EGESIF_21-0025-00
27/09/2021

EUROPEAN COMMISSION

DIRECTORATES-GENERAL
REGIONAL AND URBAN POLICY
EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION

Commission explanatory note

APPLICATION OF THE "DO NO SIGNIFICANT HARM" PRINCIPLE UNDER COHESION POLICY

European Regional Development Fund

European Social Fund Plus

Cohesion Fund

Just Transition Fund

COMMISSION EXPLANATORY NOTE

Application of the "do no significant harm" principle under cohesion policy

The Common Provisions Regulation (CPR) in Recital 10 states that in the context of tackling climate change *"the Funds should support activities that would respect the climate and environmental standards and priorities of the Union and would do no significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) No 2020/852"* ("The Taxonomy Regulation"). In addition, in accordance with Article 9(4), "*the objectives of the Funds shall be pursued in line with the objective of promoting sustainable development as set out in Article 11 TFEU, taking into account the UN Sustainable Development Goals, the Paris Agreement and the "do no significant harm" principle*". This explanatory note aims to clarify how the compliance with the 'do no significant harm' principle (DNSH) shall be ensured under cohesion policy[1] in line with the legal framework established in the CPR, the ERDF/CF Regulation, the JTF Regulation and the Interreg Regulation. It ensures coherence with the approach under the Recovery and Resilience Facility (RRF) and thereby avoids unnecessary administrative burden for Member States.

1. What is 'Do No Significant Harm'?

For the purposes of the CPR, DNSH is to be interpreted within the meaning of Article 17 of the Taxonomy Regulation. This Article defines what constitutes 'significant harm' for the six environmental objectives covered by the Taxonomy Regulation:

1. An activity is considered to do significant harm to *climate change mitigation* if it leads to significant greenhouse gas (GHG) emissions;
2. An activity is considered to do significant harm to *climate change adaptation* if it leads to an increased adverse impact of the current climate and the expected future climate, on the activity itself or on people, nature or assets;
3. An activity is considered to do significant harm to the *sustainable use and protection of water and marine resources* if it is detrimental to the good status or the good ecological potential of bodies of water, including surface water and groundwater, or to the good environmental status of marine waters;
4. An activity is considered to do significant harm to the *circular economy*, including waste prevention and recycling, if it leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources, or if it significantly increases the generation, incineration or disposal of waste, or if the long-term disposal of waste may cause significant and long-term environmental harm;
5. An activity is considered to do significant harm to *pollution prevention and control* if it leads to a significant increase in emissions of pollutants into air, water or land;
6. An activity is considered to do significant harm to the *protection and restoration of biodiversity and ecosystems* if it is significantly detrimental to the good condition and resilience of ecosystems, or detrimental to the conservation status of habitats and species, including those of Union interest.

[1] Cohesion policy funds: European Regional Development Fund, Cohesion Fund, European Social Fund +, Just Transition Fund

2. How should the DNSH principle be applied in the context of the CPR? [2]

Certain types of investments that are deemed harmful to the environment are legally excluded from the scope of the Funds[3]. For the eligible investments under cohesion policy, compliance with the DNSH principle is supported through the following provisions:

– the compliance with relevant EU environmental legislation (as part of applicable law) at the level of each operation is an explicit requirement in the CPR;

– the obligation to carry out a Strategic Environmental Assessment (SEA) for cohesion policy programmes for which this is needed based on the requirements of the SEA Directive[4];

– the thematic enabling conditions under Policy Objective 2 which make funding conditional to the fulfilment of certain criteria derived from the environmental acquis;

– in case of non-compliance with any of the rules, the regulatory framework provides for effective mechanism for not disbursing EU Funds to the programmes concerned, hence preserving the general objective of the DNSH principle.

The above provisions support but do not exclude automatically the possibility to define types of actions in the programmes which do not comply with the DNSH principle. Therefore, a dedicated assessment has to be carried out during the programming phase to prevent the inclusion of activities or types of actions in the programmes that could do significant harm.

In order to ensure a consistent application of the principle across the EU funding instruments, it is recommended to follow the approach taken under the RRF[5] , adapted to take into account the legal framework for programming under the CPR.

Similarly to the approach taken under the RRF, the ex-ante compatibility with the DNSH principle under cohesion policy is to be ensured **at the level of the definition of the types of actions** in the programmes. It is therefore essential that the compliance with the DNSH principle shall be assessed and ensured during the process of defining the *types of actions*[6] in the programme. Member States should therefore assess whether the types of actions defined in the programmes present any risk with respect to compliance with the DNSH principle.

