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Defining the green to make environmental concerns heard in the EU? The legal consequences of the (unexpected) uses of the taxonomy

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Defining the green to make environmental concerns heard in the EU? The legal consequences of the (unexpected) uses of the taxonomy

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Abstract: The European Union (EU) has recently adopted different legislative acts that classify economic activities as being environmentally sustainable or not. Implicitly, they aim at making visible elements that are deeply linked to intergenerational justice and future generations' interests. They may contribute not only to relevant environmental policy-making, but also to unmute NGOs or interested citizens, as those actors may rely on environmental categories to hold public authorities or private companies to account in political and judicial arenas in a seemingly objective manner. A prominent example of such acts is Regulation 2020/852 establishing a taxonomy for sustainable investments. While the taxonomy has been understood as a market tool that would help ensuring that financial actors have trustworthy information, this chapter highlights that it serves to frame not only private actors' decisions, but also, less expectedly, public authority's rising (environmental) governance through spending, which increasingly dwells on the European taxonomy to allow future generations' interests to be (allegedly) considered. This has a decisive impact on both the legitimacy and legal validity of using delegated acts to define the content of the taxonomy, considering that delegations must, under EU law, only cover non-essential aspects of an area. This chapter therefore argues that efforts to amplify future generations' interests through taxonomies are, to some extent, being pursued at the cost of the greater democratic legitimacy that should have accompanied regulation through standard legislative acts.

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Introduction

The European Union (EU) has recently adopted different legislative acts that, either primarily or incidentally, classify economic activities as being environmentally sustainable or not. Implicitly, they aim at visibilizing elements that are deeply linked to intergenerational justice and the interests of future generations. They may therefore contribute not only to relevant environmental policy-making, but also to unmuting NGOs or interested citizens, in that the latter may rely on environmental categories to hold public authorities or private companies accountable for their (non-)compliance with EU law, or more generally for their level of support for environmental protection in a seemingly objective manner.

A prominent example of such acts is Regulation 2020/852 establishing a taxonomy for sustainable investments (hereafter the "Taxonomy Regulation")[1] that is interrelated with many corporate sustainability reporting duties derived from other pieces of EU legislation. Other less well-known examples include (i) the Recovery and Resilience Facility (hereafter the "RRF") Regulation[2] with its green tagging mechanism, (ii) the Green Bonds Regulation with its identification of activities that may be financed under that framework[3] and, less recently, (iii) the successive Common Agricultural Policy regulations with their environmental conditionalities and eco-schemes tied to EU funds. This environmental taxonomy turn is accompanied by the provision of guidance incentivising Member States to generate their own green classifications, such as the green budgeting initiative. On top of this, at national levels, many Members States are greening their export or growth grants to companies[4], which necessitates defining environmentally virtuous practices that qualify for subsidies.

[1] Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, *O.J.* 2020, L 198/13.

[2] Regulation 2021/241 establishing the Recovery and Resilience Facility, *O.J.* 2021, L 57/17. On environmental mainstreaming in EU funds more generally, see Z. Darvas and K. Sekut, "Greening the EU budget: why climate mainstreaming needs reform", *Bruegel Analysis* (2025).

[3] Regulation 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, *O.J.* 2023, L 30.11.2023.

[4] M. Mazzucato and D. Rodrik, "Industrial Policy with Conditionalities", *Working Paper – Institute for Innovation and Public Purpose* (2023).

These instruments vary in precision and scope. Yet, they are all creating an environmental taxonomy of socio-economic activities. Within the remaining of this chapter, an environmental taxonomy may be defined as a classification of socio-economic activities based on their environmental (positive or negative) impact with a certain systematicity. Although taxonomizing efforts are often presented as science-based technical endeavours, many authors have shown that they inevitably entail a great part of socially constructed choices that may, consciously or unconsciously, be politically motivated[5]. This is particularly true for environmental objectives. In Cahen-Fouro and Monserand's words: "whether or not a given investment is green depends very much on the socio-economic context in which it takes place. For example, an electric car may be a green investment if it replaces one or more internal combustion cars. It is not if it replaces public transport or cycling"[6]. It may therefore be argued that a sufficient democratic legitimacy should underpin those choices.

For policy-makers, taxonomies are a way to "see like a State"[7]: they allow to render facts legible for the legal order, which in turn enables a precise, granular action on politically relevant situations. Legal systems have therefore progressively adopted taxonomies in legal acts over the years both as a signal to anchor scientific and/or political discussions in long-term democratically legitimate instruments, and to provide legal certainty and trust to the categories that have been developed[8].

This is the case in the European legal system. The European Systems of Accounts Regulation dictates what constitutes an economic activity or not and creates rules to classify debt as being public or private, or classify spending as being an investment or consumption, for instance[9].

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[5] A. Desrosières, *Prouver et Gouverner. Une Analyse Politique Des Statistiques Publiques* (La Découverte, 2014) ; S. Müller-Wille, I. Charmantier, "Lists as Research Technologies", *Isis* (2012), p. 743-752.

[6] L. Cahen-Fourot and A. Monserand, "La macroéconomie de la post-croissance", *L'Économie politique* (2023), p. 20, translation is ours.

[7] J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999).

[8] See N. Vander Putten, *Indicateurs institutionnels et gouvernance par les nombres. Repenser l'au-delà du PIB par le droit de la quantification* (Presses universitaires Saint-Louis, 2024), part III, Chapter 1.

[9] Regulation 549/2013 on the European system of national and regional accounts in the European Union, *O.J.* 2013, L 174/1.

Similarly, the classification of products by activity (CPA) codes defines product categories, the statistical classification of economic activities (NACE for *nomenclature statistique des ativités économiques*) delineates different types of economic activities, and the Nomenclature of Territorial Units for Statistics (NUTS) codes set a common language to determine the level of a sub-state entity[10]. To a certain extent, it may be argued that by their very nature, legal rules inevitably rely on scope of applications, conditions, thresholds and ceilings, which require sufficiently authoritative components comprising, among other things, pre-established categories and definitions. In short, the creation of taxonomies is the indispensable complement to relevant policy making.

