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LAW, FINANCE & SUSTAINABILITY

How can law drive finance towards
a more sustainable world?

**HUGUES
BOUTHINON-DUMAS**

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Law, Finance and Sustainability: How can law drive finance towards a more sustainable world?

Compiled and edited by Professor Hugues Bouthinon-Dumas, ESSEC and Tom Gamble, the Council on Business & Society. With special thanks to graphic designer Melissa Guillou, ESSEC.



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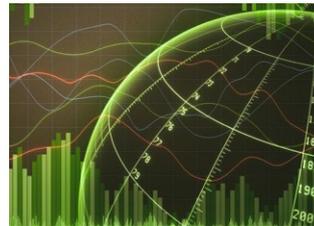
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He is editor of a collective book with professors Anne-Catherine Muller and Bénédicte François, *La finance durable et le droit / Sustainable Finance and Law* published by IRJS (Sorbonne).

Hugues Bouthinon-Dumas



Sustainable finance is a movement that impacts every segment in the field of finance.

THE WHAT AND WHY OF SUSTAINABLE FINANCE

What does the notion of “sustainable finance” cover?

There is no unanimous opinion on what the notion of sustainable finance exactly covers, though the expression obviously refers to “sustainable development”. We can say that sustainable finance is finance that has a concern for sustainable development – in other words, a concern for long-term conciliation between economic, social and environmental interests.

In reality, we can observe that the interests of players in the financial field for extra-financial concerns vary in accordance with both the topic and the players involved. We can nevertheless consider that the heart of the matter lies in the challenges faced by climate change and the energy transition linked to it. Moreover, sustainable finance can be concerned by other topics such as social inequalities, the protection or endorsement of minorities, gender equality, the fight against modern slavery, good governance practices and notably the fight against corruption, human rights, the quality of customer relations, etc. The list of all the subjects impacted by sustainable finance still remains to be completely drawn up.

As such, sustainable finance is much like a school of thought and a tendency based on older notions such as Sustainable Development, CSR or ESG (Environment-Social-Governance) criteria applied to company audits.

Why the players in the financial field today take into account social and environmental stakes?

The motivation is two-fold – which in fact explains why there is a certain ambiguity attached to the very idea of sustainable finance.

Sustainable finance first of all consists in taking into account social and climate risks in financial decisions and calculations, without necessarily questioning financial logic. But sustainable finance can also be conceived in a wider, more radical perspective, indeed revolutionary, regarding the transformation of the economic system towards sustainable development and by using the means of action proper to the field of finance. For example, by providing the financial resources required for the energy and ecological transformation or by modifying corporate behaviours so that companies are aware of, and take into consideration, their impact on society and the environment.

How big is the change in direction triggered by sustainable finance?

It's still much too soon to say if sustainable finance is just a fad, or even a rather hypocritically slogan used by financiers, or the exact opposite – the demonstration of a complete change of paradigm that we can characterise in different ways. We can, for example, consider that the social and environmental costs linked to economic activity must, from now on, be systematically internalized. Another way to see things is trying to substitute short-term finance into finance that is concerned by its long-term development. This radical transformation in finance is increasingly on people's lips, but is far from being established practice.

What is sure, however, is that sustainable finance is a movement that impacts every segment in the field of finance: banks, providers of credit, insurance companies, pension funds, investment funds – including private equity – listed companies, and primary and secondary financial markets as well as all the players orbiting around these: regulators, auditors, rating agencies, financial analysts, and so on.

Geographically, we can observe the rise in sustainable finance initiatives in Europe, Canada, and the United States, as well as in Asia – for example in Singapore, where the country is attempting to position itself as a major hub in this field.

FOOD FOR THOUGHT

- To what extent are you motivated to invest/ use your money to finance green investments or services? Would you change banks if your current one did not offer green products?
- To what extent do you think sustainable finance will actually "save the world"?
- If you aren't already convinced, what would have to happen to convince you totally?
- How far do you think sustainable finance should go? Should it be mandatory? Should every avenue of the financial sector be concerned?
- How about drawing up a list of all the financial products and services you are currently paying for in your daily life (insurance policies, accounts, etc.)? Which ones are actively beneficial for the environment or for social equality? What could you do to change that, if you were so inclined?



