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NAVIGATING THE LANDSCAPE OF EU SUSTAINABLE FINANCE REGULATION: CHALLENGES AND IMPERATIVES TO ENFORCE SUSTAINABILITY FINANCIAL PROMISES IN THE EU THROUGH HARMONIZED PRIVATE ENFORCEMENT MECHANISMS

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List of Abbreviations

ABoR	**Administrative Board of Review**
AG	**Advocate General**
Art./Arts.	**Article/Articles**
BJR	**Business Judgement Rule**
CBA	**Commonwealth Bank of Australia**
CDSB	**Climate Disclosure Standards Board**
CDP	**Carbon Disclosure Project**
CESR	**Committee of European Securities Regulations**
Charter	**Charter of Fundamental Rights of the European Union**
CJEU	**Court of Justice of the European Union**
CMU	**Capital Markets Union**
CRA	**Credit Rating Agencies**
CRAR	**Credit Rating Agencies Regulation**
CSDDD	**Corporate Sustainability Due Diligence Directive**
CSR	**Corporate Sustainability Reporting**
CSRD	**Corporate Sustainability Reporting Directive**
EBA	**European Banking Authority**
ECHR	**European Convention of Human Rights**
ECtHR	**European Court of Human Rights**
EEA	**European Environment Agency**
EECS	**European Enforcers Co-ordination Sessions**
EESC	**European Economic and Social Committee**
EFRAG	**European Financial Reporting Advisory Group**
e.g.,	**Exempli gratia**

EIOPA	**European Insurance and Occupational Pensions Authority**
ESAs	**European Supervisory Authorities**
ESMA	**European Securities and Markets Authority**
ESG	**Environmental, Social and Governance**
ESFS	**European System of Financial Supervision**
ESRS/ESTS	**European Sustainability Reporting Standard/European Sustainability Technical Standards**
ESV	**Enlightened Shareholder Value**
EU	**European Union**
EUGBs	**European Union Green Bonds**
EUGBR	**European Union Green Bond Regulation**
EUGBS	**European Union Green Bond Standard**
FASB	**Financial Accounting Standards Board**
FCA	**Financial Conduct Authority**
FRC	**Financial Reporting Council**
FSMA	**Financial Securities Markets Act 2000**
GRI	**Global Reporting Initiative**
HLEG	**High-level expert group**
IAS	**International Accounting Standards**
IBIPs	**Insurance-based Investment Products**
ICMA	**International Capital Markets Association**
ICMA GBP	**International Capital Markets Association Green Bond Principles**
i.e.,	**Id Est**
IFRS	**International Financial Reporting Standards**
IOSCO	**International Organization of Securities Commission**

IPCC	**Intergovernmental Panel on Climate Change**
IPO	**Initial Public Offering**
IR	**Integrated Reporting**
ISSB	**International Sustainability Standards Board**
KPIs	**Key Performance Indicators**
MiFID/MIFID II	**Market in Financial Instruments/ Market in Financial Instruments II**
NCAs	**National Competent Authorities**
NFRD	**Non-Financial Reporting Directive**
NGOs	**Non-Governmental Organization**
OECD	**The Organization for Economic Cooperation and Development**
PAIs	**Principal Adverse Impacts**
PIOB	**Public Interest Oversight Board**
RTS	**Regulatory Technical Standards**
SASB	**Sustainability Accounting Standards Board**
SDGs	**Sustainable Development Goals**
SEC	**US Securities Exchange Commission**
SFDR	**Sustainability Financial Disclosure Regulation**
SRB	**Single Resolution Board**
SRD I	**Shareholders Right Directive I**
SRD II	**Shareholders right Directive II**
SSPEs	**Securitisation Special Purpose Entities**
SPVs	**Special Purpose Vehicles**
SPEP	**Sustainability Private Enforcer Panel**
TEU	**Treaty on the European Union**
TFCD	**Task Force on Corporate Disclosure**
TFEU	**Treaty on the Functioning of the European Union**

UNDP	**United Nations Development Program**
UNFCCC	**United Nations Framework Convention on Climate Change**
UNGP	**United Nations Guiding Principles**
US	**United States**
WMO	**World Meteorological Organization**
WpHG	**Wertpapierhandelsgesetz**

Part I. Chapter I. Legal Framework for the enforceability of sustainability financial promises in the EU

1. Introduction to sustainability financial promises.

Climate change and sustainable development may be the main defining challenge of our time. The Paris Agreement represents a signal sent to the markets in order to implement a policy action that help contribute to mitigate climate change. Global organizations have growingly embraced the sustainability movement from the 1972 United Conference on the Human Environment, which led to the creation of the United Nations Environmental Programme,[1] and the creation of the Intergovernmental Panel on Climate Change (IPCC) in 1988 by UNEP and the World Meteorological Organization (WMO). Nonetheless, the event that facilitated the emergence of several initiatives to address climate change was the 1992 Rio Summit, where the action plan for the United Nations (UN), Agenda 21, was created, and the need for governments and multilateral organisations to achieve sustainable development goals was established.[2]

Over time, the scientific understanding of climate change and associated social crises has advanced from these foundational principles. The United Nations Development Program (UNDP) developed the Sustainable Development Goals (SDGs), which are divided into seventeen actions and aim to act as a global call to act against climate change, social inequalities, and poverty and to develop balance between social, economic, and environmental sustainability.[3] Consequently, the imperative for action has expanded beyond governmental and public entities to encompass private enterprises.[4]

Against this backdrop, recognizing the pivotal role of the financial sector in fostering economic and societal progress, it has assumed a central position in the worldwide efforts to address the

[1] UNEP, *United Nations Conference on the Human Environment led to the creation of the United Nations Environmental Programme*, 1972.

[2] United Nations Conference on Environment and Development, Rio Summit, 1992.

[3] UNDP, *Sustainable Development Goals,* https://www.undp.org/sustainable-development-goals.

[4] See IPCC, *Special Report on the Impacts of Global Warming of 1.5ºC*, 2018: https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf. See also the Global Economic Forum, Global Risk Report of 2018.

climate crisis and promote social development. The gradually promotion of green and sustainable finance has become a prominent issue in various countries around the world, and the European policymakers are in a good position to lead the transition towards a low-carbon economy, and the market for green bonds and sustainability-linked bonds are increasingly popular.[5]

In light of these considerations, various recent sustainable finance regulations have been published to remedy certain deficiencies, particularly standardize transparency obligations – the European Union green bond standard and the EU Taxonomy Regulation—[6] and Directives and Regulations concerning the enhancement of transparency regarding sustainability-related risks associated with corporate operations –the Corporate Sustainability Reporting Directive (CSRD), the European Union climate and Environmental, Social and Governance (ESG) benchmarks and the Sustainable Finance Disclosure Regulation (SFDR)—.[7]

One of the primary challenges lies in effectively implementing sustainability criteria, which encompass environmental, social, and governance factors. Put differently, while the introduction of regulations concerning sustainable finance represents a crucial initial step, the guarantee of enforcement remains uncertain. As elaborated below, sustainable finance regulations, following the conventional approach of securities regulations, lack harmonized private enforcement mechanisms. Consequently, litigation before national civil courts has emerged as a primary avenue through which stakeholders and the public seek to hold corporations, including financial firms, accountable for their actions and commitments.[8]

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[5] O. WEBER and A. ELALFY, *The development of green finance by sector,* in MARCO MIGLIORELLI and PHILIPPE DESSERTINE (eds), *The Rise of Green Finance in Europe Opportunities and Challenges for Issuers, Investors and Marketplaces,* Palgrave Macmillan, 2019, 66.

[6] 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) (hereafter Taxonomy Regulation) and Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (hereafter EUGBR).

[7] In particular, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance) PE/35/2022/REV/1 (hereafter the CSRD), the 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 (hereafter EU labels for climate and ESG benchmarks and benchmarks' ESG disclosures), and 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) PE/87/2019/REV/1 (hereafter the SFDR).

[8] IPCC, *Climate Change 2022. Mitigation of Climate Change, Working Group III-6th Report of the Intergovernmental Panel on climate Change*, 2022,

However, mediation is progressively gaining traction as an alternative dispute resolution mechanism for certain types of disputes.[9]

In the European Union (EU), the first significant sustainable finance action took place in March 2018, when the European Commission released an action plan that aimed to incentivize the financial sector to fill the investment gap and keep the temperatures within the 1.5°C.[10] The renewed sustainable finance strategy and implementation of the action plan on financing sustainable finance growth detailed the comprehensive EU strategy to further link sustainability and finance.[11] Thus, the EU Sustainable Finance Action Plan integrates a major policy objective to orient and re-orient capital flows towards "sustainable investments",[12] to include environmental and social objectives in financial decision-making aims to limit the financial impact of environmental and social risks,[13] to boost corporate transparency of market

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https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf.: «litigation has influenced the outcome and ambition of climate governance».

[9] Although an extensive analysis of the mediation proceedings for sustainability financial disputes falls out of the scope of this work, there are some elements that the reader may consider of relevance. In particular, disputes in which claimants argue that corporations have breached the OECD Multinational Enterprise Guidelines. See, e.g., Friends of the Earth Australia and others v Australia and New Zealand Banking Group Limited, Australian NCP, Initial Assessment, para 4.1, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201124_na_complaint-1.pdf; Development YES v Group PZU (omission of of relevant environmental information in the non-financial statements of an insurer firm), inal Statement, p. 3 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190726_11814_na.pdf.

The OECD Guidelines for Multinational Companies together with 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 Right, have become relevant international soft law instruments under the EU sustainable finance laws. These instruments are under the Taxonomy Regulation, one of the three "minimum safeguards" that an economic activity shall comply with to qualify as environmentally sustainable under the Taxonomy Regulation. See Article 3 of the Taxonomy Regulation.

the OECD Guidelines for Multinational Enterprises incorporates an implementation mechanism, the National Contact Points (NCPs) to ensure the effectiveness of the Guidelines. The National Contact Points (NCPs) are agencies established by national governments and their mandate consists of enhancing the effectiveness of the Guidelines and due diligence by responding to enquiries of the adherents and to handle disputes. In this regard, the NCPs are a non-judicial government-supported grievance mechanism to resolve conflicts regarding the global activities of firms, and alleged infringements of responsible business conduct, that may arise in relation to the implementation of the OECD Guidelines on Multinational Enterprises. See, e.g., OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*,2023, 56. See also OECD, *What are National Contact Points for RBC?*, https://mneguidelines.oecd.org//ncps/; and OECD, *How do NCPs handle cases?*, https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm.

[10] EUROPEAN COMMISSION, European Commission Communication Action Plan: Financing Sustainable Growth COM/2018/097 final (hereafter EU Sustainable Finance Action Plan).

[11] EUROPEAN COMMISSION, *Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth*, 2020, https://finance.ec.europa.eu/publications/renewed-sustainable-finance-strategy-and-implementation-action-plan-financing-sustainable-growth_en. (Hereafter EU renewed sustainable finance strategy).

[12] Section 1.1 of the EU renewed sustainable finance strategy, cit.

[13] *Ivi*, section 1.2.

participants' activities,[14] where institutional investors and asset managers play a key role to consider sustainability factors and risks in the investment process.[15]

In pursuit of this objective, the initial stride towards delineating the legal responsibilities and entitlements associated with sustainability criteria involved the formulation of a shared lexicon. This common language facilitates financial market participants in discerning sustainable endeavours from those that lack sustainability attributes. Therefore, the European Commission appointed a high-level group of experts (HLEG) to develop recommendations for the classification system for "sustainable activities" on the basis of the main objectives included in the EU Sustainable Finance Action Plan,[16] and the European Green Deal objectives.[17] The HLEG's report led to the development and publication of the EU Taxonomy Regulation,[18] a classification system that defines criteria for economic activities that are aligned with a net zero transition plan and with the compliance with environmental goals, other than climate change mitigation and climate change adaptation.[19]

A "green promise" refers to financial instruments in which the use of the proceeds is going to finance an environmentally sustainable objective, as defined in the Taxonomy Regulation, e.g., reduction of GHG emissions. The financial promise will consist of a "sustainability promise" if the proceeds are used to finance a sustainable investment, e.g., as defined in Article 2(22) of the SFDR. In this regard, the series of sustainability financial products is wide, and green bonds are the most important ones.[20]

Furthermore, the regulatory framework of securities transactions comprises several pieces of legislation that aim to protect investors. Considering the foregoing, the Prospectus Regulation is a key piece of legislation in the securities markets,[21] and its liability regime for enforcing

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[14] Section 1.3 of the EU renewed sustainable finance strategy, cit.
[15] *Ivi*, section 3.2.
[16] HLEG, *Financing a Sustainable European Economy*, Final Report, 2018, https://finance.ec.europa.eu/document/download/2e65cb1e-bd47-4441-816a-d89ec61eef45_en?filename=180131-sustainable-finance-final-report_en.pdf.
[17] EUROPEAN COMMISSION, *The European Green Deal*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.
[18] In the EU, the Taxonomy Regulation.
[19] EUROPEAN COMMISSION, EU taxonomy for sustainable activities, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en.
[20] See Taxonomy Regulation, cit.
[21] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing

financial promises is a crucial element in our analysis. The reason for this is that the Prospectus Regulation is one of the few capital market regulations that provides for a civil liability regime in case of “material” breaches of the transparency obligations in the prospectus, although the duty to implement civil liability measures lies with the Member States.[22]

In practice, the above-mentioned situation means that the rules on prospectus civil liability are not harmonized. Each Member State has its own rules and national courts rule on the basis of its national legislation. In doing so, national civil courts are subject to the principles of effectiveness and equivalence. This means, for example, that civil courts should not take into considerations clauses in the prospectuses that substantially constrain or exclude civil liability for breach of the Prospectus Regulation.[23]

However, allowing national courts to determine whether the information contained in the prospectus conforms to the regulations outlined in the Prospectus Regulation — specifically, assessing the materiality of the information presented or omitted — differs from this unified cause of action. Minor discrepancies in the methodologies employed by national civil courts to determine whether the information in the prospectus is materially misleading may result in variations among national prospectus liability frameworks.[24] As a consequence, both legal certainty and investor protection could be compromised.

The above is aligned with the challenges encountered by the Capital Markets Union (CMU) initiative as well. The primary aim of the CMU is to facilitate the movement of investments and savings throughout the European Union, benefiting investors, consumers, and firms across all EU member states.[25] The CMU action plan outlines sixteen legislative and non-legislative measures designed to achieve three main objectives, one of which is to bolster a green, digital,

Directive 2003/71/ECText with EEA relevance OJ L 168, 30.6.2017, p. 12–82 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) (hereafter Prospectus Regulation).

[22] Article 11 of the Prospectus Regulation.

[23] See, e.g., D. BUSCH, *The influence of the EU Prospectus Rules on Private Law*, in D. BUSCH (ed), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020, para 18.80.

[24] Danny Busch explains that: «[a]lthough the current practice (p. 76) around more familiar types of securities would not change, the arrival of both new forms of transferable instruments and new forms of capital markets would require uniform application across the EU». See D. BUSCH, *The influence of the EU Prospectus Rules on Private Law*, cit.

[25] EUROPEAN COMMISSION, *Capital markets union 2020 action plan: A capital markets union for people and businesses*, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan_en.

inclusive, and resilient economic recovery by enhancing access to financing for European enterprises. Despite some advancements since 2015, fragmentation persists within the capital markets.[26].

Within this context, the definition of securities under the Prospectus Regulation lacks uniformity. The regulation refers to MiFID II,[27] which in turn, defines securities by deferring to national regimes. Consequently, this setup allows for variations among national regulators to influence the definition of the term. The emergence of new types of transferable securities has not clarified the definition of green securities, such as green securities and sustainability-linked bonds, as well as green securitized products.

In green or sustainable securities transactions, the issuer of the green/sustainable financial instrument "promises" to undertake specific actions or achieve particular goals, which may involve meeting predefined targets, adhering to benchmarks, or earmarking investments for specific purposes.

Green financial promises parallel the more conventional promises found in financial contracts, such as commitments to pay a fixed interest rate of 5% or the broader objective of maximizing dividends and company value. Framed in this manner, we can evaluate the effectiveness of the green promise by applying the perspective commonly used to assess the fulfilment of conventional contractual commitments.

This leads us to our initial question: What happens if the party making the green or sustainability promise fails to fulfil it? From a sceptical standpoint, we inquire whether there are mechanisms in place to compel the promisor to uphold their commitment or to dissuade them from reneging on their promise. The absence of unified enforcement mechanism also leads us to conclude that the answer to that question depends on the assessment and conclusions reached by the adjudicator on a case-by -case basis. Although market financial players would

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[26] The other two objectives are to «make the EU an even safer place for individuals to save and invest long-term» (Actions 7-9) and to «integrate national capital markets into a genuine single market» (Actions 10-16). See EUROPEAN COMMISSION, *Capital markets union 2020 action plan: A capital markets union for people and businesse*s, cit.

[27] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (hereafter MiFID II).

benefit from uniform application across the EU, however, it appears to be difficult that significant changes are to be place.[28]

Our fundamental argument focuses on the distinction between ex ante mechanisms and ex post enforcement mechanisms, and the involvement of national courts in adjudicating sustainability financial disputes. Our aim is to analyse the similarities and differences in the case law developed in this domain, whether there are sufficient incentives for investors to litigate and promote social and environmental objectives promised by the issuer.[29]

Finally, private litigation in national courts is the only available remedy when an investor alleges damages deriving from sustainability-related misstatements,[30] presenting challenges for courts in technically detecting infringements.[31] This situation may contribute to the fragmentation of the market and undermine the competition of the transition towards the creation of a unified sustainable capital markets within the EU. For that reason, we will try to suggest some proposals to contribute towards the harmonization of the private enforcement avenues for sustainability financial disputes within the EU.

On a different note, but related to the previous considerations, the transition towards sustainability and transparency duties is designed to impact firms by expanding the fiduciary obligations of managers. This includes not only the issuers, but also managers, who are required to assess and disclose how sustainability criteria influence the firm's investment and strategic decisions, in the best interest of their clients or beneficiaries.[32] Furthermore, it empowers shareholders to express concerns regarding management decisions overlooking sustainability risks and discourages investments in environmentally harmful projects or sectors.

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[28] . BUSCH, *The influence of the EU Prospectus Rules on Private Law*, cit.

[29] P. DAVIES, *Damages Actions by Investors on the Back of Market Disclosure Requirements*, in D. BUSCH, E. AVGOULEAS, and G. FERRARINI (eds), *Capital Markets Union in Europe*, Oxford University Press, 2018.

[30] This category of disputes encompasses transparency-oriented tools designed to enhance the information disclosed by issuers in the capital markets, specifically targeted at investors. This involves non-financial sustainability disclosures (NFRD) utilized to assess the "green" transparency of bonds, and green benchmarks, which pose challenges in their alignment with the EU green taxonomy.

[31] And different theories to resolve the dispute may be applied by the courts. See T. J. MULLANEY, *Theories of Measuring Damages in Security Cases and the Effects of Damages on Liability*, in *Fordham L. Rev.*, 1977, vol 46, 277.

[32] OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises*, 2019, 16, https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf

This shift represents a departure from the traditional paradigm where the managers' and directors' duty to act in the best interest of the company required to prioritize shareholder interests in decision-making. The evolving approach now integrates the concerns of both shareholders and other relevant stakeholders in managerial considerations. However, the customization of ex post enforcement mechanisms at the national level is based on national civil liability, and subject to the same challenges due to the lack of harmonization of private enforcement mechanisms at EU level.

2. Liability for misstatements under EU securities regulations (I). Prospectus liability and market abuse liability.

The growing market for green financial products has raised the question of what conditions shall the promise meet to qualify as an environmentally sustainable financial promise. To avoid greenwashing, issuers of green or sustainable securities shall disclose relevant information about the green credential of the securities.

However, the scope of the sustainable disclosure regime under the SFRD is limited by comparison to the scope the Prospectus Regulation. The SFDR does not contain any private enforcement mechanism in case of an alleged misleading of sustainability-related information in pre-contractual disclosures (e.g., in the prospectuses), or any other kind of announcement. Therefore, the starting point to analyse the liability for sustainability-related misstatements under EU securities regulation is Article 11 of the Prospectus Regulation.[33]

Claims for misrepresentations in prospectuses about the sustainability credentials of the financial product are governed by the liability regime for economic loss arising from false information disseminated in the market. Liability for economic loss is the cornerstone of tort liability in the field of private financial law, the structuring of which is based on the national

[33] Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/ECText with EEA relevance [2017] OJ L 168 (hereafter Prospectus Regulation). Article 11 mirrors Article 6 Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L 345 (hereafter Prospectus Directive).

laws of the Member States.[34] This situation has prompted the development of differences in the prospectus liability measures developed in each Member State.

The fact that the liability regime of the prospectus is focused on economic loss and the lack of harmonisation of the liability regime present a challenge in determining liability for damages arising from inaccurate statements related to sustainability.

2.1 Misstatements in initial disclosures have a direct impact on prices.

2.1.1 Protected legal interest: financial value of assets/securities and reliance.

Mandatory disclosure is an instrument that aims to correct conflicts of interests and enhance investor protection, i.e., enable investors to make optimal investment decisions, and market efficiency, i.e., prices contain available and reliable information.[35]

The term "value" is influenced by particular views of how the society evolve and the objectives that "ought to" be developed. Some economists accept the economic theory of value, according to which the concept "economic value" is defined by supply and demand: the value of something is determined by price and, therefore, economic value connects the production of goods and services to their distribution across the economy and the reinvestment of earnings in the markets to generate further income.[36] According to other economists, price shall precede value, considering value a concept that cannot be measures by using price-based tools.[37]

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[34] *Ivi*.

[35] Some scholars consider that the level of enforcement of the law in practice is critical in ascertaining the quality of the regulatory regime. See J. COFFEE, *Law, and the Market: The Impact of Enforcement*, in *University of Pennsylvania Law Review*, 2007, vol 156, 229.

[36] M. MAZZUCATO, *The Value of Everything*, Penguin, 2019, 6.

[37] LUDWIG VON MISES, *Human Action: A Treatise on Economics*, Liberty Funds, 2007. For example, where the plaintiff argues that the value of the asset has decreased as a default of the defendant in cases concerning the publication of defective prospectuses and offering statements, i.e., when issuers omit relevant information or disclose incorrect or inaccurate information in prospectuses or offering documentation. Omission of negative information or disclosing false information (e.g., regarding a serious risk of insolvency) may create the appearance that the value of the firm or securities is greater than it is. The investor will pay the price upon the reliance on the information they receive ignoring that the shares or bonds are overvalued compared to their actual value and that a serious risk exist that the issuer's business may collapse. In this situation investors are entitled to request a compensation for damages which usually consists of the reimbursement of the difference between the purchase price of the securities and their actual value. Value in this context refers to the economic value of the asset and is calculated by applying price-based tools. See, for example, Tessival spa v. Intesa Sanpaolo SpA, Corte di Cassazione, sez. I, 11 giugno 2010, n. 14056. Tessival acquired shares from the Banco di Napoli (the firm was integrated in Intesa Sanpaolo) which subsequently turned out to have a lower value than the purchase price. Banco di Napoli published an inaccurate prospectus as to the balance sheet of the bank prior to the offering. The Italian

The idea that prices contain relevant information as to the value of goods and services has influenced the securities transaction markets too. When selling and buying investment products like securities, some scholars hold that prices provide sufficient information about the securities and the issuing firms according to the market efficiency theory,[38] so the value of assets is determined by prices and depend on the eye of the holder of the securities.[39]

Behavioural finance exposes biases that challenge market efficiency theories, providing rationale for investors' seemingly irrational decisions.[40] Contrary to the assumption that individuals can thoroughly assess all available information, research has shown that both unsophisticated and professional investors often resort to heuristics or rules of thumb due to information overload, i.e., suffer from behavioural biases.[41] Overconfidence also plays a role in shaping decisions, of managers of banks and financial intermediaries, as well as there is overconfidence in the rating and assessment by rating agencies.[42]

Economic benefits aren't the sole motivators for individuals; decisions may be driven by considerations of "fairness,"[43] reflecting human tendencies to punish unfair behaviour. Prospect theory posits that decisions deviate from expected utility based on individuals' risk attitudes, with a preference for avoiding losses over the allure of potential gains.

Supreme Court held that the prospectus published by the bank was misleading and calculated damages on the basis of the actual financial value of the shares of the bank.

[38] N. BARBERIS and R. THALER, *A survey of Behavioral Finance*, in G.M. CONSTANTINIDES, M. HARRIS and R. M. STULZ (ed,), *The Handbook of Economics and Finance*, Elsevier, 2002, 1053 ff. The authors hold that prices should be "fundamentally correct" provided that agents are rational, and market is frictionless.

[39] F. H. EASTERBROOK and D. R. FISCHEL, *Mandatory Disclosure and the Protection of Investors*, in *Virginia Law Review*, 1894, vol. 669, no.70, 694-695. Against the theory that capital markets are efficient and therefore prices are accurate, see N. L. GEORGAKOPOULOS, *The Logic of Securities Market*, Cambridge University Press, 2017, 59-76, where the authors criticize the capital asset price model (CAPM) and "market efficiency" argument on the basis of the lack of evidence of efficiency to assure that prices would never be wrong in the face of inaccurate information or frictions.

[40] E.g., on market irrationality and systemic biases often distort the rational investor's decision-making process R. J. GILSON and R. KRAAKMAN, *The Mechanism of Market Efficiency*, in *Va LR*, 1984, vol 549, no 70; H. THALER, *Misbehaving: The Story of Behavioral Economics*, W.W. Norton & Company, Inc, 2015, and R. H. THALER and C. R. SUNSTEIN, *Nudge: Improving Decisions on Health, Wealth, and Happiness*, Yale University Press, 2008.

[41] F. DELLA NEGRA, *The civil effects of MiFID II between private law and regulation*, in *Quaderno di Ricerca Giuridica della Consulenza Legale*, 2020, No 90, 115-142: and as a result, «crucially dependent on the interpretative approach of national courts».

[42] S. ALVARO, R. LENER, and P. LUCANTONI; in collaboration with V. ADRIANI, F. CIOTTI, and A. PARZIALE, The Prospectus Regulation The long and winding road, in *Quaderno della Consulenza Legale*, 2020 (hereafter The Prospectus Regulation: The long and winding road), 19.

[43] R. VEIL (ed), *European Capital Markets*, Hart Publishing, 2021, ch 2.

Hindsight bias influences perceptions, causing past events to appear more probable than initially thought. Additionally, when assessing the likelihood of a risk, people tend to rely on readily available information, illustrating a reliance on easily accessible data.

From the perspective of accounting regulation some scholars place value on the effectiveness of existing accounting rules to measure the level of sustainability of the firm,[44] following the idea that the theory of the accounting system becomes part of the theory of the firm.[45] Ohers criticize the limitations of existing financial accounting rules is a key element to determine whether a firm is sustainable or not, but corporate financial accounting only takes into account financial capital, and disregards natural capital. Thus, Robé proposes to enhance "sustainability accounting." [46]

Unlike traditional financial capital, this natural capital is not subject to ownership, and there is no mechanism to charge for its use. Due to its nature, this form of capital is not adequately accounted for in market systems and classical financial accounting.[47] In other words, environmental capital falls outside the conventional market and financial accounting framework fall outside the price-based logic of financial accounting. Therefore, its use cannot properly be measured and accounted for.

The rationale underpinning sustainability accounting is that the integration of sustainability-related factors into the corporate purpose of a firm requires firms to adapt their business models to internalize externalities firms cause upon environment and the society, e.g., a firm should

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[44] J-P. ROBÉ, *The Shareholder Value Mess (And How to Clean it Up)*, in *Accounting, Economics, and Law: A Convivium*, 2020, vol. 10, no. 3.

[45] R. H. COASE, *Accounting and the Theory of the Firm*, in *Journal of Accounting*, 1990, no. 12, 3-13: "within the firm there are explicit costs…provided for by the accounting system [rather than by the firm price]".

[46] J-P. ROBÉ, The Shareholder Value Mess, cit.:
«Nature's CO2 absorption capacity is a form of capital we share. It is not owned by anyone, and no one is in a position to present a bill for its use. Falling outside the market/price system and of classical financial accounting, the use of this capital is not properly accounted for. Accordingly, markets cannot discriminate among firms which are environmentally sustainable and those which are not. Corporate accounting concentrates on financial capital. If financial markets are not provided with hard numbers about the environmental costs of firms' operations, they can't process this information and value differently the debt and equity instruments issued by sustainable firms (via their corporate structure) from the debt and equity of unsustainable ones».

[47] ('Shareholder value mess', no date, p. 4)

adjust its financial resources for investing in the carbon sinks and to restore the CO2 absorption capacity used in its "whole upstream value chain".[48]

The sustainability accounting approach introduces a positive incentive for "sustainable firms" with an interest in creating a competitive advantage over unsustainable competitors and will increase the confidence of investors in sustainable firms because they will cope better in the event, e.g., of restrictive regulations.[49]

In relation to the value of the assets, some authors emphasize that the value of assets depends on the expected future performance of the issuing firm rather than on what have happened to the firm to date.[50]

According to the later view, issuers must inform about potential risks associated to the "promises" they make when offering and selling securities instead of providing .[51] The rationale underneath this approach is that directors and managers of issuing firms are in a better position to provide reliable information regarding the nature of the risks that the firm and the securities may face, so they must disclose all relevant risks to avoid asymmetries of information between issuers and investors, especially in primary markets.[52]

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[48] See, e.g., M.P. PERALES VISCASILLAS, *Impacto de la lucha contra el cambio climático en el gobierno corporativo,* in *Revista de Derecho del Sistema Financiero: mercados, operadores y contratos*, 2023, ISSN 2695-9534, no 5, 11-66, and previously, M.P. PERALES VISCASILLAS, *Retos y tendencias actuales en sostenibilidad y gobierno corporativo: una mirada tras el Covid-19*, in *Revista española de seguros: Publicación doctrinal de Derecho y Economía de los Seguros privados*, 2021, ISSN 0034-9488, no. 185-186. In addition,.J-P. ROBÉ, The Shareholder Value Mess, cit. Robé uses as example that a reporting entity should adjust its financial accounting in order to include the financial resources for investing in the carbon sinks and to restore the CO2 absorption capacity used in its "whole upstream value chain". It is a way to make firms internalize the externalities they generate.

[49] J-P. ROBÉ, The Shareholder Value Mess, cit., 24. M.P. PERALES VISCASILLAS, *Impacto de la lucha contra el cambio climático en el gobierno corporativo*, cit., 33-38. The author acknowledges the challenge posed by defining the social and environmental aspects that firms may incorporate into their corporate purpose. This difficulty arises from the ambiguity surrounding which specific elements should be included. Additionally, the blurred distinction between shareholders and other stakeholders further complicates matters, as it can lead to uncertainty regarding the rights and roles of each group within the firm and in relation to its business activities.

[50] The Prospectus Regulation: The long and winding road, cit., 13.

[51] *Ibidem*.

[52] See, for instance, Section 4A of Securities Exchange Act, or Article 7.7 of the Prospectus Regulation. An example is when the securities regulation establishes that issuers shall provide information in the prospectus concerning the value in money which the securities in offer might fetch in a transaction of buying and purchasing. Some authors hold that a mandatory disclosure, like the disclosure obligation established in the Prospectus Regulation, is an effective tool that can remedy asymmetry of information in public securities markets. J. C. COFFEE JR, *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, in *J Corp L* 1, 1999, no 25.

The initial premise is that transparency of all relevant information available regarding the financial promise and the issuer allow the investor to assess the liabilities, financial position, and prospectus of the issuer and of guarantors (if any), the rights attaching to the securities, the reasons for the issuance and other information that is included in the prospectus with the aim to make informed investment choices.[53]

The imposition of mandatory disclosure requirements on issuers has been an enduring pillar of regulation in this area for, at least, two main reasons. First, in the primary market, where the issuer sells securities to investors, disclosure of the prospectus by the issuer seeks to address the disparity of information between the issuer (and its advisors) and the investor. In other words, the mandatory disclosure model has been considered the correct model for correcting asymmetries of information between issuers and investors in primary markets.[54]

Second, access to relevant information about the opportunities and risks of the financial product will enable the investor to make an informed decision, reducing the risk of mis-selling of overvalued securities.[55]

Scholars who support the mandatory disclosure model assume that individuals who have access to all relevant information can make rational investment choices to maximize their economic returns[56] given that price reflect all available information and, consequently, provide equal access to relevant and *reliable* information.[57] Under this approach, price is the cornerstone to grant investor protection, and damage is measured taking into account adverse impact on price

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[53] Article 6(1) of the Prospectus Regulation.
[54] The Prospectus Regulation: The long and winding road, cit., 13.
[55] N. MOLONEY, EU securities and financial law, Oxford University Press, 2014, 54-59.
[56] J. C. COFFEE JR, *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, cit.,; J. C. COFFEE JR, *The impact of Enforcement?*, in *UPaLR*, 2007, no 156, 229; B. S. Black, The legal and Institutional Preconditions for Strong Securities Markets, in 48 UCLA LR 781 (2001) and R. La Porta, F. Lopez-de-Silanes, A. Shleifer, What Works in Securities Law?, in 61 J Fin 1 (2006).
[57] This is Fama's efficient markets hypothesis, according to which prices may reflect low market efficiency for information that is not yet available, medium efficiency refers to the availability of price to quickly integrate new information, and strong information refers to the ability of price to integrate all public, private and insider information. See E. F. FAMA, *Efficient Capital Markets: A Review of Theory and Empirical Work*, in 25 *Journal of Finance*, 1970, no 384. In the same vein, see F. H. EASTERBROOK and D. R. FISCHEL, *Mandatory Disclosure and the Protection of Investors*, cit., «The justification most commonly offered for mandatory disclosure rules is that they are necessary to 'pre- serve confidence' in the capital markets. It is said that investors, especially small and unsophisticated ones, withdraw their capital to the detriment of the markets and the economy as a whole when they fear that they may be exploited by the firms or better-informed traders. Disclosure rules both deter fraud and equalize 'access' to information, re- storing the necessary confidence».

deriving from misleading or false statements,[58] i.e., a misleading statement in the prospectus may generate a decline in, say the share price (in equity securities).

However, market efficiency and rationality of investors have been criticized for disregarding some fundamental elements that influence investment choices. For example, investors have heterogeneous expectations, investors do not share rational expectations, and asset pricing.

3. Misstatements under the EU securities regulations (II). "Sustainability-related misstatements" have an indirect impact on prices.

EU laws have incorporated international accounting standards on the basis of markets and price system the best suitable mode of economic exchange and asset valuation, bit environmental and social negative externalities remain unaccounted for because they do not affect prices, i.e., they are not considered part of the firm's assets, and therefore they are not "controlled" by the firm.[59]

Sustainability-related disclosure is driven by an increase interest on the part of the investment community who are interested in knowing the non-financial value created by the firm in which they invest,[60] and in investment products that explicitly seek to meet certain sustainability standards or achieve certain sustainability objectives.[61] Thus, The growth in the number of investment products that aim to pursue sustainability objectives impact on the access to financial capital because good sustainability reporting becomes a key element for firms whose securities are admitted to trading in regulated markets–acting as shareholders on behalf of third parties—.

The regulatory landscape governing corporate reporting and sustainability-related disclosures involves several interconnected EU regulations and directives and international standards.

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[58] M. RUBINSTEIN, *Rational Markets: Yes or No? The Affirmative Case*, in *Financial Analysts Journal*, 2001, vol. 57, no. 3, who hold that prices contain the critical value of stocks. BARBERIS and R. THALER, *A survey of Behavioral Finance*, in G.M. CONSTANTINIDES, M. HARRIS and R. STULZ (eds), *Handbook of Economics and Finance*, Elsevier, 2002, 1053.
[59] J-P. ROBÉ, The Shareholder Value Mess, cit., 16.
[60] G. STRAMPELLI, *L'informazione non finanziaria tra sostenibilità e profitto*, in *Analisi Giuridica Dell'Economia 1/2022*, 2022, 145-164.
[61] Recital 11 of the CSRD.

First, the Prospectus Regulation imposes disclosure requirements of relevant factors and risks for an issuer to be admitted to trading of securities on a regulated market.[62] This should include sustainability-related risks if the issuer, and their management body, deemed those risks relevant for the investor.[63]

3.1 Protected legal interest under the disclosure regime.

3.1.1 Non-financial reporting directive (NFRD): sustainability-related risks qualify as non-financial information.

Securities regulations, as part of capital markets law, are connected to other fields of law. Among them, accounting regulation, corporate law and insolvency are some of the most important. In the context of sustainable finance, accounting regulations have influenced the evolution of the legal interest covered by transparency regulations. This change, in turn, impacts liability for non-compliance with transparency rules, as "non-financial information" is now included as a relevant element for companies that fall under the scope of accounting regulations.

Accounting law is highly harmonized at EU level, and there is a coordination effort between the EU and international accounting standards organization to develop international accounting standards with the aim to create a common framework for financial market participants.[64] The Accounting Directive[65] requires firms to disclose financial statements that provide a fair review of the firm's development, performance, and position.