3. How should Member States ensure compliance with the DNSH principle when preparing their programmes?

Before submitting the programmes for adoption by the Commission, the Member States have to ascertain that the programmes comply with the DNSH principle. This shall be achieved by assessing

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[2] The Interreg programmes on EU external borders involving non-EU partner countries should apply the DNSH principle similarly to the application of other horizontal principles. Given the limitations such as the absence of RRF in the non-EU part of the programmes the principle of proportionality should be applied.

[3] Article 7 of the ERDF and Cohesion Fund Regulation, Article 9 of the JTF Regulation

[4] Directive 2001/42/EC of the European Parliament and of the Council on the Assessment of the effects of certain plans and programmes on the environment. The SEA procedure has to be completed before the Commission formally adopts the programme subject to the SEA.

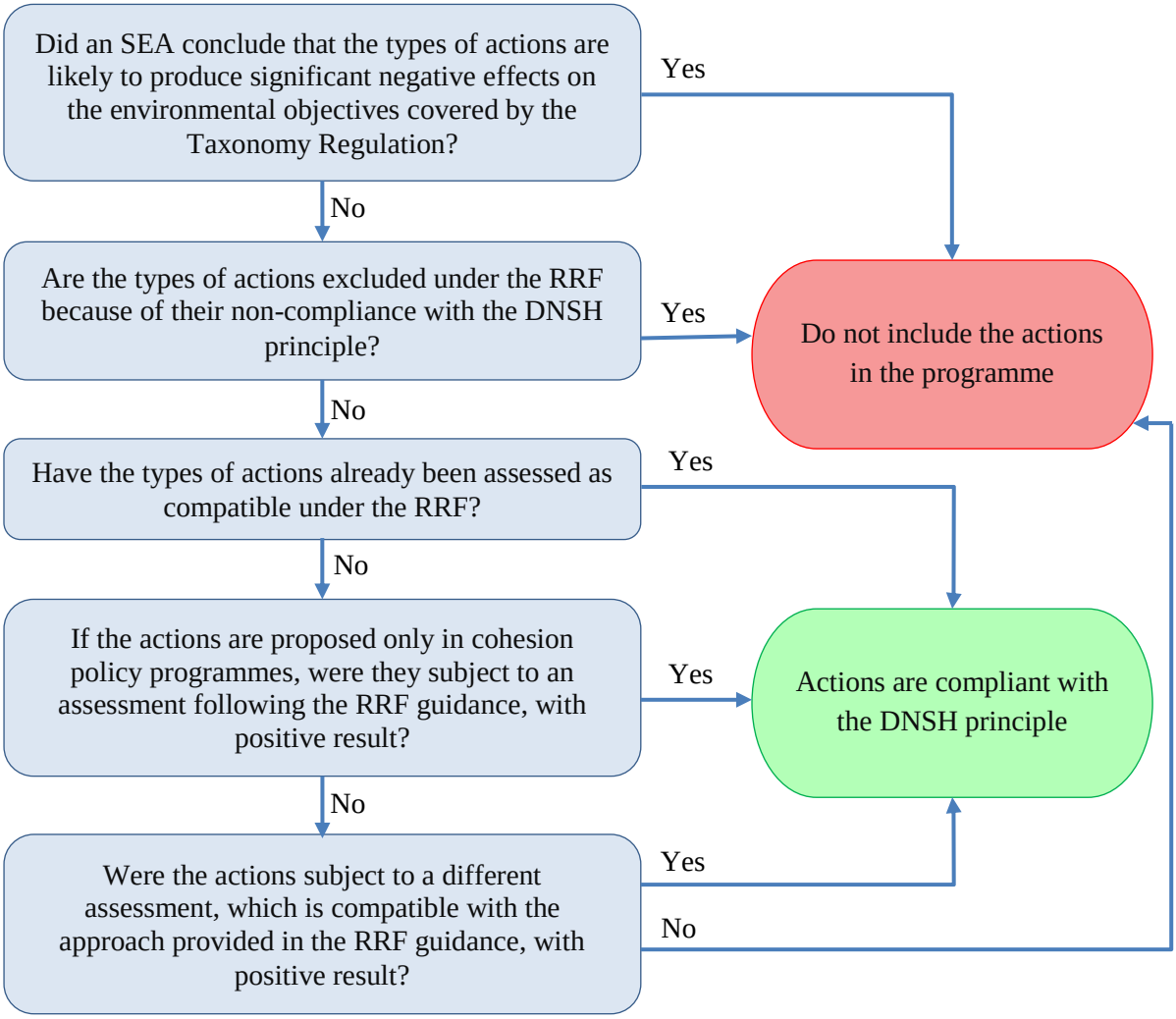
[5] cf. Article 19(3), point d of Regulation (EU) 2021/241 ´*the Commission shall provide technical guidance to the Member States to that effect*`. Commission Notice: Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation (2021/C 58/01)

