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Expert Analysis Chapters

Q&A Chapters

ESG and Sustainability at the Core of Financing: A European Union Perspective


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Introduction

Reuters recently published that "Four of the biggest U.S. banks are no longer signatories to the Equator Principles, an industry benchmark for assessing environmental and social risks in project-related finance".[1]

This undoubtedly shows that ESG is an ongoing hot topic but one which is currently not exempted from controversy, in particular in the US market. Reuters reported in the same publication that "[t]he departures are the latest example of major financial services companies leaving corporate environmental initiatives since U.S. Republican politicians started suggesting participation could breach antitrust rules".

Europe, specifically the European Union ("EU"), is currently pushing strongly for shifting capital towards sustainable investments and has drawn several policies and legislation accordingly – further to the signature of the Paris Agreement and adhesion to the 2030 Agenda.

We are indeed far away from those times where it was necessary to explain that the acronym ESG stands for environmental, social, and governance, but we are also far away from a harmonised view about where an ESG approach should lead us. Times are uncertain as regards ESG considerations and claims, and one needs to consider that compliance and legal due diligence is required in respect of ESG considerations and claims like never before.

We note as well that from an EU perspective, ESG and sustainability considerations need to consider and comply with EU competition rules.

Without prejudice to the required compliance with the EU and national legislations at EU level, at least from an EU perspective, ESG considerations keep pushing the sustainability agenda and are a driving force for new legal requirements and new approaches to financing.

Following EU legislation, several companies proudly report on their sustainable investments as well as on their sustainable financings. At the same time the ongoing reporting from companies and financial entities is followed closely, and greenwashing and green claims is required to be looked at attentively when working on business strategies and investments. So, it seems the key message at the EU level is currently to keep going: pushing for the sustainability agenda, but doing it right.

The 2030 Agenda and the Paris Agreement

The 2030 Agenda and the Paris Agreement set the framework for the EU Green Deal and for the current sustainability strategy of the EU Commission along with the work undertaken within the EU institutions.

The 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals ("SDGs"), signed in September 2015 at the United Nations General Assembly, focus on people, planet, prosperity, and peace. It is meant to be a call to action for all UN Countries and stakeholders to implement it in a joint effort. The 17 SDGs contain a wide range of goals, from ending poverty and hunger and promoting gender equality to combatting climate change and fostering peace, addressing the economic, social, and environmental dimensions of sustainable development.

The Paris Agreement, ratified by the EU on 5 October 2016,[2] is the first universal, legally binding global climate agreement, aiming to strengthen the global response to the threat of climate change, by limiting warming to well below 2ºC, reducing greenhouse gas emissions, and supporting measures to adapt to the impacts of global warming. The 2030 Agenda and the Paris Agreement set up the global framework for international cooperation on sustainable development, with the EU committed to be a frontrunner in implementing SDGs and raising the climate goals ambition.

The European Green Deal is a package of policy initiatives, which aims to carry out the EU's green transition, with the ultimate goal of reaching climate neutrality by 2050, bringing the EU into a "fair and prosperous society with a modern and competitive economy".[3]

The EU Sustainable Finance Strategy

On 14 September 2016 the EU Commission issued the Communication on the Capital Markets Union[4] where the Commission acknowledged the need for reforms for sustainable finance to support investment in clean technologies and their deployment. Such reforms were deemed essential to meet climate and environment objectives and international commitments such as the EU's commitments under the Paris Agreement.

In said Communication the EU Commission indicated that in respect of ESG issues, the EU adopted mandatory disclosure requirements for certain large companies and would also adopt non-binding guidelines on the methodology for reporting such information to investors and consumers. The EU Commission also indicated that "it is also assessing the follow-up to the recent consultation on long-term and sustainable investment which emphasised the importance of ESG issues for the longer-term performance of companies and investors". The Commission further indicated that it was to set up an expert group "to develop a comprehensive European strategy on green finance".

At the end of 2016, a High-Level Expert Group on Sustainable Finance ("HLEG") was set up by the EU Commission to help develop such comprehensive EU strategy on sustainable finance, defined by the EU Commission as "the process of taking environmental, social and governance (ESG) considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects".[5]

Further to the establishment of the HLEG, their recommendations on sustainable finance formed the basis of the action plan on sustainable finance adopted by the Commission in March 2018[6] (the "Action Plan").

