Is it easy to be green at the beginning of 2024?

Can we spend each day thinking about "ESG" duties, the colour of the leaves or is it nicer to be red, or yellow, or gold or something much more colourful like that, in the banking and financial markets? [1]

Miguel da Câmara Machado
Lawyer and Chief Legal Counsel at Banco de Investimento Global (BiG), Guest Lecturer at the Faculty of Law of the University of Lisbon and researcher at the Faculty's Private Law Research Centre.

Abstract:
This paper aims at analysing the "ESG" (environmental, sustainable, and corporate governance) duties and the major doubts they have raised among us, namely regarding the densification and completeness of concepts. If we cannot define these duties, we cannot understand how to comply with them. In these pages, we intend to understand their legal nature and dissect how regulators and supervisors have imposed these duties on the various players in the financial and banking markets.

Keywords:
ESG, credit institutions, financial institutions, disclosure requirements, environment, sustainability, governance, social concerns.

This version of the article is an update of its original version, published about a year ago, and its main purpose is to reflect the legislative changes that have taken place between then and now. Nonetheless, we cannot help but notice how the rules that apply to this matter still need to be densified and clarified, particularly by the authorities that supervise the obliged institutions.

[1] All the positions expressed in this presentation are strictly personal and in no way bind or represent the position or understanding of any organisation with which the author has collaborated and are intended, above all, as a presentation of the new legislation and some of the questions raised about it.

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At the end of the 1970s, a frog called KERMIT sang in his swamp that "it's not easy being green".[2] Nor has it been easy for the financial markets to be "green", "sustainable" or to ensure that there are concrete ways of measuring and incentivising certain values (the so-called ESG, or "Environmental, Social and Governance") to be pursued by companies and investors.

If it is easy to know that the sun is yellow, cherries are red or the sky is blue, it is not easy to know what a "green investment" is or what each of those little words means: what is an investment that protects the environment, fosters or contains social concerns, or incorporates and considers "good corporate governance"?

On 13 December 2023, the 28th United Nations climate conference, more commonly referred to as the Conference of the Parties to the UNFCCC, or COP28, came to an end in Dubai.

This year's meeting ended on a much more hopeful note than the meetings of previous years, with many of the speakers declaring that an agreement had been reached that signalled the "beginning of the end" for fossil fuels.

Many consider it to be the first time that a UN climate summit has ended with such a strong call to resolve the main cause of the climate crisis. The Presidency of COP28 in Dubai calls this agreement "historic" for that reason. In a way, it can't help but be, given the critical moment the world is in, with 1.2°C of global warming and increasing climate disasters. But the COP and climate experts are very divided as to where the agreement will take us - and how quickly it will do so.

The negotiating process this year has been a long one, but even though at one point it looked like it wouldn't get there, COP28 reached the destination that COPs are supposed to reach: a set of legal decisions, agreed by all parties under the United Nations Framework Convention on Climate Change (UNFCCC).

With a crucial text - the loss and damage fund - agreed at the very beginning of the summit, the event was dominated by discussions around fossil fuels.

In particular, there has been special attention paid to how the text of the global balance sheet will describe the future of fossil fuels. This first global stocktake is a response to the Paris Agreement - the truly historic agreement reached in 2015 to limit global warming to 1.5ºC - and sets out how countries will achieve this goal.

The text agreed in Dubai recognises the

> 'need for deep, rapid and sustained reductions in greenhouse gas emissions, in line with 1.5 °C trajectories, and calls on Parties to contribute to global efforts in a nationally determined manner,

[2] See the lyrics of the song *Bein' Green*, also known as *It's Not Easy Bein' Green*, written by Joe Raposo and performed by Jim Henson, in his 'The Muppet Show' (1976-1981), as Kermit, the Frog. This song has become famous and has been sung by dozens of singers over the last few decades, but the definitive version can be read in Jim Henson, 'It's not easy being green - and other things to consider' (New York: Hyperion, 2005) 14-15.

taking into account the Paris Agreement and their different national circumstances, trajectories and approaches'.[3]

On fossil fuels, it calls on countries to:

> 'phase out fossil fuels in energy systems in a fair, orderly and equitable manner, accelerating action in this critical decade to achieve net zero by 2050 in accordance with science'.[4]

COP experts are analysing every word of this declaration. From expressions like 'call for' to 'abandon the transition' - a far cry from the initial phase-out option desired by activists - and the recommended deadline.

