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de Lange, J.

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EU Sustainable Finance Regulation: A missed opportunity for transformative change?

Dr. J. de Lange[1]

This article suggests that the transition towards a more sustainable version of finance and the financial system is at a critical juncture. At such juncture, the article considers the extent to which the sustainable finance regulations that have been adopted to date can be understood as having introduced change of a transformative, novel or business-as-usual type. The article also reflects on how the conclusions drawn could be used to improve European sustainable finance strategy in the future.

1. Introduction

Sustainability has been a dominant theme of recent times. Indeed, it has featured heavily in the EU financial regulatory agenda since the publication of the 2018 Sustainable Finance Action Plan. As part of the EU's drive to integrate sustainability into finance, a raft of new measures have been adopted at EU level including the Sustainable Finance Disclosure Regulation (SFDR), the Taxonomy Regulation, the EU Green Bond Standard Regulation (EuGBS), the ESG Rating Regulation (ESGRR) and, most recently, the Corporate Sustainability Due Diligence Directive (CSDDD). Multiple amendments have also been made to existing EU financial regulations such as the Benchmarks Regulation, MiFID, the AIFMD, the UCITS Directive and the Accounting Directive.[2]

There are, however, multiple indications that the legislative sustainability train may be set to decelerate in the coming years. Indeed, the impending European Parliamentary elections are due to take place against a backdrop of increasing division as to the future trajectory of sustainability policy. The recent scramble to salvage the CSDDD, following a rather unprecedented late-stage rejection by the Council of the EU, demonstrated the existence of such divisions at the highest levels of the EU. Moreover, it is anticipated that sustainability will be assigned a notably less central position in the strategic priorities of the European Council for the forthcoming period. Furthermore, a shift to the courtroom is discernible, with judges increasingly being called on to determine the legality of climate action (or inaction) on the part of governments, corporates and financial institutions.[3]

Against this backdrop, this article reflects on the contribution of the financial regulations enacted under the 2018 Action Plan. Specifically, the article considers the extent to which the measures signal transformative change in the financial system and/or in the role of financial regulation or whether, in fact, the EU legislature may have squandered the opportunity to introduce such change.

2. Sustainability at a critical juncture: contemporary political context

The outgoing European Commission has certainly been productive in its approach to sustainability rule-making. Multiple legislative measures have been adopted in rapid tempo, expanding the European acquis by thousands of pages if delegated acts are included in the calculation. There are, however, indications that EU financial regulation may, for the time being, have largely delivered its contribution to the transition to a more sustainable financial system.

First, the 2018 Action Plan[4] remains the cornerstone of EU sustainable finance policy despite the fact that the Plan has twice been renewed and updated. The Commission's 2021 communication, for example, described its purpose as being to finalise and consolidate the foundations of the '*ambitious framework*' laid by the 2018 Action Plan.[5] The 2023 update, meanwhile, consisted of numerous documents which continued to work towards the implementation of

1. The author is an Assistant Professor of Financial Law at the University of Amsterdam and an independent legal consultant. This article is based on the PhD that Jennifer recently defended, entitled 'Great Expectations of Sustainable Finance: A Critical Analysis of EU Sustainable Finance Strategy and Sustainable Finance Regulation'. Comments and queries are welcome at j.s.delange@uva.nl.
2. Note that all of these measures have been published in the Official Journal. They are described further at section 3 of this article.
3. See further section 2 of this article with respect to these points.
4. European Commission, Action Plan: Financing Sustainable Growth, COM/2018/097 final, 8 March 2018.
5. European Commission, Strategy for Financing the Transition to a Sustainable Economy, COM/2021/390 final, 6 July 2021, p. 20.

that framework.[6] Neither of these two revisions therefore introduced any particularly new or innovative approach to the integration of sustainability into finance, instead relying on the course already set in 2018. Moreover, a report published by the Platform on Sustainable Finance recently suggested that the framework had largely been delivered, placing the emphasis on improving 'useability' and the development of 'market practices' to ensure its uptake.[7] It appears, therefore, that European sustainable finance strategy remains focused on the finalisation of those actions envisaged in the 2018 Action Plan rather than on the introduction of a more far-reaching programme of change for the financial markets.

Further, there are indications that the precedence afforded to sustainability and the green transition within the EU is being eroded, with other concerns assuming greater strategic importance. A leaked outline of the EU's 2024-2029 Strategic Agenda indicated defence, competitiveness and democracy as the cornerstones of Europe's most pressing ambitions.[8] This apparent shift in emphasis away from the green agenda is likely a reflection of the political climate in which the European Council is debating its new strategic priorities. Indeed, recent and on-going conflicts both in and outside of Europe, the spiralling costs of energy and increased division caused by the burden of transitions on those often least able to shoulder them, have served to shift political focus not only at EU but at national political level. Political parties expressly aligned with a less progressive sustainability approach (or certainly a less climate-focused approach) are enjoying increased support throughout Europe. As such parties gain influence within national governments, they inevitably influence the agenda set at EU level by Heads of State. This shift may well be further entrenched in the event that upcoming EU level elections return a European Parliament less inclined to actively pursue further sustainable finance measures.

Something of a push-back from industry towards the transition to a greener and more sustainable version of finance is also evident.[9] The corporate lobby, for example, reportedly played an influential role in reducing the scope of the CSDDD.[10] Furthermore, enthusiasm for ESG investing appears notably subdued in certain industry quarters.[11] Larry Fink of BlackRock, a previously high-profile advocate of the practice, has been accused of performing a 'drastic pivot' in terms of his support for on the practice, for example.[12] However, it should be noted that there are certainly also examples of continued industry support for sustainability, with the Dutch pension fund ABP having recently announced an intention to achieve €30 billion in impact investments by 2030.[13]

Moreover, division over sustainability policy is evident in court rooms across the world. In the US, court cases have been filed which seek to hold fiduciaries responsible for investing for ESG rather than for profit.[14] This anti-ESG trend is also apparent in a number of State laws enacted to expressly

