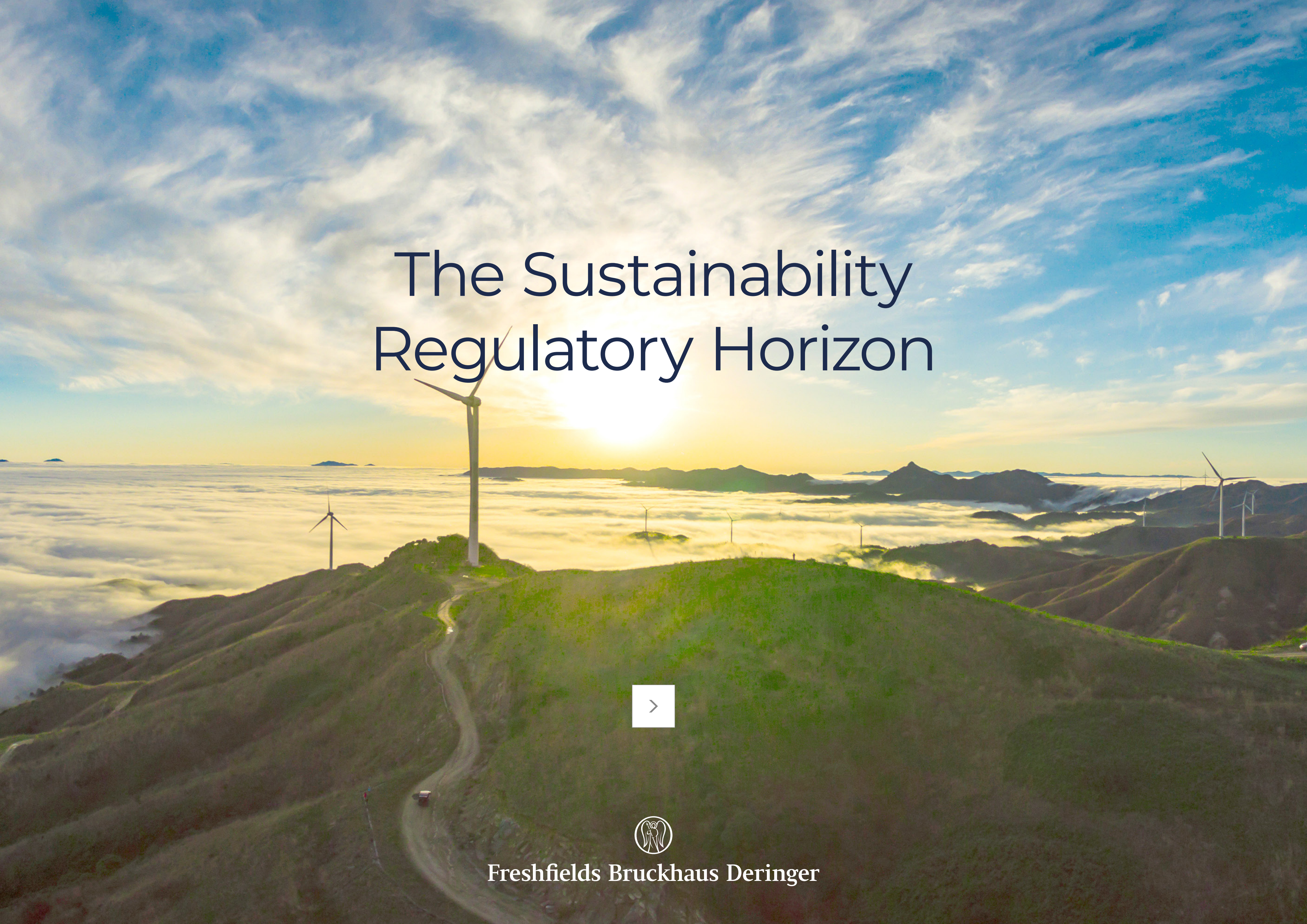
The Sustainability Regulatory Horizon



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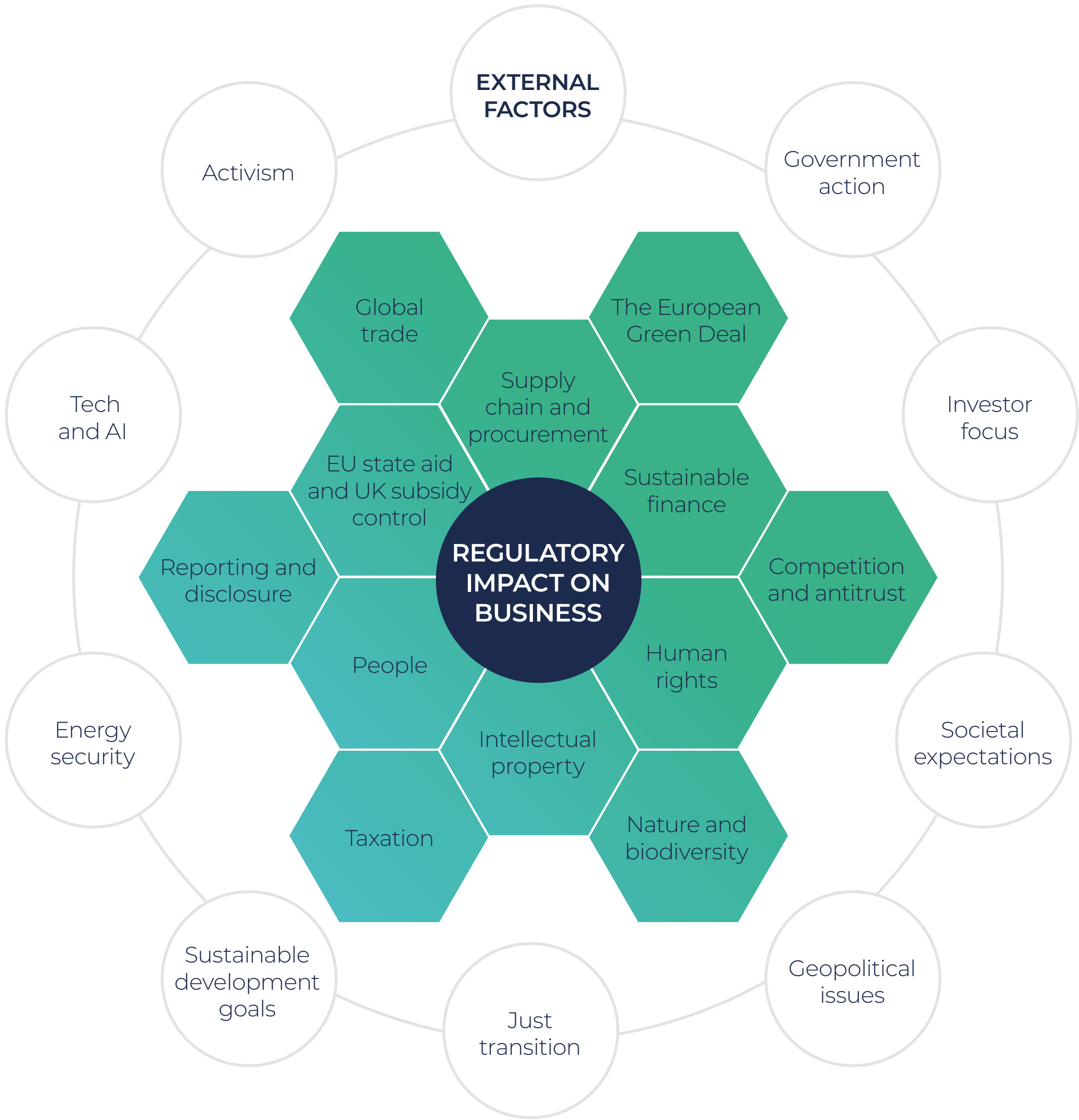
The sustainability regulatory horizon

Sustainability-related regulation is one of the fastest-evolving branches of rulemaking governing businesses globally. Our sustainability regulatory horizon explains the regulatory hot topics which may affect your organisation, with examples including the latest on ESG reporting, upcoming obligations to manage environmental and social impacts in supply chains, sustainability collaborations and merger control, and tax and people issues.

We have experience advising across the full spectrum of sustainability-related regulation and would be delighted to discuss any topics with you in more detail.

Click on a topic in the grid to explore our in-depth insights on recent regulatory developments and find out what's on the horizon.



Competition and antitrust

Competition and antitrust

Sustainability collaborations

Recent regulatory developments in sustainability collaborations

Any company considering a collaboration with one or more competitors, potential competitors, suppliers or customers to further sustainability goals (eg joint research into green technologies, committing to minimum or pro-sustainability standards, combining resources and/or operations) should seek specialist antitrust/competition law advice. A careful jurisdiction-by-jurisdiction assessment will need to be carried out on any collaboration before they are entered into, and in some cases it may be possible to approach authorities for informal assurances on whether the collaboration is likely to breach antitrust/competition laws.

Breaches of antitrust/competition law can result in harsh penalties (eg in the EU, potential fines of up to 10 per cent of annual worldwide turnover), heavy sanctions for individuals (eg in the US, criminal penalties of up to $1 million and up to 10 years in prison) and costly litigation.

Competition laws and policies are in flux and there are important differences in approach internationally. Authorities in the EU, UK and Asia Pacific have updated their policies and guidance to better enable businesses to collaborate in a way that is competition law compliant — although the guidance differs on some important points. The UK Competition and Markets Authority (**CMA**), European Commission (**EC**) and the Dutch and Greek authorities also encourage informal consultations on initiatives, so businesses can get direction as to how their agreement is likely to be viewed. Other authorities such as the US are not flexing their rules or practices.

US antitrust authorities have stated clearly that ESG should be considered an element of competition as within any market. Anti-ESG politics has led to certain government actors repeatedly threatening that ESG collaborations may violate US antitrust laws. ESG collaborations face investigations from state attorneys-general and the House Judiciary Committee. At the other end of the spectrum, businesses also face pressure from state laws and consumer lawsuits targeting greenwashing. Such divergence creates risks for business.

The combined forces of international divergence, litigation risk from anti-ESG groups and the general consensus that competition is a key driver of green innovation and that authorities need to take a tough approach towards enforcement means that collaborations to achieve ESG goals are under the regulatory spotlight. Each must be assessed carefully under the relevant laws and jurisdictions that may apply.

Outlook: What's on the horizon?

Many competition authorities will continue to consider and consult on reforms to enable greater collaboration on legitimate sustainability initiatives (as seen most recently in Japan and Singapore). Further clarity on the line between legitimate and illegal 'green agreements' is expected to emerge in 2024 as authorities apply their new policies and respond to requests for informal guidance.