The institutionalisation of taxonomies is progressively reaching the realm of environmental matters. Most notably, with the rise of (binding) climate commitments, targets and projections, the methodologies to generate inventories of greenhouse gas emissions (GHGs) are increasingly controlled and harmonised: questions such as how to make GHGs with different warming potential and lifespans commensurate, and how to account for carbon capture and utilisation (CCU) and carbon capture and storage (CCS) have recently been regulated by EU institutions[11]. Beyond enhancing precision in environmental regulation, these categories also serve as tools that NGOs and citizens can appropriate to demand compliance with environmental legislation or advocate for stronger environmental protections[12].

[10] Regulation 451/2008 establishing a new statistical classification of products by activity (CPA), *O.J.* 2008, L 145/65 ; Regulation 1893/2006 establishing the statistical classification of economic activities NACE, *O.J.* 2006, L 393/1 ; Regulation 1059/2003 on the establishment of a common classification of territorial units for statistics, O.J. 2003, L 154/1.

[11] See L. Yona, B. Cashore and M. Bradford, "Factors Influencing the Development and Implementation of National Greenhouse Gas Inventory Methodologies", *Policy Design and Practice* (2022), p. 197-225 ; M. Petel, N. Vander Putten, "Vers une bataille de chiffres institutionnels dans les procès climatiques ? Analyse critique à l'aune de l'affaire Klimaatzaak", in Cournil (dir.), *Expertises et argumentaires juridiques. Contribution à l'étude des procès climatiques* (DICE editions, 2024), p. 151-172 ; K. Talus, R. Maddahi, "Carbon Capture and Utilization under EU Law: Impermanent Storage of CO2 in Products and Pre-Combustion Carbon Capture", *The Journal of World Energy Law & Business* (2024), p. 1-14.

[12] On activism with official statistics, see for instance E. Didier, "Globalization of Quantitative Policing: Between Management and Statactivism", *Annual Review of Sociology*, vol. 44 (2018), p. 515–534.

In this context, this chapter aims at examining the recent endeavours to taxonomise economic activities as being environmentally contributive or detrimental. It argues that while the Taxonomy Regulation has been understood as a market tool that would help ensuring that financial actors have trustworthy information, this is only the tip of the iceberg. Environmental taxonomies – of which *the* EU taxonomy (referred to as *the* taxonomy below) is progressively becoming the cornerstone – are also used directly by the EU to intervene in the economy in a more selective manner to advance an environmental agenda through funding. In other words, this chapter does not purport to offer a detailed presentation of the Taxonomy Regulation's legal and political intricacies[13], nor does it intend to evaluate its contested environmental adequacy or transformational potential[14]. It rather highlights how these taxonomising efforts serve to frame not only private actors' decisions, but also, less expectedly, public authority's rising (environmental) governance through spending, which increasingly dwells on *the* taxonomy to allow future generations' interests to be allegedly considered[15].

This has, in turn, important legal and democratic consequences. Legally, as in European law delegated acts may only cover "non-essential" aspects of an area, the legal validity of the reliance upon them to define the content of *the* taxonomy should be re-assessed. Democratically, this chapter argues that efforts to amplify future generations' interests through taxonomies are, to some extent, currently being pursued at the cost of the greater democratic legitimacy that should have accompanied classification endeavours through standard legislative acts. While, admittedly, the number of academic publications on the EU green taxonomy is rapidly multiplying, much less attention is paid to its uses by public authorities[16].

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[13] See for instance S. Eckert, "Business and private finance: their role in the EU's climate transition", in Rayner *et al.* (eds.), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar, 2023), p. 83-97.

[14] C.-A. Papari *et al.*, "Can the EU taxonomy for sustainable activities help upscale investments into urban nature-based solutions?", *Environmental Science & Policy* (2024), p. 1-16.

[15] On governance through spending in the EU more generally, see C. Kilpatrick, J. Scott (eds.), *New Frontiers of EU Funding: Law, Policy, Politics* (Oxford University Press, 2024).

[16] P. Tettamanzi, R. Gotti Tedeschi and M. Murgolo, "The European Union (EU) green taxonomy: codifying sustainability to provide certainty to the markets", *Environment, Development and Sustainability* (2024), p. 27129-27130.

The remainder of this chapter is structured as follows. Section 1 presents the main instruments referred to in this introduction containing environmental taxonomies: the Taxonomy Regulation, the RRF Regulation, the Green Bonds Regulation as well as the Green Budgeting Framework. Section 2 then argues that these instruments highlight relatively unexpected uses of taxonomies in general, and of *the* taxonomy, in particular: The latter is progressively becoming the essential component of a rising (supposedly) green selective industrial policy, which has legal implications on the admissibility of the technique of delegated acts. By doing so, this chapter adopts a "law in context" approach, first outlining the applicable legal framework doctrinally, and then evaluating it not only through legal principles but also in relation to its historical emergence and political significance[17]. The chapter furthermore fully endorses the methodological view according to which legal systems are not "external" to "the economy", but are constitutive of it, also through the establishment of seemingly descriptive components of public economic action[18].

1. Taxonomising the contribution or harm to environmental protection in the European Union

There are currently at least 33 green taxonomies that have been published or that are being developed worldwide, mainly originating from the work of States or international organisations[19]. Among them, the European taxonomy established by the Taxonomy Regulation, which is briefly described below, is arguably one of the most influential (1.1)[20]. Next to this, other EU instruments have had the same implicit effect of creating partly overlapping taxonomies, which rely to a great extent on *the*

[17] S. Taekema, W. van der Burg, *Contextualising Legal Research* (Edward Elgar, 2024), Chapter 5.

