.¹⁸⁹ It must take into account the views of a wide range of stakeholders and carry out its tasks in accordance with the transparency principle.¹⁹⁰ To support the Platform with this task, a 'stakeholder request mechanism' will be launched (later) in the first quarter of 2023. It will allow stakeholders to submit suggestions based on scientific evidence, on new activities that could be included in the EU taxonomy or on possible amendments to the technical screening criteria of existing activities.

¹⁸⁶ *Ibid.*, Article 20(1), and recital (50), fourth – seventh sentences.

¹⁸⁷ *Ibid.*, Article 20(4), first and second sentences, and recital (51). The minutes of the Platform's meetings and other relevant documents are published on the Commission's website. To ensure the efficient and sustainable organisation of its work and meeting practices and to enable broad participation and efficient interaction within the groups, their subgroups, the Commission and stakeholders, the Platform should consider, where appropriate, the increased use of digital, including virtual, technologies (*ibid.*, Article 20(5), and recital (56)).

¹⁸⁸ See **Section B above, under 4**.

¹⁸⁹ **TR**, Article 20(2), and recital (52).

¹⁹⁰ *Ibid.*, Article 20(3).

(2) In order to help the Commission in evaluating the appropriateness of complementing or updating the TSC, financial market participants are encouraged to inform it if they consider that an economic activity that does not meet the TSC, or for which such criteria have not yet been established, should qualify as environmentally sustainable.¹⁹¹

1.2 Formalisation of the Member State Expert Group on Sustainable Finance

The TR provides that the (existing) “**Member State Expert Group on Sustainable Finance**” (i.e., the TEG)¹⁹² should be vested a formal status and, *inter alia*, advise the Commission on the appropriateness of the TSC and the approach taken by the Platform regarding their development pursuant to **Article 19**. For this purpose, the Commission must keep the Member States informed through regular meetings of that Group to facilitate an exchange of views between them on a timely basis, in particular as regards the main output of the Platform, such as new TSC, material updates thereof, or draft reports.¹⁹³

2. Exercise of the delegation

(1) In order to specify the requirements set out in the TR, and in particular to establish and update for different economic activities granular and calibrated TSC for what constitutes ‘**substantial contribution**’ and ‘**significant harm**’ to the environmental objectives, the power to adopt delegated acts (in accordance with Article 290 TFEU) in respect of the content and presentation of the information referred to in **Article 8(4)**,¹⁹⁴ as well as in respect of the TSC laid down in **Articles 10(3), 11(3), 12(2), 13(2), 14(2) and 15(2)**¹⁹⁵ has been conferred on the Commission for an indeterminate period from **12 July 2020**. This delegation of powers may be revoked at any time by the European Parliament or by the Council, by a decision putting an end to the delegation of specified therein, taking effect on the day following its publication in the *OJ* or at a later date specified therein and not affecting the validity of any delegated acts already in force.¹⁹⁶

(2) The Commission must notify any delegated act adopted simultaneously to the European Parliament and to the Council; such delegated act will enter into force only if no objection has been expressed by either of these two EU institutions within a period of four months of notification of that act to them or if, before the expiry of that period, both these EU institutions have informed the

¹⁹¹ *Ibid.*, Article 20(6), and recital (50), last sentence.

¹⁹² See above in **Section A, under 1.1 (2)**.

¹⁹³ **TR**, Article 24, and recital (53). As in the case of the Platform, the increased use of digital, including virtual, technologies should be considered, where appropriate (*ibid.*, recital (56)).

¹⁹⁴ See **Section D above, under 3 (2)**.

¹⁹⁵ See **Section C above, under 3**.

¹⁹⁶ **TR**, Article 23(1)-(3), and recital (54), first sentence. The Commission must gather all necessary expertise, prior to the adoption and during the development of delegated acts, including through the consultation of the experts of the Expert Group on Sustainable Finance. Before adopting a delegated act, it must act in accordance with the principles and procedures laid down in the **Interinstitutional Agreement** of 13 April 2016 “on Better Law-Making” (OJ L 123, 12.5.2016, pp. 1-14). In particular, to ensure equal participation in the preparation of delegated acts, the co-legislators should receive all documents at the same time as Member States’ experts, and their experts should systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts (*ibid.*, Article 23(4), and recital (54), second and third sentences).

