SLAUGHTER AND MAY/

ESG IN 2024: MATURITY, CLARITY AND UNCERTAINTY

GOVERNANCE & SUSTAINABILITY
Part of the Horizon Scanning series


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Over the course of 2023, the concepts of ESG, and sustainability more broadly, evolved to reflect and anticipate developments in society, governmental policy and corporate decision-making and strategy.

We expect 2024 to be no different. The world's view of ESG will likely be tested against the backdrop of the anti-ESG movement in the United States, U-turns in UK governmental policy in the context of the cost-of-living crisis and the ongoing conflicts in the Middle East and Ukraine.

Yet, these developments are unlikely to slow down the pressure from investors, lenders, regulators, and sectors of society that see ESG as a priority. For this reason, in 2024 expectations on companies to create adaptable strategies and ensure that they deliver on their ESG commitments will be even higher, and many have already demonstrated resilience in meeting their commitments.

The current focus is on listed companies, public interest entities and the finance sector, but private companies (particularly large private companies) are under increasing pressure to re-evaluate their businesses, disclose more information and revisit their governance structures accordingly to cater for the risks and opportunities presented by the sustainability agenda.

To help businesses make sense of the various challenges and opportunities presented by ESG, in 2024 we have collected our thoughts around three key themes: **maturity**, **clarity** and **uncertainty**.

MATURITY

We have sensed from conversations with our clients a marked shift towards implementation and operationalisation of ESG, regardless of political and economic uncertainties and ongoing regulatory evolution. Whilst the political environment fluctuates (particularly with significant elections coming this year, including in the United States) stakeholder expectations are no longer focused solely on whether businesses must transition, but rather how to transition and how fast.

Those businesses plotting a path for their transition most successfully often start with their purpose, strategy and commercial proposition in mind (i.e. a sophisticated view of sustainability, opportunity and risk). They understand this will require increasingly focused sustainability leadership from the board and the senior management team. The Transition Plan Taskforce's (**TPT**) framing of Ambition, Action and Accountability (see further below) captures the zeitgeist. Businesses that get ahead of the regulation on transition plans will have the prospect of differentiating themselves positively.

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Our sense is that, once the current suite of contemplated UK regulatory initiatives are consulted on and implementation processes are commenced (notably endorsement of the International Sustainability Standards Board (**ISSB**) standards, TPT, TNFD (defined below), Sustainability Disclosure Requirements and a UK Green Taxonomy), the stock of domestic transparency and reporting regulations will stabilise. The UK Government's pillars of strategic action for green finance, being 'greening finance' and 'financing green' have been furthered, with measures to ensure that market participants have the information and data that they need to manage risks and allocate capital where there are opportunities. Climate finance, and in particular the private sector's role in providing such finance, was also a key theme of **COP28**: **Discussion points for business from week 1**, **Impacts for business** . Good market practice will continue to develop, with a collaborative approach from regulators and amongst businesses.

2023 saw a consistent voice from multiple business sources, trade associations and stakeholder platforms for more meaningful regulatory intervention, ranging from calls for a comprehensive industrial strategy, to better support for particular energy transition technologies, to a more ambitious regulatory framework to incentivise transition. We expect this to continue as businesses see the opportunity that sustainability presents, the need to progress their transition and the demands of their stakeholders to do so.

CLARITY

Corporate ESG reporting frameworks will continue to evolve in 2024 and will benefit from greater clarity from regulators, albeit that it is unlikely that full clarity will emerge by the end of the year.

Regimes like the Taskforce on Climate-related Financial Disclosures (**TCFD**) will merge into more prescribed regulatory content via the European Sustainability Reporting Standards (**ESRS**), the ISSB standards, the TPT framework and such like. Despite imperfect interoperability, each new framework calls for improved transparency through more detailed disclosure requirements (including in respect of scope 3 emissions, the subject of a UK Government call for evidence that closed at the end of 2023), assurance processes and materiality assessments.

The ISSB has published its sustainability and climate change disclosure standards, which may become the global baseline for sustainability reporting in many jurisdictions, including in Brazil, Japan, South Africa and the UK. The EU has gone a step further, adopting a "double materiality" approach via the Corporate Sustainability Reporting Directive and ESRS, requiring disclosures about the impact a business has on people and planet, not just what is financially material. The US Securities and Exchange Commission (**SEC**) is yet to publish its climate rules. Reporting on biodiversity is also expected to develop, as companies get to grips with the recommendations of the Taskforce on Nature-related Financial Disclosures (**TNFD**), published in September. Human rights and supply chain integrity will also go up the reporting agenda.