Underlying climate action is the need to finance it properly - with funding to help developing countries make the transition; to help vulnerable countries adapt to climate change; and to help them recover when climate change manifests itself lethally.

Adaptation funding has one of the most glaring gaps between what is needed and what is realised. Established under the Paris Agreement, the global adaptation goal aims to help change this. COP28 has now agreed on the text to put it into practice, but the language has also been watered down. The draft text 'calls on developed countries' to provide funding to developing countries, but the final version states that 'continued and enhanced international support' for developing countries is 'urgently needed'.

Summing up the progress made at COP28, the summit president included the mobilisation of more than 85 billion dollars (78.8 billion euros) in new financial commitments, in all climate areas.

This COP28 could have real consequences for future COPs (optimists and pessimists alike), after experiencing the hottest year on record, people around the world are increasingly looking for real action - and many are sceptical about the UN summit's ability to deliver it.

While many commentators welcome the progress made at COP28, the Centre for International Environmental Law has branded it a 'fossil fuel-fuelled failure'. 'We need alternative forums to manage the decline of fossil fuels, free from the influence of those who profit from them', said Nikki Reisch, Director of the Climate and Energy Programme at the Centre for International Environmental Law.[5]

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[3] Draft Text on CMA agenda item 4, 'First global stocktake under the Paris Agreement', Version 11/12/2023 16:30 <https://unfccc.int/sites/default/files/resource/GST_2.pdf> accessed 8 February 2024.

[4] Idem.

[5] Analysing the 'historic agreement' of COP28 in Dubai, read a summary of the main conclusions at <https://pt.euronews.com/green/2023/12/13/a-cop28-chega-a-um-acordo-historico-para-abandonar-os-combustiveis-fosseis-quais-sao-as-pr> accessed 8 February 2024.

Last year, on 18 November 2022, the 27th United Nations climate conference (COP27), came to an end in Sharm El Sheikh, Egypt, with a much less hopeful feeling and a much more intense sense that 'it's not easy being green' than the previous one in Glasgow[6], Scotland. For that year's edition, after the end of COP26 in Glasgow, it was hoped that ESG factors would be integrated and that incentives would be generated to invest and take these types of values into account in business choices, before the invasion of Ukraine by Russia and the 'energy crisis' forced us to rethink these problems, which was reflected in the devaluation of ESG factors in economic and financial decisions.[7]

The choice of these factors makes possible to have different standards for comparing companies and funds, in addition to the traditional corporate balance sheets, reports and accounts. Nonetheless, defining concepts[8] that help to verify regulatory compliance and the incorporation of these values into the banking and financial system[9] is one of the major problems in this area, so as to prevent us from merely 'rebranding' investment products without addressing the concerns that the schemes (and investors) really want to pursue.

While many still questioning the approach of the securities markets to ESG issues and classifying the approach of the authorities and central banks as merely bombastic and flashy speeches, which ultimately mean little,[10] others believe in the possibility of imposing information and disclosure obligations that cause real impact or changes in corporate culture in the governance of companies, resulting from the application of these regimes.[11] What is certain is that, at a global level, but more importantly at an European level through European Union (EU) regulations, the obligations in this area have been growing and we can only expect more in the years to come.

As of 10 March 2021, pursuant to Articles 3 and 20 of Regulation (EU) 2019/2088, financial market participants must publish and disclose information on their sustainability risk integration policies in their websites. To summarise, these policies must include provisions for:

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[6] Comparing COP26 and COP27, as 'good cop and bad cop', listen to the discussion between Jason Palmer and Catherine Brahic in the podcast 'The Intelligence' available online at <https://open.spotify.com/episode/6T3AWbQg4IjyrvvZ5zQdHa> accessed 8 February 2024.

[7] Regarding this topic, see the report by John O'Sullivan, 'The tenacity of ESG investing', *The Economist* (16 November 2022) <https://www.economist.com/finance-and-economics/2022/11/16/the-tenacity-of-esg-investing> accessed 8 February 2024.

[8] The issue of defining concepts is essential to discussing any topic. On this, see, with great interest and depth, Roque Cabral, 'Si definimos no discutiremos', *Escritos de Ocasião* (Lisbon: Universidade Católica, 2008) 9-16.

[9] On this matter, we suggest the timely and comprehensive study by Marc Carney, *Value(s) - Building a better world for all* (William Collins, 2021), a book in which the former governor of the central banks of Canada and England discusses the importance of these values in global markets.

