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Article

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A duty under customary international law and a condition for funding under the EU Recovery and Resilience Facility: the genealogy of the "do no significant harm" principle

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Abstract

EU Member States are obliged to apply the "Do no significant harm" principle in their public procurement procedures when their projects are financed under the EU Recovery and Resilience Facility (RRF). Despite the binding nature of this novel principle, doubts persist around its scope and implications. This contribution aims at tracing the evolution of the "no-harm" rule, which is recognised as a rule of customary international law at the international level while in the EU it was elaborated as a mandatory condition on public procurement contracts falling under the RRF framework.

Keywords

Do no significant harm - Principle - Environmental law - Public procurement - Recovery and Resilience Facility

1. Introduction

In 2021, the Recovery and Resilience Facility (RRF) regulation entered into force, providing unprecedented financial support that the EU put at the disposal of its Member States after the COVID-19 crisis. Member States were required to present their National Recovery and Resilience Plans (NRRPs) as in accordance with the rules of the Regulation, setting very specific conditions, among which targets and milestones to be respected along the whole process: from the presentation of the national plans until the execution of the projects financed by the Facility.
According to Article 18(d) of the Regulation, such plans shall explain how "no measure for the implementation of reforms and investments included in the recovery and resilience plan does significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852". The "Do no significant harm" (DNSH) principle thus constitutes a binding condition for EU Member States to obtain the facility's funds. These latter are to be dispensed at the national and then local level in great part through public procurement contracts. Therefore, the DNSH - as defined in the EU Taxonomy Regulation - acquired unprecedented relevance in this field of law in the last years, as public administrations were faced with the challenge of demonstrating, at each step of the procurement procedure, how the measures at stake would not significantly harm the environment in the meaning of the EU Taxonomy Regulation. In this context, the principle exemplifies a rule which is primarily aimed at integrating environmental concerns along the public procurement cycle. Despite its important potential to drive public administrations towards a more conscious integration of environmental concerns along the procurement cycle, questions remain on its nature, scope, and modalities of enforcement during the various steps of the procedure.
This contribution aims to identify the origins of the "no-harm" principle in the international and then in the EU legal orders to assess whether some patterns can be found in its application in

different contexts, for example in how the courts deal with the principle, elaborating the role of due diligence standards or of environmental assessment tools in solving cases of responsibility for environmental harm. Through the study of the genealogy of the principle, some essential features of the rule will be collected which could become relevant in the upcoming judicial elaborations of the principle in its current form under EU law.

The international legal order is the first context in which the principle appeared in the guise of the "no-harm" rule, originally not belonging specifically to the environmental law domain. Its significance has grown through the elaborations of arbitral and judicial tribunals which consider it as a customary international rule. Their work provided important clarifications on its nature and structure. Proof of its relevance and general acceptance is that the rule has been integrated into the most authoritative international environmental conventions. The EU has also introduced the principle into its Green Deal and is apparently giving more and more relevance to its integration in its various policies.

Some differences will be observed between the use of the rule in the international and in the EU legal orders. At the international level, the "no-harm" principle constitutes a general obligation from which various procedural obligations arise and is perceived as the "bedrock of international environmental law" (Sands & Peel, 2012). Within the EU, the rule was elaborated in attempt to provide a common taxonomy in the context of the Union's financial sector and to support its green transition.

2. The development of the "do-no harm" rule in the international context: between judicial practice and international conventions

Originally known as the "no-harm" rule[1], this principle is enshrined in different and authoritative sources of international law, principally belonging to the environmental dimension.

Before delving into its codified versions, it should be noted that the "no-harm" rule is traditionally recognised as a principle of customary international law, "whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other states" (Brownlie, 2019). In the international environmental law context, the principle has been mostly operated to ground the liability for acts which are not prohibited by international law - one easy example being an economic activity that causes pollution transcending the borders of a state. Some authors express doubts on the willingness of courts to impose responsibility for transboundary damages on states in the absence of an express obligation, yet, they underline that specific regimes have been established for guaranteeing legal redress in the case of environmental harm (Crawford, 2019). Due diligence also plays a key role in these kinds of cases: even where an activity might not be in itself prohibited by international law, this would not exclude that damage caused by "poor judgment or poor management in carrying out the activity" could entail responsibility (Dupuy, 1976). Not only is due diligence strictly related to the "no-harm" rule, but the rule is sometimes even identified itself as a general obligation of due diligence (Maljean-Dubois, 2021).

