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Challenges Posed to the EU Financial Market by the Implementation of the Concept of Sustainable Financing

Abstract: The subject of this study is, firstly, the identification of new obligations for financial institutions and supervisors resulting from the normative inclusion of ESG (environmental, social and governance) policy in financial market regulation. Secondly, we will answer the question of whether and to what extent the current regulatory pattern is changing in connection with ESG policy and, for this purpose, conduct an examination in the light of the provisions of the sustainable finance risk law from the perspective of a financial institution operating on the financial market, taking into account supervisory regulations in this area. The study also aims to consider various possible solutions for the optimal implementation of the policy of counteracting sustainable development risks in financial market law.
Keywords: financial market, sustainable finance, sustainability risk

Introduction

The normativization of policies for making sustainable finance (SF) and ESG (environmental, social and governance) goals a reality in the European Union (EU) financial market has been a priority of legislative and regulatory activity for several years. One expression of this activity is Regulation 2019/2088 (Regulation on Sustainability-Related Disclosures in the Financial Services Sector 2019). Recital 5 of this regulation indicates the need to harmonize sustainability information relevant to investors, and to participants in the financial market more broadly, in the investment decision-making process, as well as the impact on promoting environmental or social characteristics. The impact of this information on the entire EU financial market is significant and is becoming a challenge for steering regulatory trends in the financial market.

The question of the materialization of sustainable finance policies in the financial market which is addressed in this paper will be analysed from the perspective of financial institutions and national and EU supervisory authorities. In essence, the following questions will be answered: firstly, how to ensure (with what methods and legal instruments) the materialization of the concept of SF and ESG policy in the financial products and services constructed by financial institutions (FI); secondly, what the new goals, tasks and duties of FI associated with this idea and policy are, as well as the legal implications for customers; and thirdly, how to reduce the risk of actions that thwart or hinder the materialization of the concept of SF and ESG policy in the financial market. Additionally, we can also derive an answer to the questions of whether it is the capital or the banking segment that is to have a leading role within the financial market in providing SF and influence other market participants with respect to environmentally sustainable investments. Another issue analysed in the study is the question of the feasibility of and need for stronger normative integration of ESG policies and instruments in order to minimize the risks associated with the implementation of SF concepts in FI activities in the financial market.

This study asserts that a new pattern is emerging of financial institutions operating in accordance with SF and ESG policies and taking special care to supplement them with instruments to counter these risks in financial activities, so-called sustainability risk (SR).

1. Sustainability, sustainable finance and sustainability risk in the financial market as doctrinal and normative concepts

The normativization of the policy of materializing SF and ESG goals in the EU financial market, as indicated in the introduction, follows the development of a new pattern of values on the basis of which the modern economy functions. The search for a basis on which economic development could optimally take place has generated a need to define what sustainable development is and to set the course of legislative changes for SF.

Sustainable development is, on the one hand, economic development in which, public, private and commercial entities, individually and collectively, reduce social and environmental cost risks by taking into account environmental, social and governance (ESG)[1] factors in investment and management decisions. On the other hand, it is a process of transition to a type of economy whose core is concern for the well-being of present and future generations, and the ability to meet the needs of not only the present but also future generations. The new development paradigm, combining ethical and economic elements and respect for environmental resources, has been a priority of the legislative and regulatory activities of EU Member States for several years, and the concepts of environmental, social and corporate governance risks have become normative.[2]

This is driving change in the financial sector, where increasing pressure to integrate ESG goals into specific processes and strategies is becoming apparent, both due to changes in the legal environment and the treatment of sustainability as an institutional commitment by sector participants (United Nations Environment Programme, 2011). It has also given impetus to the emergence of the notion of sustainable finance. The term is associated with two aspects: directing finance towards growth that promotes well-being and meeting society's needs in the long term, beyond generations, but also strengthening financial stability by incorporating ESG policy into investment decisions (European Commission, 2018). The term 'sustainable finance', a concept referring to the investment decision-making process in the field of private and public finance, should be associated with the consideration of environmental, social and governance characteristics in order to increase investment in sustainable development projects (European Commission, 2018). It should be emphasized that this covers a broad spectrum of factors in these areas and should apply to environmental issues as much as to respect for human rights,[3] including labour rights, anti-money laundering procedures, corruption and tax transparency measures (European Parliament, resolution of 29 May 2018).

