Introduction to Sustainability Law

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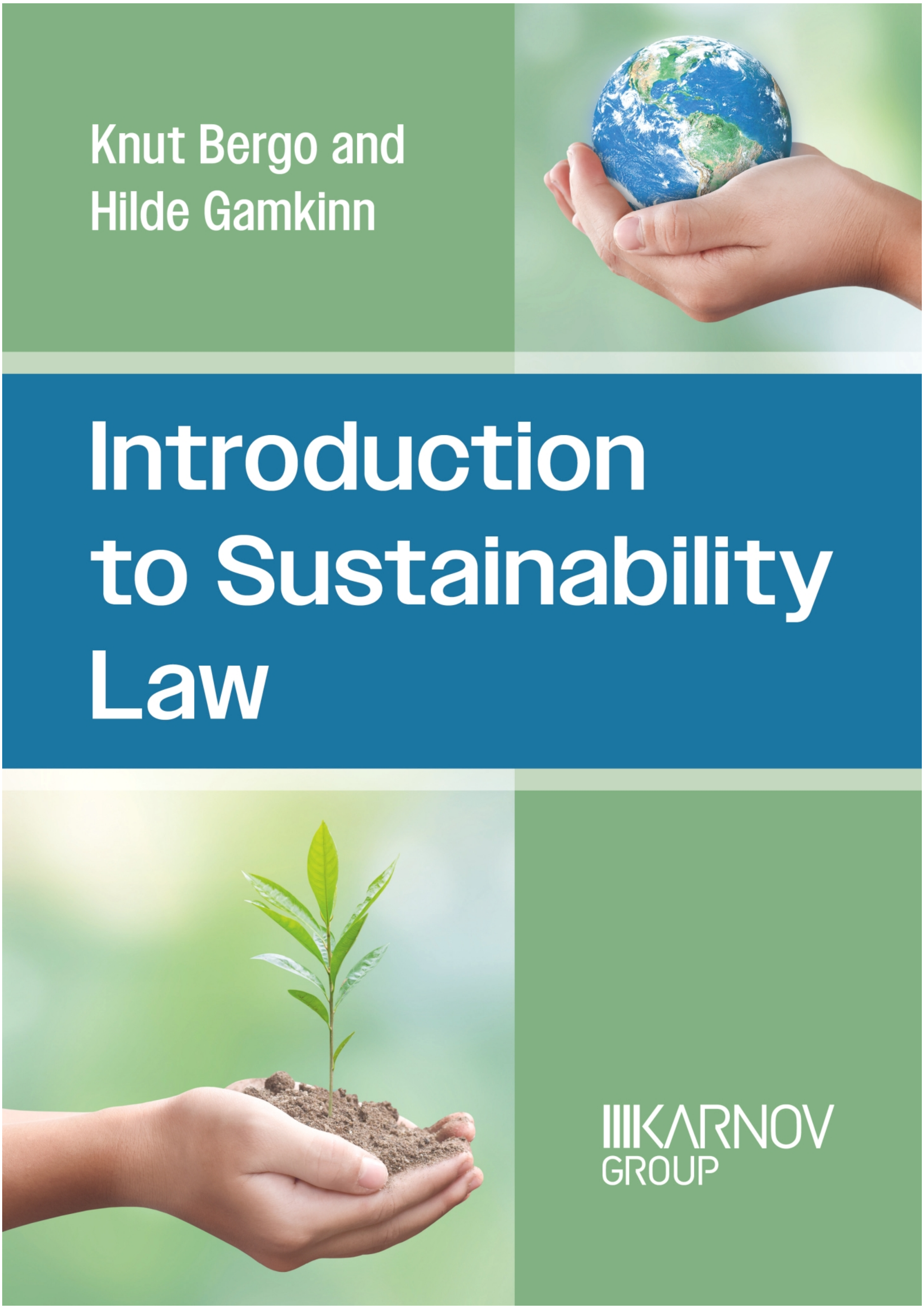
Dato	2024-08-04
Publisert	Karnov forlag (KARNOV-2024-14)
Sammendrag	The book introduces sustainability law from a Norwegian and European perspective, focusing on laws relevant to commercial enterprises. Sustainability law encompasses legislative acts and regulations related to environmental, social, and governance (ESG) issues. The authors cover recent EU developments in sustainability law over the past five to ten years divided into classification rules, disclosure rules, and performance and liability standards. The book is aimed at Norwegian professionals and students, and highlights climate change mitigation laws and their integration with human rights and social standards, while providing an overview of broader sustainability-related legal requirements.
Utgiver	Karnov Group Norway
Versjon	1. edition
Referanse	ISBN 978-82-93816-64-5

Innholdsfortegnelse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1 Introduction

1.1 What is Sustainability Law?

This book provides a brief introduction to sustainability law, with a Norwegian and European perspective, and a particular focus on the laws relevant to commercial enterprises.

The term ‘sustainability law’ covers legislative acts and other laws relevant to sustainability or environmental, social and governance matters (‘ESG’).

These laws can systematically be divided into *classification rules* defining sustainability/sustainable activities, *disclosure rules* calling for reporting and transparency on sustainability issues and *performance and liability standards* relevant to sustainability.

Sustainability law is a new legal subject, while environmental and human rights laws have longer pedigrees. In this book we are about the body of sustainability classification, disclosure and performance standards developed by the EU in the last five to ten years, while more traditional environmental laws and human rights are referred to in passing (apart from the final Chapter 8 on the human rights angle on climate change). Hence, anyone wanting a deep understanding of environmental laws and human rights must look elsewhere. This is not meant to disparage these important fields of law but is a tribute to their maturity.

Our aim is to introduce this new body of sustainability law to Norwegian professionals and students. It is part of the syllabus for the law school course in *Sustainability Law* (*Bærekraftsrett*) and other courses at the Norwegian Business School. Hence, our perspective is Norwegian. However, this book mainly addresses laws with a larger jurisdictional scope; the EU sustainability laws already included or to be included in the EEA Agreement and already implemented or to be implemented in Norwegian law in the coming years.

Many of these laws are about climate change mitigation. Hence, we are more focused on the details in respect of laws pertaining to this environmental objective than with the laws concerning other environmental objectives such as prevention of pollution and protection of water and biodiversity, as well as the important but less extensive legislation on the circular economy. Similarly, our focus on human rights, social objectives and governance issues are limited, as these topics are dealt with in other and more mature fields of law. Here, our approach is mainly about how human rights and social standards «fit in» with the climate initiatives and the increasing obligations for commercial enterprises to address such issues.

1.2 The Triangle: EU law, EEA law and Norwegian law

The EEA Agreement or European Economic Area Agreement extends the European Union’s (EU) internal market to three European Free Trade Association (EFTA) countries – Norway, Iceland and Liechtenstein.[1] The EEA Agreement is the basis for extensive legal cooperation between EU and these EFTA states on uniform legislation and the harmonised application of such law-making. The main objective of the EEA Agreement is to establish a common market for goods, services, capital and workers in the EEA area. Environmental and sustainability laws are becoming an increasingly important element of EEA cooperation.

Initially, environmental goals were pursued at state level in the EU member states, to some extent initiated and coordinated by the EU. Since 2005, sustainability laws have increasingly become an integrated part of the EU and key element of its internal market regulation. For two decades the EU has been the most innovative and active legislative body worldwide when it comes to sustainability, with a market-oriented approach to sustainability as a key tool. This means that many of the sustainability laws issued by the EU are relevant to the EEA Agreement. Consequently, Norwegian sustainability law largely comprises EEA laws that reflect EU law. Hence, most of the EU sustainability laws we discuss in this book are, or are expected to be, included in the EEA Agreement or aligned under the EEA Agreement protocol 33 and consequently also Norwegian law, or will become Norwegian law. We will further explore the details in this respect.

This does not mean that EU laws on sustainability are automatically part of the EEA Agreement. The EEA Agreement primarily deals with the internal market. The agreement includes chapters on common EEA policies and rules on environmental and social issues (as well as policies such as education). However, these are separate issues from the internal market regulations. Article 73 states that actions by the contracting parties relating to the environment shall a) preserve, protect and improve the quality of the environment; (b) contribute towards protecting human health and (c) ensure a prudent and rational utilisation of natural resources. Article 73.2 states that environmental actions shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. This does not commit Norway to a common policy with the EU on sustainability in general. Norway has sometimes objected to the inclusion of EU legislation on environmental issues in the EEA Agreement, opted for a weaker alignment, or simply delayed its implementation into the agreement. In short, Norway has at times displayed an opportunistic approach to EU sustainability efforts, aligning with the EU to the extent that it makes it easier for Norway to meet climate targets, for example.[2]

1.3 EU as global mover on sustainability

The EU legal framework (named the EU Acquis is extensive and covers a wide range of policy areas in which the EU maintains active politics and legislation. It includes EU *primary law* comprising the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU), the EU Charter of Fundamental Rights («the Charter») and the fundamental principles of EU law as recognised by its court, the European Court of Justice («CJEU»).[3]

TEU article 3 outlines the EU's aims and objectives and identifies environment and sustainability as policy areas for the EU. TEU article 21 outlines the principles and objectives of the EU's international action to include promoting EU values, contributing to peace and security, upholding international law, promoting multilateralism, and promoting democracy, the rule of law, human rights, and the principles of the United Nations (UN) Charter. Environmental action is further dealt with in TEUV articles 191-193, in which article 191 lays out the EU's environmental policy to preserve, protect and improve the environment and contribute to sustainable development. The article calls for a high level of protection (but reflecting the diversity in EU regions) to be based on the *precautionary* principle of preventive action and the principle that environmental damage is primarily rectified at source and that the polluter shall pay. Correspondingly, the article 37 of the Charter calls for a high level of environmental protection, and improvement of the quality of the environment shall be integrated into policies of the EU and «ensured in accordance with the principle of sustainable development».

The EU has introduced extensive *secondary legislation* on environmental issues, including on the prevention of climate change, for which the EU has been a global leader since the 1990s. This includes the Directive 2003/87/EF establishing the ETS, the world's first «cap-and-trade» system for greenhouse gas emissions. Another important instrument is Directive 2008/98/EF on Management of Waste relevant to the circular economy. For many years the EU has also had a number of legislative acts designed to prevent pollution, preserve water quality, biodiversity and promote energy efficiency. Other laws concerning environmental issues include the procedural rules in the Strategic Environmental Assessment («SEA») Directive» and the Project Directive (2011/92/EU).

In the wake of the Paris Agreement in 2015, there was a change to a faster pace in the EU's sustainability efforts. This is reflected in the European Green Deal from 2020, which is the EU's overall policy document on climate issues aligned with the objectives of the Paris Agreement. This document defines the overall political aim of the EU for Europe to be the first climate-neutral continent and achieve net carbon neutrality at the latest by 2050, with the interim goal of reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. All 27 EU member states are committed to the 2050 goal.

The EU Climate Law (Regulation (EU) 2021/1119) is borne out of the European Green Deal. It sets the 2030 and 2050 targets as binding law for the EU and its member states, with procedures for setting a 2040 interim target. In February 2024, the Commission proposed a 2040 target of a 90 percent reduction in its Recommendation for 2040 target to reach climate neutrality by 2050.

The EU Climate Law aims to ensure that all EU policies contribute to these goals, and that all sectors of the economy and society play their part. One political tool for achieving this is the EU Sustainable Finance Action Plan (SFAP) Overview of sustainable finance. We will revert to these policy documents below in chapter 1.4.

Most of the EU legislation this book addresses are part of the SFAP. Importantly, although this plan and its implementing legislation is highly relevant to the European financing industry and financial markets, it does not primarily target this industry and these markets. The Taxonomy classification system and the Corporate

Sustainability Reporting Directive (CSRD) with the European Sustainability Reporting Standards (ESRS) also apply to this segment but are mainly directed at all commercial enterprises in Europe, primarily «heavy» industries involved in the energy, industrial and transportation sectors, which must respond urgently if the climate targets under the European Green Deal are to be met. Other sectors – such as manufacturing and clothing in particular – have a long way to go towards a circular economy.

A green transition per the Green Deal will require significant new investments in renewable energy solutions and commercial and industrial production and transportation facilities and infrastructure. The investments needed are way too large to be funded by the public sector. Hence, a green transition in Europe (and elsewhere) will require a significant amount of private capital. The overall approach of the EU in this respect is to improve transparency on sustainability factors and make use of (capitalist) market dynamics, with the new legal framework for sustainability reporting and sustainable finance being a tool to reorient capital flows towards sustainable investments, while also achieving the other aspects of the green deal: sustainable growth in Europe with long-termism and sustainability in financial and real-life investments and businesses.

The other EU tools in this regard amount to a mix of prescriptive rules and liability standards, most recently the Corporate Sustainability Due Diligence Directive (CSDDD) of 2024, supplementing administrative planning, capital injections and other governance measures at EU and state level.

Ultimately, the EU roadmap to sustainability in 2050 is based on the moral assumption that European businesses and individuals support a green transition and will contribute to make it happen. The Green Deal can be said to reflect a *Kantian* belief that all or most people will act according to their common interest in a sustainable future, provided they understand the sustainability consequences of their behaviour, know the improvement measures required and know that their neighbours are watching their moves.[4]

The Kantian view on mankind is probably too optimistic, even in a setting of full transparency on sustainability issues. Too many capital interests, commercial undertakings, states and individuals benefit from their brown or dark red activities and are likely to preserve the status quo and work against a green transition. But this is precisely why the EU sustainability laws encompass more than clarifications and transparency requirements supported by moral appeals. One of the aims of this book is to introduce the reader to a *tightening regulatory landscape*; a legislative cycle in which vague policies turn into more elaborate and stricter mandatory standards. The time for fluffy talk and soft laws are over; we are entering the Age of Sustainability Law. This is the key contribution of the EU to the rest of the world.

1.4 A brief look at the legislative acts and processes in the EU

This book will deal with *secondary law*, which is the legislative acts issued by EU legislators based on the treaties. The legislators in the EU are the Council and the European Parliament (EP). However, the European Commission (EC) has the legislative initiative. The main elements of the procedure are:

1. The EC submits its proposal to the Council and the EP.
2. The Council and the EP adopt a legislative proposal at the first or second reading.
3. If they do not agree after the second reading, a conciliation committee is convened.
4. If the text agreed by the conciliation committee is acceptable to both institutions at the third reading, the legislative act is adopted.

If the legislative proposal is rejected at any stage, or EP and Council do not reach a compromise, the proposal is not adopted, and the procedure ends.

There are five types of EU legal acts of which three are «legislative acts»: A regulation is a binding legislative act with direct effect. Regulations contain provisions on when to come into force – usually shortly after publication in the EU's Official Journal. A directive is a binding legislative act that sets goals or legal standards for the member states to achieve but where it is up to each state to decide on the form of implementation. Directives may be more generic or purpose-oriented than regulations, but many directives introduce detailed rules as minimum or fully harmonised standards. National implementation in the EU/EEA is then likely to be an *act of transformation* where the national legislation more or less mirrors the directive's text. A decision is a legal act binding on those it addresses, for example, an EU state or individual entity. Certain EU decisions are incorporated into the EEA Agreement.

A recommendation is not a legislative act but a document issued by an EU authority suggesting a course of action without imposing an unconditional legal obligation on the addressees, eventually including a call for explanations of deviations («comply or explain»). Certain recommendations are incorporated into the EEA agreement. An example is the Commission Recommendation (EU) 2023/1425 of 27 June 2023 on facilitating finance for the transition to a sustainable economy on how companies can voluntarily use EU sustainable finance tools to seek or provide transition finance.

Guidelines are non-binding acts basically on par with the recommendations. Many guidelines are about harmonising the interpretation and implementation of EU laws across the EU/EEA. Key subsegment are the guidelines issued by EU Agencies such as the European Banking Authority (EBA) under article 16 of its framework regulations. Such guidelines are directed at EU/EEA national financial authorities and/or the financial institutions operating in the EU/EEA. Within two months of the publication of a guideline, national financial authorities must inform the EU agency whether they will comply with or deviate from it (and explain any intended deviations). The *EU/EEA legal certainty principle* implies that national authorities must follow the guidelines they have not objected to. Hence, these may be «soft laws» initially but become hard laws to the (non-objecting) national authorities and the financial institutions concerned.

Regulatory Technical Standards (RTS) are binding legislation. This term connotes delegated EU legislation on technical aspects necessary for the uniform application or implementation of EU law. RTS are typically drafted by a European Financial Authority, such as the European Banking Authority or another expert institution, and then adopted by the EC as «level 2» delegated regulations with the same binding force as other EU regulations. Thus, RTS are not a separate form of legislation but refer to the legislation being technical, regulatory and drafted by experts. As far as sustainability law is concerned, there are several RTS' that address the implementation of the SFDR. The European Sustainability Reporting Standards («ESRS») supplementing the CSRD are also examples of RTS.

1.5 Implementation of EU law into EEA law

When the EU approves new legislation considered relevant to the EEA Agreement, this legislation will be passed on to the EFTA States with a request to have it included in the EEA Agreement. Each EFTA state then determines whether to consent to or veto an incorporation decision in the EEA Joint Committee. Hence, EFTA states are not under a legal obligation to include new EU legislation in the EEA agreement.

Norway has not filed a formal veto on any legislative act that the EU has required to be included in the EEA Agreement but there have been long delays (of 5-10 years or more) in implementation. Typically, by this time the act has been amended at EU level, meaning that the discrepancies remain upon awaiting the inclusion of the amended act or acts. This includes legislation on environmental issues such as Directive 2010/31/EU on energy-efficient buildings. Norway has also argued against the relevance to the EEA of EU acts and/or requested separate alignment agreements under the EEA Agreement protocol 31 to avoid continued and/or its compliance being a matter for the ESA and EFTA Court.[5] There is a growing gap between EU law and EEA law, both at secondary level and primary level (as the Charter and changes to the TEU and TFEU since 1992 have not been included in the EEA Agreement).

In accordance with article 7 of the EEA Agreement, EFTA states are legally obliged to implement the relevant EU legislation into their national law by incorporation (of regulations) and transformation (of directives) following a decision by the EEA Joint Committee and the waiver of any specific (constitutional) reservation posted by any EFTA State.

The EEA Agreement article 6 provides that legislative acts included in the EEA Agreement, in so far as they are «identical in substance» to rules in the EU treaties (as of 1992) and EU legislative acts adopted under such treaties, shall in their implementation and application, be interpreted «in conformity with the relevant rulings of the EU Court of Justice» (CJEU) prior to the signature date of the EEA Agreement, which was 5 May 1992. The homogeneity principle is stated in the preamble to the EEA Agreement.

The homogeneity principle is also reflected in article 3 in the Agreement between the EFTA states on the establishment of a Surveillance Authority («ESA») and a Court of Justice (the EFTA Court») cf. Avtale mellom EFTA-statene om opprettelse av et overvåkningsorgan og en domstol. Article 3.1 mirrors article 6 in the EEA agreement while article 3. 2 addresses subsequent rulings from the CJEU and requires the EFTA Surveillance Authority and EFTA Court to «pay due account» to the principles laid down by such rulings.

On this basis, in its case law the EFTA Court has maintained that EEA law as a main rule shall be interpreted in accordance with the interpretative methods of the CJEU, most notably its interpretive formula of text, purpose and system and the importance on CJEU precedence and general principles of EU law (including legality, legal certainty and proportionality). However, the EFTA Court has also stated that the special characteristics of the EEA Agreement must be taken into account, and on occasions the court has applied a purposive interpretation (deviating from CJEU precedence) to achieve uniform content in the EEA. There is a growing complexity in the interpretation of EEA law as there is a widening gap between EU law and EEA law, cf. above.

1.6 Implementation of EEA law into Norwegian law

The EEA Agreement is binding in Norway as an international treaty. However, Norway has a *dualistic* legal system. This means that international law binding on the Norwegian state but not as Norwegian law applicable in Norwegian courts.

The EEA Agreement (main agreement) was incorporated into Norwegian law by *reference* in the EEA Act of 1992 Lov av 27. november 1992 nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven).

Subsequent EU regulations incorporated into the EEA Agreement are implemented in Norway by reference in a Norwegian Parliamentary act («lover» in Norwegian) or delegated act («forskrift» in Norwegian) issued by a Ministry or other governmental body on the basis of a parliamentary act.

Relevant samples are Regulation (EU) 2019/2088, the Sustainable Finance Disclosure Regulation (SFDR) and Regulation (EU) 2020/852 taxonomy regulation. Both regulations were incorporated into Norwegian law by an act of Parliament in 2021; Lov av 22. desember 2021 nr. 161 om offentliggjøring av bærekraftsinformasjon i finanssektoren og et rammeverk for bærekraftige investeringer.

EU directives included in the EEA Agreement are implemented into Norwegian law by transformation in a Norwegian legislative (parliamentary or delegated) act. One example is the Corporate Sustainability Reporting Directive (CSRD) that will be implemented by amendments to the Accounting Act.[6] The CSRD is already in force in the EU and is expected to be included in the EEA Agreement in 2024. Thus, transformation into Norwegian law is likely to occur before the CSRD become EEA law.

The duality principle means that the binding laws in Norwegian courts are the Norwegian legislative acts, and that the interpretation of such acts is governed by Norwegian *rules of interpretation* («rettskilderegler» in Norwegian) with the Norwegian Supreme Court as the ultimate arbiter. However, for acts intended to implement EEA legislation, the «background» EU/EEA-legislation will generally be decisive for the interpretation of the Norwegian act. The main reason for the EEA homogeneity principle is reflected in the EEA Agreement article 6, which is Norwegian law in accordance with the EEA Act, and the general *presumption principle* in Norwegian law whereby Norwegian law as a main rule shall be held/interpreted to comply with international law binding for Norway. This means that a Norwegian legislative act implementing EEA law shall generally be interpreted in accordance with the CJEU's interpretive rules. This principle is reflected in *inter alia* the case law of the Norwegian Supreme Court originating from Rt-2000-1811 (*Finanger I*). Exemptions apply where the wording of the Norwegian legislative act, the Norwegian Constitution or the European Human Rights Convention require otherwise.[7] With such reservations, Norwegian law must correspond with the background EU legislation once a Norwegian EEA implementing act has entered into force.

1.7 Late Spring – April 2024

This book not only addresses EU/EEA law on sustainability. In Chapter 3 we address UN initiatives to combat climate change. in Chapter 6 we touch upon the international instruments on human rights in respect of the minimum standards of sustainable activities, and in the final Chapter 9 we revisit human rights with a climate change perspective. Human rights are overriding legal standards the EU and the member states and Norway must comply with in their legislative and political actions, including with regard to sustainability efforts. This provides ground for some reflections on the relationship between the relatively technical sustainability laws that are the main topic of this book.

This angle has gained even more relevance recently due to the decisions by the European Court of Human Rights on 9 April 2024 in case 53600/200 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* in which political decisions by Switzerland to combat climate change were considered insufficient to meet the standard of *positive environmental protection* required by article 8 of the European Convention of Human Rights. The Court introduced a detailed and dynamic interpretation on what is legally required of political action to combat climate change. We will further explore this in the final chapter. However, to summarise in one sentence, the Court held that the signatory states are legally required to **do whatever it takes scientifically to meet the targets of a maximum 2°C and preferably only a 1.5° rise in global average temperatures in the Paris Agreement.** This is potentially a game changer, bringing law really into the picture in the fight to combat climate change.

There are many political and legal details left to discuss and decide upon, of course. But failure to meet the scientifically based calls for accelerating reductions in greenhouse gas (GHG) emissions is no longer a legally permitted option. This poses severe challenges for Norway, as a top tier emitter ofGHG in its territories and as an importer and exporter of embedded emissions. The challenges are exacerbated by the fact that – contrary to other European nations – Norway has failed to reduce its GHG emissions.[8]

What was not an imminent game change was the Court's decision on the same date in case 39371/20 *Duarte Agostinho and Others v. Portugal and 32 Others* (coe.int). Here the court ruled that the European Convention only permits domiciles of each (European) signatory state to sue their home state for breach of the convention standard on positive environmental action. This is, however, not the last word but raises two legal questions, to which the proper answer in our opinion is «No» and «Possibly»: Can there be different standards of human rights for climate change for Europeans and the rest of the world, and can European (and non-European) states be held liable internationally for damage caused by people in other jurisdictions? We will briefly touch upon these interesting topics.

In late April 2024, the EU approved the CSDDD. This means that from 2027 onwards, compliance with human rights and alignment with the Paris Agreement climate targets and the EU's interim targets will also be a legal obligation for larger commercial undertakings in Europe, where violations will trigger penalties and civil liabilities in respect of human rights issues.

Both independently and working in conjunction, the court's interpretation of article 8 of the Convention and the CSDDD implementation may be legal events that trigger the necessary but late change of pace and direction on climate initiatives, substituting failing political narratives (based on more or less good intentions) and soft law remedies with sustainability law proper.

2 Sustainability and ESG concepts

2.1 What is sustainability?

A common definition of «sustainability» can be derived from the «Brundtland Report»: *Sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*

Thus «sustainability» may be loosely and broadly defined as all factors relevant to human value creation that do not compromise the well-being of future generations. Correspondingly, «sustainability law» can be defined as any piece of legislation or other laws or regulations that promote sustainability in this broad sense.

However, in sustainability law, there are more precise definitions of «sustainability» as we will further explore below.

It is important to distinguish between «sustainability» as a non-legal and a legal concept. «Sustainability» first evolved as a non-legal concept, and we will start our analysis of this here.

2.2 Non-legal concepts – Sustainability Factors and Sustainability Risks

Key sub-distinction is between «sustainability/sustainability factors» and «sustainability risk». This distinction is applied in SFDR: The regulation defines «sustainability factors» as environmental, social, and employee matters, respect for human rights, anti-corruption and anti-bribery matters, [9] while »sustainability risk« is defined as an environmental, social or governance event or condition which, if it occurs, could cause an actual or potential material adverse impact on the value of the investment.[10] A corresponding distinction is reflected in the CSRD, cf. Chapter 3 of this book.

In both legislative instruments «sustainability/sustainability factors» refer to scientific or societal concepts focusing on environmental, social and governance matters while «sustainability risk» addresses the potential negative or positive financial impact that such matters may have on financial investments and is an economic concept.

These concepts are *interrelated* as sustainability factors are to be assessed as causes of financial risks (and opportunities), although it is important to remember that we are talking about different perspectives and assessments – the division line is economic concerns versus other concerns.

The term «sustainable investments» is generally understood to cover financial investments made with sustainability in mind/taken into consideration. This term includes both investments in which the primary motive is to invest not only for financial profit but to contribute positively to the environment or society («impact investment»), and investments in which sustainability factors are considered to avoid negative business/financial effects or increase profitability.

Recently, the volume of sustainable investment has grown significantly in Norway, Europe and globally. This is partly because investors want to invest in an environmentally or socially responsible way, partly because they believe that sustainability factors will affect the financial performance of the enterprises they invest in and will ultimately affect the financial return on their investments. Often there is a mix.

To illustrate: Reallocating investments from fossil fuel to green energy will significantly reduce carbon emissions globally. Investors may, however, decide not to invest in fossil fuel companies partly because they fear these companies' major balance sheet assets (of fossil fuel resources and facilities) will be «stranded assets»; the companies will not be permitted to extract and utilise fossil fuels or be able to market at a reasonable price, or they will become more heavily taxed to provide for a green transition, ultimately lowering profits and market prices on the company's shares, leading to the shares of fossil fuel companies becoming stranded assets in a medium and long-term scenario.[11] Sustainability risk is largely a *political gamble:* The EU, UN and states with environmental concerns are urging for and introducing legislation to promote green energy while fossil fuel producing countries are undermining the transition efforts.[12]

2.3 Sustainability and ESG

The terms «sustainability»and «ESG» are often used interchangeably in everyday language. Sustainability may connote a broader concept as to the objectives, but for this book the concepts have a similar scope: «ESG» is a convenient acronym to explain which sustainability goals we are dealing with, where E means environment, S means social and G means governance and can be further elaborated as follows:

Environmental: How political or business decisions affect the environment in respect of climate change, usage of water, land and other raw materials, waste management reduction and disposal, pollution control, preservation of water quality, biodiversity, and ecosystems.

Social: How decisions affect society and social standards, such as human rights, good labour standards (fair wages, working conditions, health and safety), human health, local communities and consumer welfare, etc.

Governance: Concerns corporate governance and management practices, such as integration of sustainability in business strategies, ethical behaviour with no bribery or corruption, transparency as to political lobbying etc. and possibly also tax planning. Thus, the «G» in ESG addresses other issues than the older concept of «good corporate governance» in company law.