The Action Plan included the following 10 actions:

- Action 1: Establishing an EU classification system for sustainable activities.
- Action 2: Creating standards and labels for green financial products.
- Action 3: Fostering investment in sustainable projects.
- Action 4: Incorporating sustainability when providing financial advice.
- Action 5: Developing sustainability benchmarks.
- Action 6: Better integrating sustainability in ratings and market research.
- Action 7: Clarifying institutional investors' and asset managers' duties.
- Action 8: Incorporating sustainability in prudential requirements.
- Action 9: Strengthening sustainability disclosure and accounting rule-making.
- Action 10: Fostering sustainable corporate governance and attenuating short-termism in capital markets.

Action 1 of the Action Plan evolved into the Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020, commonly known as the Taxonomy Regulation, on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the "Taxonomy Regulation"). Regulation (EU) 2020/852 is the foundation stone of the European taxonomy framework.

Since an EU regulation is a piece of legislation which, unlike EU directives, does not need to be implemented into national legislations, this binding legislative act must be applied directly in its entirety across the EU.[7] In fact, the circumstance that the EU Taxonomy is a regulation instead of a directive is generally relevant as it reflects the EU Commission intention to harmonise the interpretation and implementation of such a powerful tool among the Member States of the EU.

The Technical Expert Group

Later, the EU Commission set up a Technical Expert Group (the "TEG") to assist the EU Commission in the development of various legislative proposals, among which is the EU Taxonomy. The TEG initiated its work in July 2018 with 35 members from civil society, academia, business, and the finance sector, as well as members and observers from the EU and international public bodies.

Within the framework of the Taxonomy Regulation, the TEG was asked to develop recommendations for technical screening criteria for economic activities to be considered sustainable activities.

In March 2020 the TEG published its final report on the EU Taxonomy containing recommendations on the design of the EU Taxonomy as well as guidance on its implementation. This report followed the preliminary work the TEG published in June 2019.

It is worth noting that during its mandate, the TEG engaged with over 200 experts to develop their recommendations for the technical screening criteria. The work of the TEG was crucial for the development of the EU Taxonomy and the reports it published are helpful in understanding the rationale and directions taken throughout this legislative process.

Naturally, the TEG is a technical group and accordingly in this context it is also unescapable to consider the discussions and negotiations at the level of the EU institutions, including the European Parliament.

The EU Taxonomy

The Taxonomy Regulation sets out a classification system for economic activities to be considered environmentally sustainable – the EU Taxonomy, acting as a "green classification system that translates the EU's climate and environmental objectives into criteria for specific economic activities for investment purposes".

It recognises that it is "green, or 'environmentally sustainable', economic activities that make a substantial contribution to at least one of the EU's climate and environmental objectives, while at the same time not significantly harming any of these objectives and meeting minimum social safeguards".[8]

As such, for an activity to be considered environmentally sustainable it needs to contribute substantially at least to one out of six environmental objectives: (i) climate change mitigation; (ii) climate change adaptation; (iii) sustainable use and protection of water and marine resources; (iv) transition to a circular economy; (v) pollution prevention and control; and (vi) protection and restoration of biodiversity and ecosystems.

For an activity to be considered environmentally sustainable under the EU Taxonomy, it must fulfill three conditions: (i) making a substantial contribution to at least one of the aforesaid environmental objectives by complying with its substantial contribution technical screening criteria, as indicated above, and furthermore; (ii) doing no significant harm to any other environmental objective, by complying with the "do-no-significant-harm" technical screening criteria; and (iii) complying with minimum social safeguards, i.e, companies must carry out their activities in compliance with minimum safeguards in matters of human rights (and labour rights), anti-corruption, responsible taxation, and fair competition.[9]

The EU Taxonomy is commonly referred to among others as the main piece of the puzzle, the backbone of sustainable finance, the metric of the XXI century for sustainable activities, or the tool to fight greenwashing. These expressions evidence that undoubtedly, EU Taxonomy is considered the basis and the first step for stakeholders approaching or involved with sustainable finance at the EU level.

Without fully understanding the intricacies of the EU Taxonomy, it will be difficult to entirely grasp the potential of a sustainable finance strategy or to avoid liabilities arising from greenwashing accusations.

