ESG in a Nutshell: Legal Challenges of Sustainable Development

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Introduction

In the past, companies could voluntarily decide whether to integrate environmental, social, and corporate governance aspects into their operations. Now companies that neglect these issues may expose themselves to legal consequences and liability, but also other negative impacts, in particular reduced competitiveness, exclusion from the supply chain, loss of reputation and credibility, or difficulty recruiting staff.

ESG and sustainability are a new field for many entities. To help businesses navigate through the maze of regulations, we have identified the main issues from different areas of law where ESG and sustainability risks may arise. We also suggest ways to help mitigate these risks.

ESG—why is it necessary?

On 5 January 2023, the Corporate Sustainability Reporting Directive (CSRD) came into force, extending sustainability reporting obligations to additional entities, i.e. all large companies (public and non-public) and small and medium-sized listed companies. According to the European Commission's estimates, the obligation to report on sustainability will apply to about 50,000 companies across the European Union (so far it has been fewer than 12,000 companies). The deadline for transposing the directive into national law lapsed on 6 July 2024. In Poland, the Ministry of Finance is responsible for implementation of the CSRD, and has prepared a draft of the relevant law.

A new group of businesses will be subject to the reporting obligation as early as 1 January 2025 (report in 2026). We write in detail about who sustainability reporting applies to in chapter I.

We are not obliged to report. Do we need to worry about ESG?

Yes. Even entities not subject to the reporting obligation should take action in the area of ESG: collect relevant data, measure emissions, set emission reduction targets, verify compliance with human rights in their supply chain, and ensure compliance of operations with applicable regulations. This is important because their counterparties who are required to report on sustainability will report not only information on their own operations, but also certain data on their value chain (e.g. regarding manufacturers, suppliers, subcontractors or users), if necessary to understand the impact, risks and opportunities associated with the reporting entity's operations and to ensure delivery of information of sufficiently high quality.

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Appropriate actions will enable such businesses to establish and maintain co-operation with counterparties who are subject to the reporting obligation, and prevent themselves from being effectively **excluded from the supply chain.**

Difficulty in accessing financing, or **more expensive financing,** as well as an **outflow of investors,** e.g. due to specific legal requirements in the sustainability area imposed on investors and lenders, are also a significant risk.

In the long run, ignoring ESG may also lead to **lawsuits against the company**, not to mention significant **reputational risks**. It cannot be ruled out that **individual managers may be held liable** for failure to comply with certain ESG obligations. It should be remembered that ESG is not just about reporting, but also entails a number of other environmental, social, employment and corporate governance obligations.

ESG—why is it worth it?

In short, to become more transparent, more attractive to contractors and consumers, and friendlier to the environment and society. Companies building a strategy around ESG areas strive to ensure that their activities, beyond purely financial profits, also generate value for customers, employees, society, and the entire planet.

Investment in ESG, although it often requires significant expenditures, undoubtedly translates into a **long-term increase in enterprise value**.

The benefits of running a sustainable business can be summed up as follows:

- ESG gives access to financing on better terms.
- ESG attracts investors and can have a positive impact on the company's valuation and financial performance (premium for lower risk).
- ESG can be part of a company's competitive advantage.
- A business operating in compliance with ESG principles is perceived as a more attractive employer.

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Glossary of terms

The ESG area is full of abbreviations that can be enigmatic. So we have prepared a glossary of the most commonly used terms. Some of them appear in this publication, so we encourage you to consult the glossary first.

2030 Agenda	Transforming Our World: The 2030 Agenda for Sustainable Development, a resolution adopted in 2015 by all member states at the UN General Assembly—as a guide for global development, the resolution established 17 Sustainable Development Goals (SDGs)
carbon footprint	The sum of greenhouse gas emissions attributable directly or indirectly to a person, organisation, event or product
circular economy	The concept of minimising the environmental impact of products by selecting ingredients and design enabling their reuse—the opposite of a linear economy
climate neutrality	The state of balance between greenhouse gases emitted into the atmosphere and their absorption by ecosystems
CSDDD/CS3D	Corporate Sustainability Due Diligence Directive—Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937
CSRD	*Corporate Sustainability Reporting Directive*—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—*the directive expands the group of entities obliged to report on sustainable development*
DEI/D&I	Diversity, equity and inclusion, aka diversity and inclusion—a strategy of respecting the individual characteristics of employees while integrating them into the company's structure in the most mutually beneficial way
double materiality	The basic principle on which ESRS sustainability reporting is based—double materiality has two dimensions: impact materiality and financial materiality
EFRAG	European Financial Reporting Advisory Group, which under the CSRD advises the European Commission on the development of ESRS
ESG	Environmental, Social, (Corporate) Governance—criteria for conducting non-financial assessments of enterprises, countries and other entities—and also the three main areas of activity where companies should be guided by principles of sustainable development and act with respect for the broader interests of stakeholders
ESRS	European Sustainability Reporting Standards, required to be followed under the CSRD

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gap analysis	Comparing an entity's current state with the desired state and developing solutions to achieve the desired state
GHG	Greenhouse gases—gases whose presence in the atmosphere contributes to global warming via the greenhouse effect
GHG Protocol	Greenhouse Gas Protocol, a global standard for measuring and managing greenhouse gas emissions, addressed to both private and public entities—also a set of tools to help companies measure greenhouse gas emissions and assess the effects of projects aimed at mitigating climate change
Green Claims Directive	Proposal for a directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (green claims directive), published by the European Commission on 22 March 2023—intended to defeat greenwashing
greenwashing	The practice of using vague, unreliable or misleading environmental claims to give consumers the false impression that a product or service is "green" and thus more marketable
NFRD	*Non-Financial Reporting Directive*—Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups—it *introduced obligatory non-financial reporting by public companies and financial entities employing more than 500 people*
RES	Renewable energy sources
SDGs	Sustainable Development Goals
SFDR	Sustainable Finance Disclosure Regulation—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—it seeks transparency in the analysis of sustainability risks associated with operation of the financial services sector
stakeholders	Interested parties, who may influence a company or be influenced by it—stakeholders might be, for example, customers, consumers, employees, suppliers, lenders, regulators, NGOs, or specific communities
supply chain	The full range of activities or processes carried out by entities located upstream of the entity providing goods or services
sustainability (or non-financial) reporting	Also known as ESG reporting—providing information (in addition to financial information) required by the CSRD based on the ESRS revealing the company's ESG activities and performance
sustainable development	Also known as "sustainability"—growth that can meet the needs of the present generation without diminishing the chances of future generations

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Sustainable Development Goals (SDGs)	The 17 Sustainable Development Goals (SDGs) provided for in the UN's 2030 Agenda, with 169 related tasks across three levels (environmental, social and economic) to be achieved by all stakeholders—governments, international organisations, NGOs, science, business, and citizens
Taxonomy	The common name of 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—a classification system for sustainability measures
value chain	The full range of activities, resources and relationships related to the entity's business model and the external environment in which the entity operates

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Company size and ESG: Who is covered by sustainability reporting?

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To examine sustainability reporting more closely, we should first refer to the provisions of the Polish Accounting Act implementing Directive 2013/34/EU. By dividing enterprises into micro, small, medium-sized, large and public-interest entities, the directive modified the set of entities subject to the obligation to report non-financial information enabling an assessment of the situation, activities and intentions of the company.

As of 1 January 2017, a non-financial reporting obligation was imposed on the largest public-interest entities (employing more than 500 people) in connection with implementation of the Non-Financial Reporting Directive (NFRD). This directive rejected the voluntary approach to non-financial reporting and introduced minimum legal requirements on the information to be disclosed to the public. But this reporting obligation was limited in scope and applied to only a narrow group of entities.

Given the limited scope of the NFRD, the next step was to supplement it and replace it with the Corporate Sustainability Reporting Directive (CSRD). The new regulations on sustainability reporting introduce significant changes to the scope of the reported information, reporting rules, and the group of entities required to report.

The purpose of the CSRD is to harmonise reporting standards so that a larger group of companies report comparable and reliable information. But the advantages do not stop there. The CSRD is also intended to achieve:

- **Increased transparency**—by reporting on the sustainability impact of their activities, companies increase their transparency, allowing stakeholders to better understand their activities
- **Data comparability**—the CSRD harmonises sustainability reporting standards to better compare data reported by different entities
- **Support for investment decisions**—reporting this information should allow investors to make more informed choices
- **Better risk management**—companies will have to identify and report sustainability risks
- **Support for implementation of the Sustainable Development Goals**—reporting will increase companies' awareness of their environmental and social impact.

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Reporting entities

The non-financial reporting obligation under the Accounting Act currently applies to a narrow group of entities—under Art. 49b(1), only the largest companies that are "public-interest entities" (banks, insurers, and companies listed on the stock exchange) and employ more than 500 people, and meet one of two financial conditions:

- PLN 85 million of total assets in the balance sheet at the end of the financial year, or
- PLN 170 million of net revenues from the sale of goods and products for the financial year.

