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Criteria for environmentally sustainable economic activities with a special focus on the legal significance of the technical screening criteria under the EU Taxonomy Regulation

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Abstract

The present master thesis seeks to understand what is legally required to substantially contribute and do no significant harm to the environmental objectives, of the newly adopted EU Taxonomy Regulation. A particular focus was to understand the legal significance of compliance with the technical screening criteria meant to supplement the general conditions to substantially contribute and do no significant harm. The research questions of the thesis are answered using legal doctrinal research.

When examining the research question of the thesis, it was found that there exist acceptable reasons, capable of making the argument that there exists a presumption for the exhaustiveness of the technical screening criteria, in fulfilling the conditions to contribute substantially and do no significant harm. Nevertheless, this presumption merely establishes a point of departure. It was also identified several arguments, capable of challenging this presumption, demonstrating that there is more to it than that. The master thesis also examined whether its findings were applicable in Norway, and thusly within the European Economic Area, and found that there were no substantial hindrances to apply an EU-conform interpretation of the EU Taxonomy Regulation within the European Economic Area.

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List of abbreviations:

CJEU - Court of Justice of the European Union

DNSH – Do no significant harm

EUTR - European Union Taxonomy Regulation

TEU - Treaty on the European Union

TFEU – Treaty on the functioning of the European Union

Chapter I: Introduction

1.1 Background

Each year, somewhere around US$ 1 trillion is invested into fossil fuel related economic activities, despite our knowledge of the correlation between such investments and global warming. [1] Following this trajectory, the investments are anticipated to amount to US$ 20 trillion, altogether, between year 2017 and 2040. [2] This is concerning because it channels finite amounts of capital away from sustainable economic activities, over to fossil fuel related economic activities. This trend contradicts and jeopardizes the attainment of the global temperature goals set out in the Paris Agreement under the United Nations Framework Convention on Climate Change. [3] In this thesis we will have a look at one of the legal instruments established to turn this trend within the legal system of the European Union.

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2099 (hereinafter EUTR), also known as the EU Taxonomy Regulation, is a classification system, which defines what economic activities are deemed sustainable by the EU. [4] It is one out of several instruments availed by the EU in their effort to attain their climate and energy targets for 2030 and to realize the European Green deal.[5]

The European Green Deal is a tremendous policy package adopted by the EU, which pursues the goal of making Europe the first climate-neutral continent in the world by 2050. [6] It

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[1] *Michael Lazarus and Harro van Asselt, 'Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken',* Climatic Change *150, no. 1–2 (September 2018): 1–3, https://doi.org/10.1007/s10584-018-2266-3.*

[2] *Lazarus and van Asselt, 3.*

[3] *Lazarus and van Asselt, 1–3.*

[4] *'EU Taxonomy for Sustainable Activities', Text, European Commission - European Commission, accessed 25 January 2022, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en.*

[5] *'EU Taxonomy for Sustainable Activities'.*

[6] *'Delivering the European Green Deal', Text, European Commission - European Commission, accessed 18 May 2022, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en.*

comprises of several proposals targeting policy-areas such as climate; energy; agriculture; industry; environment and oceans; transport; finance and regional development; and research and innovation. [7] The policy package also contains the very first European Climate Law.[8] The European Climate Law establishes the legally binding objective of net zero emissions by 2050, cf. Article 2 (1). It also establishes a legally binding intermediate goal of minimum 55% net reduction of greenhouse gas emissions by 2030 compared to 1990 levels, cf. Article 4. To attains these climate-goals the EU Commission estimates that approximately an extra 260 billion EUR per annum needs to be invested into sustainable economic activities. [9] This number cannot be achieved by the public sector alone. [10] In this regard, the EUTR plays an essential role in encouraging private investors to channel their investments into sustainable activities.

The EUTR is, together with the Non-Financial Reporting Directive and the Sustainable Finance Directive, first and foremost a transparency tool, seeking to ensure mandatory disclosure of companies' environmental performance. [11] [12]

However, the EUTR may be used in other ways as well. For instance, sustainability-oriented investors may use it to inform their selection of sustainable investments. [13] This could give

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[7] *'A European Green Deal', Text, European Commission - European Commission, accessed 18 May 2022, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.*

[8] *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).*

[9] *'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS The European Green Deal' (2019), chap. 2.2, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX%3A52019DC0640.*

[10] *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS The European Green Deal, chap. 2.2.*

[11] *'FAQ What Is the EU Taxonomy and How Will It Work .Pdf', 1, accessed 25 January 2022, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-taxonomy-faq_en.pdf.*

[12] *'FAQ What Is the EU Taxonomy and How Will It Work .Pdf', 8.*

[13] *'FAQ What Is the EU Taxonomy and How Will It Work .Pdf', 8.*

sustainable companies an edge – or vice versa a disadvantage - when competing for capital from sustainability-oriented investors.

In a broader legal perspective, the classification system could also be used to inform the interpretation of other legal provisions, in which "sustainability" or "sustainable development" in one form or another appears as a condition in relation to an economic activity. At least within EU investment law.

Hence, having a thorough understanding of what is legally required to be considered "sustainable" under the EUTR should be of the utmost interest for everyone subject to its scope of application or to anyone else in other ways affected by it.

To start, the EUTR differentiates between three types of economic activities, that can be deemed sustainable. First, it defines "environmentally sustainable" or "green" activities, as activities that substantially contributes to the environmental objectives of the EUTR in and of itself. Second, it defines "transitional activities". These are activities, for which no viable low-carbon options exist, and with emission levels equivalent to the best-performing average within the respective industry or sector. Third, and finally, it defines "enabling activities", as activities that directly enables "environmentally sustainable" activities. [14]

The qualifying conditions for sustainable economic activities are set out in Article 3 of the EUTR. To qualify, the activity:

1. needs to "make a substantial contribution to one or more of the [six] environmental objectives" established under the EUTR;
2. it must not "significantly harm any of the environmental objectives";
3. it must "be carried out in compliance with minimum [social] safeguards";
4. and finally, the activity must "comply with technical screening criteria", which will be codified in delegated acts by the Commission.

The latter condition regarding the technical screening criteria will be paid extra attention in this thesis. Compliance with the technical screening criteria is, on the one hand, crystalized as

[14] *'FAQ: What Is the EU Taxonomy and How Will It Work in Practice?', n.d., sec. 5.*

a separate qualifying condition in Article 3 (d) of the EUTR. At the same time, the technical screening criteria also supplements the general criteria for "substantial contribution" and "do no significant harm", cf. Article 3 letter (a) and (b). This raises the question of whether the technical screening criteria are just minimum requirements to observe or whether they play a determinative role in satisfying both conditions in Article 3 (a) and (b) as well.

Figuring out the legal significance of the technical screening criteria is therefore valuable. If we don´t know this, it will be difficult to offer advice on how to adapt to the regulation. For instance, if a company assumes the criteria are exhaustive, the most cost-effective approach will be to fulfil the screening criteria and do nothing more than that. If on the contrary, they are non-exhaustive, they should pay attention to the potential risk of violating the general conditions to (i) contribute significantly and (ii) do no significant harm, to the environment, cf. Article 3 letter (a) and (b) too. Potential consequences of such negligence could be i.e. loss of future capital from sustainability-oriented investors and spoiled efforts to become sustainable.

The EUTR is not just relevant for the Member States of the EU. For instance, Norway, is not a Member State of the EU, but party to the European Economic Area (EEA) Agreement. [15] New legal acts from the EU that are of relevance to the EEA are incorporated into the EEA Agreement and applicable in the EFTA-States as well. [16] The EU Taxonomy Regulation is considered EEA-relevant and will therefore be implemented also in Norway.[17] [18] For the purpose of understanding the potential legal implications of the EU Taxonomy Regulation in an EFTA-State, this thesis will also describe the implementation-process of the EUTR in

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[15] *'1113623-How-EU-Acts-Become-EEA-Acts.Pdf', 1, accessed 24 February 2022, https://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf.*

[16] *'1113623-How-EU-Acts-Become-EEA-Acts.Pdf', 1.*

[17] *'Prop. 208 LS (2020-2021).Pdf', 27, accessed 24 February 2022, https://www.regjeringen.no/contentassets/85b9ade4257f43a0b2ed33d0568b5fec/no/pdfs/prp202020210208000dddpdfs.pdf.*

[18] *'Innstilling fra finanskomiteen om lov om offentliggjøring av bærekraftsinformasjon i finanssektoren og et rammeverk for bærekraftige investeringer', inns, Stortinget (finanskomiteen, 10 December 2021), https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2021-2022/inns-202122-049l/?all=true.*

Norway. The analysis will also seek to reveal the potential legal implications this could have for the understanding of Article 3 outside of the EU.

1.2 Purpose and research question

The purpose of this thesis is to understand the legal meaning of the conditions to substantially contribute and do no significant harm, to the environmental objectives under the EU Taxonomy Regulation, within the European Union and the European Economic Area. It will especially focus on the legal significance and use of the technical screening criteria in understanding these two conditions. To fulfill this purpose, the following research question have been formulated:

Are the technical screening criteria under the EU Taxonomy Regulation exhaustive criteria or do they merely form part of the basis for assessing compliance with the environmental objectives set out in the EU Taxonomy Regulation?

To answer the research question, I will answer the following sub-questions.

A. What is the legal significance of the general criteria cf. Articles 10 and 11, to contribute substantially and do no significant harm to the environmental objectives, in relation to Article 3 (a) and (b) of the EU Taxonomy Regulation?
B. What are the legal arguments - for and against - the technical screening criteria being exhaustive and which of the two resulting solutions carries the most legal weight?
C. How is the EU Taxonomy Regulation implemented in Norway and are there any legal implications in terms of the interpretation of Article 3 within an EFTA-country compared to within the EU?

The role of sub-question A is to establish the general meaning of the condition to substantially contribute and do no significant harm to the environmental objectives of the EUTR. This question is asked, because the general conditions set out in Article 3 (a) and (b) of the EUTR is part of the legal basis used to adopt the delegated acts that contains the specific technical screening criteria. In other words, the general criteria establish obligatory limits and requirements for the specific technical screening criteria. If there are discrepancies between the general and the specific criteria, this could indicate the need for additional criteria to

remedy that discrepancy. Subsequently this could indicate the non-exhaustiveness of the specific technical screening criteria. Therefore, the first question seeks to understand what these outer limits and requirements are, before looking into the specific technical screening criteria and examine whether they match the general criteria or not, under sub-question B. Sub-question B, in general, seeks to identify arguments - pro et contra – for the exhaustiveness - or non-exhaustiveness - of the specific technical screening criteria based on relevant legal sources under EU law. Finally, sub-question C investigates whether the findings under sub-question A and B is applicable in Norway, which is part of the European Economic Area and subsequently the EUTRs scope of application. This will give an idea whether there are any implementation-factors that could affect the understanding of Article 3 EUTR within the EEA.

1.3 Methodology

1.3.1 Relevant legal sources

The EUTR is a legal source under EU Law. To interpret the rights, obligations and freedoms contained within the Regulation, we will have to avail relevant legal sources in the EU legal system. In the following I will explain what categories of legal sources exist under EU Law; what their legal characteristics are; how they relate to each other; and what category the EUTR sorts under.

EU Law is a hierarchical system, comprising of two main categories of legal sources, namely, primary and secondary sources. [19] Primary sources include the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – as well as annexed protocols and declarations. These primary sources hold primacy over secondary sources. [20]

Secondary sources include: (i) legislation adopted in virtue of article 288 (Regulations, Directives, Decisions, Recommendations and Opinions); (ii) case-law from the Court of Justice of the European Union (CJEU); (iii) General principles of EU Law; and (iv)

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[19] *Nicolas de Sadeleer, 'Sustainable Development in EU Law: Still a Long Way to Go',* Jindal Global Law Review *6, no. 1 (2015): 40–41, https://doi.org/10.1007/s41020-015-0009-0.*

[20] *Karen Davies,* Understanding European Union Law *(Florence, UNITED STATES: Taylor & Francis Group, 2013), 54, http://ebookcentral.proquest.com/lib/uu/detail.action?docID=1104822.*

obligations under international law.[21] These secondary sources are, as mentioned, outranked by the primary sources.[22]

Regulations shall, cf. article 288 TFEU, "have general application … [and] be binding in its entirety and directly applicable in all Member States". The EUTR is such a Regulation. This implies that the legal act has unconditional, unaltered, and EU-wide application. [23] Hence Regulations distinguishes themselves from e.g. Directives, which are merely "binding, as to the result to be achieved, upon each Member State to which it is addressed", cf. article 288 TFEU. It is useful to keep in mind this distinction between Directives and Regulations, because typically, Directives, are availed to harmonize fragmented legal rules within the EU, whereas Regulations aim at legal unity.[24] In other words, one of them develops the legal landscape through more of a "bottom-up"-approach and the other uses more of a "top-down"-approach.

1.3.2 Interpretation of written legal sources

There are numerous ways of interpreting written legal sources. The choice of interpretive technique depends on the underlying norms and values of the legal system in question and the type of legal source that we are interpreting. In the following, a rendition of the different interpretation techniques availed to infer meaning and arguments from sources, subject to interpretation in this thesis, will be presented.

A natural point of departure is literal interpretation. Meaning that we seek to obtain the ordinary meaning of the word or text in question. [25] This typically implies an immediate and self-evident understanding of the word or text. Literal interpretation sustains the rule of law-principle. This is meant in the sense that it bases itself on the express will of the legislator. It is objective, equal to all and it reduces the risk of arbitrary use of power. EU maintains that

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[21] *Davies, 54–55.*

[22] *Davies, 54.*

[23] *Davies, 56.*

[24] *Davies, 57.*

[25] *Gerard Conway,* The Limits of Legal Reasoning and the European Court of Justice *(Cambridge: Cambridge University Press, 2014), 19.*

rule of law is one of its founding values. [26] Hence, literal interpretation should play an important role.

Beyond literal interpretation, we find purposive or teleological interpretation. This technique is frequently applied by the CJEU, and therefore highly relevant in the present analysis. [27] This technique implies an interpretive process in which the observer tries to understand the legal source in alignment with its goal or objectives. This doesn´t have to conflict with ordinary meaning or discard a literal interpretation. However, it allows the interpreter to somewhat deviate from - or extend - the ordinary meaning of the text, within reason. This presuppose that the interpretation is consistent with the goal or objectives of the legal instrument.[28]

Purposive interpretation is related to another perspective of interpretation, namely, the consequentialist point of view. When assuming a consequentialist perspective, the observer assesses the legal and actual outcomes of different interpretations.[29] Interpretations that result in outcomes that are meaningless/absurd or in direct contradiction with the purpose of the provision, are deemed either weak or invalid, under this perspective.