6. European Commission, A Sustainable Finance Framework that works on the ground, SWD (2023) 209 final, Strasbourg, 13 June 2023. This package, for example, contained two draft delegated acted acts to be adopted pursuant to the Taxonomy Regulation and a proposal for regulation to increase the integrity and transparency of ESG ratings, which was a matter that had been flagged as warranting further study in the 2018 Action Plan.
7. Platform on Sustainable Finance, 'A Compendium of Market Practices How the EU's Taxonomy and sustainable finance framework are helping financial and non-financial actors transition to net zero', January 2024. The Platform acts as an advisory body to the European Commission on matters regarding sustainable finance.
8. Greenpeace European Unit, Leaked strategic agenda: military ambition leaves EU vulnerable to ecological collapse, 10 April 2024. The European Council's website also indicates that the Informal meeting of the Heads of State on 6 October 2023 pinpointed the following main concerns: (i) a strong and resilient EU; (ii) security & defence (iii) competitiveness & the single market (iv) multilateralism & global partnerships (v) enlargement & absorption capacity and (vi) migration. The strategic agenda is scheduled to be formally adopted in June 2024.
9. Unilever, for example, recently indicated a revision of its stated ESG commitments to focus on a more 'realistic' set of the most 'urgent' actions, an objective which the Financial Times has observed translates into *'extending deadlines and reducing the scale of environmental targets*'. See Schumacher, CEO Statement, Defining a new era for sustainability leadership, on the company's website (last consulted 30 May 2024). See also Speed, M., Unilever says laxer environmental targets aim for 'realism', Financial Times, 25 April 2024.
10. See, for example, Lara Wolters (rapporteur on the CSDDD), speech of 28 February 2024, delivered shortly after the Council rejected a proposed draft of the CSDDD: "*The failure of Member States to improve this agreement is an outrage to me. This law should be a global landmark to hold companies to account and incentivise responsible business conduct, and companies are already preparing to implement it. ....Member States are listening to a minority of extreme business voices who have so far rejected every proposal and continue to do so*." See also Corporate Europe Observatory et al, Report, INSIDE JOB: How business lobbyists used the Commission's scrutiny procedures to weaken human rights and environmental legislation, 8 June 2022. In the interests of balance, it should, however, also be noted that a number of businesses lent their broad support to the measure, see for example Joint Letter, Support for alignment of the CSDDD with the international standards on sustainability due diligence, published 11 April 2023 and updated as of 30 August 2023.
11. See, for example, the departure of JP Morgan Asset Management, State Street Global Advisors, and PIMCO from the industry initiative Climate Action 100+, as reported in 'Reaction To Recent Departures', Climate Action 100+ website, 24 February 2024.
12. McGowan, J., 'BlackRock's Fink Calls for Energy Pragmatism, Omits ESG From Annual Letter', Forbes, 27 March 2024.
13. Press Release, 'ABP sets new investment goals in a changing economy', 4 March 2024. For such purpose, impact investments were explained as those yielding "*double returns: financial and societal impacts*".
14. See, for example, Spence v American Airlines, a class action filed in June 2023 alleging that the investment of employees' retirement savings in funds that use ESG strategies is a breach of fiduciary duty and similarly Wong et al v NYC Employees Retirement System, filed in November 2023, alleging that a decision to divest in fossil fuel investments jeopardises retirement funds.

outlaw such ESG investment strategies, which have been branded as ideologically driven examples of 'financial fraud'.[15] In Europe, however, litigation has tended to focus on holding governments and corporations to account for *failures* in taking adequate measures to address climate change.[16]

One can debate whether increasing indifference and detachment from sustainability as well as the current 'activism' of the courts is related to a failure of law-makers to enact adequate rules and regulations. This is, however, a matter for another article. The present article will limit itself to exploring one component of that debate - namely the extent to which the regulations enacted under the Action Plan can be understood to have contributed to a comprehensive shift in the financial system and the extent to which they reflect a repositioning of the instrument towards sustainability.

3. Key Sustainable Finance Regulations

As noted at section 2 above, the legislative measures enacted pursuant to the 2018 Action Plan have been credited as having provided the 'building blocks' of an 'ambitious framework' of sustainable finance in the EU. The SFDR, Taxonomy Regulation and a collection of miscellaneous amendments to existing financial regulations have been identified by the Commission as key to this framework.[17] These measures are briefly described at sections 3.1, 3.2 and 3.3 below. Given limitations of space and time, this article will focus its attention on assessing the extent to which these legislative developments can be understood as effecting regulatory change that can be described as transformative nature. Brief reference will, however, also be made to the more recent EuGBS, ESGRR and the CSDDD, which are described at section 3.4 below.[18]

3.1. The Sustainable Finance Disclosure Regulation (SFDR)

The SFDR, adopted in late 2019, obliges certain market parties to publish sustainability-related information concerning their own practices and in relation to specific types of financial product.[19] Since the SFDR is very jargon-heavy, bold type is used below to indicate terms that are defined in the measure.[20]

First, the SFDR requires '***financial market participants***' and '***financial advisors***' to publish explanations of the way in which '***sustainability risks***' are managed and are integrated into their remuneration policies.[21] Furthermore, such parties must disclose how they consider the '***principal adverse impacts***' of the investment decisions they make or the advice they provide on '***sustainability factors***'.[22]

Second, next to the above 'entity-level' requirements, the SFDR introduces a number of 'product-level' disclosure obligations. For example, where a '***financial product***', promotes '***environmental or social characteristics***' (a so-called light green product) or has '***sustainable investment***' as its objective (a dark green product), information must be made available with respect to how such characteristics or investments are pursued.[23]

3.2. The Taxonomy Regulation

The Taxonomy Regulation, adopted in June 2020, introduces a common language by reference to which specific economic activities can be identified as being environmentally sustainable.[24] Essentially, the measure sets out four conditions, such that the relevant economic activity must:

15. See News Release, 'Governor Ron DeSantis Leads Alliance of 18 States to Fight Against Biden's ESG Financial Fraud', March 16, 2023, published to the Florida Government website (www.flgov.com)
16. See Urgenda v State of the Netherlands regarding GHG reduction commitments and decided in 2019, Greenpeace v State of the Netherlands regarding government support to KLM and decided in September 2020, Greenpeace Netherlands and 8 citizens of Bonaire v. The Netherlands filed January 2024 and the recent action initiated by Milieudefensie against ING Bank N.V. with a letter to ING dated 19 January 2024.
17. See, for example, European Commission, Questions & Answers on the Sustainable Finance package, 13 June 2023, which identifies the Taxonomy, disclosures and 'tools' (such as benchmarks) as key building blocks.
18. This scope of this article is also not intended to dismiss on-going work regarding regulatory interventions more particularly targeted towards the apparatus of the Banking Union and the prudential framework. Limitations are simply necessary as a matter available time and space.
19. Regulation (EU) 2019/2088 on sustainability related disclosures in the financial services sector, OJ L 317, 9.12.2019, p. 1–16.
20. In summary:
    '*FMPs*' include 'funds' and, in certain cases, banks.
    '*financial advisors*' include intermediaries, banks and funds that provide certain advice.
    '*sustainability risk*' means an environmental, social or governance event or condition that may materially impact investment values.
    '*principal adverse impacts*' are explained in detailed delegated acts.
    '*sustainability factors*' include environmental, social and employee matters, human rights & anti corruption/bribery.
    '*financial products*' include participations in funds, pension products and managed portfolios.
    '*environmental/social characteristics*' are described in disclosure templates.
    '*sustainable investment*' means an investment contributing to an environmental or social objective that does not significantly harm any such objectives, and where good governance practices are followed.
21. Article 3 and article 5, SFDR.
22. Article 4, SFDR.
23. See articles 8 and 9, SFDR.
24. See article 3, Taxonomy Regulation.