«Sustainability» and «ESG» are primarily a *normative* concept dealing with how political and corporate decision-making should be designed, cf. the initial definition of sustainability above. For environmental issues, it is more than that – it involves s*cientific issues* such as whether current levels of global greenhouse gas emissions, pollution, resource extraction or destruction of species and natural habitats are sustainable or will actually destroy the natural resources of the world and in consequence destroy or diminish the opportunities for future generations to meet their needs. Ultimately, we face normative issues; it is in principle a normative choice to combat climate change, destruction of biodiversity and natural habitats etc. rather than just drive efficiency and progress measured by economic success. However, assuming that preservation of the planet is the ultimate goal is largely a scientific issue about what needs to be done with regard to a sufficiently fast transition to a carbon-neutral and circular society.

In this regard there are differences between the E-factors and the S and G factors: Environmental issues ultimately relate to the physical world around us, the species and other matters that exist and the natural chain of cause and effect, including *planetary boundaries and turning points* where there is no way back from dramatic changes and severe environmental harm. To illustrate: Most scientists today agree that we have exceeded or are close to transgressing important planetary boundaries and turning points on climate change. Thus, as a matter of hardcore scientific fact, the earth is in an unsustainable state; this is not just a matter of political or ethical opinion. When it comes to social and governance factors, there is more diversity of opinion and fewer purely empirical issues. Of course, few people really support violations of human rights or fundamental standards for decent working conditions or public health. There are often different opinions on what qualifies as transgressions and violations rather than as legitimate exercises of collective (democratic) rights and/or individual rights to use and extract resources, etc. Thus, S and G assessments concern *fundamentally normativeissues* and are, by implication, subject to extensive public debate and (legitimate) differences of opinion.

This does not mean that environmental topics are void of normative considerations; a key question to many people is how to balance and eventually rank environmental against social factors, including the importance of a functioning economy, securing jobs and meeting material needs and a *just transition* ensuring that no one is «left behind» by the green transition that needs to take place. Environmental survival is ultimately not just a matter of voting in a public forum; it is a fact of nature and not up to our normative definitions and choice of actions (other than the choice to disregard the dangers or deprioritise the efforts).

2.4 Sustainability as a legal concept

Thus far, we have identified sustainability/ESG as societal concept calling for political and/or ethical assessment and action, ultimately based on a scientific sustainability concept on environmental issues, and an economic risk/reward concept assessing the financial impact of these effects. We are now heading into the main topic of this book – legally binding norms on states, companies/corporations, and individuals with respect to their handling of sustainability/ESG factors and risks, where a breach of the norms has severe consequences such as penalties, payment obligations or loss of entitlements, mainly (and potentially violently) imposed on a state level.

The legal sustainability concept is normative and closer to the societal (political and ethical) than the economic concept. Legal sustainability standards may be viewed as a concretisation of the scientific environmental concepts into requirements for action and a balancing and concretisation of political and ethical sustainability objectives and standards.

Still, it is important to note that societal, scientific and legal sustainability are not the same. To illustrate: It is a matter of fact that any other course of action than immediately and drastically reducing global levels of greenhouse gas emissions is likely to lead to significant long-term climate change and irreparable damage to biodiversity. However, from this fact alone we cannot infer that there are any specific legal obligations on energy producers, energy consumers and their nation states to reduce emission levels.

There are important links; legislative acts on a national or supranational level or international treaties are generally based on scientific or ethical or political sustainability objectives and standards and may explicitly incorporate such standards. But we are principally dealing with *different systems of thought and action*. Law is a textual, source-bound discipline in which the relevant definitions, obligations and entitlements must be based on international treaties, national legislation and jurisprudence from courts of law, and cannot be derived from scientific facts or moral or political assessments alone.

There is an alarming *backlog* in sustainability law when compared to scientific needs and best practice ethical standards. In our opinion, it is not very constructive to regard this as a «fault of law». In our opinion, law, science and morality are best treated as different concepts.

The backlog has several historical, social and political causes, including economic considerations, such as profit motives inherent to capitalism and GDP fetishism. Additionally, there are certain biases in legal thinking on the sovereign rights of nation states and proprietary rights for individuals and corporations (though we believe the latter may be overstated).

However, this is first of all a consequence of the concept of «law» connoting *positive/established, publicly sanctioned norms* resulting from more or less democratic negotiation and decision-making processes on a national and supranational level (such as the EU), and a global level: Such laws simply cannot be an elite/avantgarde design aimed at bridging the gap between politically decided/agreed sustainability standards and the scientifically necessary and/or best ethical standards on sustainability.

A possible bridge from scientific and societal concepts to legal concepts is the non-binding «soft law». This concept includes various non-binding norms in the form of guidelines and recommendations, such as the global *voluntary frameworks* for integrating sustainability factors and reporting on sustainability issues issued by various international organisations, that we will further explore shortly.

The gap that needs a bridge from science and morality to law is particularly narrow in the EU, which explains why most of this book addresses EU/EEA law. Upon reading the Norwegian Constitution article 112, it could be tempting to believe that legal standards are stricter in Norway. The article states that every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations that will safeguard this right for future generations as well.

However, this text has had limited legal effect. The blame for this can be squarely placed on the judges and lawyers responsible for the diminutive reading in HR-2020-2472-P (*Klimadommen*).

While emphasising the difference between the legal and other sustainability concepts, we wish to remind the reader that laws – including sustainability laws – are generally *minimum standards of basic conduct* - which is why transgression laws are sanctioned by society.

Hence, sustainability laws (and other laws) are not intended to override more ambitious societal concepts. No law prohibits companies and individuals from going beyond what is legally required. ESG/sustainability means quite the opposite – it is a Kantian moral concept calling for more ambitious approaches than mere legal compliance and financial risk management.[13] It is a call for ethical reflection and the development of *better practices to supplement legal standards and modify economic models/priorities*. Hence, it is important to remember that legal and economic and moral standards are not the same. On many occasions it is simply not sustainable to do what is legal and financially wise.

3 Sustainability and ESG – a brief history

3.1 Introduction

The history of sustainability and ESG are often traced back to the 1970s; to Rachel Carson: *The Silent Spring* and similar books and thoughts triggered by the alarming rise in pollution and the devastation of nature from the 1950s onwards, giving rise to legislation and international treaties to combat pollution, etc. In principle it can be traced back to the origin of modern industrialised capitalism in the 1800s; there have always been opposing voices calling for the protection of the planet from excessive human extraction and misuse.

For our purpose, a good starting point is the Brundtland Report from 1993, initiating a political development leading to the specific UN initiatives to combat climate change and the broader defined UN Sustainability Development Goals (SDGs). UN efforts to reduce carbon emissions and combat climate change came on the agenda in the 1990s and led to the United Nations Framework Convention On Climate Change («UNFCCC») of 1992, the first UN initiative on climate change. This framework led to the Kyoto protocol of 2007 which introduced a more specific target to limit the increase in global temperature to below 2 degrees Celsius above pre-industrial levels and where developed countries committed to reducing their emissions by specific amounts compared to the levels in 1990. The reduction targets varied, with the overall target being an average reduction of 5.2 percent between 2008 and 2012. The protocol came into force in 2005 after it was ratified by countries that were responsible for at least 55% of global greenhouse gas emissions. Major emitters like the United States did not ratify the Protocol, thereby limiting its overall effectiveness. In 2015 the Paris Agreement replaced the Kyoto Protocol as the primary global climate agreement. Please see section 3.3 below for further details on the UN climate initiatives.

3.2 UN Sustainability Goals

In 2015, the UN member states adopted part of the 2030 Agenda for Sustainable Development agenda responding to a proposal from the UN Open Working Group established in 2013 which, in turn, were based on previous initiatives.[14] The 2030 agenda is a »plan of action for people, planet, and prosperity - which also seeks to strengthen universal peace in larger freedom» including 17 Sustainable Development Goals visualised as follows: https://sdgs.un.org/goals.

The SDGs are key milestone in international politics. However, implementing the SDGs is challenging for several reasons, including the need for coordinated, legal and financial action at national and international levels involving nations, companies and individuals. The world is complex and diverse, and the goals are demanding. Combating poverty, preventing climate change and promoting equality, peace, justice, health, education and clean water etc. is not an easy task, either separately or combined. The broad goals may make them vague with no accessible or clear roadmap or consensus on how to achieve them. Measuring is also an issue, as not all SDGs have quantifiable targets, making it challenging to measure progress. The lack of precision makes it hard to hold nations and other stakeholders accountable for commitments or lack of progress. Hence, the SDGs are political goals with the purpose of guiding the world towards more specific actions to achieve a more sustainable future, and the vagueness stems from the complexity of the issues and the need to allow flexibility in how the various nations implement them.

Meeting the SDGs with limited resources requires strategic prioritisation, innovation and international cooperation, leveraging technology and partnerships to pool resources and expertise. The potential contradiction of SDGs may require a balancing of objectives and careful planning to ensure that progress in one area is not at the expense of another area. Some argue that SDG 8, which promotes decent work and economic growth, could be in conflict with SDG 13, calling for urgent action to combat climate change, as pursuing growth without adequate sustainable practices could exacerbate environmental degradation; someone may even add the goal to end poverty (SDG 1) and hunger (SDG 2) and affordable energy to this balancing act.

The SDGs may be conflicting in a world in which the population is still increasing and living standards are low for the vast majority (however, it does not imply a need to continue the extensive use of fossil energy and the depletion of resources to provide decent living standards). The SDGs are also vague, and the actions required to achieve them are many and interconnected and not necessarily easy to identify or harmonise. There are also differing national interests, priorities and capacities. What is seen as progress by one state or actor may be at odds with the objectives or strategies of other actors, leading to a lack of cooperation and potential conflict.

Still, the most important reason it is hard to achieve the SDGs is that a large and powerful minority – most of the people in the USA and Europe and some other states, and a smaller number of people elsewhere – are much better off than the rest of the world and have strong vested interests in preserving the current state of affairs as to who owns what of earthly riches and consumes them in abundance. Norwegians are certainly not the only people who enjoy a privileged lifestyle and are not alone in being both a major producer of fossil energy and a major consumer of goods. And maybe Norway is the nation that is most in denial of this *double standard* and the most delusional or dishonest in presenting itself as a nation of high standards when it comes to sustainability.

3.3 The UN initiatives on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) entered into force in 1992 and now has 198 signatories, i.e. all UN states. The UNFCCC preamble includes important *factual acknowledgements* including the fact that climate change and its adverse effects are a common concern of humankind, that human activities have substantially increased concentrations of GHG and enhanced the greenhouse effect and that this will result, on average, in additional global warming that may adversely affect natural ecosystems and humankind. The preamble also notes that the largest share of emissions originates in developed countries, that per capita emissions in developing countries are still relatively low, and that the share of global emissions originating in developing countries will continue to grow to meet their social and developmental needs.

In respect of the policy actions to be taken, the preamble notes that the global nature of climate change calls for the widest possible cooperation of the states «in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions». It recalls the UN Charter and the principles of international law that provide «sovereign right to exploit their own resources pursuant to their own environmental and developmental policies», but also «the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction». The preamble calls for «effective environmental legislation taking account of economic and social cost, in particular for developing countries, to be based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings, to be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter and take into full account «the legitimate priority needs of developing countries of sustained economic growth and the eradication of poverty».

Hence, with these mixed policy considerations it is no surprise that the UNFCCC did not include specific commitments by or legal obligations on the states. However, its article 1 included relevant definitions of sustainability law, including defining the term «adverse effects of climate change» as meaning «changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socioeconomic systems or on human health and welfare», and «climate change» as a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods».

Article 2 defined the «objective» of the Convention as follows:

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Article 3 also introduced certain *principles* to guide the Parties in their actions, inter alia that:

> «1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
>
> 2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.
>
> 3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost (...)
>
> Article 4 provide more specifics, requiring the parties to take «into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances» to develop and regularly update national inventories of emissions and national and, where appropriate, regional reduction programmes addressing emissions by sources and removals by sinks. The article also required the Parties to communicate detailed information on their policies and measures with the aim of returning individually or jointly to their 1990 levels of emissions.

The UNFCCC did not include specific legal obligations or sanctions but importantly it introduced a surveillance mechanism in the set-up of annual COPs («Conference Of Parties») that come together to discuss and negotiate international climate policy. The COP is responsible for assessing progress, reviewing commitments and developing new agreements and protocols related to climate change.»

3.3.1 The Kyoto Protocol

The UNFCCC policy targets were first operationalised through the Kyoto Protocol, following up the first COP in 1995. The Protocol was adopted in 1997, entered into force in 2005 and had 192 parties. The Kyoto Protocol committed industrialised countries and economies in transition to limit and reduce their GHG emissions in accordance with agreed individual targets. It was legally binding on developed countries only and applied the UNFCCC principle of differentiated responsibility and respective capabilities: Annex B sets binding emission reduction targets for 37 industrialised countries and economies in transition and the EU. Overall, this added up to an average 5 percent emission reduction compared to 1990 levels over the five-year period from 2008 to 2012.

3.3.2 The Warshaw Mechanism

In 2013, the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts was established at COP19 as the main vehicle of the UNFCCC to pursue this area of work, particularly with regard to vulnerable developing countries. The mandate is also reflected in the Paris Climate Agreement Article 8 and shall fulfil the following functions: enhancing knowledge and understanding of comprehensive risk management in respect of damage caused by climate change, strengthening dialogue, coordination among stakeholders and enhancing action and support, including through funding and technology.

3.3.3 The Paris Agreement

The Paris Agreement was adopted at COP21 in Paris in 2015 and entered into force in 2016 when 194 UN members ratified the Agreement. The USA ratified the Agreement in 2016, withdrew in 2020 under President Trump and resigned under President Biden in 2021.

The Agreement reiterated that climate change is a common concern of humankind, and emphasised that when taking action the parties should «respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity».

The most important aspect was the general commitment to more specific climate targets of «holding the increase in the global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5 C above preindustrial levels». The Agreement called for an increase in the ability to adapt to the adverse impact of climate change and foster climate resilience and low emissions development in a manner that did not threaten food production and for finance flows consistent with a pathway towards low emissions and climate resilient development, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. Importantly, article 4 called for «a global peak of GHG emissions as soon as possible, recognising that peaking will take longer for developing countries» and calls for rapid reductions after that in accordance with the best available science to achieve a balance between anthropogenic emissions by sources and removals by sinks in the second half of this century «on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty».

The legal tool to achieving this are the «nationally determined contributions» (NDC). In contrast to common practice under international law (and the Kyoto Protocol), the obligations of each state were not negotiated and fixed at international level but left for each member state to decide and implement. This weakened the efficiency of the agreement but was necessary to reach an agreement on overall climate targets and NDCs, including for developing countries. The NDCs filed are legally binding. However, the Agreement permits intra-state agreements and trade in carbon credits among states.

Since 2020, signatory countries have been submitting national climate action plans with NDCs. The parties must then update their NDCs, which must not fall short of the previous NDC and must reflect the highest possible level of ambition.

The parties must regularly report on their progress in implementing their NDCs and the international peer review in accordance with the Enhanced Transparency Framework.

The agreement works on a five-year cycle of increasingly ambitious action by the signatory states, where a g*lobal stocktake* is to be conducted once every five years to assess the overall level of progress.

At the COP26 in Glasgow in 2021, the Glasgow Climate Pact was adopted by the signatories. It *inter alia* expressed «alarm and utmost concern that human activities have caused around 1.1°C of warming to date, that impacts are already being felt in every region and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted». It also stressed «the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement and «recognized that limiting global warming to 1.5°Crequires rapid, deep and sustained reductions in global GHG emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other GHG». This «requires accelerated action in this critical decade, on the basis of the best available scientific knowledge and equity, reflecting common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty», with an «urgent need for Parties to increase their efforts to collectively reduce emissions through accelerated action and implementation of domestic mitigation measures».

Hence, the common acknowledgement of the signatory parties of the severity of the situation could not be made clearer.

The UN Climate Panel (IPCC) annually reports on the efforts under the Paris Agreement to provide the main scientific evidence referred to in the text.[15] The IPCC reports have grown even more alarming over time. The 2023 report *inter alia* explained that all global modelled pathways that limit warming to 1.5 degrees Celsius (with a >50% likelihood) with no or limited overshoot and those that limit warming to 2 degrees Celsius (with >67% confidence) «involve rapid and deep and, in most cases, immediate GHG reductions in all sectors this decade».

> «In preparation for COP28 in Dubai in December 2023, a «synthesis report» on the technical dialogue of the first global stocktake was drafted and included the following:
>
> 'Key finding 1: since its adoption, the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis. While action is proceeding, much more is needed now on all fronts.
>
> Key finding 2: to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, governments need to support systems transformations that mainstream climate resilience and low GHG emissions development. Credible, accountable and transparent actions by non-party stakeholders are needed to strengthen efforts for systems transformations.
>
> Key finding 3: systems transformations open up many opportunities, but rapid change can be disruptive. A focus on inclusion and equity can increase ambition in climate action and support.
>
> Key finding 4: global emissions are not in line with modelled global mitigation pathways consistent with the temperature goal of the Paris Agreement, and there is a rapidly narrowing window to raise ambition and implement existing commitments in order to limit warming to 1.5°C above pre-industrial levels.
>
> Key finding 5: much more ambition in action and support is needed in implementing domestic mitigation measures and setting more ambitious targets in NDCs to realize existing and emerging opportunities across contexts, in order to reduce global GHG emissions by 43 per cent by 2030 and further by 60 per cent by 2035 compared with 2019 levels and reach net-zero CO2 emissions by 2050 globally.

> Key finding 6: achieving net-zero CO_2 and GHG emissions requires systems transformations across all sectors and contexts, including scaling up renewable energy while phasing out all unabated fossil fuels, ending deforestation, reducing non-CO_2 emissions and implementing both supply- and demand-side measures.
>
> Key finding 7: just transitions can support more robust and equitable mitigation outcomes, with tailored approaches addressing different contexts.
>
> ....
>
> Key finding 12: averting, minimizing and addressing loss and damage requires urgent action across climate and development policies to manage risks comprehensively and provide support to impacted communities.
>
> Key finding 13: support for adaptation and funding arrangements for averting, minimizing and addressing loss and damage need to be rapidly scaled up from expanded and innovative sources, and financial flows need to be made consistent with climate resilient development to meet urgent and increasing needs.
>
> Key finding 14: scaled up mobilization of support for climate action in developing countries entails strategically deploying international public finance, which remains a prime enabler for action, and continuing to enhance effectiveness, including access, ownership and impacts.
>
> Key finding 15: making financial flows – international and domestic, public and private – consistent with a pathway towards low GHG emissions and climate resilient development entails creating opportunities to unlock trillions of dollars and shift investments to climate action across scales.
>
> Key finding 16: existing cleaner technologies need to be rapidly deployed, together with accelerated innovation, development and transfer of new technologies, to support the needs of developing countries.»

The COP28 First Global Stocktake agreed in Dubai in 2023 Outcome of the first global stocktake. Draft decision -/CMA.5. Proposal by the President (unfccc.int) reaffirmed the Paris Agreement targets. It «recognized efforts made» but expressed «serious concern that 2023 is set to be the warmest year on record and that impacts from climate change are rapidly accelerating» and emphasised the need for urgent action and support to keep the 1.5°C goal within reach and to address the climate crisis in this critical decade. The document included a commitment (item 6) to «accelerate action in this critical decade on the basis of the best available science, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty». It noted with alarm the IPCC report, but maintained that feasible, effective and low-cost- mitigation options are available in all sectors to keep 1.5°C within reach in this critical decade.

Furthermore, it commented on pre2020 gaps in action by developed countries. The IPCC had indicated that these countries should reduce their emissions by 25-40 per cent below 1990 levels by 2020, but this was not achieved by many countries (and we may add, Norway is among those countries that are most off track). It explained that the carbon budget consistent with achieving the Paris Agreement climate goal is «now small and being rapidly depleted» as historical cumulative net carbon dioxide emissions already account for around four fifths of the total carbon budget available for a 50 per cent probability of limiting global warming to 1.5°C.

Item 28 noted the need for deep, rapid and sustained reductions in GHG emissions in line with 1.5°C pathways and called on the parties to contribute to following global efforts, in a nationally determined manner taking into account the Paris Agreement and their different national circumstances, pathways and approaches. More specifically its letter d) called for a

> «transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science.»

3.3.4 Human Rights towards a Sustainable Future

The UNFCCC is a mechanism for coordinating international politics on a macro level; it has developed a body of new international law with (in sequence) non-binding targets on maximum temperature rise and reductions in GHG emissions (where the 2050 target is a balance or net zero) as well as a specific obligation on the part of the signatory states to reduce emission levels, with responsibilities allocated among the states.

Other initiatives have linked climate change to the existing body of international human rights. This includes Resolution 76/300 of July 2022 from the UN General Assembly (with Norway voting in favour) recognising *the right to a clean, healthy, and sustainable environment as a human right*. The resolution stressed «the universal, indivisible nature of all human rights and their interdependence with environmental protection» and called for «strengthened international cooperation and capacity-building to support the full implementation of environmental agreements», also emphasising «the significant impacts of environmental degradation on the most vulnerable populations and the role of states and businesses in safeguarding human rights while addressing environmental challenges».

We will further explore the implications of this document (and the international human rights more generally) in Chapter 5 when dealing with the recent rulings from the European Court of Human Rights on the 1950 European Convention on Human Rights in a climate context.

3.3 Market initiatives – a brief overview

In 2005, the UN Secretary-General and the world's largest institutional investors initiated the project to develop the Principles for Responsible Investment (PRI).[16] PRI is mainly funded by an annual membership fee payable to the signatories, funding from governments and international organisations, corporate sponsorship, and in-kind support for events and projects. The UN partners (UN Environment Programme Finance Initiative (UNEP FI)[17] and UN Global Compact[18]) are crucial in delivering PRI strategy and holding seats on the PRI Board. The reader may find the PRI's six Principles for Responsible Investment here (how to incorporate ESG issues into investment practice).

In 2015, the G20 Finance Ministers and Central Bank Governors asked the Financial Stability Board (FSB)[19] to convene public and private sector actors to review how the financial sector may take account of climate-related issues. The Task Force on Climate-related Financial Disclosures (TFCD was established as an industry-led task force to develop voluntary climate-related financial disclosures providing non-binding *recommendations* on sustainability-related financial disclosures for various sectors, including the reporting of greenhouse gas emissions. with recommendations on the disclosure of climate-related risks, with relatively detailed and practical standards. As the TCFD released its 2023 status report in 2023, it had fulfilled its remit, and was disbanded. The FSB has asked the IFRS Foundation to continue to monitor the progress of companies' climate-related disclosures.

Other voluntary reporting systems for sustainability/ESG were developed by the Sustainability Accounting Standards Board (SASB). The International Financial Reporting Standards (IFRS) and the International Sustainability Standard Board (ISSB), the Value Reporting Foundation, was consolidated into the IFRS Foundation in August 2022, and the ISSB assumed responsibility for the SASB standards. SASB Standards identify and standardize disclosure for the sustainability issues most relevant to investor decision-making in 77 industries. On average, each standard contains six topics of disclosure and 13 accounting metrics. The SASB has developed a Materiality Finder as a visual guide to help businesses identify their material issues.

In respect of climate change, the frameworks for identifying and reporting greenhouse gas (GHG) emissions are of great significance. Here, the Greenhouse Gas Protocol and ISO 14064 are key voluntary frameworks (now being applied under the ESRS).

GHG include carbon dioxide (CO_2) (produced by burning fossil fuels, solid waste, trees and wood products due to specific chemical reactions), methane (CH_4) emitted during the production and transport of coal, oil and natural gas, as well as from livestock and other agricultural practices, nitrous oxide (N_2O) (emitted from agricultural and industrial activities and the combustion of fossil fuels and solid waste) and fluorinated gases, which include hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and nitrogen trifluoride, which are created during industrial processes and used in several applications. These gases have a high global warming potential.

The are two primary methods of measuring or calculating GHG emissions. Firstly, direct emission measurement may be conducted using sensors and other monitoring equipment in large, point source emitters such as power plants. The second method is calculation based on activity data, e.g. fuel consumption.

The GHG Protocol categorises emissions into three scopes; scope 1 emissions are direct emissions from the reporting company's resources, facilities and operations; scope 2 emissions are indirect emissions from the generation of purchased energy, while scope 3 emissions are all other indirect emissions that occur in the value chain of the reporting company both upstream (other suppliers) and downstream (including when customers use its products).

Scheme 1,2,3 scope emissions. Credit: Plan A based on the GHG protocol.

The voluntary standards are still of importance globally, but – as far as large Norwegian, European and third-country undertakings with important business in the EEA area are concerned – will be replaced by the mandatory disclosure rules in the CSRD/ESRS for 2025 onwards (we will further explore these in Chapter 3). The voluntary standards have contributed to the content of these rules (*inter alia* the ESRS E1 reporting standard applied the reporting system of the GHG Protocol). The more detailed and mandatory rules can hopefully reduce the amount of «greenwashing» misrepresentation of facts and selective use of reporting standards.[20] Critics may claim that the GRI and other market initiatives on sustainability have not amounted to much. The world is really struggling to combat climate change. But then the same could be said of the UN initiatives, which we will now turn to.

4 Carbon taxes and quota systems

4.1 Carbon taxes

Many economists are in favour of carbon taxes as the primary tool to reduce GHG emissions. The problem, as they correctly see it, is that GHG emissions are externalities to traditional economic measurements. Like other «common goods» such as air (and traditionally also water) they have no market price and the cost of them (or cost of damage to them) are not reflected in the calculation of profits. Hence, the solution is to put a proper price on GHG emissions.

This is where carbon tax becomes the solution, placing the cost on the polluter. A producer of goods can surely pass on this cost to its customers, but in a competitive and efficient market this would benefit providers of goods and services that produce less emissions. The tax raises the price of the goods, which also benefit providers while giving them an increased market share. To the extent that there are no low-carbon alternatives in the market, a sufficiently large carbon price will trigger innovations in new technology and new solutions. A tax may impact the profit of producers; however, it is ultimately the consumers that carry the burden.

In our opinion, there is no doubt that a global carbon tax system would have solved the climate challenges decades ago, where the proceeds from the system could have mitigated social concerns in the transition (an even better system would be higher direct taxation of profits from producers of goods with high emissions). There is, however, no international agreement on carbon taxes, for several reasons. This has also resulted in slow progress being made on the regional and national systems that have been introduced.

4.2 The ETS, ETS2 and the CBAM

The EU Emissions Trading System (ETS) is a «cap-and-trade» system for greenhouse gas (GHG) emissions established under Directive 2003/87/EC.

The ETS was introduced on the back of the Kyoto Protocol that introduced tradeable quota as a tool to reduce GHG emissions. In the Protocol the EU pledged to reduce GHG emissions in 2012 by 8 per cent compared to 1990 levels, and to prepare for reductions for the subsequent period from 2011-2020.

The key element of the *decreasing quotas* («allowances» or permits) for GHG emissions by enterprises in the sectors covered; enterprises that exceed their permitted quota must purchase allowances in the market from those enterprises that have spare allowances. Hence, the ETS is a market-oriented carbon tax for the whole EU area (with no national distribution) in which the ultimate allocation of emissions is left to the market. This adds to efficiency as the reductions are likely to take place in the industries and enterprises in which the reduction cost is lowest. The ETS market also provides a *price signal* for future carbon prices; this promotes the planning of and investment in innovative technologies for emission reductions and new and zero or low emission products and solutions. However, the issue of free allowances to major GHG emitters works against the principle that the polluter shall pay but smoothed the introduction and contributed to reducing economic carnage in these industries and avoid «carbon leakage» in industries migrating from the EU area.

The ETS was launched in 2005 and is the pioneer emission trading system worldwide. In the first and second phase, an overflow of allowances led to low prices, as Eastern Europe industries were allocated quotas and then downsized. In the third phase, allocation policies were tightened, and a market stability reserve mechanism was introduced to reduce allowance surplus and improve market resilience to shocks.

With other factors, this led to an overperformance by the EU on its Kyoto reduction targets, with a 22 percent reduction by 2020.[21] *Since 2020, the ETS prices have been rising but are volatile, and with increased energy prices (and other initiatives) it contributed to significant emission reductions in the EU in 2022 and 2023. Credit: www.investing.com, www.tradingeconomics.com*

As explained, the ETS system works so that an overall cap is set for the industries covered and then divided into permits for each enterprise/installation in these sectors. The overall cap is reduced annually. The fourth and current phase (2021-2030) is to provide a 62 per cent reduction in the sectors covered compared to 1990 levels. This target was introduced under the Fit for 55 package (which refers to the EU plan of reducing net GHG emissions in the EU area by at least 55 per cent by 2030, cf. Chapter 5 below). This resulted in an increase in the annual reduction from 2.2 percent to 4.3 percent for 2024-2027 and 4.4 percent for 2028-2030. New reduction targets will be introduced for the fifth phase (2031-2040) to provide for further reductions, with no allowances to be made after 2040, other than for a possible negative emission market).