At times we are faced with legislation or legal sources adopted a long time ago. The wordings of the text can in some instances be colored by that fact. As a remedy, an originalist interpretation might help our understanding. Originalist interpretation involves that the interpreter "situates" themselves at the time of adoption of the source and attempts to understand the intention through the lenses of the author of the source. [30] Albeit, under EU Law, historically, the CJEU have not laid down too much effort trying to interpret the original intention of the legislative parties. [31]

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[26] *Georges Abi-Saab et al., eds.,* Evolutionary Interpretation and International Law *(Hart Publishing, 2019), 318, https://doi.org/10.5040/9781509929917.*

[27] *Stephen Brittain, 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal',* Irish Jurist *55 (2016): 134.*

[28] *Conway, 20.*

[29] *Conway, 20.*

[30] *Conway, 20–21.*

[31] *Abi-Saab et al.,* Evolutionary Interpretation and International Law*, 2019, 316.*

Other times, legal instruments are perceived to be living instruments that are supposed to evolve dynamically. In that case, evolutive or innovative interpretation can be applied where the understanding is informed by the current and evolving legal environment in which the legislation exists. [32]

In the context of the EU legal system, the CJEU avail all these interpretative techniques. However, they have not consistently assigned any particular weight to any of the specific techniques.[33] Hence, they cannot be placed in a hierarchy, where e.g. the interpretation results inferred from a literal interpretation is inferior to one inferred from a teleological interpretation.

1.3.3 EU Legal Method

The EU Taxonomy Regulation is part of the corpus of EU Law. Therefore, specifically, EU legal method should be applied when interpreting the legal sources and answering the research question. In this context EU legal method is to be understood as the implicit norms, principles and values that guides legal practitioners when they identify and interpret relevant legal sources to ascertain and apply legal rules. In the EU-context, the CJEU and their legal reasoning, is the primary influencer when it comes to develop the EU legal method. In the following I will account for the different methodical traits that characterize this method.

The principle of independent and uniform application of EU legal provisions is a central starting point, which is derived from the principle of equality in EU law. [34] The former principle implies that understandings of similar concepts from national legal cultures in the Member States, like e.g. legal terminology and legal doctrine, does not carry weight within the independent EU legal system unless it is specified in the EU legislation itself.[35] [36]

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[32] *Conway,* The Limits of Legal Reasoning and the European Court of Justice*, 20–21.*

[33] *Gunnar Beck, 'The Macro Level: The Structural Impact of General International Law on EU Law: The Court of Justice of the EU and the Vienna Convention on the Law of Treaties',* Yearbook of European Law *35, no. 1 (2016): 495, https://doi.org/10.1093/yel/yew018.*

[34] *Halvard Haukeland Fredriksen and Gjermund Mathisen,* EØS-rett *(Bergen: Fagbokforl., 2014), 218–19.*

[35] *UsedSoft GmbH v Oracle International Corp, No. Case C-128/11 (ECJ 3 July 2012).*

[36] *Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker, No. Case C-320/12 (ECJ 27 June 2013).*

Furthermore, EU law should be interpreted in light of its context and purpose. [37] [38] In terms of the context-component, this has several implications. First, the legal act must be interpreted in accordance with the outer limits of the legal basis it is established from.[39] Second, it must be interpreted in light of general principles of EU law including the duty to respect fundamental rights. [40] Third, the obligations contracted by the EU under international law, is considered an integrated part of its legal system. International law can even hold primacy over EU secondary law. [41] Hence, relevant international obligations provide important contributions to the interpretation of EU law. Fourth, the recitals/preambles of legal acts as well as their history of origin can offer recourse. [42] And finally, subsequent guidance-documents developed after the adoption of the legal act, from central bodies of the EU, can be used to shed light on the content of legal norms. [43]

Regarding the purposive interpretation-component, there are several factors to observe. First, one needs to identify where the purpose is expressed. The goals and objectives of legal acts can be found in individual provisions. But they can also be found in fragmented pieces scattered across the legal act and associated sources. Because of this, effort must often be put into the interpretation of e.g. recitals of the legislative acts, EU primary law or preparatory works. [44]

In the elaboration of contextual and purposive interpretation there are certain interpretive norms worth mentioning. For one, there is a presumption that main rules in the law are more open to expansive interpretation, and that – the other way around – derogations and exceptions to the main rule are subject to a presumption of more restrictive interpretation. [45]

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[37] *Fredriksen and Mathisen, 222.*

[38] *Abi-Saab et al.,* Evolutionary Interpretation and International Law*, 2019, 316.*

[39] *Fredriksen and Mathisen,, 223–24.*

[40] *Fredriksen and Mathisen, 225–26.*

[41] *Fredriksen and Mathisen, 227.*

[42] *Fredriksen and Mathisen, 228–30.*

[43] *Fredriksen and Mathisen, 230.*

[44] *Fredriksen and Mathisen, 232–33.*

[45] *Fredriksen and Mathisen, 234–35.*

Another principle of interpretation, often referred to in CJEU case-law as "effet utile" or the "intended effect" [46], implies that in the event of multiple valid interpretations of a provision, preference should be awarded to the interpretation that contributes to the effective realization of the underlying purpose of the legal act. [47]

1.4 Limitations

This thesis will not include an analysis of Article 3 (c) EUTR, on minimum social safeguards. This is an important cumulative requirement under Article 3. It is therefore highly relevant in determining the sustainability of an economic activity. It could even be that the minimum social safeguards in part are interrelated with the requirements to substantially contribute and do no significant harm to the environmental objectives, one way or another. Nevertheless, the principal reason this requirement is not covered in this thesis, is that the technical screening criteria are not explicitly connected to it and therefore are irrelevant for the purpose of the present analysis.

The scope of the analysis will also be delimited to include only the technical screening criteria set out in the first Delegated Act [48] (hereinafter referred to as the Delegated Act) establishing technical screening criteria for climate change mitigation and adaptation. This simply has to do with the fact that the other Delegated Acts for the remaining environmental objectives has yet to enter into force. The consequence of this limitation is that not every inference drawn from this thesis can be directly applied to the understanding of the technical screening criteria set out in the successive delegated acts. Nevertheless, it is assumed that the findings of this thesis regarding the legal significance of the technical screening criteria set out in the first delegated dct has relevance for the understanding of the legal significance of technical

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[46] *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, No. Case C-537/03 (ECJ 30 June 2005).*

[47] *Fredriksen and Mathisen, 236.*

[48] *Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (Text with EEA relevance)*

screening criteria set out in successive delegated acts under the EUTR, relating to the remaining environmental objectives.

1.5 Structure

Under Chapter II, sub-question A will be examined. A description of the content of the general criteria to substantially contribute and DNSH to the climate change mitigation and adaptation objective of the EUTR is provided. Attached to this description, an analysis of the legal significance of the general criteria, in relation to Article 3 (a) and (b) EUTR, will be discussed.

Next under Chapter III, we will endeavor to answer sub-question B. In doing so we will first provide a description of Article 3 (d) EUTR and explain its relationship to the technical screening criteria. Then we will undertake a purposive interpretation of the EUTR to discuss the potential exhaustiveness of the technical screening criteria.

We will then continue the inquiry of sub-question B in Chapter IV, seeking to identify arguments, for and against the exhaustiveness of the technical screening criteria through review of general principles of EU law and the mandatory requirements of the EUTR itself.

In Chapter V, we will embark on sub-question C. In doing so we will describe the implementation of the EUTR in Norway and see if there are any implications in terms of the understanding of Article 3 EUTR or whether we can apply the findings of Chapters II, III and IV of this thesis, also in Norway and within the EEA.

Under Chapter VI, some final remarks will be provided. A summarized account of the findings most relevant to the research question of this thesis will be presented, alongside some suggestions for future research.

2 Chapter II: The general criteria of the EUTR

2.1 Substantial contribution

The first condition that needs to be fulfilled for an economic activity to be qualified as sustainable, cf. EUTR Article 3 (a), is that it "contributes substantially" to one or more of the environmental objectives set out in Article 9. This refers to the objectives of:

- climate change mitigation;
- climate change adaptation;
- the sustainable use and protection of water and marine resources;
- the transition to a circular economy;
- pollution prevention and control; and
- the protection and restoration of biodiversity and ecosystems.

The contribution needs to be made in accordance with Articles 10 – 15 EUTR, which establishes the general requirements for substantial contribution to each environmental objective. Below, I will elaborate on the general requirements for climate change mitigation and climate change adaptation, set out in Articles 10 and 11. These are the general criteria for climate change mitigation and adaptation, corresponding to the specific technical screening criteria set out in the first delegated act, which is subject to further analysis in this thesis.

2.1.1 Climate change mitigation

Article 10 (1) prescribes that a substantial contribution to climate change mitigation should be "consistent … with the temperature goal of the Paris Agreement through the avoidance or reduction of greenhouse gas emissions or the increase of greenhouse gas removals" (this is also stated in EUTR Recital 24). When referring to the temperature goal of the Paris Agreement, the EUTR refers both to the aspirational goal of limiting the temperature increase to 1,5 degrees Celsius above pre-industrial levels, and the absolute goal of keeping it well below 2 degrees Celsius compared to pre-industrial levels, cf. Article 2 (5) EUTR.

It would be reasonable to assume that compliance with the goals of the Paris Agreement represent the ultimate criterion for whether an economic activity contributes substantially to the climate change mitigation objective. That being said, the EUTR is not particularly

concrete about how and how much an activity needs to avoid, reduce or remove emissions, to attain the "substantial" threshold in general. The design of the EUTR implies that this threshold is supposed to be set by the Commission in their technical screening criteria, cf. Article 10 (3). Nevertheless, it should, in theory, be plausible to ascertain a minimum threshold based on the goals of the Paris Agreement as well.

However, the Paris Agreement itself, does not offer any conclusive guidance in terms of where to set such a threshold for a substantial contribution. The agreement merely provides that all Parties shall "prepare, communicate and maintain successive nationally determined contributions" (NDCs) stating their emission-reduction-targets and "pursue domestic mitigation measures" to deliver their NDCs, cf. Article 4 (2). In other words, each Party determine their own level of ambition in terms of how much they want to reduce and how they want to achieve it. The agreement does not provide any guidance in clear terms as to how the global burden of climate change mitigation should be shared among the Parties.

The Paris Agreement do however encourage each Party to let their NDC "reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities", cf. Article 4 (3). On the one hand, this could conduce to heighten the threshold for the EU, due to their considerable responsibility and relatively strong capability to contribute towards this objective. Yet, on the other hand, it does not provide anything more explicit on where this theoretical threshold must or should be set, other than as high as possible.

The EUTR on the other hand, at least outlines some examples on *how* substantial contributions in relation to the climate change mitigation objective, in general, can be achieved through process- and product innovations. A specified, yet non-exhaustive, list over such innovations is listed in Article 10 (1) letters (a) – (i) which includes:

a) *"generating, transmitting, storing, distributing or using renewable energy in line with Directive (EU) 2018/2001, including through using innovative technology with a potential for significant future savings or through necessary reinforcement or extension of the grid;*

b) *improving energy efficiency, except for power generation activities as referred to in Article 19(3);*

c) *increasing clean or climate-neutral mobility;*

d) *switching to the use of sustainably sourced renewable materials;*

e) *increasing the use of environmentally safe carbon capture and utilisation (CCU) and carbon capture and storage (CCS) technologies that deliver a net reduction in greenhouse gas emissions;*

f) *strengthening land carbon sinks, including through avoiding deforestation and forest degradation, restoration of forests, sustainable management and restoration of croplands, grasslands and wetlands, afforestation, and regenerative agriculture;*

g) *establishing energy infrastructure required for enabling the decarbonisation of energy systems;*

h) *producing clean and efficient fuels from renewable or carbon-neutral sources; or*

i) *enabling any of the activities listed in points (a) to (h) of this paragraph in accordance with Article 16"*

Once again, this list is not exhaustive, even though it is quite comprehensive. Other means could be applied so long as they avoid or remove greenhouse gas emissions or increase greenhouse gas removals to a substantial extent in line with the goals of the Paris Agreement. When measuring the potential mitigation-effect of a non-listed process- or product-innovation, the items listed under Article 10 (1) could serve as a natural reference for comparison. Either way, the most essential requirement is that the activity avoids, reduce, or removes greenhouse gas emissions. It is also reasonable to assume that the aforementioned theoretical minimum threshold for contribution needs to be attained, which precludes innovations resulting in minor reductions or removals of greenhouse gas-emissions compared against a hypothetical baseline.

Article 10 (2) establishes another category of activities eligible to contribute substantially to climate change mitigation. Namely, the aforementioned, transitional activities, which are those activities that are carbon-intensive, but still "supports the transition to a climate-neutral economy". Transitional activities need to fulfill three conditions to be considered sustainable under the EUTR. First, the greenhouse gas emission levels of the activity must correspond to the best performance in the sector/industry; second, the activity must not stand in the way of development and deployment of low-carbon options; and third, the activity must not lead to lock-in of carbon-intensive assets.

The third condition to avoid lock-in of carbon intensive assets also known as "carbon lock-in" refers to a "tendency for certain carbon-intensive technological systems to persist over time, "locking out" lower carbon alternatives", according to the preparatory work of the EUTR. [49] In other words, the EUTR acknowledge that there exists a temporary slot in the sustainable economy in which there is a need for transitional activities to be inserted. However, the transitional activity is only welcome if it does not function as a long-term or permanent substitute, blocking the way for low-carbon options to enter the economy.

Article 10 (3) imposes an obligation onto the Commission to develop technical screening criteria that are meant to "supplement" paragraphs 1 and 2 of Article 10, in terms of determining whether an economic activity substantially contributes and/or significantly harms the environmental objective of climate change mitigation. These are the so-called technical screening criteria, which will be examined further in Chapter III and IV of this thesis. For now, it is worth pointing out that the technical screening criteria are meant to "supplement" the general criteria of the EUTR. Semantically, this could suggest that the Commission are permitted to elaborate and add details to the meaning of the general criteria, but not to replace their core content. Implying that if it can be argued that the specific technical screening criteria contradicts the general criteria, then the general criteria should hold primacy over the specific criteria, because they are the foundational legal basis of the technical screening criteria. Not the other way around.

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[49] *'200309-Sustainable-Finance-Teg-Final-Report-Taxonomy_en.Pdf', 20, accessed 19 May 2022, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf.*

The way that the EUTR is designed could very well be reason to argue the existence of a presumption for the exhaustiveness of the technical screening criteria. The reason why, is that the general criteria set out in Article 3 (a) and (b) EUTR, cf. Articles 10 and 11, are quite overarching and vague. So vague and overarching that they are difficult to make sense of alone. The delegated power to adopt specific technical screening criteria in Article 10 (3) (and 11 (3)) manage this problem by specifying and adding detailed content to these general provisions. This system appears to be intentional and logical. If we accept the existence of such a presumption, the overarching research question of this thesis, remains more a question of whether one could challenge this presumption - or this main rule - that the technical screening criteria are exhaustive.

