

POLICY BRIEF

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Sustainable Finance Law: The EU Paradigm and the Way Forward

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Sustainability has become a buzzword with a view to corporates and financial organizations. Undoubtedly, the Paris Agreement paved the way for accelerated climate action aimed at a 2 degrees scenario, while urging non-state actors to bolster the transition towards sustainable development under Article 2(1)(c).¹ Alongside the Paris Agreement, the United Nations Sustainable Development Goals (SDGs) signal states' efforts and goals to achieve sustainability, while manifold other international standards and initiatives have been developed aimed at reinforcing and strengthening these efforts.²

The European Union (EU) has been a leading actor in promoting sustainable development, which is entrenched under Articles 3 and 21(2)(d) of the Treaty on the European Union.³ In addition to holding a prevalent role under the Paris Agreement, the EU has also committed to the realization of the SDGs steering the transition towards a climate-resilient and sustainable development.

To date, the EU has been a pioneer in promoting sustainability across all aspects of the economy. Remarkable progress is notable in the realm of sustainable finance, aimed at incorporating sustainability considerations into financial organizations' decision-making processes.⁴ In this regard, the European Commission established an Action Plan on financing sustainable growth in March 2018.⁵ Moreover, in December 2019, the Commission published the EU Green Deal aimed at operationalizing EU's commitment for climate neutrality by 2050 by addressing a wide array of policy areas.⁶ In line with the objective of the EU Green Deal, the Commission also communicated the Sustainable Europe Investment Plan in January 2020, constituting the investment pillar of the EU Green Deal.⁷ The Sustainable Europe Investment Plan also incorporates a Just Transition Mechanism, aimed at financially supporting those regions and sectors most affected by the sustainable transition.⁸ Last but not least, in alignment with the EU Green Deal, the Commission announced a renewed sustainable finance strategy aimed at providing the policy tools to ensure that the financial system will

¹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Decision 1/CP.21.

² United Nations, 'Sustainable Development Goals' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/development-agenda/> (last accessed 14 January 2021).

³ Consolidated Version of the Treaty on European Union [2016] OJ C 202.

⁴ European Commission, 'Overview of Sustainable Finance' https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en (last accessed 14 January 2021).

⁵ 'Renewed Sustainable Finance Strategy and Implementation of the Action Plan on Financing Sustainable Growth' https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en (last accessed 14 January 2021).

⁶ European Commission, 'Communication from the Commission to the European Parliament, the European Parliament, the European Council, the Council, the European

Economic and Social Committee and the Committee of the Regions: The European Green Deal' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640> (last accessed 14 January 2021); European Commission, 'A European Green Deal: Policy Areas' https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (last accessed 14 January 2021).

⁷ European Commission, 'Communication from the Commission to the European Parliament, the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Sustainable Europe Investment Plan' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0021> (last accessed 14 January 2021).

⁸ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Just Transition Fund' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0022> (last accessed 14 January 2021).

support the transition of businesses towards sustainability, while enabling private investors and the public sector to facilitate sustainable investments.⁹

This policy brief aims to provide an analysis of the EU legislative package on sustainable finance, while sharing forward-looking views on sustainable finance law. It is noteworthy that the term ‘sustainability’ transcends ‘green’ and climate considerations, while also subsuming social and governance factors – the so-called Environmental, Social, and Governance (ESG) factors. In this respect, the EU Action Plan on Sustainable Growth involves broader objectives than that of climate change.¹⁰

EU Action Plan for Sustainable Growth

The EU Action Plan constitutes the Commission’s comprehensive strategy aimed at (i) re-orienting capital flows towards sustainable investments, (ii) mainstreaming sustainability into risk management, and (iii) fostering transparency and long-termism. These three objectives are to be achieved through the implementation of ten actions.¹¹ Thus far, legislative acts have been adopted for the establishment of an EU classification of sustainable activities – the so-called EU taxonomy – (action 1), the integration of sustainability and increased disclosure by investors (action 7), the development of sustainability benchmarks (action 5), the strengthening of corporate disclosures (action 9.2) and the incorporation of sustainability in investment advice (action 4). Additional technical guidance concerns the creation of standards and labels for green financial products (action 2), the integration of sustainability in credit ratings

(action 6) and the incorporation of sustainability in prudential requirements (action 8).