Significant legislative developments will also continue in 2024. For example:

- The EU's Corporate Sustainability Due Diligence Directive (**CSDDD**) envisages that companies can share information/collaborate to reduce emissions — see more detail in The European Green Deal and Supply chain and procurement sections.

Competition and antitrust

- The forthcoming EU Green Claims Directive is indicative of increased regulatory scrutiny of 'greenwashing', following similar initiatives by the CMA and Australian Competition and Consumer Commission (ACCC).

As ESG is often at the centre of political debates, the range of key elections taking place on both sides of the Atlantic in 2024 could also impact ESG policies more broadly and the role that competition law should play in facilitating or deterring industry collaborations.

Merger control

Recent regulatory developments in sustainability and merger control

There is no consistent approach between regulators on the way sustainable development should be considered in merger control processes, potentially raising uncertainty when clearance is required in multiple jurisdictions.

Consumer preferences for sustainable products, services and technologies may, for example, be seen as a differentiating factor in the competitive assessment or in the market definition. They may also be reflected in the design of remedies.

Authorities are more likely to pursue innovation theories of harm as a means of preventing the loss of 'green' innovation. So called 'green killer acquisitions' — incumbents buying smaller, innovative players — are likely to attract particular scrutiny under the EC's new approach to referrals of deals falling below EU or national thresholds.

There is also scope under most merger control frameworks for authorities to take account of environmental benefits as efficiencies, particularly when consumers on the relevant markets directly benefit. However, the evidential bar is high.

There is a clear trend for these issues to feature more heavily in merger reviews and this is set to continue.

Outlook: What's on the horizon?

As authorities such as the EC and the UK CMA have included sustainability as a relevant non-price factor of competition in their guidelines, we expect to see more cases where consumer demand for sustainable products plays an important role in merger reviews and decisions.

In the US, the federal antitrust agencies continue to take the position that ESG considerations remain an element of competition and that there is 'no ESG exception' to the antitrust laws, including with regards to merger review.

How can Freshfields help with sustainability and competition and antitrust issues?

Sustainability collaborations

We can help you navigate this complex (and shifting) terrain by:

- Advising on how to reduce the antitrust/competition law risk associated with joint initiatives and collaborations
- Liaising with all relevant authorities

Competition and antitrust

- Helping you navigate and shape legislative and regulatory processes across different jurisdictions

Merger control

- We develop global strategies to ensure our clients get the best possible outcomes in merger control proceedings. This includes in relation to cross-border deals with sustainability components, where we have market-leading expertise in developing efficiency arguments and/or remedies to address regulators' concerns.
- We actively contribute to policy debates at national and international levels and regularly help our clients respond to consultations and engage with the authorities on these issues.

Our publications

- Singapore Competition and Consumer Commission publishes Guidance Note on environmental cooperation agreements
- JFTC proposes revisions to the Environmental Sustainability Guidelines
- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- Global Antitrust in 2024: 10 key themes — Antitrust and sustainability
- Antitrust & sustainability — takeaways from our recent debate
- Antitrust & ESG: UK CMA issues final guidance on environmental sustainability agreements
- Antitrust & ESG: European Commission publishes its final guidelines for businesses collaborating to meet sustainability goals

All our blog posts on competition and sustainability.

Podcasts

- Essential Antitrust #28: Collusion or collaboration: competition and the fight for net zero

Related topics

EU state aid and UK subsidy control, Global trade, Human rights, People, Supply chain and procurement, Sustainable finance, The European Green Deal.

EU state aid and UK subsidy control

EU state aid and UK subsidy control

Recent regulatory developments in sustainability and EU state aid and UK subsidy control

- Europe's state aid rulebook has been adapted to cater for the new regulatory and political environment under the European Green Deal.
- Comprehensive new guidelines on state aid for climate, environmental protection and energy (**CEEAG**) are applicable as from January 2022.

The CEEAG allow for higher aid amounts, extend the categories of permissible aid, and move away from pre-defined limits for state aid towards a more flexible system of competitive bidding. The EU Commission has already made use of its new powers under the CEEAG and approved a number of aid measures under these new rules.

- In light of Russia's war on Ukraine and its impact on the European energy markets, the EU Commission has even further temporarily loosened its state aid framework to support the European economy and the energy transition.

The Temporary Crisis and Transition Framework (**TCTF**) gives EU member states significant flexibility until the end of 2025 to subsidise companies to support the rollout of renewable energy and energy storage, the decarbonisation of industrial production processes and investments in sectors which are strategic for the net zero transition. The TCTF also allows for `matching aid´, ie, where there is a risk that a green investment project is diverted away from the EU, the Member States may match the subsidies companies could receive in a third country outside the EU. As with the CEEAG, there are already a number of EU Commission decisions approving aid for the energy transition under the TCTF, in particular relating to large scale decarbonisation projects and hydrogen deployment.

In the UK, the new subsidy control regime came into force in January 2023, which allows for a more flexible regime based on a principles-based assessment and a non-binding report issued by the Competition and Markets Authority's (**CMA**) Subsidy Advice Unit. Public authorities and beneficiaries will need to ensure that subsidy measures are also assessed against the energy and environment principles.

Outlook: What's on the horizon?

- The EU Commission will make more use of so-called important projects of common European interest (**IPCEIs**), which enables Member States to collaborate and pool resources to fund investments in specific industries or sectors, but also requires the funding to include various different beneficiaries in different Member States. So far, the EU has approved IPCEIs for microelectronics, batteries, hydrogen and cloud computing. The EU Commission considers IPCEIs an effective tool to balance the need for public investments with the need for a competitive level playing field and will likely further expand the use of IPCEIs going forward.
- More support in the EU for the development of net zero technologies (eg clean steel, wind power, e-mobility, and hydrogen) can be expected going forward.
- Continued support by local governments and UK government departments in order to achieve the 2050 net zero targets, which will continue to be reviewed by the Subsidy

EU state aid and UK subsidy control

Advice Unit. It remains to be seen what legal challenges may be brought and how this will impact the risk of such investments in the UK.

How can Freshfields help with EU state aid and UK subsidy control sustainability issues?

- Our EU regulatory and public affairs team helps our clients navigate and shape legislative and regulatory processes in the EU and Germany.
- Our EU state aid team has established working relationships with the EU Commission and Directorate-General (DG) for Competition and supports clients navigating the existing and the upcoming state aid environment and rulebook, including advising on individual notifications for grants.
- Our UK subsidy control team supports clients with ensuring that proposed sustainability-focused measures are compliant with the new UK subsidy control regime, as well as navigating referrals to the Subsidy Advice Unit and managing legal challenges.

Our publications

- EU State aid for the green transition: the floodgates are open
- The UK Subsidy Control Act comes into force – Practical considerations for beneficiaries of subsidies
- The Energy Transition: Recent developments in trade and competition law – What you need to know
- A fresh look at the Commission's EU State aid puzzle: tackling the economy's green transition in 2022 and beyond

Related topics

Competition and antitrust, Global trade, The European Green Deal.

Global trade

Global trade

Recent regulatory developments in sustainability and trade

Fisheries subsidies

In 2022, World Trade Organisation (**WTO**) Members adopted a new Agreement on Fisheries Subsidies, which prohibits harmful fisheries subsidies, including those that contribute to illegal, unreported and unregulated fishing. As of 6 March 2024, the agreement has been formally accepted by 44 WTO Members. It requires 110 WTO Members to accept the agreement before coming into force.

Free trade agreements

Increasingly, free trade agreements (**FTAs**) incorporate ambitious, and legally enforceable, provisions on sustainability and animal welfare:

- FTAs permit trade-restrictive measures if they can be justified on environmental grounds – including in some cases compliance with the Paris Agreement (the 2022 UK-New Zealand FTA). However, these grounds need to be legitimate, and the measures properly calibrated to their environmental objectives.
- Most modern FTAs also routinely contain sustainability obligations requiring compliance with international labour (International Labour Organisation/`ILO´) and environmental agreements, and effective enforcement of domestic labour and environmental laws. Mechanisms such as the EU's new Single Entry Point also facilitate the lodging of complaints to enforce such obligations.

Investment treaties

Sustainability-related factors are increasingly taken into consideration in concluding investment treaties, as well as giving rise to claims and defences in state-investor dispute settlements.

Host states increasingly seek to have greater flexibility to implement regulatory measures on the basis of sustainability-related concerns.

In addition, some new investment treaties include sustainability-related commitments for investors, mainly relevant in host state counterclaims. The 2023 EU-Chile Advanced Framework Agreement provides for host state counterclaims against an investor that has failed 'to comply with an international obligation applicable in the territories of both Parties'.

Unilateral trade and sustainability measures

Countries are also increasingly adopting unilateral trade and sustainability measures to promote sustainability at home and internationally:

In October 2023 the EU carbon border adjustment mechanism (**CBAM**) came into application in its transitional phase. During a transitional period from October 2023 to December 2025, the EU CBAM will only apply as a reporting obligation. The EU CBAM will then be introduced progressively, in parallel with the phase-out of free EU Emissions Trading System (**ETS**) allowances between 2026 and 2034. The UK has also confirmed plans to implement its own

Global trade

CBAM by 2027 which will affect the aluminium, cement, ceramics, fertiliser, glass, hydrogen, iron, and steel sectors.

Some countries have adopted mandatory due diligence requirements for companies, requiring them to report on human rights and environmental risks in their worldwide operations and supply chains, including the EU's recently approved Corporate Sustainability Due Diligence Directive (**CSDDD**) which is expected to enter into force later this year. In 2022, the EU adopted a new Corporate Sustainability Reporting Directive (CSRD) extending ESG reporting obligations to a larger range of companies than before. The EU's Deforestation Regulation, which entered into force in June 2023, requires products sold in or exported from the EU to be 'deforestation-free'. New Zealand also adopted its Climate Change (Forestry) Regulation 2022 on 1 January 2023.

In December 2021, the US passed legislation prohibiting imports of forced labour products from China's Xinjiang region. On 5 March 2024, the EU Commission and the EU Council also provisionally agreed on a blanket ban on products made with forced labour on the EU market, covering all products (ie those made in the EU for domestic consumption and exports, and imported goods). The difference in the EU's approach is clearly influenced by WTO law constraints.

The US Inflation Reduction Act commenced progressively from 2023. This legislation allows companies to earn tax credits for green production, but these are conditioned on use of domestic products or facilities, counter to WTO rules. The EU has responded by increasing its own green subsidies, without the local content element.