[6] Each programme shall set out the types of actions pursuant to Article 22(3)(d)(i) CPR, Article 11(2)(g) of the JTF Regulation and Article 17(3)(e)(i) of the Interreg Regulation

the types of actions defined in the programme with respect to their potential to do significant harm to the environmental objectives. The same approach applies to programme amendments. While the SEA procedure identifies the measures to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the programme, it does not automatically entail compliance with the DNSH principle. Therefore, a dedicated DNSH assessment at the level of the types of actions in the programmes is necessary, building also on the SEA findings.

Where potential risks to the compliance with the DNSH principle are identified, the proposed action should be adjusted taking into account necessary mitigating measures that will be implemented to prevent and offset any significant harm with regard to the six environmental objectives covered by the Taxonomy Regulation. If this is not possible, the type of action concerned should be removed from the programme.

Beyond the requirement for the types of actions to fall under the scope of the Funds and be compliant with the EU environmental acquis and the enabling conditions, compatibility of the programme with the DNSH principle shall be ensured by addressing the following questions for each type of action:



4. Documentation supporting the fulfilment of the principle in the programmes

The programme template in the CPR[7] does not provide for the possibility for including a detailed DNSH assessment in the programme. In order to demonstrate that the necessary assessment was carried out, each programme should include the following statement under the heading *The related types of actions* in section 2.1.1.1.1 *Interventions of the Funds*[8] under each specific objective, by selecting one of the options proposed:

"The types of actions have been assessed as compatible with the DNSH principle, since:

- *they are not expected to have any significant negative environmental impact due to their nature, or*
- *they have been assessed as compatible under the RRF, or*
- *there have been assessed as compatible under the RRF DNSH technical guidance, or*
- *they have been assessed as compatible according to Member State's methodology."*

Any necessary supporting information on how the DNSH principle has been taken into account should be documented by the Member States and made available on request of the Commission services in the informal dialogue with the national authorities.

5. Commission assessment

The Commission will assess the programmes in line with Article 23 CPR[9], including compliance with Article 9(4) CPR. When it considers that the pursuit of the objectives of the Funds, as reflected in the programme and the types of actions thereunder, as proposed by the MS does not take into account the DNSH principle, it may request further information and make observations within 3 months. After the review of the programme by the Member State, if it still cannot be concluded that the DNSH principle is taken into account, the Commission will make observations again and not adopt a decision approving the programme.

The Commission will follow the same approach for programme amendments, in line with Article 24 CPR[10].

6. Compliance with the DNSH principle during programme implementation

To respect the provisions of Article 9 CPR, namely that the objectives of the Funds shall be pursued in line with the DNSH principle, Member States are responsible for the implementation of this principle throughout the programming period. No obligation is laid down in the cohesion policy Regulations requiring a case by case assessment of compliance of each operation with the DNSH principle per se, but rather that operations fall within the types of actions which have been assessed as DNSH compliant within the programmes. Member States must therefore (i) put in place selection procedures that are sufficiently detailed to ensure compatibility of operations with DNSH compliant types of actions set out in approved programmes and (ii) are compatible with applicable EU environmental law. This requires:

[7] For Interreg programmes, in the Interreg Regulation.

[8] For Interreg programmes, section 2.1.2.

[9] For Interreg programmes, Article 18 Interreg Regulation

[10] For Interreg programmes, Article 19 Interreg Regulation

- Defining types of actions in programmes in sufficient detail to ensure that they are DNSH compliant and that an appropriate check can be carried out against the definition as part of the selection procedure of specific operations.
- Selecting only those operations for funding that comply with the programme and with applicable EU and national law[11]. If an operation does not fall under the types of actions defined in the programme, it cannot be selected for funding. Audits carried out by the national authorities and the Commission services will verify the effective functioning of the management and control system and correct any irregularities in this respect.
- Ensure that operations correspond to DNSH compliant actions defined in the programme by applying appropriate project selection criteria. The findings of the SEA can be a source of inspiration to ensure DNSH compliance when establishing selection criteria to check the compatibility of operations with DNSH compliant actions. The report "Integration of environmental considerations in the selection of projects supported by the European structural and investment funds"[12] provides practical indications on selection criteria which have a purpose to support more environmentally friendly projects as well as on other tools with a purpose to improve the environmental performance of projects.

[11] Article 73(2) CPR

[12] https://op.europa.eu/en/publication-detail/-/publication/25295fb0-c577-11ea-b3a4-01aa75ed71a1/language-en