

JDP

ESG
Newsletter

ESG legal framework - where to find answers

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The first JDP ESG Newsletter served as a general introduction to the ESG topic. In this issue, we discuss the most important, from a practical point of view, legal regulations regarding ESG. In upcoming ESG Newsletters, we will explain in detail individual aspects of ESG. Enjoy your reading!

ESG LEGAL FRAMEWORK



As we explained in our first ESG Newsletter (you can find it [here](#)), the term of ESG is not specifically defined under legal provisions. It covers a wide range of areas of life and business that are subject to various regulations.

The existing catalogue of ESG regulations is not exhaustive and we expect it to expand.

A pivotal role seem to play the rapidly evolving regulations related to the so-called non-financial reporting. Notably, there is a discernible trend toward standardising the rules and terminology used in relation to ESG.

In this ESG Newsletter, we concisely summarise the key regulations regarding ESG as well as their scope and primary objectives.

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UE legislation

The initiation and ongoing development of ESG are primarily attributed to the goals defined by the EU under the **European Green Deal**, presented in the Communication from the Commission of 11 December 2019, COM(2019) 640 final. The European Green Deal is being implemented through, among other things, the Fit for 55 package that is legally outlined in the Communication from the Commission of 14 July 2021, COM(2021) 550 final. Given the above, it comes as no surprise that the development of ESG regulations is driven primarily by EU's decisions.

At this stage of developments, **the focus lies on formulating regulations regarding reporting obligations related to non-financial reporting**, i.e. reporting effects of addressing ESG challenges.

These regulations primarily target entities crucial from the market perspective on a macro scale.

These are participants in the financial and insurance sectors as well as companies listed on regulated markets. However, as these entities need to obtain reportable information from their contracting parties, **in practice the number of entities affected by reporting obligations is considerably higher.**



The objective of the said provisions is to impose obligations regarding disclosing information pertinent to ESG considerations.



Establishing a **standardised framework** in this context is expected to help understand, monitor and enforce the compliance of business operations with the ESG principles.



Assessing ESG compliance may be important from the perspective of **investors, consumers, employees and employers** who make up the major part of market participants.

Legal framework for non-financial reporting: step by step

	Legislative act	Scope of the regulation
1	<p>Directive 2014/95/EU of the European Parliament and of the Council</p> <p>NFRD (Nonfinancial Disclosure Reporting Directive)</p>	requires including in management reports an additional statement of non-financial information, relevant to an understanding of the development of an undertaking, relating to environmental, social and employee matters, human rights, anti-corruption and anti-bribery
2	<p>Regulation (EU) 2019/2088 of the European Parliament and of the Council</p> <p>SFDR (Sustainable Finance Disclosure Regulation)</p>	governs non-financial reporting in the financial market area; introduces an obligation to report on the strategy for sustainability risks in investment decisions and to disclose the negative impact of investment decisions on sustainability factors
3	<p>Regulation (EU) 2020/852 of the European Parliament and of the Council</p> <p>EU Taxonomy</p>	standardises ESG terminology and streamlines the implementation of the ESG principles by the financial market, establishes a uniform basis for examining the environmental impacts of projects, which, in particular, is intended to enable the streamlining of capital flows towards green investments, as well as the introduction of solutions to combat so-called “greenwashing”
4	<p>Commission Delegated Regulation (EU), ie. 2022/1288 supplementing the SFDR and the EU Taxonomy</p>	clarifies or extends the obligations under the SFDR and the EU Taxonomy, including clarifying the contents and the presentation of disclosed data and specifying criteria and technical standards
5	<p>Directive (EU) 2022/2464 of the European Parliament and of the Council</p> <p>CSRD (Corporate Sustainability Reporting Directive)</p>	replaces the NFRD and extends the reporting mechanisms to small and medium-sized enterprises, governs the rules of ESG auditing and clarifies the rules of ESG reporting

The **CSDD (Corporate Sustainability Due Diligence) Directive (Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence** and amending Directive (EU) 2019/1937 of 23 February 2022, **COM(2022) 71 final**), currently in the preparation phase, will also play an important role here. Once introduced, business undertakings will have to ensure due diligence in building their supply chains by identifying, assessing and managing their negative environmental and social impacts. The draft directive provides for sanctions for breaching obligations in this regard.

On 31 July 2023, the European Commission adopted a delegated regulation endorsing the **European Sustainability Reporting Standards (ESRS)**. **This regulation has not yet been published and is awaiting entry into force.**

The ESRS aims to establish comprehensive norms and detailed standards for reporting done in accordance with the EU Taxonomy and the CSRD; in particular it allows for comparing and verifying data.



