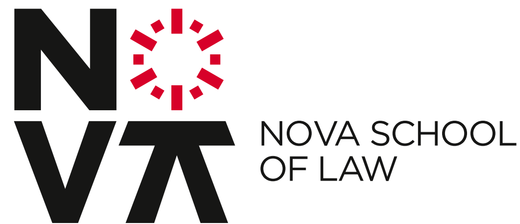


GABRIELA DE SOUSA E FIGUEIREDO SOARES

# ESG is in the eye of the beholder: the ambiguities within concept, culture and evaluation

Dissertação com vista à obtenção do grau de Mestre em Direito na especialidade de Direito e Gestão

Orientador:

Doutor Miguel de Azevedo Moura, Professor na Faculdade de Direito da Universidade Nova de Lisboa

setembro 2022

## Declaração Antiplágio

Declaro por minha honra que o trabalho que apresento é original e que todas as minhas citações estão corretamente identificadas. Tenho consciência de que a utilização de elementos alheios não identificados constitui uma grave falta ética e disciplinar.

Gabriela Soares

## Anti-plagiarism statement

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

Gabriela Soares

*Aos meus pais.*

# Modo de Citar

Atendendo às especificidades da investigação realizada e das fontes consultadas, as citações bibliográficas seguem o estilo *Harvard*.

# Siglas e Abreviaturas

CDFIs- Community Development Financial Institutions

CDP- Carbon Disclosure Project

CDSB- Climate Disclosure Standards Board

CERES- Coalition for Environmentally Responsible Economies

CSRD- Corporate Sustainability Reporting Directive

DOL- Department of Labor

EIRIS- Ethical Investment Research and Information Service

ERISA- Employee Retirement Income Security Act

EU- European Union

ESG- Environmental, Social and Governance

GHG Protocol- Greenhouse Gas Protocol

GRI- Global Reporting Initiative standards

IIRC- International Integrated Reporting Council

KPIs- Key Performance Indicators

NGO- Non-Governmental Organization

SASB- Sustainability Accounting Standards Board

SBTi- Science Based Targets Initiative

SDGs- United Nations Sustainable Development Goals

SFDR- Sustainable Finance Disclosure Regulation

SEC- United States Securities and Exchange Commission

SMEs- Small and Medium-Sized Enterprises

PRI- United Nations Principles for Responsible Investment

TCFD- Task Force on Climate-related Financial Disclosures

UN- United Nations

UNFCCC- United Nations Framework Convention on Climate Change

US- United States

# Declaração de Caracteres

A presente dissertação é composta no corpo do texto por 194 910 carateres, incluindo espaços e notas de rodapé.

# Abstract

The ESG universe has expanded dramatically in recent years and it looks like it is here to stay. The sustainability motto proliferated very quickly and the various market participants eagerly embraced ESG integration, but its definition and consolidation lagged behind. The initial voluntarism brought out the subjectivities and nuances of each law, culture and national institutions resulting in enhanced heterogeneity and sometimes incompatibility between jurisdictions. In this context, it is especially noticeable that fiduciary law may represent an obstacle to the receipt of ESG factors according to the legal system in question. Alongside the diversity of approaches to sustainability issues, typical phenomena arise from the ESG framework's ambiguity and lack of planning, namely the contradictory corporate performance scores presented by distinct rating agencies and the greenwashing practices. In this sense, as more and more supporters of sustainable policies emerge, proportionally the skepticism among the dogmatic ones grows due to confusion and uncertainty which weaken the credibility of ESG practices. On top of that, only recently a concern to regulate the ESG market has arisen, so its real potential is yet to be explored.

# Index

1. The Evolution of ESG ........ 1
  1.1. Origins ........ 1
  1.2. The 90s and the Corporate Sustainability movement ........ 3
  1.3. Corporate Social Responsibility and Impact investing tendencies ........ 4
2. So what exactly is ESG anyway? ........ 8
  2.1. General overview ........ 8
  2.2. A problem of semantics? ........ 9
  2.3. Too many labels for the same topic ........ 11
  2.4. Economic value versus Moral values ........ 12
  2.5. Jungle of standards and frameworks for voluntary ESG disclosures ........ 13
  2.6. The urgency of a taxonomy ........ 14
3. How does variation across cultures, national institutions, and compatibility with fiduciary law influence ESG embracement? ........ 20
  3.1. ESG as an heritor of culture and national institutions ........ 20
  3.2. Cultural Dimensions ........ 23
  3.3. National institutions' influence on ESG ........ 27
  3.4. The specific problem of reconciling fiduciary law with ESG ........ 31
4. ESG Market foibles and ambiguities ........ 45
  4.1. How something so positive can become such a chaos ........ 45
  4.2. ESG Ratings universe ........ 46
  4.3. Greenwashing ........ 61
5. Conclusion ........ 78
6. Bibliography ........ 81

# 1. The Evolution of ESG

## 1.1. Origins

Addressing nonfinancial information, ethical issues, social considerations and restrictions has already been a topic of discussion since the 19th century. Early faith-based organizations, such as the Quaker Friends Fiduciary Corporation,  advocated restrictions avoiding "sin stocks," a policy reflected in their decision in 1898 to adopt a "no weapons, alcohol, or tobacco" investment policy, as well as the refusal to make any investments related to the slave trade in the US, designed to align their investment funds with their core values[1]. Already in the 50s, Electrical and Mine Workers Unions started investing pension capital in affordable housing and health facilities[2]. A major general shift in social unrest emerged in the 1960s and 70s as protests spread, with investors excluding stocks or even entire industries from their portfolios based on business activities such as tobacco production due to its health impacts, but above all because of political events[3]. The Black Power and the American Indian movements emerged, also Women's rights lobby groups and farm worker associations joined the Green Power movements in demanding change. The Anti-Vietnam War student movement exposed meaningless death and destruction, exacerbated by the use of the harmful Agent Orange, the chemical weapon used by the US Military and produced by American based companies which forced a drastic adjustment in the stock-market[4].

All these advances on the evolutionary path of environment, social and governance awareness seemed to fall by the wayside with the influential "Shareholder Value Theory" proclaimed by Milton Friedman[5]. This doctrine established that the social responsibility of

---

[1] Rayer, Q. (2017) *Exploring ethical and sustainable investing*, in The Review of Financial Markets, p.5

[2] Mccarthy, A. (2017) *Dismantling Solidarity: Capitalist Politics and American Pensions since the New Deal*, in Cornell University Press, Chapter 4, p. 77-125

[3] Townsend, B. (2020) *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, in The Journal of Impact and ESG Investing, p.10-25

[4] Edelman, M. (2001) *Social Movements: Changing Paradigms and Forms of Politics*, in Annual Review of Anthropology Vol. 30, p.285-317

[5] Friedman, M. (1970) *The Social Responsibility of Business is to Increase its Profits*, in The New York Times Magazine 13 September, p. 122-126

business is to increase its profits whereby directors have the duty to do what is in the interests of their masters, the shareholders, to make as much profit as possible. Friedman perceived the New Deal and European models of social democracy as a threat, defending the urge to reduce the effectiveness of unions, blunt environmental and consumer protection measures, and defang antitrust law. He sought to reduce consideration of human concerns within the corporate boardroom and legal requirements on business to treat workers, consumers, and society fairly.

The first Human Environment Conference took place in Stockholm, in 1972, gathering political leaders, diplomats, scientists, representatives of the media and NGOs from 179 countries aiming to address the impact of human socio-economic activities on the environment[6]. Socially responsible investment efforts specifically targeted investments in apartheid South Africa[7], with the "Comprehensive Anti-Apartheid Act" and in countries involved in arms trade (e.g., Sudan), leading to the creation of the Ethical Investment Research Services Ltd. (EIRIS)[8] in London, which was set up to provide independent research for churches, charities, and NGOs so they could make informed and responsible investment decisions.

First published in 1976, the OECD Guidelines for Multinational Enterprises[9] emerged as non-legally binding recommendations on responsible business conduct addressed by governments to multinational enterprises (MNEs), operating in or from the countries that adhered to the Guidelines. The Guidelines cover a broad range of topics related to business ethics, employment and industrial relations, human rights, environment, information disclosure, competition, taxation, science and technology.

Bearing in mind that the eighties were devastating in terms of environmental disasters, including the Prudhoe Bay oil spill and Chernobyl, the Coalition of Environmentally

---

[6] Boudes, P. (2014) *United Nations Conference on the Human Environment [1972]*, in Encyclopedia Britannica

[7] Treslstad, B. (2016) *Impact Investing: A Brief History*, in Capitalism and Society, Vol. 11: Iss 2, Arcticle 4

[8] https://eirisfoundation.org/history/

[9] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144

Responsible Companies (CERES) was formed in 1989[10]. In parallel, many mutual funds, such as the Calvert Social Investment Fund Balanced Portfolio[11] and the Parnassus Fund[12] were founded to cater the concerns of socially responsible investors, which applied positive and negative screens or filters to their stock selections.

### 1.2. The 90s and the Corporate Sustainability movement

In the 1990s the world witnessed a consolidation of the aforementioned funds. With the aim of tracking sustainable investment through a capitalization-weighted methodology, the Domini Social Index was launched, disproving the argument that investors were settling for lower returns by limiting their portfolios' range[13]. Companies were appointed based on a span of social and environmental criteria, providing investors a benchmark to measure screened investments versus their unscreened counterparts. Intensified activism alongside the engagement of dialogue with companies with questionable corporate behavior, allowed the support for community development financial institutions (CDFIs)[14]. A sense proliferated that investors' monetary resources were being used in a positive way, by injecting capital into small businesses, housing programs and granting loans to local people in financial difficulties.

In the year of 1992, Rio de Janeiro hosted the United Nations Conference on Environment and Development (UNCED)[15]. The most important conclusion of this 'Earth Summit' was "how different social, economic and environmental factors are interdependent and evolve together, and how success in one sector requires action in other sectors to be sustained over time." The conference also recognized that a significant effort for harmonizing economic, social and environmental dimensions required innovative outlooks of the way we produce and consume and how we live and work.

---

[10] Thorne, D. (2016) *Coalition for Environmentally Responsible Economies*, in Encyclopedia Britannica

[11] https://www.calvert.com/

[12] https://www.parnassus.com/

[13] Fernando, J. (2022) *MSCI KLD 400 Social Index*, in Investopedia

[14] Benjamin, L., Rubin, J., Zielenbach, S. (2004) *Community development financial institutions: Current issues and future prospects*, in Journal of Urban Affairs,Vol. 26, Number 2, pages 177–195

[15] https://www.un.org/en/conferences/environment/rio1992

Later, with global warming growing rapidly, The Kyoto Protocol[16] was internationally adopted, having as its main purpose the reduction of greenhouse emissions on the part of industrialized nations. Countries involved committed to be penalized by receiving a lower emissions limit in the following period, in case they emitted more than its assigned limit.

### 1.3. Corporate Social Responsibility and Impact investing tendencies

In the Forum of Davos, Kofi Annan announced the United Nations Global Compact[17], principles encouraging enterprises, countries and cities worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. Officially launched in 2000, this framework became the world's largest corporate social responsibility initiative with 13000 corporate participants and other stakeholders over 170 countries.

Relying on the idea that power entails responsibility, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights presented the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[18]. The UN Sub-Commission recognized that even though transnational corporations and other business enterprises had the ability to improve living conditions, strengthen the economy and develop new technological solutions, they also had the capacity "to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities". Nevertheless, The UN Commission on Human Rights considered the Norms in 2004, but ended up not approving them.

As a result of the appeal made by the Secretary-General of the United Nations at the time, the ESG acronym materialized in the "Who Cares Wins– Connecting Financial Markets to a Changing World"[19]. The report was published in 2004, seeking "to develop guidelines and recommendations on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions".

---

[16] https://unfccc.int/kyoto_protocol
[17] https://www.unglobalcompact.org/about
[18] https://digitallibrary.un.org/record/501576
[19] https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf

The initiative involved twenty financial institutions from 9 countries with total assets under management of over 6 trillion USD, with the support of the U.N. Global Compact and funding from the Swiss government. The report called in particular for stronger and more resilient financial markets, contribution to sustainable development, awareness and mutual understanding of involved stakeholders and improved trust in financial institutions.

In 2006, the Principles for Responsible Investment (PRI)[20] emerged as an international organization which is keen to promote the incorporation of ESG factors into investment decision-making, advocating that an "economically efficient, sustainable global financial system is a necessity for long-term value creation". The organization relies on voluntary disclosures by participating members, known as signatories, responsible for over $100 trillion in assets worldwide, including the world's largest and most influential investors. PRI dispel the idea that environmental, social and governance impacts are negative externalities which can be ignored for purposes of investment decisions.

In the wake of the Global Financial Crisis investors needed to turn to other sources of income and saw an opportunity in natural resources, which were originally seen as an offshoot of the private equity and infrastructure asset classes. The economic slowdown caused an increase in forest clearing for firewood, timber, or agricultural purposes. Despite all its negative aspects, the 2008 crisis, in a certain way, ended up resulting in a breath of fresh air when it comes to reducing environmental degradation, as we witnessed a general reduction in energy consumption[21].

In a bid to standardize an accounting and measurement framework, the Sustainability Accounting Standards Board (SASB)[22] was launched in 2011. The global nonprofit organization develops sustainability accounting standards that support corporations to disclose decision-useful information to investors, through a strict process that covers evidence-based research and balanced stakeholder participation. This framework uses sector-

[20] https://www.unpri.org/
[21] Sampei, H. (2018) *ESG awareness is an enduring legacy of the global financial crisis*, in Fidelity International
[22] https://www.sasb.org/

specific Key Performance Indicators (KPIs) in order to reflect the subset of environmental, social, and governance (ESG) issues most relevant to financial performance in each industry.

Acknowledging the urgent need to implement an authoritative global standard, the UN Guiding principles on Business and Human Rights[23] were unanimously endorsed by the UN Human Rights Council in 2011, grounded on "Protect, Respect and Remedy" principles. The first pillar, 'The State Duty to Protect', sustains that host states are required to protect the human rights of individuals within their territory and home states have jurisdiction to regulate the conduct of their nationals, even when it takes place outside of their own territory. The second pillar, 'The Corporate Responsibility to Respect', stipulates that respecting human rights requires enterprises to develop a public commitment embedded in a company's institutional culture, that is a Human Rights Due Diligence process. Finally, the third pillar advocates 'The Access to Remedy'.

In 2015 , all United Nations Member States adopted The 2030 Agenda for Sustainable Development[24] in an attempt to ensure a strategic direction for global violence prevention. At its core are the 17 Sustainable Development Goals (SDGs)[25], a plan designed to eradicate poverty by investing in education and health, with a view to end inequality and boost economic growth whilst addressing climate change.

In the same year, the Paris Agreement[26] was signed at the 21st session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), informally known as COP 21, as the first-ever legally-binding universal treaty. The agreement aimed to determine a landmark to combat climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Also, it sought to intensify the actions and investments needed for a sustainable low carbon future, with enhanced support to assist developing countries to do so. The treaty stipulated that the parties must report regularly on their emissions and on their implementation efforts. The

---

[23] https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
[24] https://sdgs.un.org/2030agenda
[25] https://sdgs.un.org/goals
[26] https://unfccc.int/sites/default/files/english_paris_agreement.pdf

decision also encouraged the efforts of all non-party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other sub-national authorities.

In the years that followed, the growth trend in ESG assets surprised, reaching $22.8 trillion in 2016 and $30.6 trillion in 2018[27], according to the Global Sustainable Investment Association. In light of several catalysts such as the EU Taxonomy, sustainability-linked bonds (green-bonds) and loans emerged as a new asset class and had helped spur another wave of growth by opening the tap to a broader set of industries and objectives.

The European Commission 2018 Sustainable Finance Action Plan introduced The Sustainable Finance Disclosure Regulation (SFDR) aiming to improve transparency in the market for sustainable investment products, to prevent greenwashing and to increase transparency around sustainability claims made by financial market participants, presenting comprehensive disclosure requirements covering a broad range of ESG metrics at both entity- and product-level.

In the beginning of 2020, sustainability seemed to be a political priority with new climate initiatives ranging from the organization of the COP 26 to the launch of the Green Deal in Europe. We witnessed the integration of material ESG factors into existing investment solutions, and the development of new sustainable investment solutions accelerated response to ever-growing investor interest. In spite of what might have been predicted, market flows suggest that COVID-19 did not slow down the momentum for sustainable investing[28]. On the contrary, the pandemic has only provided an environment of awareness and a willingness to commit progressively to the integration of ESG criteria, not forgetting that, despite the small climatic benefit we have seen, social inequalities are increasingly marked reinforcing the need for robust CSR and ESG investment.

In a rhetorical analysis of the impacts caused by the pandemic, in 2021, Larry Fink, CEO of BlackRock, advocated the 'stakeholder's capitalism philosophy' in his Annual Letter to

[27] Wilson, N. (2022) *ESG + Public Health = ESHG*, in Standford SOCIAL INNOVATION Review
[28] Adamsa, C., Abhayawansab, S. (2022) *Connecting the COVID-19 pandemic, environmental, social and governance (ESG) investing and calls for 'harmonisation' of sustainability reporting*, in Critical Perspectives on Accounting Vol. 82: 102309

Shareholders[29] which would prove to be a turning point for sustainable investment. Fink highlighted the connection between profit and purpose, making clear that purpose-driven companies will be the ones that will achieve long-term success for all stakeholders, including shareholders.

The year of 2022 is marked by the emergence and consolidation of regulation worldwide, mainly in an attempt to address the ambiguity of the ESG criteria, its disclosure and evaluation, as well as the fight against greenwashing practices. Henceforth, Global ESG assets may surpass $41 trillion by 2022 and $50 trillion by 2025, one-third of the projected total assets under management globally[30].

# 2. So what exactly is ESG anyway?

## 2.1. General overview

At its core, ESG is a means by which enterprises can be evaluated according to a panoply of environmentally, socially and governance ends. In this sense, ESG draws an array of conducts and practices which are converted into factors used to measure non-financial impacts of certain investments or companies[31]. Whereas initially ESG was perceived as a criteria to exclude companies with questionable sustainable behavior from investment portfolios, more recently ESG has been maneuvered under a vision of positive reinforcement, as a way to distinguish companies which adopt strategies concerned with the impact on the environment and in the community. Also, ESG metrics have been evolving over the years, being at the present time, a good way to assess risk and opportunity. In particular, the notorious abbreviation is then composed of an "E" which stands for environment, an "S" that respects to social and a "G" referring to governance. In each of the elements one can include an endless variety of concepts and activities, for instance, "E" may comprehend climate change, deforestation, biodiversity, energy consumption, "S" may comprise diversity, gender equality, racial justice, safety, labor standards and "G" covers the governing of "E" and "S"

---

[29] Fink, L. (2021) *Larry Fink's 2021 letter to CEOs,* in BlackRock: https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter

[30] Yazdani, H. (2022) *The bright spots in a complicated ESG framework*, in World Economic Forum

[31] Bergman, M., Deckelbaum, A. (2020) *Introduction to ESG*, in Harvard Law School Forum on Corporate Governance

reflected in corporate board composition, executive compensation, bribery and corruption, amidst others.

### 2.2. A problem of semantics?

In the midst of all the ESG notions that one can find, there is not really an unequivocal definition, which gives everyone a lot of room to make their own contribution to the concept. In the end, since everybody is working with different terminologies, no one is effectively enlightened leading to tremendous confusion. Dealing with undetermined ESG matters involves constant subjective judgements in the identification of relevant factors, in the assessment of whether those factors are positive or negative and how much weight to give each factor. In fact, the ESG rubric is largely fluid, including the meaning of "environmental", "social" and "governance", which entails additional subjectivity, making the application and empirical analysis of ESG investing challenging and contextual. At the abstraction level, one could agree that, for instance, freedom of association and diversity are positive social factors, deforestation and pollution are bad environmental examples and that brierberry and corruption are negative governance factors. Even so, due to varying social and cultural conceptions or respective national law and institutions, the design of good or bad factors can also differ. Hence, given the inexistence of official specific guidance, "an investor will have to make subjective judgments about how much weight to give E versus S versus G factors so that they may be traded off against each other"[32]. To make things worse, when moving from abstract principles to implementation, the inherent ambiguity of the ESG rubric becomes even more evident. What is actually embodied in E, S or G?

If we dig a little, we find the debates about environmental harms are anything but consensual and depend largely on scientific evidence of the moment. For instance, nuclear power enables low carbon emissions but, in case of a catastrophe, it can have immediate devastating effects[33]. In respect with social factors uncertainty is even more acute, since this parameter is strongly shaped by the cultural, institutional and economic development context of each geographic region. For instance, different cultures perceive privacy differently, while some

[32] Schanzenbach, M., Sitkoff, R. (2020) *ESG Investing:Theory, Evidence, and Fiduciary Principles*, in Journal of Financial Planning, Discussion Paper No. 1038, p.4

[33] Diesendorf, M. (2015) *Accidents, Waste and Weapons: Nuclear Power Isn't Worth the Risks*, in THE CONVERSATION

are extremely strict about it, others are more tolerant in compromise it, namely for security reasons[34]. As expected, governance factors are also contentious. For example, depending on the company, a staggered board can either bring stability and long-term growth or strengthen bad management and undermine firm value. Thus, "optimal corporate governance might be contextual, that is, heterogeneity among firms may require heterogeneity in governance. What is a good G factor for one firm may not be good for another."[35] Complexity increases when we combine more than one ESG component as with the discussion about race and gender diversity on a company's board, which mixes social and governance factors[36].

"On the level of language, which can guide behavior and outcomes, the term ESG is fairly meaningless. It's an acronym for categories of things companies should work on."[37] From this idea, Winston warns that the ambiguity of ESG definition and the respective lack of standardization are causing a widespread false sense that the fact that a company announces that it is doing ESG, necessarily means that it is committed to sustainable practices, provoking a placebo effect. Hence the urgent need "to imbue ESG with meaning". Voluntarily revealing that, as a company, you comply with criteria that is not properly clarified can mislead investors and consumers. This is because, in itself, following ESG practices does not yet mean anything in particular, but due to the exponential growth and the pressure felt by investors to include ESG in their strategies, a false idea of almost unquestionable safety and reliability has been established.

Although, as already reiterated, there is no exact definition of ESG, a study[38] carried out by the Financial Industry Regulatory Authority (FINRA) and the University of Chicago revealed that from a sample of 1.228 retail investors only 24 percent could adequately describe ESG.