Overall, the main objective of enacting legislation on sustainable finance was to avert greenwashing, while establishing uniform standards for assessing financial performance and fostering transparency. The novelty of EU sustainable finance law is that it introduces a new approach to how we perceive financial risks and financial performance, while instituting the *principle of double materiality* (see below).

Key Legislative Acts

EU Taxonomy

The EU Taxonomy Regulation entered into force on 12 July 2020.¹² The regulation establishes the criteria to be satisfied for an activity to qualify as environmentally sustainable. In line with Article 2, an ‘environmentally sustainable investment’ is defined as an ‘investment in one or several economic activities that qualify as environmentally sustainable’ under the regulation. In addition, Article 9 designates six environmental objectives, notably (i) climate change mitigation, (ii) climate change adaptation, (iii) the sustainable use and protection of water and marine resources, (iv) the transition to a circular economy, (v) pollution prevention and control, and (vi) the protection and restoration of biodiversity and ecosystems. Moreover, in accordance with Article 3, an economic activity qualifies as environmentally sustainable where this activity (i) contributes substantially to one or more of the environmental objectives, (ii) does not significantly harm any of the environmental objectives (Article 17 determines when an economic activity shall be considered to significantly harm each of the

⁹ European Parliament, ‘Legislative Train Schedule: Renewed Sustainable Finance Strategy’ <https://www.europarl.europa.eu/legislative-train> (last accessed 14 January 2021).

¹⁰ See for instance the interpretation of ‘sustainability’ by Walter Kahlenborn and others, ‘Defining “Green” in the Context of Green Finance’ (European Commission 2017) <http://op.europa.eu/en/publication-detail/-/publication/0d44530d-d972-11e7-a506-01aa75ed71a1/language-en>.

¹¹ European Commission, ‘Communication from the Commission to the European Parliament, the European Parliament, the European Council, the Council, the European

Economic and Social Committee and the Committee of the Regions: Action Plan Financing Sustainable Growth’ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN> (last accessed 14 January 2021).

¹² Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) 2020 (OJ L).

objectives), (iii) is carried out in compliance with the minimum safeguards contained in Article 18,¹³ and (iv) complies with the technical screening criteria.

In line with Article 10 of the Taxonomy Regulation, the Commission shall adopt a delegated act establishing technical screening criteria in order to supplement and operationalize the criteria set under the regulation. In particular, the delegated act shall contain the criteria for determining the conditions under which a particular economic activity qualifies as contributing substantially to climate change mitigation and adaptation. This delegated act shall be adopted by 31 December 2020, in order to apply from 1 January 2022. To date, the Commission has adopted a draft delegated act, comprising two annexes establishing technical screening criteria with regard to climate change mitigation and adaptation.¹⁴

In accordance with Article 27 of the Taxonomy Regulation, the climate change mitigation and adaptation objectives shall apply from 1 January 2022, whereas the remaining objectives shall apply only from 1 January 2023. Thus far, the taxonomy is only partially developed, focusing primarily on climate change mitigation and adaptation. However, in accordance with Article 26 of the regulation, social objectives shall also be considered for inclusion under the regulation by December 2021.

SFDR

In December 2019, the Sustainable Finance Disclosure Regulation (SFDR) was published.¹⁵ Even though SFDR has already entered into force, it will only apply after March 2021 (Article 20). The SFDR

aims to incorporate sustainability-related risks into financial decision-making processes through the establishment of non-financial disclosures for financial market participants (FMPs) – including Markets in Financial Instruments Directive (MiFID) firms providing portfolio management, Alternative Investment Fund Managers Directive (AIFMs) and Undertaking for Collective Investment in Transferable Securities (UCITS) Managers –, financial advisers and financial products. More precisely, the regulation distinguishes between (i) disclosures at an entity and a product level, (ii) website, pre-contractual and periodic report disclosures, and (iii) disclosures regarding standard products and products either promoting Environmental and Social (E&S) characteristics or having sustainable investments as their objective. For each of the disclosure categorizations between entity and product level, the regulation requires particular types of information to be disclosed, while determining where they shall be disclosed (website, pre-contractual arrangements or periodic reports).

