The Sustainability Regulatory Horizon
The Sustainability Regulatory Horizon

The grid to the right outlines the main categories of sustainability-related regulation, one of the fastest-evolving branches of rule-making in the world. Developments in these areas can raise risks and opportunities for your business, affecting everything from your disclosure obligations to your corporate development strategy and your financing options. We have experience advising our clients across the full spectrum of sustainability-related regulations and would be delighted to discuss any of them with you in more detail. In the meantime, to find out more about forthcoming developments and explore our in-depth insights, click on each topic on the grid.
Global trade
Global trade

What developments do we see on sustainability and global trade?
In 2022, WTO Members adopted a new Agreement on Fisheries Subsidies in 2022. The agreement prohibits harmful fisheries subsidies, including those that contribute to illegal, unreported and unregulated fishing. The agreement has been formally accepted by Canada, the United States, Seychelles, Singapore, Switzerland and Iceland. It requires 109 WTO Members to accept the agreement before coming into force.

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. 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 (ILO) and environmental agreements, and effective enforcement of domestic labour and environmental laws. The new UK-Australia FTA adds an innovative chapter requiring the enforcement of animal welfare laws.

- These obligations are usually subject to dispute settlement and have led to several arbitral decisions. In 2021, the EU succeeded in a claim under the EU-Korea FTA that Korea had failed to comply with its ILO obligations. Several claims have also been determined under the 2020 USMCA rapid reaction mechanisms for labour rights in Mexico.

- In May 2023, the first complaint about labour standards was lodged using the EU’s new Single Entry Point, a mechanism for enforcing labour and environmental obligations under EU FTAs.

FTAs also contain provisions on high regulatory standards, fair trade and responsible business practices. These provisions do not require concrete action but make it easier for parties to pursue sustainable development goals without breaching trade obligations. These rules are also evolving:

- The 2022 UK-New Zealand FTA expressly states that measures may be adopted to pursue climate change goals without breaching the agreement.

- Efforts to address climate change also go beyond FTAs. In October 2022 Singapore and Australia signed the world’s first Green Economy Agreement, which provides for cooperation in a number of areas related to trade, investment and the environment.

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

- In April 2023 the EU adopted a carbon border adjustment mechanism (CBAM). The CBAM will be a reporting obligation until the end of 2025, when it applies fully. It aims to price carbon content into imports and prevent carbon leakage (the transfer of production from the EU to other countries with lower emission reduction ambitions, and the replacement of EU products by more carbon-intensive imports). Questions remains as to how the EU will assess carbon pricing in exporting countries. The UK has opened consultations on a similar scheme.

- Building on business and human rights initiatives, 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. In 2022, the EU adopted a new Corporate Sustainability Reporting Directive (CSRD).
Global trade

extending ESG reporting obligations to a larger range of companies than before. A parallel Corporate Sustainability Due Diligence Directive is currently going through the EU's legislative process. The EU's Deforestation Regulation has just been approved by the European Parliament and will require products sold in or exported from the EU to be 'deforestation-free'. This affects certain foodstuffs, but also all products containing commodities including wood and rubber, and affects packaging, furniture, clothing using rubber, and paper-based products. New Zealand recently passed similar legislation which focused on climate change issues.

• In December 2021, the US passed legislation prohibiting imports of forced labour products from China's Xinjiang region. The EU is following suit, although forced labour regulation is structured differently. In September 2022 the EU Commission proposed 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. These tax credits are often 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.

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 and FTA obligations.

Outlook: what's on the horizon

• 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; and
  – develop guidelines to inform the development and implementation of voluntary eco-labelling programmes.

• There are efforts among APEC countries to update their list of 54 environmental goods whose tariffs were cut to 5% or less.

• More rigorous enforcement of the sustainable development commitments in the EU’s trade agreements via the post of Chief Trade Enforcement Officer.

• Additional unilateral EU trade policy measures to promote sustainability in trade:
  – Adoption of revised EU Generalised System of Preferences, with expanded human rights and environmental conditions for beneficiaries to receive tariff preferences
  – a proposed corporate sustainability due diligence regulation

Related topics

• EU Green Deal, Horizontal collaboration, Human rights.
The EU Green Deal
The EU Green Deal

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 for a Carbon Border Adjustment Mechanism (CBAM) and proposals to revise existing laws, such as the:
  - Emissions Trading System Directive;
  - Land Use, Forestry and Agriculture Regulation;
  - Renewable Energy Directive; and
  - a regulation on strengthening the CO2 emission performance standards for new passenger cars and vans.
Provisional agreements on most of the files listed above have now been reached. Final agreement should take place in the coming months, before the laws enter into force in the Official Journal of the EU.
- Following the Russian invasion of Ukraine and high energy prices, in 2022 the Commission published new emergency energy proposals to try to reduce prices. Legislative initiatives include increasing the EU’s 2030 renewable energy targets, introducing mandatory gas storage targets, and placing a cap on gas prices. These are now all in force until the end of 2023 or later.
- In November 2022, the Commission published a new proposal for the certification of carbon removals. In February 2023, a proposal for CO2 standards for heavy-duty vehicles was published.

A New Zero Industry Act

The Commission is currently consulting stakeholders on setting climate targets for 2040.

Financing the sustainable transition

- In March 2023, the Commission presented new measures including:
  - European Critical Raw Materials Act; and
  - Revision of EU’s internal electricity market rules.