---

[34] Solove, D. (2008) *The meaning and value of privacy*, in Understanding Privacy, Chapter 4, p. 71-81

[35] Schanzenbach, M., Sitkoff, R. (2020) *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing By A Trustee*, Discussion Paper No. 971, in Stanford Law Review, Vol. 72, 2020, p. 434

[36] Rhode, D., Packel, A. (2014) *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, in DELAWARE JOURNAL OF CORPORATE LAW, Vol. 39, p. 377

[37] Winston, A. (2022) *What's Lost When We Talk 'ESG' and Not 'Sustainability'*, in MIT Sloan Management Review

[38] Mottola, G., Valdes, O., Ganem, R., Fontes, A., Lush, M. (2022) *Investors say they can change the world, if they only knew how: Six things to know about ESG and retail investors*, in FINRA Investor Education Foundation and NORC at the University of Chicago

Gerry Walsh, president of FINRA Investor Education Foundation admitted "retail investors do not understand ESG investing, only 9 percent say they have ESG-related investments, and familiarity with the concept is not as comprehensive as some coverage on the topic of ESG investing might suggest."[39]

We witness an absence of an exhaustive or universal list of ESG considerations, as well as an inconsistency in the labels used to describe investment strategies which consider ESG factors.[40] Actually, we have reached the point where a company's ESG disclosure is itself a factor in the ESG scoring of the company by some ratings services[41]. Moreover, there are countless ESG rating agencies and ESG-themed mutual funds which are often contradictory. All this ambiguity surrounding the ESG definition only contributes to opportunistic practices, such as greenwashing, and to skepticism in sustainable activities.

### 2.3. Too many labels for the same topic

The reference to ESG issues can appear in several ways and the associated confusion and overlapping is a result of all the historical events that gave rise to the current conception. Although all the labels are commonly used to refer to ESG in general, if we dig deep enough, we realize they do not mean the same thing and each term has its own nuance. For instance, "socially responsible investing" is usually related to the avoidance of ethically doubtful businesses. "Impact investing" refers to investing with the disclosed objective of generating and measuring social and environmental benefits alongside a financial return[42]. In contrast, "responsible investing" and "sustainable investing" regard the identification of investment risks and opportunities with the assistance of ESG analysis. Nowadays, we often witness that those who deal with socially responsible investing portray it in much alike as those who handle sustainable investing. Thus, there is an inconsistency in the use of such labels and distinct labels can be used to mean overlapping ideas which ultimately causes confusion

---

[39] Pipitone, N. (2022) *Survey Shows Many Investors Don't Even Know What ESG Stands For*, in propmodo

[40] CFA Institute (2015), *Environmental, Social, And Governance Issues In Investing: A Guide For Investment Professionals*: https://www.cfainstitute.org/-/media/documents/article/position-paper/esg-issues-in-investing-a-guide-for-investment-professionals.ashx

[41] Dieschbourg, M., Nussbaum, A. (2017) *No Place to Hide Thanks to Morningstar, Bloomberg, MSCI, and Multiple Global Data Providers*, in Investments & Wealth Institute

[42] GLOBAL IMPACT INVESTING NETWORK, *IMPACT INVESTING, A guide to this dynamic market*: https://thegiin.org/assets/documents/GIIN_impact_investing_guide.pdf

among investors who can hardly identify the ESG issues that best fit the strategy they want to implement.

### 2.4. Economic value versus Moral values

Within the ESG scope lie distinct currents and perspectives, some of them more focused on the facet of risk management others more inclined to the ethical side. ESG factors are taken into account by investors due to a panoply of reasons. Whereas some perceive them as economic risks and opportunities, ergo a source of economic value, others see far beyond that, prioritizing their moral values component. Investors motivated by moral values may not want to be conniving with conducts or products they consider objectionable or may actively strive to impact society or the environment in a positive way fostering a values-based approach to ESG. Conversely, others may invest in so called "sin stocks" for the simple fact that they believe it is an economically attractive investment and perceive ESG factors as a way to complement their traditional financial analysis, implementing value-based strategies.

It turns out that in the current paradigm and in certain frameworks is unthinkable to integrate an investment strategy that does not make financial sense in terms of investment returns, with a concern for externalities and impact. Indeed, the fact that the concept of ESG is not well established and that there is the constant association that its integration is a diversionary tactic that undermines profit prosecution, makes the potential of this form of investment more and more postponed by some markets. Even for those who have difficulty perceiving ESG as a serious investment strategy given its ambiguity, exist formulations that demonstrate within this umbrella term there may be possibilities of reconciliation between the traditional conception of investment and the inclusion of ESG. It's all just a taxonomy away.

This was precisely the concern of Schanzenbach and Sitkoff[43] who distinguished ESG investing grounded on moral effects on third parties and the risk and return benefits perspective. The researchers refer to "collateral benefits ESG" when the investment is "motivated by providing a benefit to a third party or otherwise for moral or ethical reasons.". Usually, this type of ESG functions as a screen on investment activity, when the investor avoids firms or industries perceived as unethical or falling below a certain ESG threshold.

[43] Schanzenbach, M., Sitkoff, R. (2020) *ESG Investing:Theory, Evidence…* op.cit., p.2

Such strategy may also be applied through shareholder voting or engagement for the purpose of inducing a firm's change of practices toward offering collateral benefits apart from improvement to investor risk and return. For instance, a collateral benefits ESG investment strategy might eschew investment in a tobacco company for the collateral benefit of reducing health problems. Alternatively, risk-return ESG investing involves the employment of ESG factors as metrics for assessing expected risk and returns aiming to improve return with less risk. A classic risk-return ESG strategy, known as active investing, is to apply ESG factors to pick stocks or other securities on the theory that those factors can identify market mispricing and therefore profit opportunities. In fact, risk-return ESG investing can be perceived as a kind of profit-seeking active investing strategy, in the scenario where, for example, we avoid weapons industry because financial markets underestimate its litigation and regulatory risks, instead of avoiding it to achieve collateral benefits from reduced violence. In this case, divestment would improve risk-adjusted return. Furthermore, active investing is not the only remaining option, risk-return ESG investing strategies may also be applied through active shareholding or stewardship by fostering shareholder voting or other engagement with management. As will be seen later, this differentiation plays a crucial role in the reconciliation between certain jurisdiction's pre-established institutions and the possible embracement of ESG strategies.

### 2.5. Jungle of standards and frameworks for voluntary ESG disclosures

In the absence of an international common ground in relation to ESG terminology, disclosure and evaluation, various frameworks and indices have arose in an attempt to inform ESG handlers. Among the main frameworks, we find the Global Reporting Initiative standards (GRI), the Sustainability Accounting Standards Board (SASB) standards, the International Integrated Reporting Council (IIRC), the United Nations Principles for Responsible Investment (PRI) and the United Nations Sustainable Development Goals (SDGs), that dedicate to general ESG matters and those that specifically address climate issues, such as the Carbon Disclosure Project (CDP), the Task Force on Climate-related Financial Disclosures (TCFD), Climate Disclosure Standards Board (CDSB), the Greenhouse Gas Protocol (GHG Protocol) and the Science Based Targets Initiative (SBTi).

At this point, becomes important to analyze how these initiatives coexist, if they all follow the same line of action or if each one has its own particularity. For instance, GRI offers a global, sector-agnostic disclosure standard for enterprises operations' impact on environment and society, whereas SASB provides a financial materiality-based approach to sustainability disclosure in order to foster a more sector-focused perspective on the financial impacts of ESG issues on firms. GRI standards are established through a Due Process Protocol which counts with the collaboration of independent experts in numerous sectors, while SABS holds a project-based system in which firms take part. Moreover, GRI standards aim to inform all stakeholders, conversely SASB is more oriented to investors and capital providers. These remarkable differences exist mainly due to distinct geographical, cultural and social influences whereby SASB is historically anchored in the American market and GRI reflects a more European vision of sustainability. It is worth noting that following the lack of understanding on how to address both standards, GRI and SASB were forced to release a guide on alignment to both initiatives[44].

In terms of climate-specific disclosure frameworks, the variety and variation is even more pronounced. On the one hand, CDP disclosure involves a thorough climate questionnaire, filled out directly by the firm which is centered on its performance, requiring detailed emissions disclosure at the level of operations and supply chain. On the other, TCFD sets best-practice recommendations for disclosing a corporate's approach to climate risk management and respective impact on company strategy and targets. Besides, SBTi presents a forward-looking analysis of whether climate targets are in line with the Paris Agreement.

Once again, even though there may be some complementarity between these initiatives, the emergence of so many frameworks and standards has resulted in an entanglement of heterogeneous and sometimes contradictory guidelines which ultimately confuses companies, investors and consumers. Additionally, the need to resort to a second line of advice to better manage reporting and cover as many standards as possible is often demotivating.

### 2.6. The urgency of a taxonomy

[44] GRI, SASB (2021) *A Practical Guide to Sustainability Reporting Using GRI and SASB Standards*, Report: https://www.globalreporting.org/media/mlkjpn1i/gri-sasb-joint-publication-april-2021.pdf

From what we have seen so far, having a solid taxonomy base is the first step to (re)build the whole ESG universe, as more credible and representative of what it intends to evaluate. If the base is contaminated, it will be easier to fall into a snowball effect and everything that follows, from the quality of disclosures to the reliability of ratings, will be increasingly fragile and ambiguous.

Against this backdrop, the EU Taxonomy emerged as a pioneer initiative, largely surpassing several jurisdictions, by proposing "a classification system, establishing a list of environmentally sustainable economic activities."[45] It is important to take a closer look at this initiative since it has served as an inspiration for taxonomies that followed. The EU Taxonomy describes environmentally sustainable activities as "the activities that make a substantial contribution to, at least, one of the EU's environmental objectives, while, at the same time, not significantly harming any of these objectives and meeting minimum social safeguards."[46] The proposed environmental objectives include: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control and protection of healthy ecosystems. Depending on the outcome of the EU political negotiations on the Corporate Sustainability Reporting Directive, the goal is that all financial market participants and all large companies and listed SMEs businesses necessarily report against the Taxonomy. It is expected that this initiative will revolutionize the existing ambiguity around ESG terminology, by providing a common language and clear definition of "sustainable", and foremost, its implementation symbolizes an enhancement of mandatory sustainability reporting in the EU encouraging the allocation of capital towards conducts which are "irrefutably" green, by using science-based criteria. Another positive point is this initiative proves to be flexible since it gives room for intermediate levels of compliance, allowing activities to be identified as "taxonomy-eligible".

---

[45] European Comission, *EU taxonomy for sustainable activities*: https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en

[46] Pettingale, H., Maupeou, S. and Reilly, P. (2022) *EU Taxonomy and the Future of Reporting*, in Harvard Law School Forum on Corporate Governance

More could be done since the current classification has an environmental focus[47] and it is only covered by 13 industry sectors. One big downside regarding this question is that organizations carrying out activities which are not eligible under the Taxonomy will have little immediate incentive to transit towards more sustainable business practices or investments. Moreover, bearing in mind that investors are massively being pressured to channel capital into sustainable investments, the narrow coverage of the Taxonomy, as well as the ambiguous designations of certain activities, fade away the feeling that this initiative really means a paradigm shift. The fact is that, besides this, any enterprise within the EU should not postpone strategy and reporting alignment with the Taxonomy because inaction against this developments will only hamper the capacity to attract capital and enterprises' license to operate.

Hitherto, the absence of a recognized standardization has legitimated the conception of sustainable credentials without objective assessments. The Taxonomy, in addition to being an initiative that may influence a new worldwide trend of mandatory reporting, also represents the transition towards labelling and designations, "meaning companies can no longer rely on policies and disclosure to attract positive ESG ratings or investment"[48]. In fact, non-EU funds may be pressured by EU-based or even other investors to disclose the portion of investments that are aligned with the EU taxonomy, as well as to allocate capital towards such investment activities, regardless of their jurisdiction. Unless the non-EU financial market participants are active in EU markets, the EU Taxonomy is not binding. However, for instance "U.S. investors may use the Taxonomy to gauge whether an investment contributes to an "environmental objective," such as climate change mitigation or adaptation."[49]

This initiative is the fundamental cornerstone of a set of fresh EU regulations such as the Sustainable Finance Disclosure Regulation (SFDR) and the Corporate Sustainability Reporting Directive (CSRD). The SFDR requires companies to disclose the way they integrate sustainability risks and objectives in their policies and in financial products, ergo companies must classify the investments they provide based on their ESG credentials. This

[47] However the EU is already considering creating a social taxonomy.
[48] Pettingale, H., Maupeou, S. and Reilly, P. op.cit.
[49] Farmer, A., Thompson, S. (2020) *The Ripple Effect of EU Taxonomy for Sustainable Investments in U.S. Financial Sector*, in Harvard Law School Forum on Corporate Governance

diploma is associated with the EU Taxonomy insofar as it requires specific disclosure obligations such as whether products qualify as sustainable under the Taxonomy. The CSRD emerges to tackle not only climate and environmental issues, but also factors related to social and corporate governance. The CSRD proposal significantly enhances the scope of the existing Non-financial Reporting Directive rules and requires all large, all listed, and some non-EU companies to report sustainability information against mandatory European Sustainability Reporting Standards. This diploma enables companies whose activities are not included in the Taxonomy to give further sustainability data of their activities and investments. All the referred regulations intend to standardize reporting requirements and improve transparency.

It should be noted that, despite several appeals made by stakeholders a US Taxonomy is off the cards. Moreover, a landmark report[50] from Financial Stability Oversight Council (FSOC) has highlighted the significance of establishing common green definitions aligned with international standards. In a recent analysis of public comments to future disclosure rules made by SEC revealed a large percentage of participants considered essential that SEC should draw upon existing standards, such as the TCFD and SASB, in order to contribute to international harmonization. In response, Reuters[51] believes "how much U.S. regulators will leverage from what the EU has developed is open to debate, say experts, but given the considerable amount of work that has already been done in this area it is unlikely that they will want to start from scratch". However, the opinion that the definitions proposed in the SEC's climate risk disclosures[52] and ESG guidance proposals[53] could be used to assist market practices' standardization has been gaining more and more supporters. This position in being defended specially by US senior bankers such as Jeffrey Siegel, head of US public and regulatory policy, at BNP Paribas which advocates "the SEC's recently published proposal

---

[50] U.S. DEPARTMENT OF THE TREASURY (2021) *Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability*: https://home.treasury.gov/news/press-releases/jy0426

[51] Reuters (2021) *U.S. regulators seen developing 'green taxonomy' to provide guidance to financial firms*: https://www.reuters.com/legal/transactional/us-regulators-seen-developing-green-taxonomy-provide-guidance-financial-firms-2021-07-14/

[52] SEC (2022) *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*: https://www.sec.gov/news/press-release/2022-46

[53] SEC (2022) *SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices*: https://www.sec.gov/news/press-release/2022-92

to combat greenwashing of investment funds should also be helpful in defining and standardizing ESG terms" and Ivan Frishberg, chief sustainability officer at Amalgamated Bank that stresses the urge to "get away from manipulated intensity targets and metrics that can be helpful for management but don't guard against absolute understanding of what's happening."

In the case of China, no legislative definition falls into the strict category of a "taxonomy" comparable to that of the EU. However, over the last years, China has been launching various legislative frameworks related to sustainable finance. Actually, the green bond catalogue published by People's Bank of China, in 2015, is often referred to as China's taxonomy. Moreover, in the lending department, the China Banking Regulatory Commission issued green credit guidelines, performance indicators and reporting forms. In 2019 China updated the Guiding catalogue for the green industry, a joint production of seven ministries and related commissions[54].

Furthermore, the Association of Southeast Asian Nations (ASEAN), aware that its member states are vulnerable targets for the devastating consequences of climate change, announced the creation of an ASEAN Taxonomy[55] to establish a common language for sustainable finance. This initiative plans to provide a credible framework filled with science-based definitions, inclusive and beneficial to all its member states and aligned with the sustainability initiatives taken by the capital market, banking and insurance sectors. Plus, it has a concern for the consideration of widely used taxonomies and other relevant taxonomies, as appropriate, aiming to facilitate an orderly transition towards a sustainable ASEAN[56].

Also Singapore has dedicated itself to this topic, with the Green Finance Industry Taskforce (GFIT) recent publication of a second consultation paper "Identifying a Green Taxonomy and Relevant Standards for Singapore and ASEAN"[57] on its proposed taxonomy for

[54] OECD, *9. Sustainable finance definitions and taxonomies in China*, in OECD iLibrary: https://www.oecd-ilibrary.org/sites/5abe80e9-en/index.html?itemId=/content/component/5abe80e9-en

[55] ASEAN Taxonomy Board (2021) *ASEAN Taxonomy For Sustainable Finance*

[56] Uhrynuk, M., Burdulia, A. (2021) *ASEAN Releases Sustainability Taxonomy for Southeast Asia*, in Eye on ESG, MAYER BROWN

[57] Green Finance Industry Taskforce (2022) *Identifying a Green Taxonomy and Relevant Standards for Singapore and ASEAN*

Singapore-based financial institutions. The main focus of this initiative is to provide a common framework for classification of economic activities upon which financial products and services can be built and eradicate greenwashing through a clear greenness criteria. Singapore aspires to encourage the flow of capital to support low carbon transition, crucial to prevent climate change. The Singapore Taxonomy intends to be consistent and compatible with other taxonomies, especially the EU Taxonomy and the ASEAN Taxonomy[58].

Although it is still at a very early stage, Australia is another jurisdiction that has been concerned with this issue, with ASFI having recently announced a Project Steering Committee, constituted by key financial market stakeholders, government and regulators, aiming to develop an Australian sustainable finance taxonomy[59]. Alongside this committee will be the Technical Advisory Group (TAG) to advise and comment on any aspect of the ASFI Taxonomy Project. ASFI considers this initiative a fundamental action to ensure "the transition of the economy, financial portfolios, companies and economic activities by providing clear and consistent definitions of what is classified as a sustainable activity and, given Australia's commitment to net zero by 2050, defining how economic activities will need to transition over time to continue to be classified as sustainable". Furthermore, this project is not isolated and intends to build on what has already been done in other frameworks, such as the EU and, at the same time, work together with New Zealand to ensure international credibility and inter-operability.

With the emergence of several taxonomies around the world, there is a concern that they may not be compatible and may make the definition of the concepts even more difficult. Since we are in an increasingly global world with countless multinational enterprises, we cannot run the risk of getting lost in translation. In this sense, the unique International Standard Industrial Classification of All Economic Activities (ISIC) sector classification mapping methodology was the first critical effort towards comparable taxonomies including the EU, China, Singapore, Japan, India, among others. In fact, this framework has served as a basis for other initiatives such as the EU-China Common Ground Taxonomy (CGT)[60] which emerged to

---

[58] Uhrynuk, M., Harris, S., Lee, J. (2022) *Singapore Publishes Second Version of Green Taxonomy for Financial Institutions*, in Eye on ESG, MAYER BROWN

[59] ASFI, *Taxonomy project*: https://www.asfi.org.au/taxonomy

[60] International Platform on Sustainable Finance, *Common Ground Taxonomy – Climate*

improve the comparability and inter-operability of taxonomies around the world, covering significant contribution criteria for climate change mitigation. Instead of proposing a 'single' or 'common' taxonomy, CGT intends to provide generic methodologies for benchmarking taxonomies. Moreover, CGT is not legally binding but rather a source of inspiration since it provides an analytical toolkits for other jurisdictions when developing their own taxonomies[61].

# 3. How does variation across cultures, national institutions, and compatibility with fiduciary law influence ESG embracement?

## 3.1. ESG as an heritor of culture and national institutions

In the course of time, on account of increasing environmental and social awareness stakeholders started to expect firms to truly dedicate to sustainable practices. By feeling the pressure, many enterprises voluntarily adopted politics which responded to ESG disclosure and reporting needs. According to Mathews[62], ESG conduct arises from a social contract to obtain legitimacy. Growing legitimacy consequently lows regulatory pressure and defends companies' from the stigma of loss of reputation which creates an unfavorable situation where voluntary disclosures are selectively composed by positive information disguising negative ones. Moreover, research reveals that exposure to media incentives the establishment and extent of ESG reporting but undermines the quality of the disclosure which conveys the idea that ESG performance ends up being less of effective sustainability activities and more of transmitting positive evidences to external stakeholders for better financial prospects.

Therefore arises de necessity to establish named parameters in order to avoid a discrepancy between the ESG disclosed data and the real performance of the companies. Thus, certain

---

*Change Mitigation*: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/211104-ipsf-common-ground-taxonomy-instruction-report-2021_en.pdf

[61] Gong, Y., Merle, C. (2021) *EU-China Common Ground Taxonomy, a painkiller to taxonomy headaches?*, in Natixis

[62] Mathews, M. R. (1997) *Twenty-five years of social and environmental accounting research: Is there a silver jubilee to celebrate?*, in Accounting, Auditing & Accountability Journal, 10(4), 481–531

jurisdictions, depending on their cultural beliefs and respective institutions, felt the urge to homogenize the processes of integrating ESG criteria by implementing regulation, which could bring more certainty to investors and customers. Actually, regulation has proven to have great influence in shaping ESG scores. This phenomenon has only increased regulatory variations between countries, leaving regulators unable to follow a universal best practice.

A country's regulatory and legal framework is impacted by formal institutions, for instance constitutions, contracts and form of government, and informal institutions such as customs, traditions and culture, which are expressed in a particular way in each country[63]. According to the Williamson's study 'New Institutional Economics'[64], culture appears as the informal institution which most directly and indirectly influences the behavior of formal institutions such as corporations. Thus, the way stakeholders and managers envision corporate responsibility will vary across countries. However, it should be noted that other country-level elements such as economic growth, state of capital market and also firm-level elements are equally corporate responsibility influential factors.

What drives corporate ESG acceptance, disclosure and performance may be expounded by diverse theories. The stakeholder theory[65] comes as a way to balance capitalism and ethics, advocating that a company should create value not only for shareholders, but also for all stakeholders. Alternatively, the legitimacy theory[66] determines that organizations must steadily try to certify that they execute their practices complying with societal boundaries and norms. Moreover, the institutional theory advocates that stakeholders' behaviors are explained by wider cultural components such as beliefs, rules and costumes and how disparities in countries' institutional constraints influence companies' internal structures, processes, decisions and performance[67]. The institutional theory is supported by institutional

[63] Kaufmann, W., Hooghiemstra, R., Feeney, M. (2018) *Formal institutions, informal institutions, and red tape: A comparative study*, in Wiley

[64] Williamson, O. (2000) *The new institutional economics: Taking stock, looking ahead*, in Journal of Economic Literature, 38(3), 595–613

[65] Freeman, R., Harrison, J., Wicks, A., Parmar B., Colle, S. (2010) *Stakeholder Theory: The State of the Art*, Cambridge University Press, p.195

[66] Deegan, C. (2002) *Introduction: The legitimising effect of social and environmental disclosures – a theoretical foundation*, in Accounting, Auditing & Accountability Journal

[67] Jackson, G., Deeg, R. (2008) *Comparing capitalisms: Understanding institutional diversity and its implications for international business*, in Journal of International Business Studies, 39(4), 540–561

isomorphism which occurs through the coercive, normative and mimetic actions of organizations, being a "constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions."[68] Therefore, regardless the existence of international patterns or codes, corporate ESG conduct is deeply dependent on countries' formal and informal institutions.

According to Brammer[69], geographical diversity entails variations in stakeholder activism and in management decision-making. Since there are countless legal and cultural variations among countries, multinational enterprises face a doubled challenge related to normative and coercive pressures from each jurisdiction's institutes. Furthermore, national culture plays a great role in what is the conception of ethics and more specifically, experience shows that different countries and respective stakeholders distinctly value each component (E, S or G) of corporate sustainability. Thus, all this wrangling over cultural and normative disparities only adds to the difficulty in defining and assessing ESG criteria.

