Eidgenössische Technische Hochschule Zürich
Swiss Federal Institute of Technology Zurich

Curbing Illicit Financial Flows from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance the SDGs

Working Paper No. 03/2023 (R4D-IFF-WP03-2023)

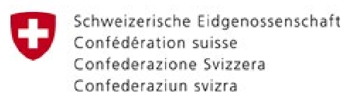
Illicit Financial Flows and Sustainable Finance: Interlinkages and Open Questions

December, 2023

Judith Schäli
Centre for Development and Environment (CDE), University of Bern

Elisabeth Bürgi Bonanomi
Centre for Development and Environment (CDE), University of Bern

© The Authors. All rights reserved. For more details, visit the project website: https://curbing-iffs.org/.
This project is funded through the Swiss Programme for Research on Global Issues for Development (www.r4d.ch) by the Swiss Agency for Development and Cooperation (SDC) and the Swiss National Science Foundation (SNSF). The working paper is also partially funded through the CDE Transformation Stream on Sustainable Finance and parts of it are used in the project report by Astrid Mirjam Zabel von Felten and others, "Report of the CDE Transformation Stream on Sustainable Finance" (Centre for Development and Environment (CDE) forthcoming).



Swiss Agency for Development and Cooperation SDC

SWISS NATIONAL SCIENCE FOUNDATION

source: https://doi.org/10.48350/192816 | downloaded: 29.4.2024

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS II

TABLE OF FIGURES IV

TABLE OF LAW IV

1 INTRODUCTION: TWO SIDES OF THE SAME COIN 1

2 THE EU SUSTAINABLE FINANCE FRAMEWORK 3

2.1 THE EU TAXONOMY REGIME 4

2.1.1 Criteria and environmental objectives *4*

2.1.2 Transparency: Disclosure and sustainability reporting *6*

2.1.3 Tools: Climate Benchmarks and Green Bonds *10*

2.2 FINANCIAL MARKET REGULATION AND SUPERVISORY LAW 11

3 SUSTAINABLE FINANCE REGULATION IN SWITZERLAND 13

3.1 SWISS TRADITION OF SELF-REGULATION 13

3.2 TRANSPARENCY: DISCLOSURE REGULATIONS FOR COMPANIES 16

3.3 STANDARD SETTING AND GREEN CONFEDERATION BONDS 18

4 THE ROLE OF IFFS IN THE SUSTAINABLE FINANCE FRAMEWORK 18

5 LOOKING AHEAD: OPEN QUESTIONS AND RESEARCH NEEDS 20

REFERENCES 22

TABLE OF ABBREVIATIONS

AMAS	Asset Management Association Switzerland
CDP	Carbon Disclosure Project
CIA	Climate and Innovation Act
CISA	Collective Investment Schemes Act
CISO	Collective Investment Schemes Ordinance
CO	Swiss Code of Obligations
COP	Conference of the Parties
CSDDD	Corporate Sustainability Due Diligence Directive
CSRD	Corporate Sustainability Reporting Directive
DDTrO	Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour
EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESG	Environmental, Social and Governance (factors)
ESMA	European Securities and Markets Authority
ESRS	European Sustainability Reporting Standards
ETF	Exchange-traded funds
EU	European Union
EuGBs	European Green Bonds
FINMA	Swiss Financial Market Supervisory Authority
FinSA	Financial Services Act
FinSO	Financial Services Ordinance
FOEN	Swiss Federal Office for the Environment
G20 SFWG	G20 Sustainable Finance Working Group
GFANZ	Glasgow Financial Alliance for Net Zero
IFFs	Illicit financial flows
ILO	International Labour Organization
IPSF	International Platform on Sustainable Finance
ISSB	International Sustainability Standards Board
KPI	Key Performance Index
MiFID II	Markets in Financial Instruments Directive (amended)
NFRD	Non-Financial Reporting Directive
NGFS	Network of Central Banks and Supervisors for Greening the Financial System
OECD	Organization for Economic Co-operation and Development
PRB	Principles for Responsible Banking
PRI	Principles for Responsible Investment
RTS	Regulatory Technical Standards (SFDR)
SBA	Swiss Bankers Association
SBTi	Science-Based Targets Initiative

SFDR	Sustainable Finance Disclosure Regulation
SIF	State Secretariat for International Finance
SNB	Swiss National Bank
SPI	Swiss Performance Index
SSF	Swiss Sustainable Finance
TCFD	Task Force on Climate-related Financial Disclosures
TNFD	Taskforce on Nature-related Financial Disclosures
UCA	Unfair Competition Act
UN	United Nations
UNEP FI	UN Environment Programme's Finance Initiative
UNFCCC	United Nations Framework Convention on Climate Change
UNGP	UN Guiding Principles on Business and Human Rights
WRI	World Resources Institute

TABLE OF FIGURES

Figure 1. Forms of regulatory influence on corporate behaviour 2

Figure 2. EU Sustainable Finance Strategy 4

Figure 3. Transparency of financial products and transparency on economic activities. 6

Figure 4. System overview 12

Figure 5. Development of sustainable investments in Switzerland 13

TABLE OF LAW

Commission Delegated Directive (EU) 2021/1270 of 21 April 2021 amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS) [2021] OJ L 277/141

Commission Delegated Regulation (EU) .../... of 27 June 2023 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C(2023) 3851 final (not yet published in the official journal) (Taxonomy Environmental Delegated Act)

Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2016] OJ L 87/1

Commission Delegated Regulation (EU) 2021/1257 of 21 April 2021 Amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 as Regards the Integration of Sustainability Factors, Risks and Preferences into the Product Oversight and Governance Requirements for Insurance Undertakings and Insurance Distributors and into the Rules on Conduct of Business and Investment Advice for Insurance-Based Investment Products [2021] OJ L 277/18

Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation [2021] OJ L 443/9

Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2022] OJ L 188/1 (Complementary Climate Delegated Act)

Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of "do no significant harm", specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to

the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports, including corrigendum of 27 December 2022 [2022] OJ L 332/1 (SFDR Technical Standards 1)

Commission Delegated Regulation (EU) 2023/363 of 31 October 2022 amending and correcting the regulatory technical standards laid down in Delegated Regulation (EU) 2022/1288 as regards the content and presentation of information in relation to disclosures in pre-contractual documents and periodic reports for financial products investing in environmentally sustainable economic activities [2022] OJ L 50/3 (SFDR Technical Standards 2)

Commission Recommendation (EU) 2023/1425 of 27 June 2023 on facilitating finance for the transition to a sustainable economy [2023] OJ L 174/19

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, Council Directive 2014/102/EU of 7 November 2014, Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021, and Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 (MiFID II)

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU (Accounting Directive) as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (Non-Financial Reporting Directive, NFRD)

Directive (EU) 2022/2464 the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15

Federal Act on Climate Protection Targets, Innovation and Strengthening Energy Security (Climate and Innovation Act CIA), adopted on 18 June 2023, planned entry into force on 1 January 2025 (BBl 2022 2403)

Paris Agreement (adopted by UNFCCC COP decision on 12 December 2015, entered into force on 4 November 2016) in Report of the COP 21, FCCC/CP/2015/10/Add.1, Annex

Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM/2022/71 final (CSDDD Proposal)

Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims COM(2023) 166 final (Green Claims Directive)

Proposal for a Regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities, COM/2023/314 final

Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector [2019] OJ L 317/1 (Sustainable Finance Disclosure Regulation, SFDR)

Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks [2019] OJ L 317/17 (EU Climate Transition Benchmarks Regulation)

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 [2020] OJ L 198/13 (EU Taxonomy Regulation)

Regulation (EU) 2023/xx of the European Parliament and of the Council of 23 October 2023 on European Green Bonds and Optional Disclosures for Bonds Marketed as Environmentally Sustainable and for Sustainability-Linked Bonds [2023] not yet published in the OJ (Green Bonds Regulation)

Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12 (EBA Regulation)

1 INTRODUCTION: TWO SIDES OF THE SAME COIN

Finance is a principal means to drive progress towards sustainable development. By regulating financial flows and aligning them with environmental, social, and economic priorities, an enabling environment for sustainable development can be created and important means of implementation can be generated. In order to create a new global framework for financing sustainable development, the Addis Ababa Action Agenda was adopted in 2015 at the Third International Conference on Financing for Development under the auspices of the United Nations.[1]

Two central pillars of the Addis Ababa Action Agenda concern the handling of domestic public resources as well as domestic and international private business and finance. Both pillars are indispensable for the overarching goal of achieving sustainable development in its three dimensions by promoting inclusive economic growth, protecting the environment, and fostering social inclusion – in addition to ending poverty and hunger.[2]

The first pillar is primarily dedicated to combating Illicit Financial Flows (IFFs) and creating fair and transparent taxation systems. IFFs are cross-border financial flows that are considered illicit in terms of their origin, cross-border transfer, or end use.[3] Examples include money flows resulting from tax evasion, money laundering, bribery, or trade mispricing by institutions or individuals.[4] Under the Addis Ababa Action Agenda, states specifically agreed to:

- redouble efforts to substantially reduce IFFs by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption;
- also reduce opportunities for tax avoidance;
- enhance revenue administration through modernized, progressive tax systems, improved tax policy, and more efficient tax collection;
- improve the fairness, transparency, efficiency, and effectiveness of their tax systems;
- enhance disclosure practices and transparency in both source and destination countries;
- make sure that all companies, including multinationals, pay taxes to the governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies. Here, special focus is given to resource-rich developing countries and the extractive industries.[5]

The second pillar addresses the potential contribution of the private sector to financing sustainable development and closing investment gaps in key sectors for sustainable development. In respect of this pillar, states committed to:

---

1 United Nations, "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)" adopted on 13–16 July 2015 in Addis Ababa and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015 para 1f. <https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf> accessed 6 December 2023.

2 ibid para 1.

3 See Irene Musselli and Elisabeth Bürgi Bonanomi, "Illicit Financial Flows: Concepts and Definition" (2020) 12.1 Revue internationale de politique de développement <http://journals.openedition.org/poldev/3296> accessed 2 September 2023.

4 Irene Musselli, Elisabeth Bürgi Bonanomi and Anu Lannen, "The Price of Fairness: Tackling Mispricing of Commodity Exports from Poor Countries" (CDE 2021) CDE Policy Brief 19 <https://www.cde.unibe.ch/research/cde_series/policy_briefs/the_price_of_fairness_tackling_mispricing_of_commodity_exports_from_poor_countries/index_eng.html> accessed 2 September 2023.

