

# Conceptualizing sustainability\*

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## 1. Introduction

Sustainable governance has become a mainstream focus for every business. It provides not only a venue for incorporating the always existing uncertainty in the corporate decision-making process, but also a means for identifying value-creating opportunities for the organizations. As stakeholders increasingly demand large corporations to inform them about their environmental, social and governance (ESG) performance, sustainability now enjoys the same stance as financial aspects on the corporate agenda. Current global challenges such as climate change, pollution, bribery, slavery, child labour, poverty and various diseases have harnessed businesses to improve their ESG performance. Moreover, it has become clear that the matter of sustainability can no longer be dealt with by businesses alone but requires involvement of our whole (civil) society. The European Union is also putting significant effort into identifying the right mechanisms to encourage sustainable behaviour. In a way, sustainability opens a whole new world and has brought us many new themes, concepts and topics, many of which are still developing and taking shaped. To enhance the understanding of existing discussions regarding sustainability, we provide an overview of key concepts and legal frameworks connected to sustainability by describing, explaining and clarifying these key concepts, topics and frameworks.

Hereafter, paragraph 2 provides an historical perspective on sustainability. Paragraph 3 discusses some concepts that are relevant in the field of sustainability. This paragraph starts with some general concepts, and then turns to concepts than are of a somewhat narrower nature. Paragraph 4 discusses a few areas in which (legal) issues regarding sustainability can arise within companies. Paragraph 5 discusses a number of important legal frameworks in the field of sustainability, first on an international level and then on the level of the European Union (EU). With regard to the EU paragraph 5 first states some general remarks and then turns to concrete examples of legal initiatives. Paragraph 6 contains a short conclusion.

## 2. Historical perspective

The concept of sustainability dates back to ancient times, as illustrated by Emperor Hadrian's (AD 117-138) efforts to protect Lebanon cedar. Lebanese cedar, prized

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for its quality, was utilized in various ancient civilizations, from Solomon's temple construction to Phoenician ships and ancient Egyptian mummification. However, the high demand for this wood led to deforestation in Lebanon. Emperor Hadrian intervened by declaring the cedar forests in the Lebanese mountains an Imperial domain, safeguarding the area from excessive logging.<sup>1</sup> The term 'sustainability' itself is attributed to Hans Karl von Carlowitz (AD 1645-1714), a mining manager in the Electorate of Saxony. Von Carlowitz recognized the industry's reliance on a continuous supply of wood for energy and construction. He understood the vital link between the economy and sustainable forest management, realizing that extensive deforestation would halt industrial progress. Von Carlowitz advocated for *nachhalende Nutzung* – sustainable use – of forests, pioneering the early concepts of sustainable resource management.<sup>2</sup>

Preserving nature to sustain economic activities has been a historical norm, safeguarding what is valuable to humanity. Yet, this perspective has evolved over time. The needs of mankind are broader than purely economic, a healthy environment is deemed just as important. However, defining the precise scope of 'needs' sparked debates and was clarified from the 1970s onward.

The UN Conference on the Human Environment in Stockholm of 1972 marked the start of a dialogue between industrialized and developing countries on the link between economic growth, the pollution of the air, water, and oceans and the well-being of people around the world. This event signalled the beginning of a convergence among key sustainability dimensions, namely environmental preservation, economic development, and social well-being.

The Brundtland Commission, previously known as the World Commission on Environment and Development, was a United Nations sub-organization established in 1983. Chaired by Gro Harlem Brundtland, the former Prime Minister of Norway, the commission published *Our Common Future* in 1987, commonly referred to as the Brundtland Report. This report aimed to address the perceived conflict between global economic growth and escalating ecological degradation. In an attempt to reconcile this apparent contradiction the Brundtland Commission used the term 'sustainable development', which was defined as development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs. The concept of sustainable development appears to contain an inherent contradiction. Initially, 'sustainable' was linked to responsible environmental and resource usage, whereas 'development' traditionally referred to enhancing socio-economic conditions. Addressing poverty often led to greater raw material consumption, contrasting with, for example, climate change goals that aimed to decrease resource use. The Brundtland Commission's introduction of the term 'sustainable development' served as a catalyst, uniting various dimensions of what we now define as sustainability.

- 1 J.D. Hughes & J.V. Thirgood, 'Deforestation, Erosion, and Forest Management in Ancient Greece and Rome', *Journal of Forest History* 1982, p. 60-75, p. 73.
- 2 H.K. von Carlowitz, *Sylvicultura Oeconomica*, Leipzig: Johann Friedrich Braun 1713, p. 105-106.