KEY TAKEAWAYS

- Sustainable finance (SF) can be defined as finance that has a concern for long-term conciliation between economic, social and environmental interests.
- Its main focus is on the challenges faced by climate change and the energy transition, though other CSR-oriented topics can be linked to it: among them social inequalities, inclusion, gender equality, human rights, good governance practices and compliance.
- SF is a school of thought and a tendency based on older notions such as Sustainable Development, CSR or ESG (Environment-Social-Governance) criteria applied to company audits.
- The motivations behind SF are twofold:
 - 1) The taking into account of social and climate risk in financial decisions and calculations
 - 2) the wider, purposeful transformation of the economic system towards sustainable development.
- SF attempts to trying to substitute short-term finance into finance that is concerned by its long-term development.
- SF impacts every segment in the field of finance (banks, insurance companies, pension funds, etc.) as well as regulators, auditors, rating agencies, financial analysts, etc.
- Europe, Canada, the United States and Singapore are pioneers in the SF movement.



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It is wise to call upon other types of mechanisms – more incentive-driven than coercive and founded as much on finance as on the law.

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SUSTAINABLE DEVELOPMENT: HOW CAN THE WORLD OF FINANCE HELP?

What financial mechanisms can be used to serve the cause of sustainable development?

There are many mechanisms and often they can be combined and used with each other.

The oldest mechanism is without doubt socially responsible investment (SRI) which can be spontaneous: investors seek only to place their money in companies they see as ethically fit. Historically, this led funds inspired by religious movements to exclude from their portfolios activities that they judged immoral – armaments, tobacco, alcohol, pornography, and so on. Today, some investors readily turn away from activities that they believe go against the values and actions of sustainable development – for example, coal-fired power stations – or even decide to invest as a priority in sectors that, on the contrary, seem respectful to the planet, such as organic agriculture.

SRI can also be encouraged by the law makers. As such, certain rules oblige investors to ask themselves

the question of whether an investment will be respectful of the planet and its populations. Other regulations oblige those who manage and commercialize savings products such as UCITS, life insurance, and savings accounts to propose green or sustainable investments to their policy holders.

Shareholder activism is another means of action. For investment funds motivated by the advocacy of a social or environmental cause, or even NGO, it means making use of resources offered by law and by corporate governance to influence how a company is run – for example, through the request for a resolution to appear on the agenda of the shareholders' General Meeting in order to bring the company's attention to focus on subjects related to its social or environmental policy or impact. As such, institutional investors with a right to vote in the GM are increasingly called upon to have a determined policy on this aspect, even if uninspired by a militant approach.

The incentive for companies, and in particular listed companies, to take action in the direction of sustainable development can also occur through the information they must communicate to the public on their policy, their efforts and their results in terms of social and environmental footprint. This incentive is founded on the underlying notion that companies have an interest in showing themselves as exemplary or that they seek to be more attractive in the eyes of stakeholders who hold these issues at heart – investors, but also employees, clients, local authorities, suppliers, and so on.

A variation of extra-financial reporting previously described consists in entrusting the responsibility of auditing initiatives and performance in the social and environmental fields to third-party organisations – which may be rating agencies, independent third-party bodies, or companies providing certification or quality/eco-labels. Here again, the concern to achieve a good rating, good audit, good ranking or to benefit from a distinctive label is supposed to lead companies to adopt an intrinsically ethical set of behaviours.

Another method to incite corporates consists in redefining the mission of the company by rewording its corporate purpose. It is now a widespread that companies are invited to take into account the social and environmental consequences of their activity. What's more, some of them can choose to set themselves a specific mission that exceeds the sole objective of achieving profit. The pursuit of social objectives – for example, the economic inclusion of certain populations – or environmental objectives – such as preserving biodiversity – can contribute to orienting company behaviours so that they act in favour of sustainable development. This possibility was brought about in France by the PACTE law following the Notat-Senard report. Equivalent initiatives have been undertaken in other countries, notably in support of B-corporations.