Commission that they will not object. That period can be extended by two months at the initiative of the European Parliament or of the Council.¹⁹⁷

3. Amendments to the SFDR

In order to ensure consistency between the two fundamental EU sustainability-related legislative acts, namely the SFDR and the TR, the latter amended the former to the following effect:

First, the ESAs should jointly develop RTSs further specifying the details of the content and presentation of the information in relation to the “do no significant harm” principle.¹⁹⁸

Second, the ESAs were also mandated to develop, through the **Joint Committee**,¹⁹⁹ draft RTSs to supplement the rules on transparency of the promotion of environmental characteristics and of environmentally sustainable investments in pre-contractual disclosures and in periodic reports.²⁰⁰

4. Review clauses

(1) By **13 July 2022**, and subsequently every 3 years thereafter, the Commission must publish a **Report on the application of the TR**, evaluating the following aspects:²⁰¹ *first*, the progress in its implementation with regard to the development of TSC for environmentally sustainable economic activities; *second*, the possible need to revise and complement the criteria set out in **Article 3** for an economic activity to qualify as environmentally sustainable; *third*, the use of the definition of environmentally sustainable investment both in EU law and at Member State level, including the provisions required for setting up verification mechanisms of compliance with the criteria set out in the TR; *fourth*, the effectiveness of the application of the TSC in channeling private investments into environmentally sustainable economic activities and in particular as regards capital flows, including equity, into private enterprises and other legal entities, both through financial products covered by the TR and other financial products; *fifth*, the access by financial market participants covered by the TR and by investors to reliable, timely and verifiable information and data regarding private enterprises and other legal entities, including investee companies within and outside its scope and, in both cases, as regards equity and debt capital, taking into account the associated administrative burden, as well

¹⁹⁷ *Ibid.*, Article 23(5)-(6).

¹⁹⁸ *Ibid.*, **Article 25**, and recital (36), first sentence. These must be consistent with the content, methodologies and presentation of the sustainability indicators in relation to adverse impacts as referred to in the SFDR; they must also be compliant with the principles enshrined in the European Pillar of Social Rights, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, including the ILO Declaration on Fundamental Principles and Rights at Work, the eight fundamental conventions of the ILO and the International Bill of Human Rights (*ibid.*, recital (36), second and third sentences; see also **above in Section B, under 4**).

¹⁹⁹ On the Joint Committee, see **Gortsos, Ch.V. (2020): European Central Banking Law – The Role of the European Central Bank and National Central Banks under European Law**, Palgrave Macmillan Studies in Banking and Financial Institutions, Palgrave Macmillan Springer, Cham – Switzerland, p. 127; see also at: <https://esas-joint-committee.europa.eu>.

²⁰⁰ **TR, Article 25**, and recital (37). The Final Report on these draft RTS, relating to Articles 8(4), 9(6) and 11(5) SFDR, were submitted on 22 October 2021 (JC 2021 50, available at: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/Joint%20RTS%20on%20content%20and%20presentation%20of%20sustainability%20disclosures/1022396/JC%202021%2050%20-%20Final%20report%20on%20taxonomy-related%20product%20disclosure%20RTS.pdf).

²⁰¹ *Ibid.*, Article 26(1), and recital (59).

as the procedures for the verification of the data necessary for determining the degree of alignment with the TSC and to ensure compliance with those procedures; and *finally*, the application of Articles 21-22 on NCAs, measures and penalties.²⁰²

(2) The Commission should also publish, by **31 December 2021**, a Report describing the necessary provisions in order to meet the following goals: extend the TR’s scope **beyond environmentally sustainable economic activities**;²⁰³ cover economic activities that do not have a significant impact on environmental sustainability and significantly harm it, as well as a review of the appropriateness of specific disclosure requirements related to transitional and enabling activities; and also cover **social objectives**. In this respect, *inter alia*, the Platform on Sustainable Finance submitted on 12 July 2021 a draft Report on “A Social Taxonomy”. Its objective is to support investors to contribute to finance projects ensuring decent work, inclusive and sustainable communities, as well as affordable healthcare and housing.²⁰⁴

(3) Finally, by **13 July 2022**, the Commission should have assessed the effectiveness of the advisory procedures for the development of the TSC established under the TR.²⁰⁵

To the best of the authors’ knowledge, these Reports and that assessment had not been published as of 20 February 2023.

F. Concluding remarks

(1) The Taxonomy Regulation (TR), adopted in 2019, is a key milestone in defining legally sustainable activities. It should be viewed within the context of the climate and energy targets set by the EU for 2030 in order to become climate-neutral by 2050, and constitutes, along with the Sustainable Finance Disclosure Regulation (SFDR) and the Low Carbon Benchmarks Regulation, the regulatory ‘trilogy’ implementing the CMU Action Plan in relation to sustainable finance.²⁰⁶ It substantially builds on the 2020 Report of the Technical Expert Group on Sustainable Finance (TEG), which developed the “EU taxonomy” classification system to determine whether an economic activity can qualify as environmentally sustainable.²⁰⁷ The system of its rules is anchored in the definition of six specific environmental objectives,²⁰⁸ which constitute the benchmark on the basis of which an

²⁰² On Articles 21-22, see **Section D above, under 3**.

²⁰³ In that respect, the (above-mentioned) TEG Report proposed, *inter alia*, the development of TSC for ‘brown’ economic activities, which do not provide substantial contribution to environmental objectives.