Finally, disclosure of transition plans is likely to see major growth in 2024. The UK's TPT has published its "gold standard" sector-neutral transition plan disclosure framework, which offers businesses a better sense of how wider stakeholder expectations are likely to be set, and how to satisfy or exceed them. The TPT's guidance on legal considerations for transition plans preparers (to which Slaughter and May contributed) also offers guidance on how to account for directors' duties and competition law when making transition plan disclosures. This will be supplemented by sector specific guidance, following closure of a consultation at the end of 2023.

We expect to see greater clarity with respect to regulating greenwashing as well. In the US, regulators including the SEC have been cracking down on greenwashing and strengthening their rules. In the UK, whilst the Advertising Standards Authority continues to closely police misleading green claims in advertising, we anticipate further guidance from the Competition and Markets Authority arising out of its sector-by-sector review of greenwashing in consumer-facing businesses and many will be closely watching how the Financial Conduct Authority enforces its newly released anti-greenwashing rule and implements its guidance (currently out for consultation) when issued.

Companies wanting to play a role in helping formulate UK ESG policy are invited to participate in various governmental and regulatory consultations, with the key upcoming consultations summarised in Table 1.

UNCERTAINTY

Given the breadth of sustainability, there are still areas of great uncertainty and we expect this theme to continue into 2024, best illustrated by the case of the EU's Corporate Sustainability Due Diligence Directive (**CS3D**).

The directive is ambitious, and in-scope entities need to gear up for its implementation by mapping their value chains and embedding processes into their operations to cater for the level of oversight and assurance that is needed. There will inevitably be tensions and complexities around how different member states address the directive, and indeed how different players impose requirements across their business relationships. See more detail on the CS3D on page 26.

In the field of ligation, we are continuing to see cases against corporates and financial institutions, and expect this to continue through 2024. For example, the scope of companies' and their boards' duties in an ESG context remains a live issue for companies to watch closely. In 2023, in two separate climate-related derivative claims brought by shareholders against company boards (**ClientEarth v Shell** (in which Slaughter and May acted for Shell and its directors) and **McGaughey v USSL**), the English courts emphasised their reluctance to wade into the reasonable commercial decision-making of boards, even in a climate change context. We expect these issues to play out further in 2024, with boards' ESG strategy and decision-making staying under the spotlight, and that the use of derivative actions will remain in the playbooks of some shareholders with ESG goals.

Elsewhere, we are seeing attempts to **use the courts to** impose direct obligations on companies with respect to their CO2 emissions, such as in the on-going cases *Lliuya v RWE* in Germany and *Milieudefensie v Shell* in the Netherlands. We are yet to see these types of cases before the English courts, where other routes such as threatened **securities claims (sections 90 and 90A/Schedule 10A FSMA)** for misleading statements or omissions in ESG material published by UK listed companies are gaining traction.

Table 1: Key upcoming ESG policy consultations in the UK

Body	Subject matter	Focus of consultation / call for evidence	Status
UK Government	Transition plans disclosures for largest companies	The introduction of requirements for the UK's largest companies (public and private) to disclose their transition plans if they have them, similar to what the FCA is doing (see below).	Was planned to be launched in "Autumn/ Winter 2023" (not yet launched)
UK Government	UK Green Taxonomy	The draft UK Green Taxonomy, designed to be a tool to provide investors with definitions of which economic activities should be labelled as 'green'.	Was planned to be launched in "Autumn 2023" (not yet launched)
FCA	Anti-greenwashing rule	Consultation on the FCA's newly-announced anti-greenwashing rule. **GC23/3: Guidance on the anti-greenwashing rule | FCA**	Closes 26 January 2024
FCA	ISSB	Updating TCFD-aligned disclosure rules for listed companies to refer to UK-endorsed ISSB standards, and the appropriate scope and design for the new regime. New requirements would apply from 2026 (in respect of accounting periods beginning on or after 1 January 2025). The FCA also expect to consult on moving from the current comply-or-explain compliance basis to mandatory disclosures for listed issuers. **Primary Market Bulletin 45 | FCA**	First half of 2024
FCA	Transition plans	Developing guidance setting out the FCA's expectations for listed companies' transition plan disclosures (at the same time as consulting on the ISSB standards). Under the FCA's rules, companies only have to disclose their transition plans if they have one, and this is not expected to change. **Primary Market Bulletin 45 | FCA**	First half of 2024

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