ClientEarth

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Guidance on applying the ‘do no significant harm’ principle under the 2028-2034 MFF

Response to the call for evidence

ClientEarth welcomes the opportunity to provide feedback to the European Commission on the technical guidance on applying the ‘do no significant harm’ principle (hereafter “**DNSH**” and “**DNSH Guidance**”) in the next multiannual financial framework (hereafter “**MFF**”), to be developed as required by Article 5 of the proposal for a Regulation establishing a budget expenditure tracking and performance framework (hereafter “**proposed Performance Regulation**”).

The proposed Performance Regulation is a positive step forward. The shift from a programme-specific approach to a horizontally applicable DNSH principle across the entire EU budget, amongst other horizontal rules and principles, has the potential to make the DNSH principle more effective and simpler to apply at the same time. The DNSH principle can be a cornerstone of the EU’s integrated economic and environmental policies to drive the EU’s resilience. It is not just a technical tool but potentially a transformative tool driving the EU’s repeated commitment to sustainability across all policy areas.

Our contribution first elaborates on general findings on the DNSH principle (section 1). It then concretely set outs recommendations for an effective DNSH principle and Guidance, to improve substantive requirements as well as enforceability (Section 2). Finally, we develop specific recommendations for small-scale and low impact operators (Section 3).

1 General findings on the DNSH principle

The Utrecht University Law and Sustainability Clinic is currently carrying out a research project for ClientEarth on the DNSH principle.[1] The preliminary findings of the research finds that the DNSH principle is a **valuable expression of the integration principle** enshrined in Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU, which mandate that environmental protection must be integrated into the definition and implementation of the Union's policies, in line with sustainable development. It is a way to operationalise, a tool that concretises the integration duty, providing criteria to weigh whether an activity causes significant harm to specific environmental objectives.

The research also shows that the DNSH principle has been **applied in multiple forms to instruments governing public and private finance**. The DNSH principle, one of the central pillars of the EU Green Deal, has been operationalised by Article 9 and 17 of the Taxonomy Regulation. In most instruments, the DNSH principle functions as a **criterion**, (e.g. Taxonomy Regulation, the Sustainability Finance Disclosure Regulation, the EU-ETS and the Carbon Removals and Carbon Farming Regulation) or a **horizontal principle** (e.g. Recovery and Resilience Facility, Cohesion Fund, Just Transition Fund, European Regional Development Fund) to obtain funding, a certification or classification of an activity. Non-compliance with the DNSH principle, whether as a criterion or horizontal principle, has concrete legal consequences in most instances (funding denied, certification refused etc.). This demonstrates a certain but **varying degree of legal bindingness** of the DNSH principle across most instruments depending on the regulatory context in which it is embedded. However, **derogations can seriously undermine the bindingness of the DNSH principle** if these are not properly circumscribed and extensive discretion is given to the Member States, having only to argue that applying the DNSH principle is unfeasible. For instance, two derogations were introduced in the Recovery and Resilience Facility (RRF) motivated by exceptional circumstances, but whereas the first derogation initiated by the RepowerEU regulation was circumscribed by various conditions and Member States had to demonstrate that these conditions were met subject to review by the Commission, the second derogation initiated by the European Defence Industry Programme (EDIP Regulation) gave extensive discretion to Member States who only had to argue that the application of the DNSH was inappropriate.

Other scholars draw similar conclusions. The DNSH serves as a filtering mechanism, distinguishing between environmental damage that is prohibited and that which is permitted, and is thereby an emerging environmental norm.[2] It is a *"**critical component of the broader framework of EU environmental principles outlined in Article 11 and 191 TFEU**"* and whereas *"environmental principles are of a more programmatic nature, providing overarching guidelines for environmental governance, the DNSH principle adds a practical, evaluative dimension. It requires specific assessments of projects and investments to ensure that they align with broader environmental goals without causing harm, thus concretizing the more general environmental principles enshrined in the Treaty. In this direction, it complements and reinforces existing principles and objectives, such as the obligation to achieve a high level of protection, the precautionary principle, the principle of prevention and the principle of integration."*[3] In addition, the DNSH principle reinforces Article 11 TFEU and serves as an