The introduction of the requirement to integrate sustainability characteristics into the activities of financial-market participants must raise the question of the risk posed to customers, the market and the institutions themselves, which can be collectively referred to as sustainability risk. Sustainability risk, according to the wording of Regulation 2019/2088, means 'an environmental, social or governance event or condition that, if it occurs, could have a material adverse effect on the value of an investment, as defined in sector-specific legislation, in particular Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97 and (EU) 2016/2341, or in delegated acts and regulatory technical standards adopted thereunder' (Recital 14 of Regulation 2019/2088).

1 On the history of the meaning of the term ESG, see for example Pollman (2022).
2 See Regulation (EU) 2019/2033 of 2019; Directive (EU) 2019/2034 of 2019; and Directive (EU) 2022/2464 of 2022.
3 On linking human rights with financial-market regulation, see Nieborak (2021).

Analysis of existing regulations permits us to categorize SR by assigning particular risks to areas that constitute the three pillars of ESG goals. Thus, a distinction can be made between environmental, social and corporate governance risks. Their identification at the normative level must be done from different perspectives and objectives: the customer and the financial market and its professional participants (credit institutions, insurers, investment companies). Nevertheless, all risks associated with the integration of ESG policy into particular processes and strategies in the financial market are an element of consumer protection and financial stability, which justifies the need for the European Supervisory Authorities (ESAs) to expand their supervisory powers and responsibilities accordingly (European Parliament, resolution of 29 May 2018). At the same time, a new sustainable finance strategy is currently being implemented in the EU, with an emphasis on actions in the areas of transformation finance and financial system resilience, and banks and insurers are expected to identify and manage SR (European Commission, 2021).

Sustainability risks within the area of environmental risk which have been identified by EU legislation and documents by ESAs include emissions and other environmental risks, including climate risk,[4] climate change-related risk (European Securities and Markets Authority, 2023) and risks related to green and sustainable assets (European Parliament, resolution of 29 May 2018), and in the social arena include the risk of incidents of child labour, the risk of forced labour and the risk of corruption within the sphere of corporate governance (European Commission, 2022).

Taking an even broader perspective on the risks present in the financial market in terms of scope, we can add to those mentioned above the risks associated with the introduction of sustainable financial products. These risks include greenwashing, making misleading sustainability claims, and those associated with making green claims in any public disclosure. Undoubtedly, these are risks that will intensify with emerging regulatory requirements.

2. New tasks and duties for financial institutions concerning the implementation of sustainable finance from the EU and national perspectives

As with the other risks involved in activities undertaken by financial institutions, countering risks in the area of SF requires, first of all, proper identification of the sources of those risks; the introduction of internal mechanisms to support processes

4 According to ECB information from 2022: ‘most banks do not include climate risk in their credit risk models, and just 20% consider climate risk as a variable when granting loans. Banks currently fall short of best practices, according to which they should establish climate stress-testing capabilities that include several climate risk transmission channels (e.g. market and credit risks) and portfolios (e.g. corporate and mortgage)’ (European Central Bank, 2022).

that eliminate risks; the use of standardized models for measuring risks; supervision of FIs' activities as regards meeting requirements related to countering a given type of risk, in this case in the area of SF; and efficient management of this type of risk when it arises, its monitoring in various relevant time horizons and determining the consequences resulting from excessive SR in the activities of FIs. This raises questions about the means of mitigating these risks and the use of binding or soft law instruments, or even self-regulatory policies, as well as new sets of information and (non-financial) disclosure obligations through which a sound ESG policy is to be implemented in the financial market.[5]

Expanding the control and supervisory model to encompass SF activities means, first of all, that institutions operating in the financial market should be equipped with internal mechanisms that allow them to assess the SR of particular financial products or services aimed at specific customers or groups of customers. There are also questions about how to supervise the proper implementation of ESG policies in the financial market, at both EU and national level.

The legal obligation for banks, listed companies and insurance companies to disclose their policies on environmental, social, labour, human rights, and anti-corruption and anti-bribery issues (non-financial information) as part of, for example, their management reporting, derives from 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 Companies and Groups. This Directive 2014/95/EU deals with the provision of information on a company's own activities, while Regulation 2019/2088 covers reporting on its own financial products and services but which is based on information on third-party activities that these products or services finance.

