

# Duurzaamheid en financieel recht

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EFR 22 september 2023

Duurzaamheid en klimaat staat in vele sectoren centraal; dat geldt natuurlijk onverkort in de financiële wereld. Klimaatverandering en de overgang naar een duurzame economie gaan gepaard met risico's voor financiële instellingen, die zij vanuit het oogpunt van integere en beheerste bedrijfsvoering adequaat moeten beheersen. Een voorbeeld: verzekeraars dienen klimaatveranderingsrisico's te integreren in hun ORSAa (own risk and solvency assessment). De Europese Commissie heeft daartoe een ontwerpregeling opgesteld, mede om het toezicht te harmoniseren (zie EIOPA 2 augustus 2022, Application guidance on climate change materiality assessments and climate change scenarios in ORSA). Ook wereldwijd zijn hiertoe initiatieven ontwikkeld. Financiële instellingen in algemene zin zijn gehouden duurzaamheid (sustainability) tot speerpunt te maken.

# Actieplannen, voornemens en maatregelen inzake duurzame business modellen, diensten en producten

**\*EU Actieplan: duurzame groei financieren (COM(2018) 097) aansluitend bij de Overeenkomst van Parijs 2015 en de agenda van de VN 2030 Sustainable Development Goals (SDG) met als resultaat de EU Taxonomie en SFDR; Green deal COM(2019)640; Capital markets COM(2020)590f; Strategy for financing COM(2021)390f.**

**\*UN: ESG: Environment (milieu), Social (mens en maatschappij), Governance (behoorlijk bestuur);**

**\*EU: Verordening (EU) 2019/2088 betreffende informatieverstopping over duurzaamheid in de financiële dienstensector (SFDR)**

**\*EU: richtlijn (iw financieel jaar 2024) betreffende duurzaamheidsrapportage door ondernemingen Richtlijn 2022/2464 (zie artikel 1 voor financiële instellingen en ondernemingen)**

**\*COP28;**

**\*Financial Stability Board (Climate change NGFS 2019, Greening 2020, Environmental Risk Analysis by Financial Institutions 2020)**

**\*EU: sustainable finance package 13 juni 2023**

**\*EU: voorstel Vo betreffende de transparantie en integriteit van op ecologische, sociale en governancefactoren gebaseerde activiteiten COM(2023) 314f.**

# AFM:

## **\*Vereisten uit de SFDR**

De SFDR stelt voor financiëlemarktdeelnemers en financieel adviseurs informatieverstrekkingregels vast over:

het in aanmerking nemen van ongunstige effecten op duurzaamheid in het beleggingsbeleid of -advies, op entiteitsniveau en op productniveau; de integratie van duurzaamheidsrisico's, de gedragslijnen inzake duurzaamheidsrisico's, en het beloningsbeleid met betrekking tot de integratie van duurzaamheidsrisico's.

Financiëlemarktdeelnemers die duurzame producten aanbieden moeten daarnaast transparant zijn over de manier waarop een product invulling geeft aan duurzame doelstellingen dan wel kenmerken, zowel precontractueel als op periodieke basis.

**\*in 2023 afgerond: consultatie over de AFM Leidraad duurzaamheidsclaims**

# AFM 2023:

Per 1 januari 2024 gelden aangescherpte transparantieregels voor de duurzaamheidsinformatie (ESG) in het jaarverslag van de grootste beursgenoteerde ondernemingen; de Corporate Sustainability Reporting Directive (CSRD). Hiermee wordt bijvoorbeeld duidelijk wat klimaatverandering betekent voor de waardeontwikkeling van een onderneming en wat hun impact is op het milieu. Vooruitlopend daarop heeft de AFM een verkenning gedaan naar hun rapportage over klimaat, en de assurance hierbij. Er blijken nog grote stappen nodig om 2024 te kunnen halen.

# EU actueel: SFDR aanpassing

The European Commission has published a Delegated Regulation ([2023/363](#)) to amend and correct the SFDR regulatory technical standards (**RTS**) ([2022/1288](#)) - in particular, to update the template disclosures for products investing in environmentally sustainable activities.