i. contribute substantially to one of six environmental objectives;
ii. not significantly harm any of those six environmental objectives;
iii. be carried out in compliance with minimum standards, which means that, for example, the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights must observed; and
iv. comply with 'technical screening criteria', which are detailed standards set out per type of economic activity in delegated regulations.[25]

For such purposes, the six environmental objectives are: (1) climate change mitigation; (2) climate change adaptation; (3) the sustainable use and protection of water and marine resources; (4) the transition to a circular economy; (5) pollution prevention and control; and (6) the protection and restoration of biodiversity and ecosystems.

Importantly, next to providing a detailed definitional booklet of environmentally sustainable economic activities, the Taxonomy Regulation introduces a number of disclosure obligations. For example, a wide range of companies are required to provide information annually on the extent to which their economic activities are environmentally sustainable as per the Taxonomy.[26] Furthermore, parties making light or dark green products available must also explain the extent to which those products are aligned with the Taxonomy.[27]

3.3. Miscellaneous Amendments

A range of existing financial regulations have also been amended pursuant to the implementation of the Action Plan.

Since December 2019, amendments to the Benchmarks Regulation (the **Benchmarks Amendment**)[28] have obliged benchmark administrators to explain how certain benchmarks reflect or pursue environmental, social and governance ('**ESG**') objectives (or not). Standard criteria for the construction of Climate Transition Benchmarks (**CTB**) and Paris-aligned Benchmarks (**PAB**) were also introduced, and administrators of 'significant' benchmarks were tasked with using their 'endeavours' to publish at least one CTB.[29]

Further, a series of delegated acts adopted under the Markets in Financial Instruments Directive (**MiFID**), the Units in Collective Investments Funds Directive (**UCITSD**), the Alternative Investment Funds Directive (**AIFMD**), the Solvency Directive (**SD**) and the Insurance Distribution Directive (**IDD**) were amended in 2022.[30] Pursuant to these changes, parties including banks, funds and pension providers are obliged to disclose how they consider sustainability risks and to ensure that prospective investors are asked to provide their '*sustainability preferences*' as part of existing client due diligence procedures.[31] Essentially, this means that investors must be asked whether their investments should include financial instruments that: (i) are Taxonomy-aligned, (ii) are '*sustainable investments*' as such term is understood the SFDR; or (iii) that consider '*principal adverse impacts*' on '*sustainability factors*' (as such terms are understood in the SFDR).[32]

Finally, in November 2022, the Corporate Sustainability Reporting Directive (**CSRD**), introduced amendments to the Accounting Directive, Audit Directive, Audit Regulation and Transparency Directive.[33] In summary, these amendments oblige a wider range of entities to report annually on so-called '*sustainability matters*' and mandate independent audits of such disclosures. The CSRD also replaced existing references to 'non-financial' reporting with references to 'sustainability' reporting.

25. See for example Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, published in the Official Journal on 9 December 2021. Essentially, separate technical screening criteria apply with respect to each of the six environmental objectives.
26. See article 8 of the Taxonomy Regulation. The types of company subject to this obligation are defined as those also required to make certain periodic reports under the Accounting Directive.
27. See articles 5 and 6 of the Taxonomy Regulation. Article 7 also requires a negative disclosure statement to be made where a financial product does not contribute to an environmental objective.
28. Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, published in the OJ on 9.12.2019. For reference, well-known benchmarks include interest rates such as the sterling overnight index average (SONIA) and the euro interbank offered rate (EURIBOR) and equity indexes such as the Dow Jones Industrial Average and the S&P 500.
29. See the Benchmarks Amendment, para (1) introducing relevant new definitions into the Benchmarks Regulation and also para (3) adding a new Chapter 3 to Title III to cover the two new benchmarks. The 'endeavours obligation' is found at article 19a of the Benchmarks Regulation, although the Commission recently submitted a proposal to remove this.
30. See further Delegated Directive (EU) 2021/1270; Delegated Regulation Delegated Regulation (EU) 2021/1255; Delegated Regulation (EU) 2021/1253; Delegated Directive (EU) 2021/1269; Delegated Regulation (EU) 2021/1257 and Commission Delegated Regulation (EU) 2021/1256.
31. Specifically, this requirement applies where a 'suitability' test must be conducted, but not where an 'appropriateness' test is required pursuant to relevant legislation.
32. See, for example, Article 1(1) Delegated Regulation (EU) 2021/1253.
33. Directive (EU) 2022/2464 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15–80.

3.4. Recent additions to the sustainable finance framework

More recent additions to the sustainable finance framework include the EU Green Bond Standard Regulation (**EuGBS**), published in November 2023 and setting out requirements for issuers who wish to designate their bond an 'EuGB'.[34] The measure stipulates that such issuers must provide additional disclosures and ensure that an external reviewer verifies compliance with the standard. Furthermore, the ESG Ratings Regulation (**ESGRR**) was adopted by the European Parliament in April of this year.[35] The regulation introduces rules with respect to the supervision of ESG raters, imposing organisational requirements and mandating certain disclosures.

Further, a Corporate Sustainability Due Diligence Directive (**CSDDD**) finally received the Council's seal of approval on 24 May 2024.[36] Pursuant to this Directive, Member States will be required to ensure that certain companies undertake due diligence with respect not only to their own activities but those of their *'business partners'* and to take action to prevent, end or mitigate any actual or potential adverse impacts on human rights and on the environment. Following extended debate, only large companies will be directly subject to the mandatory due diligence requirements, financial institutions will remain largely out of scope for the foreseeable future and provisions introducing civil liability for breach of the CSDDD have been significantly watered down.[37] Furthermore, direct amendments to directors' duties, which formed a feature of early drafts, were deleted from the final drafts of the Directive.[38]

In summary, a fairly impressive number of sustainable finance regulations have been adopted, and existing financial regulations amended, over the course of the past 6 years or so. The following section will analyse the type of change introduced by this package of measures.