Large companies and all listed companies (excluding listed micro-enterprises) are also responsible for assessing the information relating to their subsidiaries (if the parent company reports for the entire group).

Importantly, companies obliged to report under the current Accounting Act in 2025 will disclose information on sustainability for 2024 in accordance with the CSRD, i.e. based on uniform reporting standards (ESRS).

From when do other entities have to report?

With each passing year, the reporting obligation under the CSRD will expand to eventually include smaller companies (both public and private), in three stages:

Stage I (for 2024)—enterprises that have already been subject to the reporting obligation under the NFRD, i.e.:

- Large public-interest entities exceeding the criterion of the average number of 500 employees in a financial year as at the balance sheet date, and one of two financial thresholds: balance sheet total of EUR 20 million or net sales revenues of EUR 40 million
- Public-interest entities that are parent undertakings of a large group as defined in Art. 2(1) of Directive 2013/34/EU,[1] exceeding as at the balance sheet date, on a consolidated basis, an average headcount of 500 employees in a financial year, and one of the two aforementioned financial thresholds.

1 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.

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Stage II (for 2025) will apply to:
- Large entities (other than those already required to report for 2024) that as at the balance sheet date exceed at least two of the following three criteria:
  - Balance sheet total of EUR 25 million
  - Net sales revenue of EUR 50 million
  - Average number of employees in the financial year of 250
- Parent undertakings of a large group comprising parent undertakings and subsidiaries to be consolidated, which, on a consolidated basis, exceed at least two of the following three criteria without consolidation exclusions:
  - Balance sheet total of EUR 25 million
  - Net sales revenue of EUR 50 million
  - Average number of employees in the financial year of 250.

Stage III (for 2026) will require sustainability reporting by:
- Small and medium-sized enterprises that are public-interest entities (or listed entities) that do not exceed two of the three thresholds above for 2025 but exceed two of the following three criteria:
  - Balance sheet total of EUR 450,000
  - Net sales revenue of EUR 900,000
  - Average number of employees in the financial year of 10
- Small and non-complex credit institutions, which are large enterprises, or small or medium-sized public-interest entities
- Internal insurance and internal reinsurance undertakings, if they are large undertakings or medium-sized or small listed undertakings that meet the foregoing criteria.

Impact of the CSRD on non-EU entities

The CSRD will also apply indirectly to non-EU entities if they are the ultimate parent of the group. These companies will have an indirect obligation to prepare sustainability reporting for years starting from 1 January 2028 (report in 2029) at the group level if these entities:
- Have a large subsidiary in the EU or a small/medium-sized public-interest entity or branch that had net turnover of more than EUR 40 million in the previous financial year, and
- At the group or individual level had turnover in the EU in excess of EUR 150 million for each of the last two financial years.

The CSRD imposes a specific obligation on EU subsidiaries of such entities subject to reporting obligations under the CSRD. They must publish sustainability reporting by the ultimate third-country parent company. If EU subsidiaries do not receive such reporting from the parent company, they will have to prepare and publish this information themselves, to the extent that they have it or have obtained it, together with a statement that the ultimate

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third-country parent company has not provided the relevant information. Similar requirements are also imposed by the CSRD on large branches established by entities from a third country.

The sustainability report should be prepared at the group level by non-EU entities in accordance with the reporting standards for third-country entities to be adopted by the European Commission, or, by way of derogation, in accordance with the ESRS or standards recognised as equivalent.

Exemption from the reporting obligation

The CSRD will not apply to micro-enterprises, i.e. entities that do not exceed two of the following three criteria as at the balance sheet date:
- Balance sheet total of EUR 450,000
- Net sales revenue of EUR 900,000
- Average number of employees in the financial year of 10.

Reporting will remain voluntary for SMEs whose securities are not listed on the stock exchange.

The right to exemption from ESG reporting will also be available to entities belonging to corporate groups.

Subsidiaries that will ultimately be covered by the CSRD and reporting in accordance with the ESRS will be able to benefit from the ESG reporting exemption if they are included in the consolidated reporting of their upstream parent company, provided they meet certain requirements provided for in the CSRD.

Reporting areas

Sustainability reporting requires obligated companies to include in a separate section of their management report the information necessary to understand the company's impact on sustainability issues, e.g. in terms of use of solutions in the enterprise aimed at protecting the environment, social issues, or employment rules and their impact on the company's growth, performance and position. This information is to be presented in accordance with the uniform ESRS, falling into the three areas of ESG:

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Environmental:

- Greenhouse gas emissions—information on emissions of CO_2, methane and other greenhouse gases
- Natural resource management—consumption of water, energy and raw materials, and wastes
- Biodiversity—assessing the impact on biodiversity and ecosystems
- Climate change—measures taken for climate change adaptation and mitigation

Social:

- Employment and employee rights—information on employment, diversity, and worker health and safety
- Community involvement—cooperation with local communities and social initiatives
- Health and safety—measures to ensure safe working conditions
- Human rights—assessment of respect for human rights in the supply chain

Governance:

- Management structure—information about the board, committees, remuneration and corporate structure
- Ethics and code of conduct—anti-corruption policies, ethical standards and compliance
- Risk and risk management—assessing the risks associated with the company's operations
- Cooperation with shareholders—information on dialogue with investors and shareholder participation.

Under the guidelines for ESG reporting, which call for integration of these three areas into the business strategy, entities should set specific ESG-related indicators and the goals they want to achieve. This enables monitoring of the progress and effectiveness of the measures taken. But there is limited leeway in the selection of indicators. The CSRD, together with the ESRS, introduces fundamental reporting standards:

- Quality of information—the information reported must be relevant, presented in a faithful manner, as well as comparable, verifiable and understandable
- Double materiality—the standards should cover all information relevant to the users of the information
- Value chain and reporting boundaries—material, actual or only potentially adverse impacts, risks and opportunities related to the company's value chain, including its products and services, business relationships and supply chain, should be presented
- Appropriate time horizon, i.e. information on the past and future should be presented

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- Due diligence requirement—the information should address identification and monitoring of the most important actual or potential adverse impacts related to the company's operations, and actions taken to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts.

As signalled above, the information included in the reports must comply with the European Sustainability Reporting Standards (ESRS), a set of benchmarks developed to standardise the reporting of sustainability-related information by enterprises. The ESRS will be applied by the first group of entities (the largest public-interest entities currently reporting non-financial information) in their sustainability reporting for 2024.

The ESRS comprise 12 universal standards, which can be divided into two categories:
- Cross-cutting standards—two standards that apply to all ESG areas
- Thematic standards—10 standards focussing on issues specific to environmental, social or governance.

Assessing sustainability reporting

ESG reporting is intended to enable the assessment of whether companies are doing business in a sustainable manner. In practice, this could provide a significant boost to companies that promote positive role models, while discouraging cooperation with entities failing to respect ESG in their business strategy.

ESG reporting can also be a criterion for granting state aid. In that context, companies actively working for sustainability and maintaining high ESG standards would have a better chance at obtaining public funding.

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Summary

A key objective of the CSRD is to ensure that a larger group of companies report relevant, comparable and reliable sustainability information according to uniform standards. At the same time, we must not lose sight of mandatory verification of sustainability reporting. Non-financial reports prepared by obligated entities will be subject to review by statutory auditors or independent, accredited certifiers.

The reporting rules introduced by the CSRD are intended to equalise the materiality of non-financial and financial information. This will contribute to the future unification of rules for certifying both types of information. The next few years of reporting should be considered a transitional period, which is essential to adapt national regulations in this area and for obliged companies to develop the framework for their ESG reports within the limits set by EU standards.

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Sustainability reporting and criminal liability and other risks

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Can the CSRD and the ESRS adopted by the European Commission lead to criminal sanctions? When could police or prosecutors take an interest in a company or its people in the ESG context?

Although the CSRD is not yet implemented into Polish law, it can be expected that non-submission of an ESG report will be subject to a criminal sanction (as in the case of failure to comply with the obligation to submit financial statements). In addition, the ESRS cover many areas where there are risks of criminal sanctions or that fall directly within the scope of criminal law. A key example is implementation of anti-corruption procedures.

For this reason, the criminal-law perspective should be taken into account when implementing ESG policies and strategies.

Areas of sustainability reporting related to criminal liability

Some areas of sustainability reporting relate to obligations that may lead to criminal liability in the case of non-compliance—liability of the company itself as a legal entity (as in the case of some environmental offences) or natural persons affiliated with the company.

ESRS G1 (business conduct), which focuses on issues related to business ethics, corporate culture, anti-corruption, whistleblower protection, and animal welfare, is particularly noteworthy here. The G1 standard also focuses on supplier relationship management, including payment practices, especially timely payment to SMEs.

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G1 STANDARD

What information must an undertaking include in its ESG report?