These unilateral measures to promote sustainability may face legal challenges and other countermeasures under international trade agreements. For example, the US has imposed countervailing duties on imports of certain EU steel products produced in installations benefitting from free allowances under the EU's ETS, and in March 2024, Malaysia succeeded in a WTO dispute against the EU for its Renewable Energy Directive II, which targets phasing out usage and imports of unsustainably produced biofuels by 2030, on the grounds that the EU was administering this Directive in an unjustifiably discriminatory (and for a dissenting panellist also a protectionist) manner.

Outlook: What's on the horizon?

- Additional unilateral EU trade policy measures to promote sustainability in trade, such as the EU Forced Labour Import Ban, which was provisionally agreed by the European Parliament and the EU Council on 5 March 2024 and requires formal adoption by EU member states and European Parliament to become effective. Once it takes effect, the EU Commission will establish a Forced Labour Single Portal to enforce the new rules.
- More rigorous enforcement of the sustainable development commitments in the EU's trade agreements via the post of Chief Trade Enforcement Officer.
- Costa Rica, Fiji, Iceland, New Zealand, Norway and Switzerland continue to negotiate an Agreement on Climate Change, Trade and Sustainability (ACCTS). This initiative, launched in 2019, is designed to:
  - Remove tariffs on environmental goods and add new and binding commitments for environmental services
  - Liberalise environmental goods and services
  - Introduce new disciplines to eliminate harmful fossil fuel subsidies
  - Develop guidelines to inform the development and implementation of voluntary eco-labelling programmes

Global trade

How can Freshfields help with trade and sustainability issues?

- We inform clients about potential opportunities and risks in trade negotiations and trade policymaking.
- We advise clients on the compatibility of sustainability regulations with countries' WTO, FTA and investment law obligations.
- We provide guidance on sustainability regulatory topics such as deforestation, supply chain due diligence rules, carbon taxes (eg CBAM), digital taxes, and the EU Foreign Subsidies Regulation.
- We help clients handle sustainability compliance mandates ranging from advanced due diligence around corporate transactions and disclosures, to representing them in some of the highest-profile ESG-linked lawsuits in the world.

Our publications

- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- What to expect from the new European Forced Labour Regulation
- Stocktake on the EU and UK Carbon Border Adjustment Mechanisms
- Navigating the new scope of the German Supply Chain Act and looking ahead for the EU
- Delving into Dutch NCP Procedures
- Important Expansion of the German Supply Chain Duty of Care Act – including applicability to non-German Companies
- CBAM: go-live of transitional phase
- EU Deforestation Regulation published: A step forwards in global supply chain legislation
- WTO dispute settlement update: Frozen Fries put the MPIA to the test
- The Energy Transition: Recent developments in trade and competition law – What you need to know

Podcasts

- 'EUnpacked' podcast series – Episode #1: The EU's Corporate Sustainability Due Diligence Directive– a turning point for business

Related topics

Competition and antitrust, Human rights, Reporting and disclosure, Supply chain and procurement, Taxation, The European Green Deal.

Human rights

Human rights

Recent regulatory developments in sustainability and human rights

The legal landscape for business and human rights has changed significantly over the past decade, and multinationals now face a complex array of obligations, with laws not only requiring that they disclose the efforts they are taking to identify and address human rights risk in their supply chains, but also obliging them to take specific preventive and reactive measures. Many laws also carry the threat of civil liability and regulatory enforcement in case of non-compliance.

In February 2022, the European Commission proposed the EU Corporate Sustainability Due Diligence Directive (**CSDDD**). This Directive imposed corporate due diligence obligations covering human rights, environmental protection and climate change mitigation. The Directive has been the subject of intense negotiation at the EU Council level however, after a number of compromises to the text (including narrowing the scope of the companies to which it applies and the extent to which it applies to the 'downstream' supply chain activities), it has now been approved by both the Council and the Parliament's Committee on Legal Affairs (JURI). A final plenary vote by the Parliament is expected on 24 April 2024 and the Directive will enter into force later this year. If it passes, Member States will be required to transpose the Directive into national law within two years. The CSDDD is the most significant piece of human rights and supply chain legislation that has been passed globally. It will apply to both EU and certain non-EU companies and will require them to carry out due diligence and publicly report on the human rights impacts in their upstream supply chain (including indirect suppliers) and certain elements of their downstream supply chain. The CSDDD also requires Member States to introduce extensive civil liability regimes that may increase the litigation risk faced by in-scope companies.

Additionally, there are sector-specific supply chain instruments in the EU:

- The EU Conflict Minerals Regulation entered into force in January 2021. This regulation aims to ensure responsible sourcing of certain metals and minerals (tin, tantalum, tungsten and gold);
- The new EU Batteries Regulation entered into force in August 2023 and commencing from 18 February 2024, promotes the sustainability of batteries across their entire life cycle and requires companies selling batteries to carry out due diligence on the human rights risks (among others) inherent in the extraction, processing and trading of raw materials; and
- The EU Deforestation Regulation entered into force in June 2023. This regulation aims at guaranteeing that products imported to or exported from the EU market do not contribute to global deforestation and forest degradation (ie product ban). While focused on deforestation, the Regulation also prohibits the import of in-scope products that were produced in violation of local indigenous land rights.

In parallel to the EU's efforts, many other countries, including France, Germany, Switzerland, and Norway, are introducing similar legislation. We are also seeing increased levels of regulatory activity in this space, with the German regulator, BAFA, being particularly active in enforcing the requirements of the German Supply Chain Act. In summer 2022, the US

Human rights

started enforcing its Uyghur Forced Labor Prevention Act (UFLPA), which affects US and non-US companies by banning the import of products potentially linked to forced labour. The EU is in the process of introducing an equivalent Forced Labour Regulation that would prohibit the import (or production) of products manufactured with forced labour.

Complementing these measures, human rights issues are also at the forefront of recently introduced sustainability reporting obligations. The most significant such example is the EU Corporate Sustainability Reporting Directive (CSRD) which requires companies to report publicly on the human rights impacts and risks, along with a broader range of other issues. Companies within the scope of the Directive are required to report in accordance with the European Sustainability Reporting Standards (**ESRS**) or recognized equivalent standards. The ESRS are developed by the European Financial Reporting Advisory Group (EFRAG) and a first set of 12 standards were adopted as a Delegated Act by the EU Commission in summer 2023, entering into force from January 2024.

This intense regulatory scrutiny is accompanied by a rising litigation risk in the space. Claimants, often backed by NGOs, are targeting companies through the courts over alleged failures to respect human rights, including by pursuing parent companies for the actions of businesses in their group and targeting companies for alleged human rights impacts that take place in their overseas supply chains. National courts are having to decide whether they can hear such cases, or whether they should proceed in the courts of the country where the alleged misconduct occurred. The regulatory obligations requiring companies to carry out due diligence on their operations and their supply chains, and report publicly on their efforts, are only likely to increase this litigation risk going forward.

The way companies respect human rights is also receiving scrutiny from investors, in part due to the availability of benchmarks that assess companies' human rights records as well as increasing public sustainability reporting.

Finally, human rights arguments are also being used to apply pressure on companies in relation to other sustainability issues, such as climate change and biodiversity.

Outlook: What's on the horizon?

- The implementation of the CSDDD by EU Member States over the next two years.
- The progress of the EU proposal to ban from the EU market any products linked to forced labour.
- Continued enforcement of Germany's human rights due diligence law by BAFA.

How can Freshfields help with human rights and sustainability issues?

We help clients on a broad range of human rights issues, such as:

- Strategic board advice on a company's human rights strategy
- Human rights due diligence and complex risk assessments in a company's own operations and supply chains
- Drafting human rights policies and procedures and supplier contracts
- Internal and external capacity-building and reporting requirements
- Developing due diligence and reporting compliance programmes in light of the emerging legislation in the space

Human rights

- The approach to grievance mechanisms and remediation issues
- Evaluation of alignment of operations/processes with UNGC, UNGP OECD
- Advising on interactions with NGOs and complaints filed to ‘quasi-judicial’ mechanisms such as the OECD National Contact Points
- Advising on human rights litigation, including international class actions etc.

Our publications

- Sustainable global supply chains: EU’s CSDDD finally adopted by Council
- What to expect from the new European Forced Labour Regulation
- The Loss and Damage Fund at COP28 — a step in the right direction
- Navigating the new scope of the German Supply Chain Act and looking ahead for the EU
- Delving into Dutch NCP Procedures
- Important Expansion of the German Supply Chain Duty of Care Act — including applicability to non-German Companies
- Human rights and supply chain compliance for the financial sector: Clarifications on human rights due diligence?
- Highlights from the UN Forum on Business and Human Rights
- Road to COP28: Climate change — business and the just transition
- New EU sustainable batteries regulation becomes law — what you need to know
- EU Deforestation Regulation published: A step forwards in global supply chain legislation
- What to expect from the EU’s CSDDD #1: Enforcement Mechanism

Related topics

Competition and antitrust, Global trade, People, Reporting and disclosure, Supply chain and procurement, Sustainable finance.

Intellectual property

Intellectual property

Recent regulatory developments in sustainability and intellectual property

Patents

In the UK, patent applications for inventions of environmental benefit can be 'fast-tracked' through a route called the Green Channel, which was introduced in 2009 for inventions of environmental benefit.

Applicants must state in writing which action(s) they wish to accelerate (ie the channel can be used at different stages in the patent prosecution process) and provide an appropriate explanation of how their application relates to a 'green' or environmentally friendly technology. A detailed investigation into Green Channel explanations will not typically be conducted, although Green Channel requests will be refused if they are clearly unfounded.

Green Channel take-up has been steady, with an increased uptake in recent years. The Intellectual Property Office (IPO) received a record 496 requests in 2022, a 9 per cent increase from the previous year. Other countries have instituted accelerated environmental channels, including Australia, Canada, Brazil, China, Japan, Israel, Taiwan, the Republic of Korea, and the US.

There is no harmonised 'green accelerator' at European level, although inventions of sustainability value can be fast-tracked through the accelerated examination Programme for Accelerated Prosecution of European Patent Applications (PACE), which is available for any technology.

Trade marks and green claims

As companies turn to environment-related advertising, this has led to an increase in trade mark applications incorporating sustainability credentials (such as 'green', 'sustainable', 'bio', 'natural').

While corporate commitments to sustainability are commendable, companies risk accusations of 'greenwashing', particularly where environmental advertising is false, incomplete or exaggerated.