It is argued that the principle's original form, the one that is codified in customary international law, derives from the principle of good-neighbourhood and is perceived as a "corollary of the principle of permanent sovereignty over natural resources" (Dupuy & Vinuales, 2018). Since its earliest forms, the "no-harm" rule was identified as a duty placed on States to protect some objects in their territories. The first forms of the rule indeed emerged in State, judicial, and arbitral practice in the late nineteenth and early twentieth centuries (McIntyre, 2020) and concerned the recognition of the duty of States to take reasonable measures to protect aliens within their territory

[1] This contribute will interchange the notions of "principle" and "rule" as the same approach was followed in international environmental law scholarship and practice.

and were closely linked to the duties of prevention and due diligence placed upon States (Dunn, 1932). The "no-harm" duty progressively extended through international jurisprudence from its initial aim of covering harm caused by private actors within a host State's territory, to comprise both a duty to protect foreign citizens from private criminal acts and to a duty to prosecute and punish those who caused injury to aliens and their properties (McIntyre, 2020). One illustrative example is the *Lac Lanoux* case (Lac Lanoux Arbiration, 1957), concerning the use of the waters of Lake Lanoux in the Pyrenees. In this case, France was willing to carry out certain works for the utilization of the lake's waters - which belonged wholly to the French territory. Spain however claimed that such works would have adversely affected Spanish rights and interests since the lake's flowing waters crossed the country. On this occasion, the *ad hoc* Arbitral Tribunal elaborated the relevant rules of international law applying to the case, which were identified as the rules to which "[a]ll still and running water, whether in the public or private domain, shall be subject". The tribunal stressed that when examining the question of whether France has taken Spanish interests into sufficient consideration, "it must be stressed how closely linked together are the obligations to take into consideration adverse interest in the course of negotiations, and the obligation to give a reasonable place to these interests in the adopted solution". The consideration of adverse interest would thus acquire importance in two different ways along the procedure: the manner in which they were considered during the negotiations and the more substantial result in the final solution. In this case, just because France was deemed to have undertaken negotiations in good faith, this did not dispense it "from giving a reasonable place to adverse interest in the solution it adopts". In this latter determination, the manner in which a project has taken into consideration the interests involved and other related factors are "all essential factors in establishing (...) the merits of the project". This case is one of the first instances of how harm has been historically assessed: a clear differentiation between a *procedural* assessment (the manner in which the adverse interests were considered during negotiations) was contraposed to an assessment on the merits (how those interests were eventually integrated in the result).

In the subsequent *Wipperman* Case (United States of America v. Venezuela) (1887)), the US-Venezuela Mixed-Claims Commissions clarified that no State is responsible for acts of individuals in its territory "as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs". This decision set a clear relationship between the duty of prevention and the one of due diligence: this latter imposes standards on the conduct of Member States and is relevant in assessing the State's responsibility when the damage occurred. This aspect appears to be one of the founding elements of the "no-harm" rule, as it will become clear in the judicial and arbitral elaborations of the principle within the environmental domain.

When it comes to liability for specifically environmental harms at the international level, the "no-harm" rule is often depicted as a "complicated mix of customary international law, sparse precedents from arbitral or judicial panels, liability provisions in international agreements and domestic law" (Percival, 2021). The rule in this context was indeed firstly elaborated by arbitral and judicial courts, then recognised as a customary international rule and subsequently codified in international agreements concerning the protection of the environment. Its existence has mostly been linked - and often coincided[2] - with the duties of prevention and due diligence binding on States. However, some authors have argued that because its emphasis is on the transboundary harm rather than protection of the environment *per se*, the principle "stops short of embracing a genuine preventing dimension" (Sadeleer, 2020).

The "no-harm" rule's first traces in the environmental domain are traditionally identified in the judicial and arbitral activities on transboundary cases (McIntyre, 2007). In the '40s, the rule was

[2] See e.g. O. McIntyre, *The current state of development of the no significant harm principle: How fare have we come?*, Springer, 2020. https://doi.org/10.1007/s10784-020-09501-8

for the first time applied in the field of environmental law in the *Trail Smelter Arbitration* case (1941). On that occasion, the Arbitral Tribunal constituted for the case found that:

> Under the principles of international law (...) no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

For the first time, a tribunal explicitly placed on States the responsibility of avoiding injuring the territory of another State, in the cases where the consequences would have been "serious" and the injury would be established by "clear and convincing evidence". The first mentions of the rule were thus grounded on the duty of States to avoid harming other States' territories, in other words, to prevent harm to territories outside their jurisdiction.