2.1.2 Climate change adaptation

Article 11 (1) (a) and (b) prescribes two alternative ways of achieving a substantial contribution to climate change adaptation. The first option, cf. Article 11 (1) (a), is to include adaptation solutions that either substantially reduce the *risk* of adverse impacts on the economic activity due to climate change or to substantially reduce the *actual adverse impact* on the economic activity itself, without simultaneously exposing people, nature or assets for increased risk of adverse impacts due to climate change.

Alternatively, cf. Article 11 (1) (b), the economic activity can provide an adaptation solution that contribute substantially to the prevention or reduction of risk in terms of adverse impact from the current and expected future climate on people, nature or assets – while not increasing the risk of adverse impact on people, nature and assets. In addition, the adaptation solution in question needs to comply with Article 16 EUTR. The cumulative requirements of Article 16 is that the economic activity does not (i) lead to a lock-in of assets that undermine long-term environmental goals, considering the economic lifetime of those assets, and (ii) has a substantial positive impact, on the basis of life-cycle considerations.

Article 11 (2) elaborates that the adaptation solutions, referred to in Article 11 (1), should undergo assessment and prioritization. Furthermore, as a minimum requirement, the adaptation solution must prevent or reduce location- and context-specific adverse impact on the activity itself or on the activity´s immediate surroundings.

Article 11 (3) imposes an obligation onto the Commission to develop technical screening criteria that are meant to "supplement" paragraphs 1 and 2 of Article 11, in terms of determining whether an economic activity substantially contributes or significantly harms the environmental objective of climate change adaptation. This provision is equivalent to Article 10 (3), covered above under 2.1.1. The initial comment made with respect to Article 10 (3) applies here, to Article 11 (3) as well.

The Regulation should also be interpreted consistently with the Sendai Framework for Disaster Risk Reduction 2015-2030 (see EUTR Recital 26). The Sendai Framework is an international covenant on disaster risk reduction, containing seven agreed upon targets. [50] The seven targets are to:

- "Substantially reduce the global disaster mortality
- Substantially reduce the number of affected people globally
- Reduce direct disaster economic loss in relation to global gross domestic product
- Substantially increase the number of countries with national and local disaster risk reduction strategies
- Substantially enhance international cooperation to developing countries
- Substantially increase the availability of and access to early warning systems and disaster risk information." [51]

These seven targets should therefore be taken into account when assessing the compliance of an economic activity in relation to the climate change adaptation objective.

2.2 Do no significant harm

According to Article 3 (b) EUTR, an economic activity needs to do no significant harm to the environmental objectives set out in Article 9. Article 17 establishes general criteria for

[50] *Jaroslav Mysiak et al., 'Brief Communication: Sendai Framework for Disaster Risk Reduction – Successor Warning Sign for Paris?',* Natural Hazards and Earth System Sciences *16, no. 10 (30 September 2016): 2189–90, https://doi.org/10.5194/nhess-16-2189-2016.*

[51] *Mysiak et al., 2190.*

significant harm for each respective objective. The assessment should be based on life-cycle assessments of the products and services provided for by an economic activity.

Article 17 (1) (a) provides that an economic activity should be considered to do significant harm to the environmental objective of climate change mitigation, if the activity "leads to significant greenhouse gas emissions". Similarly, Article 17 (1) (b) provides that an economic activity should be considered to do significant harm to the environmental objective of climate change adaptation, if the activity "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".

It would appear that Article 17 a and b, essentially are dichotomies of Article 10 and 11. Much like Articles 10 and 11, these provisions are overarching and vague on the activity-level – as they do not state concretely how much harm is required to constitute "significant harm". The details on what constitutes significant harm is sought provided for, through specific technical screening criteria, cf. Articles 10 (3) and 11 (3).

In Article 17 (2) it is emphasized that the criteria set out in paragraph 1, should be based upon a life cycle assessment of the environmental impact from both the activity itself and the products and services derived from it, considering their "production, use and end of life". The concept of life-cycle assessments of the environmental impacts of economic activities is essential to the design of the EUTR. The implications of this concept will be discussed further under 4.2.7 below.

2.3 Tentative summary

In Chapter II we have ascertained the outer limits and requirements established by the general criteria of the EUTR. These are limits and requirements that the technical screening criteria in the Delegated Act needs to respect and abide by. The room to maneuver within these limits are however wide, as the general criteria can be characterized as overarching and vague requirements.

Given the design of the EUTR, with vague and overarching general criteria and specific technical screening criteria, providing essential elaboration to the former, it could be reason to ascertain the existence of a presumption for the exhaustiveness of the technical screening criteria.

3 Chapter III: The specific criteria in light of their purpose

3.1 The technical screening criteria

3.1.1 Analysis of Article 3 (d)

Article 3 (d) prescribes that the economic activity needs to comply with technical screening criteria that have been established by the Commission. These technical screening criteria are based on the general criteria set out in Articles 10 - 16. They should also comply with Articles 17 and 19 of the EUTR. These mandatory requirements for the technical screening criteria will be analyzed further under 4.2 of this thesis.

The technical screening criteria for the climate change mitigation and adaptation objectives, are set out in Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021, [52] Annex I in the Delegated Act enumerates nine categories of economic activities with associated technical screening criteria. Also contained within Annex I of the Delegated Act, are sub-annexes A – E, which contains generic criteria for "do no significant harm" (DNSH) to four different objectives and technical specifications for water appliances.

The technical screening criteria are fixed in many forms to satisfy the requirements set out in article 19 of the EU Taxonomy Regulation. They are, or at least should, be set as: quantitative thresholds or minimum requirements; as relative improvements; as sets of qualitative performance requirements; as process or practice-based requirements; or as precise descriptions of the nature of economic activities with sufficient environmental performance (see Recital 3 of the Delegated Act).

As previously covered under 2.1.1 and 2.1.2, these technical screening criteria also supplement the content of the general criteria to substantially contribute and DNSH to the environmental objectives, cf. Article 3 (a) and (b).

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[52] *'Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (Text with EEA Relevance)', 442 OJ L § (2021), http://data.europa.eu/eli/reg_del/2021/2139/oj/eng.*

3.1.2 Two legal solutions

One plausible interpretation of Article 3 of the EUTR, read in conjunction with articles 10 (3), 11 (3) and 17 thereof, is that compliance with the technical screening criteria alone is sufficient to qualify an economic activity as sustainable. In other words, that the technical screening criteria are self-standing qualifying criteria.

Yet, another plausible interpretation is that compliance with the technical screening criteria is a separate condition, which fulfillment of, has no decisive bearing for the fulfillment of Article 3 (a) and (b). In other words, that the criteria form the cumulative yet non-exhaustive basis for an assessment of whether an economic activity contributes substantially, and/or DNSH to the environmental objectives cf. letter a and b.

Below, this issue will be closely examined using purposive interpretation of the EUTR and seeking answers in other rules and principles of EU Law, including the EUTR itself.

3.2 Purposive interpretation of Article 3

The overall purpose of the EUTR is to ensure the functioning of the internal market that works for the sustainable development of Europe. Hence the EUTR is instrumental in attaining both the climate and energy targets of the Union as well as their sustainability-ambitions laid down in the "European Green Deal" (see Recital 1-2 of the EUTR).

According to the EUTR, achievement of these overarching goals, implicitly presuppose the achievement of several supporting sub-objectives. Below, an explanation of said supporting objectives will be provided. Attached to this teleological analysis of the EUTR-objectives, arguments, pro et contra, for the exhaustiveness of the technical screening criteria, will be discussed.

3.2.1 Effective functioning of the Internal market

The perhaps most prominent objective under the EUTR, is the harmonization of sustainability criteria across borders within the EU for the sake of the *effective functioning of the internal*

market (see Recitals 1, 9 and 12 of the EUTR). The integration of the European economies into one single market by removing barriers to the free movement of goods, capital, services and labor and establishing common rules between European States, is a cornerstone policy of the EU, which is anchored firmly in Article 26 TFEU. [53]

This objective is also viewed as crucial to fulfill the objective of sustainable development within the EU. Removal of barriers to the free movement of capital is necessary to promote investor confidence in sustainable investments and create credible sustainability-labels for comparison of products and services, within the EU as a whole (see EUTR Recitals 12 - 14). With reference to the EUTR and the research question of this thesis, the question is whether additional and variable sustainability-criteria - beyond the technical screening criteria - has an effect conducive to inhibit or reduce the free movement of the fundamental freedoms, in any way or to any extent.

It would not seem likely that additional and variable criteria would fundamentally hinder the free movement of capital as such. The EUTR and the associated rules on sustainable finance merely impose disclosure requirements, unapt to fully hinder free movement. However, as pointed out in Recital 11 of the EUTR, the use of different classification systems for sustainability in different Member States could discourage cross-border investments, which again is detrimental to the aim of financing sustainable development. Hence, applying additional and variable sustainability-criteria, when determining the sustainability of an economic activity within one Member State or a group of Member States, could intervene with the effective functioning of the internal market, at least to some extent.

Given the importance of internal market considerations under the basic Treaties of the EU, this notion could provide a strong argument in favor of the exhaustiveness of the technical screening criteria.

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[53] *Christos Genakos and Michael Pollitt, 'Introduction to the Special Issue in "Celebrating 25 Years of the EU Single Market"',* Review of Industrial Organization *55, no. 1 (August 2019): 1, https://doi.org/10.1007/s11151-019-09690-w.*

3.2.2 The notion of Unity

In their communication of 8 March 2018, the Commission stressed the importance of a "unified classification system for sustainable activities". The aim of this system is to reorient capital flow towards sustainable development (see EUTR Recital 6). This accentuates the implicit goal of creating a homogenous understanding of what sustainable economic activity is, using a common set of criteria, including the technical screening criteria. This notion of unity could also be considered interrelated to the aim of avoiding fragmentation of the internal market, as discussed under the previous sub-heading. Underpinning the notion of unity with the aim of ensuring the effective functioning of the internal market could add to its legal significance – given the latter objective´s importance in EU law and foundation in Article 26 TFEU.

Using a complete set of technical screening criteria would, legally speaking, be an effective method to ensure such unity and prevent variable applications of the EUTR. This could be one argument in favor of the exhaustiveness of the technical screening criteria. Since, otherwise, if variable and non-codified criteria were to be implied, this could contradict the idea of unified understanding as opposed to a fragmented understanding.

Broadly speaking, even the selection of "Regulation" as the preferred legal act under Article 288 TFEU could be of interest in the present analysis. Seeing as Regulations are generally applicable in all Member States and binding in their entirety, they are - as pointed out in literature - often the preferred legal act, when legal unity is the desired outcome. [54] This could indicate the legislative intention of establishing strong consistency in the codified sustainability-criteria within the Union.

3.2.3 Coherence with existing policy and law

The technical screening criteria should also be consistent with minimum requirements laid down in other Union Law (see EUTR Recital 40). Thus, ideally, the criteria should be consistent with the entirety of EU law besides the internal unity within the regulation itself.

[54] *Davies,* Understanding European Union Law*, 57.*

This notion is reaffirmed in Article 19 (1) (d) which seeks to ensure that the EUTR is compatible and coherent with other pieces of EU law and policy.

The technical screening criteria should also build on "best practices, standards and methodologies developed by internationally reputed public entities … [or in lack of viable alternatives] well-established standards developed by internationally reputed private bodies" (see Recital 5 of the Delegated Act). It would therefore appear as if the legislator has put down a comprehensive effort to cover all bases and adopt all scientific points of reference to the concept of sustainability, to make the legal framework consistent and comprehensive.

This broad approach will likely make the technical screening criteria robust, as it accounts for almost every conceivable legal and scientific input on the issue of sustainability. This assumption is based on the simple logic that, the more legal and scientific perspectives reflected in the technical screening criteria, the lesser is the risk of receiving objections based on excluded legal or scientific grounds. This notion could make it harder to challenge the unified criteria with reference to additional and variable criteria, as the technical screening criteria already covers most of them. This could be argued in favor of the exhaustiveness of the technical screening criteria.

3.2.4 Greenwashing

Another important objective is to "enhance investor confidence and awareness of the environmental impact of … financial products or corporate bonds, to create visibility and to address concerns about "greenwashing."". Greenwashing is defined in this instance as "the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met.". To achieve these objectives, the need for *uniform* criteria is once again emphasized as a solution to this problem (see EUTR Recital 11).

From the above we can infer that heterogenous criteria, as opposed to uniform criteria, implies increased risk of greenwashing. Uniform criteria could prevent or reduce such a risk. It can also enable competent authorities to address actors that greenwash their economic activities. On the one hand, this could be used to argue the position that the technical screening criteria should be interpreted as exhaustive criteria. Because additional and variable

criteria within different jurisdictions would depart from the notion of uniformity within the EU, which is viewed as an effective remedy against greenwashing (see EUTR Recital 11). On the other hand, assuming a more consequentialist point of view, delimiting the sustainability-assessment to static technical screening criteria, could increase risk of greenwashing in a more dynamic extra-legal sense. What is meant with extra-legal sense, in this context, is definitions of sustainability from other disciplines than that of law. This could either be within one singular discipline, e.g. ecology, or it could be multidisciplinary definitions combining inputs from several disciplines.

3.2.5 Conflicting definitions of sustainability

Conflicting definitions of sustainability, stemming from other disciplines, could provide other criteria, that are either more stringent or more lenient than what is prescribed by the technical screening criteria of the EUTR. It is legally problematic if the sustainability-criteria in the Delegated Act are not aligned with the best available scientific knowledge. Because it could cause uncertainty as to whether the technical screening criteria actually ensures a substantial contribution and DNSH to the environmental objectives cf. Article 3. In that case the EUTR would risk its credibility as a gold standard for qualifying sustainability - and potentially jeopardize its overarching objective of actually ensuring sustainable development.

In the draft of the Delegated Act it was established that during the consultations prior to the adoption of the Delegated Act, there were polarization between those who believed that the proposed technical screening criteria were too ambitious to manage and those who believed it was too lenient to be effective.[55] This illuminates the situation in which some, believe that the technical screening criteria are conducive to abate greenwashing - based on a firm belief in comprehensive, binding and unified systems. Whereas other stakeholders, who assumes a critical external point of view, believe that the same system, due to its lenient ambitions, can

[55] *'COMMISSION DELEGATED REGULATION (EU) …/... 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 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' (202AD), sec. 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:C(2021)2800.*

contribute to sustain the issue of greenwashing. In other words, they construe the very legal system itself as the "greenwasher", so to speak.

Although these considerations, regarding inefficient regulation, perhaps should be characterized as external and critical considerations of the legislation, belonging to legal sociology or similar disciplines, this does not necessarily mean they are legally irrelevant.