Other rules impacting corporate governance are also made to make companies become active in sustainable development. The opening up of company administrative and monitoring bodies to employee representatives, even other stakeholders, is a means of bringing companies around to being aware of the concerns of these players. Norms and standards determine the role and responsibility of company's top executives and directors and, as such, constitute a means to influence company strategy and policy, especially when these increasingly include extra-financial considerations – if only through social and environmental risk indicators.

Finally, we can see that a certain phenomenon is currently and considerably in development – that of green financing: the issuing of green bonds, green loans or even sophisticated financial products contain

certain advantages for the benefactor company when it reaches its social or environmental objectives. All of these mechanisms distinguish themselves from mandatory law – in particular, traditional labour law and environmental law – which exercise direct constraints on companies to force them to respect norms and standards. And it is because the regulation-based approach is limited in effectiveness that it is wise to call upon other types of mechanisms – more incentive-driven than coercive and founded as much on finance as on the law.





KEY TAKEAWAYS

- The oldest financial mechanism to serve the cause of sustainable development is socially responsible investment (SRI): investors seek only to place their money in companies they see as ethically fit.
- Some laws require / force... investors to ask themselves the question of whether an investment will be respectful of the planet and its populations.
- Other regulations oblige those who manage and commercialize savings products such as UCITS, life insurance, and savings accounts to propose green or sustainable investments to their policy holders.
- Shareholder activism: institutional investors with a right to vote in the GM are increasingly called upon to have a determined policy on social and environmental issues.
- Companies also have an interest in sustainable development because they must show themselves as exemplary or more attractive for stakeholders (investors, employees, clients, local authorities, suppliers, etc.).
- Another incentive comes from companies and the need to achieve a good rating, good audit, good ranking or distinctive label.
- In some countries (France with the PACTE law, or B-Corps in others), companies are encouraged to redefine their mission and purpose to take on a social and environmental dimension.
- Some countries encourage green financing (ex: green bonds, loans) by offering certain advantages for the benefactor company when it reaches its social or environmental objectives.
- The vast majority of mechanisms are not mandatory by law and regulations are limited in their effectiveness. As such, mechanisms are needed that incentivize rather than coerce.

FOOD FOR THOUGHT

- What national, pan-national or international regulations exist in your country that make it mandatory for companies and businesses to take into account social or environmental dimensions?
- To what extent do they achieve the desired results? And to what extent do companies play the game?
- How about your company or organisation? Are you audited or do you produce CSR reporting? What difference does it make?





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It is no longer possible today to outsource social and environmental risks.”

WHY FINANCE IS GOING GREEN

What triggered the change in attitude among those in the financial field?

Without doubt, there are two, combined phenomena:

- A very general tendency in society of awareness of the stakes – and even of the emergency of – the climate issue. Players in the financial field do not live on another planet, even if in the past financial rationality did not generally include concerns of this nature.
- Pressure exerted via various actors in leading companies in the financial sector to take into consideration the stakes much more seriously than they did before.

Some of these actors were in advance of the times, such as SRI funds, extra-financial rating agencies or financial institutions working in the development aid sector such as the AFD (French Development Agency) – though these forerunners occupied a relatively small space on the wider stage of things.

However, what has radically changed the standpoint of traditional financial players on social and environmental stakes has without doubt been risk assessment even more than the potential of

commercial developments in this new niche. The consequences of climate change and social troubles associated with it generally have a negative impact on the assets of financial institutions because a large number of their investments will lose value – for example, energy infrastructures which pollute, or ski resorts located in areas where in future years it will no longer snow. In the case of insurance companies, the negative effect is doubled because they may have to dole out compensation for the victims of catastrophes that we can anticipate will occur through climate change. As such, not only their assets but also their liabilities will be affected.