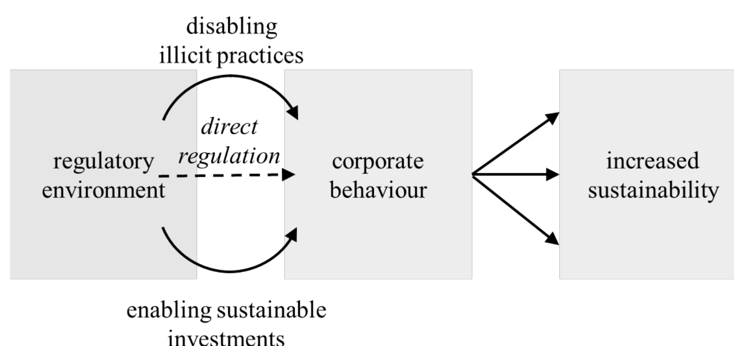
5 United Nations (n 1) paras 20–29.

- develop policies and strengthen regulatory frameworks to better align private-sector incentives with public goals;
- incentivize the private sector to adopt sustainable practices;
- foster long-term quality investment;
- foster a dynamic and well-functioning business sector while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements, such as the Guiding Principles on Business and Human Rights and the labour standards of the International Labour Organization (ILO), the Convention on the Rights of the Child, and key multilateral environmental agreements.[6]

Efforts under the second pillar are aimed, on the one hand, at directly influencing the behaviour of companies so that their economic activities contribute to sustainable development and, on the other hand, at steering private financial flows towards sustainable economic activities that will, in turn, further promote the transformation of the economy towards sustainability.

The combat against illicit financial flows – including those related to tax evasion, aggressive tax avoidance, and corruption – and the steering of private finance towards sustainable development objectives are thus closely linked and serve the same overarching goal and global agenda for sustainable development. While the sustainable finance agenda aims to channel funds into a green and fair economy, the fight against IFFs aims to – or has the potential to – recapture revenue (e.g. tax revenue) needed for human development and environmental protection, especially in commodity-exporting developing countries. While the objectives are similar, the regulatory approaches of the two areas are different: The fight against IFFs is fundamentally based on a *disabling* approach that seeks to curb undesirable or illegal practices. Sustainable finance, on the other hand, follows more of an *enabling* approach that seeks to identify sustainable economic activities and offer investors opportunities to select product portfolios according to their sustainability preferences (see Figure 1).

Figure 1. Forms of regulatory influence on corporate behaviour



Since the adoption of the Addis Ababa Action Agenda, the regulatory implementation of its "private finance pillar" has made considerable progress, for example in the European Union (EU). Over the past few years, the EU has developed a very dense, tightly meshed set of rules designed to ensure transparency of financial products vis-à-vis investors with regard to the impact of the financed companies or their activities on the environment and, to a lesser extent, on other factors such as human rights. The present working paper first provides a basic explanation of the still very new, dynamic, and evolving sustainable finance regulatory framework before discussing in greater detail the interplay between the two regulatory areas – IFFs and sustainable finance – and uncovering questions for future research.

[6] ibid paras 35–37.

Section 2 deals with the EU's extensive regulatory framework. Special focus is given to the Taxonomy Regulation, which is at the heart of the framework, and its interaction with related acts. Section 3 looks at the approach that Switzerland has chosen in this area. Section 4 offers some reflections on the role of IFFs within the sustainable finance framework. Finally, Section 5 identifies a number of open questions that require further research.

2 THE EU SUSTAINABLE FINANCE FRAMEWORK

Sustainable finance plays a key role in contributing to the policy objectives of the European Green Deal, a set of EU policy initiatives aimed at addressing the existential threats of climate change and environmental degradation.[7] It channels private investment "into the transition to a climate-neutral, climate-resilient, resource-efficient and fair economy, as a complement to public money."[8] In doing so, it is an important tool to implement the EU's international obligations under the Paris Agreement[9] as well as to achieve the EU's related objective of making the bloc climate-neutral by 2050.[10]

An essential element of sustainable finance is incorporating environmental, social, and governance (ESG) factors into investment decision-making. This leads to more long-term investments in sustainable economic activities, which are, on the other hand, recognized as a prerequisite for long-term financial stability.[11]

In 2018, the EU adopted its Action Plan on Financing Sustainable Growth[12] aimed at:

1. reorienting capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;
2. managing financial risks stemming from climate change, resource depletion, environmental degradation, and social issues; and
3. fostering transparency and long-termism in financial and economic activity.[13]

Since the adoption of its Action Plan, the EU has been gradually building a sustainable finance framework. At the centre of the framework is the so-called Taxonomy Regulation.

The EU framework for sustainable finance is thus an important tool for the EU to achieve its environmental policy objectives, with the Taxonomy Regulation at its centre.

[7] The Green Deal, as presented by the European Commission on 11 December 2019, is a growth strategy that, among other things, "aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts": European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, the European Green Deal" (2019) COM(2019) 640 final 2.

[8] European Commission, "Overview of Sustainable Finance" <https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en> accessed 18 August 2023.

[9] Article 2(1)(c) of the Paris Agreement aims to strengthen the response to climate change by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development: Paris Agreement (adopted by UNFCCC COP decision on 12 December 2015, entered into force on 4 November 2016) in Report of the COP 21, FCCC/CP/2015/10/Add.1, Annex.

[10] See European Council, "European Council Meeting (12 December 2019) – Conclusions" (2019) EUCO 29/19, CO EUR 31, CONCL 9.

[11] European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth" (2018) COM(2018) 97 final 1.

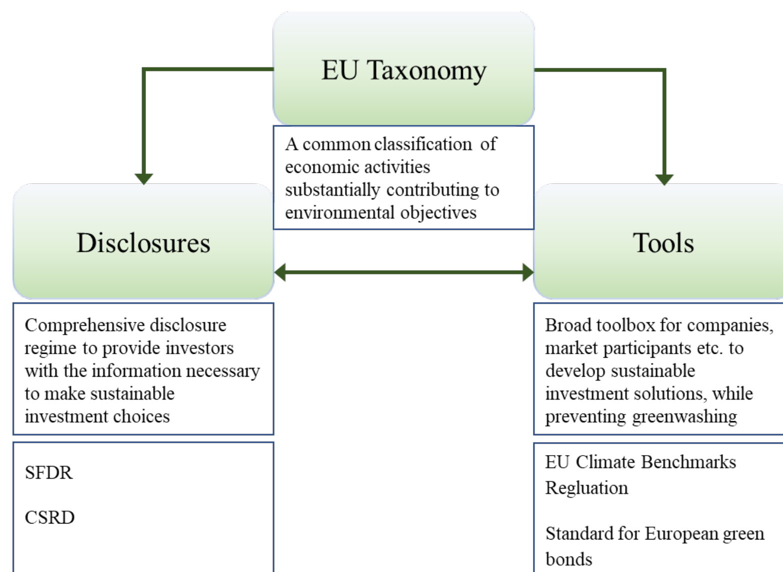
[12] European Commission, "Action Plan: Financing Sustainable Growth" (n 11).

[13] ibid 2.

2.1 THE EU TAXONOMY REGIME

As a science-based classification system for environmentally sustainable activities, the taxonomy informs specific regulations on disclosure and sustainability reporting. Moreover, the taxonomy provides the basis for EU-wide standards on environmentally sustainable financial products as well as for an EU ecolabel framework for financial products, an EU Green Bond Standard, and sustainability benchmarks.[14] These tools complement the taxonomy and disclosure requirements to facilitate, through transparency, the task of aligning investment strategies with the EU's climate and environmental objectives (see Figure 2).[15]

Figure 2. EU Sustainable Finance Strategy



Source: Adapted from European Commission, "Sustainable Finance Strategy (Factsheet)" (6 July 2021) <https://finance.ec.europa.eu/system/files/2021-07/210706-sustainable-finance-strategy-factsheet_en.pdf> accessed 24 August 2023.

2.1.1 Criteria and environmental objectives

The **EU Taxonomy Regulation**,[16] which entered into force on 12 July 2020, provides a common, science-based classification system for sustainable economic activities. It offers a clear definition of what is legally considered "environmentally sustainable". The definition guides companies, investors, and policymakers in investment-related decision-making processes, supporting the shift towards more environmentally sustainable investments. Moreover, the Taxonomy Regulation aims to protect private investors from greenwashing.[17]

---

[14] See ibid 4.

[15] Rainer Baisch and Rolf H Weber, "Entwicklungen im europäischen Finanzmarktrecht 'Sustainable Finance' und DLT-Regulierung" in Astrid Epiney, Sarah Progin-Theuerkauf and Petru Emanuel Zlătescu (eds), *Schweizerisches Jahrbuch für Europarecht / Annuaire suisse de droit européen 2021/2022* (Schulthess Juristische Medien AG 2022) 178, with references on relevant regulation.

[16] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 [2020] OJ L 198/13 (EU Taxonomy Regulation).

[17] See European Commission, "EU Taxonomy for Sustainable Activities" (*Finance*) <https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en> accessed 31 March 2023.

The taxonomy sets out four criteria that must be cumulatively fulfilled for an economic activity to qualify as environmentally sustainable.[18] Specifically, an economic activity is considered environmentally sustainable when it:

1. contributes substantially to one or more of six pre-defined environmental objectives;
2. does not significantly harm any of the pre-defined environmental objectives;
3. is carried out in compliance with a number of social and human rights minimum safeguards;[19] and
4. complies with the technical screening criteria established by the European Commission for each of the environmental objectives.

The six environmental objectives are defined in Article 9 of the Taxonomy Regulation and include:

1. climate change mitigation;
2. climate change adaptation;
3. the sustainable use and protection of water and marine resources;
4. the transition to a circular economy;
5. pollution prevention and control; and
6. the protection and restoration of biodiversity and ecosystems.

Each of these environmental objectives is interpreted in accordance with relevant EU law and the specific provisions of the Taxonomy Regulation which describe certain essential elements relevant to different objectives. In addition, the Commission adopted technical screening criteria for each of the environmental objectives to determine whether economic activities contribute substantially to that objective and whether significant harm is done to any of the objectives. In addition to the environmental impact of the economic activity itself, the criteria consider the life cycle of the products and services provided by said economic activity.

The technical screening criteria are defined in three Delegated Acts:

- The **EU Taxonomy Climate Delegated Act** was adopted in April 2021 and came into force on 1 January 2022. It "lists a number of activities in sectors covering the large majority of EU carbon emissions […] and sets criteria to determine whether each activity can be considered to make a substantial contribution to climate change mitigation and climate change adaptation, and to do no significant harm to environmental objectives."[20]
- The **Taxonomy Complementary Climate Delegated Act**[21] sets out conditions subject to which certain nuclear and gas activities can be added as transitional activities to those already covered by the first Delegated Act on climate mitigation and adaptation. It moreover introduces specific disclosure requirements for businesses related to their activities in the gas and nuclear energy sectors.

---

[18] EU Taxonomy Regulation Article 3. The Taxonomy Regulation applies to financial market participants that offer environmentally sustainable financial products and non-financial companies that issue environmentally sustainable corporate bonds.