[1] G. Clementi, M. Miéville, S. Roos, T. Scuticchio, *Research Report on the Do No Significant Harm Principle*, Utrecht University Law and Sustainability Clinic, 2026 (forthcoming).
[2] E. Tla da Silva, *Unravelling the nature of the "Do No Significant Harm": an emerging principle of EU environmental law or a transformative tool for the green economy*, Review of European Administrative law, Volume 18, 2025-2, p.119.
[3] Ibid., p. 120.

important and **powerful 'silo-breaker'.**[4] First, it promotes integration across EU sectoral policies by fostering coherence between environmental protection and other policies, such as energy, agriculture, fisheries, infrastructure or industrial policy. Second, the integrative approach is extended within environmental objectives themselves. Indeed, whereas environmental policymaking often focuses on individual environmental objectives, it helps prevent situations where progress towards one environmental objective, such as climate mitigation, is pursued at the expense of another, such as biodiversity protection, pollution prevention, circularity or water resilience.[5] **This systemic and integrative function should be explicitly reflected in the single DNSH Guidance**.

These findings show a **clear need to clarify and streamline the DNSH principle to make it simpler to apply, and at the same time ensure its legal bindingness to make it effective, whereby any derogations from the DNSH principle need to be assessed against their potential to undermine the integration principle enshrined in the EU treaties**.

2 Recommendations for an effective DNSH principle and Guidance

We welcome the anchoring of the DNSH principle as a horizontal principle in Article 5 of the proposed performance Regulation, in line with the requirement that "*programmes and activities shall, where feasible and appropriate in accordance with the relevant sector-specific rules, be implemented to achieve their set objectives without doing significant harm to the environmental objectives (…)* as set out in Article 33(2)(d) of Regulation 2024/2509 on the financial rules applicable to the general budget of the Union (EU financial regulation). We also welcome the operationalisation of the horizontal DNSH principle through a single guidance for applying the DNSH principle.

While we welcome the DNSH Guidance in view of simplification, efficiency and consistency, the DNSH principle must remain impactful and enforceable to contribute to the EU climate and environmental objectives. A single guidance broadly applicable to the entire EU budget should not lead to watering down the principle by adopting the "lowest common denominator" approach. Furthermore, we would like to note that the qualifier *"where feasible and appropriate in accordance with the relevant sector-specific rules"* is without prejudice to EU legal principles and obligations deriving from the EU Treaties, including – among others - the integration principle (highlighted above), as well as the principle of coherence and the need for EU policies to ensure a *high level of protection and improvement of the quality of the environment.* The qualifier can thus not be interpreted in a way that reduces the previously afforded degree of environmental protection or otherwise undermines or renders unachievable other EU policy objectives.

We therefore recommend applying the following principles and common foundations when designing the single DNSH Guidance. Some of these general principles should also be explicitly set out in the guidance in accordance with Article 5 para 2 proposed Performance Regulation.

[4] Ibid., p. 123.
[5] Ibid., p. 124.

2.1 Substantive requirements for the DNSH principle and Guidance

1. Pursuant to Article 33 EU Financial Regulation applicable to the general budget of the EU, the principle of sound financial management requires amongst others that programmes and activities funded by the EU Budget shall, "*where feasible and appropriate in accordance with the relevant sector-specific rules, be implemented to achieve their set objectives without doing significant harm to the environmental objectives*" as set out inf Article 9 Taxonomy Regulation. **The DNSH principle can further be developed to define what constitutes 'significant' harm to those six environmental objectives within the meaning of Article 17 Taxonomy Regulation**. This implies that only activities or assets assessed as not significantly harmful to any of these six environmental objectives can be considered compliant with the DNSH principle. This is not merely a matter of legal consistency but also essential to avoid fragmented environmental decision-making. **The guidance should therefore make explicit that a positive contribution to one environmental objective can never compensate for significant harm caused to another.**

While broad consistency should be sought between the DNSH principle in the Taxonomy Regulation and the EU budget, the **Taxonomy Regulation subsequent delegated acts and technical screening criteria should not apply by reference in the EU budget**. Indeed, the DNSH principle under the Taxonomy and the next MFF have different legal bases (Article 114 TFEU versus Article 322 TFEU), objectives (classification of private investments versus EU funding), scope and design features (private versus public finance).