The enterprises either *receive* emission allowances for a (steadily decreasing) portion of their current emissions and reduce emissions accordingly or they *buy* allowances at market price in initial auctions or in the secondary market. Initially, all allowances were allocated for free. Now, a total of 57 per cent are auctioned, the funds going to the member states and the ETS monetary mechanisms. At year-end, an enterprise must surrender enough allowances to cover its GHG emissions.

EUAs are defined as «financial instruments» under the EU financial market laws (MIFID II, MAD) and listed on European exchanges (the former Norwegian market Nord Pool ASA was the first worldwide exchange to list allowances). Equally important, the ETS framework includes a system for reporting emissions and recording allowances issued and traded, with no double-counting and fraud.

The ETS system focuses on scope 1 and 2 emissions that can be measured and verified with a high level of accuracy in specific sectors, such as carbon dioxide (CO_2) from electricity and heat generation, energy-intensive industry sectors including oil refineries, steelworks and the production of iron, aluminium, other metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals, as well as commercial aviation within the EEA; nitrous oxide (N_2O) from the production of nitric, adipic and glyoxylic acids and glyoxal; and perfluorocarbons (PFCs) from the production of aluminium.[22] The scope of the various sectors has been rising and now also includes shipping and international aviation.

The EU is establishing a second trading system – the ETS2 – for emissions from energy use in buildings, road vehicles and small industries not covered by the existing EU ETS. The cap aims to reduce emissions by 42 percent by 2030 compared to 2005 levels. The ETS2 will become operational in 2027. During the first three years the ETS2 is operational, if the price of allowances exceeds EUR 45 (adjusted for inflation), additional allowances may be released from the ETS2 market stability reserve to address excessive price increases. Allowances may also be released from this reserve if the price of allowances increases too rapidly.

Initially the EU had plans to include certified reductions of emissions taking place outside Europe («CER») in the ETS as the Kyoto Protocol and the Paris Agreement article 6 provided for such a solution. This did not happen, primarily because of challenges in the verification systems needed to avoid fraud and double (or rather multiple) counting of reductions in the CER market. However, there has always been a «bilateral» private market in which enterprises (and states) have purchased inexpensive «carbon credits»for other purposes than meeting the ETS requirements.

The EU is now establishing a carbon border adjustment mechanism (CBAM) Regulation (EU) 2023/956) to prevent «carbon leakage» by subjecting products from non-EEA countries to a carbon levy linked to the ETS price payable if the same goods had been produced within the EU.[23] In the preparation period from 2023 to 2026, EU importers shall submit CBAM reports on emissions on specified imported goods. The CBAM will come into effect from 2027 onwards, whereafter importers must start paying a carbon levy by purchasing CBAM certificates linked to the ETS auction price. Similar to the ETS, the CBAM only covers scope 1 and scope 2 emissions.

The CBAM reduces the risk of carbon leakage and the need for compensation schemes since EU/EEA producers have an advantage with sales in the EU/EEA area. However, it will not fully remedy the carbon leakage as sales outside Europe are not covered; enterprises with large revenues outside Europe are still incentivised to move to jurisdictions with no or lower carbon taxes.

The ETS includes the EEA area. It is also linked to the Swiss ETS system. China and Korea have established an allowance market, but no link exists. Chinese allowance prices are not yet at the EU level. The USA has no federal cap-and-trade system and is not likely to get it, although there are state systems in California and Massachusetts.

The ETS directive is part of the EEA Agreement and has been implemented in Norwegian law.[24] The CBAM is expected to be implemented under the EEA Agreement or as a separate agreement under protocol 31 with amendments. Norway has (incorrectly) claimed that the CBAM is a customs issue and not relevant to the EEA. The EU is not likely to allow Norway to disregard the CBAM. However, it seems as if the Norwegian government is hesitant about agreeing with the EU on climate policies post 2030.

In response to the ETS, some EU member states implemented compensation schemes to offset the increased costs incurred by energy-intensive industries to prevent production from moving to countries with less stringent climate measures, known as *carbon leakage*. This is permitted but any arrangements must be carefully designed to comply with the EU's state aid rules. Norway introduced some of the most industry-friendly but climate-unfriendly compensation schemes to support its electricity consuming industries. This scheme is becoming increasingly costly and was somewhat modified in 2024.[25]

4.3 ESR and Land Use, Land-use Change and Forestry (LULUCF)

The Effort Sharing Regulation («ESR») (EU) 2018/842 is an EU legislative act that sets binding targets on member states with respect to domestic GHG emission in those sectors not covered by the ETS, including domestic transport (excluding aviation), buildings, agriculture, small industry and waste. The ESR was first adopted in 2018 and amended in 2023 to accommodate a strengthened EU target of 40 percent reduction compared to 2005 levels (from an initial 30 percent) as part of the Fit for 55 package. The requirements differ among member states with Germany, Denmark, Finland, Sweden and Luxembourg having the most ambitious obligations to cut 50 percent while the least demanding targets are in Bulgaria and Romania with 10 percent and 12.7 percent, respectively. The cuts shall be linear in the period. However, the states may «borrow» from their quotas for subsequent years.

The LULUCF sector, cf. Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry, comprises both emissions and carbon removal («negative emissions»). Carbon stored in wood products (sawn wood, panels and paper, i.e. harvested wood products (HWPs)) is estimated separately. In Europe, forest land is the main net sink of the LULUCF sector. HWPs are also a continuous sink over the time series, whereas cropland, grassland, wetlands and settlements were net emission sources. The LULUCF Regulation was adopted in 2018 and strengthened as part of the Fit for 55 package. It requires member states to ensure neutrality in this segment; GHG emissions must be balanced by at least an equivalent (and accounted) removal of CO_2 from 2021 to 2030.

These two instruments together with the ETS are the main tools for the EU to achieve the NDC filed by the EU (jointly with the EEA countries) under the Paris Agreement, for a minimum 55% reduction in GHG emissions (compared to 1990 levels) by 2030.

The three instruments include cross-sector mechanisms in which a surplus of ETS allowances, available national quotas under the RSR and/or LULUCG negative emissions, may be applied to cover RSR and LULUCF deficits, within certain limits.

4.4 Norwegian carbon reduction targets and taxes

Under the Kyoto Protocol, Norway filed those annual emissions in 2013-2020 should be 16 percent lower than emissions in 1990. Norway failed to achieve domestic reductions during this period; the 2020 figure was around 4 percent lower than in 1990 but would likely been higher had it not been for COVID-19.

Norway met this target by purchasing allowances under the ETS and international carbon credits («CER». The Kyoto Protocol and Paris Agreement provide for international systems but CERs are often instruments of fraud, and (understandably) are marketed at very low prices. There are no effective and safe system in place to verify the reductions and prevent double sales, contrary to the ETS, which as strong regulatory systems in place to ensure that the quotas are real and applied only once. The EU has prohibited member states from meeting their 2021-2030 quotas by purchasing carbon credits from outside Europe, and it is not a relevant instrument to meet the ETS requirements.

Norway (jointly with the EU) has filed a NDC under the Paris Agreement of a minimum 55% reduction in GHG emissions compared to 1990 levels by 2030. There is a low probability that Norway will meet this target domestically. As the target is joint with the EU, Norway may meet the obligations by purchasing allowances under the ETS (or national reductions under the ESR or LULUCF). It remains to be seen whether Norway will move forward with its current position of also utilising CERs.

As explained, the ETS Directive is part of the EEA Agreement and has been implemented in Norwegian law. This was not the case with the ESR or LULUCF targets for 2030 reductions. In 2019, Norway and the EU made a separate agreement to include these instruments under Protocol 31 of the EEA Agreement but with amendments to the ordinary protocol to include surveillance by the ESA and EFTA Court. The motive for this was not to create any precedent for subsequent agreements on the 2040 or 2050 reduction targets.

On a national level, Norway's targets with respect to CGHG emission reductions are set in the Lov av 16. juni 2017 nr. 60 om klimamål (klimaloven). In contrast to the EU Climate Act (cf. below), this legislative act does not set legally binding targets but only an «ambition» of achieving a reduction of a minimum 55 per cent by 2030 (but this target is internationally binding as the NDC was filed under the Paris Agreement) and to be a «low carbon society» with a 90-95 per cent reduction by 2050. These targets can be met on an EEA level. Thus far there is no target for 2040. The Norwegian act, however, calls for increased ambitions, stocktaking every five years and annual reports to Parliament, to include trajectories for the sectors and a carbon emission budget.

Finally, there are some political targets: In 2022, the Government announced a «national transition target» whereby GHG emissions will be reduced by 55% domestically, although this is not a legally binding target. In 2016, the Parliament issued a political goal for «climate neutrality from 2030 onwards» with the intention of contributing to international reductions, probably involving CER or similar instruments outside the EU/EEA. It is uncertain what this will mean in practice and whether Norway will comply with this rule.

Norway is fond of taxes and has long had national taxes on GHG emissions in the petroleum industry, cf. Lov av 21. desember 1990 nr. 72 om avgift på utslipp av CO2 i petroleumsvirksomhet på kontinentalsokkelen and taxes on GHG emissions related to mineral oil, fuel natural gas and LPG (liquefied petroleum gas) and waste burning. The plan is to increase these taxes significantly by 2030. The tax may have contributed to lower scope 1 emissions in the Norwegian oil and gas industry but does not target the much larger scope 2 and scope 3 emissions in the value chain and customer use of products. Norwegian carbon taxes have been subsidised to the extent of non-balance by stimulating measures for the offshore sector and other industries with high emissions.

5 Sustainability policies and frameworks in the EU

5.1 The European Green Deal

The European Green Deal (EGD) of 2019[26] is part of the overall EU strategy to implement the UN 2030 Agenda and UN SDG, with a roadmap for making the economy in the EU zone sustainable with the main targets of (i) net-zero GHG emissions by 2050, (ii) decoupling of economic growth from resource use and (iii) just transition with no person or places left behind. Key tool in this respect is a rapid increase in the flow of capital toward sustainable investment.[27] The EGD increased the emission reduction target for 2030 to at least 50 per cent and towards 55 per cent compared to 1990 levels, provided for the extended ETS with CBAM and introduced a number of initiatives.[28] The EU is integrating sustainability in all its policies and pursuing green finance to meet the 2030 climate and energy targets. The goal is EUR 260 billion in additional annual investments through public and private sector financing.

5.2 The European Climate Law

The European Climate Law (ECL)[29] is a governance mechanism setting the key policy goal of the European Green Deal into binding law, with the (new) 55% target for2030 and a net-zero target for 2050.[30]

Importantly, the ECL also defines the process for establishing an interim target for 2040. In February 2024 the Commission presented its (first) assessment for a 2040 climate target for the EU, recommending a reduction in net GHG emissions of 90% relative to 1990. The next Commission (after the 2024 election) will present its final legislative proposal for the 2040 target in the European Climate Law.

5.3 The EU Sustainable Finance Action Plan

The EU Sustainable Finance Action Plan (SFAP)[31] is a 10-step action plan to achieving the following three goals: reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth; manage financial risks from climate change, resource depletion, environmental degradation and social issues; foster transparency and long-termism in financial and economic activity.

The background is that the EU has identified an annual investment gap of around EUR 180 billion in the EU zone to achieve the climate and energy targets for 2030, with an overall annual gap in transport, energy and resource management infrastructure of EUR 270 billion. This requires a major reallocation of private capital to sustainable investments. A key prerequisite for such investments is clarity about what constitutes sustainable investments and transparency based on sustainability information from industries and financial market participants: The EU needs a well-functioning «green finance» market promoting long-term value creation and management of sustainability risks and impact investment.

5.3.1 The 10 SFAP-points[32]

Against this background, the Commission launched an SFAP 10-point action plan in 2018: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097.

The implementation of action points 1-10 comprises three «legal tools» enacted by various legislative instruments addressed in this book:

Classification rules: The Taxonomy (TR), the SFDR, the Green Bond Standard and the Green Benchmark Regulations.

Transparency rules calling for sustainability disclosure and reporting (NRFD, TR 8 DA and CSRD/ESRS), as well as green benchmark regulations.

Performance rules and liability standards calling for integration of sustainability in financial enterprises (SDFR, MIFID II Sustainability, CRR Green Factor) and compliance (CSDDD).

5.3.2 Classification rules

The most important act in this respect is the Taxonomy Regulation (EU) 2020/852. This is a classification system (a taxonomy) for environmentally sustainable activities based on detailed, scientifically based quantitative and qualitative criteria. The taxonomy also introduces a disclosure system for »green percentages«- the proportion of company revenues that stems from Capex and Opex relating to sustainable activities. The taxonomy is further elaborated in Chapter 6 of this book.

5.3.3 Transparency rules

There is now a comprehensive EU disclosure/reporting regime in place for financial and non-financial enterprises on sustainability issues.

The first legislation of any substance was the Sustainable Finance Disclosure Regulation (SFDR) (EU) 2019/2088 (SFDR) addressing financial market participants and financial advisers offering *portfolio management and investment advisory services* (while the much more significant financial services sector of lending, brokering and corporate finance and insurance was excluded). The SDFR requires the disclosure of sustainability factors for sustainable investments and assessment and the disclosure of sustainability risks for investments in general. It introduced the first EU-harmonised definition of »sustainable investment« products and differentiates between two types of such products – *Article 8* and *Article 9* products. SDFR is addressed in Chapter 5.

The Accounting Directive (2013/34/EU) is the general legislative framework on financial and non-financial transparency and reporting by EU enterprises. The Non-Financial Reporting Directive (NFRD, Directive 2014/95/EU) was an amendment, introducing minimum reporting requirements on non-financial factors for «large public interest» companies with more than 500 employees. Large companies are defined as companies with a balance sheet exceeding EUR 20 million, net revenue exceeding EUR 40 million and more than 250 employees, while public interest companies include listed companies, banks, insurance companies and certain designated companies.

The Corporate Sustainability Reporting Directive (CSRD Directive (EU) 2022/2464 replaced the NFRD. The CSRD extends the reporting requirements on sustainability issues to all large companies, as well as smaller listed companies that are not micro companies (companies exceeding EUR 4 million in balance and EUR 8 million in revenue and 10 employees) with sequential implementation: The CSRD applies to large companies with public interest and more than 500 employees for the fiscal year (FY) 2024 onwards (first reporting in 2025), to all large companies from FY 2025 onwards and to listed small and mid-sized companies from FY2026 onwards (with a two year postponement option). The CSRD also applies to non-EU companies with substantial activity in the EU FY from 2027 onwards.[33] The CSRD requires disclosures from a «double materiality» perspective, meaning that companies must report how sustainability issues affect their business (sustainability risk) and how they impact the environment and social and governance matters (sustainability factor). The CSRD has introduced much more extensive and detailed reporting requirements through delegated acts – the European Sustainability Reporting Standards (ESRS). The CSRD also features mandatory assurance for reporting by an independent assurance service provider. The CSRD and ESRS are explored in more detail in Chapter 7.

5.3.4 Performance rules and liability standards

As part of the Green Deal and the FSAP initiative, the EU supplemented its legislation on financial service providers on ESG issues. A more general approach is the new Corporate Sustainability Due Diligence Directive (CSDDD), which was finally approved in April 2024.

The CSDDD applies to large undertakings with more than 1000 employees, which must identify, prevent, mitigate and end any actual or potential adverse impacts of their activities on human rights, with administrative penalties and civil liability for any transgressions. In this respect the CSDDD is making «harder law» concerning voluntary international standards such as the UN's Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the OECD Due Diligence Guidance for Responsible Business Conduct. A second element is that undertakings must put in place a plan on how to meet the Paris Agreement targets on net-zero carbon emissions by 2050 and EU interim reduction targets of 2030 and 2040. We will further explore this in Chapter 8.

6 Classification rules

6.1 The EU Taxonomy

This chapter provides an overview of the Taxonomy Regulation with supplementary legislation. The main document is the Taxonomy Regulation (EU) 2020/852 («TR») which entered into force on 12 July 2020 (although it was implemented on a step-by-step basis). The taxonomy is a classification system providing definitions of environmentally sustainable economic activities, in short «green activities». Hence, the taxonomy does not classify companies as either green or not green, as most companies will only be partially sustainable.

The taxonomy also includes disclosure rules in which all large companies with public interest (In accordance with the Accounting Directive) must report their Green Ratios; the proportion of turnover stemming from green activities[34] as well as the Opex[35] and Capex[36] relating to green activities, where the Capex ratio development is an essential sign of the green transition.

The Taxonomy classification system was initially based on the final report on EU taxonomy of the Technical Expert Group (TEG) published on 9 March 2020. The main target was to provide a realistic trajectory towards the Green Deal and the Paris Agreement target of net-zero GHG emissions and a circular economy by 2050 based on scientific criteria, to stimulate action in this respect by individuals, enterprises, organisations, nation states and the EU. Subsequently, the Commission, as required under TR article 20, appointed a group of experts – the Platform on Sustainable Finance – to assume the role of expert advisors with regard to the taxonomy.

The overall aim of the taxonomy classification is to promote the reallocation of capital to sustainable activities and prevent «greenwashing». It has a special bearing on the financial industry. As explained, the ESAP identifies a need for large investments in sustainable technologies and businesses. Here, the taxonomy is a tool to help close the investment gap of EUR 270 billion annually to meet the climate and energy targets for 2030 and mitigate climate change and the additional EUR 100-150 billion per year needed to achieve broader environmental objectives.

An equally important (and direct) aim is to guide industries and enterprises on *how to become environmentally sustainable* with the necessary speed. In this respect, the taxonomy and its delegated acts is a roadmap about which types of commercial activities will be permitted in the EU zone in 2050 (and relevant interim target dates). The taxonomy classification system and the disclosure rules in the TR and CSRD, are voluntary in respect of actual sustainability/ESG efforts, in the sense that these instruments define sustainable economic activities and require undertakings to report relevant information, preparing for the allocation of capital for the necessary transition investments. These instruments do not require undertakings to change the modus operandi and become sustainable. However, undertakings with activities that are not in line with the TR criteria for the relevant business segment will be most likely within a few years find themselves subject to a stricter legal regime with prohibitions or strong financial disincentives.

«Greenwashing» can broadly be defined as disinformation by an enterprise or organisation to present an environmentally or socially responsible public image that is not supported by facts. Greenwashing may provide an unfair competitive advantage to the enterprises involved and bring disrepute to providers of sustainable finance products and ESG efforts more generally. The main contribution of the taxonomy in this respect are detailed criteria on which activities are sustainable. On occasion, enterprises (including financial institutions) have been greenwashing by representing themselves as «sustainable» or «green» based on vague standards of sustainability, including the UN SDGs. To illustrate: Aquaculture has sometimes claimed to be «sustainable» with reference to SDG 2 (no hunger), while fossil fuel companies generally refer to the need for their energy contributions to promote growth (In accordance with SDG 8) in lesser developed parts of the world.

Some argue that the TR criteria are too strict and need to be more relaxed. However, this may create loopholes that are exploited for greenwashing purposes. Furthermore, the basic idea when the taxonomy criteria were set is that there is a need for a speedy transition with no *lock-in* solutions keeping the fossil age (cf. below on this concept). A couple of years ago some experts argued for a gradual approach that recognised «shades of green» and a step-by-step transition. Today, more people realise the mistake of such an argument. However, it has served to slow down the green transition and probably also lock-in effects. Furthermore, it contributed to the alleged «green» financing of shady project viewed from a sustainability perspective and contributed to bringing the concept of ESG and sustainability financing into disrepute in certain circles.

The taxonomy applies to EU/EEA areas, but its influence is likely to be that of a global roadmap. Industries are largely comparable and what the EU is really attempting to do is to define what sustainable commercial activities are in general.

6.2 The Taxonomy Environmental Objectives

The key term in the TR is «*environmentally sustainable economic activities»* cf. article 3 defining this as economic activities that:

a) contribute substantially to one or more of the six environmental objectives,

b) do no significant harm to any of the six environmental objectives,

c) meet minimum social and governance safeguards as per TR Article 18, and

d) comply with technical screening criteria set in delegated acts.

The «environmental objectives» are listed in article 9 and include (i) climate change mitigation, (ii) climate change adaptation, (iii) sustainable use and protection of water and marine resources, (iv) the transition to a circular economy, (v) pollution prevention and control, and (vi) the protection and restoration of biodiversity and ecosystems.

6.2.1 Objective 1: Climate change mitigation

According to TR article 10.1, an economic activity shall qualify as contributing substantially to climate change mitigation where it «contributes substantially to the stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system consistent with the long-term temperature goal of the Paris Agreement through the avoidance or reduction of greenhouse gas emissions or the increase of greenhouse gas removals, including process or product innovations». [37] Article 10.1 letters a to h specifies the relevant activities such as energy production, transmission and use, carbon sinks and carbon capture and utilisation (CCU) and carbon capture and storage (CCS), while letter i) addresses enabling activities, cf. above.

Article 10.3 points to the delegated acts (DA) for the technical screening criteria.

The economic activities included are primarily those activities that are compatible with the 2050 Paris Agreement target of net-zero GHG emissions. Article 10.2, however, includes «transition activities» incompatible with this target but where there are no technological or economically viable alternatives regarding three conditions: a) GHG emission levels must correspond to best performance in the sector or industry, b) the activity does not hamper the development and deployment of low-carbon alternatives, and/or c) does not lead to a lock-in of carbon-intensive assets considering their economic lifetime.

«Lock in» or «carbon lock-in» are established terms in environmental economics and refer to market dynamics. There is a general tendency for capital-intensive technological systems to persist over time. Thus, new investments with lower GHG emission may «lock out» better alternatives with a lower carbon footprint due to a combination of technical, economic and institutional factors. However, technologies and facilities may be costly to build, relatively inexpensive to operate and over time they reinforce the political, market and social factors that make it difficult to move away from or «unlock» them. Consequently, by investing in assets that are prone to lock-in, planners and investors restrict future flexibility and increase the cost of achieving the agreed climate protection goals.[38]

TR article 10.2 is a binding norm for the Commission in establishing the detailed technical screening criteria (cf. below on the TSC in the delegated acts) and is reflected in the definition of certain activities such as disqualifying transport or construction solutions specially designed for fossil fuel. The lock-in effect was also important in the supplementary delegated act when fixing timelines (2035) for when electricity production or natural gas must convert to other sources.

6.2.2 Objective 2: Climate change adaptation

Letter a) in Article 11 includes activities with solutions that either substantially reduce the risk of the adverse impact of the current climate and the expected future climate on economic activity, or substantially reduce the adverse impact without increasing the risk of an adverse impact on people, nature or assets. The adaptation solutions shall be assessed and ranked in order of priority using the best available climate projections. Letter b) addresses enabling solutions and satisfying conditions in Article 16 related to enabling activities.

6.2.3 Objective 3: Sustainable use and protection of water and marine resources

An economic activity that substantially contributes to the sustainable use and protection of water and marine resources in which that activity (i) substantially contributes to achieving the excellent status of bodies of water, including bodies of surface water and groundwater, (ii) preventing the deterioration of bodies of water that already have good status, and (iii) substantially contributes to achieving the good environmental status of marine waters or to preventing the deterioration of marine waters that already have a good environmental status. The activities are broadly defined in Article 12 (1), including enabling activities.

6.2.4 Objective 4: Transition to a circular economy

Article 13 has an extensive definition of the circular economy, including the increased durability of products, recycling of materials and waste, and enabling activities. Many actors consider it to be the most critical long-term sustainability objective, affecting the other objectives. It challenges the current capitalist production system based on extensive extraction and the use of natural resources and the replacement of goods and extensive trade. Some actors are concerned that a change to a circular economy will limit growth and prosperity, while others believe that a circular economy aimed at sustainability and resource efficiencies may improve global growth. What is quite clear is that it will represent a fundamental change to current production and consumer practices in many parts of the world, and raise several technological, regulatory and policy issues to address the complexities in the many (and potentially global) supply chains.

6.2.5 Objective 5: Pollution prevention and control

This objective has a broad definition in article 14.1, calling for preventing or reducing pollutant emissions into air, water or land, other than greenhouse gases, preventing or, where not practicable, reducing pollutant emissions into air, water or land, other than greenhouse gases; improving levels of air, water or soil quality in the areas in which the economic activity takes place while minimising any adverse impact on human health and the environment or the risk thereof, preventing or minimising any adverse impact on human health and the environment of the production, use or disposal of chemicals and cleaning up litter and other pollution – including enabling such activities described above.

6.2.6 Objective 6: Protection and restoration of biodiversity and ecosystems

In accordance with article 15.1, an economic activity qualifies as substantially contributing to the protection and restoration of biodiversity and ecosystems where it substantially contributes to protecting, conserving or restoring biodiversity or to achieving the good condition of ecosystems, or to protecting ecosystems that are already in good condition through any of the actions specified in letters a) to e) dealing with conservation, land use/management, agriculture, forestry, and enabling activities.

6.3 Environmentally Sustainable Activities

Environmentally sustainable activities are primarily those activities that directly impact the environmental objectives. However, they may also include «enabling activities» as defined in article 16 as «an economic activity (...) that directly enables other activities to make a substantial contribution to one or more of (the) objectives, provided it does not lead to a lock-in of assets that undermine long-term environmental goals and has a substantial positive environmental impact based on life-cycle considerations».

Two criteria to qualify as sustainable per TR article 3 is that an activity must contribute substantially to one or more of the six environmental objectives (the «SC» threshold) and do not significantly harm any of the six environmental objectives (the «DNSH» threshold).

It would not be no easy task for commercial enterprises and their advisors to decide which of the many thousand different types of economic activities in Europe meet these criteria. This is where the Technical Screening Criteria (known as «TSC») come in and provide detailed and largely quantitative criteria to apply to the classifications.

The TSC are set by the Commission in delegated acts. There are currently three delegated acts in this respect; the Commission Delegated Regulation (EU) 2021/2139 on-climate objectives 1 to 2, the Commission Delegated Regulation (EU) 2022/1214 (the Complementary Delegated Act on objectives 1 to 2 regarding nuclear energy and gas electricity production) and the Commission Delegated Regulation (EU) 2023/2486 on the objectives 3 to 6.

The first act was based on expert advice from the TEG, the second act was based on political initiatives from certain EU member states., and the third act on advice from the Platform on Sustainable Finance: a group of experts appointed by the Commission as required under TR article 20.

The legal basis for the delegated acts is TR articles 10-15, calling for the Commission to set TSC in delegated acts, subject to the generic definitions of the six objectives in articles 10-15 (including the lock-in-prohibition on transition activities) and further requirements in TR Article 19 letters a) to k), including the principle of technological neutrality, preference for quantitative criteria with thresholds, the basis of conclusive scientific evidence and use of the precautionary principle. The Commission was tasked with taking into account the life cycle of the activities, products and services (including their end of life) and potential market impacts of the transition, including the risk of certain assets becoming stranded, and provide for equal treatment to avoid distortion of competition in the markets. Finally, the technical screening criteria shall be «easy to use» and facilitate the verification of compliance, cf. letter k).

Great efforts were made by the Commission and its advisors. The results are no less than impressive, and we strongly disagree with those actors who claim that the TSC are too extensive, detailed or complex. No one is supposed to master all the TSC. In our opinion, those actors familiar with the relevant business segments should be in a position to understand and apply the delegated acts. The main content are their annexes listing the various commercial activities (using the European statistical standard NACE codes for the various activities) that are economically sustainable when meeting the detailed TSC criteria set for them.

The initial focus of TEG and the Commission was on sectors responsible for 93.5 percent of direct GHG emissions in the EU with the potential to contribute significantly to climate change mitigation. One sector – agriculture – was not included in the final delegated acts.

The TR is technology-neutral and excludes just one class of activities – those activities involving solid fossil fuel (coal) cf. TR article 19.3.

Oil and gas production and storage or transport is not listed and is therefore not sustainable under any circumstances. Construction or the operation of electricity generation facilities that produce electricity using fossil gaseous fuels are, however, on specific terms, considered a transition activity in accordance with the supplementary delegated act, sections 4.29 to 4.31. One requirement is that an undertaking is designed and constructed to use renewable and/or low-carbon gaseous fuels and the transition to the full use of renewable and/or low-carbon gaseous fuels takes place by 31 December 2035, with a commitment and verifiable plan approved by the management body of the undertaking.

Section 7.1 on **Construction of new buildings** can serve as a good illustration of the architecture and the level of details:

Description of the activity

Development of building projects for residential and non-residential buildings by bringing together financial, technical and physical means to realise the building projects for later sale as well as the construction of complete residential or non-residential buildings, on own account for sale or on a fee or contract basis.

The economic activities in this category could be associated with several NACE codes, in particular F41.1 and F41.2, including also activities under F43, in accordance with the statistical classification of economic activities established by Regulation (EC) No 1893/2006.