- In 2021 the Commission adopted a comprehensive Sustainable Finance package, including:
  - Taxonomy Climate Delegated Act; and
- In 2022, the Commission presented:
  - a new proposal on sustainable corporate due diligence;
  - a legislative proposal on Green Bond Standard; and
  - a proposal for a ban on products made with forced labour.
- In 2023, the Commission will publish a new regulatory proposal on environmental, social and governance ratings.
The EU Green Deal

**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.
- In 2023, the Commission will publish a legislative framework for sustainable food systems, as well as legislation for plants produced by certain genomic techniques. There will also be an initiative on protecting, sustainably managing and restoring EU soils.

**Decarbonising energy**
- Revision of the Renewable Energy Directive pushing the renewables target to 42.5 per cent by 2030, doubling the current renewables share in just a decade.
- New EU Framework to decarbonise gas markets, facilitating the uptake of renewable and low-carbon gases, including hydrogen.
- Solar energy strategy.
- Methane Strategy to reduce methane emissions in the energy sector in Europe and in the EU global supply chain.
- Offshore renewable energy.
- Strategy for smart sector integration.
- Net-Zero Industry Act to increase manufacturing capacities of green tech in the EU.

**Environmental protection**
- EU Biodiversity Strategy for 2030 including legally binding nature restoration targets.
- Chemicals Strategy for Sustainability, including:
  - new rules on the sustainable use of pesticides;
  - upcoming legislation on the hazard classification, labelling and packaging of chemicals; and
  - targeted revision of REACH.
- EU Forest strategy including a regulation to ensure deforestation free products in the internal market.
- EU Action Plan: Towards Zero Pollution for Air, Water and Soil including:
  - revised lists of surface and groundwater pollutants; and
  - revision of EU ambient air quality legislation.
- Proposal for a Directive to strengthen the protection of the environment through criminal law.
The EU Green Deal

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; and
  - 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.
- Production and supply of sustainable alternative fuels.

Industrial strategy for a clean and circular economy
- EU industrial strategy.
- Circular economy action plan (textiles, construction, electronics, plastics; sustainable product initiative).
- Legislation on batteries.
- Proposal for zero-carbon steelmaking.
- 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, revision of EU packaging rules and green claims.
- 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.

What are the goals of the EU 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.

Further important actions
- Review of state aid guidelines (see state aid 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.
How can Freshfields help with the EU Green Deal?

- Our EU regulatory and public affairs team draws on our sustainability experience to help clients 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.

Outlook: what's on the horizon

- Final legislative proposals under the Von der Leyen Commission will be unveiled by the end of 2023, ahead of the next European elections in mid 2024.
- The EU’s ambitions are undisputable, but it remains to be seen how much will be achievable in practice.
- We are tracking developments and watching the impact of the Green Deal on the global economy (see global trade section).

Related content:

- 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 moves quickly to adopt law banning products contributing to deforestation ahead of UN Biodiversity Conference
- EU legislators limber up for intense negotiations on the ‘Fit for 55’ package
- What makes hydrogen “renewable”? — a quick look at the Commission’s draft delegated act
- Nature & Biodiversity — Is the UK falling behind the EU?
- ESG disclosure requirements — are you ready for the EU corporate sustainability reporting directive?
- Sustainable products: the European Commission’s ambitious plans to redesign consumer products
- The EU’s proposed ban on greenwashing: What businesses need to know
- Slow fashion: The EU’s vision for sustainable and circular textiles
- The new EU Gas Package — setting the scene for hydrogen grids and other hydrogen infrastructure
Supply chain
Supply chain

**What is sustainable procurement?**

Sustainable procurement is “a process whereby organisations meet their requirements for goods, services, works and utilities in a way that achieves value for money on a whole of life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising its impact on the environment”.

**Annual spend**

- UN organisations: $29.6bn (in 2021).
- EU Member States: €2tn (in 2017).
- UK: £379bn (from April 2021 to April 2022).

**Background and current global perspective**

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 has been estimated at 14.9 percent of annual GDP across the 22 OECD countries for which data is 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](https://www.un.org), the [World Bank](https://www.worldbank.org) and the [EU](https://europa.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.
- 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.

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

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.
**Impact of sustainability-related due diligence obligations**

In parallel, jurisdictions are introducing legislation requiring companies to conduct due diligence on their supply chains to identify human rights and/or environmental risks. For example:

- the UK has recently prohibited certain businesses from using certain commodities if they have not been produced in line with local laws protecting forests and other natural ecosystems.
- France's Duty of Vigilance Law requires companies to assess environmental and human rights related risks in their supply chains.
- Germany’s Supply Chain Due Diligence Act requires companies to identify, assess and prevent adverse environmental and human rights related risks in their supply chains and own operations.
- The EU’s Corporate Sustainability Due Diligence Directive, when enacted, will require companies to carefully manage social and environmental impacts throughout their supply chain, including their own business operations.

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

Freshfields frequently advises clients on how to navigate the increasingly complex web of regulations and legislation in this space.

**How can Freshfields help?**

- Sustainable procurement policies and requirements have the potential to affect businesses across all sectors but will be of particular interest to:
  - public bodies procuring goods, works and services;
  - suppliers to governments and international organisations, where “sustainable” credentials will increasingly be key to successful tendering;
  - bidders for contracts funded by multinational development banks including the World Bank;
  - investors looking to invest in sustainable companies and/or avoid sustainability-related risks; and
  - private companies either directly affected by new legislation or regulations, or seeking to pursue sustainability-related objectives.