Applying mechanisms for identifying, reporting and analysing irregularities

- What mechanisms have been adopted for identifying, reporting and analysing violations of the law or behaviour contrary to the law, internal codes of conduct or other internal rules
- Whether there are procedures in place for prompt, independent and objective investigation of business ethics incidents, including corruption and bribery
- Whether irregularities can be reported by both employees and other stakeholders

Anti-corruption policies

- Whether there are internal anti-corruption policies in place in line with the United Nations Convention against Corruption
- If there are no such policies, a statement that they are absent, with information on plans for their implementation, together with a timetable
- What positions in the company are most exposed to the risk of corruption
- Whether corruption has been identified, in what cases, and whether there have been convictions regarding corruption in the company (all such cases must be disclosed in the ESG report)

Whistleblower protection and whistleblowing policies (note that in Poland, the law implementing the Whistleblowing Directive (2019/1937) will enter into force on 14 September 2024 (Whistleblower Protection Act of 14 June 2024))

- Internal channels for whistleblowing
- Training provided to the staff responsible for receiving reports
- Measures adopted for protection of whistleblowers
- If there are no such policies, a statement that they are absent, with information on plans for their implementation, together with a timetable

Risks of criminal liability

The reporting obligations under the CSRD do not in themselves impose an obligation to adopt specific sustainability solutions. They only oblige the entity to provide information about their implementation status. **But it should be borne in mind that adopting an ESG strategy in all areas—for example anti-corruption policies and whistleblower protection—will greatly reduce the risk of legal violations.** Thus it reduces the risk of criminal liability.

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Examples of ESG areas that may involve criminal liability include:

- **Environmental issues, covered by ESRS E1–E5.** Here, criminal liability may relate to offences against the environment, committed as a result of the company's failure to exercise due care. In the case of most environmental offences, criminal liability and the criminal proceedings leading up to it can directly affect a legal person (e.g. the company), without the need for a prior conviction of a natural person.
- **Business management issues, covered by ESRS G1**—in particular criminal liability for bribery. In this case, a legal person (e.g. the company) may be held liable for a criminal act if a specific individual affiliated with the company is first convicted.
- **Employment issues, covered by ESRS S1–S2.** Certain actions to the detriment of individual labour rights or trade union rights may lead to liability for a crime or petty offence. As a rule, natural persons responsible for employment matters will be the subject of prosecution.

If the company becomes aware that irregularities have occurred that may have these consequences, the appropriate response would be to conduct a detailed investigation in accordance with internal procedures.

Criminal liability for failure to comply with the ESG reporting obligation

The law implementing the CSRD into the Polish legal system has not yet been adopted. Therefore, it is currently uncertain what the nature of sanctions for failure to submit a proper ESG report will be. But by way of analogy, Art. 79 of the Accounting Act provides for criminal liability for failure to submit financial statements or operating reports. It can be expected that similar sanctions will also apply to ESG reporting.

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Other risks

Based solely on the CSRD, it is possible to identify three categories of additional risks associated with failure to comply with environmental reporting obligations:

- Loss of competitiveness
- Loss of access to financing
- Administrative sanctions.

The main risk from the business's point of view will be **loss of competitiveness**. This is primarily due to the purpose of reporting, to establish transparent criteria for assessing an undertaking. The data presented in ESG reports will probably be among the key factors allowing investors to decide on whether to invest in a company. The same will apply to the selection of suppliers and other participants in the process of producing goods or services. There is no doubt that the biggest entities that have been subject to the reporting obligation select suppliers implementing policies consistent with environmental protection requirements. This means that all entities, even those not subject to the reporting obligation, should take appropriate measures to avoid falling out of the existing supply chains.

Closely related to the loss of competitiveness is the risk of **losing access to financing**. This particularly concerns access to funds granted under numerous EU programmes and the possibility of obtaining various types of subsidies or incentives from individual member states. Public funds should only be used to support entities that contribute to the green transition of the European economy. Such solutions are already in place in EU law, where the possibility of granting public support to entities conducting certain activities is sometimes directly excluded.

The risk of **administrative sanctions** raises the most doubts. In the absence of implementation of the directive by the Polish parliament, it is still unclear what sanctions entities subject to the reporting obligation must take into account. However, both administrative and criminal sanctions should be expected. Liability for damages is also at stake. Administrative fines can be particularly severe for enterprises, as they are often higher than criminal fines. Moreover, administrative penalties are generally imposed on the basis of the Administrative Procedure Code, which provides for significantly lower guarantees for infringers than they would enjoy under the Criminal Procedure Code. At this stage, it cannot be ruled out that a violation of the reporting regulations will lead to overlapping liability under the administrative and criminal regimes. In some cases, this may mean that an entity is punished twice for the same act (an "act" should be understood in this context as fulfilling the elements of a criminal offence as well as an administrative infraction). And notably, an entity might fulfil the elements of an offence not just through action, but also by omission of a legal duty to act.

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Recommendations

To comply with ESG and sustainability requirements, businesses should implement effective procedures for monitoring, analysing and eliminating breaches of the law, including anti-corruption procedures and procedures for reporting irregularities by persons inside and outside the organisation, along with legal protection for whistleblowers. This comprehensive policy should then be included in the ESG report, filed along with the company's operating report. It is also necessary to monitor and assess ESG risks on an ongoing basis.

Summary

Failure to comply with the ESG obligations may lead to criminal consequences, especially in the context of ESRS G1, which requires the inclusion of mechanisms for identifying irregularities, an anti-corruption policy, and whistleblower protection. Implementing an ESG strategy reduces the risk of breaking the law, which is vital in the areas of environmental, corporate and employee issues covered by the EU's sustainability standards. Therefore, appropriate procedures should be implemented to adapt to ESG standards, minimise criminal risk, and build a solid foundation for the company's sustainable development going forward.

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ESG and environmental law

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Environment

Environmental aspects are vital to ESG—the "E" comes first, stressing the importance of these issues. In accordance with the principle of double materiality, in the verification process, the impact of the environment on the activities of enterprises, and the impact of their activities on the environment, are both examined. Environmental factors relate to climate change mitigation, cutting greenhouse gas emissions, adaptation to climate change, consumption of resources and the circular economy, pollution, biodiversity and ecosystems, including water and marine resources.

Environmental law and sustainability reporting

Environmental protection is a key area of sustainability reporting. The European Sustainability Reporting Standards (ESRS) provide that in each case it will be mandatory to report on issues related to climate change mitigation by the company and adaptation to it (standard E1). Reporting will cover issues such as:

- Transition plan for mitigating climate change (e.g. greenhouse gas emission reduction targets, with an explanation of how the company's targets are compatible with limiting global warming to 1.5°C)
- Significant impacts, risks and opportunities related to climate change and their interaction with the company's strategy and business model
- Activities and resources related to climate policies (including a description of the measures carried out and planned and the funds allocated for their implementation)
- Climate change mitigation and adaptation objectives (in particular, whether and how greenhouse gas emission reduction targets have been set)
- Energy consumption (including total energy consumption in connection with the company's business, broken down into energy from fossil, nuclear and renewable sources)
- Greenhouse gas emissions
- Expected climate-related financial impacts and the entity's sustainability-related financial capabilities (including those affecting the company's financial position, financial performance and cash flows in the short, medium or long term).

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In addition, depending on the results of the double materiality analysis, issues related to pollution (E2), water and marine resources (E3), biodiversity and ecosystems (E4), and the use of raw materials and circular economy (E5) will be reported. This will include information on items such as:

- Pollutants emitted by the company (methane, carbon monoxide and carbon dioxide, among others)
- Substances of concern and substances of very high concern manufactured, used, distributed, commercialised or imported by the company
- Total water consumption, the amount of water recycled and reused, and the amount of water stored
- The number and size of biodiversity-sensitive areas or nearby sites adversely affected by the company
- The company's contribution to achievement of the circular economy, e.g. by designing products to ensure their durability, reusability, repairability, refurbishment and recyclability.

In the context of ESG requirements, attention should also be paid to the two recently published draft sustainability reporting standards for small and medium-sized enterprises.

Under the CSRD, the European Financial Reporting Advisory Group (EFRAG) was mandated to develop a reporting standard for SMEs that are public-interest entities. The first of the drafts concerns entities that will have to report from 2026 (report in 2027). It will be issued as a delegated act, which means that it will be binding.

The second draft covers entities not legally obliged to report. This standard is therefore voluntary. However, its importance should be appreciated, as the need for reporting by entities outside the groups indicated in the CSRD may result, for example, from the audit of supply chains by entities that are required to report.

A key element of the proposed standards is the "environment" section. Consultations on both drafts runs until 21 May 2024. The text of the drafts and more information on the consultation process can be found on the EFRAG website.

