

# EUROPEAN UNION

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## 1. How is “ESG” in the European Union (EU) defined in a corporate/commercial context, and what are its major elements?

The EU has not adopted a formal definition of “ESG”. The EU has, however, adopted similar concepts around “sustainability”, as discussed below.

## 2. What, if any, are the major laws/regulations in the EU specifically related to ESG?

The impetus for ESG regulation in the EU can be traced back to a series of landmark international agreements concluded in 2015, namely the adoption of the UN 2030 Agenda for Sustainable Development and its Sustainable Development Goals and the Paris climate agreement. The latter includes a commitment to align financial flows with a pathway towards low-carbon and climate-resilient development.

The European Commission’s 2018 Action Plan on Financing Sustainable Growth identified 10 key action points to fulfil these sustainability goals in respect of financial services, including:

- establishing a taxonomy for sustainable activities;
- creating standards for “green” financial products;
- incorporating sustainability as part of financial advice;
- developing sustainability benchmarks and improving the integration of sustainability within ratings; and
- strengthening disclosures made by asset managers and financial advisers to their clients.

Moreover, in December 2019, the Commission presented the European Green Deal (Green Deal), a growth strategy aiming to make Europe the first climate-neutral continent by 2050. To this end, the Commission has been developing a comprehensive policy agenda on sustainable finance in the framework of the Green Deal and the new strategy for financing the transition to a sustainable economy.

### Corporate Sustainability Reporting Directive (CSRD)

In a bid to extend the scope of, and address shortcomings in, the Non-Financial Reporting Directive (NFRD), the European Parliament formally adopted the CSRD in November 2022, which establishes a new mandatory framework for non-financial disclosures in the EU. The requirements will apply to all large EU companies that meet certain financial thresholds, listed or otherwise, as well as non-EU companies with turnover of at least EUR 150 million in the EU. The CSRD amends several existing directives such that nearly 50,000 companies will be subject to the new reporting obligations, compared to approximately 11,700 under the current regime. Reporting requirements under the CSRD will apply on a phased basis, as follows:

- from January 1, 2024, for large public interest companies with over 500 employees that are already subject to the NFRD;
- from January 1, 2025, for large companies not currently subject to the NFRD (over 250 employees and/or EUR 40 million in net turnover and/or EUR 20 million on its balance sheet); and

- from January 1, 2026, for listed small and medium-sized enterprises (SMEs). SMEs can opt out until 2028.

The CSRD envisages the adoption of EU Sustainability Reporting Standards (ESRS), to be developed by the European Financial Reporting Advisory Group (EFRAG). EFRAG has published a first set of draft ESRS, which were submitted to the Commission on November 22, 2022, and is currently in the process of developing sector-specific standards in addition to those aimed specifically at SMEs.

### Sustainable Finance Disclosure Regulation (SFDR)

The EU's SFDR entered into force in December 2019 and requires all EU financial market participants and financial advisors (including non-EU firms marketing in the EU) to make ESG disclosures in relation to their financial products, sustainability risks and adverse sustainability impacts. The scope of required disclosure depends on the level of integration of ESG considerations within the financial product. Products promoting environmental or social characteristics (Article 8 products) and products having sustainable investments as their objective (Article 9 products) are subject to pre-contractual and ongoing disclosures on sustainability indicators used to monitor performance. The SFDR's Level 1 requirements have been applicable since March 2021. The final Level 2 disclosures were published in the Official Journal of the EU in July 2022 and apply from January 2023.

Level 1 entity-level disclosures require fund managers to:

- assess the potential for ESG factors to negatively impact the returns of funds under management; and
- disclose the outcome of that assessment to investors both in funds' prospectus documents and on the firm's website.

The entity-level disclosures also require in-scope firms to publish an "adverse impacts statement" on their website. Firms with 500 or more employees are required to publish a statement describing the due diligence policies that are applied by the firm to identify the adverse impacts of investment decisions on sustainability factors. Firms with fewer than 500 employees have the option to either publish a statement or clearly state that adverse impacts are not taken into account (as long as they detail why they are not and, where relevant, whether there is an intention to account for them in the future).