2. Per Article 33 para 2(d) EU Financial Regulation and Article 1 para 2 proposed Performance Regulation, the application of the DNSH principle may not be feasible or appropriate in all instances. Article 5 para 3 proposed Performance Regulation further provides that this is the case for defence and security activities and that the DNSH guidance shall identify other cases, such as crisis situations (e.g. natural catastrophes) or other reasons of overriding public interest.

While some flexibility may be necessary, **any derogations from the application of the DNSH principle shall be clearly defined, circumscribed, narrowly interpreted, with strict conditions and time-bound, to preserve the principle's value, purpose and impact**. This means that:

- **The notions of "defence and security activities", "crisis situations" and "reason of overriding public interest" needs to be clearly defined**.
  If "security activities" were to also encompass "energy security", such derogation cannot become a backdoor for fossil fuel funding when such funding should be on the exclusions list (see point 5 below). In other words, funding fossil fuels cannot qualify as "security activities". Energy security militates against locking in more fossil fuels and global biodiversity loss and the collapse of critical ecosystems could affect the EU's resilience, security and prosperity.[6] Recent legislation, such as the Industrial Accelerator Act or the Regulation on Environmental Assessments (under the Environment Omnibus) among others, apply the "public interest" and "overriding public interest" designation (either as a rebuttable presumption or in an absolute

[6] See the UK government report on "*Nature security assessment on global biodiversity loss, ecosystem collapse and national security*" (January 2026).

way) to entire sectors or categories of projects. Given the expansion of these cases to the majority of EU economic sectors, without any impact assessment as to the implications of such a legislative development, the actual scope of application of the DNSH principle is restricted, with the risk of the Article 5 para 3 derogation no longer being "narrowly construed", but rather being converted into the general rule (see directly below). Similarly, derogations cannot be granted on justifications relating to "food security", insofar as a crisis situation has not been identified based on the best available evidence.

Furthermore, the notion of "overriding public interest" is borrowed from the Habitats Directive, Water Framework Directive and Birds Directive in which it has a specific meaning. Whenever a measure or project would fall within the scope of any of these directives and are found to do harm to the objectives of these directives, a further assessment to examine whether they are of overriding public interest is required. Such assessment requires a weighing of interests at stake in all circumstances and "*while no specific qualified preponderance of interest is required for this purpose, it must nonetheless be the case that a concrete assessment must be undertaken*".[7] If there is an overriding public interest, the measure or project can only go ahead subject to conditions. Exempting projects or plans of overriding public interest from DNSH assessments would undermine the concept, as they are by definition harmful.

- **Derogations from the DNSH principle must be interpreted strictly.** As exceptions to a general rule, derogations must be construed narrowly and cannot be applied in a manner that undermines the effectiveness of the provision from which they depart or undermine the objectives or the *effet utile* of the legislation which they form part of. Any derogation should therefore remain limited in scope, subject to strict conditions and safeguards, and cannot be relied upon to justify structural or recurring departures from the DNSH principle.
- Member States should not have the sole discretion to decide unilaterally on what constitutes a "crisis situation" or a "reason of overriding public interest", but **Member States should duly and publicly provide reasons for such genuine exceptional circumstance which shall under all circumstances remain subject to rigorous scrutiny and prior approval by the Commission**, following on predetermined, objective SMART criteria and always on a case-by-case basis.
- Regardless of the criteria set in the proposed Performance Regulation and the associated DNSH Guidance, the legality of any derogations will need to be assessed directly against legal principles of primary EU legislation, as enshrined in the EU Treaties.

3. The proposed Performance Regulation and DNSH Guidance must clarify that **compliance with the DNSH principle should be an eligibility requirement to access EU funding**, not only an overarching horizontal principle to consider, to ensure its legal bindingness and enforceability. This entails that only measures or projects that can demonstrate ***ex-ante* compliance** with the DNSH principle should be eligible for funding, but it should equally mean that actual compliance needs to be verified at the implementation phase as information may be missing about the planned measure. A mechanism for suspension or recovery of payments in case of non-compliance needs to be provided in the DNSH Guidance.