Potential actions

To align their operations with ESG and sustainability requirements, companies should take environmental action in advance, in particular on climate change mitigation, pollution reduction, protection of water and marine resources,

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protection of biodiversity and ecosystems, efficient use of raw materials, and implementation of a circular economy. Examples of these measures include:

- Calculation of the company's carbon footprint (taking into account direct emissions, indirect energy emissions and indirect emissions from the value chain) and development of an emission reduction strategy
- Drawing up a strategy to increase the share of energy from renewable sources
- Changing the means of transport used to more sustainable ones (e.g. replacing internal combustion cars with electric or hydrogen-powered cars)
- Introducing incentives for employees to commute to work by bicycle or public transport
- Exploring the possibility of reducing the use of water and electricity, thus optimising the production process
- Reducing the use of single-use products and packaging in favour of reusable items
- Using wastes as valuable raw materials for production
- Use of waste heat
- Repair of broken equipment as an alternative to the purchase of new equipment
- Verification of environmental protection activities undertaken by business partners as part of the supply chain.

Summary

Environmental requirements related to sustainable development are contained in numerous legal acts, not only those already in force but also those now being drafted. In this regard, the new regulations implemented as part of the European Green Deal and the Fit for 55 package are crucial. Importantly, these regulations and requirements apply not only to sectors typically associated with a strong environmental impact (such as energy or manufacturing), but will apply to all sectors, including for example the service industry.

There is no doubt that proper compliance with the reporting obligation will be crucial not only due to legal requirements, but also to maintain competitiveness. A fundamental goal of the ESG regulations is to create transparent business assessment criteria, particularly for sustainable development and environmental protection. This will allow investors and enterprises to obtain key information they can rely on to make conscious use of their funds. Proper reporting and operation of the company in accordance with environmental protection requirements therefore has a positive impact on the profitability of the business.

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ESG and competition and consumer protection law

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From the point of view of competition and consumer protection law, ESG and sustainability primarily concerns:

- **Greenwashing,** i.e. unreliable ecological marketing
- **Sustainability agreements** involving cooperation between businesses to generate benefits from sustainable development.

Greenwashing

This term is used to describe unreliable marketing that misleads recipients about (seeming) ecological practices by a business or the environmental benefits of its goods or services. Greenwashing is usually intended to heighten the attractiveness of goods or services for audiences, and consequently draw customers and increase sales. But often the presentation of unreliable ecological messages is simply due to ignorance. Importantly, greenwashing can involve not only messaging about environmental performance, but also concerning, for example, the social characteristics of goods or services, animal welfare, or sustainability measures undertaken by the business.

Whether or not the business is consciously seeking to mislead, greenwashing may constitute a practice that violates the collective interests of consumers. Against businesses whose "green" statements and markings are false, incomplete or deceptively presented, or otherwise threaten to mislead consumers, Poland's competition authority (the president of the Office of Competition and Consumer Protection—UOKiK) may initiate proceedings for infringement of the collective interests of consumers. This can lead to fines as high as **10% of the business's annual turnover** in the financial year preceding the year when the penalty is imposed. Greenwashing can also result in a loss of credibility in the eyes of consumers, driving customers away.

Currently, UOKiK is examining practices that may bear the hallmarks of greenwashing in connection with offering of products for sale, and marketing activities generally. The regulator has also initiated investigations into businesses, mainly from the clothing and cosmetics market, to determine whether the respondents have committed an infringement justifying initiation of proceedings over practices infringing the collective interests of consumers.

The European Union is also introducing detailed regulations to strengthen the position of consumers and eliminate practices bearing the hallmarks of

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greenwashing. The Greenwashing Directive[2] came into force 26 March 2024, imposing liability for such activities, and expanding the list of characteristics which may be misleading and the catalogue of unfair market practices. And work is underway on a draft directive on environmental claims (known as the Green Claims Directive).

It is not only businesses offering goods or services directly to consumers who need to beware of greenwashing. In dealings between businesses, greenwashing may be considered an act of unfair competition. This, in turn, may lead other businesses to file suit for damages under the Unfair Competition Act, due to efforts to benefit by making misleading designations of goods or services or spreading false or misleading information about the company.

Greenwashing is also a real risk from the perspective of investors. The Polish Financial Supervision Authority (KNF) focuses on this aspect, combating greenwashing practices related primarily to financial investments, securities, or green bonds.

Sustainability agreements

Under Art. 101 of the Treaty on the Functioning of the European Union, any agreement which has as its object or effect the restriction of competition in the internal market is prohibited. But under Art. 101(3) TFEU, agreements that confer certain advantages on the market are exempt from that prohibition.

Sustainability agreements may include any type of horizontal cooperation (i.e. between actual or potential competitors) that genuinely implements one or more sustainable development goals (including not only environmental or climate goals, but also social objectives, e.g. related to workers' rights, human rights, transition to healthier and more nutritious food, or animal welfare), regardless of the form of cooperation. Subject to certain conditions, some such agreements may benefit from the exemption from the ban on anticompetitive agreements, due to the benefits generated by performance of the agreement.

2 Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers in the green transition through better protection against unfair practices and through better information.

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Violation of the ban on anticompetitive agreements is threatened with severe sanctions. The regulator may impose fines on:

- Participants in the arrangement, of up to 10% of the annual turnover achieved in the financial year preceding the year when the penalty is imposed (also on an undertaking exerting a significant influence over a direct participant, e.g. the parent company, which in the case of large corporate groups can greatly increase the severity of the penalty)
- An individual managing an enterprise who, in the course of their duties during the period of infringement, by act or omission, knowingly allowed the undertaking to violate the prohibition, in an amount of up to PLN 2,000,000.

Thus, before entering into joint sustainability efforts with other businesses, it is important to consult the proposal with a competition law specialist.

How to avoid risks?

To minimise the risk of greenwashing, communications about a business's activities, goods and services should be clear, precise, justified, and backed by reality, so that the information enables consumers to make informed and objective choices, without distorting the image of the business or its goods or services. This means that the people responsible for the company's messaging and marketing need to be trained in:

- Risks that may be associated with disingenuous marketing messages
- Desirable features of messages relating to environmental benefits
- Legal requirements for ESG communications.

It may also be helpful to develop internal procedures to prevent greenwashing, and a policy on initiating cooperation with other businesses, including competitors, requiring advance analysis in each case to ensure compliance with the applicable rules of competition law.

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ESG and "green" trademarks

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Increasingly, trademark applications for "green goods and services," e.g. related to photovoltaics, solar heating, wind energy or recycling, are an indicator of business innovation. These trends, which are visible in our own practice, were confirmed in a study by the European Union Intellectual Property Office (EUIPO), "Green EU trade marks—2022 update: Analysis of goods and services specifications 1996–2021," published in February 2023. From 2015 to 2021, the greatest share of "green" EU trademarks were filed in areas such as "energy saving and production" (48%), "pollution control" (18%) and "transport" (11%). Other goods and services bearing such marks related to "climate change," "recycling," "waste control," "environmental awareness," and "agriculture."

Green trademarks, red flags

Trademarks for green goods and services are in general a beneficial and desirable phenomenon, confirming the growing innovation in this area.

Another visible trend is for undertakings to include verbal or figurative references to ecology or sustainability in the trademarks they file for registration. Examples include green graphics, images of plants, trees or soil, references to words or abbreviations such as "bio," "eco," "green," "sustainable," "organic," "natural," "zero waste," "environment-friendly," and others associated with ecology and environmental protection.

But when seeking protection of a trademark suggesting or referring to ecological properties, the applicant must take into account that they may encounter problems with registering such marks. Here are two basic ones:

- A mark may be found to merely describe a property of the goods or services—descriptive signs cannot be protected as trademarks
- The mark may be found to mislead the public, e.g. as to the ecological or sustainable nature or ecological origin of the goods or services—if the product has nothing to do with ecology, such a mark will not be registered.

Green coal—really?

A good example of a problematic designation is "eco-pea coal." Eco-pea coal is a trade name for a solid fuel produced from coal or lignite intended for generating heat in retort boilers. The "pea" in the name refers to the consistency of the product (not the product's "greenness"), while "eco" is short for "economical"—not "ecological"! But the prefix "eco" may cause consumers to perceive the trade name of the product as suggesting that the product has environment-friendly, pro-ecological features. This message is emphasised

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by verdant elements of labels for eco-pea coal, e.g. leaves, trees, or the colour green generally. But research by the Client Earth Foundation has found that eco-pea coal can hardly be considered environment-friendly or healthy for humans. The name of the product misleads recipients, suggesting "green" features the product does not have.

Consequently, the Client Earth Foundation and others have taken legal action, including initiating court proceedings against producers and distributors of eco-pea coal. In Poland, UOKiK ordered an inspection of the compliance of eco-pea coal products with the relevant standards. An additional difficulty in the case of eco-pea coal is that this term is used in the regulation of the Minister of Climate and Environment on quality requirements for solid fuels. Efforts to clean up the regulation have failed—it still includes the term "eco-pea coal," although it has been clarified that this is a trade name.