Fundamentally, the changes look to ensure that investors receive the information set out in the Complementary Climate Delegated Act (**CDA**) ([2022/1214](#)). This includes detail in the pre-contractual disclosures, on websites and in periodic reports regarding exposures to investments in fossil gas and nuclear energy activities.

## EU: Regulation on the transparency and integrity of Environmental, Social and Governance rating activities

ESG ratings play an important role in the EU sustainable finance market as they provide information to investors and financial institutions regarding, for example, investment strategies and risk management on ESG factors.

Today, the ESG ratings market currently suffers from a lack of transparency and the Commission is proposing a Regulation to improve the reliability and transparency of ESG ratings activities. New organisational principles and clear rules on the prevention of conflicts of interest will increase the integrity of the operations of ESG rating providers.

These new rules will enable investors to make better informed decisions regarding sustainable investments. Moreover, the proposal will require that ESG rating providers offering services to investors and companies in the EU be authorised and supervised by the European Securities and Markets Authority (ESMA). This will also ensure the quality and reliability of their services to protect investors and ensure market integrity.

# **EU Taxonomie definieert wat duurzaam is**

De Europese Commissie heeft een lijst gepubliceerd van economische activiteiten die bijdragen aan het halen van het doel van de EU om in 2050 klimaatneutraal te zijn. Deze zogenaamde ‘Taxonomie’ geldt als leidraad voor investeringen in duurzaamheid.

De EU Taxonomie (Vo (EU) 2020/852 ) maakt duidelijk welke activiteiten wel of niet duurzaam mogen heten, op grond van hun wetenschappelijk getoetste bijdrage aan het voorkomen van klimaatverandering of beperken van de gevolgen ervan (adaptatie). De lijst kan worden gebruikt door grote bedrijven en financiële instellingen in de rapportage over hun duurzaamheid.



The EU Taxonomy is a cornerstone of the EU's sustainable finance framework and an important market transparency tool that helps direct investments to the economic activities most needed for a green transition. The Commission has today approved in principle a new set of EU Taxonomy criteria for economic activities making a substantial contribution to one or more of the non-climate environmental objectives, namely:

- sustainable use and protection of water and marine resources,
- transition to a circular economy,
- pollution prevention and control,
- protection and restoration of biodiversity and ecosystems.

To complement this, the Commission has adopted targeted amendments to the **EU Taxonomy Climate Delegated Act**, which expand on economic activities contributing to climate change mitigation and adaptation not included so far – in particular in the manufacturing and transport sectors. The inclusion of more economic activities covering all six environmental objectives, and consequently more economic sectors and companies, will increase the usability and the potential of the EU Taxonomy in scaling up sustainable investments in the EU.

# ESG

ESG houdt in dat factoren als energieverbruik, klimaat, beschikbaarheid van grondstoffen, gezondheid, veiligheid en goed ondernemingsbestuur worden meegewogen bij de selectie en het beheer van deelnemingen in bedrijven. ESG staat voor het zoeken naar een evenwicht tussen financieel economische resultaten, transparantie, sociale belangen en het milieu zonder de balans er tussen te verliezen (meerwaarde: risicobeperking en waardecreatie).

## UN: The Five Ps

The 17 SDGs are structured around the five pillars of the [2030 Agenda](#): People, Planet, Prosperity, Peace, and Partnerships. These 5 Ps highlight how the SDGs are an intertwined framework instead of a group of solo goals. The progress on one P must balance and support the progress on another.