The momentum for sustainable development gained traction during the 1990s. The United Nations Conference on Environment and Development in Rio de Janeiro (1992) marked a significant milestone by introducing a comprehensive agenda for environment and development, known as Agenda 21, which was widely adopted. Subsequently, in 1995, the World Summit for Social Development took place in Copenhagen. The conference's final report, the Report of the World Summit for Social Development, emerged as a pivotal source of inspiration, by highlighting the social dimension, making it a distinct component within the sustainable development paradigm, further enhancing integrated thinking about sustainability.

In 2000 the Millennium Development Goals (MDGs) were unanimously adopted by the UN General Assembly. The MDGs aimed to significantly diminish global poverty, hunger, disease, and inequality within fifteen years. Eight specific goals were outlined: eradicating extreme poverty and hunger, ensuring universal basic education, promoting gender equality, enhancing women's empowerment, reducing child mortality and improving maternal health, combating HIV/AIDS, malaria, and other diseases, preserving a sustainable environment, and fostering global cooperation for development. The MDGs proved to be an example of setting concrete and measurable sustainability objectives and integrated sustainable thinking linking the different dimensions of sustainability.

However, during the United Nations Conference on Sustainable Development in 2012 (the Rio+20 conference), it became evident that the MDGs had not been adequately integrated into the national policies of UN member states. This realization prompted a perceived need among Member States to craft a future global development agenda that could oversee and enhance the achievements of the MDGs. This led to the formulation of the Post-2015 Development Agenda, culminating in Agenda 2030 and the Sustainable Development Goals (SDGs). The SDGs represent a significant step in the convergence of diverse sustainability domains. This convergence is highlighted in the preamble to Agenda 2030: 'They [the SDGs] are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social, and environmental'. However, this preamble does not offer a definitive answer regarding the relationships between these various domains, an ongoing debate within the international community.<sup>3</sup>

### 3. Concepts in the field of sustainability

#### 3.1 General concepts

In the debate surrounding sustainability a number of concepts are being used that may need some background and explanation. The purpose of this paragraph is to explain these concepts that have a rather general purport, to allow for a better

3 M.Y.H.G. Erkens, C. de Groot & C.H.A. van Oostrum, 'Inleiding', in: M.Y.H.G. Erkens, C. de Groot & C.H.A. van Oostrum (eds.), *Panta Rhei. Recht en Duurzaamheid*, Den Haag: Boom Juridische Uitgevers 2023, p. 3-17; J.L. Caradonna, *Sustainability: A History*, Oxford: Oxford University Press 2014, p. 136-175.

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understanding of ongoing discussions: weak versus strong sustainability, the need for a circular economy, and – as regards businesses – the tendency toward a stakeholder approach.

*Weak sustainability* envisions the coexistence of nature preservation and economic growth, emphasizing human interests in relation to nature. This perspective leans towards anthropocentrism, evaluating nature's importance based on its relevance to human society. In contrast, *strong sustainability* challenges the direct connection between sustainability and economic growth. This viewpoint advocates for a more ecocentric approach, prioritizing the preservation of planetary boundaries. The focus lies on aligning human society within these boundaries, promoting a balance between ecological preservation and human well-being.<sup>4</sup>

Then, there is the idea of the *circular economy*. As opposed to the traditional linear economic model, which is based on a 'take-make-consume-throw away' pattern, the circular economic model emphasizes reusing, repairing and recycling, creating a (nearly) closed loop.<sup>5</sup> In a circular economy, the life cycle of products is extended while the waste of materials is reduced.<sup>6</sup>

As regards companies, the debate on sustainability prefers a *stakeholders approach* over a shareholder approach. Such a stakeholder approach is the practice in which organizations formulate and implement processes to balance in some kind of way the interest of all stakeholders impacted by the organization. Not only the company's shareholders are taken into account, but also employees, suppliers, local communities, creditors and others. It seems the attention for a stakeholder approach is growing and this also becomes more and more an important mechanism for businesses when developing a sustainable strategy.

### 3.2 Concepts of a somewhat narrower nature

This paragraph discusses another set of concepts. These are concepts that are more concrete than the general concepts discussed in the previous paragraph: they are the Anthropocene, the donut economy, the term transition, the so-called 'commons', wizards and prophets, and finally the term wicked problems.

The concept of the *Anthropocene* is related to geological eras. These are periods of time that comprise all the rocks formed during that time. Its use allows us to divide and study the different stages through which the planet has passed since its creation until today. The current geological age is Anthropocene, the age of human impact on Earth. Since the pre-industrial era, and especially since the second half of the last century, the degradation of the environment and the climate change caused by humans have increased at a rate never seen in any other time in history. There seem to be two main causes: the model of energy production and the resource consumption model. The model of energy production is connected to energy

4 E. Neumayer, *Weak versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms*, Cheltenham: Edward Elgar Publishing 2013.