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[62] Article 6 of the Prospectus Regulation.

[63] Recital 54 of Prospectus Regulation.

[64] N. MOLONEY, *EU securities and Financial Law*, cit., 49-53.

[65] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives (hereafter Accounting Directive).
According to the Accounting Directive, firms shall provide a "fair review" of the development of the business and of its position in the management reports, but non-financial "key performance indicators" relevant to the particular economic activity of the firm, including environmental and employee matters, shall be integrated financial reporting together with the (mandatory) financial aspects of the firm's business "where appropriate". Thus, "where appropriate" may require setting out in the account non-financial information in accordance with a prudent valuation relying on historical data of actual adverse impacts to avoid understating of losses or overstating of profits.

According to the Accounting Directive, regulated firms are obligated to publish annual financial statements and consolidated financial statements, encompassing balance sheets, profits and losses, and notes to the financial statements.[66] As a result, management bodies, at both entity level and consolidated levels, bear the responsibility for drawing up and publishing the annual financial statements and management reports,[67]. involving estimates, judgements and models that will generate the financial statements and meet the financial reporting obligation.

In disclosing annual financial statements in their management reports firms shall provide a "fair review" of the development of the business and of its position in the management reports, but non-financial "key performance indicators" relevant to the particular economic activity of the firm, including environmental and employee matters,[68] shall be integrated financial reporting together with the (mandatory) financial aspects of the firm's business "where appropriate". Thus, "where appropriate" may require setting out in the account non-financial information in accordance with a prudent valuation relying on historical data of actual adverse impacts to avoid understating of losses or overstating of profits.[69]

The fair view is a general principle that requires firms to disclose true information about the company's assets, liabilities, financial position, and profit or loss.[70] This fair view will be reflected in the price of the assets and liabilities.

The Court of Justice of the EU interpreted in *GIMLE* and *Tomberger* the true and fair view principle as making prudent valuations,[71] where the concept of prudent valuation related to the principle of purchase price or production cost,[72] i.e., the valuation of the assets relies on

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[66] Article 4(1) of the Accounting Directive.

[67] Recital 40 of the Accounting Directive states that: «Members of the administrative, management and supervisory bodies of an undertaking should, as a minimum requirement, be collectively responsible to the undertaking for drawing up and publishing annual financial statements and management reports. The same approach should also apply to members of the administrative, management and supervisory bodies of undertakings drawing up consolidated financial statements».

[68] Article 19(1), third paragraph of the Accounting Directive.

[69] Article 6(1)(c)(i) and (ii) of the Accounting Directive.

[70] Article 4(3) of the Accounting Directive. See case C-322/12 GIMLE [2013] EU:C:2013:632, para 30 and the case-law cited (hereafter GIMLE).

[71] GIMLE, cit., para 33.

[72] See Non-Paper of Commission Services DG FISMA, Meeting of the Accounting Regulatory Committee (Arc), Agenda Item Vannex – General Principles of the Accounting Directive, 2015, https://finance.ec.europa.eu/system/files/2017-01/2016-06-27-true-and-fair-view_en.pdf.

historical costs rather than the real value of assets,[73] taking into account all elements – profits made, charges, income, liabilities and losses – which actually relate to the financial year in question.[74]

The court has not ruled on the use of an accounting method that includes non-financial information. The Court of Justice noted that there are not EU rules specifically applying to the method and evaluation criteria to meet the fair view principle,[75] and has accepted approaches prioritizing substance over form which consider all relevant factors aligning with market conditions and the annual accounts accurately represent the company's assets, financial position, and profit/loss.[76] In *Wagram* the Court of Justice recognized that the method under consideration, recognizing both the present value of the asset and imputed interest, was deemed consistent with the true and fair view principle, arguing that this approach prioritizes substance over form and considers all relevant factors, aligning with market conditions and finance charges.[77]

In *DE + ES Bauunternehmung* the Court of Justice connects the principle of prudence with the principle of reliability. It stressed that the principle of true and fair view requires accounts to reflect the activities and transactions which they are supposed to describe, and that the accounting information be given in the form judged to be the soundest and most appropriate for satisfying third parties' needs for information without harming the interest of the company.[78]

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[73] GIMLE, cit., paras 34-35, and C-306/99 BIAO [2003] ECLI:EU:C:2003:3, para 123.
[74] C-234/94 Tomberger v Gebrüder von der Wettern [1996] ECLI:EU:C:1996:252, para 22.
[75] Case C-275/97 DE + ES Bauunternehmung [1999] EU:C:1999:406, para 40 (hereafter DE + ES Bauunternehmung) : those provisions should be determined «under the conditions laid down by the national legislation of the various Member States», provided that «the annual accounts give a true and fair view of the assets, financial position and the profit or loss of the company and that the provisions do not exceed in amount the sums which are necessary».
[76] For example, case C-640/18 Wagram Invest SA v Belgian State [2020] ECLI:EU:C:2020:293. The referring court's answered whether in the case of a public limited company acquiring a financial fixed asset through long-term, interest-free instalments, similar to a loan, the true and fair view principle outlined in Article 2(3) of Directive 78/660 allows for an accounting method. This method involves recording the purchase price in the balance sheet as an asset, deducting a discount related to a non-interest-bearing debt becoming due after one year, and entering the discount as a charge in the profit and loss account. The true and fair view principle requires annual accounts to accurately represent the company's assets, financial position, and profit/loss. Consequently, the true and fair view principle does not prohibit this accounting method.
[77] case C-640/18 Wagram Invest SA v Belgian State, ECLI:EU:C:2020:293, paras 30-42.
[78] Case C-275/97 DE + ES Bauunternehmung, cit., paras 27 and 40. Thus, the Court concluded that in the absence of specific Community rules guiding the evaluation of provisions for charges and liabilities, national legislation in Member States should determine these provisions. A consolidated provision for all such potential liabilities should be established when a comprehensive valuation is the most suitable method to accurately reflect the expenditure under 'Liabilities' for a true and fair view. However, this is conditional upon the annual accounts

The Court of Justice's interpretation in previous cases has expanded the fair value principle's scope to include "all relevant factors aligning with market conditions" or to permit the use of an accounting method that involves recording a discount for a non-interest-bearing debt becoming due after one year in the profit and loss account.

However, redirecting capital flows towards long-term, sustainable investments necessitates the integration of sustainability considerations into financial assessments and risk management valuations, which are mainly forward-looking considerations. As a result, potential future disputes may necessitate a fresh evaluation of fair value by the Court of Justice. This would determine whether non-financial considerations, particularly environmental and social information (primarily forward-looking considerations), should be included in the assessment, the extent to which they should be considered, and the degree of risk assumed by the issuer.

Under the NFRD sustainability-related considerations still did not qualify as financial risks. Otherwise, they qualify as "non-financial information" there is still ambiguity regarding the extent to which and how environmental and social information (especially forward-looking considerations) should be factored into accounting assessments.[79]

The Non-Financial Reporting Directive (NFRD),[80] amending the Accounting Directive, was the first legal instrument at EU level that imposes to large companies and public interest companies to disclose non-financial information in management reports. It aimed to integrate coordination measures that shall apply to the laws, regulations, and administrative provisions of the Member States.[81] The NFRD builds upon the Accounting Directive, enhancing "responsible business operation" for large companies in relation to environmental, social, and human rights impacts.[82]

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offering a true and fair representation of the company's assets, financial position, and profit or loss, and the provisions not surpassing the necessary amounts.

[79] Some authors have raised doubts as to the ability of financial accounting information to serve as an optimal instrument for a prognosis on future firm's performance in the current framework reorienting capital flows towards long-term investments require that disclosure reflect information on sustainability issues.

[80] 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 and diversity information by certain large undertakings and groups Text with EEA relevance (hereinafter NFRD).

[81] Article 1 of NFRD.

[82] See CEPS' Study on the Non-Financial Reporting Directive, prepared for the European Commission to support the review of the NFRD, November 2020, available at https://op.europa.eu/en/publication-detail/-

Firstly, a distinction between the Accounting Directive and the NFRD lies in the concept of "fair review" of the information disclosed by companies required to do so. While the Accounting Directive requires accounting information to reflect an accurate picture of the company's development, performance, and position, the NFRD goes further by incorporating "the impact of [business] activity."[83]

Secondly, the NFRD, as well as the Accounting Directive, did not provide a definition of non-financial information. The Accounting Directive[84] in its Article 19 relates the disclosure of non-financial information to "key performance indicators", including information relating to "environmental and employee matters",[85] but without providing further guidance as to what key performance indicators should be used and how to disclose them.

The NFRD integrates a comply-or-explain obligation requiring firms to produce a non-financial statement into the management report.[86] In addition, the NFRD expands the number of matters that qualify as non-financial information to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption, and bribery matters.[87]

The NFRD introduces for the first time an obligation to report "non-financial statements" besides financial statements, on a comply or explain basis, extending this duty to large undertakings.[88] As a result, managers and directors of firms subject to NFRD must report on environmental, social and employee matters, respect for human rights, anti-corruption and

/publication/1ef8fe0e-98e1-11eb-b85c-01aa75ed71a1/language-en. The NFRD applied on approximately 12 000 companies.

[83] Article 19(a)(1) of the NFRD.

[84] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance (hereinafter Accounting Directive).

[85] Article 19(1), third paragraph of the Accounting Directive.

[86] Article 19a (1), second paragraph, states that if the undertaking does not pursue the policies in relation to the non-financial matters (environmental, social and employees matters, respect for human rights, anticorruption, and bribery matters), the non-financial statement "shall provide a clear and reasoned explanation for not doing so".

[87] Article 19a (1) of the NFRD.

[88] i.e., «exceeding on their balance sheet dates the criterion of the average number of 500 employees». See Article 19 of the NFRD.

bribery matters, or justified why those considerations do not reflect the fair review of the firm's development, position, condition and its activity impact.[89]

The same provision seems to require the integration of forward looking information about risks: the non-financial statement shall include the principal risks related to non-financial considerations linked to the firm's operations and " where relevant and proportionate" its "business relationships, products or services" which are "likely to cause" adverse impacts in those areas, and how the firm manages those risks.[90] This entails the proportionality assessment of the materialization of principal risks of potential or actual severe impacts, considering their scale and gravity and disclose information on the identified risks and how the firm manages those risks.[91]

The disclosure obligation under the NFRD constitutes a procedural due diligence obligation. This means that the non-financial statement shall include a description of the policies, principal risks identified and how the firm manages those risks and non-financial key performance indicators.[92] In other words, undertakings shall exhibit that they set in motions the policies on those matters or include an explanation for not doing so.[93]

As a result, the effectiveness of NFRD may be limited if certain companies, from which users seek sustainability information, either do not disclose such information or, in cases where it is disclosed, fail to provide all relevant details.[94] Moreover, even when sustainability information is reported, it tends to lack the required level of reliability and comparability between different companies due to, at least in part, to the lack of a common and harmonized reporting framework

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[89] Matters cover under Article 19a of the NFRD are: «(a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented; (c) the outcome of those policies; (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; (e) non-financial key performance indicators relevant to the particular business».

[90] Article 19a(1)(d) of the NFRD.

[91] Recital 8 of the NFRD.

[92] Article 19a (1) of the NFRD.

[93] Article 19a (1), second paragraph of the NFRD.

[94] This was also noted by the European commission in the Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC, and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final (CSRD). Recital 13 of the Proposal for CSRD stressed the NFDR's concomitant evaluation of corporate reporting and revealed issues pertaining to the efficacy of the NFRD due to numerous enterprises failed to divulge pertinent data concerning all principal sustainability-related matters, such as climate-related information and all GHG emissions, and factors that affect biodiversity.

and enforcement mechanisms to ensure an adequate and proportionate integration of non-financial risk.[95]

In situations where an investor claims that the information contained in the management report is false information or the omission of material non-financial information in the management report included in the prospectus or in the periodic information disclosed to the market, the courts would proceed to examine whether the obligation to disclose the policies implemented by the issuer has been complied with. If such policies exist, the proportionality of the measures taken would be assessed. In order to carry out this assessment process effectively, it is essential to have a benchmark against which the proportionality analysis conducted by the issuer can be compared and assessed.

To facilitate useful and comparable disclosure of non-financial information, the NFRD offers a partial solution. It confers the European Commission powers to develop non-binding guidelines on methodology for reporting, including non-financial key performance indicators, general and sectoral.[96] These "key performance indicators" shall be disclosed too in the non-financial statement[97] and include non-financial information to "at least" environmental matters, social and employee-related matters, respect for human rights, anti-corruption, and bribery matters.[98]

The Commission, taking into account current best practices, international developments and the results of related Union initiatives issued the Guidelines on non-financial information in 2017,[99] and after a consultation by ESMA requiring a more stringent set of requirements, the

[95] *Ibidem*.
[96] Article 2 of the NFRD.
[97] Articles 19a(1)(e) and 29a(1)(e) of the NFRD.
[98] Recitals 6 and 7 of the NFRD. Non-financial statements shall include, in terms of environmental matters, information about the current and anticipated impacts of the undertaking's operations on the environment, health, and safety, as well as details on energy use, greenhouse gas emissions, water consumption, and air pollution. For social and employee-related matters, the statement may cover actions taken for gender equality, adherence to International Labour Organisation conventions, working conditions, social dialogue, workers' rights, health and safety, and engagement with local communities. Concerning human rights, anti-corruption, and bribery, the non-financial statement could include information on efforts to prevent human rights abuses and measures in place to combat corruption and bribery.
[99] Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) C/2017/4234 OJ C 215 (hereafter EU's 2017 Guidelines on reporting climate-related information). The Guidelines refer to the preliminary analysis referenced in Annex I of the EMAS Regulation (Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 http://eur-lex.europa.eu/legal-content/EN/TXT/? uri=CELEX:32009R1221).

Commission issued its Guidelines on reporting climate-related information to supplement the 2017 Guidelines.

The EU's 2017 Guidelines on reporting climate-related information provided non-binding guidelines, which did not create new legal obligations but aimed "to help companies disclose" high quality, relevant, useful, consistent and more comparable non-financial (environmental, social and governance-related) information (2017 Guidelines).[100] The approach of the Guidelines was lenient and broad,[101] and as noted by ESMA several factors contributed to the limited used of the Guidelines by issuers, such as the extensive requirements in the Guidelines by comparison to the minimum required by the NFRD, and the non-binding nature of the Guidelines, it is unlikely that they will trigger a significant shift in the direction of more comparability and enforceability of the non-financial disclosures.[102]

Since the Guidelines did not provide guidance on how to comply with the reporting framework, large companies subject to the NFRD should choose between several reporting frameworks which provide different reporting standards, such as the Global Reporting Initiative (GRI),[103] the Sustainability Accounting Standards Board (SASB),[104] Climate Disclosure Standards Board (CDSB),[105] Carbon Disclosure Project (CDP)[106] or Integrated Reporting (IR).[107] This

[100] Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) C/2017/4234 OJ C 215 (hereafter EU's 2017 Guidelines on reporting climate-related information).
[101] For example, in relation to the assessment of "material non-financial information", the Guidelines provides that To assess the materiality of information, the Guidelines include some factors that companies should be taken into account: (1) the company's business model, strategy and principal risks, including "company's goals, strategies, management approach and systems, values, tangible and intangible assets, value chain and principal risks"; (2) the relevant considerations, interests, concerns and expectations of relevant stakeholders, and the impact of their activities (e.g., "a company producing mineral water may consider specific measures taken to protect the hydric resources it relies upon") and how they respect human rights, including supply chain aspects; and (3) public policies and regulation that may affect the company.
[102] ESMA, *Ref: Revision of the European Commission's Non-Binding Guidelines on Non-Financial Reporting, ESMA32-334-109*, 2019, https://www.esma.europa.eu/sites/default/files/library/esma32-334-109_comment_letter_on_revision_of_ec_nbg_on_non-financial_reporting.pdf.
[103] GRI, *Why Report?,* https://www.globalreporting.org/how-to-use-the-gri-standards/.
[104] SASB Standards, https://sasb.org/standards/download/. These standards are part of the IFRS foundation. The SASB Standards have inspired the development of the European Sustainability Reporting Standards (ESRS) by EFRAG and there is coordination in fulfilling the requirements of IFRS Sustainability Disclosure Standards, cit.
[105] Climate Disclosure Standards Board, https://www.cdsb.net.
[106] CDP, Guidance for Companies, https://www.cdp.net/en/guidance/guidance-for-companies.
[107] Integrated Reporting, *International <IR> Framework*, 2021, https://integratedreporting.ifrs.org/wp-content/uploads/2021/01/InternationalIntegratedReportingFramework.pdf.

situation contributed to increase the uncertainty as the lack of uniform reporting framework hampers the reliability and comparability between issuer's disclosure.[108]

Among the above-mentioned standards, the SASB Standards are important guidance in the EU and play a fundamental role in the creation of harmonized binding standards. The 2002 IAS Regulation[109] required issuers admitted to trading on a regulated market be presented in accordance with international accounting standards, i.e., International Accounting Standards (IAS), International Financial Reporting Standards (IFRS), and the amendments to those standards and future standards adopted by the international Accounting Standard Board (IASB).[110] Therefore, in accordance with the 2002 IAS Regulation's requirements, the SASB's IFRS sustainability-reporting standards will be adopted and used in the EU once they are endorsed by the European Commission.[111] In doing so, the European Commission assess if the standards meet two requirements: (1) the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management, and (2) the standards are not contrary to the accounting principle of "fair view",[112] and conducive to the "European public good", where the concept "European public good" is not defined.[113]

3.1.2 From NFDR to Corporate Sustainability Reporting Directive (CSRD): sustainability risks qualify as financial risk.

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[108] ESMA, *Response to public consultation. ESMA response to the European Commission consultation on the review of the NFRDP*, 2020, 6, https://www.esma.europa.eu/sites/default/files/library/esma32-334-245_response_to_ec_consultation_on_revision_of_nfrd.pdf.

[109] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (hereafter 2002 IAS Regulation).

[110] Article 2 of the 2002 IAS Regulation.

[111] Article 3 of the 2002 IAS Regulation.

[112] *Ibidem*.

[113] From a policy angle, see EGRAG, *IFRS Endorsement Criteria in Relation to IFRS 9*, Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, IP/A/ECON/2015-14, 2015, https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563460/IPOL_STU(2015)563460_EN.pdf. In 2016 the European Parliament urged the Commission, along with EGRAG, to ensure that accounting standards adhere to the "public good" criterion, safeguarding financial stability and supporting EU economic development. It calls for clear guidelines on the interpretation of 'public good' and the 'true and fair view' principle, based on European Court of Justice case-law and the Accounting Directive. See European Parliament (2018). International Accounting Standards (IAS) evaluation European Parliament resolution of 7 June 2016 on International Accounting Standards (IAS) evaluation and the activities of the International Financial Reporting Standards (IFRS) Foundation, the European Financial Reporting Advisory Group (EFRAG) and the Public Interest Oversight Board (PIOB) (2016/2006(INI)) (2018/C 086/03), 5, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IP0248.

The Corporate Sustainability Reporting Directive (CSRD) will replace the NFRD. It goes one step further towards the integration of sustainability risks into the management and reporting of firms operating in the EU. The CSRD on sustainability reporting aims to (1) help companies identify their own sustainability risks and opportunities stemming from their economic activities; (2) enhance firms' reputation by improving dialogue between firms and stakeholders; and (3) create sustainability reporting standards that make it possible for target firms to provide relevant, coherent, and sufficient information that reduce ad hoc requests for information.

In addition, the CSRD integrated notable changes to the EU rules on reporting of non-financial information. First, the CSRD expands the sustainability reporting requirements to additional categories of firms (undertakings) beyond large public-interest with over 500 employees.[114]

Second, the CSRD defines sustainability-related risk as a category of financial risk. The CSRD goes a step further from the NFRD as it incorporates the "double materiality" standard, emphasizing sustainability considerations as factors that may contribute to financial risks. This double materiality standard is further developed in the European Sustainability Technical Standards (ESTS) by EFRAG.[115]

The sustainability-reporting obligation does not impose substantive duties on companies or explicitly refer to the directors' duty of care and duty of loyalty, although indirectly mandate boards to align corporate strategy with climate change and non-financial considerations. In this regard the CSRD imposes a procedural due diligence obligation and requires corporations:[116] (1) to set up due diligence processes, indicating how sustainability matters are incorporated into the due diligence process;[117] (2) to *identify*, *prevent*, *mitigate*, *remediate* or *bring* an end to actual or potential adverse impacts connected with the firm's own operations and with its value chain,[118] and the result of such actions,[119] and (3) to describe administrative, management

[114] As outlined in Articles 19a and 29a of Directive 2013/34/EU
[115] EFRAG, *Public consultation on the first set of Draft ESRS*, https://www.efrag.org/lab3.
[116] Article 19a and 29a of the CSRD.
[117] In doing so, where applicable, firms shall take into account the "Union requirements on undertakings to conduct a due diligence process".
[118] Article 19a(2)(f) of the CSRD.
[119] «Including its products and services, its business relationships and its supply chain, actions taken to identify and monitor those impacts, and other adverse impacts which the undertaking is required to identify pursuant to other Union requirements on undertakings to conduct a due diligence process».

and supervisory bodies' tasks with regard to sustainability matters, as well as "their expertise and skills" in these matters or the access such bodies have to such expertise and skills".[120]

Under the CSRD, all large undertakings and undertakings (excluding micro undertakings) with securities traded on a regulated market in the EU shall report sustainability information.[121] The restriction of exemptions for public-interest entities under Article 40 of the Accounting Directive does not apply, and such entities should not be treated as large undertakings for sustainability reporting purposes. Small and medium-sized undertakings with securities traded on a regulated market, categorized as public-interest entities, may use sustainability reporting standards for their size.[122]

The discipline of sustainability reporting goes beyond the boundaries of regulatory transparency, affecting the basic elements of company and corporate law, such as the company's interest and the pursuit of this interest by the company's management bodies. Establishing a well-designed framework for sustainability reporting is essential for injecting substance into discussions surrounding corporate purpose or, alternatively, the divide between stakeholders and shareholders.[123]

Second, the lack of a sufficiently harmonized non-financial disclosure regime poses a significant obstacle to creating a shared classification system for sustainable activities may exacerbate greenwashing, implementing a comprehensive and standardized approach to non-financial reporting is vital to curbing misleading practices and ensuring transparency in the realm of sustainability.[124]

[120] Article 19a(2)(c) of the CSRD.
[121] Article 19a and 29a of the CSRD.
[122] The undertakings falling under the extended reporting requirements must also comply with Article 8 of the Taxonomy Regulation, which refers to the reporting obligations envisaged in Articles 19a and 29a of Directive 2013/34/EU.
[123] G. BALP and G. STRAMPELLI, *Institutional Investors as the Primary Users of Sustainability Reporting*, in KERN ALEXANDER, MICHELE SIRI and MATTEO GARGANTINI (eds), *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance*, Cambridge University Press, 2023. See also G. STRAMPELLI, L'informazione non finanziaria tra sostenibilità e profito, cit., 145-164.
[124] G. BALP and G. STRAMPELLI, *Institutional Investors as the Primary Users of Sustainability Reporting*, cit. See also G. STRAMPELLI, L'informazione non finanziaria tra sostenibilità e profito, cit., 145-164.

Finally, the CSRD, while not imposing substantive obligations on firms, the Council proposed amendments to the proposal for Corporate Sustainability Due Diligence Directive (CSDDD)[125] in order to align it as much as possible to the CSRD. Nonetheless, the final version of the CSDDD, while interconnected with the CSRD, diverges in its scope. Whereas the CSRD endeavours to establish a unified sustainability reporting framework encompassing enterprises of varying sizes, the CSDDD seeks to institute a duty of due diligence upon firms and their governing bodies. This duty entails the identification, mitigation, or prevention of adverse environmental or human rights impacts stemming from the economic operations of the firm.

Nonetheless, both directives are linked too. The CSRD requires, as part of the transparency obligation, that firms disclose their due diligence processes to address sustainability-related risks and factors. The CSDDD aims to imposing a mandatory due diligence obligation on firms and their corporate managers to reduce the negative impact on environment and human rights resulting from the economic activity of the firm and vice versa, in line with the "double materiality" principle envisaged in the CSRD.[126]

This connection highlights the comprehensive regulatory framework aimed at integrating sustainability considerations into corporate governance and reporting practices.

As regards the CSDDD, during the legislative procedure and voting for the Directive, the European Parliament tried to integrate a specific obligation for financial firms and to extend the due diligence obligations to directors and managers.[127] The Council opposed the Commission's proposal and the European Parliament's negotiating position.[128]

[125] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final (Proposal for CSDDD).

[126] The trilogue is ongoing and the Commission, parliament and Council are drafting the final agreement which is expected by April 2024.

[127] Article 25 of the Proposal for CSDDD, cit. See also European Parliament, *Amendments(1) adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 –2022/0051(COD)*, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html. (Hereafter EP's position on the proposal for CSDDD).

[128] Council of the EU, Council adopts position on due diligence rules for large companies, https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/. (Hereafter Council's position on the proposal for CSDDD).

3.2 Sustainability materiality test and price-related criteria:

3.2.1 Materiality test

Article 6 of the Prospectus Regulation establishes that a prospectus "shall contain the necessary information which is material to an investor" depending on the "nature" and "circumstances" of the issuer and the "type" of securities, which is "material to an investor" for making an informed assessment of (1) the assets, liabilities, profits and losses, and the financial position of the issuer as well as the "prospects of the issuer and of any guarantor"; (2) the rights attaching to the securities; and (3) the reasons for the issuance and its impact on the issuer.

In addition, Article 16 of the Prospectus Regulation states that issuers "shall assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact" (emphasis added.) Article 11(2)(a) states that national civil liability attaches to the person responsible for the prospectus when this is "misleading, inaccurate or inconsistent" or, as clarified in paragraph (b) when the prospectus lacks to provide "key information in order to aid investors when considering whether to invest in the securities" (emphasis added.)

A breach of the disclosure obligation under the Prospectus Regulation requirements constitutes an unlawful act that is imputable to the person responsible for the content of the prospectus.

International accounting organizations, such as the Financial Accounting Standards Board (FASB), the Sustainability Accounting Standard Board (SASB), and the International Accounting Standards Board (IAB), have provided a definition of "materiality" for firms and clear standards for disclosures.

The FASB defines materiality as "[i]nformation is material if omitting it or misstating it could influence decisions that users make on the basis of the financial information of a specific reporting entity."[129]

[129] FASB, *Statement of Financial Accounting Concepts No. 8: Conceptual Framework For Financial Reporting* , 2010, 17, http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176157498129&acceptedDisclaimer=true.

3.2.2 Sustainability Financial Disclosure Regulation (SFDR): sustainability risks as a material negative impact on the "value" of an investment

The SFDR is addressed to financial intermediaries, i.e., financial market participants and financial advisers, to offer them a transparent framework where different financial products can be compared and avoid misleading information when an investment is promoted as sustainability when in reality, they exacerbate greenwashing.[130] Indeed, the preamble of the SFDR relates it to the sectoral legislation that govern financial intermediaries' manufacturing of financial products or provision of investment advice.[131] They are also subject to the disclosure requirements envisaged in the SFDR to inform investors about how the product is designed to achieve sustainability goals.[132]

Under the SFDR, financial market participants offering "sustainable financial products" shall assess the relevance of the sustainability risks and disclose (1) *how* the financial market participant integrates the risks into their investment decisions, and (2) the outcomes of the assessment of potential impacts of sustainability risks in the financial returns of the financial product in offer.[133] These risks are integrated into investment decisions following a comply or explain approach. Thus, if sustainability-related risks *deemed "irrelevant"*, the financial market participant must provide the reasons therefor. The relevance of irrelevance of sustainability-related risk is a matter of business judgement.[134]

This standard applies for general pre-contractual disclosures of regular products (article 6 of the SFDR),[135] and to disclosures for financial products that explicitly promote environmental

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[130] Article 1 of the SFDR. See also D. BUSCH, *EU Sustainable Finance Disclosure Regulation*, in *Capital Markets Law Journal*, 2023, Vol 18, Issue 3, 303–328, https://doi.org/10.1093/cmlj/kmad005.
[131] Recital 7 of the SFDR.
[132] R. VEIL(ed), *European European Capital Markets*, cit., 434.
[133] Article 6 of the SFDR.
[134] Recital 15 of the SFDR: "This Regulation seeks to achieve more transparency regarding how financial market participants and financial advisers integrate sustainability risks into their investment decisions and investment or insurance advice. Where the sustainability risk assessment leads to the conclusion that there are no sustainability risks deemed to be relevant to the financial product, the reasons therefor should be explained." (Emphasis added). However, for offerings made through the publication of a Prospectus, relevant or material "sustainability-related" risks shall be disclosed under Article 6.
[135] These products are called "grey products" because they do not promote sustainable investment or pursue sustainable objectives. Nonetheless these products are subject to the comply or explain obligation to report on sustainability risks. See

or social features, or a combination of both (article 8 of the SFDR),[136] as well as those with sustainable investment objectives and a designated benchmark (article 9 if the SFDR).

The disclosure obligation serves as a regulatory mechanism intended to "encourage" institutional investors to consider sustainability risks but adopts a suggestive tone in relation to the fiduciary duties of financial market participants that confer investment firms' discretion and lack an enforcement mechanism for misleading information or greenwashing disclosure.

For financial products that explicitly promotes environmental or social characteristics, or a combination of both,[137] pre-contractual information must describe how the promoted environmental or social characteristics align with the sustainability risks embedded in investment decisions, including any designated reference benchmark. Likewise, for financial products with sustainable investment objectives and a designated index, the financial market participant should disclose how the designated index aligns with the objective and its specificities compared to a broad market index.

The reference to an index provides certain objective benchmark for comparison of financial products, the assessment of sustainability risks remains subjective. Financial market participants must exercise business judgement to determine the relevance or irrelevance of the sustainability risks and adverse effects on financial returns, which introduces an element of subjectivity in the assessment.

For products that do not fall within the category of article 8 or 9, the financial intermediary offering or advising about the securities shall assess the "relevance" or irrelevance of the risks linked to the securities and the suitability and appropriateness of the product. This obligation is based on a comply or explain basis and the disclosure information will depend on the financial market participant's discretion. If deemed relevant, they shall be disclosed in the pre-contractual disclosure, e.g., a prospectus, how it takes sustainability risks into account when making investment decisions. Thus, if sustainability risks are deemed irrelevant by the financial intermediary, it shall give reasons explaining thereof.

[136] Article 8 of the SFDR. These products are called "light green".
[137] *Ivi*, these products are called "dark green".

The disclosure of corporate information and risks associated with offered securities (under the SFDR and the Prospectus Regulation), along with the formulation of engagement policies (under the SRD II) and corporate disclosures (under the CSRD and NFRD), fall within the realm of regulatory compliance, and complemented by other international soft law instruments, such as the ISSB IFRS Sustainability-related financial information standards and Climate-Related disclosure standards.[138] But the evaluation of the information to be disclosed – specifically, determining material risks, liabilities, or making forecasts—entails a matter of business judgement.[139]

While business judgment is insufficient to justify breaches of fiduciary duties or non-compliance with transparency obligations, the ex post examination of board's investment or strategic decisions, subject to the board's discretion and their proportionality analysis, complicates the demonstration of non-compliance. Similarly, an increase in transparency does not guarantee the effective management of non-economic risks, especially when the risk analysis remains inherently subjective.

3.2.3 CSRD and EFRAG reporting criteria and international standards.

The connection between the material element and sustainability has been established by relevant sustainability Standards. The concept of materiality sustainability, which is associated with risk factors of financial instruments other than conventional financial risks, is relatively new.

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[138] See IFRS Sustainability-related financial information standards, cit., paras 5-7 (governance), 24-25 (risk management).

[139] For example, both SRD I and SRD II encourage shareholders to actively exercise their voting rights, boards retain significant discretion in interpreting shareholder resolutions and assessing their relevance. Boards may decide that certain resolutions do not address a "significant policy issue" for the firm. This has been endorsed by some national courts inside the EU and outside the EU. For instance, the German District Court of Braunschweig Courts has to rule in *Church of England Pensions Board and others v. Volkswagen AG* whether boards have power to not disclose climate change-related information on lobbying activities and to give reasons as to how these activities help reduce risks for the group of companies from climate change while contributing to the Paris Accord's goals. See Church of England Pensions Board and others v. Volkswagen AG (pending), https://climatecasechart.com/non-us-case/church-of-england-pensions-board-and-others-v-volkswagen-ag/.
In Australia, *ACCR v Commonwealth Bank of Australia* the Courts of Appeal ruled that shareholders do not have the authority to propose resolutions that "intrude" on the management of a company. In both cases, minority shareholders' claim was on the basis of an unlawful intent to influence the board's climate-related strategy and the court suggested the shareholders to change the company's constitution to allow so. See Australasian Centre for Corporate Responsibility (ACCR) v Commonwealth Bank of Australia [2015] FCA 785; 325 ALR 736 (1).

Both the ISSB S1 on sustainability-related disclosures and the European Financial Reporting Advisory Group (EFRAG) have addressed the concept of materiality, but from different perspectives.

The ISSB, operating under the International Financial Reporting Standards (IFRS) Foundation, responded to the demand for more transparent, reliable, and comparable reporting on sustainability-related financial information.[140] The ISSB's inaugural general sustainability standard, encapsulated in IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, adopts an approach where materiality is assessed solely at the issuer level. ISSB S1 focuses on material sustainability risks and opportunities that may impact the "purpose of the entity" (outside-in approach or single approach). These standards highlight the importance of the primary users, i.e. the recipients of sustainability reports.[141]

In contrast to the ISSB's standards, the European Financial Reporting Advisory Group (EFRAG) follows a double materiality standard, considering the impact of an investment on the environment. EFRAG's European Sustainability Technical Standards (ESTS) recognise the interrelationships between the financial and impact dimensions, and that impact can be material from both perspectives.[142] Double materiality has two dimensions: impact materiality[143] and

[140] The ISSB released the exposure drafts, ED/2022/S1, https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf, and ED/2022/S2, https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-appendix-b.pdf. These exposure drafts were crafted to meet the needs of primary users seeking enhanced insights into a firm's value. Following a thorough process, the ISSB finalized these drafts in June 2023, and they now serve as the foundation for the ISSB, *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*, https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements/, (hereafter IFRS Sustainability-related Financial Information or IFRS Sustainability Disclosure Standards), and ISSB, *IFRS S2 Climate-related Disclosures* https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/ (hereafter IFRS Climate-related disclosures). (Hereafter, together, IFRS Sustainability Disclosure Standards).

[141] E.g., IFRS Sustainability-related Financial Information, cit.

[142] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards C/2023/5303 (hereafter ESTS).

[143] See ESTS, cit., section 3.4. Impact materiality is defined by the ESTS as: «sustainability matter is material from an impact perspective when it pertains to the undertaking's material actual or potential, positive, or negative impacts on people or the environment over the short-, medium- or long-term. Impacts include those connected with the undertaking's own operations and upstream and downstream value chain, including through its products and services, as well as through its business relationships. Business relationships include those in the undertaking's upstream and downstream value chain and are not limited to direct contractual relationships… impacts on people or the environment include impacts in relation to environmental, social and governance matters». (Emphasis added).

financial materiality.[144] A sustainability matter is material under the ESTS[145] if it means the criteria defined for impact materiality, or financial materiality, "*or both*".[146] The ESTS shall be taken into account by those firms governed by the sustainability reporting obligation established in the CSRD.

The review of materiality under EFRAG's ESTS will require assessing "double materiality", taking into account the definition of "impact materiality" and "financial materiality", which are defined in the ESTS as follows:[147] impact materiality refers to the significance of a sustainability issue in terms of the actual or potential impacts, positive or negative, of the firm's own operations, its entire value chain (upstream and downstream), products, services and business relationships on people or the environment in the short, medium and long term.

Financial materiality covers significance from a financial perspective, determined by the financial effects it may trigger for the firm. This includes risks or opportunities that could significantly influence the company's development, financial position, financial performance, cash flows, access to finance or cost of capital in the short, medium, or long term. Financial materiality extends beyond matters within the control of the company, encompassing information about material risks and opportunities arising from business relationships beyond the scope of consolidation used in the preparation of the financial statements.

Therefore, double materiality encompasses disclosure of technical accounting (financial materiality) and socio-economic and environmental factors and risks (impact materiality) that are technical but non-financial (or not purely financial) elements for which price-based tool can provide limited information.[148]

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[144] See ESTS, cit., section 3.5, Financial materiality is defined as is "[t]he financial materiality assessment corresponds to the identification of information that is considered material for primary users of general-purpose financial reports in making decisions relating to providing resources to the entity. In particular, information is considered material for primary users of general-purpose financial reports if omitting, misstating or obscuring that information could reasonably be expected to influence decisions that they make on the basis of the undertaking's sustainability statement." (Emphasis added).