4. Evaluating the contribution of sustainable finance regulation

One could study and evaluate the contribution of a policy or law in a multiplicity of ways. For example, one could make a comparative study across different jurisdictions, explore the extent to which the relevant measure solves societal issues (or creates new ones) or examine its economic effect. This particular article, however, evaluates the extent to which the financial regulations enacted under the EU's sustainable finance policy can be understood as being *transformative.* The reason for the selection of this criteria for regulatory failure (or success) is rather simple. Namely, that the EU's 2018 Action Plan was launched against a backdrop which suggested to the wider public that this was precisely the aim of the policy.

Not only did high profile individuals lend their support to the idea that "*Finance must be green, or it cannot be at all*"[39], that we must "*rewire the entire global financial system for Net Zero*"[40] and that "*we are on the edge of a fundamental reshaping of finance*"[41], but the Commission's own expert advisors underlined the importance of re-engineering the financial system[42] and repositioning financial regulation towards sustainability.[43] Indeed, this High-Level Expert Group (**HLEG**) raised the possibility of constructing financial policy and regulation by reference to a 'Think Sustainability First' principle.[44] Moreover, the Commission itself confirmed in its 2018 Action Plan that "*Reorienting private capital to more sustainable investments requires a comprehensive shift in how the financial system works*".[45] It is submitted that these high profile pronouncements certainly contributed to expectations that the pursuit of

34. Regulation (EU) 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, OJ L, 2023/2631, 30.11.2023.
35. Proposal for a Regulation on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities, COM(2023) 314 final. The proposal is currently awaiting Council approval.
36. Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final. Note that all references in this article to specific articles in the CSDDD refer to the final compromise text of March 2024.
37. In terms of scope, note that the CSDDD will be gradually phased in, with only those companies with 5000 employees and a worldwide turnover of EUR 1,500 million falling within scope initially. Ultimately, further entities will fall within scope provided they meet the thresholds of 1000 employees and EUR 450 million worldwide turnover (see further art 30 CSDDD).
38. The original text proposed by the Commission and supported by the European Parliament contained an article 25 which specified that "*Member States shall ensure that, when fulfilling their duty to act in the best interests of the company, directors of companies referred to in article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long-term.*"
39. Le Maire, B., statement made at Climate Finance Day 2017, "*Finance must be green, or it cannot be at all, it must contribute to the fight against climate change and to the general interest.*"
40. Sunak, R. MP, Chancellor of the Exchequer, COP26 Finance Day speech, Glasgow, 3 November 2021.
41. Fink, L., A Fundamental Reshaping of Finance, 2020 Letter to CEOs, 2020.
42. High-level Expert Group on Sustainable Finance, Interim Report 'Financing a European Economy', July 2017 (the **HLEG Interim Report**), at p2: "*The commitment to hard-wiring sustainability into EU policies and cross-cutting initiatives is already ingrained in the Mid-Term Review of the Capital Markets Union Action Plan. But a deeper re-engineering of the financial system is necessary for it to become truly sustainable from an economic, social and environmental perspective.*"
43. See HLEG Interim Report (2017) p. 3.
44. See HLEG Interim Report (2017) p. 58.
45. 2018 Action Plan, p. 1.

sustainable finance in Europe would entail some measure of transformative change and that, therefore, examining the extent to which such ambitions have been realised is a legitimate enquiry.

Moreover, examining the transformative nature of change is certainly not a new pursuit. Since Kuhn's influential work on paradigm shifts within the natural sciences[46], scholars have dedicated considerable time to exploring how his work can help to analyse change across the social sciences. Specifically, Hall has suggested that change can be categorised as first, second or third order.[47] For such purposes, Hall explained first order change as "*the process whereby instrument settings are changed in the light of experience and new knowledge, while the overall goals and instruments of policy remain the same*".[48] Second order change was understood as the situation where "*the instruments of policy as well as their settings are altered in response to past experience even though the overall goals of policy remain*".[49] Finally, third order change was described as characterised by "*simultaneous changes in all three components of policy: the instrument settings, the instruments themselves, and the hierarchy of goals behind policy*".[50] Black further developed these three categories in order to examine regulatory innovation, detailing which types of *regulatory* change could be deemed of first, second or third order change.[51]

Building on this work, this article evaluates the extent to which selected sustainable financial regulations which have been adopted under the 2018 Action Plan can be considered to have introduced change of a business-as-usual, novel or transformative nature. For such purposes, these terms are understood as follows:

- **Business-as-usual (BAU) change:** instrument settings change but constitute a continuation of previous practices; nothing intrinsically 'new' to the solutions suggested and/or adopted; overall goals of policy and the goals and economic rationale of financial regulation remain the same; change, but of a nature that market participants are generally accustomed to in the field of financial regulation.
- **Novel change:** new techniques or processes; the use of existing techniques in new or unusual ways or in novel combinations; the use of regulatory incentives where there were none, the use of penalties (sticks) where there were previously only incentives (carrots); no transformative shift.
- **Transformative change:** characterised by and identifiable through significant transformations in the regulatory approach (i.e. in instruments, institutions and/or organizational structures and processes), often accompanied by a high level of business-as-usual and/or novel interventions; changes to the goals of 'financial policy' and/or the rationale of financial regulation

4.1. Business-as-usual changes

The Commission has consistently adopted a position that essentially dismisses the notion that sustainable finance may entail a shift in embedded thinking or strategy about financial policy and regulation and has in fact rather stifled the debate as to what a sustainable financial system might look like. A number of examples point towards this conclusion.

First, sustainability was initially and with little discussion slotted into the existing Capital Markets Union project under a pillar of the CMU entitled 'Investing for long-term, infrastructure and sustainable development'.[52] Views as to whether a more appropriate approach might have been to introduce sustainability as an umbrella theme sitting hierarchically above both the Capital Market and Banking Unions were simply not solicited from the wider public or, consequently it appears, considered.

Second, the expert group's initial suggestion of a "Think Sustainability First" principle was unceremoniously ignored in the 2018 Action Plan and has been difficult to locate ever since, indicating something of a resistance to entertaining new processes in the design and adoption of financial regulation.