New tasks and duties for FIs with respect to SF and ESG policy are set forth, inter alia, in Regulation 2019/2088, and are primarily related to the requirement to disclose certain information on the ways in which market participants and financial advisors incorporate sustainability risks into their activities and take into account adverse sustainability impacts. These duties are to be carried out in order to achieve the goal of a level playing field and to compare financial products across Member States with respect to related environmental, social and governance risks, as well as to sustainable investment objectives. Indeed, the idea is to reduce the information asymmetry in the relationship between principal and contractor with regard to the introduction of SR into activities, the consideration of adverse sustainability effects, the promotion of environmental or social characteristics, and sustainable investments, by requiring financial market participants and financial advisors to disclose relevant information to end-investors before entering into a contract, and then on an ongoing basis when acting as contractors to those end-investors (principals). Thus the main obligation

5 On the challenges of incorporating climate risk into financial risk management, see Hertel (2021).

addressed in Regulation 2019/2088 for FIs and financial advisors is the inclusion of any SR that could have a negative material impact on investment returns or advice in due diligence (Article 4). The regulation requires financial market participants and financial advisors to specify in their strategies how they incorporate these risks into their business, and to publish these strategies (Article 3). Assessments of SR and the information made available are to be disclosed prior to contracting (Articles 8 and 9).

In particular, a requirement has been introduced that in the absence of the existence of SR in relation to a given financial product, the rationale for such a statement should be given; when the existence of such risks is established, qualitative and quantitative information on their impact on the outcome of a given financial product should be included in the obligation to disclose; and that the overall sustainability-related effects of financial products should be regularly reported. ESG policy and SR in the financial market therefore impose new tasks and duties on FIs at the national level. The question that arises is how to normatively express ESG policy and mitigate SR in the regulations that already exist in markets such as banking. While it is clear that the new disclosure and information obligations regulated in directly effective and applicable EU regulations do not require implementation in national law, their full implementation should be considered within internal systems at FIs or should lead, for example, to the creation of control units dedicated to this specific risk within those institutions. Indeed, the new tasks and responsibilities of FIs are certainly manifested in the expansion of their management and internal control systems to encompass SR and ESG policies. While it is worth noting that Regulation 2019/2088 mainly applies to the capital sector,[6] the SR analysed are, after all, also found in other market segments and may be the subject of the internal documents, strategies or internal control systems of, for example, banks (as referred to, for example, in Article 9–9f of the Act of 29 August 1997 on Banking Law). FIs are obliged to report information covered by disclosure requirements, and this may imply the need to expand analytical structures in institutions by adding specializations in SR and ESG risks. And while Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment (on the taxonomy), together with the Regulatory Technical Standards (RTS), introduces uniform EU-wide prompts for the criteria for assessing the environmental sustaina-

6 The regulation applies to financial market participants offering financial products as defined in the Sustainble Finance Disclosure Regulation and financial advisors providing insurance or investment advice. The regulation thus applies to investment products and advisory and portfolio management services, and regulates the information obligations of financial market entities. The addressees of this information are the clients of these entities – in particular, those who are purchasers of their investment products and services. Disclosure obligations are carried out through websites, as part of pre-contractual information provided to the client under the relevant sector regulations, and as part of the information disclosed in periodic reports under relevant sector regulations.

bility of a given economic activity (as the taxonomy relates – for now – to environmental issues), the internal assessment of institutions based on these criteria should be done in a structured and organized manner within FIs.

After all, it is also possible to incorporate SR issues into a bank's risk management unit to enable the independent identification, assessment, control, risk monitoring and reporting of this type of risk, as an implementation of Article 9–9f of the Act of 29 August 1997 on Banking Law and the Recommendation 20 Z of the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego), as well as in the Regulation of the Minister of Finance, Funds and Regional Policy of 8 June 2021 on risk management systems, internal control systems and remuneration policy in banks, issued on the basis of Article 9f of the Act of 29 August 1997 on Banking Law. This regulation offers the possibility of incorporating SR, in principle without making amendments to it, but only by substantively incorporating SR into the risk management system. According to § 7 of the Regulation, firstly, within the framework of the risk management system, the bank manages risk by identifying, measuring or assessing, monitoring, controlling and reporting on risk, including risk mitigation, together with assessing the effectiveness of risk mitigation measures taken, and secondly, the bank's risk management is carried out on the basis of relevant analyses independently of the operation of the bank's risk management system, based on strategies, policies, procedures and plans. Sustainability risk could find its way into these strategies, policies and plans – being implemented and taking place partly also within the framework of bank self-regulation.