Further guidance on the substantive and procedural aspects of the rule in the environmental domain are to be found in the International Court of Justice (ICJ) judicial activity. Two outstanding decisions in this regard are the 2010 *Pulp Mills* case (Argentina v. Uruguay) and the 2015 *San Juan River* cases. In *Pulp Mills*, the Court considered prevention - as often used as synonym to the "no-harm" rule[3] - as the source of other customary environmental rules, among which that of requiring environmental impact assessment, "all of which function to discharge the due diligence obligations inherent to the duty of prevention" (McIntyre, 2013). This represents the first time an international court has stated that "the prior assessment of transboundary impacts is not merely a treaty-based obligation but a requirement of general international law" (Boyle, 1991). The relationship between the general duty of prevention and requiring an environmental impact assessment (EIA) is thus one way to prove that the duty of prevention has been respected. In the *San Juan River* cases (Costa Rica v. Nicaragua), the Court for the first time recognised the loss of ecosystem services associated with a watercourse State's riparian rights as amounting to compensable material damage. In this case, Costa Rica contended that Nicaragua had occupied the territory of Costa Rica because of the construction of a canal from the San Juan River to Laguna los Portillos, and carried out certain related works of dredging and the River. According to Costa Rica, the dredging and the construction of that canal would seriously affect the flow of water to the Colorado River of Costa Rica, and would cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region. As part of the proceedings, Costa Rica sought compensation for the loss of environmental goods and services the country sustained due to Nicaragua's activity on its territory. The ICJ issued an order in 2011, finding that Costa Rica should be compensated for the unlawful activities of Nicaragua, and a decision on the merits in 2015, establishing that Nicaragua's activities were unlawful and violated Costa Rica's territorial sovereignty and navigational rights. In 2018, the Court ruled how much Nicaragua had to compensate Costa Rica for the loss of environmental services. In this case, the ICJ clearly recognised that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.[4] *Costa Rica v. Nicaragua* was the first case wherein the ICJ adjudicated a claim for compensation for environmental damage.

These two decisions are considered among the most relevant ones elaborating e specifying the duty of due diligence and the related importance of EIAs as a proof of the fulfilment of this duty. On these occasions, the "no-harm" rule was thus used as a source for more specific environmental obligation and as a sort of catalyst / guarantee that procedures are carried out in respect of the duty of due diligence.

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[3] Courts appear to use the two rules as synonyms in most cases. However, some scholars differentiate their scope: despite States will not breach the no harm principle where any damage caused is not considered otbe significant, they might still breach their duty of due diligence is not preventing its occurrence (Sadeleer, 2020).

[4] In this passage, the Court recalled its previous decision in ICJ, *Pulp Mills Case*. (2010). para. 101.

Despite these important elaborations of courts on the principle, the "no harm" rule has tended and still tends to be formulated in a very general manner. For this reason, the implications of its application on States' activity have remained opaque (McIntyre, 2020). However, the principle has not remained marginalised to the practice: the "no harm" rule has been codified in authoritative sources of international environmental law, as it will be illustrated below.

In the '70s, the first global environmental summit took place in Stockholm, known as the United Nations Conference on the Human Environment. The outcome of the conference was a declaration of principles of environmental law: the Stockholm Declaration on the Human Environment. Principle 21 of this Declaration expresses the responsibility that States have to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, as previously expressed in the cases *Trail Smelter* and *Lake Lanoux* (Boon, 1992). The 'no harm' rule was subsequently codified also in Article 10 of the 1987 Principles and Recommendations adopted by the Brundtland Commission's Expert Group on Environmental Law (EGEL 1987) but, most importantly, in Principle 2 of the 1992 Rio Declaration. Titled "State responsibility for damage", the latter states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Stockholm's principle 21 and Rio's principle 2 represent together a paradigm shift: according to some authors, they place greater emphasis on the prevention of damage in general rather than on the damage caused to the sovereign rights of other States (Sadeleer, 2020). This represented an important difference with respect to the judicial and arbitral tribunal above-mentioned.

