

# The Sustainability Regulatory Horizon



Freshfields Bruckhaus Deringer



## 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.





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# 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, which is the WTO's second multilateral trade agreement concluded since its establishment, and its first one with environmental sustainability as the core objective. The agreement prohibits harmful fisheries subsidies, including those that contribute to illegal, unreported and unregulated fishing. As of 1 October 2023, the agreement has been formally accepted by 43 WTO Members, including Canada, China, the European Union, Japan, Iceland, the United States, the United Arab Emirates, New Zealand, Singapore and Switzerland. It requires 110 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. For example, the 2022 UK-New Zealand FTA expressly states that measures may be adopted to pursue climate change goals without breaching the agreement.

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 settlement. In general, while investment treaties have historically been viewed as protecting investors against arbitrary exercise of regulatory power of host states and are often used by host states to attract foreign investments, host states increasingly seek to have greater flexibility to implement regulatory measures on the basis of sustainability-related concerns.

- Many new-generation investment treaties concluded after 2010 contain environmental provisions aimed at safeguarding the host state's policy space. Some include environmental protection as a carve-out in provisions dealing with indirect expropriation, national treatment or the prohibition of performance requirements, such as article 5(5) in the 2019 India-Kyrgyzstan BIT. Some others include environment protection as a general exception, although ISDS tribunals have applied general exception clauses in narrow and unexpected ways.



# Global trade

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

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 remain as to how the EU will assess carbon pricing in exporting countries. On 1 October 2023, the CBAM entered into application in its transitional phase, with the first reporting period for importers ending 31 January 2024. 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) 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 focusing 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 its 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.

These unilateral measures to promote sustainability at home may face legal challenges and other countermeasures. For example, in October 2023 the European Commission initiated an anti-subsidy investigation into imports of electric vehicles from China, which could result in the imposition of countervailing duties. The US has also imposed countervailing duties on imports of certain EU steel products produced in installations benefitting from free allowances under the EU’s Emissions Trading System.



# 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.

## 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](#), [Competition and antitrust](#), [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 CO<sub>2</sub> 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.

- 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. Extensions of some of the emergency energy files are being discussed.
- In November 2022, the Commission published a new proposal for the certification of carbon removals. In February 2023, a proposal for CO<sub>2</sub> 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; and
  - Revision of EU's internal electricity market rules.

These files continue to be discussed by co-legislators.

## Post-2030 EU climate policy

The Commission is currently working on a proposal to set its climate targets for 2040. This will be presented next year. A CCUS strategy will also be published by the Commission in 2024.

## 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](#) (see 'Reporting and Disclosure' for details).
- Political negotiations among the EU decision-makers on a legislative proposal on Green Bond Standard have come to an end. This new regulation, once it comes into force, will establish 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. At least 85% of the funds raised by the bond will have to be allocated to economic activities that align with the Taxonomy Regulation. It should be published in the EU Official Journal before the end of 2023.





# The EU Green Deal

- In 2022, the Commission presented:
  - a new proposal on sustainable corporate due diligence (CSDDD) which is still under negotiations in Brussels — a final text should be agreed by Q1 2024; and
  - a proposal for a ban on products made with forced labour, which is still under negotiations in Brussels — negotiations are difficult and unlikely to be concluded before the end of the current EU 5-year term in June 2024.
- In June 2023, the Commission published a new regulatory proposal on environmental, social and governance ratings, which is under negotiations by EU co-legislators with the ambition to reach a final deal by Q1 2024.
- 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.

## 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

- 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.
- The 'Renovation Wave for Europe' including the revision of the Directive on the energy performance of buildings.
- Net-Zero Industry Act to increase manufacturing capacities of green tech in the EU.
  - The Commission will publish a new European Wind Power Package in October 2023.



# The EU Green Deal

## 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;
  - revision of the legislation on the hazard classification, labelling and packaging of chemicals; and
  - targeted (but currently delayed) revision of the EU chemicals regulation REACH.
- 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; and
  - revision of EU ambient air quality legislation.
- 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.

## 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).
- 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, 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.



# The EU Green Deal

## 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 remain a priority in the next term. In any case, the EU has made clear that the next 5-year political cycle will be about enforcement and implementation of the newly adopted laws. Companies, especially large ones with cross-border activities and entities, will need to have strong compliance procedures in place.
- We are tracking developments and watching the impact of the Green Deal on the global economy (see global trade section).

## Related content

- [Nature Restoration Regulation generates storm in European Parliament](#)
- [The European Critical Raw Materials Act: A quick summary on what it does and when it's coming](#)
- [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](#)



# The EU Green Deal

- [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](#)
- [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 new EU Gas](#)



# Supply chain and procurement



# Supply chain and procurement

## 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 on public sector procurement

- UN organisations: \$29.6bn (in 2022).
- 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 in 2020 was estimated at 14.9 percent of annual GDP across the 22 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.
- 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.