Even though we may recognize that globalization and free capital movement overcome boundaries between nations allowing convergence and standardization of certain institutions, we also have to admit that is unpractical to think that global integration will completely overlap national culture. In fact, research[70] shows that even with globalization and free capital movement, investors' rights substantially differ across nations and thus the corporate conduct and ownership standards. Moreover, Ortas' insights expose that "there cannot be a universal best practice for corporate ESG behavior rather it is a function of the societal culture of respective countries"[71], question that again contributes to the debate about the ambiguity of the ESG concept and respective evaluation method.

Having said that, it is of enormous relevance to understand which institutions and cultural dimensions across countries influence ESG performance and disclosure the most.

---

[68] DiMaggio, P., Powell, W. (1983) *The iron cage revisited: institutional isomorphism and collective rationality in organizational fields*, in American Sociological Review, Vol. 48, p. 149

[69] Brammer, S., Brooks, C., & Pavelin, S. (2006) *Corporate social performance and stock returns: UK evidence from disaggregate measures*, in Financial Management, Vol. 35(3), 97–116.

[70] La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Vishny, R. (1998) *Law and finance*, Journal of Political Economy, Vol. 106(6), 1113–1155

[71] Roy, A., Mukherjee, P. (2022) *Does National Culture Influence Corporate ESG Disclosures? Evidence from Cross-Country Study*, in Vision-The Journal of Business Perspective

### 3.2. Cultural Dimensions

The most consensual framework used to understand cultural differences across countries, the effects of culture on the values of its members and the way those principles affect people's behavior was brought by Hofstede. Hofstede's Cultural Dimensions Theory[72] initially introduces six key dimensions namely power distance, uncertainty avoidance, individualism-collectivism, masculinity-femininity, and short vs. long-term orientation. Afterwards researchers added restraint vs. indulgence.

Power distance regards to the extent to which the less powerful members, organizations or institutions of society tolerate and expect that power is unequally distributed. Individuals that embrace a high degree of power distance easily accept hierarchies without the need for justification. An example of a high power distance society is India whereas New Zeeland exhibits a low power distance index, where relations are typically more consultative, democratic or egalitarian. Furthermore, in low power distance index workplaces, employers and managers tend to ask for employees' input.

Individualism and collectivism describe individuals' integration into groups. Whilst individualistic societies, such as Australia, emphasize achievement and individual rights prioritizing the needs of oneself and respective immediate family, collectivism gives greater prominence to relationships and loyalty, putting the group before the individual, which is a typical conduct of Asian countries such as China, Korea and Japan. Moreover, studies support the idea that an individualistic society exhibits rule preference to gain legitimacy.

A society's tolerance for uncertainty and ambiguity is covered by the uncertainty avoidance dimension. Typically, high uncertainty societies reveal a low endurance for risk-taking situations, seeking to minimize the unknown through strict rules and regulations and tend to be more emotional. Mediterranean cultures, Latin America, and Japan rank the highest in this category, whereas Singapore Denmark, Great Britain and the United States rank the lowest[73].

Femininity vs. masculinity index, is another dimension of national culture. This index analyses how much a society perpetuates traditional masculine and feminine roles. According

[72] Hofstede, G. (1980) *Culture and organizations*, International Studies of Management & Organization, Vol. 10(4), 15–41

[73] Snitker, Thomas Visby (2010), *Handbook of Global User Research*, Chapter 9.6.4

to Hofstede's theory, masculinity refers to societies in which social gender roles, specially emotional, are clearly distinct and strict, usually meaning larger gender wage gap. Conversely, in a femininity society the role's differentiation blurs, there is effective gender equality recognition, institutions tend to be more flexible, and more women exercise management and political functions. According to Hofstede 2010 Masculinity vs Femininity Index research[74], involving 76 countries, masculinity scored high in Japan, in German speaking countries, and in some Latin countries (Italy and Mexico), it is moderately high in English speaking Western countries, moderately low in some Latin and Asian countries like France, Spain, Portugal, Chile, Korea and Thailand and low in Nordic countries and in the Netherlands.

The cultural dimension of Short-Term vs. Long-Term Orientation considers the extent to which cultures promote delaying gratification or the material, social and emotional needs of its members. A long term orientation society is more pragmatic and detached from tradition thus emphasizes persistence, perseverance, saving, thrift, long-term growth and capacity to adapt. On the contrary, short-term orientation in a society, indicates a focus on the near future, involving short-term success or gratification, and invests in the present time. Research shows that China, Japan, South Korea and Singapore[75] exhibit high long-term orientation scores whereas Australia, United States, some Latin American, African, and Arabian countries can be identified as short-term orientated societies.

At last, the restraint and indulgence index addresses the extent and tendency for a society to accomplish its desires, ergo a society's impulse and desire control. That is to say, an indulgent society values satisfaction of human needs and desires while a restrained one observes value in curbing ones' desires and withholding pleasures aiming to align more with societal norms.[76] Among indulgent countries are Australia, Canada, the US, Argentina, Chile, and

[74] Hofstede, G. (2011) *Dimensionalizing Cultures: The Hofstede Model in Context*, in Online Readings in Psychology and Culture, Unit 2

[75] Mattews, B. (2000) *The Chinese Value Survey: An interpretation of value scales and consideration of some preliminary results*, in International Education Journal Vol 1, No 2

[76] Hofstede, G., Hofstede, G. J., Minkov, M. (2010). Cultures and Organizations: Software of the Mind.

several African countries, in contrast to Russia, China, Japan, and South Korea, countries which show restraint.

#### 3.2.1. Cultural Dimensions' influence on ESG

Despite the existence of several previous researches in the field, Roy and Mukherje[77] dedicated to investigate how certain cultural dimensions proposed by Hofstede (power distance, individualism vs collectivism, uncertainty avoidance and short-term vs. long-term orientation) impact ESG disclosures. Their study[78] is grounded on the institutional theory and invokes Williamson's model of 'New Institutional Economics'. Besides, it resorts to hierarchical linear modelling (HLM) technique for measuring the impact of culture on corporate ESG disclosures controlling for country-level and firm-level characteristics. Moreover, not only this research provides an holistic view, it particularizes the effects of culture on each ESG parameter as dependent variables and takes into account Tobin's Q and firm size factors.

Regarding environmental disclosure, the study reveals that power distance represents an extremely negative effect whereas individualism and long term orientation constitute a positive impact on disclosure scores. This is because a short-term society behavior typically means unrestrained spending which leads to ecological pressure. The uncertainty avoidance dimension was found to be irrelevant to this parameter. It is worth mentioning that indicators of economic development firmly expose considerable adverse impact, meaning higher environmental footprints and that country-level market capitalization reports positive co-efficient.

As for the social disclosure scores, uncertainty avoidance reports significant positive effects. In fact, according to research[79] exists a close connection between risk-taking conducts and unethical actions. Once again, power distance undermines corporate social disclosures. However, contrary to environmental disclosures, per capita GDP and country-level market capitalization have a favorable role in social scores, since health, hygiene, social security or

[77] Roy, A., Mukherjee, P. op. cit. p.1
[78] The cross-country study includes 1990 non-financial firms' results from 56 countries according to Bloomberg's ESG scores.
[79] Rallapalli, K. C., Vitell, S.J., Wiebe, F. A., & Barnes,J. H. (1994) *Consumer ethical beliefs and personality traits: An exploratory analysis*, Journal of Business Ethics, Vol. 13(7), 487–495

quality of education grow with economic development. Moreover, firms with larger size and higher market valuations represent significant positive relation with social disclosure scores.

In terms of corporate governance, as with the other ESG parameters, power distance has negative impacts and individualism and long-term orientation depict positive effects. Yet regarding uncertainty avoidance results reveal a negative association with corporate scores. In this case, market represents a crucial role and at the country-level market capitalization also increases scores. In relation to firm-level, Tobin's Q ratio influences results positively.

Overall, the four cultural dimensions used as variables in this study demonstrate consistent association with corporate ESG behavior. Evidences indicate that a country's high ranks in power distance usually mean poor corporate ESG disclosures. Moreover, high levels of individualism and long-term orientation represent positive scores in all parameters. Concerning the uncertainty avoidance dimension, the results are no longer so coincident. While the environmental and social parameter report positive results when countries experience higher levels of uncertainty avoidance, with corporate governance it proves to be just the opposite. Finally, the authors of the study add that country-level cultural factors influence to a large extent stakeholders' perception and activism for corporate responsibility.

Although the authors of the present study did not consider it essential to address the influence of the femininity vs. masculinity and the restraint and indulgence dimensions on ESG performance, these are still topics of the utmost relevance, and besides, previous studies have already dwell on these subjects.

Ringov and Zollo[80] have proven that masculinity influences negatively the quality of corporate behavior whereas gender egalitarianism (a proxy for lack of masculinity) has a positive and significant effect. The authors think that these results are mainly due to the fact that "highly masculine societies place low value on caring for others, on inclusion, cooperation, and solidarity"[81] whereby career advancement, material success and competition are the priorities.

[80] Ringov, D., Zollo, M. (2007) *The impact of national culture on corporate social performance*, in in Corporate Governance International Journal of Business in Society, Vol. 7 No. 4, p. 476-485
[81] Ibidem, p. 477

With respect to indulgence versus restraint, Sun[82] and other scholars verified individuals from indulgent societies are frequently more inclined to the immediate gratification of desires and needs, so companies in indulgent cultures are less likely to follow strict corporate social responsibility norms, presenting a negative relation with ESG performance.

As it can be seen, the referred studies' conclusions reinforce previous theories[83] which claim that cannot exist a universal best practice for corporate ESG behavior since it is a consequence of a society's culture, question that again contributes to the debate about the ambiguity of the ESG concept and respective evaluation method.

### 3.3. National institutions' influence on ESG

While some scholars advocate that companies' ESG performance is determined by cultural differences, others argue that cross-country variations cannot be explained by cultural and economic disparities but rather by national institutions[84]. New institutionalism determines how variations in countries' institutional constraints impact companies' internal frameworks.

Ortas, Álvarez and Gallego-Álvarez consider that corporate decisions, conduct and performance are strongly shaped by nations' institutional environments. To corroborate this, the referred researchers dedicated to the analysis of the national institutions' influence on corporate ESG performance, by using a multilevel model dataset of 4.751 companies operating in 52 countries.[85] Furthermore, since certain national institutions represent differential impacts on certain dimensions of companies' ESG performance, this research addresses the three variables: social, environmental and governance. The study at hand, examines the way national institutions shape companies' ESG performance resorting the varieties of institutional systems approach[86] which is an innovative extension of the

[82] Sun, J., Yoo, S., Park, J., Hayati, B. (2019) *Indulgence versus Restraint: The Moderating Role of Cultural Differences on the Relationship between Corporate Social Performance and Corporate Financial Performance*, in Journal of Global Marketing, Vol. 32:2, 83-92

[83] Ortas, E., Álvarez, I., Jaussaud, J., Garayar, A. (2015) *The impact of institutional and social context on corporate environmental, social and governance performance of companies committed to voluntary corporate social responsibility initiatives*, in Journal of Cleaner Production, 108, 673–684

[84] Chapple, W., Moon, J. (2005) *Corporate social responsibility (CSR) in Asia: A seven-country study of CSR web site reporting*, in Business & Society, 44(4), 415–441

[85] The authors manage the variability of companies' ESG performance into company, company within country and across country levels, with data provided by Reuters.

[86] Fainshmidt, S., William, Q. J., Aguilera, R. V., & Smith, A. (2018) *Varieties of*

institutional theory and gathers the wider institutional context provided by the state, corporate governance, human capital, social capital and financial market institutions.

**a) State**

State can intervein into economies directly when is actively engaged in economic production via state-owned companies, indirectly through capital provision, favoritism or participation in corporate governance or through the general stance it assumes towards national economic life.

Whitin this context, we can appoint several types of country state posture. First, we can find regulatory states, such as the US, which determine and apply the rules of business, specially the enforcement of property rights. Second, developmental states, for instance Taiwan and Brazil, are described by exercising significant control over the economy mostly by concentrating on long-term national interests and taking part in business sectors' development via industrial policies. Third, we can identify predatory states, which usually demonstrate feeble institutions and lack of market competition, such as Eastern Europe countries, generally controlled by elites who monopolize power with non-transparent decision-making processes. At last, welfare states, typical of Northern Europe, center their politics on the promotion and protection of social and economic welfare of citizens[87].

According to Hartmann and Uhlenbruck[88], "a strong state is perceived as having comprehensive policies and regulation on environmental preservation and thus firms located in such countries are better prepared to meet and even exceed regulatory prescriptions", hinting that regulatory and welfare systems may prompt enterprises to engage with ESG practices, since they will enforce compliance with existing social and environmental regulation and international treaties. The referred study concludes that enterprises in regulatory and welfare states end up achieving higher levels of ESG performance,

*institutional systems: A contextual taxonomy of understudied countries*, in Journal of World Business, 53(3), 307–322

[87] Ortas, E., Álvarez, I., Jaussaud, J., Garayar, A. op. cit. p.9

[88] Hartmann, J., Uhlenbruck, K. (2015) *National institutional antecedents to corporate environmental performance*, in Journal of World Business, Vol. 50, p. 732

demonstrating that effective social and environmental regulations positively influence firm's involvement.

### b) Corporate governance

The way companies' control and management is performed may be roughly categorized as: concentration of ownership, which concerns the interaction between owners, workers and management; family ownership, prevalent in most sectors in the economies of Latin America, the Middle East, North Africa and parts of Asia; and family intervention in management[89].

Since large shareholders tend to overpower firms' board reducing the diversity of directors and independence, high ownership concentration usually leads to weak ESG performance. As for family firms, due to a higher level of proximity and accountability, they traditionally invest harder on employee satisfaction, diversity, environment and product-related concerns. Yet they typically lower companies' performance in what concerns community issues.

### c) Human capital

A nation's cultural factor that also influences firms' ESG performance is human capital, which may be analyzed through the level of knowledge capital and coordination with labor.

The way organizations are involved with employees regarding productive activities is explained by the level of knowledge capital. Lack of knowledge capital generally lowers motivation to invest in special capabilities and employee fulfilment. So, organizations are more able to invest in firm-specific skills, such as health and safety, training and development, diversity and opportunity programs, which consequently boosts ESG performance, in the circumstances where knowledge capital is collectively accessible.

In addition, countries that promote a solid coordination with labor and respective organization have a better chance of achieving longer term investments and to establish priorities concerning social, environmental and governance issues. Contrarily, nations with fragmented labor markets present poor collective action and the management of human resources is strongly related to family elites and political decisions[90].

---

[89] Ortas, E., Álvarez, I., Jaussaud, J., Garayar, A. op. cit. p.13
[90] Ibidem p.11

Therefore, firms in states with high levels of knowledge, combined with strong labor organization are more likely to accomplish better ESG outcomes.

**d) Social capital**

A society's capacity to generate social capital is linked to enduring experience of social organization grounded in historical and cultural practices which may be screened over long periods.

Countries that reveal true commitment with economic equality, standardly exhibit higher levels of trust irrespective of the economic development degree. Moreover, widespread trust, meaning the extent to which society members trust other members and society broadly, allow us to assess countries' social capital.

Note that confidence has predisposition to be meagre in developmental and emerging markets specially due to corruption and ineffective state challenges which negatively influences ESG performance. So, we can deduce that consolidated trust ergo high levels of social capital contribute to enhance ESG scores[91].

**e) Financial markets**

Equity markets, credit markets, family and state are the usual forms companies obtain financial resources. The implementation of stakeholder relationships by enterprises depend largely on market institutions.

In certain jurisdictions, such as the US, equity and credit markets are companies' main financial source which reveals a high degree of shareholder dispersion. Yet in other countries, for instance China, since the state owns the factors of production or financial institutions, it behaves as a supplier of financial resources. Additionally, in underdeveloped financial markets, such as Arab countries, companies are likely to rely on domestic capital markets grounded on collected family wealth. It is worth noting that under the circumstances in which states or families assume the position of capital provider, the substitution of financial markets takes place, inhibiting their development[92].

---

[91] Ibidem p.12
[92] Ibidem p.10

Therefore, companies inserted in developed credit and equity markets are more susceptible to implement innovative management practices, since they are less constrained by economic actors, making them more receptive to include ESG factors into their operations. Besides, in such type of country culture costumers' opinions intensely affect companies' behavior. Consequently, firms are more encouraged to integrate sustainability factors into their business models.

Thus, as studies suggest, companies within countries with developed equity and/or credit markets achieve higher levels of ESG performance than those located in countries where the state is the main financing supplier. Moreover, family ownership hinders companies' performance in community issues, however improves firms' performance in aspects such as diversity, employees, and environmental factors.

#### 3.3.1. Conclusions

From the aforementioned, one can conclude that companies established in regulatory and welfare states with high levels of knowledge and social capital are more engaged to sustainability matters ergo obtain higher scores on ESG performance. Moreover, companies placed in nations with developed equity and/or credit markets achieve higher levels of ESG performance than those in countries where the state is the primary source of enterprises' financing. At last, family ownership reduces firms' performance in community issues but positively influences companies' performance regarding diversity, employees and environmental matters.

### 3.4. The specific problem of reconciling fiduciary law with ESG

Since fiduciary law is one of the main institutions hindering the acceptance and integration of ESG practices, it becomes crucial to discuss specifically how this framework may vary among jurisdictions. In fact, he confusion about the intersection of fiduciary principles and ESG practices arises notably due to the ambiguity of its definition and distinct conceptions rooted in the culture and law systems.

In 2014, the PRI UNEP FI and UN partners identified the misinterpretation of fiduciary duties as the primary obstacle to ESG incorporation. Consequently, The Fiduciary Duty in the 21st Century programme arose in an attempt to demystify this traditional concept[93].

Historically, the term "ESG investing" comes up alongside socially responsible investing (SRI) based on third-party effects rather than investment returns. Therefore, turns out to be an umbrella term which covers any investment strategy that enhances an enterprise's environmental or social impacts and governance structure, reason why it only makes it difficult to integrate for the more dogmatic investors who tend to view this strategy as a distraction from the pursuit of profit.

Even assuming that ESG factors may be applied by trustees, we must keep in mind that the selection of relevant factors depends on a high level of subjectivity, due to the lack of clarity regarding the ESG rubric. As previously mentioned, there is no uniform and unequivocal conduct for the use of ESG criteria and the question remains of which factors (E, S or G) to prioritize in case of conflict, leaving the investor adrift.

Once again, cultural differences get in the way. The growing concern regarding the integration of ESG factors into valuation models intensifies particularly in the US, with the 2008 Employee Retirement Income Security Act (ERISA) stating that fiduciaries should not make investment decisions that take into account "any factor outside the economic interest of the plan."[94]

In an attempt to provide further clarification, in the years of 2015, 2016 and 2018, innovative bulletins that address the legality of ESG investing by a pension trustee subject to federal law were issued. The first state which amended its trust code to specifically address ESG investing by a trustee was Delaware, situation that only increased the level of uncertainty since such amendment deviates from traditional trust fiduciary law. Moreover, in 2019, the President imposed the revision of the existing guidance "to ensure consistency with current

[93] PRI (2019) *FIDUCIARY DUTY IN THE 21 CENTURY*, Final Report: https://www.unpri.org/download?ac=9792

[94] Dechert LLP (2020*) ERISA's Social Goals? ESG Considerations Under ERISA*: https://www.dechert.com/knowledge/onpoint/2020/5/erisa-s-social-goals--esg-considerations-under-erisa.html

law and policies that promote long-term growth and maximize return on [pension] plan assets."[95]

After the Principles for Responsible Investment (PRI), along with an influential group of scholars and practitioners, have taken the position that fiduciary principles require a trustee to use ESG factors, investment fiduciaries witnessed increasing and widespread pressure to include ESG strategies. In line with this trend, regulators in the European Union and United Kingdom have looked over the question of ESG investing by trustees, however drawing conclusions contrary to those of the US.

Specifically, The Pensions Regulator's Guide to Investment Governance 14 (2019) concluded that that the law governing pensions in the U.K. allows "trustees [to] take account of non-financial factors."[96] In 2019, the European Insurance and Occupational Pensions Authority (EIOPA) issued its opinions on Governance and Risk Management of Pension Funds recommending that national regulatory authorities within the EU use their stewardship roles to "encourage pension funds to consider the impact of their long-term investment decisions and activities on ESG factors" and "the impact of sustainability risks on pension fund liabilities".[97]

All these contradictory positions only intensified the discussion whether taking ESG criteria into account would or not undermine the fiduciary duty theory, making its clarification urgent.

### 3.4.1. Fiduciary Law

Fiduciary law dates back religious Jewish, Christian, and Islamic laws, having been recognized in Roman Law and Common Law[98]. Although fiduciary law may appear in international law, family law, laws of agency, employment, pensions, medical services, surrogate decision-making, remedies, charities, and not for profit organizations, fiduciary

[95] Presidential Documents (2019) Executive Order no. 13868, 5(b), Vol, 84 Federal Register: https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf

[96] The Pensions Regulator (2019) *A guide to Investment governance*, p. 14: https://perma.cc/Z4NQ-2B5A

[97] EIOPA (2019) *EIOPA issues opinions on governance and risk management of pension funds*: https://perma.cc/M3YG-TFT3

[98] Frankel, T. (2018) *The Rise of Fiduciary Law*, in Harvard Law School Forum on Corporate Governance

duties are often related to various business relationships, such as the ones between trustees and beneficiaries, executors and legatees, or board members and shareholders.

Thus a fiduciary is a person or an organization that acts on behalf of someone, called the principal or the beneficiary. The fiduciary law dictates that the fiduciary acts in the best and sole interest of the beneficiary completely putting aside its own. Noteworthy that in case of breach, the fiduciary is accountable for the ill-gotten profit with the beneficiaries being usually entitled to damages.

Fiduciaries have discretion as how they invest the funds they control, although the scope of that discretion is variable. It can be constrained for example due to tailored mutual funds or even state control. Regarding the discretion left to the investment decision maker, certain obligations, such as fiduciary duties, emerge as to ensure that those who administrate other people's money do not serve their own interests, which play a crucial role namely in positions of vulnerability.

As expected, the way fiduciary duties are framed vary between countries and common law and civil law systems, with some jurisdictions applying a hybrid model or even adding influences of costumery and religious law. It is clear that the concept of fiduciary duty is mostly recognized in common-law systems based on custom and usage, ergo uncodified. Already in the case of continental Europe, the civil-law system reigns and thus there is a reliance on comprehensive, codified set of laws[99].

Concerning common law jurisdictions fiduciary duties are the key framework ruling the investment decision makers discretion, aside from any particular constraints enforced contractually or by statute or regulation. Generally, these duties have their origin in courts' decisions and some have since been articulated by statute. In such jurisdictions courts interpret the duties in the light of specific cases, and if new facts or circumstances emerge,

[99] Stewart, F., Yermo, J. (2008) *Pension Fund Governance: Challenges and Potential Solutions*, in OECD Working Papers on Insurance and Private Pensions No. 18.

duties are open to re-interpretation. Moreover, there is the possibility for governments to pass new statutes in reaction to changed circumstances or specific court decisions[100].