[145] In the ESTS, cit., the definition of double materiality is detailed and technical by comparison to the definitions enshrined in other standards. The definition of (single) materiality is comprehensive a technical under the IFRS S1 too. The GRI Standards provide a very general definition of material impact as merely indicating that material impact includes potential economic, environmental, or human rights impacts.

[146] See ESTS, cit., Section 3.2.

[147] ESTS, cit., Section 3.5.

[148] ESTS, cit., Section 3.3.

They require firms governed by the CSRD to report sustainability information regarding the risks and opportunities that could reasonably impact on the firm and vice versa (outside-in-outside approach).

Ultimately, both definitions share the central idea that material sustainability-related information has the potential to influence decisions and perspectives, but definition 2 enriches this perspective by introducing "dual materiality" and considering financial and impact aspects separately and together.

In relation to the definition of "damage" caused by misleading sustainability reporting is not defined yet under the EU sustainability financial regulations. Determining damage could be helpful for market participants because under the current framework, damage cannot be anticipated using the same price-based criteria that tort courts would apply in calculating the compensation in a case where the investor alleged financial loss Whether the "damage" caused by the omission of climate-related risks in the prospectus cannot be materialized, i.e., the falsity or omission generates "reputational" or "moral" loss, the Prospectus Regulation requirements apply. .

Chapter II. Private enforcement mechanisms for sustainability-related misstatements in the EU.

1. Harmonized substantive disclosure regime v heterogeneous enforcement measures at EU level.

1.1 The sustainable finance regulations remain silent about harmonized civil liability regime for misstatements in prospectuses or pre-contractual disclosures.

Current EU laws do not seek to harmonize national system of liability for damages in investors legal actions against misstatements in prospectuses in public offerings and periodic disclosures. Securities regulations are instruments of EU financial supervision law, and therefore, they have focused on enhancing public enforcement and coordinated administrative sanctions, while EU regulations have given less prominence to private enforcement actions.[149] This framework has been mirrored in the sustainable finance realm.

The SFDR, the EUGBR and the CSRD rely on the transparency tool too, but they remain silent on the civil liability of financial market participants and financial intermediaries for a breach of the sustainability-related disclosure rules, reporting obligations and fiduciary duties. Liability is then left to Member States and national private laws, in line with the general liability

[149] E.g., NCAs can suspend an offer of securities to the public or admission to trading (Article 32 of Prospectus Regulation) or impose administrative pecuniary sanctions (Article 38 of Prospectus Regulation). Likewise, the regulation for the European Union Green Bond Standard (EUGBS) supports the transition by providing a voluntary standard that can be used for issuers and investors to invest the proceeds from their EuGBs in Taxonomy-aligned investments and tackle greenwashing. See Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds PE/27/2023/REV/1 (hereafter EUGBR). Furthermore, Articles 44-52 of the EUGBR, confers NCAs powers to suspend the issuance of an EUGB (article 52(1)(h) of the EUGBR) in case the issuer failed to meet the transparency obligations provided for in the Regulation, i.e., the pre-allocation of the use of proceeds, post-issuance allocation reports.
In relation to the goals that green bonds shall purport, see, e.g., the proposed assessment by the World Bank to select projects that would meet green bond criteria. See UNFCC, *Green Bond Factsheet*, in *Treasury World Bank*, 2014, https://unfccc.int/sites/default/files/worldbankgreenbondfactsheet.pdf.
D. BUSCH, *The Influence of the EU Prospectus Rules on Private Law*, In D. BUSCH, G. FERRARINI, J. P. FRANX (eds), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020, para 18.02.

regime envisaged in the Prospectus Regulation for plain-vanilla securities transactions and other relevant national laws.[150]

Addressing the challenge of defining "greenwashing" risk in legal terms is complicated by comparing it to financial risk. When an issuer recommends or markets a financial product with a lower than appropriate risk of default, it creates an unfair advantage over competitors, increasing the risk to investors of losing their returns. This advantage can be accurately quantified in economic terms (e.g., using price-based tools), for example by calculating the difference between the returns promised and those received, which provides a clear measure of the inequality.

In contrast, greenwashing is not only limited to the realm of financial risk; its implications encompass broader issues related to society and sustainability policies in general. This phenomenon can result in an unfair competitive advantage for participants in greenwashing, while undermining the credibility of investors, competitors, and consumers in the transition to a more sustainable society. Identifying greenwashing behaviour sheds light on the harm suffered by those who relied on companies' claims, undermining overall confidence in "green" financial instruments.[151] Furthermore, any "greenwashing" actions act as an obstacle to, and may even impede, the achievement of science-backed climate neutrality goals, as set out by global conferences on climate change,[152] and in international agreements[153] and EU legislation.[154]

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[150] For example, the CSRD, CSDDD, and the NFRD do not integrate any liability provision. Since the NFRD and the CSRD amended the Accounting Directive we should observe the content of the civil liability measures laid down in the Accounting Directive. If we observe the content of the Accounting Directive, we can conclude that Member States are responsible for developing appropriate measure to establish the liability for drawing up and publishing the financial statements and the management report where the Prospectus Regulation requirements do not apply. See Article 33 of the Accounting Directive.

[151] N. BADENHOOP, *Green Bonds. An assessment of the proposed EU Green Bond Standard and its potential to prevent greenwashing*, Study requested by the ECON committee of the European Parliament, 2022, 19, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703359/IPOL_STU(2022)703359_EN.pdf; L. FLETCHER and J. OLIVER, *Green investing: the risk of a new mis-selling scandal*, in *Financial Times*, February 20, 2022, https://www.ft.com/content/ae78c05a-0481-4774-8f9b-d3f02e4f2c6f. More specifically in relation to green bonds, C. FLOOD, *Fears rise over 'greenwash' bonds*, in *Financial Times*, March 21, 2022, https://www.ft.com/content/178449a7-8897-4359-b23a-e85524c3e227. Accessed 22 December 2022.

[152] UNFCC, *COP 2*1, 30 Nov. - 11 Dec. 2015, https://unfccc.int/event/cop-21.

[153] E.g., UNFCCC, *Paris Agreement*, 2015, https://unfccc.int/process-and-meetings/the-paris-agreement; see also UNFCCC, Glasgow Climate Pact, https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26.

[154] EUROPEAN COMMISSION, The European Green Deal, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_es. The European Green Deal has been the baseline for the development of further relevant regulations such as Regulation (EU) 2021/1119 of the European Parliament and

The assessment of common elements in greenwashing claims, such as a market player's competitive advantage or investor losses, becomes particularly complex. For example, according to the European Green Bond Regulation (EUGBR), the proportion of bond proceeds that the issuer *promises* to allocate for activities that are "environmentally sustainable"[155] in accordance with the allocation report methodology shall be, "at least" 85% of the bond proceeds.[156] What are the consequences for investors, and what is the nature of their loss, if a given issuer breaches this requirement, using more than the remaining 15% of the bond proceeds for general corporate purposes? Can investors access to effective legal mechanisms to protect their rights in accordance with Article 47 of the EU Charter?

The sustainable finance initiatives, in particular the SFDR and the EUGBR, do not provide a straightforward answer to these questions as they do not establish a specific liability regime.[157] The closest initiative to the inclusion of a liability regime within EU sustainable finance regulation was the EUGBR. In the legislative process of European green bond regulation, the Parliament's negotiating position advocated incorporating a civil liability regime for cases of "lying" about alignment with the Taxonomy,[158] taking inspiration from the Prospectus regime given that issuers shall issue a prospectus in accordance with the Prospectus Regulation to use the designation "European Green Bond" or "EuGB".[159]

of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (hereafter European Climate Law).

[155] In accordance with Article 3 of the Taxonomy Regulation.

[156] Annex I of the EUGBR (4. Intended allocation of bond proceeds).

[157] During the legislative procedure of the EUGBR, the Proposal and the European Parliament's position suggested the integration of a civil liability provision mirroring the civil liability regime envisaged in the Prospectus Regulation, i.e., based on national civil liability. The final version of the EUGBR removed the provision and focused exclusively on public enforcement by NCAs for infringement committed by issuers, and by ESMA for infringements committed by reviewers.

[158] See Article 12a Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on European green bonds (COM(2021)0391 – C9-0311/2021 – 2021/0191(COD)) (hereafter EP's negotiating position on the proposal for EUGBR).

[159] At this point we should clarify two aspects. First, since the EP's negotiating position on the EUGBS proposes the integration of a civil liability provision, we will focus in this section on prospectus civil liability. We will leave aside public enforcement under the Prospectus Regulation. Also, in accordance with Art. 11, civil liability provisions cannot be omitted even when applying public enforcement measures. Second, as explained in RAMOS MUÑOZ, CERRATO, and LAMANDINI, *The EU's "green" finance. Can "exit", "voice" and "coercion" be enlisted to aid sustainability goals?* In *European Banking Institute Working Paper Series 2021 - no. 90*, 2021, 1-49. It is more difficult to measure liability resulting from green defaults (false information contained in the prospectus, other offering documents, or the reporting information periodically disclosed to the market) than liability arising from information integrated in the bond. In the latter situation the parties may stipulate, in accordance with freedom of contract, liability in the offering documents themselves and the actions that may be further required by the issuer/offeror in case of default.

The final version of the EUGBR only mentions in a recital of the EUGBR the "liability provisions" of the Prospectus Regulation, without integrating them together with the public enforcement mechanisms into the Regulation.[160] In any case, applying the Prospectus civil liability to greenwashing claims offers a patchy liability regime for breach of the requirements, and therefore is not a problem-free solution.[161]

The general principles of effectiveness and equivalence may have a harmonizing effect on how civil courts should assess damages claims for a breach of sustainability-related disclosure and reporting obligations set out in the SFDR and the CSRD, but still, national courts may apply divergent approaches in the resolution of this type of sustainability financial disputes.[162]

There may be a valid reason to re-consider.[163] The effectiveness of regulations depends on both their practical application as on the adequacy of their substantive formulation,[164] and this

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[160] Recital 29 of the EUGBR: «Only bonds in respect of which the issuer has published a prospectus pursuant to [the Prospectus Regulation] and bonds covered by Article 1(2), points (b) and (d), of that Regulation should be allowed to use the designation 'European Green Bond' or 'EuGB'. <u>That Regulation includes liability provisions</u>». (Emphasis added).

[161] The EUGBR provides NCAs are granted supervisory powers to assess issuer compliance with transparency obligations related to the sustainability credentials linked to the EUGB. Nonetheless, such supervisory powers do not encompass verifying the truthfulness or accuracy of the information mandated by the Regulation, nor do they address issuers' adherence to obligations regarding proceeds allocation. See Articles 44 (tasks) and 45 (powers) the EUGBR.
As a result, a significant ambiguity arises as the regulation fails to specify whether the findings stemming from the public investigation and supervision process could carry any weight in subsequent civil proceedings before national authorities. One potential strategy to mitigate the potential divergence of outcomes across Member States is to enhance convergence between public and private enforcement mechanisms. This involves considering the results of supervisory and investigative actions conducted by an NCA during legal proceedings before national civil courts. By incorporating these findings into civil proceedings, a more cohesive and harmonized approach to enforcement can be achieved, fostering consistency and effectiveness in the application of sustainability-related regulations across the European Union.

[162] D. BUSCH, *EU Sustainable Finance Disclosure Regulation*, in *Capital Markets Law Journal*, 2023, Volume 18, Issue 3, 303–328. A previous version can be also found in D. BUSCH, *Sustainability Disclosure In The Eu Financial Sector*, in D. BUSCH, G. FERRARINI and S. GRÜNEWALD (eds), *Sustainable Finance in Europe Corporate Governance, Financial Stability and Financial Markets*, Palgrave macmillan, 2020, 440.

[163] We contend that achieving a more robust convergence between public and private enforcement mechanisms is recommended for ensuring the optimal effectiveness of EU securities regulation and the achievement of the Capital Market Union (CMU). While our current research primarily centers on establishing harmonized private enforcement mechanisms within the market for sustainable financial instruments, a comprehensive examination of how national competent authorities (NCAs) wield their powers to supervise, investigate, and sanction in tandem with private enforcement mechanisms surpasses the immediate scope of our analysis. Nevertheless, we acknowledge the intrinsic connection between these elements and suggest that further exploration and analysis of this intricate interplay would be valuable, providing a more holistic understanding of the regulatory landscape and contributing to the ongoing discourse on sustainable finance regulation.

[164] P. DAVIES, *Damages Actions by Investors on the Back of Market Disclosure Requirements*, in D. BUSCH, E. AVGOULEAS, and G. FERRARINI (eds), Capital Markets Union in Europe, Oxford University Press, 2018, vol. i., ch 15.

requires an adequate and coordinated enforcement system. Differences in levels of implementation across the Union could lead to disparities in the impact of the rules. This, in turn, may contravene the harmonising objectives of the Capital Markets Union (CMU).[165]
The integration of civil liability regime into sustainable finance regulation can be a step forward and supplement the other public enforcement mechanisms given that civil liability can have deterrence effect from misleading,[166] but some additional considerations need to be addressed.

1.2 Prospectus civil liability and greenwashing liability.

The liability standard under the Prospectus Regulation is associated with the "materiality" test,[167] which implies that the alleged misleading statements must be sufficiently material to conclude that the investor relied on them (*reliance*) in making the investment decision.[168] The terms "materiality" or "reliance" are not defined in the EU financial regulation and must be interpreted by adjudicators on a case-by-case basis.[169]

the determination of whether a (greenwashing) risk is material or not under the current regulatory framework would depend on the interpretation of the information provided by the issuer and the stated preferences of the investor. Therefore, difficulties in interpreting the materiality standard would persist while the civil liability regime of the prospectus applies to

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[165] R. VEIL, M. WIESNER, and M. REICHERT, *Disclosure and Enforcement Under the EU Listing Act, ECFR*, 2022, Available at SSRN: https://ssrn.com/abstract=4190439.
[166] C-174/12 Hirmann [2013] ECLI:EU:C:2013:856, para 46: «civil liability (..) is capable of deterring issuers from misleading investors».
[167] Art. 11 read together with Art. 6 Regulation 2017/1129. On the interpretation of the materiality standard by national courts of Member States see D. BUSCH, G. FERRARINI, and J. P. FRANX (eds), Prospectus Regulation and Prospectus Liability, Oxford University Press, 2020.
[168] See also V. DE SERIÈRE, *The Contents of the Prospectus: Non-Financial Information and Materiality*, in D. BUSCH, *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020, chapter 9, 9.23: «the materiality test using the average investor threshold as described above will be applied, therefore also if an investor instituting a (p. 206) prospectus liability claim is not a consumer».
[169] Some national courts have applied the "reasonable average" investor approach to interpret the materiality standard. For example, in the Netherlands, Supreme Court 27 November 2009, JOR 2010/43 (World Online): the Court cited Art 6:194 of (old) Dutch Civil court and held that, irrespective of whether the investor is professional or not, «the expectations of an averagely well-informed, prudent and observant ordinary investor must be assumed». In Germany, BGH, 12 07 1982, II ZR 175/81 in NJW 1982, S. 2823. The court held that an average investor could understand a financial statement, but she does not have to have specific financial knowledge. See also DANNY BUSCH, EMILIOS AVGOULEAS, and GUIDO FERRARINI (eds), *Capital Markets Union in Europe*, cit., 325.

civil "greenwashing liability" claims for breaches of the SFDR, or the EUGBS or other sustainability-related reporting standards.[170]

Furthermore, by moving the civil liability regime from the prospectus, it would remain ambiguous whether non-compliance with green objectives (such as the promotion of ESG characteristics under Article 8 of the SFDR, or the minimum proportion allocation of EUGB proceeds to taxonomy-aligned projects as required by the EUGBR) would trigger civil liability for providing inconsistent information or omitting material details about the promotion of sustainability characteristics, or allocation of EUGB proceeds.

Assuming that the "green/sustainability-related misstatement" included in the prospectuses intensifies the risks of greenwashing and can be considered "material", another relevant question arises as to the damages to be claimed.[171] The civil liability of the prospectus is based on a tort action against the issuer, the offeror or the person responsible for drawing up the prospectus.[172] The burden is therefore on the investor to prove the damage, the fault of the issuer and the causal link.[173]

First, the level of fault that investors must prove encompasses, at a minimum, negligence, and this standard is interpreted according to national private law standards.[174] Second, an even greater challenge for investors is to prove the causal link between the alleged harm and the investor's decision to purchase the green bond. In the case of conventional bonds, where the expected benefits are financial, the link between a misleading statement affecting the financial performance can be assessed by objective elements, such as the market price of the bonds.

[170] For example, a breach of the double materiality standard envisaged in the ESTS for disclosures of Article 19a and 29a of the CSRD.
[171] RAMOS MUÑOZ, CERRATO, and LAMANDINI, *The EU's "green" finance. Can "exit", "voice" and "coercion" be enlisted to aid sustainability goals?*, cit., 1-20.
[172] See Article 11 of the Prospectus Regulation.
[173] A complete analysis on the particularities of the standard of liability in each EU jurisdictions is included in D. BUSCH, G. FERRARINI, and J. P. FRANX (eds), Prospectus Regulation and Prospectus Liability, cit.
[174] ESMA, *Comparison of liability regimes in Member States in relation to the Prospectus Directive*, 2013, section 3.1.4. https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf. Accessed 28 February 2023.

However, in the case of "green securities", the source of comparison of the harm resulting from greenwashing cannot be, at least in full, a decrease in market price.[175] Therefore, but some questions remain unresolved. In general terms, the scale and potential adverse impacts of greenwashing require precise enforcement channels for affected parties, such as investors, competitors of issuers and civil society. In the absence of clear provisions and associated remedies, greenwashing behaviour may go unnoticed, without generating legal consequences.[176]

2. Impact of enforcement disparities on market participant's procedural rights: access to effective judicial remedy

The access to effective judicial remedy is envisaged in Article 47 of the European Union (EU) Charter of Fundamental Rights (hereafter EU Charter) and recognised in Article 6 and 13 of the European Convention of Human Rights (ECHR). The provision embeds a "right to an effective remedy before a tribunal"[177] to grant legal aid "to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".[178] The right to an effective remedy encompasses other procedural rights, such as the right to bring an action, the right of access to a tribunal, the right to be heard, the rights of the defence, the principle of equality of arms, and the principle of *audi alteram partem*. At the same time, the right to access to effective judicial protection is not an absolute right.[179]

The lack of harmonized remedies at EU level confers power upon national courts to assess the appropriate and proportionate measures to settle the dispute. It is true that in the EU, where

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[175] RAMOS MUÑOZ, CERRATO, and LAMANDINI, *The EU's "green" finance. Can "exit", "voice" and "coercion" be enlisted to aid sustainability goals?*, cit.,: «it is an opportunity cost, in the sense that the investor would have been better investing their money someplace else».
[176] Securities regulations place more value on public enforcement mechanisms than in private enforcement ones. See, N. Moloney, EU securities and financial law, cit., chs 1-2. The same occurs in the context of greenwashing liability under securities regulation, For example, an analysis of greenwashing liability under the EUGBR and a discussion on the enforcement mechanisms can be found in E. CERRATO GARCÍA and F. AGOSTINI, *The Green Bonds Market in the light of EU Commission's Proposal: Implications for greenwashing liability*, in D. RAMOS and A. SMOLENSKA (ed), *Greening the Bond Market: A European Perspective*, Palgrave Macmillan, 2023. We refer to these situations as examples of "greenwashing effects".
[177] Article 47(1) of the Charter of Fundamental Rights of the EU (hereafter EU Charter or Charter).
[178] Article 47(3) of the EU Charter.
[179] See Article 47 in relation to Article 52(2) of the EU Charter: the exercise of the rights conferred by Article 47 can be exercised "under the conditions and within the limits' defined by relevant Treaty provisions which make provision for it". Case C-410/20 Banco Santander, SA v J.A.C. and M.C.P.R.[2022] ECLI:EU:C:2022:351, para 47; C-752/18 Deutsche Umwelthilfe [2019] EU:C:2019:1114, para 44.

remedies are to be requested before national courts, these are not only capable of resolving the dispute but also have the power to provide adequate remedies to grant effective judicial protection in "the fields covered by Union law" (article 19 TEU) as well as to ensure that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy" (article 47 of the EU Charter), and subject to the principles of equivalence and effectiveness.

The principle of effective judicial protection is a widely accepted principle in the case law of the Court of Justice of the European Union (Court of Justice or CJEU).[180] This principle aims to not limited the rights of individuals to have access to judicial effective protection, e.g., to avoid that national procedural requirements on individual's standing to bring legal proceedings infringes EU law and the fundamental rights enshrined in the EU Charter.[181]

Member States are then responsible for ensuring, in every instance, that rights are effectively protected. This means that the specific procedural rules governing actions to protect an individual's rights under European Union law must be at least as favourable as those governing similar national actions (principle of equivalence) and must not impede in a practical or excessive manner the exercise of rights conferred by EU law.

The problem is that the uniformity claimed by the EU sustainable finance measures and by the renewed EU sustainable finance strategy trip over the differences between the judicial systems within the EU. Although some Court of Justice's rulings have established that the Treaties "created a complete system of legal remedies".[182] In practice, the multi-level structure (EU-Member States) of the EU system appears to require a coordinated effort of European and national bodies, including legislative, judicial, or administrative ones, to ensure its effective operation.

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[180] C-12/08 Mono Car Styling [2009] ECLI:EU:C:2009:466, para 48 (hereafter Mono Car Styling); Case C-432/05 Unibet [2007] ECR I-2271, para 37, and Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-0000, para 335.

[181] In Mono Car Styling, cit., the Court of Justice found that the limitations imposed by national rules on individual complaints do not violate Directive 98/59 or the principle of effective judicial protection enshrined in Article 6 of the ECHR. The focus remains on safeguarding collective information and consultation rights while permitting individual actions within reasonable limits.

[182] C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECLI:EU:C:2002:462, para 40 (in the context of a challenge of EU legislative measures); C-97/91 Oleificio Borelli v Commission [1992] ECLI:EU:C:1992:491, para 15.

Disputes concerning sustainability-related misstatements will apply the Prospectus liability regime. Prospectus civil liability is an example of EU regulation where at EU level sustainable finance regulations provide for substantive disclosure obligations addressed to financial market participants, but there are not harmonized private enforcement avenues to seek redress in case of a breach with such disclosure obligations at EU level.

In other words, it is for the Member States to establish a system of legal remedies and procedures due to EU rules do not govern the liability regime for misstatements integrated in the prospectuses. These remedies and procedures shall ensure respect for the fundamental right to effective judicial protection.[183] In doing so, national jurisdictions shall observe the principles of effectiveness and equivalence, including the determination of detailed procedural rules governing legal actions brought to safeguard the rights of individuals arising out of EU law.[184] In the context of sustainability-related misstatements in which prospectus civil liability applies:

This situation raises the question of identifying the most suitable mechanisms for ensuring effective judicial protection in the realm of sustainable finance. It's crucial to recognize that the traditional remedies employed by national courts in tort proceedings—[185]where investors sought compensation due to a decline in the economic value of their securities—might not align with the relief sought by environmentally conscious investors in sustainability-related disputes.[186] As will be discussed in chapters 3 and 4, plaintiffs in sustainability financial disputes seek redress for the "risk of damage" resulting from misleading statements regarding environmental (social or governance) matters. Their primary focus lies in compelling companies to change their behaviour, compelling them to divest from projects with adverse

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[183] E.g., C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013] EU:C:2013:625, para 100.

[184] C-583/11 P Inuit Tapiriit Kanatami and Others, cit., para 102.

[185] For example, C-304/17 Löber v. Barclays [2018] ECLI:EU:C:2018:701; Case C-174/12, Hirmann v. Immofinanz, ECLI:EU:C:2013:856, various judicial decisions arising out of Bankia IPO: STS 380/2021, of 2 June, ECLI:ECLI:ES:TS:2021:225, FJ 6. See also STS Bankia v UMAS, citing STS 380/2021; Verein fur Konsumenteninformation v Volkswagen AG, 62019CV0343 (2020), paras 58-66; C-375/13 Kolassa [2015] EU:C:2015:37.

[186] DANNY BUSCH, *EU Sustainable Finance Disclosure Regulation*, cit., 303–328. The author advocates for a potential enhancement of the SFDR through the introduction of European liability rules addressing instances of non-compliance with sustainability disclosure regulations and fiduciary duties. However, the author notes that conventional private law consequences may prove insufficient in the current landscape, particularly when the correlation between sustainability and investment performance is not consistently evident. The article contemplates the prospect of pursuing damages in natura, suggesting a redefinition of the concept of "damage" to encompass environmental harm. This, in turn, could result in the imposition of indemnities on sustainability funds, either at the European Union or Member State level.

environmental or social impacts while encouraging investment in endeavours with positive social and/or environmental implications,[187] or the withdrawal of prospectuses, and the subsequent liability of the NCA,[188] for including vague climate-related statements in prospectuses.[189]

Ultimately, the absence of a uniform approach and the disparities across the domestic judicial systems can affect the procedural right of market participants to receive effective judicial remedy (article 47 of the Charter read together with Article 2 TEU).

3. Judicial review of misstatements by national courts: procedural Autonomy and principles of effectiveness and equivalence.

The Prospectus Regulation establishes that a breach of the disclosure obligation constitutes an unlawful act that is imputable to the issuer, its administrative, management and supervisory bodies, or the person responsible for the content of the prospectus.[190] Member States shall develop appropriate civil, administrative, and criminal measures. In relation to the private law consequences of disclosure rules under the Prospectus Directive, the Court of Justice held in *Hirmann* that, in the absence of EU regulation, the internal legal order of Member States shall lay down the conditions in which damages can be awarded, in accordance with the principle of effectiveness and equivalence.[191]

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[187] For example, Milidefeusie; Notre Affaire à Tous Les Amis de la Terre and Others v BNP Paribas (pending); Comissão Pastoral da Terra and Notre Affaire à Tous v BNP Paribas (pending). In both cases the NGOs request the courts to declare that the bank shall cease investing in fossil fuel projects and financing "brown" firms. See also ClientEarth v Board of Directors of Shell [2023] EWHC 1137 (Ch); [2023] EWHC 1897 (Ch); [2023] EWHC 2182 (Ch) (the NGO claims; ClientEarth v Enea. https://climatecasechart.com/non-us-case/clientearth-v-enea/.

[188] This seems to be a next step towards the enforceability of sustainability credentials in case private claims in the event that private claims are unsuccessful or are not rejected on procedural grounds. An example is the recent claim submitted by the NGO ClientEarth against the Financial Conduct Authority (FCA), the supervisory authority in the UK, based on an "unlawful" approval of a prospectus which, in the plaintiff´s view, was misleading as to the climate-related risks linked to the securities in offer.

[189] ClientEarth v. Financial Conduct Authority (Ithaca Energy plc listing on London Stock Exchange), https://climatecasechart.com/non-us-case/clientearth-v-financial-conduct-authority-ithaca-energy-plc-listing-on-london-stock-exchange/.

[190] Article 11 of the Prospectus Regulation.

[191] the principle of effectiveness revolves around the conditions imposed by national laws on EU-based rights. These conditions should not create impediments that render the exercise of these rights either impossible or excessively difficult. he principle of equivalence, the focus lies on comparing the remedies offered by national law, where it should be granted an "equivalent" treatment between claims. See also Hirmann, para 40.

The requirements for damages should be proportionate, effective, dissuasive, and non-discriminatory. In the Opinion of the AG Kokott discussed about the effectiveness, proportionality and dissuasiveness of penalties.[192] He argued that penalties are dissuasive if who commits an infringement fear that the penalty will be in fact imposed on him, i.e., in the context of sustainable finance, lying about the green or sustainability credential of the securities or the sustainability economic activity of the issuer (greenwashing) will likely be punished.[193]

These principles have been interpreted by the Court of Justice in civil liability actions related to the EU prospectus rules,[194] as well as in the field of competition,[195] where the Court has ruled on the role of private enforcement and the interplay between private and public enforcement to deter infringements. The question how these principles can accommodate diverse circumstances within sustainable finance.

A similar decision was adopted by the Court of Justice in Genil v Bankinter, a case dealing with the harmonization of remedies stemming from infringements of MiFID II's conduct of business rules by investment firms.[196] The Court of Justice stated that Member States can develop their private law remedies for non-compliance with the Directive's requirements all while adhering to the principle of equivalence and effectiveness.[197]

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[192] Joined cases C-387/02, C-391/02 and C-403/02 Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02), AG Opinion [2004] ECLI:EU:C:2004:624, paras 87-91.

[193] What is decisive are the nature, level and likelihood of the penalty being imposed. This was the conclusion of the AG Kokott in the criminal proceedings the Court of Justice argued that the penalties provided in cases of false information on firms (false accounting).

[194] C-174/12 Hirmann v Immofinanz [2013] ECLI:EU:C:2013:856, paras 33, 40-43.

[195] Joined Cases C-295/04 to C-298/04 Manfredi [2006] ECLI:EU:C:2006:461 ; C-453/99 Courage and Crehan [2001] ECLI:EU:C:2001:465.

[196] C-604/11 Genil 48 and Comercial Hostelera de Grandes Vinos [2013] ECLI:EU:C:2013:344 (hereafter Genil). One of the questions posed by the referring court inquired about the contractual consequences when an investment firm, offering an investment service, fails to adhere to the assessment requirements outlined in Article 19(4) and (5) of Directive 2004/39. The CJEU clarifies that while administrative measures or sanctions can be imposed under Article 51 of Directive 2004/39 for non-compliance with its provisions, the directive does not specify whether Member States must establish contractual consequences for contracts that do not meet the obligations of Article 19(4) and (5). The Court concludes that, in the absence of EU legislation on this matter, each Member State's internal legal system has the authority to determine the private law remedies for non-compliance with the conduct of business rules. This determination, however, is subject to the overarching principles of equivalence and effectiveness, as established in the case law, ensuring that the consequences are fair and enforceable. In this regard, see also DAMBROSIO, MONTEMAGGI, ANNUNZIATA, AFFERNI, ANDENAS, and DELLA NEGRA, P*rivate and Public Enforcement of EU Investor Protection Regulation*, in *Quaderni di Ricerca Giuridica della Consulenza Legale*, n. 9/202084, 102.

[197] -604/11 - Genil 48m cit., paras 56-58.

In the field of competition, private and public enforcement act as complementary tools.[198] In Courage the Court of Justice held that "the practical effect of the prohibition laid down in Article 81(1) of the Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[199]

Sustainability financial disputes may present potential risks to national civil courts in relation to the interpretation of sustainability-related disclosures rules and fiduciary duties. This means that some courts might provide a broad interpretation of the disclosure obligation in relation to sustainability-related credentials.[200] Likewise, some courts may rely on private law principles such as good faith, reasonableness, and fairness to interpret sustainability disclosures and fiduciary duties.

In the Netherlands, the landmark case *Milieudefensie v Royal Dutch Shell* is an example of this phenomenon. The Dutch courts ruled in favour of the NGOs-plaintiffs and applied the "fair share" principle[201] against Shell, and their administrative and management bodies, stressing that firms are expected to act responsibly in relation to human rights protection and therefore they shall implement preventive measures to address adverse human rights impacts in which they may be involved.[202]

This situation prompts the question of whether a modification or the creation of new remedies is a solution to be adopted in the context of sustainability financial disputes. This question has been resolved in opposite directions by the Court of Justice. In *Inuit* case the court held that neither the TFEU nor Article 19 of the TEU "intended to create new remedies before the

[198] D DAMBROSIO, MONTEMAGGI, ANNUNZIATA, AFFERNI, ANDENAS, and DELLA NEGRA, P*rivate and Public Enforcement of EU Investor Protection Regulation*, cit., 85.
[199] In addition, Recital 5 of Antitrust Claims Directive states that: "he full effectiveness of antitrust rules requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions" (Recital No 3). In that picture, "actions for damages are (..) one element of an effective system of (..) enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions."
[200] D. BUSCH, *EU Sustainable Finance Disclosure Regulation*, cit., 303–328.
[201] F. ELDERSON, *"Come hell or high water": addressing the risks of climate and environment-related litigation for the banking*, Keynote speech by Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the ECB Legal Conference, 2023, https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230904_1~9d14ab8648.en.html.
[202] Milieudefensie et al. v. Royal Dutch Shell plc. [2021] ECLI:NL:RBDHA:2021:5339 (hereafter Milieudefensie v Royal Dutch Shell).

national courts to ensure the observance of European Union law other than those already laid down by national law."

In *Factortame* case the Court of Justice asserted that interim relief, should be granted due to the principle of effectiveness, compelling national courts to ensure "real and effective judicial protection." [203]This obligation stands even when there is no equivalent protection under national law. A similar approach can be adopted by national courts when assessing remedies, justifying the introduction of previously unused interim relief by citing the absence of effective remedies within specific legal contexts.

In the absence of EU legislation specifically addressing an issue, the onus is on the domestic legal systems of each Member State to designate the competent courts, and to lay down detailed procedural rules governing actions to protect the rights conferred by EU law on litigants.[204] For example, In *Mono Car Styling*, the Court of Justice emphasized that standing and individual's interest in bringing legal proceedings are matters of national law that shall be established with observance of the principles of equivalence and effectiveness, and without undermining the right to effective judicial protection.[205]

4. An overview of judicial review of misleading statements by the CJEU. Procedural aspects.

Since national laws govern the substantive assessment regarding the damage giving rise to compensation, indemnity rules, limitation periods or the amount of compensation, and major differences subsist among Member States, identifying the competent court that will carry out the judicial review and the applicable law are crucial elements to resolve securities disputes. As we will see below, the first step would be to identify the place where the alleged loss and/or the event giving rise to the loss took place. The CJEU has stated that to determine jurisdiction and

[203] Case C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1990] ECLI:EU:C:1990:257. The Court answered a preliminary ruling on the power of national courts to grant interim relief.
[204] C-317/08 Alassini [2010] ECLI:EU:C:2010:146. See also C-605/18 Adler Real Estate and Others [2021] ECLI:EU:C:2021:712 and C-546/18 Adler Real Estate [2021] ECLI:EU:C:2021:711 where both cases share the same root problem: the absence of effective judicial protection in the preliminary proceedings before the Takeover Commission. Both cases emphasize the relevance of effective judicial protection under Article 47 of the Charter in the context of a question regarding the binding force to final administrative decisions of a supervisory authority.
[205] Mono Car Styling, cit., para 49.

applicable law it is necessary to first determining the *close connecting factors* between the dispute and the court that is called upon to hear it.[206] In this regard, further questions that can be raised include what "the place where the damage occurred" *or* where "the wrongful conduct arose" means in a situation in which the alleged damage is a "green wrong", stemming from misleading non-financial information in a prospectus. Should climate-conscious investors be considered a separate group from regular investors to whom specific jurisdiction and choice of law rules will apply?

First, the connecting factors differ from contractual to tortious liability.[207] The distinction between contractual and tortious liability is important because it affects procedural aspects of the legal proceedings, such as the person entitled to claim damages, the scope of liable persons and the place where the damage occurred, as well as substantive aspects that will be discussed below. As regards the person entitled to claim, contractual liability can be invoked by one of the contracting parties when the counterparty breaches its promise (i.e., breach of a contractual obligation).[208]

For example, the seller makes the promise in a sale agreement that she will use the net use of proceeds of the underlying assets to finance a green or social project but if the money is actually invested in a polluting or non-sustainable project, the investor may claim damages based on the violation of the contractual obligation of investing in a green or sustainable project, and activate the legal mechanism provided for in the contract to seek redress. The scope of liable persons will extent to signatories of the contract and, in exceptional circumstances, to third-parties who allege a justified and legitimate interest.[209] The contract may also fix the compensation that the injured party is entitled to request, whether the adjudicator will be the

[206] M. LAMANDINI and D. RAMOS MUÑOZ, *EU Financial Law*, Wolters Kluwer, 2016, 399-423; M. GARGANTINI, *Prospectus Liability and Litigation, Prospectus Liability: Competent Courts of Jurisdiction and Applicable Law*, in D. BUSCH (ed), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020, ch 19, 476-477.
[207] J. L. COLEMAN, *Tort Law and the Demands of Corrective Justice*, in *Indiana Law Journal*, 2012, vol 67, issue 2, article 6, 33; LORD NEUBERGER, *Implications of Tort Law decisio*ns, Address to Northern Ireland Personal Injury Bar's Inaugural Conference,
County Down, 12; S. L. SCHWARCZ, *Distorting Legal Principles*, in *Journal of Corporation Law*, 2012, vol 35, no 4.
[208] *Ibidem*.
[209] *Ibidem*.

national courts of a specified country or an arbitral tribunal,[210] as well as the national laws that adjudicators shall apply to the dispute.[211] In the absence of specific contractual provisions that govern matters of jurisdiction and applicable law, these will be determined by the conflicts of law rules, which are harmonized norms at EU level: the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels II or Regulation 1215/2012)[212], and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), together with the principles of private law, and the settled case-law of the CJEU should be also taken into account.