[19] ibid Article 18.

[20] European Commission, "EU Sustainable Finance April Package" (2021) <https://finance.ec.europa.eu/system/files/2021-04/sustainable-finance-communication-factsheet_en.pdf> accessed 21 April 2023.

[21] Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2022] OJ L 188/1 (Complementary Climate Delegated Act).

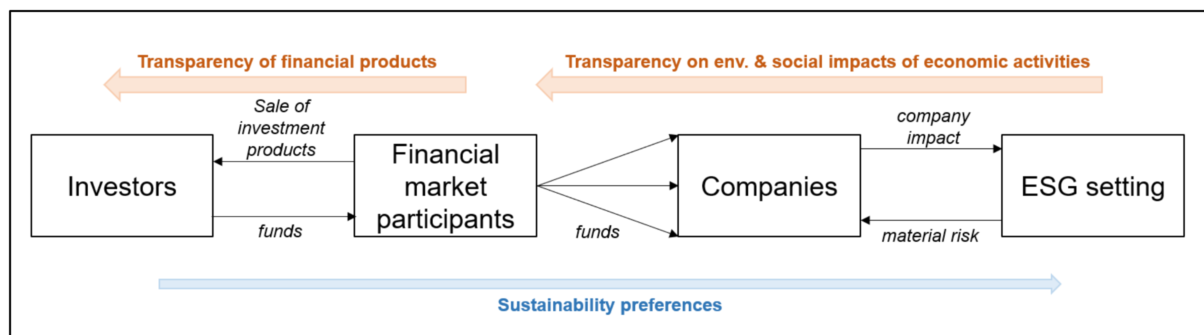
- On 27 June 2023, the Commission adopted the **Taxonomy Environmental Delegated Act**,[22] including a new set of EU taxonomy criteria for economic activities making a substantial contribution to one or more of the non-climate environmental objectives.[23]

The taxonomy defines what an environmentally sustainable economic activity is. In doing so, it links environmental objectives to compliance with minimum social and human rights safeguards. This means that if, for example, a company buys land to protect it from deforestation and offset carbon emissions, but displaces the local population – thus violating the safeguards – the economic activity cannot be considered environmentally sustainable in line with the taxonomy, even if it contributes to an environmental objective.

2.1.2 Transparency: Disclosure and sustainability reporting

Transparency is a prerequisite for combating the phenomena of *greenwashing* and *greenwishing*.[24] In the area of sustainable financing, transparency is twofold: firstly, for an investor to pursue his or her sustainability preferences, there must be transparency regarding the financial products. Secondly, for such transparency to be realized, there must be transparency regarding the actual economic and social impacts of the concrete economic activities and companies funded by specific financial products (see Figure 3). Corresponding regulations are therefore usually also multi-layered.

Figure 3. Transparency of financial products and transparency on economic activities.



Source: © Adapted from Astrid Zabel von Felten, in: Zabel von Felten and others.

The Taxonomy Regulation is relevant for disclosure requirements under the **EU Sustainable Finance Disclosure Regulation (SFDR)**,[25] which aims to provide "more transparency on the degree to which

22 Commission Delegated Regulation (EU) …/... of 27 June 2023 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C(2023) 3851 final (not yet published in the official journal) (Taxonomy Environmental Delegated Act).

23 European Commission, "Implementing and Delegated Acts - Taxonomy Regulation" <https://finance.ec.europa.eu/regulation-and-supervision/financial-services-legislation/implementing-and-delegated-acts/taxonomy-regulation_en> accessed 24 August 2023.

24 *Greenwashing* means the risk that customers and investors are misled about the sustainable characteristics of financial products and services. *Greenwishing* refers to an unintentional form of greenwashing, when financial institutions believe in the sustainability of their products but fail to achieve the communicated, intended impacts and results: see Antonios Koumbarakis and others, "Greenwashing and Greenwishing – a Regulatory View" (PwC Switzerland 2022) 5.

25 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector [2019] OJ L 317/1 (Sustainable Finance Disclosure Regulation, SFDR).

financial products consider environmental and/or social characteristics, invest in sustainable investments or have sustainable objectives."[26] The SFDR is addressed to financial market participants and financial advisors. It articulates entity-level and product-level disclosure requirements.

Requirements at entity level: The SFDR requires specific disclosures from financial market participants and investment advisers on how they address *sustainability risks* (referring to "an environmental, social or governance event or condition that […] could cause an actual or a potential material negative impact on the value of the investment")[27] and *principal adverse impacts* of investment decisions on sustainability factors.[28] The two components are thus complementary in the sense of a **double materiality**.[29] Important instruments in this regard include ecological assessments and impact monitoring.[30]

Requirements at product level: With regard to financial products, the SFDR defines disclosure obligations regarding pre-contractual disclosure, periodic reporting, and website product disclosure. It provides for different levels of disclosure, depending on the degree to which sustainability is a consideration. "Normal" disclosure requirements only refer to sustainability risks that concern impacts on the value of the investment itself (Article 6 SFDR). Specific disclosures need to be made for products that promote environmental or social characteristics (Article 8 or "light green" products) or that have sustainable investment as their core objective (Article 9 or "dark green" products).[31]

Both types of requirements came into effect on 10 March 2021 (so-called Level 1 disclosures). In April 2022, a set of technical standards on SFDR requirements was adopted (referred to as Regulatory Technical Standards, or RTS).[32] The standards specify the exact content, methodology, and presentation of the information to be disclosed. Respective requirements began applying on 1 January 2023 (so-called Level 2 disclosures). Since 20 February 2023, financial market participants are required to disclose the extent to which their portfolios are exposed to gas- and nuclear-related activities that comply with the Taxonomy, as set out in the Complementary Climate Delegated Act.[33]

---

[26] J.P. Morgan Asset Management, "EU SFDR Explained: A Guide to the EU Sustainable Finance Disclosure Regulation for Investors" <https://am.jpmorgan.com/ch/en/asset-management/institutional/investment-strategies/sustainable-investing/understanding-SFDR/> accessed 29 August 2023.

[27] Article 2 (22) SFDR.

[28] Article 2 (24) ibid. Companies with less than 500 employees are not necessarily required to consider principle adverse impacts and thus publish a statement on due diligence policies. However, where a company does not consider such impacts, a clear explanation of the reasons is required: see Article 4(1) ibid.

[29] "Double materiality is an extension of the key accounting concept of materiality of financial information. Information on a company is material and should therefore be disclosed if 'a reasonable person would consider it [the information] important' […]." Under the concept of double materiality, it is not just ESG-related risks for the company that can be material but also impacts of a company on ESG factors: Matthias Täger, "'Double Materiality': What Is It and Why Does It Matter?" (*Grantham Research Institute on Climate Change and the Environment*, 21 April 2021) <https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/> accessed 30 August 2023.

[30] See Anthesis, "A Guide to the EU Sustainable Finance Disclosure Regulation (SFDR)" (4 April 2023) <https://www.anthesisgroup.com/a-guide-to-the-eu-sustainable-finance-disclosure-regulation/> accessed 24 August 2023.

[31] See J.P. Morgan Asset Management (n 26).

[32] Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of "do no significant harm", specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports, including corrigendum of 27 December 2022 [2022] OJ L 332/1 (SFDR Technical Standards 1).

[33] Commission Delegated Regulation (EU) 2023/363 of 31 October 2022 amending and correcting the regulatory technical standards laid down in Delegated Regulation (EU) 2022/1288 as regards the content and presentation of information in relation to disclosures in pre-contractual documents and periodic reports for financial products investing in environmentally sustainable economic activities [2022] OJ L 50/3 (SFDR Technical Standards 2).

SFDR disclosures must be made annually. The European Supervisory Authorities (ESAs)[34] provide an editable version of the templates on their website and submit an annual report to the European Commission on best disclosure practices.[35] Compliance of financial market participants and financial advisors with SFDR requirements is monitored by the competent authorities of EU Member States. These authorities are endowed with the necessary supervisory and investigatory powers.[36]

The EU Taxonomy Regulation informs the interpretation of the SFDR[37] and supplements respective disclosure requirements, especially with regard to financial products that promote environmental characteristics or have sustainable investment as their objective (SFDR Article 8 and 9 products). Such funds must report their taxonomy-compliant share in the portfolio.[38] Where investments underlying a financial product do not consider the EU criteria for environmentally sustainable economic activities, a respective statement must be included in the product information.[39]

The question of the environmental sustainability of financial products can only be answered if sufficient information on the environmental sustainability of economic activities in the real economy is available on the financial markets. Transparency regulations for companies in the real economy are thus a prerequisite for transparency of financial products. For this reason, the EU adopted its **Non-Financial Reporting Directive (NFRD)**,[40] which was amended by the **Corporate Sustainability Reporting Directive (CSRD)**,[41] the latter of which entered into force on 5 January 2023. Under the CSRD, all large companies and all listed companies (except listed micro-enterprises) are required to disclose: (1) all information necessary to understand the respective company's impacts on sustainability matters; and (2) all information necessary to understand how sustainability matters affect the respective company's development, performance, and position.[42] This includes, among other things: information regarding sustainability-related risks and opportunities; a description of the respective company's policies in relation to sustainability matters; a description of its due diligence process with regard to sustainability matters; a description of its principal actual or potential adverse impacts linked to its operations and value chain; and information on mitigation measures. For the purposes of the EU sustainability reporting regime, sustainability matters include environmental matters, social matters and treatment of em-

---

[34] The three ESAs are the European Banking Authority (EBA); the European Securities and Markets Authority (ESMA); and the European Insurance and Occupational Pensions Authority (EIOPA).

[35] Article 18 SFDR; Anthesis (n 30); European Commission, "Sustainability-Related Disclosure in the Financial Services Sector" <https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en> accessed 29 August 2023.

[36] Article 14 SFDR.

[37] The definition of "sustainable investment" in the SFDR includes investments in economic activities that contribute to an environmental objective which, amongst others, should include investments into "environmentally sustainable economic activities" within the meaning of the Taxonomy Regulation: EU Taxonomy Regulation Preambular para 19.

[38] ibid Article 5–6.

[39] ibid Article 7.

[40] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU (Accounting Directive) as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (Non-Financial Reporting Directive, NFRD).

[41] Directive (EU) 2022/2464 the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15.