As for the civil law jurisdictions, statutory provisions or respective interpretation guidelines regulate any obligations such as fiduciary duties and the conduct of investment decision makers. Worth noting that statutory provisions present different nuances in each country but the duties to act conscientiously in the interests of beneficiaries, to seek profitability, the recognition of the portfolio approach to modern investment and other duties related to liquidity and limits on the selection of assets are transversal to all civil law jurisdictions[101]. Countries that follow this legal system tend to resort to contractual arrangements with a financial institution or management company and emphasize specific regulatory guidance than principles.

Notwithstanding the disparities, in both systems the fundamental duties owed to beneficiaries are the duty to act prudently and the duty to act loyally in accordance with the purpose of the trust. Even though the traditional fiduciary duties are the duty of loyalty and prudence, in corporate law, we may also find the duties of care, good faith, confidentiality and disclosure.

As the Delaware Supreme Court explained in *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939), the duty of loyalty implies that corporate fiduciaries must act without personal economic conflict, since they are not allowed to benefit from their position of trust to further their private interest[102].

A trustee must administer a trust with a degree of care, skill, and caution just like a prudent trustee would exercise[103], according to the duty of prudence.

The duty of care requires directors to inform themselves before making a business decision, of all material information reasonably available to them[104], the latter being dependent on the quality of the information, the advice available, and weather they had the sufficient

[100] PRI (2019) *FIDUCIARY DUTY*… op cit. p.11
[101] Gelter, M., Helleringer, G. (2018) *Fiduciary Principles in European Civil Law Systems*, in ECGI Working Paper Series in Law, Working Paper N° 392/2018, p.3-4
[102] Legal Information Institute, *fiduciary duty*, in Cornell Law School: https://www.law.cornell.edu/wex/fiduciary_duty
[103] *Amgen Inc. v. Harris*, 577 U.S. __ (2016)
[104] *Smith v. Van Gorkem*, 488 A.2d 858 (1985)

opportunity to obtain knowledge regarding the problem prior action[105]. Additionally, directors must analyse the information through a critical conduct[106].

Moreover, fiduciaries must pursue their principal's interests and fulfil their duties without violating the law[107], obeying the good faith duty.

Under the duty of confidentiality, fiduciaries must keep and protect information and not disclose it for their own benefit[108]. Whereas the duty of disclosure determines that a fiduciary must act with complete candour, revealing all of the facts and circumstances[109].

It should be retained that fiduciary duty is not a static concept[110], being strongly conditioned by knowledge development, market practices and conventions, regulations and policies and social norms. It makes perfect sense that this concept adapts steadily to the investment landscape and since the argument that environmental, social and governance issues are in a certain way important drivers of firm value is being increasingly widely accepted, it is urgent that a more adequate vision of the fiduciary duties be established.

### 3.4.2. The American perspective

#### 3.4.2.1. The strictness of the "exclusive purpose"

In the US, fiduciary investment managers must act in the sole interest of the beneficiaries by developing a diversified portfolio with risk and return goals reasonably suited to the purpose of the trust.

ERISA[111] defines the sole interest rule by stating that a pension trustee is required to act "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of "providing benefits".

---

[105] *Moran v. Household Intern., Inc.,* 490 A.2d 1059 (1985).
[106] *Smith v. Van Gorkem*, 488 A.2d 858 (1985).
[107] *The Walt Disney Co. Derivative Litig*., 906 A.2d 27 (Del. 2006).
[108] *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).
[109] *Amgen Inc. v. Harris*, 577 U.S. (2016).
[110] PRI (2019) *FIDUCIARY DUTY…* op cit. p.12
[111] Employee Retirement Income Security Act of 1974, Public Law 93–406, As Amended Through P.L. 117–58, Enacted November 15, 2021: https://www.govinfo.gov/content/pkg/COMPS-896/pdf/COMPS-896.pdf

Thus, the “sole interest” or “exclusive benefit” rule implies that any third party interests are completely ignored, preventing fiduciaries from being influenced by external motives other than the fulfilment of the trust’s intent. Such rule is prohibitory rather than regulatory, dictating that in case of a fiduciary acts with mixed rationale, there is an undeniable breach of the duty of loyalty[112].

A beneficiary only needs to prove the trustee’s mixed motives to prove a breach. Even though a fiduciary may not be liable for make-whole compensatory damages if a beneficiary cannot prove a loss with reasonable certainty, the fiduciary’s breach of duty of loyalty entitles the beneficiary to alternative relief such as trustee removal, injunction, disgorgement of profits, unwinding the transaction by way of equitable lien, constructive trust, or otherwise, or even punitive damages.

Moreover, the Supreme Court has already clarified the relevant purpose regards “financial benefits” and that a pension trustee, even in absence of direct self-dealing, is breaching the duty of loyalty whenever the trustee acts other than to benefit the beneficiaries financially[113].

Actually, American pension law is distinguished by the exclusive and mandatory focus under ERISA on pecuniary goals ending up being much more inflexible than other common law jurisdictions, such as the United Kingdom. This framework reveals a paternalistic public policy which conceives that “many households, if left to their own devices, will make mistakes in planning and saving for retirement.”[114] With this in mind, the worker is motivated to save for retirement due to substantial tax benefits, whereby the investment of such thrifts is subject to fiduciary rules that make financial returns the only goal. Even though there are several types of contribution plans nowadays, in this way, the US rule also prevents costly and unwieldy aggregation of principal tastes in multiparticipant plans.

Despite the above, it should be mentioned that in certain situations American law also perceives the duty of loyalty by the comprehension of the “best interest” concept, typically present in corporate law and applicable under trust law when the sole interest rule is waived.

---

[112] Schanzenbach, M., Sitkoff, R. (2020) *Reconciling Fiduciary Duty*…op. cit. p. 401
[113] Ibidem p. 406
[114] Bubb, R. (2015) *A Behavioral Contract Theory Perspective on Retirement Savings*, in Connecticut Law Review, NYU Law and Economics Research Paper No. 15-06, p.48: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626069

This rule is generally executed under the "entire fairness test"[115] and indicates that a fiduciary is not categorically prohibited from acting with a conflict of interest, but rather must act in the best interest of the beneficiary notwithstanding the conflict[116].

Having said this, whilst the sole interest rule does not permit any defence to an unauthorized conflict, the best interest rule allows a fiduciary to sustain a conflicted action as entirely fair, which makes the second a regulatory rule. The rules in question may be appropriate depending on their context, whereby the sole interest rule is relevant when a conflicted transaction is unlikely to be beneficial and the principal's monitoring is weak, and the best interest rule is key when the conflicted action will be in the best interests of the principal with sufficient frequency that the principal is better off with a regulatory than with a prohibitory rule[117].

Therefore, instead of suppressing all transactions that could mean that the fiduciary has an interest, the best interest rule allows them as long as it suffers a judicial review under a fairness test.

#### 3.4.2.2. Is there a chance in US?

After understanding the concept of fiduciary duties, why does it seem to us, especially from an American point of view, that the use of ESG criteria in fiduciary investing deviates from the very rooted nature of this normative?

So long as the fundamental idea of fiduciary duties refers to selflessly defend the interests of the principal, appears inconsistent and even going too far in having a concern for environmental, social and governance factors. However, persists the idea that ESG investing could also improve risk-adjusted returns, thereby providing a direct benefit to investors, thus complying with the sole interest rule. It can be concluded that the difficulty that exists in aligning ESG investing with the common investment practices probably comes from the idea that ESG criteria is confined to collateral advantages.

[115] The "entire fairness" test is observed in corporate law as a requirement for fair price and fair dealing.
[116] Schanzenbach, M., Sitkoff, R. (2020) *Reconciling Fiduciary Duty*…op. cit. p. 422
[117] Ibidem p. 402

Let us recover the distinction made earlier between collateral benefits ESG and risk-return ESG and comprehend how these concepts relate to the American fiduciary law's perspective. As we will see, generally, collateral benefits ESG violates the fiduciary duty of loyalty whilst risk-return ESG might be acceptable under the duties of loyalty and prudence[118].

On the one hand, it is clear the consideration of interests other than the financial ones of the beneficiary may be defined as collateral benefits ESG and that the "sole interest rule" forbids collateral benefits. Therefore, even if the act is undertaken in good faith, when the trustee aims both to benefit the beneficiary financially and to obtain collateral benefit, he or she is violating the sole interest rule to the extent that the trustee is acting for a purpose other than the one of the trust.

On the other hand, the duty of loyalty does not seem to conflict with the risk-return ESG perspective, insofar as it consists of an active investing strategy fostered by strive for improved risk-adjusted returns. Accordingly, a risk-return ESG investing strategy complies with the sole interest rule. In this case, the duty under discussion is no longer the duty of loyalty and becomes a matter of prudence. Thus, what is crucial is that the fiduciary observes the prudent investor rule[119].

The prudent investor rule demands a fiduciary to manage a trust portfolio with "an overall investment strategy having risk and return objectives reasonably suited to the trust" and to "diversify the investments of the trust", under an "ongoing duty to monitor investments and to make portfolio adjustments if and as appropriate."[120]

So, according to the prudent investor rule, no type of investment is theoretically mandatory, acceptable or impermissible, weather active or passive, since it neither favours or disfavours any specific kind of investment strategy. In fact, both risk-return ESG investing or anti-ESG investment strategies might be valid or not, as per the circumstances.

[118] Schanzenbach, M., Sitkoff, R. (2020) *ESG Investing: Theory, Evidence…* op. cit. p. 11
[119] Schanzenbach, M., Sitkoff, R. (2017) *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, in Journal of Empirical Legal Studies, Vol. 14, Issue 1, p. 129-168
[120] According to the Restatement (Third) of Trusts (1992) and the Uniform Prudent Investor Act (1994).

Bearing this in mind, a risk-return ESG strategy has to be evaluated on the exact same conditions as any other investment strategies, under the prudent investor rule[121].

We can conclude from this that a risk-return ESG program could well comply with the prudent investor rule, but not necessarily so. The fiduciary must underlie the investment strategy on a reasonable analysis ensuring that the risk-return benefits offset associated costs and that the risk and return goals of the strategy are adjusted to the beneficiary's interests and development of the trust.

As mentioned, since the duty of prudence involves ongoing monitoring, after implementing a prudent investment strategy, weather based on ESG considerations or not, a fiduciary must perpetuate the monitoring process by analysing the balance between costs and returns. If needed, the fiduciary has to adjust the investment program in light of actual performance and changing circumstances[122].

#### 3.4.2.3. US stuck in the dogmas of the past

As we have witnessed, the US has been very reluctant to conceive the importance of environmental and social issues in the business context and has lagged far behind in terms of associated legislative initiatives.

In addition to a mentality that historically tends to protect business above all, the discussion about environmental issues and the role of the capital markets in assisting societal end economic change is rigorously polarised[123]. Since legislative change requires consensus, one of the main obstacles to the integration of the ESG factors into fiduciaries' investment decisions is the usual disagreement among its political bodies (House, Senate and President) and respective ideology among parties.

Despite the apparent inertia on the part of sovereign organs, the public debate has been showing a paradigmatic change regarding the role that citizens expect enterprises and financial entities to play in society. In response, in 2019 a lobbying organisation formed by CEOs of the largest US companies, the Business Roundtable, enacted a statement signed by

---

[121] Schanzenbach, M., Sitkoff, R. (2020) *ESG Investing: Theory, Evidence*… op. cit. p. 12
[122] Schanzenbach, M., Sitkoff, R. (2020) *Reconciling Fiduciary Duty*…op. cit. p. 428
[123] PRI (2019) *FIDUCIARY DUTY*… op cit. p. 50

181 companies expressing a commitment to take into account the interests of stakeholders, including employees and communities, beyond shareholders when making business decisions. This statement demonstrates the will to boost proactive collaboration with business interests to pressure political changes in fiduciary duty and ESG integration.[124]

The Securities and Exchange Commission (SEC) and the Department of Labor (DOL) play a fundamental role in interpretation, implementation and enforcement of laws within their jurisdiction, as US regulators.

Among various competences, the DOL supervises fiduciaries for private sector retirement plans (ERISA fiduciaries) and enforces the law that regulate their obligations in advising clients on retirement. Certain policy pronouncements concerning the obligations of ERISA fiduciaries have aroused confusion among those in charge of overseeing private sector retirement plans. In 2018, a Field Assistance Bulletin[125] reaffirmed DOL's longstanding position that obliges fiduciaries to consider ESG factors in their investment strategies insofar as "ESG factors, in fact, involve business risks or opportunities that are properly treated as economic considerations themselves". However, simultaneously the DOL declared that fiduciaries "must avoid to readily treating ESG issues as being economically relevant to any particular investment choice".

Fiduciaries' capacity to integrate ESG factors with actual effectiveness, relies on upon access consistent comparable ESG data. As the responsible for executing corporate disclosure statutory requirements, for a long period, SEC disregarded appeals from investors to implement comprehensive ESG disclosure mandate applicable to public companies.

Slowing down the integration process even further, in 2020, DOL published "Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" rules hindering the access of retirement plan investors to ESG strategies by preventing ERISA retirement plan accounts from investing based on "non-pecuniary" factors in ESG strategies if doing so would sacrifice returns or increase risks for participants

[124] Business Roundtable (2019) *One Year Later: Purpose of a Corporation*: https://purpose.businessroundtable.org/

[125] US DOL (2018) Field Assistance Bulletin No. 2018-01 - Superseded by 85 FR 72846 and 85 FR 81658

and prohibiting retirement plan fiduciaries from voting on shareholder resolutions with no direct economic impact on a plan[126].

In the aftermath, due to widespread criticism, the rules turned out not to be enforced[127] and DOL has committed to conduct relevant stakeholder outreach "to determine how to craft rules that better recognize the important role that [ESG] integration can play in the evaluation and management of plan investments."[128]

Despite the slow pace of change, in march 2022, SEC proposed the inclusion of new requirements which compel "registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements."[129] Regarding this recent proposal, SEC Chair Gary Gensler avowed the "core bargain from the 1930s is that investors get to decide which risks to take, as long as public companies provide full and fair disclosure and are truthful in those disclosures."

Months later, SEC announced an amendments' proposal to rules and reporting forms to foster consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of ESG factors. The suggested amendments intend to categorize certain types of ESG strategies broadly, obliging funds and advisers to present specific disclosures in fund prospectuses, annual reports, and adviser brochures based on the ESG strategies they pursue.

---

[126] Alcock, M., Albano, M. (2021) *New DOL Proposal on ESG Investing and Fiduciary Exercise of Shareholder Rights*, in Harvard Law School Forum on Corporate Governance

[127] It should be noted that this turnaround is mainly due to the change from the Trump administration to Biden's. In a press release related to the announcement explaining why the DOL was not enforcing these previously published rules, Principal Deputy Assistant Secretary for the Employee Benefits Security Administration Ali Khawar stated that "these rules have created a perception that fiduciaries are at risk if they include any ESG factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights."

[128] US DOL (2021) *Us Department Of Labor Releases Statement On Enforcement Of Its Final Rules On Esg Investments, Proxy Voting By Employee Benefit Plans*, News Release: https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310

[129] SEC (2022) *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, Press Release: https://www.sec.gov/news/press-release/2022-46

### 3.4.3. The EU vision: at the forefront of integration

Even though priority must typically be given to the highest possible return on investment, "no legal framework has been identified in the EU or any of its Member States that limits institutional investors from taking relevant environmental, social and governance (ESG) issues into account in their investment decisions."[130] In fact, the majority of the leading institutional investors in the EU hold sustainable and responsible investment policies and are signatories of the PRI Initiative which compels them to incorporate ESG factors.

The effort to integrate ESG criteria was well demonstrated when the European Union was recognised as the centre for financial regulation by the 2015 Fiduciary Duty in the 21st Century report[131]. Despite the fiduciary duty term is not incorporated in the EU law, the concepts of prudence and loyalty are fundamental principles of the EU finance policy[132].

The integration of ESG factors by regulated pension funds, was first addressed by the Institutions for Occupational Retirement Provision (IORP) Directive, in 2016. Additionally, police makers reached agreement on a revised Shareholder Rights Directive which aimed to strengthen stewardship and address shot-termism and principal-agent issued in the investment chain.

After PRI have drawn attention to the need for a clear strategy and vision, the EU established a High-Level Expert Group on Sustainable Finance that recommended the clarification of the investor duties through an "omnibus" directive. In response, the EU established sustainability as a priority of the Capital Markets Union programme through an Action Plan on Financing Sustainable Growth, implemented in 2018. The Plan's action line unfolds in three main reform areas which encompass the reorientation of capital flows towards sustainable investment in order to achieve sustainable and inclusive growth, the management of financial risks stemming from climate change, environmental degradation, and social issues and the fostering of transparency and long-termism in financial and economic activity.

---

[130] Stewart, F., Yermo, J. op. Cit. p. 8

[131] PRI (2019) *FIDUCIARY DUTY…* op cit. p. 34

[132] European Commission, DG Environment (2014) *Resource Efficiency and Fiduciary Duties of Investors*, Final Report ENV.F.1/ETU/2014/0002, p. 5: https://ec.europa.eu/environment/enveco/resource_efficiency/pdf/FiduciaryDuties.pdf

Without further ado, as a result of the above mentioned plan, in 2019 the first legislative proposal emerged and two years later, the Sustainable Finance Disclosure Regulation (SFDR)[133] materialized. The Regulation on sustainability-related disclosures for the financial services sector establishes transparency rules on the integration of sustainability risks and the observation of potentially adverse sustainability impacts (PAIs) in investors' and financial advisors' processes, keeping in mind the availability of sustainability-related information in financial products.

The SFDR crystalizes that EU asset managers, whether or not ESG-focused, must integrate ESG factors and PAIs into their investment decisions as part of their fiduciary duties. It is worth noting that while the SFDR does not apply to US asset managers not providing products in the EU, it has reached US companies as EU asset managers which invested in US companies must obtain ESG data from them to comply with their fiduciary and disclosure obligations under SFDR.

"Sustainable investments" which have environmental or social goals are subject to the strict requirements of Article 2(17) of the SFDR and pre-contractual disclosure requirements of Article 9 of the SFDR, while products that promote environmental and/or social characteristics, but do not consist of "sustainable investments," are subject to the pre-contractual disclosure requirements of Article 8 of the SFDR.

The regulation at hand represents an enormous significance regarding the encouragement of investors to understand and eradicate their investment strategy potential adverse impacts in environment and society and inhibit exaggerated or unfounded claims of "greenness."

Demonstrating its willingness to effectiveness, the European Commission, with the orientation of the European Supervisory Authorities (ESAs), has been leaning over amendments to delegated acts under the UCITS Directive, Solvency II, AIFM Directive, MiFID II and the Insurance Distribution Directive, to enlighten that sustainability must be

---

[133] REGULATION (EU) 2019/2088 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 on sustainability-related disclosures in the financial services sector (Text with EEA relevance)

taken into account in all interpretations of the prudent person principle, governance and risk management.

That said, it is more than clear that the European rationale not only poses no obstacle to making fiduciary law and ESG compatible, but even considers that an investor must integrate such factors into his portfolio in order to fulfil his or her duties.

# 4. ESG Market foibles and ambiguities

## 4.1. How something so positive can become such a chaos

The growing awareness of environmental and social problems has triggered an unrestrained demand for sustainable products and businesses that has reached the various market participants. Consumers, influenced by each other, and in order to keep up with the trend, began to demand more and more that companies embrace social responsibility policies. As a result, companies have been forced to integrate these practices and demonstrate that they are doing so, at the risk of losing a major market opportunity and being disregarded by consumers and investors. In this sense it became necessary for the stakeholders to understand which companies were the most outstanding in their sustainable conduct as well as those that were implementing the most efforts to positively impact the planet. In order to create a benchmark for stakeholders, several rating agencies soon set out to create methods for evaluating corporate ESG factors. To analyze companies' performance and assign a given score, rating providers had to rely on public data sources, surveys or even the disclosure reports supplied by the companies themselves. As one would expect, due to the lack of an unequivocal definition of ESG and regulation regarding companies' disclosures, often the data made available was ambiguous, subjective and dubious. This unbridled phenomenon turned out to be a real vicious circle causing several problems at various levels, starting with the confusion installed among investors and consumers, and ending with the companies which truly wished to contribute to sustainable development, to found themselves in a market that gave them mixed signals, a lot of scrutiny, and little guidance. Out of all this confusion scandalous situations emerged such as the contradictory results attributed by different agencies to the same companies or the exploitation by certain enterprises that, under a “green disguise”, try to deceive the public and gain advantage over their competitors.

### 4.2. ESG Ratings universe

Investors represent a driving force insofar as companies feel pressured to work on their corporate behavior in such a way that it meets ESG goals, otherwise they are in danger of being excluded by investors which have as priority the improvement of their sustainability risk profile. Moreover, investors may organize their portfolios in a way that their assets are realigned so as to pursue higher ESG scores and to ditch those with lower scores. To make this assessment, investors need to consult quantitative and qualitative information about companies' sustainability conduct[134]. So where do investors get this essential data? Behold, investors, asset managers and financial institutions rely more and more on ratings and reports released by ESG rating agencies.

ESG ratings "measure and evaluate companies' long-term exposure to ESG risks, and the robustness of their strategies for managing those risks compared to their industry peers"[135], serving as a guideline for investors' decision-making regarding capital allocation and risk management.

ESG ratings appeared in the 1980s in response to an investors' growing need for a firms' screening service that did not focus solely on financial characteristics but also on social, environmental and governance performance. The first rating agency to be established was Vigeo-Eiris, in 1983, in France and five years later the US welcomed Kinder, Lydenberg & Domini (KLD).

The market for ESG ratings has expanded quickly, and if in the beginning it had a high specialized investor clientele, eventually became mainstream. Sustainable investing was originally carried by institutional investors yet retail investors started to display increasing interest, which has resulted in substantial inflows for mutual funds that seek to take ESG criteria into account in their investment processes. The key role PRI played is unquestionable by compelling numerous financial institutions to commit with ESG integration. Naturally, ESG ratings became a crucial basis for the decision-making process of sustainable investing,

[134] Eltobgy, M., Brown, T. and Picard, N. (2021) *Here's Why Comparable ESG Reporting Is Crucial for Investors*, in World Economic Forum
[135] Sipiczki, A. (2022) *A Critical Look at The ESG Market*, in CEPS S Policy Insights No 2022-15, p.2

exhibiting great power of influence with far-reaching effects on asset prices and corporate policies.

This rising need for ESG rating information has led to a somewhat uncontrolled growth entailing the acquisition of ESG data vendors by established financial data providers, such as MSCI which acquired KLD, Morningstar bought Sustainalytics, Moody's took up Vigeo-Eiris and S&P Global acquired RobecoSAM. The magnitude of ESG standards, metrics, third-party data providers, ratings, rankings and indexes has accelerated even more, with currently more than 600 ESG ratings and rankings accessible across the globe[136]. As one would expect, along with unbridled growth, complications have emerged, inter alia, lack of clarity, transparency and communication, as well as a widespread concern over the management of conflicts of interest.