One of the mechanisms which in retrospect seems to have played a major role in this awareness is in France with the “Loi sur le devoir de vigilance” (duty of care) and, more generally, the mechanisms for extending the legal responsibility of companies which now oblige them to take care of negligence and risks regarding their subsidiaries as well as their supply chain. In other words, it is no longer possible today to outsource social and environmental risks and even more so to base one's business model on forms of unethical exploitation or policy that does major harm to the environment. From this moment on, these risks will have to be taken into account as seriously as possible: identify them, measure them and take action to minimise them.



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KEY TAKEAWAYS

- Attitudes in the financial field have changed due to the general tendency in society of awareness of the stakes and emergency of the climate issue; and pressure exerted by leading players in the financial sector (ex: Larry Fink of BlackRock).
- However, it is risk assessment that has radically changed the standpoint of traditional financial players on social and environmental stakes.
- The consequences of climate change and associated social troubles have a negative impact on the assets of financial institutions – a large number of their investments will lose value.
- In France, the “Loi sur le devoir de vigilance” (duty of care) and the legal responsibility of companies to take care of negligence and risks regarding their subsidiaries as well as their supply chain has played a key part in awareness.

FOOD FOR THOUGHT

- What national, pan-national or international regulations exist in your country that make it mandatory for companies and businesses to take into account social or environmental dimensions?
- To what extent do they achieve the desired results? And to what extent do companies play the game?
- How about your company or organisation? Are you audited or do you produce CSR reporting? What difference does it make?





“From the moment investors know what they’re dealing with, we can consider that it’s preferable to ‘let the market decide.’”

FINANCE AT A TURNING POINT: CLEANING UP THE GREENWASHING IMAGE

Does finance also contribute positively to the fight against global warming and the encouragement of social values?

Yes, but it's here that there exists a high risk of drift or hypocrisy – something we call *green washing*.

It's without doubt that here the expectations facing sustainable finance are at their highest. Finance will play a truly essential role in sustainable development if it manages to provide the green transition with substantial financial means – and here we're speaking about thousands of billions of euros or dollars – it requires if it is to succeed.

Various channels of financing can be used. As we know, the budgets of the States or local authorities are not limitless, if only for the reason that fiscal revenues are today weakened by tax evasion practices made easier by globalisation and the insufficient cooperation between states in this area. We must, moreover, consider that the efforts of certain institutions such as the OECD to fight against international tax evasion constitutes a contribution to sustainable finance. But even strengthened, public budgets will still not

be enough to take up the challenges of sustainable development and the fight against the effects of climate change. As such, we have to turn towards other sources of financing. Long-term savings accounts and the capital generated by pension funds or life-insurance policies, for example, are especially singled out for financing very long-term investments. Specific instruments have been developed today which ensure the financing of expenditure linked to the green transition. This is generally known as green bonds and *green loans*.

Financial advantages such as favourable tax regimes, or those that are symbolic – there is a healthy appetite today for everything green, and the financial sector has not escaped the phenomenon – are today linked to green financing. As such, there is a strong temptation to green, sometimes abusively so or fraudulently, projects in order to benefit from these advantages or to redeem a corporate image is strong.

It's here that the law plays an extremely important role in preventing this misappropriation which can completely undermine sustainable finance by discrediting it. It is possible to legally define categories of projects that



truly deserve to be qualified as green or sustainable. In this case, certain third-party players such as third-party independents or rating agencies can then be called upon to audit and monitor the reality of initiatives having effectively kept to the promises and intentions declared. And if a case of *green washing* is established, various sanctions can be applied by the various administrations, regulators and judges – from the revocation of advantages associated with sustainable finance to the suppression of misleading practices. Vigilance with regard to sustainable finance is therefore necessary and the stuff of both the regulators and other watchdogs such as NGOs.

Are there any debates on, or any even contention, regarding the notion of sustainable finance?