The existing toolkit against misleading (environmental) advertising is typically contained in consumer and unfair competition law, but the EU is putting further safeguards in place: the Directive on empowering consumers for the green transition through better protection against unfair practices and through better information (Empowering Consumers Directive) came into force on 26 March 2024. It aims to ban greenwashing (ie misleading environmental claims) by empowering consumers to make informed purchasing decisions. The Empowering Consumers Directive complements the EU's (yet-to-be-adopted) Green Claims Directive which will provide a more in-depth set of restrictions with regard to environmental claims and labelling.

In the UK and the EU, the present trade mark system itself can be used to filter out misleading 'green' trade marks. 'Green' trade marks may be refused registration or subsequently declared invalid if they are deceptive or contrary to public policy or law (for example consumer protection law or, in the future, the Empowering Consumers Directive or the Green Claims Directive).

Intellectual property

Designs

The EU is updating its EU designs legislation. The EU Commission published its proposals in November 2022 — the proposed legislation liberalises the spare parts market, consistent with efforts to promote the circular economy. The European Council and European Parliament reached a provisional deal in December 2023.

Outlook: What's on the horizon?

- Patents: We expect take up of the Green Channel to remain steady.
- Trade marks: The EU's Empowering Consumers Directive entered into force on 26 March 2024. The European Parliament adopted its first reading position on the Green Claims Directive in March 2024. The file will be followed up by the new Parliament after the European elections that will take place in June 2024.
- Designs: The agreed text on the reform of the EU's designs legislation package is yet to be formally adopted.

How can Freshfields help with intellectual property and sustainability issues?

Transactions/collaborations

We have seen an uptake in collaborations in the field of green technologies. Such arrangements aren't without risk, and careful consideration should be given to ownership of any new IP, its exploitation and administration. Our teams of IP experts can help navigate the complex IP landscapes that arise from such arrangements.

Weaker patents may lead to patent litigation

Rapid grant routes, such as the Green Channel, may lead to weaker patents and so there will be increased patent litigation risk for those implementing green tech. Indemnities from suppliers may not suffice, particularly if they are small, innovative and at risk of disappearing. Our team of patent litigators are on hand to help advise clients on dispute risks and strategy. We represent clients in patent disputes at UK and European level.

Our publications

- New Law on Greenwashing finally adopted — The EU Directive on empowering consumers for the green transition
- Combatting greenwashing — existing toolkit, EU developments and the role of trade marks

Related topics

The European Green Deal.

Nature and biodiversity

Nature and biodiversity

Recent regulatory developments in sustainability and nature and biodiversity

Biodiversity provides the stock of resources on which society depends and, for this reason, there is growing scrutiny (from regulators, shareholders and consumers) on the extent to which companies are both dependent on nature and on how companies (or supply chains) impact nature.

Regulations aimed at protecting specific natural habitats or species have been in place for decades in many countries. The international interest in the nature, fuelled by the UN Biodiversity Conference (COP 15) has resulted in renewed legislative focus on specific aspects of biodiversity and the protection of nature. The past 24 months have seen the EU lead the way to enact legislation which seeks to protect nature globally, with the UK also taking active steps to address similar issues.

The key recent developments have included:

- In February 2022, the European Commission proposed the EU Corporate Sustainability Due Diligence Directive (**CSDDD**). This directive imposed corporate due diligence obligations covering human rights, environmental protection and climate change mitigation. Following some lengthy political discussion, the Directive is expected to pass a final plenary vote in the European Parliament in April 2024. The CSDDD will likely be published in the EU's Official Journal and enter into force in summer/autumn 2024. Member States shall then transpose the Directive into national law within two years (presumably summer/autumn 2026).
- The EU's Deforestation Regulation. This regulation seeks to restrict trade in products associated with illegal deforestation and impose mandatory due diligence obligations on EU importers of those products. The UK has enacted similar primary legislation (although the detailed secondary legislation implementing many of the principles has not yet been enacted).
- The EU's proposed Nature Restoration (which in February 2024 was formally adopted in plenary by the European Parliament at its first reading but taken off the agenda for formal adoption in April 2024 after Hungary said it would no longer support the proposal) and Sustainable Use of Pesticides Regulations. These regulations would (i) require member states to have binding targets for the protection and restoration of large areas of land and sea and (ii) establish a new framework for the management of pesticides to reduce both the use of and risks stemming from pesticide use by 50 per cent across the EU by 2030.
- The introduction of the UK Biodiversity Net Gain requirements for planning applications, which seek to achieve nature positive plans for developments.
- Upcoming bans on single use plastics, changes in law on microplastics and planned reforms for product packaging (eg the proposed EU Packaging and Packaging Waste Regulation).
- Investors are also increasingly scrutinising businesses on their biodiversity track records (a trend which is likely to increase following the introduction of biodiversity-linked reporting duties).
- In the UK and across Europe, increasingly sophisticated networks of NGOs and claimant law firms are applying pressure on companies in relation to their biodiversity impacts, using many of the techniques and arguments that have been deployed in the climate change space in recent years.

Nature and biodiversity

Outlook: What's on the horizon?

The EU's CSDDD is anticipated to come into force during 2024 while the timeframes for the other proposals mentioned above are slightly longer.

The EU's Deforestation Regulation entered into force on 20 June 2023 and the majority of its provisions will apply to large and medium sized enterprises from 30 December 2024. European Commission guidance on the interpretation of the Regulation is expected in mid-2024, although the benchmarking system rating countries' level of risk to deforestation is subject to delays.

Further UK or European legislation is progressing covering packaging and waste, the right to repair for products, measures to prevent microplastic pollution from the unintentional release of plastics pellets and the management of seeds and plant/forest reproductive material.

Mirroring developments in the climate space, in September 2023 the Taskforce on Nature-related Financial Disclosures (**TNFD**) released its final recommendations to guide businesses in reporting publicly on their impacts and dependency on nature. As the Taskforce on Climate-related Financial Disclosures recommendations have made their way into compulsory legislative obligations, companies are expected to pay close attention to the new TNFD recommendations.

How can Freshfields help with nature and biodiversity and sustainability issues?

- We advise multiple clients on the rapidly developing framework of biodiversity regulation, including developing compliance and reporting frameworks to meet the requirements.
- We also help clients navigate their engagements with the full range of stakeholders on biodiversity issues. This includes investors, regulators, NGOs, suppliers and customers.
- Finally, we frequently advise clients on biodiversity and environmental litigation, including on class actions, often with an international element.

Our publications

- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- Nature and biodiversity reporting – live legal risks
- Nature Restoration Regulation generates storm in European Parliament
- EU Deforestation Regulation published: A step forwards in global supply chain legislation
- Law and Politics in Brussels: Discussing the EU's Corporate Sustainability Due Diligence Directive
- Banning PFAS chemicals in the EU – Consultation launched
- COP15 – how does the new global biodiversity framework impact businesses?

Nature and biodiversity

- The new EU deforestation regulation and its international scope — is your business affected?
- COP15: the importance of biodiversity and what it means for your businesses
- Re-packaging old rules: How will the EU's proposed new packaging Regulation tackle excessive packaging and packaging waste?

Related topics

Global trade, Human rights, Reporting and disclosure, Supply chain and procurement.

People

People

Recent regulatory developments in ESG and people

Global businesses are increasingly looking to embed people-related sustainability initiatives. Compliance with legal and regulatory requirements is a minimum standard, but expectations from a variety of stakeholders, including the workforce itself, place pressure on companies to take actions beyond what is required as a matter of law:

- Hybrid, remote and flexible working arrangements have become a more permanent tool for organisations to attract and retain staff. Several EU member states, including Austria, Belgium and Spain, have passed legislation to encourage and regulate homeworking. These new working practices can have a positive impact on the fight against climate change (for example, through less business travel).
- Diversity and inclusion (**D&I**) was once a 'nice to have' for businesses, but it is now expected, with increasing levels of reporting, disclosure and explanation obligations being placed upon organisations. In the UK, there are rules in place for listed companies requiring them to publicly disclose whether they meet specific diversity targets at board and executive management level on a 'comply or explain' basis. In the US, similar rules apply to most companies listed on Nasdaq's US exchange. Alongside D&I, better enforcement of equal pay has been a political priority for various legislators, and there has been an increased focus on pay transparency at a national and EU level. In the coming months and years, we expect to see diversity and pay transparency move beyond the traditional spheres of gender and ethnicity, and towards characteristics such as disability, socio-economic background and neurodiversity.
- #MeToo and wider workplace issues continue to unfold and there is an increasingly strong focus from regulators on non-financial misconduct and corporate culture. Many businesses now face the very real prospect of regulatory intervention, with many sectors having obligations to report on how whistleblowers and sensitive allegations made by workers are handled. Reporting obligations are also a feature of the EU whistleblowing directive (see below).
- Alongside new working arrangements, working conditions and work-life balance are a real focus. EU directives on transparent and predictable working conditions and work-life balance for parents and carers set out new standards aimed to improve predictability and clarity on working conditions and equal access to the labour market, fair working conditions and work-life balance. In the UK, certain flexible working changes came into force this year. We are also spotting an increasing trend around legislators in certain jurisdictions tackling the right to disconnect from company communication systems.

Outlook: What's on the horizon?

A variety of regulatory changes are expected in the people space, with a focus on the following areas:

- New working arrangements: several jurisdictions have introduced or proposed new rules in relation to hybrid, remote and flexible working. Many others have plans to legislate or regulate in this area.
- Taxation: with hybrid, remote and flexible working now a new normal, tax authorities across the globe are recalibrating their stance on internationally mobile employees. Employers should factor in the tax angle when updating policies and discussing working policies.