Thus, another area, and one new to FIs, is the necessity of including these risks in the bank's management strategies and risk management strategies, or other policies ordered by the bank's board of directors, which would constitute the implementation of Recommendation 21 of the FSC with regard to SR. Besides, § 18 of the 2021 regulation by the Minister of Finance indicates that in implementing a risk management strategy, a bank shall introduce and update risk management policies and procedures, specifying in particular the risks that are particularly important in the bank's operations. The use of the open catalogue formula provides another opportunity for incorporating SR analysis into the area of broader risk management.

For a stronger integration of ESG policy into banks' activities, it should be noted that FSC Recommendation 29 Z also allows for the possibility of minimizing SR in the banking market and taking ESG policy into account when creating a policy for the approval of new products. In addition, § 21 of the Minister of Finance 2021 Regulation indicates that before introducing a new product, the bank must conduct a preparatory process, including in particular an analysis of the product's compliance with the bank's management strategy and risk management strategy, and the identification and assessment of significant risks associated with the product within the framework of the risk management system. Expanding the SR in question requires expansion of the bank's information policy covering disclosures. Another option seems to be for financial institutions to conduct internal verification of ESG compliance before releasing a new financial product or service to the market.

It remains an open question how to 'hold financial institutions accountable' for their duty to implement ESG policies. On the one hand, we may see the possibilities for supervision related to the control of the implementation of disclosure and informational duties, but we may also wonder in the future about the consequences of a lack of, or defective implementation of, ESG information obligations for the benefit of a potential client, for example, prior to the conclusion of a contract. How, in practice, can tests and assessments of the environmental impact of a given product or service be conducted, when this type of activity is not encompassed in the core competencies of financial institutions? What legal effect would a defectively conducted test have? Legal issues also arise regarding protection of a misinformed customer and protection against the practice of seeking an unfair competitive advantage.

These questions and issues make clear that the financial market is only in the early stages of shaping and clarifying ESG policies, from the point of view of FIs, supervisors and legislators alike. It is undeniable, however, that the implementation of informational and disclosure obligations regarding ESG policy must take advantage of FinTech and SupTech – the latest advances (algorithms) and tools for the acquisition and analysis of Big Data (Zhao & Farinas, 2023, p. 1).[7]

3. New tasks and duties for supervisory authorities in implementing the concept of sustainable finance from the EU and national perspectives

The new control and supervisory tasks should therefore particularly manifest themselves, firstly, in control competencies linked to ESG disclosure obligations and policies, and secondly, in the regulatory competencies of EU and national supervisors in the form of issued guidelines, the drafts of Binding Technical Standards (BTS) and RTS, and recommendations of national supervisors addressing sustainability in the financial services sector. At the national level, one way to mitigate the risks analysed may be the expansion of the supervisory and control model to include matters of FI compliance with ESG policies; including new ESG issues would be a refinement of the supervisory and control model. This can be done by incorporating ESG considerations into matters that will be examined by FIs in the normative framework from the perspective of their management and internal control systems in FIs, but it must also be underlined that the financial market regulators have little experience so far with sustainability-oriented financial regulations (Zetzsche & Sørensen, 2022, p. 71).

7 On integrating ESG policies through FinTech into the operations of financial institutions, see Arner et al. (2020).

As for the EU supervisor, on the other hand, its involvement in the implementation of ESG policy should be linked to regulatory activities, issuing guidelines, and draft BTS and RTS. This is also the case; in fact, the ESAs are developing these drafts for clarifying the content, methods and presentation of information related to sustainability indicators in relation to climate and other adverse environmental effects, to social and labour issues, and to respect for human rights and anti-corruption and anti-bribery measures, as well as for clarifying the presentation and content of information in relation to the promotion of the environmental or social characteristics and sustainable investment objectives that will need to be disclosed in pre-contractual documents, annual reports and on the websites of financial market participants.