Polish regulations

The EU regulations referred to above have impacted Polish legislation. As an EU Member State, Poland has initiated the implementation of ESG solutions. Some EU regulations, particularly those enacted in the form of **regulations**, apply directly across the EU. **Directives**, on the other hand, require so-called transposition, i.e. the enactment of national legislation incorporating the solutions set out in the directives into national legal systems. The Polish legislature has not yet enacted a specific law that would attempt to comprehensively regulate ESG issues.

However, ESG-related matters are governed under some existing Polish special laws regarding e.g. **accounting, financial market, environmental protection, labour law or competition and consumer protection.**

For instance, the obligations arising from the NFRD have been transposed into Polish law by the **Act amending the Accounting Act** of 15 December 2016 (Journal of Laws of 2017, item 61), under which Article 49b introducing the **obligation to include non-financial information** in management reports was added.

Under Article 49b of the Accounting Act, the said obligation extends to entities that, in the financial year for which they prepare financial statements and in the year preceding that year, exceed the following numbers:

1. **500 people:** in the case of annual average FTE employment and
2. **PLN 85.000.000:** in the case of total assets in the balance sheet at the end of the financial year, or **PLN 170.000.000:** in the case of net revenue from sales of goods and products for the financial year

The statement on non-financial information must include at least:

- 1) a brief description of an undertaking's **business model**;
- 2) key **non-financial performance indicators** related to an undertaking's operations;
- 3) description of **policies operating at an undertaking** in relation to social, employment, environmental, respect for human rights and anti-corruption issues, as well as a description of the **results of applying these policies**;
- 4) **description of due diligence procedures** if an undertaking applies them under the above-mentioned policies;
- 5) description of significant **risks associated with an undertaking's operations** that could adversely impact the matters referred to in point 3 above, including risks associated with an undertaking's products or its relationship with the external environment, including business partners, and a description of the management of those risks.

When preparing a statement on non-financial information, an undertaking may freely choose the principles that it applies, including its own, national, EU principles or international standards, norms or guidelines.

However, in the statement, it must specify what principles, standards, norms or guidelines it has applied.

Among other national laws and directly applicable EU regulations governing ESG-relevant issues in Poland, the **following regulations** are worth highlighting:



Labour Code



Commercial Companies Code



Accounting Act



GDPR



Act on Competition and Consumer Protection



Act on Insurance and Reinsurance Activity



Financial Instruments Trading Act



MAR



Banking Law



Sanctions for failure to comply with ESG regulations

Generally, the EU regulations regarding ESG do not contain provisions that would per se introduce administrative or criminal sanctions for non-compliance. However, this does not mean that trading participants cannot be sanctioned for non-compliance with the ESG principles. National ESG legislation may constitute a basis for imposing sanctions under specific laws on ESG issues, including those mentioned above.

The provisions of the **Financial Market Supervision Act** which grant the Polish Financial Supervision Authority (KNF) powers to enforce compliance by financial market participants with, for example, the provisions of the SFDR, play an important role in this context.

In the case of a breach of the obligations under the SFDR, such as the obligation to report adverse impact of certain financial products on sustainability, KNF is empowered in particular to:

- request bringing the activities leading to a breach to an end,
- request to the competent bodies of the financial market participant to dismiss a member of the company's board responsible for a breach,
- prohibit the provisions of certain financial products or impose fines.



Under the **Accounting Act**, anyone who, contrary to its provisions, fails to publish on a website documents regarding non-financial reporting is subject to a fine or a restriction of liberty.



Greenwashing activities are considered by the Office for Competition and Consumer Protection as a **violation of collective consumer interests** by breaching the obligation to provide consumers with reliable, true and complete information. Such actions expose the entities concerned to sanctions.

Notably, the President of the Office for Competition and Consumer Protection is authorised to issue a decision ordering bringing such practices to an end and then to issue a decision imposing a penalty of up to 10% of an entity's turnover generated in the financial year preceding the year in which the penalty was imposed.



Introducing **criminal provisions** for distorting ESG data is being considered.



Summary

As you can see, the regulatory issues related to ESG can be divided into two main areas:

- dynamically developing **area related to so-called non-financial reporting**, centralised at the EU level and currently focused on the obligations imposed on the largest trading participants, and
- **other ESG regulations**, spread throughout various EU and national laws on environmental protection, employment, or corporate governance, which already apply to all business undertakings.

To assess ESG compliance of their business operations, market participants should engage experienced advisors, including lawyers, who will perform a comprehensive, multi-faceted audit of their business and identify key responsibilities and areas for improvement.

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