[10] In this regard, read the text by Stuart Kirk, 'The banking approach to net zero is just claptrap', *Financial Times* (11 November 2022) <https://www.ft.com/content/80d7aea2-8ba5-49f6-9cf0-1548629a7478?shareType=nongift> accessed 8 February 2024.

[11] Virginia Harper Ho, 'Modernizing ESG disclosure', (2022) 1 *University of Illinois Law Review* 277-356 or Umberto Tombari, 'Corporate social responsibility (CSR) environmental social governance (ESG) e "scopo della società"', (2021) Parte seconda, a. 119 2 *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni* 225-234, or, among others, Abel Sequeira Ferreira, 'A cultura empresarial no governo das sociedades: breve introdução', in *Administração e governação das sociedades*, coord. Paulo Câmara and others (Coimbra: Almedina, 2020) 183-228.

(a) a duty to consider ESG criteria when defining the appropriate investment strategy for each client;
(b) a duty to inform and make available to clients the information on the ESG criteria of the products they commercialise;
(c) a duty for product managers/investment managers to favour investments with a high ESG rating.

Since the end of 2019, a considerable expansion of regulations in the EU requiring companies to disclose ESG data have been noticed, seeking to materialise reports that present some densification of concepts and some requirements regarding the types of 'investment labels' and, more recently, measures to combat so-called 'greenwashing' - the attempt to make an investment appear sustainable when, in reality, it is not.

In addition to the legislation that we will briefly present below, there are several proposals for Directives that are currently under discussion[12] and will oblige covered entities, between 2024 and 2026, in the EU and in third countries (if the company group generates significant income in the EU and has a subsidiary or branch based in the EU that meets certain criteria).

In addition to these proposals, we already have regulations in force and mandatory, regarding the obligation to disclose more non-financial information, the new Corporate Sustainability Reporting Directive (CSRD), Directive (EU) 2022/2464 of the European Parliament and of the Council was published on 16 December 2022, amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU about corporate sustainability reporting. This Directive regulates some aspects of the obligations to present online information, as we will have the opportunity to analyse in a further point of the present article. The broad scope of this regulation will now require companies to disclose, among other things, sustainability objectives, adopt sustainability information standards and disclose their business model and strategy in relation to risks and opportunities related to sustainability issues.

Besides that, there are discussions at European level about a complementary Corporate Sustainability Due Diligence Directive (CSDDD) which, if adopted, will bring new due diligence and far-reaching governance requirements related to ESG issues.

This Supplementary Directive will require EU companies, or those with significant operations in the EU, to integrate these factors into their policies to identify, monitor and prevent circumstances that could have a negative impact on human rights and the environment. Within the regime proposed by the EU, the CSDDD also contemplates a sanctioning regime (which, in principle, will be merely administrative) in the event of non-compliance, to be imposed by the regulators of each EU member state, providing for heavy penalties based on the turnover of companies.

[12] On these plans, see Katie Barton and others, 'ESG Market Alert - November 2022' <https://www.jdsupra.com/legalnews/esg-market-alert-november-2022-1310118/> accessed 8 February 2024.

In the United Kingdom, the Financial Reporting Council (FRC) launched a project in November 2022 to understand how companies use, develop and assess the concept of ESG "materiality" in their ESG reports, inviting several regulated organisations to take part in the discussion.

This type of public consultation - and even self-regulation, which is more common in Common Law countries - is to be welcomed and would be recommended for European Union countries which, unfortunately, are increasingly adopting a top-to-bottom logic that harms EU financial institutions, which, wrapped up in an overwhelming bureaucracy of opportunities, are prevented from competing in global markets, because the American or Asian framework is less stifling and more understandable (and will probably allow for more growth in the long term), meaning that European entities do not benefit from an adequate level-playing field, and it is inevitable that European markets will suffer in the long term.[13]

The participants at COP28 in Dubai or at COP27 in Sharm El Sheikh were also dealing with these differences, with discussions surrounding the creation of a new investment fund to support the victims of climate change-related disasters, to be developed by December 2023 (still in the very early stages). In essence, the basic discussion (and, once again, an attempt to determine concepts) was centred on who would benefit from this initiative. The EU representatives want most of these investments to go to 'particularly vulnerable' countries instead of 'developing countries', which, according to the outdated definitions of the UN Climate Convention, still include non-poor countries like China or Singapore (whose wealth per citizen will be double the wealth of each European).[14]

Returning to the initiative by the Financial Reporting Council Lab at the end of 2022, it should be noted that the results achieved might be essential for the definition of concepts in these areas, helping companies to determine which kind of t information should be included in 'ESG' corporate reports and the depth of information needed to be provided, trying to escape the subjectivism inherent to these matters. Knowing what environmental, sustainability and good governance values are and how to define them is a challenge for institutions, particularly when it comes to non-financial information, as it is the case with ESG criteria reports.