3.2.6 Reconciliation of conflicting definitions of sustainability

In Recital 38 of the EUTR, the two-sided nature of sustainability is acknowledged. Both the static legal construct, based on legal criteria in the EUTR, and the more dynamic scientific concept, which develops in parallel to the legal concept, with the accumulation of scientific evidence and technological change. The latter definition represents, in lack of better words, "actual sustainability" and the former, "legally constructed sustainability". These at times converging - and at times conflicting - understandings of sustainability are sought reconciled through regular revisions of the criteria cf. Article 19 (5). Through this revision-process it is possible to account for the ever-changing, at times subjective, and dualistic concept of sustainability to some extent.

On the one hand this continuous revision-process could be argued to underpin the exhaustiveness of the technical screening criteria. First, because it accounts for legal foreseeability. The stakeholders affected by the Regulation can identify and apply relevant criteria to their activities and safely assume they comply with the regulation. Second, it captures the dynamics of the sustainability-concept. As our knowledge about impacts of economic activities - on environmental, social and economic factors - progressively accumulates, so does our understanding of what is sustainable. Hence, it will never be practicable to have a static set of criteria to regulate something that is both dynamic and reacts in non-linear ways to anthropogenic actions. To respond to such a challenge, the best way to legally operationalize such rules, would appear to be through adaptive mechanisms and revision-cycles. This would support the understanding that the technical screening criteria should be exhaustive, even though they inevitably will be outdated from time to time.

Yet, the aforementioned review-mechanism could also be used to argue for the non-exhaustiveness of the technical screening criteria. Because it firmly establishes the aim of

promoting and adopting actual sustainability into the technical screening criteria, in line with developments in science, technology, markets and in policy (see Recital 58 of the Delegated Act). This could be construed to mean that outdated screening criteria should not necessarily carry weight if there is conclusive scientific evidence that the current technical screening criteria do not support actual sustainability. Because that is the very aim of the criteria and the EUTR, regardless of whether they are codified appropriately at the time.

3.2.7 The aim of being up to date

Cf. EUTR Article 19 (5), the Commission shall "regularly review the technical screening criteria". However, no specific frequency for when and how often to perform this review procedure is set for activities in general.

The same provision does nevertheless fix a minimum review cycle of three years for transitional activities cf. Article 10 (2). Although this doesn´t provide answers on how often technical screening criteria for "green" or enabling activities should be reviewed, it could perhaps provide benchmarks useful to assess what "regularly review" entails in general.

The absence of set timeframes for review of the technical screening criteria is problematic. Choosing when and how often to do it, appears to be a decision based on discretion as it is regulated now. It is difficult to assess the timeliness of the review-cycle and whether it is sufficient to avoid *de facto* greenwashing through the technical screening criteria.

The issue of revision-frequency is cause for concern with respect to the EUTR and its credibility in terms of greenwashing and its ability to channel sustainable investments in time. Because it permits the Commission to review the technical screening when it suits them, even though the need for a revision of the criteria may be more urgent. Hence, circumventing the technical screening criteria or adding additional criteria in virtue of Article 3 (a) and/or (b), could be a necessary evil, to ensure compliance with the environmental objectives. If so, this could be argued in favor of the technical screening criteria being non-exhaustive.

3.2.8 Legal clarity

It is also an aim of the regulation to avoid compliance costs on economic operators. The technical screening criteria should therefore be "practicable and easy to apply" to "provide for sufficient legal clarity" as it is stated in Recital 47 of the EUTR. Article 19 (1) (k) EUTR, reaffirms that the technical screening criteria shall "be easy to use and set in manner that facilitates the verification of their compliance". Legal clarity also plays an important role, in sustaining the rule of law and ensuring legal certainty, which the EU legal system has at its core, cf. Article 2 TEU.

Based on the notion that the technical screening criteria should ensure legal clarity and be easy to apply, the criteria should ideally be exhaustive in nature. Because, reading "between the lines" and inferring additional criteria from other sources than the EUTR and the Delegated Act, to determine whether an economic activity qualifies as sustainable, is not in line with this notion.

Therefore, ideally, an observer of the EUTR should be able to read the Regulation and the technical screening criteria of the Delegated Act - and be able to derive their legal rights, obligations and freedoms from it, based on its face value. Hence, this could be argued in favor of the exhaustiveness of the criteria. Because exhaustive and palpable criteria could abate or at least reduce doubts concerning the content and extent of the legal obligations contained within the EUTR. Thus, ensuring a degree of legal clarity.

Strict requirements in terms of legal clarity lowers the threshold for what can be accepted when applying vague and ambiguous legal sources in a case. Hence, if the requirement is strict, this would favor an exhaustive enumeration of detailed and precise technical screening criteria. The other way around, if we presuppose a lenient requirement in terms of legal clarity for the technical screening criteria, the room to include additional and variable criteria beyond what is prescribed in the Delegated Act, increases. However, it is unclear what constitutes "sufficient legal clarity" under the EUTR.

Case in point, it is self-evident that the sustainability-criteria will require a substantial level of technical detail which is difficult to present textually in a concise, intuitive and clear manner to "ordinary" people. Recital 11 of the Delegated Act even states that, some of the technical

screening criteria require expert-help to be properly understood and measured. This will likely make the criteria less available to most people and companies. For these reasons, it seems reasonable to assume that when the EUTR states that, the technical screening criteria are meant to provide "sufficient legal clarity", this is not meant in the sense that an ordinary person without appropriate qualification should be able to understand it. Rather, it would seem reasonable to assume that they must be ascertainable, first and foremost for professionals with appropriate qualifications. This, however, does not necessarily imply that the technical screening criteria should be viewed as non-exhaustive. It would still be reasonable to assume that the technical screening criteria could be comprehensive enough to allow, for qualified actors, to assess the sustainability of an economic activity based on the technical screening criteria´s face value.

According to Recital 4 of the Delegated Act, the technical screening criteria should "ensure that economic activit[ies] makes a positive impact on the climate objective or reduces negative impacts on the climate objective" and "specify the minimum requirements that the economic activity should meet in order to qualify as environmentally sustainable". Hence, they should be able to provide in clear and complete terms what the minimum-requirements are, so that professionals within their respective fields, can ascertain the fulfillment of each criterion. This could imply that the criteria are exhaustive, because they are to ensure positive impacts and prevent negative impacts by setting these minimum requirements. In other words, the significance and reach of these criteria are quite extensive, if they are molded as intended by the legislator.

3.2.9 Exclusion of fossil fuel energy sources

There are also indications that the EUTR contains a principle of exclusion of fossil fuel energy or at the very least, an internal logic. This is expressed in several elements of both the EUTR and the Delegated Act.

According to Article 10 (2) EUTR, transitional activities that conduce to phase out emissions from solid fossil fuels, are deemed particularly apt to support the transition to a climate-neutral economy. Antithetically, this would suggest that fossil fuel energy-related activities conflicts with this objective. Furthermore, in Article 19 (2) EUTR, it is provided that the technical screening criteria are to "ensure that power generation activities that use solid fuels

do not qualify as environmentally sustainable economic activities". Based on this, it would seem reasonable to argue that activities that in any way enables the use of solid fossil fuel for power generation, should be deemed unsustainable as well. Otherwise, it would contradict the underlying logic of 19 (2), which would seem to be the exclusion of solid fossil fuels.

Moving on to the Delegated Act, it is provided in Recital 35, that in order to "ensure that the transport activities considered sustainable do not facilitate the use of fossil fuels, the technical screening criteria for the relevant activities should exclude assets, operations and infrastructure dedicated to transport of fossil fuels". This notion manifests in Annex I of the Delegated Act in which the phrase, or a version of the phrase, "not dedicated to transporting fossil fuels" is repeatedly used in the technical screening criteria for vessels and vehicles. See for example, Section 3.3 and Section 6.2 of Annex I in the Delegated Act.

Similarly, with respect to technical screening criteria for infrastructure and buildings, the phrase, or a version of the phrase, "not dedicated to extraction, storage, transport or manufacture of fossil fuels", is used frequently. Examples of this can be found in Sections 6 and 7 in Annex I of the Delegated Act. Also, in relation to the technical screening criteria for so-called "Professional, scientific and technical activities" in Section 9 of Annex I, it is a recurring phrase that the activity should not be "undertaken for the purposes of fossil fuel extraction or fossil fuel transport". A final example can be found in relation to the technical screening criteria for "Financial and insurance activities" in Section 10.1. In the criteria for substantial contribution, it is stated that the activity cannot "include insurance of the extraction, storage, transport or manufacture of fossil fuels or insurance of vehicles, property, or other assets dedicated to such purposes".

In other words, the EUTR and the Delegated Act poses quite comprehensive legal hindrances for several economic activities that are associated with fossil fuel energy production. Both activities that directly use or produce fossil fuel energy; and, activities that enables the production and use of fossil fuel energy, are among the excluded activities. It is nevertheless not indubitably ascertainable whether it exist a general principle against similar activities. On the one hand, if the legislators behind the EUTR wanted a general principle of exclusion for all fossil fuel related activities, they could have made so abundantly clear in the requirements for the technical screening criteria. Instead, they have enumerated criteria excluding specific types of economic activities that support the production and use of fossil fuel.

On the other hand, there are arguably enough indications to establish an internal logic within the EUTR, to the effect that any activity that is necessary in enabling the production and/or use of fossil fuel energy should be excluded from the list over sustainable activities. If for instance, vessels that are dedicated to transporting fossil fuel, is unable to qualify as environmentally sustainable [56], then by analogy, an offshore wind farm providing an oil platform with electricity to its production, should not be able to qualify either. In its current state, the technical screening criteria for "electricity generation from wind power"[57] contains no value chain considerations like those applicable to manufacture of low carbon transport technologies. The technical screening criteria for wind power does not explicitly preclude the option of transmitting electricity to i.e. oil platforms or coal powerplants. Neither does the technical screening criteria for other economic activities that are generating clean energy. This would imply the possibility that an economic activity producing clean energy could enable the production of fossil fuel energy and still be deemed environmentally sustainable, if we presuppose that the economic activity in isolation comply with the technical screening criteria for that activity and that they are exhaustive.

If we presuppose the existence of a principle of exclusion of fossil fuel, with normative effect, then it could be applied to e.g wind power generation activities supplying fossil fuel production facilities with electricity, and deem them not sustainable, even though they, in isolation, comply with the technical screening criteria. This would in essence mean that the technical screening criteria are not exhaustive.

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[56] *Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (Text with EEA relevance), Annex I, Section 3.3.*

[57] *Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (Text with EEA relevance), Annex I, Section 4.3.*

3.2.10 Tentative summary

Above, arguments for and against the exhaustiveness of the technical screening criteria is discussed in light of the different purposes, that the EUTR is meant to serve. As one can tell, the arguments does not exclusively support either of the solutions.

If we were to group and sort the different aims and purposes. discussed above, into overarching categories, we could split them into one category for aims supporting *single market considerations* and another for those supporting *environmental considerations*. As shown in the discussions, some of these aims and purposes could be sorted under both, causing a certain overlap. It could nevertheless be useful to group them into these categories to illuminate some of the principal differences between the different arguments.

The single market considerations, consisting of inter alia, the notion of unity, policy coherence, anti-greenwashing - support the intention of having strong consistency when it comes to sustainability-criteria. These aims are conducive to the removal of barriers to the free movement of capital and establishing common rules for the Member States of the EU - thusly ensuring the effective functioning of the internal market, cf. Article 26 (2) TFEU. The arguments derived from these purposes could be used to substantiate the claim that the technical screening criteria are exhaustive in nature. Although, as one can see, they can also support the solution that they are non-exhaustive. So even though single market considerations perhaps appear to favor the solution that the technical screening criteria are exhaustive, this can hardly be characterized as a certainty.

On the other side, we have the environmental considerations. These considerations may challenge the acceptability of technical screening criteria on environmental grounds, scientifically as well as legally. These considerations may appear to favor the non-exhaustiveness of the technical screening criteria. I.e. technical screening criteria that acknowledge economic activities that indirectly support fossil fuel use and production, as sustainable, can hardly be accepted on environmental grounds. It can also be mentioned that the constructed dichotomy between single market considerations and environmental considerations is not absolute either and oftentimes we see that the two provides aligned solutions.

It is difficult to ascertain which of the two categories carries the most legal weight with respect to the understanding of the EUTR. On the one hand it would appear as the single market considerations has a stronghold, because the EUTR is adopted on the basis of Article 114 TFEU, which is a legal basis intended primarily to ensure the functioning of the internal market. On the other hand, it is obvious - and impossible to ignore - that the core aim of the EUTR is to integrate and ensure effective environmental protection to deliver the European Green Deal. Otherwise, it is questionable whether the Regulation would come to be at all, if not for the environmental aspects. The EUTR also affirms that the effective functioning of the internal market, sustainable development and environmental protection, are interrelated objectives (see Recitals 1, 9 and 12 of the EUTR). Whether the single market considerations or the environmental considerations ranks the highest - or whether the two stands on equal footing - is therefore somewhat unclear.

4 Chapter IV: The specific criteria in relation to EU Law

4.1 The technical screening criteria in relation to the general principles of EU Law

4.1.1 Integration principle

Cf. Article 11 TFEU, "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union´s policies and activities, in particular with a view to promoting sustainable development".

The integration principle has at least three types of legal implications. First, it implies that environmental protection measures may be adopted on other legal grounds than that of environmental policy, namely Article 192 TFEU. [58] Second, it implies that environmental requirements may be integrated into sectoral policy and law based on other legal bases than Article 192 TFEU. In example, public contract holders may adopt environmental requirements when awarding public service contracts, even if the applicable legislation doesn´t explicitly permit them to do so. [59] Third, the principle may function as a bridging component to challenge the legal validity of a legal act based on environmental concerns, as it enables the application of the environmental principles set out in Article 192, even if the legal act is adopted on another legal basis which pursues other Union objectives than that of the environment. [60]

The principle of integration, thusly, permits the application of environmental principles of EU Law onto the interpretation of the EUTR. This, even though it is adopted on the basis of Article 114, which is not primarily a legal basis intended for environmental protection.

4.1.2 Sustainable development

The principle of sustainable development was introduced at the world stage in 1992 at the United Nations Conference on Environment and Development in Rio De Janeiro.[61] The

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[58] *David Langlet and Said Mahmoudi,* EU Environmental Law and Policy *(Oxford: Oxford University Press, 2016), 60–61, https://doi.org/10.1093/acprof:oso/9780198753926.001.0001.*

[59] *Langlet and Mahmoudi, 61.*

[60] *Langlet and Mahmoudi, 61.*

[61] *de Sadeleer, 'Sustainable Development in EU Law', 42.*

World Commission on Environment and Development defined the principle in their report, as "development that meets the need of the present without compromising the ability of future generations to satisfy their own needs". [62] This component of intergenerational equity is an important feature of the principle of sustainable development.

In the same report the World Commission pointed out three interrelated dimensions of sustainable development. Namely, (i) the economic, (ii) the environmental and (iii) the social dimension which forms the basis of the sustainability-principle. [63] Awareness of the three dimensions and their relationship between one another is important because they often represent competing interests that needs to be weighed up against each other or reconciled.