Let us take a look at the recent polemic involving Tesla Motors, the world's leading manufacturer of electric vehicles. While MSCI' ESG index displayed near-perfect score, simultaneously, FTSE rated Tesla's environmental performance at "zero"[137]. As one might expect such an event caused a great deal of fuss since the electric car firm ranked behind various oil companies confusing the majority of consumers and investors. In fact, the truth is Tesla has been fostering transition to a low-carbon economy by pushing the entire global auto industry to focus on electric vehicle technology. Moreover the company is at the forefront of solar-panel industry in the US. Nevertheless, concerning the environmental department, Tesla lack of transparency reporting on carbon emissions, water use, or waste management practices has been questionable[138]. To make things worse, it is known Tesla presents poor record on labor issues and human capital having recently been sued by the California Department of Fair Employment and Housing after claims from hundreds of employees alleging discrimination, including the use of racial slurs by co-workers[139].

[136] SustAinability (2020) *Rate the raters 2020: Investor Survey and Interview Results*: https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/sustainability-ratetheraters2020-report.pdf
[137] Mormann, F., Mormann, M. (2022) *It's Time to Give Companies Standalone Climate Ratings*, in Harvard Business Review
[138] Bansal, T. (2021) *How Green Is Tesla, Really?*, in Forbes: https://www.forbes.com/sites/timabansal/2021/05/13/how-green-is-tesla-really/?sh=1e458321576e
[139] Norton, L. (2022) *This is Why Tesla's ESG Rating Isn't Great*, in Morningstar

Therefore, what we can conclude from this is that distinct ESG rating providers account different stances and perspectives when analyzing companies' performance.

Meanwhile, in a report on Environmental, Social and Governance Ratings and Data Products Providers[140], the International Organization of Securities Commissions (IOSCO) has warned for the "wide divergence within the ESG ratings and data products industry", adding that there is "an uneven coverage of products offered, with certain industries or geographical areas benefitting from more coverage than others"[141] which becomes a major barrier to investors who strive to follow certain investment strategies.

In order to identify the causes of ESG ratings' divergence, the MIT Sloan Sustainability Initiative launched the Aggregate Confusion Project[142]. The research team gathered data from six different providers[143] and found that the correlations between the ratings are on average 0.54, and range from 0.38 to 0.71 which means the data that decision-makers receive from rating agencies is relatively noisy[144]. In the first place, since in the process of identification of out-performers and laggards investors encounter a challenge, ESG performance is less probable to be reflected in corporate stock and bond prices. Of course that investors' tastes might affect asset prices but only under the circumstance in which a large enough market fraction holds and deploys a uniform non-financial preference. Thus, even in the case where a considerable fraction of investors prefers ESG performance, ratings' discrepancy scatters the effect of such preferences on asset prices. Besides, ESG ratings' divergence undermines firms' commitment to work on their ESG performance, since they receive conflicting hints from rating providers and go astray trying to figure which practices will be appreciated by the market. In addition, empirical studies may be jeopardized due to the fact that resorting to a rater in derogation of another, might completely twist the conclusions of the research.

[140] International Organization of Securities Commissions (2021), *Environmental, Social and Governance Ratings and Data Products Providers*, Final Report: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD690.pdf

[141] Ibidem p. 1

[142] MIT SLOAN SUSTAINABILITY INITIATIVE, *The Aggregate Confusion Project*: https://mitsloan.mit.edu/sustainability-initiative/aggregate-confusion-project

[143] KLD (MSCI Stats), Sustainalytics, Vigeo-Eiris (Moody's), RobecoSAM (S&P Global), Asset4 (Refinitiv) and MSCI

[144] Berg, F., Koelbel, F., Rigobon, R. (2020) *Aggregate Confusion: The Divergence of ESG Ratings*, in Forthcoming Review of Finance

Overall, the ambiguity around ESG ratings constitutes an obstacle for decision-makers who try to engage with more sustainable practices.

### 4.2.1. Why ESG ratings diverge?

#### 4.2.1.1. Discrepancy in aggregation

##### a) Scope, measurement and weights

In the absence of a universal practice that evaluates sustainable performance, the reasons behind the lack of coherence among ESG rating results remain. In their study, Berg, Koelbel and Rigobon[145] explain this divergence phenomenon stems from "aggregate confusion".

In order to understand the existence of ambiguous outcomes we must first understand how ratings are built. The researchers concerned, indicate ratings are composed by scope which exhibits all the attributes that together form the overall concept of ESG performance, indicators that produce numerical measures of the attributes and an aggregation rule gathering the indicators into a single rating[146]. That said, the discrepancy can arise from scope, measurement or weights divergence.

To be precise, scope divergence regards to the circumstance where ratings are grounded on distinct sets of attributes. For example, attributes such as energy consumption, human rights and data protection and privacy may be incorporated in a certain rating's scope. While one rating provider may include energy consumption, another might not, which generates differences between the two ratings and we are no longer facing an equal evaluation. In relation to measurement divergence, this happens when data vendors measure the same attribute invoking distinct indicators. For instance, a company's human rights practices could be assessed on the grounds of absence of child labor, or by the number of human rights related court cases against the company. Both comprehend aspects of the attribute human rights practices, however they probably will result in different assessments. It should be noted that indicators may address policies, such as the existence of code of conduct or outcomes, for example the frequency of incidents. Moreover, information can come from a variety of sources: company reports, public data sources, surveys, interviews made to trade unions and

[145] Berg, F., Koelbel, F., Rigobon, R. op. cit. p. 2-5
[146] Mayor, T. (2019) *Why ESG ratings vary so widely (and what you can do about it)*, in MIT SLOAN SCHOOL OF MANAGEMENT

NGOs or even media reports[147]. It is noteworthy that,  comparing to financial reports, ESG data displayed by companies is unstructured and unstandardized. The majority of the information used for constructing ESG rankings is sourced from companies' voluntary and mostly unaudited disclosures, raising serious doubts regarding its reliability. Weights divergence arises when rating agencies hold distinct perspectives on the relative importance of attributes. For instance, data protection and privacy may enter the final rating with greater weight than the energy consumption indicator. In addition, the inputs of scope, measurement and weights divergence are interrelated which makes it even more complicated to assess the divergence of aggregate ratings.

The aforementioned researchers developed a framework which facilitates a structured comparison of distinct rating methodologies in order to understand why there are so many divergences between the scores displayed by different rating agencies, at what level they are triggered and which components have the most influence so that the final result is so dissimilar.

In fact, they come to the conclusion that the most responsible component for the ESG ratings' divergence is measurement, ergo distinct raters evaluate performance of the same company in the same category differently. This means that "even if two raters were to agree on a set of attributes, different approaches to measurement would still lead to diverging ratings."[148] The categories where measurement disagreement occurs with more frequency are human rights, product safety and climate risk management.[149] Scope divergence comes right after as the second reason for ratings incoherence, implying that rating providers take certain categories into account that others disregard. Weights divergence proves to be the less significant since "disagreement about the relative weights of categories that are commonly considered"[150].

Moreover, the authors of the study provide evidences which ascertain that ESG rating divergence besides having its origin in diversity of opinions it also happens due to

[147] Kotsantonis, S., Serafeim, G. (2019) *Four things no one will tell you about ESG data*, in Journal of Applied Corporate Finance, Vol. 31(2), p. 50–58
[148] Berg, F., Koelbel, F., Rigobon, R. op. cit. p. 4
[149] Ibidem p.30
[150] Idem

disagreement about facts. The divergence at the scope and weights' levels constitutes a discrepancy about the significant categories of ESG performance and their importance relative to each other. It should be clarified that is more than valid that distinct raters consider diverse views on such questions, actually, it is even desirable, since ESG ratings' users also hold heterogeneous preferences regarding scope and weights. In practice, different investors will have different perspectives concerning which categories they consider material and suitable to drive the company's business success.

Notwithstanding the foregoing, measurement divergence represents a problem assuming that ESG ratings should ultimately be grounded on facts that can be proved. These variations between raters only exist because they resort to different indicators and measurement approaches. Until ESG disclosure standards ceases to be inconsistent, or data and measurement approaches become more transparent, or that there is effective regulation with clear guidelines directed to the rating agencies, the likelihood of measurement divergence remaining a challenge to ESG ratings' coherence is high.

#### b) Rater effect

Following the problem of the measurement assessment, the Aggregate Confusion Project team identified one more variable called the "Rater Effect". This phenomenon, also known as 'halo effect', describes some sort of bias which arises from the fact that a performance perception in a certain category affects the way other categories are visualized.

Noteworthy that the evaluation process of companies' performance inevitably entails a certain degree of judgment and subjectivity often caused by cultural and social context in which the rating agencies are inserted. Firm performance categories such as impact on local communities, labor practices and pollution require rating providers to resort to a certain degree of judgment, and what is considered best practice in one socioeconomic framework, may not have the best reception in another. The rater effect explains that when a company is positively evaluated in a specific indicator the likelihood of getting a favorable scoring increases considerably, which ultimately contaminates an effective and trustworthy analysis of each category. Although distinct ESG categories may be interrelated, for instance health

and pollution, a reliable analysis implies that a separate and independent evaluation of each category is carried out[151].

MIT researchers consider that a possible justification for rater effect might be the fact that ESG rating agencies allocate analysts by firm instead of distributing them by category, which gives them a general idea of the company and then influences their analysis in the particular. Therefore, measurement divergence not only arises from random measurement error, but also happens because of rater specific bias.

#### 4.2.1.2. Social origins

According to Eccles and Stroehle[152], the lack of clarity about rating agencies' measurement and comparability is far from being just a matter of methodology since "rating companies are part of an overall social context to which companies can respond in different ways."[153] This means that in addition to the challenges of definition, aggregation and measurement, discrepancies between ESG ratings firstly arise from data providers' social origins. So what is even further behind scope, measurement and weights?

The researchers highlight the dimensions that have the most impact on ESG ratings as the rating agencies' conceptualization of sustainability, their definition of materiality and their specialization. The first dimension refers to the way rating providers perceive and contextualize the ESG purpose as an instrument in the capital market, which can be demonstrated by the selection of particular indicators or the preference of some categories over others. Data vendors' conceptualization instinctively entails an expression of ethical and moral worldviews. The definition of materiality explains how providers prioritize ESG issues, by recognizing what kind of information is more meaningful to investors. Hence, whether and how materiality is incorporated in ESG has great impact on the aggregation and weighting of metrics, since materiality assessment leads to conceptual discrimination. ESG rating agencies specialization is strongly connected with their own historical origins and represents the mission of that organization, its core value proposition and respective business

[151] Ibidem p. 26
[152] Eccles, R., Stroehle, J. (2018) *Exploring Social Origins in the Construction of Environmental, Social and Governance Measures*, in Job Market Paper
[153] Ibidem p. 37

strategy. This dimension largely influences providers' strategic positioning on the market and products and services rendered.

It turns out that the referred dimensions are shaped by ESG data providers' social origins which consequently determine the process of construction and quantification of the ESG ratings. Eccles and Stroehle confess the social origins of an organization are fixed in time and, naturally, may vary. Yet, in their study, the researchers propose a list of the social origins that are more determinant to sustainability, materiality and specialization.

**a) Conceptualization of Sustainability**

In what concerns the conceptualization of sustainability it has been assessed that founders' backgrounds, clients and other stakeholders and mission, vision or purpose are the social factors that represent most weight in shaping such concept[154].

To be more precise, professional backgrounds and beliefs of rating agencies' founders[155] doggedly determine the formulation of sustainability notion ergo the definitions of ESG embodied in the organization. For instance, before dedicating to ESG, Nicola Notat of Vigeo, was president of one of France's biggest labor unions and her motivation was, above all, to support socially responsible business before the transition into data provision to investors. In other respects, the founders of Innovest, with a banking and consulting background, specially focused on financial importance of ESG information.

At the beginning of its activity, in order to obtain recognition, rating providers are, to a certain extent, hostage to the clients' interests. Thus, the majority of rating agencies had a particular client category in mind for their early products and naturally the preferences exteriorized by these first clients end up influencing the data vendor ESG framework. Whereas MSCI start working with big asset managers with a special interest in financially material ESG information, EIRIS had its beginnings alongside charities and churches which compelled it to offer credible ethical component in its products[156].

[154] Ibidem p. 25
[155] Ibidem p.26
[156] Idem

Although it is often a marketing ploy that ends up not matching reality, mission, vision and purpose constitute a data provider's core values and agenda, which can serve as a guide for clients to identify themselves more or less[157]. This information can appear in written company statements or in declarations made by its leaders. For example, Innovest's mission emphasizes "a particular focus on [the] impact on competitiveness, profitability, and share price performance."[158] Alternatively, KLD envisions "to achieve […] greater corporate accountability and, ultimately, a more just and sustainable world."[159]

Therefore, by looking at these elements we can draw patterns that indicate variations between more normative, values-driven organizations or those which reflect a more financially approach, called value-driven. It should be pointed out that most values-based agencies consider that ESG can enhance financial returns as well. One can also distinguish organizations intended to display data to inform the world for financial analysis from those that elaborated information to transform the world. That said, naturally this inclination for a value or values approach impacts a rating agency's methodology, namely the choice of dimensions and benchmarks. In fact, the study conducted by Eccles and Stroehle reveals that "an organization's orientation towards a values-based understanding of ESG leads to more use of qualitative measures, whereas a value-based focus favors quantitative metrics". Quantitative measures generally include performance metrics whilst qualitative measures highlight processes and policies. Another point of interest is that values-based data agencies tend to rely more on public benchmarks than value-based vendors, when seeking public legitimacy. For instance, Vigeo-Eiris resorts to a panoply of universally recognized standards as benchmarks, such as ILO, UN conventions or even EU publications whereby 96% of issues encompassed by GRI framework are covered. In the case of value-based agencies, since their legitimation comer from the correlation of their ESG indications with financial returns, usually they do not relate their dimensions to public standards. At last the dimensions chosen to assess ESG are strongly connected to the agencies' founders' backgrounds. The referred connection of Vigeo's founder to the labor movement largely influenced the

---

[157] Ibidem p. 27
[158] https://web.archive.org/web/20030525181746/http://innovestgroup.com/
[159] http://web.archive.org/web/20071109045842/http://www.kld.com:80/about/index.html

providers' emphasis on labor issues, by displaying a numerous list of work related indicators[160].

### b) Materiality

Materiality is used as a filter of the information that is or should be relevant to stakeholders. But who are the actual recipients? It turns out that materiality can be perceived as the meaningful data for investors or as the information that matters to the world. The tendency for rating agencies to follow one or the other depends on social factors. Therefore, materiality is closely connected to the notion of significant stakeholders, to the extent that these are the ones who ESG research and data is produced for[161].

On the one hand, we have materiality as externality when an outside-in perspective is taken into account as well as firms' impacts on social and environmental stakeholders, the impact materiality as defined by GRI[162]. The rating agency Vigeo-Eiris adopts this approach since risks and opportunities besides being assessed for the company, they are also screened for those included in the company's wider ecosystem. On the other, as stated by SASB, materiality as non-financial factors that are important to investors respects the financial relevance of ESG issues, the so called financial materiality. For instance MSCI establishes the following "a risk is material to an industry when it is likely that companies in a given industry will incur substantial costs in connection with it. An opportunity is material to an industry when it is likely that companies in a given industry could capitalize on it for profit."[163] A hybrid approach can also be found, for instance, in Sustainalytics, which holds a wide definition of stakeholders and resorts either to GRI and SDGs or to SASB guidelines.

In light of this, the above mentioned study establishes a link between the adopted materiality and the value or values-based currents of thought. It follows that values-drive agencies are more likely to establish a wide range of significant stakeholders, ergo implementing an

---

[160] Eccles, R., Stroehle, J. op. cit. p.27
[161] Ibidem p. 29
[162] The GRI Perspective, (2022) *The materiality madness: why definitions matter*: https://www.globalreporting.org/media/r2oojx53/gri-perspective-the-materiality-madness.pdf
[163] Eccles, R., Stroehle, J. op. cit. p.31

impact materiality, while value-driven providers devote to investors and shareholders and defend long-term financial returns, by exercising financial materiality.

In the process of analyzing the weights and issues picked by distinct rating agencies, emerge four strategies: weights and indicators by industry, weights and indicators by issue or geographic area, the definition of criteria which give cause for exclusion and the definition of issues with universal importance. The majority of rating agencies use some industry specific indicators. Nevertheless, rating providers that adopt the financial materiality approach are specially meticulous when managing weights or sub-industry scores within their ratings, such is the case in MSCI and Innovest. Impact materiality driven ratings prefer issue-specific weights and indicators, often implement a universal value to certain matters and are much more thorough with the use of criteria which give cause for exclusion, as can be witnessed in GES, KLD and Vigeo-Eiris[164].

#### c) Specialization of the rating providers

ESG rating agencies have been dedicating more and more to covering the widest range of subjects but is still noticeable that certain providers have preponderance for certain areas than others. Specialization, a particularly strong expertise in one or more areas can also be explained by providers' social origins.[165] Once again, a nexus can be established between specialization and value or values-driven strategies. Generally, rating agencies that, at the beginning, presented a preponderance for environmental and social issues fall under values-driven current, taking as an example Vigeo, oekom and KLD. Yet, value-driven strategy shows a stronger connection with early focus on governance and finance, such as GES and Morningstar. Moreover, it is of interest to note that there is a correlation between organizations' early product portfolio and subsequent mergers and acquisitions. In an attempt to cover as many as possible areas, we have been witnessing a phenomenon of consolidation and of course a provider's area of expertise influences its acquisition strategy. Let us take the case of ISS-oekom: whereas ISS was originally an expert in corporate governance solutions, oeakom has always been particularly dedicated to environmental and social topics. Hence, the acquisition of oekom by ISS came to enable an optimization of their products and

[164] Ibidem p.32
[165] Ibidem p.33

services, giving ISS the additional support for SRI and oekom que possibility to work with larger companies. Consequently, specialization leaves a legacy even after consolidation phenomena, namely in the characteristics that products and services continue to have that go back to the beginning of each agency's activity.

In conclusion, one can verify that the divergence between ratings from different agencies stems primarily from social origins that are reflected in the conception of sustainability, materiality and specialization and which, in turn, interfere with the construction elements of the ratings, ergo the scope, measurement and weights.

### 4.2.2. Tackling divergence

#### 4.2.2.1. Advice in absence of standardization

As can be observed, rambling ESG data has implications for investors, companies, researchers and rating companies, and while there is no standardization, it is necessary to take certain precautions so that the final ESG information obtained is as congruent as possible. This is an extremely complex issue since we are dealing with discrepancies on both cultural and technical level. It all starts with rating agencies that by providing contradictory data hinder users' reliable acknowledgement.

Having said this, greater transparency should be imposed, which begins with a clarification of how rating agencies' formulation of ESG performance varies from others, mainly in terms of scope of attributes and aggregation rule. Another essential step implies that rating providers become aware that their measurement practices and methodologies must be equally transparent. In this way, investors and other stakeholders have a better possibility to analyze the quality of the measurement, which ultimately may trigger greater competitiveness among ESG rating providers and consequently improve the way measurement is done. Hence, rating agencies should strive to understand the rationale behind the rater effect so as to remove eventual biases.

With regard to researches, it is recommended the inclusion of various ESG ratings in their empirical studies if the intention is to assess the "consensus ESG performance" as viewed by

financial markets in which numerous ratings are handled[166]. Another option could be the use of one specific ESG rating to measure a proper company property, as long as the researchers clarify the reasons behind the suitability of that particular measurement approach and the respective aggregation procedure. Also, researchers have the possibility to develop hypotheses around attributes that are more narrowly established than the general concept of ESG performance, by relying on transparent measures such as carbon footprint or employee engagement, which allows them to avoid incertitude around the weighting of different categories. For a greater defense against measurement uncertainty, in this case, researchers should incorporate alternative measures of such attributes.

Regarding investors, Berg, Koelbel and Rigobon explain they could minimize discrepancy between raters by about 50 percent through obtaining indicator level data and then apply their own scope and weights on the data. Moreover "remaining differences can be traced to the indicators that are driving the discrepancy, potentially guiding an investor's additional research"[167]. A simple way to decrease inconsistency is to average indicators from different providers although this mechanism can be compromised since deviations might be randomly distributed, as explained by rater effect. In the meantime, it is crucial that investors support actions which intend to harmonize disclosure and to instigate transparent data sources.

With respect to companies, as already mentioned, implementing a strategy aimed at ameliorating scores with one rating agency will not ensure that the same will work for another provider which ultimately has a deterrent effect. To eradicate this uncertainty, also firms should work alongside rating agencies to institute straight and transparent disclosure standards and certify that the information is publicly available.

As set out above, besides institutional logics, several cultural inclinations arise from the way distinct rating providers measure ESG. The cultural nuances in question may also instigate interesting dynamics between rating agencies and rated companies. This means that data vendors have their own manner of collecting data to which companies can respond in different ways[168]. That is to say it is expected that an European company gets a better

---

[166] Liang, H., Renneboog, L. (2016) *On the foundations of corporate social responsibility*, in Journal of Finance, Vol. 72(2), p.853-910
[167] Berg, F., Koelbel, F., Rigobon, R. op. cit. p. 32
[168] DiMaggio, P., Powell, W. op. cit. p. 147–160.

understanding of the ratings' originated by Vigeo, since this agency probably ends up covering more issues of the EU framework, for instance, a great emphasis on labor practices. Contrarily, an American for being more used to a different context with a distinct understanding of labor conditions it would most likely be difficult to fit in. Therefore, in order to tackle ESG ratings' divergence, agencies should value an analysis that is as free of very specific social constructions as possible, allowing an objective evaluation to any company coming from anywhere.

With this in mind, investors will have a better chance to select appropriate ratings which are in line with their values, empirical studies carried out by researchers may lead to less biased results and be more useful for the implementation of standardization and rated companies are more likely to receive clearer orientation on what is expected from them.

#### 4.2.2.2. With standardization in sight

Surely the best way to ensure that we move towards eradicating ratings' divergence is to push for legislation that will mandatorily frame the way companies disclose their ESG data and how rating agencies operate in building their rankings, or even standardized recommendations that allow a market harmonization. In 2021, the International Organization of Securities Commissions (IOSCO) published a recommendations' report[169] applicable to securities regulators, ESG ratings and data product providers, and users of ESG ratings and data products. Among the various recommendations IOSCO encourages ESG ratings and data product providers to consider adopting and implementing written procedures designed to help ensure the issuance of high-quality ESG ratings and data products based on publicly disclosed data sources where possible and other information sources where necessary, using transparent and defined methods. Moreover, the organization calls for the regulators to pay more attention on the use of ESG ratings and rating agencies in their jurisdiction.

Japan pioneered the launch of a code of conduct for ESG evaluation and data providers[170], released by the Financial Services Agency (FSA). This initiative establishes that rating

[169] IOSCO (2021) *Environmental, Social and Governance (ESG) Ratings and Data Products Providers*

[170] FSA (2022) *The Code of Conduct for ESG Evaluation and Data Providers (Draft)*

agencies should set "necessary procedures to analyze in detail information that can be reasonably obtained and formulate and provide ESG evaluation and data".