As the EU Commission highlights "the EU taxonomy allows financial and non-financial companies to share a common definition of economic activities that can be considered environmentally sustainable. In this way, it plays an important role in helping the EU scale up sustainable investment, by creating security for investors, protecting private investors from greenwashing, helping companies become more climate-friendly and mitigating market fragmentation".[10]

The Taxonomy Regulation entered into force on 12 July 2020 and further to that the Commission implemented several delegated and implementing acts with the list of environmentally sustainable activities by defining technical screening criteria for each environmental objective.

The road for mastering the EU Taxonomy is bumpy and the EU Commission acknowledged it and published on its website an EU taxonomy navigator[11] offering four tools to help with the EU Taxonomy: (i) an EU taxonomy compass with a visual representation of sectors, activities and criteria included in the EU Taxonomy delegated acts;[12] (ii) an EU taxonomy calculator with a step-by-step guide on reporting obligations;[13] (iii) an FAQs repository with an overview of questions and answers on the EU taxonomy and its delegated acts;[14] and (iv) an EU taxonomy user guide with a guidance document on the Taxonomy for non-experts.[15]

Nevertheless, many uncertainties remain, and an analysis of taxonomy reporting by companies bound by taxonomy reporting obligations shows that there is not yet unified and harmonised reporting at EU level. The sustainability path is being undertaken, step by step.

As the taxonomy regulation adopts a full value chain approach, by covering the entire value chain of an eligible economic activity, it is expected to have an indirect impact on small and medium enterprises ("SMEs"), as SMEs are part of that value chain.

Stakeholders need to be fully aware of the complexities of the system when undertaking its reporting obligations and that early preparation is required since the flow of information needs many times to be re-oriented, new information must be sought and due diligence undertaken.

The Taxonomy Delegated Acts

The first Taxonomy delegated act which implements the EU Taxonomy was published on 9 December 2021,[16] the Delegated Act on sustainable activities for climate change adaptation and mitigation objectives, also known as the Climate Delegated Act. This delegated act has been in force since January 2022.

The Climate Delegated Act published the first list of environmentally sustainable activities by defining technical screening criteria for the first two environmental objectives: (i) climate change mitigation; and (ii) climate change adaptation.

As is often the case of publication of legislation by the EU Commission, such delegated act was accompanied by a set of documentation, including practical advice and guidance from the EU Commission on various matters of the sustainable finance package. This included a Commission Communication on "EU taxonomy, corporate sustainability reporting, sustainability preferences and fiduciary duties: Directing finance towards the European green deal".[17]

On 10 December 2021, a subsequent delegated act was published, the Delegated Act supplementing Article 8 of the Taxonomy Regulation, also known as the Disclosures Delegated Act.[18] The Disclosure Delegated Act indicates the content, methodology, and presentation of the information to be disclosed by financial and non-financial undertakings concerning the proportion of environmentally sustainable economic activities in their business, investments, or lending activities. It is a key act as regards reporting obligations.

On 15 July 2022 the Climate Delegated Act was amended by a Complementary Climate Delegated Act[19] which included in the list of sustainable activities covered by the EU Taxonomy, specific nuclear and gas energy activities (under strict conditions). This Delegated Act applied as from January 2023. The purpose of this Complementary Climate Delegated Act was to "help accelerate the shift from solid or liquid fossil fuels, including coal, towards a climate-neutral future".[20]

The approval of this Delegated Act was not without controversy and involved intense discussions and negotiations among stakeholders and including at the European Parliament level.[21]

On 21 November 2023, an amendment to the Climate Delegated Act was published,[22] inserting new activities with its technical screening criteria on the Annex I and Annex II of the Climate Delegated Act and amending the descriptions or the technical screening criteria of the activities listed on those mentioned Annexes. This Regulation has been almost entirely applicable since 1 January 2024.[23] 21 November 2023 also saw the publishing of the Delegated Act listing the activities and its technical screening criteria regarding the remaining four environment objectives,[24] i.e., (i) sustainable use and protection of water and marine resources, (ii) transition to a circular economy, (iii) pollution prevention and control, and (iv) protection and restoration of biodiversity and ecosystems, known as the Environment Delegated Act. This Delegated Act also introduces some amendments to the Disclosures Delegated Act. The Environment Delegated Act applies as of January 2024.