The 2001 International Law Convention Draft Articles on State Responsibility can also offer some clarifications on the legal nature of the duty of prevention. These apply generally to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" (Draft Article 1). In the commentary to the Draft Articles, it was noted - in reference to different environmental conventions - that:

> It is clear that such agreements do not establish the strict obligation not to pollute (obligation of result), but only the obligation to "endeavour" under the due diligence rule to prevent, control and reduce pollution. For this reason, the breach of such obligation involves responsibility for fault (Pisillo-Mazzeschi, 1991).

A progressively more detailed determination of the function of the rule was thus provided. In the case of the Draft Articles this involved a focus on the obligation to behave in a certain way prescribed by the principle. In this regard, due diligence became an essential element for assessing liability. McIntyre indeed pointed out the relevance of the due diligence-based standards of conduct on the part of the State to describe the normative content of the no-harm rule. As highlighted by the author, due diligence is often employed in international law to denote a notionally similar standard of care which is required in different contexts. The notion, according to the ILA Study Group 2016,

> is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, of reasonable care, that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided.

Due diligence has been also described as a "technique of proceduralisation, deferring controversial inquiries as to the content of substantive rules regulating wrongdoing to less controversial questions relating to informed decision-making and process" (Koskenniemi, 1989). This standard is flexible and thus allows States for a certain degree of autonomy. Its 'open-ended' nature is perceived as convenient by some because it allows avoiding the setting of too precise rules in international conventions.

The no-harm rule has thus become an "omnipresent feature" of different international agreements and declarative instruments and conventions (McIntyre, 2020). The history contributing to its formation is reflected in those tools. In fact, the principle is nowadays described as a positive obligation, more specifically as a duty of due diligence - "an obligation of conduct and not of result" (Maljean-Dubois, 2021). It is acknowledged that the rule plays as a source for other procedural obligations which are its corollaries: "information, notification, cooperation, impact assessment, and continuous monitoring" (Maljean-Dubois, 2021, referring to *Costa Rica v. Nicaragua*). However, the non-detailed content of the principle might lead to an important level of legal uncertainty, which might represent a significant obstacle in times in which the protection of the environment is experiencing a democratisation process. Those are interested in claiming that harm has occurred indeed will not enjoy of a well-established and detailed rule drawing the lines of the responsibility of the perpetrators. On the other hand, such flexibility and its customary nature allow the principle to be applied even where the law does not expressly mention it.

3. The "do no significant harm" (DNSH) principle in the EU legal context

Within the EU legal order, the DNSH is also found in different sources, each one of them varying in objective and legal nature. The most relevant ones considered in this contribution are EU primary law (the Treaties), the EU Green Deal, the EU Taxonomy Regulation, and the RRF Regulation.

Article 191 of the Treaty on the Functioning of the EU (TFEU) sets important and general rules for the development of the Union's environmental policies. Its paragraph 2 specifies that: "Union policy on the environment (...) shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay". Moreover, Article 11 TFEU explicitly calls for environmental protection to be integrated into the definition and implementation of the Union's policies or activities - thus opening a wide range of policies whereby concerns like the DNSH could be integrated.

The first and most general reference to the DNSH principle in the EU legal order is to be found in the EU Green Deal (COM(2019) 640 final). Representing the EU manifesto for its green ambitions, the Green Deal is a non-binding EU legal instrument defining the general address of the Union policy with a focus on the protection of the environment. The document displays a section titled "A green oath: 'do no harm'", where it is stated that the Commission, in general, "will improve the way its better regulation guidelines and supporting tools address sustainability and innovation issues", with the objective of ensuring that all the EU initiatives - also those outside the Green Deal - "live up to a green oath to 'do no harm'". To this end, the Communication states that an explanatory memorandum will accompany all legislative proposals and delegated acts and will include a specific section explaining how each initiative upholds this principle.

The content of the principle is described in more detail for the first time in the EU Taxonomy Regulation (Regulation 2020/852), in the context of the Union's greater attempt to create an "EU-wide classification system for sustainable activities". To pursue this objective, EU institutions developed the EU taxonomy as a market transparency tool that helps directing investments to the economic activities that are needed for the transition. Among the announced ambitions of the

strategy, the EU included the aim of avoiding greenwashing practices, *i.e.* that economic operators would use auto-referential qualifications to obtain unfair advantages in the market by advertising financial products as eco-sustainable where in reality they do not meet the environmental criteria (Recital 11 of Regulation 2020/852). This is why "a common language and a clear definition of what is 'sustainable' is" was elaborated for financial and non-financial companies to share common definitions in this field.