According to Article 4(6) SFDR, Technical Regulatory Standards (RTS) are to be adopted, aimed at supplementing the SFDR on the content, methodologies and presentation of the relevant information to be disclosed under the regulation. The draft RTS provide *inter alia* sustainability indicators and metrics for FMPs and financial advisers to take into account when disclosing information in compliance with SFDR.¹⁶ Even though the adoption of RTS was intended to be finalized by December 2020, it is still pending, with the RTS application set for no later than the SFDR application in March 2021. Importantly, the SFDR is to be interpreted in light of the EU Taxonomy Regulation. One indication of the interdependence

¹³ Article 18 refers to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

¹⁴ 'Commission Delegated Regulation (EU) .../... Supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by Establishing the Technical Screening Criteria for Determining the Conditions under Which an Economic Activity Qualifies as Contributing Substantially to Climate Change Mitigation or Climate Change Adaptation and for Determining Whether That Economic Activity Causes No Significant Harm to Any of the Other

Environmental Objectives' [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:Ares\(2020\)6979284](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:Ares(2020)6979284) (last accessed 14 January 2021).

¹⁵ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (Text with EEA relevance) 2019 (OJ L).

¹⁶ European Banking Authority, 'Joint RTS on ESG Disclosure Standards for Financial Market Participants' (*European Banking Authority*, 22 April 2020) <https://www.eba.europa.eu/regulation-and-policy/transparency-and-pillar-3/joint-rts-esg-disclosure-standards-financial-market-participants> (last accessed 14 January 2021).

between the two legislative acts is demonstrated under Article 2(17) SFDR referring to the definition of sustainable investment in alignment with the Taxonomy Regulation.

EU Benchmark Regulation

In December 2019, a regulation (Benchmark Regulation) was published amending Regulation (EU) 2016/1011.¹⁷ The Benchmark Regulation adds two new categories of benchmarks, notably the EU Climate Transition Benchmark (EU CTB) and the EU Paris-aligned Benchmark (EU PAB). Out of these two benchmark categories, the EU CTB provides more flexibility in terms of methodology and selection of the underlying assets, whereas the EU PAB is more ambitious and stringent, as the selection or exclusion of underlying assets follow a Paris-aligned trajectory (Article 1). Moreover, in accordance with Articles 19a-19c of the Benchmark Regulation, the benchmark administrator has an obligation to disclose the selection or exclusion criteria of the underlying assets, as well as the methodology for the weighting of the assets in the benchmark. Last but not least, in conformity with Article 19d of the Benchmark Regulation, benchmark administrators are obliged to disclose how their benchmark is aligned with the objectives of the Paris Agreement.

In addition to the Benchmark Regulation, the Commission adopted some delegated acts in July 2020,

¹⁷ Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (Text with EEA relevance) 2019 (OJ L); Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance) 2016 (OJ L).

¹⁸ European Commission, 'Implementing and Delegated Acts: Find Links to Implementing and Delegated Acts for Regulation (EU) 2016/1011 on Benchmarks, Including Equivalence Decisions.' https://ec.europa.eu/info/law/benchmarks-regulation-eu-2016-1011/amending-and-supplementary-acts/implementing-and-delegated-acts_en (last accessed 14 January 2021).

¹⁹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial

containing granular rules establishing minimum technical requirements for the methodology of EU climate benchmarks.¹⁸

NFRD

In line with the Action Plan for sustainable growth, the Commission decided to revise the non-binding guidelines of the Non-Financial Reporting Directive (NFRD) on the disclosure of ESG-related information.¹⁹ In January 2019, a final report on climate-related disclosures was published followed by non-binding, new climate reporting guidelines in June 2019 as a supplement to the already existing guidelines.²⁰ The new guidelines incorporate the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and include the principle of double materiality comprising both financial and non-financial materiality.²¹ In line with the principle of double materiality, a company shall not only incorporate climate-related risks in its financial performance, but also it shall take into consideration the company's impact on climate and thus disclose non-financial information on the company's external impacts.