5 European Parliament, *Closing the loop. New circular economy package*, January 2016, p. 2.

6 Ibid.

produced from coal, oil and natural gas, which emits large amounts of greenhouse gases and influences global warming. The resource consumption model is about the growing population using more natural resources than the Earth is able to regenerate. This brings us to the next concept: the donut economy.

In 2012 Kate Raworth coined the intricate term *donut economy* for her visual representation on sustainable development, which aims to combine both planetary limitations and societal boundaries.<sup>7</sup> The visual aid in understanding this concept is a donut, where the outer boundary is formed by the ‘environmental ceiling’. Going beyond this ceiling could result in climate change, ozone depletion or biodiversity loss. The inner boundary is formed by the ‘social foundation’, consisting of e.g. water, food and health. The donut-shaped area between the environmental ceiling and the social foundation is the space where inclusive and sustainable economic development can take place. As we go beyond the ceiling, a transition seems to be necessary.

The term *transition* refers to any process where a change from one form to another takes place. A significant aspect in the transition to a more sustainable world is the transition to renewable and sustainable energy sources, more specific the European transition to carbon neutrality by 2050.<sup>8</sup> The European Climate Law lays down the aim, as first set out in the European Green Deal, for net zero greenhouse gas emissions for EU countries as a whole by 2050.<sup>9</sup> An intermediate point is set in 2030, where emissions should be reduced by 55%.<sup>10</sup>

An issue that is closely connected to transition are the *commons*. A common resource (a ‘common’) refers to any resource that is accessible (and useful) to many, but where each use could impact the welfare of other users.<sup>11</sup> Key commons are surface and groundwater, wildlife and forests. In this respect, the so-called ‘tragedy of the commons’ is an economic theory which demonstrates that when all individuals exploit a common in their own interest, this will ultimately lead to a loss of the resource for the entire community.<sup>12</sup> This is in contrast to the concept of sustainable development. Where sustainable development takes the need of future generations into account, the tragedy of the commons results in the loss of resources and makes it more difficult, if not impossible, for future generations to meet their needs.

Then there are the *wizards and prophets*. A fundamental contradiction in approaches to sustainability revolves around two opposing perspectives: wizards and prophets,

7 K. Raworth, *A safe and just space for humanity: Can we live within the doughnut?*, Oxford: Oxford International 2012, p. 4.

8 Art. Regulation (EU) 2021/1119.

9 Ibid.

10 Art. 4 Regulation (EU) 2021/1119.

11 D. Feeny et al., ‘The Tragedy of the Commons: Twenty Two Years Later’, *Human Ecology* 1990/18, no. 1, p. 3.

12 Feeny (1990), p. 2; A. Spiliakos, ‘Tragedy of the Commons: What it is and 5 examples’, online.hbs.edu/blog, 9 February 2019.

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as delineated in Charles C. Mann's book, *The Wizard and the Prophet*. Mann portrays the difference between wizards and prophets through the divergent beliefs of two twentieth-century scientists, Norman Borlaug and William Vogt, offering contrasting visions for achieving a sustainable society. On the one hand, wizards, inheriting the legacy of Norman Borlaug, view innovation as the key to overcoming sustainability challenges. Borlaug's research led to the development of high-yield crops, saving millions from starvation and earning him the name 'father of the Green Revolution'. The wizard approach posits that with the flick of a wand, innovation and technology can solve mankind's problems. This perspective, often referred to as ecomodernism, underscores humanity's innovative strength and the potential of harnessing technology to address sustainability challenges.<sup>13</sup> On the other hand, prophets, inspired by William Vogt, a pioneering environmentalist, advocate the belief that surpassing our planet's natural limits will lead to our downfall. Proponents of this view emphasize reducing our reliance on Earth's resources as a means to save humanity. This perspective underscores the importance of behavioural change.

Sustainability and ESG related issues, especially in connection with climate change, are sometimes considered to be *wicked problems* (in contrast to non-wicked, 'benign' or 'tame' problems). As early as 1973 Rittel and Webber described the nature of wicked problems along the following ten interlocking properties:<sup>14</sup>

- wicked problems have no definitive description and formulation;
- wicked problem have no 'stopping rule', meaning that they will not be definitively solved;
- as a consequence the solutions to wicked problem are 'expressed as "good" or "bad" or, more likely, as "better or worse" or "satisfying" or "good enough";
- any solution to a wicked problem will generate new problems;
- any solution to a wicked problem is a 'one-shot operation' because it is not possible to have trial runs;
- solutions to wicked problems are difficult or maybe even impossible to come up with;
- wicked problems are essentially unique: "There are no classes of wicked problems in the sense that principles of solution can be developed to fit all members of a class";
- wicked problems tend to be a symptom of another problem or other problems which makes them difficult to solve;
- it is difficult to explain what the cause of a wicked problem is;
- wicked problems are part of a causal web (an open system), which leads to ambiguity in finding solutions.