The principle appears several times in this Regulation. Firstly, the Regulation 2020/852 refers back to Regulation 2019/2088 on sustainability-related disclosures in the financial services sector, in particular to its Article 2, para. 17, which defines what a "sustainable investment" is, that is "an investment in an economic activity that contributes to an environmental objective (...) to a social objective (...), provided that such investments do no significantly harm any of those objectives and the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance". This legal instrument couples the adjective "significant" with harm, differently from what can be read in the more general declarations of the Green Deal. Despite the insertion of this new element to the principle, Regulation 2019/2088 only mentions it in general terms - differently from the EU Taxonomy Regulation. Article 3, para. (b) of the EU Taxonomy Regulation indeed provides further elements on the rule by stating that to establish the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity "does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17". These are the first references to the legal content of the DNSH principle within the EU legal order. Article 9 lists the environmental objectives for the purposes of the Regulation, they are: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems. Article 17 recalls these objectives and defines when an economic activity shall be considered to significantly harm the objects of those objectives: for each one of them, the provision describes the effects of an activity on the corresponding objective. For example, an activity shall be considered to significantly harm climate change mitigation, "where that activity leads to significant greenhouse emissions" (Article 17, para. 1(a)). It is thus Article 17 that defines the content of the DNSH principle. To establish whether an economic activity is sustainable, the activity should succeed in a "double test": one is positive and foresees a contribution to one or more of the six environmental objectives contained in Article 9, one is negative and prescribes that the activity shall not significantly harm any of those objectives (Onida, 2021).

The EU Taxonomy Regulation therefore represents the first document legally defining the DNSH principle and the main reference for the other EU legal instruments mentioning the principle. However, it should be noted that despite the authority of the Taxonomy as reference for other legal tools mentioning the rule, Article 17 never mentions the notion of "principle" along the definition of the content of this rule. The DNSH rule is introduced *merely* as an evaluation tool (Spera, 2022).

What is relevant for the definition of the principle is that this Regulation is not isolated as it was indeed integrated and supported by some subsequent legal documents such as the *Climate Delegated Act* (2021), the *Disclosures Delegated Act* (2021), the amended *Complementary Climate Delegated Act* (2023) and the *Environmental Delegated Act* (2023).[5] Each one of them provides further technical guidance on the DNSH principle by providing sectoral technical screening criteria. The level of technical details provided by these documents surely represents an important difference from the international law's conception of the principle, which still nowadays appears to display a quite vague content.

[5] All these resources are available on the European Commission's official website: https://finance.ec.europa.eu/regulation-and-supervision/financial-services-legislation/implementing-and-delegated-acts/taxonomy-regulation_en.

The principle was then included in other policy instruments of a financial nature, adding relevance to a novel but growing EU financial strategy, that is a performance-based system for which allocation of EU funding is based on targets and milestones - among which the respect of the DNSH principle, which progressively acquired more and more importance. For instance, in 2021, the European Commission published the *Technical guidance on the climate proofing of infrastructure in the period 2021-2027* (2021/C 373/01).[6] In this document, the Commission affirms that this guidance meets the requirements laid down for several EU funds,[7] among which the DNSH principle as derived from the EU's approach to sustainable finance and enshrined in the EU Taxonomy Regulation.[8] Another representative example of this trend beyond the financial domain is the Commission's *Better Regulation* communication (2021),[9] which "ensure[s] that the 'do no significant harm' principle is applied across all policies in line with the European Green Deal oath". The mention of the DNSH principle in these different documents is a demonstration of the EU institutions' position on the principle, which is apparently to expand its application to other forms of funding and policies of the EU. In its replies to the European Court of Auditors (ECA)'s report "Sustainable finance: more consistent EU action need to redirect finance towards sustainable investment" (2021), the Commission claimed that it has integrated "wherever possible", aspects of the Taxonomy Regulation into the EU budget. It added that the DNSH principle is "largely applied across the EU budget through a number of tools and regulatory provisions".