So, over the next few years, in order to be 'easier to be green', like Kermit the Frog at the end of the song, it is important to know:

(a) Which ESG factors companies consider when determining what to report to supervisors;

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[13] This is the case regarding money laundering or terrorist financing prevention - as we have tried to illustrate in, cf. MIGUEL DA CÂMARA MACHADO, 'How do you say "money laundering" in Russian? (отмывание денег?) and "too fast" in Ukrainian? (занадто швидко?)', in *Regimes da prevenção de branqueamento de capitais e compliance bancário (em tempos de guerra)* (3rd ed Lisbon: AAFDL Editora, 2022) 9-24. In other sectors too, such as the European Regulation on the digital operational resilience of the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014, which was also approved in November 2022. The new regulation, which was also approved in November 2022 and which, despite providing for a transition period of 2 years, will entail a major effort on the part of obliged entities to adapt and adjust, with more internal bank policies, mandatory reviews and new reports that do not exist outside the European area.

[14] About this fund and the results of COP27, it is important to read the recent text by Catherine Brahic, 'A new UN fund for "loss and damage" emerges from COP27' <https://www.economist.com/international/2022/11/20/a-new-un-fund-for-loss-and-damage-emerges-from-cop27> accessed 8 February 2024.

(b) When and how often companies consider ESG 'materiality';
(c) How 'materiality' is used in assessments by companies to determine which information should be included or excluded in their reports;
(d) How companies think about 'materiality' regarding non-financial information, compared to financial information; and
(e) What investors want to understand about 'materiality'.

In another Common Law initiative, it is interesting to follow the Sustainability Disclosure Requirements (SDR) presented on 25 October 2022 by the FCA (Financial Conduct Authority) and the consultation document on investment labels launched for public consultation.

In the aforementioned consultation, that ended on 25 January 2023, the British regulator invited the various stakeholders (FCA-regulated companies, industry groups, consumers, regulators, industry experts, academics, and advocacy groups) to give their opinion on the proposals and new ESG rules that will apply to all FCA-regulated companies. The responses shaped the final version of the FCA's handbook, published in October 2023.[15]

These rules aim to crack down on the concept of greenwashing and improve consumer confidence in the market for sustainable investment products, and, once again, include the development of sustainable investment labels, imposing disclosure requirements and restrictions on the use of sustainability-related terms (such as ESG, green or sustainable) in the designation and marketing of products in case certain requirements are not met. This seems to be an appropriate way to constrain asset managers and companies in order to avoid misleading or exaggerated marketing in these areas.

These new British regimes are intended to deepen (from a more consumer-focused viewpoint) and follow regimes already imposed at a federal level in the United States of America and in the EU, where, for now, Regulation (EU) 2019/2088 (hereinafter, the 'Regulation'), applicable to financial market participants (credit institutions, financial advisors, among others, as defined in Article 2 of the Regulation), is paradigmatic.

In the European Union, ESMA (the European Securities and Markets Authority) also announced on 27 October 2022 that it intends to amend its Union Strategic Supervisory Priorities (USSP)[16] to include ESG disclosures alongside the quality of market data. The new prioritisation of ESG disclosures replaces the costs and performance of retail investment products and represents an important step in the implementation of ESMA's Strategy, which gives a prominent role to sustainable financing.

In November 2022, ESMA launched a public consultation on the guidelines it intends to issue on the possibility of using names or designations in financial products that contain terms related to ESG,

[15] This resource is available online at <https://handbook.fca.org.uk/handbook/ESG.pdf> accessed 8 February 2024.