Following an European Securities and Markets Authority (ESMA) call for evidence on ESG Ratings[171], in 2022, the European Commission launched a consultation[172] on ESG ratings and sustainability factors in credit ratings directed to all stakeholders. This initiative requested feedback on proposed measures intended to address dysfunction and ambiguity in the ESG ratings market, which integrate minimum disclosure requirements for ratings methodology, centralized EU registration system for providers and conflict-of-interest rules. The EU expects that in the aftermath of this consultation may arise a potential policy initiative. It turns out that the responses to the questionnaire reveal that certain leading ESG and credit rating providers are rejecting this attempt to regulate the sector. MSCI, Moody's, RepRisk and the London Stock Exchange Group (LSEG) supported an EU intervention as, for instance with a code of conduct, but pushed back the possibility of a regulatory approach, whereas Fitch and ISS completely declined an intervention in the sector[173]. Moreover, Morningstar, LSEG, MSCI, S&P and ISS alleged that the market was functioning well. Despite this reluctance on the behalf of big players, 80% of the market was supportive of an EU policy intervention[174].

In the UK the discussion has been a lot about whether ESG ratings agencies should be brought under the competence of the Financial Conduct Authority (FCA)[175], but it seems that with the support of the government and under the FCA 2022 to 2025 strategy further announcements will appear[176]. In the American market looks like there will be no change so soon. Despite several appeals made to the SEC, it is very unlikely that "sweeping changes to its decades-old, materiality-based disclosure framework just to accommodate investor demand"[177] to occur. It is expected that SEC introduces climate risk disclosures

---

[171] ESMA (2022) *Call For Evidence on market characteristics for ESG Rating Providers in the EU*
[172] European Commission (2022) *Targeted consultation on the functioning of the ESG ratings market in the European Union and on the consideration of ESG factors in credit ratings*
[173] Azizuddin, K. (2022) *ESG ratings providers push back against EU regulation proposals*, in responsible investor
[174] Andrew, T. (2022) *Leading ESG data providers reject EU regulation proposals*, in ETF STREAM
[175] Curran, J. (2022) *ESG rating providers: time for regulation?,* in Kennedys
[176] FCA (2022) *ESG integration in UK capital markets: Feedback to CP21/18*
[177] Wolfe, K. (2022) *Who Regulates the ESG Ratings Industry?*, in Bloomberg Law

requirements[178] or even human capital metrics[179] soon, but an effective reform seems to be a long way off.

## 4.3. Greenwashing

### 4.3.1. Emergence and in(definition)

The greenwashing term is far from being unanimous among the literature mostly on account of its multidisciplinary characteristic. As such, to this day, there is no concrete definition of greenwashing which entails an added difficulty for consumers and investors when it comes to identifying the phenomenon. Moreover, certain scholars consider only environmental issues when discussion greenwashing, distinguishing it from the term of *bluewashing*,[180] which regards social practices, while others do not establish a distinction and perceive greenwashing as a social and environmental phenomenon[181]. Despite this, there have been several individuals and organizations who have dedicated to trying to define it and the various perspectives have in common the idea that greenwashing is a method of disclosure, usually used by companies, but that can also be employed by governments and non-governmental organizations (NGOs), of environmental actions that are not sustained in practice, in an attempt to present to the public an environmentally responsible reputation, seeking to preserve and expand their markets.

The first big studied media case involving the act of misleading consumers in respect with environmental practices was starred by the oil company Chevron, in the 1980s, which launched a series of television and print ads that showed Chevron employees safeguarding various kinds of animals. What happened is that the marketing campaign was a huge success and even won an Effie advertising award. At the same time the revolt and frustration among environmentalists was growing. Shortly after, greenwashing was coined in 1986 by the environmentalist Jay Westervelt in the context of a vacation travel in which he recognized

---

[178] SEC (2021) *Public Input Welcomed on Climate Change Disclosures*: https://www.sec.gov/news/public-statement/lee-climate-change-disclosures

[179] SEC (2021) *Prepared remarks at London City Week*: https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321

[180] Sailer, A., Wilfing, H., Straus, E. (2022) *Greenwashing and Bluewashing in Black Friday-Related Sustainable Fashion Marketing on Instagram*, in Sustainability 14(3):1494

[181] Netto, S., Sobral M., Ribeiro, A., Soares, G. (2020) *Concepts and forms of greenwashing: a systematic review*, in Environmental Sciences Europe

the hotel industry was falsely promoting the reuse of towels as part of a broader environmental strategy, when, in fact, the appeal was made as an unassuming cost-saving measure[182].

Several different perspectives followed with different starting points. While some perceive greenwashing as selective disclosure, others view it as a phenomenon of decoupling and others explain it through the signaling and corporate legitimacy theory. Moreover, even within each current we have different nuances depending on the authors. The first mentioned perspective refers to the situation when the negative information regarding a company's environmental performance is silenced and the positive is praised. For instance, it is the case of TerraChoice[183] which defines it as "the act of misleading consumers regarding the environmental practices of a company or the environmental performance and positive communication about environmental performance" and Marquis[184] which characterizes it as "a symbolic strategy whereby firms seek to gain or maintain legitimacy by disproportionately revealing beneficial or relatively benign performance indicators to obscure their less impressive overall performance". Alternatively, certain scholars associate greenwashing to a decoupling phenomenon related with symbolic actions "which tend to defect attention to minor issues or lead to create 'green talk' through statements aimed at satisfying stakeholder requirements in terms of sustainability but without any concrete action", as defended by Siano[185]. At last, corporate legitimacy is divided into three strands, starting with the cognitive legitimacy which "is based on the shared taken-forgranted assumptions of an organization's societal environment", then moral legitimacy that "relies on moral judgments about the organization and its behaviour" and pragmatic legitimacy which is "the result of self-interested calculations of the organization's key stakeholders, and it is based on stakeholder's perceptions of their personal benefit deriving from corporate activities and

---

[182] Watson, B. (2016) *The troubling evolution of corporate greenwashing*, in The Guardian: https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies

[183] TerraChoice (2010) *The sins of greenwashing: home and family edition*: http://sinsofgreenwashing.org/fndings/the-seven-sins/

[184] Marquis, C., Tofel, M., Zhou, Y. (2016) *Scrutiny, norms, and selective disclosure: a global study of greenwashing*, in Organization Science 27(2), p. 483-504

[185] Siano, A., Vollero, A., Conte, F., Amabile, S. (2017*) "More than words": expanding the taxonomy of greenwashing after the Volkswagen scandal*, in Journal of Business Research Vol 71, p.27–37

communication."[186] So, in Seele and Gatti opinion, greenwashing takes place in the context of pragmatic legitimacy.

To conclude, just as there is no unequivocal definition of sustainability or ESG, there is also no greenwashing definition or criteria, giving room for abuse and ambiguity, as well as for companies to easily clear themselves in court cases. Beyond that, well-intentioned companies also see their way obstructed due to the lack of an agreed-upon definition of what sustainability means or an established benchmark for the minimum requirements needed for a company's practices and advertising to be considered sustainable and trustworthy. Even experts "can find it difficult at times to determine which brands are genuinely committed to reducing their impact on the environment versus those who simply aim to sell more products by appealing to conscious fashion consumers"[187].

#### 4.3.2. Greenwashing drivers

##### a) Regulation and informal monitors

The phenomenon of greenwashing can be motivated by a variety of external and internal factors. Starting with the regulatory and monitoring context, a non-market external driver, which includes the issue of regulatory environment, as well as the pressure exerted by media, activists and NGOs[188]. According to each jurisdiction, protection and penalties against greenwashing can be more or less effective, working or not as a deterrent for companies. Due to the ambiguity of the phenomenon and difficulty in defining it, plus all the shortcomings at the level of ESG disclosures put in place by companies the regulatory activity has not been the most efficient in recent years. The perception of greenwashing as a negative practice is accepted globally, but is more or less tolerated depending on the culture of each country, the industry in question, the freedom that is given to advertising agencies and the law that

---

[186] Seele, P., Gatti, L. (2015) *Greenwashing revisited: in search of a typology and accusation-based defnition incorporating legitimacy strategies*, in Business Strategy and the Environment Vol. 26(2), p. 239-252

[187] SFF (2022) *With No Industry Agreed-Upon Definition of Sustainability, is There Really Such a Thing as Greenwashing?* :https://www.thesustainablefashionforum.com/pages/quick-question-with-no-industry-agreed-upon-definition-of-sustainability-is-there-really-such-a-thing-as-greenwashing

[188] Delmas, M., Burbano, V. (2011) *The Drivers of Greenwashing*, in California Management Review Vol. 54, no. 1, p. 69

protects consumers.[189] Given the limited formal greenwashing regulation activist groups and NGOs play a crucial role as informal monitors of such practices, especially through campaigns that aim the education of consumers. Along with the media, these organizations and individuals represent a threat of public exposure what makes companies think twice before getting involved in scandals. Beyond that, they have the ability to trigger the interest of consumers and investors for sustainable causes. Although, the lack of effective regulation sometimes reduces NGOs and media activists to mere reputational whistleblowers.

### b) Consumers, investors and competitive pressure

Consumer and investor demand, as well as competitive pressure are market external drivers which highly influence the adoption of greenwashing practices.[190] Companies feel increasingly encouraged to forcibly integrate environmentally friendly policies and to present a green image to both consumers and investors. Hence enterprises face incentives to express positively about their environmental performance and the greater the pressure to convey this profile, the more likely it is that greenwashing practices will be adopted to satisfy their recipients[191]. Moreover, the competitive landscape also plays a fundamental role, since companies usually interact with their opponents in product market to win over consumers and consequently fight for survival to capitalize their market share[192]. In this context, greenwashing allows organizations to get ahead of their competitors due to their environmentally friendly reputation. Thus, a company's behavior is strongly influenced by competitive pressure through conducts undertaken by other companies in order to reach the same group of consumers in the market.

### c) Market opportunities

---

[189] Nguyen, N. (2020) *Greenwashing behaviours: Causes, taxonomy and consequences based on a systematic literature review*, in Journal of Business Economics and Management Vol. 21(5) p. 1486-1507

[190] Delmas, M., Burbano, V. op. cit. p. 71

[191] Vos, J. (2009) *Actions Speak Louder than Words: Greenwashing in Corporate America*, in Notre Dame Journal of Law, Ethics and Public Policy, Article 13, Vol. 23, p. 673-697

[192] Testa, F., Boiral, O., & Iraldo, F. (2018) *Internalization of environmental practices and institutional complexity: Can stakeholders pressures encourage greenwashing?*, in Journal of Business Ethics, Vol. 147, p. 287–307

“Green marketing provides business bottom line incentives and top line growth possibilities”[193]. Companies that come up with innovative products and services concerning environmental footprint give themselves access to new markets, considerably increase profits and benefit from competitive advantages over the companies which are “sleeping” on green products. Thus, market opportunities may be identified by a new demand a company can meet as it is not supplied by rivals. Events such as global warming and the Covid-19 pandemic arise as great opportunities since they generate intensified concern on the behalf of consumers who become more socially and environmentally aware. In this regard, enterprises resort to greenwashing to attract worried and emotional clients increasing popularity.

#### d) Organization-level drivers

Internal factors such as company characteristics, incentive structure and ethical climate, effectiveness of intra-firm communication and organizational inertia shape the way companies perceive and respond to external drivers. Namely size, industry, profitability or lifecycle influence the strategies adopted by a company and respective costs, benefits and downsides. For instance, publicly traded firms tend to face greater investor pressure to integrate ESG factors ergo to enter by greenwashing behavior. Another example is that more-profitable companies with higher margins are better equipped to withstand the impact of an NGO's scrutiny in a greenwashing case. Or even consumer products companies are more subject to suffer from campaigns seeking to provoke public indignation due to greenwashing practices than service firms. Additionally, a company’s incentive structure and ethical climate can be decisive for the demonstrated ethical behavior. For example, the encouragement of the prosecution of arbitrary financial goals by managers, or the stimulation to reward on-time performance and punish late performance usually result in unethical behaviors. Moreover, unethical conduct has been shown to take place in organizations in which egoistic, instead of benevolent or principled, ethical climate prevails. It should be noted that companies that embrace an ethic code and standards of conduct have less

[193] Sarkar, A. (2012) *Green Marketing and Sustainable Development Challenges and Opportunities*, in International Journal of Marketing, Financial Services & Management Research Vol.1

probability of resort to greenwashing[194]. A company's strategy may also be strongly affected by organizational inertia which is the persistence of existing practices, more frequent in larger older companies. This phenomenon might explain an eventual gap between a company's declaration of apparent sustainable commitment and its implementation, leading to greenwashing. Finally, the effectiveness of intra-firm communication is also an important internal firm characteristic, since meagre transfers of knowledge may reflect a lack of communication between the marketing departments and product development or production, ultimately resulting in greenwashing practices. This can happen because of a paucity of direct relationships and due to rare interaction with R&D teams[195].

### 4.3.3. Greenwashing forms

In 2019, Ryanair promoted itself through a marketing campaign with the motto "Europe's lowest fares, lowest emissions airline" which was later banned by the Advertising Standards Authority (ASA)[196] for being misleading. ASA clarified consumers would interpret the campaign as "saying flying with Ryanair would mean contributing lower CO2 emissions than if they had chosen a rival airline in Europe, rather than low as a measure of their own carbon footprint"[197]. In the same year, S.C. Johnson faced a class action lawsuit related to Windex, a popular window cleaner which is claimed to be "non-toxic" when the product actually contains chemicals that are severely detrimental to health and may consequently harm people, animals and the environment[198]. The problem with this product does not stop here, on the Windex packaging consumers can also read "100% ocean plastic". It turns out the plastic used was pulled from plastic banks, known as Ocean Bound Plastic (OBP) due to the risk of ending up in the ocean. However, the plastic used for Windex bottles was never in the

---

[194] Cullen, J., Parboteeah, K., Victor, B. (2003) *The Effects of Ethical Climates on Organizational Commitment: A Two-Study Analysis*, in Journal of Business Ethics, Vol 46/2, p. 127-141

[195] Hansen, M. (1999) *The Search-Transfer Problem: The Role of Weak Ties in Sharing Knowledge across Organization Subunits*, in Administrative Science Quarterly, Vol. 44/1, p. 82-111

[196] ASA (2020) *ASA Ruling on Ryanair Ltd t/a Ryanair Ltd*, Rulings: https://www.asa.org.uk/rulings/ryanair-ltd-cas-571089-p1w6b2.html

[197] Oakes, O. (2020) *Ryanair ads banned over 'lowest emissions' claim*, in campaign: https://www.campaignlive.co.uk/article/ryanair-ads-banned-lowest-emissions-claim/1673038

[198] Sortor, E. (2020) *Windex Class Action Alleges Cleaner Contains Toxic Ingredients*, in Top Class Actions: https://topclassactions.com/lawsuit-settlements/consumer-products/cleaning-products/windex-class-action-alleges-cleaner-contains-toxic-ingredients/

ocean[199]. In this respect, Delmas and Burbano[200] alert to the fact that greenwashing may happen both at the firm-level, as shown in the Ryanair example, or product or service-level, as in the case of Windex. According to the literature review caried out by Netto, Sobral, Ribeiro and Soares[201], two distinct major classifications of greenwashing may be found, those being claim greenwashing and executional greenwashing, which in turn may happen at the firm or product/service levels.

#### 4.3.3.1. Claim greenwashing

This is the most addressed form of greenwashing among researchers, mainly at the product/service level, which resorts to textual arguments that explicitly or implicitly mention ecological benefits of a product or service to induce a misleading environmental claim. With this in mind, Carlson, Grove and Kangun listed three types of greenwashed advertising: those employing false claims, those omitting crucial information that could help to analyze environmental claim sincerity and those employing vague or ambiguous terms[202]. In order to better clarify this concept, TerraChoice, an environmental marketing company released the so called "seven sins of greenwashing"[203], a classification generally recognized by experts. This framework was designed "to indicate the main ways in which a company can mislead consumers with environmental claims"[204], although certain authors[205] consider that the classification just dwells on product-level greenwashing. The proposed list includes: the sin of the hidden trade-off, which refers to the situation when the claim is grounded on a narrow array of attributes ignoring other fundamental environmental issues; the sin of no proof that consists in as uncertified claim stripped of supportive evidence; the sin of vagueness which refers to a poorly defined claim that is so broad that it becomes likely to deceive the consumer; the sin of worshiping false labels regards the move of giving the impression of a

---

[199] Akepa (2021) *Greenwashing: 10 recent stand-out exemples*: https://thesustainableagency.com/blog/greenwashing-examples/

[200] Delmas, M., Burbano, V. op. cit. p.69

[201] Netto, S., Sobral M., Ribeiro, A., Soares, G. op cit. p. 7-10

[202] Carlson, L., S. Grove, and N. Kangun. (1993) *A content analysis of environmental advertising claims: A matrix method approach.*, in Journal of Advertising Vol 22(3), p. 27-39

[203] . TerraChoice op. cit.

[204] Baum, L. (2012) *It's Not Easy Being Green … Or Is It? A content analysis of environmental claims in magazine advertisements from the United States and United Kingdom*, in Environmental Communication A Journal of Nature and Culture Vol. 6(4), p. 423-440

[205] Delmas, M., Burbano, V. op. cit. p.67

third-party endorsement which is actually nonexistent; the sin of irrelevance is the providence of a truthful claim, however unimportant or unhelpful for consumers strive for environmentally preferable products; the sin of lesser of two evils represents a claim which may be valid within the product category however attempts diverting the consumer from the bigger environmental impacts of the category as a whole; and the sin of fibbing which regards claims that are simply false.

Within the scope of an examination of the oil gas industry communication on hydraulic fracking, Scanlan considered essential to complete TerraChoice's classification by adding a list of new greenwashing sins. His approach "speaks to the political economy of resource extraction, its environmental impacts, and how greenwashing frames that discussion."[206] For that matter, the author indicates: the sin of false hopes which is a claim that intensifies a false hope; the sin of fearmongering which involves claims that foment insecurity associated to not "buying in" on an organization practice; the sin of broken promises regards claims that, for example, promise that fracking will lift up poor communities enrichment from mineral rights and economic development but they end up facing irreversible impacts; the sin of injustice which respects to the fact that the environmental communication is directed towards population that benefits from fracking but do not experience the impacts completely alienating the affected communities; the sin of hazardous consequences uncovers that greenwashing hides the reality of inequality and diverts the public from hazards others suffer; and the sin of profits over people and the environment. In other words, Scanlan winds up "the delivery of false hopes and resulting broken promises, fearmongering that reorients public understanding of risk and the hazardous consequences of fracking, environmental injustice, and the pursuit of profits over people and the environment have serious impacts on the planet."[207]

More focused on greenwashing at the firm-level, Contreras-Pacheco and Claasen[208] propose five types of this phenomena, for instance, the "dirty business" that depicts companies which

---

[206] Scanlan, S. (2017) *Framing fracking: scale-shifting and greenwashing risk in the oil and gas industry*, in Local Environmental Vol. 22(1), p.1-27

[207] Ibidem p. 20

[208] Contreras-Pacheco O, Claasen C (2017) *Fuzzy reporting as a way for a company to greenwash: perspectives from the Colombian reality*, in Problems and Perspectives in Management 15(SI), p.526-536

perpetuate inherently unsustainable practices and industries; the "ad bluster" represents the behavior of distracting the audience through exaggerated advertising; the "political spin" describes the situation of lobbying regulators and governments aiming to achieve benefits that impact sustainability; the " it is the law, stupid!" which respects to the proclamation of sustainability accomplishments or commitments that are already dictated by law; and the "fuzzy reporting" which consist of taking advantage of sustainability reports with the objective of twisting the reality or creating a positive image in terms of corporate social responsibility practices.

#### 4.3.3.2. Executional greenwashing

With the growing awareness to the theme, the diffusion of earnest advertising practices and respective regulation, claim greenwashing has been declining.[209] Regardless, the demand for green products and businesses has intensified without precedent, thus companies began to enter for less obvious alternatives to deceive consumers. In this sense, the executional greenwashing arises as a strategy that does not use any type of claim, however implies "nature-evoking elements such as images using colors (e.g., green, blue) or sounds (e.g., sea, birds). Backgrounds representing natural landscapes (e.g., mountains, forests, oceans) or pictures of endangered animal species (e.g., pandas, dolphins) or renewable sources of energy (e.g., wind, waterfalls)".[210] Therefore, wittingly or unwittingly these factors may persuade consumers to believe in a brand's greenness under a misleading understanding.

This tactic becomes particularly dangerous because it is more challenging to address via self-regulation or government regulation than the claim greenwashing, since the panoply of visuals and sounds that can deceive the public are endless, depending on each consumer's cultural background making it inconceivable to create an unequivocal universal recommendation. Moreover, research[211] shows that executional greenwashing affects non-

[209] Parguel, B., Bnoît-Moreau, F. (2013) *The power of 'executional greenwashing'. Evidence from the automotive sector*, in Lalonde Conference
[210] Netto, S., Sobral M., Ribeiro, A., Soares, G. op. cit. p.10
[211] Parguel, B., Benoît-Moreau F., Russell, C. (2015) *Can evoking nature in advertising mislead consumers? The power of 'executional greenwashing'*, in International Journal of Advertising: The Review of Marketing Communications

expert consumers the most, so it is essential that there is effective investment in consumer education.

Therefore, claim greenwashing may activate a rational mechanism wherein consumers are capable of detecting greenwashing in advertisements, while executional greenwashing can allure the audience appealing to their empathy towards nature via an affective mechanism.

### 4.3.4. Consequences of greenwashing

A demonstration of ESG practices embracement can work as a marketing ploy increasing consumer demand and stakeholder recognition. The problem is when the dedication to corporate social responsibility is only apparent and ends up being nothing more than mere window-dressing publicity campaigns. Corporate greenwashing affects not only consumers but also stakeholders. The latter may be divided in existing stakeholders, that are positively impacted by greenwashing since additional profits emerge, or potential stakeholders, that are mainly investors who aspire to participate in the real implementation of ESG practices which along with society as a whole are negatively affected due to deadweight loss in welfare economics. It should be noted that greenwashing is a practice that carries a lot of risk on the part of corporations and its consequences manifest mostly in the long term since the company's reputation can be compromised and brand trust completely lost.

#### 4.3.4.1. Corporations

Enterprises face the great challenge of balancing profit maximization and environmental protection. In general, corporations tend to advantage from greenwashing since the illusion created in customers can make them invest in such products and even make them willing to pay a higher price for the supposedly greener brand, which makes companies profit. The growing pressure exerted by shareholders, consumers and activists induces many enterprises to adopt greenwashing practices in order to create an environmentally friendly image and reputation. Nonetheless, greenwashing most likely will influence corporate performance in an environmental inspection process, and above all, it will reveal a gap between ESG performance and ESG reporting[212]. Once this incongruence is evinced, it becomes inevitable

[212] Uyar, A., Karaman, A. S., Kilic, M. (2020) Is *corporate social responsibility reporting a tool of signaling or greenwashing? Evidence from the worldwide logistics sector*, in Journal of Cleaner Production 253, 119997

that employees, consumers, investors or NGOs lose their confidence in a firm credibility. Consequently, greenwashing provokes skepticism among stakeholders and a crises of belief[213], representing a barrier to the development of green marketing approaches which are subject to increased scrutiny from the outset.