[7] Case E-13/24, EFTA Court, 5 March 2025, para 37.

4. **Compliance with EU environmental legislation is a prerequisite for complying with the DNSH principle.** This means that the EU budget cannot fund activities or assets the legality or regularity of which is directly affected by a Commission decision to issue a reasoned opinion in accordance with the infringement procedure under Article 258 of the TFEU or by a judicial or administrative decision from a national public authority.

   Yet the operationalisation of the DNSH principle should go beyond mere compliance with EU environmental law. It should provide an additional safeguard to be complied with to exclude EU funds from financing potentially harmful projects or measures, as well as to improve the environmental performance of projects or measures. Environmental impact assessments (EIA), strategic environmental assessments (SEA) and sustainability and climate proofing can be used to demonstrate compliance with the DNSH principle but should not automatically imply compliance with DNSH. Whenever a project passes an EIA or SEA does not mean that a project does not do significant harm, it means that the environmental impacts have been assessed and are in principle mitigated or managed. The results of an EIA or SEA can certainly contribute to a DNSH assessment, but the angle, speed and depth of the procedures differ and can therefore not be merged.

5. Article 5 para 2 proposed Performance Regulation indicates that the DNSH Guidance shall identify "*policy areas or activities that are considered to do significant harm to one or several environmental objectives and can therefore not be financed from the EU budget*". This creates the basis for an outright **exclusion list which sets out policy areas or activities that cannot under any circumstance be in line with the DNSH principle**. Precedents in several EU programmes already exist. Such a general exclusion list creates legal certainty if clear and precise, eliminates loopholes for the unequivocally harmful policy areas or activities, and lowers administrative burden. At the same time, a general exclusion list also leaves room for a dedicated additional exclusion list under specific EU funds.

   Amongst others, **funding fossil fuels with the EU budget is inherently incompatible with the DNSH principle** as it perpetuates environmental harm and conflicts with the EU's commitment to phase out fossil fuel subsidies without delay as per the 8th Environmental Action Programme. All direct and indirect support for fossil fuel infrastructure, production, and consumption should therefore be part of the exclusion list. And as stated above, funding fossil fuels cannot be classified as "security activities".

6. Conversely, Article 5 para 2 proposed Performance Regulation indicates that the DNSH Guidance shall identify *"policy areas or activities that are always deemed to be in line with the do no significant harm principle".* Although such approach is understandable in light of simplicity and efficiency, it needs to be handled with utmost caution to avoid erosion of the DNSH principle. The **intervention fields listed in Annex I of the proposed Performance Regulation cannot be considered as automatically in line with the DNSH principle as Annex I was not designed to accommodate such DNSH assessment/compliance**:

   - As set out in our joint briefing on the Performance Regulation, a few of these intervention fields are outright in violation of the DNSH principle and many do not actually contribute to

climate or environmental objectives[8]. Moreover, many intervention fields have a wide scope with varying environmental impacts.

- The coefficients set out in Annex I take account of the positive effects of the intervention fields on climate and environmental objectives, i.e. the contribution towards the EU climate and environment targets, and do not focus on the negative impacts which is exactly the purpose of a DNSH assessment. The coefficients are also not sufficiently granular for a DNSH assessment, since they merge water, pollution, circular economy and biodiversity objectives into one environmental coefficient, meaning that they cannot be used as a sole basis for assessing compliance with the DNSH principle.

If the Commission nevertheless decides to rely on Annex I to identify policy areas or activities that are always deemed to be in line with the DNSH principle, the DNSH Guidance should make explicit that:

- Only a strictly limited selection of policy areas or activities with no foreseeable environmental impact, such as "Education and skills", "effective public administration", "Peace, conflict and humanitarian aid" or "Rights, equality and justice" are eligible
- For the remaining policy areas or activities, a positive climate or environmental coefficient under Annex I does not presume compliance with the DNSH principle.