Don't mislead

Practice shows that businesses sometimes go too far in choosing an "eco-mark." This must not lead to a situation where the designation is misleading to consumers. This can be seen from the attempt to register the following verbal and figurative mark:

This mark was filed for plastic bags, packaging items, and plastic cups. EUIPO denied protection, finding apart from other grounds for refusal that the mark was misleading.[3] The label used the word "paper" twice, suggesting that the goods marked with it were made of paper and would be recycled in a process designed for paper products. But the mark was applied to goods made of plastic. Consumers could therefore be misled into buying the product. EUIPO also pointed out that because of the marking, consumers might segregate the waste from this product incorrectly—not as plastic, but throwing these items in the blue bin for paper.

Arguments about misleading the public as to the environmental nature of products arise quite often in EUIPO decisions. Regarding the application for registration of the mark for goods including knives, USB flash drives, and laminated (plastic-coated) paper products, EUIPO found that the relevant public would have the impression that by buying products with this mark, they would be contributing to protection of the environment, maintaining

3 EUIPO decision of 10 October 2022.

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ecological stability and cleanliness of the seas, when in fact such products are harmful to the environment and contain plastic, whose molecules can end up in the oceans.[4]

#savethe♥cean

How to stand out in a sea of "green"

Designations describing the characteristics of goods or services are not protected as trademarks. An attempt to register the term "Greenworld" as a trademark for goods including fuels and electricity, and services such as the sale of fuels and transmission of electricity, was rejected on this ground.[5] It was found that "Greenworld" was descriptive for these goods and services, i.e. it described the features, properties or purpose of the goods, indicated their "green" (environment-friendly) character or suggested green energy. The applicant claimed that the combination of "green" and "world" was a neologism and therefore acquired distinctiveness in relation to the goods, but the office considered that the mere combination of descriptive elements without introducing any unusual changes, in particular in syntax or meaning, meant that the mark as a whole was merely descriptive.

"Green" marketing strategies may also involve registration of slogans as trademarks. As a rule, advertising slogans, or marks containing quality markings or incentives to purchase goods or services, are difficult to register as a trademark. For example, an attempt to register the slogan "The Future Is Plant-Based," for goods such as dietary supplements, vitamins, vegan chocolate and ice cream, failed.[6] EUIPO found that the phrase generally indicated the characteristics of the goods that would bear the mark, which might contain plant ingredients or active substances, be produced from plants, or be used for production of plant-based foodstuffs. This promotional expression therefore did not display ingenuity, and was not particularly memorable, original or fanciful. Only the presence of such features can give a slogan the distinctiveness it needs to be registered.

However, the position of regulators and courts is variable and inconsistent. In some cases (e.g. those indicated below), businesses have managed to register trademarks containing the elements "green," "bio" or "eco." In these cases, arguably it was the addition of graphics or a more complex presentation that was decisive.

4 EUIPO decision of 11 November 2019.

5 T106/14, *Universal Utility International v OHIM* (Greenworld).

6 T133/22, *Katjes Fassin v EUIPO* (The Future Is Plant-Based).

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EUTM 015882996	Green World Gaming	registered for IT services
EUTM 001271659	GREEN WORLD ALLIANCE	registered for toners and office machine recycling services
EUTM 017867608	Green world	registered for natural remedies and non-medicinal soaps
R.147394	ECOCHRON	registered for roof accessories, chimneysweep steps, and metal construction products
R.321830	only BiO	registered for processed fruits and vegetables, and bullion
R.287604	Zielona Kraina	registered for publications and spices

Summary

As businesses have observed development taking a “green” direction, they are more and more eager to use “green” designations for their goods and services and to apply for “green” trademark protection. This seems like a natural consequence of the increase in environmental awareness of the society and the related popularity of environment-friendly goods and services. Nevertheless, it is worth examining in advance whether the selected “eco-label” will be capable of obtaining legal protection.

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ESG and banking & finance

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For some time now, the internal policies of corporate entities—both financers (banks, other lenders, investment funds, private equity funds) and companies seeking financing—have established specific goals and obligations in the ESG area. The changing regulatory environment for a sustainable economy, including regulation of credit institutions and financial markets, also poses new challenges for all market participants. They will have to adapt to new regulatory requirements, including sustainability reporting and the EU taxonomy.

At the same time, there is a growing demand for sustainable financial products, which until recently were niche products but now are a major trend. It is estimated that the global green finance market will grow about sixfold over the next decade.

We observe that clients are increasingly looking for support in complying with ESG regulations, as well as in constructing templates for green loan agreements and other financial products intended for implementation of projects with an environmental dimension. Market participants also need advice on specific financings—on the appropriate wording of provisions on ESG objectives and requirements in loan agreements and other financing documents (e.g. term sheets) and ensuring consistency between documents. Green bonds (where the proceeds are earmarked for environmental projects) and sustainable loan agreements (where the cost depends on the borrowers' achievement of sustainability targets set out in the loan agreement) are also an important aspect.

Risk

Entities that fail to comply with the applicable regulations, as well as "soft law" in this area (e.g. guidelines of industry organisations) or market standards, expose themselves not only to legal liability, but also to the risk of reputational damage. They may prove less competitive and face difficulties attracting customers, capital and investors. Even now, investors are hesitant to engage their funds in ventures that do not take account of sustainability aspects. Sometimes, an unfavourable score in an ESG audit results in a decision not to invest in that company.

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Meanwhile, the benefits for parties from engaging in sustainable finance can be considerable:

- Positive impact on the environment and slowing of climate change
- Resilience to market distortions due to climate change through access to new markets
- Positive impact on reputation and market credibility
- Access to a broader and more diversified group of investors (focused on ESG investments) and cost-effective sources of financing
- Building stronger, value-based relationships with shareholders
- Increasing the ability to retain employees who perceive ESG goals as an important aspect of their private and professional lives
- Compliance with regulatory obligations.

Financers need to:

- Gradually implement legal requirements in their organisation for ESG reporting and sustainable finance products
- Introduce further ESG elements into their business strategy
- Expand their range to include more products that are sustainable and support the green transition.

Banks that have not analysed their loan portfolio for compliance with ESG requirements need to do so now. Virtually all banks on the Polish market offer loans to finance projects involving energy efficiency, renewable energy sources, and green mortgages. In addition, by expanding their offering, they can offer related products to finance their customers' sustainable operations, such as guarantees, letters of credit, or hedging of interest-rate risk.

Similar measures should be taken by companies wishing to obtain financing on attractive terms, because financers have been examining this aspect of borrowers' operations for some time. Clients themselves are also increasingly aware that excellence in ESG allows them to obtain financing on more favourable terms. Depending on the industry, it will be useful for entities obtaining financing to analyse their portfolio, contracts, customers, and supply chains. More and more companies are choosing to set ESG goals and enshrine them in their policies, monitor implementation going forward, conduct periodic audits, and publish reports accordingly. It is also worth considering appointment of an ESG officer, whether at the level of the management board or financial departments, or a separate position reporting directly to the board.

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Summary

On one hand, the approaching boom in the market for sustainable financial products will reward businesses that have already taken steps to meet their ESG goals, but on the other hand, it may create an opportunity for others to formulate and pursue these targets, and thus improve their competitiveness and access to financing. Companies looking for capital and at the same time pursuing active ESG measures can expect to be offered more cost-effective financing, such as a lower margin, zero commission, or the possibility of obtaining loan guarantees or subsidies under national or EU programmes. And companies investing in green technologies through green bonds can increase investors' interest in their debt instruments.

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ESG and labour law

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ESG literally centres on the social dimension of sustainability—the "S" in ESG. In this respect, the organisation must analyse its impact on the social environment in which it operates. For employers subject to sustainability reporting under new EU laws, labour issues will be crucial.

Compliance with international standards, building a stable and friendly work environment, and respecting employees' rights and their freedom to associate in trade unions, are just a few of the factors that contribute to building the image of an organisation that cares about growing sustainably, in harmony with its environment.

Risk	Description
Reputation	Increasingly, potential employees and independent contractors consciously and critically analyse entities they will be associated with, in terms of how they organise their work. They are most eager to work with employers who respect human rights, take a pro-environmental stance, and care about equality in the workplace.
Employer's liability	Depending on the regulations adopted in each member state, deficiencies in reporting or failure to adopt certain required procedures may result in administrative or criminal liability for the employer. In addition, failure to conduct a thorough analysis of internal procedures in light of the requirements imposed by EU law may lead to civil liability to employees, for example for discrimination.

Potential actions

To meet ESG requirements in the area of labour law, employers should:

- **Analyse existing policies** (diversity, work/life balance, hiring, reintegration), and if they do not have such policies in place, adopt appropriate measures to eliminate possible manifestations of discrimination (this may require analysing the gender breakdown of their workforce) and ensure stable employment (which may require an analysis of the types and terms of contracts offered to workers)
- **Analyse supply chains** to counteract human rights violations in cooperation with stakeholders and relevant authorities (human rights due diligence), and adopt appropriate procedures in this regard

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- **Protect whistleblowers** and ensure their anonymity, implement an effective internal reporting procedure, and bring it into line with national legislation when adopted
- **Carry out occupational health and safety measures**, keep up-to-date statistics on accidents and injuries in the workplace, and implement procedures adequate to the identified risks and the type of business
- **Inform employees** and consult them on sustainability issues, to duly and transparently fulfil ESG obligations.