Businesses whose operations involve sustainability risks (e.g., in sectors such as mining, oil and gas, and garment production) or with complex international supply chains (particularly where goods or services are procured from regions with poor environmental/human rights records) are likely to be most affected by due diligence legislation.
How can Freshfields help with sustainable procurement?

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.

Freshfields experience in sustainable procurement

Our experience 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 required to meet the European Waste Water Directive.
- 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.
- 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.

Outlook: what's next 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 (e.g. 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.
State aid
State aid

What regulatory developments do we see relating to state aid?

- Europe’s state aid rulebook is being adapted to cater for the new regulatory and political environment under the EU Green Deal. [see Green Deal section].
- The EU Commission is, however, open to receiving sustainability-related state aid notifications based on the currently existing rulebook.
- State aid granted under the EU recovery plan may be tied to the obligation that the recipient actively contributes to the EU Green Deal’s goals.
- Member states’ subsidies will not only be available for EU-based companies, but also for non-EU companies that have business activities within the EU.

Outlook: what’s on the horizon

Comprehensive new guidelines on state aid for climate, environmental protection and energy are applicable as from January 2022.
- The new guidelines 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 will make more use of so-called important projects of common European interests (IPCEIs), which bring together ‘knowledge, expertise, financial resources and economic actors throughout the Union… to overcome important market or systemic failures and societal challenges which could not otherwise be addressed’.
- More support for the development of clean steel and hydrogen technologies.
- The EU Commission published a “Temporary Crisis Framework” to support companies affected by the war in Ukraine and to tackle the exceptionally high gas and electricity prices. This will be particularly relevant for energy-intensive industries, and supply chain and trade flow disruptions.

How can Freshfields help?

- Our EU regulatory and public affairs team helps our clients navigate and shape legislative and regulatory processes in the EU and Germany.
- Our state aid team has established working relationships with the EU Commission, DG Competition, and supports clients navigating the existing and the new state aid environment and rulebook, including advising on individual notifications for grants.

Related content

- A fresh look at the Commission’s EU State aid puzzle: tackling the economy’s green transition in 2022 and beyond
- State aid unchained — the EU Commission publishes its proposal for Guidelines on State aid for climate, environmental protection and energy (CEEAG)
- Financing the green transition: how will the EU support industry?
- Global antitrust in 2022: 10 key themes — antitrust and net zero
- (Re-)shaping EU state aid rules for a green transition: the EU Commission opens a new public consultation on the IPCEI framework
- State aid: The Commission has adopted a Temporary Crisis Framework in response to the conflict in Ukraine, Andreas von Bonin, Merit Olthoff, Gabriel Andraos, Clémence Coppin (freshfields.com)

Related topics

EU Green Deal, Sustainable finance.
Sustainable finance
The financial services sector will play a vital role in our economic transition by steering capital towards business activities that are more sustainable or compatible with environmental, social and governance (ESG) objectives, and away from activities which are not. Over the past few years, many international bodies, governments and regulators have intervened to promote sustainable finance, and increasingly require disclosure of sustainability risks (particularly climate change) and disclosure of the way those risks are managed. Investors and activists have also taken a particular interest in the way that financial institutions approach sustainability.

Strong sustainability or ESG credentials can be a competitive differentiator for almost any business, including in the financial services sector. Financial institutions are looking at their operations, funding and products from an ESG perspective, and considering the changes required to their business models to make the most of strategic opportunities.

One example of this is sustainable or green fintech solutions, which enable investors to make conscious investment decisions, monitor their portfolios and make an active contribution to ESG initiatives.

Finally, financial institutions also face increasing litigation and regulatory risks arising from ESG-related matters such as their climate commitments and firm-wide ESG policies, product disclosures, advice, and investment management.

What regulatory developments do we see for 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 ESG disclosure section below), 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. Diversity of employees and management, a healthy culture and fair treatment of all stakeholders are increasingly a focus for regulatory scrutiny (see Worklife 2.0 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 the climate transition plans which will be required in the UK and that the PRA may consider in its supervisory process. In the EU, the ECB is following up on a stress testing exercise for European banks with targeted requests and supervisory guidance; the European Commission’s pending legislation contains proposals for banks to manage and disclose climate related and other environmental risk.

• 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. The UK FCA introduced new rules on TCFD-aligned climate related disclosures for listed companies, and separately for asset managers and some other asset owners. The FCA intends to implement International Sustainability Standards Board (ISSB) aligned disclosure in the future and has also proposed broader sustainability disclosure requirements. Elsewhere, changes are at an earlier stage. The US SEC consulted on new climate risk disclosure rules but the substantial feedback to the proposed rules means a likely implementation delay until mid-2023 at the earliest. And the authorities in Hong Kong are considering the adoption of the Common Ground Taxonomy as well as corporate disclosures aligned to the ISSB principles in a proportional manner.

• And there is 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 and the Hong Kong 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.

How can Freshfields help?

• We help our clients structure financing transactions to deliver sustainable development in:
  – project finance;
  – green, social and sustainability bonds, green and social loans, sustainability-linked;
  – bonds and loans, and social impact bonds;
  – ESG derivatives;
  – green securitisations; and
  – impact investments.
Sustainable finance

- 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.
- 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.