[18] S. Eriksson, "The Centrality of Law for EU Sustainable Finance Markets: Outlining a Research Agenda", *Review of European, Comparative & International Environmental Law* (2024), p. 57-69, at p. 58.

[19] O. Azoulay, C. Merle and L. de Souza, *The New Geography of Taxonomies. A Global Standard-Setting Race* (Natixis, 2023), p. 4 and 9.

[20] O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 11. The authors note that "Several Taxonomies are based (or being inspired) on the EU taxonomy such as ISO 14030 or the UK & South Africa's Taxonomies under development" (at p. 33).

taxonomy: the RRF Regulation, the Green Bonds Regulation and the Green budgeting initiative (1.2)[21].

1.1. The Taxonomy Regulation unpacked

In 2020, the EU adopted the aforementioned Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment. This regulation defines what sustainable economic activities are “for the purposes of establishing the degree to which an investment is environmentally sustainable” (Article 1(1)). Under Article 3, an activity is considered to be sustainable (“taxonomy aligned”) if four conditions are met.

First, it needs to contribute substantially to one of the following six environmental objectives: (i) climate change mitigation, (ii) climate change adaptation, (iii) sustainable use and protection of water and marine resources, (iv) transition to a circular economy, (v) pollution prevention and (vi) control and protection and restoration of biodiversity and ecosystems. Those environmental objectives are defined with a few lines in the regulation[22]. Climate change mitigation is the only objective that is defined through a hard target: It refers to “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” (Article 2 (5)). It may entail measures linked to renewable energy, energy efficiency, climate neutral mobility and carbon capture and utilisation (CCU) or storage (CCS) with net reduction in GHGs under Article 10. So-called “transitional activities” and activities that directly “enable” substantially contributing activities may also be included under certain conditions (see Article 16 and 10 (2)).

Second, the activity as well as the products and services provided must not significantly harm one of the previously mentioned six environmental objectives. The regulation explicits what the “do no significant harm” (DNSH) principle implies regarding each of the six objectives (Article 17).

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21 Classifications such as those used for sectoral instruments (such as the common agricultural policy or LIFE funds) or for banking macro or micro-prudential tools (which focuses on environmental *risks* rather than environmental contributions) are excluded from the analysis.

22 See, for instance, Article 2 (5)(6) and (9) of Regulation 2020/852.

Third, minimum (social) human rights safeguards should be guaranteed through the implementation by the relevant financial actor of a procedure ensuring the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (Article 18 of the Taxonomy Regulation).

Fourth, the activity must comply with technical screening criteria. This condition may be understood as a sub-condition of the first and second ones exposed above: the regulation tasks the Commission to "supplement" with delegated acts the "substantial contribution" condition as well as the DNSH principle for each of the six environmental objectives (Article 19). The Taxonomy Regulation establishes minimal requirements for these delegated acts: the technical screening criteria should be quantitative "to the extent possible", "cover all relevant economic activities within a specific sector", "be based on conclusive scientific evidence and the precautionary principle" and be adopted after consultation of a Member State expert group, for instance (Articles 19 and 23). The Commission also relies for this task on the advice of a body of experts coming from EU institutions, private stakeholders, civil society and academia, i.e. the Platform on Sustainable Finance (Article 20).

To date, three main delegated acts have been adopted. The first delegated act adopted in June 2021[23] details the screening criteria related to climate change adaptation and mitigation in sectors such as energy, forestry, human health, chemicals, and waste. Annexes I and II of the climate delegated act determine the criteria to classify an economic activity as contributing substantially to climate mitigation (Annex I) and adaptation (Annex II) while complying with the DNSH principle[24]. A second delegated act amending the climate delegated act was infamously adopted in March 2022 to include, under certain conditions, nuclear

[23] Commission Delegated Regulation 2021/2139 supplementing Regulation (EU) 2020/852 by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, *O.J.* 2021, L 442/1.

[24] For an overview of the climate delegated act's content, see C. Gortsos and D. Kyriazis, "The Taxonomy Regulation and Its Implementation", in Busch, Ferrarini and Grünewald (Eds.), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Springer International Publishing, 2024), p. 505-561, at p. 538.

energy and natural gas as “transitional technologies”[25]. This shows how the adoption of those delegated acts, which may at first sight look technical and politically neutral, may be environmentally decisive and heavily contested[26]. A third delegated act containing the technical screening criteria relating to the four remaining (non-climate) criteria was adopted in June 2023[27].

In general, these technical screening criteria are based either on the *nature* of the technology being used (*e.g.* manufacturing renewable *versus* coal-based energy technologies), on the *environmental performance* of the activity (*e.g.* renewing a water supply system leading to at least 20% improvement in energy consumption) or on the *compliance with certain pre-existing norms or standards* (*e.g.* operating vehicles that are compliant with the EURO VI standard)[28]. Because of the length and of the complexity of these delegated acts – the Climate Delegate Act alone is 349-page long[29] – the Commission published in June 2023 a 56-page long user guide to “navigate the EU taxonomy for sustainable activities”[30].

[25] See Commission Delegated Regulation 2022/1214 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, *O.J.* 2022, L 188/1. See also the Commission Delegated Regulation 2023/2485, *O.J.* 2023, L 21.11.2023, which amends marginally the Climate Delegated Act). Some of these acts are legally contested, see below, section II, B.

[26] On the political causes and consequences of this, see C. Fontan “The EU Taxonomy as a battleground: Puzzling, powering and institutionnal trajectory, draft manuscript” (forthcoming, 2025), noting that some members of the Platform on Sustainable Finance wrote an open letter to complain about this inclusion and resigned.

[27] Commission Delegated Regulation 2023/2486 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, *O.J.* 2023, L 21.11.2023.

[28] O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 17-18.

[29] On the complexity of the taxonomy, see S. Kooths, “EU Taxonomy: Mission Impossible”, *The Economists’ Voice* (2022), p. 243-249, at p. 244.