13 C.C. Mann, *The Wizard and the Prophet. Two Groundbreaking Scientists and Their Dueling Visions to Shape Tomorrow's World*, New York: Alfred A. Knopf 2018.

14 H.W.J. Rittel & M.M. Webber, 'Dilemmas in a General Theory of Planning', in: *Policy Sciences* 1973-4), p. 155-169. At p. 160 they write: 'As you will see, we are calling them "wicked" not because these properties are themselves ethically deplorable. We use the term "wicked" in a meaning akin to that of "malignant" (in contrast to "benign") or "vicious" (like a circle) or "tricky" (like a leprechaun) or "aggressive" (like a lion, in contrast to the docility of a lamb)'.

#### 4. Sustainability in (corporate) practice

1 August 2024 marked Earth Overshoot Day, a yearly occurrence that indicates the date on which humanity's demand for ecological resources exceeds the resources that the earth can regenerate in that year. The resources consumed in the remainder of the year add up to the global overshoot. Inordinate use of resources, in excess of the amount the earth can regenerate, will eventually lead to a global deficit. This brings us back to the tragedy of the commons: the way humanity exploits common resources in its own interests could ultimately lead to a loss of those resources.

Sustainable development aims to balance the present and the future: development must be achieved in a way that current generations are able to meet their own needs, while not compromising the ability of future generations to meet theirs. As advocated by Vogt's prophets, behavioural change can be a solution to the global overshoot. Before we are able to consider the needs of future generations, and consequently make apt behavioural changes, the impact of our current behaviour must become clear. Adverse impacts, the negative effects of investment decisions and advice on e.g. sustainability factors, must be identified and analysed.

The identification of adverse impacts requires insight into the (consequences of) operations within corporations and their supply and value chains. A corporation's supply chain consists of the actors involved in the production process of a product, such as suppliers, manufacturers, distributors and retailers. The supply chain starts at the sourcing of raw materials and reaches to the final sale to the customer. Where the supply chain focuses on the practical process, the value chain sees to value addition through e.g. R&D and design. Even though these concepts differ, they are strongly co-dependent: a value chain cannot exist without a supply chain, and a supply chain cannot lead to optimized products without a value chain. Due diligence and transparency within these chains are imperative in recognizing and identifying harmful activities, making behavioural changes, and monitoring the effects of these changes.

One area where the consequences of activities are becoming more discernible, is within the emission of carbon gasses. Three categories have been devised: scope 1, scope 2 and scope 3. Scope 1 refers to emissions as a direct result of the corporation's activities, e.g. the use of fuel in company vehicles. A corporation's scope 2 emissions consist of the indirect emissions generated in the production of purchased energy. Scope 3 emissions are the most complex: they see to all indirect emissions, which do not fall under scope 2, that are associated with a corporation's supply and value chain, both upstream and downstream. Scope 3 emissions could see to emissions as a result of buying raw materials from suppliers or the emissions arising from customers using their final products. The categorization of carbon emissions is the first step in identifying the adverse effects of activities within supply chains and value chains, making behavioural change in this area more feasible.

Once the adverse effects of corporate activities are clear, subsequent steps can be taken. Being able to identify a harmful activity and its executing party opens the

path to corporate responsibility and liability. When instances of environmental damages or human rights violations arise, the extent to which a company can be held responsible and liable is decided by the scope of existing regulations on corporate responsibility and liability. Companies could be held accountable for their own acts and omissions, and possibly for acts and omissions of their subsidiaries or business partners.

A disadvantage of corporate responsibility and liability as a means to protect sustainable interests is its focus on remedial measures. Possible dissuasive effects could occur, but its strength lies in holding accountable responsible actors after damages have already materialized. A more proactive approach to protecting the environment exists in the rights of nature doctrine. The rights of nature doctrine argues that (parts of) nature as such should be given legal rights. These rights could be awarded to nature as a whole, or to parts of nature, like a water area, species of animals, or plants. By awarding (parts of) nature legal rights in advance, it is possible to provide protection upfront, not merely remediation afterwards. The recognition of the rights of nature can take several forms. One example is the constitution of the Republic of Ecuador that states that the nature that belongs to Pacha Mama (Mother Earth) has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, composition, functions and evolutionary processes. Another example (also driven by the necessity of reconciliation with the indigenous people) is found in New Zealand. The area where the Whanganui River flows is recognized as a legal person in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Under the Act, 'Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements'. The purpose of the Act is 'to record the acknowledgements and apology given by the Crown to Whanganui Iwi', iwi being aboriginal inhabitants of New Zealand. Also under the Act, 'Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person'. The Act creates the 'office of Te Pou Tupua', consisting of two persons: 'One person must be nominated by the iwi with interests in the Whanganui River and one person must be nominated on behalf of the Crown'. Te Pou Tupua aims to be the human face of Te Awa Tupua and act in its name.