In the EU, sustainable development was introduced in the Fifth Environmental Action Programme and were continued in the two succeeding programs thereafter. [64] Today the principle of sustainable development is one of constitutional nature as it is codified as an objective in article 3 (3) TEU. [65] The provision states that the Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment". This reflects the sentiment that balancing the three interdepending dimensions (environmental, social and economic) is a necessity to achieve sustainable development.

The sustainable development principle should be interpreted in light of the principle of integration set out in Article 11 TFEU [66]. In virtue of Article 11 TFEU, the sustainable development principle becomes an overarching and sector-neutral objective of the Union. It also underpins the idea that environmental, social and economic factors are intertwined and requires mutual integration in all policies and activities of the Union. The link between

[62] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 42.*

[63] *Langlet and Mahmoudi, 42.*

[64] *Langlet and Mahmoudi, 43.*

[65] *Langlet and Mahmoudi, 43.*

[66] *Langlet and Mahmoudi, 43.*

sustainable development and the principle of integration is further reinforced in the Charter of Fundamental Rights Article 37. [67] [68]

In EU Law, sustainable development enjoys status as a legal principle. [69] However, it is doubtful whether the principle holds the same rank and influence as other general principles of EU law, like for instance the principle of proportionality and subsidiarity.[70]

The Treaties establish what should be the basis of sustainable development (environmental, social and economic considerations). That being said, they are not particularly concrete about what the legal content of the principle of sustainable development is in the EU-context. Hence, it is difficult to derive any concrete obligations from the principle given the way it is codified in the basic Treaties. Therefore, elaboration on the concrete implications of the principle must be sought elsewhere.

In their Conclusion to the Strategy for Sustainable Development in the EU of 2001, the European Council defines sustainable development as "meeting the needs of the present generations without compromising those of future generations". In other words, reaffirming the underlying principle of inter-generational equity, which forms an integral element of sustainable development.[71] Interestingly, this particular element of sustainable development is not reflected in the Treaty-articulation of the principle, see Article 3 (3) TEU.[72] In addition, the strategy entails a procedural element, instructing decision-makers to identify and consider environmental, social and economic impacts of their decisions. In doing so, they should consider such impacts both within and outside of the EU. [73] This procedural element is perhaps, by far, the most concrete legal implication of the principle in EU law.

When arguing for and against the exhaustiveness of the technical screening criteria, the principle of sustainable development doesn´t really offer much concrete guidance one way or

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[67] *Langlet and Mahmoudi, 43.*

[68] *de Sadeleer, 'Sustainable Development in EU Law', 45.*

[69] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 43.*

[70] *de Sadeleer, 'Sustainable Development in EU Law', 48.*

[71] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 44.*

[72] *de Sadeleer, 'Sustainable Development in EU Law', 48.*

[73] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 44.*

the other. It does, however, point to where the relevant sources of arguments may be found. It also refers to a theoretical balance between economic, social and environmental factors that are to be achieved, in which each factor holds the same value. If it can be demonstrated that the technical screening criteria in relation to an economic activity, disproportionately emphasizes the importance of one of the three dimensions, then the principle of sustainable development could be evoked, to argue the inclusion of additional criteria that balance out the imbalance. Hence, the principle offers a potential argument against the exhaustiveness of the technical screening criteria.

4.1.3 A high level of environmental protection

Closely related to the principle of sustainable development, is that of a high level of environmental protection. In accordance with Article 3 (3) TEU, the Union "shall work for … a high level of protection and improvement of the quality of the environment". Specifically, for environmental policy, the principle is reiterated in Article 191 (2) TFEU.

The legal significance of the principle has proven substantial in CJEU case-law. One example of this, was *Sweden v. Commission,* in which the court assessed the validity of a Commission Directive that classified paraquat, which is a toxic fast-acting herbicide, as an allowable substance under the Directive in question. [74] The court decided, based on inter alia infringement of the principle of high level of environmental protection, to annul the act in question. [75] Based on the foregoing, we know that infringement of the principle – at least together with other legal bases - can have significant legal implication on the validity of legal acts.

Hence, it could have relevance in relation to the validity of provisions of the EUTR or the technical screening criteria in the Delegated Act. Next question is, therefore, what is required to satisfy the "high level"-threshold, legally speaking.

The threshold for what qualifies as a "high level" is quite unclear. In literature, a relativistic interpretation of the threshold is suggested, in which the most ambitious environmental

[74] *Kingdom of Sweden v Commission of the European Communities, No. Case T-229/04 (GC 11 July 2007).*

[75] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 50.*

standards set out in national legislation and policy, in Member States, serves as a benchmark for comparison. [76]

This would imply that national legislation within Member States with stricter environmental protection requirements than what is provided for by the EUTR could serve as a basis to relativize and ascertain what is an adequate level of environmental protection. With respect to the technical screening criteria, these may be considered below the high level of environmental protection if, inter alia, they are more lenient than environmental protection requirements set out in Member States´ domestic legislation. In other words, this could be an argument in favor of viewing the technical screening criteria as non-exhaustive. Because the principle establishes a general and dynamic requirement for the EUTR to ensure a sufficient degree of environmental protection, which is fit for legal review by the CJEU.

On the other hand, having a uniform set of rules with a relatively high - albeit not the highest-level of environmental protection - that instead ensures a high degree of participation, could plausibly offer a high level of environmental protection due to its share compliance rate across the Union. However, this argument is weakened by the fact that it is not legally sanctioned as an approach apt to achieve a high level of environmental protection by the EU legislation itself. It is more of a pragmatic perspective than a legal argument. Its legal persuasion is therefore doubtful.

Furthermore, when establishing the threshold of "high level" under the principle of high level of environmental protection, one should also avail the best scientific information available. This is based on the CJEU´s findings in *Pfizer Animal Health SA v Council of the European Union*, in which they interpreted a similar concept of "high level", found in Article 169 TFEU regarding consumer protection. [77] The CJEU stated that the Union shall "ensure that their decisions are taken in light of the best scientific information available and that they are based on the most recent results of international research". [78] Although the aforementioned case-law revolves around provisions concerning consumer protection, the findings are relevant in our case, in that they offer guidance in terms of where to look for bases when establishing a "high

[76] *Langlet and Mahmoudi, 50.*

[77] *Pfizer Animal Health SA v Council of the European Union, No. Case T-13/99 (GC 11 September 2002).*

[78] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 50–51.*

level"-criterion found in the basic Treaties. The EUTR and the technical screening criteria should therefore base themselves upon the best scientific information and ensure that they are based on the most recent results of international research to ensure they are in line with the principle of high level of environmental protection.

In light of this, there is an opening to argue that the technical screening criteria are *de facto* insufficient to achieve a high level of environmental protection, based on best available scientific information. One could for instance address inadequate technical screening criteria for climate change mitigation, if said criteria are based on outdated information which is falsified or proven imprecise by more recent scientific findings. This could be argued in favor of the non-exhaustiveness of the technical screening criteria, as they could always be revised in light of new scientific development in virtue of the principle of high level of environmental protection.

Another effect of the principle of high level of environmental protection, is that Member States may legislate more ambitious environmental protection requirements than that of the EU. However, this presuppose that the EU legislation is based on an environmental competence in the basic treaties. [79] If this is the case, then more ambitious environmental protection criteria than what is provided for by the EUTR and the technical screening criteria could be adopted by Member States. Hence, additional and variable criteria could be permitted within EU´s jurisdiction. This could be argued in favor of the non-exhaustiveness of the technical screening criteria, as additional and variable criteria could be applied on Member State-level. Then again, this relies on the EUTR being adopted on the basis of environmental competence in the basic treaties.

The EUTR is based on the legal competence of Article 114 TFEU which "shall apply for the achievement of the objective set out in Article 26 [TFEU]". Hence, the legal basis is meant primarily to "ensure the functioning of the internal market" cf. Article 26 TFEU – and not foremost environmental protection. The internal market is supposed to work for the sustainable development of Europe, which also implies considerations on environmental protection. Nevertheless, the functioning of the internal market entails primarily "an area without internal frontiers" cf. Article 26 (2) TFEU. The functioning of the internal market

[79] *Langlet and Mahmoudi, 51.*

which often implies deregulation to get rid of "internal frontiers", will at times be at odds with environmental regulation, which typically creates barriers to the free movement of the four fundamental freedoms, for the sake of environmental protection. [80] Hence, characterizing Article 114 TFEU as an environmental legal competence could be controversial. And to revisit the point made in the previous paragraph, it is doubtful whether this provision constitutes an environmental legal basis and whether it permits more ambitious environmental protection on Member State-level. It is therefore also doubtful, whether additional and variable sustainability criteria could be adopted in virtue of the principle and that this could be argued for or against the exhaustiveness of the technical screening criteria.

In addition to the abovementioned legal implications, the principle of a high level of environmental protection may also be used for interpretive purposes. For example: if EU Law is interpreted to be conducive to undermine a high level of environmental protection, then any alternative interpretation result with the opposite effect might be deemed as more acceptable. [81] In relation to the EUTR, this could imply that, for instance, interpreting the general criteria in Article 3 (a) and (b), to include additional and variable criteria, beyond what is prescribed by the technical screening criteria, would be persuasive, if such criteria are necessary to ensure a high level of environmental protection.

4.1.4 Principles of prevention and precaution

The principle of preventive action represents a proactive approach, codified in Article 191 (2) TFEU, which entails that EU should act to prevent, reduce or control adverse environmental impact whenever the risk of such an event is certain. Proactiveness is deemed favorable compared to reactiveness, especially with respect to environmental protection. This due to the inherent nature of environmental damage which is often irreversible or at least very difficult and costly to restore. [82]

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[80] *de Sadeleer, 'Sustainable Development in EU Law', 46–47.*

[81] *Georges Abi-Saab et al., eds.,* Evolutionary Interpretation and International Law *(Hart Publishing, 2019), 51, https://doi.org/10.5040/9781509929917.*

[82] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 53.*

The precautionary principle is in many ways an extension of the preventive principle. While the preventive principle typically entails to prevent, reduce or control cases of *demonstrated* adverse environmental impact, the precautionary principle takes it a step further to also include environmental harm that is *not fully demonstrated*. However, this does not include scientifically unfounded risks of a mere hypothetical nature. [83] So, in other words, both principles are proactive in nature, however the former is applicable when the risk-status is certain, whereas the latter is applicable in situations where the risk-status is uncertain. As will be elaborated below, the precautionary principle thusly can be of particular relevance to the understanding of the EUTR and the technical screening criteria.

At times, and especially when dealing with the concept of sustainability, there will be dissent in scientific communities regarding the existence or the acceptable degree of risk, an economic activity pose. These opinions could be of relevance in some instances under the precautionary principle. However, the fact that there are minor fractions of scientists with dissenting opinions, within the larger scientific community, is not sufficient alone to invoke the precautionary principle. [84]

The principle is codified in Article 191 (2) TFEU. Although, the precautionary principle is included in Article 191 (2) TFEU, which provides a legal basis to adopt acts within the environmental field of policy, the principle is also broadly applicable whenever it is adequately connected, directly or indirectly, to the protection of the environment and/or human health. [85] Hence, it is applicable also to the EUTR which clearly has an environmental dimension to it.

The EUTR affirms the relevance of the precautionary principle in Recital 40 and in Article 19 (1) (f) - relating to its technical screening criteria. The precautionary principle should apply to the technical screening criteria when there are concerns with respect to environmental risks that are yet to be fully demonstrated scientifically. As we can observe in case-law and literature, the potential legal implications of erroneous application of the precautionary

[83] *Langlet and Mahmoudi, 52.*

[84] *Langlet and Mahmoudi, 52.*

[85] *Langlet and Mahmoudi, 51–52.*

principle could be legal invalidity of acts. [86] Relying on stricter standards to supplement the technical screening criteria, when there is doubt whether they are effective to ensure a substantial contribution and do no significant harm to the environment, could gather some support, based on the precautionary principle, as long as there are adequate levels of expected risk, that the technical screening criteria are ineffective to that end. This could weaken the exhaustive nature of the technical screening criteria, as they could always be challenged, sufficed that there is an expected risk of adequate size connected to the more lenient criteria of the Delegated Act.

4.1.5 Rectify at source- and polluter pays-principle

The rectify at source principle, also known as the proximity principle, is intended to have a preventive effect, and thusly supplements the aforementioned principle of preventive action. The principle entails that adverse environmental effects stemming from a given activity should be rectified as close as possible to the originating source. This way the liable actors responsible for the environmental damage are held to account, and the risk of damage-proliferation and long-term effects are prevented or at least reduced. [87]

The principle is anchored in Article 191 (2) TFEU, but nevertheless the principle´s scope of application is somewhat unclear in EU Law. The proximity principle is ideal to apply in cases of quantitative emission standards because you can attribute emissions to point sources and prescribe limits to them. However, in the EU, large parts of the environmental protection legislation base itself on environmental quality standards, which is difficult to attribute to point sources the same way like with quantitative emission standards. [88] [89] Due to this, it is uncertain whether the principle has general applicability in all of the Union´s environmental legislation. The principle is not expressly acknowledged in the EUTR nor the Delegated Act.

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[86] *Langlet and Mahmoudi, 52–53.*

[87] *Langlet and Mahmoudi, 54.*

[88] *Langlet and Mahmoudi, 54.*

[89] *Staffan Westerlund,* Fundamentals of Environmental Law Methodology *(Uppsala University, Department of Law, 2007), 60–61, http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-258801.*

Closely associated with the principle of proximity is that of the polluter pays principle, which is inserted in Article 191 (2) TFEU. The aim of the principle is to internalize environmental externalities and ensure that the liable polluter is held to account for its environmental expenses, instead of other innocent stakeholders. [90] The principle is conducive both to the environmental ambitions of the Union as well as for the functioning of the internal market. Because, on the one hand, it deters actors from polluting and, on the other, environmental cost is being paid by the polluter instead of other stakeholders - which otherwise could have distorted the competition in the internal market due to unfair allocation of advantages and disadvantages. [91]

Identification of the polluter in question is a central issue with respect to the content of the principle, and this has proven to be quite difficult. For instance, where in the supply chain should the line be drawn with respect to identification of the polluter?[92] Should, for instance, the emission of CO_2 be attributed to the driver of a car when it exits the tailpipe, or would it be more sensible to attribute it to the operator of the petroleum-platform who extracts oil - with inevitable CO_2-emissions ensuing at a later stage in the supply-chain? This question remains open.