[42] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, Council Directive 2014/102/EU of 7 November 2014, Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021, and Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 in particular Articles 19a and 29a.

ployees, respect for human rights, anti-corruption and bribery, and diversity on company boards. Companies subject to the CSRD have to report according to **European Sustainability Reporting Standards (ESRS)**.[43]

Article 8(1) of the Taxonomy Regulation refers to these frameworks and obliges respective financial and non-financial undertakings to disclose the proportion of environmentally sustainable economic activities that align with the EU Taxonomy criteria ("Taxonomy-aligned economic activities").[44] The financial variables that need to be disclosed are specified in Article 8(2) and Annex 1 of the **Taxonomy Disclosures Delegated Act**.[45] The so-called *key performance indicators* (KPIs) allow investors and financial institutions to have clear and comparable data on the environmental performance of the respective company.[46]

Provision or trading of unsustainable financial products is not prohibited under EU law, as long as the products do not involve illicit or illegal activities.[47] However, the regulations strive to curb greenwashing – that is, they try to prevent banks or insurance companies from presenting their financial products as more environmentally friendly (or more sustainable) than they are. The harmonized definition of sustainable economic activities and investments serves this purpose, as does a range of disclosure requirements.

Put simply, companies must report on the environmental (and social) impacts of their economic activities (CSRD) and, in particular, on the proportion of environmentally sustainable economic activities (Taxonomy Regulation). Based on the information provided by the companies, banks and other financial market participants must foster transparency regarding the financial products (SFDR) they offer. Specifically, investment funds must disclose the share of environmentally sustainable investments in the portfolio (Taxonomy Regulation).

The SFDR, the CSRD and the Taxonomy Regulation are closely related and complementary to the **Corporate Sustainability Due Diligence Directive (CSDDD)** proposed by the Commission on 23 February 2022.[48] Under the former three, companies *need to provide data and information* on risks and impacts within their value chains that are linked to environmental factors or human rights. The proposed CSDDD requires businesses to *address adverse impacts* arising from their own operations or those of their subsidiaries and, where related to their upstream or downstream supply chains, from their established business relationships inside and outside Europe. The proposed regulation also lays down

---

[43] See European Commission, "Corporate Sustainability Reporting" <https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed 30 August 2023.

[44] For non-financial undertakings, *Taxonomy-eligibility* has to be disclosed since 1 January 2022 and *Taxonomy-alignment* since 1 January 2023. For financial undertakings, *Taxonomy-eligibility* has to be disclosed since 1 January 2022 and *Taxonomy-alignment* will need to be disclosed from 1 January 2024: see Sara Feijao and others, "EU Taxonomy Delegated Act with Details of Article 8 Disclosures Published in the OJ" (*linklaters*, 14 December 2021) <https://sustainablefutures.linklaters.com//post/102hee3/eu-taxonomy-delegated-act-with-details-of-article-8-disclosures-published-in-the> accessed 31 August 2023.

[45] Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation [2021] OJ L 443/9.

[46] For more information, see European Commission, "Corporate Sustainability Reporting" (n 43); "FAQ: What Is the EU Taxonomy Article 8 Delegated Act and How Will It Work in Practice?" 3 <https://finance.ec.europa.eu/system/files/2021-07/sustainable-finance-taxonomy-article-8-faq_en.pdf> accessed 21 April 2023.

[47] As Musselli and Bürgi Bonanomi point out, it is difficult to draw an *ex ante* distinction between "illegal" and "illicit" activities, as so-called illicit activities often involve illegal elements – sometimes in combination with poor law enforcement: Musselli and Bürgi Bonanomi (n 3) 3 ff.

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

rules on penalties and civil liability for infringing those obligations. Once it enters into force, the CSDDD will apply to companies that exceed the applicability threshold of 500 employees on average and an annual net worldwide turnover of more than EUR 150 million. Whether the financial sector should be included in the scope of the CSDDD was the subject of controversial debate. On 14 December 2023, the European Parliament and the Council of the European Union agreed a compromise deal that excludes the core business of financial actors – especially their investment and lending activities – from the scope of the CSDDD. However, there will be a review clause for a possible future inclusion of the financial downstream sector.[49]

According to the agreed compromise by the European Parliament and the Council of the European Union, core financial services will be temporarily excluded from the obligations under the CSDDD. The financial sector will only have to apply the CSDDD in relation to their own operations and upstream supply chains.

As a further complement to the Taxonomy Regulation, the Commission proposed a new law in March 2023 to extend the fight against greenwashing beyond the financial sector. The proposed **Green Claims Directive** defines criteria to prevent companies from making misleading claims about the environmental benefits of their products and services.[50]

2.1.3 Tools: Climate Benchmarks and Green Bonds

Along with the use of the EU Taxonomy, the Commission recommends the use of specific tools such as climate benchmarks and green bonds.

Benchmarks are indices that play a central role in the price formation of financial instruments. They make it possible to track and measure performance and allocate assets accordingly. Traditional benchmarks reflect sustainability goals only to a limited degree. As such, they are not appropriate to measure the performance of sustainable investments.[51] With the **EU Climate Transition Benchmarks Regulation**[52] of 27 November 2019, the EU introduced two new categories of climate-related benchmarks: the EU climate transition benchmark and the EU Paris-aligned benchmark. In the same vein, ESG disclosure requirements have been introduced for all benchmarks except for interest rate and currency benchmarks. Benchmarks should thus disclose "within their benchmark statement whether they pursue ESG

[49] Council of the European Union, "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights" (Press Releases, 14 December 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/> accessed 21 December 2023. See also Allenbach-Amman J, "EU Parliament and Member States Reach Deal on Corporate Due Diligence Law" (edie, 18 December 2023) <https://www.edie.net/eu-parliament-and-member-states-reach-deal-on-corporate-due-diligence-law/> accessed 21 December 2023; Loyens & Loeff, "The CSDDD Deal Has Been Sealed; Provisional Agreement Reached on 14 December 2023 on the CSDDD" (News, 15 December 2023) <https://www.loyensloeff.com/insights/news--events/news/the-csddd-deal-has-been-sealed-provisional-agreement-reached-on-14-december-2023-on-the-csddd/> accessed 21 December 2023.

[50] Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims COM(2023) 166 final (Green Claims Directive).

[51] European Commission, "Action Plan: Financing Sustainable Growth" (n 11) 7.

[52] Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks [2019] OJ L 317/17 (EU Climate Transition Benchmarks Regulation). See also Commission Recommendation (EU) 2023/1425 of 27 June 2023 on facilitating finance for the transition to a sustainable economy [2023] OJ L 174/19; European Commission and Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Development of Tools and Mechanisms for the Integration of ESG Factors into the EU Banking Prudential Framework and into Banks' Business Strategies and Investment Policies: Final Study* (Publications Office of the European Union 2021) <https://data.europa.eu/doi/10.2874/220248> accessed 24 August 2023.

objectives and have to provide an explanation of how their methodology reflects ESG factors".[53] The Commission has specified the minimum standards and minimum explanation contents in Delegated Regulations.[54]

On 23 October 2023, the European Parliament and the Council adopted the **European Green Bond Regulation**,[55] which lays down uniform requirements for issuers of European Green Bonds (EuGBs) and provides optional disclosure templates for bonds marketed as environmentally sustainable and for sustainability-linked bonds. These EuGBs will be available to companies and public entities that wish to raise funds on capital markets to finance their green investments. Issuers of EuGBs need to ensure that at least 85 percent of the funds raised by the bond are allocated to economic activities that align with the Taxonomy Regulation.

With its uniform classification system for environmentally sustainable activities, the taxonomy provides a basis for EU-wide standards regarding sustainability benchmarks and green bonds.

2.2 FINANCIAL MARKET REGULATION AND SUPERVISORY LAW

The taxonomy regime is flanked by various regulations in the financial market sector, which further promote and push the shift towards sustainable investment:

Through an adjustment of the relevant requirements under the **Markets in Financial Instruments Directive (MiFID II)**[56] and delegated acts, sustainability requirements must now be considered by financial service providers, including in asset management and investment consultancy. Comparable sustainability-related requirements were also introduced in the area of funds and insurance sales.[57] Before these adjustments, the focus was on providing transparent information regarding risks and costs, with no specific focus given to sustainability factors.[58] Another important measure in this context is the adaptation of organizational requirements and operating conditions for investment firms, especially through the mandatory integration of sustainability preferences into the suitability assessment. This means that clients must be asked which sustainability preferences should be considered in the investment advice they are provided. If existing or potential clients request that a minimum proportion be invested in

53 ESMA, "Climate Benchmarks and ESG Disclosure" <https://www.esma.europa.eu/esmas-activities/sustainable-finance/climate-benchmarks-and-esg-disclosure> accessed 30 August 2023.

54 For an overview, see European Commission, "Implementing and Delegated Acts on Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 Amending Regulation (EU) 2016/1011 as Regards EU Climate Transition Benchmarks, EU Paris-Aligned Benchmarks and Sustainability-Related Disclosures for Benchmarks" <https://finance.ec.europa.eu/system/files/2022-08/climate-benchmarks-level-2-measures-full_en.pdf> accessed 30 August 2023.

55 Regulation (EU) 2023/xx of the European Parliament and of the Council of 23 October 2023 on European Green Bonds and Optional Disclosures for Bonds Marketed as Environmentally Sustainable and for Sustainability-Linked Bonds [2023] not yet published in the OJ (Green Bonds Regulation).

56 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 (MiFID II).

57 Commission Delegated Directive (EU) 2021/1270 of 21 April 2021 amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS) [2021] OJ L 277/141; "Commission Delegated Regulation (EU) 2021/1257 of 21 April 2021 Amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 as Regards the Integration of Sustainability Factors, Risks, and Preferences into the Product Oversight and Governance Requirements for Insurance Undertakings and Insurance Distributors and into the Rules on Conduct of Business and Investment Advice for Insurance-Based Investment Products [2021] OJ L 277/18".

58 For more information, see Baisch and Weber (n 15) 182 f.; Lukas Fahrländer and David Jost, "Berücksichtigung von ESG-Präferenzen im Finanzdienstleistungsgeschäft" [2023] Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 120.

sustainable investments, the requirements of Article 9 SFDR (or at least those of Article 8 SFDR) must be met.[59] Also, the Commission recently proposed new transparency rules for ESG rating providers.[60]

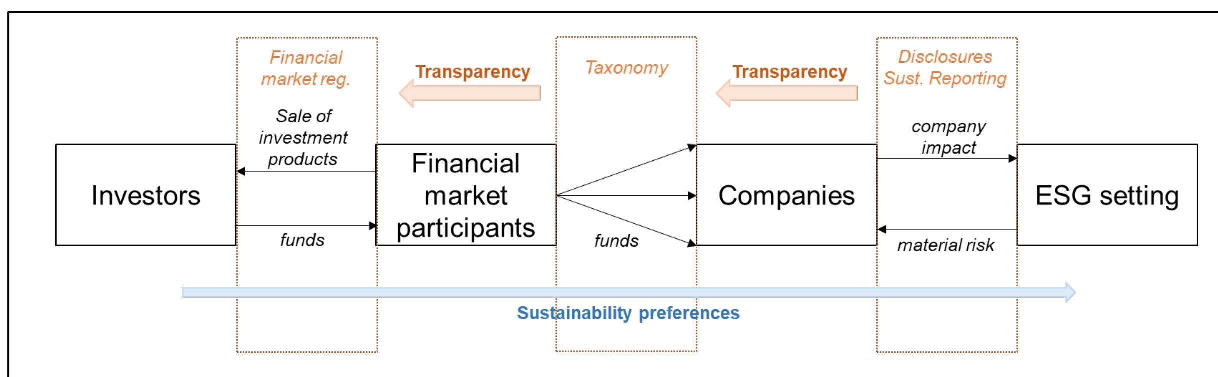
Investors must now be asked about their sustainability preferences. Asset managers, investment advisors, etc. must take these into account in investment advice and the suitability assessment of products.