The amendments to the activities list evidence the EU Taxonomy as a dynamic and evolving classification, i.e. the list of activities changes over time (including considering technological developments) as foreseen under the Taxonomy Regulation. This renders the taxonomy reporting exercise more complex but also more flexible for accommodating necessary technical evolution as well as requests from stakeholders for additional activities to be considered – as foreseen under the stakeholder request mechanism that involves the Platform on Sustainable Finance.[25] This mechanism was launched to address suggestions from stakeholders regarding activities in the EU taxonomy.[26]

The Reporting Obligations, the CSRD and the CSDDD

The fact that EU legislation requires large companies and listed companies to publish regular reports on their social and environmental risks, as well as on how their activities have an impact on people and the environment, has had a huge impact on mainstreaming ESG into the daily operation of companies, in particular the ones affected by such reporting obligations.

These reporting obligations are forcing companies to look internally, re-assess their businesses strategies and implement flows of information directed to such strategies and reporting obligations.

The Directive (EU) 2022/2464, of 14 December 2022, known as Corporate Sustainability Reporting Directive ("CSRD"), which entered into force on 5 January 2023, builds on the rules regarding social and environmental information that companies must report, and it also enlarges the list of companies that must report. All large companies, as well as listed SMEs, will now progressively be required to report on sustainability, and some non-EU companies will also have to report as provided for in the CSRD.

Under the Directive (EU) 2014/95 of 22 October 2014, known as the Non Financial Reporting Directive ("NFRD"), the reporting obligations applied essentially to listed companies, banks, and insurance companies with more than 500 employees. CSRD amplifies this scope of application and extends the reporting obligations, such as in 2025, to all big companies established in a Member State that fulfil at least two of the following criteria: (i) balance of more than €25 million; (ii) turnover of more than €50 million; and (iii) more than 250 employees, in 2026, to SMEs with values listed on the regulated market of a Member State (with a possibility of opting out until 2028), in 2028, to SMEs that opted out and companies headquartered outside of the EU, that have at least a subsidiary or branch in the EU with a turnover of €150 million or more.

These companies will have to report according to European Sustainability Reporting Standards ("ESRS"), the first set of which was published in December 2023.[27] Specific standards are expected for SMEs (with a more appropriate approach for SMEs' reality), which are under development, and for the companies headquartered outside of the EU. Recently, the EU Commission and Parliament reached a provisional agreement to postpone to 30 June 2026, the adoption of the reporting standards for certain sectors and for third-country companies with a €150 million turnover in the EU and which have at least one subsidiary or branch in the EU, scheduled for 30 June 2024. This postponement would allow companies to focus on the implementation of the first set of ESRS[28] and would give more time to the European Financial Reporting Advisory Group ("EFRAG") for the development of sector-specific standards and the standards for third-country companies. This proposal needs to be endorsed and formally adopted by the European Parliament and the European Council. At the time of writing, the proposal is awaiting parliament's position in first reading.

The publication of all the reporting standards is important for the full implementation and effectiveness of the CSRD framework. The reported information depends on a materiality assessment, to be made and demonstrated by the companies at stake. The CSRD requires assurance on the sustainability information that companies will report and will provide for the digital taxonomy of such information.

CSRD is also expected to also have an indirect impact on SMEs, as SMEs are part of the value chain of those undertakings already directly covered by the reporting obligations.

In 2022 the EU Commission adopted a proposal for a directive on corporate sustainability due diligence ("CSDDD") with the aim to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance. This CSDDD proposal brings the ESG framework to a stricter level, including, even, a relevant penalty component for companies that fail to comply with obligations provided therein. From essentially reporting obligations, the EU legislation has evolved to effective material obligations.

The text of the CSDDD proposal is undergoing several changes and at the time of writing this chapter its final outcome is still unclear. Nonetheless, after some considerable difficulties at the European Council endorsement level, significant progress was made very recently as the European Council approved an adjusted text proposal of the CSDDD. The CSDDD is now waiting for the European's Parliament formal approval. The recent text adjustments imply, among other aspects, that the new due diligence rules will apply to EU and non-EU companies and parent companies with over 1,000 employees, with a turnover of more than €450 million and to franchises with a turnover of more than €80 million if at least €22.5 million was generated by royalties.

The proposed Directive on Corporate Sustainability Due Diligence requires companies to conduct human rights and environmental due diligence, by integrating due diligence in their policies, identifying actual or potential adverse impacts, preventing, and mitigating potential adverse impacts, establishing and maintaining a complaints procedure, monitoring the effectiveness of their due diligence policy and measures and publicly communicating on due diligence. Companies will also have to adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5° C in line with the Paris Agreement. CSDDD, as already mentioned, will also bring stricter obligations with a relevant penalty component as firms will be liable if they do not comply with their due diligence obligations and will have to fully compensate their victims. They will also have to adopt complaints mechanisms and engage with individuals and communities adversely affected by their actions.