We might think that sustainable finance is quite a consensual idea regarding its intentions and that any tensions arise especially at the level of the implementation of these intentions.

In reality, even at this level, there is not agreement. Should, for example, actions be encouraged that go in the right direction but which are slow to achieve results? Can an action that improves the combustion capacities of coal-fired power stations that reduces pollution deserve to be financed by green financing? Can the production of energy by nuclear power stations have a place in the portfolio of sustainable finance products – even if they both enable the production of large quantities of CO²-free electricity but also generate problems regarding industrial risk and treatment of nuclear waste?

Confronted with these complex decisions, there are two attitudes which may be adopted. Firstly, a normative perspective consisting in drawing up a list of actions or criteria enabling projects to be qualified or disqualified for sustainable financing. This is the path of taxonomy (See European Regulations of 27 November 2019). Secondly, a certain pluralism can be encouraged – both in terms of methodologies and criteria for the attribution of green or sustainable certification and labels. From the moment investors know what they're dealing with thanks to clarity on the quality of projects and instruments, we can consider that it's preferable to "let the market decide" between the offers. In both cases, it means having a clearer idea of the extra-financial qualities of the investments involved that claim to be ethical in nature.



KEY TAKEAWAYS

- Finance will play an essential role in sustainable development if it manages to provide the green transition with substantial financial means.
- Various channels of financing can be used: Public budgets will not be sufficient. Long-term savings accounts and the capital generated by pension funds or life-insurance policies are best-suited to very long-term investments and as such funding.
- The law plays an extremely important role in preventing misappropriation of green financing initiatives.
- Third-party players such as third-party independents or rating agencies can be called upon to audit and monitor the reality of initiatives.
- If a case of *green washing* is established, various sanctions can be applied by the various administrations, regulators and judges (ex: revocation of advantages associated with sustainable finance, or the suppression of misleading practices).
- Because of the complexity involved, standard or norms should be used, drawing up a list of actions or criteria enabling projects to be qualified or disqualified for sustainable financing (ex: European Regulations of 27th November 2019).
- Pluralism can be encouraged – both in terms of methodologies and criteria for the attribution of green or sustainable certification and labels.
- But investors need to have a clearer idea of the extra-financial qualities of the investments involved that claim to be ethical in nature (via audits and quality control).

FOOD FOR THOUGHT

- To what extent does your government tax various products and stakeholders in order to raise funds for sustainability initiatives? Should this be the norm and are you personally ready to pay the price of saving the planet?
- What examples of green washing can you think of? And what has happened to the companies and organisations that indulged in it?
- What do you think should be done to discourage green washing and encourage companies to 'walk the talk' of sustainability and social impact?





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Legal practitioners are being pushed to redefine the purpose of a company.

SUSTAINABLE FINANCE: THE STAKES AND CHALLENGES FOR REGULATORS AND LEGAL PRACTITIONERS

Legal practitioners: caught between run-of-the-mill and new challenges

I would say that legal practitioners have commonplace challenges to deal with. Traditional legal-financial instruments have to be adapted to the new issue of sustainable finance. For example, green bonds are in essence bonds, green loans are first and foremost loans – but in each case, the elements that justify their qualification as being sustainable have to be taken into account. Certain professional bodies such as the International Capital Market Association (ICMA) are also driven to developing new models of financing contracts. Another example is that rules of responsibility must without doubt be adapted in case an issuer fails to keep to his promise to commit to an environmentally-friendly policy he has drawn up – because the existence of prejudice, in its usual sense, can count as default. In the context of common law, sustainable finance begs the question of whether fiduciary obligation should be redefined – should fiduciary contracts still seek maximum yield in the sole interest of their

beneficiaries without taking into account any other consideration? It has been shown that the information communicated by issuers within the framework of extra-financial reporting is today both of a very varying quality and interest. As such, this information should be standardized or in any case presented in a way that it can truly be used by stakeholders.