Level 2 product-level disclosures include pre-contractual and periodic disclosure templates for Article 8 and Article 9 products, which should be annexed to prospectuses and annual reports, as well as a principal adverse sustainability impacts statement template. Such disclosures now play a big role in new marketing activities, including by private fund managers.

### Taxonomy Regulation

The Taxonomy Regulation, as applicable from 1 January 2022, sets out a common set of technical screening criteria to test and measure the extent to which an economic activity qualifies as environmentally sustainable. It applies where financial market participants make products available that promote specific environmental characteristics or products that have sustainable investment as an objective.

In order to align with the regulation and qualify as environmentally sustainable, the activity must substantially contribute to at least one of the six environmental objectives and comply with the relevant technical screening criteria. It must do no significant harm to any other environmental objective and must comply with minimum safeguards. The six environmental objectives are:

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

Under Article 8 of the regulation, firms subject to the NFRD, as described below, are required to disclose the proportion of turnover derived from products or services that qualify as environmentally sustainable, and the proportion of the capital and operating expenditure relating to assets or processes associated with those activities.

The regulation initially focused on climate change issues, with technical screening criteria and disclosure requirements applicable to the objectives of climate change mitigation and adaptation applying from 1 January 2022. In March 2022, the Commission's Platform on Sustainable Finance published its recommendations for technical screening criteria for the remaining four objectives.

While the Taxonomy Regulation is concerned with the measurement of the environmental sustainability of certain economic activities, the Commission is also considering the establishment of a social taxonomy. As discussed in more detail below, this is expected following the end of the Commission's current mandate in 2024.

### **Non-Financial Reporting Directive (NFRD)**

In relation to non-financial reporting, the NFRD applies to large public-interest entities (such as companies listed on a regulated market of any Member State, credit institutions, insurance undertakings and those designated as public-interest entities by Member States) with over 500 employees during the financial year as recorded on their balance sheet. The directive requires those companies, along with public-interest parent companies of large groups that collectively employ more than 500 people, to include a non-financial sustainability statement within their management report. This provides for an understanding of the undertaking's activity and its impact on environmental, social and employee matters, human rights, anti-corruption and bribery. Such a report should include a description of the business model, description of policies relating to the matters above and the outcome of those policies, the principle risks in relation to those matters and any relevant non-financial key performance indicators. The NFRD also requires the inclusion of information relating to the undertaking's diversity policy or, in the absence of one, an explanatory statement.

### **Corporate Sustainability Due Diligence Directive (CSDDD)**

The Commission adopted a proposal for the CSDDD in February 2022 that would require in-scope companies to identify and, where necessary, prevent, end or

mitigate their activities' adverse impacts on human rights and the environment. The proposal includes requirements to establish and maintain a complaints procedure, to monitor the effectiveness of due diligence policy and measures and to publicly communicate on due diligence. The proposal also introduces the opportunity for victims of harms committed by in-scope companies, their subsidiaries, contractors and suppliers, either at home or abroad, to take legal action relating to any due diligence failures before EU courts. The directive is expected to come into force during the course of 2023.

The CSDDD will first apply to all EU companies with at least 500 employees and EUR 150 million in net worldwide turnover as measured at the company level (Group 1 companies), which, in addition to the above, are required to adopt plans to ensure their business strategies are compatible with the goal of limiting global warming to 1.5°C in accordance with the Paris Agreement. Other EU limited liability companies that operate in high-impact sectors, such as textiles, agriculture and mineral extraction, which have at least 250 employees and net worldwide turnover of EUR 40 million (so-called Group 2 companies) must comply two years after the Directive applies to Group 1 companies. The rules will also apply to any non-EU companies active within the EU who meet the turnover thresholds in respect of their turnover generated within the EU.

### **3. What other laws/regulations in the EU touch on ESG themes?**

The Conflict Minerals Regulation (Regulation 2017/821) requires EU companies to ensure they import ores and concentrates containing tin, tantalum, tungsten or gold from responsible and conflict-free sources and comply with certain supply chain due diligence obligations.