Third, the EU approach to sustainable finance largely frames the financial system as able to make positive contributions towards the goal of sustainability, while under-emphasizing its contribution to negative outcomes. The Action Plan, for example, conceptualized sustainable finance as a matter of: (i) redirecting private capital to sustainable investment opportunities, (ii) managing sustainability risk, and (iii) transparency and long-termism.[53] The Action Plan spent far less time (if any) reflecting on the extent to which a sustainable financial system is, or ought to be, one which operates with integrity and procedural fairness, leading to equitable distributions and actively preventing or prohibiting externalities. Indeed, the Commission essentially sidestepped any such debate when initially framing its

46. Kuhn, T. S., The structure of scientific revolutions, University of Chicago Press, 1962.
47. Hall, P. A., Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain, Comparative Politics , April 1993, Vol. 25, No. 3, see pp. 275-296 (**Hall (1993)**).
48. Hall (1993), p. 278.
49. Hall (1993), p. 279.
50. Hall (1993), p. 279.
51. Black, J. et al., Regulatory Innovation: A Comparative Analysis, Edward Elgar, 2005, at p. 15.
52. This information appeared on the website of the European Commission in 2017, summarising its Capital Markets Union Action Plan (subsequently updated).
53. 2018 Action Plan, p.1.

sustainable finance policy.[54] Nevertheless, it must be acknowledged that the sustainable finance regulations enacted do generally reflect a 'double materiality' approach to sustainability, meaning that both (i) the impact of a business on sustainability factors and (ii) the impact of sustainability matters on a business are relevant points of disclosure.

Fourth, the EU's sustainable finance regulations have overwhelmingly pursued a disclosure strategy, which anyone with the most cursory knowledge of EU financial regulation and its theoretical underpinnings will recognise as rather business-as-usual approach to financial rule-making.[55] As noted at section 2, the SFDR consists of a collection of disclosure obligations, the Taxonomy mandates the provision by certain companies of further information concerning the extent to which their economic activities can be understood as environmentally sustainable and the Benchmarks Regulation requires enhanced disclosures with respect to how certain benchmarks reflect or pursue ESG objectives.

Finally, not only was a disclosure approach business-as-usual, the extension of disclosure to *sustainability* matters was also not entirely novel. Specifically, the Accounting Directive had for a number of years already obliged all large companies and public interest entities *'active in the extractive industry or the logging of primary forests'* to publish an annual payments to governments report.[56] Furthermore, since 2014, certain large companies had been obliged to include a non-financial statement in their management reports containing information *'...necessary for an understanding of the undertaking's development, performance, position and impact of its activity relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters"*.[57] The 'principal risks' linked to the company's operations and likely to cause 'adverse impacts' in respect to such matters were also to be disclosed, as well as information with respect to the management of such risks. The links between the terms used in this pre-Action Plan legislation in fact bears some striking resemblances to those employed in the post-2018 sustainable finance regulation, pointing to a BAU rather than an innovative approach to sustainability disclosure.[58]

Moreover, the Commission's pre-occupation with a disclosure strategy as a means of greening the financial system is remarkable considering the fact that there is ample precedent for more interventionist regulatory techniques. The Securitisation Regulation provides an example of a measure that prohibits undesirable behaviour (the practice of re-securitisation) and restricts the market for such products (by imposing limitations on sales to retail investors).[59] Similarly, the recently agreed AI Act contains a list of AI practices which are explicitly banned in the EU.[60] The Women on Boards Directive also took a rather interventionist step in setting a quota pursuant to which the boards of listed companies within the EU need to have at least 40% female non-executive directors or have a female representation of executive and non-executive of at least 33% by mid-2026.[61]

Despite such precedents, sustainable finance regulation has generally refrained form imposing such directive obligations or prohibitions. While the Benchmarks Amendment included an obligation on providers of 'significant' benchmarks to use their 'endeavours' to publish a Climate Transition benchmark, for example, the SFDR includes no such obligations for parties with significant activity in the funds or bonds market to ensure that they offer (or invest in) some proportion of green products. Moreover, no economic activities are actively prohibited as a result of the sustainable finance package and neither is there a 'dirty' Taxonomy to help identify undesirable or non-green activity. Arguably, there are

54. The terms of reference handed to its High-Level Expert Group on Sustainable Finance in 2016 included, for example, an instruction to review "the disclosure obligations of both companies and institutional investors, fiduciary obligations of institutional investors and asset managers and other ways of enhancing transparency and providing relevant information on the full range of environmental risks in particular but also, where relevant, social and governance risks.' See European Commission, Call for applications for the selection of members of the High-Level Expert Group on Sustainable Finance, 28 October 2016.
55. Disclosure is the go-to mechanic for the regulation of the financial markets and examples are numerous Examples include the Prospectus Regulation (which requires large amounts of information to be disclosed by prospective issuers) and the Securitisation (which, among other measures, requires the provision of detailed information on matters such as the underling pool). The Benchmark Regulation and the Credit rating Agency Regulation likewise mandate the availability of information in order to meet their respective objectives.
56. Accounting Directive, article 42.
57. This amendment was introduced via a new Article 19a and 29a Accounting Directive, added pursuant to Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1–9, otherwise known as the Non-Financial Reporting Directive or NFRD.
58. Indeed, the Accounting Directive already used the 'double materiality' approach to disclosure.
59. Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, articles 8 and 3 respectively.
60. Proposal for a Regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act or AI Act) and amending certain Union Legislative Acts, see article 5. This proposal was adopted by the Council on 21 May 2024 and publication in the OJ is currently awaited.
61. Directive 2022/2381 of 23 November 2022

signs of evolution in this respect, with the most recently agreed legislative measure, the CSDDD, obliging companies to not only disclose information with respect to their supply chains but also to take action to mitigate, prevent and ultimately end discovered abuses. For the reasons noted at section 2 however, it is likely that further measures requiring companies to undertake positive actions in addition to disclosure will be increasingly difficult to realise in the current political context.

In summary, the Commission initially slotted sustainable finance into an existing sub-category of its flagship CMU strategy, failing to initiate an open discussion as to how the issue could be tackled within the EU regulatory apparatus or to engage in a meaningful discussion as to the parameters of a sustainable financial system. Further, the favoured approach to the integration of sustainability into finance has overwhelmingly been a disclosure-based one. Moreover, the Commission in crafting its proposals has largely declined to follow legislative precedent which could potentially have legitimated the prohibition of the most damaging economic activities, the imposition of quotas, or the introduction of reasonable endeavours obligations on investors and/or product manufacturers pursuant to which those parties could have been bound to invest in or offer some proportion of sustainable investment opportunities. It is therefore difficult, in a number of important respects, to characterise the EU's approach as anything other than a rather timid, albeit voluminous, version of BAU.