Labour law and sustainability reporting

The ESRS encompass four standards for social aspects, including a standard for reporting on the company's own employees and employees in the value chain. Mandatory reporting will cover, in particular, information on:

- How the interests, views and rights of persons employed in the company are taken into account, and their impact on the entity's strategy and business model
- Policies on managing material impacts on employees
- Procedures in place to ensure:
  - Elimination of negative impacts on employees
  - Channels through which employees can raise their concerns
  - Methods to solve reported problems
- The profile of employees and other persons working in the company (in particular the number of permanent and temporary employees, broken down by gender, and the numbers and rate of employee turnover in the reporting period)
- Gender balance at the highest levels of the corporate structure, as well as employment across different age groups: under 30, 30–50, and 50+
- The scope of collective bargaining with employees (in particular, the percentage of employees covered by collective agreements and the impact on working conditions)
- Adequate remuneration of employees in accordance with indicators, including any pay differentials between male and female employees
- Social protection of workers against loss of income due to adverse life events
- Employment of persons with disabilities
- Incidence of workplace accidents, including fatalities, among all employees, as well as occupational diseases
- Family leave practices (e.g. maternity leave)
- Identified incidents of discriminatory behaviour against employees, including mobbing, and cases of human rights violations (e.g. forced labour or child labour)
- Training offered to workers to improve their professional skills.

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Summary

For employers to maintain a positive image and avoid liability for shortcomings in sustainability, they should:

- Analyse existing ESG policies and procedures (ESG due diligence)
- Update their internal policies, and where necessary adopt new ones, in line with ESG requirements
- Develop methods for obtaining and gathering employment information to be disclosed in ESG reporting
- Raise awareness of ESG among employees, in particular managers, e.g. through internal training.

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ESG and public procurement

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With the entry into force of Poland's new Public Procurement Law of 2019, the importance of ESG in public procurement has increased, as the new act enshrined **the principle of economic efficiency** in awarding contracts. This forces environmental and social aspects to be taken into account as early as the stage of planning the procedure for award of public contracts. This principle is given a rank equal to other basic procurement principles, such as openness, transparency, fair competition, and equal treatment of contractors.

Economic efficiency

In accordance with the principle of economic efficiency, the contracting authority should award the contract in a way that ensures the best effects of the contract—including social, environmental and economic effects, if achievable in a given contract—in relation to the expenditures incurred. Contracting authorities are therefore obliged to choose the most effective solutions in the long term, and implementation of this postulate is ensured by greater emphasis on the stage of planning the procedure, and then accounting for the effects of the completed public contract in a report on performance of the contract.

When planning the procedure, contracting authorities must consider the possibility of taking into account social, environmental or innovative aspects of the contract. This is an obligatory element of the analysis of needs and requirements carried out by the contracting authority in every procurement procedure above the EU thresholds. The analysis of needs and requirements is a formal stage of preparing the procedure, resulting in a document produced by the contracting authority showing the thought process leading to the determination of the subject of the contract. In addition, to better prepare the procedure, the contracting authority may conduct preliminary market consultations with contractors, and thus obtain knowledge about the market, including key ESG aspects.

Goals of well-thought-out procurement

The basic goal of economic efficiency is to ensure the best possible quality of supplies, services and construction works, within the budget available to the contracting authority. In addition to contract planning and reporting on the completed contract, this objective is furthered by the regulations on setting the criteria for participation in the procedure and for evaluating bids, which are not based solely on price, but also quality. Quality criteria do not concern only the technical aspects of the subject of the contract, but also social

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aspects, such as the needs of people with disabilities, and environmental aspects, including energy efficiency.

Reserved contracts

The principle of economic efficiency also means that contracting authorities are expected to strive to achieve the best results of the contract, including social, environmental and economic effects. Thus, economic efficiency does not refer only to financial aspects. The best social effects might result, for example, from entrusting performance of the contract to a contractor with the status of a sheltered workshop, or with the mission of social and professional integration of marginalised individuals: person who are disabled, unemployed, homeless, or whose freedom is restricted.

Art. 94 of the Public Procurement Law sets out in detail the objectives of units involved in the integration of socially marginalised persons, and indicates that the contracting authority may restrict access to the procurement procedure only to such units. This provision implements Art. 20 of Directive 2014/24/EU, according to which member states may reserve eligibility for procedures to economic operators whose main objective is the social and professional integration of persons with disabilities or disadvantaged persons, or provide for the possibility of performing such contracts under sheltered employment schemes, if at least 30% of the persons employed by contractors are disabled or disadvantaged workers.

Another justification for reserving contracts for entities engaged in this type of activity is that they may not be able to win contracts under normal conditions of competition. Reserving contract is a right of the contracting authority, which does not have to justify its decision. In such a case, the contracting authority will require documents or statements from the contractor confirming compliance with the social requirements set by the contracting authority.

It should be noted that in the case of reserved contracts, the 30% threshold of employment of disabled or disadvantaged employees applies to each consortium member and entities sharing their capacity with the consortium. Therefore, the possibility of combining capacity to perform the contract in this case is limited to entities meeting the social benchmarks specified by the contracting authority.

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Quality and best results

Implementation of the ESG goals of public procurement procedures requires good planning:

- Correctly defining the conditions for participation in the procedure, including environmental and social requirements imposed on contractors
- Description of the subject of the contract
- Setting criteria for evaluation of offers that will lead to selection of the most economically effective offer.

With regard to conditions of technical or professional capacity, the contracting authority may require economic operators to comply with quality management standards and implement environmental management systems or standards. The contracting authority will verify these requirements based on specific evidence.

In addition, in the case of projects intended for use by natural persons, the subject of the contract must be defined taking into account the requirements for disabled access. Therefore, public procurement implements the principle of accessibility as enshrined in Art. 9 of the UN Convention on the Rights of Persons with Disabilities, i.e. enabling persons with disabilities to live independently and participate fully in all aspects of life, on an equal footing with other citizens.

The principle is that the description of the subject of the contract should reconcile solutions that meet the needs of both people with disabilities and all other users. The design of buildings should therefore be universal, taking into account the diversity of needs and equal opportunities, so that everyone can participate in all spheres of life. Proposals on how to implement these postulates are promoted by the Public Procurement Office in Poland, which provides guidance on its website on how to implement the principle of accessibility in all types of contracts, as well as examples of provisions in the terms of reference.

Green public procurement

The principle of green public procurement (GPP) means striving to procure goods, services and construction works that have a lower environmental impact over their life cycle compared to typically procured items for the same purpose. For example, this may involve ordering products with lower energy consumption, lower CO_2 emissions, fewer hazardous substances in products, and consequently lower operating costs and easier disposal after they have reached the end of their useful life.

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In Polish public procurement, green procurement is pursued through planning, and further in defining the subject of the contract taking into account performance or functionality requirements, requirements for the characteristics of the material, product or service, and with reference to technical standards and assessments. Among other things, the contracting authority may require certain features of the subject of the contract related to the level of environmental and climate impact, packaging, marking, labelling, the production process and method, quality level, efficiency, safety, and construction methods and techniques.

In addition, contracts for government units that award contracts as part of performance of their public tasks must be performed using electric vehicles or natural gas-powered vehicles. When buying new vehicles, all contracting authorities must allocate a portion of the funds to ecological vehicles (zero--emission or low-emission, i.e. electric or hydrogen-powered).

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ESG and the construction sector

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The EU's Construction Products Regulation from 2011 has proved ineffective and not up to the growing challenges of economic transformation in the face of progressive climate change. A new regulation is intended to accelerate the transformation of the construction sector into a more circular industry. To this end, environmental requirements will become part of the criteria of harmonised technical standards construction products will have to meet in the common market.

The construction industry is one of the main sources of pollution and CO_2 emissions in Europe. For this reason, construction is one of the main areas of interest in setting aims for the green transition of the EU economy. To become environmentally sustainable, the industry must greatly increase its circularity, and this requires significant changes in the construction products market. The technical requirements for construction products placed on the common market should be redefined, and rules for the reuse of existing construction products should be introduced.

Progressing climate change has rendered the current Construction Products Regulation,[7] in force since 1 July 2013, insufficient and outdated in the face of the challenges and the increasingly bold goals of economic transformation in Europe. Therefore, in 2019, the European Commission started laying the groundwork for a new regulation consistent with the requirements of the circular economy and other objectives of the European Green Deal.

New requirements in the common market for construction products

The proposal issued by the Commission in 2022 emphasises harmonisation and simplification of the procedure for standardising the technical requirements for new and used construction products. This process should take into account the most important requirements from the point of view of the green transition. The main problem under the current regulation is the lengthy standardisation process and the resulting significant shortcomings of harmonised pan-European standards for construction products, which contributes to the low effectiveness of the current regulation. To boost the standardisation process, the Commission would like to be able to set deadlines for pan-European technical organisations to adopt individual standards, and

7 Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC.