Related blog posts and links
- The year in ESG for financial services
- Financial institutions and biodiversity — The next hot topic in ESG
- Picking up the pieces — Ten trends in sustainable debt for 2023
- COP27 blog on sustainable finance
- ESG finance: investing in a brighter future
- LMA, LSTA and APLMA joint updates: a maturing sustainable loan market
- How to negotiate Sustainability-Linked Loans: The Loan Market Association issues further articles and guidance

- Curbing ‘green-washing’: the Loan Market Association tightens its guidance on sustainability linked loans
- Latest developments in the investment grade sustainable lending market
- From brown to green: How issuers are turning their existing bonds green
- ICMA clarifies use of ESG bonds for securitisation in new publications
- A new tool in the sustainable finance toolkit: the Sustainability-Linked Bond Principles
- The proposed EU Green Bond Standard — will this transform the market for green bonds? Hope for a new paradigm? Progress towards a global baseline of sustainability disclosure standards
- Sustainability-linked derivatives Part 1
- Sustainability-linked derivatives Part 2 (KPIs)
- Sustainability-linked derivatives Part 3 (Regulation)

Related topics
ESG disclosure, A legal framework for impact, EU Green Deal, State aid, Horizontal collaboration.
Reporting and disclosure
Our clients are under increasing pressure to make disclosures on and manage sustainability- and climate-related risks and opportunities. Globally there is an increased focus on environmental, social and governance matters and disclosure of useful, comparable and consistent information is needed for investors. Regulators are continuing to tighten ESG disclosure rules — and enforcement of them — to support market stability and are promoting standardised disclosure to facilitate comparison.

**The push for greater ESG disclosure**

Mark Carney, then Governor of the Bank of England and now UN Special Envoy for Climate, famously warned in 2015 that we faced a potentially cataclysmic climate-related financial shock, by failing to look far enough ahead to see the costs of climate change: the Tragedy of the Horizon.

In the years since, the G20, the EU and national governments, investors, NGOs and activists alike have been pursuing strategies to break that tragedy — to manage the impacts we can’t yet see, related to both climate change and the wider scope of ESG issues. They are chasing three broad, interrelated objectives:

- Pushing investment toward a sustainable economy
- Pushing corporates to have strategies which take account of ESG, and particularly climate risk
- Pushing disclosure, to arm investors with information so they can invest more sustainably, and to nudge corporates to demonstrate the resilience of their business models through public accountability

Crystallising these objectives into frameworks continues to be a focus around the globe, with businesses looking for clear and consistent directives.

**Growing pressure from stakeholders, and managing the risks of getting it wrong**

Stakeholder pressure is making improved ESG disclosure and transparency increasingly important for our clients.

While the year-on-year increase in climate-related shareholder resolutions continued in the 2022 AGM season, there has been a jump in the number of management and board-proposed climate-related resolutions. This increase shows corporates are readily taking the lead to integrate climate-related considerations across their business.

ESG activism continues to increase steadily, with climate change, remuneration and wider social concerns the focus areas. Insufficient disclosure, or wrongly-worded or focused disclosure, can expose businesses to impacts ranging from accusations of greenwashing, to significant reputational and financial damage. Activists are positioning themselves to acquire strategic shareholdings to challenge businesses from within.
Frameworks and standardisation

Nearly 400 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. Pursuit of an international standard has been a key focus and on 26 June 2023, the IFRS Foundation's International Sustainability Standards Board (ISSB) published two sustainability disclosure standards which were endorsed by IOSCO (International Organisation of Securities Committees) on 25 July 2023:

- IFRS S1 covering disclosure of sustainability-related financial information
- IFRS S2 covering climate-related disclosures.

Their overall aim is to create the global baseline for sustainability and climate reporting to allow companies to disclose useful, comparable, and consistent information to investors. They are not mandatory, but it is hoped that countries will adopt and apply these standards within their jurisdictions. Although voluntary, reporting against these standards will take effect from 1 January 2024.

Established and upcoming voluntary international frameworks and interaction with the ISSB Standards

- TCFD — (Task Force on Climate-related Financial Disclosures) is a common foundation for many climate-related disclosure frameworks and has now been adopted in a number of UK mandatory regimes. Companies that comply with IFRS S2 will meet all of the TCFD recommendations. TCFD also forms the basis for the SEC’s draft climate disclosure proposal in the US. It has been recently reported that the IFRS Foundation will take over the monitoring of the progress on companies’ climate-related disclosures from the TCFD during 2024.
- Global Reporting Initiative's Standards provide guidelines for reporting on economic, environmental and social impact. As part of a collaboration with the IFRS Foundation, technical mapping of the GRI Standards against the ISSB Standards is under development.
- CDP (Carbon Disclosure Project) provides a system for carbon disclosure. CDP is incorporating IFRS S2 (climate-related disclosures) into its disclosure system from 2024.
- Taskforce on Nature-related Financial Disclosures framework (which includes TCFD-aligned recommended disclosures) to be published September 2023. TNFD have announced they are working with the ISSB on incremental enhancements to the ISSB standards to include nature-related standards.