Technical screening criteria

Substantial contribution to climate change mitigation
Constructions of new buildings for which:1.The Primary Energy Demand (PED) (281), defining the energy performance of the building resulting from the construction, is at least 10% lower than the threshold set for the nearly zero-energy building (NZEB) requirements in national measures implementing Directive 2010/31/EU of the European Parliament and of the Council (282). The energy performance is certified using an as built Energy Performance Certificate (EPC).2. For buildings larger than 5 000 m2 (283), upon completion, the building resulting from the construction undergoes testing for airtightness and thermal integrity (284), and any deviation in the levels of performance set at the design stage or defects in the building envelope are disclosed to investors and clients. As an alternative: where robust and traceable quality control processes are in place during the construction process this is acceptable as an alternative to thermal integrity testing.3. For buildings larger than 5 000 m2 (285), the life-cycle Global Warming Potential (GWP) (286) of the building resulting from the construction has been calculated for each stage in the life cycle and is disclosed to investors and clients on demand.
Do no significant harm («DNSH»)
(2) Climate change adaptation
(3) Sustainable use and protection of water and marine resources
(4) Transition to a circular economy
(5)Pollution prevention and control
(6)Protection and restoration of biodiversity and ecosystems

In this very detailed manner, the Annexes define environmentally sustainable (green) practices in various commercial businesses/sectors of the economy.

The taxonomy is a binary classification system in the sense that non-listed sectors as well as other practices (within or without the listed business segments/sectors) are *not* environmentally sustainable under the taxonomy and other legislation referring to its definition of sustainable activities.

Like any other legal code, the TR include generic or specific wording for this either/or classification but largely quantifiable measurements. Hence, there are no «shades of green» here. This does not mean that non-listed business segments and activities are environmentally harmful; some of them are while others may be harmless. In 2022, the Platform on Sustainable Finance issued an report on an extended taxonomy analysing the merits of a more complex matrix in which non-sustainable activities are classified in the subcategories of Red (with an implicit subcategory of Dark Red)[39] , Yellow[40] and White[41] to provide a more comprehensive and informative framework for assessing the sustainability of economic activities. It is not clear what benefits this will serve (considering the increased complexity created and the fact that it is the sustainability activities that are to be promoted) and it is unclear as to whether this initiative will be followed up by the Commission.

The TEG's initial approach was to provide TSC for the economic sectors that had the greatest potential to contribute to Europe's climate and energy targets, although environmentally important sectors have still been excluded: In its draft, the TEG addressed agriculture as a sector that had major impact on most TR objectives but it was not politically possible for the EU to agree on TSC.

From a Norwegian perspective, it is even more important that the fishing and aquaculture sector are not included. In their current state most aquaculture facilities have a negative impact on objectives 1 and 2-6.

The TR is designed to be dynamic and evolve to eventually cover more economic activities. For listed activities, new criteria are likely to be added and the existing TSC refined, as TR article 20.5 requires the Commission to regularly review the TSC in line with scientific and technological developments. As for transitional activities, in order to ensure a credible transition pathway consistent with a climate-neutral economy, the Commission shall review the criteria at least every three years.

6.4 Minimum Safeguards

The final requirement under TR article 3 is that environmental sustainable activities must also meet the «minimum safeguards» (MS) laid down in article 18, where these are specified to be (i) the OECD Guidelines for Multinational Enterprises and (ii) the UN Guiding Principles on Business and Human Rights, including principles and rights in the eight fundamental conventions identified in the Declaration of the International Labour Organisation (ILO) on Fundamental Principles and Rights at Work, and the International Bill of Human Rights.[42]

There is no legal basis for technical screening criteria for the MS.

The MS means that the taxonomy is not just concerned about environmental issues but also takes social and governance factors into account, by reference to international «soft laws»:

The OECD Guidelines for multinational enterprises were adopted by 42 governments at the OECD Meeting in 2011. The guidelines require «General Policies» and «Disclosure» by multinational entities (MNEs) and Performance Standards on the eight substantive topics:

1. Human rights,
2. Employment and Industrial relations,
3. Environment,
4. Bribery, bribe solicitation, and extortion,
5. Consumer interests,
6. Science and technology,
7. Fair competition,
8. Taxation.

The UN Guiding Principles on Business and Human Rights (UNGPs) were developed by the Special Representative of the UN Secretary-General and endorsed by the UN Human Rights Council in 2011. The Human Rights Council is an inter-governmental body within the UN system comprising 47 member states elected by the General Assembly.

The International Bill of Human Rights include the:

1. UN Universal Declaration of Human Rights (1948)
2. UN International Covenant on Civil and Political Rights (1966 CPC)
3. UN International Covenant on Economic, Social and Cultural Rights (1966 ESCC)

The 1966 CPC overlaps with the European Convention on Human Rights (coe.int), which became Norwegian law in 1999 in the Human Rights Act. The 1966 CPC and ESCC to a large extent overlap with the EU Charter on Fundamental Rights.

The International Labour Organization (ILO) core conventions covering labour standards, and the relevant core conventions are:

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)

7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

The ultimate legal basis is that international human rights (as identified by the above documents) constitute international law (Norwegian: *folkerett*) binding on the UN member states (and the European states cf. the European Human Rights Convention. However, as a main rule these constituting documents are not legally binding on business undertakings or individuals; their legal rights and obligations primarily depend on national laws (including laws implementing human rights). This is where the UNGPs come in as international «soft law» calling for business enterprises to assume responsibility and respect international human rights as *global standards of expected conduct* regardless of the various nation states' abilities or willingness to enforce them.

Some international human rights are quite specific. Others are broadly defined principles or objectives where the content is not clear cut. But some of these rights are further defined in large detail by jurisprudence from international courts or UN-appointed expert committees. This is particularly the case for the European Human Rights Convention, as the European Court of Human Right (Homepage of the European Court of Human Rights – ECHR) has issued more than 24,000 rulings on the convention. Still, there may be a lack of clarity as to the scope of many of the rights, in particular those dealing with social matters.

In 2022 the Platform on Sustainable Finance published a Final Report on Minimum Safeguards analysing the TR article 18 documents to identify topics for which advice is needed and EU regulations related to these topics. The report provides suggestions to ensure and verify compliance and describes relevant practices.

The MS can be considered a «minor hardening» of the non-binding soft laws of the OECD Guidelines and the UNGPs, as it makes human rights compliance a mandatory supplement for enterprises that wish to qualify as environmentally sustainable under the taxonomy.

The Corporate Sustainability Reporting Directive (CSRD) with the supplementing European Sustainability Reporting Standards (ESRS) add a further legal dimension by requiring enterprises to disclose and report on further specified social and governance matters, cf. Chapter 7. The Directive on Corporate Sustainability Due Diligence (CSDDD) will make it mandatory for companies to have due diligence procedures to avoid violations of human rights in their (global) value chain and subject them to potential liabilities for violations, cf. Chapter 8 below.

The current taxonomy addresses environmental issues only. In 2022 the platform issued a report on social taxonomy on a possible social taxonomy, but it does not seem likely that this initiative will proceed any further in the near future.

6.5 Taxonomy disclosure rules

The classification of environmentally sustainable activities in the TR with delegated annexes may be seen as *voluntary performance standards* in the sense that the enterprises in the listed sectors are not legally required to change to sustainable practices. But they are certainly being «nudged» in this direction. The definitions of SC and DNSH refer to «baseline» EU legislation directly related to the six TR objectives (such as addressing pollution and the preservation of biodiversity) or indirectly concerning the objectives (such as energy efficiency targets). The reference in Delegated Act Annex 1 section 7.1 to Directive 2010/31/EU (the Nearly Zero Energy Directive, NZED) may illustrate this. The key idea of the taxonomy is to identify activities that move beyond this legal baseline, making a significant contribution to one or more of the six objectives. The baseline of mandatory performance standards is likely to be raised, and the dynamics of the taxonomy imply that the «bar» for (voluntary) better performance will be raised accordingly.

However, the taxonomy also entails mandatory legal obligations. TR article 4 requires the use of the taxonomy criteria for environmentally sustainable economic activities in public measures, standards and labels. TR articles 5 and 6 addresses the financial sector and require financial market participants offering sustainable finance products under SFDR articles 8 and 9 to analyse and disclose their alignment with the taxonomy and portion of aligned activities (cf. below on the SFDR).

More importantly, TR article 8 introduces a specific taxonomy-related disclosure regime for all enterprises that are obliged to disclose non-financial information under the CSRD: They shall include information on how and to what extent their activities are associated with economic activities that qualify as environmentally sustainable (green) under the TR, including key performance indicators (KPIs) showing the proportion of their turnover derived from TR aligned sustainable activities, and the proportion of their capital expenditure and operational expenses associated with such activities. TR 8.4 provides for a delegated act to specify the content and presentation of the information on taxonomy alignment, cf. the Delegated Regulation (EU) 2021/2178 in which the Commission specifies the methodology to be applied by various market segments in detailed annexes. We will further explore this topic in Chapter 3.

6.6 Other sustainability classifications

6.6.1 SFDR definition of sustainable investments

The Sustainable Finance Disclosure Regulation Systems Green Funds (SFDR) applies to financial market participants who provide asset management and financial advisors. Its primary objective is to increase transparency on how sustainability factors and sustainability risks are considered in capital management. SFDR also introduced «soft» performance requirements on the «integration» and consideration of sustainability risks, and, for larger participants, sustainability factors in their business approach. We will further explore these aspects of the SFDR in Chapters 3 and 4, respectively.

Motivated by these objectives, SFDR article 2 (17) has a very broad definition of «sustainable investments» as «an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance».

Compared to the taxonomy definition with its SC and DNSH requirements and detailed TSC, the above definition is wide and open. It basically leaves it up to financial asset managers to define the target ESG level and select the investments they believe contribute to environmental or social factors. This approach was due to the general purpose of the SFDR, which is to include those financial products that are *claimed* to be sustainable and call for increased transparency, including on the ratio of alignment with the TR definition of sustainable activities. Ultimately, a high proportion of the investments that the financing industry claims to be green/sustainable has turned out to be not aligned with the TR definition. This was no surprise to anyone familiar with the «opportunistic» strait of the industry (or human nature, for that matter) and the complexity involved in defining and assessing what sustainability actually means.

The SFDR divided the universe of investment funds and other financial products into three categories: Article 6 addresses products with no sustainability focus, article 8 with products in which ESG is taken into consideration, article 9 addresses funds and products invested with a sustainable objective, commonly referred to as «impact funds/impact investments». The SFDR set detailed disclosures about sustainability risks and factor impacts and the process to manage them in pre-contractual documents, periodic reports and on websites, with the heavier toll falling on the managers of the article 9 products, cf. Chapter 4.

6.6.2 The EU Green Bond Standard

The EU Green Bond Regulation (EU) 2023/2631 (GBR) aims to facilitate the issuance of green bonds and combat greenwashing in the bond market. Bonds are a fixed-income financial instrument where commercial enterprises or public institutions borrow money from a group of investors by issuing interest-bearing tradeable bonds representing parts of the loan. «Green bonds» are bonds where the proceeds are specifically earmarked to raise money for climate and environmental projects. The bond market was the market segment in which sustainability financing was first launched, mainly as a tool for financing specific environmental-friendly investment projects by companies with an overall business that was not sustainable. In this respect, bond financing is an excellent tool for sequential improvement and green transitions. However, there were creative definitions of what qualified as «green purposes» (and as social purposes for the much smaller segment of «social bonds») and thus an alarming level of greenwashing (though not as excessive as in the «sustainable» fund industry now regulated by the SFRD).

The GBR was a «soft» response to this. It does not prohibit the issue of «green bonds» that do not meet the requirements but is a *labelling* system; anyone who labels their bonds as «European Green Bonds» or «EuGB» must comply with Title II of the GBR, cf. article 3. Here, the key feature is that the proceeds of the bonds must be used to finance activities aligned with the TR definition of «environmentally sustainable activities», cf. article 4 requiring all proceeds to be applied in this way before the maturity of the bonds. Article 5 provides a «pocket exemption» where issuers may allocate up to 15 percent of the bond proceeds to economic activities that «comply with the taxonomy requirements, with the exception of the technical screening criteria»(TSC) for (a) economic activities with no TSC in force at the date of issuance of the bonds, or (b) activities «in the context of international support reported in accordance with internationally agreed guidelines, criteria and reporting cycles» including climate financing reported to the Commission under the UN Framework Convention on Climate Change as referred to in article 19(3) of Regulation (EU) 2018/1999 and official development assistance reported to the Development Assistance Committee of the OECD.

Other important features of the GBR include rules on the disclosure of information including a pre-issuance fact sheet with content further specified in the annex. It is subject to external review, a prospectus, the preparation of post-issuance allocation reports that must be subject to external review to verify the allocation, and impact reports to be prepared at least once during the lifetime of the bonds to assess environmental impacts of the use of the proceeds. The impact report may be subject to external review, but this is not a requirement. The regulation's title IV provides detailed requirements on the permitted external reviewers, including their registration with the European Securities and Markets Authority (ESMA).

GBR title III includes rules on the issuers of other bonds marketed as «environmentally sustainable» or «sustainability-linked». The former is defined in article 2 as «a bond whose issuer provides investors with a commitment or any form of pre-contractual claim that the bond proceeds are allocated to economic activities that contribute to an environmental objective», while «sustainability-linked bond» means «a bond whose financial or structural characteristics vary depending on the achievement by the issuer of predefined environmental sustainability objectives».

To those familiar with the financial markets, the label of sustainability-linked financing basically means that there is something «fishy» going on; this label is applied precisely because the proceeds are not used to finance sustainable activities but provided for general corporate purposes, possibly including projects that could never qualify as environmentally sustainable under the TR, such as the financing of vessels or equipment designed to transport or extract fossil fuel. Similarly, after the GBR comes into force in December 2024, it will not be a good sign (from an ESG perspective) if a European bond is marketed as «environmentally sustainable» but the EuGB level is not applied.

The GBR was watered down in the final round and does not include any mandatory disclosure requirements on issuers of such bonds. However, article 20 provides that the Commission shall publish guidelines establishing «templates for voluntary pre-issuance disclosures» for issuers of such bonds, to include the percentage of taxonomy-aligned investments. In accordance with article 21, such issuers «may make periodic disclosures of post-issuance information by means of common templates» to be fixed by the Commission in delegated acts, including ratios of taxonomy alignment. Hopefully these measures to provide better information will be sufficient to bring greenwashing in the bond industry to an end. Still, by December 2026, the Commission shall publish a report on the need to regulate sustainability-linked bonds, accompanied by a legislative proposal, where appropriate.

6.6.3 (Other) Green Product Labels and Green Benchmarks

The GBR is a green product label for bonds established by EU legislation as part of the Sustainable Finance Action Plan. This plan also includes other green labelling efforts concerning green benchmarks.

An older and general part of the «EU toolkit on ESG» is establishing green product labels to provide consumers and investors with clear, standardised information and the certification of products that meet specific environmental standards, helping them make informed choices.

Benchmarks are important tools for the finance market as many fund managers and investors rely on them to define the «investment universe» and measure investment performance. Benchmarks and benchmark administrators are generally governed by Regulation (EU) 2016/1011 on financial indices (the «EU Benchmark Regulation»). This regulation defines «benchmark» as «any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees». «Index» is defined as «any figure (a) that is published or made available to the public and (b) that is regularly determined (i) entirely or partially by the application of a formula or any other method of calculation, or by an assessment; and (ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys».

Conventional benchmarks/indices track market value performance for a segment of selected financial instruments or assets, potentially including the largest companies to cover the totality of the market or specific sector or market segments. In the past decade, index providers have also designed ESG, sustainability or «low carbon» benchmarks that identify companies/assets based on their impact on sustainability. The multiple criteria created confusion as the very same companies were included in some ESG indices but excluded from others. In 2018, the Commission put forward a proposal for a regulation creating two type of low carbon benchmarks and requiring ESG disclosure for all benchmarks. TEG was mandated and issued a detailed report in June 2019. This resulted in the Low Carbon Benchmark Regulation (EU) 2019/2089 amending the general EU Benchmark Regulation, introducing the EU Climate Transition benchmark and the EU Paris-aligned Benchmark as new benchmarks and posting requirements on sustainability-related disclosures for all benchmarks.

7 Disclosure rules

7.1 Background

The EU Sustainable Finance Action Plan item 9 calls for the EU to «strengthen sustainability disclosure and accounting rulemakingby enhancing the role of sustainability in financial reporting and accounting standards». This chapter will mainly focus on the new and improved sustainability disclosure rules introduced to achieve this: the CSRD and the supplementary ESRS.

However, it is worth reiterating that for some years the EU has had a more limited reporting regime based on the Non-Financial Reporting Directive (2014/95/EU) (NFRD) amending the Accounting Directive (2013/34/EU). The NFRD required large public interest entities to disclose certain non-financial information. The NFRD was included in the EEA Agreement and implemented in Norwegian law.

7.2 CSRD and ESRS

In 2022, the EU Commission adopted a new amendment directive for sustainability reporting (EU) 2022/2464, the Corporate Sustainability Reporting Directive («CSRD»). CSRD is a central part of the EU Sustainable Finance Action Plan and amended the Accounting Directive, Transparency Directive and Audit Directive/Audit Regulation.

The CSRD extends the scope of undertakings that are legally required to report on sustainability issues and adds more quality to the reporting by introducing stricter standards, including the European Sustainability Reporting Standards («ESRS») In accordance with the delegated acts. The CSRD also extends the TR 8 scope on disclosure and provides additional data for financial enterprises reporting under the TR and SFDR. The CSRD will be included in the EEA Agreement and implemented in Norway in 2024.[43]

The purpose of the CSRD is to prevent greenwashing by undertakings and «false» ESG investments (by investors making factual mistakes) and contribute to the reallocation of capital to sustainable investments. In addition, the reporting will – particularly on an aggregate basis for the business segments – serve as a factual basis for coordinated political action. Disclosure rules may also trigger better sustainability performance by the individual enterprises: The undertakings which, as a matter of law, are required to report on sustainability issues and carry out due diligence are also incentivised to improve their performance if or when they find negative impacts, particularly when benchmarked against their peers. Hence, both the sustainability classification rules (such as the taxonomy), and the disclosure rules may indirectly lead to better performance; the rules are only «hard» concerning classification and transparency but are «soft law nudging» with regard to real action.

CSRD article 2 (17) defines «sustainability issues» as «environmental, social and human rights, and governance factors, including sustainability factors defined in point (24) of article 2 Regulation (EU) 2019/2088» while article 2 (18) defines «sustainability reporting- as «reporting information related to sustainability issues in accordance with articles 19a, 29a and 29d». Hence, the concept of «sustainability» in the CSRD is environmental and societal, not economic; however, the disclosure rules also pertain to the financial effects of such factors (as we will further explore below).

The 2013 Accounting Directive generally applies to the «undertakings» listed in Annex I (limited liability companies) or Annex II (other types of undertakings in which all participants actually have limited liability).

However, the sustainability reporting requirements will not apply to all undertakings subject to the directive and will enter into force sequentially. The Accounting Directive includes important definitions in this respect. Article 2 defines «public-interest entities» as undertakings whose transferable securities are admitted to trading in the regulated market of a member state («listed companies») or who are credit institutions, insurance companies or are designated by the member states as public interest entities.

Article 3 splits «undertakings» into four categories depending on size: micro, small, medium and large:

Undertaking	Balance sheet total (EUR)	Net turnover (EUR)	Average no. per FY
Micro	450,000	900,000	10
Small	5,000,000-10,000,000[44]	7,500,000-15,000,000[45]	50
Medium	25,000,000	50,000,000	250
Large	25,000,000	50,000,000	250

Micro undertakings are undertakings that do not exceed two or more limits set for them, small undertakings are undertakings that do not exceed two or more limits set for them. Medium-sized undertakings are undertakings that are not micro or small but exceed one of the limits set in the fourth line. Large undertakings are undertakings that exceed two or more of the limits set in the fourth line.

These limits apply on a company level and not on a consolidated (group) level. However, in accordance with CSRD article 29a a parent undertaking of a large group must disclose on a consolidated basis. Article 2 defines «large groups» as groups comprising parent and subsidiary undertakings which, on a consolidated basis, exceed at least two of the three limits set for large undertakings.

- The sustainability disclosure rules of the NFRD applied to large undertakings that were public-interest enterprises with more than 500 employees. For these undertakings, CSDR/ESRS will come into force for the fiscal year 2024 onwards (first reporting in 2025).
- CSRD/ESRS will then apply from the fiscal year 2025 onwards (with first reporting in 2026) to all large undertakings and large groups, with exemptions for some financial institutions for which 2026 will be the first fiscal year.
- CSRD/ESRS will apply from the fiscal year 2026 onwards (with first reporting in 2027) for listed small and medium undertakings. However, the requirements as to reporting content are less strict in these in accordance with article 19a.6, and they may postpone their first reporting to reporting in 2029 (for the fiscal year 2028).
- From fiscal year 2028 onwards (with first reporting in 2029), CSRD/ESRS will also apply to certain non-EEA undertakings Following CSRD article 40a; EU/EEA subsidiaries of a third- country undertaking, as

well as EU/EEA branches of a third-party undertaking generating a net turnover of more than EUR 40 million in the preceding financial year. In both instances the third-country undertaking must generate a net turnover of more than EUR 150 million at group level in the EU for each of the last two consecutive financial years.

The sustainability report shall be part of an undertaking's financial report. This «upgrading» (from the issuance of a separate sustainability report) is primarily meant to emphasise its importance, but could also be said to provide a *better context* for the analysis of the financial report: A sustainability factor/impact may trigger a sustainability risk with rising significance that eventually may have direct implications on the financial figures by warranting the depreciation of asset values etc. and weaken operational results, ultimately leading to loss of revenue and/or profit.

CSRD article 19a sets the general requirements as to the reporting content for the undertakings subject to a duty of disclosure, while article 29a sets similar rules for large groups on a consolidated basis. These articles incorporate the principleof double materiality: The undertakings are to report information necessary to understand (i) the impact of the undertaking/group on sustainability issues (cf. definition in article 2) and (ii) how sustainability issues affect its business and financial position. The first is an «inside-out» external sustainability impact perspective, the second is an «outside-in» internal business perspective (mirroring the distinction between scientific/societal concepts and the economic concept of sustainability risk as explained above, and the distinction between «sustainability factors» and «sustainability risk» in the SFDR).

Article 19a requires undertakings to (a) give a brief description of their business model and strategy, including (i) their resilience to risks related to sustainability issues and (ii) the opportunities related to sustainability issues. Importantly, it requires undertakings to report on (iii) any plans including implementing actions and related financial and investment plans they may have to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the EU Climate Act and, where relevant, their exposure to coal, oil and gas-related activities. The undertakings must also report (iv) how their business model and strategy take into account the interests of their stakeholders and the impact of the undertaking on sustainability issues; (v) how their strategy has been implemented concerning sustainability issues and (i) disclosure on the time-bound targets related to sustainability issues set by the undertaking, including, where appropriate, absolute GHG reduction targets for 2030 and 2050 as a minimum. The report shall contain a statement of whether the environmental targets are based on conclusive scientific evidence as well as information concerning the role of the administrative, management and supervisory bodies about sustainability issues, and of their expertise and relevant skills, etc.

Value chain information is covered in article 19a (3). Where applicable, the sustainability report shall include information about the undertaking's operations and value chain, including its products and services, business relationships and supply chain. For the first three years, if not all required information from the value chain is available, the undertaking shall explain the efforts made to obtain such information, the reason why not all the information could be obtained, and its plans to obtain such information in the future.

Article 19a (6) introduces the limited reporting obligations for small and medium-sized enterprise (SMEs) and «uncomplicated» financial institutions. These entities may limit their reports to (a) a brief description of the undertaking's business model and strategy; (b) a description of its policies in relation to sustainability issues; (c) its principal actual or potential adverse impacts on sustainability issues and actions taken to identify, monitor, prevent, mitigate or remediate actual or potential adverse impacts; (d) the principal risks to the undertaking related to sustainability issues and how the undertaking manages those risks; and (e) key indicators necessary for the disclosures referred to in points (a) to (d).

7.2.1 ESRS

CSRD article 29b empowers the Commission to adopt delegated acts with general reporting standards clarifying the content and structure of sustainability reporting. These standards shall «to the greatest extent possible» take account of global standard-setting initiatives for sustainability reporting, as well as financial participants' need for information to comply with the SFDR and TR indicators and methodologies, as well as other EU acts and declarations. Article 29c provides for simplified reporting standards for SMEs – these standards shall be proportionate and relevant to their capacities, characteristics and the scale and complexity of their activities. Article 40b provides for specific reporting standards for non-EEA companies.

This is the legal basis for the European Sustainability Reporting Standards (ESRS) to be adopted by the Commission, based on technical recommendations from the European Financial Reporting Advisory Group's (EFRAG), a non-profit association established under Belgian law with expertise in standardised reporting. In 2022, the EFRAG submitted a first set of 12 draft ESRS, which the Commission adopted in 2023 as the first set of general standards in Commission Delegated Regulation (EU) 2023/2772. The EFRAG is now working on sector-specific standards as well as the standards to be set for SMEs and non-EEA undertakings.

This first set of ESRS comprises 12 sections and contains two cross-cutting standards and ten topical standards. The first cross-cutting standard (ESRS 1) sets out the mandatory concepts and principles that companies should apply when preparing sustainability statements and includes various categories such as value chains, time horizons, etc. ESRS 2 addresses strategy, governance and materiality assessment and provides overarching disclosure requirements.

The ten topical standards cover specific ESG items, where the first five reflect the taxonomy objectives:

ESRS E1 addresses the disclosure of climate change impact, including GHG emissions, climate-related risks and opportunities, and the undertakings' strategies for mitigation and adaptation.

ESRS E2 addresses pollution management, including emissions of pollutants, waste management and strategies for reducing pollution.

ESRS E3 concerns disclosure on the use and conservation of water and marine resources, including water consumption, impacts on water ecosystems, and water management practices.

ESRS E4 requires reporting on an undertaking's impact on biodiversity and ecosystems, including habitat protection, biodiversity conservation efforts, and impacts of operations on natural habitats.

ESRS E5 addresses the undertaking's sustainable resource utilisation and integration of circular economy principles, such as resource efficiency, recycling, and waste reduction strategies.

ESRS S1 on «Own workforce» requires a company to report on social issues relevant to its workforce, including labour practices, employee rights, health and safety and workforce diversity.

ESRS S2 on «Workers in the value chain» concerns disclosures on the treatment of workers in the supply chain, focusing on fair labour practices, working conditions and supply chain responsibility.

ESRS S3 on «Affected Communities» requires the undertakings to report on their impact on local communities, including community engagement and development initiatives.

ESRS S4 on «Consumers and end users» concerns disclosures relevant to the rights and well-being of consumers, product safety, customer satisfaction and data protection.

ESRS G1 addresses ethical business practices and governance, including anti-corruption measures and lobbying efforts, etc.

The standards include detailed provisions for reporting and are intended to be aligned with global best practice standards such as the IFRS sustainability disclosure standards and the GRI. The ESRS includes phase-in provisions and relief in the first years, to reduce regulatory burdens and facilitate first-time applications. Nevertheless, reporting under ESRS will be a demanding task for the undertakings concerned, and their value chain undertakings.

This approach is revolutionary. The EU wants to introduce and implement a pan-European (and potentially global) reporting standard. The task is comparable with but much harder to achieve than the increased standardisation (and sophistication, as a consequence thereof) of European and international financial reporting over the latest 50-60 years.

The ESRS requirements are detailed and will be burdensome to many, precisely to provide for aligned reporting in the EEA. Still, it is important to recall that the main workload for the undertakings is – for the first time – to learn the legal framework, standards and digital reporting system (the ESAP) and establish the necessary internal reporting systems and procedures, not the sustainability reporting as such or subsequent reporting in the same format/system. Most of all, it is a matter of getting to know your business and value chain: The CSRD and ESRS necessitate *full sustainability due diligence* on the operations of the undertakings concerned and their value chain, as well as the development of efficient and robust *systems for monitoring, measuring and reporting the impact of ESG*.[46] For many years, undertakings, investors and government bodies have taken financial reporting *very* seriously and invested heavily in monitoring and reporting systems for this purpose. What the CSRD/ESRS requires is that sustainability issues are taken just as seriously – and not a second too soon, in our opinion.

7.2.2 Reporting sustainability – standardised digitalisation and light audit

The sustainability report must (as part of the management report) be published together with the undertaking's financial statements within a reasonable period, which shall be at the most 12 months after the balance sheet date, In accordance with CSRD article 30 (1). member states may require the undertakings to make the management report available to the public on their website free of charge.