In line with the aforementioned taxonomy legislation and CSRD, the CSDDD is built on value chain logic. The CSDDD will have an indirect impact on SMEs as the latter are part of the value chain.

SFDR

The Regulation (EU) 2019/2088 of the European Parliament and the Council, of 27 November 2019, known as the Sustainable Finance Disclosure Regulation[29] is also a relevant instrument for sustainable finance.

It is part of the European legislative package for sustainable finance and establishes the specific rules in the financial services sector, for the sustainability-related disclosure of information on financial assets and products.

A sustainable investment under the SFDR is considered to be an "investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance".[30]

We note that this definition of "sustainable investment" in Article 2 (17) of the SFDR is broader than the scope of the Taxonomy Regulation, and may include sustainable investments in an economic activity with an environmental objective that is not expressly covered by the Taxonomy (limited to six specific environmental objectives) or sustainable investments in an economic activity with an objective of a social nature (not yet subject to a specific taxonomy).

The disclosure of specific information concerning the sustainability level of the financial product by the financial market participants and financial advisers gives specific information to investors that allows them to make more informed choices of investments into companies and projects supporting sustainability objectives. SFDR combats greenwashing by trying to prevent the labelling of an investment as sustainable when it does not comply with environment and social standards.

As explained under SFDR, "the consideration of sustainability factors in the investment decision-making and advisory processes can realise benefits beyond financial markets. It can increase the resilience of the real economy and the stability of the financial system. In so doing, it can ultimately impact on the risk-return of financial products. It is therefore essential that financial market participants and financial advisers provide the information necessary to enable end investors to make informed investment decisions".[31]

The sustainable disclosure obligations may also be of help to achieve the transition for more sustainable economic activities as the SFDR "(…) is also designed to allow investors to properly assess how sustainability risks are integrated in the investment decision process. In this way, the SFDR contributes to one of the EU's big political objectives: attracting private funding to help Europe make the shift to a net-zero economy".[32]

The EU Green Bond Standard

As regards sustainable finance, a key piece of legislation recently enacted is the EU Green Bond Standard which was published on 30 November 2023.

Green financing has been playing an increasingly important role in the financing of projects, such as renewables projects. The number of green loans and green bonds is growing consistently – notwithstanding the percentage of green bonds still being limited.

The EU Green Bond Standard shows the intention of the EU Commission "to set a clear gold standard for green bonds".[33] This Standard relies on the EU Taxonomy criteria to define sustainable, green activities, and aims to provide transparency to the market. The EU Commission highlights that the creation of such Standard was recommended by the HLEG (which as previously indicated recommended also the establishment of a common sustainable finance taxonomy).

We note that while this Standard is voluntary, the impact of its use being supported by institutions such as the European Investment Bank ("EIB") will certainly contribute for mainstreaming its adoption. We note for instance that the EIB stated in its Climate Bank Roadmap 2021–2025 its intention to gradually align Climate Awareness Bonds and Sustainability Awareness Bonds with the EU Green Bond Standard as retained over time and amended by the European Commission.[34]

In effect, the EIB indicated that the EIB Group plans are to gradually increase the share of green finance. Considering that green finance is being increasingly scrutinised by the EIB with the taxonomy lens, reflecting though an ESG approach, this will certainly have an impact in the financing of projects in Europe. The EIB Climate Bank Roadmap clearly states that the EIB intends to align its tracking methodology for green finance with the EU Taxonomy framework.

We note that the EU Green Bond Standard was recommended also by the TEG "to enhance the effectiveness, transparency, comparability and credibility of the green bond market".

The practical implementation of the EU Green Bond Standard and the adhesion of the market to this standard is yet to be seen but its influence is already being felt in the market.

Green Claims

To address this concern on greenwashing claims and for reaching the targets set within the framework of the European Green Deal, the EU issued a Proposal for Directive on substantiation and communication of explicit environmental claims. The Directive Proposal is currently awaiting Parliament's approval.