People

- Decent wages: the EU adopted a directive establishing a Europe-wide framework for adequate minimum wages. Member states now have until 2024 to implement the directive into national law.
- D&I and pay transparency: this topic remains a primary focus for authorities across the globe, including the UK and US (see above). An EU directive to promote gender equality on boards of listed companies requires in-scope companies to have 40 per cent of non-executive director positions or 33 per cent of all board positions (executive and non-executive) held by women by the end of June 2026. Another EU directive, which aims to strengthen pay transparency during recruitment and employment, came into force in 2023. The pay transparency directive prohibits pay secrecy agreements, offers collective redress, shifts the burden of proof to the employer, and sets out reporting obligations for employers with at least 100 employees.
- Employee activism and group workforce litigation: we are seeing a significant increase in strike action, requests made to employers for trade union recognition, and informal ‘employee activism’ (where workforces mobilise against their employers on certain sustainability issues, such as preventing investment in non-renewables). We anticipate more pressure to be exerted by the workforce going forwards. Alongside this, employees may have concerns about the way in which they have been treated, and this could be fertile ground for group workforce actions. We anticipate an increase in group actions in the following areas: equal pay, worker status (see below), changes to terms and conditions, collective redundancies, minimum wage, bonus payments, working time and holiday pay. On the EU front, the EU Commission recently proposed a directive aiming to further improve social dialogue in the EU by strengthening the role and capacity of European Works Councils in transnational decision-making processes, including in relation to recent developments such as green and digital transitions.
- Atypical working and employment status: the growth in the number of platform workers and the increase in employment status group workforce claims have led some jurisdictions to increase their regulatory oversight of the gig economy. An EU draft directive on strengthening the rights of platform workers is close to being adopted and this could happen before the European elections in June 2024. As proposed, the directive introduces a legal presumption of employment for platform workers if their relationship fulfils certain criteria. It also reverses the burden of proof to employers, provides for more transparency when it comes to the use of algorithms, and promotes collective bargaining.
- Climate-conscious pension scheme investment and disclosure: this has increasingly been a focus for pensions legislation and regulation. In the UK, regulations intended to secure effective pension scheme governance and decision-making with respect to the impact of climate change are in force, as are regulations requiring some pension schemes to make climate-related disclosures. In addition, the EU’s Sustainable Finance Disclosure Regulation (see above) requires pension schemes to disclose information regarding their approaches to sustainability.
- Enhanced whistleblower protection: the EU whistleblowing directive has now been implemented in most member states. The directive imposes stricter obligations on businesses in relation to the handling of misconduct reports, particularly on the protection of whistleblowers. To comply with the new rules, employers must review reporting channels and existing whistleblowing policies. The directive has been implemented in different ways by member states so local advice will be required.
- Corporate governance and due diligence: The EU directive on corporate sustainability reporting (see above) requires in-scope companies to disclose information on a broad range of sustainability matters including employee matters. All companies subject to this

People

directive will from 2024 be subject to the European Sustainability Reporting Standards, which cover workforce issues.

- Incorporation of sustainability metrics into variable remuneration: executive compensation is increasingly made conditional upon meeting ESG targets, and we expect this to remain a significant topic for stakeholders going forwards. For example, the draft ISSB standards (see above) include requirements relating to sustainability- and climate-related performance metrics in executive remuneration.

How can Freshfields help with people and sustainability issues?

We advise clients on long-term strategies to create more sustainable workplaces, including in relation to:

- Hybrid and remote performance assessments and investigations, renewed oversight arrangements, regulatory compliance, global HR policies
- Board composition and mentoring and networking programmes designed to improve the representation of minority groups in the workplace
- Workforce activism and employment litigation on issues including discrimination and equal pay
- Whistleblowing frameworks and associated governance arrangements, sensitive workplace investigations including in relation to issues including discrimination and whistleblowing-related victimisation
- The incorporation of sustainability measures into variable remuneration including structure, alignment to strategy and disclosure
- Assessing employment-related costs/footprint (reduced office space, reduced commute, other salary adjustments etc)

We deliver this advice either on a standalone basis or as part of bigger projects, such as M&A deals and corporate restructurings.

Freshfields has unparalleled employment and class action expertise, including experience advising tech and other companies on potential group workforce litigation, and defending innovators and market disruptors against such claims.

We advise companies and trustees on a range of legal matters related to pension schemes and related obligations.

Our publications

- The Parker Review 2024: Shaping ethnic diversity in UK business
- FTSE Women Leaders Review: the findings and recommendations
- Sexism in the City: the FCA's latest efforts to tackle non-financial misconduct in the workplace
- Whistleblowing survey 2023
- ESG and people
- ESG Reporting for EU and non-EU companies: Entry into force of the Corporate Sustainability Reporting Directive
- Sustainability
- Climate change and the workplace

Related topics

Human rights, Reporting and disclosure, Taxation.

Reporting and disclosure

Reporting and disclosure

Frameworks and standardisation

Regulators are tightening ESG disclosure rules — and enforcement of them — to support market stability and are promoting standardised disclosure to facilitate comparison.

About 600 mandatory and voluntary frameworks for sustainability disclosure exist worldwide, making it difficult for corporates to select a framework which will meet the requirements of a broad number of stakeholders and mandatory reporting requirements.

Established voluntary international frameworks

Task Force on Climate-related Financial Disclosures (TCFD) recommendations	Taskforce on Nature-related Financial Disclosures Risks (TNFD)	Global Reporting Initiative's (GRI) standards	Carbon Disclosure Project) (CDP)	Sustainability Accounting Standards Board (SASB) standards	International Sustainability Standards Board (ISSB) standards
This is a common foundation for many climate-related disclosure frameworks. It also forms the basis for the SEC's climate disclosure proposal in the US. It has now been adopted in a number of UK mandatory regimes.	Published in September 2023. In January 2024, 320 companies, financial institutions and market service provisions signalled their intent to adopt the TNFD recommendations.	Provide guidelines for reporting on economic, environmental and social impact.	Provides a system for carbon disclosure.	Provide industry-based sustainability disclosures. Since August 2022 the SASB organisation is part of the IFRS foundation and the ISSB has committed to maintain, enhance and evolve the SASB standards.	Standardising frameworks IFRS S1 and IFRS S2 on sustainability disclosures, published in June 2023. The standards apply to annual reporting as of 1 January 2024 for companies reporting in accordance with IFRS.

Recent regulatory developments in sustainability and reporting and disclosure

All businesses must engage with ESG disclosure, especially those facing a sustainability related transformation, such as energy, chemicals, and automotive. Banks, insurers and investors must also strive for transparency on ESG disclosure. Many disclosure obligations are increasingly unavoidable and require time to embed into businesses.

Institutional investors are mobilising, making it increasingly more difficult to secure investment and finance without transparency.

EU

The EU's Corporate Sustainability Reporting Directive (**CSRD**) came into force in January 2023 creating new sustainability reporting obligations for companies within and outside of the EU. The CSRD will replace the Non-Financial Reporting Directive that has already been in effect since 2014 and will eventually apply to more than 50,000 companies. It creates a uniform and binding reporting standard with an external audit requirement. For this purpose, the EU also adopted the first set of European Sustainability Reporting Standards (**ESRS**) in July 2023. Further ESRS setting sector-specific and reporting on non-EU companies-specific standards have been delayed and are currently expected to be adopted in 2026.

A political agreement has been reached on the new European Corporate Sustainability Due Diligence Directive (**CSDDD**), which sets out new mandatory due diligence standards for companies on human rights and environmental compliance as well as obligations to strategically address climate change. It would then start to gradually apply from 2027.

Reporting and disclosure

A new regulation proposing to ban products made from forced labour from being sold on the EU market has also been provisionally agreed. Where the CSDDD addresses expectations in relation to due diligence covering forced labour, this Regulation includes specific measures preventing the placing and making available of products on the EU market. All companies placing products on the EU market will be impacted regardless of their size. Companies will need to demonstrate to national authorities that they comply with the Regulation to avoid bans and potential fines.

The EU has enacted various regulations and directives as part of its sustainable finance agenda. The main legislative acts are: The EU Taxonomy Regulation, CSRD and the EU Benchmarks Regulation.

The EU Taxonomy Regulation, in force since 2020, establishes a classification system for sustainable economic activities and identifies relevant conditions that activities need to meet. This aims to direct investments towards sustainable projects and activities in line with the European Green Deal objectives.

United States

On March 6, 2024, the Securities and Exchange Commission (**SEC**) adopted its long anticipated final rules on climate related disclosures, amending Regulations S-K and S-X to set forth the climate-related information that companies will be required to disclose in their filings with the SEC, however, on April 4 the SEC issued a stay of the rules which will be on hold until the US Court of Appeals for the Eighth Circuit completes its review of the consolidated petitions challenging their validity. The final rules apply to both US domestic companies and foreign private issuers who file periodic reports with the SEC.

On October 7, 2023, California signed into law the `Climate Accountability Package,´ including the Climate Corporate Data Accountability Act and Greenhouse Gases: Climate-Related Financial Risk. The Acts will require disclosure of Scope 1, 2 and 3 greenhouse gas emissions and for companies to prepare a biennial climate-related financial risk report respectively.

In 2022, the Biden administration signed into law the Inflation Reduction Act 2022, which has a focus on decarbonisation in the US and seeks to address social impacts of inflation.

Hong Kong

In April 2024, the Hong Kong Stock Exchange published new climate-related disclosure requirements and the associated changes to its Listing Rules which will come into effect from 1 January 2025 in phases. The new requirements are developed based on IFRS S2, with implementation reliefs available.

With effect from July 2020, HKEX's ESG Reporting Guide was amended to incorporate elements of the TCFD recommendations such as requiring board's oversight of ESG matters, targets for certain environmental KPIs and disclosure of impact of significant climate-related issues.

UK

The Transition Plan Taskforce, which was created following COP26, published its final guidance for disclosing climate transition plans in October 2023. The purpose of the framework is to support internal actions to drive a transition strategy, but also provide information to investors to support investment to accelerate transition. The disclosure framework includes five elements of reporting and 19 recommended elements within

Reporting and disclosure

that disclosure. The Taskforce has also prepared summary guidance for sectors to adopt recommendations tailored for their businesses.

The Financial Conduct Authority (**FCA**) intends to consult in 2024 on changes to the Listing Rules to make disclosure of transition plans mandatory for listed companies.

The government announced the preparation of a UK Sustainability Disclosure standard in August 2023. It is expected to closely reflect the ISSB standards and endorsement of the UK standards is expected in July 2024.

Certain large unlisted UK companies are now also required to make various ESG-related disclosures in their annual reports. Subject to requirements, certain large companies need to report on which governance code they have adopted and applied; report on workforce engagement arrangements; make certain non-financial information disclosures (which covers various ESG related topics, including, broadly, TCFD-aligned disclosures).

Most companies with publicly traded securities must disclose material risks in financial filings.

Outlook: What's on the horizon?

- Increasing expectations on ESG performance. More timely disclosure is expected on financial conditions due to unprecedented disruptions.
- Shareholder and stakeholder activism will continue to rise.
- Regulators are now focusing on standardisation and regulators are showing greater willingness to take enforcement action for corporate governance breaches.
- Compliance scrutiny increases as disclosures are more readily made by business. The TCFD has reported that for fiscal year 2021 only 4 per cent of companies disclosed in line with all 11 of its recommendations in their climate-related disclosures.
- In the UK: The FCA and Financial Reporting Council (FRC) have reported on trends in compliance with those disclosures in 2022, and in relation to trends of metrics and targets disclosures in 2023. The findings of those reports will be critical for disclosures for PLC and for all large companies and LLP reporting from 2023.
- In the EU, more technical reporting standards for specific sectors are expected to be published to assist disclosure exercises under the CSRD.