Importantly, article 29d calls for a single electronic reporting format, as further defined in the Delegated Regulation (EU) 2021/815 feeding into the European single access point (the ESAP). Hence, all undertakings are to report the same content (to the extent relevant to their businesses) in the same digital format to a single data point.

The CSRD also provides for mandatory external assurance on sustainability reporting. Such an assurance is not a full audit. Compliance with the legal reporting requirements on sustainability is exempt from the general requirement in the Audit Directive article 34 on the auditor's confirmation of the undertaking's compliance with laws; the assurer to «express an opinion based on a limited assurance engagement» only as regards the compliance of the sustainability reporting with the requirements of the CSRD with the reporting standards (the ESRS), the process carried out by the undertaking to identify the information reported, and compliance with the requirement to mark-up sustainability reporting in accordance with article 29d and compliance with the reporting requirements provided for in TR article 8.

The statutory auditor or another auditor may provide assurance services. The member states may also allow an «independent assurance service provider» established in their territory to provide the service, on conditions provided for in the CSRD article 34 with further references. member states permitting independent assurance service providers must, within five years of the CSRD coming into effect, also be open to passporting such services within the EU (EEA).

7.2.3 Implementation into Norwegian law

It is proposed that the CSRD will be implemented into the Norwegian Accounting Act with amendments (and exchanged into NOK In accordance with the directive) in the definitions of undertakings:

Undertaking[47]	Balance sheet total (NOK)	Net turnover (EUR)	Average no. per FY
Micro	5,000,000	10,000,000	10
Small	84,000,000	168,000,000	50
Medium	290,000,000	580,000,000	250
Large	290,000,000	580,000,000	250

This means that the flexibility offered by the CSRD to maximise the balance sheet and turnover limits for «small undertakings» (to the rounded NOK equivalent of EUR 7.5 and 15 million, respectively, rather than EUR 5 and 10 million) is applied. Hence, there will, at least theoretically, be a higher number of Norwegian listed undertakings that qualify as micro undertakings and are not subject to a duty of disclosure.

The Accounting Act section 3-3c implemented the NFRD and extended its scope to include all public limited liability companies. This section will be cancelled as the CSRD is implemented in the Accounting Act.

7.2.4 The SFDR Disclosure Rules

Regulation (EU) 2019/2088 on sustainability-related disclosure requirements for the financial services sector (SFDR) applies to «financial market participants» and «financial advisors» offering certain financial investment services. Still, it excludesthe larger (and more ESG-critical) financial sectors of deposit-taking, lending, brokerage and corporate finance services by banks, investment firms in general and also insurance companies. The SFDR defines «sustainable investment»and classifies the various types of funds, cf. Chapter 2.6.1 for details. The topic here is the disclosure rules in the SFDR (cf. Chapter 6 regarding SFDR classification rules).

The SFDR came into effect on 10 March 2021, with additional applicable technical standards coming into effect later. Article 2 defines the key terms used throughout the regulation. The term «financial market participant» (FMP) is defined in article 2 (1):

a. an insurance undertaking with an insurance-based investment product (IBIP);
b. an investment firm that provides portfolio management;
c. an institution for occupational retirement provision;
d. a manufacturer of a pension product;
e. an alternative investment fund manager (AIFM);
f. a pan-European personal pension product provider;
g. a manager of a qualifying venture capital fund;
h. a manager of a qualifying social entrepreneurship fund;
i. UCITS management company;
j. a credit institution that provides portfolio management

The definition of a financial advisor (FA) is as follows per article 2 (11):

a. an insurance intermediary that provides insurance advice with regard to IBIPs;
b. an insurance undertaking which provides insurance advice with regard to IBIPs;
c. a credit institution which provides investment advice;
d. an investment firm which provides investment advice;
e. an AIFM which provides investment advice
f. a UCITS management company which provides investment advice

«Sustainability factors» are defined in SFDR article 2 (24) as «environmental, social, and employee matters, respect for human rights, anti-corruption, and anti-bribery matters» while article 2 (22) defines «sustainability risk» as «an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potentially material adverse impact on the investments value».

Hence, we see the distinction between the scientific and societal concept in article 2 (24) and the economical concept in article 2 (22).

Article 3 requires FMPs and FAs to be transparent about their policies on integrating *sustainability risk* in their decision-making processes. Article 5 requires their remuneration policies to address information on how such policies are consistent with such integration and publish this on their websites. Article 6 requires pre-contractual disclosures on how sustainability risks are integrated into investment decisions and the results of the assessment of their likely impacts on the returns of the financial products. If sustainability risks are deemed irrelevant, the descriptions shall include a clear and concise explanation.

Article 4 addresses the *integration of sustainability factors on an entity level* and requires that an FMP and FA shall publish on their website whether (a) they consider «principal adverse impacts on sustainability factors» –

also referred to as «*PAIs»* and explain their due diligence policies in this regard or (b) explain with «clear reasons» why they do not have such policies and whether and when they intend to consider PAIs in the future. Option (b) is not available to FMPs with more than 500 employees (on a group level) who must have a PAI policy on an entity level. FMPs and FAs that take PAIs into account shall by 30 June each year on their website, in a separate section titled: «Statement on principal adverse impacts of investment decisions on sustainability factors», publish information as specified in detail in this delegated act, cf. the Commission Delegated Act (EU) 2022/1288.

Article 7 includes additional disclosure requirements for financial products where sustainability factors are considered («sustainable investment products» or «Article 8 or Article 9 funds/products») with a clear and reasoned explanation of whether and, if so, how, a product considers PAIs. For other products (article 6 funds/products), there shall be a «prominent statement» that adverse impacts on sustainability factors have not been considered and the reasons why they have not been considered.

SFDR article 8 requires pre-contractual disclosures for article 8 funds/products that «among other things promote environmental or social characteristics», including how these characteristics are met, by using a reference benchmark, where applicable, for sustainable investments. Here we find key link to the TR article 6; the percentage of investments in taxonomy-compliant sustainable activities shall be disclosed. The Delegated Act (EU) 2022/1218 provides detailed rules for reporting, including a template in Annex 2. One requirement is a graphic representation/pie chart showing the taxonomy alignment percentage.

Article 9 pertains to financial products with «sustainable investment as their objective», detailing the disclosures required in pre-contractual documents. Many «green» investment products track an index of sustainable investments. The FMP/FA must disclose how the designated index is aligned with the objective and explain why and how the index differs from a broad market index. If no index has been designated as a reference benchmark, the FMP/FA must explain how the objective is to be attained for the relevant investments. Specific disclosures apply to investments aimed at reducing carbon emissions.

SFDR article 10 calls for website disclosure from the FMPs and FAs on how article 8 or 9 funds/products promote ESG characteristics and sustainable investments, including a description of these characteristics or objectives and the methodologies and data used to assess, measure and monitor this effort. SFDR article 11 requires periodic reports on the extent to which ESG characteristics are met for article 8 funds/products, while reporting on article 9 funds shall include the overall sustainability-related impact using relevant sustainability indicators or where an index has been designated as a reference benchmark, a comparison between the overall sustainability-related impact of the financial product with the impacts of the designated index, and a broad market index through sustainability indicators. Delegated Act (EU) 2022/1288 articles 50-67 with Annex IV and V templates provide details on required reporting.

There are also cross references to article 5 in the Taxonomy Regulation whereby the FMPs and FAs promoting article 9 funds must include information on the alignment with the taxonomy definition of environmentally sustainable investments under TR Article 3: The report shall specify the alignment percentage; the percentage proportion of investments in TR sustainable economic activities in each financial product, including details of the proportions of enabling and transitional activities. TR article 6 sets corresponding requirements for article 8 funds.

FMPs and FAs (and providers of sustainability indices) all need information from the «underlying» undertakings, in whose shares and bonds they are investing their clients' money. In the first period when the SFDR was in force there was limited information, which partly explains the «greenwashing» of some firms. This lack of information is now being remedied by the extensive mandatory disclosures from the underlying enterprises under TR and CSRD.

7.3 Taxonomy disclosure rules

As explained in Chapter 2, the taxonomy classifies economic activities as environmentally sustainable.

In addition, TR article 8 imposes specific disclosure obligations on all financial and non-financial undertakings subject to the obligation to disclose information on sustainability under article 19a or article 29a of the Accounting Directive (NFRD/CSRD):

In the report, these undertakings shall include information on how and to what extent their activities are associated with economic activities that qualify as environmentally sustainable under TR, including the following KPIs (Green Percentages/Green KPIs):

a. the proportion of their turnover derived from products or services associated with economic activities that qualify as environmentally sustainable under TR,

b. the proportion of their capital expenditures (Capex) relating to assets or processes associated with economic activities that qualify as environmentally sustainable under TR,

c. the proportion of their operational expenditures (Opex) relates to assets or processes associated with economic activities that qualify as environmentally sustainable under TR.

The duty to disclose applies to large public interest undertakings with more than 500 employees (undertakings subject to NFRD). However, the subject scope will expand with the CSRD's extension of scope on sustainability reporting, to include all large undertakings from 2026 onwards and listed SMBs from 2028 onwards.

Article 8 (4) authorises the EU Commission to adopt delegated acts outlining content and calculation methodologies for sustainability indicators. This was the basis for the Commission Delegated Regulation (EU) 2021/2178 (Taxonomy Disclosure Delegated Act or TDDA, which standardises how the undertakings are to disclose taxonomy-relevant matters. The Commission has also published FAQs to help companies understand and implement their disclosure obligations effectively.

The TDDA introduces different rules for the various subject entities on the methodology to be applied when calculating KPIs and additional information to be provided.

In accordance with TDAA article 2, non-financial undertakings are to disclose the information specified in Annex I in tabular form using the templates in Annex 2. Article 3 requires asset managers to disclose in accordance with Annexes III and XI using the templates in Annex IV. article 4 requires credit institutions to disclose in accordance with Annexes V and XI using the templates in Annex VI, which include «green asset ratios» (GARs) reflecting the proportion of assets financing/invested in TR sustainable activities to the total assets of the institution. Article 5 requires investment firms to disclose in accordance with Annexes VII and XI using the templates in Annex VIII, including GARs. Article 6 requires insurance and reinsurance to be disclosed following Annexes IX and XI, using the templates in Annex X.

TDDA article 7 includes general provisions for all financial undertakings on how their KPIs are to be calculated. Exposures to central governments, central banks and supranational issuers shall, as a rule, be excluded from the numerator and denominator. General financing exposure shall be included in the numerator weighted by the turnover and Capex KPIs of the issuer. To illustrate: A fund's equity stake in a company reporting 40% TR alignment shall be included in the funds KPI nominator with 40%.

Importantly, financial undertakings shall exclude exposures to undertakings that are not obliged to disclose sustainability information under the Accounting Directive (NFRD/CSRD) from the numerator but not from the denominator. This means that a loan to a non-listed SME not subject to the CSRD, or to a large undertaking not yet reporting under the CSRD, will reduce the green KPIs of the financial undertaking. There is an exemption for green bonds and other debt instruments financing taxonomy-aligned activities, with a «grandfathering» clause for such bonds in article 7 (5); bonds stay green for five years upon stricter TSC being introduced on the borrowing company.

Exposures to undertakings that are not subject to NFRD/CSRD but provide equivalent information on a voluntary basis may possibly be included in the numerators from 1 January 2025, subject to a decision by the Commission In accordance with TDDA article 9 (3). This *intentional statement* by the Commission is intended to motivate borrowing companies to align with the taxonomy and provide the relevant sustainability information in order to improve their bank's KPI (on a not necessarily fully voluntary basis) as a stimulus for the financing of SMEs without subjecting them to the CSRD/ESRS framework. Without such an exemption, there will be no incentive on credit institutions and other financial undertakings to require taxonomy alignment and disclosure by non-listed SME clients but rather an incentive to reduce the financing of such companies to improve the financer's Green KPIs.

TDDA article 7 (7) provides a carve-out whereby financial undertakings may use estimates for assessing the TR alignment of exposures to third-country undertakings (not subject to disclosure rules In accordance with the

CSRD) to demonstrate compliance with the taxonomy article 3 criteria (apart from letter b) on DNSH criteria, as this is a much more demanding compliance assessment).

The disclosure required under TR article 8 includes more than the KPIs (green percentages). TDDA article 8 calls for a breakdown of exposures of financial undertakings into sectors, while article 9 calls for «additional disclosures accompanying the KPIs as specified in the Annexes».

The TR disclosure obligations were implemented in increments in terms of subject and content: From 2022 onwards, all undertakings subject to NFRD were obliged to report their KPIs based on *taxonomy-eligible activities*. Taxonomy eligibility and taxonomy alignment are not the same, cf. TDDA article 1 (5) and (6), whereby a «taxonomy-eligible economic activity» means that the activity is listed in TR Delegated Acts while «taxonomy-aligned economic activity» is an activity that meets the TR Delegated Act TSC. From 1 January 2023 onwards (first based on 2022 figures), non-financial undertakings were obliged to report their KPIs based on *taxonomy alignment*. From January 2024 onwards (initially based on 2023 figures), financial undertakings were obliged to report their KPIs on taxonomy alignment to the extent that the underlying borrowers/investee companies had reported their own alignment.

The TR disclosure scope will be extended in line with the CDRD expansion; all large undertakings must report KPIs for the first time in 2026 based on their 2025 figures and all listed SMEs are obliged to report their KPIs in 2027 at the earliest. The financial undertakings that finance these new subjects will then «lag» one year in converting the relevant exposures from taxonomy-eligible to taxonomy-aligned or non-aligned.

7.4 The Greenwashing Prohibition Framework

The disclosure rules introduce positive requirements on undertakings regarding what to report and how to report on sustainability issues, with the direct aim of providing transparency and the indirect aim of preventing greenwashing. These rules are supplemented by two recent legislative acts dealing with misleading reporting and greenwashing.

The Green Transition Directive (EU) 2024/825 amended the Unfair Commercial Practices Directive (2005/29, UCPD) and the Consumer Rights Directive (2011/83,CRD) banning «environmental claims related to future environmental performance» that are «without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan (with) (....) measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings are made available to consumers». It also prohibited generic environmental claims such as «environmentally friendly», «eco-friendly», «green» and similar where performance cannot be demonstrated by reference to a recognised labelling scheme (such as Regulation 66/2010 on EU Ecolabel or EN ISO 14024 ecolabelling schemes in the member states.

This is likely to be supplemented by a new *Green Claims Directive* following up on the Commission Proposal 2023/0085(COD). The proposal concerns environmental claims and labelling in business-to-consumer practices and introduces strict requirements on substantiation (including a verification and pre-approval system), communication of claims and environmental labels and labelling schemes. The proposal will be finally reviewed by the new Parliament following the elections in June 2024.

8 Sustainability performance requirements

8.1 Introduction

Ultimately, ESG/sustainability is concerned about the real world of real people with their commercial, private and or politically motivated actions manipulating the environment, extracting and using natural resources and impacting environmental or social conditions. Sustainability classification systems and disclosure rules are merely preparatory measures in this regard. They can be seen as impotent tools when considering the urgency of climate and environmental issues. What is needed, many people will say, are prescriptive rules: *mandatorylaws requiring change.* A sustainable future will probably also require a major change of personal attitudes and values and the significant distribution of welfare on a global scale, meaning goodbye to the obsession with GDP and everlasting growth. This suggests that a too proscriptive approach could backfire.

The question also remains at to what the most efficient tool is for a green transition: strict prescription or other forms of inducements or nudging. Today's green transition is very much an investment game that is working overtime in global and fundamentally capitalist economies, where the approach of the EU is to *prepare and condition for private, market-based and more or less voluntary sustainability efforts*. One goal is to change the short-termism of financial and commercial markets (where economic profit is all that matters and the future is measured in months, and long-term sustainability not an issue) into a long-term perspective with a society of sustainable economic activities; this will only be achieved by promoting investments in the technology, new products and production facilities that are required. The EU wants to *play with commercial participants* to establish a sustainable society and not dismantle capitalism or «rein in» commercial drivers more than necessary. After all, the EU project is still also about *creating efficient European markets* with fair competition and freedom of movement for goods, services, capital and people, with the overall aim of stimulating economic growth and prosperity, as well as private and public welfare. Hence, the EU has a long record of removing national obstacles to efficient internal markets.

The EU also has a long legislative record on environmental issues and labour matters. Since our book does not aim to cover these subjects or human rights in general, or company law on corporate governance, our focus in this chapter is very selective: We only discuss the CSDDD as a general framework on sustainability, and the performance standards relevant to the finance industry. This is partly because of our (limited) field of expertise, partly because environmental laws are probably best explained and best understood *sector-wise* as an integrated part of energy law, shipping law, aviation law, planning and real estate law, mining law, consumer protection law, etc.

However, we make an exception by providing a brief overview of legislation concerning Taxonomy Objective 1 on climate change that has been a priority for the EU over the last decade, with the Climate Act (Regulation 2021/1119) and the Fit for 55 packages as recent key initiatives to ensure that the climate target for 2030 of a 55% reduction in GHG emissions (and possibly a 90% reduction by 2040) and net-zero GHG emissions in 2050 is met. Here, the EU has issued several sector-specific regulations with mandatory requirements and «nudging» to support market-driven changes. The key policy aim is to increase demand for renewable and low-carbon fuels and gradually reduce carbon emissions.

For an update on the delivery under this plan, see the Fit for 55: Delivering on the proposals.

A key element was the strengthening of the reduction targets for the major GHG-emitting enterprises in the ETS (with the ETS2 and CBAM forthcoming) and reduced national quotas in ESR and a call for GHG balance in LuLUCF (cf. Chapter 4.2. above) but the package also included a number of sector-specific initiatives:

One element was the update of the Renewable Energy Directive (EU) 2023/2413 setting a binding overall renewable energy target of at least 42.5 percent at EU level by 2030 but aiming for 45 percent. It also includes a revised Energy Efficiency Directive ((EU) 2023/1791) that raises the ambition on energy efficiency and introduces "energy efficiency first» as a fundamental principle of EU energy policy with legal standing, meaning that energy efficiency must be considered by the member states in their policy and major investment decisions that are taken in the energy and non-energy sectors. Of relevance is also Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action («the Governance Regulation»).

Another element was the strengthening of the Energy Performance of Buildings Directive 2010/31/EU. This directive required all newbuilds to be «early zero energy buildings» from 2021 onwards; this goal is now to be strengthened with a requirement that all new building shall be «zero energy buildings» from 2030 onwards, and also calls for the renovation of existing buildings to improve energy performance, with important deadlines in this decade.

A recent market-nudging initiative is the *RefuelEU Maritime*; Regulation on the use of renewable and low-carbon fuels in maritime transport (EU) 2023/1805. This regulation requires vessels operating from or visiting European ports to use an (increasing) percentage of non-fossil fuel. The aim is to stimulate the commercial production of and efficient markets in non-fossil fuels such as hydrogen or electricity. (As for the shipping sector, it is worth remembering is that around 50 percent of world tonnage carries oil, gas or coal. Hence, a transition to renewable energy will fundamentally change international shipping.)

The *ReFuelEU Aviation* is a similar initiative to make the aviation sector use less fossil fuel and stimulate alternative markets, see Regulation (EU) 2023/2405.

Another recent initiative to combat climate change is the Deforestation Regulation (EU) 2023/1115 to protect the world's forests as natural carbon sinks. It targets European enterprises (including traders) that buy and sell the commodities (or products containing or made from them) soy, beef, oil palm, wood, cocoa, coffee and natural rubber. The regulation prohibits the purchase of such products harvested from deforested fields after 2020 and requires the provision of due diligence statements.[48]

The more general take-away is the following: Europe is a «capitalist» society in which commercial interests and capital owners are key players, and a green transition will require a major reallocation of their capital to sustainable investments. This is to be facilitated and stimulated by the classification and disclosure rules as the framework for a robust transition. But the EU is not waiting for the change to happen but continuously introducing legislative instruments to stimulate change. In this regard the *sequencing* of the Taxonomy regulation (of 2020), followed by CSRD/ESRS of 2022 and the new CSDDD of 2024 is illustrative, with enforcement similarly sequenced.

The political climate can, of course, change, and the green transition be put on hold or possibly reversed. However, the EU has now put in place a legal framework that sets limits on what future EU politicians and member state politicians can do in terms of environmental harm. Amending existing EU legislation requires large majorities in the legislative bodies. The EU is first and foremost a *legal system*, and the judicial system of the EU (the CJEU and national courts) has now received a «potent» set of legal standards to apply. These courts, together with the European Court of Human Rights, are now going to be key supervisors of the sustainable transition.

This new *legal age of sustainability* is the topic for the last two chapters of this book.

8.2 The Corporate Sustainability Due Diligence Directive

8.2.1 Introduction

The Corporate Sustainability Due Diligence Directive (CSDDD) has a turbulent history. A formal starting point was the Sustainable Corporate Governance initiative in 2020, where the Commission responded to a call from the Parliament in 2018. The Commission asked for feedback on inter alia a reorientation of the traditional company governance standards from a shareholder perspective to a broader stakeholder perspective, as championed by voices calling for more sustainability in business. This would impact mandates and liabilities for corporate decision-makers (company directors and executives) and was subject to severe criticism. In 2022, the Commission issued a draft sustainability due diligence directive with a modified approach to this topic.[49] In December 2023, the Council and the Parliament reached a provisional agreement on an amended version. It was expected that this agreement would be approved by the Council, but political support eroded in certain quarters (including Germany) in early 2024 and the agreement did not have the sufficient majority support in the Council. This led to closed-door negotiations. The Council approved a watered-down version that was approved by the Parliament on 24 April 2024 and formally approved by the Council on 24 May.[50] Following such approval the directive is likely to be set in force in mid-2024. The member states will have two years to transpose the directive into their national laws. The CSDDD will clearly be relevant to the EEA, and we expect it to be included in the EEA Agreement.

The CSDDD is the EU's effort to improve the preservation of human rights and environmental standards by European businesses globally and strengthen corporate efforts to meet the Paris Agreement climate targets. Key side motive is to harmonise legal frameworks in the EU and promote legal certainty, thereby creating a level playing field for European commercial enterprises. Some member states (and Norway by way of the Transparency Act) have national laws on sustainability due diligence, leading to a certain fragmentation among EU/EEA member states. Moreover, as a globally important market, the EU carries more weight. Hence, the preamble (71) describes a desire to «better exploit [...] the potential of the single market to contribute to the transition to a sustainable economy and contributing to sustainable development through the prevention and mitigation of potential or actual human rights and environmental adverse impacts in companies» chains of activities [that] cannot be sufficiently achieved by the member states acting individually or in an uncoordinated manner [addressing] problems and their causes that are of a transnational dimension [...] where individual member states' measures risk being ineffective and lead to fragmentation of the internal market.

8.2.2 General content

The main elements are described in article 1 as:

(a) laying down legal obligations for certain corporate undertakings with respect to handling actual and potential human rights and environmental adverse impacts caused by their own operations, subsidiaries and value chain business partners,

(b) to establish liabilities for violations of these obligations, and

(c) laying down a legal obligation to adopt and put into effect a transition plan for climate change mitigation to ensure, through best efforts, compatibility of the business model and strategy with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C.

This broadens the content and legal impact beyond the Norwegian Transparency Act (cf. below).

The CSDDD does not introduce new environmental standards, human rights or social responsibilities but refers to existing international legal instruments as specified in Annex (cf. below). The new and important element is that undertakings subject to the CSDDD are placed under legal obligations with corresponding liabilities for any breach: human rights are no longer a state responsibility only or up to national legislation. In this respect, the CSDDD converts the internationally recognised voluntary soft law standards of the OECD Guidelines on multinationals into hard European law. This is also true in the literal sense; the due diligence obligations prescribed in the CSDDD articles 7-16 is based on the OECD guidelines.

Importantly, the CSDDD concerns more than due diligence in the narrow sense of «factfinding» on the environmental or human rights impact of a business. Factfinding is only the first due diligence step; the CSDDD also calls for prevention, mitigation and remediation of adverse effects, with legal liabilities for any damage caused. Hence, the directive is more fundamentally a *corporate sustainability responsibility directive.* The background for this is that voluntary international initiatives – including the OECD Guidelines – have proved insufficient; there is clearly a need for stricter obligations enforced by regulatory and judicial supervision, and legal sanctions.

8.2.3 Subject undertakings

Subject entities in accordance with CSDDD article 2 include companies incorporated in the EU area that

a. has more than 1000 employees on average and a net worldwide turnover of more than EUR 450 million in the last financial year, or
b. is a g a parent company of a group that reaches the thresholds; or
c. is party to franchising or licensing agreements with third-party companies to ensure a common identity, business concept and uniform business methods and which triggered royalty payments of more than EUR 22,5 million in the last financial year and had a net worldwide turnover of more than EUR 80 million in the last financial year.

Following article 2 (2), it also applies to third-country incorporated companies meeting these conditions, with the exemption that there are no requirement of 1000 employees.[51]

Article 2.3 provides an exemption for ultimate parent companies whose main activity is to hold shares in operational subsidiaries without engaging in management, operational or financial decisions, following an application to the relevant (national) supervisory body. There is also an exemption for AIFs and UCIT funds; such funds are rarely engaged in management of their investee/target companies.

Article 30 calls for sequential implementation: CSDDD will apply from three years after the directive is set in force (meaning mid-2027) for companies with more than 5000 employees and EUR 1.5 billion in turnover, one year later for companies with 3000-5000 employees and turnover of over EUR 900 million, and one year later for the rest. Similarly, there is a sequencing for third country companies depending on whether their EU turnover exceeds EUR 1500 billion, 900 or 450 million.

The CSDDD requires EU/EEA member states to implement national legislation by directive requirements for the subject companies incorporated in their jurisdiction. However, the CSDDD provisions do not apply to the EU/EEA states as such, nor to state institutions or state enterprises not organised as (limited liability) companies in accordance with the Accounting Directive definition. This is in line with the customary approach in EU legislation, although it is rather strange in a sustainability context: Many enterprises/undertakings with a large turnover many thousands of employees and a potentially significant sustainability impact in Europe are state-owned facilities in the transport (aviation, rail transport, etc.) and energy sectors and housing sector. Furthermore, activities in other sectors, such as health services may have a huge social or environmental effect. The regulatory omission is a traditional one, and do not to include these in the legislative frameworks (as we shall see there is only a «light» link in the CSDDD article 31).

This is the same for the CSRD, which introduced disclosure rules to the commercial sector only (while the taxonomy classifications are independent of corporate structures and target many activities traditionally performed by state bodies or enterprises). With respect to the disclosure rules, this is of great importance as there is no EU legislation or international instrument calling for state disclosure of sustainability information (apart from the requirements under the UNFCCC/Paris Agreement on GHG budgets, etc.).

The international human rights and environmental law instruments referred to in the CSDDD Annex are, however, directly binding on the states. In this regard, there is no need for a CSDDD to make them responsible. The extent to which a state can be held liable in a domestic court for violation of state obligations under international law is, however, in principle, a matter of national law. The most important legal effect of the limitation of the scope of the CSDDD to companies only is that it is still up to national law (and other international laws) to what extent states and state-owned enterprises (apart from companies) can be held liable for damage caused by a breach of international human rights or environmental laws.

8.2.4 Key definitions

Article 3 contains definitions, including a definition of «companies» referring to the list of companies in Annex 1 and 2 under the Accounting Directive.

Key definitions include (b) defining «adverse environmental impact» to mean an «adverse impact on the environment resulting from the breach of one of the prohibitions and obligations listed in Part I, points 15 and 16, and Part II of the Annex, taking into account national legislation linked to the provisions of the instruments listed therein». The reference to national legislation may strengthen the supra-national aspects for EU member states cf. the preamble (32) explaining that these instruments shall be interpreted in line with international law and «general principles of Union environmental law, as set out in the article 191 TFEU». The point is that these international laws are also part of EU law, which is national law in the various member states and is not left to implementation *by* the member states.

Letter (c) defines «adverse human rights impact» as meaning «an impact on persons resulting from (i) an abuse of one of the human rights listed in the Annex I, Part I Section 1, as those human rights are enshrined in the international instruments listed in Annex I, Part I Section 2 and (ii) an abuse of a human right not listed in the Annex I, Part I Section 1, but included in the human rights instruments listed in the Annex I, Part I Section 2, provided that the human right can be abused by a company or legal entity; (...) directly impairs a legal interest protected in the human rights instruments listed in Annex I, Part I Section 2; and the company could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case, including the nature and extent of the company’s business operations and its chain of activities, characteristics of the economic sector and geographical and operational context».

Hence, the CSDDD does not establish new legal definitions on environmental standards and human rights but *incorporates* existing international laws on environmental issues and human rights referred to in the Annex in a legally binding framework for the companies subject to the CSDDD.