The Commission has also proposed a regulation on deforestation-free products, which would apply to all companies, irrespective of their legal form or size, placing soya, beef, palm oil, wood, cocoa, coffee products or any product derived therefrom on the EU market, or exporting them from it (COM(2021) 706 final). Under the proposal, no in-scope commodities would be allowed to enter or exit the EU market if they were produced on land either deforested or degraded after 31 December 2020. This regulation is expected to come into force in 2023.

The Directive on preventing and combating trafficking in human beings and protecting its victims constitutes a legal framework designed to fight all forms of exploitation in the EU by natural and legal persons, including sexual exploitation, begging, slavery, servitude, the exploitation of criminal activities and the removal of organs (Directive 2011/36/EU). The directive requires Member States to ensure that all legal persons are held liable for offenses committed for their benefit by any person who has a leading position within the legal person. It provides for sanctions to be raised on a legal person held liable, including exclusion from any entitlement to public benefits or aid and disqualification from the practice of commercial activities.

The European Parliament in September 2022 adopted a directive governing the adequacy of minimum wages for EU workers (COM(2020) 682 final), which

currently range widely from EUR 332 per month in Bulgaria to EUR 2,257 in Luxembourg (pre-tax). The directive does not set a fixed minimum wage but considers:

- the adequacy of minimum wages;
- the promotion of collective bargaining on wage setting; and
- effective access to minimum wage protection.

Member States would be required to monitor the adequacy of minimum wages and report to the Commission on an annual basis. The European Council formally adopted the directive in October 2022, after which Member States will have two years to implement it in national law.

EU antitrust law and policy is also becoming increasingly intertwined with considerations relating to ESG. In November 2021, the Commission published a communication in which it acknowledged that EU competition policy can contribute to the green transition by enabling companies to cooperate in the joint pursuit of genuinely green initiatives (COM(2021) 713 final). In making a competition assessment, consumer preferences for sustainable products, services and technologies should be taken into account whenever appropriate. By way of example, the Commission noted that restrictive agreements under Article 101(1) TFEU might be exempted should the sustainability-linked benefits they bring to consumers outweigh their harm. Draft revised rules on horizontal cooperation agreements between companies were published by the Commission on 1 March 2022 and aim to include a new chapter addressing the assessment of agreements pursuing sustainability objectives, including those that set sustainability standards.

In addition, recent Commission guidelines on state aid for climate, environmental protection and energy, applicable from January 2022, have aligned state aid rules with the objectives and targets of the Green Deal.

#### **4. What, if any, litigation or enforcement activity has the EU seen related to ESG?**

Enforcement of the EU's ESG frameworks, as provided for through Regulations and Directives, is left to the national governments of member states (Article 299 TFEU). Please see country-specific chapters.

#### **5. What are the major non-law/regulatory drivers of ESG trends and developments in the EU?**

##### **Soft non-binding laws**

The EU supports various UN instruments that impact businesses, including the UN Guiding Principles on Business and Human Rights, the UN's 2030 Agenda for Sustainable Development and the Sustainable Development Goals.

##### **Stakeholders**

For many stakeholders, greenwashing has become a particular concern. The European Securities and Markets Authority (ESMA) has made tackling the issue a priority in its 2022-2024 Sustainable Finance Roadmap, which includes actions to

assess greenwashing market practices, conduct case discussions on greenwashing amongst national competent authorities (NCAs) and work to develop a common understanding of NCAs' supervisory role.

In March 2022, the Commission also proposed amendments to the Unfair Commercial Practices Directive (UCPD) to address the issue of greenwashing, which include:

- adding the environmental or social impact of products to the list of characteristics about which a trader cannot mislead consumers;
- establishing the making of claims about the future environmental performance of a product without clear, objective and verifiable commitments and targets nor an effective monitoring system as a practice considered misleading; and
- including the making of generic and vague environmental claims where actual performance cannot be demonstrated in the “black list” of prohibited unfair commercial practices.

These amendments are expected to come into force in late 2023.

### National Contact Points (NCPs)

Please see country-specific chapters.