[30] European Commission, *A User Guide to Navigate the EU Taxonomy for Sustainable activities* (European Commission, 2023).

1.2. Incidental taxonomies in the Recovery and Resilience Facility, the Green Bonds Regulation and the Green Budgeting Framework

Next to the Taxonomy Regulation, which has as main aim to set a classification of economic activities, other EU instruments create *incidental* taxonomies: they classify economic activities as being environmental or detrimental for the direct purpose of forming a component of the legal regime that they establish. Three instruments of this type may be identified: the Recovery and Resilience Facility Regulation, the Green Bonds Regulation and the Green Budgeting Framework. Those instruments are briefly exposed below by highlighting their link with the Taxonomy Regulation. A table listing them in chronological order may be found in the annex of this chapter.

1.2.1. The Recovery and Resilience Facility

As part of NextGenerationEU, the EU's economic response to the Covid-19 crisis, the EU adopted Regulation 2021/241 establishing the RRF. It provides for the distribution of 672.5 billion euros (at 2018 values) borrowed on the financial markets by the Union. These amounts are allocated in the form of grants and loans to support national plans drawn up by the Member States, which set out reforms and investments to be implemented by 2026 at the latest. Legal scholars have highlighted how the combination of both the scale of the sums involved and the Facility's institutional architecture make it a key instrument for the future of the Union[31].

The national plans financed by the Facility must serve six "pillars", one of them being the green transition. The green pillar benefits from a specific earmarking guarantee: Member States must devote a minimum of 37% of their expenditure to climate mitigation or adaptation objectives. Furthermore, the regulation states that, in accordance with the "do no significant harm" principle, reforms or investments may not support economic activities that cause significant harm to the Union's environmental ambitions[32]. Although there are legal loopholes and

[31] Among many others, see S. Cafaro, "The Evolving Economic Constitution of the European Union: Eulogy to Stability?", in G. Grégoire and X. Miny (eds.), *The Idea of Economic Constitution in Europe* (Brill Nijhoff, 2022), p. 487-506 and B. De Witte, "The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift", *Common Market Law Review* (2021), p. 635-682.

[32] See Articles 5 (2) and 18 (4)(e) and 19 (3)(e) of the RRF Regulation. The DNSH principle is not applicable as such to the RepowerEU chapters of the national recovery

insufficiencies regarding these requirements[33], the latter may be conceived as an indirect environmental conditionality: the granting of European funds whose primary agenda is post-Covid 19 recovery is conditional on the pursuit of a secondary agenda – in this case environmental[34].

The RRF Regulation indicates which investments or reforms are considered to contribute to the greening (in practice, climate-centric) objective. Annex VI (to which the relevant provisions refer) contains 181 "areas of intervention" for which it is specified if and to what extent they contribute to climate or environmental objectives. This green tagging may be understood as a less elaborated form of pre-taxonomy: it precedes the Commission's climate delegated act adopted in June 2021 (compared with February 2021 for the RRF Regulation). Yet, there was a political will to align both instruments to the greatest extent possible[35]. The very nature of both instruments, however, generates inevitable differences: *the* taxonomy aims at classifying investments in economic activities, while the facility finances not only investment projects, but also political reforms.

Regarding the DNSH principle, Article 5 of the RRF Regulation refers to Article 17 of the Taxonomy Regulation to define it. Again, in a context where the relevant delegated acts were not adopted yet, the RRF Regulation stated that the Commission "shall provide technical guidance to the Member States" to make their assessment of the fulfilment of the DNSH principle (Article 19(3) and Recital 25), which it did through a communication[36]. In this technical guidance, the Commission does not set much red lines (with the exception of reforms leading to a rise of fossil fuel financing or subsidies, and of fossil fuel-based electricity or

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plans that Member States had to include in their updated plans following the amending of the RRF regulation aimed at reducing dependence on Russian fossil fuels (see Article 21*quater*, § 3 of the RRF Regulation).

33 For a discussion, see P. Dermine, N. Vander Putten, "Governing EU's environmental transition through spending? Loopholes and governance concerns in the recovery funds", in M. Eliantonio *et al.* (eds.)*, Greening Europe and the Rule of Law: Opportunities for and limits to EU's legal power* (Edward Elgar, forthcoming).

34 For a classification of conditionnalities, see Viorica Vita, *The Rise of Spending Conditionality in the European Union* (European University Institute, 2018).

35 European Commission, "NextGenerationEU Green Bonds Allocation Report", (Commission Staff Working Document SWD(2022) 442 final, 16 December 2022).

36 Commission Notice Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation, *O.J.* 2021, C 58/1.

heating system-related projects)[37], but rather provides a non-exhaustive list of factors that can be taken into account as part of national authorities' assessments, such as compliance with environmental legislation or the application of certain environmental (ISO) standards. Alignment with *the* taxonomy's technical screening criteria may nonetheless also be used to show compliance with the principle[38].

This type of environmental guarantee attached to EU money does not only concern the one-off RRF. Similar DNSH requirements, for instance, apply for other EU funds such as the European Regional Development Fund, the Cohesion Fund, the Just Transition Fund, InvestEU, the Social Climate Fund, the Innovation Fund or the Modernisation fund, with small variations each time. Many of them refer to the Taxonomy Regulation to define the DNSH principle and its specific conditions[39].

1.2.2. The Green Bonds Regulation

Regulation 2023/2631 on European Green Bonds is another regulation that incidentally establishes a classification that partly overlaps with *the* taxonomy. The core idea underpinning green bonds is that, contrarily to traditional bonds, the proceeds collected through their issuance will be dedicated to "green" activities only. They mostly serve to finance "renewable energy, real estate, green transport, and sustainable water management"[40].