In respect of human rights, the key legislative documents are the 1966 UN covenant on Civil and Political Rights (the CPR), the 1966 UN covenant on Economic, Social and Cultural Rights (the ESC) and the ILO documents concerning employment rights. The definition of «adverse human rights impact» in the CSDDD article 2 provides for different protection levels for the human rights explicitly listed in Annex 1, Part I, section 1 (to be interpreted in line with the instruments referred to) and the human rights derived from the general and encompassing legal instruments referred to, with further qualifiers in respect of the latter.

The explicitly listed human rights include the right to life, protection from torture, cruel and inhuman or degrading treatment, the right to liberty and security, protection from arbitrary or unlawful interference with privacy and family life or freedom of thought, the right to enjoy just and favourable conditions of work, including a fair wage and an adequate living wage/income, decent living when provided by the company, safe and healthy working conditions and reasonable limitations of working hour, the right of the child to be protected from economic exploitation, prohibition of forced or compulsory labour, right to freedom of association, assembly and the right to organise and collective bargaining and protection from discrimination.

Annex Part, I section 1, item 15, offers explicit protection for *environmental human rights,* defined as «causing any measurable environmental degradation such as harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation, that (a) substantially impairs the natural bases for the preservation and production of food; (b) denies a person access to safe and clean drinking water; (c) makes it difficult for a person to access sanitary facilities or destroys them; (d) harms the health, safety, the normal use of land or lawfully acquired possessions of a person; or (e) substantially adversely affects ecosystems contributing directly or indirectly to human wellbeing, all as interpreted in line with CPR article 6 (1) and ECS articles 11 and 12».

Another environmental human right is specified in item 16, dealing with «the rights of individuals, groupings and communities to lands and resources» and «the right not to be deprived means of subsistence» which entails probations on unlawful eviction, «land grabbing» or the use of forests and waters, including by deforestation, where the land, forests or waters »secures the livelihood of a person» as interpreted per the CPR articles 1 and 27 or articles 11 or 12 of the ECS.

In respect of «pure» environmental legal standards, Annex section 2 refers to international agreements dealing with the objectives 3-6 in the TR (conventions on biodiversity and regulations on hazardous substances and waste) – in some instances, as they are implemented in the EU legislation referred to.

The international instruments to mitigate climate change (most importantly, the UNFCCC and the Paris Agreement) are not on the list; the Commission's proposal to add this to the list was not approved by the legislative bodies. This means that the climate change risks and actions are not governed by the due diligence obligations in articles 7-14 but by article 22 calling for a transition plan to meet the Paris Agreement targets (cf. below in chapter 8.2.7). However, Annex part I, section 1, items 15 and 16 may trigger liabilities for enterprises that cause severe climate change that affects the human rights referred to there (cf. below in Chapter 9).

It is important to note that *EU legislation* on environmental issues and social and human rights falls outside the scope of the CSDDD, cf. article 1 (3) making it clear that other EU legislative acts shall prevail. This means that similar or stricter environmental standards under EU law have the effect of EU/EEA law in general (including the important distinction of no horizontal effect but a vertical effect for directives for private undertakings) and liabilities attached.

The relevant EU rules include the Charter on Fundamental Rights, which is a part of EU law, cf. Chapter IV in particular. The EU is not party to the European Convention on Human Rights (ECHR), but the ECHR is binding on all EU/EEA member states and the rights specified in the ECHR are considered as «general principles of EU law» by the CJEU and highly relevant when interpreting the mirroring provisions of the Charter and other elements of EU law.

Like other international laws, the ECHR is directed at states with no «horizontal» direct effect on private undertakings but include positive obligations on the contracting member states to protect the human rights enshrined therein. A party who believes that their human rights in accordance with the ECHR have been violated can, per the ECHR, instigate legal proceedings in national courts that can ultimately be brought before the European Court of Human Rights. Thus, in respect of the ECHR there is already an efficient system in place concerning access to court and legal liability for states for transgressions.

This does not preclude litigation actions under EU law against the member states for breach of the ECHC, as a breach of the ECHR may also constitute a breach of EU law and be enforced under the general system of EU law with the CJEU as the ultimate court presiding over the national courts in their capacity as EU law courts. However, the fact that the CSDDD does not refer to the ECHR but to (global) international law instruments means that private undertakings subject to the CSDDD cannot be held liable under the CSDDD for a breach of human rights in accordance with the ECHR.

Other important definitions in article 2 are (e) «business partner»meaning an entity i) with whom the company has a commercial agreement related to the operations, products or services of the company or to whom the company provides services pursuant to point (g) («direct business partner»), or ii) which is not a direct business partner but which performs business operations related to the operations, products or services of the company («indirect business partner»)».

Related thereto, point (g) defines «chain of activities» to mean (i) activities of a company's «upstream business partners» related to the production of goods or the provision of services by the company, including (...) and (ii) activities of a company's «downstream business partners» related to the distribution, transport and storage of the product, where the business partners carry out those activities for the company or on behalf of the company, excluding the distribution, transport, storage of the product being subject to the export control under the Regulation (EU) 2021/821 (...) after the export of the product is authorized».

This means that a company is responsible for adverse impacts stemming from suppliers and business partners involved in the provision by the company of its products and services, including «downstream» chains assisting the company in its production and delivery. The company is, however, not responsible for adverse impacts stemming from its customers' use of its products and services.[52]

Importantly, the CSDDD does not apply to a «value chain» definition but a more limited «business partner» chain definition. This is of particular importance to the downstream scope. Here, the OECD Guidelines on multinational companies are more extensive, cf. the OECD MNG Commentary in Chapter II, item 17, excluding retail customers but including investee companies, commercial clients and joint venture partners, as well as commercial buyers of a company's products and services.

This is key topic, as European and other international companies may otherwise engage with companies committing transgressions of human rights or environmental standards behind a «legal shield» of supposed independence. One illustration is *beaching*; the dismantling of a ship by running it onto a beach (in Bangladesh or elsewhere) and dismantling it through manual labour. This is the cheapest way to dismantle a ship and reuse the materials, but it is a health hazard to those involved and may be a significant source of pollution. The CSDDD will cover operations where a European ship owning company or its subsidiaries are in charge of such operations, but not operations where a local (or international) company buys the vessel from the shipowner and then carries out the beaching – this would be covered by the OECD Guidelines.

One particular aspect of the more limited CSDDD definition is that financial companies (such as credit institutions) are not responsible for the impacts caused by investee companies or the commercial clients they are financing: the borrowers or other clients of a European bank are not a downstream «business partner» within the meaning of the CSDDD. Hence, European credit institutions and other financial institutions and investment firms may continue to provide financial support to companies violating human rights and environmental standards. This limitation has been heavily debated and article 36 (cf. the preamble (70)) requires the Commission, no later than two years after the date when the CSDDD is set in force, to submit a report on the need for requirements tailored to regulated financial undertakings with respect to the provision of financial services and investment activities.

Article 2 also includes other important definitions, including the definition of «*stakeholders»* to mean the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships; «*severe adverse impact»* to mean an adverse environmental impact or an adverse human rights impact that is especially significant by its nature, or affects a large number of people or a large area of the environment, or which is irreversible, or is particularly difficult to remedy as a result of the measures necessary to restore the situation that prevailed prior to the impact, and «*appropriate measure»* to mean a measure that is «capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action».

8.2.5 Level of harmonisation

CSDDD article 4 sets the level of harmonisation. This is primarily a minimum directive but calls for full harmonisation with respect to certain obligations: Member states may not introduce national laws with obligations diverging from the articles 8(1) (identifying and assessing adverse impacts), 10(1) (prevention) and 11(1) (bringing adverse impacts to an end) but with exemptions: In accordance with article 1(2), members states are not required to reduce their current level of protection of human, employment and social rights or environment or climate under national law or applicable collective agreements. Further, under article 1 (3), protection under other EU legislative acts will prevail. Finally, in accordance with article 4(2), a member state may introduce national provisions that are more «stringent» or that «are more specific in terms of the objective or the field covered».

8.2.6 Due diligence requirements

Article 5 requires member states to ensure that companies conduct a risk-based human rights and environmental due diligence by carrying out actions as further defined in articles 7 to 16, with support on group level in accordance with article 6. The obligations on the companies include the following:

1. To have in place a due diligence policy developed in consultation with the company's workers and their representatives;
2. Identify and assess adverse human rights and environmental impacts;
3. Prioritise these adverse impacts based on their severity and likelihood;
4. Prevent and mitigate as well as bring to an end and minimise the extent of potential and actual adverse human rights and environmental impacts;
5. Provide remediation to actual adverse impacts;
6. Carry out meaningful engagement with stakeholders;
7. Establish and maintain a notification mechanism and complaints procedure;
8. Monitor the effectiveness of the measures taken;
9. Communicate publicly on the due diligence conducted; and

A company must review and update its due diligence process at least annually (every 12 months), or in the event of significant changes in its operations or an operating context. Impacts are to be assessed based on their severity and likelihood, considering both potentially affected stakeholders and scientific evidence.

A key fully harmonised provision is article 8(1) on the obligation of companies to take appropriate measures to identify actual or potential adverse human rights and environmental impacts in their operations, in their subsidiaries and those of their «business partners in «the chain of activities». In this regard the undertakings shall, taking into account relevant risk factors, take appropriate measures to: (a) map their own operations, those of their subsidiaries and those of their business partners in the chain of activities in order to identify general areas where adverse impacts are most likely to occur and be most severe; (b) based on the results of the mapping, carry out an in-depth assessment in the areas where adverse impacts were identified to be most likely to occur and most severe.

Article 9 requires – where it is not feasible to prevent, mitigate or bring to an end or minimise all identified adverse impacts at the same time to their full extent – companies to prioritise adverse impacts identified in order to fulfil the obligations under article 10 or 11, based on the severity and likelihood of the adverse impacts (in this respect the cost of actions are not, as such, a prioritising factor).

Article 10 requires appropriate measures to prevent potential adverse impact that «has or should have been» identified, or adequately mitigate those impacts where prevention is impossible or requires gradual implementation. This article also identifies elements to be taken into due account when designing the appropriate measures, such as whether the impact is caused by the company, subsidiary or business partner and its «ability to influence» the business partner.

Article 10 (2) identifies specific measures to be taken to the extent relevant, including (a) to develop and implement a prevention action plan, with reasonable and clearly defined timelines, (b) to seek contractual assurances from a direct business partner that it will ensure compliance with the company's code of conduct and prevention action plan, (c) make necessary financial or non-financial investments, adjustments to its business plan, overall strategies, operations, design and distribution practices; (d) provide targeted and proportionate support for an SME business partner, and (e) to the extent permitted by law, collaborate with others to increase its ability to prevent or mitigate the adverse impact. The company may also engage with and/or seek contractual assurances with an indirect business partner, to be accompanied by the appropriate measures to verify compliance, cf. article 10 (3) to (5).

Article 10 (6) addresses potential adverse impacts that could not be prevented or adequately mitigated by the above measures, and requires, as a last resort, and to the extent permitted by law, the company to refrain from entering into new or extending existing relationships with a business partner with respect to the relevant chain of activities, and a) adopt and implement an enhanced prevention action plan by «using or increasing its leverage through the temporary suspension of business relationships» concerning the activities or b) ultimately terminate the business relationship with respect to the activities where the potential adverse impact is «severe». The company shall first assess whether the adverse impacts of doing as reasonably expected are «manifestly more severe», in which case it is not required to suspend or terminate.

Article 11 requires appropriate measures to end actual adverse impacts that are or should have been identified under articles 8 and 9. The measures shall be designed to take into account whether the impact is caused by the company alone or a subsidiary or business partner and its «ability to influence» the business partner. Where an adverse impact cannot be immediately brought to an end, its extent shall be minimised. Article 10 (3) requires companies to take the following appropriate measures where relevant: (a) neutralise the adverse impact or minimise its extent, with actions proportionate to its severity and the company's implication in it; (b) where adverse impact cannot be immediately brought to an end, without undue delay, develop and implement a corrective action plan with timelines and qualitative and quantitative indicators for measuring improvement, (c) seek contractual assurances from a direct business partner on its compliance with the company's code of conduct and corrective action plan, (d) make the necessary financial or non-financial investments and adjustments to its business plan, overall strategies and operations etc., (e) provide «targeted and proportionate support» for an SME business partner, (f) to the extent permitted by law, collaborate with other entities, and (g) provide remediation in accordance with article 12.

If the above is insufficient, the company may seek contractual assurances with an indirect business partner, to be accompanied by the appropriate measures to verify compliance, cf. 11 (4) and (5). Per article 11 (6), as a last resort, the company must refrain from entering into new or extending existing relationships with a business partner concerning the relevant activities (where permitted by the governing law) and implement an enhanced corrective action plan, using or increasing the company's leverage through temporary suspension of business relationships with respect to the activities concerned, and if this fails to remedy the matter, terminate the business relationship with respect to the relevant activities if the actual adverse impact is severe, following an assessment on whether the adverse impacts of doing so could be reasonably expected to be manifestly more severe, in which case it is not required to do so.

Article 13 calls for «meaningful engagement with stakeholders», while article 14 requires a notification and complaints system. Article 15 titled «monitoring» requires companies to periodically assess the adequacy and effectiveness of their due diligence measures, article 16 provides for companies to report on the matters covered and publish an annual statement on their website, unless the companies are subject to sustainability disclosure under the CSRD or exempted thereunder, with reporting to the European single access point (ESAP) In accordance with article 17.

Article 18 requires the Commission to seek guidance about non-binding model contractual clauses to help companies comply with article 10(2) and 11 (3). In accordance with article 19, the Commission, following consultations, shall issue general, sector and impact-specific guidelines on the due diligence operations (and on transition plans in accordance with article 22) while article 21 requires the Commission to establish a helpdesk.

Article 20 requires the member states to provide «accompanying measures» in the form of dedicated websites, portals or platforms, financial support to SMEs, and facilitation of joint stakeholder initiatives. This provision also clarifies that companies may take part in industry schemes and multi-stakeholder initiatives to support the implementation of due diligence and that the Commission, in collaboration with member states, may issue guidance setting fitness criteria and methodology for assessing the fitness of such schemes. Article 20 also regulates the use of third-party verification on compliance with the due diligence obligations. Such verification will not, as such, imply that the companies are exempted from penalties under article 27 or civil liabilities under article 29, but in practice it will likely be key factor in assessing negligence.

8.2.7 Article 22 – transition plans to mitigate climate change

Article 22 requires companies subject to the CSDDD to adopt and put into effect a transition plan for climate change mitigation that aims to ensure, «through best efforts», that the company's business model and strategy is «compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality as established in the Climate Act, including its intermediate target, and where relevant, its exposure of the company to coal, oil and gas-related activities.

In accordance with article 22(2), the plan shall contain (a) time-bound targets related to climate change for 2030 and in five-year increments up to 2050, based on conclusive scientific evidence and including, where appropriate, absolute emission reduction targets for scope 1-3 greenhouse gas emissions for each significant category; (b) a description of the «decarbonisation levers» identified and key actions planned to reach such targets including, where appropriate, changes in the undertaking's product and service portfolio and the adoption of new technologies; (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan; (d) a description of the role of the administrative, management and supervisory bodies with regard to the plan.

Article 22(3) provides that companies that report a transition plan for climate change mitigation in accordance with CSRD article 19a, 29a or 40a shall «be deemed to have complied with article 15. This similarly applies to companies included in a transition plan filed under CSRD by a parent company.

The transition plan directly concerns the business model and strategy for «the company» – naturally a company shall not design the business model and strategy of other companies, including upstream or downstream business partners. However, transition models in accordance with article will indirectly have severe implications for the chain of business partners. To illustrate with the oil and gas segment: A transition away from oil and gas extraction will «wipe out» the supply segment including seismic activities, building of installations, transport, supply etc, which will have to reorient their business models accordingly or cease to exist.

In practise, the indirect scope of article 22 is much more extensive as it covers the full value chain including customers – retail as well as commercial: The scope 3 emissions that are to be included and reduced according to the Paris Agreement and Climate Act targets, include the «embedded emissions» related to the company's products, such as the GHG emissions stemming from the customer's use of fossil fuels. Legally and practically, the article requires companies to provide their customers with equivalent products with zero emissions by 2050 or by other means meet the balance target (and interim reduction targets) with negative emissions offsetting. In theory, an oil and gas producer could plan for customers to implement CCS solutions but then must restrict its customer base accordingly and take account of cost increases.

In our opinion, the financial sector will also indirectly have to take account of its full value chain when designing its strategy and business model: A bank with a business model that includes financing the oil and gas sector must plan for a transition, possibly by limiting its financing to companies with transition plans that meet the requirements of article 22.

In accordance with article 22 (3), the plan shall be updated every 12 months and describe the progress the company has made towards achieving the targets referred to under paragraph 1, point (a).

The GHG emissions target to be planned for is demanding: The company must aim to achieve net-zero emissions in 2050 in scope 1-3 emissions, including customer emissions, where any emissions planned for are offset by negative emissions that are properly certified (natural sinks or air capture). Even more demanding for many companies will be the interim targets in accordance with the Climate Act; the 55% reduction by 2030 and the coming 2040 target (where the Commission has suggested a 90% reduction). For many companies this will require a full change of production method or product line, or downsizing of activities that are not compliant.

The transition plan shall also identify the *actions* necessary to reach targets and the *investments needed* to implement them. However, regarding the cash allocation for such investments, the legal requirements are more moderate, In accordance with the preamble (53): This requirement shall

«[B]e understood as an obligation of means and not of results. Being an obligation of means, due account should be given to the progress companies make, and the complexity and evolving nature of climate transitioning. While companies should strive to achieve the GHG emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable».

To illustrate: A company that identifies a need to invest EUR 1 billion in new facilities to meet the 2030 target is not legally obliged to make this investment if it does not have the means and cannot secure them by new equity issues or loan financing. But for those companies with financial means, it is very hard to see how they can avoid using them according to their transition plan.

This is of particular interest to oil and gas companies, which, since 2022, have had large profits, substantial dividend programmes and want to preserve «business as usual» as long as possible. In our opinion, article 22 will require companies to retain profits in the company to the extent necessary to fund the transition. 2030 is not far away and companies must therefore probably suspend dividend payments from 2024 onwards.

Most importantly, current and expected future market demand for high-emission products is not a relevant excuse to not transition according to the targets; the article requires companies to plan on how to meet market demand with zero or very low emission products (be it renewable energy, aluminium, steel, cement, commercial buildings or transport services with low emissions, and so on).

The details of the transition plans are to be further developed by the undertaking, supplemented by guidelines from the Commission. A net-zero plan could possibly include the purchase of «negative emissions» such as carbon capture from the air, but then the company must describe the actions to be taken and the investments needed to achieve this. The mere storage of GHG where the capture is credited to another undertaking will clearly not suffice.

Preamble (73) states that the plans shall be based on «evidence with independent scientific validation» that is consistent with the limiting of global warming to 1.5°C as defined by the Intergovernmental Panel on Climate Change (IPCC) and take account of the recommendations of the European Scientific Advisory Board on Climate Change. This may suggest a trajectory with a *minimum* 55 % reduction in GHG emissions by 2030.

Companies that have adopted a (voluntary) transition plan are to report this under CRSD articles 19a.2, 29a.2 and 40a.2, cf. Chapter 7. Per CSDDD article 22(2), such entities are «deemed to have complied with the obligation to adopt a transition plan. The preamble (50) explains however that «(w)hile the adoption obligation will be considered to have been met, companies still have to abide by their obligation to put the transition plan into effect (on a best effort/necessary means basis) and to update it every 12 months to assess progress towards the targets», cf. the general requirement for plan updates in article 22(3).

8.2.8 Supervision and regulatory enforcement, etc.

CSRD article 24 requires member states to designate one or more national supervisory authorities to ensure compliance by companies with their due diligence obligations under articles 7-16 and the adaptation and design of the transition plan under article 22.

As regards European companies, the competent supervisory authority shall be that of the member state in which the company has its registered office. This is the standard procedure for the supervision of EU law but has inherent weaknesses in a CSDDD context, particularly for states that are prone to favour their local champions (partly because of state economic interests) or have sectors that are economically important but which have an adverse effect on the environment (such as Norway, with its oil and gas industry). The risk may partially be mitigated by the requirement on the Commission under article 28 to set up a European Network of Supervisory Authorities, comprising representatives of the supervisory authorities, to facilitate cooperation and coordination and the alignment of regulatory, investigative, sanctioning and supervisory practices, with sharing of information and contributions from EU supervisory agencies.

In respect of third country companies, the competent supervisory authority shall be that of the member state in which the company has a branch. If the company has several EU branches, the competent supervisory authority shall be that of the member state with the highest EU turnover. Member states may designate the task to its authorities for the supervision of regulated financial undertakings.

The supervisory authorities shall be vested with the powers specified in article 25 and be allocated adequate powers and resources to carry out the tasks assigned to them, including requiring companies to provide information and carry out investigations related to compliance with the obligations in articles 7 to 16.

As regards the transition plans under article 22, supervisory authorities shall, as a minimum, be required to supervise «the adoption and design of the plan in accordance with the requirements» of article 22. This means that the supervision does not have to include the extent to which companies are following up on their plans on a «best effort basis», cf. also the preamble (73). This is possibly not a major weakness, as non-compliance is likely to be both transparent and public knowledge in many cases. The more worrisome fact is that the CSDDD does not provide for penalties or civil liability where a company fails in its best-effort implementation. This does, however, not mean that such a failure does not have legal consequences, cf. below.

Article 26 requires member states to ensure that any natural or legal person that has reason to believe there is non-compliance with the CSDDD is entitled to submit their concerns to any supervisory authority through easily accessible channels.

Article 27 calls for penalties (including pecuniary penalties) on infringements of the national provisions adopted pursuant to the CSDDD and requires member states to take all necessary measures to ensure that such penalties are implemented. The penalties provided shall be adequate, dissuasive, proportionate and based on criteria set in article 27(2). Where a company fails to comply with a decision imposing a pecuniary penalty within the applicable time limit, the supervisory authority shall make a public statement indicating the company responsible and the nature of the infringement.

In accordance with article 27 (4), pecuniary penalties shall be based on the company's net worldwide turnover, with a maximum limit of not less than 5% of its net worldwide turnover in the financial year preceding the fining decision (based on consolidated turnover for an ultimate parent company). Article 27(3) identifies factors to be taken into account when determining the penalty. It does not require negligence or wilful misconduct from company employees or directors, although the ECHR article 7.1 require a «mental link» (*mea culpa)* from a natural person acting for the company.

Article 30 also gives directive 2019/1937 on the protection of «whistleblowers» application to report all breaches of the CSDDD.

8.2.9 Public procurement

As explained, the CSDDD requirements do not apply to member states or state activities. However, in accordance with article 31 on «public support, public procurement and public concessions», compliance with the CSDDD obligations or voluntary implementation shall qualify as an «environmental or social aspect» that contracting public authorities may take into account as part of the award criteria for public and concession contracts and the performance of public and concession contracts.

8.2.10 Civil liability

The provisions on civil liability in the CSDDD was a concern in the 2024 political re-match. Recently, NGOs and other interested parties have brought claims against states and commercial enterprises in several European courts concerning breach of human rights and environmental laws (cf. Chapter 9) and there was a fear that this would increase under the proposed CSDDD. An obvious response is that such a development would be beneficial as civil liabilities impact company revenue and stock market pricing. It is, therefore, a great tool to improve compliance by profit-motivated parties. However, the (implicit) concern was that civil law action may lead to stricter enforcement of the CSDDD standards than (mainly) leaving this to the national supervisory authorities.

In the final text, the liability clause remained but was somewhat watered down: Article 29(1) requires member states to ensure that companies subject to the CSDDD can be held liable in their courts for damage caused to a natural or legal person where (a) the company *intentionally or negligently* failed to comply with the obligations in CSDDD articles 10 or 11 to prevent or bring to an end any adverse effect on an internationally recognised right, prohibition or obligation listed in Annex I that is *aimed to protect the natural or legal person* and (b) this violation caused damage to the natural or legal person's *legal interest protected under national law*.

This means that the liability standard is not strict but dependens upon subjective guilt (*mens rea*), with *negligence* as the most relevant criterion in practice. Ultimately, the distinction between diligent and negligent conduct regariding respect to the applicable human rights will depend on court interpretation. We expect the CJEU to interpret «negligence» as an autonomous concept under the CSDDD and apply a reasonably strict interpretation: The directive requires that systems are put in place to detect potential human rights violations and requires companies to prevent and remedy transgressions. Clearly, there will be no liability for human rights violations «coming out of the blue», but many transgressions will be known or reasonably expected, and the companies have minimal leeway with respect to remedying them – articles 10 and 11 do not impose limited obligations by means.

Civil liability action is only open to plaintiffs whose interests are protected under international law on human rights and national law. This means that private litigation to protect a mere public interest in social and environmental standards is not protected by article 29. But as environmental degradation is a relevant human right in accordance with Annex part 1, section 1, item 15, litigation by people affected will thereby be protected under article 29. In theory, article 29 provides an opening for national laws that limit protection offered by the relevant international instruments. However, in practice, this would amount to a breach of the relevant international law instruments (as well as EU law, and probably also the EEA agreement).

What this really means is that companies shall be held to account by their home courts to pay damage caused by wilful and negligent violation of human rights protecting the relevant plaintiff.

By article 29 (1) second paragraph, a company cannot be held liable for damage caused «only by its business partners in its chain of activities». As explained, a company subject to the CSDDD has legal *responsibility* for its value chain; it must act in accordance with articles 7-16 if the activity of a business partner has adverse effect on human rights or environmental laws and ultimately it may have to terminate the business relationship. However, the company will not be liable for damage caused by the business partner alone.

Apart from this, article 29 does not regulate when a company shall be deemed to have *caused* damage relevant to article 29. Its «system» is that a breach of a human right specified in Annex, part 1, section 1, trigger liability for damage caused. Clearly there is a need for a causal link of sort from a negligent or wilful action by the company to the relevant breach of the human right, but the company must not be the sole or even the main perpetrator, cf. article 29 (5) on possible joint liability with others.

In respect of environmental degradation caused by climate change, the key issue is if, and to what extent, major emitters of GHG – such as oil and gas companies – can be held liable for their contribution to the GHG emission levels, taking into account that they are many players who do their part by offering profitable, but legally permitted products that meet a strong market demand by consumers. The latter factors did not prevent liabilities for the tobacco industry to compensate for damage caused, but there were several layers to these cases, including misrepresentation by the industry. It is too early to determine the extent to which there will be a legal parallel, cf. Chapter 9. The legal issue as to when «small contributions of damage» are sufficient to establish a responsibility for a breach is not solved by article 29, but is a matter of interpretation of the international human right texts relevant to the topic (where CSDDD article 22 can be of indirect relevance by addressing the mandatory duty for all companies to do their part of the climate actions required).

In respect of corporate actions in general and causal links to any violations that take place, the burden of proof is vested with the plaintiff; the EU legislators rejected a proposal for a revised burden of proof. Article 29 (3) e) does, however, provide that when a claimant has presented «a reasoned justification containing reasonably available facts and evidence» sufficient to support the plausibility of their claim for damage and has indicated that additional evidence lies in the control of the company, the courts are able to order that such evidence shall be disclosed by the company, in accordance with national procedural law that may limit the disclosure to what is necessary and proportionate.

Article 29 (2) calls for full compensation for the damage occurred «in accordance with national law» with no «overcompensation, whether by means of punitive, multiple or other types of damages». Article 29 (3) requires that national rules on limitation of claims do not unduly hamper actions and are not more restrictive than for other damage claims, with a limitation period of a minimum of five years from when the infringement ceased, and the claimant know or could reasonably be expected to know the facts supporting the claim. The cost of proceedings shall not be prohibitively expensive, there shall be injunctive measures available, and «reasonable conditions» for a trade union or NGO to bring actions to enforce the rights of the alleged injured party. Also in this respect, the directive provides a harmonisation of the applicable legal standards.

Article 29 (4) provides that companies that have participated in industry or multi-stakeholder initiatives, or used third party verification or contractual clauses to support due diligence obligations can still be held liable. Article 29 (5) provides that the liability of a company under the laws implementing article 29 shall be without prejudice to the liability of its subsidiaries or business partner, with joint and several liability where the damage was caused jointly with the company. Article 29 (6) provides that article 29 shall not limit companies' liability under EU law or national legal systems and be without prejudice to such rules calling for more extensive or stricter liability. Member states shall ensure that the provisions implementing article 29 in national law have «overriding mandatory application» with respect to its public international law. To illustrate: Norwegian law implementing CSDDD article 29 shall apply for damage caused to plaintiffs in Brazil by Norwegian companies operating in Brazil, even if such damage in accordance with international private law is a matter of Brazilian law only. It could be said that this is the key point of the article: European companies can be sued in Europe under European laws that meet the minimum standards set in the CSDDD.