# Supply chain and procurement

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](#), currently the strictest regulation, 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 as well as adapting commercial contracts and business practices.
- 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, will introduce new civil liability regimes in this respect and the 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.

Freshfields frequently and comprehensively advises clients on how to navigate the increasingly complex web of regulations in this space and how to adapt and improve corporate processes, governance and policies accordingly in practice.

## 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 (eg 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.



# Supply chain and procurement

## 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; and
- advise clients on the scope and application of human rights/environmental due diligence legislation (see the 'Human Rights' section).

## 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; and
- 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 (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.



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**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](#).

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# **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 [People](#) section).





# Sustainable finance

## 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 \(Regulation\)](#)
- [EU Green Bond Standard — 10 questions](#)
- [Launch of the 2022 ISDA Verified Carbon Credit Transactions Definitions](#)

## Related topics

[A legal framework for impact](#), [Reporting and disclosure](#), [EU Green Deal](#), [State aid](#), [Competition and antitrust](#).

# Reporting and disclosure



# Reporting and disclosure

Our clients are under increasing pressure to make disclosures on and manage climate-related risk and opportunities. However, we are seeing an increased focus on environmental, social and governance risks and opportunities to be disclosed and managed globally.

## 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; and
- 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 has 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

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. Pursuit of an international standard has been a key focus in the last two years, with the





# Reporting and disclosure

IFRS Foundation's standards being of great importance. In June 2023 the IFRS Foundation's International Sustainability Standards Board (ISSB) issued its inaugural standards IFRS S1 and IFRS S2.

## Established voluntary international frameworks

- TCFD Recommendations – (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. It also forms the basis for the SEC's draft climate disclosure proposal in the US.
- Taskforce on Nature-related Financial Disclosures Risks (in addition to the TCFD recommendations).
- Global Reporting Initiative's Standards provide guidelines for reporting on economic, environmental and social impact.
- CDP – (Carbon Disclosure Project) provides a system for carbon disclosure.
- SASB Standards – 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.

## Recently published IFRS frameworks

In June 2023 the ISSB published the standardising frameworks IFRS S1 and IFRS S2 on sustainability disclosures. The standards apply to annual reporting as of 1 January 2024 for companies reporting in accordance with IFRS. An earlier application is possible provided

both standards are applied. However, the application of the standards is only binding insofar as they are declared mandatory. In the EU, the IFRS standards are regularly binding for consolidated accounts of publicly traded companies but IFRS S1 and S2 still need to be adopted by the EU as IFRS standards to be applied.

IFRS S1 requires companies to disclose information about all sustainability-related risks and opportunities that could reasonably be expected to affect the entity's prospects. The entity shall in particular address the procedures it uses to identify and monitor these risks and opportunities as well as the progress towards any targets it has set or is required to meet by law or regulation. IFRS S2 sets out specific requirements for climate-related risks and opportunities. IFRS S2 incorporates SASB standards and the TCFD recommendations.

Complying with certain requirements regarding the content and presentation of disclosures is intended to assist addressees of the financial reports in providing resources to the entity.

## Regulatory developments

- The EU has enacted various regulations and directives as part of its sustainable finance agenda. The main legislative acts are: The EU Taxonomy Regulation, the Corporate Sustainability Reporting Directive and the EU Benchmarks Regulation. An EU Green Bond Standard is currently under development.

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.



# Reporting and disclosure

Besides, 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 European Sustainability Reporting Standards (ESRS) in July 2023.

- In the **US**, the SEC proposed rules to strengthen climate disclosure by public companies in March 2022. Nearly 16,000 comments were sent in response to the proposal.

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

- Since 2016, Hong Kong listed issuers are required to provide an ESG report in accordance with HKEX's Environmental, Social and Governance Reporting Guide on the 'comply or explain' provisions.
- With effect from July 2020, HKEX's ESG Reporting Guide has been 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.
- In April 2023, the Hong Kong Stock Exchange (HKEX) published a consultation paper which closed in July 2023, proposing the introduction of mandatory ISSB aligned climate-related disclosure (S2) for ESG reports starting from 1 January 2024.

## Singapore

- Starting from the financial year 2022, all listed issuers on the Singapore Exchange (SGX) are required to provide climate reporting on a 'comply or explain' basis.
- In the financial year 2023, climate reporting became mandatory for issuers in the financial industry, agriculture, food and forest products industry, and energy industry. From the financial year 2024, issuers in the materials and buildings industry, as well as the transportation industry, will also be subject to mandatory reporting.
- On 6 July 2023, SGX's published a consultation paper which closed on 30 September 2023, proposing a phased-in approach for mandatory ISSB-aligned climate-related disclosures (S2). This approach will apply first to all listed issuers from the financial year 2025, followed by large non-listed companies with annual revenue of at least S\$1bn from the financial year 2027. Subsequently, non-listed companies with annual revenue of at least S\$100m to less than S\$1bn will be included from around the financial year 2030, with a date to be confirmed subject to a review in 2027.