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if these deadlines are not met, the Commission could introduce and approve technical standards itself through delegated acts.

The new draft regulation also clarifies the rules for the use of the CE mark. Construction products are now issued a declaration of "performance" and not (as is the case in other sectors) a declaration of "conformity." The new regulation would require a declaration of conformity for construction products as well. It is also proposed to introduce rules for CE marking in relation to used construction products, or construction products entering the common market from third countries.

The Commission also proposed to extend the scope of the Ecodesign Regulation to cover construction products, which should meet four technical requirements, for durability, reusability, reparability, and ease of remanufacturing. The Commission also pointed to the need to apply the new regulation to services and works in the construction sector, i.e. design and construction services.

To monitor the circularity of the construction sector, it is proposed to introduce digital passports for construction products with a central database on their use, consumption and reuse.

Legislative process

In May 2023, the European Parliament's Committee on the Internal Market and Consumer Protection issued a report proposing amendments to the Commission's proposal. In July 2023, these amendments were adopted by the Parliament. They mainly concern removal of the Commission's proposal to extend application of the new regulation to construction works and services, as well as reducing the new requirements in relation to SMEs.

In its position, the Parliament expressed concern that overregulation could create burdensome bureaucracy hindering the free movement of construction products within the common market. In this regard, the Parliament asserted that national authorities should retain some leeway in formulating new technical requirements for construction products. Indeed, individual member states and their authorities have the best idea of whether participants in the given national market for construction products, in particular SMEs, can meet the new requirements. Importantly, the Parliament called for cautious expansion of the Commission's authorisation to introduce harmonised technical standards through delegated acts. In the absence of appropriate technical competence in the Commission, this authorisation could have the opposite effect and prolong standardisation processes even further, or lead to hasty adoption of standards without due consideration and technical analysis.

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The Council of the European Union presented its position in June 2023. The Council supported the Commission's proposal in principle, but pointed out that it should be clarified, in particular with regard to the digital passport and the central database of construction products, and adapted in line with the current and planned EU rules on the green transition.

At the end of 2023, the "trilogue" (as it is known) between representatives of the European Commission, the European Parliament, and the Council of the European Union concluded, reaching agreement on the wording of the draft regulation. The negotiated version adopted a number of measures to support SMEs in meeting the new requirements for construction products. In this respect, the Commission is to be backed by a specially appointed expert group in its analysis and assessment of current market needs. The Commission would also provide software to allow manufacturers to calculate the environmental sustainability of construction products, taking into account the life cycle of the product. This would allow manufacturers to easily and quickly adapt to the adopted technical standards. As a result of the trilogue, it was agreed that the period for transition to full application of the new regulation should ultimately be 15 years, compared to the 22 years or 10 years previously proposed.

On 10 April 2024, the European Parliament adopted the regulation at first reading, in the wording developed in the trilogue. This draft will be subject to further legislative work in the Council.

Summary

The legislative procedure to date shows that the European Commission and the Council of the EU are stressing the ambitious goals for transformation of the construction sector, while the European Parliament raises the need to take into account the differing degrees of economic transformation across member states and the risk of a negative impact that demanding technical requirements for construction products could have on small and medium-sized enterprises. The range of measures in the draft to support SMEs, as well as the long grace period until full application of the new regulation, should give players on the construction products market time to adapt to the expected and, most importantly, necessary changes in the area of green transition.

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ESG and energy law

Rafał Pytko
Energy

Energy is at the heart of the Sustainable Development Goals set out in the UN's 2030 Agenda:

- **SDG 7—Ensure access to affordable, reliable, sustainable and modern energy for all.** Access to adequate clean energy is a benchmark for countries with developed economies. Achieving this goal is becoming an urgent challenge at a time of significant increases in electricity prices in Europe and around the world, resulting from war and disruptions in supply chains.
- **SDG 8—Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.** At a time of increasing electrification of production processes and transport, guaranteed access to affordable energy is essential for further economic growth and job protection.
- **SDG 11—Make cities and human settlements inclusive, safe, resilient and sustainable.** This is relevant to cities' dependence on access to electricity and heat.

In Poland, the vast majority of electricity and heat generation (73% of electricity and even more heat) is associated with greenhouse gas emissions. For this reason, for many years to come the use of energy will pose huge challenges regarding the energy transition and the need to continuously reduce the environmental and climate impact of the energy sector.

Risks arising from failure to adapt operations to environmental challenges

- **Rising costs of doing business.** The inevitable rise in costs of emission allowances under the EU Emissions Trading System is already causing unprecedented increases in the price of electricity produced in old coal-fired power plants.
- The announced **introduction of a carbon footprint study** in the context of the Carbon Border Adjustment Mechanism (CBAM) now being implemented will force the reduction of emissions throughout the production chain. Failure to shift production processes to less emission-intensive technologies will inevitably hurt a business's competitiveness.
- As **customers' awareness** of environmental and climate challenges grows, companies' failure to act to cut emissions in their production process will pose an increasing threat to the company's reputation. Protests against the activities of companies exerting a particularly negative impact on the environment (blocking power plants, hanging protest banners, barricading roads) are already common. Failure to live up to the community's rising expectations, especially when those expectations are backed by science, will inevitably intensify social conflicts and make it hard to do business.

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- The lack of cooperation between companies and local communities can also cause resistance from **nearby residents** (as in the philosophy commonly known as NIMBY—"not in my back yard"). Such attitudes, often driven by emotions and a lack of knowledge, may even prevent projects from going forward or block the operation of production facilities. For this reason, it is already vital (and will become even more relevant in the future) to properly inform inhabitants of areas not far from plants under construction or already in operation about the beneficial impacts on the local economy, the absence of negative impacts, and mitigation measures taken.

Potential actions

The most common and reasonable response to the challenges arising from the changing energy reality among companies is the trend toward **installing their own renewable energy sources and striving to use 100% renewable energy**. Favourable regulatory solutions, as well as falling RES prices, will allow businesses to recoup such investment in a short time and achieve significant savings on electricity and heat bills.

And the option of using renewable energy is not restricted to companies that can erect RES installations on their premises or put solar units on the roof. More and more companies offer the sale of 100% renewable energy through **power purchase agreements (PPAs)**, where users buy renewable energy direct from the producer. Leasing of RES installations is also frequently offered, allowing companies without sufficient ready cash to take advantage of these solutions over time.

The use of renewable energy is also advantageous for companies' reputation, when they are eager to announce, for example, that they use 100% renewable energy. Similarly, deploying a **zero-emission vehicle fleet** or providing facilities for **customers to charge electric cars** can enhance a company's reputation for its commitment to protecting climate and the environment. **Energy optimisation of processes** is also key.

As the regulatory environment rapidly evolves, companies need to **monitor the changing legal situation on an ongoing basis, at both national and EU levels**. This monitoring may require in-depth knowledge of legislative processes, so companies should consider drawing on the professional services of law firms in this area.

Education and training of employees is another essential element. Sustainability concerns exert a cross-sectional impact on diverse aspects of corporate operations, so it will be necessary to increase employees' awareness of the complex environmental impacts of their employers' business.

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Summary

Due to the high level of emissions from energy production, energy-related areas of companies' operations will be highly susceptible to analysis from an ESG perspective. Consuming energy from renewable sources as much as possible, including self-generation from RES for the company's own needs, can greatly reduce a company's negative environmental impacts.

Prices of energy sold by the main energy groups are driven by price fluctuations on fuel markets. For this reason, failure to diversify generation sources can expose companies to unexpected increases in their energy bills. Self-generation and energy storage technologies afford companies some control over their energy costs, but also protect against unexpected grid failures, which can suddenly cut power to essential machinery, causing heavy financial losses.

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ESG and M&A: Is there a connection yet?

Aleksandra Drożdż
adwokat, M&A and Corporate

In the face of growing demands by lawmakers, but also consumers, contractors, employees, investors and NGOs, all companies wishing to remain attractive on the M&A market need to take account of environmental, social and governance aspects in their operations.

In recent years, these issues have had an increasing impact on M&A deals, including the criteria for selecting acquisition targets, due diligence, transaction documentation, valuation, financing, and post-transaction integration. This megatrend was well demonstrated in a recent study of the M&A market in Europe.[8]

In the "Temperature's Rising" survey, almost half of respondents (41%) indicated that their most recent deal was driven by ESG factors, and more than half (56%) indicated that they were aware of ESG factors but they were not the key reason for the transaction. Only a handful of respondents (3%) said ESG factors played no part in the transaction. To complete this picture, more than half of those surveyed said that the relevance of ESG factors in the context of M&A deals had increased over the past 12 months (58%), and a quarter said that it had increased significantly (24%). These findings are consistent with our own experience in recent months, in particular when it comes to advising public companies or private equity funds. We increasingly see sustainability issues not only behind the scenes of deals, but in press releases.