# UN-SDG

## Sustainable Development Goals

**1** NO  
POVERTY



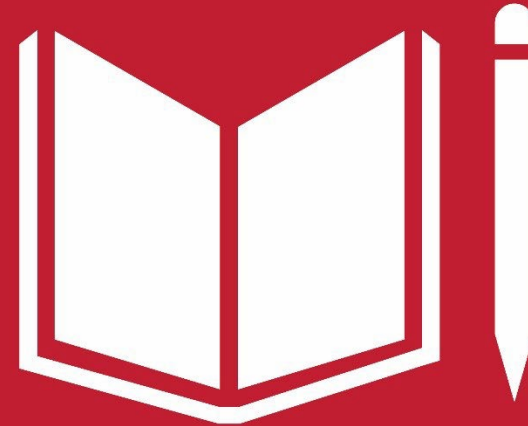
**2** ZERO  
HUNGER



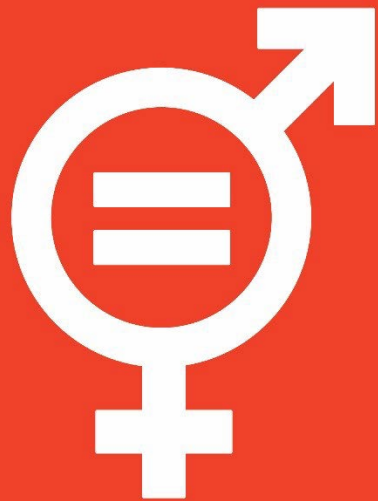
**3** GOOD HEALTH  
AND WELL-BEING



**4** QUALITY  
EDUCATION



**5** GENDER  
EQUALITY



**6** CLEAN WATER  
AND SANITATION



**7** AFFORDABLE AND  
CLEAN ENERGY



**8** DECENT WORK AND  
ECONOMIC GROWTH

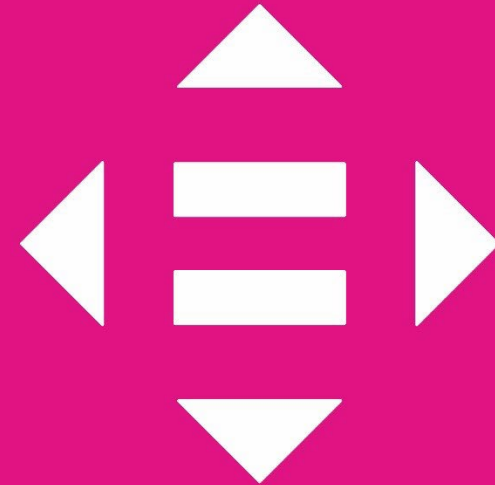




**9** INDUSTRY, INNOVATION  
AND INFRASTRUCTURE



**10** REDUCED  
INEQUALITIES



**11 SUSTAINABLE CITIES  
AND COMMUNITIES**



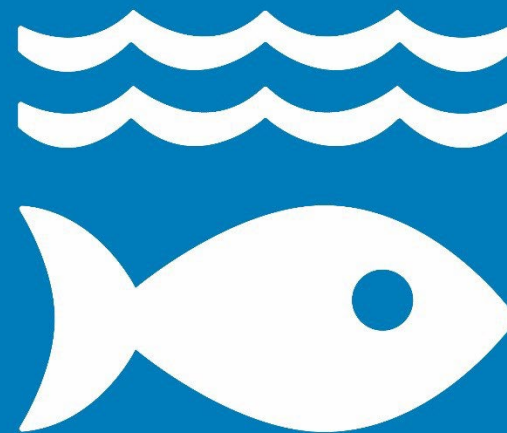
**12 RESPONSIBLE  
CONSUMPTION  
AND PRODUCTION**