## 6. Are the laws, regulations and obligations highlighted in Question 2 primarily related to corporate disclosure?

Reporting and corporate disclosure make up the focus of much of the legislation outlined in Question 2; however, the EU's ESG regulatory framework is not solely outcome-oriented. The SFDR's regulatory technical standards, for example, specify the content and methodologies in the preparation and presentation of information required under the regulation, thus prescribing the process by which in-scope firms must measure their outputs.

Other EU Directives are also process-oriented, such as the CSDDD, which provides a framework for the assessment of actual and potential adverse impacts of an undertaking's activities on human rights and the environment. See, also, the regulations and directives outlined at Question 3 above.

### Reporting

Taken together, the full gamut of ESG regulations require companies to disclose across a broad range of formats. Fund managers falling subject to the SFDR must make certain entity-level disclosures in fund prospectus documentation and on their websites. Product-level disclosures are required again in fund prospectuses and in annual reports.

Non-financial reporting required of firms falling within the scope of the NFRD and proposed CSRD should be contained in annual management reports, while due diligence policies envisaged under the CSDDD must be updated by in-scope firms on an annual basis.

Reporting requirements in the EU also reflect the notion of double materiality, first coined in the NFRD, which requires a company to disclose ESG information necessary to understand the impact of its activities. While climate-related



information should be reported where necessary to understand the inward development, performance and position of the company, it must also be reported where necessary to understand the external impact of the company's activities on broader society and the environment. In this way, the materiality perspective of the NFRD covers both financial materiality and social and environmental materiality, unlike other sustainability reporting frameworks, such as the Taskforce on Climate-related Financial Disclosures, whose perspective is restricted to that of financial materiality only.

## **7. Which sectors are most impacted by ESG in the EU? How significant is ESG investment in the EU?**

### **Private equity/hedge funds/asset managers**

Fund managers are heavily impacted by the requirements imposed under the SFDR and, as outlined above, with the regulation requiring not only EU financial market participants and financial advisers to comply with broad sustainability-related disclosures, but also all non-EU firms marketing in the bloc. In ensuring compliance, fund managers must update marketing materials, including public websites, and source reliable and credible ESG data to form the basis of those disclosures.

### **Banks**

European banks are coming under increasingly strict rules in relation to ESG reporting. In January 2022, the European Banking Authority published its final draft implementing technical standards on Pillar 3 disclosures in relation to ESG risks. Under the new rules, banks headquartered in the EU will be required to report on their exposure to carbon-related assets and assets subject to climate change-related risks, such as floods and fires. They must also disclose the extent to which their financing activities are aligned with the EU Taxonomy, expressed through both the Green Asset Ratio and the Banking Book Taxonomy Alignment Ratio.

European insurers are now also subject to stricter ESG-related requirements. Changes to Solvency II (Directive 2009/138/EC) effective from August 2022, for example, have seen the prudent person principle amended to include mandatory consideration by European (re)insurers of sustainability risks, and the sustainability preferences of their customers, in the investment process.

### **Small and medium-sized enterprises (SMEs)**

In broadening the scope of the NFRD, the CSRD extends reporting requirements to all listed EU companies, including SMEs, with an opt-out available during a transition period running until 2028. Under the tiered application timeline, SMEs will be required to report from January 2026 under a proportionate set of ESRs.

On the EU's proposals for new due diligence requirements, while the CSDDD does not directly include SMEs within its scope, those who wish to do business with larger in-scope enterprises will be heavily impacted, as the directive extends to the operations of entities with which qualifying companies have established business relationships.

### Fashion

Of particular relevance to the fashion industry is the Commission's Circular Economy Action Plan. As part of that plan, the Commission adopted a package of measures in March 2022 including an EU strategy for sustainable and circular textiles, aimed at ensuring that by 2030, textile products within the EU market are long-lived and recyclable, free from hazardous substances and produced with respect to social rights and the environment. Measures forming part of the strategy include:

- the introduction of mandatory eco-design requirements through a proposed Ecodesign for Sustainable Products Regulation;
- measures to prevent the destruction of unsold or returned goods; and
- measures aimed at tackling microplastics pollution.