Regulatory developments:

- The EU has embedded into law a taxonomy for classifying sustainable economic activities and identified relevant conditions that activities need to meet to qualify through the EU Taxonomy Climate and Environmental Delegated Acts. The EU’s Corporate Sustainability Reporting Directive was finalised in January 2023 creating new mandatory sustainability reporting obligations for companies within and outside of the EU and the related European Sustainability Reporting Standards (ESRS) published in July 2023. Reporting on a broad ambit of ESG matters will be required for some companies from 2025 using 2024 data.
Reporting and disclosure

- In the **US**, the SEC-proposed rules to strengthen climate disclosure by public companies in March 2022. The SEC is still considering feedback from consultations on the rules with the next draft expected in late 2023 to include significant changes. The Inflation Reduction Act 2022 has a focus on decarbonisation in the US and seeks to address social impacts of inflation.

- In **Hong Kong**, listed companies are subject to mandatory ESG disclosure requirements and ‘comply or explain’ social KPIs. The Hong Kong Stock Exchange is proposing to strengthen climate-related disclosures to align with IFRS S2 from 1 January 2024.

- In **Singapore**, sustainability reporting for listed companies has been mandatory since 2016, and reporting is encouraged to be in line with TCFD Recommendations. The Sustainability Reporting Advisory Committee is recommending that, from 2027, disclosures for listed companies should be in line with the ISSB standards and disclosure for non-listed companies (with annual revenue over S$100m) is implemented before 2030.

- In **mainland China**, the China Enterprise Reform and Development Society produced the ESG Disclosure Standards as a voluntary framework to apply to ESG disclosures from June 2022. China’s Ministry of Ecology and Environment has also introduced mandatory environmental disclosure obligations for listed companies and bond issuers.

- The **UK** has extended its climate related disclosure obligations to all large companies and LLPs from 2023, following requirements for listed companies and regulated financial firms and asset managers to report in the last financial year. This is a further step in the implementation of UK’s policy to make TCFD-aligned disclosures compulsory across the entire economy — a first in the G20. The UK is also developing its own taxonomy for classifying sustainable economic activity and consultation on guidelines for activities is expected soon.

**Broad corporate disclosure obligations**

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

- EU/UK: Market Abuse Regulation (MAR) and Prospectus Regulation (PR) broadly capture ESG risks.

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

**What ESG disclosure developments are relevant to our clients?**

- 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.
**Reporting and disclosure**

**How can Freshfields help?**

- 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.

**Outlook: what’s on the horizon**

- Increasing expectations on ESG performance. More timely and extensive disclosure is expected on financial conditions due to unprecedented disruptions and the publishing of the ISSB Standards.
- 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’s latest report noted that only 4% of companies disclosed in line with all 11 of its recommendations in their climate-related disclosures.
- In the UK: The first climate disclosure reports by Premium Listed Companies have been made and the FCA and FRC have reported on trends in compliance with those disclosures. The findings of those reports are critical for this disclosure year for PLC and for all large companies and LLP reporting from 2023.
- In the US: the SEC is still working through feedback from its consultation on its climate disclosure rule proposals and timing for the final rule has not been programmed.

**Related content:**

- [Add new briefing once published]
- Global sustainability standards and reporting
- ISSB: A new era for global sustainability disclosure
- ESG Reporting for EU and non-EU companies: Entry into force of the Corporate Sustainability Reporting Directive
- The International Sustainability Standards Board — global update
- ESG for financial sponsors — priorities, challenges and opportunities
Competition
What regulatory developments do we see in relation to horizontal collaboration?

- Any company considering a collaboration with one or more competitors to further sustainability goals (e.g. joint research into green technologies, committing to minimum or pro-sustainability standards, combining resources and/or operations) should seek specialist competition law advice.
- Breaches of competition law can result in harsh penalties (e.g. in the EU potential fines of up to 10 per cent of annual worldwide turnover) and follow-on damages claims.
- Competition law and policy is in flux. Regulators are considering – and, in some cases, responding to — calls for reforms to allow (or at least not prevent) greater collaboration to further sustainable development. For instance, Germany's competition authority recently approved two separate horizontal sustainability initiatives. The first is a retail-level voluntary commitment to set common standards for wages in the banana supply chain. The second is an agreement rewarding livestock owners for improving the conditions in which animals are kept, which is primarily financed by a group of large retail players. However, only a few weeks later, the German authority blocked a cooperation in the dairy farm sector where it had questioned the contribution of this agreement to genuine sustainability targets.

Outlook: what's on the horizon

Competition regulators will continue to consider and consult on reforms to enable greater collaboration on sustainability initiatives. Several European competition authorities have published papers and guidance for businesses, while their counterparts in the US, Asia and beyond are also considering the issue. A significant milestone in this discussion was achieved when the European Commission on 1 March 2022 published its draft Guidelines on Horizontal Cooperation which contains a new and comprehensive chapter on how to deal with sustainability agreements under EU competition law.

- Authorities will be keen to ensure a degree of consistency across the world, particularly given the cross-border nature of many sustainability projects. But some authorities (e.g. in the Netherlands and Germany) are moving more quickly to permit cooperation in certain circumstances. Such divergence creates risks for business.

How can Freshfields help?

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

- advising on how to reduce the competition law risk associated with joint initiatives and collaborations;
- liaising with all relevant authorities; and
- helping you navigate and shape legislative and regulatory processes across different jurisdictions.