Green bonds may in principle be issued by private or public actors. In practice, however, public authorities are the main emitters: The quantity of green bonds emitted by the Commission until 2023 makes it, according to its website, the largest emitter in the world, and thirty percent of all NextGenerationEU funds will have originated from European Union green bonds (approximately 250 billion euros). By way

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[37] See the aforementionned Commission Notice Technical guidance, point 2.1.

[38] See the aforementionned Commission Notice Technical guidance, point 2.5.

[39] For an extended discussion and comparison, see M Beltrán Miralles et al., *The Implementation of the 'Do No Significant Harm' Principle in Selected EU Instruments: A Comparative Analysis*, (European Commission Joint Research Center, 2023).

[40] N. Maragopoulos, "Toward a European Green Bond Standard: A European Initiative to Promote Sustainable Finance", in Muñoz and Smoleńska (eds.), *Greening the Bond Market, A European Perspective* (Palgrave, 2023), p. 21-50, at p. 25.

of comparison, it is estimated that the global issue volume until 2021 is 270 billion USD[41].

The Green Bonds Regulation sets a voluntary standard for private or public actors (including States or sub-state authorities) wanting to emit bonds tagged as "green". The standard includes disclosing a series of pre- or post-issuance elements provided for by the regulation, most notably an ex-post annual allocation report and impact assessment, as well as a mandatory review by third-party verifiers subjected to certain requirements and controls[42]. It should be understood, however, that the regulation appears in a competitive environment for green bonds standards: the Green Bonds Principles established by the International Capital Market Association, for instance, have been used by many green bonds' emitters before, including Member States and the European Union. It did not, however, provide a precise content of what could or could not be financed with the proceeds collected from their issuance[43].

Under Article 4 of the Green Bonds Regulation, proceeds from EU green bonds should only finance (directly or indirectly) taxonomy-aligned activities. Yet, to allow for a certain flexibility, issuers may allocate up to 15% of the proceeds to activities that do not comply with the technical screening criteria when they have not entered into force yet, or when they are not considered as directly applicable, in cases of activities reported as official development assistance and international climate financing. Those activities must, however, comply with the DNSH principle as set out in the climate delegated act (Article 5).

1.2.3. The Green Budgeting Initiative

Green budgeting practices aim at tagging (and highlighting) green expenditures within the (proposed) budgets and at systematising environmental impact assessments within the budgetary process. In its "Green Deal" communication, the Commission noted that "A greater use of green budgeting tools will help to redirect public investment, consumption and taxation to green priorities and away from harmful subsidies. The Commission will work with the Member States to

[41] See V. Brühl, "Green Finance in Europe – Strategy, Regulation and Instruments", *CFS Working Paper Series* (2021), p. 9.

[42] For an extensive study of green bonds in the EU, see Muñoz and Smoleńska (eds.), *op. cit.*

[43] V. Brühl, *op. cit.*, p. 9.

screen and benchmark green budgeting practices”.[44] In line with this agenda, the Commission published several documents to incentivise Member States to adopt green budgeting practices and provide training for national authorities wishing to go in that direction. The recently reformed directive for budgetary frameworks does not require Member States to do so, yet its Recital 18 provides that

> Green budgeting tools can help redirect public revenue and expenditure to green priorities. In that respect, the regular reporting of relevant information improves budget deliberations. Member States could publish information on how the relevant elements of their budgets contribute to achieving climate-related and environmental commitments at national and international level and the methodology used. Member States should publish data and descriptive information separately for expenditure, tax expenditure and revenue items […][45].

In January 2022, the Commission published its five pages-long EU Green Budgeting Reference Framework[46]. The document does not favour a specific green tagging methodology, but the European taxonomy is used in some Member States[47] and is considered by the Institute for Climate Economics, the organisation providing EU-funded training to Member States, as one of the easiest ways to proceed with the green tagging[48]. In a context where the EU committed to allocate 30% of its 2021-2027 spending to climate action[49], these climate tagging within budgetary documents should multiply in the future.

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[44] European Commission Communication, “The European Green Deal” (COM(2019)640final, 11 December 2019), at 2.2.2.

[45] Directive 2024/1265 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, *O.J.* 2024, L 30.4.2024.

[46] European Commission, “European Union Green Budgeting Reference Framework” (20 January 2022), available at https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/green-budgeting-eu_en.

[47] OECD, *Green Budget Tagging: Introductory Guidance & Principles* (OECD Publishing, 2021).

[48] C. Boutron, *Greener, better, stronger: Factors for the successful implementation of green budgeting in EU Member States*, (I4CE, 2023).

[49] See Recital 28 of Regulation establishing the framework for achieving climate neutrality, *O.J.* 2021, L 243/1.

2. Taxonomies as the relatively unexpected component of rising selective industrial action

In the light of the instruments exposed above, this section argues that although the European taxonomy for sustainable investments derives from a capital market union agenda more than an environmental agenda – and was therefore mainly intended to serve as an informational tool for the market – it is progressively used as a central tool within instruments that may be characterised as belonging to a rising selective industrial policy (2.1). This has consequences on the legal validity of the breadth of the delegated acts, which may, in light of these elements, cover "essential" aspects (2.2).

2.1. The Taxonomy confronted with a rising environmental governance through spending

Many political scientists, legal scholars and think tanks are readings current trends in EU regulation as the rise of a selective state-led industrial policy. State-led selective industrial policy may be understood as a set of targeted policies aimed at strengthening certain (type of) economic actors or sectors through public finance. This contrasts with an industry- or investor-led horizontal industrial policy with a more market-neutral (or technology-neutral)[50] industrialisation policy, in which it is the functioning of "the economy" in general that must be supported[51]. While both dimensions have always been present to a certain extent, the latter was arguably prevailing at the EU level until recent years[52].

The orientation of spending towards green activities through instruments such as the Recovery and Resilience Facility, sovereign green bonds

[50] S. Eriksson, *op. cit.*, p. 60.