4.2. Novel changes

Where regulatory change reflects new techniques or processes or the use of existing techniques in new or unusual ways or in novel combinations, the change is classed as novel for the purposes of the current analysis. Although section 4.1 above has argued that many of the changes introduced under the EU's package of sustainable finance regulations are of a BAU nature, there are certainly a handful of changes that could be described as novel. These include (i) the adoption of a science-based approach, (ii) the development of a set of sustainability principles and (iii) the further development of a co-regulatory approach to financial rule-making and implementation. New obligations for certain companies to disclose transition plans are also rather novel.

First, a science-based approach has been adopted to sustainability. Rather than simply setting out rules and principles of a generalised nature, the Taxonomy in particular sets out incredibly detailed, science-based 'technical standards' in many hundreds of pages of delegated regulation in order to guide determintions as to when ecnomic activity may be deemed 'environmentally sustainable'. Furthermore, the Taxonomy is intended to be dynamic, with the Platform on Sustainable Finance installed to advise the Commission on an on-going basis with respect to necessary changes as and when developments, including those of a scientific nature, dictate.[62]

Second, a number of sustainability principles have been gradually introduced into the EU acquis. A 'comply or explain' approach has consistently been used to implement disclosure obligations pursuant to the legislative interventions adopted under the 2018 Action Plan.[63] Further, the double materiality approach referred to at section 4.1 above is reflected in a number of the measures. Entities in-scope of the SFDR, for example, are expected to disclose not only the sustainability risks to which they are subject but also the principal adverse impacts their activities have on certain '*sustainability factors*'. Both such approaches have precedent in EU financial regulation, however, and are therefore not entirely new.[64]

Perhaps the most novel principle introduced pursuant to the Commission's drive to integrate sustainability into the financial system is that of 'do no significant harm' (**DNSH**). The concept was initially introduced in the 2019 Benchmarks Amendment. Specifically, the measure dictates: (i) that activities relating to the underlying assets included in a Climate-transition or Paris-aligned benchmark must not *significantly harm* 'other ESG objectives'[65]; and (ii) that companies significantly harming an environmental objective (as defined in the Taxonomy) may not be included in a Paris-aligned benchmark.[66] Similar 'do no significant harm' requirements were embedded in the SFDR, with 'sustainable investment' defined to exclude any investment that significantly harmed environmental or social objectives.[67] Indeed, the recitals of the SFDR referred to the DNSH criteria as a precautionary principle.[68] With the adoption of the Taxonomy in 2020, the DHSH criteria was officially labelled as a principle[69] and, strikingly, has since been transported into European regulation and policy beyond that envisaged in the Action Plan. Most notably, the Regulation establishing

62. See further the Taxonomy Regulation, article 20, regarding the Platform on Sustainable Finance and its mandate.
63. Such approach is reflected in the SFDR, for example, at articles 4(1)(b) and 4(5)(b).
64. For example, 'comply or explain' and double materiality approaches were already reflected in the Accounting Directive prior to the implementation of the Action Plan.
65. See article 3(23a) Benchmarks Regulation, as amended.
66. See Commission Delegated Regulation (EU) 2020/1818 of 17 July 2020 supplementing Regulation (EU) 2016/1011 as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks C/2020/4757, OJ L 406, 3.12.2020, p. 17–25, article 12(2).
67. SFDR, article 2(17).
68. SFDR, recital 17.
69. See article 25(1) of the Taxonomy Regulation, which added a new article 2a to the SFDR, labelling the concept a '*principle*'.

the Recovery and Resilience Facility in 2021 specifically laid down the 'horizontal principle' that *"the Facility shall only support measures respecting the principle of 'do no significant harm'"*[70] and the 2019 European Green Deal referred to a need for all EU initiatives to *"live up to a green oath to 'do no harm'"*.[71] Moreover, the DNSH principle has been absorbed into the Better Regulation Guidelines following their revision in 2021, such that regulatory impact assessments must now check *'conformity with'* the principle.[72]

Although this emerging set of sustainability principles suggests something of a novel change in the field of financial regulation, it remains notable that the 'Think Sustainability First' principle proposed by the HLEG in its Interim Report[73], has yet to be adopted with comparable enthusiasm. Roundly ignored in the 2018 Action Plan, the approach has however recently re-surfaced in the EU's 8th Environment Action Programme of May 2022, which committed to *"adopting a 'Think Sustainability First' approach in the context of the Better Regulation programme"*.[74] Nonetheless, such principle has yet to appear in the Better Regulation Toolbox as the time of writing.[75]

Third, a rather cooperative approach to crafting and implementing financial regulation has been employed by the Commission, which can be understood as an extension of a regulatory approach developed in the aftermath of the financial crisis and flagged by Dorn in 2016.[76] Such approach abandons the notion that regulation is understood as imposed upon a resistant market and instead conceives of rule-making and enforcement as a more dynamic process of cooperation between the regulator and the regulated.

The Commission, for example, adopted a co-legislative approach to the drafting of sustainable finance regulation. First, its use of the term "ESG" rather than "sustainability" in earlier sustainable finance regulations such as the Benchmarks Amendment was clearly influenced by the industry-formulated Principles of Responsible Investment.[77] Second, there are striking parallels between the 2018 Action Plan and the approach suggested by industry over 10 years previously in the Who Cares Wins Reports prepared by industry representatives in 2004 and 2005.[78] Third, industry members are typically heavily reflected in the expert panels tasked with advising the European Commission on matters of sustainable finance.[79]

Other aspects of the strategy reflect a co-supervision approach, where certain parties are essentially tasked with checking the extent to which other players in the markets comply with particular standards (whether such standards are mandatory or otherwise). Benchmark administrators have, for example, been tasked with constructing climate benchmarks with reference to whether companies meet certain minimum standards.[80] Indeed, companies that benchmark administrators find to be in violation of certain standards must be excluded from Paris-aligned benchmarks. The CSDDD also reflects an extension of this co-supervision approach, since it obliges large companies not only to report on their own supply chains but actually to engage (and ultimately disengage) with delinquent business partners in order to address environmental issues and human rights abuses. In essence, such legislative provisions coopt financial players as enforcers of non-mandatory obligations on the rest of the market.