As explained by the EU in the explanatory memorandum of the proposal "in March 2022 the Commission proposed to update Union consumer law to ensure that consumers are protected and to empower them to contribute actively to the green transition. This proposal provides more specific rules (*lex specialis*) and complements the proposed changes to the Unfair Commercial Practices Directive (*lex generalis*)".[35]

In March 2023, the proposal for a directive on green claims was published,[36] the Commission indicating as its objectives to "make green claims reliable, comparable and verifiable across the EU, protect consumers from greenwashing, contribute to creating a circular and green EU economy by enabling consumers to make informed purchasing decisions, help establish a level playing field when it comes to environmental performance of products".[37]

The Proposal for a Green Claims Directive aims to provide new criteria for stopping companies from making misleading claims about the environmental merits of the products and services they are offering. It creates a new set of rules and concepts, applicable to producers and traders, for substantiating and certifying environmental claims and environmental labels, by using robust, science-based and verifiable methods, as well as penalties for breaking said rules.

The Directive proposal is part of the legislative package included in the EU's New Circular Action Plan. In this legislative package, alongside the Directive proposal on Green Claims, were also included: (i) the recently published Directive (EU) 2024/825 of the European Parliament and of the Council, of 28 February 2024,[38] known as the Directive on Empowering Consumers for the Green Transition, to protect consumers' rights to receive reliable and trustworthy information, combat greenwashing and promote sustainable consumption; (ii) the Proposal for a new Ecodesign for Sustainable Products Regulation, based on the existent Ecodesign Directive, aiming to broaden to more product groups the latter's scope, which currently only covers energy-related products; and (iii) the Proposal for a Right to Repair Directive, to promote the repair of goods both within and beyond the legal guarantee.

The Proposal for a Green Claims Directive and the Directive on Empowering Consumers for the Green Transition, while establishing different obligations, are complementary because they aim to prevent greenwashing by ensuring that consumers are given reliable and trustworthy information.

Project Finance and the EU Taxonomy

The EU Taxonomy is about sustainable finance and the EU legislative package on sustainable finance aims "to help improve the flow of money towards sustainable activities across the EU. By enabling investors to re-orient investments towards more sustainable technologies and businesses".[39]

Project finance has not specifically been the centre of EU Commission discussions and documents on taxonomy and sustainable finance, but it is naturally embedded therein and referenced in various documents since the beginning of the discussions on sustainable financing.

Reference is made already in the first TEG 2019 Technical Report on the EU Taxonomy indicating that project finance may consider the optional use of the EU Taxonomy – "We also note that the Taxonomy may be used on a voluntary basis by other financial actors, such as banks, for the purpose of project finance".[40]

In fact, the TEG 2019 Technical Report on EU Taxonomy includes a specific section on case studies on possible voluntary uses of the Taxonomy, with one regarding project finance. For reference, below is an extract of this specific section of the TEG 2019 Technical Report on the EU Taxonomy:[41]

"12.3.5 Voluntary use of the Taxonomy for project finance

Project finance is the funding of long-term infrastructure, industrial projects and public services using a non-recourse or limited recourse financial structure. The debt and equity used to finance a project is paid back from the cash flow generated. Project financing is a loan structure that relies primarily on the project's cash flow for repayment, with the project's assets, rights and interests held as secondary collateral. Generally speaking, a project includes a limited number of activities and a direct relationship between debt and equity providers and the project management company. Therefore, the identification of the eligible activities for the Taxonomy is expected to be relatively straightforward. Projects will often entail specific activities, such as the building of a wind park or infrastructure assets. However, in practice, projects could also involve components that can comply with the Taxonomy and components that cannot, for example, in the case of the refurbishment of current infrastructure or real estate. For this reason, a project financier should, in line with the equities strategy, take a granular approach to analysing the projects compliance with the Taxonomy. The Taxonomy-eligible part of the lending can be counted as 'green'. This is in line with the current methodology applied by multilateral development banks (MDBs). As with equities, there is no minimum for the percentage of green activities to be counted per project. To implement a granular approach, the recording system of the project must be credible on the metrics and thresholds required by the Taxonomy. Ideally the contribution to Taxonomy-related objectives should be clarified in the pre-appraisal stage of a project to give clarity to the investor right away and enable alignment of the recording system if necessary. In intermediated lending the Taxonomy objective, climate change mitigation or climate change adaptation, should be contractually earmarked for the activities as identified in the Taxonomy".