## Mainland China

- Since February 2022, the Ministry of Ecology and Environment has required companies categorised as major emitters of pollutants and publicly traded companies that have been penalised for environmental violations to annually disclose a wide range of environmental information.
- Starting from 4 September 2023, the SZSE requires that listed companies included in the 'Shenzhen Stock Exchange 100 Index' should disclose their Social Responsibility (SR) reports separately and encourages that other companies listed on the Shenzhen Stock Exchange disclose their SR reports.



# Reporting and disclosure

- In the **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 that disclosure. It is expected to apply first to listed companies in the UK but may have broader application to large companies too.
- Also in the **UK**, 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.

## Broad corporate disclosure obligations

- Most companies with publicly traded securities must disclose material risks in financial filings.
- **EU/UK:** Market Abuse Regulation (MAR), Prospectus Regulation (PR) and Sustainable Finance Disclosure Regulation (SFDR) broadly capture ESG risks. In addition, the CSRD amends the Transparency Directive to require the companies concerned to publish sustainability data in line with the CSRD.
- **UK:** 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).

## 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.

## 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.



# Reporting and disclosure

## 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 focussing 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% of companies disclosed in line with all 11 of its recommendations in their climate-related disclosures.
- **In the UK:** The FCA and 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 US,** the SEC is expected to release final rules on climate-related disclosure in the near-term.
- **In the EU,** more technical reporting standards for specific sectors are expected to be published to assist disclosure exercises under the CSRD.

## Related content

- [A guide to global sustainability reporting standards \(Freshfields briefing\)](#)
- [Unpacking the status of climate disclosures](#)
- [What does COP27 mean for business?](#)
- [ESG for financial sponsors – priorities, challenges and opportunities](#)
- [Hope for a new paradigm? Progress towards a global baseline of sustainability disclosure standards](#)
- [What's next in addressing climate-related financial risk?](#)
- [ISSB: A new era for global sustainability disclosure](#)
- [Advancing climate transition through disclosure – the UK Transition Plan Taskforce's gold standard framework](#)
- [UK Green Taxonomy – GTAG provides further technical advice to the UK Government](#)
- [A new Year's Resolution: Mandatory climate reporting for large asset](#)

# Competition and antitrust



# Competition and antitrust

## What regulatory developments do we see in relation to 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.
- 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 criminal offences and director disqualification) and costly litigation.
- Competition laws and policies are in flux and there are important differences in approach internationally. Some agencies are updating their policies and guidance, as well as providing informal guidance to companies and publishing case summaries, to help businesses collaborate within the rules. Others are not flexing their rules or practices.
- 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 so 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?

Competition authorities will continue to consider and consult on reforms to enable greater collaboration on legitimate sustainability initiatives. Several European competition authorities in Europe and Asia have published guidance for businesses. However US

guidance is unlikely to be forthcoming and the US antitrust authorities have stated clearly that ESG should be considered an element of competition as within any market.

Some authorities will be keen to ensure a degree of consistency across the world, particularly given the cross-border nature of many sustainability projects. While some authorities (eg in the Netherlands and the UK) are adopting more permissive policies for certain types of cooperation, others are continuing to enforce the laws under traditional frameworks. Meanwhile, in the US, anti-ESG politics has led to certain government actors repeatedly threatened that ESG collaborations may violate US antitrust laws. 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 antitrust/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

All our blog posts on [competition](#) and [sustainability](#).

## Related topics

[Global trade](#), [EU Green Deal](#), [Sustainable finance](#), [Human rights](#), [People](#).





# Competition and antitrust

## What regulatory developments do we see in 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 Commission'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?

Authorities, including the EU Commission and UK 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.

## 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

All our blog posts on [competition](#) and [sustainability](#).

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# People



# People

## What regulatory developments do we see in relation to people issues?

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. Several other countries, including Germany, are considering implementing something similar. 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.
- #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. Most member states have implemented both directives but some are yet to do so.

## 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.
- **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.



# People

- **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 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 bans 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.
- **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. The EU commission has proposed a directive which, if adopted, would introduce a legal presumption of employment for platform workers if their relationship fulfills certain criteria. Negotiations are currently ongoing between the EU Council, Parliament and Commission. While we await the outcome, the EU Commission has published guidance on collective bargaining for platform workers, irrespective of their status.
- **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 is being implemented in differently 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 directive will from 2024 be subject to the European Sustainability Reporting Standards, which cover workforce issues.