In line with these recent developments, the DNSH was described to be an "essential paradigm" for the use of EU funding and to have a "pervasive" scope (Spera, 2022). This character of the DNSH principle is shown very clearly within the RRF framework - the largest programme under the 2021-2027 Multiannual Financial Framework (MFF). According to Regulation 2021/241, access to RRF funding is conditional: the NRRPs shall include measures that effectively contribute to the green transition of an amount that represents at least 37% of the plan's allocation, and no measure shall violate the DNSH principle.

The DNSH principle is mentioned in Article 5 among the "Horizontal principles": "The Facility shall only support measures respecting the principle of 'do no significant harm'". Its respect is mandatory in all phases of the projects and transcendental: compliance shall be ensured from the moment the plan is presented until the execution and monitoring of the project, for any measure included in the plan. Article 18 includes, among the elements that the plans shall include, "an explanation of how the recovery and resilience plan ensures that no measure for the implementation of reforms and investments included in the recovery and resilience plan does significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852". According to Article 19, the Commission is in charge of assessing the plans and thus shall take into account, among other criteria, "whether the recovery and resilience plan is expected to ensure that no measure (...) does significant harm to environmental objectives (...)". Additionally, the Commission is expected to provide technical guidance to Member States to this effect. Commission's guidance in this regard is a pragmatic support provided to Member States and their administrations to assist them in the application of the principle when spending the RRF funding. The principle thus translates into an assessment of compliance with the objectives building up the principle according to the EU Taxonomy.

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[6] Climate proofing is a process that integrates climate change mitigation and adaptation measures into the development of infrastructure projects.

[7] It mentions InvestEU, Connecting Europe Facility (CEF), European Regional Development Fund (ERDF), Cohesion Fund (CF), and the Just Transition Fund (ITF).

[8] It should be noted that the guidance addresses only two of the environmental objectives of Article 9 of the EU Taxonomy regulation, i.e. climate change mitigation and adaptation.

[9] The Commission's "better regulation" is an EU agenda aiming at ensuring "evidence-based, transparent EU law-making based on the views of those impacted". Its mission aims at evaluating and improving EU law. https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en.

The effects of the detailed DNSH principle as applied obligatorily on Member States in the RRF context are specific to this framework, with important considerations for the field of public procurement law. Being the Regulation directly binding in the domestic legal orders, public administrations face a decrease in the uncertainty around the rules but also in the room for their discretion (Costanzo, 2023) in the procedures for using the RRF funding. The DNSH principle in the EU legal order is a rule showcasing multiple meanings and which can reach a considerable degree of technical and legal detail. This has the effect of making it a binding rule of conduct for public administrations and economic operators which does not necessarily require the interpretation of legislators and courts, differently from what is traditionally expected from a principle (Cozzio, 2024) and from how the "no-harm" rule is known and applied at the international level.

4. The DSNH principle in the light of its genealogy: a new paradigm or just an evaluation of potential harm under specific circumstances?

Given its mandatory nature under the RRF, the principle is collecting growing attention from scholars in the public procurement law field. The DNSH principle was described as one of the most prominent legal instruments for the development of public procurements towards the green transition (Cozzio, 2024). According to some authors, the principle represents a change in the administrative culture of planning and definition of public investments. It would contribute to ensuring the coherence of the public buying activity with the economic policies of green transition which go beyond the RRF (Pernas Garcia, J. J., 2021). These statements are ambitious and in line with the premises announced by the Commission in the recitals of the RRF Regulation, whereby it associates several times the recovery with the green transition's objective. Moreover, the European Commission's recent communications made it clear that the applicative scope of the principle will be expanded through its progressive application to other EU funding instruments (C(2021) 5430 final). Specifically, it is foreseen that the realisation of financial measures referred to in the technical guidance document, from 2021 until 2027, and of the 8th Environment Action Programme to 2030 (Barelli, 2023).

Since most of the NRRPs' investments enter the market through public procurement, the impact of the principle becomes evident despite these ambiguities. Contracting authorities are indeed required to ensure the respect of the DNSH principle along all phases of the procedure: from planning to execution of the contracts. This requires both *ex ante* and *ex post* monitoring and assessments. In this context, some observations on the historical origins of the principle could be elaborated to reflect on the components of the principle.