How can Freshfields help with reporting and disclosure and sustainability issues?

- We advise on the full range of ESG disclosure requirements from investors and regulators, and the underlying substantive obligations.
- We help to develop guidelines on disclosure, manage risks, and present sustainability ambitions and actions to stakeholders in 'the best possible way'.
- We advise on wider stakeholder communications.
- We help manage litigation risks associated with 'greenwashing' or other disclosure related claims and defend clients when needed.
- We assist our clients to use ESG disclosures to test ESG performance in the context of M&A.

Reporting and disclosure

Our publications

- Comparison of SEC Final Rules on Climate-Related Disclosures against ISSB Standard, EU CSRD/ESRS Requirements, and California "Climate Accountability Package" Disclosures
- HKSE new climate disclosure requirements - Changes to the HK Listing Rules
- New climate disclosure requirements for Hong Kong-listed companies: top tips for how issuers can adapt
- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- What to expect from the new European Forced Labour Regulation
- Update: US Court of Appeals for the Fifth Circuit Stays the SEC's Final Rules on Climate-Related Disclosures
- SEC Adopts Final Rules on Climate-Related Disclosures
- California Adopts 'Climate Accountability Package'
- Comparison of new California 'Climate Accountability Package' disclosures against ISSB Standard, SEC Proposed Rules on Climate Disclosures and EU CSRD/ESRS requirements
- Advancing climate transition through disclosure — the UK Transition Plan Taskforce's gold standard framework
- A comparison of global sustainability disclosure standards: ISSB, ESRS and draft SEC
- ISSB: A new era for global sustainability disclosure

Podcasts

- Unpacking the status of climate disclosures

Related topics

Global trade, Nature and biodiversity, Supply chain and procurement, Sustainable finance, The European Green Deal.

Supply chain and procurement

Supply chain and procurement

Recent regulatory developments in ESG and supply chain and procurement

Procurement (of goods, works and services) by governments and global organisations constitutes a significant proportion of GDP across the world. The amount spent on public procurement in 2023 was estimated at 13 per cent of annual GDP across the 38 OECD countries for which data was available.

An increasing number of governments and global organisations are incorporating sustainability objectives into procurement policies and practices, using their purchasing power to help achieve wider societal goals. The United Nations, the World Bank and the EU have all published guidance on how sustainability-related factors should be taken into account when those entities are procuring goods and services and/or financing projects.

National governments worldwide are also taking steps to support sustainability through procurement:

- The UK requires a minimum weighting of 10 per cent of the total score in tender evaluations to be applied to ‘social value’ and requires bidders for large contracts to commit to reaching net-zero by 2050.
- German government guidance recommends that all federal agencies include sustainability criteria in all tenders.
- The French public procurement code provides for evaluation criteria to include categories such as biodiversity and environmental performance.
- Spanish public procurement legislation requires all tender specifications to include social and environmental criteria.
- The EU Batteries Regulation lays down rules on green public procurement to be used by Europe’s public authorities as regards batteries.
- The European Commission has been developing voluntary Green Public Procurement (**GPP**) criteria for several product groups. Furthermore, following the adoption of the 2020 Circular Economy Action Plan, the Commission is proposing minimum mandatory GPP criteria and targets in sectoral legislation and phase in compulsory reporting to monitor its uptake through a Draft Green Public Procurement Strategy and Action Plan.
- In the US, green procurement is incorporated at every level of government (including in Presidential Executive Orders, legislation and agency actions). The Environmental Protection Agency and Department of Defense (among others) have well-developed green purchasing programmes.
- Singapore has announced that the Government will set aside up to 5 per cent of evaluation points for environmental sustainability for large government construction and ICT tenders starting from FY2024.

Companies are increasingly following suit, incorporating sustainability-related objectives and criteria into their procurement processes and contracts with suppliers.

Supply chain and procurement

Global trade policy and agreements are also aligning trade with climate and sustainable development objectives. Supplier access to global public markets will increasingly require 'sustainable' credentials.

Outlook: What's on the horizon?

- A shift from softer recommendations to concrete requirements that suppliers meet clear sustainability criteria or risk exclusion from certain supply chains/public markets. This shift is already underway in the UK and other European countries and is likely to be felt more acutely in sectors where sustainability-related risks are higher (eg energy and extractives sectors).
- An increasing body of sustainability-related procurement policies, due diligence and reporting legislation worldwide.
- A competitive edge for suppliers that can demonstrate sustainable practices over other bidders for certain contracts.
- Greater scrutiny of companies' procurement practices by investors and shareholders.
- Increased collaboration will be required amongst key stakeholders such as companies, employees, suppliers and governments.

Jurisdictions are also increasingly introducing legislation requiring companies to conduct due diligence on their supply chains to identify human rights and/or environmental risks.

For example, the EU's Corporate Sustainability Due Diligence Directive, when in force, will require companies to carefully manage social and environmental impacts throughout their supply chain, including their own business operations. The Directive will introduce new civil liability regimes in this respect as well as an obligation to set up corporate climate change plans that align with the Paris Agreement.

As more of such legislation comes into force, companies will need to scrutinise their supply chains, restructure their corporate governance, adjust their procurement processes and supplier contracts accordingly.

How can Freshfields help with supply chain and procurement and sustainability issues?

Our market-leading procurement practice advises procuring entities and bidders on all aspects of procurement processes, global procurement compliance programmes and bid challenges.

We:

- Advise our clients (both bidders and purchasers) on global developments, access to public markets and compliance with procurement law including sustainability requirements
- Assist clients with tender processes (both bidding and buying)
- Help clients with developing internal procurement policies and effective supply chain due diligence and management
- Represent clients in bid challenges following alleged breaches of procurement law
- Advise clients on the scope and application of human rights/environmental due diligence legislation (see Human rights section)

Supply chain and procurement

Our experience in sustainable procurement includes:

- Design of procurement policies: advising a global charity on the design of its procurement policy including to take account of wider societal goals and sustainability objectives
- Advice on design of procurement processes and evaluation criteria: advice to UK Government (DEFRA) on the construction, procurement and financing of the 23-km Thames Tideway
- Bid challenges: representing EnergySolutions EU in its challenge to the award of contracts by the Nuclear Decommissioning Authority to decommission 12 key nuclear sites, ultimately leading to a £97m settlement and the Magnox Inquiry
- Advising a professional services client on the development of best practices in content moderation, to ensure respect for human rights based on the United Nations Guiding Principles
- Assisting a client in 'future-proofing' its contracts with new suppliers to ensure that they comply with human rights due diligence legislation and best practice
- Advising a bidder on its participation in the UK competition for Carbon Capture and Storage Technology development

Our publications

- What to expect from the EU's CSDDD #1: Enforcement Mechanism
- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- Taking stock: Four months of notifications under the EU Foreign Subsidies Regulation – More than 150 cases and one Phase II investigation
- Navigating the new scope of the German Supply Chain Act and looking ahead for the EU
- EU's foreign subsidies regime officially kicks off – a new chapter for M&A and public procurement in the EU
- EU Deforestation Regulation published: A step forwards in global supply chain legislation
- The UK takes steps to eradicate modern slavery in government supply chains

Related topics

Global trade, Human rights, Reporting and disclosure, Sustainable finance, The European Green Deal.

Sustainable finance

Sustainable finance

Recent regulatory developments in sustainability and sustainable finance

Financial services regulators recognise the threat of climate change to financial stability and the role of financial institutions in the transition to a net zero economy. Financial services regulators are intervening in four areas:

- Identifying sustainable activity: setting criteria to help financial institutions assess which activities can be considered sustainable so they can be labelled appropriately
- Governance and risk: requiring the integration of sustainability considerations into financial institutions' governance and risk management practices and ensuring that responsibility is allocated at board level
- Products and services: encouraging financial institutions to make their investment products and services more sustainable and make sustainable options more widely available to investors
- Disclosure: in addition to the ESG disclosure required of corporates (see Reporting and disclosure section), regulators require financial institutions to publicly disclose information about their products and services, and to disclose additional information about how institutions are managing sustainability risks themselves, with the aim of empowering investors to make decisions based on sustainability criteria

Regulators are looking beyond the climate and governance aspects of ESG. Employee and management diversity, a healthy culture that discourages non-financial misconduct and fair treatment of all stakeholders are increasingly a focus for regulatory scrutiny (see People section).

Outlook: What's on the horizon?

US authorities have already publicly announced greenwashing investigations involving a number of financial institutions and we expect more hard-edged regulatory enforcement in the US and elsewhere as expectations of firms' capabilities in this area increase. We also expect more shareholder, stakeholder and investor class actions relating to ESG commitments and disclosure, often initiated by NGOs campaigning on climate change.

Prudential regulators are requiring institutions to integrate climate risk, in particular, into strategic risk management. Examples include climate transition plans, which are now required in the UK and may be considered by the PRA in its supervisory process. In the EU, CRD6 will also require banks to draw up and implement transition plans.

Corporate disclosure regimes and additional disclosures for financial institutions are developing at different paces and contain differences, even when based on Task Force on Climate-Related Financial Disclosure (**TCFD**). The EU continues to implement its Sustainable Finance Disclosure Regulation (**SFDR**), while in the UK, the Financial Conduct Authority (**FCA**) intends to consult on International Sustainability Standards Board (**ISSB**) aligned disclosures in 2024. In the US, the Securities and Exchange Commission (**SEC**) has adopted new climate risk disclosure rules that will take effect in 2026, and some states have adopted separate disclosure requirements. The authorities in Hong Kong have developed a prototype of the Hong Kong taxonomy (drawing largely from the Common Ground Taxonomy) and have pledged to adopt the ISSB standards locally for corporate disclosures in a pragmatic and proportionate manner.

Sustainable finance

There is also a growing impetus by regulators to impose rules to mitigate against greenwashing. The US SEC and UK FCA have both announced measures around misleading product labelling relating to sustainability (the FCA is consulting on an anti-greenwashing rule) and the European Commission is also considering introducing a product categorisation regime. In Hong Kong, the Securities and Futures Commission (SFC) has strengthened the rules on fund managers' management of climate risks and related disclosures to combat greenwashing.