[51] Among many others, see CMLR Editorial Board, "The EU's Integrated Policy Approach towards Competitiveness: The Interplay between State Aid Control and Industrial Policies", *Common Market Law Review* (2024), p. 1-12 ; R. Veugelers, S. Tagliapietra and C. Trasi, "Green Industrial Policy in Europe: Past, Present, and Prospects", *Journal of Industry, Competition and Trade* (2024), p. 1-22 ; D. Kleimann *et al.*, *How Europe Should Answer the US Inflation Reduction Act*, (Bruegel Policy Contribution Issue, 2023) and O. Fontana, S. Vannuccini, *How to Institutionnalise European Industrial Policy (For Strategic Autonomy and the Green Transition* (Centro Studi Sul Federalismo, 2024).

[52] O. Fontana, S. Vannuccini, *op. cit.*, p. 6 and M. Bartl, *Reimagining Prosperity: Toward a New Imaginary of Law and Political Economy in the EU* (Cambridge University Press, 2024), p. 141.

or green budgeting practices may be seen as one of the ways in which this takes place.[53] Such a shift happens, however, within a wide array of adaptations in areas such state aid, EU single market, climate policy, research and innovation, macroeconomic frameworks and public investment instruments[54].

The rise of a (partly green) publicly funded industrial policy is the consequence, among others, of two overlapping political agendas. First, the ecological agenda of the EU gained importance in the years following the adoption of the Green Deal. The presence of public funds is considered by many as being key to channel investments towards sustainable economic activities[55] and "de-risk" them[56]. Environmental earmarking and spending conditionalities – necessarily relying on classifying criteria – are, in this sense, "essential elements in the art of governing through budgets"[57]. Second, externally, the geopolitical context enticed the EU to orient its agenda towards an open strategic autonomy[58]. Open strategic autonomy may be defined in economic terms as a manner for the EU "to continue to build on (and benefit from) openness – consistent with its commitment to open and fair trade with diversified and sustainable global value chains while assertively defending its interests, protecting the EU's economy from unfair trade practices and ensuring a level playing field both internally and globally"[59]. It is, in other words, a way to "equip the EU to manage interdependence in

[53] M. Panascì, "Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution", *Common Market Law Review* (2024), p. 13-54.

[54] R. Veugelers, S. Tagliapietra and C. Trasi, *op. cit.*, p. 7.

[55] M. Bartl, *op. cit.* p. 165 and C. Gortsos and D. Kyriazis, *op. cit.*, p. 11.

[56] D. Gabor, "The (European) derisking state", *Stato e mercato, Rivista quadrimestrale* (2023), p. 53-84.

[57] V. Vita, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* (2017), p. 1-18, at p. 11.

[58] I. Alami, A. Dixon (*The Spectre of State Capitalism* (Oxford University Press, 2024)) mention, among the causes of the new state capitalism the "competitive emulation" in the context of geoeconomics and geopolitical rivalry (at p. 19). See also A. Petti, "EU COVID-19 purchase and export mechanism: A framework for EU operational autonomy", *Common Market Law Review* (2022) p. 1333-1370.

[59] CMLR Editorial Board, *op. cit.*, p. 2. See also A. Steinbach, "The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict", *European Journal of International Law* (2023), p. 973-1006, at p. 978.

line with its interests and values"[60], one of them being the green transition. Although both agendas may be clashing to a certain extent (geopolitical concerns may override environmental interests, for instance), they have in common that they imply a departure from market neutrality according to which "the market" should be supported independently from its content[61].

Simply put, systematically categorising economic activities (i.e. taxonomizing) as being (environmentally) worthy of public intervention is an essential feature of conditioning the granting of funds, which itself is part of a State-led selective (partly green) industrial policy toolbox. Multiplying such uses of *the* taxonomy was not, however, the intention behind the adoption of the Taxonomy Regulation. Indeed, the European taxonomy was first and foremost designed as a way to advance a capital market union through the establishment of an informational tool to be disseminated openly. As many authors argue, *the* taxonomy was indeed conceived as a tool that may be appropriated by shareholders, clients or other stakeholders in a form of informational market governance. Colaert, for instance, highlights that, just as any financial regulation, the main substantive policy objectives of *the* taxonomy is stability, market integrity (i.e. the creation of a market with a level playing field) and consumer protection[62].

Indeed, the Sustainable Finance Action Plan – the strategic document from which the Taxonomy Regulation derives – was adopted in 2018, that is before the Green Deal, the Covid-19 pandemic and the recent geopolitical events[63]. This plan served mainly a

> markedly hands-off market-based approach to address the negative impact connected to financial markets, which is focused on providing transparency to consumers about the sustainability attributes of financial

[60] See European Commission Communication, "Trade policy review – An open, sustainable and assertive trade policy" (COM(2021)66 final, 18 February 2021).

[61] P. Charbonnier, "War Ecology: A New Paradigm", *Green* (2022), p. 70-76.

[62] V. Colaert, "The Changing Nature of Financial Regulation: Sustainable Finance as a New EU Policy Objective", *Common Market Law Review* (2022), p. 1669-1710, at p. 1672-1673. See also O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 13.

[63] European Commission communication "Action Plan: Financing Sustainable Growth" (Com(2018)97final, 8 March 2018).

> products and fighting greenwashing. This approach leaves to market participants the decision of 'how green', if at all, their activities should be[64].

The taxonomy emerges within that framing, accompanied by a system of information disclosure legislative acts such as the Corporate Sustainability Reporting Directive – a chapter of the reporting made by companies under that directive should be dedicated to the undertakings' alignments with *the* taxonomy[65] – and the recently adopted Corporate Sustainability Due Diligence Directive requiring big companies to, among other things, establish transition plans[66].