Related blog posts and links

Global antitrust in 2022: 10 key themes — Antitrust in transforming industries and Antitrust and Net Zero
All our blog posts on competition and sustainability

Related topics

Global trade, EU Green Deal, Sustainable finance, Human rights, Worklife 2.0.
What regulatory developments do we see in merger control?

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

- The EU Commission is looking at the role sustainability should play in merger enforcement. 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.

- The Commission is 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 Commission’s new approach to referrals of deals falling below EU or national thresholds.

- There is also scope under the EU framework for the Commission to take account of environmental benefits as efficiencies, particularly when consumers on the relevant markets directly benefit.

- In the UK, the Competition and Markets Authority (CMA) recognises that sustainability may be a relevant customer benefit that could offset a lessening of competition. Benefits in the form of environmental sustainability that support the transition towards a low-carbon economy can be taken into account, provided that the efficiencies benefit customers in the UK (e.g., by leading to lower energy costs or a lower carbon footprint of the firm’s products). The sustainability of a product or service may also be recognised as an important non-price aspect of competition.

- In Asia, sustainability is expected to have a role in competition law but it remains to be seen how different authorities may define sustainability. Sustainability is a key policy priority in some jurisdictions, such as China, with the country aiming to be carbon neutral by 2060.

Outlook: what’s on the horizon

- Authorities, including the Commission and CMA, have a number of ongoing policy workstreams likely to lead to further guidance on the role sustainability benefits (and harms) should play in merger enforcement. The EU’s chief economist has already proposed developing tools for the analysis of ‘green/out-of-market efficiencies’.

- Further changes are possible across the world, with the pandemic pushing sustainability up the agenda for some authorities.

How can Freshfields help?

- 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.

Related blog posts and links

- Global antitrust in 2022: 10 key themes — antitrust and net zero and M&A - optimising growth strategies in the new world of antitrust
Worklife 2.0
What regulatory developments do we see in relation to the future of work?

• Initially a temporary response to the Covid-19 pandemic, hybrid, remote and flexible working arrangements have become a more permanent tool for organisations to attract and retain staff. Several member states of the EU, including Austria and Spain, have passed legislation to encourage and regulate homeworking, whilst several other countries are considering implementing similar legislation.

• As well as working practices, the last few years have changed attitudes, for example towards executive remuneration. They have also highlighted inequalities, shining a spotlight on issues such as diversity and inclusion (D&I) and the need for strong policies, disclosure and explanation. In the UK, there are now rules in place for listed companies requiring them to publicly disclose whether they meet specific diversity targets relating to gender and ethnicity at board and executive management level on a ‘comply or explain’ basis.

• #MeToo and wider workplace misconduct issues continue to unfold and may have even been exacerbated by the re-opening of workspaces post-pandemic. Businesses face the very real prospect of regulatory intervention, with an increasing number of 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).

• New working practices can have a positive impact on the fight against climate change. This can be achieved by reducing business travel, implementing climate-friendly policies etc.

Outlook: what’s on the horizon

Regulatory changes are expected, with a focus on the following areas.

• Hybrid working: several jurisdictions have introduced new rules in relation to hybrid working, and many others have plans to increase their regulatory regimes.

• Wages: the pandemic fueled a debate about what constitutes a decent wage, with the EU having 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: remains a primary focus for authorities in the EU, the US (California), the UK and Japan. Another EU directive that aims to strengthen pay transparency during recruitment and employment, as well as to narrow gender pay gap was adopted by the European Parliament and is waiting for formal approval from the Council of EU. The latter directive bans pay secrecy agreements, offers collective redressing, shifts the burden of proof to the employer and sets out reporting obligations for employers with at least 100 employees.

• Taxation: with the pandemic seemingly a thing of the past and hybrid working a new normal, tax authorities across the globe are starting to recalibrate their stance on how to deal with the situation. Employers should factor the tax angle in when deciding on new hybrid working policies.

• Group workforce litigation: one anticipates an increase of group actions in the following areas: equal pay, changes to terms and conditions, worker welfare, permanent changes to the workforce, executive pay and remuneration. An increase in collective claims is also noticed in relation to the classification of platform workers.
Worklife 2.0

- Platform workers: the European Commission's proposed package of binding and non-binding legislation to enhance the protection of platform workers is still under discussion, with the European Parliament having adopted its position in February 2023. Next step is for the EU Council to adopt such position before the negotiations between EU institutions may commence.

- The proposed package established a rebuttable presumption of employment, regulates algorithmic management (as do other acts — see below), Traceability. In the meantime, the EU Commission published its guidance on collective bargaining for platform workers, irrespective of their status.

- Managing AI risks in the workplace: risks deriving from the use of the AI in the workplace have stayed in the attention of legislators. The draft EU’s AI Act, which proposes a regime to regulate AI in Europe, is still under discussion. The Act has been redrafted in response to the rapid introduction of groundbreaking AI technologies into the market. Companies must therefore carefully consider the risks of introducing AI into their workplaces as the regulatory landscape of AI in the workplace continues to evolve with new technology.

- Climate-friendly pension legislation: climate-conscious investment and disclosure has increasingly been a focus for new legislation and regulation regarding pension schemes. 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. Moreover, the EU’s Sustainable Finance Disclosure Regulation requires financial market participants, including pension schemes, to disclose information regarding their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts.