For matters of jurisdiction in contract disputes, Article 7(1)(a) of Brussels II states that the courts of "the place of performance of the obligation in question" will be have jurisdiction. The parties may choose the applicable law that will govern the contract in accordance with Article 3(1) of Rome I, or, in the absence of choice, Article 4(1)(a) states that the applicable law will be the law of the country where the seller of securities has her habitual residence, or where the service is provided in a contract for the provision of services (Article 4(1)(b)).[213]

In contrast, tortious liability applies, in broad terms, where one party claims that other person, by acting wrongfully, caused harm to her personal, property or economic interests,[214] and no legal agreement exists between the parties of the dispute, or the claim is not considered as relating to a contract.[215] Hence, on cross-border disputes –i.e., the parties are located in different countries and/or the alleged damages have taken place in a country different from where the parties are located-, matters of jurisdiction and applicable law are harmonized at EU

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[210] If the contract does not include jurisdiction clause, and both parties are located in Contracting States as defined in Article 5(1) of the Brussels Convention, the dispute shall be submitted to "the courts for the place of performance of the obligation in question".

[211] If the contract does not include applicable law clause, the applicable law will be determined by the conflict of law rules included in 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 /* Consolidated version CF 498Y0126(03) */ (Rome I).

[212] Brussels II replaced Brussels Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters.

[213] Article 4(2) of Rome I. Nonetheless, Article 4 (1) (h) states that if in accordance with Article 4(21) of MiFID II the contract is governed by a multilateral system "which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments (…)" in accordance with "non-discretionary rules and governed by a single law", shall be governed by the law of the multilateral system.

[214] C. VAN DAM, *Protected Interests*, in C. VAN DAM, *European Tort Law*, Oxford University Press, 2007, 141.

[215] C-304/17 Löber [2018] ECLI:EU:C:2018:701, para 26 (hereafter Löber).

level, and will be determined by the Brussels II and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), together with the settled case-law of the CJEU. Article 7(2) of Brussels II determines that in matters relating to tort, a party of a contracting State may be sued "in the courts of the place <u>where the harmful event occurred</u>". As regards the law applicable to non-contractual obligations deriving from a tort, Article 4(1) of Rome II states that it shall apply "the law of the country in which the damage occurs" even if the place where the wrongful conduct or indirect consequences of the event occurred were different.

Albeit there are not unified criteria as to securities disputes based on prospectus liability should qualify as contractual or tortious, the CJEU stated in *Kolassa* and *Löber* that prospectus liability as a matter that does not fall under "matters relating to a contract"".[216] in *Kolassa* the CJEU held that the application of the rule of jurisdiction for matters relating to a contract in accordance with Article 5(1) of Regulation 44/2001 (current Article 7(1) of Brussels II) "presupposes the establishment of a legal obligation freely consented to by one person towards another" and "on which the claimant's action could only be considered".[217] Thus, the existence of certain obligations from financial intermediaries towards an investor is insufficient in the absence of free consent. The CJEU concluded that even if the bank had certain obligations to Mr Kolassa, a legal obligation freely consented to by the bank to the investor was non-existent, and therefore the action brought against the issuer and based on prospectus liability should be invoked under tortious provisions.[218] In addition, some scholars hold that in cross-border disputes concerning prospectus liability against issuers tortious liability is "the most common legal basis" not only to assess the substantive consequences, but also to determine jurisdiction and the applicable law.[219]

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[216] See Löber, cit., para 23; and C-375/13 Kolassa [2015] EU:C:2015:37, para 57 (hereafter Kolassa). The CJEU has established that a claim concerning the liability of the issuer of information on a prospectus should be considered tortious and, consequently, it falls out the scope of matters relating to contract. For instance, in Ms. Löber v. Barclays, a case where the claimant argues that her investment decision had been induced by a defective prospectus, and the plaintiff requests damages on the grounds that the false statement in turn led to the financial loss in her bank account. See Judgment of 28 January 2015, Kolassa (C-375/13, EU:C:2015:37), para 57; Judgement of 8 May 2018, Löber v Barclays (C-304/17: ECLI:EU:C:2018:310), para 23. On the contrary, some scholars establish that "the prospectus constitutes a contractual document above all else" on the grounds that one of the underlying objectives of the prospectus regulation is to provide the conditions on which a purchaser may rely if there is a breach of contract or tort. See A. HUDSON, *The Law of Finance*, Sweet&Maxwell, 2013, 1078, para 36-15.

[217] Kolassa, cit., para 36.

[218] *Ivi*, paras 36-41, 66.

[219] Matteo Gargantini holds that this is "because tortious liability is normally regarded as the relevant criterion under the autonomous interpretation of [Brussels II]". See M. GARGANTINI, *Prospectus Liability and Litigation,*

Second, settled case-law of the CJEU has applied an independent and strict interpretation of the rule of special jurisdiction envisaged in Article 7(2) of Brussels II.[220] Likewise, the CJEU has interpreted the connecting factors that are to be taken into account *for the localization of financial damages* and the concept of "damages".

As regards the concept "damage", this aspect has been interpreted not as part of the substantive evaluation that aims to identify the adverse consequences for a specific plaintiff, but "to determine jurisdiction" by "identifying those places with a close relationship to the dispute"[221]. The place where the damages occurred has evolved in the case-law of the Court. The debate has focused on the difference between the bank account where the financial losses materialize and the place where the securities investment was made, and the place of relevant activity and where the wrongful conduct occurred, and a mix of different factors altogether.

On cross-border disputes regarding securities liability, the CJEU decisions have identified and clarified the "specific factors or circumstances" of the case in order to define the "close and foreseeable" place where financial damage occurred in accordance with the rules established in Brussels II (in particular, Article 5(3)). The examination has been required for "purely financial damage".[222] Where the financial loss has been at the core of the dispute, the CJEU has accepted that the damage occurred in the place of the account in which the court was expressed in accounting terms (*Universal* judgement). Nonetheless, the proximity or foreseeability requirement, i.e., the connection between the dispute and the competent court, requires proving other circumstances besides the place where the damage occurred are taken into account in order to attribute jurisdiction. Such "specific circumstances" vary in landmark cases.

Prospectus Liability: Competent Courts of Jurisdiction and Applicable Law, cit., para 19.13. In Löber the CJEU held that on the basis of the facts of the case -prospectus liability- and the conclusions reached by the referring court, «the claim brought by the Applicant has no contractual basis and should be considered as tortious». See Löber, cit., paras 23-29.
Therefore, I will proceed on that basis.

[220] Case C-304/17, Löber, 12 September 2018, EU:C:2018:701, para 17; case C-709/19, VEB v BP, 12 May 2021, ECLI:EU:C:2021:377, paras 18 and 24.

[221] C-27/17 flyLAL-Lithuanian Airlines, ECLI:EU:C:2018:136, para 29.

[222] Verein fur Konsumenteninformation v Volkswagen AG, 62019CV0343 (2020), paras 58-66.

In *Kronhofer*, the Court stated that were competent the courts from the country where the wrongful conduct ("the event giving rise to the damage") and where the damage had occurred -where the bank account is-.[223] In *Kolassa*, the Court took into account different factors to conclude that Austrian courts had jurisdiction, including the place where the loss –i.e., the financial damage over the assets of a bank account with a bank established in Austria- occurred.

In *Universal Music*, the court evaluated the place where precontractual negotiations, the signing of the contract and mediation procedure occurred and concluded that Czech Republic court had jurisdiction because Czech Republic was the place of "relevant activity".[224] In *Löber*, the court stated that the bank account is a factor that should not be assessed isolated, but together with other factors such as the place where secondary market purchase is made, the place where the investment contract was signed, the clearing accounts intended for the execution of the transaction, and the notification of the prospectus in plaintiff ́s domicile.[225]

A "green wrong" may derive, in broad terms, from a lack of compliance with the promise to fulfil some environmental objective as established in the prospectus (e.g., failure to adapt internal policies to reduce greenhouse emissions linked to the issuer's economic activity, lack of implementation of measures to mitigate the impact of the issuer's business activity on the environment or in order to protect the land or biodiversity), or omitting climate change risks that climate-conscious investors would have been of relevance for investor at the time when they made the investment choice.[226]

Nonetheless, green wrongs do not have to generate equal harms, i.e., some wrongs may create an economic harm, but others do not. In situations when someone files a prospectus liability claim based on a failure to provide material sustainability-related information, before carrying out the substantive assessment of the alleged breach, determining cautiously the courts that have jurisdiction and the law applicable may influence the later substantive assessment of the adverse consequences for a specific claimant.[227]

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[223] C-168/02 Kronhofer [2004]ECLI:EU:C:2004:364.
[224] C-12/15 Universal Music International Holding [2016] ECLI:EU:C:2016:449.
[225] C-304/17 – Löber [2018] ECLI:EU:C:2018:701.
[226] RAMOS MUÑOZ, CERRATO, LAMANDINI, *The EU's "green" finance. Can "exit", "voice" and "coercion" be enlisted to aid sustainability goals?*, cit.
[227] VEB v Volkswagen, AG Campos Sánchez-Bordona [2020] ECLI:EU:C:2020:253, states that: "Reasons of proximity between the dispute and the court, or of foreseeability for the parties, require that factual elements other than the place where the damage occurred must, taken together, confirm the suitability of that place when it comes

Considering the case-law of the CJEU, one can argue that on cross-border disputes regarding securities liability, the CJEU decisions have identified and clarified the factors that define the place where financial damages occurred in accordance with Article 5(3) of Brussels II, as well as the interpretation of the harmful event and damages in the context of securities disputes has evolved. Hence, the doctrine developed in Kolassa could apply to green securities disputes if *the place where damages caused by "green wrongs"* relating to a securities transaction matched the place where the financial damage occurred.

how important is, for determining the jurisdiction and applicable law, the "green" nature of the alleged wrong? If the financial value of the assets decreases as a result of misleading information or relevant omission of environmentally related factors (green default), will the "green default" constitute sufficient grounds to entitle the investor to bring an action against the issuer or offeror and seek redress? Can the green default consider a cause of direct damage for the investor under prospectus liability rules? Should the devaluation of the financial value of the asset (damage) be considered a direct or an indirect consequence of the green default? Could a green default lead to conclude that the issuer acted *wrongfully* under the prospectus liability rules?

First, someone may argue that a green default deriving from misleading information in a prospectus does not differ from "regular" prospectus liability claims, which are governed by

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to attributing jurisdiction. n that (recent) case-law of the Court which, thus far, is restricted to three judgments, 43Judgments in Kolassa, Universal and, in particular, Löber (paras 54-56). Where the financial loss is symbolized by a specific physical object, it may suggest that this object and its location serve as the starting point for establishing jurisdiction in the context of Article 7(2) of Regulation No 1215/2012. 53The observations of VKI, the Commission and the United Kingdom, which describe the damage as 'hybrid' (as opposed to merely financial) appear to suggest this, although it is not clear what inferences they draw from that description for the purposes of attributing international jurisdiction. The physical location of the object at the time when the loss occurs 54This is the time when the vehicle was purchased by the person who owned it when the defect in the engine was made public. is, as in the case of a bank account, insufficient: all the more so, when the object is something moveable. The relative nature of the objectives of proximity and legal certainty is, moreover, a structural feature of the system of allocating jurisdiction under Regulation No 1215/2012. Each of the jurisdictions provided for in Article 7 reflects an ex-ante balancing exercise, carried out, in the abstract, by the legislature, between the requirements of foreseeability and of proximity. (para 63) The result of that balancing exercise strikes a reasonable balance between the two principles, which must be maintained when the rule is implemented. In that connection, the Court previously stated that it is not possible to dismiss the result of applying the criterion formally laid down by Article 7 of Regulation No 1215/2012, even if, in the particular case, it leads to a court which has no connection with the dispute (para 64). Where the financial loss is symbolized by a specific physical object, it may suggest that this object and its location serve as the starting point for establishing jurisdiction in the context of Article 7(2) of Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

tortious liability rules. Therefore, Article 7(1) of Brussels II and Article 4(1) of Rome II would apply.[228] Second, it may be argued that, where the core of the dispute is misleading environmental-related risk it appears more appropriate to initiate climate proceedings rather than initiating securities fraud proceedings. This issue, as far as we know, has not been addressed in the EU yet, but it has been discussed by some US courts.

In relation to the first option, in *VEB v BP*, a case in which the devaluation of assets derived from an oil spill that caused deaths, injuries and environmental damage in the Gulf of Mexico, the plaintiffs argued that the devaluation of assets was the result of misleading information concerning the oil spill. The discussion focused on purely financial loss and whether the courts of the plaintiff's domicile -the Netherlands, the place where the bank account where securities were held- had jurisdiction.

The environmental damage deriving from the explosion on the oil drilling platform[229] was not taken into account as a potential connecting factor by the CJEU when determining the jurisdiction and applicable law, despite the plaintiff argued that the devaluation of the certificates resulted from "BP's provision of incorrect, incomplete and misleading information concerning the oil spill".[230] Instead, the CJEU considered the place where the listed company must comply with their statutory reporting obligations the place where the damage occurred on the grounds that "those Member States that such a company can reasonably foresee the existence of an investment market and incur liability".[231]

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[228] Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") /* COM/2003/0427 final - COD 2003/0168 */ (hereafter Proposal for Rome II) analyses established the "violation of the environment"). But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union' s more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country' s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle.

[229] Case C-709/19 Vereniging Van Effectenbezitters [2021] ECLI:EU:C:2021:377, para 8, (hereafter Vereniging Van Effectenbezitters).

[230] Nonetheless, in the summary of facts the CJEU held that VEB argued that the devaluation of the certificates resulted from «incorrect, incomplete and misleading information concerning the oil spill» rather than from «the vagaries of the financial markets" given that the shareholders took investment choices that "they would not have made had the facts been presented correctly and fully». See Vereniging Van Effectenbezitters, cit., para 15.

[231] Vereniging Van Effectenbezitters, cit., paras 35 and 37: «Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that the direct occurrence in an investment account of purely financial loss resulting from

In particular, the CJEU denied the jurisdiction of Dutch courts arguing that it was insufficient concentrated to attribute jurisdiction to Dutch courts that the financial loss occurred in the Netherlands, the place where the investors' assets were, that the defendant disseminated the information worldwide rather than only to Dutch investors, and therefore the place where the damage occurred were "the courts of the Member State in which the bank or investment firm where the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State."[232]

As regards the second option, in the US, the securities fraud claim has been the preferred resource by plaintiffs in climate litigation cases concerning the disclosure of climate-related risks. However, in *The People of the State of New York v Exxon Mobil Corporation (Exxon)* the court noted that Exxon was not guilty in the current proceedings despite the court's intention was not to absolve the defendant from responsibility for contributing to climate change. The court emphasized that the reason why it reached such conclusion was that the parties should have initiated climate change proceedings rather than a securities fraud one given that, taking into account the state blue regulation -and, particularly, the Martin Act- Exxon could not be considered guilty of providing material misrepresentation as to future climate change costs to investors.

In sustainability financial disputes based on environmental damage, requires examining the concept of "environmental damage" is defined in Rome II. The CJEU and some opinions by Advocates General have clarified that the concept of "environmental damage"[233] provided for in Rome II cannot be considered a general concept of damage used in the substantive assessment to quantify the adverse consequences for a specific claimant, but it rather aims to determine where the specific damage arises. Article 7 of Rome II refers to non-contractual

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investment decisions taken as a result of information which is easily accessible worldwide but inaccurate, incomplete or misleading from an international listed company does not allow the attribution of international jurisdiction, on the basis of the place of the occurrence of the damage, to a court of the Member State in which the bank or investment firm where the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State».

[232] Vereniging Van Effectenbezitters, cit., para 35.

[233] Preamble (24) of Rome II defines "environmental damage" as an "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms".

obligations arising out of environmental damage[234] (direct damage),[235] or damage suffered "by persons or property" as a result of the environmental damage (indirect damage),[236] and offers two options: the application of the general rule of Article 4(1), according to which "the law of the country in which the damage occurs" shall apply, and an exception to apply "the law of the country in which the event giving rise to the damage occurred" if the person sustaining the damage so chooses.[237]

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[234] Pursuant to Preamble (24) of Rome II.
[235] See Proposal for Rome II analyses established the "violation of the environment". A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.
[236] Article 7 of Rome II ("environmental damage"). The Proposal for Rome II already established that Article 7 was expected to lay down a special rule for civil liability in relation to violations of the environment. Reflecting recent developments in the substantive law, the rule covers both damage to property and persons and damage to the ecology itself, provided it is the result of human activity. The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred.
The proposal encourages European or even international harmonisation on the basis of many environmental disasters have an international dimension. But the instruments adopted so far deal primarily with questions of substantive law or international jurisdiction rather than with harmonisation of the conflict rules. And they address only selected types of cross-border pollution. In spite of this gradual approximation of the substantive law, not only in the Community, but major differences also subsist - for example "in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation". The question of the applicable law has thus lost none of its importance.
Analysis of the current conflict rules shows that the solutions vary widely. The *lex fori* and the law of the place where the dangerous activity is exercised play a certain role, particularly in the international Conventions, but the most commonly applied solution is the law of the place where the loss is sustained (France, United Kingdom, Netherlands, Spain, Japan, Switzerland, Romania, Turkey, Quebec) or one of the variants of the principle of the law that is most favourable to the victim (Germany, Austria, Italy, Czech Republic, Yugoslavia, Estonia, Turkey, Nordic Convention of 1974 on the protection of the environment, Convention between Germany and Austria of 19 December 1967 concerning nuisances generated by the operation of Salzburg airport in Germany). The Hague Conference has also put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged.
The proposal explains that the basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection.
[237] The European Economic and Social Committee (EESC) in its opinion on the Proposal for a Regulation to non-contractual obligations (Rome II) emphasizes that:
«Clearly, by providing an exception to the general rule which, disguised as a conflict of laws provision, allows the injured party the choice of applicable law, the Commission is pursuing objectives which actually have nothing to do with conflict of laws, but which are rather intended to encourage potential environmental polluters to take environmental protection very seriously by threatening them with the application of a more stringent system of substantive law. This is also made clear in the explanatory memorandum to Article 7».

Likewise, recital 25 Rome II Regulation links the concept of environmental damage to the principles envisaged in Article 174 of the Treaty, which provides that there should be a high level of protection on the basis of "precautionary principle and the principle that preventive action…, the principle of priority for corrective action at source and the principle that the polluter pays".[238] This recital also establishes that "the question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is located".

The CJEU has applied the standard of the special jurisdiction rule of Article 7(2) of Brussels II to non-contractual obligation arising out of an environmental damage , i.e., the place where the harmful event occurred or may occur, in cases where the core of the dispute has been an environmental damage.[239] Hence, in pure environmental damage cases, the CJEU has sometimes applied a more flexible standard than the one it has applied in pure financial loss cases.

The question of determining the competent court that should resolve an environmental damage deriving from non-contractual obligations is not specifically established in Brussels II. Therefore, tortious liability stemming from environmental damages are governed by the same provision of other tortious claims pursuant to Articles 7(2) and 4(1) of Brussels II.

In *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace S*A, a "pure" environmental claim proceedings, the CJEU answered to a the preliminary question submitted by the *Gerechtshof Den Haag* about whether the "place where the harmful event occurred" could be interpreted as "the place where the damage occurred" or to "the place where the event giving rise to the damage occurred" (place where the act was wrongfully committed or omitted).[240] The CJEU adopted a flexible approach and, taking into account the "close connexion between the component parts of every sort of liability" and the "effective conduct of the proceedings",[241] held that if the place where the damage occurred (*locus* damni) is not identical to the place

[238] See, e.g., EUROPEAN COMMISSION, *Principles of environmental law*, https://www.era-comm.eu/Introduction_EU_Environmental_Law/EN/module_2/module_2_11.html. The polluter pays principle is applied in accordance with the principle of proportionality.
[239] Case C/21-76, Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA [1976] ECLI:EU:C:1976:166 (hereafter Handelskwekerij Bier v Mines de Potasse d'Alsace).
[240] *Ibidem.*
[241] Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA, cit., para 17.

where the harmful consequences emerged (*locus laesioni*), the expression "the place where the harmful event occurred" includes both places. Thus, the plaintiff may choose the place where the defendant will be sued.

A direct environmental damage as defined in Rome II could hardly be extrapolated to green securities disputes based on misleading sustainability or environmental risk. Nonetheless, it can be discussed whether a damage suffered "by persons or property" as a result of the environmental damage could be considered in a green securities claim for a particular class of shareholders:[242] someone may argue that claims based on prospectus liability affect financial assets owned by shareholders, which are intangible property rights, thereby the legal action intend to protect some property right.[243]

[242] M. W. McDaniel, *Bondholders and Corporate Governance*, in *The Business Lawyer*, 1976, Vol. 41, No. 2, 413-460.

[243] Cees van Dam, Protected Interests, cit. 166. See Jasinskij and Others v. Lithuania, Application No. 38985/97, 9 August 1998.The ECtHR has stated that «securities having an economic value can be regarded as "possessions in the sense of Article 1 of Protocol No. 1 of the ECHR regarding the fundamental right to protection of property. »

Part II. Chapter III. Analysis of sustainability financial disputes

1. Introduction. Legal strategies, outcomes, and precedents

Sustainability financial disputes represent a distinctive category within the realm of financial disputes. In 2022, among the 232 cases where judgments have been rendered thus far, approximately half (113) have yielded direct outcomes that promote climate action.[244] Financial is an influential sector, and therefore litigants are progressively concentrated their efforts on it to generate impact.[245] Many of these disputes often carry strategic significance, intertwining individual economic interests with broader societal concerns such as the advancement of climate policies and the protection of human rights.[246] Given this unique intersection, we propose employing a methodology grounded in case law analysis.

By scrutinizing relevant sustainability financial disputes involving investment firms, we aim to elucidate the convergence points of challenges and opportunities in climate litigation against financial firms. In other words, our focus lies in delving into the obstacles and advantages presented by private enforcement mechanisms in sustainability financial disputes involving financial institutions, especially concerning claims pertaining to misstatements in prospectuses and offering documentation.
This methodology enables us to establish links between regulatory deficiencies and evolving litigation patterns, thereby facilitating a more comprehensive grasp of the terrain at hand. This approach allows us to draw connections between regulatory gaps and emerging litigation trends, with the aim to provide a clearer understanding of the landscape.

In doing so, some considerations are in order. As mentioned above, relevant EU capital markets laws, such as the Prospectus Regulation, leave Member States the responsibility to develop private enforcement measures. Others, such as MiFID II, the Transparency Directive (TD) or

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[244] SETZER, NARULLA, HIGHAM and BRADEEN, *Climate litigation in Europe A summary report for the European Union Forum of Judges for the Environment*, in *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science and the European Union Forum of Judges for the Environment*, 2022, 30.
[245] *Ibidem*.
[246] SETZER and BYRNES, *Global trends in climate change litigation: 2020 snapshot*, in *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science*, 2020.

the Market Abuse Regulation (MAR) do not explicitly provide for specific private enforcement mechanisms.[247] Some scholars hold that such an absence of private enforcement avenues reveals that capital market laws do not aim to protect private interests, but rather the well-functioning of capital market, [248] i.e., a collective interest.

In our view, the private enforcement dimension is important. The CJEU has considered private enforcement a useful tool to settle disputes and supplement public enforcement in particular cases.[249] In *Skanka*, the Finnish Supreme Court submitted a preliminary ruling on:

(1) whether Article 101 Treaty on the Functioning of the European Union (TFEU) should be interpreted to hold acquiring companies liable for damages caused by cartels when they acquire all shares of companies involved in the cartel, dissolve them, and continue their commercial activities.
(2) if liability is to be determined directly under Article 101 TFEU, whether the concept of "undertaking" mentioned in that article includes entities liable for compensation, and if so, whether the same principles for determining liability in cases concerning fines apply; and
(3) if liability is to be determined based on national provisions, whether national rules exempting acquiring companies from liability for damages caused by the dissolved companies, even though obtaining compensation from the dissolved companies is impractical, contradict EU law requirements of effectiveness.[250]

According to the CJEU, the determination of entities liable for cartel damages is governed by EU law. Article 101 TFEU establishes direct legal effects and creates rights for individuals, allowing anyone harmed by cartel conduct to claim damages.[251]

The CJEU ruling highlighted that actions for damages for infringement of EU competition rules are integral to the enforcement system and ensure the effectiveness of competition rules. In other words, private enforcement plays an important role to protect individuals' own interests

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[247] C. GRIGOLEIT, *Sanctions and Degree of Harmonization*. In R. VEIL (ed), *Regulating EU Capital Markets Union*, Oxford University Press, 2024, 104.
[248] *Ibidem*. The author mentions that capital market laws protect "capital market institutions".
[249] C-724/17, Skanska Industrial Solutions and Others, ECLI:EU:C:2019:204, 2019 (Skanska case).
[250] Skanska case, paras 6-23.
[251] Skanska case, para 46-47. In this regard, the CJEU stated that the concept of an "undertaking" in Article 101 TFEU has the same scope regardless of whether it concerns fines imposed by the Commission or damages claims. Liability for cartel damages then rests with the undertakings involved in the cartel.

and also to ensure compliance with the rule of law and to preserve the well-functioning of the market and the effectiveness of EU law.[252]

The preference for developing public enforcement mechanisms over private enforcement mechanisms in sustainable finance regulations may stem from the historical reliance of private mechanisms on the demonstration of harm to private interests, while public mechanisms operate independently of individual harm or loss.[253] Consequently, public sanctions may surpass the actual losses incurred due to an infringement, reflecting societal perspectives on culpability.

In the realm of sustainability financial disputes, a significant challenge lies in quantifying damages for plaintiffs in actions brought before national courts. It necessitates determining which damages directly result from the defendant's actions, identifying specific losses suffered, and justifying why these losses should not be borne by the plaintiff.[254]

Considering the foregoing, we will also refer to other two main sources in our analysis. First, the Grantham Institute Reports of 2021, 2022 and 2023. These reports show the evolution in climate litigation strategies against both public institutions and private corporations.[255] In particular the 2023 Global Trend Report highlights a persistent surge in legal actions targeting corporations, including financial institutions, along with public financial entities.[256]

Grantham Institute Reports divide the current litigation cases between strategic and non-strategic cases. Among the strategic cases, cases are classified taking into account the type of

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[252] ELLISGSEN, *Standing to enforce European union law before national courts*, Hart Publishing, 2021, 39-41, and the explanation of the *Muñoz* case cited therein.
[253] In the context of capital market legislation, see, e.g., C. GRIGOLEIT (2024), *Sanctions and degree of harmonization*, cit., 89-118.
[254] A comprehensive overview of the national requirements to prove prospectus civil liability can be found in D. BUSCH (ed), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020.
[255] For example, J. SETZER AND C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, in *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science*, 2023.
[256] *Ivi*, 42. Notably, a singular case presently addresses a potential breach of the obligation to disclose material climate-related risks, with the defendant being the UK regulatory authority.

litigant: cases against governments,[257] public institutions,[258] and cases against corporations.[259] The third category would comprise "mixed" cases, in which have been included cases against public actors that may influence private relationships too (e.g., ClientEarth v the Belgian National Bank;[260] Massachusetts v. Environmental Protection Agency;[261] Urgenda Foundation v. State of the Netherlands[262]).

Second, the Sabin Center for Climate Law database. This database is an international climate litigation database, organized by type of claim, and reports on climate litigation against governments and firms worldwide. According to the information available in the Sabin Center for Climate Law database, there have been 192 climate litigation cases against corporations in jurisdictions other than the US (private law disputes). These cases comprise different types of claims. Under the category "financing and investment", the database has registered 4 cases, while other disputes against corporations include "climate damage" (32 cases), "carbon credits" (8 cases), "disclosures" (15 cases), "environmental assessment and permitting" (35 cases), "GHG emissions reduction" (29 cases), "just transition" (3 cases), "misleading advertising" (56 cases), and "pollution" (1 case).[263]

In addition, an interesting aspect is the growing number of decisions adopted by adjudicators other than judges. In particular, the Sabin Center for Climate Change Law database shows an

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[257] For example, O'Donnell v. Commonwealth, VID482/2020, FCA 1223, 2021. The lawsuit claims that the Australian government's response to climate change will have a substantial impact on Australia's economy and its standing in global financial markets. Consequently, investors involved in trading Australian government bonds are purportedly exposed to significant climate-related risks, which the government allegedly failed to disclose. Additionally, the lawsuit contends that the government has not been forthright in disclosing these risks, accusing it of misleading or deceiving investors both in the past and present.

[258] For example, Friends of Earth v UK Export Finance, EWHC 568 (Admin), 2022; EWCA Civ 14, 2023. Friends of the Earth England Wales and Northern Ireland filed a lawsuit against UK Export Finance's decision to provide over $1 billion of UK taxpayers' money for a liquefied natural gas (LNG) project in Mozambique. The lawsuit does not question whether the UK government should have considered the Paris Agreement in making its decision. Instead, it focuses on whether, after determining that the project and its financing complied with the UK and Mozambique's obligations under the Agreement, the decision itself was lawful.

[259] In this category we can find financial regulation cases, such as Abrahams v. Commonwealth Bank of Australia (2017) VID879/2017 and McVeigh v REST, NSD1333/2018, 2018, in Australia, The People of the State of New York v. Exxon Mobil Corporation, N.Y. Sup. Ct., 452044/2018, 2015, in the US. Also, this category includes Milieudefensie et al. v. Royal Dutch Shell plc., ECLI:NL:RBDHA:2021:5337, 2021, before the Dutch courts and other complaints, such as ClientEarth complaint against BP in respect of violations of the OECD Guidelines in the Netherlands in 2020.

[260] ClientEarth v. Belgian National Bank, 21/38/C, 2021 (withdrawn).

[261] Massachusetts v. Environmental Protection Agency, 549 US 497, 2007.

[262] Urgenda Foundation v. State of the Netherlands, HAZA C/09/00456689, 2015.

[263] Sabin Center for Climate Change Law, *Climate Chart Non-US Climate Change Litigation against corporations, individuals*, https://climatecasechart.com/non-us-case-category/corporations/.

increasing number of claims on misleading advertising or breach of the OECD Guidelines filed to the OECD National Contact Point (NCP), "a government-supported office whose core duty is to advance the effectiveness of the OECD Guidelines", with the aim to settle the dispute to the NCP's mediation proceedings.[264]

Statistics for private disputes against financial corporations in the US are more precise in relation to climate finance disputes in the Sabin Center for Climate Change Law database: securities and financial regulation cases comprise 31 cases.[265]

2. Type of sustainability financial promises subject to enforcement

2.1 Misleading climate-related statements in prospectuses.

The recently published 2023 Global Trend Report on climate litigation highlights a persistent surge in legal actions targeting corporations, including financial institutions, along with public financial entities.[266] Notably, a singular case presently addresses a potential breach of the obligation to disclose material climate-related risks, with the defendant being the UK regulatory authority.

A ground-breaking claim on prospectus liability is *ClientEarth v FCA*.[267] The NGO commenced legal proceedings against the Financial Conduct Authority (FCA) alleging that the FCA's decision to approve Ithaca's IPO prospectus to list on the London Stock Exchange was unlawful for being "too general". ClientEarth argued that investors will be misled because the prospectus does not detail material climate-related risks affecting its business, the significance of these

[264] BankTrack v ING Bank, OECD Mediation proceedings, 2017, https://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank. Sabin Center for Climate Change Law database has registered 9 cases, which has been conducted in National Points located in Italy, the Netherlands, Norway, Poland, Japan and the United Kingdom.
[265] SABIN CENTER FOR CLIMATE CHANGE LAW, *Climate Chart US Climate Litigation, Securities and Financial Regulation*, https://climatecasechart.com/case-category/securities-and-financial-regulation/.
[266] J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, cit., p. 42.
[267] ClientEarth v. Financial Conduct Authority [2023] EWHC 3301 (Admin) (Ithaca Energy plc listing on London Stock Exchange), https://www.bailii.org/ew/cases/EWHC/Admin/2023/3301.html. Ithaca is a major oil and gas producer in the UK North Sea. It applied for and obtained listing on the London Stock Exchange in 2022 and submitted a prospectus for approval by the Financial Conduct Authority (FCA), the UK's financial regulator. The FCA approved Ithaca's prospectus. In February 2023, ClientEarth filed a judicial review lawsuit, arguing that the climate risks associated with Ithaca's business were not adequately disclosed, and therefore, the FCA breached the Regulation by approving the prospectus.

risks, how the business model of the firm will be adapted to the Paris Agreement goals, and how this will impact its assets.[268] The alleged misstatements are contrary to the obligation to assess materiality of risk factors in accordance with Article 16 of the prospectus Regulation and ESMA Guidelines.[269]

Mrs Justice Lang DBE, in her judgement dated 13 December, dismissed the renewed application for judicial review to proceed to trial. First, she ruled that it was not arguable within the current legal proceedings that the FCA committed a legal error in approving the prospectus, emphasizing that Parliament had entrusted the FCA, an expert regulator, with the responsibility for such approval.[270] As a result, the court underscored its inability to substitute the FCA's perspectives, and any challenge should be based on a "public law error", such as misdirection, failure to consider relevant factors or irrational decision-making.[271]

Furthermore, the Court determined that the Paris Agreement had been identified as a material risk for Ithaca's business in the prospectus, and the FCA possesses the "discretion" to evaluate whether such a risk is adequately described and substantiated.[272] Consequently, it is for the FCA to deem that the Prospectus sufficiently addressed climate-related risks, as it concluded in this case.[273]

The request for judicial review of the prospectus' approval raises various relevant questions. First, the plaintiff based the misstatement on a breach of the statutory provision (Article 16 of the prospectus Regulation, but also on the soft law guidelines on ESMA Guidelines.[274]

Second, Article 16 requirements of the Prospectus Regulation are interpreted in a flexible way, i.e., requirements are not rigid, requiring evaluative judgements. In this regard, the integration

[268] ClientEarth, R (On the Application Of) v Ithaca Energy Plc [2023] EWHC 3301 (Admin), para 28 (hereafter ClientEarth, R (On the Application Of) v Ithaca Energy Plc).
[269] *Ivi*, para 18.
[270] ClientEarth, R (On the Application Of) v Ithaca Energy Plc, cit., para 21.
[271] *Ibidem*.
[272] ClientEarth, R (On the Application Of) v Ithaca Energy Plc [2023] EWHC 3301 (Admin). FCA, paras 27-29.
[273] *Ibidem*. FCA argued that Ithaca had provided sufficient information for investors to assess the risk in accordance with relevant regulations.
[274] However, the court did not apply the ESMA Guidelines in the instant case because these Guidelines do not provide a separate requirement for the issuer to disclose its assessment of risk and materiality. See ClientEarth, R (On the Application Of) v Ithaca Energy Plc, cit., para 22.

of a separate requirement for issuers to disclose their risk assessment in technical guidelines or supervisors' RTS may help courts interpret such requirements.[275]

Third, this claim raises the question of the scope and liability of NCAs in the exercise of the powers conferred in the Prospectus Regulation to approve and supervise issuers.[276] In particular, whether NCAs' supervisory powers conferred under the Prospectus Regulation enable them to verify whether climate-related risks are sufficiently "detailed". This, in turn, would require an assessment of the truthfulness or accuracy of the information that issuers provide pursuant to the Prospectus Regulation.[277]

Under the Prospectus Regulation and Delegated Regulation, the powers to approve the NCAs encompasses the scrutiny of the "completeness", "consistency" and "comprehensibility" of the information given in the prospectuses.[278] *Completeness* requires to assess whether the factors and risks listed in Article 6 and 16 of the Prospectus Regulation are included in the prospectuses.[279] *Consistency* requires prospectuses to be "free of material discrepancies", whether the risk disclosed elsewhere are included in the risk factors section, whether the use of proceeds is consistent with the issuer's strategy and amount of proceeds raised, consistency of the issuer's operating and financial review, auditor's report and working capital statement.[280] *Comprehensibility* refers to the review of the draft prospectus to ensure it is clear, free from unnecessary reiterations, uses plain language and an easily readable font size and is structured, describes the nature of the issuer's operations and its principal activities and trade- or industry-specific terminology.[281]

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[275] Some recent rulings reveal how courts refers to both ESMA Guidelines on Risk Factors under the Prospectus Regulation and the FCA's Technical note to resolve the dispute. See ClientEarth, R (On the Application Of) v Ithaca Energy Plc, cit., paras 16-21, 28.

[276] A comprehensive overview of the liability of financial supervisors and resolution authorities can be found in DANNY BUSCH, CHRISTOS GORTSOS, and GERARD MCMEEL QC (eds), *Liability of Financial Supervisors and Resolution Authorities*, Oxford University Press, 2022.

[277] The Prospectus Regulation remains UK law post-Brexit. For maintaining clarity and consistency throughout the work where we refer to EU Prospectus Regulation. See FCA, *The Prospectus Regulation Rules sourcebook*, https://www.handbook.fca.org.uk/handbook/PRR.pdf.

[278] Article 2(r) of the Prospectus Regulation (definition of approval) in relation to Article 35 of the Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (PR Commission Delegated Regulation).

[279] Article 36 of the PR Commission Delegated Regulation. The prospectus contains the type of issuer, the type of issuance, the type of security, and the type of offer or admission to trading, and the financial history of the issuer.