The 2021 Report of the European Banking Federation and the United Nations Environment Programme Finance Initiative on "Testing the application of the EU Taxonomy to core banking products – High Level Recommendations"[42] includes several case studies, among which a project finance for offshore wind and a project finance for a solar plant. One of the recommendations of this Report is "Recommendation 6: Owners of standards and frameworks, labels and certification schemes should clarify alignment with the EU Taxonomy". As regards specifically project finance, the Report indicates that market standards that banks see as a priority for mapping with the EU Taxonomy are "the Equator Principles, and the IFC performance standards and set of guidelines that are commonly used as reference for managing environmental and social risks associated to some types of financial products, such as project finance".

The Report on Platform Recommendations on Data and Usability (by the Platform on Sustainable Finance set by the EU Commission)[43] which was published in October 2022 briefly mentions project finance when it states that "Integrating the Taxonomy into product design is seen as an interesting commercial opportunity to support customers in their transition journey. Some institutions are aligning internal offerings by directly adding Taxonomy considerations to their existing products. The Platform observed new product development incorporating Taxonomy considerations in the retail, corporate banking (project finance) as well debt equity (green bonds and transition bonds, especially) business lines. To support this product growth, banks would welcome an extended Taxonomy to capture a broader array of the activities financed".[44]

At the same time, in October 2022, the Platform for Sustainable Finance also published a Final Report on Minimum Safeguards giving advice on project finance and including a case in this respect, included below for reference as well:[45]

"6.3. Special Case 1: Project finance

For any investment (loan or equity or mezzanine) in a potentially Taxonomy-aligned activity carried out by a listed, private, or public company, it is proposed that MS should be assessed on the basis of the recommendations for companies made in this report. For investments in projects, the undertaking which has to be compliant with MS would be the undertaking which is implementing the project. This can be a project company which has been set up for the only purpose to carry out the project, meaning a special purpose vehicle (SPV). This SPV might be owned by 55 one or several companies. If a company holds more than 50% of the SPV, the owner of the majority should comply with MS as described in this report. If there is no majority shareholder the SPV is considered the undertaking which is carrying out the activity and should comply with MS as suggested in this report. If an SPV employs only a limited number of employees, they might easily fall under the category of SME, and would therefore be treated as such. However, projects are often huge and require large sums of financing. The impacts on human rights, corruption, and taxation, might therefore be considerable as they often operate in sensitive geographies and sectors. That is why SPVs should meet the MS requirements for CSRD companies or non-EU companies as outlined in this report, and not the lighter requirements for SME. Equator principles or the IFC performance standards might be a help to assess MS alignment of SPVs, however the criteria in this report should always apply as the IFC PS and Equator Principles are not fully aligned with the UNGPs. OECD Guidelines and additional measures to close those gaps would be expected of SPVs."

We note additionally that this Report addresses the issue of which companies will most likely not be covered under the CSDDD Directive and will not have to report under the CSRD and indicates special criteria for project finance. As regards criteria for minimum safeguard alignment, the criteria to be considered for Project finance/Special purpose vehicles ("SPVs") is as follows: (i) as regards human rights: for SPVs, the criteria for large EU and non-EU companies apply respectively and the equator principles might give guidance on compliance; (ii) as regards corruption: for SPVs, the criteria for large EU and non-EU companies apply respectively; (iii) as regards taxation: for SPVs, the criteria for large EU and non-EU companies apply respectively; and finally (iv) as regards fair competition: for SPVs, the criteria for large EU and non-EU companies apply respectively.

This is fully in line with the concern raised in the special case study of the Report on Minimum Safeguards[46] that "projects are often huge and require large sums of financing. The impacts on human rights, corruption, and taxation, might therefore be considerable as they often operate in sensitive geographies and sectors. That is why SPVs should meet the MS requirements for CSRD companies or non-EU companies as outlined in this report, and not the lighter requirements for SME".

It seems clear that sponsors must continue to pay attention to these matters in their assessment of a project.

A Compendium of Market Practices

The Platform on Sustainable Finance published in January 2024 a compendium of market practices on "How the EU's Taxonomy and sustainable finance framework are helping financial and non-financial actors transition to net zero".[47]

One of the examples provided therein on the difficulties encountered by one of the participants in the work undertaken by the Platform referred to, including as regards project finance assessment, the "misalignment between national regulations and the Equator Principles requirements and specific EU directives and EU Taxonomy requirements".