- Enhanced whistleblower protection: EU Directive 2019/1937 on whistleblowing has now been implemented in most member states. This directive imposes stricter obligations on businesses on handling 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 is being implemented in differently ways by member states so this review should check local rules individually.

- Sustainable Corporate Governance (SCG): The February 2022 EU directive proposal on corporate sustainability due diligence proposes additional duties for directors as well as a requirement for companies to take into account the fulfilment of the climate change obligations when setting any variable remuneration for its directors. The incorporation of sustainability related metrics in pay package for directors is nothing new: many large organisations and some regulators already have such requirements in place but having these confirmed in a directive will be new. In addition, the European Commission has put forward a separate proposal for a regulation that intends to prohibit the placing on the EU market of products made with forced labour, as well as their export from the EU. The communication on decent work, which is part of the the same initiative serves as a good reminder of all existing EU and international initiatives/legal instruments (ILO convention, trade agreements etc) aimed at combatting child and forced labour and promoting decent work.
Incorporation of sustainability metrics into variable remuneration: executive compensation is increasingly made conditional upon meeting ESG targets. That is something we are seeing in the listed company environment that is making its way into larger private organisations too.

Trade unions and employee activism: historically, employers that were not unionized had less engagement with their workforce. We are now seeing more ‘employee activism’, where the workforce mobilises against actions of its employer on ESG issues (e.g. preventing investment in non-renewables, mishandling allegations of harassment etc.). We are also seeing an increase in requests from employees for formal trade union recognition.

How can Freshfields help?

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

- hybrid performance assessment, hybrid investigations, renewed oversight arrangements, D&I, remuneration structures, employee engagement and more;
- regulatory compliance, reviewing and amending global HR policies (including health and safety, hybrid working, business travel, equal treatment/discrimination and disciplinary sanctions, whistleblowing);
- assessing employment-related costs/footprint (reduced office space, reduced commute, other salary adjustments etc); and
- assessing risks related to the use of AI at the workplace.

We deliver this advice either standalone 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.
What regulatory developments do we see in the human rights space?

- 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 efforts to identify human rights risk in their supply chains and the specific steps they are taking to address them, but also obligating them to take specific preventive and reactive measures.

- The EU Commission proposed in February 2022 a new directive imposing corporate due diligence obligations covering human rights, environmental protection and climate change mitigation (EU Corporate Sustainability Due Diligence Directive). The directive is expected to enter into force by the end of 2023 and will impose significant due diligence obligations on both EU and non-EU companies. The Directive allows for significant fines to be imposed for non-compliance and provides a mechanism for civil claims to be brought by those impacted by businesses’ operations. The EU is also proposing complementary legislation and, in September 2022, the Commission proposed a regulation that would ban from the EU market any products linked to forced labour, including the export of such products from the EU.

- In parallel to the EU’s efforts, many other countries, including, France, Germany, Switzerland, and Norway, are introducing similar legislation. In summer 2022, the US 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. Complementing these measures, human rights issues are also at the forefront of recently introduced sustainability reporting obligations. The most significant such examples 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.

- 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 its operations and its supply chains, and report publicly on its 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 thanks to the availability of benchmarks that assess companies’ human rights records. Human rights arguments are also being used to apply pressure on companies in relation to other sustainability, such as climate change and biodiversity.

How can Freshfields help?

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.
Human rights

- internal and external capacity-building and reporting requirements;
- developing due diligence and reporting compliance programmes in light of the emerging legislation in the space;
- 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.

Outlook: what’s on the horizon

- More specific human rights and supply chain legislation will be adopted in Q2/3 2023 at the EU level (e.g., EU Sustainable Batteries Regulation which will require companies to ensure batteries are sourced responsibly).
- Germany’s human rights due diligence law (which is currently considered as the strictest) has been applicable since 1 January 2023 to companies with at least 3,000 employees and will apply from 1 January 2024 to companies with at least 1,000 employees.
- A similar proposal has also been introduced in the Netherlands and is currently progressing through the legislative process.

Related blog posts and links

All our blog posts on human rights issues, Proposed EU regulation banning products linked to forced labour, proposed EU directive on corporate sustainability due diligence, Proposal for a EU directive on corporate sustainability and due diligence.

Related topics

Global Trade, Worklife 2.0, Competition, Sustainable finance.
Intellectual property
Intellectual property

What intellectual property developments are relevant to our clients?
Sustainability is now being considered in IP regulation. The UK-EU Trade Cooperation Agreement, agreed by the EU and the UK and in force since 1 January 2021, in addition to ensuring “an adequate and effective level of protection and enforcement of intellectual property rights”, also aims to:
• “facilitate the production, provision and commercialisation of innovative and creative products and services... by reducing distortions and impediments to such trade, thereby contributing to a more sustainable and inclusive economy”.

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. The system has recently been particularly attractive to Chinese applicants who accounted for over 25% of the applications published by the IPO in 2022. 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 system Procedure for Accelerated Prosecution of European Patent Applications (PACE), which is available for any technology.

IP transactions
• 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.
• Increasingly, clients are asking for supply chain partners to comply with sustainable, environmental and/or ethical standards that can be embodied in codes of practices.
• Clients are looking at full supply chain traceability and the establishment of robust systems to monitor and prevent adverse effects. For example, clients may demand measurable, time-bound performance targets and publicly report on progress. ESG laws and regulation compliance will affect valuations and representations and warranties in acquisitions.