There has been push back against ESG rule-making in some political quarters, especially in the US, but regulators are likely to continue developing requirements in the ESG field.

We also expect market-led initiatives to gain further traction, with banks (voluntarily) extending their climate target setting to include their clients' Scope 1, Scope 2 and Scope 3 emissions in connection with capital markets arranging and underwriting services for new debt and equity instruments.

How can Freshfields help with sustainable finance issues?

We help our clients structure financing transactions to deliver sustainable development in:

- Project finance
- Labelled bonds such as green, social and sustainability bonds, green and social loans, sustainability-linked bonds and loans, and social impact bonds
- ESG derivatives
- Green securitisations
- Impact investments

We keep our clients up to date with sustainability-linked legislative changes around the world. Freshfields was commissioned by PRI (the UN-supported Principles for Responsible Investment), the UN Environment Programme Finance Initiative (UNEP FI) and the Generation Foundation to consider the extent to which institutional investors can – and should – use their power and influence to generate a positive sustainability impact. Our report 'A legal framework for impact' was published in July 2021.

Sustainable finance

We advise organisations on how to disclose their ESG activities effectively to stakeholders while managing risk, and help our clients navigate regulators' expectations in relation to governance structures, management responsibilities and risk management procedures for sustainability and ESG.

We also have market-leading expertise in regulatory investigations and ESG-related complaints (including complaints under the OECD Guidelines) and ESG-related litigation.

Our publications

- ESG regulation and litigation in 2024: what's on the horizon for UK financial institutions?
- On the road(map) to sustainable investing: The FCA's final rules on sustainability disclosures and labelling
- Road to COP28: Climate finance — unlocking private capital to beat climate change

Click here to view all our blogs relating to sustainable finance.

Related topics

Competition and antitrust, EU state aid and UK subsidy control, Nature and biodiversity, People, Reporting and disclosure, The European Green Deal.

Taxation

Taxation

Recent regulatory developments in ESG and taxation

Policymakers see taxation as a catalyst to promote sustainability in business models and investment decisions:

- Energy taxation: the Energy Taxation Directive (ETD) is to be revised as part of The European Green Deal/Fit for 55 package. There is pressure to withdraw reductions and exemptions for fossil fuels, including for aviation and maritime transport. The OECD wants to create more sustainable energy taxation systems worldwide. However, ongoing issues with global energy supplies have slowed progress in relation to environmental taxes and some national and more recent multinational 'windfall tax' measures (including the EU's revenue cap) have hit the renewables sector and could discourage investment in this area.
- EU Carbon Border Adjustment Mechanism (**EU CBAM**) and Emissions Trading System (**EU ETS**): in April 2023, the EU adopted proposals to revise the EU ETS and introduce a new EU CBAM. The EU CBAM puts a price (linked to the EU ETS) on imports of certain goods (including electricity, cement, iron, steel, aluminium, fertilizer, hydrogen and ammonia, as well as certain downstream products such as screws and bolts) based on their carbon emissions. During a transitional period from October 2023 to December 2025, the EU CBAM will only apply as a reporting obligation. The EU CBAM will then be introduced progressively, in parallel with the phase-out of free EU ETS allowances between 2026 and 2034. Additional proposals to reform the EU ETS have also been approved, including extending its scope to the maritime, aviation, road transport and construction sectors.
- UK CBAM: following a consultation published in March 2023 considering a range of potential policy measures to mitigate carbon leakage risk, it has been confirmed that the UK government intends to introduce a UK CBAM from 1 January 2027. This will follow a similar structure to the EU CBAM and will apply a tariff on imports of emission-intensive products based on the embedded emissions of these imports, although will not involve the purchase or trading of emissions certificates. Further details on the design and delivery of a UK CBAM will be subject to consultation in 2024.
- Green tax incentives: we see a surge in tax incentives to divert investment decisions to climate-friendly options, such as capital allowances for investing in environmentally-friendly assets or tax credits incentivising research and development into green technology. In the US, the Inflation Reduction Act introduced and expanded a number of clean energy-oriented tax credits, particularly in the electric vehicle and renewable energy production spaces.
- Stronger government and redesign of corporate tax systems: the pandemic has helped shift global tax policy, with an onus on big businesses paying their 'fair share'. The OECD two-pillar approach, which sees a move away from the need for physical presence for the right to tax and a global minimum tax rate payable by multinational enterprises, was agreed by over 130 members of the Inclusive Framework. The EU's medium-term vision will consider the role of tax policies in supporting businesses' transition to a green(er) Europe, possibly resulting in a re-design of corporate tax and VAT systems.

Taxation

- Societal expectations: demands for transparency on how big business is taxed add to pressure for public country-by-country reporting (**CbCR**) and for publishing effective tax rates. A proposal for an EU directive on public CbCR was adopted by the European Council in September 2021, with reporting due to start in 2024 in relation to 2023. In the UK, large businesses must publish their 'tax strategy'. The role of tax policy in addressing human rights issues, such as gender inequality, is also in the spotlight.
- ESG/Tax good governance: corporates and investors are prioritising profits less and looking more at the societal impact of an investment. Tax is becoming an important governance consideration. If a company engages in aggressive tax planning, is the business sustainable and robust? Investors are starting to exclude companies from their portfolios due to tax policies.

Outlook: What´s on the horizon?

- Following international agreement on the key components of the OECD's 'pillar two' proposal to introduce a global minimum tax, attention has turned to domestic implementation. Key jurisdictions, including EU Member States and the UK, have enacted domestic legislation with the result that significant aspects of the rules are in effect from January 2024, with additional rules scheduled to apply from January 2025.
- Technical work on aspects of the OECD's 'pillar one' proposals is still ongoing. Progress on the 'Amount A' proposal (a new taxing right not based on physical presence) has now been delayed a number of times. In October 2023, the OECD released the latest version of the text of the Amount A multilateral convention (**MLC**). Work to resolve the remaining differences on the Amount A MLC has continued into 2024, with the aim of finalising the text of the MLC by the end of March 2024 and holding a signing ceremony by the end of June 2024, although as at mid-April 2024 the final text of the Amount A MLC had not yet been published. Further delay on agreement risks the introduction of new domestic digital services taxes (DSTs).
- The OECD has officially launched its Inclusive Forum on Carbon Mitigation Approaches to bring together experts on climate, tax and economic policy. This forum seeks to improve the global impact of emissions reduction efforts through better data and information sharing as well as evidence-based learning.
- The EU is continuing with its ambitious package of reforms (Business Taxation for the 21st Century or BT 21), which includes the EU CBAM and a revised EU ETS (as discussed above) and Unshell (or 'ATAD3' — a proposed directive to target the perceived misuse of shell companies for tax purposes). The Commission also unveiled legislative proposals, in September 2023, proposing comprehensive, structural reform of the EU business tax framework, ('BEFIT'), as well a proposal to implement common transfer pricing rules for EU-based entities, based on existing OECD guidelines.
- Governments across the world are showing increasing interest in using national tax measures to tackle climate change, both in terms of environmental taxes and tax incentives. Although the recent energy crisis somewhat slowed progress in this area, others see the potential for proceeds raised from windfall taxes to be used to invest in greener technology and infrastructure.

Taxation

- The EU is increasingly keen to link ESG reporting with tax transparency. Businesses should be mindful of non-tax reporting standards incorporating some tax criteria (such as the EU Corporate Sustainability Reporting Directive and its interaction with the EU Taxonomy and OECD guidelines for multinational enterprises).

How can Freshfields help with taxation and sustainability issues?

- We help clients navigate new tax rules and adapt tax policies to changing rules and the evolving political and social climate.
- In M&A transactions, we scrutinise a target's tax strategies to identify risks posed by new tax rules and raised standards for tax good governance.
- We advise on tax disputes arising under new tax rules and challenge new tax rules if they are not designed equitably.
- We help steer the legislative process for new tax rules by providing strategic advice and the right legal arguments for lobbying.

Our publications

- Stocktake on the EU and UK Carbon Border Adjustment Mechanisms
- The OECD's Pillar One proposal: where are we now?
- ESG and tax transparency: the next frontier of tax disputes?
- How does tax fit into the ESG landscape and what does this mean for businesses?
- CBAM: go-live of transitional phase
- Carbon Capture — The Current State of Play in the European Union
- What you need to know now about the impact of the OECD's global minimum tax on M&A transactions
- Addressing carbon leakage risk to support decarbonisation: A consultation on strategic goals, policy options and implementation considerations

See our Global tax reform: the OECD pillars landing page for our latest publications on the OECD's 'Two-Pillar' proposals.

Related topics

Competition and antitrust, EU state aid and UK subsidy control, Global trade, Human rights, Intellectual property, People, Reporting and disclosure, Sustainable finance, The European Green Deal.

The European Green Deal

The European Green Deal

What are the goals of the European Green Deal?

- To make Europe carbon neutral by 2050.
- To decouple economic growth from resource use.
- To ensure no person or place is left behind.

Climate ambition

The European Climate Law enshrines the EU's commitment to be climate neutral by 2050.

Unveiled in July 2021, the Fit for 55 package aims to make the EU's climate, energy, land use, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55 per cent by 2030. The package comprises proposals to revise existing laws, such as the:

- Emissions Trading System Directive
- Land Use, Forestry and Agriculture Regulation
- Renewable Energy Directive
- Regulation on strengthening the CO_2 emission performance standards for new passenger cars and vans

Agreements on most of the files listed above have now been reached, with the new texts published in the Official Journal of the EU.

In November 2022, the Commission published a new proposal for the certification of carbon removals. In February 2023, a proposal for CO_2 standards for heavy-duty vehicles was published. These are still being discussed by co-legislators.

In March 2023, the Commission presented new measures including:

- A Net Zero Industry Act
- European Critical Raw Materials Act
- Revision of EU's internal electricity market rules

These files are being finalised by co-legislators and should become law in the coming months.

Post-2030 EU climate policy

The Commission presented a communication on setting 2040 climate targets in February 2024, which favours a 90 per cent greenhouse gas reduction target by 2040. The communication was published alongside a new strategy for Industrial Carbon Management, which aims to scale-up Carbon Capture, Use and Storage (CCUS) in Europe.

Financing the sustainable transition

In January 2023, the new Corporate Sustainability Reporting Directive (CSRD), which replaces the Non-Financial Reporting Directive (NFRD), came into effect. For the first time in the EU, companies in the scope of the Directive will have to do mandatory reporting against European Sustainability Reporting Standards (ESRS) (see Reporting and disclosure section).