To enforce compliance with the taxonomy and related regulations, EU Member States are required to lay down rules on measures and penalties, which should be effective, proportionate, and dissuasive. National competent authorities and the European supervisory authorities should exercise their product intervention powers also with respect to mis-selling practices or misleading disclosures of sustainability-related information.[61] Where a competent authority of a Member State does not act in line with Union law, the European supervisory authorities have the power to intervene and may, if necessary, adopt individual decisions directly addressed to a financial institution, requiring specific action or the cessation of specific practices.[62]

The regulations are implemented by the EU member states. The European supervisory authorities can take action in the event of inadequate implementation. In practice, the exact handling and role of the supervisory authorities need to be carefully considered: How can the supervisory authorities verify the information provided by companies and investigate the situation on the ground? How are populations – especially those in the global South that are particularly affected by the economic activities of companies – incorporated in these processes?

The combination of a harmonized classification system, detailed disclosure requirements, facilitating tools, and financial market regulations clearly enables a financial flow towards environmentally sustainable products without, however, prohibiting investments in "unsustainable" products and services (see Figure 4).

Figure 4. System overview



Source: Adapted from Astrid Zabel von Felten, in: Zabel von Felten and others.

[59] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2016] OJ L 87/1 Article 2(7). See also Baisch and Weber (n 15) 178, with references.

[60] Proposal for a Regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities, COM/2023/314 final.

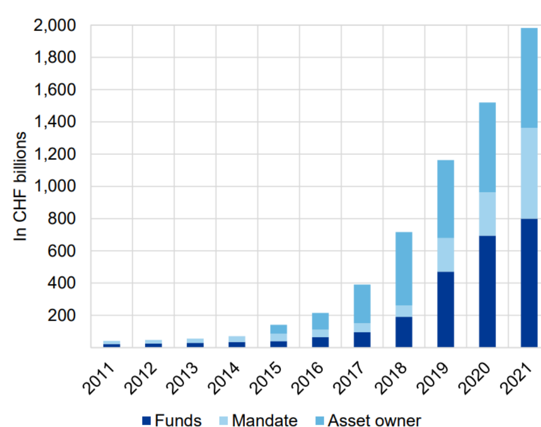
[61] EU Taxonomy Regulation Preambular para 55.

[62] See, for instance, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12 (EBA Regulation) Article 17.

3 SUSTAINABLE FINANCE REGULATION IN SWITZERLAND

Switzerland is one of the leading centres for cross-border wealth management and is committed to being a leading location for sustainable finance.[63] The share of financial products labelled as "sustainable" is rising significantly. In 2021, they reached a volume of CHF 1.98 trillion in Switzerland (see Figure 5).[64] Nevertheless, only 1 percent of the exchange-traded funds (ETFs) under the Swiss Performance Index (SPI) would be considered as environmentally sustainable investments under the EU Taxonomy.[65] This is because Switzerland does not refer to the EU (or any other) taxonomy in its internal law, having opted for a different (less) regulatory approach. Unlike in the EU, sustainable financing in Switzerland is mainly driven by private or private–public initiatives. As we will see, however, the question of what criteria financial products labelled as "sustainable" must fulfil remains largely open, and the fight against greenwashing is challenging because of the lack of relevant (legally binding) definitions.[66]

Figure 5. Development of sustainable investments in Switzerland



Source: Swiss Sustainable Finance (SSF) and University of Zurich Center for Sustainable Finance & Private Wealth (UZH CSP), "Swiss Sustainable Investment Market Study 2022" (SSF and UZH CSP 2022) 6.

3.1 SWISS TRADITION OF SELF-REGULATION

Unlike the EU, Switzerland has so far decided against adopting a taxonomy. Instead, the Swiss government has opted for a principles-based regulatory framework and self-regulation of the financial market. Its strategy is based on the primacy of market-based solutions, broad support for private-sector alliances,

---

63 Swiss Federal Council, "Sustainable Finance in Switzerland: Areas for Action for a Leading Sustainable Financial Centre, 2022–2025" (2022) Swiss Federal Council Report 3f <https://www.sif.admin.ch/dam/sif/en/dokumente/finanzmarktpolitik/Nachhaltigkeit/bericht_sust_finance.pdf.download.pdf> accessed 23 October 2023.

64 Swiss Finance Council, "The Swiss Approach to Sustainable Finance" (2023) 1 <https://www.swissfinancecouncil.org/images/issue-notes/The_Swiss_Approach_to_Sustainable_Finance_.pdf> accessed 23 October 2023.

65 Vontobel, "Sustainable Investing Under the New EU Regulatory Framework: Information for EU/EEA Clients with Discretionary and Advisory Mandates" (2022) 7.

66 For a critical review of the Swiss approach, see Mirjam Eggen, "Grüne Finanzprodukte: Eine finanzmarktrechtliche Standortbestimmung" [2021] Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 698, 705; Thomas Jutzi and Andri Abbühl, 'Prevention of Greenwashing of Collective Investment Schemes in Switzerland' [2023] Jusletter <https://jusletter.weblaw.ch/juslissues/2023/1169/prevention-of-greenw_0119bbb9ca.html> accessed 6 November 2023.

and the subsidiarity of state action.[67] Alleged advantages of self-regulation include its more rapid development compared to formal legislation, higher market proximity, and broad industry acceptance.[68] In a report on sustainable finance, issued in December 2022, the Swiss Federal Council argued that market mechanisms are more efficient than a taxonomy (in the sense of a state-imposed classification of economic activities) "in dynamically identifying technologies and solutions that effectively contribute to sustainability goals".[69]

In the absence of a taxonomy or a comparable regulation, there is no legal definition of sustainable investments or greenwashing under Swiss law. The Swiss supervisory authority FINMA therefore issued a **Guidance on preventing and combating greenwashing** in November 2021.[70] Under the current legal regime, FINMA is forced to rely on very general provisions. In its fight against greenwashing, it focusses on sustainability-related information at the fund level and suitable organizational structure at the institutional level for managing such products. With regard to information at the fund level, the sole legal bases include the *prohibition of deception* regarding collective investment schemes,[71] minimum content requirements for fund documentation,[72] as well as general loyalty, due diligence, and disclosure obligations of persons who manage or represent collective investment schemes.[73] Minimal organizational requirements for financial institutions include the duty to identify, measure, control, and monitor their risks, including legal and reputational risks, as well as to organize effective internal controls.[74] The legal situation with regard to the advisory process (at the point of sale) is also flawed: The Financial Services Act (FinSA) does not currently contain specific rules for combating greenwashing. In particular, FinSA does not include any specific duties that indicate how a client's sustainability-specific preferences should be accounted for at the point of sale.[75]

There is currently no explicit prohibition of greenwashing under Swiss law.[76] While so-called green or sustainable investments are flourishing, the lack of legal definitions and regulatory requirements for sustainability-related financial products and services "increases the risk that investors and clients will be consciously or unconsciously misled about the sustainable characteristics of financial products and

---

67 See Swiss Federal Council (n 63) 5; "Sustainable Finance Guidelines" <https://www.newsd.admin.ch/newsd/message/attachments/61909.pdf> accessed 13 November 2023.

68 Swiss Finance Council (n 64) 4.

69 Swiss Federal Council (n 63) 15.

70 FINMA, "FINMA Guidance 05/2021: Preventing and Combating Greenwashing" (2021) <https://www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20211103-finma-aufsichtsmitteilung-05-2021.pdf?sc_lang=en> accessed 20 November 2023.

71 Article 12(1) of the Collective Investment Schemes Act (CISA; SR 951.31).

72 Article 35*a* of the Collective Investment Schemes Ordinance (CISO; SR 951.311), Annex 6 of the Financial Services Ordinance (FinSO; SR 950.11) and Article 102 CISA.

73 Article 20(1) CISA. Eggen and Stengel concluded in a study commissioned by the FOEN in November 2019 that financial service providers are obliged, based on the rules of conduct as well as their duties of loyalty and due diligence, to take climate risks into account as part of their risk clarification and information to their clients. However, according to the study, they are not obliged to include climate impacts, i.e. the effects of their investment and financing decisions on the climate, in their investment and advisory process: Mirjam Eggen and Cornelia Stengel, "Rechtliches Gutachten 'Berücksichtigung von Klimarisiken und -wirkungen auf dem Finanzmarkt' im Auftrag des BAFU" (BAFU 2019) 80. The same conclusion will apply to biodiversity-related risks and impacts: see Swiss Federal Council (n 63) 15.

74 Article 9 of the Financial Institutions Act (FinIA; SR 954.1). See also Article 14(1)(c) CISA as well as Article 20(1) CISA.

75 FINMA (n 70) 5. Article 68 of the Financial Services Act (FinSA; SR 950.1), which deals with misleading statements in advertising materials, is one of the sole legal bases for intervention at the point of sale.

76 A possible approach for a ban on greenwashing was discussed as part of the revision of the CO_2 Act for the period after 2024: The Federal Act of 19 December 1986 on Unfair Competition (Unfair Competition Act, UCA, SR 241) was to contain a new element covering the offence of unfair advertising and sales methods. According to the discussed provision, a person acts unfairly if they make statements about themselves, their goods, works or services with regard to the climate impact caused that cannot be substantiated by objective and verifiable evidence. However, the amendment to the UCA was ultimately not included in the draft amendment of the CO_2 Act.

services".[77] Moreover, this lack of definition leads to very heterogeneous use of terms, different approaches to and assessments of sustainability, and legal uncertainties. The lack of concise definitions of offences also limits the scope of action of FINMA, the supervisory authority.