[16] On these priorities, see ESMA's website at <https://www.esma.europa.eu/press-news/esma-news/esma-work-esg-disclosures-new-union-strategic-supervisory-priority> accessed 8 February 2024.

sustainable finance or sustainability, from 18 to 20 February 2023.[17] The final document was published on 2 October 2023.[18]

In the document mentioned above, concrete examples are given of the types of fund designations that could be permitted, which are interesting to know (for example, what could be considered 'Climate Change Solutions Fund', 'Sustainable Water Equities Fund', 'Biodiversity Equity Fund', 'Sustainable Society Fund' or 'Global Impact Fund'), in order to understand what is, or can be, considered and sold as 'green' in the EU.

ESMA and the National Competent Authorities (NCAs) intend to keep pace with the growing demand for ESG-related financial products and to promote the transparency and comprehensibility of ESG disclosures in key segments of the sustainable finance value chain, such as issuers, investment managers or investment firms, and also to combat "greenwashing". In addition, ESMA claims it intends to gradually promote greater scrutiny of ESG disclosures through effective and consistent supervision, which will also involve building supervisory capacity to fully incorporate financial sustainability into day-to-day supervisory work and supervisory culture in these areas, 'infecting' those supervised so that they also adopt an ESG corporate culture.[19] It should be noted that, due to the delays in relation to what was planned in 2019, the supervised have been the first to concretise concepts, while it is expected that the European and national authorities will densify and help to understand what is intended in these areas. Related to the sustainability disclosures and the integration of such risks, ESMA has launched, in July 2023, a new common supervisory action (CSA), that predicts the cooperation between ESMA and the NCAs to assess the compliance of supervised asset managers with the European regulation, such as the sustainable finance disclosure regulation (SDFR), the Taxonomy regulation and other relevant implementing measures.

In light of the above, ESMA seems to be honouring the promise made last fall, by assuming the compromise to work together with member state authorities in the areas of disclosure of ESG products and quality of market data. In addition, they intend to closely monitor the evolution of the costs of this type of investment as a key element in investor protection (since the verification of ESG criteria by distributors will involve considerable investment on their part, which will end up being reflected in the final prices of the products and services made available to consumers in the banking and financial markets).

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[17] You can consult all the details of this public consultation online at <https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-funds%E2%80%99-names-using-esg-or-sustainability-related accessed 8 February 2024.

[18] Available on-line at <https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-524821-2931_ESG_names_and_claims_in_the_EU_fund_industry.pdf> accessed 8 February 2024.

[19] On this subject, and already building bridges with the ESG subject Abel Sequeira Ferreira, 'A cultura empresarial no governo das sociedades: breve introdução', cit. 183-228.

It should be noted that the previous legal basis in the EU consisted of the aforementioned Regulation (EU) 2019/2088, which established several transparency and information duties related to sustainability in the financial services sector (which came into force on 10 March 2021).

For now, it is important to emphasise that Recital 13 of the Regulation establishes the duty of financial market participants and financial advisors providing investment advice, regardless of the design of the financial products and the market they are aimed at, to publish written policies on the integration of sustainability risks and to ensure the transparency of this integration. According to Recital 23, these entities are required to provide summarized information about these policies available on their websites (which implied the production of many ESG policies by the obliged entities in the spring of 2021, which were ahead – because they are regulated – of the supervisors who have been slower to realise the obligations applicable in these areas).

Under the terms of Recital 28, the drafting of this policy and its availability on the website is not dependent on any legislative or regulatory act on the part of the respective Member State, although they may go beyond the Regulation and 'adopt or maintain in force more stringent provisions regarding the publication of climate change adaptation policies and the disclosure of additional information to end investors regarding sustainability risks'.

Among the information duties foreseen in the Regulation, it is important to highlight that, according to Article 3, financial market participants and financial advisors must publish, on their respective websites, information regarding their policies on integrating sustainability risks into their investment decision-making process or their investment advice, respectively. In accordance with Article 6, the same players must also include, in their pre-contractual disclosures, descriptions of how sustainability risks are integrated into their investment decisions and investment advice, respectively, and the results of their assessment of the potential impacts of sustainability risks on the performance of the financial products they offer and advise on.

Where financial market participants and financial advisors consider that sustainability risks are not material, the descriptions referred to in the first subparagraph shall include a clear and concise explanation of the reasons for this.

According to Article 8 of the Regulation, whenever a financial product promotes, among other things, environmental or social characteristics, or a combination of these characteristics, provided that the companies in which the investments are made comply with good governance practices, the information to be disclosed under Article 6 must include the following:

(a) information on how these characteristics are achieved;
(b) if a reference index has been designated, information on whether and how this index fulfils these characteristics.