Which clients will be most affected?
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.
Taxation
What developments do we see in taxation and reporting?

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 EU 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, the current energy crisis has slowed progress in relation to environmental taxes and some of the national and recent multinational “windfall tax” measures (including the EU’s revenue cap) have recently been introduced 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 – this list was increased during the legislative process and now includes 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?** The UK government published a consultation in March 2023 considering a range of potential policy measures to mitigate carbon leakage risk, including introduction of a UK CBAM, mandatory product standards and other policy measures to help grow the market for low carbon products, as well as emissions reporting which could support the implementation of potential mitigation policies.

- **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, Biden’s Inflation Reduction Act introduces and expands 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.

- **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.
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.

**Freshfields experience in taxation and reporting**

- We advised a publicly listed energy provider on its de-carbonising strategy and energy taxes.
- We have advised real estate companies on their applications for tax exemptions for self-generated electricity.
- We have advised energy providers in proceedings leading to the abolition of an energy tax provision due to breaches of European and constitutional law.
- We advised The Royal Foundation of The Duke and Duchess of Cambridge on the spin out of The Earthshot Prize (a global environmental prize and platform designed to discover, accelerate and scale ground-breaking solutions to environmental problems) into its own stand-alone charitable entity.

**Outlook: what's on the horizon**

- Global political consensus on the OECD's two-pillar approach to the challenges of digitalisation and globalisation resulted in a framework published in October 2021, with model rules for the OECD’s “pillar two” (the global minimum tax) published in December 2021, detailed commentary published in March 2022 and technical guidance for implementation published in February 2023. Alongside this, the EU adopted a directive implementing the pillar two rules in December 2022. The focus has now turned to domestic implementation and various jurisdictions have published draft implementing legislation with the intention that significant aspects of these rules will take effect from 1 January 2024. Technical work on various aspects of “pillar one” (a new taxing right not based on physical presence) is still ongoing with the aim of finalising a new pillar one multilateral convention by mid-2023, for entry into force in 2024.
- The OECD has also now 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 (both now approved by the European Parliament) and Unshell (or “ATAD3” a proposed directive to limit tax benefits for shell companies). The Commission also unveiled a consultation, in October 2022, proposing comprehensive, structural reform of the EU business tax framework, based on principles agreed at an OECD level (“BEFIT”).
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 energy crisis has 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.

The EU is increasingly keen to link ESG reporting with tax transparency. Look out for non-tax reporting standards incorporating some tax criteria (such as the forthcoming Corporate Sustainability Reporting Directive and the EU’s plans for a social taxonomy).

**Related blog posts:**
- Carbon capture and storage: the role of tax incentives.
- EU BT 21: Sustainability and tax — what is on the EU’s agenda?
- A windfall tax by any other name: the European Commission’s legislative proposal to address rising energy prices.
- Global tax reform: a historic moment.
- Unshell — a proposed EU Directive to fight the (mis)use of shell entities.
- CBAM — European Parliament’s latest draft report — key issues at a glance.
- Road to COP27 — how is tax being used to tackle climate change?
- Germany’s new emissions trading system: an unconstitutional scheme.

**How can Freshfields help?**
- 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.
Biodiversity
What are the recent regulatory developments?

- 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 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 18 months has 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:
  - The introduction of the EU Corporate Sustainability Due Diligence Directive, imposing corporate due diligence obligations covering human rights, environmental protection and climate change mitigation. Biodiversity impacts fall within this remit and so in-scope businesses will be required to carry out due diligence on their own and their suppliers’ impacts on biodiversity and report publicly on their efforts.
  - The EU’s Deforestation Regulation. This regulation will 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 legislation with detailed secondary legislation expected later this year.
  - The EU’s proposed Nature Restoration 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% across the EU by 2030.
  - Upcoming bans on single use plastics and planned reforms for product packaging (e.g. 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 starting to apply 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.

Outlook: what’s on the horizon

- The EU’s Corporate Sustainability Due Diligence Directive is anticipated to come into force during 2024 while the timeframes for the other proposals mentioned above are slightly longer. Agreement on the text of the EU’s Deforestation Regulation was reached in December 2022 and the regulation is expected to become law in the summer of 2023.
Outlook: what’s on the horizon

- The EU is also expected to put forward a number of other proposals, including an initiative to tackle microplastic pollution and a new framework for the management of seeds and plant / forest reproductive material.

- Mirroring developments in the climate space, the Taskforce on Nature-related Financial Disclosures (TNFD) is also developing recommendations to guide businesses in reporting publicly on their impacts and dependency on nature. The well-regarded and widely-endorsed Taskforce on Climate-related Financial Disclosures recommendations are likely to encourage companies to closely monitor the publication of the TNFD recommendations expected in autumn 2023.

How can Freshfields help?

- 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.

Related blog posts and links

- COP15 — how does the new global biodiversity framework impact businesses?
- The new EU deforestation regulation and its international scope — is your business affected? COP18: 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?
- Law and Politics in Brussels: Discussing the EU’s Corporate Sustainability Due Diligence Directive
- Banning PFAS chemicals in the EU — Consultation launched

Related topics

Human rights, Reporting and disclosure, Global trade
Contacts

Tim Wilkins
Global Partner for Client Sustainability, New York
E timothy.wilkins@freshfields.com

Jake Reynolds
Head of Client Sustainability and Environment, London
E jake.reynolds@freshfields.com