²⁰⁴ At: https://ec.europa.eu/info/publications/210712-sustainable-finance-platform-draft-reports_en. This draft Report is based on the above-mentioned UN “Guiding Principles on Business and Human Rights”. Related is also the Platform’s draft Report of the same date on “Taxonomy extension options linked to environmental objectives”, at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-platform-report-taxonomy-extension-july2021_en.pdf.

²⁰⁵ **TR**, Article 26(2)-(3).

²⁰⁶ This trilogy has important implications for, and influence on, emerging taxonomies in third countries. By way of example on how the TR affects foreign markets and especially Hong Kong, by indirectly forcing them to adopt similar taxonomies, see **Lunven, G. (2021)**: The EU Sustainable Finance Taxonomy Regulation: Implications for ESG Information and Hong Kong Financial Industry, *Hong Kong Journal of Legal Studies*, Volume 15, p. 76.

²⁰⁷ See **Section A, under 1.1**.

²⁰⁸ See **Section A, under 3**.

economic activity can be assessed to qualify as environmentally sustainable and, hence, the degree to which a financial investment is environmentally sustainable is established.

For this latter purpose, an economic activity qualifies as environmentally sustainable if it substantially contributes to one or more environmental objectives, does not significantly harm any other environmental objective, is carried out in compliance with specific safeguards²⁰⁹ and complies with applicable technical screening criteria (TSC), as set out in the delegated acts adopted (and to be adopted) by the Commission pursuant to the TR.²¹⁰ When developing the TSC, the Commission is assisted by the advisory Platform on Sustainable Finance, composed of experts representing the public sector, the private sector and the civil society. It is also advised by the Expert Group on Sustainable Finance on the appropriateness of the TSC and the approach taken by the Platform regarding their development.²¹¹ The delegated acts should be adopted in two stages: those on climate change mitigation and adaptation by 31 December 2020 (these have been adopted and apply from 1 January 2022); and those on the other objectives by 31 December 2021 (this stage has yet to materialise).²¹²

(2) The TR applies to any measures adopted by Member States or by the EU setting out requirements for financial market participants or issuers in respect of financial products²¹³ or corporate bonds that are made available as environmentally sustainable, to financial market participants that make available environmentally sustainable financial products and to undertakings which are subject to the obligation to publish a non-financial statement or a consolidated non-financial statement pursuant to the EU Non-Financial Reporting Directive and issue environmentally sustainable corporate bonds. To avoid harming investor interests, the TR introduces specific disclosure requirements for marketing financial products or corporate bonds as environmentally sustainable investments. These obligations supplement the sustainability-related disclosure rules of the SFDR in pre-contractual disclosures and in periodic reports; in this respect, firms will have to consider the impact that the new rules will have at both entity and product level.²¹⁴ Furthermore, to ensure consistency between the TR and the SFDR, the former amended the latter.²¹⁵

(3) It is, finally, also noteworthy that litigation before EU Courts is already under way. More specifically, on 17 September 2022, ClientEarth AISBL (from Belgium) launched an action for annulment under **Article 263 TFEU**, before the EU's General Court, against a Commission Decision rejecting a request brought by ClientEarth (**Case T-579/22, *ClientEarth v Commission***).²¹⁶ With this action, ClientEarth requested an internal review, pursuant to Article 10 of the Aarhus Regulation,²¹⁷

²⁰⁹ See **Section B**, under 2-4, respectively.

²¹⁰ See **Section C** and **Section E, under 2**.

²¹¹ See **Section C, under 5.2** and **5.4**, respectively.

²¹² See **Section E, under 1**.

²¹³ On a related matter, the Commission continues to strive for more sustainable products generally, not simply more sustainable financial products; see the March 2022 proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM/2022/142 final – 2022/0095).

²¹⁴ See **Section D**.

²¹⁵ See **Section E, under 3**.

²¹⁶ OJ C 45, 6.2.2023, pp. 16-17.

²¹⁷ **Regulation (EC) No 1367/2006** of the co-legislators of 6 September 2006 “on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and

of the EU Taxonomy Climate Delegated Act, which, as noted earlier, was adopted pursuant to the TR, and in particular Articles 10(3) and 11(3) thereof.²¹⁸

In support of its action, ClientEarth relied on various pleas in law. More specifically, it alleged that the Commission disregarded a few essential elements of the TR when making the that delegated act. Furthermore, it accused the Commission of errors in the assessment of scientific evidence concerning combustion of forest biomass for energy and of errors in assessing the manufacture of bioplastic. Should the first of these pleas be accepted by the General Court, the EU Taxonomy Climate Delegated Act will be annulled, which will certainly have grave consequences for sustainable finance regulation in the EU.

Access to Justice in Environmental Matters to Community institutions and bodies”, OJ L 264, 25.9.2006, pp. 13-19, as in force (the ‘Aarhus Regulation’).

²¹⁸ See **Section C above, under 5.2 (1)**.

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