Introduction of new regulatory obligations—changes in the M&A market

Why are ESG issues so important in mergers and acquisitions? The respondents indicate primarily regulatory requirements (55%), followed by reputation (38%), moral obligation (37%), pressure from investors (31%), risk management (29%), and pressure from employees (10%). Indeed, in due diligence projects, ESG-related regulatory requirements are taken into account to a greater extent than before, particularly when examining corporate issues (e.g. corporate governance policy), environmental (e.g. circular economy), employment (e.g. anti-discrimination and anti-mobbing policies), competition and consumer protection (e.g. greenwashing risk), and compliance (e.g. anti-corruption, sanctions, whistleblowing, and AML/KYC policies). The specific scope of the audit depends largely on the target's sector, but also the requirements of the investor (and indirectly the financer), which have undoubtedly risen in recent years.

8 SS&C Intralinks and Mergermarket, "Temperature's Rising: The Growing Importance of ESG to EMEA M&A" (2022).

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ESG audit—the new normal

In the "Temperature's Rising" study, a large share of respondents admitted that they had abandoned transactions due to ESG factors (41%). A majority of respondents (65%) confirmed that ESG due diligence is now standard practice for every deal, and the rest (31%) indicated that it is sometimes carried out. In addition, in almost half of the cases (46%), this audit is extensive and covers the target's entire supply chain. For private equity respondents, this figure rises to two-thirds (65%). But a consensus on the standard scope of ESG due diligence is only now beginning to form, and companies are not always able to provide high-quality data or documentation in this area—one of the biggest obstacles to conducting due diligence. For now, we as lawyers obviously focus on the most pressing of these factors, i.e. regulatory compliance. But we are also taking a broader new perspective on ESG, as the bar for compliance is raised ever higher—for companies throughout the value chain, not just companies directly subject to ESG obligations.

Implementation of sustainability principles—potential benefits

In the study, respondents almost unanimously (85%) indicated that a high ESG rating increases the value of a company. This is due to many aspects, primarily the possibility of obtaining state aid (55%), strengthening the brand (52%), reducing risks (43%), increasing revenues (21%), higher productivity (20%), and lower costs (9%). Building enterprise value taking ESG into account opens the door to better access to capital and more favourable financing conditions.

The Intralinks/Mergermarket survey found that a significant proportion of investors (41%) are willing to pay a higher price when a target achieves a high ESG rating, with almost half of this group (46% each) indicating a bonus below 10% and half in the range of 10–20%.

In a survey conducted by the Warsaw Stock Exchange in 2022, the vast majority of stock market investors (81%) rated companies with an ESG strategy in place as carrying lower risk.[9] Companies that match current expectations for sustainable growth are particularly popular with private equity funds, which increasingly take ESG into account in their investment policies, especially in light of the trend toward socially responsible investing (SRI). To fetch the highest bid, the seller must prepare for the sale so that it meets the higher sustainability demands of investors.

The "Temperature's Rising" study clearly shows that the impact of sustainability on transactions is not a question of the future, but the here and now. It

9 Warsaw Stock Exchange, "The Impact of ESG Factors on Investment Decisions" (2022).

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is already an integral part of every deal, as we also observe in our M&A and Corporate practice. Nevertheless, the market is still rapidly evolving, so in the coming years we expect more far-reaching changes that will have to be taken into account by all players wishing to operate successfully on the M&A market.

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ESG and life sciences—food and pharma companies targeted by regulators

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More and more companies from the life sciences sector are deciding to implement ESG principles into their operating strategies. Although in the short term this generates costs, long-term, solidly grounded growth of companies operating in industries directly impacting human health (e.g. agri-food, pharma, cosmetics, plant protection products and fertilisers) requires investment in ESG. But positive change in business practices does not occur independently of external factors. To a large extent, it is driven by a range of legislative solutions, primarily at the EU level, including both indirect mechanisms for impacting the market and "hard" legal obligations imposed on businesses.

Companies that produce and sell agri-food products are already facing challenges in ESG implementation. Changes in the pharmaceutical industry are on the horizon in a few years. This process is enforced not only by regulators, but also by consumers (to be joined in the near future by patients) who demand products that are healthy, cheap, and also sustainably and ethically produced. These are daunting requirements, so companies should prepare for the upcoming changes now.

Upcoming regulatory changes and potential actions by companies

In the Farm to Fork Strategy published in May 2020, the European Commission set an ambitious goal of building a fair, healthy, environment-friendly and crisis-resilient food system. This requires an overhaul of food law regulations, changes that will inevitably impose new obligations on companies operating in this area.

An amendment to Food Information to Consumers Regulation (1169/2011) is already working its way through the EU's legislative process. The purpose is to improve the information on food labels by, among other things:

- Introducing standardised, mandatory front-of-pack (FoP) nutrition labelling
- Extending the scope of mandatory origin information for certain products
- Reviewing the rules on best-before date marking.

The legislative package on the welfare of farmed animals, which is to include new rules for transport of animals, is also widely discussed. The European Commission plans to shorten the maximum transport time and ban animal transport at temperatures above 30°C. Finally, restrictions for the food sector will apply to the layer of communication with consumers. The Green Claims

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Directive, which is being worked up by the Commission, aims to introduce clear new criteria for assessing environmental claims addressed to consumers, and thus combat the phenomenon of greenwashing.

In addition to tightening the requirements for production processes and products offered on the EU market, indirect mechanisms for steering the market are also being implemented. In particular, it is worth mentioning the bonus incentives for pro-ecological activities undertaken by farmers via their direct subsidies, and restrictions on sales opportunities imposed on producers of so-called unhealthy food. EU lawmakers also use soft-law instruments, an example of which is the EU Code of Conduct on Responsible Food Business and Marketing Practices. Operators can voluntarily commit to measures consistent with the objectives indicated in the code, and then report on what they have achieved. In Poland, such reports are already being published by companies such as chocolate maker Wedel.

In the longer term, legislative solutions aimed at guaranteeing environmental sustainability will also affect the pharmaceutical industry. This primarily means proposals for changes in the requirements involving the environmental impact of drugs, included in the so-called Pharma Package. They include extension of the obligation to prepare an environmental risk assessment report, to be enclosed with the application for marketing authorisation for a medicinal product. Currently, this assessment is carried out only in a narrow range. The package will also set out specific rules for preparing an environmental risk assessment for medicinal products containing or consisting of genetically modified organisms.

Risk

As the "hard" regulations mentioned above governing the food market are still in the works, it cannot be said with any certainty at this point what exactly the consequences of violating them will be. Based on the drafts presented so far, it should be assumed that these will be administrative penalties and financial sanctions. Above all, it is worth bearing in mind that consumers are paying more and more attention to the health-promoting nature of the products they buy, and ethical and environmentally sound production processes. The expectations declared in this area translate into specific purchasing decisions, and thus impact the revenues of companies in the sector. Hence a fundamental impact of shortcomings in implementation of ESG standards will be unfavourable financial results for the business over the long run.

As for the regulations that will apply to pharmaceutical companies after entry into force of the changes proposed in the Pharma Package, performance of the extended obligation to carry out environmental risk assessment will

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be evaluated as part of the marketing authorisation procedure for a medicinal product. Therefore, failure to comply with these requirements may result in denial of marketing authorisation, or withdrawal of a conditional authorisation.

Summary

Legislative work now being carried out at the EU level clearly indicates that in the near future, companies across the life sciences sector will face a significant increase in the number of ESG regulations. At the moment, they are focused primarily on issues of environmental sustainability, but they will probably soon also reach issues of social and managerial responsibility. Therefore, it is essential for companies to constantly monitor legislative initiatives and launch measures in good time to modify their activities accordingly, in particular in the areas of production, purchasing and marketing. The path to achieving the Sustainable Development Goals can be individual and tailored to the current needs and capabilities of the company, and not just imposed from the top down by EU or national lawmakers.

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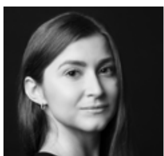

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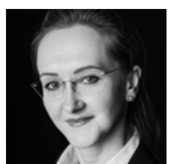

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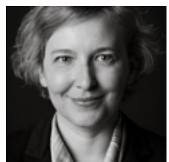

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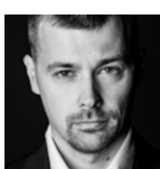

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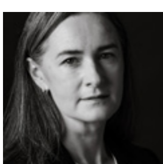

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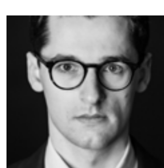

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About Wardyński & Partners

We are an interdisciplinary law firm with over 150 lawyers. We have many years of experience providing comprehensive legal services to businesses.

We advise clients on environmental, social and governance issues. We help clients navigate the maze of new regulations to ensure that their operations comply with new sustainability requirements, such as preparing the organisation for sustainability reporting, conducting due diligence on human rights in the supply chain, and preparing a human rights policy and code of conduct for suppliers.

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