#### 4.3.4.2. Consumers

Greenwashing has a terrible impact on consumers and the fact that it has become an increasingly common practice ultimately demotivates consumer's purchase of green products even if they come from companies with an unblemished track record. As mentioned above, the emerging scandals of mismatches between performance and what is advertised make consumers behave under a dubious rational. The growing awareness and education of consumers makes them more and more resistant to attempts at deception and what was once easily absorbed under the guise of an environmental trend has now become a trigger for doubt and search for clarification. Moreover, greenwashing is no longer just a moral issue but also a matter of brand attitude, green branding equity and buying intent[214].

#### 4.3.4.3. Stakeholders

A major problem that stakeholders face is the usual absence of sufficient and reliable information of a company's ESG footprint which makes advertising play a crucial role in the way investors and the community perceive a company's performance. Greenwashing practices betray such reliability reducing upcoming investment opportunities. Besides, the probability of a company caught in a greenwashing campaign to establish partnerships with other companies drastically declines since the latter do not want to be associated with such practices. In this context greenwashing represents a danger for investors' trust and leads to negative market feedback. Furthermore, it is known that the main challenges of ESG data disclosures are the unaudited ESG reports, the lack of standardization in disclosure rules and the inexistence of a global governing body that ensures the accuracy of reported sustainable data. That said, the alignment between a company's ESG transparency and its ESG

---

[213] Guo, R., Tao, L., Li, C. B., Wang, L. (2017) *A path analysis of greenwashing in a trust crisis among Chinese energy companies: The role of brand legitimacy and brand loyalty*, in Journal of Business Ethics, Vol. 140(3), p. 523-536

[214] Akturan, U. (2018) *How does greenwashing affect green branding equity and purchase intention? An empirical research*, in Marketing Intelligence & Planning Vol.36, p. 809–824

performance is crucial since "greenwashing can be a barrier for investors to integrate ESG data into their investment strategy"[215].

#### 4.3.4.4. Society

It is clear that exposure to greenwashing frequently results in society's cynicism and mistrust. Even if shareholder benefits exceeded consumer's forfeit, the advantages of society as a whole will be necessarily downsized. In addition, this phenomenon really means that organizations spend more time and resources on marketing itself and publicity agencies than on actually minimizing its environmental impacts. Greenwashing hinders the development of a circular and sustainable economy, since it lowers sustainability efforts and complicates consumers' comprehension of their purchase consequences on the environment. Moreover, for the less informed, the success of a greenwashing campaign symbolizes the triumph of a placebo effect where people, despite not having done anything to help the environment, feel good about it. This only proves that intervention by regulators is essential to eradicate the negative impacts of greenwashing.

### 4.3.5. How is the greenwashing issue being attended around the globe?

Similarly to other dimensions of the social responsibility universe, greenwashing is not being tackled the same way around the globe. As already mentioned, the greenwashing triumph is directly related to the countless environmental labels, the dubious disclosure and reporting methodologies and the lack of rules controlling enterprises' green claims.

In the US, SEC recently issued two new sets of proposed rules, the Investment Company Names[216] (Names Rule), and the Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies[217] (ESG Disclosure Rule) aiming to combat greenwashing practices. As SEC declared these "proposed amendments to rules and reporting forms [would] promote consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of environmental, social, and governance

[215] Yu, E. P.-y., Luu, B. V., Chen, C. H. (2020) *Greenwashing in environmental, social and governance disclosures*, in Research in International Business and Finance, 52, 101192

[216] SEC (2022) *Investment Company Names*: https://www.sec.gov/rules/proposed/2022/33-11067.pdf

[217] SEC (2022) *Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies*: https://www.sec.gov/rules/proposed/2022/33-11068.pdf

(ESG) factors."[218] This package intends to primarily combat climate change trough the implementation of regulations that force the financial sector to offer meaningful environmental information to governments, the investing public and consumers. Secondly, there is a rationale for implementing paradigmatic change concerning channeling capital into more environmentally-conscious causes. Specifically, the Names Rule emerges to update the original, adopted in 2001 with the main changes being the assurance that "investors' assets in funds are invested in accordance with their reasonable expectations based on the fund's name" applying to "any fund name with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics . . . includ[ing], for example, fund names with terms indicating that the fund's investment decisions incorporate one or more ESG factors." With respect to the ESG Disclosure Rule, it intends to improve the consistency and comparability of ESG-related disclosures among several investment funds and advisors focused on ESG investing[219] by providing "specific requirements about what a fund or adviser following an ESG strategy must include in its disclosures" as otherwise "the lack of a more specific disclosure framework[] increases the risk of funds and advisers marketing or labelling themselves as 'ESG,' 'green,' or 'sustainable' in an effort to attract investors or clients, when the ESG-related features of their investment strategies may be limited." For that matter, a sliding scale of disclosure is established which relates to the degree of ESG focus of the entity. Beyond this dedication to improve legislation, the SEC has been relentless in the combat of greenwashing notably with the conviction of BNY Mellon's fund management division to a 1.5 million dollars fine[220] for allegedly providing misleading information on its ESG investments. Moreover, the SEC has also filed a complaint[221] against Vale S.A. a publicly traded mining company based upon "making false and misleading claims" "about the safety of [a] dam through its environmental, social, and governance (ESG) disclosures."

---

[218] SEC (2022) *SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices*: https://www.sec.gov/news/press-release/2022-92
[219] Hupart, J., Gates, M., Baumstein, D., Michaels, P., Taylor, C. (2022) *SEC Proposes Regulations to Address "Greenwashing" By Investment Funds*, in THE NATIONAL LAW REVIEW
[220] SEC (2022) *SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations*: https://www.sec.gov/news/press-release/2022-86
[221] SEC (2022) *SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse*: https://www.sec.gov/news/press-release/2022-72

In the beginning of 2022, the Canadian Securities Administrators (CSA) launched a staff guidance on ESG-related investment fund disclosure[222]. CSA emphasized that the creation of new ESG-related funds and respective ESG incorporation into existing funds “has been an increased potential for "greenwashing", whereby a fund's disclosure or marketing intentionally or inadvertently misleads investors about the ESG-related aspects of the fund”. In this context, the Staff Notice clarifies existing requirements in the light of this new fund tendency aiming to provide greater understanding of ESG-related fund disclosure and sales communications to capacitate investors to make informed investment decisions.

In the UK, with the objective of helping businesses to comply with their consumer protection law obligations, in 2021, the Competition and Markets Authority (CMA) published the Green Claims Code[223] requiring that all green claims must be truthful, accurate, clear, unambiguous and substantiated. Moreover, this code forbids claims that omit or hide important information, and requires advertisers to take into account the whole life cycle of their products and services when making environmental claims[224]. Following this, the UK regulator launched an investigation initiative to comprehend how products and services claiming to be 'eco-friendly' are being marketed, and whether consumers could be being misled[225]. In the meantime, a FCA’s Discussion Paper on Sustainability Disclosure Requirements (SDR)[226] and investment labels is on top of the table and ISS ESG anticipates that the FCA draft rules will be published soon, alongside Technical Screening Criteria (TSC). FCA is considering consumer-facing product disclosures aimed at retail investors, as well as detailed product-level disclosures aimed at institutional investors and even mandatory climate transition plans disclosure. Furthermore, ASA has equally been focusing on

---

[222] CSA (2022) *CSA Staff Notice 81-334 - ESG-Related Investment Fund Disclosure*: https://www.osc.ca/en/securities-law/instruments-rules-policies/8/81-334/csa-staff-notice-81-334-esg-related-investment-fund-disclosure

[223] CMA (2021) *CMA guidance on environmental claims on goods and services*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf

[224] Daniel, C. (2021) *UK Regulators Show Unjustified Green Claims in Advertising the Red Light*, in THE NATIONAL LAW REVIEW

[225] GOV.UK (2022) *Misleading environmental claims:* https://www.gov.uk/cma-cases/misleading-environmental-claims#full-publication-update-history

[226] FCA (2021) *Sustainability Disclosure Requirements (SDR) and investment labels, Discussion Paper*

misleading green claims, namely in the food and beverage sector, having recently sanctioned the milk companies Alpro[227] and Oatly[228], on the basis that the ads were deceptive and open to interpretation according to the UK Advertising Codes.

In 2021, the Securities and Futures Commission (SFC) of Hong Kong released a circular[229] approaching enhanced disclosure for ESG-related funds, requiring new disclosure for periodic assessments and new guidelines for funds with a climate-related focus. The SFC keeps an ESG funds' public register after SFC authorization. Hence, the SFC updated the Fund Manager Code of Conduct (FMCC) adding requirements for asset managers, following a two-tier approach concerning the observation of climate-related risks. At the IFRS Foundation Conference 2022 the CEO of SFC highlighted the importance of supporting the ISSB project[230] to help stem greenwashing, calling attention to the fact that "worries about greenwashing had increased given the rush to embrace environmental, social and governance (ESG) objectives across the financial landscape and advertise net-zero commitments", moreover, "the current fragmented sustainability reporting landscape deprived investors of consistent, comparable data, and this contributed hugely to greenwashing risks"[231]. As a result of an effort to hold ISSB and IOSCO recommendations, SFC has recently published an Agenda for Green and Sustainable Finance[232] aiming to improve corporate disclosures even more, to monitor the implementation of measures related to ESG funds and to identify appropriate regulatory framework.

[227] ASA (2021) *ASA Ruling on Alpro (UK) Ltd t/a Alpro*: https://www.asa.org.uk/rulings/alpro--uk--ltd-a20-1081249-alpro--uk--ltd.html
[228] ASA (2022) *ASA Ruling on Oatly UK Ltd t/a Oatly*: https://www.asa.org.uk/rulings/oatly-uk-ltd-g21-1096286-oatly-uk-ltd.html
[229] SFC (2021) *Circular to management companies of SFC-authorized unit trusts and mutual funds - ESG fund*: https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/products/product-authorization/doc?refNo=21EC27
[230] IFRS (2022) *ISSB delivers proposals that create comprehensive global baseline of sustainability disclosures*: https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/
[231] SFC (2022) *Implementing a global baseline for corporate climate disclosures*, *Keynote address at IFRS Foundation Conference 2022*: https://www.sfc.hk/-/media/files/ER/PDF/Speeches/Synopsis---CEO-at-IFRS-Foundation-Conference_28-Jun_final.pdf
[232] SFC (2022) *Agenda for Green and Sustainable Finance*: https://www.sfc.hk/-/media/EN/files/COM/Reports-and-surveys/SFC-Agenda-for-Green-and-Sustainable-Finance_en.pdf

Moreover, in 2022, the Monetary Authority of Singapore (MAS) published the Environmental Risk Management Information Papers[233] to implement the MAS Guidelines on Environmental Risk Management. The information papers highlight emerging and positive practices by financial institutions, identifying areas where further work is needed. MAS stresses that especially banks are at varying stages of embracing relevant risk management processes and it is urgent that these institutions address climate related-risks but also focus on other environmental risk factors, such as biodiversity loss[234].

Following the trend, the Australian Sustainable Finance Initiative (ASFI) has announced the establishment of an expert group[235] to provide technical input on the development of a "green" economy, bringing together banks, insurance companies, peak bodies and scholars into a self-funded collaboration aiming to align financial services with long-term international commitments such as the UN Sustainable Development Goals (SDGs) and the Paris Agreement. This initiative builds on the Australian Securities and Investments Commission (ASIC) review of ESG marketing by superannuation and managed funds[236].

Finally, at the EU level a lot of initiatives have been raining, being even complicated to keep track of them. In 2018, the European Commission released the action plan on sustainable finance[237]which emerged to dictate a roadmap for sustainable finance through the reorientation of capital flows toward a more sustainable economy, the integration of sustainability into risk management, the promotion of transparency and long-termism and greenwashing eradication. After that, quickly arose the Climate Benchmarks Regulation (EU

---

[233] MAS (2022) *Information Papers on Environmental Risk Management:* https://www.mas.gov.sg/publications/monographs-or-information-paper/2022/information-papers-on-environmental-risk-management

[234] Moody's Analytics (2022) *MAS Publishes Papers on Environmental Risk Management*: https://www.moodysanalytics.com/regulatory-news/may-31-22-mas-publishes-papers-on-environmental-risk-management

[235] Verney, P. (2022) *Australian finance sector names expert group to work on 'science-based' taxonomy*, in responsible investor

[236] Mishra, S. (2022) *Regulatory Solutions: A Global Crackdown on ESG Greenwash*, in Harvard Law School Forum on Corporate Governance

[237] European Commission (2018) COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN CENTRAL BANK, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Action Plan: Financing Sustainable Growth https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097

2019/2089)[238] to enhance benchmark methodologies' transparency and comparability regarding ESG metrics by providing a standardized index. This regulation created two labels of climate-related benchmarks, the EU climate transition benchmark (EU CTB) which conducts the resulting benchmark portfolio into a decarbonization trajectory, and the EU Paris-aligned benchmark (EU PAB) which intends the alignment of the resulting benchmark portfolio's carbon emissions with the Paris Climate Agreement[239]. Alongside emerged a Delegated Regulation[240] specifying the minimum standards of the benchmarks methodology and respective ESG disclosure requirements. The Sustainable Finance Disclosure Regulation (EU 2019/2088)[241] followed requiring financial market participants to disclose how they integrate and consider both financially material ESG risks and the adverse sustainability impacts in respect of their complete investment universe. The regulation provides detailed templates and a concrete list of ESG principle adverse impact indicators to report on. Also, the SFDR demands extensive disclosures concerning the investment strategy, criteria and use of the EU taxonomy for defined categories of products with ESG features and investment sustainable goals. This regulation entails adaptation in existing EU directives such as the Markets in Financial Instruments Directive (MiFID) and Insurance Distribution Directive (IDD) in order to integrate the new products' definitions. Alongside these initiatives, there are others under development, namely the Corporate Sustainability Reporting Directive (CSRD)[242] which implements mandatory ESG standards an external auditing for ESG

[238] Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2089

[239] ESMA, CLIMATE BENCHMARKS AND ESG DISCLOSURE, https://www.esma.europa.eu/policy-activities/sustainable-finance/climate-benchmarks-and-esg-disclosure

[240] Commission Delegated Regulation (EU) 2020/1818 of 17 July 2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.406.01.0017.01.ENG&toc=OJ%3AL%3A2020%3A406%3ATOC

[241] REGULATION (EU) 2019/2088 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 on sustainability-related disclosures in the financial services sector https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R2088-20200712

[242] European Commission (2021) COMMUNICATION Sustainable finance package https://finance.ec.europa.eu/publications/sustainable-finance-package_en#csrd

reports, the EU Green Bonds Regulation (EUGBR)[243] that comes to clarify the definition of green economic activities based on the Taxonomy Regulation and reduce potential reputational risks for issuers and the Corporate Sustainability Due Diligence Directive (CSDDD)[244] establishing a corporate due diligence duty for companies to identify, bring to an end, prevent, mitigate and account for negative ESG impacts in their own operations and value chains. Furthermore, the European Commission launched an Initiative on substantiating green claims[245] which resorts to the European Green Deal motto that "companies making 'green claims' should substantiate these against a standard methodology to assess their impact on the environment" and to the 2020 Circular Economy action plan commitment that "companies substantiate their environmental claims using Product and Organisation Environmental Footprint methods." At last, this initiative intends to review the EU consumer law to effectively combat greenwashing.

## 5. Conclusion

All in all, the world has witnessed an uneven and non-paced reception of ESG factors according to each society and legal system. The ESG universe evolved in such way that several distinct movements overlapped, ultimately getting mixed up with each other, which caused the concern for ESG factors to become associated with a mere exaltation of externalities. The growing global awareness of environmental and social issues has made citizens to reflect on their choices as consumers and to demand that companies do not pursue profit at all costs. At the same time, investors, some more focused on risk management assessment others more motivated by the ethical side, perceived this trend as a great market opportunity, which put even more pressure on companies to adapt to a sustainable conduct. Despite the absence of concrete guidelines and requirements, companies, in an attempt to

[243] European Commission, European green bond standard, How an EU-wide standard could encourage market participants to issue & invest in EU green bonds and improve the effectiveness, transparency, comparability & credibility of the market, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/european-green-bond-standard_en

[244] European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

[245] European Commission, Initiative on substantiating green claims https://ec.europa.eu/environment/eussd/smgp/initiative_on_green_claims.htm

stand out in the market, have channeled efforts to appear as socially and environmentally friendly as possible, which has not always meant a real dedication to “green” practices, products, and services, deceiving stakeholders. The ESG phenomenon has built up so fast and with such urgency that forced the various market participants to move forward with often insignificant actions in terms of sustainability and unconsolidated strategies which led to a general feeling of confusion and placebo effect.

With this in mind, the present dissertation has proven that national institutions, culture and law play a crucial role in the reception, development and application of ESG practices. In this regard, the fiduciary duty framework represents a particular hindrance namely when confronted with the view that the integration of ESG factors may be intended to positively impact third parties, going beyond the strict interest of the beneficiary. In this sense, in spite of globalization, there is great subjectivity and heterogeneity among nations especially in terms of ESG politics acceptance, corporate social responsibility performance and regulatory efforts.

Furthermore it follows that voluntarism contributed to all this ambiguity, since put companies to disclose their performance data in their own way and taste, allowed rating providers to build their evaluation methods by prioritizing what they considered most fundamental, and generated a market in which some make every effort to try to steer towards a sustainable goal and others remain inert without any consequence other than judgment by a section of the public opinion. Such spontaneity, on the one hand, brought out contradictory scores provided by different rating agencies. On the other, it gave room for abuse by certain enterprises which took advantage of the lack of consumer education and regulatory standards incurring in greenwashing practices.

Finally, it turns out the embedded ambiguity in the ESG universe is hindering the full exploitation of all its potentialities. The lack of worldwide standardization, the divergence of ESG scores between rating agencies and the increasingly frequent greenwashing scandals have been fomenting doubt, discredit and skepticism among consumers, investors and legislators, delaying the real goal of moving towards a more sustainable world. Against this backdrop, binding regulation seems to be the best weapon to eradicate subjectivity and to drive transparency and enforcement that ensure a true application of ESG factors. Moreover,

in the construction of such regulations legislators must take into account comparability and inter-operability between frameworks to improve international ESG credibility.

# 6. Bibliography

Adamsa, C., Abhayawansab, S. (2022) *Connecting the COVID-19 pandemic, environmental, social and governance (ESG) investing and calls for 'harmonisation' of sustainability reporting*, in Critical Perspectives on Accounting Vol. 82: 102309: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8882606/

Alcock, M., Albano, M. (2021) *New DOL Proposal on ESG Investing and Fiduciary Exercise of Shareholder Rights*, in Harvard Law School Forum on Corporate Governance: https://corpgov.law.harvard.edu/2021/11/09/new-dol-proposal-on-esg-investing-and-fiduciary-exercise-of-shareholder-rights/

Akturan, U. (2018) *How does greenwashing affect green branding equity and purchase intention? An empirical research*, in Marketing Intelligence & Planning Vol.36, p. 809–824: https://www.sciencegate.app/document/10.1108/mip-12-2017-0339

Andrew, T. (2022) *Leading ESG data providers reject EU regulation proposals*, in ETF STREAM: https://www.etfstream.com/news/leading-esg-data-providers-reject-eu-regulation-proposals/

Azizuddin, K. (2022) *ESG ratings providers push back against EU regulation proposals*, in responsible investor: https://www.responsible-investor.com/esg-ratings-providers-push-back-against-eu-regulation-proposals/

Baum, L. (2012) *It's Not Easy Being Green ... Or Is It? A content analysis of environmental claims in magazine advertisements from the United States and United Kingdom*, in Environmental Communication A Journal of Nature and Culture Vol. 6(4), p. 423-440: https://www.researchgate.net/publication/271927361_It's_Not_Easy_Being_Green_Or_Is_It_A_Content_Analysis_of_Environmental_Claims_in_Magazine_Advertisements_from_the_United_States_and_United_Kingdom

Benjamin, L., Rubin, J., Zielenbach, S. (2004) *Community development financial institutions: Current issues and future prospects*, in Journal of Urban Affairs,Vol. 26, Number 2, pages 177–195: https://www.richmondfed.org/~/media/richmondfedorg/community_development/resource_centers/cdfi/pdf/benjamin_rubin_zielenbach.pdf

Berg, F., Koelbel, F., Rigobon, R. (2020) *Aggregate Confusion: The Divergence of ESG Ratings*, in Forthcoming Review of Finance: https://qgroup.wildapricot.org/resources/Documents/Rigobon_Aggregate%20Confusion%20Paper.pdf

Bergman, M., Deckelbaum, A. (2020) *Introduction to ESG*, in Harvard Law School Forum on Corporate Governance: https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/

Boudes, P. (2014) *United Nations Conference on the Human Environment [1972]*, in Encyclopedia Britannica: https://www.britannica.com/topic/United-Nations-Conference-on-the-Human-Environment

Brammer, S., Brooks, C., & Pavelin, S. (2006) *Corporate social performance and stock returns: UK evidence from disaggregate measures*, in Financial Management, Vol. 35(3), 97–116.
https://www.researchgate.net/publication/5054753_Corporate_Social_Performance_and_Stock_Returns_UK_Evidence_from_Disaggregate_Measures

Carlson, L., S. Grove, and N. Kangun. (1993) *A content analysis of environmental advertising claims: A matrix method approach.*, in Journal of Advertising Vol 22(3), p. 27-39:
https://www.researchgate.net/publication/261644024_A_Content_Analysis_of_Environmental_Advertising_Claims_A_Matrix_Method_Approach

Chapple, W., Moon, J. (2005) Corporate social responsibility (CSR) in Asia: A seven-country study of CSR web site reporting, in Business & Society, 44(4), 415–441: https://doi.org/10.1177/0007650305281658

Contreras-Pacheco O, Claasen C (2017) *Fuzzy reporting as a way for a company to greenwash: perspectives from the Colombian reality*, Problems and Perspectives in Management 15(SI), p.526-536:
https://www.researchgate.net/publication/320179184_Fuzzy_reporting_as_a_way_for_a_company_to_greenwash_Perspectives_from_the_Colombian_reality

Cullen, J., Parboteeah, K., Victor, B. (2003) *The Effects of Ethical Climates on Organizational Commitment: A Two-Study Analysis*, in Journal of Business Ethics, Vol 46/2, p. 127-141:
https://www.researchgate.net/publication/226150884_The_Effects_of_Ethical_Climates_on_Organizational_Commitment_A_Two-Study_Analysis

Curran, J. (2022) *ESG rating providers: time for regulation?*, in Kennedys, https://kennedyslaw.com/thought-leadership/article/esg-rating-providers-time-for-regulation/

Daniel, C. (2021) *UK Regulators Show Unjustified Green Claims in Advertising the Red Light*, in THE NATIONAL LAW REVIEW https://www.natlawreview.com/article/uk-regulators-show-unjustified-green-claims-advertising-red-light

Deegan, C. (2002) *Introduction: The legitimising effect of social and environmental disclosures – a theoretical foundation*, in Accounting, Auditing & Accountability Journal, ISSN: 0951-3574:
https://www.emerald.com/insight/content/doi/10.1108/09513570210435852/full/html

Delmas, M., Burbano, V. (2011) *The Drivers of Greenwashing*, in California Management Review Vol. 54, no. 1: https://asset-pdf.scinapse.io/prod/3122377085/3122377085.pdf

Dieschbourg, M., Nussbaum, A. (2017) *No Place to Hide Thanks to Morningstar, Bloomberg, MSCI, and Multiple Global Data Providers*, in Investments & Wealth Institute: https://investmentsandwealth.org/getattachment/fdf4d0e3-adc0-487a-bbe0-624cdefb3b2f/IWM17NovDec-ESGNoPlaceToHide.pdf

Diesendorf, M. (2015) *Accidents, Waste and Weapons: Nuclear Power Isn't Worth the Risks*, in THE CONVERSATION: https://theconversation.com/accidents-waste-and-weapons-nuclear-power-isnt-worth-the-risks-41522

DiMaggio, P., Powell, W. (1983) *The iron cage revisited: institutional isomorphism and collective rationality in organizational fields*, in American Sociological Review, Vol. 48, 147-160: https://www.enriquedans.com/wp-content/uploads/2021/11/The_Iron_Cage_Revisted_Institutional_Isomorphism_a.pdf

Eccles, R., Stroehle, J. (2018) *Exploring Social Origins in the Construction of Environmental, Social and Governance Measures*, in Job Market Paper: https://ora.ox.ac.uk/objects/uuid:8b655ba6-a5d6-4774-a24f-8a235176a595/download_file?safe_filename=Eccles%2Band%2BStroehle%2B2019%2BExploring%2BSocial%2BOrigins%2Bin%2Bthe%2BConstruction%2Bof%2BESG%2BMeasures.pdf&file_format=pdf&type_of_work=Journal+article

Edelman, M. (2001) *Social Movements: Changing Paradigms and Forms of Politics*, in Annual Review of Anthropology Vol. 30, p.285-317: https://d1wqtxts1xzle7.cloudfront.net/40820041/Edelman_2001-with-cover-page-v2.pdf?Expires=1662992749&Signature=dw-jRv8Rc0ICv1mbXP829Yh12Z0ipKWdf1rNJLCrhTULEtQgyfJAIokJd7tBievZsvHzvr34D3s74MKrvaeliTPDNlQhkge1x-46RhMEoE3rp0pkqtaotiG5qfQCDmwGOln0jxfyO7KwffhWiVia~p4vINRpyHPbPpFE86Gz9OgMFNIYlC8RNESg25MDCnt-KTY0HrlJyjRkn-LLruch1dH5mrOajDpL9yA5qGIdtspMN28eMjn3D2XMnvt6muAvAH0mF7liv9XT3G80BCWskolV22V93ouh2shg4z1ehVjizvPvstS8RSlRyQMR4kQ8ESLETqYmbc5EyxvVdguERQ__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

Eltobgy, M., Brown, T. and Picard, N. (2021) *Here's Why Comparable ESG Reporting Is Crucial for Investors*, in World Economic Forum: https://www.weforum.org/agenda/2021/07/comparable-esg-investors/.