In accordance with Article 19a NFRD, the directive is applicable on large undertakings which are public-interest entities exceeding the average number of 500 employees. The directive establishes an obligation for eligible undertakings to disclose ESG-related information in non-financial statements with regard to

and diversity information for certain large undertakings and groups 2014 [32014L0095].

²⁰ European Commission, 'Technical Expert Group on Sustainable Finance Report on Climate-Related Disclosures' https://ec.europa.eu/info/files/190110-sustainable-finance-teg-report-climate-related-disclosures_en (last accessed 14 January 2021); European Commission, 'Communication from the Commission - Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information)' [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01)) (last accessed 14 January 2021); European Commission, 'Communication from the Commission - Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information' [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0620\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0620(01)) (last accessed 14 January 2021) respectively.

²¹ TCFD, 'Task Force on Climate-Related Financial Disclosures' <https://www.fsb-tcfd.org/> (last accessed 14 January 2021).

their (i) business model (ii) policies and due diligence (iii) outcome of policies (iv) principal risks and risk management and (v) key performance indicators. In line with the NFRD, the new guidelines propose climate-related disclosure for each of these five reporting areas, to be further aligned with a globally recognized disclosure framework, such as the TCFD. In addition to the non-financial statement, Article 20 NFRD also requires the disclosure of diversity information with regard to the administrative, management and supervisory bodies of the undertakings. Last but not least, NFRD requires an auditor to verify whether the non-financial statement is available, including however no judgement on materiality.

Given that the new guidelines are non-binding and result hence in the lack of comparability of disclosed information, the Commission decided to improve the framework, especially with respect to materiality. To this end, in December 2019, the Commission decided to review the NFRD and its legal status – likely to take the legal form of regulation –, launching thus a public consultation. The Commission’s proposal premised on the outcome of the public consultation is expected by March 2021.²²

EU GBS

In January 2020, the EU announced the establishment of an EU Green Bond Standard (GBS) in line with the EU Green Deal.²³ Prior to this announcement, a report was published proposing the content of a draft EU GBS followed by a usability guidance offering recommendations on the practical application of an EU GBS.²⁴ The rationale behind an EU GBS lies in the significant role that green bonds can

play in financing assets that can contribute to the transition towards low-carbon economies. The EU GBS was proposed, but yet to be adopted. In this regard, the Commission has launched a targeted consultation on the EU GBS, the outcome of which will determine the legal form and scope of the EU GBS, i.e. whether it will constitute voluntary guidelines or a legally binding framework.²⁵

In general terms, the report and usability guide on the EU GBS adopt the voluntary International Capital Market Association (ICMA) Green Bond principles.²⁶ In alignment with the ICMA principles, the EU GBS adopts a ‘use-of-proceeds’ approach relying on four core components for a bond to qualify as green. The main criteria are:

- (i) the alignment of the use-of-proceeds with the EU Taxonomy, i.e. the proceeds shall be used to finance green projects eligible under the EU taxonomy;
- (ii) the content of a Green Bond Framework to be produced by the issuer in order to provide information on future issues and the type of projects to be financed;
- (iii) the required allocation and impact reporting, including information on the allocation of proceeds to green projects and the regional distribution of green projects, the description of green projects, metrics about the projects’ environmental impacts and the methodology used for impact evaluation; and

²² European Commission, ‘Non-Financial Reporting by Large Companies (Updated Rules)’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive> (last accessed 14 January 2021); European Commission, ‘Non-Financial Reporting by Large Companies (Updated Rules): Public Consultation’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation> (last accessed 14 January 2021).

²³ European Commission, ‘EU Green Bond Standard’ https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-green-bond-standard_en (last accessed 14 January 2021).