Article 9, on the other hand, sets out that, regarding financial products whose objective is sustainable investment, and which have been designated on the basis of benchmarks, the information to be disclosed must be accompanied by:

(a) information on how the designated index is aligned with this objective;
(b) an explanation of why and how the designated index aligned with that objective differs from a general market index.

In addition to Article 11, which is combined and articulated with Articles 8 and 9, in accordance with Article 10, financial market participants shall publish and update on their websites, in an accurate, fair, clear, not misleading, simple and concise manner, and in a clearly visible place, for each financial product referred to above:

(a) a description of the environmental or social characteristics or the sustainable investment objective;
(b) information on the methodologies used to assess, measure and monitor the environmental or social characteristics of the impact of the sustainable investments selected for the financial product, including their data sources, the analysis criteria for the underlying assets and the relevant sustainability indicators used to measure the environmental or social characteristics or the overall sustainability impact of the financial product;
(c) the information referred to in Articles 8 and 9 above;
(d) the information referred to in Article 11, which states that whenever financial market participants offer a financial product referred to in Articles 8 or 9, they must include a description of the following elements in their periodic reports:
    i. for a financial product referred to in Article 8, the extent to which environmental or social characteristics are achieved;
    ii. for a financial product referred to in Article 9, the overall sustainability impact of the financial product through relevant sustainability indicators; or, if a benchmark index has been designated, a comparison of the overall sustainability impact of the financial product with the impacts of the designated index and a general index through sustainability indicators.

Regarding the presentation and content of the information to be provided, the Regulation has already mandated the EBA and ESMA to draw up draft regulatory technical standards since 2019. However, in the last quarter of 2023, the implementation and delimitation of concepts, so far, is very much left in the hands of market players, when drawing up and approving policies on the integration of sustainability risks that we know about in 2021 and in the construction of strategies and products that integrate these concepts.

The need to specify certain criteria and clarify the reporting models that will have to be adopted is mitigated, albeit insufficiently, by the provisions of Delegated Regulation (EU) 2022/1288 of 6 April 2022, which complements Regulation (EU) 2019/2088 of the European Parliament and of the Council, published in the Official Journal of the European Union on the 25 July 2022. Delegated Regulation (EU) 2022/1288 sets out more clearly the deadlines by which the information must be published on the websites of the obligated parties and the way in which this information must be submitted.

The environmental factor must reflect the environmental implications determined by the company's activity, particularly concerning to climate change. Sustainable investment, from an environmental point of view, is an investment in one or more economic activities that are qualified as sustainable in accordance with Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 (the Taxonomy Regulation). Environmental criteria include, among others, resource efficiency in terms of energy use, the use of renewable energies, the development of a waste management programme, the way in which it solves potential problems of air or water pollution caused by its operations, as well as concerns about raw materials, and the company's actions in relation to climate change, particularly in terms of controlling greenhouse gas emissions, which can have an impact on biodiversity and the circular economy.

The social factor allows us to determine how the company relates to its stakeholders, meaning all the people with whom it interacts: employees, suppliers, customers, and the communities in which they operate. These include categories such as human rights, diversity, and non-discrimination in the workplace, through the adoption of measures that contribute to combating inequalities and promoting social cohesion, health and safety at work, remuneration and management of human resources, following responsible marketing and R&D (Research and Development), social integration, or investing in human capital or economically or socially disadvantaged communities, among others.

Finally, the corporate governance factor concerns to good governance practices. In the ESG context, governance refers to the way the company is run, assessing management by the board of directors, the respective internal control mechanisms, and governance in the interests of all stakeholders, from a long-term perspective. In particular, management structures, share capital structure and shareholder rights, healthy labour relations and staff remuneration practices, transparency and company accounting are taken into account[20].

And, in the meantime, throughout 2023, financial 'bets' on sustainability are changing and there are marked differences between the US and the EU. Curiously, the markets of the 'Trump era' were more 'friendly' to ESG than those of the 'Biden era', as has been noted in think articles in specialised journals.[21]

> 'The anti-ESG backlash has captured the public's attention and opened up a transatlantic divide. While EU investors boast of their efforts to achieve "zero" greenhouse gas emissions as soon as possible, many of their US counterparts dodge the issue or say they have to obey their clients' wishes. The impact on the real world is difficult to assess. On the one hand, green infrastructure and investment funds for the climate transition continue to pay off, on the other, anti-ESG

[20] In particular, on the social interest and ESG considerations in regard to directors, see José Ferreira Gomes, 'Responsabilidade civil dos administradores: ilicitude e culpa', in *Administração e governação das sociedades* cit. (279-307), 280-281.