[280] Article 38 of the PR Commission Delegated Regulation.

[281] Article 37 of the PR Commission Delegated Regulation.

Completeness, consistency, and comprehensibility relate to the formal aspects that issuers must satisfy in order to obtain the approval of the authorities for their prospectus. In this respect, the authorities have the ability to examine the formal compliance with the disclosure obligations set forth in the prospectus.

On the basis of the scrutiny of the above-mentioned characteristics carried out by the NCAs, they have powers to refuse permission for listing,[282] require issuers to publish a supplement prospectus,[283] require auditors, managers of the issuer, or financial intermediaries to provide "all material information" that may have an effect on the assessment of the securities,[284] or impose conditions to protect investors.[285]

As a result, in our view the Prospectus Regulation does not require a "detailed" evaluation of the issuer-specific risks, i.e., to scrutinize compliance with the substance of disclosure obligation.

ClientEarth published a position paper with recommendations about the FCA's use of its powers.[286] The NGO recommends that FCA, to mitigate investor and market climate risk shall "Making *demonstrable* Paris- alignment a condition of listing for climate-exposed companies", circumscribing climate-exposed listings as "high risk" transactions subject to "heightened scrutiny" during eligibility review, and releasing "clear and authoritative guidance" to the market explaining its approach to climate-exposed listings.[287]

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[282] Article 32(1)(k) of the Prospectus Regulation.
[283] Article 22 of the Prospectus Regulation.
[284] Article 32(1)(c) and (l) of the Prospectus Regulation.
[285] LUCA ENRIQUES, GERARD HERTIG, REINIER KRAAKMAN, and EDWARD ROCK (eds), *Corporate law and securities market. In The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd edn, Oxford University Press, 2017, 256-257. The authors explain that in EU law, listing authorities, including securities regulators and stock exchanges, are empowered to scrutinize applications for exchange listings to safeguard the interests of the investing public. For instance, the UK's Financial Services and Markets Act 2000 grants authority to the UK Listing Authority to reject listing applications deemed detrimental to investors' interests. Similarly, the Italian authority may oppose exchange listings that contradict its supervisory objectives of ensuring market transparency, orderly trading conduct, and investor protection. In the United States, various states authorize state regulators to withhold approval for securities issues that deviate from specified guidelines or appear, in the officials' view, to pose significant risks without corresponding economic merit. Nevertheless, the majority of securities offerings are currently exempt from state regulators' scrutiny. It is noteworthy that quality-control provisions have diminished in popularity among European policymakers, with the described powers being rarely, if ever, exercised.
[286] CLIENTEARTH, *UK listing rules and climate change Position Paper*, 2022, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220808_19122_na.pdf.
[287] *Ivi,* table 1.

However, this last idea does not seem to be plausible in the near future. If we observe the recently approved EU Green Bond Regulation (EUGBR),[288] NCAs are required to have the necessary supervisory and investigatory powers to ensure that issuers of EUGBs for which a prospectus is published pursuant to the Prospectus Regulation comply with the disclosure requirements set out in the EUGBR before and after the issuance of the European Green Bonds.[289] This supervisory powers are nonetheless limited.

Recital 33 of the EUGBR clarifies that the "extended" powers the regulation confers the NCAs should not be used to "verify the truthfulness" or "accuracy of the information that issuers are required to provide" pursuant to this Regulation, nor "whether issuers have complied with the obligations regarding the allocation of proceeds". In other words, the compliance with the "substantive" disclosure obligations is a matter outside the scope of the NCAs' powers.

Finally, Ithaca's IPO opted for traditional securities rather than green-labelled securities. However, the dispute revolves around potential failure to sufficiently disclose or describe the specificity of climate-related risks linked to the securities. The ongoing debate on whether issuers should explicitly outline significant climate-related risks in the financial disclosures of prospectuses, regardless of the nature of the securities issued, raises the possibility of extending disclosure obligations under Articles 6 and 16 of the Prospectus Regulation to all types of securities, regardless of their "green-labelled" status. Currently, this remains an uncertain aspect within the existing regulatory framework. So far, this element is an uncertain aspect in the current regulatory framework. The SFDR incorporates a "comply or explain" obligation, wherein issuers are required to either refrain from issuing green securities[290] or provide an explanation for not considering the adverse impact of investment decisions on sustainability factors.[291] The SFDR positively encourages companies to make sustainable investments but does not cover the entire market.

[288] European Parliament legislative resolution of 5 October 2023 on the proposal for a regulation of the European Parliament and of the Council on European green bonds (COM(2021)0391 – C9-0311/2021 – 2021/0191(COD)).
[289] Articles 44 and 45 of the EUGBR.
[290] Article 4 of the SFDR.
[291] Article 6 of the SFDR.

2.2 Greenwashing allegations for false statements.

This section discusses lawsuits related to greenwashing allegations in relation to sustainability information, in the context of securities fraud and consumer protection.[292] These kinds of lawsuits have been filed in the US and involve allegations of false or omitted sustainability information in formal securities filings or other disclosure formats.[293] The greenwashing claims based on fraudulent statements have been traditionally filed in front of US courts, as revealed by the 2019-2023 Global trend reports.[294]

Furthermore, in 2022 arguments based on fraud were integrated into climate/washing claims against fossil fuel companies.[295] The Sabin Center Climate Change Litigation Databases records 30 securities and financial regulation cases in the US (closed and pending), where only 9 of them are securities fraud cases for failing to disclose climate risks.[296] In this regard, private claims have been filed against big companies (Carbon Majors) based on having defrauded shareholders as a result of misrepresentations of the impacts of climate change on their economic activities or greenwashing advertising.[297]

Against the background of recent cases which focus on predicting future impacts derived from misleading mismanagement of climate-related risks,[298] older securities fraud claims tried to

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[292] One of the most recent examples is City of New York v. Exxon Mobil Corp. Docket number(s): 1:21-cv-04807 Court/Admin Entity: S.D.N.Y.

[293] D. C. LANGEVOORT, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, in *The Georgetown Law Journal*, 2019, no 107, 967-1012.

[294] J. SETZER and R. BYRNES, *Global trends in climate change litigation: 2020 snapshot*, cit., 1. The report reflects that fraud claims are one of the strategies being used against Carbon Majors.

J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2021 snapshot*, cit.. In 2021 the NGO ClientEarth initiated a campaign shedding light on how major fossil fuel companies, such as BP, ExxonMobil, Aramco, Chevron, Shell, Equinor, Total, RWE, Drax, and Ineos, are disseminating misleading information regarding climate change through their advertising. Some instances of such misinformation could potentially lead to fraud allegations. For example, State v. American Petroleum Institute, a claim filed by State of Minnesota against Exxon Mobil, Koch Industries Inc., and the American Petroleum Institute, accusing them of participating in a "campaign of deception." The lawsuit included common law claims for fraud and misrepresentation, as well as claims under the state's Consumer Fraud Act.

J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, cit., 44. It compares early securities fraud cases field by shareholders and focused on financial impacts already sustained to new cases focused on breach of fiduciary duties for not adequately predict future impacts in their risk management procedures and corporate reporting obligations.

[295] J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2022 snapshot*, cit., 40.

[296] SABIN CENTER CLIMATE CHANGE LITIGATION DATABASES, *US Climate Change Litigation*, https://climatecasechart.com.

[297] J. SETZER and R. BYRNES, *Global trends in climate change litigation: 2020 snapshot*, cit., 19.

[298] E.g., ClientEarth v Board of Directors of Shell [2023] EWHC 1137 (Ch). This is a civil claim based on breach of fiduciary duties of the members of the board of Shell. See above section 2.2.

prove a demonstrable loss of value of the securities as a result of the alleged mismanagement.[299] As a result, these cases are "easier" to resolve to the extent that there was an actual damage by the time the lawsuit was filed.[300]

In securities fraud claims in the US, courts have taken into account aspects such as the statutory scheme (reliance, scienter, and materiality requirements), form of presentation of the alleged sustainability falsity, and location of disclosure to resolve the disputes. US Courts have been more likely to agree with plaintiff when disclosures are concrete and fact-based, and less so when they are vague or aspirational or "puffery", which are deemed "not material".[301] Some scholars advocate that the distinction between actionable statements and vague or aspirational statements pose challenges for litigants and corporations navigating sustainability disclosure liability.[302]

Securities fraud claims were the type of lawsuit initially filed against firms based on allegedly false or misleading sustainability-related disclosure under Rule 10b-5 of the Securities Exchange Act 1934.[303] These cases connect the misleading statements to the loss of financial value of investors, as a result of a misleading disclosure of the carbon proxy costs, or because the firm did not properly asset the risk of "stranded assets" in their disclosures.[304]

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[299] For example, In re BP p.l.c. Sec. Litig*.,* MDL NO. 4:10-MD-2185 (S.D. Tex. May. 31, 2016). The "BP Deepwater Horizon" shareholder litigation under Section 10(b) took place after the big oil discharged into the Gulf of Mexico.

[300] J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, cit., 38.

[301] Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U.S. ___, 2015 WL 1291916 (U.S. Mar. 24, 2015) (hereafter Omnicare). This is a landmark case deals with the registration statements under Section 11 of the Securities Act of 1933 for companies that wish to issue securities and the difference between statements of facts and statements of opinion. The court held that Section 11 liability does not attach to a sincere statement of pure opinion. The court acknowledged that statements of opinion can lead to Section 11 liability in limited circumstances. First, if the one making the statement does not subjectively believe in the truth of the opinion, Section 11 is violated. Second, if a statement of opinion incorporates an underlying fact that is untrue, Section 11 liability attaches. In the case of omissions, an omission of material facts about the issuer's inquiry into or knowledge concerning a statement of opinion could create liability under Section 11.

[302] C. M. AJAX and D. STRAUSS, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?* in *Ecology Law Quarterly*, 2018, no 45, 703-734.

[303] The elements of a private securities fraud claim, based on violations of section 10(b) and Rule 10b–5, are: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." See Matrixx, 131 S.Ct. at 1317–18 (quoting Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 157, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008)).

[304] Ramirez v. Exxon Mobil Corp. Docket number(s): 3:16-cv-3111 Court/Admin Entity: N.D. Tex.

In re BP p.l.c. Securities Litigation involves a shareholder litigation that took place as a result of a severe oil spill in the Gulf of Mexico. The plaintiffs argued that BP issued false and misleading statements in press releases, interviews, in order to keep BP securities trading at inflated prices.[305] These misleading sustainability disclosures were material to the plaintiff's investment decisions.[306] The Court, relying on *Omnicare*'s analysis of statement of facts and statements of opinions,[307] held that some statements were actionable,[308] and those which were predictive in nature were material,[309] and found liability when omitted facts conflicted with what a reasonable investor would have taken from the statements. [310] The dispute was resolved by a settlement between BP and the shareholders.[311]

A landmark securities fraud case in the US has been *The People of the State of New York v Exxon Mobil*.[312] This was an important step for further securities claims against Exxon Mobile and other "Carbon Majors". In this civil case, the core of the dispute was whether the firm committed a fraud scheme against shareholders by firm's mismanagement of risks and how it accounted for the costs of climate change regulation.[313]

The court specifically addressed issues of fraud and did not absolve Exxon of any potential responsibility for contributing to climate change but concluded that a securities fraud claim was not the appropriate cause of action to discuss this issue. In particular, the court emphasized that,

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[305] In re BP p.l.c. Sec. Litig., MDL NO. 4:10-MD-2185, cit., para 743.
[306] The formal opening criminal and civil investigations into BP following the spill caused a declined of approximately 15%. Furthermore, the Board suspended dividend payments. In total, BP securities fell in value by almost 48% from the date of the oil spill. See *In re BP p.l.c. Sec. Litig*., MDL NO. 4:10-MD-2185 (S.D. Tex. May. 31, 2016), para 744.
[307] Omnicare, cit.
[308] Such as the assessments made by BP regarding the precise volume of the spill into the Gulf after the incident, P's actions in response to an oil spill incident in the Gulf of Mexico, and responses to employee's safety concerns. In re BP p.l.c. Sec. Litig., MDL NO. 4:10-MD-2185 (S.D. Tex. May. 31, 2016), paras 724-726.
[309] The Court distinguished between "generalized positive statements about a company's progress" which are immaterial and are not a basis for liability, and "Statements that are predictive in nature". The latter statements are actionable "only if they were false". *In re BP p.l.c. Sec. Litig*., cit., para 748.
[310] Omnicare, cit.
[311] BP agreed to pay $175 million USD. See D. CRAFT and V. SRIDHAR, *BP Agrees to Pay $175 Million to Settle Claims with Shareholders*, in *REUTERS*, 2016, https://www.reuters.com/article/us-bp-spill-settlement/bp-agrees-to-pay-175-million-to-settle-claims-with-shareholders-idUSKCN0YP099.
[312] The People of the State of New York v. Exxon Mobil Corp., cit. This was the first fraud claim regarding climate-related misleading information was submitted by a group of shareholders against Exxon Mobile Corporation.The lawsuit, initiated in 2015 after a four-year investigation, asserted that Exxon's publicly disclosed projections of climate-related costs contradicted its internal projections, constituting fraudulent behaviour.
[313] The People of the State of New York v. Exxon Mobil Corp., cit. The New York state judge ruled in favour of Exxon against the state's Attorney General, who contended that the company.

taking into account the Blue-Sky regulation[314] –particularly, the Martin Act-,[315] Exxon could not be considered guilty of providing material misrepresentation as to future climate change costs to investors. In order for Exxon to be found guilty of future climate change costs, the plaintiff should have initiated climate change proceedings rather than a securities fraud claim.

In addition, despite the court considered that a securities fraud claim was not the appropriate cause of action to resolve the dispute, it also assessed the materiality of the misstatement. It held that the statements concerning the "climate change costs" were not deceptive, or material. To dismiss the allegation on misrepresentation, the court based its reasoning on misstatements regarding proxy cost of carbon by Exxon.[316] As regards materiality, the court held that evidence indicated the investors did not rely on speculative assumptions of future climate change costs when making their investment decisions, i.e., the climate-risk information disclosed was non-material to conclude that a reasonable investor would have relied on it.[317]

In a separate but similar case, *Commonwealth v. Exxon Mobil Corp*.,[318] the Massachusetts Attorney General filed a claim against Exxon Mobil Corp. and some aspects of the New York case are echoed in this case, although in this case the plaintiff alleged that the firm was allegedly mispresenting its product as reducing greenhouse gas emissions.[319] In the motion to dismiss the case the court found plausible allegations that Exxon intentionally misrepresented and omitted information about climate change risks. In particular, the court agreed with the Commonwealth that Exxon had an affirmative duty to warn consumers about climate risks associated with use of its products arises once it created the impression that using its products resulted in

[314] This is the set of statutes, rules and regulations providing for the supervision and regulation of offers and sales of securities. See PRACTICAL LAW, *Glossary, Blue Sky Laws*, Thomson Reuters, https://uk.practicallaw.thomsonreuters.com/7-382-3275?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[315] The Martin Act is enshrined in the New York General Business Law 352-359(h), and it is the most severe blue-sky law in the US.

[316] The People of the State of New York v. Exxon Mobil Corp., cit. Exxon's public disclosures during the 2013 to 2016 period under scrutiny, which encompassed Form 10-K filings and March 2014 reports specifically addressing climate change risks and regulations, distinguished proxy costs of carbon and greenhouse gas (GHG) costs as "distinct and separate metrics.

[317] The People of the State of New York v. Exxon Mobil Corp., cit., cf. TSC Industries, cit., according to which material representations as information that "would have been viewed by a reasonable investor as having significantly altered the total mix of information made available" TSC Industries, Inc v. Northway, Inc., 426 U. S. 438 (1976).

[318] Commonwealth v. Exxon Mobil Corp. Docket number(s): SJC-13211 Court/Admin Entity: Mass., p. 24 (hereafter Commonwealth v. Exxon Mobil Corp).

[319] Ibidem.

environmental benefits.[320] According to the court, deceptive advertising claims did not require specific falsities about fuel products, only that the representations were misleading.[321]

This argument followed the approach on materiality applied in fraud-on-the-market case *In re Massey Energy Co. Securities Litigation*.[322] The plaintiff's allegations centred on false statements in securities filings, press releases, public statements by company officials about the company's commitment and attention to safety records, and inaccurate statements about the frequency of violations of mining policies and regulations, as well as costs and liabilities affected by environmental and safety laws.[323] The court denied the defendant's motion to dismiss, reasoning that the plaintiffs presented sufficient specific facts to show that Massey provided "materially" false and misleading information about workplace safety in violation of section 10(b) of Securities Exchange Act of 1934.[324]

Ramirez v. Exxon Mobil,[325] an action failed by shareholders where they argue that Exxon's failure to disclose information about its internal assessment of transition risk amounted to securities fraud, resulting in a drop in value for shares when the misinformation was subsequently corrected, i.e., those assets were "stranded assets" that will cause loss to investors.[326] The Texas Federal Court recently declined to certify class for investors' securities fraud claims based on Exxon's alleged misstatements regarding proxy cost of carbon on the basis of market reaction to the investigations by New York and California Attorneys General.

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[320] Commonwealth v. Exxon Mobil Corp, cit., 24-25. The decision follows Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 2011, 44, and Schueneman v. Arena Pharm Inc., 840 F.3d 698, 706 (9th Cir. 2016) (when choosing to disclose positive information to the market, they are bound to do so in a manner that would not mislead investors, including disclosing adverse information…).

[321] Commonwealth v. Exxon Mobil Corp., cit., 17-22. The court, at this stage, couldn't determine if Exxon's representations would mislead a "reasonable consumer" and disagreed with Exxon's argument that the claims were a "pure omission" not subject to liability. Regarding "greenwashing" claims, the court refrained from deciding if the alleged misrepresentations were unactionable puffery.

[322] In re Massey Energy Co. Securities Litigation 883 F. Supp. 2d 597, 601–09 (S.D. W.Va. 2012) (hereafter In re Massey Energy Co). The plaintiffs filed a securities fraud class action lawsuit against Massey Energy, the fourth largest coal company in the US. They alleged that Massey provided false and misleading information about its mine safety record and safety improvement procedures, artificially inflating stock values and causing losses to investors following a 2006 mining disaster.

[323] In re Massey Energy Co., cit., para 604. The securities claim was filed after some mines died and followed criminal and civil litigation.

[324] In re Massey Energy Co., cit., para 616.

[325] Ramirez v. Exxon Mobil Corp., cit.

[326] *Ibidem*. See D. CARDWELL, *Exxon Mobil Shareholders Demand Accounting of Climate Change Policy Risks*, in *N.Y. TIMES*, (May 31, 2017), https://www.nytimes.com/2017/05/31/business/energy- environment/exxon-shareholders-climate-change.html.

According to the court, the presumption of reliance was rebutted by the expert's opinion showing no statistically significant negative price reactions to corrective disclosures.[327]

A further case in the "Exxon saga" is In re Exxon Mobil Derivative Litigation.[328] After the unsuccessful securities claims, this lawsuit showed a change in the legal strategy of plaintiffs. This case integrates additional derivative actions alleging that Exxon directors violated their fiduciary duties by allowing false and misleading disclosure of climate risks and requesting a compensation for damages as a result of a breach of fiduciary duties, waste of corporate assets and unjust enrichment.[329] In this claim, plaintiff already requested to the court to compel Exxon to take necessary actions to reform and improve its corporate governance and internal procedures.[330] The action is still pending before the Northern District of Texas courts.[331]

BRS v. Volkswagen AG presents a securities fraud case in the context of an IPO where the plaintiff is a class of bondholders. The bondholders alleged that the defendant failed to disclose their massive defeat-device scheme before investors subscribed the offered.[332] The court concluded that the defendant created a greenwashing "fraud scheme" because it identified as a priority in the prospectus to sell "clean diesel vehicles" that would integrate engines to reduce emissions. However, such engines did not contribute to reduce greenhouse gas emissions.[333]

The court concluded that the statements were misleading before the uncovered massive defeat-device scheme because any *reasonable* investor could have concluded that the defendant was committed to emission-reducing technology.[334]

Finally, the first "climate-washing" and fraud complaint in front of the US Securities and Exchange Commission (SEC) regarding an IPO for the issuance of sustainability-linked bonds issued by JBS, a Brazilian meat giant corporation.[335] The argument remains the same: JBS has

[327] See In re Exxon Mobil Corp. Derivative Litigation 3:19-cv-16380 D.N.J., http://climatecasechart.com/case/saratoga-advantage-trust-energy-basic-materials-portfolio-v-woods/.
[328] In re Exxon Mobil Corp. Derivative Litigation, cit., 55.
[329] *In re Exxon Mobil Corp. Derivative Litigation*, cit., 85.
[330] *Ibidem.*
[331] In re Exxon Mobil Corp. Derivative Litigation, cit., Opinion and Order.
[332] *BRS v. Volkswagen AG, et al.,* cit., para 10.
[333] *Ibidem.*
[334] *BRS v. Volkswagen AG, et al.,* cit., 6.
[335] Might Earth v JBS (pending), https://www.mightyearth.org/wp-content/uploads/Mighty-Earth-SEC-JBS-IPO-Submission.pdf.

made public and investor materials that it is on a path to meet Net Zero goals, but fails to fully measure, disclose, or most importantly reduce, its Scope 3 emissions. The SEC is investigating whether JBS's conduct violate antifraud securities laws.[336]

In In the context of sustainability financial disputes in the EU, to the best of our knowledge, there have not been any discussion about disclosure proceedings where the issuer has tried to secure enrichment, and/or increase their reputation with an intention to deceive. Nonetheless, this kind of allegations could potentially be the next step that strategic plaintiffs might pursue based on a violation of market abuse regulations,[337] leading to the initiation of criminal proceedings. Such allegations would entail to initiate criminal proceedings before national courts alleging a false materiality assessment of the activity's impact on the environment or vice versa that may result in a "unfair view" of the company's assets, liabilities, financial position and profit or loss, thereby jeopardizing the interests and trust of third parties, undermining the well-functioning of the market.[338]

2.3 Disputes based on non-disclosure of material corporate sustainability-related risks.

In 2021 were registered the first claims on fiduciary duties and corporate due diligence against big corporations, but also banks, pension funds, asset managers, insurers, and major retailers.[339] These disputes have raised issues concerning inadequate disclosure or misinformation in corporate reporting and financial statements against management bodies (2.3.1) and against investment decisions of financial intermediaries, especially trustees in relation to sustainable investments (2.3.2).[340]

2.3.1 Green fiduciary duties of management bodies.

[336] *Ibidem*.
[337] See chapter 1.
[338] In a different context, presents an example of criminal proceedings for false accounting.
[339] J. SETZER and R. BYRNES, Global trends in climate change litigation: 2019 snapshot, cit., and by the same authors Global trends in climate change litigation: 2020 snapshot have not registered any case focused on the "green" fiduciary duties of firm's management bodies.
[340] J. SOLANA, *Climate Litigation in. Financial Markets: A Typology*, cit., 103-135.

Selecting the information that will be published in a prospectus or sustainability-related corporate reporting statement, considering the material sustainability-related risks that may affect the securities in offer and the issuer, or whether it has developed a correct internal risk assessment to identify, prevent, or mitigate sustainability-related risks affecting their business and vice versa is a business decision that ultimately depend on whether the management bodies acted on an informed basis, in good faith and took the action in the interest of the firm and its members.

Good faith and procedural due care have considered two significant pre-requirements to rely on the Business Judgement Rule. [341] The duty of care has a procedural and substantive dimension. The interpretation of the substantive duty of care in recent corporate climate litigation has integrated some principles from "soft law" instruments when evaluating if directors and managers have adequately assessed climate, social or other sustainability risks, in line with their fiduciary duties. [342] A question in this regard is whether directors are subject to a green fiduciary duty and how to interpret such a duty.[343]

These decisions are business judgement decisions, highly subjective,[344] and are normally protected by the Business Judgement Rule (BJR), and may conflict with others, such as actions based on conflicts of interests, which are subject to an objective test.[345] This makes it hard that the basic duty of the director to act in the best interests of the company can be effectively enforced.

[341] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Cede & Co. v Technicolor, 634 A.2d 345 (Del. 1993).

[342] Oxfam and Others v BNP Paribas, cit., Writ of Summons, para 43. In Oxfam and Others v BNP Paribas, the plaintiffs argue that there is an interpretative framework applicable to multinational enterprises that clarify the duty of care that is expected of firms in the absence of case law.

[343] C. WILLIAMS, *Fiduciary Duties and Corporate Climate Responsibility,* in *Vanderbilt Law Review* 2021, *74,* 1916. The author holds that in the US: «It is highly doubtful to this Author that a Delaware court would hold, today, that directors have a "societal duty», as argued by Jaap Winter, and certainly unlikely that a Delaware court would state any conclusion in those terms. Yet it is not unlikely to think that the concept of what boards and executive teams need to actually do to advance the interests of "the corporation and its shareholders," which is the object of the board's fiduciary obligations in Delaware,158 is changing. These changes in boards' actions will require, in at least many instances, deeper consideration than today of the effects of corporate action on the climate, and actual decisions to adopt Paris-aligned strategies. This consideration, this Author argues, is a slice of Jaap Winter's "societal duty."

[344] P. DAVIES, *Enlightened Shareholder Value and the New Responsibilities of Directors*, Lecture delivered at the University of Melbourne Law School, 2005, https://law.unimelb.edu.au/__data/assets/pdf_file/0014/1710014/94-Enlightened_Shareholder_Value_and_the_New_Responsibilities_of_Directors1.pdf. In relation to the BJR, see L. L. ENRIQUES, G. HERTIG, R. KRAAKMAN, and E. ROCK (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd edn, Oxford University Press, 2017.

[345] . DAVIES, *Enlightened Shareholder Value and the New Responsibilities of Directors*, cit.

ClientEarth v Board of Directors of Shell reflects the above-mentioned difficulties.[346] The Court interpreted the statutory duty established in section 172 of the Companies Act of 2006 "seek to impose specific obligations" on the Directors regarding how to manage their businesses and affairs.[347] According to the judge, *all directors* of firms are subject to this duty. However, ClientEarth's reasoning that that the lack of ceasing investments in new fossil fuel projects is a breach of the directors' duties to promote the best interests of the company under the UK Companies Act 2006 goes beyond required by law.

In ClientEarth v Board of Directors of Shell, Client Earth officially initiated legal proceeding against the company in 2023 on the grounds that the directors did not conduct a prudent management of the firm. As a result, firm did not adapt its management procedures and strategies to climate objectives, firm's act did not advance climate change risk management as described in Shell's corporate documentation published in April 2021, October 2021, and April 2022.[348] Client Earth alleged that the Board of Directors of a high-emitting company, as was Shell, has a fiduciary duty to manage climate risk. Managing climate risks involves considering the impacts of its strategic and investment decisions on climate change, and to reduce its contribution to it. A lack of doing so, in the plaintiff's view, constituted a breach of the directors' fiduciary duties pursuant to sections 172 and 174 of the Companies Act of 2006.[349]

The High Court dismissed the plaintiff's case on procedural grounds, in particular, on the basis of a lack of prima facie case.[350] In its assessment, Mr Justice provided an interpretation of the ultimate intention of section 172 of the Companies Act of 2006.

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[346] ClientEarth v Board of Directors of Shell, cit. Client Earth officially initiated legal proceeding against the company in 2023 on the grounds that the directors did not conduct a prudent management of the firm. As a result, firm did not adapt its management procedures and strategies to climate objectives, firm's act did not advance climate change risk management as described in Shell's corporate documentation published in April 2021, October 2021, and April 2022. Client Earth alleged that the Board of Directors of a high-emitting company, as was Shell, has a fiduciary duty to manage climate risk. Managing climate risks involves considering the impacts of its strategic and investment decisions on climate change, and to reduce its contribution to it. A lack of doing so, in the plaintiff's view, constituted a breach of the directors' fiduciary duties pursuant to sections 172 and 174 of the Companies Act of 2006. Section 172 of the 2006 Companies Act: the duty to promote the success of the company under section 174 of 2006 Companies Act, and the duty to exercise reasonable care, skill, and diligence.

[347] ClientEarth v Board of Directors of Shell [2023] EWHC 1137 (Ch), Paras 27-30, https://www.bailii.org/ew/cases/EWHC/Ch/2023/1137.html.

[348] ClientEarth v Board of Directors of Shell [2023] EWHC 1137 (Ch), Para 2, https://www.bailii.org/ew/cases/EWHC/Ch/2023/1137.html.

[349] section 172 of the 2006 Companies Act: the duty to promote the success of the company under section 174 of 2006 Companies Act, and the duty to exercise reasonable care, skill, and diligence.

[350] See Iesini v Westrip Holdings Limited [2010] BCC 420 ("Iesini") at [78]: « […] The *prima facie* case to which s.261(1) refers is a *prima facie* case "for giving permission". This necessarily entails a decision that there is

Mr Justice Trower stressed that the statutory duty established in section 172 of the Companies Act of 2006 “seek to impose specific obligations” on the Directors regarding how to manage their businesses and affairs.[351] According to the judge, *all directors* of firms are subject to this duty. However, ClientEarth’s reasoning that that the lack of ceasing investments in new fossil fuel projects is a breach of the directors’ duties to promote the best interests of the company under the UK Companies Act 2006 goes beyond required by law.

Particularly, the judge noticed that the formulation of this duty as specific duties which “flow from what is said to be the logical consequence of the Board's acceptance that climate risk is a serious risk to Shell's business” is inconsistent with the well-established principle that it is for directors themselves to determine how best to promote the success of a company for the benefit of its members. In doing so, the judge concluded that directors of a firm such as Shell may decide the weight to be attached to the non-exhaustive list of factors included in section 172.

In other words, the judges’ reasoning was that the Directors of firms do not have “absolute duties” which cut “general duties” to have regard to the many “competing considerations” as to how to best promote the success of Shell for the benefit of its members as a whole. The judge described the alleged duty to adapt the business model and adopt a new policy investment to ceasing investments in new oil and gas as “incidental duties”.

For that reason, the High Court concluded that it is for the directors themselves to *weigh* the impact of the company’s operations on the community and the environment and their response to the business risk linked to climate change is part of their decision-making process.[352] The

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a *prima facie* case both that the company has a good course of action and that the course of action arises out of a directors' default, breach of duty (etc.) ».
In the UK, the courts have distinguished between the procedural position of the plaintiff at common law and the procedural position to continue a derivative claim governed by statutory rules. The procedural test requires to overcome the filter required by section 261(2) of the 2006 Companies Act and the substantive application entails the application by the court of the test set out in section 263.
In Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 at 222A, the Court of Appeal stated that it was necessary for the claimant to establish a prima facie case both that the company was entitled to the relief claimed and that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle.

[351] ClientEarth v Board of Directors of Shell [2023] EWHC 1137 (Ch), Paras 27-30, https://www.bailii.org/ew/cases/EWHC/Ch/2023/1137.html.

[352] In contrast, in a corporate litigation case against a non-financial firm, ClientEarth v Enea, the Polish national courts found the resolution held in the Extraordinary General Meeting of ENEA S.A. on expressing qualified consent to commence the Construction Stage of the Ostrołęka C project (the power plant) to be *null and void*.

"proper balancing" of competing considerations is a "classic management decision" with which the court is "ill-equipped to interfere".[353]

In other words, the judgement places value on the discretion of directors to determine the weight to attach to the factors they consider, and the court cannot interfere.[354]

In our view, if conventional managers refuse to see their role as different and more engaged towards shareholders or beneficiaries when it comes to sustainability goals, one possibility would be to appoint a party (e.g., a gatekeeper) whose role is to do that.[355]

In this context, it seems essential to clarify whether genuinely new green fiduciary duties are necessary, or if it would suffice to reinterpret the duty of care and loyalty of companies.[356] This aligns with the theory of enlightened shareholder value,[357] which advocates for identifying stakeholders suitable for the company and considering them in internal risk decision-making, as well as in the documentation provided to investors in the market.

ClientEarth, acting as a minority shareholder, challenged the construction of a coal power project (Ostraleka C project). ClientEarth voted against the resolution approving the project. Following its adoption, ClientEarth brought an action under the Polish commercial code in front of the Polish national courts after. The NGO requested the nullity of the firm's resolution to build a coal power plant and the legal responsibility of the firm's directors to manage and disclose climate-related risks.
This case drew attention to the accountability of firms and the liability of directors. After the ruling of the court, the defendant announced the cessation of investment in the project for economic reasons.

[353] Para 48 and 25, citing Lord Wilberforce in Howard Smith Ltd v Ampol Ltd [1974] AC 821 at 832E/F: «There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at».

[354] S. L. SCHWARCZ, *Bond Defaults and the Dilemma of the Indenture Trustee*, in *Alabama Law Review*, vol. 59, no. 6, 2007, vol 21–9, 2007–8.

[355] For a deepen analysis on "green gatekeepers" to resolve coordination problems, see RAMOS MUÑOZ, CERRATO, LAMANDINI, *The EU's "green" finance. Can "exit", "voice" and "coercion" be enlisted to aid sustainability goals?*, cit.

[356] *Ibidem*.

[357] P. DAVIES, *Enlightened Shareholder Value and the New Responsibilities of Directors*, cit. V. H. HO, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, in *Journal of Corporation Law*, 2010, no 36, 59. Some authors emphasize that firms are interested in maximizing long-term value of the firm and what it is of relevance is to determine which stakeholders are material to the firm. See A. EDMANS, *The End of ESG*, in *Financial Management*, 2023, no 52, Issue 1, 3-17. Previously, C. MAYER, *Prosperity,* Oxford University Press, 2018, 11. B. HOLMSTROM, and S. KAPLAN, *The State of U.S. Corporate Governance: What's Right and What's Wrong?*, in *Journal of Applied Corporate Finance*, 2003, vol 15, no 3, 10. In contrast, some authors critic the ESV because of its unambitious objectives. See L. BEBCHUK, R. TALLARITA, *The Illusory Promise of "Stakeholderism": Why Embracing Stakeholder Governance Would Fail Stakeholders*, in O. HART and Luigi Zingales, *The New Corporate Governance*, 2022, 27; D.S. LUND, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability*, in E. POLLMAN, R.B., THOMPSON, *Research Handbook on Corporate Purpose and Personhood, Edwrd Elgar Publishing*, 2021p. 91.

Some national legislations advocate for "creating" a due diligence duty for firms to take into account adverse impacts on the environment and human rights. As a result, some

The results of these legislative changes are giving rise to lawsuits against banks, urging them to cease financing "brown" companies and fossil fuel projects, based on an alleged breach of the duty of diligence. These legal actions also call for the development of more ambitious and specific transition plans. These proceedings are still pending resolution.

On one hand, they could follow the decision of the English courts in ClientEarth v FCA, asserting that internal risk management is subjective. Therefore, the claimants' stance on the level of detail required in transition plans might be seen as competing with the defendant company's vision of climate risk management. Alternatively, the courts might understand that financial companies should exhibit more diligent behaviour or following the precedent set by the courts in Milieudefensie, must assume their "fair share" and adopt ambitious measures for environmental protection and human rights.

This situation, at the very least, increases the litigation risk for banks and financial firms. From a financial stability perspective, both scenarios (internalizing sustainability risks or ignoring them) heighten the risk of instability. This issue remains uncertain for experts. Perhaps establishing private harmonization mechanisms at the EU level (a common cause of action) would at least allow anticipation of what national courts might decide. Alternatively, it might be necessary to establish a coordinated control mechanism at the EU level to monitor progress toward integrating sustainability risks into the transition plans of banks and financial firms.

2.3.2 Green fiduciary duties of financial intermediaries.

The role of trustees can also be pivotal in scrutinizing securities and their accompanying documentation before making investment decisions on behalf of their beneficiaries, the investors. The Global Trends Report of 2022 revealed that some cases arose from financial investments in the fossil fuel industry complaints. *Harvard Climate Justice Coalition v. President & Fellows of Harvard College* lawsuit was a ground-breaking claim filed by students

at some US universities alleging that the universities' failure to divest from fossil fuels violates state laws, including fiduciary duties of fund managers to prudently manage charitable funds.[358]

The Global Trend Report of 2023 showed a new trend in litigation ranging from requests to divest of first claims against to requests to clarify responsibilities and encourage active engagement with uncertainty by key decision makers.[359] In 2023's wave of cases plaintiffs (investors) request adapting decision-making and risk management systems to the complexity of climate change remains a challenge, meaning that active and transparent engagement with uncertainty is critical.

In these cases, the incorporation of sustainability criteria into investment decision-making sparks a debate between the objectives that trustees are meant to pursue, encompassing both economic and non-economic considerations, in order to act in the best interest of the beneficiaries. Compliance with this principle depends on the assessment of diverse economic, social, and environmental factors that affect the investment decision. As a result, investment firms undertake to assess which investment products are more suitable for final investors. The final decision will be made by adjudicators.[360]

In other words, the debate revolves around determining the appropriate investment actions that align with these objectives and contribute to their realization, taking into account that Engaging in excessive short-term risk taking may compromise the interests of beneficiaries, but divesting from some projects may reduce the beneficiaries' economic return of the investment.