After two years of political negotiations, the EU decision-makers came to an agreement on the final Regulation on Green Bond Standard, which was published in the EU Official Journal

The European Green Deal

on 30 November 2023. It will start applying from 21 December 2024. This new regulation establishes an EU voluntary standard for green bonds and will be available to companies and public entities that wish to raise funds on capital markets to finance their green investments.

Following extended political negotiations, the European Council approved the compromise text on the Corporate Sustainability Due Diligence Directive (CSDDD), which is expected to enter into force in H2 2024 with staged application to start in 2027 for the first set of companies.

On 5 March 2024, EU co-legislators reached an informal agreement on the proposed forced labour regulation, which aims to ban products made with forced labour. The scope of this agreement covers products made in the EU for domestic consumption and exports as well as imported goods, with primary obligations taking effect 36 months after entry into force.

In June 2023, the Commission published a new regulatory proposal on environmental, social and governance ratings, on which negotiations concluded on 5 February 2024. See Freshfields' client briefing for more information.

In September 2023, the Commission opened a 3-month public consultation on the Sustainable Finance Disclosures Regulation (SFDR) — focusing on legal certainty, the useability of the regulation and its ability to tackle greenwashing — with a view to revise it in H2 2024 or early 2025 following the European Parliament's elections. (see Freshfields blog for more information).

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Sustainability of food systems

- Farm to Fork Strategy, including the EU Code of Conduct on Responsible Food Business and Marketing Practices.
- Consultation on NGTs for sustainable food systems.
- Actions to boost organic production.

Decarbonising energy

- New EU Framework to decarbonise gas markets, facilitating the uptake of renewable and low-carbon gases, including hydrogen.
- Solar energy strategy.
- Offshore renewable energy.
- Strategy for smart sector integration.
- The ‘Renovation Wave for Europe’ including the revision of the Directive on the energy performance of buildings

Environmental protection

- EU Biodiversity Strategy for 2030 including legally binding nature restoration targets.
- Chemicals Strategy for Sustainability, including revision of the legislation on the hazard classification, labelling and packaging of chemicals.
- EU Forest strategy including a new regulation to ensure deforestation free products in the internal market now in-force.
- EU Action Plan: Towards Zero Pollution for Air, Water and Soil including:
  - Revised lists of surface and groundwater pollutants.
  - Revision of EU ambient air quality legislation.

Zero emissions and smart mobility

- Strategy for sustainable and smart mobility (updated in December 2021) to modernise EU transport systems by increasing connectivity and shifting more passengers and freight to rail and inland waterways. It includes:
  - A smart and sustainable TEN-T framework
  - Action Plan on long-distance and cross-border rail
  - Update of the Intelligent Transport Services Directive
  - New EU Urban Mobility Framework
- Revision of emissions standards for combustion-engine vehicles, which will include the development of post-Euro 6/VI emission standards in the Spring of 2022.

Industrial strategy for a clean and circular economy

- EU industrial strategy.
- Circular economy action plan (textiles, construction, electronics, plastics; sustainable product initiative).
- New regulation on batteries, now in-force.
- New Ecodesign framework for sustainable product design.
- A new Plastics Package: measures to restrict the addition of microplastics to products and to reduce the release of microplastics in the environment, as well as a policy framework for biodegradable plastics.
- Initiatives on the right to repair, new EU Packaging and Packaging Waste Regulation, Empowering Consumers Directive (now in-force) and green claims.

Further important actions

- Review of state aid guidelines (see EU state aid and UK subsidy control section).
- Just Transition Mechanism (which includes the Social Climate Fund).
- Announcement by the Commission to double external funding for biodiversity in 2022.
- Initiatives to screen and benchmark green budgeting practices of member states and the EU.
- Integration of the Sustainable Development Goals in the European Semester.
- Proposed changes to the Innovation Fund – funding clean technologies.

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Sustainability of food systems	Decarbonising energy	Environmental protection	Zero emissions and smart mobility	Industrial strategy for a clean and circular economy	Further important actions
		• Proposal for a Directive to strengthen the protection of the environment through criminal law. In November 2023, the Commission is expected to propose a new forest monitoring framework	• Production and supply of sustainable alternative fuels.	• Revision of ELV Directive (change to a regulation) and Waste Shipments rules. • European Chips Act, a comprehensive set of measures to ensure the EU's security of supply, resilience and technological leadership in semiconductor technologies and applications.	• The Commission just published its first Climate Risk and Resilience report setting out how the EU and its Member States can better anticipate, understand, and address growing climate risks.

Outlook: What's on the horizon?

There will be European Parliament elections in June 2024, followed by the appointment of a new College of Commissioners. Ursula von der Leyen is broadly expected to stay at the helm of the Commission for another 5 years, but the other Commissioners, especially those overseeing EU Green Deal policy, are likely to change. We observe a mounting backlash from right-leaning political parties and parts of the industry, especially SMEs, against the Green Deal agenda, considering it as too strict and hampering on the competitiveness of the European companies.

While we do not expect the sustainability agenda to disappear in the next term, because the EU's ambitions are undisputable, it remains to be seen how the agenda might shift in light of a possible political change.

We are tracking developments and watching the impact of the Green Deal on the global economy (see Global trade section).

How can Freshfields help with European Green Deal issues?

- Our EU regulatory and public affairs team draws on our sustainability experience to help clients anticipate, navigate and shape legislative and regulatory processes.
- Our sector teams understand sector-specific regulatory and legislative changes, and help clients implement agreed goals and upcoming regulations and directives.

The European Green Deal

Our publications

- Sustainable global supply chains: EU's CSDDD finally adopted by Council
- What to expect from the new European Forced Labour Regulation
- The European Critical Raw Materials Act: A quick summary on what it does and when it's coming
- Nature Restoration Regulation generates storm in European Parliament
- New EU sustainable batteries regulation becomes law – what you need to know
- EU publishes new biodiversity proposals: a closer look at plans to promote development of gene-edited crops and reduce food and textile waste
- EU Deforestation Regulation published: A step forwards in global supply chain legislation
- Microplastics: the EU's macro step to halt micro particles
- Draft rules on 'green' claims and rights to repair published by European Commission
- Banning PFAS chemicals in the EU – Consultation launched
- EU unveils Net Zero Industry Act to boost competitiveness in Europe
- Re-packaging old rules: How will the EU's proposed new packaging Regulation tackle excessive packaging and packaging waste?
- EU legislators limber up for intense negotiations on the 'Fit for 55' package
- Nature & Biodiversity – Is the UK falling behind the EU?
- ESG disclosure requirements – are you ready for the EU corporate sustainability reporting directive?
- What makes hydrogen 'renewable'? – a quick look at the Commission's draft delegated act
- Sustainable products: the European Commission's ambitious plans to redesign consumer products

Related topics

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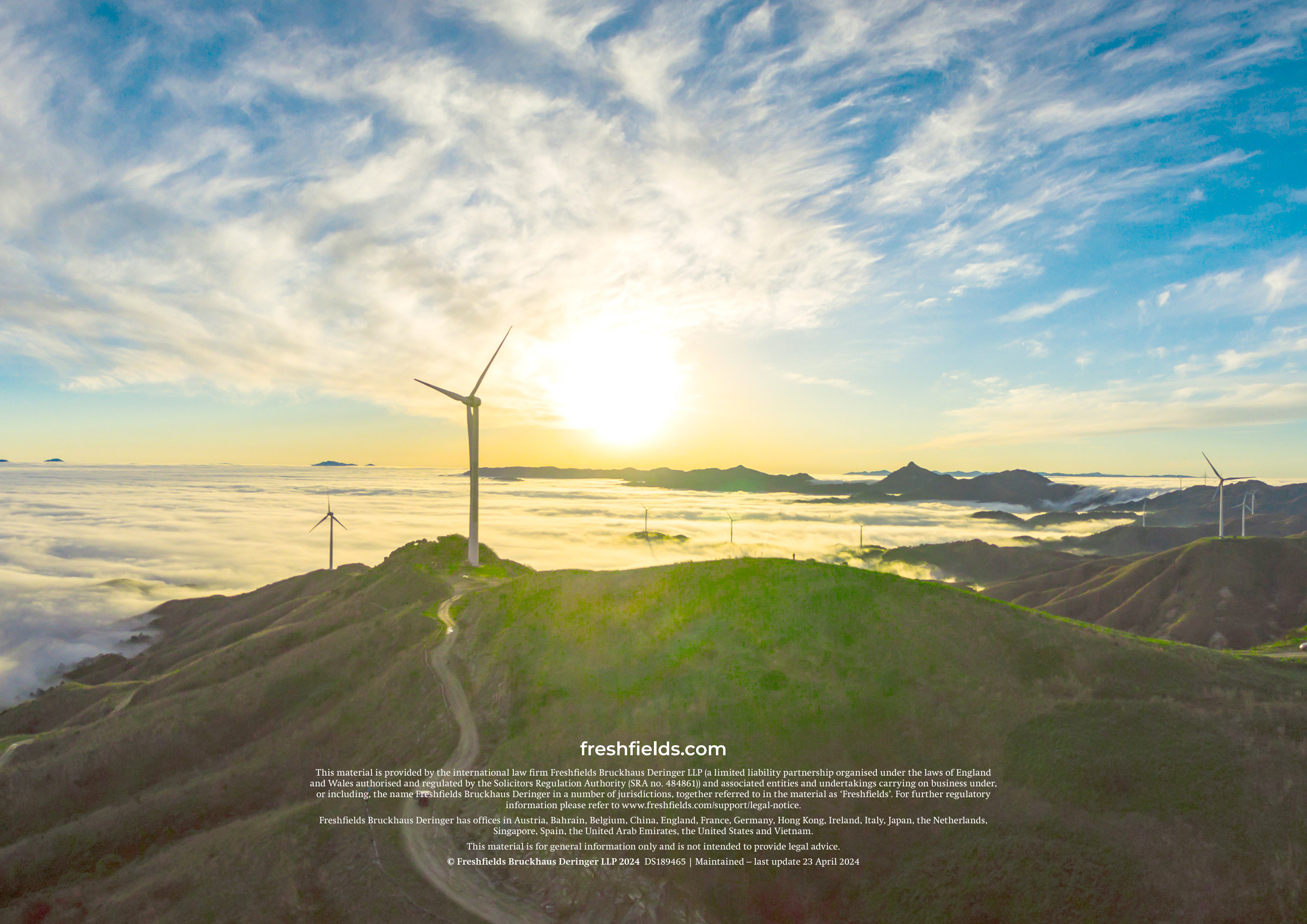

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