# People

- **Incorporation of sustainability metrics into variable remuneration:** executive compensation is increasingly made conditional upon meeting ESG targets. The EU directive on corporate sustainability due diligence is expected to come into effect in 2024. It proposes a requirement for companies to take into account the fulfilment of climate change obligations when setting variable remuneration for their directors. In the same vein, the draft ISSB standards (see above) include requirements relating to sustainability- and climate-related performance metrics in executive remuneration.

## How can Freshfields help?

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; and
- 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.

## Related content

- [WorkLife 2.0 | Freshfields Bruckhaus Deringer](#)
- [ESG and people | Freshfields Bruckhaus Deringer](#)
- [Sustainability | Freshfields Bruckhaus Deringer](#)

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# Human rights





# Human rights

## 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, including liability and enforcement risks in case of non-compliance.

- In February 2022, the European Commission proposed a new directive imposing corporate due diligence obligations covering human rights, environmental protection and climate change mitigation (EU Corporate Sustainability Due Diligence Directive or CSDDD). 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 CSDDD would still need to be transposed into national legislation by the different EU Member States. This transposition period may take up to two years (for large companies) or four years (for smaller companies operating in high-risk sectors). The Directive will allow significant fines to be imposed for non-compliance and provide a mechanism for civil claims to be brought against obligated companies when being non-compliant.
- 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). And the new EU Batteries Regulation, which entered into force in August 2023 and commencing from 18 February 2024, is promoting the sustainability of batteries across their entire life cycle and adds to the ever-increasing legislation regarding supply chain

compliance. In June 2023, also the EU Deforestation Regulation entered into force, which 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).

- 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. 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 twelve 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



# Human rights

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 due to the availability of benchmarks that assess companies' human rights records as well as increasing public sustainability reporting.
- 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,
- 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 introduced at the EU level:

- 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.
- 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](#),
- [Proposal for a EU directive on corporate sustainability and due diligence](#),
- [EU Deforestation Regulation published: A step forwards in global supply chain legislation](#),
- [New EU sustainable batteries regulation becomes law — what you need to know](#).

## Related topics

[Global Trade](#), [People](#), [Competition and antitrust](#), [Sustainable finance](#), [Supply chain](#).

# 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, with an increased uptake in recent years. The IPO received a record 496 requests in 2022, a 9% increase from the previous year. The system has recently been particularly attractive to Chinese applicants who accounted for almost 25% of requests 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 **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 trademark 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.



# Intellectual property

- 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: in March 2023, the European Commission adopted a proposal for a new 'Green Claims Directive' introducing a set of minimum criteria for the substantiation of green claims. The Council of the European Union and the European Parliament announced in September 2023 that they had reached a provisional agreement on the directive.
- 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 'Green Claims Directive').

## 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.

## 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





# 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, ongoing issues with global energy supplies has slowed progress in relation to environmental taxes and some of the national and the 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. In the



# Taxation

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 during 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 opening the new pillar one multilateral convention for signature by the end of 2023, for entry into force in 2025.
- 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 target the perceived misuse of shell companies for tax purposes). The Commission also unveiled legislative proposals, in September 2023, proposing comprehensive, structural reform



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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 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. Businesses should be mindful of non-tax reporting standards incorporating some tax criteria (such as the forthcoming Corporate Sustainability Reporting Directive and its interaction with the EU Taxonomy and OECD guidelines for multinational enterprises).

## Related blog posts and briefings:

- [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?](#)
- [Tax policy and women: is 'gender neutral' enough?](#)
- [Carbon Capture – The Current State of Play in the European Union](#)

## 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



# Biodiversity

## What are the recent regulatory development?

- 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 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 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 legislation with detailed secondary legislation expected in due course.
- 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, 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 starting to 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.



# Biodiversity

## 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.
- The EU's Deforestation Regulation entered into force on 20 June 2023 is the majority of the provisions will apply to large and medium sized enterprises from 30 December 2024.
- In October 2023, the European Commission proposed new measures to prevent microplastic pollution from the unintentional release of plastics pellets. The EU is also expected to put forward a number of other proposals, including a new framework for 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?

- 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? 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?](#)
- [Law and Politics in Brussels: Discussing the EU's Corporate Sustainability Due Diligence Directive](#)
- [Banning PFAS chemicals in the EU — Consultation launched](#)
- [Nature restoration regulation generates storm in European Parliament](#)

## Related topics

[Human rights](#), [Reporting and disclosure](#), [Global trade](#)

The background is a solid teal color with a pattern of raised, 3D hexagonal tiles. The tiles are arranged in a staggered grid, creating a textured, honeycomb-like appearance. The lighting is soft, casting subtle shadows that give the tiles a sense of depth.

# Contacts





# Contacts



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