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[358] J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2022 snapshot*, cit., 40. In the US, students at 13 universities, including Harvard, Princeton, Yale and Stanford, have filed complaints with their respective states' attorneys general. The students are urging the states to investigate these alleged legal violations. These complaints come after the where students sought divestment of Harvard's endowment funds, claiming that continued investment in fossil fuels breached the university's fiduciary and charitable duties. The case was dismissed by the Massachusetts Appellate Court in 2016 on the basis that the students lacked standing to bring the claim.

[359] J. SETZER and C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, cit.

[360] UNEP FINANCE INITIATIVE (2005). A legal framework for the integration of environmental, social and governance issues into institutional investment, Examples of engagement, https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf, p. 26. (Hereinafter Freshfields Report 2005), p. 85. MiFID II includes a public enforcement regime and cite specific breach of mandatory obligations that are subject to supervisory, investigatory and sanction actions by the NCAs. For example, accepting fees or commissions in relation to the provision of the investment service to clients constitutes an infringement subject to administrative sanctions by the NCAs under MiFID II. See Article 24(7)(b), and 70(3) of MiFID II.

Trustees are bound by a paramount fiduciary duty, which means that, above all else, they must prioritize the interests of the beneficiaries.[361]

Cowan v Scargill[362] is a case from the mid-1980s that underscores the fundamental duties of trustees, particularly in the context of making investment decisions that align with the best interests of beneficiaries. The court interpreted "best interest", as primarily referring to "best financial interests," emphasizing a narrow interpretation of the fiduciary duty of loyalty and prudence.[363]

The interpretation of "social investment" is made in line with the beneficiaries' financial interest and the trustees' actions under a trust. Therefore, trustees are obliged to assess investments based on their potential to yield the best financial return for beneficiaries because trustees are required to prioritize financial interests, taking into account associated risks, income prospects, and capital appreciation. However, investment decision cannot be based on "moral considerations"[364]

The discussion between "ethical investment" and "economic return" has evolved in the development of trustees' duties. The 1993 Goode Report, which focused on Pension Law Reform,[365] affirmed that trustees have the full right to adopt an ethical investment policy and

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[361] Cowan v Scargill [1985] Ch 270; Butler-Sloss v The Charity Commission for England and Wales [2022] EWHC 974 (Ch) (hereafter Butler-Sloss case). The case of Butler-Sloss v. Charities Commission addresses the trustees' fiduciary duties and the power to exercise discretion in balancing financial and non-financial considerations when making investment decisions for charitable trusts. It was brought forward by the trustees of two significant charitable funds who sought clarification on whether aligning their investment decisions with environmental objectives, specifically those outlined in the Paris Agreement, and thereby aligning with the missions of their respective charities, would constitute a breach of their fiduciary duties. The Court affirmed that such alignment, even if it resulted in a lower rate of return on the charities' investments, did not constitute a breach of fiduciary duties.
See also R. KRAAKMAN, *Corporate Liability Strategies and the Costs of Legal Controls*, in *Yale Law Journal*, 1984, no. 93, 863. See also Freshfields Report 2005, 83.

[362] Cowan v Scargill [1985] Ch 270. The defendant was the trustee for a miner's pension fund. The fund's investment fund had an investment plan including in South Africa and the oil industry. Recognizing that investing the miner's pension fund in oil companies, which directly competed with the coal industry, would not be in the best interest of the beneficiaries, the defendant proposed the withdrawal of this investment.

[363] M. LAMANDINI and D. RAMOS, *EU Financial Law. An Introduction*, cit., 518. D. POLLARD, *The Short-form 'Best Interests Duty' - Mad, Bad and Dangerous to Know*, in TLI, 2018, no 106, 176, Available at SSRN: https://ssrn.com/abstract=3297009.

[364] The duty to act in the best interests of beneficiaries extends beyond financial gain. Trustees must consider the moral and social values of beneficiaries, but trustees are required to prioritize financial interests over "social or ethical investments."

[365] SECRETARY OF STATE FOR SOCIAL SECURITY, Pension Law Reform, Vol II, Ihttps://assets.publishing.service.gov.uk/media/5a759b0fed915d6faf2b4494/2342_ii.pdf.

actively follow it. However, it emphasized that the fundamental priority should always lie in safeguarding the beneficiaries' interests, a broad consideration The investment policy should align with the legal standards of diligence and caution.

The case of *Harries v The Church Commissioners for England* or *Bishop of Oxford*[366] case tempers Cowan v Scargill ruling. It revolves around the duty of trustees, specifically the Church Commissioners, in making investment decisions.[367] The assessment of the trustees' duties and the best interests of beneficiaries is taken together with the standard of prudence that shall orient investment decisions[368]. This means that trustees may exclude certain investment if such an exclusion does not jeopardize the financial profitability of the portfolio. In other words, trustees cannot deviate from accepted investment principles or invest ethically if it poses a significant risk or interferes with their duty to fulfil the charity's activities.

The 2014 Law Commission report "Fiduciary Duties of Intermediaries" commented that the term "best interest" is not defined in the statute.[369] The Report mentions that taking sustainability factors into account, in particular environmental and governance, has a positive financial impact[370] Nonetheless, the integration of ESG factors does not necessarily mean, in accordance with the consultation paper, to look at all possible ESG factors or a duty for trustees to take ESG factors into account.[371] In the case of trustees, the Report stated that they *should* take ESG factors into account to the extent that ESG factors can lead to "better returns over the longer-term" and given that evidence shows that "active stewardship and integration of ESG factors within investment decisions can lead to improved risk-adjusted performance."[372] In other words, whether trustees *may* or *must* consider sustainability considerations depends, in accordance with the Law Commission, on "financial materiality".[373]

[366] Harries v The Church Commissioners for England [1992] 1 WLR 1241.
[367] *Ibidem*.
[368] S. ROBERTS, *Changing attitudes to ethical investment?*, 2014, https://www.gov.uk/government/speeches/changing-attitudes-to-ethical-investment.
[369] LAW COMMISSION (2014). *Fiduciary Duties of Investment Intermediaries*, para 4.35, https://lawcom.gov.uk/project/fiduciary-duties-of-investment-intermediaries/.
[370] *Ivi*, para 5.74. It mentions private studies showing that companies that scored well for ESG factors "outperformed or yielded comparative returns to others" and were "a lower risk as measured by the cost of equity and debt capital." However, this argument clashes with the fact that, for firms, it is profitable to externalize the costs of their business activities, rather than internalize them.
[371] LAW COMMISSION (2014). *Fiduciary Duties of Investment Intermediaries*, cit., paras 4.35, 5.75. In the same vein, a special report by The Economist in 2022 shows that ESG should be unbundled, and regulation should focus on tackling environmental problems, especially those deriving from emissions.
[372] LAW COMMISSION (2014). *Fiduciary Duties of Investment Intermediaries*, cit., para 5.63.
[373] *Ivi,* para 5.65.

The interpretation of Litigation can help clarify obligations and responsibilities, as seen in the case of *ButlerSloss v. Charities Commission*,[374] where trustees successfully sought confirmation that aligning an investment policy with environmental goals is not a breach of fiduciary duties. Hence to adopt one investment policy or another, compares the differences between applying an "absolute prohibition" on investments conflicting with non-financial objectives and exercise their discretion lawfully,[375] i.e., "balancing"[376] potential risks and financial impacts, and providing reasons for their decisions,[377] and ultimately, given that beneficiaries cannot give their consent in favour of one policy or another, this would justify that trustees exercise discretion consistently with the purposes of the trust.[378]

The judgment emphasizes that trustees should maximize financial returns due to the financial needs of charities, where different type of conflicts, direct and indirect may arise. In case of direct conflict between the investment and the charity's purpose, trustees are advised to refrain from investing, even if it results in significant financial detriment.[379] In cases of indirect conflicts, trustees should conduct a balancing exercise, weighing potential financial loss against the risk of financial detriment if conflicting investments are excluded. The judgment recognizes

[374] Butler-Sloss case, cit. This ruling could potentially establish a precedent with implications for future contentious disputes in similar contexts.
[375] Butler-Sloss case, cit., para *75:* "[If] the "starting point" of maximising financial returns […] then I find it difficult to see how it should be ignored completely when there is a potential direct conflict. If there is an absolute prohibition on directly conflicting investments then it would mean that this is the first question that trustees must ask and that presumably they are under a duty to do so[…] But where there are the practical difficulties around identifying which companies are in fact acting in conflict with the charity's purposes, it cannot be the case that the failure to identify such companies may constitute a breach of trust."
[376] Butler-Sloss case, cit, para 77. the real dispute, in accordance with the Judge, is not whether there is an absolute prohibition because trustees have discretion as part of their mandate to assess potential situations of direct conflict. Rather, the real dispute encompasses whether trustees "have in fact carried out the necessary balancing exercise in relation to their decision to adopt the Proposed Investment Policy such that the court should bless their decision.
[377] Butler-Sloss case, cit., paras 60-62. The judgment acknowledges the difficulty of automatically excluding investments conflicting with non-financial objectives, especially concerning Scope 3 emissions data. In the Vice-Chancellor's view, should be discarded, especially if they cause financial detriment. The Judge stated that: "The only question is whether they have sufficiently balanced that objective with any financial detriment that may be suffered as a result. In my view they have, and the performance of the portfolio will be tested regularly against recognized benchmarks and will seek to provide the financial return specified in the Proposed Investment Policy". See para 87.
[378] Butler-Sloss case, cit., para 74.
[379] *Ivi,* paras 17, 45. The plaintiffs are managers of the charity trust through a fund (Impact Investment fund. They requested the High Court, supervisor body together with the Attorney General and the Charity Commission, to confirm that their new policy investment was "lawful", not in breach of their fiduciary duties. Yet, in this case the "value" highlighted in the purpose of the Charity was environment protection.

that decisions influenced by "moral considerations" should generally be discarded, especially if they cause financial harm.[380]

Finally, the court concluded that the claimants' policy is lawfully, and that the plaintiff properly exercised their discretionary powers, taking into account potential financial detriment and balancing it against the objective of the proposed investment policy.

The judgment recognizes the differences in legal nature between pension funds and charitable funds, implying that their strategies, investment decisions, and board duties may differ. This distinction is crucial when interpreting fiduciary duties in the context of investment decisions.

In the current framework where sustainability considerations are on the rise courts have interpreted "best interests" in a broader sense, taking into account the multifaceted nature of the trustee's duty, requiring a careful and balanced consideration of financial interests, risk factors, and the moral and social values of the beneficiaries.[381] a turning point was marked in the aftermath of the *McVeigh* case.[382]

McVeigh v. Australian Retail Employees Superannuation Trust (REST) deals with the trustee's disclosure obligations and the board of trustee's fiduciary duties when a fund holds assets on trust for the beneficiaries or investors (the plaintiff) and have fiduciary duties towards them. McVeigh is a fund member of REST and a beneficiary of the Retail Employees Superannuation Trust (REST Trust).[383] At the same time, REST is the corporate trustee of REST Trust.[384]

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[380] Butler-Sloss case, cit., paras 45-46.
[381] LLOYD BROWN, *Cowan v Scargill and the fiduciary duty of investment: has the nature of the investment duty changed and what is currently driving "socially responsible investing" in pension schemes?,* in *Trusts & Trustees*, 2020, Vol 26, Issue 8-9,. 756–766.
[382] McVeigh v. REST [2019] FCA 14 NSD 1333 of 2018 (hereafter McVeigh v. REST).
[383] *Ivi*, para 4: for the purposes of "making an informed judgment" about the "management and financial condition of the superannuation entity" and the "relevant sub-plan". See Section 1017C (1) and (2)(c) of the Corporations Act: « (1) This section applies to the issuer of a financial product if the product is: (a) a superannuation product; or (b) an RSA product. Information for concerned person related to a superannuation product (2) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of: (c) making an informed judgment about the management and financial condition of: (i) the superannuation entity; and (ii) the relevant sub-plan (if any)…».
[384] See M. LAMANDINI and D. RAMOS, *EU Financial Law*, cit., 517-518. In Australia the governance structure of a superannuation fund is a mix between the Trust model and the Corporate Model they describe: the trustee holds the assets on trust for the benefit of their beneficiaries and have fiduciary duties towards them. At the same time, the fund functions like the corporate model, i.e., the trustee is formed in accordance with the Corporations Act 2001, the board of directors assume the main responsibilities of the fund and use a custodian, and fund

Some disputes such as Mc Veigh narrow down the nature of the issues to the controversy between the fund and the beneficiary and established that the overall situation was a "moderately complex case" about the duties of the superannuation trustee –REST— in relation to climate change and their obligation to inform their members.[385]

Put simply, the fact that motivated the course of action of the plaintiff was not, at least not exclusively, a harm or detriment to a plaintiff's individual interest, but climate change, a societal challenge falling within the sphere of protection of public interests. For that reason, the Court considered that the issues were not completely concrete. Therefore, the interpretation of the disclosure obligation from trustees to their beneficiaries, and the fiduciary duties of the trustees towards the beneficiaries, both elements belonging mainly to corporate law and the sphere of protection of private interests, might be insufficient to respond the questions raised in the claim.[386]

The parties reached an agreement and withdrew the claim. In the statement announcing the agreement, REST declared that it knew that climate change constitute a material, direct and current financial risk and agreed to "measure, monitoring and reporting outcomes" in relation to its climate related progress and actions in line with the recommendations of the TCFD, and "encourage" its investee companies to disclose in line with the TCFD recommendations.[387] This reveals again the importance of soft law in sustainable finance, and in the ex post interpretation of sustainability financial disputes.

McVeigh v. REST raises interesting issues regarding what interests are investors (shareholders and non-shareholders) entitled to enforce and the role of soft law standards. It was also a novel case because of the relief requested by McVeigh. He did not request compensation. As a primary relief, he sought to a judicial declaration confirming that the trustee breached its due diligence risk duties and injections restraining the fund from continuing to breach such duties.

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beneficiaries (e.g., the plaintiff in McVeigh v. REST) may request information to make informed decision. See also Australian Superannuation Industry (Supervision) Act 1993.

[385] McVeigh v. REST, cit., para 11.

[386] McVeigh v. REST, cit. It first held that the amended notice of filing went beyond the interpretation of the disclosure obligation provided for in section 1017C of the Corporation Act and the due diligence risk duties under the SIS Act along with the compliance with the duties of trustees. The Court stated that the claim was of a public interest nature as it raised a "socially significant issue" about "the role of superannuation trusts and trustees in the current controversy about climate change".

[387] McVeigh v. REST, cit, Statement from Rest, 2 November 2020,, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201102_NSD13332018_settlement-agreement.pdf.

Alternatively, McVeigh sought a declaration that the fund contravened the Corporations Act and the SIS Act by failing to provide the plaintiff with further climate change information, that the fund is under an equitable obligation to give the requested climate change information and an injunction requiring REST to give the information to McVeigh. [388]

The final statement published by REST[389] indeed took up the last above-mentioned point. REST *committed* to "take further steps to ensure that investment managers take active steps" to "measure", "monitoring" climate risks and other relevant ESG risks in accordance with the TCFD's recommendations. Likewise, REST "requires that compliance with these efforts be reported back to it" and will use various mechanisms to improve the compliance of investment managers.

Among the initiatives agreed on by the parties, the statement mentioned the following: implementing a long-term objective to achieve net zero carbon footprint for the fund by 2050, publicly disclosure of the fund's portfolio holdings, conduct due diligence and monitoring of investment managers and their approach to climate change, engage with investee companies to promote effective policies that reflect the climate goals of Paris Accord, and reporting outcomes on climate-related progress.[390]

Yet, such commitments are included in the agreement as a best effort promise. To clarify, REST duty to stimulate or give confidence to the investee companies to adopt the TCFD recommendations, but REST does not have to guarantee any successful result.[391] Nonetheless, it was a first step in the transition period towards a sustainable economy. Also, as the measures agreed on by the parties are contained in a private agreement between the parties, it can be monitored to check that the fund delivers on its promises.

This case was an important step in the recognition of climate change as a financial, investment, market, reputational, strategic, governance and third-party risk.[392] In particular, the trustee recognized that there is a link between climate change and economic and social consequences

[388] McVeigh v. REST, cit*,* Notice of filing, 24 September 2018.
[389] McVeigh v. REST, Statement from Rest, cit.
[390] Ibidem.
[391] For example, REST promises to "encourage" its investee companies to disclose climate risk. *McVeigh v. REST*, Statement from Rest, cit.
[392] *Ivi,* 1.

for its beneficiaries,[393] as well as its capacity to take action, oversight its performance because its behaviour will be monitored. In addition, the trustee placed value on the content of the TCFD's recommendations.[394]

3. Legal Challenges of Sustainable Finance Enforcement. Legal Standing for third parties' private litigants.

The legal standing of NGOs in disputes against corporations has been a matter of discussion by the courts. The NGOs are playing a relevant role in strategic climate litigation, including climate finance litigation. However, courts have denied standing in some cases. In *ClientEarth v Board of Director of Shell*, ClientEarth submitted a derivative claim against the board of directors of Shell. However, the High Court focused on the NGO's activist profile and denied legal standing to defend "collective interests".[395] Mr Justice Trower argued that ClientEarth was only entitled to bring a derivative claim in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by one or more of the Directors[396] and it requires the court's permission to continue the claim (s.261(1)).[397]

ClientEarth v Board of Director of Shell's ruling draws some parallels with the Plaumann doctrine in the EU. In *Plaumann*,[398] the Court of Justice of the EU denied legal standing of an NGO to defend collective interest unless it cannot demonstrate how the decision impacted them.

[393] For example, "Rest acknowledges that climate change could lead to catastrophic economic and social consequences and is an important concern of Rest's members". See *McVeigh v. REST*, Statement from Rest, cit., 2, 1.
[394] «Consistent with the Task Force on Climate-related Financial Disclosures (TCFD), Rest acknowledges that climate change could lead to catastrophic economic and social consequences». See *McVeigh v. REST*, Statement from Rest, cit., 1.
[395] ClientEarth v. Shell's Board of Directors, cit. para 64: "However, it seems to me that where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agenda with the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith. The reason for this is that it will be clear to ClientEarth that it is using an exceptional procedure in the form of a derivative action, for a purpose other than the purpose for which the legislation has made it available. If, on the evidence adduced by the applicant, that remains an open and unanswered question irrespective of what Shell might say at the substantive hearing, the court cannot be satisfied that ClientEarth is acting in good faith, a situation which will count strongly against a conclusion that it has established a prima facie case for permission."
[396] Under Chapter 1 of Part 11 to Companies Act 2006.
[397] ClientEarth v. Shell's Board of Directors, cit., Mr. Justice Trower's decision, paragraph 2.
[398] See Case 25-62 Plaumann & Co. v Commission of the European Economic Community. [1963] ECLI:EU:C: 1963:17 (hereafter Plaumann). The Court of Justice denied legal standing to an NGO challenging a decision made by the European Commission in environmental matters. The appellant NGOs argued that its legitimate interest lied in safeguarding the environment and human rights, constituting a collective interest rather than an individual one.

Recent rulings have shown a more flexible approach towards the standing of NGOs, marking a potential shift from the English courts' previous stance in cases like *ClientEarth v Board of Directors of Shell* and the Plaumann doctrine. In *ClientEarth v FCA* the Judge held that the NGO had standing to file a claim on the basis of the arguments on which the other judgments cited had denied it, i.e., the public interest of the plaintiff. In this case, the NGO's interpretation of its legitimate interest served to justify the NGO's filing of the lawsuit because the subject matter of the lawsuit falls within its area of expertise (the environment) and its mission to ensure that public agencies act in accordance with their legal obligations in relation to the climate crisis.

Part III. Chapter IV. Some steps towards a uniform dispute settlement approach for sustainability financial disputes.

1. Evaluation of EU private enforcement effectiveness, equivalence, and coherence.

Investors navigating green securities disputes encounter substantial legal challenges, predominantly rooted in the complexities of proving tortious liability. The burden of establishing damages, fault or negligence, and causation rests on investors,[399] with considerable variation in the interpretation of these tortious requirements across EU Member States.[400] This divergence significantly influences the design of mandatory disclosure in securities regulation, with private law remedies for misleading information exhibiting distinct variations.

In the realm of green securities, the process of substantiating a "green/sustainability misstatement" arising from sustainability-related factors poses unique complexities compared to traditional securities litigation. Financial information, characterized by tangible and measurable aspects, contrasts with the abstract and challenging nature of non-financial information such as environmental or social concerns. Issuers, guided by the discretionary power granted within mandatory disclosure regimes, determine what information is considered "fair" and "reliable" for inclusion in prospectuses. This discretion introduces flexibility, but it also raises questions about the standards for fairness and reliability in the context of sustainable and green finance.

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[399] As regards the civil liability regimes, the persons responsible for the information given in the prospectus have joint and several liability in the majority of Member States. Only Slovakia the court may decide whether or not to apply several liability in justified cases according to ESMA. See ESMA (2013), *Comparison of liability regimes in Member States in relation to the Prospectus Directive*, 2013, https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf, 12, 18. In relation to the administrative sanctions, national competent authorities of each Member State can apply fines that differ from one country another, ranging from administrative fines of a percentage of the total amount offered, prohibition or suspension of a public offer, to public reprimand.

[400] F. DELLA NEGRA, *The civil effects of MiFID II between private law and regulation*, in *Quaderno di Ricerca Giuridica della Consulenza Legale,* 2020, no 90, 115-142: «Crucially dependent on the interpretative approach of national courts».

The discretionary power bestowed upon issuers operates more as a principle than a rigid rule within the mandatory disclosure regime.[401] EU laws emphasize concepts like "fair," "material," and the behaviour of a "reasonable investor," aligning with broader principles embedded in the rule of law. This underscores the need for an interpretative approach against the rule of law when dealing with legal binding nature in green securities disputes.

Despite securities regulations offering answers within existing rules, outcomes may lack consistency, necessitating alignment with the values and principles of each legal system.[402] Scholars argue that a principles-based regulatory approach may better achieve normative goals than rigid rules, contingent on the effectiveness of the enforcement regime.[403] The perceived liability for deviating from principles may lead issuers to adopt a conservative approach, potentially treating environmental-related risks as "opinions" or accompanying them with waivers of responsibility.[404]

Examining the procedural guarantees in green securities disputes, the principles of equivalence and effectiveness become paramount. The CJEU has established that national procedural laws must ensure the exercise of Union rights, and while Member States enjoy autonomy, it must not compromise the principles of equivalence and effectiveness.[405] The principle of equivalence mandates that remedies for non-EU claims should be equivalent to those available for EU claims, preventing discrimination based on the origin of the claim. Simultaneously, the principle of effectiveness requires national conditions not to make the exercise of EU-based rights impossible or excessively difficult.[406]

[401] See, for example, L. A. CUNNINGHAM, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, in *Vanderbilt Law Review*, 2007, no 60, 1420-22; C. L. FORD, *New Governance, Compliance, and Principles-Based Securities Regulation*, in *American Business Law Journal*, 2008, no 45, 1-10.
[402] M. GARGANTINI, *Prospectus Liability: Competent Courts of Jurisdiction and Applicable Law*, cit., ch19.
[403] See, for example, L L. A. CUNNINGHAM, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, cit., 1420-22; C. L. FORD, *New Governance, Compliance, and Principles-Based Securities Regulation*, cit., 1-10.
[404] STEVEN L. SCHWARCZ, *The "Principles" Paradox*, in *European Business Organization Law Review*, 2009, no 10, 175-184.
[405] Hirmann v. Immofinanz, cit., para 46; Genil v. Bankinter, cit.
[406] DAMBROSIO, MONTEMAGGI, ANNUNZIATA, AFFERNI, ANDENAS, and DELLA NEGRa, *Private and Public Enforcement of EU Investor Protection Regulation*, in *Quaderni di Ricerca Giuridica della Consulenza Legale*, 2020, n. 9/2020, 84.

Legal precedents, such as Hirmann and Genil, highlight the CJEU's stance on civil liability in the context of green securities. The CJEU emphasizes the deterrence effect of civil liability in Immonfinanz, asserting that it is capable of preventing issuers from misleading investors. The court also underscores the importance of domestic civil liability regimes aligning with the principles of effectiveness and equivalence, ensuring that investors can pursue civil liability actions without facing prohibitive obstacles.[407]

2. A common private enforcement approach for sustainability financial disputes (I). Common cause of action (look at art. 35a of the CRAR)

In light of the previous considerations in this analysis, we deem it crucial to implement harmonized private enforcement mechanisms for market operators, available during sustainable financial disputes. We appreciate the partial harmonization progress in the civil liability framework through the regulation of rating agencies, providing the right to claim for both issuers and investors and establishing guidelines for legal action.

While acknowledging that this mechanism is not flawless and still heavily relies on national legislation and local court decisions, it represents a step towards harmonizing the private liability framework within the European Union for financial market disputes. Given that the current sustainable financial regulation primarily focuses on developing public enforcement mechanisms, neglecting private enforcement mechanisms, we propose examining the civil liability framework embedded in the CRAR.

We suggest integrating it as an optimal option for investors in disputes arising from breaches of transparency obligations. The civil liability framework outlined in the CRAR addresses breaches of the transparency duty related to ratings or misleading information, and the addressees also align. Therefore, we consider it a plausible option to promote the harmonization of private enforcement mechanisms within the EU.

The following sub-sections explain the advantages and limitations of our proposal.

[407] D. BUSCH, *The Influence of the EU Prospectus rules on private law*, cit., para 18.32.

2.1 Right to sue: "investor" or "issuer".

Under Article 35a of the CRAR,[408] "the regulation's claim can be brought by investors or issuers. Given the context of the provision, it is to be assumed that the word "investor" only means persons that invest in the instruments of the issuer that has been rated or in the instruments that have been rated. Other persons, such as shareholders of a bank who has acquired such instruments, do not have standing to bring the claim. Where persons have invested in mutual and other funds that hold such instruments, the "investor" is the fund, and not the individuals who own the fund.

Article 35a presupposes that the investor or issuer has suffered damage and that this damage was caused by the CRA violating its regulatory duties. The violation of such a duty in and by itself, however, never directly results in damage to the investor. Causation always runs via the incorrect rating which either the investor believed in, or which led to the heightening of financing costs for the issuer.63 The causal nexus is thus more complication than the regulation suggests.
Regarding standing, the provision sets out different conditions for investors and issuers. Investors are required to establish that they have reasonably relied on the rating.64 The definition of the term "reasonably relied" is left to Member State law.65 Issuers damaged by an incorrect rating, in contrast, generally have standing, except when they themselves have provided information that led to the incorrect rating.66 The latter exception is self-understood." In a similar vein, the Court of Justice might not be able to resolve about the matter of standing when the EU law does leave this issue to Member States.[409]

2.2 Reasons to sue depending on the access to detailed and accurate information.

Under Article 35a of the CRAR an investor may claim damages from a credit agency where "it establishes" that it has "reasonably relied" that the credit risk assessment of an entity or financial

[408] Art 35a (1) Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L 302/1 as subsequently amended by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013.
[409] Case C-911/19 Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR), Opinion of Advocate General Bobek, [2021] ECLI:EU:C:2021:294, para 34: «the issue of whether FBF has standing to raise a plea of invalidity before the national court against an EU measure is a matter for national law».

instrument was the result of the own credit risk assessment of the entity rather than mechanistically use of credit ratings for the assessment of the creditworthiness of the entity or the product, or otherwise the investor has relied with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating.[410]

An issuer may claim damages from a credit agency under Article 35a of the CRAR where "it establishes" it or its financial instruments are covered by the defective credit rating *and* the infringement was not caused by "misleading and inaccurate information provided by the issuer" to the credit rating agency, directly or indirectly, through information publicly available.[411]

Likewise, issuers of sustainability-related risks follow their own methodology to assess the risks associated with their economic activity and the financial product they offer.

2.3 Proportionate and reasonable limitation of civil liability regime.

EU securities regulations are mainly based on a public-enforcement approach,[412] despite some of them have integrated civil liability provisions (e.g., the Prospectus Regulation), or have developed tentative moves to address civil liability (e.g., the proposal for EUGBS that was finally removed from the final text).

The liability of issuers and financial intermediaries towards investors was not of practical relevance, although its deterrence effects have been recognized.[413] In the offering and purchasing of green financial promises, the injured party will claim damages without a contract, i.e., under tort law.

After the financial crisis the EU legislator reinforced the EU supervisory law without adding any provision on private enforcement. Only the CRAR contains rules that confer investors and issuers the right to claim damages from a rating agency.[414]

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[410] Article 35a (1) in relation to Article 5a (1) of the CRAR.
[411] Article 35a (1), third paragraph of the CRAR.
[412] N. MOLONEY, *EU securities and financial law*, cit., 122.
[413] J. C. COFFEE, *Law and the Market: The Impact of Enforcement*, in 156 University of Pennsylvania Law Review, 2007, no 156, 229.
[414] R. VEIL (ed), *European Capital Markets*, cit., ch 27, para 78.

Article 35a of the CRAR links the grounds for liability to an infringement, rather than false or wrong information in the rating, i.e., the breach of a regulatory duty (envisaged in Annex III of the CRAR).
The rationale underpinning the shaping of the liability regime as an infringement of the regulatory duty is that determining whether a rating is false or wrong is difficult given that they are forward-looking, and therefore is an element of subjective assessment.[415]

A central problem of all liability regimes concerns the question under which conditions a rating can be incorrect. As a starting point, it will be acknowledged that a rating is an opinion about the insolvency of an issuer,[416] as also reflected in the definition of rating agency. However, this does not exclude civil liability. Even if a rating agency has discretion in the assessment of the creditworthiness of an issuer, a rating may be incorrect if it is unreasonable, i.e., if a rating agency draws conclusions on the basis of the available information that are not methodologically plausible or if the rating was issued on the basis of incorrect or insufficient information. [417]

The integration of a civil liability regime for credit rating agencies under EU law of CRAs was based on the rationale that CRAs may have a substantial effect on investment decisions.[418] Thus, Article 35a of the CRAR enables issuers and investors to claim damages against a CRA that, intentionally or with gross negligence, infringed its obligations regarding conflicts of interest, organizational or operational requirements, obstacles to the supervisory activities or in relation to disclosure provisions,[419] as well as incorrect methods and practice constitute a breach of duty.

In practice, liability will likely turn around the CRA's duty to use all the information that is available to it and that is relevant to its analysis according to its own rating methodology.[420]

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[415] M. LEHMANN (2016), *Civil liability of rating agencies—an insipid sprout from Brussels*, in *Capital Markets Law Journal*, 2016, vol 11, no 1, p. 78.
[416] Article 3(1) of the CRAR.
[417] R. VEIL (ed). European Capital Markets, cit., ch 27.
[418] See EUROPEAN COMMISSION, *Public Consultation on Credit Rating Agencies*, 2010, https://ec.europa.eu/finance/consultations/2010/cra/docs/cpaper_en.pdf, 24-26, J. SOLANA*, Climate Litigation in Financial Markets: A Typology*, cit., 103–135. Against the imposition of civil liability to financial intermediaries because it may undermine their reputation and legitimacy see S. CHOI, *Market Lessons for Gatekeepers*, in Northwestern University Law Review,. no 93, 934-49.
[419] *Ibidem.*
[420] European Commission, Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, COM (2011) 747 final, p. 33 (hereafter EC's Proposal for amended CRAR), Annex III No. 142-143. See also, in relation to the methodology employed by credit rating

This methodology has not specifically integrated sustainability factors, although ESMA has proposed amendments to the CRAR and CRAR Commission Delegated Regulation[421] to ensure better integration of sustainability factors.[422]

Considering the foregoing, the financial and non-financial or sustainability information disclosed in prospectuses also has a substantial effect on investment decisions, but the Prospectus Regulation does not determine who have the right to sue in case of misleading statement. Therefore, given the complexity of the financial chain in securities transactions, a provision clarifying this aspect would be crucial.[423]

Article 35a of the CRAR does not alter the burden of proof for infringement that cause damage. Thus, investor or issuer shall demonstrate that the CRA commitment an infringement that had "an impact on the credit rating issued" in which the investor relied upon, and the impact of the rating on the decision. This means that the rating should have been defective by the time it was issued, and the CRA's infringement shall be a casual factor for the incorrect rating.

The European Commission's proposal contained a reversal of the burden of proof due to the difficulties to prove causation: if an investor shows evidence that a CRA has infringed its duty, then the CRA must prove it had not committed the alleged infringement.[424] Therefore, this clause aimed to reduce the procedural hurdles investors face in tort claims. In particular, the proposed clause relaxed plaintiff's pleading standard by requiring CRAs to prove lack of infringement. Nonetheless, this clause was established in broad terms: the clause did not list the kind of facts an investor had to establish or explain the degree of certainty that was required. This clause was not implemented in the legislative process.[425]

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agencies, the decision of the Board of Appeal in Scope Ratings GmbH v ESMA, Decision Ref.: 2020-D-03, 28 December 2020.

[421] Commission Delegated Regulation (EU) No 447/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies Text with EEA relevance OJ L 140 (hereafter CRAR Commission Delegated Regulation). See Article 4 of CRAR Commission Delegated Regulation.

[422] ESMA, *ESMA consults on possible amendments to the Credit Rating Agencies Regulatory Framework*, 2024, https://www.esma.europa.eu/press-news/esma-news/esma-consults-possible-amendments-credit-rating-agencies-regulatory-framework. The public consultation will be open until December 2024.

[423] Thus, situations such as Case C-910/19 Bankia v UMAS could be avoid or clarified.

[424] This was discussed in the European Commission's proposal for amending the CRAR. See European Commission, Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, COM (2011) 747 final, 33 (hereafter EC's Proposal for amended CRAR).

[425] EC's Proposal for amended CRAR, p. 33, Art. 35a (4) cf Article 35a (2) of the CRAR.

From an economic distributive perspective to some extent the EC's proposal suggests a redistribution of risk according to which issuers in the context of the Prospectus Regulation (rating agencies under the CRAR)

Instead, the amended CRAR in its Article 35a requires plaintiffs to present "accurate and detailed information" that shows the credit rating agency has committed an infringement of the Regulation. A novelty introduced by Article 35a that distinguishes this provision from the tortious requirement that plaintiff must prove damage is that Article 35a of the CRAR requires courts to take into account that the investor or issuer may not have access to information which is purely within the sphere of the credit rating agency. Thus, the provision recognizes the different position of issuer/investor and CRA in the transaction,[426] but at the same time national courts will interpret the level of accuracy and detailed evidence filed by the investor/issuer and will apply legal requirements in accordance with national legislation.[427]

In connection with the previous point and in relation to the next section: To mitigate potential fragmentation that this situation may cause, we propose to take into account relevant guidelines from ESAs and well-recognized international standards to increase the level of harmonization of judicial decisions adopted by national courts, plus the role of the CJEU to unify criteria (the Court of Justice may also consider relevant guidelines and recognized accounting standards to make disclosures comparable across Member States.

Some scholars hold that Article 35a of the CRAR has both compensation and preventive objectives as supervisory objectives are also covered by the civil liability provision.

The civil liability regime under the CRAR represents an hybrid model: the legal basis and certain preconditions for the claims (e.g., investor's and issuer's right to sue) can be found at EU level, while the interpretation of relevant element such as impact, reasonable, damage, intention, gross negligence or proportionate shall be interpreted in light with the national legislation in accordance with the rules of international private law, and at last, the CJEU will be the last resort step to interpret such concepts. In addition, other preconditions for the claim

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[426] Article 35a (4) of the CRAR.
[427] Article 35(4), subparagraphs 1-2 of the CRAR.

will be interpreted under national laws. As rules under tort law apply, the statute of liability will be determined on the basis of Article 4(1) of Rome II Regulation, i.e., the laws of the country where the damage occurred.

3. A common enforcement approach for sustainability financial disputes (II). Expert adjudicators for a common cause of action

3.1 Expert bodies may play a critical role in providing uniform (and binding?) guidance.

In the UE, the establishment of specialized courts is governed by Article 257 of the TFEU.[428]The principal rationale for this development was to "ease the workload of the CJEU and the GC".[429] The proposal to create a uniform decentralized or regional EU courts was not taken up.[430] The most significant structural reform was the creation of the EU Civil Service Tribunal to adjudicate on staff cases, but the GC has now taken over its function.

In this section, we refer to the ESAs and other accounting organisations, which are specialized bodies and play, or are likely to play, a relevant role in the harmonization and implementation of financial regulation in the EU. These bodies, who enjoy a little regulatory ability and expertise may play in the harmonization of a common criteria to interpret technical requirements that state bodies cannot interpret due to the lack of expert knowledge. For example, Lehmann holds, in the context of judging CRARs' opinions that state bodies do not have the expert knowledge to measure the sophisticated methods employed by CRAs to assess the risk of failure.

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[428] Article 257 of the TFEU reads: «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission. The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it. Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact before the General Court. The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously».

[429] P. CRAIG and G.DE BÚRGA (eds), *EU Law, Text, Cases and Materials*, Oxford University Press, 2020, 90.