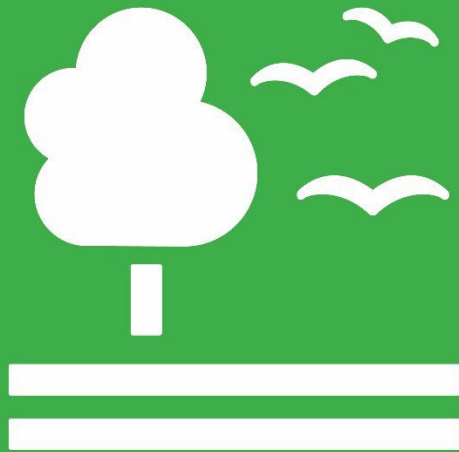
**13** CLIMATE  
ACTION



**14** LIFE  
BELOW WATER



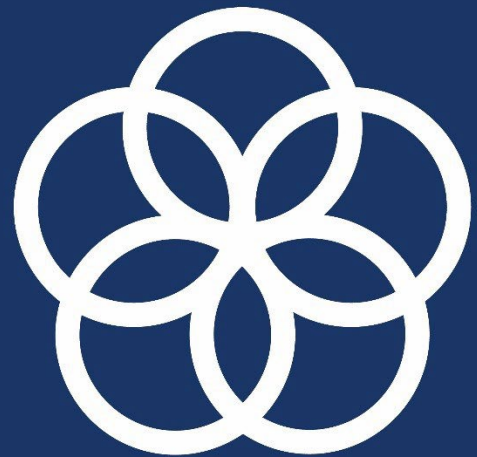
**15** LIFE  
ON LAND



**16** PEACE, JUSTICE  
AND STRONG  
INSTITUTIONS



**17** PARTNERSHIPS  
FOR THE GOALS



# COP28: opties voor financiële ondernemingen?

The sensible way to construct a profitable, long-term, climate-aligned, widely accessible investment strategy is to develop a diversified portfolio of assets that directly or indirectly support climate financing. For investors with a long-term horizon, a portfolio that meets these requirements should be composed of three main asset types.

The first is climate-resilient real estate and infrastructure – meaning assets in weather-proof, stable geographies that have low climate exposure;

The second component is green commodities. An orderly transition to a more resilient future requires massive investments not only in energy, food, and water assets but also in the metals and critical minerals used in renewable energy and electric vehicles. These include commodities such as soy, wheat, copper, rare-earth elements, cobalt, lithium and so forth;

Finally, a sensible climate-aligned portfolio should include assets that provide a hedge against inflation and geoeconomic risks, such as short-term and inflation-indexed sovereign bonds and gold (Roubiny & Bundy).

# Toepassing: sustainable risks and sustainable development

De Commissie definieert sustainable finance as ‘the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities; sustainable finance aims to ‘manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues.’

Dit heeft impact op: information disclosure obligations (SFDR) en EU financial services law, waarbij de Markets in Financial Instruments Directive (MIFID II) een belangrijke rol speelt. Het is ook van belang in de pensioensector (Institutions for Occupational Retirement Provision Directive IORP II 2016/2341).

(Mezzanotte AUBLR (2023) 215-276)

**De nieuwe regelingen leiden tot aanpassingen van** MIFID II, the Alternative Investment Fund Managers Directive (AIFMD), the Undertakings for the Collective Investment of Transferable Securities Directive (UCITS Directive), and the Insurance Distribution Directive (IDD). A key goal pursued by these changes has been to bring in sustainability-related requirements into the current regime of investor protection.



# The Meaning of Sustainability Risk

At the core of EU sustainable finance policy is the management of *sustainability risk*. The SFDR has provided a legal definition of sustainability risk that has served as central reference to define the concept in the EU sustainable finance regime. Sustainability risk means ‘an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment.’

**Veelal: klimaatverandering.**

*‘Transition risks’* constitute the other component of sustainability risk. These risks arise from changes in government policy towards low-carbon practices, the advancement of new technologies as well as shifts in market preferences.

Sustainability risk has raised the alarm among key actors in the financial sector because this risk undermines a company’s financial position (by increasing costs, downgrading the valuation of corporate assets, and reducing the company’s profitability and creditworthiness) and can spread widely across whole industries. Central bankers, financial regulators, government officials and finance-related business associations are increasingly aware that this problem, if ignored or mismanaged, will pose a credible threat to the real economy and, ultimately, to the stability of the financial sector.

Een belangrijk aspect is informatievoorziening:

Disclosure must provide a detailed description of the conflict of interest (nature and sources) that arises in the provision of investment and/or ancillary services as well as a description of the risks to the client that emerge from this conflict so that the client is in a position to make an informed investment decision. The disclosure must also indicate the steps undertaken by the investment firm to mitigate these risks. From the perspective of its internal operations, the firm is required to establish, implement and maintain an effective conflict of interest policy.

# Productontwikkeling: MIFID II en MIFID II DD 2017/593 alsmede ESMA Product Governance Guidelines

‘[a]n investment firm which manufactures financial instruments for sale to clients shall maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients.’ The manufacturing of financial instruments encompasses ‘the creation, development, issuance and/or design of financial instruments.’ The process of product approval involves the analysis of potential conflict of interest each time a financial instrument is manufactured.