Extensive sustainability regulations can come with drawbacks, such as greenwashing, greenbleaching, and stranded assets. Greenwashing refers to the practice of gaining an unfair competitive advantage by marketing a product or a service as sustainable and environmentally friendly, when in fact basic sustainable and environmental standards have not been met. Greenbleaching refers to the practice of gaining an unfair competitive advantage by marketing a product or a service as not sustainable and environmentally friendly, when in fact basic sustainable and environmental standards have been met. The term is mostly used in respect of financial markets participants who, by greenbleaching the services they offer, try to avoid regulatory demands that are connected with offering services that are sustainable and environmentally friendly. As being environmentally

and socially conscious gains traction, corporations could, knowingly or unknowingly, fall back on inaccurate marketing. As a result of new sustainability frameworks, corporations could also be left with stranded assets. Stranded assets are assets that, at some point before the end of their expected economic lifespan, become unable to generate an economic return. This can happen due to various factors related to the shift towards a low-carbon economy, such as unexpected decreases in demand or prices, physical stranding caused by events like floods or droughts, and regulatory changes. In the oil and gas sector examples of stranded assets encompass reserves still underground that will never be brought into production. These drawbacks show the complexity of sustainability issues: as a wicked problem, any solution will, in addition to possible positive results, generate new problems.

## 5. Relevant frameworks

### 5.1 Global frameworks

There are some leading global frameworks that are relevant for sustainability. These are the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the United Nations Global Compact, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, the SDGs, the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD).

The *United Nations Guiding Principles on Business and Human Rights* are a set of guidelines for states and companies to prevent, address and remedy human rights abuses committed in business operations. It is an instrument consisting of 31 principles implementing the United Nations 'Protect, Respect and Remedy' framework connecting human rights and multinational companies and other business enterprises. Developed by the Special Representative of the Secretary-General, John Ruggie, these were the first global standards for preventing and addressing the risk of adverse impacts on human rights linked to business activities, and continue to provide the internationally accepted framework for enhancing standards and practice regarding business and human rights. The Principles are based on three pillars outlining how states and businesses should implement the framework. These are: 1) the state duty to protect human rights; 2) the corporate responsibility to respect human rights; and 3) access to remedy for victims of business-related abuses.

The *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* offer guidelines to multinational enterprises, governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations. The Principles include: 1) regarding employment: employment promotion, social security, elimination of forced or compulsory labour, effective abolition of child labour, equality of opportunity and treatment, and security of employment; 2) regarding conditions

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of work and life: wages, benefits and conditions of work, safety and health, 3) and regarding industrial relations: freedom of association and the right to organize, collective bargaining, consultation, and access to remedy and examination of grievances. The guidance is founded substantially on principles adopted in international labour conventions and recommendations.<sup>15</sup>

The *United Nations Global Compact* is a non-binding United Nations pact to encourage businesses globally to adopt sustainable and socially responsible policies, and to report on their implementation. It is a principle-based framework and contains ten principles regarding human rights, labour, the environment and anti-corruption. The UN Global Compact is the world's largest corporate sustainability and corporate social responsibility initiative, with more than 20.000 corporate participants and other stakeholders in over 167 countries.

The *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* are recommendations addressed by governments to multinational enterprises. They aim to encourage positive contributions enterprises can make to economic, environmental and social progress, and to minimize adverse impacts on matters covered by the Guidelines that may be associated with an enterprise's operations, products and services. The Guidelines include the key areas of business responsibility, such as human rights, labour rights, environment, bribery, consumer interests, technology, competition, and taxation. The Guidelines require that the adhering countries, currently 51, set up National Contact Points (NCPs), which are offices charged with promoting observance of the Guidelines by multinational enterprises. Furthermore, NCPs are also charged with supporting a grievance mechanism. Under this procedure, alleged non-observance of one or more of the Guidelines' recommendations can be brought to the attention of an NCP, which is then responsible for helping the parties find a resolution for the issues raised by providing access to a consensual and non-adversarial procedure.