7. Building on points 5 and 6 above, the single DNSH Guidance could adopt **a simple, two-step approach** (similar to the approach under the Social Climate Fund technical guidance):

- First, activities, measures or projects to be supported by the EU budget should be checked against an **exclusion list** consisting of policy areas or activities that are from the outset considered to do significant harm (see point 5 above) and potentially an eligibility list of policy areas and activities with no foreseeable impact (see point 6 above).
- Second, policy areas or activities that do not fall within the scope of either list need to be subject to a more detailed DNSH assessment, in the form of sector-specific guidance which would make it easier to focus on high-impact activities where the DNSH principle can add the most value.

  The DNSH Guidance can also borrow from the guiding principles under the Social Climate Fund technical guidance: consider life cycle impacts ; take into account direct and indirect impacts ; prevent lock-in effects ; adopt best available levels of environmental and climate performance ; and ensure consistency with overarching climate and environmental objectives in the EU legislation.

[8] Joint briefing by ClientEarth, Bankwatch, CAN-E, EEB, HEAL, T&E and WWF on the Performance Regulation – Assessment of Annex I of the budget expenditure tracking and performance framework (March 2026).

8. For non-energy EU funding, the single DNSH Guidance should, as a minimum, be **aligned with the Commission's methodology on environmental harmful subsidies** (EHS)[9] which relies on the application of the DNSH principle, notably the examples of practical application in the agriculture, construction, fishing, forests, manufacturing and transport sectors. This means that any funding that would by analogy qualify as an EHS can also not be considered as compliant with the DNSH principle in the single guidance.

9. The **precautionary principle** should be embedded in the single DNSH Guidance. This implies that projects or measures that are too vaguely described and/or lack crucial information or scientific evidence for a DNSH assessment cannot be eligible for funding under the EU budget. Similarly, projects whose potential environmental impacts and risks are not yet known cannot be eligible for funding under the EU budget. It also means that the cumulative and long-term impact of projects or measures and potential harmful lock-in effects should be assessed and play a determining role on the project's eligibility.

10. Article 13 of the proposed Performance Regulation requires Member States to provide DNSH assessment for each activity in their future National and Regional Partnership Plans ("NRPPs"). This approach is welcome and it aligns with approaches under the Recovery and Resilience Facility (RRF) and InvestEU, where application occurs at the highest possible level of detail. Past experience with the RRF has shown that approvals were occasionally granted before all relevant information, such as the specific context or location of activities, was fully available, often due to tight deadlines. To prevent similar issues under the Performance Regulation, the Commission should: a) publish final guidance well ahead of the submission of plans; b) involve Member States and relevant stakeholders early in the process; c) provide clear and detailed requirements on how DNSH assessments should be documented, specifying the type of evidence needed for each activity.

At the same time, the provision raises important concerns regarding the scope and application of derogations. While the obligation to provide a DNSH assessment "for each activity" constitutes a strong baseline requirement, the possibility to depart from this obligation where the application of the DNSH principle "may not be feasible or appropriate" introduces a potentially broad and ambiguous exception (See above section 2.1 point 2). Any derogations where DNSH "may not be feasible or appropriate" must be **narrow, activity-specific, evidence-based, and publicly justified**, and remain subject to rigorous scrutiny and prior approval by the European Commission.

Finally, in line with the precautionary approach, the guidance should specify that, when drafting their National and Regional Partnership Plans, Member States should not consider an activity eligible for EU funding if sufficient information to carry out a DNSH assessment is lacking.

[9] The final version of the methodology was not published, hence we refer to the last publicly available version dated May 2024, and more specifically pp. 11-18 for the practical sectoral examples.

2.2 Procedural requirements to enable and enforce the DNSH principle

The DNSH principle should indeed contribute to the **proceduralisation of administrative environmental decision-making**. Its effectiveness therefore depends not only on substantive standards, but also on a uniform procedural approach for the assessments, as well as the quality, traceability and reviewability of the decision-making process itself. DNSH assessments should be reasoned, evidence-based, sufficiently documented, and open to scrutiny, so that compliance can be meaningfully verified by the Commission, auditors, courts and the public. We therefore recommend that the DNSH Guidance to be corroborated by the following:

11. **Objectivity and independence** of DNSH assessments are key for a strong DNSH principle and should be embedded as a principle in the single DNSH Guidance, at the very least for sectors with higher environmental risks. More clarity is needed in the DNSH Guidance on how to conduct an impactful procedure at national level while avoiding duplication with existing processes, such as permitting. Assessments need to be done by independent experts, not only by project promoters. Self-assessments do not work, as project promoters will not admit that their project do significant harm. Public consultations of stakeholders, including civil society, contribute to the objectivity and independence of the assessments and should therefore be the rule.