One relevant example is the use of EIAs, which is a relevant element for the principle in both legal orders, but arguably with a different weight. While in the international context, courts have historically used such tools as a strong support for due diligence relevant for the findings of responsibility for environmental harm, the EU case is different. In the European Commission's *Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation* (C/2023/111)[10], EIAs constitute a strong indication for the absence of significant harm for various relevant environmental objectives, however they "do not automatically entail that no significant harm is done". The undertaking of EIAs could support the arguments brought forward by the Member State for its DNSH assessment. Yet, "this does not exempt the Member State from carrying out the DNSH assessment for that measure since an EIA, SEA [...] or proofing might not cover all aspects that are required as part of the DNSH assessment". Therefore, the DNSH has a wider scope if compared to other evaluation tools. These latter could integrate its assessment, but are nor decisive or complete for its purposes under EU law. The Commission's

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC00111.

Technical guidance underlined that the DNSH considerations should be reflected in the RRP (Recovery and Resilience Plans) from the outset, meaning that tendering and procurement processes should integrate DNSH considerations and necessary mitigating steps for compliance to be ensured.

Also the level of detail required in the international and in the EU legal orders which will[11] most probably entail different implications of the application of the rule. Those differences result mainly from the different *ratios* for which the principle has been elaborated. While in the international domain, the principle arose to hold States accountable for their activities and the transboundary effects of those and is applied as a customary international law, the EU's DNSH principle was elaborated in a framework that aims at facilitating sustainable investments by providing for a classification system. Therefore, while the international "no harm" rule places on States the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States, which is a quite general aim, the EU DNSH principle was elaborated as a tool for transparency and classification and ended up being applied a condition for the disbursement of EU funds. To confirm the different perceptions of the principle in the two systems, it should be noted that no EU legal source mentions the "no-harm" rule as established in the international context.

In any case, despite the technical support of the European Commission, the practical difficulties arising from the application of the DNSH principle under the RRF persist (Caruso, 2022), being it designated as a "principle" but elaborated in a form that differs from the traditional idea of a principle of law. Among the main applicative difficulties in this framework, the assessment of its respect is among the most evident ones. In its special report on the RRF performance monitoring framework, the European Court of Auditors (ECA) emphasised the vulnerabilities of the RRF system, claiming that it is not sufficient to capture performance (ECA, Special Report 26, 2023). This element of complexity places significant obstacles on the effectiveness of the principle when it is weighed with other principles and interests (Costanzo, 2023).

However, even though relevant applicative difficulties remain around the DNSH principle, the potential of the rule in the field of public procurement should not be underestimated. By requiring public entities to assess the potential impact of their action, the principle functions as a guarantee along procedures of different types. Specifically under the RRF, its respect is required mandatorily and thus contracting authorities shall declare and prove that the projects under their control do not significantly harm the environment. This guarantee shall be provided for each step of the procurement cycle and needs thus to be substantiated in various ways, depending on the phase at stake.

5. Concluding remarks

The international "no harm" and the EU DNSH principles thus arose in different legal contexts and consequently showcase different features and implications for their application. While the "no-harm" rule has emerged as the result of states', arbitral and judicial practice where they needed states to take into account the others' views on measures that could impact beyond the national boundaries, the EU DNSH principle was elaborated as part of a wider classification system aimed at clarifying which economic activities could be deemed to be sustainable, with a view to guide investors within the Union, and subsequently became mandatory for obtaining funds under the RRF. The environmental crisis and the need to cope with it urgently have accentuated the demand for a progressive and continuing elaboration of more detailed and sophisticated rules to avoid and measure harm. A tendency in this sense can be observed in both legal orders, accompanied by a

[11] Since the Court of Justice of the EU (CJEU) has not yet decided on any case on the DNSH principle, this is an hypothesis.

development of related evaluation and assessment methodologies related to the protection of the environment and the green transition (McIntyre, 2020). This propensity contributes to the development of technical methodologies that are more comprehensive[12], in the sense that they are more predictive of the harms that certain activities could cause and they provide criteria to assess that. More reliable methodologies would be capable of supporting the identification of the necessary preventive, and monitoring measures.

In any case, the principle is in general strictly tied to procedures: its proclaimed aim - at both international and EU level - is that of securing that environmentally-aware procedures are carried out. This requires a set of specific activities on the part of the initiating public entity. Those generally include pragmatic duties of, for instance, information, impact assessment, continuous monitoring, etc. This was made clear already in the first arbitral and judicial cases concerning the principle (see, for instance, *Costa Rica v. Nicaragua*) and has been developed in detail at both the international and at the EU levels.

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[12] One example is the set of Delegated acts provided by the European Commission in support of the EU Taxonomy.

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