The *SDGs* were adopted by the United Nations in 2015 as a universal call to end poverty, protect the planet, and to ensure that by 2030 all people enjoy peace and prosperity. The seventeen goals are integrated, meaning they recognize that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability. The seventeen goal are: no poverty (SDG 1), zero hunger (SDG 2), good health and well-being (SDG 3), quality education (SDG 4), gender equality (SDG 5), clean water and sanitation (SDG 6), affordable and clean energy (SDG 7), decent work and economic growth (SDG 8), industry, innovation and infrastructure (SDG 9), reduced inequalities (SDG 10), sustainable cities and communities (SDG 11), responsible consumption and production (SDG 12), climate action (SDG 13), life below water (SDG 14), life on land (SDG 15), peace, justice, and strong institutions (SDG 16), partnerships for the goals (SDG 17).

15 See the ILO document Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

The *UNFCCC* is an international treaty to combat dangerous human interference with the climate system. The main objective can be found in Article 2 and is the ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic [*i.e.* human-caused] interference with the climate system’. The treaty calls for continuing scientific research into the climate. This research supports meetings and negotiations to lead to agreements. In 2022, the UNFCCC had 198 parties (countries). The UNFCCC’s supreme decision-making body, the Conference of the Parties, meets annually.

The *CBD* is a multilateral treaty and has three main goals: 1) the conservation of biological diversity; 2) the sustainable use of its components; and 3) the fair and equitable sharing of benefits arising from genetic resources. Its objective is to develop national strategies for the conservation and sustainable use of biological diversity. The agreement covers all ecosystems, species, and genetic resources. According to Article 26 of the convention, parties need to prepare, at intervals to be determined by the Conference of the Parties, national reports on the status of implementation of the convention.

### 5.2 *EU frameworks: general remarks*

The year 2015 is a key year for the development of sustainable regulations. In that year, both the Paris Agreement and the Sustainable Development Goals were adopted. The EU is a party to both agreements. In the years since 2015, the EU has taken several policy initiatives to deliver on its commitments, most notably the Action Plan on Financing Sustainable Growth (2018), the EU Green Deal (2019), and Sustainable Finance Strategy (2021). Central to these policy initiatives is the goal to achieve a climate-neutral and socially inclusive European society by 2050.

To achieve this policy goal, substantial investments in sustainable economic activities are needed every year. A recent study calculated that ‘The collective investment required to activate all decarbonisation measures [...] is estimated at €40 trillion by 2050, averaging €1,520 billion yearly. This equals almost 10% of current EU-27 GDP’.<sup>16</sup> This amount only concerns investments for the purpose of achieving a climate-neutral society. The amount of investment increases considerably when the financing of other sustainable policy goals is also included, such as the mitigation of biodiversity loss. In addition, already too little investment is made in sustainable economic activities who mainly relate to climate change mitigation. The report makes it clear that ‘€360 billion per year’ of additional investment is needed to achieve carbon neutrality.<sup>17</sup>

Using solely public investment to fund the sustainable transition becomes less feasible due to the significant financial resources required. Private capital is essential for attaining the EU’s sustainability objectives. Hence, channelling private funds into sustainable investments is imperative. In achieving this objective, the

16 Institut Rousseau, *Road to net zero. Bridging the green investment gap*, January 2024, p. 26, available at [institut-rousseau.fr/road-2-net-zero](https://institut-rousseau.fr/road-2-net-zero), 6 April 2024.

17 Ibid.

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Commission has various policy instruments at its disposal to guide private stakeholders, namely (1) voluntary commitments, (2) command and control regulation, and (3) market-based instruments (MBIs).

The EU utilizes all three policy instruments, but there appears to be a particular emphasis on MBIs when it comes to directing private capital towards sustainable investments. MBIs operate by harnessing market dynamics to influence the behaviour of economic actors. These instruments can be classified into three main categories. Firstly, behaviour is guided through pricing mechanisms, such as imposing levies on fossil fuels while incentivizing green energy through subsidies, thus making sustainable options more economically viable. Secondly, behaviour can be shaped through the allocation of trading rights, exemplified by emission rights within emissions trading systems. A good example of this is the European Union Emissions Trading System (EU ETS), a carbon emission trading scheme that began in 2005 and aims to lower greenhouse gas emissions in the EU. Cap and trade schemes limit emissions of specified pollutants over an area and allow companies to trade emissions rights within that area. The EU ETS gives CO<sub>2</sub> a price and creates incentives to reduce emissions in the most cost-effective manner. It is a cornerstone of EU climate policy and is the largest multi-national, greenhouse gas emissions trading scheme in the world.

The last category of MBIs influences behaviour through the dissemination of information. Providing stakeholders, such as investors, consumers, interest groups, and regulators, with specific sustainability data about a company can motivate them to take action and hold the company accountable, thereby influencing corporate behaviour.<sup>18</sup> Utilizing information to encourage stakeholders to hold companies accountable is frequently implemented in legislation through disclosure requirements.