12. An effective DNSH principle requires **a high degree of transparency of the assessment and public participation**, for greater accountability. The DNSH Guidance should therefore set out key transparency requirements harmonised across all funds, which does not pre-empt tailored requirements in fund-specific regulations. It shall include that DNSH assessments and project-level environmental impact summaries must be made publicly available. Increased transparency and public participation allow granting authorities to collect information from several sources to assess funding opportunities and reduce ex post legal challenges.

13. The effectiveness of the DNSH principle will amongst others depend on **robust monitoring on a rolling basis (throughout the life cycle of an activity or measure) and enforcement mechanism**s. Non-compliance with the DNSH principle should trigger sanctions that are proportional to the severity and persistence of the non-compliance, such as mandatory corrective actions, fund suspension, repayment/recovery clauses (e.g. in the form of clawback mechanisms) and/or infringement procedures. Moreover, as *ex-ante* assessment are sometimes based on limited information, it needs to be clear how the public can submit observations, relevant information or complaints regarding the DNSH assessments.

14. To maximise the added value of the DNSH principle and the DNSH Guidance, **capacity building** on the application of the principle amongst national managing authorities, stakeholders and beneficiaries will be necessary to ensure effective and uniform application. Member States also have to reserve sufficient time, resources and expertise to conduct thorough DNSH assessments, where necessary.

3 Specific recommendations for small-scale and low impact operators

1. Small-scale and low impact operators, including small-scale low impact fishers and smallholder farmers, should not be exempted or presumed automatically compliant with the DNSH principle. At the same time, in line with Article 5 para 2 of the Performance Regulation, the DNSH Guidance should recognise the principle of **proportionality** and avoid imposing the same administrative and evidentiary burden on small, low-risk operators as on large-scale or industrial actors. The objective should therefore be not to lower the substantive DNSH standard, but to adapt the compliance pathway and evidence requirements to the scale, risk profile and likely environmental impacts of the activity. In practice, this means that the DNSH Guidance should incorporate the following safeguards:

   - **Proportionate evidence requirements**: where the activity is demonstrably low-risk, compliance could be shown through standardised checklists, predefined criteria, use of existing permits or compliance records, and reliance on publicly available environmental data, rather than requiring lengthy assessments.
   - **Targeted support and technical assistance**: simplified procedures should be accompanied by practical guidance, templates, advisory support and capacity-buildings, so that smaller beneficiaries can comply effectively without disproportionate transaction costs.

   For small-scale, low-impact fisheries, this proportionate approach should distinguish between genuinely low-impact fishing practices and activities that may still generate significant pressures on marine ecosystems. For smallholder farmers, simplification should likewise be limited to activities with demonstrably low environmental risk, such as organic farming and agroecological practices.

2. The effectiveness of a single DNSH Guidance will also depend on whether the **same substantive environmental safeguards and eligibility conditions apply consistently across the different spending instruments of the MFF**.[10] This is particularly important where the same types of activities or sectors can be financed through multiple EU funding channels. Hence, the Commission should ensure that sector-specific conditionalities and safeguards contained in individual MFF sectoral regulation, including those applicable in the context of the NRPPs, are not confined to this single implementation channel.

   This issue is especially relevant in sectors such as fisheries and agriculture, where activities may be supported not only under NRPPs, but also through other MFF instruments such as Global Europe and the European Competitiveness Fund. If certain policy areas are subject to conditionalities, limitations and safeguards according to the instrument considered, this could jeopardize the effectiveness and an equal application of the DNSH Guidance.

[10] ClientEarth, Blue Marine Foundation, Bloom Association, Seas at Risk and BirdLife Europe & Central Asia, *The next EU budget: Investing in ocean resilience and thriving coastal communities*, p. 9, January 2026.

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