This view is confirmed by the legal basis of the Taxonomy Regulation, which is Article 114 TFEU, i.e. the clause enabling the co-legislators to adopt measures for the approximation of provisions which have as their object the establishment and functioning of the internal market. Recitals of the regulation also contain indications that the act is mainly framed as a way to tear down "obstacles to the functioning of the internal market and to prevent the emergence of such obstacles in the future" [67], in a context where many actors are trying to impose their taxonomy standard globally[68]. After all, the title of the regulation makes it clear: it is a regulation establishing a "framework to *facilitate* sustainable investment" (emphasis added) and not to *make* sustainable investments. The fostering of green financing is supposed to happen by the mere earmarking of it[69]. This means that a high level of environmental

64 Legal Issues of Economic Integration Board, "From the Board: Finalising the Sustainable Finance Regulatory Agenda", *Legal Issues of Economic Integration* (2022), p. 1-6, at p. 1.

65 Directive 2022/2464 amending Regulation 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, *O.J.* 2022, L 322/15.

66 Directive 2024/1760 on corporate sustainability due diligence, *O.J.* 2024, L 5.7.2024. See, more generally A Steinbach, "The Greening of the Economic and Monetary Union", *Common Market Law Review* (2022), p. 329-362, at p. 335 and S. Eriksson, *op. cit.*, p. 60. See also Articles 5 et 7 of the Taxonomy Regulation related to Regulation 2019/2088 on sustainability-related disclosures in the financial services sector, *O.J.* 2019, L 317/1. For an overview see Jean-Baptiste Poulle *et al.*, *EU Banking and Financial Regulation* (Edward Elgar, 2024), Chapter 70.

67 Recital 14 of the Taxonomy Regulation. See also Recital 12.

68 O. Azoulay, C. Merle and L. de Souza, *op. cit.* and S. Eriksson, *op. cit.*, p. 59.

69 S. Kooths, *op. cit.*, p. 243.

protection (Articles 191-192 TFEU) through reorienting financial flows to sustainable activities is arguably only a "sub-objective" of the act[70].

The link with sustainable public investments was admittedly not entirely absent from the regulation, however: Recital 17 of the Taxonomy Regulation mentions the public-private European Fund for Strategic Investments organised by Regulation 2015/1017[71] and its 40% climate investment target for infrastructure and innovation:

> Common criteria for determining whether economic activities qualify as sustainable, including their impact on the environment, could underpin future similar initiatives of the Union to mobilise investment that pursues climate-related or other environmental objectives.

Nonetheless, the scale of (in-)direct use of the taxonomy within state-led selective instruments such as the ones presented in the previous section was relatively unexpected, and adds to the idea that the taxonomy is progressively becoming *the* institutional common language to determine what is *green* and what is not. This, in turn, reinforces the importance of the apparently technical, yet to a great extent political, choices behind the adoption of the delegated acts defining what "substantial contributions" to the six EU's environmental objectives are, and what the DNSH principle entails.

2.2. Rethinking the legitimacy and legality of delegated acts considering the taxonomy's uses

The preceding should lead legal scholars to consider anew not only the sufficient democratic legitimacy of delegating the definition of the taxonomy's content, but also the legal validity of the process. Under Article 290 TFEU, "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act", provided that "The objectives, content, scope and duration of the delegation of power" are "explicitly defined in the legislative acts". The provision states that "The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

[70] V. Colaert, *op. cit.*, p. 1679.

[71] Regulation 2015/1017 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal, *O.J.* 2015, L 169/1.

This provision sets two conditions for the delegation mechanism to be valid: the delegation must be sufficiently specific and may not cover "essential elements of an area"[72]. Regarding the latter condition, and without entering in too much detail, the European Court of Justice stated that "which elements of a matter must be categorised as essential must be based on objective factors amenable to judicial review"[73]. The Court seems to favour a case-by-case analysis: it did not identify an exhaustive list of what these "objective factors" would be, and indicated that they depend on "the characteristics and particularities of the domain concerned"[74]. It even uses a relatively tautological reasoning, by considering that essential elements are those which "require political choices falling within the responsibilities of the European Union legislature". In Merijn Chamon's terms: "What is essential is political and what is political is essential"[75]. Additional guidance may be provided by cases in which the ECJ had to evaluate the adequacy of a legal basis for a given act – which also requires to determine what the "essential elements of an area" are. The Grand Chamber of the Court held in such a Case in 2015 that "measures which entail a policy choice reserved to the EU legislature because the measure are *necessary* for the pursuit of the objectives" of the considered policy area (in this case, the common policies for agriculture and fisheries)[76].

Elements such as the importance of the interference with fundamental rights or third countries sovereignty seem to be relevant[77]. It should also be noted that, in a case concerning the establishment by a Commission's delegated act of a given methodology to define Euro emission standards of cars, the General Court found that the essentiality requirement was not met[78], given the breadth of the delegation.

[72] For an overview, see M. Chamon, "The Legal Framework for Delegated and Implementing Powers Ten Years after the Entry into Force of the Lisbon Treaty", *ERA Forum* (2021), p. 21-38, at p. 21-22.

[73] See Case C-355/10, *Parliament v. Council*, EU:C:2012:516, paras 45-46.

[74] M. Chamon, *op. cit.*, p. 26.

[75] *Ibid*.

[76] Joined Cases C-124/13 and C-125/13, *Parliament & Commission v. Council*, EU:C:2015:790, para. 50 (emphasis added).

[77] M. Chamon, *op. cit.*, p. 26.

[78] M. Chamon, *op. cit.*, p. 28. See Joined Cases T-339/16, T-352/16 and T-391/16, *Paris/Bruxelles/Madrid v. Commission*, EU:T:2018:927. The Court of Justice did not examine that point on appeal.