**Nieuw: non-financial information betreffende ESG.** Zie ook Lafarre & Verhoeff BFLR 39 (2023)

# Kort gezegd (EU):

Sustainable finance refers to the process of taking environmental, social and governance (ESG) considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects. Environmental considerations might include climate change mitigation and adaptation, as well as the environment more broadly, for instance the preservation of biodiversity, pollution prevention and the circular economy. Social considerations could refer to issues of inequality, inclusiveness, labour relations, investment in people and their skills and communities, as well as human rights issues.

The governance of public and private institutions – including management structures, employee relations and executive remuneration – plays a fundamental role in ensuring the inclusion of social and environmental considerations in the decision-making process.

In the EU's policy context, sustainable finance is understood as finance to support economic growth while reducing pressures on the environment to help reach the climate- and environmental objectives of the European Green Deal, taking into account social and governance aspects.

Sustainable finance also encompasses transparency when it comes to risks related to ESG factors that may have an impact on the financial system, and the mitigation of such risks through the appropriate governance of financial and corporate actors

# Effectiviteit van compensatiesystemen?

The 50 most popular global projects include forestry schemes, hydroelectric dams, solar and wind farms, waste disposal and greener household appliances schemes across 20 (mostly) developing countries, according to data from AlliedOffses, the most comprehensive emissions trading database, which tracks projects from inception. They account for almost a third of the entire global voluntary carbon market (VCM), suggesting that junk or overvalued carbon credits that exaggerate emission reduction benefits could be the norm.

The vast majority of the environmental projects most frequently used to offset greenhouse gas emissions appear to have fundamental failings suggesting they cannot be relied upon to cut planet-heating emissions, according to a new analysis.

The global, multibillion-dollar voluntary carbon trading industry has been embraced by governments, organisations and corporations including oil and gas companies, airlines, fast-food brands, fashion houses, tech firms, art galleries and universities as a way of claiming to reduce their greenhouse gas footprint.

It works by carbon offset credits being tradable “allowances” or certificates that allows the purchaser to compensate for 1 ton of carbon dioxide or the equivalent in greenhouse gases by investing in environmental projects that claim to reduce carbon emissions. But there is mounting evidence suggesting that many of these offset schemes exaggerate climate benefits and underestimate potential harms. (The Guardian 19-9-23)

# Kritische kanttekeningen:

Is it finance that will be profitable in the long term and hence be itself sustainable? Is it finance that is justifiable to society? Is it finance that can help solve sustainability challenges and, if so, which ones, and to what extent can or should it seek to do that? Further, is sustainable investing the same as responsible investing, ESG investing or ethical investing? We have not yet defined 'responsible investing' in relation to responsibility to whom and for what. Does sustainable investing take account of all or just some ESG factors and in what ways and for what reasons? Ethical investing is also unclear in terms of which ethical basis, and are there forms of investing that are therefore 'neutral' or 'unethical'? H-Y Chiu, Lin & Rouch EBOLR 23(2022)



Colaert CMLR 59/6 2022 & [blogs.law.ox.ac.uk/business-law-blog/blog/2022/05/](https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/05/): *In light of the myriad new measures implementing the Commission's Sustainable Finance Action Plan, the question is whether sustainable finance can be considered an autonomous objective of financial regulation, and how this objective should be positioned relative to the traditional objectives of financial regulation: stability, market integrity, and consumer protection. Colaert finds that sustainable finance is not an autonomous objective of financial regulation yet, but that it has the potential to become one in the future, and that in case of a conflict between sustainable finance and the traditional objectives of financial regulation, the former should give way to the latter. A novel trend is that, pending stricter environmental, social and governance regulation, financial regulation has been instrumentalized to advance sustainable development by nudging companies to apply higher environmental, social and governance standards than legally required.*

THE SUSTAINABLE  
FINANCE LAW  
REVIEW

THE LAWREVIEWS

# En tot slot (ter overdenking)

**Doeland: de spokologie van afval/apocalypsofie. Over recycling, groene groei en andere gevaarlijke fantasieën**

Groene mythes ontmaskerd: kunnen we op dezelfde voet voortleven maar dan duurzaam? Circulaire economie, groene groei, groen kapitalisme + voortzetting van de status quo (beter verkoopbaar).  
Uitsterfelijkheid optie?