### 5.3 EU frameworks: examples

Redirecting private capital towards sustainable economic activities via disclosure requirements hinges on establishing EU-wide consensus on what constitutes such activities. To facilitate this, a unified framework known as the *Taxonomy Regulation*, or *EU Taxonomy*, officially enacted on 12 July 2020, was developed.<sup>19</sup> This regulation introduces a classification system enabling companies to determine whether a specific economic activity meets the criteria for environmental sustainability.<sup>20</sup> To qualify as environmentally sustainable, an economic activity must meet specific

18 B. Moore, D. Benson, A. Jordan, R.K.W. Wurzel & A. Zito, 'Governing with multiple policy instruments?', in: A. Jordan & V. Gravey (eds.), *Environmental Policy in the EU*, London: Routledge 2021, p. 299-300; C.H.A. van Oostrum, 'Transparantie en het belang van context voor het sturen op duurzame uitkomsten', in: B. Akkermans e.a. (eds.), *Privaatrecht 2050. De weg naar ecologische duurzaamheid*, Brugge: die Keure 2022, p. 267-286, p. 279.

19 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, OJEU 2020 L 198/13.

20 Art. 2 (1) Taxonomy Regulation.

criteria, as outlined in the EU Taxonomy. An economic activity is deemed taxonomy-aligned<sup>21</sup> when it:

- 1) contributes substantially to one or more of the six environmental objectives set forth by the EU Taxonomy;<sup>22</sup>
- 2) does not significantly harm any of those environmental objectives;<sup>23</sup>
- 3) is carried out in compliance with minimum safeguards;<sup>24</sup>
- 4) complies with the technical screening criteria (TSCs) established by the EU Taxonomy. The rules of the Taxonomy Regulation are operationalized into practical and tangible rules through the TSCs.<sup>25</sup>

While the EU Taxonomy provides a definition of environmentally sustainable economic activities, it does not present definitions of social and governance aspects of sustainability.<sup>26</sup> The EU Taxonomy does incorporate disclosure requirements. The majority of recently implemented disclosure obligations concerning sustainability information stem from the Corporate Sustainability Reporting Directive (CSRD), which came into effect on 5 January 2023.<sup>27</sup>

The CSRD aims to strengthen and standardize sustainability reporting for larger businesses operating in the EU. With its goal of offering stakeholders a thorough and consistent system of sustainability reporting to make decisions that will promote sustainable growth, this directive replaces the pre-existing Non-Financial Reporting Directive.

Companies which fall under the CSRD will have to report according to European Sustainability Reporting Standards about environmental, social and governance aspects of sustainability, such as climate change mitigation, working conditions and human rights. The CSRD expects companies to report in such a way that they not only disclose their own effects on society and the environment (impact materiality), but also report on the financial risks posed by sustainability issues to the company (financial materiality). This concept of double materiality requires companies to take an inside-out and an outside-in reporting approach. Additionally,

21 Art. 3 Taxonomy Regulation.

22 Environmental objectives: (1) climate change mitigation, (2) climate change adaptation, (3) sustainable use and protection of water and marine resources, (4) transition to a circular economy, (5) pollution prevention and control, and 6) protection and restoration of biodiversity and ecosystems. Art. 9 Taxonomy Regulation.

23 Art. 17 Taxonomy Regulation.

24 Art. 18 Taxonomy Regulation.

25 In addition to the economic activities that substantially contribute to the six environmental objectives, the EU Taxonomy identifies two other types of activities which can be deemed environmentally sustainable if they meet certain criteria set out in the Regulation. These are: 1) enabling activities, and 2) transitional activities.

26 For more information about a Social Taxonomy see Platform on Sustainable Finance's report on social taxonomy, available at [https://commission.europa.eu/document/d07e1f1e-3a1f-4d55-add4-a130f26b33e3\\_en](https://commission.europa.eu/document/d07e1f1e-3a1f-4d55-add4-a130f26b33e3_en), 6 April 2024.

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

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the CSRD requires the audit (assurance) of reported information, further strengthening the reliability of the disclosed sustainability information and thereby signalling trust to investors and other stakeholders who can use the disclosed information in their decision-making.

The CSRD requires large companies to disclose certain sustainability information through prescribed channels such as the management report and the company website. This should ensure that sustainability information reaches the users of this information. To ensure that such information reaches investors, a specific regulation has been made, the Sustainable Finance Disclosure Regulation (SFDR).<sup>28</sup>

The *SFDR* mandates that financial market participants and financial advisers enhance transparency regarding the consideration of sustainability in investments and investment advice. Three levels of disclosure requirements are distinguishable: 1) mandatory disclosure of sustainability policies by financial market participants and financial advisers, 2) detailed information on ESG characteristics of investments and how these are incorporated into the investment decision-making process, and 3) mandatory disclosure of the impact of investments on sustainability.