Finally, the obligations found in the CSRD and the CSDDD for in-scope companies to publish transition plans are rather novel - and are evolving. Wheras the CSRD requires in-scope companies to publish a 'brief' description of the undertaking's business model and strategy, including any transition plan the may have adopted[81], the CSDDD goes further. Notably, the CSDDD introduces an obligation for the companies within its scope to actually *"adopt and put*

70. Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75, at article 5(2).
71. European Commission, Communication, The European Green Deal, Brussels, 11.12.2019 COM (2019) 640 final, at section 2.2.5.
72. European Commission, Better Regulation Guidelines, version November 2021, at p. 32.
73. High-Level Expert Group on Sustainable Finance, Interim Report, Financing A European Economy, July 2017.
74. Specifically, the EU's 8th Environment Action Programme (**EAP**) committed to adopting a Think Sustainability First approach by *"integrating, where relevant, the SDGs in the 'better regulation' guidelines and the 'better regulation' toolbox, as well as streamlining and operationalising the 'do no harm' principle"*, see 8th EAP (2022).
75. Note that since the publication of the Better Regulation Guidelines (2021), the related Toolbox is updated periodically in on-line form. For the purposes of this article, reference has been had to the version of the Better Regulation Toolbox as publicly available and dated 20 July 2023.
76. See Dorn, N., Capital Cohabitation: EU Capital Markets Union as Public and Private Co-Regulation, Capital Markets Law Journal, vol. 11, no. 1, Oxford Publishing Limited (England), 2016, p.84-101, p. 85.
77. Available at www.unpri.org. Notably, however, later measures such as the CSRD have moved away from 'ESG' terminology to embrace references to 'sustainability' reporting.
78. See further The Global Compact, United Nations, Who cares Wins Report, 2005, a perusal of which reveals a number of striking similarities with the Commission's approach to the integration of sustainability into finance.
79. This is evident not only from the composition of the HLEG but also, for example, from the presence of industry experts in the Platform of Sustainable Finance and in the EU's Regulatory Scrutiny Board.
80. Namely, the United Nations Global Compact (UNGC) principles or the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.
81. Accounting Directive, section 19a and 29a as amended by the CSRD. Specifically, the Directive refers to plans of the company to transition to a sustainable economy in line with limiting global warming to 1,5°c and achieving climate neutrality by 2050. That the obligationis somewhat optional is implied at recital 30.

into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, compatibility of the business model and strategy of the strategy of the company with the transition to a sustainable economy".[82] The CSDDD also provides more granular requirements for such plan, with further guidelines to be developed.[83]

In conclusion, the sustainable finance regulations enacted pursuant to the 2018 Action Plan certainly reflect some novel features. The Taxonomy adopts a science-based approach. Other meaures included in the package of regulations extend existing techniques, such as the further development of principles, the use of a co-regulatory approach and increasingly directive provisions with regard to the adoption and implementation of transition plans.

4.3. Changes of a transformative nature

To the extent that transformative change is characterised by and identifiable through significant amendments in the regulatory approach, such as to the goals of 'financial policy' or the rationale of financial regulation, such changes are most notable in EU sustainable finance regulation by their absence. This is apparent in the framing of both (i) the rationale of financial regulation and (ii) the role of the financial markets.

The economic rationale of financial regulation essentially dictates that regulatory intervention is legitimate only if two conditions are met. First, a market failure must be identified. Second, regulatory intervention must be the most appropriate remedy, or in other words there must be no better alterative, such that regulation is effectively a last resort solution.[84] The use of this technique in framing and justifying EU financial regulation is well documented. For example, the impact assessments that frequently accompany Commission proposal typically analyse the case for regulation in terms of the occurrence of a failure that the market is unable to adequately address and include cost-benefit analyses of available solutions, aimed at identifying an efficient approach to the relevant problem.

This technique is certainly discernible in the context of sustainable finance regulation and, moreover, there is little indication that the relevant list of typically acknowledged market failures is expanding. Indeed, the Commission's approach has generally been to diagnose information asymmetry as the relevant market failure, and in turn, its favoured solution has been disclosure.[85]

The Commission is, however, not bound by the EU treaties or some other form of hard law to enact financial regulation *only* where commonly acknowledged market failures are established. To the contrary, in fact, the Commission's own Better Regulation Guidelines expressly stipulate that public policy interventions may be justified not only when 'markets fails', but also when regulations fail, equity/social problems require, behaviours are biased or precaution prevails.[86] The Commission's failure to invoke any such basis in its sustainable finance regulation proposals and its consistent pursuit of familiar disclosure-based solutions therefore indicates a distinct lack of novel or transformative re-thinking of the rationale of financial regulation.

Furthermore, the EU's approach to sustainable finance has not fundamentally challenged existing paradigms that govern financial regulation and the financial markets in general. First, the idea that the financial markets should deliver economic growth has not been debated, despite a movement that has long suggested that de-growth is key to a more sustainable world economy.[87] Indeed, the subtitle of the 2018 Action Plan was 'Financing Sustainable *Growth*'. Second, sustainable finance regulations have not attempted to ensure that finance is, per se, sustainable. Rather, they have endeavoured, incrementally, to create an *alternative* space within the financial system dedicated to sustainable investment which market participants may chose to use (or not). Indeed, the growth of this space ultimately relies on the notorious invisible hand in the form of the free expression of investor preferences. This aproach is clear in the deliberately agnostic structure that has been set up with regards to canvassing an investors sustainability preferences. Intermediaries are not permitted to nudge investors, for example, but must instead "*adopt a neutral and unbiased approach as to not influence clients' answers*."[88] This reflects a paradigm that remains attached to key, embedded rationales such as free markets, investor 'choice' and minimal market interference and rather neglects the

82. See article 1(c) and article 15 CSDDD. Note there will be some overlap between the CSRD and the CSDDD, although the former is applicable to a much larger pool of entities.
83. See article 15 and also article 13(1a) CSDDD.
84. See for example Mazzucato M., & Penna C. C. R., Beyond market failures: the market creating and shaping roles of state investment banks, Journal of Economic Policy Reform, 19:4, 305-326, which provides an informative overview (as well as a critique) of the features of the economic rationale of financial regulation.
85. See also section 4.1, which classified such approach as BAU approach to financial regulation.
86. Better Regulation Toolbox, Tool #13: How to analyse problems.
87. See, for example, Club of Rome, The Limits to Growth, 1972 and Foster, J. B., Capitalism and Degrowth - An Impossibility Theorem. Monthly Review, 62(8), 2011, 26-33.
88. Final Report Guidelines on certain aspects of the MiFID II suitability requirements, ESMA, September 2022, para 26, p. 45-46.