Certain topics linked to sustainable finance raise theoretical questions that are extremely interesting for legal practitioners. One of these is the question of the nature of financial instruments when what is traded on a market – that very much resembles a financial market – is not a financial product like a transferable security or a derivative, but a greenhouse gas emission rights. Another example: legal practitioners are being pushed to redefine the purpose of a company from the moment companies are considered set up not only to earn money for their shareholders, but also to play a social role. As a final example, the interest in acting liability against a company that adopts a non-compliant behaviour towards sustainable development:

can shareholders raise a red flag? Can stakeholders other than shareholders file a law suit against the firm?

Sustainable finance also poses legal practitioners the daunting question of knowing how to develop effective standards to meet the requirements of stakes that are both global and that affect the planet – something that favours international norms or transnational mechanisms of coordination – whereas the power to make the norms and to enforce them are essentially national authorities. Sustainable finance obliges legal practitioners to be skilled and creative in order for them to carry out their mission in a difficult context. Often, states use optional, indicative or non-binding rules such as soft law, good practice and self-regulation that precede their adoption and general use. A kind of virtuous market dynamic foreruns and prepares regulations. Let's observe, nevertheless, that this can only happen as such if the market conditions and the dispositions of the actors involved allow it to. Within a very competitive and tense environment where every extra cost causes the short-term bankruptcy of a company, or indeed if the players are strictly motivated by the unbridled search for profit, this ethical dynamic cannot be implemented without external constraint and credible sanctions.

What role will regulators play in sustainable finance?

First of all, it's important to underline that the authority of regulators in terms of sustainable finance was far from being obvious. Their mission traditionally consists in protecting savings and savers, keeping a watch over the proper functioning of the markets, financing systems and payment, and ensuring that the financial system isn't destabilized to the detriment of the economy. However, regulators are indeed sensitive to the issues and expectations of society as well as impetus provided by governments.

Everywhere in the past few months, we can see the regulators tackling the question of sustainable finance. They are launching individual – for example, the AMF (French financial markets authority) partnership with the ACPR (French Prudential Supervision and Resolution Authority) – or global initiatives, such as the creation of the NGFS (Network for Greening the Financial System) network.

The role of regulators is both one of catalyzing the reflection on sustainable finance and keeping an eye out so that the actors in financial systems don't divert the new tools that see the light of day from their end-goals – notably through *green washing* or other opportunistic behaviours. Ill-intentioned speculators might impact the performance and integrity of the markets dealing with green products through manipulations and insider operations. In a nutshell, regulators must essentially remain vigilant.



KEY TAKEAWAYS

- Traditional legal-financial instruments have to be adapted to the new issue of sustainable finance (ex: green bonds – the elements that justify their qualification as being sustainable have to be taken into account).
- Professional bodies such as the International Capital Market Association (ICMA) are developing new models of financing contracts that take this into account.
- Legal practitioners are seeing their profession evolve: for example, they are being pushed to redefine the purpose of a company from the moment companies are considered set up not only to earn money for their shareholders, but also to play a social role.
- Sustainable finance also poses legal practitioners the challenge of working with international norms or transnational mechanisms of coordination while the authorities possessing the power to create and apply norms are essentially national authorities.
- Sustainable finance obliges legal practitioners to be skilled and creative in order for them to carry out their mission in a difficult context.
- Within a very competitive and tense environment, the ethical dynamic of sustainable finance cannot be implemented without external constraint and credible sanctions.
- Regulators are increasingly tackling the question of sustainable finance and creating individual or global partnerships (ex: the ACPR and NGFS).
- The role of regulators is both one of catalyzing the reflection on sustainable finance and monitoring any misconduct.

FOOD FOR THOUGHT

- Should higher education institutes – indeed financial organisations – make sustainable finance a mandatory part of their education and training?
- In essence, the issue is one of breaking free from the traditional profit-oriented role of commercial organisations and companies. Isn't this at odds with a market economy?
- To what extent does sustainable finance make the legal profession much more exciting and purposeful? Would you change sector? Or would you encourage your children to join the profession?





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