This regulatory void is somewhat mitigated by recommendations from the Swiss financial sector's leading industry associations, which include the Swiss Bankers Association (SBA) and the Asset Management Association Switzerland (AMAS). They adopted a series of guidelines, including the following:

- Based on FinSA, the SBA adopted guidelines stipulating **minimum requirements for integrating sustainability criteria into investments**. Under the guidelines, SBA members are obliged to integrate ESG-preferences and ESG-risks into investment advice and portfolio management. The guidelines define specific requirements on the provision of information, documentation, and accountability in this regard. SBA members are also obligated to include ESG topics in the training and professional development of their client advisors.[78]
- The SBA moreover adopted guidelines **encouraging mortgage providers to consider the energy efficiency of buildings** when offering clients advice on financing a property.[79]
- AMAS adopted rules stipulating organizational, reporting, and **disclosure obligations** for institutions that produce and manage sustainable financial products (sustainable asset management).[80]

Switzerland's preference for self-regulation by the private sector has been reaffirmed by recent developments:

- In December 2022, the Federal Council published its position on prevention of **greenwashing** in the financial sector and instructed a working group under the lead of the Federal Department of Finance (FDF) to assess how these requirements could be implemented most efficiently. In October 2023, the FDF communicated its decision that the Federal Council's position could best be implemented by a principles-based state regulation at ordinance level. However, the FDF will dispense with further regulatory efforts if the financial industry presents a self-regulation solution that implements the Federal Council's position effectively. The deadline is August 2024.[81]
- In the **Climate and Innovation Act (CIA)**, which was adopted by the people on 18 June 2023 as an indirect counterproposal to the Glacier Initiative, the Swiss federal government committed itself to taking measures to reduce the climate impact of national and international financial resource flows. However, the only measure that is explicitly listed is that of the Federal Council possibly negotiating agreements with the financial sector on the climate-friendly orientation of financial flows.[82]

According to the Federal Council, Switzerland needs to achieve a common understanding of the general criteria according to which investment products and services can be labelled sustainable. In this process, the question arises as to how a holistic, balanced definition of sustainability would look in the

[77] FINMA (n 70) 2.

[78] SBA, "Guidelines for the Financial Service Providers on the Integration of ESG-Preferences and ESG-Risks into Investment Advice and Portfolio Management" (2023).

[79] SBA, "Guidelines for Mortgage Providers on the Promotion of Energy Efficiency" (2022).

[80] AMAS, "Self-Regulation on Transparency and Disclosure for Sustainability-Related Collective Assets" (2023). See also AMAS and SSF, "How to Avoid the Greenwashing Trap: Recommendations on Transparency and Minimum Requirements for Sustainable Investment Approaches and Products" (2021) <https://www.sustainablefinance.ch/upload/cms/user/RecommendationsforSustainableInvestmentProducts_AMAS_SSF.pdf> accessed 20 November 2023.

[81] SIF, "Further Efforts to Prevent Greenwashing" <https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilungen.msg-id-98351.html> accessed 21 November 2023.

[82] Federal Act on Climate Protection Targets, Innovation and Strengthening Energy Security (Climate and Innovation Act CIA), adopted on 18 June 2023, planned entry into force on 1 January 2025 (BBl 2022 2403) Art. 9.

context of the Switzerland's principle-based regulatory approach, and how the challenges related to IFFs can be adequately reflected in this definition.

3.2 TRANSPARENCY: DISCLOSURE REGULATIONS FOR COMPANIES

On 29 November 2020, the popular initiative "For responsible companies – to protect people and the environment" (Responsible Business Initiative) was rejected by voters. As a result, the Swiss parliament's indirect counterproposal entered into force on 1 January 2022. Under the counterproposal, new provisions were introduced in the Swiss Code of Obligations (CO, SR 220). They introduce two important innovations:

- Firstly, large Swiss companies[83] will be legally obliged to report on their policies and corresponding measures in "environmental matters, in particular the CO_2 goals, social issues, employee-related issues, respect for human rights and combating corruption", and on the risks related to these matters arising from their business operations, business relationships, products or services (Article 964*b* CO). Details regarding climate-related reporting obligations are regulated in the **Ordinance on Climate Disclosures**, which will come into force on 1 January 2024. The provisions are in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) (→ see Box) and are based on the principle of **double materiality**. Disclosures should thus show how company business activities contribute to greenhouse gas emissions.[84] However, unlike the EU regulation, the ordinance does not prescribe a specific standard for the disclosure of non-financial information.
- Secondly, companies with risks in the sensitive areas of child labour and so-called conflict minerals must comply with special and extensive due diligence and reporting obligations. The Federal Council has regulated the details of these specific obligations in the **Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour** (DDTrO, SR 221.433). The new provisions entered into force on 1 January 2022 and applied for the first time in the 2023 financial year.[85]

The disclosure obligations in accordance with the indirect counterproposal to the Responsible Business Initiative are based on an outdated EU regulation that has already been revised in the meantime by the Corporate Sustainability Reporting Directive. Requirements under the CSRD go well beyond Swiss requirements with regard to content, granularity, and format of ESG reporting. The same will be true of due diligence requirements in the EU once the CSDDD is formally adopted. The Federal Council has taken note of these new developments in EU law and assumes that Swiss regulations need to be adapted in the future. It has decided to prepare a consultation draft by July 2024 at the latest and to analyse its consequences for the Swiss economy.[86]

---

[83] Companies of "public interest" with at least 500 full-time equivalent positions and either a balance sheet total of CHF 20 million or sales revenue of CHF 40 million in two successive financial years: art. 964*a* CO.

[84] Swiss Federal Council (n 63) 8.

[85] Swiss Federal Office for Justice, "Bestimmungen Für Besseren Schutz von Mensch Und Umwelt Gelten Ab 1. Januar 2022" <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-86226.html> accessed 15 November 2023.

[86] Swiss Federal Office for Justice, "Berichterstattung Zur Nachhaltigen Unternehmensführung: Bundesrat Beschliesst Eckwerte" (22 September 2023) <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-97782.html> accessed 16 November 2023. See also Swiss Federal Office for Justice, "Prüfauftrag des EJPD vom 23. Februar 2022; Analyse Vorschläge EU-Richtlinien über Sorgfaltspflichten und Berichterstattung zur Nachhaltigkeit und möglicher Anpassungsbedarf im Schweizer Recht" (2022) <https://www.newsd.admin.ch/newsd/message/attachments/81650.pdf> accessed 16 November 2023.

Box: TCFD/TNFD

Task Force on Climate-related Financial Disclosures (TCFD):

The Financial Stability Board (FSB) created the TCFD to develop recommendations on the types of information that companies should disclose to support investors in appropriately assessing and pricing risks related to climate change. The TCFD released climate-related financial disclosure recommendations in 2017.[87] The recommendations include four thematic areas: governance, strategy, risk management, and metrics and targets. Switzerland[88] officially became a supporter of the TCFD in January 2021.

Taskforce on Nature-related Financial Disclosures (TNFD):

The TNFD is a market-led, science-based, and government-supported global initiative that developed a set of disclosure recommendations for organizations to report and act on nature-related dependencies, impacts, risks, and opportunities.[89] The recommendations will enable business and finance to integrate nature into decision making. They include the same thematic areas as the TCFD recommendations and are aligned with the goals and targets of the Kunming-Montreal Global Biodiversity Framework.

In June 2022, the Federal Council launched the **Swiss Climate Scores** that establish best-practice transparency on the Paris-alignment of financial products to foster investment decisions aligned with climate goals. They introduce six indicators, defining minimum criteria for each: (1) greenhouse gas emissions; (2) exposure to fossil fuel activities; (3) warming potential; (4) verified commitments to net zero; (5) credible climate stewardship; and (6) management to net-zero.[90] The indicators thus reflect the current situation of global companies in investment products or portfolios (status quo) and show where these companies are currently positioned in relation to international climate goals (such as the net zero target).[91] The Swiss Climate Scores are considered “a market-based alternative to more complex and prescriptive taxonomies”.[92]

To date, Switzerland has refrained from adopting a taxonomy and has opted instead for an alternative, principles-based approach. However, in order to keep pace with EU developments, regulatory adjustments are necessary, as the Federal Council has stated, for example, with regard to company disclosure obligations. An improved legal basis is also needed to record and combat greenwashing. Given that Swiss companies – including financial institutions – operating in the EU and exceeding the relevant thresholds must fulfil the requirements of the European regulations discussed, the creation of equivalent requirements seems desirable, even if Switzerland opts for a principles-based solution. Equivalent requirements should also apply to IFFs (see sub-section 4 below).

In the context of the planned adaptation of transparency regulations in Switzerland, the question arises as to how the information disclosed by companies can be verified and how the knowledge and experience of affected local populations, particularly in the global South, can be adequately incorporated in

[87] TFCD, “Recommendations of the Task Force on Climate-Related Financial Disclosures: Final Report” (2017) <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> accessed 21 November 2023.

[88] “Switzerland is committed to reaching climate neutrality by 2050 and reducing greenhouse gas (GHG) emissions by 50% by 2030 compared to 1990 levels. The Federal Council set the net-zero target in 2019 and adopted the corresponding ‘Long-Term Climate Strategy for Switzerland’ in January 2021”: Swiss Finance Council (n 64) 2.

[89] TNFD, “Recommendations of the Taskforce on Nature-Related Financial Disclosures” (2023) <https://tnfd.global/wp-content/uploads/2023/08/Recommendations_of_the_Taskforce_on_Nature-related_Financial_Disclosures_September_2023.pdf?v=1695118661> accessed 21 November 2023.

[90] Swiss Confederation, “Swiss Climate Score: Best Practice Transparency on the Paris Alignment of Investments” 3 <https://www.sif.admin.ch/dam/sif/en/bilder/dossier/swiss-climate-scores/swiss-climate-scores.pdf.download.pdf/20220629-swiss-climate-scores-en.pdf> accessed 17 November 2023.

[91] Swiss Federal Council (n 63) 16. See also SIF, “Swiss Climate Scores” <https://www.sif.admin.ch/sif/en/home/swiss-climate-scores/swiss-climate-scores-in-kurz.html> accessed 30 October 2023.

[92] Swiss Finance Council (n 64) 1.

auditing processes. Are there existing procedures in place to ensure that auditors, supervisory authorities, and internal corporate governance structures take such knowledge into account (feedback loops)?