[21] Cf. Brooke Masters and Patrick Temple-West, 'The real impact of the ESG backlash', *Financial Times* (New York: December 4 2023) <https://www.ft.com/content/a76c7feb-7fa5-43d6-8e20-b4e4967991e7?shareType=nongift> accessed 8 February 2024.

legislation has been defeated in a number of states, and relatively little capital has been withdrawn from blacklisted institutions. The vast majority of investors and fund managers incorporate climate and social risk factors into their decisions, even if they don't call them "ESG". European ESG flows have remained stable recently, but US investors have been withdrawing money from similar funds'.

It will be very interesting to follow these divergences between Europe and America in terms of sustainability in 2024.

With this illustration, we can return to the image of the colours which opened this text and use a scheme that is often used to determine concepts, between a black zone, of positive certainty (what we know 'is green', like big trees or small frogs that sing in swamps) and a white zone, of negative certainty (what we know 'is not green', like big yellow birds or furry blue monsters), but it is also important to reflect on the existence of a 'grey' zone of uncertainty that we are invited to fill in and determine, as academics and interpreters of the law, but also as enforcers of this new 'sustainable' law, whether as lawyers, regulators, investors or consumers of financial products.

It's true that choosing (to own) ESG companies, funds or investments might mean 'losing money' from a short-term perspective, since by doing so we are reducing our possibilities, overlooking industries that could be profitable and missing out on business opportunities. However, being aware of ESG factors can mean protecting our choices in advance from companies and investments that are likely to have worse performances in the long term. Staying away from alcohol, pornography,[22] and weapons industries, among others, will mean adopting a more prudent stance that could protect your shareholders or personal investments.[23]

It will therefore be in the interest of shareholders and investors to improve the ESG profile of companies, which can be vital for them to increase their value in the long term. A company's ESG profile is currently central to its global brand and reputation, as the media and the public increasingly hold them accountable for failing to act. This can have a lasting impact on revenues, as customers and investors may look for more 'sustainable' or 'green' alternatives. Conducting due diligence analyses also based on measuring ESG factors is quickly becoming a standard in the markets, even if the considerations may differ slightly between each legal system. This type of analysis will not only protect companies against negative financial risks, implying this growing emphasis on sustainability

[22] On this industry, its dubious contours and the importance of those responsible for the means of payment in regulating it, we recommend the *Financial Times* podcast 'Hot Money' which, in November 2022, released 8 episodes with a lot of in-depth research, available online in <https://open.spotify.com/show/2EU1S3kZdhPp1RgscY473O?si=AucTEm7bQ5urdAhOBablog> accessed 8 February 2024.

[23] Regarding the relationship with shareholders (and the demands they can make in these areas, cf, Giulio Sandrelli, 'Il dialogo degli amministratori con gli azionista dopo il codice di corporate governance' (2021) Parte seconda 4 *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni* 695-755.

and social responsibility, but will also help to place companies in better positions on the markets, increasing their value and attracting more investors.[24]

Finally, we can return to the song that inspired the opening of this article and conclude that the various players in the financial markets, and each one of us, can also sing, like KERMIT, THE FROG, 'green is cool and friendly like... and I think it's what I want to be'.[25]

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[24] Developing this theme from the very concept of 'social interest', see Umberto Tombari, 'Corporate social responsibility (CSR) environmental social governance (ESG) e *"scopo della società"*', (2021) Parte seconda 2 *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni* 225-234 or, on corporate social responsibility, Cynthia A. Williams, 'Corporate social responsibility and corporate governance', *The Oxford handbook of corporate law and governance*, ed. Jeffrey Gordon and Wolf-Georg Ringe (Oxford: Oxford University Press, 2020) 634-678 or John Paterson, 'Corporate governance and corporate social responsibility', *The Cambridge companion to business & human rights law*, ed. Ilias Bantekas and Michael Ashley Stein (Cambridge: Cambridge University Press, 2021) 65-85.

[25] Original text available at Jim Henson, 'It's not easy being green – and other things to consider' (New York: Hyperion, 2005) 15.