8.2.11 Directors' duties and liabilities

The text agreed in the provisional deal of December 2023 included an article defining the «duty of care» for corporate directors. When fulfilling their duty to act in the best interest of the company, they should also «take into account the consequences of their decisions for sustainability issues, including, where applicable, human rights, climate change and environmental consequences, in the short, medium and long term». This did not suggest a shift from a shareholder to a stakeholder perspective but was a «reminder» to the directors to also consider the larger consequences of corporate actions. Another provisionally agreed text specified the directors' duty to set up and oversee the implementation of the sustainability due diligence measures under the CSDDD and to adapt the corporate strategy to due diligence. Both of these proved too much for the minority in the Council and the proposals were not approved.

The board of directors[53] or chief executives of a subject company who fail to put in place a proper due diligence system following the national legislation implementing CSDDD articles 7-8 or who neglect to remedy adverse impacts on human rights or environmental laws as required by the legislation implementing articles 9-10 are likely to trigger penalties and possible liabilities on the company, and may face liability themselves under national corporate law towards the company, its shareholders or third parties. Similarly, the board of directors will be under a legal obligation to prepare a coherent and evidence-based transition plan that meets the requirements of the CSDDD article 22, to present such a plan for the shareholders for approval, and to implement the approved plan accordingly. Hence, the latest amendments may have limited practical effect. Still, they emphasise that the requirement under article 22 is an «obligation of means» where a lack of funding is relevant and «specific circumstances» may qualify for amendments to the transition plan. The due diligence requirements in articles 7-16 is stricter. However some actors may seek comfort in articles 10 (6) and 11 (7) that permit a continued business relationship where the adverse impacts of a termination could be reasonably expected to be «manifestly more severe». And importantly, the amendments leave the liability standards for company directors and executives outside EU law, as a matter of member states laws only.

8.3 The Norwegian Transparency Act

The Norwegian Transparency Act[54] applies to Norwegian undertakings subject to the Accounting Act that meet at least two of the following three conditions: (i) Sales revenue of NOK 70 million, (ii) a balance sheet total of NOK 35 million, and (iii) an average of 50 full-time equivalent employees during the accounting year. Parent companies are covered if these conditions are met collectively by the parent company and its subsidiaries. This covers a high number of «micro undertakings» that are not subject to disclosure duties under the CSRD and far below the limits for the CSDDD to apply.

The Transparency Act aims to promote an enterprise's respect for «fundamental human rights» and «decent working conditions» in connection with the production of goods and the provision of services and ensure public access to information regarding how enterprises address these issues. Section 2 defines «fundamental human rights» to mean the international human rights enshrined in the ESC, the CPR and the ILO's core conventions and is therefore piggybacking on the established international law, such as the CSDDD. Section 2 provides an independent definition of the term «decent working conditions» to mean work that ensures fundamental human rights and health, safety and environment in the workplace while providing a living wage.

The obligations of the companies involve their own (and their subsidiaries') operations, as well as those of their «supply chain». In accordance with article 2 d), this includes «any party in the chain of suppliers and sub-contractors that supplies or produces goods, services or other input factors included in an enterprise's delivery of services or production of goods from the raw material stage to a finished product». The obligation also extends to the activities of a «business partner», which is defined in article 2 to include «any party that supplies goods or services directly to the enterprise, but that is not part of the supply chain». Hence, the scope is more limited than the scope of the OECD Guidelines and also more limited than under the CSDDD (as transporters, etc. of the company's product are excluded).

The main clause is article 4 requiring the undertakings to «carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises» but where this «for the purposes of this Act» means to

a) embed responsible business conduct into the enterprise's policies,

b) identify and assess actual and potential adverse impacts on fundamental human rights and decent working conditions that the enterprise has either caused or contributed toward, or that are directly linked with the enterprise's operations, products or services via the supply chain or business partners,

c) implement suitable measures to cease, prevent or mitigate adverse impacts based on the enterprise's prioritisations and assessments pursuant to (b),

d) track the implementation and results of measures pursuant to (c),

e) communicate with affected stakeholders and rights-holders regarding how adverse impacts are addressed pursuant to (c) and (d),

f) provide for or co-operate in remediation and compensation where this is required.

This due diligence shall be carried out «regularly» and proportional to the size of the enterprise, its «nature», the context of its operations, and the severity and probability of adverse impacts. Importantly, letter f) on providing for or co-operating «in remediation and compensation where this is required» was not intended to be liability clause; the extent to which a company is liable to pay damages for violations is to be left to Norwegian liability law in general, meaning there is a reasonably strict negligence standard for companies identifying a breach of human rights or decent working conditions.

Article 5 requires companies to report on their due diligence efforts, while articles 6-7 grant everyone a right to seek information from the company on their compliance efforts.

The Consumer Authority[55] is the supervisory body for the Transparency Act, cf. article 9. This authority and the Market Council[56] may, upon non-compliance with the act, issue orders, enforcement fines[57] and infringement fines.[58]

The Transparency Act may be updated or cancelled following implementation of the CSDDD in Norwegian law, as it has much more limited legal content and impact a (disproportionally) large scope of enterprises that are subject to the requirements.

8.4 Financial sector requirements

8.4.1 Investment service providers – MiFID II ESG

The Markets in Financial Instruments Directive (2014/65/EU, «MIFID II») regulate «investment services», i.e. financial advice and brokering concerning financial instruments, corporate finance, etc.) and investment service providers (investment firms and credit institutions), as well as financial market infrastructure operators. The rules for investment firms and credit institutions include requirements on the design and marketing of «financial products» (excluding investment funds) and suitability tests of clients. MIFID II is supplemented by delegated acts, including Regulation (EU) 2017/565 (the MIFID II Regulation) and Delegated Directive (EU) 2017/593. The legal framework was amended in 2021 by (i) the Commission Delegated Regulation (EU) 2021/1253 (the «MIFID ESG Regulation») amending the MIFID II Regulation and (ii) Commission Delegated Directive (EU) 2021/1269 («MIFID ESG Directive») amending Directive (EU) 2017/593.

MiFID II requires investment firms that provide «financial advice» or «portfolio management» to perform a suitability test to assess the suitability of investment products for individual clients. The firms must update client information, investment goals, financial standing and expertise. The «financial advice» is client-specific, excluding non-tailored financial product recommendations. Several Norwegian investment firms have implemented a more comprehensive definition and must perform a suitability assessment for their broker service clients. The requirement applies to retail clients and professional clients who are not themselves licensed entities.

The MIFID ESG Regulation introduces sustainability as part of the test. It requires investment firms to ask their clients about their preferences regarding sustainability investments and consider this when selecting financial products and reporting to clients. This is a 'nudging strategy' to incentive clients to consider sustainability factors and sustainability risk when investing.

Article 2 defines «sustainability preferences» as a client's choice as to whether and to what extent they wish to include any of the following financial instruments in their portfolio; (a) a financial instrument for which the client determines that a minimum proportion shall be in sustainable activities In accordance with the taxonomy (TR) definition, (b) a financial instrument where a minimum proportion shall be invested in sustainable investments as defined in SFDR article 2 (17) and (c) an instrument that considers principal adverse impacts on sustainability factors but where the qualitative or quantitative elements are determined by the client.

For an equity investment to qualify under letter a), the investee company must have 100 percent TR alignment. However, the investment firm and client may agree on a lower ratio under the strategies of letters b) and c). Letter c) also provides for less demanding sustainability strategies, such as the exclusion strategies applied by the Norwegian sovereign wealth fund.

There are also other relevant definitions in article 2 (8); «sustainability factors», meaning sustainability factors as defined in SFDR article 2 (24), and in (9), «sustainability risks», meaning sustainability risks as defined in SFDR article 2 (22).

Based on the suitability test[59] the investment firm must determine in each case whether its investment advice or portfolio management meets the sustainability preferences. The ESMA has provided further guidelines on MiFID II suitability requirements.

The MiFID II ESG Regulation article 21 requires investment firms to 'take into account sustainability risks' when complying with the requirements of article 21 on maintaining a clear organisational structure, etc. The practical effect is that sustainability risk – not sustainability factors – must be assessed in internal systems and handled by personnel with the necessary ESG skills. Investment firms must also integrate clients' sustainability preferences in their conflict-of-interest procedures, cf. article 33. This is primarily a matter of disclosing potential interests, i.e. between financing the petroleum industry and sustainability financing. Additionally, risk management policies and procedures to identify risks related to the firm's activities, processes and systems shall consider sustainability risks, cf. article 23. Article 52 (3) on information concerning financial advice states that sustainability factors should be considered in the selection process of financial instruments. There are no similar requirements in article 60 on portfolio management reporting.

The MiFID ESG Directive Delegated directive (EU) 2021/1269 amends definitions and requirements on the «manufacturing and distribution of financial instruments» by investment firms. Article 9 (9) requires investment firms to identify a potential «target market» for each financial instrument and specify the type(s) of client for which it is compatible, including any sustainability-related objectives that meet the granularity of the three kinds of sustainable investments under the MiFiD ESG Regulations. Sustainability factors shall be presented transparently, and distributors of the products shall be provided with the relevant information. The investment firms must, in general, identify the group(s) of clients for which an instrument is incompatible, but here there is an exception; sustainable instruments are to remain available to all clients. Article 10 includes corresponding requirements for distributors of financial instruments.

8.4.2 Fund managers (UCITS, AIF)

The Commission Delegated Directive (EU) 2021/1270 amends Directive 2010/43/EU (UCITS) with obligations on UCITS management companies to apply SFDR definitions of sustainability risk and sustainability factors, integrate sustainability risks in the management of UCITS and its internal processes, systems and controls, identify conflict of interest that may damage UCITS, and perform due diligence on the principal adverse impacts of investment decisions on sustainability factors to the extent required under the SFRD – which means that only assets managers of articles 8 and 9 funds must consider sustainability factors.

The Commission Delegated Regulation (EU) 2021/1255 amends Delegated Regulation 231/2013 with corresponding obligations on AIFMs.

8.4.3 Insurance asset management

Insurance companies are exposed to ESG in two ways: (i) as important asset managers for financial assets and (ii) as insurers of physical assets and business risks exposed to climate change. Presumably this «double hit» and the long-term horizon in insurance should make the insurance segment a natural leader of the «ESG finance pack».

Solvency II regulates insurance companies under directive 2009/138 (Solvency II Directive) and Regulation 2015/35 (Solvency II Regulation) as the main acts. IDD is the Insurance Distribution Directive 2016/97.

In respect of sustainability issues, the EU has selected a similar regulatory approach to insurers as to other asset managers; insurers must take sustainability risk into account, while consideration of sustainability factors is a matter of company choice.

The Commission Delegated Regulation (EU) 2021/1256 amended Regulation 2015/35 to introduce the integration of sustainability risks in the governance, conflicts of interest procedures and risk management of insurance and reinsurance companies.

The Commission Delegated Regulation (EU) 2021/1257 amended Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 under IDD on integration of sustainability factors and risks and preferences into product oversight and governance requirements, conduct of business and investment advice for insurance-based investment products.

8.4.4 ESG in credit institutions

A general distinction in financing relates to bank financing and securities market financing by way of equity and bond capital. All real economy corporates have an equity capital (including accrued earnings) and will typically finance their investments with additional loan capital. The ratio of corporate bank loans to bond loans is around 65/35 in Europe and around 40/60 in the USA; on other continents the bank segment is typically more dominant. This means that bank financing is very important for investments on all continents. Hence, an efficient policy for the reallocation of capital to sustainable investments/activities must include lending from banks and other credit institutions.

As explained above (and in Chapter 7), financing activities are exempted from the CSDDD. At the same time the CSRD/ESR and the TR article 8 disclosure rule require credit institutions to disclose detailed information on their lending activities, including the Green Ratio (the ratio of TR aligned exposures to total exposure). This will highlight the greenest credit institutions and possibly stimulate the reallocation of exposures.

In addition, the *prudential regime* for credit institutions may affect sustainability issues. The regulatory differences among banks and other credit institutions do not concern their lending but how their lending activities are funded. The Capital Requirement Regulation (575/2013, CRR) article 4 (1) defines «credit institutions» as «an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account». Here banks are the credit institutions who take on «deposits» (as well as funding themselves by issuing shares and bonds), while other credit institutions are those institutions that are not funded by deposits but by bond issues or other loans.

Many people see banks and credit institutions as «houses of cash» presiding over the financial assets of society. This is not the case; they are *intermediaries of loans* as their lending to commercial enterprises and private individuals is largely funded by borrowing from the public (in the form of deposits) or loans from capital market investors (in the form of bonds or non-securities loans).

The equity portion is small; the equity-to-balance ratio for European banks ranges from 4-7%, while that of Nordic banks is at the high end. Hence, 93-96% of the cash that banks lend to clients is borrowed by the bank. On average, Norwegian credit institutions borrow 50% of their loan capital from depositors and the rest from market investors, where the bulk is in the form of special bonds called «covered bonds».

As explained above, the overall tool in the FSAP is to incentivise private capital holders to reallocate capital to sustainable products/investments, with the taxonomy and the CSRD/ESRS as a robust classification and transparency framework to facilitate this market-driven change.

Here, the green bond market may have the potential to reorient bank lending: Credit institutions that take a proactive stance on environmental and social issues may stop making non-sustainable investments and reorient their loan book to sustainable loans and fund these loans by issuing *green bonds or sustainability linked bonds* - presumably at a more favourable price that also befits their borrowing clients. It is also conceivable that banks were facing difficulties in acquiring funding of non-sustainable lending activities because investors in bank bonds will not (indirectly) finance such activities and refuse to invest in unclassified bank bond instruments and/or reject bonds issued by banks that finance fossil fuel extraction and other non-sustainable activities. Deposit clients could also potentially be similarly incentivised to re-allocate deposits to banks that are not involved in non-sustainable lending. The deposit markets are, however, often dysfunctional. Retail deposit customers are small prey to the big fish *aka* the banks, which their deposits at low interest and are too passive to look after their own interests; relocating deposits to green banks only will be a tall order for many deposit customers.

A number of European banks have designed green policies which imply that they will no longer finance coal, oil and gas exploration, see, for instance, Danske Banks' statement aims to "actively financing the green agenda and limiting our investment- and lending activities towards fossil-heavy sectors». However, there are still plenty of banks that finance fossil fuel extraction worldwide, mostly the major American banks. In addition to state financing and state subsidies, this is the main reasons why the green transition is so slow.

The Sustainable Action Plan calls for long-term perspectives on *sustainability risks*. The thinking behind this is that sustainability investment is not just a matter of taking a moral stance (as in the example with Danske Bank and those with similar views) but is a matter of prudent risk taking, particularly with regard to financing assets that may become «stranded» and companies that are likely to face diminishing markets, decreasing revenues and less profitability in a green transition of the economy. For readers of the Taxonomy Delegated Acts and their annexes, it is easy to see those activities that should not be invested in with a medium or long term-perspective.

However, banking is a market segment in which this reasoning may have less of a bite. It is more than 25 years before we reach 2050 and to many people the End of the Fossil Age seems far away. The exchange prices on shares issued by fossil fuels companies, their value chain companies, as well as companies with high fossil fuel consumption or large GHG emissions are likely to decrease as the transition progresses in Europe and elsewhere. However, this will mainly be of consequence to the equity holders and asset managers handling equity investments in the investment firms, insurance companies, UCISTs and AIMs. Credits/loans have priority over equity. Thus, bank lenders are right to be less concerned about the medium and long-term sustainability risk of the investee companies. From their perspective it is no major concern if the share values of their client companies are decreasing by 2035 or 2040 and their clients are left with stranded assets in their books, provided the banker can expect reasonable profitability in the interim so that the loan is repaid.

This is also why the combination of bank lending and tax benefits – particularly beneficial tax deductions and tax depreciation schemes – are so damaging to a green transition: It enables companies to allocate their profits to the repayment of loans (rather than paying taxes) and therefore pay bank creditors in full before paying their taxes.

No further EU legislation is forthcoming to induce banks to adopt a more prudent approach. The context is the regulatory framework comprising the Capital Requirement Directive 2013/36/EU (CRD) and the Capital Requirements Regulation (EU) 2013/575 (CRR) with "prudential" capital requirements on banks and other credit institutions, and the Investment Firm Regulation (EU) 2019/2033 (IFR) with corresponding prudential requirements on investment firms. A key element here is the risk-weighted[60] capital ratios[61] on **the** percentage of own capital (T1[62] , AT1[63] and T2[64])[65] to total risk-weighted assets. The minimum[66] is 8 percent, but buffer requirements[67] (with some national discretion) raise this to 165 percent (up to 18.5 percent for systemic important institutions).[68] The CRR ratios are risk-weighted[69] , meaning that bank exposures/assets are not allocated 100 percent of their value for risk assessment purposes. For instance, retail mortgage loans count for 35 percent in the standard method and 15-25 percent in larger IRB banks. This explains why banks report CRR capital ratios of 17-18 percent with a 6-7 percent equity ratio.[70]

The CRR influences where banks allocate their capital, as certain assets and asset classes are favoured due to lower risk weights. For instance, sovereign bonds have lower risk weights, encouraging banks to allocate capital to European governments. In the Nordics, similar incentives apply to retail real estate mortgages. Hence, banks need additional incentives – such as higher interest rates – to invest in corporate debt, which carries higher risk weights.

National FSAs supervise banks and investment firms.[71] They are, however, assisted and to some extent supervised by the EU Financial Agencies EBA[72] and ESMA[73] at a European level.[74]

SFAP number 8 calls on incorporating sustainability in prudential requirements.

In 2019, the EBA received three tasks: (i) to assess the inclusion of ESG risks in the supervisory review of prudential assessments, (ii) to provide for better sustainability risk disclosures by banks, and (iii) to assess a dedicated treatment of sustainable exposures («Green Supporting Factor» or GSF) with a final deadline to report in 2025.

There is a consensus among the European regulatory agencies that *sustainability risk* as a financial risk is a highly important topic, with systemic implications. The GSF is a very controversial topic, as the mandate of the EBA concerns financial stability. Consequently, while it is a «no-brainer» for the EBA to stress the importance of prudent assessments of sustainability risk, the disclosure of sustainability risk in banking and the inclusion of sustainability risk in the CRR system, a GSF is, in principle, contrary to their mandate, Thus far, the EBA has issued an EBA Opinion on green loans and mortgages and been instrumental in developing better regulations on sustainability risk assessments and disclosures (cf. below). Two further EBA reports are to be prepared by the end of 2024 and 2025, respectively.

In June 2023, a political agreement was reached between the Council of the European Union and the European Parliament on amendments to the Capital Requirements Regulation («CRR», the new version known as CRR3) and the Directive on credit institutions (the «CRD», the new version being «CRD6») to reflect the so-called Basel III package (cf. Banking sector: Provisional agreement reached on the implementation of Basel III reforms. On 6 December 2023, the Council issued a detailed text. In January 2024, the EBA issued a Consultation paper on draft Guidelines on ESG risks management.

The proposed Basel III package deals inter alia with sustainability risk as a financial risk for assessment and disclosure. It includes definitions in CRR article 4 (52d) of *«environmental, social and governance risk» or «ESG risk»,* as the risk of any negative financial impact on the institution stemming from the current or prospective impacts of environmental, social or governance (ESG) factors on the institution's counterparties or invested assets; ESG risks materialise through the traditional categories of financial risks. Article 4 (52e) defines *«environmental risk»* as the risk of any negative financial impact on the institution stemming from the current or prospective impacts of environmental factors on the institution's counterparties or invested assets, including factors related to the transition towards the objectives set out in the Taxonomy Regulation article 9 including both «physical risk» and «transition risk». Article 4 (52f) defines «physical risk» as part of environmental risk, meaning the risk of any negative financial impact on the institution stemming from the current or prospective impacts of the physical effects of environmental factors on the institution's counterparties or invested assets; article 4 defines (52g) «transition risk», as part of environmental risk, meaning the risk of any negative financial impact on the institution stemming from the current or prospective impacts of the transition to an environmentally sustainable economy on the institution's counterparties or invested assets. Article 4 (52h) defines «social risk» to mean the risk of any negative financial impact on the institution stemming from the current or prospective impacts of social factors on its counterparties or invested assets; article 4 (52i) «governance risk», meaning the risk of any negative financial impact on the institution stemming from the current or prospective impacts of governance factors on the institution's counterparties or invested assets. Article 4 also includes a definition of a «fossil fuel sector entity» as well as «exposures subject to impacts from environmental or social factors» to mean «exposures hindering the ambition of the Union to achieve its regulatory objectives relating to ESG factors, in a way that could have negative financial impacts on the institutions».

A particular regulatory concern in Basel III is whether sustainability risk is properly handled in today's *credit risk ratings* by the rating agencies. Such ratings are important in the CRR framework to assess banks in credit risk assessments. Hence, in accordance with the proposed CRR 135, one year after entry into force, the ESMA shall prepare a report on whether ESG risks are appropriately reflected in credit risk rating methodologies, whereby the Commission shall submit a legislative proposal to the European Parliament and the Council.

A proposed CRD article 449a on «Disclosure of environmental, social and governance risks (ESG risks)» requires that credit institutions «shall disclose information on ESG risks, with a distinction between environmental, social and governance risks, and between physical risks and transition risks for environmental risks» including, but not limited to: (a) the total amount of exposures to fossil fuel sector entities and how the institution integrates the identified ESG risks in its business strategy and processes, and governance and risk management. Articles 73 and 74 of the CRD will be amended to require that «short, medium and long-term horizons of ESG risks be included in credit institutions' strategies and processes for evaluating internal capital needs», as well as to put in place adequate internal governance with reference to the current and forward-looking impacts of ESG risks. In accordance with article 76, the institutions shall set out specific plans to monitor and address the financial risks arising from the green transition and process of adjustment to the relevant member state and EU regulatory objectives in relation to ESG factors. A new article 87a is to be included in the CRD, according to which supervisory authorities shall ensure that institutions, as part of their robust governance, have arrangements in place, including a risk management framework as well as robust strategies, policies, processes and systems for the ESG risks over the short, medium and long term.

There are currently no regulatory proposals for «Green Factors», and the preferred approach by the EBA seems to be to favour sustainable investments (and thus provide a reallocation) rather than by ensuring that the sustainability risk is better reflected in the risk assessments for non-sustainable investments. Ultimately, this is unlikely to provide the sufficient stimulus. What is probably needed is a ban (or a tax) on financing non-sustainable investments.

9 Human rights and climate change

In this book we have primarily focused on EU/EEA secondary laws with occasional references to Norwegian law, while only briefly addressing broader and more global initiatives and legal instruments. Hence, our focus has been sustainability laws that stem from the supranational political and legislative processes in the EU/EEA and the national legislation process in Norway. The broader initiatives have been introduced as a context, cf. Chapter 3 on the UNSDG and the UNFCCC and the Paris Agreement as the policy background for the ETS/ESR/LULUCF and the many EU legislative instruments dealing with climate change such as the taxonomy, CSRD/ESRS, CSDDD article 22. In addition, we very briefly addressed international human rights as relevant by referring to the taxonomy, the CSDDD, the Transparency Act and the OECD GMNEs.

In this final chapter we will address another legal development of importance, which was accelerated by the decisions by the European Court of Human Rights (EMD) on 9 April 2024. The verdict in case 53600/20 *Klimaseniorinnen vs. Switzerland* established the link between the European human rights convention and the international instruments on climate change, identifying a concept we label *environmental human rights* and setting *lex superior* parameters for evaluating climate initiatives at a national and supranational level. However, before analysing this angle, we will briefly address certain Norwegian law aspects concerning.

9.1 Environmental rights in Norwegian law

Historically, Norway has expressed a strong commitment to sustainable development and the preservation of human rights and has been a keen supporter of UN and European initiatives, including the adaptation of human rights standards for multinational enterprises. The transformation of the OECD Guidelines into law in the Transparency Act illustrates this. The fondness for international political and legislative initiatives also includes environmental issues.

The more important legal milestone was the Human Rights Act of 1999 in which the European Convention on Human Rights (ECHR) as well as *inter alia* the UN 1966 conventions on civil and political rights (the CP) and on economic, social and cultural right (the ESP) were incorporated into Norwegian law with priority over other Norwegian laws. In 2014, certain rights under the CP were also transformed into the Norwegian constitution, including the right to life under ECHR article 2 and the protection of private and family life under ECHR article 8.

The picture is more blurred when it comes to national initiatives to combat GHG emissions and climate change, mostly because of Norway's position as a major oil and gas producer. On the overall political level, Norway is a promotor and keen supporter of the UN initiatives in the wake of the UNFCCC, including the Kyoto Protocol and the Paris Agreement. Norway has supported and co-signed the many COP initiatives to accelerate reductions in GHG emissions, including the Dubai undertaking to transit away from fossil fuels in energy systems with accelerating action during this decade.

This has, however, not been followed up in practical politics. New licenses have been granted for the exploration and utilisation of oil and gas reservoirs on the Norwegian continental shelf with state financing: The Norwegian state is a key investor in fossil fuel extraction, both as direct owner of a field and as a «silent partner» with private enterprises. A license to develop a new oil and/or gas field has an equity package attached; it means that the Norwegian state will contribute with (at present) around 87% of the funding needed for investments (against a 78% share of the profit).

On paper, things look great with respect to environmental standards, as the Constitution article 112 reads as follows:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The state authorities shall take measures for the implementation of these principles.

The first paragraph, second sentence, enshrines the definition in the Brundtland report on the long-term management of natural resources. The first sentence seemingly establishes a human right to a high environmental standard that is beneficial to human health, biodiversity and natural production processes. The second and third paragraphs establish clear obligations on state authorities to provide the public with information on environmental impacts and status, and to take measures to implement the environmental standard. These provisions are among the most ambitious sustainability provisions in any European constitution.

However, in HR-2020-2472-P, the Supreme Court of Norway interpreted the provision in the context of a ministerial resolution in 2016 (as approved by the Parliament) to grant new petroleum exploration licenses in the Barents Sea South and Southeast (the 23rd licensing round). Environmental organisations had argued that these licenses violated constitutional rights in accordance with article 112. The Supreme Court rejected this claim. It concluded that article 112 offers limited individual rights to «material» environmental standards but entails certain procedural protection and that the licensing did not violate article 112. Furthermore, most judges found no procedural errors in the licensing process as the decisions did not involve extraction rights, whilst the minority held that climate impacts had been insufficiently assessed. The Court emphasised the wide discretionary powers of government bodies in environmental issues, particularly for decisions taken or approved at Parliamentary level.

The Supreme Court also concluded that the Norwegian constitution articles 93 (on the right to life) and article 103 (on the right to private and family life) corresponding to the ECHR articles 2 and 8 were not violated. Greenpeace has filed a complaint against this aspect of the ruling, cf. climate lawsuit to the European Court of Human Rights, which is waiting to be processed.

In the case TOSL-2023-99330, Greenpeace Norden and Natur og Ungdom had sued the Norwegian state over the approval of field development plans, pointing to a missing environmental impact assessment of scope 1-3 emissions, the procedural requirements in the Petroleum Act and EU Strategic Environmental Assessment («SEA») Directive 2001/42/EC and the Project Directive (2011/92/EU). The Oslo District Court found that the approvals were invalid due to insufficient assessments of the full scope of emissions, and that this had potentially affected the decision-making. It also granted a temporary injunction until the matter had been fully resolved by the courts. this injunction was later cancelled by Borgarting Appeal Court, which is handling the appeal.

9.2 European Environmental Human Rights

On 9 April 2024, the ECoHR ruled on three cases concerning the environmental aspects of the European Convention on Human Rights, the Grand Chamber rulings in the climate change cases.

The case of *Verein Klimaseniorinnen Schweiz and others vs. Switzerland* (case 53600/20) involved an organisation of elderly Swiss women who argued that Switzerland's lack of action on climate change violated their human rights, particularly the right to life following ECHR article 2 and the right to a healthy environment in accordance with the convention article 8. The ECoHR ruled against Switzerland, setting key precedent for climate litigation in Europe.

The Court concluded that article 8 encompasses a right for individuals to effective protection by their home state authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life, entailing a *positive obligation* for the respective signatory states to adopt and apply legislation and other measures capable of mitigating the existing and potentially irreversible future effects of climate change, cf. paragraph 538 stating inter alia that:

(a) The States have a positive obligation to put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life. In particular, States have an obligation to put in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks (see, for instance, *Jugheli and Others*, cited above, section 75; *Di Sarno and Others*, cited above, § 106; and Tătar, cited above, § 88).

(b) The States also have an obligation to apply that framework effectively in practice; indeed, regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Convention is intended to protect effective rights, not illusory ones. The relevant measures must be applied in a timely and effective manner (see *Cuenca Zarzoso vs. Spain*, no. 23383/12, § 51, 16 January 2018).