[430] J.P. JACQUÀE and J. WEILER, *On the road to European Union: A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, in CMLRev, 1990, no 27, 185. See also G. DE BÚRGA and J. WEILER (eds), *The European Court of Justice,* Oxford University Press, 2001, 217-218.

3.2 Harmonised Technical Guidelines can shape regulatory duties and compliance.

3.2.1 Soft-law instruments with binding and non-binding effects

The use of soft law in shaping EU regulatory requirements is not new in the field of financial regulation. The disclosure obligation envisaged in the Prospectus Regulation is accompanied by the development of "soft law" measures. The Prospectus Regulation explicitly states that the minimum content to be included in prospectuses shall be based on the International Organisation of Securities Commissions (IOSCO) standards, i.e., the prospectus shall contain financial and non-financial information in accordance with the international financial reporting standards (IFRS/IAS).[431]

Soft law instruments because are consistent and harmonized may facilitate both judicial and extra-judicial enforcement of conduct of business rules has already been discussed, including the challenge for these authorities to strike a balance between investor protection and financial stability.[432]

Especially the expertise of some bodies, such as the European supervisory Authorities' (ESAs) put them in a good position to be vested with specific powers to develop Regulatory Technical Standards (RTS) to implement EU laws. The ESAs shall develop Regulatory Technical Standards (RTS) in accordance with the SFDR,[433] and ESMA is in the process of drafting guidelines on the enforcement of corporate sustainability reporting by issuers whose securities are admitted to trading on a regulated market in the Union and who will be required to report in accordance with those sustainability reporting standards.[434] These guidelines are addressed to the NCAs and include recommendations as to how to interact with issuers, how to organize the enforcement task and cooperation between NCAs and ESMA.

[431] Article 13 of the Prospectus Regulation.
[432] See F. DELLA NEGRA, *The civil effects of MiFID II between private law and regulation*, cit., 115-142.
[433] Articles 4(6),8(3), 9(5), 10(2), 11(4), 13(2) and, in broad terms, Recital 30 of the SFDR.
[434] Recital 39 of the CSRD stresses the key role of ESMA in promoting supervisory convergence in the context of corporate reporting.

Other international initiatives, like international accounting standards (IAS) developed by the International Sustainability Standard Board (ISSB) are well-recognized technical standards are used for the purposes of shaping sustainable finance regulation and enhancing supervision.[435] Finally, apart from RTS, other soft law instrument that help create a common framework for market players and enforcers are the guidelines released by the ECB and the European Commission, e.g., on climate-related risks.

Aside from the need to ensure consistency in the application of sustainability reporting standards, it is also necessary to ensure the enforceability of these standards, i.e., if soft law instruments have "teeth" to reorient financing and investment during the transition towards sustainable investments. The persuasive force of the soft law standard will depend on the type of instrument, and its connection with hard law.[436] Some instruments are integrated into EU Delegated Acts to complement a regulation or directive and aims to guide the conduct of the addressee (guidelines and standards on sustainability-related disclosure),[437] or that aim to act as a guide for a third-party who supervise and enforce the application of the law (e.g., ESMA guidelines on enforcing sustainability-related reporting standards).

For example, some RTS are integrated into Delegated Acts to complement a regulation or directive and aims to guide the conduct of the addressee, e.g., the European Sustainability Reporting Standards (ESRS) under the CSRD,[438] and therefore they will be more easily

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[435] M. LAMANDINI and D. RAMOS MUÑOZ, *Law, Finance, and the Courts*, Oxford University Press, 2023, ch 3, para 3.67: «…[T]he use of soft law texts is also widespread for purposes of financial regulation and supervision».

[436] See, e.g., C. ANDONE AND F. COMAN-KUND, *Persuasive rather than 'binding' EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis*, in *The Theory and Practice of Legislation*, 2022, vol 10, no 1, 22–47, and also G. C. SHAFFER, and M.A. POLLACK, *Hard Vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, in *Minnesota Law Review*, 2010, 491. The authors distinguish between soft law instruments with strong connection to hard law and with a weak connection to hard law. From a business a human rights perspective, see J. KYRIAKAKIS, *From soft law to hard law in business and human rights and the challenge of corporate power*, in *Leiden Journal of International Law*, 2023, vol 36, no 2 ,335-361.

[437] See Z. J. GIOTAKI, P. DE LA BOUILLERIE and R. NEBOT SEGUÍ, *The Characteristics and The Legal Nature of the Supervisory and Resolution Handbook of the EBA*, in *EBA Staff Paper Series No. 15-07/2023*, 5. https://www.eba.europa.eu/sites/default/files/document_library/1060974/EBA%20staff%20paper%20-%20Legal%20force%20of%20EBA%20Handbook.pdf. The authors divide soft law instruments with a strong connection to hard law into two categories: interpretative and decisional soft law instruments. Interpretative is the law that "offers an interpretation of a piece of hard law for a third-party audience". Decisional is the soft law that «present an interpretation of a piece of hard law that guides the conduct of the author itself» or of a third-party that will have to supervise the application of the law as interpreted by the relevant act of soft law.

[438] Article 1 of Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards (ESRS).

enforced than market-based soft law standards without enforceability power, e.g., the ICMA green bond principles.

For example, guidelines such as the ICMA green bond principles, which expressly state that adherence by green bond issuers to ICMA's principles does not entail any liability in case of non-compliance with the principles would be difficult to enforce in practice,[439] or that aim to act as a guide for a third-party who supervise and enforce the application of the law (e.g., ESMA guidelines on enforcing sustainability-related reporting standards promote cooperation between financial supervisors but lack cooperation with other authorities, and private enforcement avenues).

The conventional understanding of guidelines often categorizes them as non-binding soft-law instruments within the EU framework. Nevertheless, these soft-law instruments possess the potential to standardize practices among market players and facilitate the harmonization of judicial outcomes in the EU. Nonetheless, this traditional approach may not offer a comprehensive solution in every instance. In 2019, the Commission adopted its Guidelines on reporting climate-related information. These guidelines incorporated the recommendations of the Task Force on Climate-related Financial Disclosures (TFCD) for disclosures under the scope of Articles 19a and 29a of the Accounting Directive.[440] However, these guidelines were also voluntary and limited to encourage firms to update their methodologies to climate-related reporting, but undertakings are free to decide whether to apply them or not.[441]

Similarly, the stewardship principles integrated in several national corporate governance codes, drafted as best practices recommendations, aim to offer useful guidance for companies seeking to include engagement practices to align investment strategies with environmental and social

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[439] See ICMA, *Green Bond Principles Voluntary Process Guidelines for Issuing Green Bonds June 2021* (with June 2022 Appendix 1), https://www.icmagroup.org/assets/documents/Sustainable-finance/2022-updates/Green-Bond-Principles-June-2022-060623.pdf, p. 7, Disclaimer: "…The Green Bond Principles do not create any rights in, or liability to, any person, public or private. Issuers adopt and implement the Green Bond Principles voluntarily and independently, without reliance on or recourse to the Green Bond Principles... Underwriters of Green Bonds are not responsible if issuers do not comply with their commitments to Green Bonds and the use of the resulting net proceeds. If there is a conflict between any applicable laws, statutes and regulations and the guidelines set forth in the Green Bond Principles, the relevant local laws, statutes, and regulations shall prevail." (Emphasis added).

[440] European Commission (2019). Guidelines on reporting climate-related information, https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf.

[441] European Commission (2019). Guidelines on reporting climate-related information, p. 5, https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf.

considerations.[442] However, their open-ended language, focus on transparency and encouraging divestment in case the boards disregard the requests, coupled with the absence of enforcement mechanisms in case of non-compliance, categorise them as "soft law" instruments that are difficult to implement.

The above-mentioned instruments are soft law standards intended to encourage but not ensure compliance with them. However, someone could plausibly argue that other standards or soft law instruments are "stronger", or potentially enforceable.[443]

3.2.2 Unified standards released by EU and European bodies could be enforced.

The traditional definition of guidelines makes them likely to be seen as non-binding soft-law instruments at the EU level. However, this traditional approach may not provide a comprehensive solution in every case and seems to be at odds with the current framework where there are a wide range of guidelines and standards, some of them issued by private market-based initiatives, others by supervisory authorities, and others integrated into regulation in the form of Delegated Acts, and with different objectives and enforceability.

In the EU, expert bodies, such as the European Supervisory Authorities (ESAs), release important Regulatory Technical Standards (RTS) with the aim to integrate them into regulation by means of Delegated Regulation after endorsement by the European Commission. Some experts hold that the constitutional basis for these acts can be traced to Article 288(5) of the TFEU, a provision explicitly referring to recommendations and opinions issued by the European Commission,[444] although this argument has been contested.[445]

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[442] On global considerations and challenges regarding the application of stewardship principles see D. KATELOUZOU and D. PUCHNIAK (eds), *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, Cambridge University Press, 2022. The application of stewardship principles in Italy, see STRAMPELLI, *Institutional Investor Stewardship in Italian Corporate Governance*, in *ECGI Working Paper Series in Law*, 2020, https://ecgi.global/sites/default/files/working_papers/documents/strampellifinal.pdf; Cf. in the UK REISBERG, *The UK stewardship code: On the road to nowhere?* in Journal of Corporate Law Studies, 2015, no. 2.

[443] SENDEN, *Soft Law in European Community Law*, Oxford, Hart Publishing, 2004; and A. HOFMANN, *Types of EU law and their national impact in EU soft law in the Member States: theoretical findings and empirical evidence*, in ELIANTONIO, KORKEA-AHO and STEFAN (eds), *EU soft law in the Member States: theoretical findings and empirical evidence*, Hart Publishing, 2021.

[444] See Z. J. GIOTAKI, P. DE LA BOUILLERIE and R. NEBOT SEGUÍ, *The Characteristics and The Legal Nature of the Supervisory and Resolution Handbook of the EBA*, cit.

[445] For example, M.VAN RIJSBERGEN and EBBE ROGGE (2022). European Financial Supervisory Agencies' Soft Law Powers, 14 European Journal of Legal Studies 1, pp. 225-226. The authors hold that the Treaties "do not include the power to establish Union organs tasked with supervising and/or facilitating implementation of

Sustainable finance regulation initiatives also mandate the ESAs to draft, within the powers conferred in the ESAs Regulations,[446] RTS clarifying technical aspects regarding in relation to the content, methodology, and presentation of a wide range of sustainability-related information,[447] or guidelines on the supervision of sustainability reporting by NCA.[448]

On a different note, the RTS are accompanied by other guidelines and recommendations that ai to contribute to the creation of common framework for financial market participants. The ECB also releases guidelines explaining how the institution expects financial firms and banks to act. For example, the ECB guide on climate-related and environmental risk explains how the ECB expects banks to prudently manage and transparently disclose climate and environmental risks taking into account the current prudential framework. Therefore, such guidelines shape the regulatory framework by orienting the integration of such risks into their risk management procedures and business models.[449]

The guidelines and RTS released by the European Supervisory Authorities (ESAs), or the European Central Bank (ECB) are examples of soft law measures which shape the regulatory framework. At the international level, other standards from private standard-setting initiatives have become well-recognised standards that have inspired regulation,[450] or have been included as relevant standards to monitor behaviour.

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substantive laws and policies", and therefore, the powers of EU agencies are subject to the constitutional limits formulated by the case law of the Court of Justice of the European Union.

[446] See Articles 10 to 14 of Regulations (EU) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, a Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (hereafter all together, ESAs Regulations).

[447] Recitals 9 and 30 of the SFDR.

[448] See ESMA, *Consultation Paper. Draft Guidelines on Enforcement of Sustainability Information*, ESMA32-992851010-1016, 2023, https://www.esma.europa.eu/sites/default/files/2023-12/ESMA32-992851010-1016_Consultation_Paper_on_Guidelines_on_Enforcement_of_Sustainability_Information.pdf.

[449] For example, Expectation 7 (risk management) of the ECB, *Guide on climate-related and environmental risks. Supervisory expectations relating to risk management and disclosure*, 2020, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.202011finalguideonclimate-relatedandenvironmentalrisks~58213f6564.en.pdf.

[450] E.g., Article 13(1) of the SFDR states that the ESAs may develop draft implementing technical standards (ITSs) to determine the standard presentation of information on the promotion of environmental or social characteristics and sustainable investments, the disclosure provisions mirror the TFCD.

For example, the FCA Handbook provides that, in determining whether the Prospectus Regulation has been complied with, the FCA will consider whether such a person has acted in accordance with the ESMA Guidelines on Risk Factors under the Prospectus Regulation.[451] This involves, in practice, assessing whether the parties to a potential dispute have met these soft law standards, as discussed in *ClientEarth v FCA*.[452]

3.2.3 Unified Sustainability Standards under EU Laws and Endorsed International Organizations could be enforced.

Other standards attain approval as EU standards, such as the EU Green Bond Standard (EUGBS), incorporated into the EU Green Bond Regulation (EUGBR), or the ESRS,[453] developed by EFRAG under the auspices of the CSRD framework and endorsed by the European Commission in a Delegated Regulation.[454]

International standards formulated by private standard-setting entities, backed by pertinent institutions like IOSCO and endorsed by the European Commission, acquire legitimacy within the EU. [455] The International Accounting Standards (IAS), International Financial Reporting Standards (IFRS) and related Interpretations (SIC-IFRIC interpretations) are examples of strong international standards, some of them have been endorsed by the European Commission

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In addition, Article 18 of the Taxonomy Regulation integrates as a minimum safeguard that firms carrying out environmentally sustainable economic activities shall ensure alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. This is a mandatory aspect that firms shall comply with for the purposes of establishing the degree to which an announced Taxonomy-aligned investment is actually environmentally sustainable under Article 3 of the Taxonomy Regulation.

[451] ESMA, *Guidelines on risk factors under the Prospectus Regulation*, ESMA31-62-1293, 2019, https://www.esma.europa.eu/document/guidelines-risk-factors-under-prospectus-regulation.

[452] *ClientEarth, R (On the Application Of) v Ithaca Energy Plc* [2023] EWHC 3301 (Admin), paras 16-23. The plaintiff submits that "the prospectus fails adequately to disclose or describe the specificity of the climate-related risks associated with Ithaca's securities in breach of Article 16 and the ESMA Guidelines" and the Court assessed issuer's disclosure of risk factors interpreting Article 16(1) of the Prospectus Regulation and the requirements for the issuer to disclose its assessment of risk and specificity in both Article 16(1) and ESMA Guidelines.

[453] See below section 3.2.3.

[454] Standards that have been, at least in part, taken into account in the development of European Sustainability Technical reporting standards, the EFRAG's ESTS under the CSRD).

[455] Article 3(2) of IAS Regulation.

through the endorsement mechanism,[456] provided that the standards meet some principles, i.e., they shall be true and fair, relevant, reliable, comparable and understandable.[457]

In the context of disclosure of sustainability-related financial information, in particular in relation to climate-related risks, there is a wide set of soft law standards that have been developed at EU level and internationally, from private-standard setting bodies, such as the IASB's IFRS S1 and S2 standards on sustainability-related and climate-related disclosures, and guidelines issued by EU institutions, such as the ECB guidelines on climate-related risks. In this regard, the IASB has released several documents: the general requirements containing the sustainability-related financial reporting standards,[458] an "accompanying guidance"[459] and the "IFRS S1 Basis for Conclusions".[460]

The adoption of the IFRS per se does not grant the harmonized enforcement of the standards and unified compliance of issuers, which remain a national competence.[461] Likewise, Integrating IFRS in the EU as the EU reporting standard is a complex process where the standards need to be endorsed by the Commission and this process raise some constitutional and institutional questions.

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[456] Article 2 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards. In relation to the endorsement process of IFRS in the EU, see European Commission, Financial reporting, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/financial-reporting_en. The endorsement mechanism is carried out by the European Commission together with two advisory organisations: the European Financial Reporting Advisory Group (EFRAG) and the Accounting Regulatory Committee (ARC).

[457] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards stated that IFRS standards could be adopted if they met the "true and fair view" principle (Recital 9), as well as they are relevance, understandable, reliable, and comparable among financial market players when making decisions (Article 3).

[458] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 General Requirements for Climate-related Disclosures.

[459] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, cit., Accompanying Guidance, https://www.ifrs.org/content/dam/ifrs/publications/amendments/english/2023/issb-2023-b-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information-accompanying-guidance-part-b.pdf?bypass=on.

[460] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, cit., Basis for Conclusions, https://www.ifrs.org/content/dam/ifrs/publications/amendments/english/2023/issb-2023-c-basis-for-conclusions-on-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information-part-c.pdf?bypass=on.

[461] Article 24(4)(h) of the Transparency Directive states that NCAs shall have the necessary powers to: "examine the information referred to in this Directive is drawn up in accordance with the relevant reporting framework and take appropriate measures in case of discovered infringements."

In addition, IFRS qualify as non-binding standards at the national level, which may lead to divergent interpretations and disparate decisions regarding the application of reporting standards. This is due to the different institutional structures and national approaches within the EU.[462] In order to preserve the internal stability of IFRS in the EU and, in a broader context, to mitigate the risk of affecting the consistency of the overall IFRS framework, and the stability of the market, it is crucial to coordinate the implementation of IFRS at the EU level. In this respect, ESMA's support for dialogue and cooperation plays a key role in the consistent implementation of IFRS by National Competent Authorities (NCAs) and financial institutions.

In this regard, a recent report by ESMA addresses the new sustainability reporting standards released by the International Accounting Sustainability Board (IASB). The report details the accounting requirements that issuers *need to* take into account, providing possible approaches to disclose information on climate-related risks. The aim is to enable issuers to provide more robust disclosures in how climate-related matters are accounted for in IFRS financial statements,[463] as well as to improve the communication of these effects, enabling investors and stakeholders to understand and consider these aspects when making investment decisions.[464]

3.2.4 Legal effects of sustainability standards may still differ in practice.

Standards are normally developed with the aim to provide a common framework for financial market players, and/or for public enforcers (NCAs), to reach a situation in which information released to the market and behaviour can be comparable. Nonetheless, as we have seen above, the legal effects of such standards may differ in practice. Despite the need to ensure consistency in the application of sustainability reporting standards and the fundamental role of public

[462] Prior to the creation of ESMA, the Committee of European Securities Regulations (CESR) developed a standard to enforce financial information in Europe. See CESR, *Standard No. 1 on Financial Information. Enforcement of Standards on Financial Information in Europe,* CESR/03-073, Principle 20, section G (Coordination in Enforcement), 2003. In relation to the need to support convergence in emerging matters see CESR (2007), Proposed Statement of Principles of Enforcement of Accounting Standards in Europe, CESR/02-188b, https://www.esma.europa.eu/sites/default/files/library/2015/11/02_188b.pdf. See also N. MOLONEY, *EU securities and financial law*, Oxford University Press, 161; K. SCHIPPER (2005), *The Introduction of International Accounting Standards in Europe: Implications for International Convergence*, in *European Accounting Review*, 2005, vol 14, no 101.
[463] ESMA, *Report. The Heat is On: Disclosures of Climate-Related Matters in the Financial Statements*, 2023, https://www.esma.europa.eu/sites/default/files/2023-10/ESMA32-1283113657-1041_Report_-_Disclosures_of_Climate_Related_Matters_in_the_Financial_Statements.pdf.
[464] *Ibidem*.

"enforcers" in the implementation of IFRS at the national level by financial institutions,[465] difficulties may arise from the need to ensure the enforceability of these standards. The tool through which soft law measures have been evaluated to assess their enforceability and effectiveness has been litigation.

The practical efficacy of financial standards related to sustainability has yet to undergo assessment by adjudicators. Given this lack of direct examination, it is necessary to turn our attention to instances in which courts and quasi-courts[466] have reviewed soft law standards and issued rulings on the validity of standards originating from EU institutions or international bodies and endorsed by the European Commission.

As a preliminary consideration, at least two situations should be distinguished: on the one hand, what sustainability-related standards and guidelines have legal effects and being enforceable. This would mean that such guidelines or standards can be reviewed under Article 263 of the TFEU. Examining the established case law of EU courts pertaining to the reviewability of soft law measures issued by ESAs, the courts evaluate the binding or non-binding nature of guidelines and standards, along with the powers conferred upon the institution.[467]

On the other hand, when it comes to sustainability-related standards that have received endorsement and are integral to regulations via delegated acts, justiciability hinges on adherence or deviation from the established standard compliance or non-compliance with the standard. This involves assessing whether there is an omission, potential fraud leading to greenwashing, or if the core of the dispute evolves around the application of an appropriate methodology for handling and disclosing sustainability-related risks. These risks may manifest at both the internal level (pertaining to risk management and organizational requirements) and

[465] N. MOLONEY, *EU Securities and Financial Law*, cit., 162-165. The author explains that the Coordination of Enforcement Activities and Standards by the CESR (now ESMA) recommended principles for robust enforcement in 2003, followed by a coordination standard in 2004, establishing the European Enforcers Co-ordination Sessions (EECS). The EECS aimed to enhance convergence on enforcement decisions and monitored enforcement during the crisis era. However, CESR's involvement in fair value assessment pushed the boundaries, causing confusion about IFRS standards' scope.
[466] M. LAMANDINI and D. RAMOS MUÑOZ, *A promise kept? The first years of experience of the Appeal Panel of the SRB*, Zeitschrift für Bankrecht und Bankwirtschaft, 2023, vol 35, no 3, 158-168, https://doi.org/10.15375/zbb-2023-0304. The authors state that quasi-courts in the financial realm are review bodies like the ESAs Joint Board of Appeal, the SSM's Administrative Board of Review (ABoR) and the SRB's Appeal Panel.
[467] i.e., the binding or non-binding force of sustainability-reporting financial standards is intrinsically linked to the institution that creates it, as these do not originate directly from EU or national legislative bodies (such as the EU Parliament and Council at EU level).

the product level (concerning product risk). Within this analysis, the role of "enforcers," entities other than courts tasked with overseeing and scrutinizing the implementation of technical criteria employed by issuers of sustainability-related information, becomes crucial. This aspect has undergone examination by the Single Resolution Board (SRB) in the context of a review of methodologies employed by credit rating agencies.[468]

In the case of guidelines developed by EU bodies, such as the ESAs, legal proceedings have been brought in front of the General Court of the EU and, on appeal, before the Court of Justice requesting the declaration of annulment of non-binding EU measures.[469] In such cases, the EU Courts have assessed the relationship between national judicial review of non-binding national measures and the structural issues arising from the review of soft-law measures, suing the example of guidelines adopted by the EBA.[470]

3.3 Sustainability-related reporting standards and guidelines and its potential "judiciability."

3.3.1 Judiciability of RTS developed by the ESAs (i). General considerations.

RTS developed by the ESAs, with expressly granted authority, constitute technical standards categorized as "preparatory" or "quasi-preparatory" acts.[471] Following the endorsement by the

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[468] In the case of CRA, see the decision of the Board of Appeal in Scope Ratings GmbH v ESMA, Decision Ref.: 2020-D-03, 28 December 2020. In relation to the methodology applied by credit rating agencies in accordance with Art. 8 of the CRA (credit rating agencies shall use methodologies that are "rigorous, systematic and continuous ". In Scope Ratings GmbH v ESMA, Decision Ref.: 2020-D-03, 28 December 2020, paras 112, 114, 150. The Board of Appeal recognized that Art. 22a expressly and directly "reference to ESMA's supervisory obligations as regards examination of compliance with methodologies" and "shared the view put forward by ESMA" that "the systematic application of a methodology does not imply the mechanistic application of the methodology and allows for an appropriate margin of judgment".

[469] C-322/88 Grimaldi v Fonds des maladies professionnelles [1989] (hereafter Salvatore Grimaldi v Fonds des maladies professionnelles); C-314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECLI:EU:C:1987:452.
See also E.g., European Parliament, Challenges in the implementation of EU Law at national level, Briefing requested by the JURI committee, https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608841/IPOL_BRI(2018)608841_EN.pdf.

[470] For example, in C-501/18 Balgarska Narodna Banka [2021] EU:C:2021:249, paras 79, 82. The court of Justice declared a recommendation adopted by the EBA invalid. The Court held that the recommendation at issue was a "genuine soft law instrument", i.e., a non-binding instrument expressly excluded from judicial review under Article 263 TFEU but, in the Court's view, full examination of the validity of that non-binding measure was in order pursuant to case Salvatore Grimaldi v Fonds des maladies professionnelles, cit., under Article 267 TFEU.

[471] LAMANDINI and RAMOS MUÑOZ, *Law, Finance, and the Courts*, cit., para 3.69; CHAMON, DE ARRIBA-SELLIER, FBF: *On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies: ECJ (Grand Chamber), 15 July 2021, Case C-911/19, Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de*

European Commission, these standards will transform into Delegated Regulations[472] or implementing regulations.[473] These preparatory acts comprise the technical assessment beyond the European Commission's scope,[474] and the Commission retains discretion in adopting or rejecting the act.

Therefore, the judicial scrutiny of the final decision (usually by the Commission) encompasses both the legality of the ESA's assessment and the Commission's exercise of discretion.[475] In other words, the legality of RTS or Implementing Technical Standard (ITS) prepared by ESAs can be assessed by examining the delegated or implementing regulation approved (and consequently adopted) by the European Commission.[476]

In the context of sustainable finance regulation, the ESAs have been required to develop some RTS on sustainability-related information. The SFDR requires ESAs to develop RTS on technical aspects that are broadly consider in the Regulation. These technical elements encompass the adverse sustainability impacts information at entity and financial product levels,[477] sustainability indicators in relation to adverse impacts with respect to social and employee matters, human rights, anti-corruption and anti-bribery matters,[478] and information published on website,[479] and periodic reports,[480] and the indicators related to principal adverse

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Résolution, ECLI:EU:C:2021:599, in *European Constitutional Law Review*, 2022, vol 18, no 2 286-314; VAN RIJSBERGEN and ROGGE, European Financial Supervisory Agencies' Soft Law Powers, cit., 225-226.

[472] Under Article 290 of the TFEU.

[473] Under Article 291 of the TFEU.

[474] LAMANDINI and RAMOS MUÑOZ, *Law, Finance, and the Courts*, cit., ch 3, para 3.69.

[475] T-40/00, Artedogan and others v. Commission EU:T:2002:283 at 197-199, 2002 (hereafter *Artedogan*).

[476] LAMANDINI and RAMOS MUÑOZ, *Law, Finance, and the Courts*, cit., ch 3, para 3.69

[477] Articles 4(6) and 7(1) in fine of the SFDR. These RTS were integrated in the joint draft of RTS for Commission Delegated Regulation (EU) 2022/1288 (hereinafter the SFDR Delegated Regulation), including the disclosures of principal adverse impacts (PAI) of investment decisions on sustainability factors and to integrate disclosure of financial products' decarbonisation targets. See ESAs (2023). Joint consultation on the review of SFDR Delegated Regulation, https://www.esma.europa.eu/press-news/consultations/joint-consultation-review-sfdr-delegated-regulation. A final report contains the ESAs joint draft amending RTS for the SFDR Delegated Regulation, adapting the draft to the European Commission's feedback to extend the list of social indicators for PAI, to refine the content of a number of indicators for PAI and their definitions, methodologies, metrics and presentations, and to amend GHS emission reduction targets. See ESAs (2023). Final Report on draft Regulatory Technical Standards on the review of PAI and financial product disclosures in the SFDR Delegated Regulation, JC 2023 55, https://www.esma.europa.eu/sites/default/files/2023-12/JC_2023_55_-_Final_Report_SFDR_Delegated_Regulation_amending_RTS.pdf.

[478] Article 4(7) of the SFDR.

[479] Article 10(2) of the SFDR and Articles 24, 29, 29a, 37, 42a, and 49a-g of ESMA, *Final Report on draft Regulatory Technical Standards on the review of PAI and financial product disclosures in the SFDR Delegated Regulation*, JC 2023 55, https://www.esma.europa.eu/sites/default/files/2023-12/JC_2023_55_-_Final_Report_SFDR_Delegated_Regulation_amending_RTS.pdf. (hereafter ESMA Final Report on SFDR draft Regulatory Technical Standards).

[480] Article 11(4) of the SFDR.

impacts, and formulas for calculating the proportion of sustainable investment of a financial product,[481] the presentation and content of the information to be disclosed in pre-contractual disclosures and on websites where a financial product promotes environmental or social characteristics, a combination of both,[482] or the financial product pursues a sustainable investment,[483] taking into account the characteristics and differences between financial products.

These RTS, when endorsed in the final Delegated Regulation, could be reviewed by the logic set out above: since the RTS are preparatory acts subsequently rejected or adopted by the Commission, if adopted, they could be subject to the review criteria of the final legal act, which comprises both the legality of the ESA analysis and the Commission's decision.

3.3.2 Judiciability of RTS developed by the ESAs (ii). A few examples before the EU courts.

In previous decisions in the realm of financial and banking regulation the CJEU has assessed the nature of the guidelines and recommendations to determine whether they are binding, produce legal effects, and therefore can be reviewed under Article 263 of the TFEU, or if these standards are "genuine" recommendations or opinions outside the scope of Article 263 of the TFEU.[484]

In *Belgium v Commission* the Court of Justice examined whether the guidelines which have effects on third parties could be reviewed under Article 263 of the TFEU. The Court stresses that recommendations were a specific category of EU acts, have no binding force in accordance with Article 288 of the TFEU. As a result, acts lacking binding legal effects, such as recommendations, fall outside the scope of the judicial review under Article 263 TFEU, unless the recommendation is a "false soft law instrument". The ruling distinguished the present case from previous judgments and underscored the availability of the preliminary ruling procedure

[481] Article 17a of ESMA Final Report on SFDR draft Regulatory Technical Standards.
[482] Article 8(3) of the SFDR.
[483] Article 9(5) of the SFDR.
[484] Article 263 TFEU reads: «[T]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions». (Emphasis added).

under Article 267 TFEU for examining the validity and interpretation of all acts, including recommendations.[485]

Based on an objective criterion, if the act's substance indicates binding legal effects, the act becomes a challengeable act subject to judicial review.[486] This objective test requires examining the wording, the content and the context of the recommendation in which it was adopted and the powers of the institution which adopted the act.[487] The Court concluded that the contested recommendation did not have binding legal effects because it was worded mainly in non-mandatory terms (wording), was intended to have any binding legal effects and that the Commission had no intention to confer such effects on it (content),[488] and the EU institutions and bodies did not have the intention to propose sectoral legislation on the subject matter of the dispute (context).[489]

Further criteria were considered by the AG's Opinion in Belgium v Commission.[490] First, the AG's Opinion held that the formal approach focused on legal certainty and adherence to the wording of Article 263 should not "trump over" the substance of this phenomenon, i.e., that recommendations have significant legal effects.[491] Second, the coherence of legal remedies in EU law is affected because Member States faced challenges in challenging recommendations: inducing Member States to implement rules while limiting their ability to bring an action before the Court would be illogical and counterproductive.

The AG's Opinion in *Belgium v Commission* referred to *Grimaldi* case, where the Court held that it had jurisdiction to decide on the validity and interpretation of all acts of EU bodies,

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485 Case C-16/16 P, Belgium v Commission, ECLI:EU:C:2018:79, 2018, para 44, referring to Case C-322/88 Grimaldi, EU:C:1989:646, 1989, para 8, and Case C-258/14, Florescu and Others, EU:C:2017:448, 2017, para 30.

486 Case C-16/16 P Belgium v Commission, cit., paras 29-45: an act by an EU institution qualifies as a "challengeable act" for the purposes of Article 263 TFEU when it produces legal effects, i.e., they are not recommendations with non-binding force. The Court distinguished between "false soft law instruments" and "genuine soft law instrument". False soft law instruments produce legal effects and are challengeable under Article 263 TFEU.

487 Case C-16/16 P Belgium v Commission, cit., paras 31-32: In that regard, prior to determining whether the contested act produces binding legal effects, it is necessary "to examine the substance of that act" and "to assess those effects on the basis of objective criteria", such as the content of that act and the context.

488 Case C-16/16 P Belgium v Commission, cit., para 35: 'paragraph 2 of the contested recommendation expressly states that the recommendation does not interfere with the right of Member States to regulate gambling services.

489 Belgium v Commission, para 36.

490 Case C-16/16 P Belgium v Commission, Opinion of AG Bobek, ECLI:EU:C:2017:959, 2017, paras 166-171. The AG suggested to extend ERTA test in 22/70, Commission v Council, EU:C:1971:32, 1971.

491 Case C-16/16 P Belgium v Commission, Opinion of AG Bobek, cit., paras 151-165.

including non-binding acts.[492] The Court clarified that "true recommendations" are not intended to produce binding effects, and therefore they cannot create rights upon individuals "upon which individuals may rely before a national court".[493] However, recommendations have legal effects and national courts should take them into account to decide disputes before them, or when "they are designed to supplement binding Community provisions."[494]

These considerations become significant if we observe potential challenges to declare that an EU act is not legally binding, to interpret soft law measures and the parallel review of binding and non-binding measures at the national and European levels, and/or to review an EU act and declare it invalid under Article 267 of the TFEU.[495]

More recently, in *FBF v ACPR*,[496] the Court of Justice examined the reviewability of soft law acts, taking into account whether the EBA's guidelines intended to produce binding effects, and the scope of the EBA's power to issue such guidelines.[497] The CJEU distinguished between the EBA's power to issue guidelines and recommendations (a power "to persuade") and the power to adopt acts having binding effects of the issuing body.[498] The CJEU applied the approach of previous decisions, focusing on assessing the content, context of the recommendations to generate binding effects.[499]

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[492] Case C-322/88, Salvatore Grimaldi v Fonds des maladies professionnelles, ECLI:EU:C:1989:646, 1989 (hereafter Grimaldi) para 16. See also C-501/18, Balgarska Narodna Banka, EU:C:2021:249, 2021, para 83.
[493] Grimaldi, cit., para 18. In the same vein, Société des usines à tubes de la Sarre kontra ESZAK Főhatóság, ECLI:EU:C:1957:13, 1957, 115.
[494] Grimaldi, cit., para 18.
[495] Case C-911/19 Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR), Opinion of Advocate General Bobek, ECLI:EU:C:2021:294, 2021 (hereafter FBF v ACPR, Opinion of Advocate General Bobek). The AG finally concluded that the guidelines, considered as a whole, do not fall within the scope of the legislative acts referred to in Regulation No 1093/2010 or the ones conferring specific tasks upon the EBA. Therefore, the EBA exceeded its competences in adopting the guidelines. See paras 60-75.
[496] See also FBF v ACPR, Opinion of Advocate General Bobek, cit., paras 23-25. In this case, the question was whether the FBF can refer the question to the Court of Justice, contingent on the guidelines being subject to annulment under Article 263 TFEU and whether a professional federation like FBF has the standing to bring such an action. See also case C-501/18, Balgarska Narodna Banka, EU:C:2021:249, 2021, paras 97-101.
[497] FBF claimed that the EBA guidelines are invalid due to the EBA's alleged lack of competence to issue them. FBF v ACPR, paras 48-50.
[498] Case C-911/19 Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) ECLI:EU:C:2021:599, 2021 (hereafter FBF v ACPR), para 48.
[499] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 22. the case concerned a preliminary ruling regarding the review of soft law measures, in particular the EBA guidelines on product oversight and governance arrangements for retail banking products. In particular, the ACPR published a notice on its website declaring that it complied with the EBA guidelines. It also stated that the guidelines were applicable to the credit institutions, payment institutions and electronic money institutions under its supervision, which were to make every effort to comply with them and to ensure that their distributors also comply with them. See also the ERTA test in Judgment of 31 March 1971, Commission v Council (22/70, EU:C:1971:32).

The CJEU scrutinized the verbatim of the standards, discerning a fundamental distinction between the guidelines and implementing technical standards. It determined that while the guidelines were not legally binding, they served as instructive recommendations intended for NCAs. These guidelines, characterized by their non-mandatory language, afforded flexibility, and permitted deviations with justifiable rationales. In essence, the EBA's Guidelines embraced a "comply-or-explain" framework, offering financial institutions the discretion to opt in or out, with reporting obligations contingent solely upon compliance.[500]

Hence, in cases where a NCA opts to adopt the guidelines, it assumes the role of an active enforcer, consequently binding financial institutions, the primary recipients, to compliance.[501] However, the Court's ruling underscored that the wording and the "comply-or-explain" framework substantiated the absence of the requisite legally binding effects necessary to warrant annulment actions under Article 263 TFEU.

Regarding the validity of the guidelines, the Court scrutinized the powers conferred upon the EBA under the EBA Regulation and affirmed their legitimacy.[502] Despite lacking direct legal binding force, the guidelines serve as persuasive tools,[503] urging competent authorities and financial institutions to adhere to their provisions. While they may influence the enactment of

[500] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 43: "the actual substantive guidelines…use the term 'should' as opposed to the language of 'shall'…there is no obligation on the competent authorities (25) to comply with them."

[501] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 48: once that decision is made, the initially non-binding nature becomes very much binding, as the 'nominal addressee' (the competent supervisory authority) becomes an effective 'enforcer'.