It is uncertain whether the two principles have interpretative value in relation to the EUTR and the Delegated Act. Provided that they are applicable, which is plausible, it could be of interest in relation to the inclusion of value chain considerations of the technical screening criteria. Under 3.3.10 above, it is discussed whether economic activities that enables and form part of the same value chain as fossil fuel related activities, could be deemed unsustainable because they contribute to inevitable pollution, even though they comply with the relevant technical screening criteria for their activity. If we presuppose that an EUTR-aligned activity is essential to carry out a fossil fuel related activity, one could argue that they represent an integrated whole, or in other words, that they form part of the same economic activity. If so, the EUTR-aligned activity could be identified as the source of pollution, on the same grounds as the fossil fuel activity it enables. Under the principle of proximity and the polluter pays principle, the EU should therefore treat activities that enables the production of fossil fuel as

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[90] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 55.*

[91] *Langlet and Mahmoudi, 54.*

[92] *Langlet and Mahmoudi, 56.*

polluters in their measures. Provided that this quite complex chain of arguments is acceptable, it could be argued that technical screening criteria that do not discriminate between EUTR-aligned activities that directly enable fossil fuel use and production, on the one hand, and those who don´t, on the other, contradict the polluter pays and rectify at source principle.

That being said, this presupposes a rather wide interpretation and application of the two principles, that as of today has little or no support in legislation and case law. If we consider this and the uncertainties associated with the principles´ scope of application, the argumentative value is significantly weakened.

4.1.6 Equal treatment

The principle of equal treatment (also known as the principle of non-discrimination) demand, according to the CJEU, that "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified". [93] Hence, it covers both positive (direct) and negative (indirect) forms of discrimination.

The requirement to objectively justify discrimination is satisfied if: (i) the discrimination is based on reasonable and objective criteria (ii) the discrimination in question has adequate connection to the ultimate objective that is to be achieved by the respective legislation; and (iii) the discrimination is proportionate in force to achieve said objective and not more intrusive than necessary. [94]

The principle is reflected in relation to the technical screening criteria, in Recital 45 of the EUTR, where it is stated that the criteria "should ensure that relevant economic activities within a specific sector can qualify as environmentally sustainable and are treated equally to one or more of the environmental objectives laid down in [the EUTR]". Recital 45 is also reaffirmed in Article 19 (1) (j) of the EUTR. However, it is slightly more nuanced than that. The EUTR acknowledges that certain sectors of the economy have different capacities to

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[93] *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, No. Case C-344/04 (ECJ 10 January 2006).*

[94] *Langlet and Mahmoudi,* EU Environmental Law and Policy*, 63–64.*

contribute to the environmental objectives. Still, economic activities within the same sector should be treated equally and on the same premises, to avoid unfair disadvantages for certain activities.

The fact that the EUTR discriminates between sectors with different capacities, affording certain sectors more lenient conditions than others, could contradict the principle of equality. If so the technical screening criteria in question could be challenged on those grounds, unless it is proven that the discrimination is based on reasonable and objective criteria; serves the overall objective of the EUTR and; is proportionate to achieve that objective. If the discrimination is not justified on these grounds, then the technical screening criteria could contradict the principle of equality and warrant the inclusion of additional criteria to ensure equally strict criteria for the benefitted sector.

On the other hand, having the same technical screening criteria applicable to all sectors regardless of their respective capacity to contribute to climate change mitigation and adaptation could also be a form of indirect discrimination that are also prohibited under the principle of equality. The potential for indirect discrimination could be an argument in favor of the exhaustiveness of the technical screening criteria. This means that in order to argue for the inclusion of additional technical screening criteria for the benefitted sectors, one also needs to take into account the peculiar balance between direct and indirect discrimination.

4.1.7 Tentative summary

Under 4.1 we have discussed the legal implications of relevant principles of EU Law. From the discussions it can be inferred several legal arguments, relevant in determining the potential exhaustiveness of the technical screening criteria. The principles impose obligations onto the Commission to ensure a minimum degree of environmental protection, through the EUTR. If the Commission fail to attain these minimum requirements, supplementary criteria may be warranted, and the non-exhaustiveness of the technical screening criteria may be demonstrated. The analyzed principles thusly set substantive minimum requirements for the technical screening criteria, but also offers interpretive aid, when determining which interpretation to abide by, when there are several plausible alternatives to choose from. Hence, the principles provide acceptable arguments to the effect that certain technical

screening criteria may be non-exhaustive under Article 3 EUTR, provided that they fail to deliver the required minimum degree of environmental protection.

That being said, the principles do not provide any conclusive answer about the potential exhaustiveness of the technical screening criteria. The legal limits prescribed by the general principles of EU Law are compelling arguments, especially due to their legal foundation in the basic treaties, which hold primacy over secondary sources of EU law. The issue is that they are rather general and vague in nature. It requires comprehensive efforts to document and argue for any substantive norms derived from these principles. It could therefore be reasonable to argue that the principles are most apt for the justification of exceptional derogations from the exhaustiveness of certain technical screening criteria, with deficiencies in terms of environmental protection.

4.2 Conflicts with mandatory requirements of the EU Taxonomy Regulation

4.2.1 The mandatory requirements

The technical screening criteria need to comply with Articles 10 , 11, 17 and 19 of the EUTR. We have already accounted for the content of Articles 10 and 11 in Chapter II of this thesis. These four Articles set out obligatory requirements for the technical screening criteria. The Commission must respect these requirements as the outer limit of their power to adopt delegated acts cf. Articles 10 (3) and 11 (3). If the technical screening criteria fail to respect these requirements, they are insufficient compared to the general requirements set out by the EUTR.

In the following I will review so-called requests for internal review, relating to the Delegated Act. [95] These are submissions brought before the Commission by non-governmental organizations (NGOs) [96] - in accordance with Article 10 of Regulation 1367/2006, as amended by Regulation (EU) 2021/1767.

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[95] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', accessed 29 March 2022, https://ec.europa.eu/environment/aarhus/pdf/62.%20Ares(2022)839608_Redacted%202022-02-02_Request_for_Internal_Review_Regulation_2021_2139.pdf.*

[96] *Referred to below as "the complainants", "the critics" or the NGOs"*

The reason these requests for internal review have been chosen for further analysis, is that they illuminate the relationship between the general criteria set out in the EUTR and the specific technical screening criteria, set out in the Delegated Act. As the analysis below shows, the general criteria represent outer limits for the specific technical screening criteria. The requests for internal review, points to several incidents of potential transgression of these outer limits. If the technical screening criteria fail to either respect the limits of their foundational legal basis or to attain the minimum level of environmental protection afforded by it, it could be argued that they themselves need supplementary criteria which would also imply that they are not exhaustive. Hence, the requests for internal review are of relevance in answering our research question.

It falls beyond the scope of this thesis to quality-check the scientific claims brought to light in the requests for internal review. The point of including them in the present analysis is to illustrate what type of scientific objections could be used to evoke various requirements of Articles 10 (1), 11 (1), 17 and 19 of the EUTR. It could of course be discussed, for instance, whether the technical screening criteria relating to bio energy activities are in line with the best available scientific knowledge or not. However, in this context these claims are merely meant to illuminate potential scientific deficiencies which can trigger legal mechanisms and warrant additional criteria for certain economic activities. Since the EUTR is a very recent piece of legislation that just entered into force, there is currently no relevant case law reviewing its provisions. There is also fairly little literature available on the topic. For these reasons, the requests for internal review are interesting, as they outline legal argumentation to the effect that the technical screening criteria are legally and scientifically deficient and non-exhaustive.

4.2.2 Lacking ambition

The first type of complaint to discuss, is that the technical screening criteria lacks adequate ambition. Or in other words, that they fail to ensure a "substantial contribution" to the objective of climate change mitigation or adaptation, cf. respectively Articles 10 (1) and 11 (1) of the EUTR.

According to the complainants, the technical screening criteria for i.e. forestry management merely requires a minor relative reduction in greenhouse gases compared against a hypothetical baseline - which itself may be set too high to ensure an actual net reduction in greenhouse gas emissions.[97] As we covered under 2.1.1 it is reasonable to assume, that a minimum threshold for what is considered "substantial" reduction exists, which precludes emission reductions that are of a minor extent. The technical screening criteria for forestry management are therefore deemed ineffective and presumed to be below this critical threshold. This could be used to argue the inclusion of additional criteria to remedy the discrepancy between the ambition of the mandatory requirements of the EUTR and the ambitions of the underperforming technical screening criteria.

Also, in literature it has been pointed out that certain technical screening criteria fail to deliver a "substantial contribution". For instance, the technical screening criteria for building renovations and the basic materials sector fail to provide a pathway towards climate neutrality. [98] These are also valid points to problematize in relation to the lacking ambition of technical screening criteria for transitional activities, under Article 10 (2) EUTR. The inadequate technical screening criteria could therefore be argued to be insufficient to provide a pathway toward climate neutrality and be in need of supplementary criteria. This could indicate that the technical screening criteria are insufficient and require supplementary criteria. This would also indicate that they potentially are non-exhaustive.

4.2.3 Quantity requirement

Another type of complaint relates to the absence of quantitative thresholds. According to Article 19 (1) (c) EUTR, the technical screening criteria shall, to the extent possible, be set as quantitative thresholds.

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[97] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 28–32.*

[98] *Franziska Schütze and Jan Stede, 'The EU Sustainable Finance Taxonomy and Its Contribution to Climate Neutrality',* Journal of Sustainable Finance & Investment *0, no. 0 (8 December 2021): 16–17, https://doi.org/10.1080/20430795.2021.2006129.*

In relation to i.e. forestry management, several of the technical screening criteria are set as qualitative and not quantitative criteria. The NGOs argue that sufficient scientific knowledge exist to calculate and develop quantitative thresholds, and that the criteria should be revised to reflect that. [99] Likewise, with respect to relevant criteria for bioenergy activities, the complainants argue and suggest several ways, in which qualitative criteria could be expressed in quantitative terms. [100]

In the meantime, this could be argued to require inclusion of additional quantitative criteria to match the general criteria for substantial contribution to the environmental objectives of the EUTR, cf. Article 19 (1) (c). Again, this could suggest that the technical screening criteria are not exhaustive in their current form.

4.2.4 Absence of scientific evidence

A third type of recurring objection has to do with the lack of scientific justification for some of the technical screening criteria. Article 19 (1) (f) EUTR requires that the technical screening criteria shall be based on conclusive scientific evidence. This requirement is formulated in relatively strong legal terms, as "shall be based". Thusly, it distinguishes itself from several of the other requirements of Article 19 (1), where the formulation "shall take into account" is used instead. It would therefore appear to be a provision that is ideal to challenge under a legal review.

The complainants, in their request for internal review, points inter alia, to an example relating to forestry management. The technical screening criteria in question exempts certain smaller forest holdings from the otherwise general requirement to undertake a climate benefit analysis. No scientific reason is provided as to why such an exemption is made. [101] This could suggest that the criteria lack conclusive scientific basis cf. the absolute requirement in Article

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[99] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 32–33.*

[100] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 63–64.*

[101] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 33–34.*

19 (1) (f). Therefore, an additional requirement to i.e. undertake climate benefit analysis, also for smaller forest holdings, could be in line with Article 19 (1) (f). This even if it isn´t required by the technical screening criteria for smaller forest holding. Once again this suggest that the technical screening criteria are non-exhaustive and may be supplemented to attain the mandatory requirements of the EUTR.

Another set of technical screening criteria that are criticized on the same ground, relates to the technical screening criteria for DNSH in relation to the circular economy objective of the EUTR. The criterion in question, permits economic operators to carry out climate benefit analysis to demonstrate that their economic activity does no significant harm to the circular economy objective, although there is no scientific evidence indicating that climate benefit analysis is a relevant tool for such demonstration. [102]

The critics also claim that the Commission have ignored scientific knowledge with respect to the technical screening criteria relating to various bioenergy activities. They substantiate this complaint with three reasons. First, they refer to the increasing scientific consensus on the adverse environmental effects stemming from nonselective use of woody biomass, which is not reflected in the technical screening criteria. [103] Second, they refer to the fact that the Commission have failed to consult the designated scientific organ, before developing the criteria, as they shall cf. Articles 10 (4) and 11 (4), read in conjunction with Article 20 (1). [104] Third, they claim that the Commission has illegitimately prioritized the interest of unity and policy coherence (cf. Article 19 (1) (d)) - over the interest of scientific credibility, (cf. Article 19 (1) (f)) when establishing the technical screening criteria. [105] Since Article 19 (1) (d) is an obligation to "take into account" the aim of policy coherence, whereas the obligation to base the criteria on conclusive scientific evidence, cf. Article 19 (1) (f), is an absolute "shall"-requirement - such a tradeoff would appear to be problematic.

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[102] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 26–27.*

[103] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 49–50.*

[104] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 50.*

[105] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 50–52.*

The requirement to base the technical screening criteria on conclusive scientific evidence is an important requirement to ensure the realization of the overarching objectives set out in the EUTR, and to ensure the intended effect of the regulation. If we recall the principle of high level of environmental protection, the Union is supposed to base their decisions on the best scientific knowledge, cf. Article 191 (2) TFEU. Hence, the requirement in Article 19 (1) (f) resonates with that principle, which could add some legal weight to objections raised in virtue of this provision. Article 19 (1) (f) would therefore appear to be an effective point of ingress if one were to challenge the exhaustiveness of the technical screening criteria.

4.2.5 Failure to account for the precautionary principle

Also, according to Article 19 (1) (f), the technical screening criteria shall respect the precautionary principle, whenever there is doubt and uncertainty with respect to the environmental impact of a given economic activity.

In this regard the NGOs argue that although there might be some uncertainties with respect to i.e. the extent of emission reduction that is required to be consistent with the goals of the Paris Agreement, this is not an acceptable reason to omit setting a quantified threshold for emission reductions within i.e. the forestry sector. [106]

The NGOs also evokes the precautionary principle under Article 19 (1) (f) in relation to the controversial tradeoff between scientific credibility and policy coherence, as explained above under 3.4.4. They argue that even though there are some differing opinions about the potential adverse environmental impact of certain bioenergy activities, the precautionary principle should have determinative effect and lead the Commission to land on the most cautious alternative. [107] Hence, permitting the indiscriminate use of woody biomass is not in line with the precautionary principle, due to its expected (although not demonstrated) adverse impact on the climate.

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[106] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 34.*

[107] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 52–53.*

Even though the precautionary principle, set out in Article 19 (1) (f), is an absolute requirement it is worth recalling that minor indifferences within the scientific community alone are not necessarily enough to trigger the precautionary principle (see 3.3.4 above). It is therefore doubtful whether the degree of uncertainty with respect to i.e. bioenergy activities is negligible or significant. Nevertheless, if we presuppose that the degree of uncertainty is sufficient, then it is possible to challenge the exhaustiveness of the technical screening criteria under the precautionary principle.

4.2.6 Minimum requirements for DNSH

A fourth type of critique relates to the absence of appropriate minimum requirements for DNSH to the environmental objectives, cf. Article 19 (1) (b) read in conjunction with Article 17.