With regard to the content of this obligation, the Court referred to the global climate commitments by the convention member states, most notably the UN Framework Convention on Climate Change and the 2015 Paris Agreement, the latter setting *binding targets* to keep the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the increase to 1.5°C above pre-industrial levels. Considering the compelling scientific advice provided, the Court concluded that to meet these targets, states must implement effective measures to achieve GHG neutrality within the next three decades with relevant interim reduction targets and timelines.

The Court explained in paragraph 538 that

(c)... the State must be allowed a wide margin of appreciation (see *Hardy and Maile*, cited above, § 218, with further references), in particular with regard to the substantive aspect (see *Hatton and Others*, cited above, § 100).

(d) The choice of means is in principle a matter that falls within the State's margin of appreciation; even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfil its positive duty by other means. An impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources (see*Kolyadenko and Others*, cited above, § 160, and *Kotov and Others vs. Russia*, nos. 6142/18 and 13 others, § 134, 11 October 2022).

(e) While it is not in the Court's remit to determine what exactly should have been done, it can assess whether the authorities approached the matter with due diligence and gave consideration to all competing interests (see *Mileva and Others vs. Bulgaria*, nos. 43449/02 and 21475/04, § 98, 25 November 2010).

The Court found the Swiss framework was insufficient, exceeding the margin of appreciation. Most notably the Court stated the following:

> 542. Having regard, in particular, to the scientific evidence as regards the manner in which climate change affects Convention rights, and taking into account the scientific evidence regarding the urgency of combating the adverse effects of climate change, the severity of its consequences, including the grave risk of their reaching the point of irreversibility, and the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights (see paragraph 436 above), the Court finds it justified to consider that climate protection should carry considerable weight in the weighing-up of any competing considerations. Other factors militating in the same direction includethe global nature of the effects of GHG emissions, as opposed to environmental harm that occurs solely within a State's own borders, and the States' generally inadequate track record in taking action to address the risks of climate change that have become apparent in the past several decades, as evidenced by the IPCC's finding of «a rapidly closing window of opportunity to secure a liveable and sustainable future for all» (see paragraph 118 above), circumstances which highlight the gravity of the risks arising from non-compliance with the overall global objective (see also paragraph 139 above).

> 543. Taking as a starting-point the principle that States must enjoy a certain margin of appreciation in this area, the above considerations entail a distinction between the scope of the margin as regards, on the one hand, the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect, and, on the other hand, the choice of means designed to achieve those objectives. As regards the former aspect, the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States. As regards the latter aspect, namely their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources, the States should be accorded a wide margin of appreciation.

The ruling is only binding on Switzerland, but the general interpretation of article 8 has a bearing on all member states and includes inter alia the following fairly detailed assessment standards as to the execution and implementation of transition plans:

> 548. It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see, mutatis mutandis, Georgel and Georgeta Stoicescu v. Romania, no. 9718/03, § 59, 26 July 2011).

> 549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting

of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows.

550. When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;

(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);

(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

551. The Court's assessment of whether the above requirements have been met will, in principle, be of an overall nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation (see paragraph 543 above).

State obligations under article 8 apply to measures within the jurisdictional scope of the member state. In principle, Switzerland or Norway or other European states have no obligation to reduce the GHG emissions in China or India or South Africa. This does not mean that a state's responsibility is necessarily limited to emissions stemming from domestic production or consumption. This topic is often discussed under the concept of «embedded emissions» in respect of the export or import of goods and services: One type of embedded emission are the emissions that occur abroad in the production and transportation of imported goods and services. Another type of embedded emission are the emissions triggered abroad during the use of exported goods, such as the GHG emissions triggered by the use of fossil fuel exported from Norway.

Climate change is a global challenge, and many of the EU legislative instruments (such as the taxonomy, the CSRD and the CSDDD) concern emissions in the whole value chain, with a global perspective. CSRD/ESRS requires companies to report on their scope 3 GHG emissions on a global scale. CSDDD article 22 requires a transition plan to include scope 3 GHG emissions on a global scale. In contrast, the ESR and the LULUCH set national quotas for domestic emissions only. The ETS/CBAM does not set national quotas but is based on a similar approach, as it only measures and taxes scope 1 and 2 emissions.

The individual GHG emissions that stem from commercial or non-commercial activities cannot be eliminated more than once, at source. To illustrate: If the delivery of natural gas from Norway for electricity production in Germany is substituted by a corresponding delivery of electricity from Norway to Germany, this will entail a significant reduction in the scope 3 subcategory 11 (emission on use) for the Norwegian gas export and a corresponding reduction in scope 1 emission for the German electricity industry. The benefit of this under the ETS falls on Germany. If both Norway and Germany reduced 55% (or 90%) of the relevant emission, there could be no more than a 100% reduction of this single source of emission. This would also apply if Norway inter alia were to take responsibility for reducing or balancing emissions embedded in imports of goods from China or Vietnam. However, this does not imply that there is a double-counting error if both export and import countries are responsible for reducing the relevant emission or balancing it with negative emissions or natural carbon sinks. On the contrary, as scientific evidence stresses the importance of an accelerated emissions reduction this decade, a full or partial doubling of responsibilities for embedded emissions will be a contribution to the solution under the Paris Agreement.

The issue at stake is the extent to which rich import countries with high GDP per capita and/or profiting from the export of fossil fuels may limit their efforts under the ECHR and the Paris Agreement to reducing domestic emissions or for also taking some responsibility for embedded emissions related to their import of goods in general and export (of fossil fuels).

The UNFCCC and the Paris Agreement call on each state to define their own nationally determined contribution (NDC) but does not specify that this contribution shall be based on domestic emissions only. Rather, its legally binding article 2 (2) states that the agreement «will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances; in short, it introduces a concept of «common but differentiated responsibilities» on the basis of equity and capabilities.

The ECoHR did not rule on how embedded emissions shall be handled with respect to national transition plans. In respect of the procedural issue on whether to allow its (late) offer on supporting evidence on embedded emissions, the plaintiff had referred to a study commissioned by the Swiss Federal Office of Environment (FOEN) referring to embedded emissions in import goods as well as emissions caused by Swiss finance flows (see paragraph 77). To this, the court answered:

> 279. In the case at hand, it is important to note that it has been accepted in the reports by the relevant Swiss authorities[...], and elsewhere[..., that the GHG emissions attributable to Switzerland through the import of goods and their consumption form a significant part (an estimate of 70% for 2015)[...] of the overall Swiss GHG footprint. Indeed, the FOEN has stressed the following: «In a globalised economy, both the GHG emitted in Switzerland and those emitted abroad as a result of Swiss final demand must be recorded (total final consumption expenditure of households and the public sector). A large part of Switzerland's footprint is created abroad because imports make up a high proportion of the country's total consumption. [166]
>
> 280. It would therefore be difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the applicants' rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, «embedded emissions».

As the FOEN noted, these emissions «must be» considered the overall assessment of Switzerland's GHG emissions. This means, in terms of the above- noted principles of the Court's case law, that the Court needs to clarify, if necessary, even of its own motion, these facts when assessing the applicants' original – and rather general – complaint that Switzerland had failed to reduce its GHG emissions in line with the 1.5°C target.

Hence, the Court permitted evidence on embedded emissions but emphasised (in paragraph 283) that this was «without prejudice to the examination of the actual effects of «embedded emissions» (namely, Switzerland's import of goods for household consumption) on the State's responsibility under the Convention».

Concerning the merits of the case, Switzerland argued as follows:

> 360. In any event, there was no established methodology to determine a country's carbon budget or a country's «fair share».[] Switzerland had not determined a specific carbon budget, although its national climate policy could be considered as being close to an approach of establishing a carbon budget. Swiss climate policy was based on the relevant internal assessments[...], and through its NDCs Switzerland had determined its carbon reduction targets and was on a clear trajectory to achieving net zero emissions by 2050. The Swiss NDC reflected its fair share through the principles of: responsibility (having regard to the low global contribution to GHG emissions), capacity to contribute to the resolution of the problem of climate change, and the potential to bear the financial burden of measures to reduce GHG emissions.

The Court found, however, that Switzerland's transition measures did meet the legal standards, and noted (paragraph 569) that under its current climate strategy, Switzerland allowed for more GHG emissions than even an «equal per capita emissions» quantification approach would entitle it to use». Switzerland had not developed a carbon budget for its domestic emission, and the Court added this:

> 571. In this regard the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net zero emissions (see paragraph 116 above), which can hardly be compensated for by reliance on the State's NDCs under the Paris Agreement, as the Government

> seemed to suggest. The Court also finds convincing the reasoning of the GFCC, which rejected the argument that it was impossible to determine the national carbon budget, pointing to, inter alia, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement (see Neubauer and Others, cited in paragraph 254 above, paragraphs 21529). This principle requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative purposes that the European Climate Law provides for the establishment of indicative GHG budgets (see paragraph 211 above).

Hence, the Court did not conclude on whether «embedded emissions» are relevant in respect of ECHR articles 2 and 8. Nevertheless, the reference to the formula of «differentiated responsibilities»in the Paris Agreement may suggest that countries with significant embedded emissions must take some responsibility for these as well, i.e. by financing reductions abroad in other countries. This argument is even stronger for states with significant embedded export emissions.

In case 39371/20 (*Agostino and others vs. Portugal and 32 others*) the Court followed its previous case law in concluding that the obligations of member states in accordance with ECHR article 1 (applying to «everyone within their jurisdiction») do not amount to citizens of another state. Hence, the Portuguese youths were not permitted to litigate against the 32 member states (including Norway) but were left to instigate proceedings against Portugal as their home state. In this respect, the Court, among other things, argued as follows:

> 202. The applicants have also argued that bringing a case against Portugal alone would have been of limited efficacy and that they had no other means of holding the respondent States accountable for the impact of climate change on their Convention rights (see paragraphs 124 (c) and 125 above). The Court reiterates, however, that jurisdiction should be differentiated from the issue of responsibility, which constitutes a separate matter to be examined, if appropriate, in relation to the merits of the complaint (see paragraph 178 above). What is more, while the Court accepts that climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, it notes that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is not determined by any specific action (or omission) of any other State (see Verein KlimaSeniorinnen Schweiz and Others, cited above, § 442).[75] This approach is consistent with the Court's approach in cases involving concurrent responsibility of States for the alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, for instance, Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, nos. 75734/12 and 2 others, § 160, 19 November 2019). There is therefore no risk of a vacuum in the protection of Convention rights, nor can there be impunity by any of the respondent States in this context. It is also important to stress that there exists an extensive international process, under the umbrella of the United Nations, that allows States to address the climate-change responsibilities of other States.
>
> (...)
>
> 208. In sum, extending the Contracting Parties' extraterritorial jurisdiction on the basis of the proposed criterion of «control over the applicants' Convention interests» in the field of climate change – be it within or outside the Convention's legal space – would lead to an untenable level of uncertainty for the States. Action taken in relation to some of the basic human activities mentioned above, or any omission in managing the activity's potential harmful effects on climate change, could lead to the establishment of a State's extraterritorial jurisdiction over the interests of persons outside its territory and without any particular link with the State concerned. More importantly, accepting the applicants' arguments would entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world. This would turn the Convention into a global climate-change treaty. An extension of its scope in the manner requested by the applicants finds no support in the Convention.

The totality of the cases can be summarised as follows: The interpretation of ECHR article 8 in *Klimaseniorinnen* establishes uniform and reasonably strict European standards as to the positive obligations to provide effective protection against climate change. Since non-profit organisations were granted *legal standing* to represent potential victims of climate change (cf. paragraphs 489-505), there is a functioning legal system whereby an NGO can put national transition plans and measures to the test before a court of law on a regular and dynamic basis. Since the global climate situation is dynamic and the transition measures must be continuously developed based on scientific evidence and assessed and monitored, this is of great importance. Balancing these elements, the Court limited the scope of victims to citizens of the home state (with no extraterritorial effect) and set a high bar for victim status under article 8, cf. paragraphs 487 and 488. The signal is still pretty strong: The European member states will be liable to their citizens if they fail to do their part and the overall result is significant climate change.

9.3 Global and EU law Human Rights

By the Klimaseniorinnen the ECoHR has established a system where the member states will be liable for any current or future failure to meet the positive obligation as defined by the ECHR, but where the future success or failure with respect to implementing sufficient measures and avoid climate changes will decide on the extent of adverse changes to human rights caused and the monetary damage liabilities trigged – and where the states with the most adverse effects also will be those who will have to pay most.

This may on a quick reading suggest that Norway will not be liable for significant amounts unless the Norwegian climate or environment is significantly and negatively affected by the global climate changes. This is however only true under the ECHR system and is not likely to be the outcome.

Firstly, it is fairly evident that the EU will implement the relevant measures to counter the «Duarte problem» as some parts of South-Europe are likely to suffer first and most by climate changes.

Secondly, the ECHR is Norwegian law under the Human Rights Act, and the protection of private and family life under article 8 reflected in the constitution article 103. In conjunction with the general Norwegian laws on torts, this may lead to liability under Norwegian law for the Norwegian state towards a larger group of plaintiffs.

Thirdly, the *Klimaseniorinnen* ruling may have an «indirect» precedential-extraterritorial effect by influencing global human rights: The ECHR article 8 on the protection of the rights to private and family life does not have a textual replica in the UN human rights conventions, but the CP article 6 and the ESC articles 11 and 12 entail protection of life and a healthy environment, cf. above concerning the CSDDD Annex Part 1 item 15 and 16.

In this regard, it is also relevant that the UN Declaration 76/300 explicitly recognize the right to a clean, healthy, and sustainable environment as an international human right. Norway voted in favour of this resolution. In *Klimaseniorinnen,* Norway argued that this UN resolution only provided for a «political recognition» that had no legal effect (c. the case item 372). Still, it is likely that this resolution together with the ECoHR verdict and other international instruments will lead to interpretation of the UN human rights basically corresponding to the interpretation by the ECoHR.

As concerns state responsibilities, the Court's conclusion in *Agostino* means that the ECHR (and its court system) will not be a vehicle for global liability and fairness where inter alia states profiting from fossil fuels are held responsible for climate damages caused to other states and their citizens. The «extensive international process» referred to in its paragraph 202 probably refers to the process underway under the auspices of the ICJ, the international court established under the UN. The ICJ has been asked by the General Assembly to opine on the matter of state responsibility, see Request for Advisory Opinion. The Nordic countries have submitted a joint contribution, but this document is not yet publicly available.

On May 21, 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered a Advisory Opinion on state obligations under the UN Convention on the Law of the Sea (UNCLOS) in the context of climate change. The opinion was a response to an initiative by the Commission of Small Island States on Climate Change and International Law (COSIS) established in 2021. The oceans and climate are inextricably linked as numerous adverse effects of climate change manifest there such as ocean acidification, temperature changes, and rising sea levels, while the ocean also serves as a major carbon sink. The advisory opinion is particularly important to Norway since UNCLOS is the basis for Norway's exclusive rights to petroleum reserves on the continental shelf.

The ITLOS concluded that anthropogenic GHG emissions into the atmosphere constitute «pollution of the marine environment» under UNCLOS, and that the convention state parties have «specific obligations» under *inter alia* article 194 to take «all necessary measures» to prevent, reduce, and control marine pollution from anthropogenic GHG emissions and «endeavor to harmonize their policies» in this respect, implying a «stringent» due diligence standard, that however will vary in accordance with the capabilities and available resources of each state consistent with the principle of «common but differentiated responsibilities» in the UNFCCC. The ITLOS however emphasized that all convention states must «do whatever it can in accordance with its capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions» (paragraph 241). This obligation would not necessarily be satisfied by a state complying with its obligations and commitments under the Paris Agreement. The «necessary measures» should be determined objectively taking into account «the best available science» (para 243).

This opinion has global implications as 168 states are parties to UNCLOS, with responsibilities and liabilities towards the other states cf. its article 235. Hence, the obligations under UNCLOS article 194 (and other provisions of this treaty) and the possible state liabilities for damages triggered by a breach of convention obligations is not territorially limited to its own domiciles as per the ECoHR interpretation of the ECHR in the *Agostino* case. This forms a step on the potential universal liability for breach of climate rights. cf. also the ICJ process. Even states that are not party to UNCLOS (e.g., the US) recognize many of its provisions as forming part of customary international law, and the applicability of the Court's pronouncements to these countries may be an interesting legal development in the coming years.

Then there is the possibility of litigation against private companies and undertakings for liabilities triggered by a breach of environmental standards and environmental human rights. As per the CSDDD article 29, commercial undertakings subject to European law may be sued for breaching human rights, including the environmental human rights specified in the Annex Part 1 section 1 items 15 and 16. The requirement in the CSDDD article 22 for transition plans may here be an argument for a legal responsibility for the large enterprises in Europe to do their part to transit in accordance with the Paris Agreement.

Possibly this means that we, as a matter of EU law, will see litigations and verdicts in a number of EU/EEA states mirroring the case initiated in 2019 by the environmental group Milieudefensie/Friends of the Earth Netherlands against Dutch Shell, filing under Dutch law and human rights obligations (including ECHR articles 2 and 8) before the Hague District Court. The plaintiffs called for a ruling that Shell must reduce its GHG emissions by 45% by 2030 compared to 2010 levels and to zero by 2050, in line with the Paris Agreement. The case builds on the landmark *Urgenda* decision which found that the Dutch government's inadequate action on climate change violated its citizen duty of care. On May 26, 2021, the Hague District Court ruled in favour of the plaintiffs and ordered Shell to reduce its emissions by 45% by 2030 relative to 2019, across all activities, including both its own emissions and end-use emissions. Shell appealed the decision; an appeal court ruling is expected in 2024.

So maybe we are at a turning-point, where the lawyers have the tools needed and necessary to make sustainability law the bridge between failing sustainability politics and science and the better angles of our nature.

Notes

1 Switzerland is not part of the EEA.

2 NOU 2024: 7 «Norge og EØS – utvikling og erfaringer» Chapter 8 accurately describes this approach.

3 These principles includes adherence to fundamental human rights such as the rights under the European Human Rights Convention.

4 The reference is to the great German philosopher Immanuel Kant (1724-1804). Kant is, among other things, known for his *categorical imperative* aligning individual actions with general rules and where the key is to ask the following: *What would happen if everyone did as I wanted to do?* In this sense, Kant was the founder of ESG thinking.

5 Reference is made to NOU 2024: 7 «Norge og EØS – utvikling og erfaringer», in particular Chapter 8 on environmental issues and Chapter 9 on energy.

6 cf. Prop. 57 L (2023–2024).

7 Refer Knut Bergo: *Rett praksis – lærebok i norsk juridisk metode*', (Bergen 2022) for a detailed analysis.

8 Cf. NOU 2023: 25 Klimautvalgets rapport page 31.

9 SFDR art. 2 (24)

10 SFDR art. 2 (22)

11 The extent to which financial markets take note of sustainability risk varies.

12 A few illustrations: Thus far, China has partially based its electrification efforts on coal-fired power plants while Norway subsidises its petroleum industry with NOK 250-300 billion or more annually. Cf. Knut Bergo Petroleumsskatteloven – statens indirekte økonomiske engasjement på sokkelen, Lov og Rett (idunn.no). Det motsatte av dugnad, Lov og Rett (idunn.no). Oljeskattesystemet – et dårlig 'joint venture' for staten, Juridika. Innlegg: Klimapolitikk og valgkamp i en ideell verden, Dagens Næringsliv. Myten om grønn, norsk oljeproduksjon, BI. Innlegg: De begunstigedes dugnadsbidrag, Dagens Næringsliv. Den store skattemyten, Finansavisen. This means there are less investments in green energy as these investments are less profitable than investing in the oil and gas segment. Cf. analyst John Olaisen's reflections in Analytikerne slakter Equinor, Finansavisen on Equinor's (alleged) plans to increase its investments in a «project where there is no positive tax effect, as it is in oil projects».

13 One of the negative effects of the sustainability risk concept has been that economists tend to focus on it.

14 Most importantly the *Agenda 21* of the 1992 Earth Summit in Rio de Janeiro, the *Millennium Declaration on eight Millennium Development Goals* at the Millennium Summit in 2000 in New York, the *Johannesburg Declaration* of 2002 and the Rio 2012 document *'The Future We Want.'*

15 See latest AR6 Synthesis Report: Climate Change 2023 — IPCC, Top Findings from the IPCC Climate Change Report 2023 | World Resources Institute (wri.org)

16 Initially, a 20-person investor group was drawn from institutions in 12 countries supported by experts from the investment industry, intergovernmental organisations and civil society. PRI has grown since its inception in 2006.

17 UNEP FI is a partnership between the UN Environment Programme (UNEP) and the global financial sector. UNEP FI works closely with over 200 financial institutions, being signatories to the UNEP FI Statement on Sustainable Development. UNEP FI's mission is to identify and promote the best environmental and sustainability practices at all levels of financial institution operations.

18 The UN Global Compact was launched in 2000 and is a policy platform and a practical framework for companies committed to sustainability and responsible business practices. It entails *ten universally accepted principles* on human rights, labour, environment and anti-corruption, 7,000 corporate signatories in 135 countries – the world's largest voluntary (non-mandatory) corporate sustainability initiative. It is of legal relevance by reference to the EU Taxonomy.

19 FSB is an international body that monitors and makes recommendations about the global financial system.

20 One example is Equinor which, in its 2023 Annual Report still did not report its full Scope 3 figures. No major oil companies do, but the misrepresentation is more significant for producers on the Norwegian shelf. Cf. Bergo Myten om grønn, norsk oljeproduksjon, BI.

21 See the report from *Klimautvalget 2050* in NOU 2003: 25, page 297.

22 Some sectors only include installations above a specific size (until 31 December 2023, only for flights (commercial aviation) between airports in the EEA).

23 Including cement, iron and steel, aluminium, fertilisers, organic chemicals, plastics, electricity, hydrogen and ammonia.

24 Lov av 17. desember 2004 nr. 99 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteloven). Forskrift av 23. desember 2004 nr. 1851 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteforskriften).

25 Enighet om CO2-kompensasjonsordningen ut 2030, regjeringen.no.

26 COMMUNICATION 2019/640 from the EU Commission.

27 According to an OECD estimate, additional investments of USD 630 billion per year worldwide until 2030 are needed to have a 66% chance of limiting temperature increase to below 2°C.

28 The policies also include mobilising industry for a clean and circular economy; building and renovating in an energy and resource-efficient way; accelerating the shift to sustainable and intelligent mobility with sustainable transport fuels; 'Farm to Fork': designing a fair, healthy and environmentally friendly food system; and preserving and restoring ecosystems and biodiversity with zero pollution ambitions.

29 Cf. Regulation (EU) 2021/1119 – framework regulation for achieving climate neutrality.

30 Climate-neutral economy and society by 2050, with a 2030 interim target of at least 55 per cent reduction from 1990 levels.

31 COM/2018/097, EUR-Lex (europa.eu).

32 Ten actions on this webpage: Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth.

33 https://www.wolterskluwer.com/en/expert-insights/csrd-for-us-companies

34 Turnover is the total revenue or sales a company generates in a given period and an indicator of a company's ability to sell goods and services.

35 Operating Expenses (OpEx) are the ongoing costs for running a product, business or system. OpEx are often regular (monthly, quarterly, yearly) and predictable, making them a significant part of a company's short-term budgeting and cash flow management, in

contrast to capital expenditures (CapEx), which are one-time investments in physical assets like machinery or buildings.

36 Capital Expenditures (CapEx) refers to funds a company uses to acquire, upgrade and maintain physical assets such as property, industrial buildings or equipment. It is crucial to a company's financial investment in its growth and sustainability.

37 Refer Article 2 (5) and the definition of 'climate change mitigation' as 'the process of holding the increase in the global average temperature to well below 2 °C and pursuing efforts to limit it to 1.5 °C above pre-industrial levels, as laid down in the Paris Agreement.'

38 See TEG final report on the EU taxonomy, p. 20 for definition and references.

39 Red activities are activities that are currently not sustainable but have a potential to transition to Yellow or Green. Dark Red refers to the remaining non-sustainable activities in need of exit/decommissioning.

40 Yellow activities are activities that are harmful to one or more TR objectives but not substantially harmful while also not making a substantial positive contribution to any objective. This intermediate performance space covers a level of environmental performance towards the objectives of «almost significantly harmful» up to «almost making a substantial contribution».

41 White activities are more or less neutral in terms of their impact on environmental objectives.

42 Further reference to DNSH in article 2 (17) of Regulation (EU) 2019/2088 (SFDR).

43 Cf. preparatory materials Prop. 57 L (2023–2024) and NOU 2023: 15.

44 Per national choice.

45 Per national choice.

46 Here, the name of the CSRD as compared with the Corporate Sustainability Due Diligence Directive («CSDDD») can be misleading: The CSDDD is about environmental and human rights *compliance and responsibility*; the «real» ESG due diligence directive is the CSRD calling for extensive fact finding by the subject undertakings.

47 Undertakings which on their balance sheet dates do not exceed at least two of the three criteria in the table, but with regard to large companies, those companies that exceed two of the three criteria.

48 There are stricter certification systems in place, like the Cefetra Certified Soya | Responsible Soya.

49 Corporate sustainability due diligence, European Commission (europa.eu).

50 Texts adopted – Corporate Sustainability Due Diligence – Wednesday, 24 April 2024, (europa.eu).

51 The threshold on employees is estimated to exclude all but around 5300 of the companies incorporated in the EU; less than 1% of the total. Since the CSDDD also includes obligations with respect to business partners in the value chain, the indirect effect of the CSDDD will, however, be much more significant. The provisional deal of 2023 was to include companies with 500 employees as well as high-impact sectors such as textiles, mining, etc. with more than 250 employees. However, these sectors may be included at a later stage, as the CSDDD is to be reviewed within six years of its entry into force, and then every third year after that.

52 As we will explain below, article 22 has a wider scope in this regard.

53 For further reading, cf. Gamkinn Styrets ansvar for bærekraft, Revisjon og Regnskap.

54 Åpenhetsloven.

55 Norwegian: Forbrukertilsynet.

56 Norwegian: Markedsrådet.

57 Norwegian: Tvangsmulkt.

58 Norwegian: Overtredelsesgebyr.

59 Confer MIFID II Article 25 (2) and MIFID II Delegated Act Article 54, according to MIFID ESG Regulation Article 54 (2).

60 Risk-weighted means that not all assets are considered equally risky. For example, a government bond is typically seen as less risky than a corporate loan. Thus, different types of assets are weighted differently based on their perceived risk.

61 Capital ratio measures are used to assess the financial strength of a bank. They compare a bank's capital to its assets (loans, investments, etc.). Higher ratios usually indicate a more financially stable bank.

62 Tier 1: Core capital, including equity and retained earnings.

63 Additional tier 1: Includes instruments that are not quite core capital but still high quality.

64 Tier 2: Supplementary capital, including revaluation reserves and subordinated debt.

65 T1, AT1, and T2 Capital are types of bank capital.

66 Banks are required to maintain a minimum capital ratio, typically 8% of their risk-weighted assets. For every EUR 100 of risk-weighted assets, a bank must hold at least EUR 8 in capital.

67 In addition to the minimum, banks are required to maintain extra buffers. These can vary based on national regulations and specific bank conditions.

68 Including buffers, the total capital requirement can reach up to 16.5% for most banks and 18.5% for systemically important institutions (those institutions whose failure would significantly impact the financial system).

69 Risk Weighting of Assets: Different types of assets have different risk weights. For example, (i) Retail Mortgage Loans: The standard method might count them as 35% of their actual value. It means a EUR 100 mortgage loan is considered EUR 35 in terms of risk exposure. Furthermore, (ii) IRB (Internal Ratings-Based) Approach: Larger banks might use this approach where the same loan could be weighted between 15-25%.

70 Reported CRR Capital Ratios (17-18%): A bank might report a capital ratio of 17-18%, which seems high. Equity Ratio (6-7%): The actual equity (natural, tangible capital) might only be 6-7%. The difference is due to the risk-weighting of assets, which lowers the apparent risk exposure.

71 FSA, EBA, and ESMA – play critical roles in regulating and supervising the financial industry, each with a specific focus and set of responsibilities that contribute to the stability and integrity of financial markets and the protection of investors. The national FSAs in the EU are critical to maintaining a sound, transparent and stable financial environment within their countries and across the broader European financial market.

72 The EBA is an independent EU Authority that works to ensure effective and consistent prudential regulation and supervision across the European banking sector. Its main objectives are maintaining financial stability in the EU and safeguarding the banking sector's integrity, efficiency and orderly functioning.

73 ESMA is an independent EU Authority that contributes to safeguarding the stability of the European Union's financial system. It enhances the protection of investors and promotes stable and orderly financial markets.

74 EBA Roadmap on Sustainable Finance.

75 442. For its part, the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202-03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.