With the *Deforestation Regulation* the EU aims to curb global deforestation and forest degradation linked to EU consumption and production.<sup>29</sup> The regulation sets rules concerning the introduction and availability on the EU market, as well as the export from the EU, of products that contain, have been fed with or have been made using relevant commodities, namely cattle, cocoa, coffee, oil palm, rubber, soya and wood (all these commodities are major drivers of deforestation). Consequently, the reach of this regulation is broad, encompassing a multitude of products such as leather, coffee, meat, furniture, chocolate, soybeans, cosmetics, printed materials, and paper, all of which are sourced from or manufactured utilizing these commodities.<sup>30</sup>

A company will only be authorized to place these affected products on the European market, or to export them when the following conditions are all fulfilled:

- 1) they are deforestation-free;
- 2) they have been produced in accordance with the relevant legislation of the country of production; and
- 3) they are covered by a due diligence statement.<sup>31</sup>

The Deforestation Regulation will be enforced by competent authorities in the member states. Failure to comply with this regulation can have immediate consequences, such as the immediate withdrawal or recall of the product in

28 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, OJEU 2019 L 317/1.

29 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJEU 2023 L 150/206.

30 Art. 1 Deforestation Regulation.

31 Art. 3 Deforestation Regulation.

question,<sup>32</sup> confiscation of the relevant products concerned,<sup>33</sup> or fines proportionate to the environmental damage and the value of the basic products in question or of the products in question concerned.<sup>34</sup>

A general due diligence scheme has also been developed. The recently adopted *Corporate Sustainability Due Diligence Directive* (CSDDD)<sup>35</sup> expects sustainable and responsible corporate behaviour of large companies and expects them to anchor human rights and environmental considerations in their operations and governance. The new rules aim to ensure that businesses address adverse impacts of their actions, including in their chains of activities inside and outside Europe.

The criteria to determine which companies would have to carry out due diligence are:

- 1) EU companies with, on average, more than 1,000 employees and a net worldwide turnover of a minimum of € 450 million;
- 2) non-EU companies with a minimum of € 450 million net turnover generated in the EU.

The calculation of the thresholds are at group level, ensuring that thresholds apply to the consolidated annual statements in the EU.

The due diligence obligations extend to a company's own operations, those of its subsidiaries, and the operations conducted by business partners within the company's 'chain of activities'. The definition of 'chain of activities' encompasses both upstream and downstream elements. The upstream activities of a company's business partners relate to the production of goods or the provision of services by the company, such as the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service. The downstream activities of a company's business partners relate to the distribution, transport and storage of the product, where business partners related to the distribution, transport and storage of the product, carry out those activities for the company or on behalf of the company. The due diligence obligations do not include the disposal of the product. Also noteworthy, regulated financial undertakings will for the moment not be in scope in relation to downstream due diligence obligations.<sup>36</sup>

Furthermore, all companies within the scope of the CSDDD are required to adopt and implement a transition plan for climate change mitigation aligned with the Paris Agreement. Compliance with the rules of the directive will be imposed via public and private enforcement.

32 Art. 24 lid 2 sub c Deforestation Regulation.

33 Art. 25 lid 2 sub b Deforestation Regulation.

34 Art. 25 lid 2 sub a Deforestation Regulation.

35 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 OJEU L 5.7.2024. The Corporate Sustainability Due Diligence Directive is sometimes also abbreviated as CSDD, CS-triple-D or CS3D.

36 This will be evaluated no later than two years after the date of entry into force of the Directive.

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The CSDDD has a phased in application: 1) companies with over 5,000 employees and a turnover of € 1500 million are required to implement the CSDDD starting in 2027, 2) companies with over 3,000 employees and a turnover of € 900 million must adhere to the CSDDD starting in 2028, 3) companies with over 1,000 employees and a turnover of € 300 million are obligated to adopt the CSDDD beginning in 2029.

## 6. Conclusion

Sustainability has become an important societal and economic focus point. Implementing a sustainable way forward is dependent on several factors such as the laws and views prevailing in the country, the society and its organizational structure, and on people. Nowadays, there is great attention for identifying the right mechanisms to encourage sustainable behaviour. Within companies, issues regarding sustainability can arise in different areas (e.g. sustainable use of common goods within the manufacturing process, reporting on adverse impacts and possible liability for damage to the environment). How these legal issues can, and should, be addressed is subject to a great deal of discussions. Different frameworks, both on international and EU level, aim to create solutions and create guidelines for the affected parties (e.g. companies, states and local communities). These frameworks, and the discussions surrounding them, can be best understood with a grasp on how sustainability came to be and the concepts that play a central role. By giving an overview of the key concepts and frameworks, we aim to support a better understanding of ongoing discussions, proposed solutions and developments in the coming years.