In relation to forestry management, the complainants argue that the technical screening criteria for climate change mitigation fails to satisfy the requirement in Article 19 (1) (b) cf. Article 17 (1) (a), by not including any requirement to actually assess the net greenhouse gas impact of the activity.[108] In their view, the technical screening criteria for climate change mitigation and adaptation are also too relativistic to be effective and extend to much favorable discretion to the economic operators when they assess the compliance of their own activity.[109] The complainants also argue that the same technical screening criteria fail to capture the potential harm caused by the activity itself on nature, people and assets as they should cf. Article 17 (1) (b). [110] Hence, they are deficient and require additional criteria to attain the required level of environmental protection, as mandated by Article 19 (1) (b). Implicitly, this

[108] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 43.*

[109] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 37–39.*

[110] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 37–39.*

also contradicts the obligation to identify the most relevant contributions to the given environmental objective, cf. Article 19 (1) (a), according to the NGOs. [111]

Similarly, in relation to the technical screening criteria for bioenergy activities, the complainants argue that the DNSH-criteria for the protection and restoration of biodiversity and ecosystems, are deficient. First, because they merely require that economic operators gather relevant information on biodiversity and ecosystems – instead of setting effective minimum requirements for DNSH, in alignment with Article 17 (1)(f). [112] And second, because they fail to establish quantitative and verifiable criteria relating to ecosystems and biodiversity – ignoring already existing elements of EU policy, regulating: old and primary-forest growth; pesticide use; and pollinators. [113] By ignoring the existing EU policy on the area, the technical screening criteria would probably also contradict the requirement to do so in Article 19 (1) (d) as well.

Much like the requirement to base the criteria on scientific evidence in Article 19 (1) (f), the requirement to specify minimum requirements for DNSH under Article 19 (1) (b), is a strongly worded legal provision which affords very little discretion onto the Commission when developing the technical screening criteria. It is worded as a "shall"-requirement, which affords the Commission no discretion, with respect to whether and how they want to include such minimum requirements. For that reason, this provision would also be ideal to use, when challenging the legitimacy of the technical screening criteria. Because the minimum requirements are inadequate to ensure minimum protection of the environmental objectives, then clearly, they need to be supplemented to attain the same level of protection as the mandatory requirements demand.

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[111] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 26.*

[112] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 27.*

[113] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 27.*

4.2.7 Failure to include life cycle assessments

According to Article 19 (1) (g) EUTR, the technical screening criteria are to "take into account the life cycle" of the economic activities covered by the EUTR, when assessing their environmental impact. Hence isolated considerations of the activity itself, without accounting for the environmental impact of associated products and services, derived from the activity in question, is inadequate.

The complainants argue in their request for internal review, that the technical screening criteria for bioenergy activities fail to account for such life cycle considerations. More specifically they claim that the technical screening criteria don´t consider greenhouse gas emissions from the "growing, harvesting and processing [of] the biomass" – as well as "the actual life cycle of the [bio]fuel". [114] If such is the case, then the requirements in Article 19 (1) (g) demands a more comprehensive account of the greenhouse gases associated with the economic activity than what is provided for in the current technical screening criteria. This gap in coverage could be used to argue the inclusion of criteria for a more extensive life cycle assessment. This could again suggest that the criteria are not exhaustive. On the other hand, this obligation merely entails a duty to "take into account" the life cycle. Therefore, it is difficult to ascertain whether the life cycle of a given activity is taken duly into account or not. It could therefore easily be argued that the life cycle is taken into account too.

NGOs have also submitted concerns relating to the DNSH criteria for manufacturing of organic basic chemicals with respect to Article 19 (1) (g). They claim that the Commission chose to disregard an option for including appropriate life-cycle assessments of the associated emissions just simply because it isn´t currently more burdensome to undertake. [115] Instead, the

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[114] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 64.*

[115] *ClientEarth AISBL, 'REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION Of Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (the "Contested Act")', n.d., 28–30,*

Commission chose a deficient method which set emission standards for the production processes, based on the best performing actors within the industry. This method gives a flawed impression of the real emissions occurring during manufacture of organic basic chemicals.

The complainants also evoke Article 19 (1) (g) to extend the applicability of the Delegated Act to activities that is not explicitly covered by it. In example, they argue that emissions from wood pellet manufacturing should be considered integrated in the life cycle of covered bioenergy activities. The reason why, is that wood pellets represent a growing share of the biomass fuels burned to generate bio energy. [116] For this reason, the technical screening criteria should account for the emissions stemming from production of biomass fuel and not just the burning of biomass fuel for generation of bio energy. This notion could be used to argue for inclusion of additional criteria, to cover a larger part of the supply chain of certain economic activities. This would imply that the technical screening criteria are not entirely exhaustive. If one accepts this argument, the technical screening criteria also violate Article 19 (1) (b) which requires that the technical screening criteria identify the minimum requirements for DNSH to the environmental objectives.

4.2.8 Inconsistent incentives

Cf. Article 19 (1) (i), the technical screening criteria are to "take into account the potential market impact of the transition into a more sustainable economy".

This provision also entails that the technical screening criteria should avoid creating inconsistent incentives for sustainable investments. According to the complainants, the technical screening criteria for bioenergy activities fail to do so. The reason why is that they incentivize investments into bioenergy and biofuel, even though there are increasing amounts of evidence suggesting adverse environmental effects on both forests and the climate, stemming from these activities. The NGOs therefore assumes that these activities will be

https://ec.europa.eu/environment/aarhus/pdf/64.%20Ares(2022)871216_Redacted%20ClientEarth_Request%20for%20Internal%20Review_ComReg2021-2139.pdf.

[116] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 72.*

labeled unsustainable at a later point. This could cause inconsistent incentives and result in stranded assets, contradicting Article 19 (1) (i). [117] Implying that technical screening criteria that do incentivize such activities should not be viewed as absolute nor exhaustive.

4.2.9 Tentative summary

Under 4.2 we can see that there are several points of ingress to challenge the exhaustiveness of the technical screening criteria, in virtue of the mandatory requirements of the EUTR. Of particular interest in this regard, is Articles 19 (1) (a) and (b). These provisions are strongly worded "shall" requirements, imposed upon the Commission to identify the most relevant contributions to the environmental objectives and establish minimum requirements for DNSH. The requirements establish relatively clear expectations as to what result is to be achieved and they are worded in quite absolute terms. If the Commission fail to deliver technical screening criteria that ensures substantial contribution or effective minimum requirements for DNSH, then it would be reasonable to suggest that the situation warrants additional sustainability-criteria to match the general criteria set out in Article 10 and 11. Ultimately, this would suggest that satisfaction of deficient technical screening criteria in question, alone, would fail to fulfil the conditions set out in Article 3 (a) and (b) as well.

When challenging the exhaustiveness of technical screening criteria under Articles 19 (1) (a) and (b), attention should be paid to Article 19 (1) (f) too. Comparable to Articles 19 (1) (a) and (b) - Article 19 (1) (f) - is a legally compelling "shall"-requirement. It provides that the Commission is obligated to base the technical screening criteria on "conclusive scientific evidence" and the precautionary principle. This absolute requirement establishes strict conditions for scientific certainty with respect to the appraisal of economic activities´ environmental impact. If the Commission neglects this obligation or if contradicting scientific findings emerges at a later point, the technical screening criteria can be challenged since they fail to fulfill an obligatory requirement, intended to ensure a substantial contribution and DNSH in line with Articles 10 and 11. Hence, they will also fail to satisfy the conditions laid down in Article 3 (a) and (b). This could imply the need for additional criteria, which again would indicate the potential non-exhaustiveness of the technical screening criteria. Arguments

[117] *'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022', 64.*

derived from Article 19 (1) (f) also enjoys support in general principles of EU law, including the principle of a high level of environmental protection and the principle of precaution. This could add legal weight to the solution challenging the exhaustiveness of the technical screening criteria.

Furthermore, there are mandatory requirements, that are more of a procedural due diligence character, which forces the Commission to "take into account" and include certain factors in the technical screening criteria, to the extent possible. These are of course relevant; however, breach of these obligations might be more challenging to demonstrate, as they merely require simple consideration. Hence, the threshold for satisfying them remains rather low. That being said, they are mandatory and represent interesting legal effects.

Of particular interest in that regard, is the requirement to account for life cycle considerations cf. Article 19 (1) (g). Especially due to the potential possibility of extending the applicability of the EUTR to activities that are not explicitly listed in the Delegated Act, but who are part of the same value chain and directly connected to a listed activity. Either by being essential for the operation of the listed activity or a direct and exclusive benefactor/consumer of the products or services derived from it. If we accept the validity of such extended applicability, then the technical screening criteria may be deficient if they neglect the impact of associated economic activities. Hence, additional criteria must be availed to ensure a comprehensive life cycle analysis. This would entail a broad interpretation of the life cycle concept. However, the legal acceptability of such a broad understanding is not certain at this point. Applying such an expansive interpretation to the concept should therefore be carried out with precaution.

5 Chapter V: Implementation in Norway

5.1 The implementation of the EUTR in Norway

5.1.1 Norwegian Law prior to the EU Taxonomy Regulation

Norway haven´t had any regulatory equivalent to the EUTR, prior to its implementation within the Norwegian legal system. [118] However, two pieces of legislation did cover some of the same issues. Namely, the Act of 17 July 1998 nr. 56 on Annual Accounts (the Annual Accounts Act) and the Act of 9 January 2009 nr. 2 on Control of Marketing and Contract-terms (the Marketing Act).

The Annual Accounts Act § 3-3 (c) impose an obligation onto large companies to prepare a statement on their societal responsibilities. As a minimum requirement, this statement shall include accounts of the company´s influence on: the environment; social conditions; work environment; equality and nondiscrimination; and abatement of corruption and bribery.[119] Hence, to a degree, the Annual Accounts Act ensure disclosure of environmental performance of companies of a certain size, similar to the EUTR. Although, not by any means to the same extent. The current provision in the Annual Accounts Act offers a lot more discretion to companies, both in terms of what content to include and how extensive it needs to be.

The Marketing Act § 3 requires that claims made for the purpose of marketing can be backed up by documentation. This implies that if, for instance a company markets a product or a service as sustainable, then consumers, the authorities or other parties could request documentation in virtue of this provision. In addition, §§ 6 and 7 establishes a prohibition against unreasonable and deceptive marketing. Undocumented claims will, as a rule of thumb, also be deemed deceptive. [120] Hence, to an extent the Marketing Act prohibits greenwashing, like the EUTR, so long as the marketing in question is deemed unreasonable and/or deceptive in accordance with §§ 6 and 7. However, no attached classification system, enumerating

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[118] *Finansdepartementet, 'Prop. 208 LS (2020–2021)', Proposisjon, Regjeringen.no (regjeringen.no, 4 June 2021), 11, https://www.regjeringen.no/no/dokumenter/prop.-208-ls-20202021/id2856814/.*

[119] *Finansdepartementet, 11.*

[120] *Finansdepartementet, 11.*

sustainable activities exist in relation to the Marketing Act, which is a sector-neutral piece of legislation.

5.1.2 Legislating the EU Taxonomy Regulation

Regulations from the EU legal system that are EEA-relevant, shall, according to the Agreement on the European Economic Area § 7, "as such be made part of the internal legal order of the Contracting Parties". [121] This provision therefore entails much of the same legal effects as Article 288 TFEU. Meaning that implementation of Regulations leaves no room for national discretion to the implementing parties.

Norway have chosen to implement the EUTR together with Regulation (EU) 2019/2088 on Sustainability Related Disclosures in the Financial Services Sector, into one singular Act. [122] Namely, the Act of 22 December 2021 nr 161 on Disclosure of Sustainability Information and a Framework for Sustainable Finance (hereinafter the Implementing Act).

The implementation is done mainly through incorporation, which essentially entails a direct transplant of the EUTR into the Implementing Act by a simple reference in § 3. [123] Beyond the provisions that reference the two Regulations, the Act also contains a provision on scope of application, to ensure consistency with existing Norwegian legislation. [124].

To implement the technical screening criteria, the Implementing Act contains a provision which delegates power to the Norwegian Finance Ministry to incorporate the technical screening criteria through the adoption of attached Regulations, cf. § 3 (3). [125]

As of today, the Implementing Act has yet to enter into force. The reason why, is that the two Regulations which it seeks to implement, remains to be included in the EEA Agreement, and

[121] *Finansdepartementet, 12.*

[122] *Finansdepartementet, 12.*

[123] *Finansdepartementet, 12.*

[124] *Finansdepartementet, 12.*

[125] *Finansdepartementet, 17.*

to subsequently enter into force. It is expected that the Implementing Act will enter into force during the first half of 2022. [126]

5.1.3 Importing EU Law to the EEA

When interpreting a legal act from the EU, that has been incorporated into the EEA Agreement, the point of departure, is that the interpretation should conform to the interpretation laid down within the sphere of EU Law. [127] Hence, the interpretation of the EUTR in chapter II and III of this thesis should, at the outset, be applicable within the EEA as well. This main rule is underpinned by the principle of homogeneity.[128]

The principle of homogeneity is connected to the overarching aim of the EEA Agreement, which is to integrate the EFTA-states into the internal market of the EU. [129] Such integration prerequisites common rules and equal treatment between the EFTA-States and the Member States of the EU.

The principle of homogeneity can be inferred from several provisions of the EEA Agreement, as well as certain paragraphs in its preamble.[130] In paragraph 4 of the preamble, the "objective of establishing a dynamic and homogenous European Economic Area, based on common rules" is acknowledged. Furthermore, in paragraph 15 of the preamble, it is reaffirmed that the "objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of [EU Law] which are substantially reproduced in this Agreement". Both paragraphs count as expressions of the principle of homogeneity.

Article 1 of the EEA Agreement further codifies the principle of homogeneity, by stating that "equal conditions of competition, and the respect of the same rules, with a view to creating

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[126] Finansdepartementet, 'Nye regler om bærekraftig finans vil ikke tre i kraft fra nyttår', Nyhet, Regjeringen.no (regjeringen.no, 14 December 2021), https://www.regjeringen.no/no/aktuelt/nye-regler-om-barekraftig-finans-vil-ikke-tre-i-kraft-fra-nyttar/id2892207/.

[127] Fredriksen and Mathisen, 247–48.

[128] Fredriksen and Mathisen, 247.

[129] Fredriksen and Mathisen, 85.

[130] Fredriksen and Mathisen, 40–41.

homogenous European Economic Area" is essential to achieve the aim of integrating EFTA into the internal market of the EU. With respect to the principle of homogeneity, Article 1 should also be read in conjunction with Article 6. The latter Article states that the provisions of the EEA Agreement "in so far as they are identical in substance to corresponding rules of [EU Law], shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities". The EEA Agreement even contain a separate section on the principle of homogeneity in chapter 3 of Part VII, which reiterates much of the same content laid down in Articles 1 and 6. Hence, the principle is firmly established in the EEA Agreement.