The ESAs may issue guidelines on how environmental, social and governance risks are to be taken into account in investment decisions and risk assessments in specific segments of the financial market. The ESG guidelines, issued by the European Banking Authority, as well as other ESAs, in accordance with, for example, Article 133(1a) of the Act of 29 August 1997 on Banking Law, are to be taken into account in the supervisory and control process at the national level; this also provides another opportunity for dissemination through the inclusion of SF issues in the content of supervisory and control processes in the activities of FIs.

At the EU level, the question remains of whether the competences set out in Article 9(5) of the ESA Regulations could become another 'firewall' limiting this risk in the financial market. Such an approach would, of course, require amendments to the sectoral EU financial market legislation, in line with the dispositions of Article 1(2) of the ESA Regulations. The compilation of exemplary opportunities for supervisory influence on ESG policy and its embodiment in the activities of FIs reflects the stronger normative integration of ESG policy into EU financial market activities.

The answer to the question above about the possibility of the reception of ESG policies and their implementation in various sectors of the EU financial market is positive. This policy may become most representative in the capital sector of the financial market, but FIs in other sectors of the market also have the opportunity to strengthen this policy in their activities (Chiu et al., 2022, p. 1; Katelouzou & Micheler, 2022, p. 217) and develop a new risk policy culture.[8] As an aside, it can be added that ESG issues will be integrated into risk management and supervisory systems through amendments to the CRR/CRD IV regulations[9] and the Solvency II Directive[10]. In addition, it is proposed, with the participation of the European Systemic Risk Board, the European Cental Bank and the European Banking Authority in the

8 Consideration of SR should complement the concept of risk culture in banks and its relationship to the risk management component and risk appetite presented in the literature; see Wiedemann et al. (2020, p. 301).

9 Regulation (EU) No. 575/2013 of 2013; Directive 2013/36/EU of 2013.

10 Directive 2009/138/EC of 2009.

next review of the banking macroprudential framework, to consider the introduction of macroprudential tools to address risks to financial stability associated with climate change (European Commission, 2021).

Conclusion

Reflecting on the analyses conducted in the present paper, it can be pointed out, firstly, that the control and supervisory paradigm of FIs is subject to modification, evolving towards a model of them acting in accordance with SF principles. Secondly, the supervisory paradigm in the EU financial market has been enhanced with the inclusion of risks for sustainable development and sustainable finance risks. Thirdly, it seems necessary and urgent to prepare FIs and advisors in the financial market to evaluate products and services from the perspective of ESG and SR implementation, which is primarily related to the integration of ESG policies into the management systems of FIs. Fourthly, among the urgent challenges facing FIs and advisors is the implementation of disclosure and information obligations in such a way that, on the one hand, they are effectively communicated to clients in the financial market so that they can make informed investment decisions, and on the other hand, that future obligations imposed on service providers do not disproportionately burden them. It turns out that achieving the goal of SF is possible in many areas of the financial services sector, and this can be done through both binding and soft instruments.

Indeed, ESG policy in the financial market is addressed not only to FIs and advisors, but also to national and EU legislators. An example of this is the Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA Regulation), Recital 7 of which note the necessity for solutions employed by consensus mechanisms known as proofs of work to be more environmentally friendly; it is also proposed to impose the obligation on the European Securities and Market Authority and European Banking Authority to identify (preparing drafts of the regulatory technical standards) those consensus mechanisms that may pose a threat to the environment, taking into account adverse impacts on climate and other environment-related adverse impacts, and to outline key energy indicators (European Parliament, 2023). Therefore, the White Paper on proof-of-work cryptocurrencies should include an independent assessment of a cryptocurrency's likely energy consumption (Art. 6 of the MICA Regulation). This is all the more important given that Regulation 2019/2088 is expected to apply to one of the most revolutionary regulations in the financial market in recent times in the field of cryptocurrency assets – the MiCA Regulation – as well as to cryptocurrency service providers and issuers.

The policy is also addressed to financial market customers, giving them an instrument in the form of access to sustainable financing and the materialization of

ESG policy. However, the question arises of whether this normatively expressed policy should be addressed to supervisors to a greater extent.

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