As currently drafted, the CSDDD is also set to impact the fashion industry, with a new focus on shoring up environmental and human rights due diligence throughout the supply chain.

Greenwashing in the fashion industry is also being targeted by proposed amendments to the UCPD, as outlined above.

### Automobile industry

In June 2022, the European Parliament voted to end the sale of vehicles with combustion engines in Europe by 2035. The European Parliament approved the new rules in February 2023, and the final text is now before the European Council. The legislation is a key part of the Fit for 55 package. It will likely translate into ESG regulation in relation to investment in automobile companies.

In a similar vein, the Commission is due to present a Greening of Freight Package, aiming to significantly increase energy efficiency in the sector, and consider a legislative initiative to increase the share of zero-emission vehicles in public and corporate car fleets above a certain size. The EU Save Energy Communication also includes many recommendations to cities, regions and national authorities that can effectively contribute to the substitution of fossil fuels in the transport sector.

### Energy industry

The EU External Energy Strategy, adopted in May 2022, aims to facilitate energy diversification and build long-term partnerships with suppliers, including cooperation on hydrogen or other green technologies. The Commission proposes to increase the 2030 target for renewables from 40% to 45% under the Fit for 55 package. This increased target sets the framework for other initiatives.

For example, the EU aims to introduce a dedicated EU Solar Strategy to double solar photovoltaic capacity by 2025 and install 600GW by 2030. To achieve this, they aim to introduce a Solar Rooftop Initiative with a phased-in legal obligation to install solar panels on new public and commercial buildings and new residential buildings.

The EU has also set a target of 10 million tons of domestic renewable hydrogen production and 10 million tons of imports by 2030 to replace natural gas, coal and oil in hard-to-decarbonise industries and transport sectors. The Commission is also publishing two Delegated Acts on the definition and production of renewable hydrogen to ensure that production leads to net decarbonisation.

To encourage investment, the EU is also planning a Commission Recommendation to tackle slow and complex permitting for major renewable projects, and a targeted amendment to the Renewable Energy Directive to recognise renewable energy as an overriding public interest.

## **8. What are the trends in the EU regarding ESG governance?**

Other than the CSDDD (see Question 2), there is no single EU governance law. Please see country-specific chapters for national legislative developments in governance standards.

## **9. To what extent are ESG ratings or ESG benchmarks relied upon in the EU?**

### **ESG rating agencies**

As sustainable investment has continued to become more integrated into the financial ecosystem, investors have increasingly come to rely on ESG rating agencies to provide data points that allow a comparison of companies' ESG credentials.

Clear evidence of the importance of ESG ratings in the European market can be seen in the various initiatives made by both the Commission and other EU authorities to address the regulation of ESG ratings and their providers. As part of the Commission's 2021 consultation on its renewed sustainable finance strategy, stakeholders were canvassed for their views on the quality and relevance of ESG ratings to their investment decisions, the degree of concentration in the market and the need for regulation and action at the EU level. In alluding to the importance of ratings and their providers, they highlighted that improved comparability and an increased reliability on ESG ratings would enhance the efficiency of the market for sustainable finance and facilitate progress under the Green Deal.

The Commission went on to undertake a targeted consultation on ESG ratings and sustainability factors in credit ratings that will directly feed into an impact assessment evaluating the impacts, costs and options of a possible EU intervention in the ratings space. In parallel, a complementary call to evidence was issued by ESMA in February 2022, aimed at mapping the ecosystem of rating providers operating within the EU and assessing the possible costs of supervision.

Responses from the combined consultations will potentially form the basis of a new policy initiative to be proposed by the Commission and designed to foster the reliability, trust and comparability of ESG ratings in early 2023.

### **ESG benchmarks**

In relation to benchmarks, the EU has adopted the Low Carbon Benchmark Regulation, which introduced EU climate transition benchmarks and EU Paris-aligned benchmarks and seeks to ensure that low-carbon benchmarks comply with a standard methodology to provide a degree of uniformity and prevent greenwashing (Regulation (EU) 2019/2089). In July 2020, the EU Commission adopted rules setting out minimum technical requirements for the EU climate transition benchmark label. These include requirements that the sectors to

which the benchmark is allocated reduce their carbon emissions year on year and exclude assets that significantly harm ESG objectives.