Nevertheless, the principle of homogeneity doesn´t constitute an absolute rule. It is just a principle which provides a point of departure in the form of a presumption for an interpretation that conforms with the same interpretation made within the domain of EU law. For this reason, it is assumed that the legal analysis carried out in chapter 2 and 3 of this thesis, can be directly transferred into the EEA legal context and remain valid.

6 Chapter VI: Final remarks

In the following, a summarized account of the discussions and findings above, most relevant in answering the research questions of this thesis will be provided.

6.1 Sub-question A

Articles 10 and 11 establishes general criteria for substantial contribution and DNSH, in relation to the climate change mitigation and adaptation objectives. Through sub-question A, we sought to find out what the legal significance of Article 10 and 11 EUTR were, in determining compliance with the conditions laid down in Article 3 (a) and (b). This sub-question was investigated under Chapter II of this thesis.

The analysis revealed that the general criteria establish ultimate limits and requirements for substantial contribution and significant harm. However, the content of the criteria was overarching and vague. It was therefore difficult to infer anything measurable, to ascertain the compliance of an activity, based on these criteria alone. Hence, the elaboration of the general criteria - through specific technical screening criteria - seems very important, if not essential, to the design and effective functioning of the EUTR.

Given the almost imperative role played by the specific technical screening criteria, in making the general criteria of the EUTR operational, one could argue for the presumption that the technical screening criteria are exhaustive. At least at the outset.

6.2 Sub-question B

Sub-question B sought to identify and weigh legal arguments – for and against the exhaustiveness of the technical screening criteria. In Chapter III and IV, numerous sources of EU law were analyzed to infer arguments – pro et contra – for the exhaustiveness of the technical screening criteria.

First, a teleological analysis of the EUTR were undertaken in Chapter III. Under the tentative summary in 3.2.10, the different purposes and supporting aims were sorted into one category for single market considerations and another for environmental considerations. The single market considerations would appear to favor the solution that the technical screening criteria

are exhaustive. The reason why, is that these considerations imply a high level of consistency, conducive to remove barriers to the free movement of capital, and establishing common rules within the EU, in line with Article 26 TFEU. These considerations have considerable legal weight, since the EUTR is adopted on the basis of Article 114 TFEU, which is a legal basis intended for measures ensuring the effective functioning of the internal market, with reference to Article 26 TFEU.

On the other side, the environmental considerations would at large, appear to challenge the presumption of exhaustive technical screening criteria. These considerations imply that the interest of consistency, at times must yield, for the sake of proper environmental protection. For instance, it is doubtful whether it is in line with the purpose of the EUTR, to acknowledge an economic activity, that indirectly supports the use and production of fossil fuel, even though the activity itself complies with the presumed exhaustive criteria. This is a plausible scenario under the current technical screening criteria. Likewise, it would seem problematic, if the EUTR acknowledge economic activities considered sustainable at the time of adoption of the technical screening criteria, who later on is proven contradictory to the goals of the EUTR. If one were to insist on the exhaustiveness of outdated technical screening criteria, this could jeopardize the environmental credibility of the EUTR. Read in conjunction with the minimum requirements set out in the general criteria of Articles 10 and 11, the environmental purposes underpinning the EUTR, could suggest that there are points of ingress to challenge the exhaustiveness of the technical screening criteria.

The investigation into the potential exhaustiveness of the technical screening criteria, carried on in Chapter IV. Relevant principles of EU law were examined, searching for arguments to challenge or confirm the exhaustiveness of the technical screening criteria. The analysis indicated that several principles support the solution, that the exhaustiveness of the technical screening criteria could be challenged.

The principle of sustainable development ensures that environmental interests are afforded consideration on equal footing with economic and social interests. If the technical screening criteria disproportionately emphasize the signifiicance of social or economic interests over environmental interests, then the sustainability-principle may be applied to warrant additional criteria to balance the equation. Hence, to an extent, the principle may challenge the exhaustiveness of the technical screening criteria.

The principle of a high level of environmental protection establishes substantive environmental minimum requirements, that all EU institutions must respect. If the Commission fail to ensure a high level of environmental protection, in line with the best available scientific knowledge, then the technical screening criteria may be legally inadequate under this principle. This could be used to argue for the non-exhaustiveness of the technical screening criteria.

Furthermore, the preventive principle and the principle of precaution, establishes potential safeguards against risk of adverse environmental impacts associated with an economic activity, even though the risk in question is not fully demonstrated at the current point. This could be used to challenge technical screening criteria, whenever there is sufficient concern that the Commission have not adequately appraised the potential risk, posed by a given activity. This presuppose that the risk in question is of an adequate size and that there is a sufficient degree of consensus about it in the scientific community.

When exploring the potential implications of the polluter pays principle and rectify at source principle, it was found that the both may be relevant in including value chain or life cycle considerations. The two principles could be used to challenge, inter alia, technical screening criteria that do not discriminate between, EUTR-aligned economic activities enabling other activities using or producing fossil fuel - and those who don´t. However, this argument currently lacks adequate legal foundation and remains mostly a theoretical possibility. It also presupposes that such a wide interpretation of the two principles gain acceptance. There is also doubt as to whether the principles are directly applicable to the EUTR. These reservations must be firmly emphasized. For all the reasons above, the content and extent of these principles should definitely be of interest for future research.

After reviewing the relevant principles of EU law, the analysis moved on to the obligatory requirements of the EUTR. Once again recalling the imperative part played by the technical screening criteria, in operationalizing the general criteria of the EUTR, it is crucial that they conform to the limits and requirements of their foundational legal basis. Namely Articles 10, 11, 17 and 19.

When reviewing these obligatory requirements, several arguments to the effect that the exhaustiveness of the technical screening criteria may be challenged, were identified. First, the absolute requirements of Article 19 (a) and (b) to identify the most relevant contributions to the environmental objectives and ensure effective minimum requirements for DNSH, establish thresholds that needs to be attained by the technical screening criteria. If not, additional criteria may be warranted to attain the required level of environmental protection afforded by the general criteria of the EUTR.

Furthermore, Article 19 (1) (f) lay down strict requirements in terms of scientific justification and precaution. The Commission are to base the technical screening criteria on conclusive scientific evidence and the principle of precaution. If it is demonstrated that the Commission have failed to scientifically justify the technical screening criteria or to appraise the potential risk posed by an activity, then they might be deemed legally inadequate under the requirement cf. Article 19 (1) (f). This argument enjoys added legal weight via the principle of a high level of environmental protection and the principle of precaution which both are anchored in the primary sources of the EU legal system.

Beyond the abovementioned absolute requirements, there are also procedural duties that are more of a due diligence character, which require that certain factors are taken into account and included to the extent possible in the technical screening criteria. However, since these merely require simple consideration and minimum efforts, it is challenging to ascertain an objective breach of these requirements. That being said, they are of course relevant and obligatory requirements which could be used to challenge the exhaustiveness of the technical screening criteria if not implemented properly.

6.3 Sub-question C

Under sub-question C, we sought to understand how the EUTR is implemented in the EFTA-State, Norway, and whether the process had any implications for the understanding of Article 3 EUTR within the EEA, compared to within the EU.

The question was investigated under Chapter VI, in which it was established that an EU-conform interpretation of the EUTR, would be applicable, also within the domain of EEA

law. Hence, the findings of this thesis can also be applied to the Norwegian and the EEA legal context.

6.4 The overarching research question

The overarching research question of this thesis was:

Are the technical screening criteria under the EU Taxonomy Regulation exhaustive criteria or do they merely form part of the basis for assessing compliance with the environmental objectives set out in the EU Taxonomy Regulation?

Through this thesis it is identified acceptable reasons to argue for the presumption that the technical screening criteria are exhaustive. However, this presumption may be challenged, if it is evident that the technical screening criteria fail to attain the minimum environmental requirements set out in the mandatory requirements of the EUTR and the relevant general principles of EU Law.

Bibliography:

Literature

Abi-Saab, Georges, Kenneth Keith, Gabrielle Marceau, and Clément Marquet, eds. *Evolutionary Interpretation and International Law*. Hart Publishing, 2019. https://doi.org/10.5040/9781509929917.

Beck, Gunnar. 'The Macro Level: The Structural Impact of General International Law on EU Law: The Court of Justice of the EU and the Vienna Convention on the Law of Treaties'. *Yearbook of European Law* 35, no. 1 (2016): 484–512. https://doi.org/10.1093/yel/yew018.

Brittain, Stephen. 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal'. *Irish Jurist* 55 (2016): 134–65.

Conway, Gerard. *The Limits of Legal Reasoning and the European Court of Justice*. Cambridge: Cambridge University Press, 2014.

Davies, Karen. *Understanding European Union Law*. Florence, UNITED STATES: Taylor & Francis Group, 2013. http://ebookcentral.proquest.com/lib/uu/detail.action?docID=1104822.

Fredriksen, Halvard Haukeland, and Gjermund Mathisen. *EØS-rett*. Bergen: Fagbokforl., 2014.

Genakos, Christos, and Michael Pollitt. 'Introduction to the Special Issue in "Celebrating 25 Years of the EU Single Market"'. *Review of Industrial Organization* 55, no. 1 (August 2019): 1–4. https://doi.org/10.1007/s11151-019-09690-w.

Langlet, David, and Said Mahmoudi. *EU Environmental Law and Policy*. Oxford: Oxford University Press, 2016. https://doi.org/10.1093/acprof:oso/9780198753926.001.0001.

Lazarus, Michael, and Harro van Asselt. 'Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken'. *Climatic Change* 150, no. 1–2 (September 2018): 1–13. https://doi.org/10.1007/s10584-018-2266-3.

Mysiak, Jaroslav, Swenja Surminski, Annegret Thieken, Reinhard Mechler, and Jeroen Aerts. 'Brief Communication: Sendai Framework for Disaster Risk Reduction – Successor Warning Sign for Paris?' *Natural Hazards and Earth System Sciences* 16, no. 10 (30 September 2016): 2189–93. https://doi.org/10.5194/nhess-16-2189-2016.

Sadeleer, Nicolas de. 'Sustainable Development in EU Law: Still a Long Way to Go'. *Jindal Global Law Review* 6, no. 1 (2015): 39–60. https://doi.org/10.1007/s41020-015-0009-0.

Schütze, Franziska, and Jan Stede. 'The EU Sustainable Finance Taxonomy and Its Contribution to Climate Neutrality'. *Journal of Sustainable Finance & Investment* 0, no. 0 (8 December 2021): 1–33. https://doi.org/10.1080/20430795.2021.2006129.

Westerlund, Staffan. *Fundamentals of Environmental Law Methodology*. Uppsala University, Department of Law, 2007. http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-258801.

Official sources

European Commission - European Commission. 'A European Green Deal'. Text. Accessed 18 May 2022. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

EUROPEAN ECONOMIC AREA, STANDING COMMITTEE OF THE EFTA STATES, Ref. 1113623, 23 May 2013, SUBCOMMITTEE V ON LEGAL AND INSTITUTIONAL QUESTIONS "How EU acts become EEA acts and the need for adaptations"
Note by Subcommittee V Accessed 24 February 2022.
https://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf.

ClientEarth AISBL. 'REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION Of Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (the "Contested Act")', n.d.
https://ec.europa.eu/environment/aarhus/pdf/64.%20Ares(2022)871216_Redacted%20ClientE

arth_Request%20for%20Internal%20Review_ComReg2021-2139.pdf.

COMMISSION DELEGATED REGULATION (EU) …/... 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 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 (202AD). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:C(2021)2800.

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS The European Green Deal (2019). https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX%3A52019DC0640.

'Prop. 208 LS (2020–2021)'. Proposisjon. Regjeringen.no. regjeringen.no, 4 June 2021. https://www.regjeringen.no/no/dokumenter/prop.-208-ls-20202021/id2856814/.

'Request for Internal Review - Delegated Regulation (EU) 2021/2139 Protect the Forest, Zero, Workshop, Robin Wood, SEF, Clean Air Committee, 2C 02/02/2022'. Accessed 29 March 2022. https://ec.europa.eu/environment/aarhus/pdf/62.%20Ares(2022)839608_Redacted%202022-02-02_Request_for_Internal_Review_Regulation_2021_2139.pdf.

Stortinget. 'Innstilling fra finanskomiteen om lov om offentliggjøring av bærekraftsinformasjon i finanssektoren og et rammeverk for bærekraftige investeringer'. Inns. finanskomiteen, 10 December 2021. https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2021-2022/inns-202122-049l/?all=true.

'Taxonomy: Final report of the Technical Expert Group on Sustainable Finance, March 2020_en.Pdf'. Accessed 19 May 2022. https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf.

Legislation

Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 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 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 (Text with EEA relevance), 442 OJ L § (2021). http://data.europa.eu/eli/reg_del/2021/2139/oj/eng.

Consolidated version of the Treaty on European Union (2016). http://data.europa.eu/eli/treaty/teu_2016/oj/eng.

Consolidated Version of the Treaty on the Functioning of the European Union», 326 OJ C § (2012), http://data.europa.eu/eli/treaty/tfeu_2012/oj/eng.

Lov om kontroll med markedsføring og avtalevilkår mv. av 9. januar 2009/ Act of 9 January 2009 nr. 2 on Control of Marketing and Contract-terms (the Marketing Act).

Lov om årsregnskap m.v. av 17 juli 1998/ Act of 17 July 1998 nr. 56 on Annual Accounts (the Annual Accounts Act)

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 (Text with EEA Relevance)», 198 OJ L § (2020), http://data.europa.eu/eli/reg/2020/852/oj/eng

Treaties

Paris Agreement 2015 under the United Nations Framework Convention on Climate Change

Case law

Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, No. Case C-537/03 (ECJ 30 June 2005).

Kingdom of Sweden v Commission of the European Communities, No. Case T-229/04 (GC 11 July 2007).

Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker, No. Case C-320/12 (ECJ 27 June 2013).

Pfizer Animal Health SA v Council of the European Union, No. Case T-13/99 (GC 11 September 2002).

The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, No. Case C-344/04 (ECJ 10 January 2006).

UsedSoft GmbH v Oracle International Corp, No. Case C-128/11 (ECJ 3 July 2012).

Internet sources

European Commission - European Commission. 'Delivering the European Green Deal'. Text. Accessed 18 May 2022. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en.

European Commission - European Commission. 'EU Taxonomy for Sustainable Activities'. Text. Accessed 25 January 2022. https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en.

'FAQ What Is the EU Taxonomy and How Will It Work .Pdf'. Accessed 25 January 2022. https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-taxonomy-faq_en.pdf.

Finansdepartementet. 'Nye regler om bærekraftig finans vil ikke tre i kraft fra nyttår'. Nyhet. Regjeringen.no. regjeringen.no, 14 December 2021. https://www.regjeringen.no/no/aktuelt/nye-regler-om-barekraftig-finans-vil-ikke-tre-i-kraft-fra-nyttar/id2892207/.