²⁴ European Commission, ‘TEG Report on EU Green Bond Standard’ https://ec.europa.eu/info/files/190618-sustainable-finance-teg-report-green-bond-standard_en (last accessed 14 January 2021); European Commission, ‘Usability Guide for the EU Green Bond Standard’ https://ec.europa.eu/info/files/200309-sustainable-finance-teg-green-bond-standard-usability-guide_en (last accessed 14 January 2021).

²⁵ European Commission, ‘Targeted Consultation on the Establishment of an EU Green Bond Standard’ https://ec.europa.eu/info/consultations/finance-2020-eu-green-bond-standard_en (last accessed 14 January 2021).

²⁶ International Capital Market Association, ‘Green Bond Principles’ <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf>.

- (iv) the requirements for external verification by an approved verifier to be made publicly available.

Given that green bonds are financial instruments that can ensure the meaningful and effective use of funding for the generation of environmental impacts, they can play a catalytic role for the achievement of the Paris Agreement's objectives, backed by reliable reporting and verification. What is more, an EU GBS is likely to enhance comparability of standards, due to reliance on uniform results-based standards in the use of proceeds, while fostering increased clarity and credibility due to reliance on already existing international standards. Moreover, considering the current practice under the ICMA Green Bond principles, external reviewers are often not accredited, but rather credit rating agencies use methodologies and calculations with no supervision, which may result in negative impacts. As opposed to this practice, the EU aims to regulate and standardize how these agencies work to achieve credible and independent review.

Despite the absence of a legally binding framework, the application of an EU GBS is increasingly gaining ground among EU member states. One such example is the Grand Duchy of Luxembourg as the first EU member state to issue a Sustainability Bond Framework that is aligned not only with the EU GBS requirements, but also with the EU Taxonomy.²⁷

Conclusion

It is noteworthy that the EU sustainable action plan constitutes a paradigmatic case for the transition towards sustainable development. Indeed, the EU has brought together all required policies, legislative acts and investment vehicles to accelerate the transformation to a sustainable economy. What is more, there are more legal developments to be expected in the near future concerning the standardization of sustainability ratings and the labelling of sustainable finance products, calling thus for coordinated action

and response from both financial-sector organizations and corporates.

Importantly, there are manifold challenges to be overcome with regard to the actual implementation of the adopted regulations. In particular, the EU taxonomy technical screening criteria are highly complex for financial intermediaries to analyze them. Alongside this complexity, the taxonomy predominantly focuses on climate change mitigation and adaptation, with the remaining environmental objectives and social components yet to be elaborated. In addition, the delayed adoption of the RTS considerably hinders the implementation of the SFDR, given that the former supplements and guides the implementation of the latter.

Aside from these challenges, it is notable that transparency holds a prevalent role in promoting sustainability-related considerations across the financial sector and corporates. Even though the primary legislation refers to the financial sector, the latter significantly relies on corporates' disclosures when it comes to investment decision-making. Moreover, the majority of the legislative acts links obligations with a 2 degrees Celsius scenario, demonstrating hence a strong link to the Paris Agreement and its objectives.

Overall, the EU taxonomy constitutes the cornerstone of sustainable finance law, setting the foundation for the assessment and classification of all economic activities with a potential adverse impact for the environment. In this respect, the EU taxonomy is the backbone for the SFDR, the EU benchmark regulation and the EU GBS, as it provides the general criteria for any actor to assess whether an investment qualifies as sustainable. Notwithstanding its complexity, the taxonomy embodies the remarkable progress towards systemizing economic activities depending on the sector. Given that there are additional developments to be expected in the near future, including the social component, the EU Sustainable Finance Action Plan reflects ambition and can actively contribute to a sustainable transformation in line with the Paris Agreement and the SDGs.

²⁷ The Government of Grand-Duchy of Luxembourg, Ministry of Finance, 'Sustainability Bond Framework' <https://gouvernement.lu/dam-assets/documents/actua->

[alites/2020/09-septembre/02-cadre-obligations-durables/20200831-Luxembourg-Sustainability-Bond-Framework.pdf](https://gouvernement.lu/dam-assets/documents/actua-rites/2020/09-septembre/02-cadre-obligations-durables/20200831-Luxembourg-Sustainability-Bond-Framework.pdf).



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