The EU Commission published a factsheet on this compendium,[48] noting that such market practices reflect the contributions of seven stakeholder groups (corporates, credit institutions, investors, insurers, consultants and auditors, public sector and SMEs) and the early stages of adoption of the EU sustainable finance framework. The EU Commission further noted that "these market practices should not be interpreted as best practice or 'market standard'".

We note the peer-to-peer recommendations section of this report and the investor stakeholder group encourages among other peers to "use the EU Taxonomy framework as basis for environmental, social and governance due diligence in project financing and investments in unlisted companies".

Clearly, an increasing pressure in the market for ESG considerations to be considered in the context of project financing is being seen further to the enactment of the EU Taxonomy – pushing for the use of the EU Taxonomy to transition the economy, to green it.

Conclusion

A huge economy transition effort is ongoing at EU level. The legislative framework on sustainable financing is rapidly evolving, and the market pressure is increasing.

The amount of legislation (including proposals) and policies being published is vast and companies are required to adapt fast and prepare ahead since the effort involved in compliance with this legislative framework requires time and financial resources as well as specialised human resources.

The following years will show if the world is moving in the same direction and at the same pace. But whichever direction or directions ESG and Sustainable Finance will take, for lawyers the path is clear.

ESG is currently a legal matter, a compliance matter (whichever the direction and approach being taken), and therefore strong knowledge of ESG (or anti-ESG)-related issues and its impact in financing (and project financing) is unavoidable.

From an EU perspective, sustainable finance continues to make way for supporting the economy transition and SDG goals as well as the EU Green Deal.

We must not forget that the EU is striving to become the world's first climate-neutral continent by 2050 and the relevant climate goals are binding under the European Climate Law.[49] And it is leading the way by pushing sustainable finance and financing of the economy transition. An evolving number of financial actors as well as corporates and investors are also leading the way. How this will impact and mainstream the economy in reaching the transition objectives remains to be seen.

But the increasing legislative framework on sustainable finance at EU level, and the mandatory reporting rules, will not allow companies, even outside the EU, to ignore this EU legislative framework.

Challenges are clearly ahead, but so are business opportunities. Navigating the complexities of the EU legislative framework, following the legislative preparatory works, and anticipating required changes will be critical for companies to remain competitive.

Disclaimer

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Endnotes

1. *Cf.* https://www.reuters.com/business/finance/jpmorgan-citi-wells-boa-are-no-longer-signatories-equator-principles-website-2024-03-05/
2. *Cf.* Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change. It was adopted by 196 Parties at the UN Climate Change Conference (COP 21) in Paris, France on 12 December 2015. It entered into force on 4 November 2016.
3. *Cf.* https://www.consilium.europa.eu/en/policies/green-deal/
4. *Cf.* Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions Capital Markets Union – Accelerating Reform, COM/2016/0601 final.
5. *Cf.* https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en
6. *Cf.* Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, The European Economic and Social Committee and the Committee of the Regions Action Plan: Financing Sustainable Growth, COM/2018/097 final.
7. *Cf.* https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en. A Directive on the other hand is "a legislative act that sets out a goal that EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals".
8. *Cf.* FAQ: What is the EU Taxonomy and how will it work in practice? https://finance.ec.europa.eu/system/files/2021-04/sustainable-finance-taxonomy-faq_en.pdf
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15. *Cf.* Taxonomy User Guide (https://ec.europa.eu/sustainable-finance-taxonomy/assets/documents/Taxonomy%20User%20Guide.pdf)
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22. *Cf.* Commission Delegated Regulation (EU) 2023/2485, of 27 June 2023.
23. The point (28) of Annex I and point (26) of Annex II shall only apply from 1 January 2025.
24. *Cf.* Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023.
25. The Platform on Sustainable Finance is an advisory body that has been established under article 20 of the Taxonomy Regulation and is subject to the Commission's horizontal rules for expert groups. By bringing together sustainability experts from the corporate and public sector, from industry, financial industry, academia, as well as civil society, the Platform's main aim is to advise the European Commission on the implementation of the EU taxonomy and the sustainable finance framework more broadly, while also working on possible revisions of taxonomy criteria and on monitoring of capital flows. *Cf.* https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en
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28. *Cf.* https://www.consilium.europa.eu/en/press/press-releases/2024/02/07/council-and-parliament-agree-to-delay-sustainability-reporting-for-certain-sectors-and-third-country-companies-by-two-years/
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31. *Cf.* Recital 19 of SFDR.
32. *Cf.* https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en
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