3.3 Standard setting and Green Confederation Bonds

As a complement to its domestic tradition of self-regulation, Switzerland is committed to the development of uniform standards in various international bodies and initiatives.[93] The federal government is moreover counting on voluntary commitments from the financial sector. As part of net-zero alliances under the auspices of the Glasgow Financial Alliance for Net Zero (GFANZ), a number of Swiss financial institutions have voluntarily committed to net-zero climate emission targets. The respective industry associations however rejected the conclusion of private–public industry agreements to that goal.[94]

On 17 August 2022, the Federal Council adopted a framework for issuing green Confederation bonds. In October 2022, the federal government issued the first green Confederation bond, raising CHF 766 million. It plans to regularly issue green Confederation bonds in the future. The issuance of green Confederation bonds is intended to strengthen the application of international standards in Switzerland.[95]

4 The role of IFFs in the Sustainable Finance Framework

As outlined in the introduction, sustainable finance and the fight against IFFs both serve (at least indirectly) the same goal: the creation of an enabling environment for sustainable development and the generation of necessary means of implementation. As they serve this goal through different regulatory approaches and from different angles, the interplay between the two regulatory areas should be examined more closely. In particular, the question arises as to what extent investments in economic activities involving IFFs – e.g. because they are not properly taxed in the country where they are carried out or where value is created – can be considered sustainable in the sense of the different sustainable finance regulations.[96]

---

[93] As members of the Network of Central Banks and Supervisors for Greening the Financial System (NGFS), FINMA and the Swiss National Bank (SNB) are taking part in the exchange between supervisory authorities and central banks on potential financial risks in connection with climate change and the loss of biodiversity: Swiss Federal Council (n 63) 14. Switzerland also participates in the following groups or initiatives: International Platform on Sustainable Finance (IPSF); G20 Sustainable Finance Working Group (G20 SFWG); International Sustainability Standards Board (ISSB); UN-supported Principles for Responsible Banking (PRB) and the Principles for Responsible Investment (PRI); UNEP Inquiry into the Design of a Sustainable Financial System; UN Environment Programme's Finance Initiative (UNEP FI); Science-Based Targets Initiative (SBTi). The SBTi is a joint initiative of the Carbon Disclosure Project (CDP), the UN Global Compact, the World Resources Institute (WRI) and the WWF. Its aim is to support companies in defining science-based emissions reduction targets. It also offers to check and validate companies' emissions reduction targets: ibid 12.

[94] Swiss Federal Council (n 63) 10f.

[95] ibid 20.

[96] With regard to taxation, Irene Musselli and Elisabeth Bürgi Bonanomi explored a possible application of sustainable financing in the field of illicit financial flows. Specifically, they suggest that a ban of companies convicted of tax evasion, bribery, or money laundering from finance and insurance coverage could be a possible approach under the sustainable finance paradigm to lever finance in the fight against IFFs: Irene Musselli and Elisabeth Bürgi Bonanomi, "Policy Responses to Curb Commodity Trade-Related Illicit Financial Flows" (Centre for Development and Environment CDE 2021) Working Paper NO. R4D-IFF-WP02-2021 35f <https://curbingiffsdotorg.files.wordpress.com/2021/06/wp_policies_24062021.pdf> accessed 14 July 2023.

Under the EU Taxonomy Regulation, an economic activity only qualifies as environmentally sustainable when it is carried out in compliance with a number of social and human rights minimum safeguards.[97] To this end, companies must adopt and implement procedures to ensure their alignment with the OECD Guidelines for Multinational Enterprises, among other things.[98] The Guidelines not only refer to human rights and combating bribery and other forms of corruption, but also to taxation. They notably provide that:

> *It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. […] Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.*[99]

This reference means that the absence of procedures to avoid tax evasion or even aggressive tax avoidance practices by a company result in corresponding economic activities not being considered environmentally sustainable in the sense of the Taxonomy Regulation, as they do not (fully) meet the criteria according to Article 3. As a consequence, investments in such activities are not considered "sustainable investments" in the sense of the taxonomy.

Under the SFDR, the share of investments in companies with illicit tax practices, including aggressive tax avoidance practices, needs to be disclosed at the entity level. With regard to the statement on principal adverse impacts of investment decisions on sustainability factors, the SFDR defines social indicators related to tax governance, including the share of investments in investee companies that have been involved in violations of the UNGC principles or the OECD Guidelines for Multinational Enterprises, and the share of investments in investee companies without policies to monitor compliance with these frameworks or without complaints handling mechanisms to address violations of these frameworks.[100] At the product level, both "dark green" and "light green" products (Articles 9 and 8 SFDR) presuppose that the investee companies follow good governance practices, "in particular with respect to [...] tax compliance".[101] Companies with illicit tax practices, including aggressive tax avoidance practices, do not follow good governance practices, so that financial products with investments in the economic activities of such companies in their portfolio may not be advertised as sustainable. Also, financial market participants have to describe their policy to assess good governance practices of the investee companies – including tax compliance – on their websites.[102]

Unlike in the EU, relevant Swiss law makes no reference to the OECD Guidelines or other regulations addressing IFFs or taxation in particular.

---

97 Taxonomy Environmental Delegated Act Article 3c.

98 EU Taxonomy Regulation Article 18.

99 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD 2023) Chapter XI <https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en> accessed 3 September 2023.

100 SFDR Technical Standards 1 Annex 1.

101 SFDR Articles 2(17) and 8(1). The definition of sustainable investments under the SFDR is interpreted in the light of the Taxonomy Regulation.

102 SFDR Technical Standards 1 Articles 28 and 41.

The question of how sustainability performance and tax aggressiveness are related has been examined in various studies, with different conclusions. While some authors assume that there is a negative relationship between the two,[103] others found no empirical evidence of a general relationship between sustainability-related business practices and tax avoidance.[104] For instance, Mara Maheresmi and others conclude that "Tax avoidance has no significant effect on sustainable finance disclosure […]. There is no tendency that a bank with a certain tax avoidance level will reduce or increase the possibility of sustainable finance information disclosure."[105] A final judgement on the question is difficult due to the different study results. With regard to tax avoidance practices that are qualified as illicit, the question can be left open, as illicit taxation practices alone lead to the corresponding economic activities being considered non-sustainable according to the EU taxonomy.

Transparency is a key element for both regulatory areas. In the case of IFFs, this is especially true regarding taxation[106] and addressing commodity trade mispricing[107]. Since there are significant operational hurdles in the institutionalized exchange of information with developing countries, the question arises as to whether transparency regulations in the area of sustainable finance can provide a partial remedy.

Even if a company pursues an economic activity that contributes to an environmental objective, investments in the company are not considered sustainable according to the EU taxonomy if the company employs illicit tax practices. There is as yet no corresponding reference in Swiss law.

5 LOOKING AHEAD: OPEN QUESTIONS AND RESEARCH NEEDS

While both the EU taxonomy criteria for environmentally sustainable economic activities and related disclosure obligations include questions of correct taxation (particularly under the SFDR), concrete implementation appears challenging in several respects.

On the one hand, the question arises as to how illicit tax practices can be effectively captured. To this end, the disclosure practices and obligations of companies under the CSDR must be analysed more closely in this specific respect. Further, the flow of information between the real economy and the fi-

[103] See, for instance, Roman Lanis and Grant Richardson, "Corporate Social Responsibility and Tax Aggressiveness: An Empirical Analysis" (2012) 31 Journal of Accounting and Public Policy 86; Dahlia Sari and Christine Tjen, "Corporate Social Responsibility Disclosure, Environmental Performance, and Tax Aggressiveness" (2016) 9 INTERNATIONAL RESEARCH JOURNAL OF BUSINESS STUDIES <https://irjbs.com/index.php/jurnalirjbs/article/view/1159> accessed 1 September 2023.

[104] See Max Baker, Stewart Jones and Ben Forrest Lay, "The Relationship between CSR and Tax Avoidance: An International Perspective" (2017) 32 Australian Tax Forum 95; Suzanne Landry, Manon Deslandes and Anne Fortin, "Tax Aggressiveness, Corporate Social Responsibility, and Ownership Structure" (2013) 14 Journal of Accounting, Ethics & Public Policy 611; Nirmala Devi Mohanadas, Abdullah Sallehhuddin Abdullah Salim and Lim Kwee Pheng, "CSR and Tax Aggressiveness of Malaysian Listed Companies: Evidence from an Emerging Economy"(2020) 16 Social Responsibility Journal 597.

[105] Mara Maheresmi and others, "Do Tax Avoidance and Firm Ownership Matter for Sustainable Finance Disclosure? Evidence From the Listed Banks in Asean Countries" (2023) 8 International Journal of Professional Business Review e01559, 12.

[106] See, in general, Irene Musselli and Elisabeth Bürgi Bonanomi, "Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency" (2018) 4 CDE Working Paper <https://boris.unibe.ch/125884/> accessed 2 September 2023.

[107] ibid 50; Irene Musselli and Elisabeth Bürgi Bonanomi, "Countering Commodity Trade Mispricing in Low-Income Countries: A Prescriptive Approach" (2022) 25 Journal of International Economic Law 447.

nancial sector should be examined for its practicability and impact. The corresponding template contains 500 fields that must be completed. The question arises as to whether this information is actually read, understood, and considered when deciding.[108]

On the other hand, a closer look should also be taken at external supervision: What are the triggers for the supervisory authorities to take action? How do the supervisory authorities verify the data provided, and based on what information? How is are affected local populations incorporated in the process? Are appropriate feedback loops included in the existing processes? How is the exchange of information ensured, especially with and among countries of the global South?

There is also a need for investigation of how other forms of IFFs – beyond illicit tax practices – could be better captured in sustainable finance regulation.

With regard to Switzerland, the question arises as to how the criteria in a principles-based regulation can be calibrated to tackle IFFs effectively. More broadly, how can the criteria for sustainable financing be arranged such that they cover all areas of sustainability equally and ensure that an investment is only considered sustainable when none of the relevant areas are significantly compromised? While the EU's regulatory framework pursues such a holistic approach to some extent, this remains an open question with regard to the Swiss regime.

---

[108] Rainer Baisch and Rolf H Weber, "Einbezug von ESG-Präferenzen beim Vertrieb von Finanzprodukten" [2023] Jusletter 21 <https://jusletter.weblaw.ch/juslissues/2023/1179/einbezug-von-esg-pra_e18c763bec.html> accessed 12 December 2023.