years of research arguing that investors are fundamentally irrational beings incapable of and/or unwilling to process large amounts of complex information.[89]

Unfortunately, the Commission has also rather struggled to explain the logic of this approach in the context of embedding sustainability into the financial system. Although there are various indications that the Commission's view is that more information will lead to more sustainable investment, it remains unclear *why* investors able to find sustainable products are actually expected to choose them. Clarity as to whether the rationale is that such products will be desirable from a financial return or a moral perspective would be helpful, particularly from the point of view of conducting future assessments as to whether the rationale of the strategy is sound. For example, if the hypothesis is that sustainable investments will be selected because they are more profitable, it would be informative to verify whether such investments do offer a favourable return and, if not, whether further interventions are necessary to ensure that this is the case.[90] In the event that the EU's sustainable finance policy relies more heavily on creating moral obligation, however, it would be useful to ensure that the public is in fact adequately open to assuming such responsibilities and willing, in sufficient volumes, to sacrifice financial gain in the short (and possibly also longer) term. The correlation between sustainable investing and profit remains, after all, a matter of debate.

In any case, the current approach, which appears committed to minimal interventions designed to minimise informational asymmetries and is largely reliant on the will of the individual to drive change, certainly bears the hallmarks of a neo-liberal economic approach. Such paradigm is generally recognised as the dominant paradigm of recent times, although it has attracted much criticism from political economists.[91] It is unnecessary for the purposes of this article, however, to describe the characteristics of neo-liberal economics in detail or to debate its merits. The point is that there is little in the text of the financial regulations adopted under the 2018 Action Plan, in their recitals or in related impact assessments, to indicate a shift away from the long estabished practice of framing financial regulation as a last resort, informational efficiency as a key goal and the exercise of 'free will' as an accepted method by which to achieve the common good. As such, this article concludes that the financial regulations adopted under the 2018 Action Plan indicate little in the way of transformative change.

5. Conclusions & Implications

This article set out to analyse the extent to which the EU's sustainable finance policy, as implemented through financial regulation, can be understood to have succeeded in effecting change of a transformative nature. It has been concluded that sustainable finance regulations have implemented a large number of BAU changes in a relatively short time frame, imposing wide ranging and often detailed disclosure obligations on a range of parties active in the financial markets. Furthermore, it has been observed that a handful of novel changes have been introduced, with the adoption of a science-based approach, the emergence of a set of sustainability principles, the development of the co-regulatory approach to financial regulation and the cautious introduction of requirements on larger companies to adopt and put into effect transition plans.

Ultimately, however, while the economic rationale continues to be used as the measure against which to the judge the legitimacy of legislative intervention in the financial system and Adam Smith's invisible hand continues to quietly dominate the EU's approach, it is difficult to argue that the regulations enacted under the Action Plan truly constitute transformative change. Indeed, it is particularly difficult to conclude that the current approach will lead to transformative change in the sense of a spontaneous investor shift towards sustainable financial investments given the lack of convincing reasoning offered by the Commission to date as to *why* the individual, (ir)rational investor, having processed all available sustainability information (or not), will choose to invest his or her hard-earned capital in sustainable investment opportunities.

In the event that the hoped-for spontaneous growth of the sustainable finance space, supported by the framework of legislative measures enacted under the 2018 Action Plan, fails to materialise at sufficient pace, the EU legislature may be well-advised to revisit its approach to sustainable finance and, at the very least, consider additional ways to ensure that both investors and investees make use of the sustainable finance 'framework' that has been created.

Relevant measures could include reasonable, best efforts or hard obligations to invest in, or to offer, a cer-

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89. This is a reference to the contribution of behavioural economics to our understanding of decision-making processes. A good, concise introduction to these problems of bounded rationality, decision fatigue and cognitive overload is Mallard, Graham. *Behavioural Economics*, Agenda Publishing, 2023, see in particular chapter 4.
90. Such interventions may comprise tax and/or capital requirements consequences or other (dis)incentives, either over the short or long term for example.
91. There are a great many of articles relating to the adoption of neo-liberal agendas and their positive and negative impacts. See for example, Davis, J. B., The Turn in Economics: Neoclassical Dominance to Mainstream Pluralism?, Economics Faculty Research and Publications, 2006; Viera, O. V., The Neoclassicals' Conundrum: If Adam Smith Is the Father of Economics, It Is a Bastard Child, Levy Economics Institute, Working Papers Series 893, July 26, 2017, and also Arnsperger, C., & Varoufakis, Y. What is neoclassical economics? The three axioms responsible for its theoretical oeuvre, practical irrelevance and, thus, discursive power, Panoeconomicus, *53*(1), 2006, 5–18.

tain volume of sustainable investments. More fundamentally, the EU could consider whether structural changes are necessary. Such changes could take a variety of forms. First, changes could be made in the way legislative proposals are justified by the Commission, such that equity or the precautionary principle may become a sufficient justification for legislative intervention, alongside market failure. Second, sustainability could be elevated as an umbrella theme above the CMU and Banking Union, possibly with a dedicated supervisor alongside ESMA, the EBA and EIOPA.[92] Third, there may be merit in further working out a set of sustainability principles to which *all* financial activity should adhere.

In the meantime, we can no doubt expect further advocacy through the court system as individuals and public interest organisations, disillusioned with the legislator's perceived inability or unwillingness to tackle the climate crisis through effective policy and legislative interventions, increasingly turn to the courts for justice in individual cases. Should the legislature be graced with further opportunities to contribute to the creation of a more sustainable version of finance, the analysis here should serve as a cautionary tale and hopefully contribute to the debate as to how financial regulation can be used to effectuate change of a more transformative nature in the future.

92. This suggestion aligns to some extent with a recent recommendation from the European Economic and Social Committee (**EESC**) that "*the EU needs an integrated, comprehensive strategy with ambitious long-term goals and plans, in order to accelerate progress on the SDGs at the European and global level. Instead of addressing the goals separately, the EU should adopt a holistic approach to reduce the complexity of its policies and instruments for sustainable development*", see Opinion of the EESC, 'EU and Agenda 2030: strengthening the implementation of the SDGs', dated 6 February 2024.