Arguably, the essentiality requirement must be assessed, for the European taxonomy, not only in the light of its diffusion as a market-based informational tool, but also considering the fact that it serves to allocate, *de jure* or *de facto*, public funds. This means that elements such as the inclusion of certain gas or nuclear related activities in the taxonomy, already political *in se*, is even more essential because of the many appropriations by public authorities of the taxonomy. The mere heated political debates surrounding the updates of the taxonomy should suffice to convince of the political hence essential character of its contents. While it is evident that the taxonomy should remain a flexible instrument so as to allow a regular update depending on technological changes, I argue that the regulation should go further than defining the considered environmental objectives in a few lines.

The Court should provide clarity on that point in the near future. The delegated acts are currently contested in pending cases brought before the EU's General Court. A first one is brought by the NGO Client Earth. Client Earth argues among other things that the Commission did not comply with the minimal requirements set forth in the Taxonomy Regulation by not taking into account the best scientific evidence regarding combustion of forest biomass for energy or the bioplastic manufacturing industry and by classifying of fossil gas-based activities as transitional (violation of the specificity requirement). It also argues more generally that "The Commission disregarded a number of essential elements of the Taxonomy Regulation when making the Delegated Regulation"[79]. A second one is brought by Austria. One of the pleas concerns the violation of Article 290 TFEU, considering that the legislature already excluded the classification of nuclear energy as environmentally sustainable[80]. A third one is brought by Greenpeace and others, and also contains grounds on non-compliance with Article 290 TFEU[81].

Behind these seemingly technical questions lie fundamental democratic guarantees: the Parliament and the Council may only accept or refuse, not amend, the proposed act. In this case, the delegations of powers referred to in the taxonomy "may be revoked at any time by

[79] Case T-579/22, *ClientEarth v Commission*, pending and W. Van Gaal, "EU faces twin legal challenges over weak climate goals and greenwashing", *EU Observer* (28 August 2024).

[80] Case T-625/22, *Austria v Commission*, pending.

[81] Case T-214/23, *Greenpeace and Others v Commission*, pending.

the European Parliament or by the Council" (Article 23 (3) of the Taxonomy Regulation). The delegated acts do only enter into force "if no objection has been expressed either by the European Parliament or by the Council within a period of four months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object" (Article 23 (6) of the Taxonomy Regulation). In practice, however, according to Merijn Chamon, "neither the Council or the Parliament has ever revoked a delegation", while, until 2021, drafts had merely been objected to fifteen times in total[82]. In sum, defining the green through delegated acts may not only be legally contestable, it also leads to a lower democratic legitimacy of the technical yet political choices underpinning classifications.

Conclusion

The Green Deal is presented as a strategic instrument that "supports the transition of the EU to a fair and prosperous society that responds to the challenges posed by climate change and environmental degradation, improving the quality of life of current and future generations"[83]. To implement that vision, the EU has adopted various top-down legislative acts with guiding objectives and standards that both the EU and Member States should reach, such as the EU Climate Law or the Nature Restoration Law. However, as this chapter has shown, next to these definitions of sustainability "from above" through targets and regulations that authorise or forbid in a traditional regulatory fashion, a definition of sustainability in a granular manner "from below" is also emerging, through principal or incidental environmental categorisations. If one accepts that the legal system constitutes a central tool "for instituting imaginaries into institutions and practices in modernity"[84], the Taxonomy Regulation is progressively becoming the cornerstone of that bottom-up vision of sustainability and to, supposedly, unmute environmental protection in the financial realm. It was intended as a market-based tool to make environmental concerns visible – and, behind them, the interests of future generations. Yet, less expectedly, it is also being

[82] M. Chamon, *op. cit.*, p. 30.

[83] European Commission Communication, "The European Green Deal" (COM(2019)640final, 11 December 2019), at point 4.

[84] M. Bartl, *op. cit.*, p. 43.

used more directly by public authorities to orient a governance through spending. This takes place in a context of an emerging consensus on the growing role of public spending in the ecological transition. In short: "taxonomies are rarely standalone documents, but the linchpin of entire ecosystems of laws & incentives"[85].

This, however, has legal consequences on the validity of delegating the adoption of a (too) vast number of choices regarding the technical screening criteria to the Commission. Furthermore, while the unmuting potential of these instruments for NGOs and citizens to hold governments and corporations accountable is evident, they nonetheless are contained in delegated acts, i.e. acts with a democratic legitimacy that is inferior to that of traditional legislative acts.

More generally, the taxonomy's relatively unintended applications further intensify the question of whether there is coherence between the top-down environmental objectives and the bottom-up categorisation of economic activities as environmentally beneficial or harmful. While sceptics argue that "the Taxonomy runs the risk of politicising economic activity in an unwarranted manner"[86]; others see the taxonomy as depoliticising fundamentally democratic choices on sustainability. If public authorities are to be the guardians of intergenerational justice, the way future generations' interests are being rendered legible within sustainability-related taxonomies are of an even greater importance compared to the situation in which the latter would be a mere market-based certification mechanism. In that sense, this chapter highlights the pitfall of one of the taxonomy's core characteristics: the fact that it is conceived within a partly outdated horizontal market policy mindset.

[85] O. Azoulay, C. Merle and L. de Souza, *op. cit.*. p. 15.

[86] S. Kooths, *op. cit.*, p. 247.

Annex

Instruments establishing principal or incidental environmental taxonomies of socio-economic activities in the EU by chronological order[87]

Instrument	**Adoption date**
Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment	18 June 2020
Regulation 2021/241 establishing the Recovery and Resilience Facility	18 February 2021
Commission Delegated Regulation 2021/2139 (Climate delegated act)	4 June 2021
European Union Green Budgeting Reference Framework	20 January 2022
Commission Delegated Regulation 2022/1214 amending the Climate delegated act	9 March 2022
Commission Delegated Regulation 2023/2486 (Non-climate environmental objectives delegated act)	27 June 2023
Regulation 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds	22 November 2023

[87] This list excludes regulations governing EU funds that, similarly to the RRF, contain green spending targets, or requirements to comply with the DNSH principle.