Fainshmidt, S., William, Q. J., Aguilera, R. V., & Smith, A. (2018) *Varieties of institutional systems: A contextual taxonomy of understudied countries*, in Journal of World Business, 53(3), 307–322: https://doi.org/10.1016/j.jwb.2016.05.003

Farmer, A., Thompson, S. (2020) *The Ripple Effect of EU Taxonomy for Sustainable Investments in U.S. Financial Sector*, in Harvard Law School Forum on Corporate

Governance: https://corpgov.law.harvard.edu/2020/06/10/the-ripple-effect-of-eu-taxonomy-for-sustainable-investments-in-u-s-financial-sector/

Fernando, J. (2022) *MSCI KLD 400 Social Index*, in Investopedia: https://www.investopedia.com/terms/d/domini_400.asp

Frankel, T. (2018) *The Rise of Fiduciary Law*, in Harvard Law School Forum on Corporate Governance: https://corpgov.law.harvard.edu/2018/09/10/the-rise-of-fiduciary-law/

Freeman, R., Harrison, J., Wicks, A., Parmar B., Colle, S. (2010) *Stakeholder Theory: The State of the Art*, Cambridge University Press

Friedman, M. (1970) *The Social Responsibility of Business is to Increase its Profits*, in The New York Times Magazine 13 September, p. 122-126: http://websites.umich.edu/~thecore/doc/Friedman.pdf

Gong, Y., Merle, C. (2021) *EU-China Common Ground Taxonomy, a painkiller to taxonomy headaches?*, in Natixis: https://gsh.cib.natixis.com/our-center-of-expertise/articles/eu-china-common-ground-taxonomy-a-painkiller-to-taxonomy-headaches

Guo, R., Tao, L., Li, C. B., Wang, L. (2017) *A path analysis of greenwashing in a trust crisis among Chinese energy companies: The role of brand legitimacy and brand loyalty*, in Journal of Business Ethics, Vol. 140(3), p. 523-536: https://ideas.repec.org/a/kap/jbuset/v140y2017i3d10.1007_s10551-015-2672-7.html

Hansen, M. (1999) *The Search-Transfer Problem: The Role of Weak Ties in Sharing Knowledge across Organization Subunits*, in Administrative Science Quarterly, Vol. 44/1, p. 82-111: https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1006.3668&rep=rep1&type=pdf

Hofstede, G. (1980) *Culture and organizations*, in International Studies of Management & Organization, Vol. 10(4), 15–41: https://www.tandfonline.com/doi/abs/10.1080/00208825.1980.11656300

Hofstede, G. (2011) *Dimensionalizing Cultures: The Hofstede Model in Context*, in Online Readings in Psychology and Culture, Unit 2 : http://scholarworks.gvsu.edu/orpc/vol2/iss1/8

Hupart, J., Gates, M., Baumstein, D., Michaels, P., Taylor, C. (2022) *SEC Proposes Regulations to Address "Greenwashing" By Investment Funds*, in THE NATIONAL LAW REVIEW: https://www.natlawreview.com/article/sec-proposes-regulations-to-address-greenwashing-investment-funds

Jackson, G., Deeg, R. (2008) *Comparing capitalisms: Understanding institutional diversity and its implications for international business*, in Journal of International Business Studies, 39(4), 540–561. https://doi.org/10.1057/palgrave.jibs.8400375

Kaufmann, W., Hooghiemstra, R., Feeney, M. (2018) *Formal institutions, informal institutions, and red tape: A comparative study*, in Wiley: https://onlinelibrary.wiley.com/doi/pdf/10.1111/padm.12397

Kotsantonis, S., Serafeim, G. (2019) *Four things no one will tell you about ESG data*, in Journal of Applied Corporate Finance, Vol. 31(2): https://onlinelibrary.wiley.com/doi/abs/10.1111/jacf.12346

La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Vishny, R. (1998) *Law and finance*, Journal of Political Economy, Vol. 106(6), 1113–1155: https://www.jstor.org/stable/10.1086/250042

Liang, H., Renneboog, L. (2016) *On the foundations of corporate social responsibility*, in Journal of Finance, Vol. 72(2), p.853-910: https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12487

Marquis, C., Tofel, M., Zhou, Y. (2016) *Scrutiny, norms, and selective disclosure: a global study of greenwashing*, in Organization Science 27(2):483-504: https://doi.org/10.1287/orsc.2015.1039

Mathews, M. R. (1997) *Twenty-five years of social and environmental accounting research: Is there a silver jubilee to celebrate?*, in Accounting, Auditing & Accountability Journal, 10(4), 481–531: https://www.emerald.com/insight/content/doi/10.1108/EUM0000000004417/full/html

Mattews, B. (2000) *The Chinese Value Survey: An interpretation of value scales and consideration of some preliminary results*, in International Education Journal Vol 1, No 2: https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.580.3633&rep=rep1&type=pdf

Mayor, T. (2019) *Why ESG ratings vary so widely (and what you can do about it)*, in MIT SLOAN SCHOOL OF MANAGEMENT: https://mitsloan.mit.edu/ideas-made-to-matter/why-esg-ratings-vary-so-widely-and-what-you-can-do-about-it

Mccarthy, A. (2017) *Dismantling Solidarity: Capitalist Politics and American Pensions since the New Deal*, in Cornell University Press, Chapter 4, p. 77-125

Mishra, S. (2022) *Regulatory Solutions: A Global Crackdown on ESG Greenwash*, in Harvard Law School Forum on Corporate Governance: https://corpgov.law.harvard.edu/2022/06/23/regulatory-solutions-a-global-crackdown-on-esg-greenwash/

Mormann, F., Mormann, M. (2022) *It's Time to Give Companies Standalone Climate Ratings*, in Harvard Business Review: https://hbr.org/2022/05/its-time-to-give-companies-standalone-climate-ratings

Mottola, G., Valdes, O., Ganem, R., Fontes, A., Lush, M. (2022) *Investors say they can change the world, if they only knew how: Six things to know about ESG and retail investors*, in FINRA Investor Education Foundation and NORC at the University of Chicago: https://www.finrafoundation.org/sites/finrafoundation/files/Consumer-Insights-Money-and-Investing.pdf

Netto, S., Sobral M., Ribeiro, A., Soares, G. (2020) *Concepts and forms of greenwashing: a systematic review*, in Environmental Sciences Europe: https://enveurope.springeropen.com/track/pdf/10.1186/s12302-020-0300-3.pdf

Nguyen, N. (2020) *Greenwashing behaviours: Causes, taxonomy and consequences based on a systematic literature review*, in Journal of Business Economics and Management Vol. 21(5) p. 1486-1507: https://www.researchgate.net/publication/345844645_Greenwashing_behaviours_Causes_taxonomy_and_consequences_based_on_a_systematic_literature_review

Norton, L. (2022) *This is Why Tesla's ESG Rating Isn't Great*, in Morningstar: https://www.morningstar.co.uk/uk/news/221629/this-is-why-teslas-esg-rating-isnt-great.aspx

Ortas, E., Álvarez, I., Jaussaud, J., & Garayar, A. (2015) *The impact of institutional and social context on corporate environmental, social and governance performance of companies committed to voluntary corporate social responsibility initiatives*, in Journal of Cleaner Production, 108, 673–684: https://onlinelibrary.wiley.com/doi/pdf/10.1002/csr.1706?casa_token=SMLU8Wj8oEsAAAAA:EF2ZOB7Y8MoAwxkS6V30NjOxrkwu_mA-sTM1A-qM4L78NOM2yZT7n1M-DdaeakrF0qO2icSBHttbMlE

Parguel, B., Bnoît-Moreau, F. (2013) *The power of 'executional greenwashing'. Evidence from the automotive sector*, in Lalonde Conference: https://halshs.archives-ouvertes.fr/halshs-00948933/document

Parguel, B., Benoît-Moreau F., Russell, C. (2015) *Can evoking nature in advertising mislead consumers? The power of 'executional greenwashing'*, in International Journal of Advertising: The Review of Marketing Communications: https://www.researchgate.net/publication/313614699_Can_evoking_nature_in_advertising_mislead_consumers_The_power_of_'executional_greenwashing'/link/5cd682d8a6fdccc9dd9f72a2/download

Pettingale, H., Maupeou, S. and Reilly, P. (2022) *EU Taxonomy and the Future of Reporting*, in Harvard Law School Forum on Corporate Governance: https://corpgov.law.harvard.edu/2022/04/04/eu-taxonomy-and-the-future-of-reporting/

Pipitone, N. (2022) *Survey Shows Many Investors Don't Even Know What ESG Stands For*, in propmodo: https://www.propmodo.com/survey-shows-many-investors-dont-even-know-what-esg-stands-for/

Rallapalli, K. C., Vitell, S.J., Wiebe, F. A., & Barnes,J. H. (1994) *Consumer ethical beliefs and personality traits: An exploratory analysis*, Journal of Business Ethics, Vol. 13(7), 487–495: https://link.springer.com/article/10.1007/BF00881294

Rayer, Q. (2017) *Exploring ethical and sustainable investing*, in The Review of Financial Markets: https://www.researchgate.net/profile/Quintin-

Rayer/publication/357578248_Exploring_ethical_and_sustainable_investing/links/61d5625cda5d105e551d6896/Exploring-ethical-and-sustainable-investing.pdf

Rhode, D., Packel, A. (2014) *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, in DELAWARE JOURNAL OF CORPORATE LAW, Vol. 39: http://www.gwlr.org/wp-content/uploads/2018/10/Diversity-on-Corporate-Boards-How-Much-Difference-Does-It-Make.pdf

Ringov, D., Zollo, M. (2007) *The impact of national culture on corporate social performance*, in in Corporate Governance International Journal of Business in Society, Vol. 7 No. 4, p. 476-485: https://www.researchgate.net/profile/Maurizio-Zollo/publication/235259425_The_Impact_of_National_Culture_on_Corporate_Social_Performance/links/00b4952463d809a3f0000000/The-Impact-of-National-Culture-on-Corporate-Social-Performance.pdf

Roy, A., Mukherjee, P. (2022) *Does National Culture Influence Corporate ESG Disclosures? Evidence from Cross-Country Study*, in Vision-The Journal of Business Perspective : https://www.researchgate.net/publication/358582028_Does_National_Culture_Influence_Corporate_ESG_Disclosures_Evidence_from_Cross-Country_Study

Sailer, A., Wilfing, H., Straus, E. (2022) *Greenwashing and Bluewashing in Black Friday-Related Sustainable Fashion Marketing on Instagram*, Sustainability 14(3):1494: https://doi.org/10.3390/su14031494

Sampei, H. (2018) *ESG awareness is an enduring legacy of the global financial crisis*, in Fidelity International: https://www.fidelityinternational.com/editorial/blog/pesg-awareness-is-an-enduring-legacy-of-the-global-financial-crisisp-a5a9f2-en5/

Sarkar, A. (2012) *Green Marketing and Sustainable Development Challenges and Opportunities*, in International Journal of Marketing, Financial Services & Management Research Vol.1 https://www.researchgate.net/profile/Anirban-Sarkar-2/publication/362223391_Green_Marketing_and_Sustainable_Development-Challenges_and_Opportunities/links/62dd206ef3acdd5dc215c358/Green-Marketing-and-Sustainable-Development-Challenges-and-Opportunities.pdf

Scanlan, S. (2017) *Framing fracking: scale-shifting and greenwashing risk in the oil and gas industry*, Local Environmental Vol. 22(1), p.1-27: https://www.researchgate.net/publication/318297039_Framing_fracking_scale-shifting_and_greenwashing_risk_in_the_oil_and_gas_industry/link/59d9577fa6fdcc2aad0d9183/download

Schanzenbach, M., Sitkoff, R. (2017) *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, in Journal of Empirical Legal Studies, Vol. 14, Issue 1, pp. 129-168: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607352

Schanzenbach, M., Sitkoff, R. (2020) *ESG Investing: Theory, Evidence, and Fiduciary Principles,* in Journal of Financial Planning, Discussion Paper No. 1038: http://www.law.harvard.edu/programs/olin_center/papers/pdf/Sitkoff_1038.pdf

Schanzenbach, M., Sitkoff, R. (2020) *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing By A Trustee*, Discussion Paper No. 971, in Stanford Law Review, Vol. 72: http://www.law.harvard.edu/programs/olin_center/papers/pdf/Sitkoff_1038.pdf

Seele, P., Gatti, L. (2015) *Greenwashing revisited: in search of a typology and accusation-based defnition incorporating legitimacy strategies*, in Business Strategy and the Environment Vol. 26(2), p. 239-252: https://doi.org/10.1002/bse.1912

Siano, A., Vollero, A., Conte, F., Amabile, S. (2017*) "More than words": expanding the taxonomy of greenwashing after the Volkswagen scandal*, in Journal of Business Research Vol 71, p.27–37: https://doi.org/10.1016/j.jbusres.2016.11.002

Sipiczki, A. (2022) *A Critical Look at The ESG Market*, in CEPS S Policy Insights
No 2022-15: https://www.ceps.eu/wp-content/uploads/2022/04/PI2022-15_A-critical-look-at-the-ESG-market.pdf

Snitker, Thomas Visby (2010), *Handbook of Global User Research*, Chapter 9.6.4

Solove, D. (2008) *Understanding Privacy*, Harvard University Press, p.71-81

Stewart, F., & Yermo, J. (2008) *Pension Fund Governance: Challenges and Potential Solutions*, in OECD Working Papers on Insurance and Private Pensions No. 18.: https://www.oecd-ilibrary.org/docserver/241402256531.pdf?expires=1663153607&id=id&accname=guest&checksum=3392C36535CA9924156F9BD3AE09BBA3

Sun, J., Yoo, S., Park, J., Hayati, B. (2019) *Indulgence versus Restraint: The Moderating Role of Cultural Differences on the Relationship between Corporate Social Performance and Corporate Financial Performance*, in Journal of Global Marketing, Vol. 32:2, 83-92: https://www.tandfonline.com/doi/abs/10.1080/08911762.2018.1464236

Testa, F., Boiral, O., & Iraldo, F. (2018) *Internalization of environmental practices and institutional complexity: Can stakeholders pressures encourage greenwashing?*, in Journal of Business Ethics, Vol. 147, p. 287–307: https://ideas.repec.org/a/kap/jbuset/v147y2018i2d10.1007_s10551-015-2960-2.html

Thorne, D. (2016) *Coalition for Environmentally Responsible Economies*, in Encyclopedia Britannica: https://www.britannica.com/topic/Coalition-for-Environmentally-Responsible-Economies

Townsend, B. (2020) *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, in The Journal of Impact and ESG Investing, p.10-25: https://jesg.pm-research.com/content/1/1/10

Treslstad, B. (2016) *Impact Investing: A Brief History*, in Capitalism and Society, Vol. 11: Iss 2, Arcticle 4: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886088

Uhrynuk, M., Burdulia, A. (2021) *ASEAN Releases Sustainability Taxonomy for Southeast Asia*, in Eye on ESG, MAYER BROWN: https://www.eyeonesg.com/2021/11/asean-releases-sustainability-taxonomy-for-southeast-asia/

Uhrynuk, M., Harris, S., Lee, J. (2022) *Singapore Publishes Second Version of Green Taxonomy for Financial Institutions*, in Eye on ESG, MAYER BROWN: https://www.eyeonesg.com/2022/05/singapore-publishes-second-version-of-green-taxonomy-for-financial-institutions/

Uyar, A., Karaman, A. S., Kilic, M. (2020) Is *corporate social responsibility reporting a tool of signaling or greenwashing? Evidence from the worldwide logistics sector*, in Journal of Cleaner Production 253, 119997: https://www.researchgate.net/publication/338444661_Is_corporate_social_responsibility_reporting_a_tool_of_signaling_or_greenwashing_Evidence_from_the_worldwide_logistics_sector

Verney, P. (2022) *Australian finance sector names expert group to work on 'science-based' taxonomy*, in responsible investor: https://www.responsible-investor.com/australian-finance-sector-names-expert-group-to-work-on-science-based-taxonomy/

Vos, J. (2009) *Actions Speak Louder than Words: Greenwashing in Corporate America*, Notre Dame Journal of Law, Ethics and Public Policy, Article 13, Vol. 23, p. 673-697.:https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1111&context=ndjlepp

Williamson, O. (2000) *The new institutional economics: Taking stock, looking ahead*, in Journal of Economic Literature, 38(3), 595–613: https://www.jstor.org/stable/2565421

Wilson, N. (2022) *ESG + Public Health = ESHG*, in Standford SOCIAL INNOVATION Review: https://ssir.org/articles/entry/esg_public_health_eshg

Winston, A. (2022) *What's Lost When We Talk 'ESG' and Not 'Sustainability'*, in MIT Sloan Management Review: https://sloanreview.mit.edu/article/whats-lost-when-we-talk-esg-and-not-sustainability/

Wolfe, K. (2022) *Who Regulates the ESG Ratings Industry?*, in Bloomberg Law: https://news.bloomberglaw.com/esg/who-regulates-the-esg-ratings-industry

Yazdani, H. (2022) *The bright spots in a complicated ESG framework*, in World Economic Forum: https://www.weforum.org/agenda/2022/07/still-reason-for-optimism-about-esg-investing/

Yu, E. P.-y., Luu, B. V., Chen, C. H. (2020) *Greenwashing in environmental, social and governance disclosures*, in Research in International Business and Finance, 52, 101192: https://eprints.bbk.ac.uk/id/eprint/30701/1/Greenwashing%20in%20environmental%2C%20social%20and%20governance%20disclosures%20from%20Ellen%20Yu.pdf

## Legislation and Guidelines

ASEAN Taxonomy Board, (2021) *ASEAN Taxonomy For Sustainable Finance*: https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf

ESMA (2022) *Call For Evidence on market characteristics for ESG Rating Providers in the EU*: https://www.esma.europa.eu/press-news/consultations/call-evidence-market-characteristics-esg-rating-providers-in-eu

EIOPA (2019) *EIOPA issues opinions on governance and risk management of pension funds*: https://perma.cc/M3YG-TFT3

Employee Retirement Income Security Act of 1974, Public Law 93–406, As Amended Through P.L. 117–58, Enacted November 15, 2021: https://www.govinfo.gov/content/pkg/COMPS-896/pdf/COMPS-896.pdf

FCA (2021) *Sustainability Disclosure Requirements (SDR) and investment labels, Discussion Paper*, https://www.fca.org.uk/publication/discussion/dp21-4.pdf

FCA (2022) *ESG integration in UK capital markets: Feedback to CP21/18*, Feedback Statement FS22/4: https://www.fca.org.uk/publication/feedback/fs22-4.pdf

FSA (2022) *The Code of Conduct for ESG Evaluation and Data Providers (Draft):* https://www.fsa.go.jp/news/r4/singi/20220712/20220712_6.pdf

Green Finance Industry Taskforce (2022) *Identifying a Green Taxonomy and Relevant Standards for Singapore and ASEAN*: https://abs.org.sg/docs/library/second-gfit-taxonomy-consultation-paper

GRI, SASB (2021) *A Practical Guide to Sustainability Reporting Using GRI and SASB Standards*, Report: https://www.globalreporting.org/media/mlkjpn1i/gri-sasb-joint-publication-april-2021.pdf

IOSCO (2021) *Environmental, Social and Governance (ESG) Ratings and Data Products Providers*: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD690.pdf

PRI (2019) *FIDUCIARY DUTY IN THE 21 CENTURY*, Final Report: https://www.unpri.org/download?ac=9792

Presidential Documents (2019) Executive Order no. 13868, 5(b), Vol, 84 Federal Register: https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf

REGULATION (EU) 2019/2088 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 on sustainability-related disclosures in the financial services sector

REGULATION (EU) 2020/852 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

The Pensions Regulator (2019) *A guide to Investment governance*, p. 14: https://perma.cc/Z4NQ-2B5A

US DOL (2018) Field Assistance Bulletin No. 2018-01 - Superseded by 85 FR 72846 and 85 FR 81658: https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01