[502] FBF v ACPR, cit., paras 66-132. The Court concludes that the guidelines fall within the EBA's scope of action, referring to the provisions of various directives as specified in the guidelines. Moreover, the guidelines are deemed necessary to ensure the consistent and effective application of these directives.
The Court also asserts that the contested guidelines align with the EBA's mission, contributing to consumer protection, depositor and investor protection, and establishing supervisory practices within the European System of Financial Supervision (ESFS). The guidelines are found to be consistent with the principles outlined in a Joint Position of the European Supervisory Authorities.

[503] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

national legislation,[504] the EBA is constrained to issue guidelines within the confines set by the EU legislature.[505]

The AG Bobek advocate General Bobek acknowledged the non-mandatory nature of the contested guidelines and the absence of an obligation for competent authorities to comply. However, he contended that these guidelines, though formally non-binding, are coupled with mechanisms that encourage compliance at the national level.[506] By stipulating that the NCAs and financial institutions "must make every effort to comply," the guidelines, once adopted by a competent authority, bind financial institutions at the national level. Thus, while the guidelines may be perceived as non-binding soft law at the EU level, they hold greater weight and may entail legal ramifications when viewed through the lens of national implementation, particularly for financial institutions.

In other words, wield significant influence over the behaviour of financial institutions regarding guideline adoption. Even in cases where NCAs choose not to enforce the guidelines, the content of the guidelines may imply an obligation for financial institutions to strive for compliance.[507]

A comparison between the wording in ESAs' guidelines and the reviewed case law reveals a distinct linguistic approach in contrast to the set of guidelines issued by the Commission and EU institutions concerning climate-related matters that would make the former higher enforceable than the latter.

Notably, the European Commission's Guidelines on disclosures from 2017 and 2019 adopt language that underscores their advisory nature:[508] both iterations explicitly denote that the Communication presents non-binding guidelines, devoid of any new legal obligations. Rather,

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[504] FBF v ACPR, cit., para 69. As illustrated in the case at hand where the APCR (French Prudential Control and Resolution Authority) issued acts encouraging financial institutions to adjust their practices based on EBA guidelines.
[505] FBF v ACPR, cit., para 69. As illustrated in the case at hand where the APCR (French Prudential Control and Resolution Authority) issued acts encouraging financial institutions to adjust their practices based on EBA guidelines.
[506] FBF v ACPR, Opinion of Advocate General Bobek, paras 51-53.
[507] *Ivi*, para 49.
[508] By comparison, e.g., IFRS S1 sustainability-related financial reporting standards and IFRS S2 on Climate-related disclosures use the word "shall" instead of "should" when imposing the obligation to disclose sustainability-related information associated with the product and the internal organization requirements of financial market participants subject to the Standards.[508]

their purpose is framed as assisting companies in disclosing high-quality, relevant, and comparable non-financial (environmental, social, and governance-related) information (as stated in the 2017 Guidelines).[509] Furthermore, companies are encouraged to consult ("should read") these Guidelines alongside pertinent national legislation.[510]

Other recommendations, such as the ECB Guidelines Guide on climate-related and environmental risks[511] generates "expectations" of an increased coordination between NCAs and European supervisors regarding the ECB's perspective on sound, effective, and comprehensive management, along with disclosing climate-related and environmental risks within the existing prudential framework. Additionally, the objective is to raise awareness within the industry and improve its readiness to handle such climate-related and environmental risks.

As regards the context, there are some other elements that help determine whether the sustainability-related standards and/or guidelines induce financial institutions to comply with them.[512] First, the guidelines shall indicate the addressee induce compliance (i.e., they can be addressed to NCAs, to financial institutions, or both).[513] Thus, the content and context in which the Guidelines were developed reveals a clear intention to provide financial market participants with a method to integrate sustainability-related risks into their risk management assessment,[514]

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[509] Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) C/2017/4234 OJ C 215 (hereafter EU's 2017 Guidelines on reporting climate-related information).

[510] Communication from the Commission — Guidelines on non-financial reporting: Supplement on reporting climate-related information C/2019/4490, (hereafter EU's 2019 Guidelines on reporting climate-related information) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC0620%2801%29,

[511] ECB (2020). ECB Guidelines Guide on climate-related and environmental risks. Supervisory expectations relating to risk management and disclosure, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.202011finalguideonclimate-relatedandenvironmentalrisks~58213f6564.en.pdf. (Hereafter ECB Guide on climate-related and environmental risks).

[512] Article 16(3) of Regulation No 1093/2010. For example, ESAs' guidelines are addressed to financial institutions and NCAs, who "must make every effort to comply with the guidelines". In this regard, in FBF v ACPR the AG Bobek distinguished between addresses and genuine addresses. The latter where those institutions or persons that are expressly mentioned in the guidelines. For example, the EBA guidelines on banking products refer to manufacturers and distributors of banking products, thereby clearly stating that financial institutions (manufacturers and distributors of banking products) should make an effort to incorporate the content of the guidelines into their operations.

[513] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 46. The AG Bobek interpreted this requirement as a clear intention to place a duty upon the addressees to not simply disregard the guidelines. Hence, the genuine addressees are the financial institutions where the guidelines expressly refer to financial market participants.

[514] For example, the ECB Guide on climate-related and environmental risks, EU's 2019 Guidelines on reporting climate-related information and EU's 2017 Guidelines on reporting climate-related information.

and encourage legislative development around the control of climate and sustainability risks that may impact on the economic performance of investments and issuers.[515]

In addition, ESMA draft guidelines on enforcement of sustainability information are intended to be expressly addressed to competent authorities at national level[516] that undertake enforcement of sustainability periodic information under the Transparency Directive in order to ensure that sustainability information provided by issuers meets the Transparency Directive's requirements.[517]

Second, lack of compliance by competent authorities could simply indicate that they will not apply these guidelines, without affecting the intrinsic duty of financial institutions. In other words, these guidelines may themselves be valid vis-à-vis financial institutions, irrespective of the position taken by the competent authorities.[518] This would be the case for IAS ISSB sustainability-related financial standards and climate-related disclosures.

Third, two key aspects to determine whether standards and guidelines can be enforceable are whether those guidelines and standards may become directly bound at national level (e.g., once implemented by the NCA or whether they would need to be transposed like a directive).

Finally, if positive, the next question to be answered would be whether non-compliance with guidelines can have the legal effects on national financial institutions, which is a key aspect of enforceability of legal instruments.[519]

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[515] The guidelines integrated the TCFD Recommended Disclosures and acted as a supplement of the NFRD. See EU's 2019 Guidelines on reporting climate-related information, Annex II. Also, the ECB Guide on climate-related and environmental risks, p. 45: "it should be noted that the European Commission plans to conduct a review of the NFRD as part of the strategy to strengthen the foundations for sustainable investment."

[516] For example, ESMA is in the process of developing Guidelines on Enforcement of Sustainability Information. See ESMA, Consultation on Draft Guidelines on Enforcement of Sustainability Information, cit.

[517] In particular, NCAs shall ensure that issuers with securities admitted to trading on a regulated market meet the sustainability information requirements under the Accounting Directive and the ESRS, Article 8 of the Taxonomy Regulation and the Disclosures Delegated Act and monitor their implementation by financial market operators. ESMA (2023). Consultation on Draft Guidelines on Enforcement of Sustainability Information, pp. 8-10, https://www.esma.europa.eu/press-news/consultations/consultation-draft-guidelines-enforcement-sustainability-information

[518] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 47.

[519] *Ivi*, para 49-51. The AG Bobek favored the first of the cited options, thereby favoring the effective enforcement in the Member States whose NCA implemented the guidelines. He held that the content of the guidelines became applicable through the ACPR notice to all the 'credit institutions, payment institutions and to electronic money institutions under the supervision of the ACPR'.

The AG Bobek's Opinion in FBF v ACPR criticized the Court's tendency to focus solely on the act and its author, detached from the practical impact on the legal act's addressees.[520] The AG's Opinion held that *while an act may qualify as soft law if it is considered exclusively from an EU perspective, it can be transformed into something more binding at the national level*, and the EU law system allows for such variations. Thus, the complexity of the system is introduced by the joint involvement of EU and national regulatory and judicial levels.

For example, adherence to international standards set by the ISSB, or to the ESRS developed by the EFRAG in accordance with the CSRD, would justify the impact of these standards in practice among market operators.

In FBRF v ACPR the AG held that *when considering the genuine addressees (financial institutions at the national level), the guidelines appear less "soft" than when focusing on the competent national authorities*. Despite this, the author anticipates that, based on the Court's standard approach, the contested guidelines are unlikely to be deemed binding and, consequently, not subject to review under Article 263 TFEU.

We agree with the AG's Opinion that RTS addressed to financial institutions, integrated into the Delegated Acts or by voluntary adherence should produce legal effects. At the same time, the ESAs should clarify, when necessary, technical aspects regarding in relation to the content, methodology, and presentation of a wide range of sustainability-related information,[521] or guidelines on the supervision of sustainability reporting by the NCA.[522]

Likewise, ensuring that sustainability reporting standards align with pertinent Union laws is important too. This alignment would mark a critical juncture for sustainability-related financial disclosure standards, propelling them towards unification and enhancing their practical relevance. It is the linchpin for harmonizing diverse practices and ensuring that these standards effectively guide and inform decision-making processes across the board.

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[520] FBF v ACPR, Opinion of Advocate General Bobek, cit., paras 52-55.
[521] Recitals 9 and 30 of the SFDR.
[522] See ESMA (2023). Consultation Paper. Draft Guidelines on Enforcement of Sustainability Information, ESMA32-992851010-1016, https://www.esma.europa.eu/sites/default/files/2023-12/ESMA32-992851010-1016_Consultation_Paper_on_Guidelines_on_Enforcement_of_Sustainability_Information.pdf.

Specifically, adherence to disclosure requirements outlined in the SFDR and consideration of indicators and methodologies in delegated acts pursuant to the Taxonomy Regulation are crucial. Additionally, compliance with disclosure requirements for benchmark administrators under Regulation (EU) 2016/1011,[523] standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, and any work by the EBA in implementing Pillar III disclosure requirements of Regulation (EU) No 575/2013 is essential.[524]

Furthermore, these standards should incorporate Union environmental laws, including Regulation (EC) No 1221/200[525]9 and Directive 2003/87/EC,[526] as well as Commission Recommendation 2013/179/EU,[527] its annexes, and updates. Consideration of other relevant Union laws such as Directive 2010/75/EU, along with requirements for undertakings regarding directors' duties and due diligence, is also necessary to provide a comprehensive understanding of the obligations financial market participants should comply with.

Additionally, sustainability reporting standards should align with the Guidelines on non-financial reporting and reporting climate-related information. They should also encompass other reporting requirements in the Accounting Directive,[528] not directly related to sustainability, aiming to enhance user understanding of the undertaking's development, performance, position, and impact by maximizing connections between sustainability information and other data reported in accordance with the Accounting Directive.

3.3.3 Judiciability of RTS developed by third parties other than EU bodies.

[523] 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.
[524] Recitals 41 and 42 of the CSRD.
[525] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.
[526] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.
[527] 2013/179/EU: Commission Recommendation of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations Text with EEA relevance.
[528] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance.

Another scenario involves the development of RTS by third party entities other than EU bodies. For example, the European Commission has recently endorsed the first package of the ESRS and integrated them into a Commission Delegated Regulation.[529] The ESRS are technical standards developed by the European Financial Reporting Advisory Group (EFRAG), a third party entity, in accordance with the delegated powers conferred in secondary legislation.[530] The ESRS cover sustainability matters and are introduced under the CSRD as mandatory standards,[531] addressed to firms specified in Articles 19a and 29a of the CSRD,[532] for carrying out their sustainability reporting obligations.[533]

The ESRS were developed at the same time the International Sustainability Standard Board (ISSB) prepared the IFRS Sustainability Disclosure Standards, an international private setting-standards body. In the case of IFRS, several national and EU-level bodies engage with the IASB but integrating these technical standards involves a process of endorsement in accordance with the IAS Regulation.[534] Hence, a question is whether international standardisation bodies may release de jure voluntary standards that can be reviewed in the

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[529] Article 1 of ESRS.

[530] Article 49(3b) of the Accounting Directive.

[531] Article 1 of the ESRS Delegated Regulation states that undertakings "are to use" the sustainability reporting standards set out in Annexes I and II of the Delegated Regulation for carrying out their sustainability reporting. Previously, the Proposal for a Decision of the European Parliament and of the Council amending Directive 2013/34/EU as regards the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM%3A2023%3A596%3AFIN#footnote4, expressly stated that the sustainability information must be reported in accordance with European Sustainability Reporting Standards (ESRS), to be adopted by the Commission by means of delegated acts, taking into consideration the technical advice provided by EFRAG.

[532] Article 19a of the CSRD imposes sustainability-related reporting obligations to large undertakings, and small and medium-sized undertakings, except micro undertakings, which are public-interest entities governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market of any Member State in accordance with Article 4(1)(14) of MiFID I. See Article 2(1)(a) of the Accounting Directive. Article 29a of the CSRD imposes the same obligation to parent groups, i.e., parent and subsidiary undertakings which, on a consolidated basis, exceed the limits of at least two of the three following criteria on the balance sheet date of the parent undertaking: (a)balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250. See Article 3(7) of the Accounting Directive.

[533] Recital 1 of the ESRS Delegated Regulation: "undertakings are to prepare [their management report or consolidated management report the information necessary to understand the undertaking's impacts on sustainability matters, and the information necessary to understand how sustainability matters affect the undertaking's development, performance and position]_in accordance with sustainability reporting standards starting from the financial year indicated in Article 5(2) of Directive (EU) 2022/2464 for each category of undertakings." (Emphasis added).

[534] Regulation (EU) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards OJ L 243, 11.9.2002, p. 1. In particular, ESMA coordinate action with IASB for the creation of common and harmonized standards, for enforcement and clarification of IFRS, and the European Commission may endorse IFRS following EFRAG's endorsement advice. See IFRS, Who uses IFRS Accounting Standards?-European Union, https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/view-jurisdiction/european-union/.

EU.[535] This requires to examine whether technical voluntary standards may de facto have mandatory effects.[536]

The role of harmonized technical standards released by standardisation organizations have been assessed by the EU courts in the context of a request for granting access to four harmonised technical standards (HTS) that were not available to the public.[537] Public.Resource.Org, Inc., is a pending case before the Court of Justice where it has been discussed whether HTS emanating from an standardisation organization are an act of EU law.[538]

The General Court has not engaged in an in-depth analysis of the legal nature of the standards, and slightly mentioned that the alleged harmonized standards, while belonging to EU law, are not mandatory, and produce the legal effects attached to them solely with regard to the persons concerned.[539] The AG made a more specific assessment of the HTS. The AG held that the HTS are part of the EU standardization system set out by the EU legislature: the procedure to adopt the standards initiates with a request from the European Commission (delegated power) and concludes with the verification, endorsement and publication in the Official Journal of the EU.[540] Therefore, the HST are more than a mere implementing measure originating from a European Standard Organization.[541]

In other words, compliance with some private standard-setting standards, originally conceptualized as voluntary standards, may be mandatory standards with legal effects if the standard is part of EU law. In such a case, those standards could be reviewed under the narrow requirements of Article 263 of the TFEU by examining the delegated or implementing

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[535] As mentioned in the previous section, this process poses constitutional and institutional challenges. See N. MOLONEY, *EU securities and financial law*, cit., 161-164.
[536] C-171/11 Fra.bo [2012] EU:C:2012:453, paras 27 to 32.
[537] Case C-588/21 Public.Resource.Org, Inc. & Right to Know CLG v European Commission, AG Medina, [2023] ECLI:EU:C:2023:509 (pending before the Court of Justice) (hereafter Case C-588/21 Public.Resource.Org, Inc., Right to Know CLG v European Commission, AG Medina). As part of the assessment conducted by the General Court and the AG, they examine whether the HTS can be considered an act of EU law.
[538] Case C-588/21 Public.Resource.Org, Inc., Right to Know CLG v European Commission, AG Medina, cit.; Case T-185/19 Public.Resource.Org, Inc. and Right to Know CLG v European Commission [2021] ECLI:EU:T:2021:445 (hereafter Case T-185/19 Public.Resource.Org, Inc. and Right to Know CLG v European Commission). The core of the dispute was whether the fact that HTS are an act of EU law justifies the free access to them within the EU. The General Court and the Advocate General exhibit conflicting positions on. The General Court does not consider that the fact that HTS is part of EU law justifies free access to HTS, whereas the GA does.
[539] Case T-185/19 Public.Resource.Org, Inc. and Right to Know CLG v European Commission, cit.
[540] *Ibidem.*
[541] Case C-588/21 Public.Resource. Org, Inc., Right to Know CLG v European Commission, AG Medina, cit., para 33.

regulation endorsed by the European Commission. A fundamental element would be the Commission's role in overseeing the standard adoption at the national level underscores their importance in EU law. A second critical element would be a presumption of conformity,[542] implying that compliance with the standards ensures compliance with essential principles within the EU.[543] In other words, the AG also emphasized that some standards a necessary for enforcing EU secondary legislation and argues for their enforceability, considering them de facto mandatory due to their probative value.[544]

As regards the justiciability of guidelines and recommendations on sustainability-related financial disclosures or climate-related disclosures issued by EU bodies, the EU courts have not yet ruled on them. In previous decisions in the realm of financial and banking regulation the CJEU has assessed the nature of the guidelines and recommendations to determine whether they are binding, produce legal effects, and therefore can be reviewed under Article 263 of the TFEU, or if these standards are "genuine" recommendations or opinions outside the scope of Article 263 of the TFEU.[545]

In Belgium v Commission the Court of Justice examined whether the guidelines which have effects on third parties could be reviewed under Article 263 of the TFEU. The Court stresses that recommendations were a specific category of EU acts, have no binding force in accordance with Article 288 of the TFEU. As a result, acts lacking binding legal effects, such as recommendations, fall outside the scope of the judicial review under Article 263 TFEU, unless the recommendation is a "false soft law instrument" and distinguished the present case from previous judgments and underscores the availability of the preliminary ruling procedure under Article 267 TFEU for examining the validity and interpretation of all acts, including recommendations.[546]

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[542] *Ibidem*.
[543] Case C-588/21 Public.Resource. Org, Inc., Right to Know CLG v European Commission, AG Medina, cit., paras 33-51: compliance with HTS facilitates free movement of goods or services within the EU.
[544] In relation to the recognition of HTS as mandatory standards see Case C-588/21 Public.Resource. Org, Inc., Right to Know CLG v European Commission, AG Medina, cit., para 45; T-474/15 GGP Italy v Commission [2017] EU:T:2017:36, para 67.
[545] Article 263 TFEU reads: "[T]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions." (Emphasis added).
[546] Case C-16/16 P Belgium v Commission [2018] ECLI:EU:C: 2018:79, para 44 (hereafter P Belgium v Commission), referring to Case C-322/88 Grimaldi [1989] EU:C:1989:646, para 8, and Case C-258/14 Florescu and Others [2017] EU:C:2017:448, para 30.

Based on an objective criterion, if the act's substance indicates binding legal effects, the act becomes a challengeable act subject to judicial review.[547] This objective test requires examining the wording, the content and the context of the recommendation in which it was adopted and the powers of the institution which adopted the act.[548] The Court concluded that the contested recommendation did not have binding legal effects because "the contested recommendation is worded mainly in non-mandatory terms" (wording), the recommendation was intended to have any binding legal effects and that the Commission had no intention to confer such effects on it (content),[549] and the EU institutions and bodies did not have the intention to propose sectoral legislation on the subject matter of the dispute (context).[550]

Further criteria were considered by the AG in its Opinion in Belgium v Commission. The Opinion addressed two important aspects to justify that all recommendations should be subject to judicial review.[551] First, it held that the formal approach focused on legal certainty and adherence to the wording of Article 263 should not "trump over" the substance of this phenomenon, i.e., that recommendations have significant legal effects.[552] Second, the coherence of legal remedies in EU law is affected because Member States faced challenges in challenging recommendations: inducing Member States to implement rules while limiting their ability to bring an action before the Court would be illogical and counterproductive.

The AG in Belgium v Commission referred to Grimaldi case, where the Court held that it had jurisdiction to decide on the validity and interpretation of all acts of EU bodies, including non-binding acts.[553] The Court clarified that "true recommendations" are not intended to produce

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[547] P Belgium v Commission, cit., paras 29-45: an act by an EU institution qualifies as a "challengeable act" for the purposes of Article 263 TFEU when it produces legal effects, i.e., they are not recommendations with non-binding force. The Court distinguished between "false soft law instruments" and "genuine soft law instrument". False soft law instruments produce legal effects and are challengeable under Article 263 TFEU.

[548] P Belgium v Commission, cit., paras 31-32: In that regard, prior to determining whether the contested act produces binding legal effects, it is necessary "to examine the substance of that act" and "to assess those effects on the basis of objective criteria", such as the content of that act and the context.

[549] P Belgium v Commission, cit., para 35: «paragraph 2 of the contested recommendation expressly states that the recommendation does not interfere with the right of Member States to regulate gambling services».

[550] P Belgium v Commission, cit., para 36.

[551] Case C-16/16 P Belgium v Commission, Opinion of AG Bobek, [2017] ECLI:EU:C:2017:959, paras 166-171 (hereafter P Belgium v Commission, Opinion of AG Bobek). The AG suggested to extend ERTA test in 22/70 Commission v Council [1971] EU:C:1971:32.

[552] P Belgium v Commission, Opinion of AG Bobek, cit., paras 151-165.

[553] Case Salvatore Grimaldi v Fonds des maladies professionnelles, cit., para 16. See also C-501/18, Balgarska Narodna Banka [2021] EU:C:2021:249, para 83 (hereafter Balgarska Narodna Banka).

binding effects, and therefore they cannot create rights upon individuals "upon which individuals may rely before a national court".[554] However, recommendations have legal effects and national courts should take them into account to decide disputes before them, or when "they are designed to supplement binding Community provisions."[555]

These considerations become significant if we observe potential challenges to declare that an EU act is not legally binding, to interpret soft law measures and the parallel review of binding and non-binding measures at the national and European levels, and/or to review an EU act and declare it invalid under Article 267 of the TFEU.[556]

In FBF v ACPR,[557] the Court of Justice examined the reviewability of soft law acts, taking into account whether the guidelines intended to produce binding effects, and the scope of the EBA's power to issue such guidelines[558] distinguishing between the EBA's power to issue guidelines and recommendations (a power "to persuade") and the power to adopt acts having binding effects of the issuing body.[559] The court, following the approach of previous decisions, focused on assessing the content, context of the recommendations to generate binding effects.[560]

The Court held that the wording of the standards led to conclude that the guidelines differed from implementing technical standards, and the guidelines were non-binding

[554] Salvatore Grimaldi v Fonds des maladies professionnelles, cit., para 18. In the same vein, Société des usines à tubes de la Sarre kontra ESZAK Főhatóság [1957] ECLI:EU:C:1957:13, p. 115.
[555] Salvatore Grimaldi v Fonds des maladies professionnelles, cit., para 18.
[556] Case C-911/19 Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR), Opinion of Advocate General Bobek, [2021] ECLI:EU:C:2021:294 (hereafter FBF v ACPR, Opinion of Advocate General Bobek). The AG finally concluded that the guidelines, considered as a whole, do not fall within the scope of the legislative acts referred to in Regulation No 1093/2010 or the ones conferring specific tasks upon the EBA. Therefore, the EBA exceeded its competences in adopting the guidelines. See paras 60-75.
[557] See also FBF v ACPR, Opinion of Advocate General Bobek, cit., paras 23-25. In this case, the question was whether the FBF can refer the question to the Court of Justice, contingent on the guidelines being subject to annulment under Article 263 TFEU and whether a professional federation like FBF has the standing to bring such an action. See also case Balgarska Narodna Banka, cit., paras 97-101.
[558] FBF claimed that the EBA guidelines are invalid due to the EBA's alleged lack of competence to issue them. Case C-911/19 Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) [2021] ECLI:EU:C:2021:599 (hereafter FBF v ACPR), paras 48-50. The case concerned a preliminary ruling regarding the review of soft law measures, in particular the EBA guidelines on product oversight and governance arrangements for retail banking products. In particular, the ACPR published a notice on its website declaring that it complied with the EBA guidelines. It also stated that the guidelines were applicable to the credit institutions, payment institutions and electronic money institutions under its supervision, which were to make every effort to comply with them and to ensure that their distributors also comply with them. See also the ERTA test in Judgment of 31 March 1971, Commission v Council (22/70, EU:C:1971:32).
[559] FBF v ACPR, cit., para 48
[560] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 22.

recommendations. They were addressed to NCAs but were expressed in non-mandatory terms and permitted non-compliance with reasons stated. In other words, the EBA's Guidelines followed a comply-or-explain (i.e., "an opt-in or opt-out option"), and financial institutions only need to report compliance.[561]

Hence, where a NCA adopts the guidelines (opt-in), the decision will affect the ex post enforceability of the guidelines by the NCA, i.e., the NCA becomes an effective enforcer, and therefore the financial institutions, the "real addressees", will have to comply with the guidelines too.[562] Nonetheless, the Court concluded that both the wording and the comply-or-explain approach justified that the contested guidelines lack the intended binding legal effects required for annulment actions under Article 263 TFEU.

As regards the validity of the guidelines, the Court examined the EBA's powers under the EBA Regulation and concluded that they were valid.[563] The Court asserted that, despite they lack binding legal effect, their purpose is seen as exhortatory and persuasive, directing competent authorities and financial institutions to align with them.[564] The guidelines may influence

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[561] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 43: "the actual substantive guidelines…use the term 'should' as opposed to the language of 'shall'…there is no obligation on the competent authorities (25) to comply with them."

[562] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 48: once that decision is made, the initially non-binding nature becomes very much binding, as the 'nominal addressee' (the competent supervisory authority) becomes an effective 'enforcer'.

[563] FBF v ACPR, cit., paras 66-132. The Court concludes that the guidelines fall within the EBA's scope of action, referring to the provisions of various directives as specified in the guidelines. Moreover, the guidelines are deemed necessary to ensure the consistent and effective application of these directives.

The Court also asserts that the contested guidelines align with the EBA's mission, contributing to consumer protection, depositor, and investor protection, and establishing supervisory practices within the European System of Financial Supervision (ESFS). The guidelines are found to be consistent with the principles outlined in a Joint Position of the European Supervisory Authorities.

[564] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (EBA Regulation), REGULATION (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (hereafter ESMA Regulation), Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (EIOPA Regulation). Together, these regulations are the ESAs Regulations.

national authorities to enact laws,[565] but the EBA can only issue guidelines adhering to the specific framework established by the EU legislature.[566]

The AG in its Opinion acknowledges that the contested guidelines are worded in non-mandatory terms and that competent authorities are not obligated to comply with them. However, it argues that the guidelines, although formally non-binding, are accompanied by mechanisms that induce compliance at the national level.[567] The guidelines suggest that competent authorities and financial institutions "must make every effort to comply," and once a competent authority decides to comply, financial institutions become bound by the guidelines at the national level. The author contends that, when viewed at the EU level, the guidelines may be considered non-binding soft law, but when examined at the national level, especially for financial institutions, they appear less "soft" and may have effective legal consequences.

In other words, NCAs can play a decisive role in the financial institutions' behaviour in relation to the adoption of guidelines if they accept and apply them. Nonetheless, the content of the guidelines may intend to impose financial institutions a duty to "make an effort to comply with the guidelines" even if the NCA are not going to enforce them.[568]

4. Conclusions

"*Adaptation means anticipating the adverse effects of climate change and taking appropriate action to prevent or minimise the damage they can cause, or taking advantage of opportunities that may arise. Early adaptation action saves money*."[569]

Climate change and sustainable development pose profound challenges for the 21st century. However, addressing these issues requires more than symbolic gestures; it demands concrete

[565] FBF v ACPR, cit., para 69. As illustrated in the case at hand where the APCR (French Prudential Control and Resolution Authority) issued acts encouraging financial institutions to adjust their practices based on EBA guidelines.
[566] FBF v ACPR, cit., para 69. As illustrated in the case at hand where the APCR (French Prudential Control and Resolution Authority) issued acts encouraging financial institutions to adjust their practices based on EBA guidelines.
[567] FBF v ACPR, AG Opinion, cit., paras 51-53.
[568] FBF v ACPR, Opinion of Advocate General Bobek, cit., para 49.
[569] See EUROPEAN COMMISSION, *EU Action. Adaptation to Climate Change*, available at: https://ec.europa.eu/clima/policies/adaptation_en.

actions that can be translated into meaningful rights *but also* enforceability in practice. The development of unified and effective private enforcement mechanisms continues to be the missing point in the securities regulations and the EU sustainable finance regulations. Businesses are under increasing pressure to realign with long-term objectives and actively contribute to societal well-being.

In response, policymakers have directed their attention towards financial policy, launching initiatives such as the Task Force on Climate-related Financial Disclosures (TCFD), the Network for the Greening of the Financial System (NGFS), and projects like the Green Bond Principles (GBP) and the Transition Pathway Initiative (TPI).

Europe has emerged as a frontrunner in this domain, driven by its regional commitment to sustainability and the influential role of the EU in shaping financial practices. The EU Commission's 2018 Action Plan aimed to spearhead comprehensive reforms, including the introduction of green securities and a unified green taxonomy proposed by the Technical Expert Group (TEG), empowering investors to adopt sustainable strategies.

While ambitious policy measures, in a period of uncertainty, where financial market regulation faces new challenges that are difficult to accommodate to the purely economic risk language that has guided conventional regulation, courts and other adjudicators often have to take the lead in responding to urgent social challenges.

In this context, what occurs when the issuer of a green or sustainability-linked financial instrument fails to uphold their environmental commitment, thus breaching the promise, and legal action is pursued against the defaulting party?

Firstly, we can conceptualize sustainability within financial instruments as a form of "promise." When these financial promises are oriented towards achieving environmental objectives, they transform into what we can term a "green financial promise." The issuer of such a promise undertakes specific actions or endeavours to accomplish certain goals, such as adhering to predetermined targets like reducing greenhouse gas emissions, adopting climate benchmarks, or allocating investments for specific environmental purposes. This commitment parallels economic promises like delivering returns or maximizing company value. Framed in this

context, we can evaluate the effectiveness of the promise through the lens of contractual obligations, considering the mechanisms in place to ensure its fulfilment.

Secondly, an assessment of recent climate finance litigation against financial firms raises the fundamental question of whether legal obligations are sufficient to deter opportunistic behaviours and complete the transition towards a net-zero economy, and whether the EU and/or national judicial systems consistently offer market participants clear recourse when seeking to enforce green/sustainable promises. Assessing the impact of legislation on fostering sustainable finance necessitates a return to fundamentals. Financial instruments geared towards sustainability can be likened to contractual promises, with mechanisms in place to ensure their fulfilment.

Green and sustainability financial disputes reflect the tensions between issuers and investors involved in the issuance and acquisition of green or sustainability-linked bonds. These tensions manifest in two primary forms: (1) securities claims arising from alleged false information or material omissions in prospectuses, leading investors to make misguided investment decisions; and (2) shareholder litigation asserting that companies breach their fiduciary duties by failing to manage and disclose climate risks and adapt their policies to address challenges posed by climate change.

The foundation for these disputes lies in both the EU sustainable finance legislation and existing securities regulations. The EU Sustainable Finance measures, including the Taxonomy Regulation, the SFDR, the CSRD, Environmental benchmarks, and the EUGBR which contains the EUGBS, along with EU conventional securities regulations like the Prospectus Regulation, Securitization Regulation, and MiFID, dictate disclosure obligations at the EU level.

In contrast, existing EU securities regulations mandate EU-level disclosure obligations but delegate enforcement to Member States: it falls upon the Member States to establish legal remedies and procedures for effective judicial protection, aligning with the principle of procedural autonomy and adhering to the principles of effectiveness and equivalence.

The EU sustainable finance regulations have followed the same path: some sustainable finance regulations do not even provide specific enforcement mechanisms, such as the SFDR, or the CSRD, while others have focused on the development of public enforcement mechanisms, such as the EUGBR, following the conventional EU securities and markets regulation approach, based on public enforcement mechanisms.[570] As a result, private enforcement mechanisms are to be developed at national level.

The crux of the matter lies in the clash between the EU's aspirations for uniformity through sustainable finance measures and the updated EU sustainable finance strategy, and the stark differences entrenched within the judicial systems across EU member states. This lack of harmonization and the divergences among domestic judicial systems can potentially impede market participants' procedural rights to access effective judicial remedies, a concern that resonates with Article 47 of the Charter in conjunction with Article 2 TEU.

Thirdly, we approach the question of liability stemming from non-compliance with the "green promise" by examining the commonalities in such failures and the available avenues for enforcement accessible to affected parties. Likewise, we have taken into account that sustainability financial disputes represent a unique category within the broader landscape of financial disputes. These disputes hold strategic significance, intertwining individual economic interests with broader societal concerns such as climate action and human rights protection. As such, a methodology grounded in case law analysis is proposed to shed light on the convergence points of challenges and opportunities in climate litigation against financial firms.

Forthly, we have placed particular emphasis on private enforcement mechanisms. It is evident that while the EU capital markets laws do not explicitly provide for specific private enforcement mechanisms in sustainable finance. Nonetheless, our position is that private enforcement plays a crucial role in protecting individual interests and ensuring compliance with the rule of law, as the Court of Justice of the EU has recognized in the context of antitrust, where both public sanctions can be imposed by the competition authorities while private actions of damages are availble for private market participants affected by the prohibited

[570] Moloney, EU Securities and Financial Law, cit., 121.

anticompetitive act.[571] However, the preference for developing public enforcement mechanisms over private ones in sustainable finance regulations may reflect historical reliance on public mechanisms to ensure market functioning and effectiveness.

Furthermore, we have delineated between liability arising from a "default," which might be explicitly addressed within the bond instrument, and liability stemming from an omission or provision of false information found in the prospectus, other offering documents, or the periodic disclosures made to the market. The liability resulting from a "green default" primarily falls within the realm of contractual obligations. Hence, challenges persist in both overcoming the procedural hurdles laid down in national legislation to have access to remedy, and quantifying damages in sustainability financial disputes, necessitating careful consideration of the specific losses incurred and justifying why these should not be borne by the plaintiff.

The intricacy of the enforcement framework becomes evident when examining the deliberations of courts, particularly in intricate cases like strategic sustainability financial disputes. Analyzing the rationales of national courts in such disputes can illuminate shared approaches and challenges in this emerging legal domain, offering valuable guidance for shaping a more consistent EU legal framework. Leveraging sources such as the Grantham Institute Reports and the Sabin Center for Climate Law database provides valuable insights into the evolving landscape of climate litigation, including the surge in legal actions targeting corporations, including financial institutions, worldwide.

Overall, while the number of decisions on climate finance disputes is increasing, particularly in the US, there remains a need for further examination of private enforcement mechanisms and their effectiveness in addressing sustainability-related issues in the financial sector.

Moving forward, the focus must shift towards implementing enduring measures that ensure accountability and foster sustainability in the financial sector. The existing disclosure framework requires refinement to function effectively, transcending mere compliance to become a genuine catalyst for change. Establishing a unified regulatory framework for

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[571] ELLISGSEN, *Standing to enforce European union law before national courts*, Hart Publishing, 2021, 39-41. See also C-724/17, Skanska Industrial Solutions and Others [2019] ECLI:EU:C:2019:204, 2019.

securities liability, particularly for issuers navigating complex multi-jurisdictional landscapes, is imperative for advancing sustainable finance practices.

On the one hand, the establishment of standardized and technical standards developed by market-based initiatives, and endorsed by the Commission, or developed by the European Supervisory Authorities (ESAs) concerning climate and sustainability risks could assist issuers in evaluating the material risks associated with their securities. Additionally, such standards may aid adjudicators in resolving disputes by providing a common reference point.

On the other hand, we consider that the implementation of a unified cause of action for sustainability financial disputes, inspired by the Consumer Rights Act (CRA), could contribute to the harmonization of the private enforcement mechanisms in the EU. This unified cause of action could act as a means of strengthening the duty of care for issuers' administrators and mitigating court intervention during the transition period. Issuers may perceive the need to enhance accountability for their investment decisions and the information they disclose to the public in prospectuses. This is underscored by the risk that neglecting sustainability risks linked to their products and business could result in direct legal action against them.

In this analysis, we have endeavoured to align sustainability criteria with the financial market, taking into account relevant jurisprudence and the rights and obligations of market participants. The primary challenge we have identified is the lack of harmonization at the EU level regarding the enforcement mechanisms for rights arising from sustainability misleading statements included in prospectuses and corporate reporting documentation. This situation poses a challenge not only for investors but also for the development and credibility of sustainable finance.

To address this challenge, we rely on the standard of civil responsibility outlined in the CRAR as a foundation for generating a cause of action that is somewhat more harmonized. This approach aims to enable national courts to resolve these controversies in the future with similar reasoning. In this process, we also consider that the guidelines and Regulatory Technical Standards (RTS) issued by specialized bodies at both the European and international levels can guide the courts in their efforts.

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