While there is currently no EU benchmark encompassing all three ESG pillars, the Commission has announced the commission of a study to inform the possible features of a new EU ESG benchmark label.

### **10. What is the role of the private markets versus public markets in driving ESG developments in the EU?**

For details of the role of companies and government-owned organisations within the EU, please see country-specific chapters.

### **11. What are the major challenges in terms of compliance for companies under ESG obligations?**

Access to reliable data, made more challenging by a general lack of standardisation and methodological transparency, has proved difficult for many. Requirements under the EU's ESG regulations to aggregate data, in particular non-financial data, across complex supply chains and varied portfolio companies, have proven particularly challenging.

Varying timelines for the implementation of relevant regulations have also proved burdensome, with the EU's legislative mechanics at times seeming reluctant to move. Level 2 disclosures under the SFDR, for example, were pushed back twice, eventually occurring in January 2023. Similarly, successive delays in the publication of the draft CSDDD were met with a joint statement from over 100 companies, investors, business associations and initiatives criticising these delays.

### **12. What information sources are most relevant for ESG considerations in the EU?**

In holding responsibility for proposing legislation to the European Parliament and Council, the Commission is the primary source of information relating to ESG regulation in the EU.

### **13. Has the EU developed a Taxonomy related to ESG?**

Yes. An outline of the EU's Taxonomy Regulation is provided at Question 2 above.

### **14. What does the future hold for ESG in the EU?**

In the short term, the following key developments are expected over the coming years:

- The final Level 2 Regulatory Technical Standards supplementing the SFDR and including details as to the implementation of disclosures under the SFDR and Taxonomy Regulation at entity and product level are set to apply from 1 January 2023. They include five annexes with templates for principal adverse impact statements, and pre-contractual disclosure and periodic reports for Article 8 and Article 9 products.
- The Complementary Climate Delegated Act is also set to apply from 1 January 2023 and will include specific nuclear and gas energy activities in the list of economic activities covered by the EU Taxonomy.
- Preparations to meet disclosure requirements under the CSRD will begin in earnest, as regulation will become applicable initially to companies already in scope of the NFRD in 2024 (for reporting in 2025) in 2025 for all large companies (for reporting in 2026) and in 2026 for all listed SMEs (for reporting in 2027). The first set of ESRS are due for adoption by the Commission by 30 June 2023 and the second by 30 June 2024.
- Following its proposal by the Commission in July 2021, the EU Green Bond Standard (the EUGBS) is in its final negotiation phase and is expected to be released in the final version by the end of 2022, with the legislative proposal set to enter into application in 2023 or 2024. As proposed, the EUGBS would require bonds' use of proceeds to be Taxonomy-aligned, and also certain pre- and post-issuance disclosure to be reviewed by an ESMA-registered third party.
- The CSDDD is set to pass through the European Parliament and Council for approval, and its obligations are expected to apply from 2025.
- Although the timeline for its development is currently unclear, the Commission is expected to consider the establishment of a social taxonomy, likely following the end of its current mandate in 2024. This is particularly relevant in light of the publication in February 2022 by the Platform on Sustainable Finance of its final report on the social taxonomy, which suggested a structure consisting of three objectives:
  - decent work across the value chain;
  - adequate living standards and wellbeing for end-users; and
  - inclusive and sustainable communities and societies.

Looking towards the medium and long term, the EU remains set on its strategy, founded under the Green Deal, to make Europe the first climate-neutral continent by 2050. As part of this journey, the Commission has proposed in its 2030 Climate Target Plan to cut greenhouse gas emissions by at least 55% below 1990 levels by 2030, while continuing to stimulate the creation of green jobs and grow the economy. Long term, the full range of Sustainable Development Goals will filter into the substantive requirements of EU legislation as it continues to develop.

**AUTHOR BIOGRAPHIES**



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