REFERENCES

Allenbach-Amman J, "EU Parliament and Member States Reach Deal on Corporate Due Diligence Law" (edie, 18 December 2023) <https://www.edie.net/eu-parliament-and-member-states-reach-deal-on-corporate-due-diligence-law/> accessed 21 December 2023

AMAS, "Self-Regulation on Transparency and Disclosure for Sustainability-Related Collective Assets" (2023)

AMAS and SSF, "How to Avoid the Greenwashing Trap: Recommendations on Transparency and Minimum Requirements for Sustainable Investment Approaches and Products" (2021) <https://www.sustainable-finance.ch/upload/cms/user/RecommendationsforSustainableInvestmentProducts_AMAS_SSF.pdf> accessed 20 November 2023

Anthesis, "A Guide to the EU Sustainable Finance Disclosure Regulation (SFDR)" (4 April 2023) <https://www.anthesisgroup.com/a-guide-to-the-eu-sustainable-finance-disclosure-regulation/> accessed 24 August 2023

Baisch R and Weber RH, "Entwicklungen im europäischen Finanzmarktrecht 'Sustainable Finance' und DLT-Regulierung" in Astrid Epiney, Sarah Progin-Theuerkauf and Petru Emanuel Zlătescu (eds), *Schweizerisches Jahrbuch für Europarecht / Annuaire suisse de droit européen 2021/2022* (Schulthess Juristische Medien AG 2022)

Baisch R and Weber RH, "Einbezug von ESG-Präferenzen beim Vertrieb von Finanzprodukten" [2023] Jusletter <https://jusletter.weblaw.ch/juslissues/2023/1179/einbezug-von-esg-pra_e18c763bec.html> accessed 12 December 2023

Baker M, Jones S and Lay BF, "The Relationship between CSR and Tax Avoidance: An International Perspective" (2017) 32 Australian Tax Forum 95

Council of the European Union, "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights" (Press Releases, 14 December 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/> accessed 21 December 2023

Eggen M, "Grüne Finanzprodukte: Eine finanzmarktrechtliche Standortbestimmung" [2021] Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 698

Eggen M and Stengel C, "Rechtliches Gutachten 'Berücksichtigung von Klimarisiken und -wirkungen auf dem Finanzmarkt' im Auftrag des BAFU" (BAFU 2019)

ESMA, "Climate Benchmarks and ESG Disclosure" <https://www.esma.europa.eu/esmas-activities/sustainable-finance/climate-benchmarks-and-esg-disclosure> accessed 30 August 2023

European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth" (2018) COM(2018) 97 final

——, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, the European Green Deal" (2019) COM(2019) 640 final

——, "EU Sustainable Finance April Package" (2021) <https://finance.ec.europa.eu/system/files/2021-04/sustainable-finance-communication-factsheet_en.pdf> accessed 21 April 2023

——, "Sustainable Finance Strategy (Factsheet)" (6 July 2021) <https://finance.ec.europa.eu/system/files/2021-07/210706-sustainable-finance-strategy-factsheet_en.pdf> accessed 24 August 2023

——, “Corporate Sustainability Reporting” <https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed 30 August 2023

——, “EU Taxonomy for Sustainable Activities” (*Finance*) <https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en> accessed 31 March 2023

——, “FAQ: What Is the EU Taxonomy Article 8 Delegated Act and How Will It Work in Practice?” <https://finance.ec.europa.eu/system/files/2021-07/sustainable-finance-taxonomy-article-8-faq_en.pdf> accessed 21 April 2023

——, “Implementing and Delegated Acts - Taxonomy Regulation” <https://finance.ec.europa.eu/regulation-and-supervision/financial-services-legislation/implementing-and-delegated-acts/taxonomy-regulation_en> accessed 24 August 2023

——, “Implementing and Delegated Acts on Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 Amending Regulation (EU) 2016/1011 as Regards EU Climate Transition Benchmarks, EU Paris-Aligned Benchmarks and Sustainability-Related Disclosures for Benchmarks” <https://finance.ec.europa.eu/system/files/2022-08/climate-benchmarks-level-2-measures-full_en.pdf> accessed 30 August 2023

——, “Overview of Sustainable Finance” <https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en> accessed 18 August 2023

——, “Sustainability-Related Disclosure in the Financial Services Sector” <https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en> accessed 29 August 2023

European Commission and Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Development of Tools and Mechanisms for the Integration of ESG Factors into the EU Banking Prudential Framework and into Banks’ Business Strategies and Investment Policies: Final Study* (Publications Office of the European Union 2021) <https://data.europa.eu/doi/10.2874/220248> accessed 24 August 2023

European Council, “European Council Meeting (12 December 2019) – Conclusions” (2019) EUCO 29/19, CO EUR 31, CONCL 9

Fahrländer L and Jost D, “Berücksichtigung von ESG-Präferenzen im Finanzdienstleistungsgeschäft” [2023] Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 120

Feijao S and others, “EU Taxonomy Delegated Act with Details of Article 8 Disclosures Published in the OJ” (*linklaters*, 14 December 2021) <https://sustainablefutures.linklaters.com//post/102hee3/eu-taxonomy-delegated-act-with-details-of-article-8-disclosures-published-in-the> accessed 31 August 2023

FINMA, “FINMA Guidance 05/2021: Preventing and Combating Greenwashing” (2021) <https://www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20211103-finma-aufsichtsmitteilung-05-2021.pdf?sc_lang=en> accessed 20 November 2023

J.P. Morgan Asset Management, “EU SFDR Explained: A Guide to the EU Sustainable Finance Disclosure Regulation for Investors” <https://am.jpmorgan.com/ch/en/asset-management/institutional/investment-strategies/sustainable-investing/understanding-SFDR/> accessed 29 August 2023

Jutzi T and Abbühl A, “Prevention of Greenwashing of Collective Investment Schemes in Switzerland” [2023] Jusletter <https://jusletter.weblaw.ch/juslissues/2023/1169/prevention-of-greenw_0119bbb9ca.html> accessed 6 November 2023

Koumbarakis A and others, “Greenwashing and Greenwishing – a Regulatory View” (PwC Switzerland 2022)

Landry S, Deslandes M and Fortin A, “Tax Aggressiveness, Corporate Social Responsibility, and Ownership Structure” (2013) 14 Journal of Accounting, Ethics & Public Policy 611

Lanis R and Richardson G, “Corporate Social Responsibility and Tax Aggressiveness: An Empirical Analysis” (2012) 31 Journal of Accounting and Public Policy 86

Loyens & Loeff, “The CSDDD Deal Has Been Sealed; Provisional Agreement Reached on 14 December 2023 on the CSDDD” (News, 15 December 2023) <https://www.loyensloeff.com/insights/news--events/news/the-csddd-deal-has-been-sealed-provisional-agreement-reached-on-14-december-2023-on-the-csddd/> accessed 21 December 2023

Maheresmi M and others, “Do Tax Avoidance and Firm Ownership Matter for Sustainable Finance Disclosure? Evidence From the Listed Banks in Asean Countries’ (2023) 8 International Journal of Professional Business Review e01559

Mohanadas ND, Abdullah Salim AS and Pheng LK, “CSR and Tax Aggressiveness of Malaysian Listed Companies: Evidence from an Emerging Economy” (2020) 16 Social Responsibility Journal 597

Musselli I and Bürgi Bonanomi E, “Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency” (2018) 4 CDE Working Paper <https://boris.unibe.ch/125884/> accessed 2 September 2023

——, “Policy Responses to Curb Commodity Trade-Related Illicit Financial Flows” (Centre for Development and Environment CDE 2021) Working Paper NO. R4D-IFF-WP02-2021 <https://curbingiffsdotorg.files.wordpress.com/2021/06/wp_policies_24062021.pdf> accessed 14 July 2023

——, “Countering Commodity Trade Mispricing in Low-Income Countries: A Prescriptive Approach” (2022) 25 Journal of International Economic Law 447

Musselli I, Bürgi Bonanomi E and Lannen A, “The Price of Fairness: Tackling Mispricing of Commodity Exports from Poor Countries” (CDE 2021) CDE Policy Brief 19 <https://www.cde.unibe.ch/research/cde_series/policy_briefs/the_price_of_fairness_tackling_mispricing_of_commodity_exports_from_poor_countries/index_eng.html> accessed 2 September 2023

Musselli I and Bürgi Bonanomi E, “Illicit Financial Flows: Concepts and Definition” (2020) 12.1 Revue internationale de politique de développement <http://journals.openedition.org/poldev/3296> accessed 2 September 2023

OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD 2023) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en> accessed 3 September 2023

Sari D and Tjen C, “Corporate Social Responsibility Disclosure, Environmental Performance, and Tax Aggressiveness” (2016) 9 INTERNATIONAL RESEARCH JOURNAL OF BUSINESS STUDIES <https://irjbs.com/index.php/jurnalirjbs/article/view/1159> accessed 1 September 2023

SBA, “Guidelines for Mortgage Providers on the Promotion of Energy Efficiency” (2022)

——, “Guidelines for the Financial Service Providers on the Integration of ESG-Preferences and ESG-Risks into Investment Advice and Portfolio Management” (2023)

SIF, “Further Efforts to Prevent Greenwashing” <https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilungen.msg-id-98351.html> accessed 21 November 2023

——, “Swiss Climate Scores” <https://www.sif.admin.ch/sif/en/home/swiss-climate-scores/swiss-climate-scores-in-kurz.html> accessed 30 October 2023

Swiss Confederation, “Swiss Climate Score: Best Practice Transparency on the Paris Alignment of Investments” <https://www.sif.admin.ch/dam/sif/en/bilder/dossier/swiss-climate-scores/swiss-climate-scores.pdf.download.pdf/20220629-swiss-climate-scores-en.pdf> accessed 17 November 2023

Swiss Federal Council, "Sustainable Finance in Switzerland: Areas for Action for a Leading Sustainable Financial Centre, 2022–2025" (2022) Swiss Federal Council Report <https://www.sif.admin.ch/dam/sif/en/dokumente/finanzmarktpolitik/Nachhaltigkeit/bericht_sust_finance.pdf.download.pdf> accessed 23 October 2023

——, "Sustainable Finance Guidelines" <https://www.newsd.admin.ch/newsd/message/attachments/61909.pdf> accessed 13 November 2023

Swiss Federal Office for Justice, "Prüfauftrag des EJPD vom 23. Februar 2022; Analyse Vorschläge EU-Richtlinien über Sorgfaltspflichten und Berichterstattung zur Nachhaltigkeit und möglicher Anpassungsbedarf im Schweizer Recht' (2022) <https://www.newsd.admin.ch/newsd/message/attachments/81650.pdf> accessed 16 November 2023

——, "Berichterstattung Zur Nachhaltigen Unternehmensführung: Bundesrat Beschliesst Eckwerte" (22 September 2023) <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-97782.html> accessed 16 November 2023

——, "Bestimmungen Für Besseren Schutz von Mensch Und Umwelt Gelten Ab 1. Januar 2022" <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-86226.html> accessed 15 November 2023

Swiss Finance Council, "The Swiss Approach to Sustainable Finance" (2023) <https://www.swissfinancecouncil.org/images/issue-notes/The_Swiss_Approach_to_Sustainable_Finance_.pdf> accessed 23 October 2023

Täger M, "'Double Materiality': What Is It and Why Does It Matter?" (*Grantham Research Institute on Climate Change and the Environment*, 21 April 2021) <https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/> accessed 30 August 2023

TFCD, "Recommendations of the Task Force on Climate-Related Financial Disclosures: Final Report" (2017) <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> accessed 21 November 2023

TNFD, "Recommendations of the Taskforce on Nature-Related Financial Disclosures" (2023) <https://tnfd.global/wp-content/uploads/2023/08/Recommendations_of_the_Taskforce_on_Nature-related_Financial_Disclosures_September_2023.pdf?v=1695118661> accessed 21 November 2023

United Nations, "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)" adopted on 13–16 July 2015 in Addis Ababa and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015 <https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf> accessed 6 December 2023

Vontobel, "Sustainable Investing Under the New EU Regulatory Framework: Information for EU/EEA Clients with Discretionary and Advisory Mandates" (2022)

Zabel von Felten AM and others, "Report of the CDE Transformation Stream on Sustainable Finance" (Centre for Development and Environment (CDE) forthcoming)