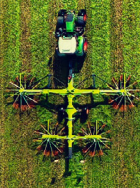




Legal risks related to biodiversity loss in the seafood and agriculture sectors



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Executive Summary

- **Biodiversity on Earth is being lost at unprecedented rates.** Our global food system is one of the main contributors, including through land and sea use, pollution, overexploitation of species, climate impacts, and the spread of alien species. The seafood and agriculture sectors are the key components of our global food system.
- **Biodiversity loss is a material financial risk** for companies in these sectors and therefore also to the financial institutions that finance them. Financial risks can be categorised as physical, transition and liability risks.
- **Companies in the seafood and agricultural sectors depend on ecosystem** services such as raw materials, clean water, pollination, and a regulated climate to produce goods and services, and can likewise be responsible for significant impacts on biodiversity. These impacts and dependencies give rise to biodiversity-related risks and opportunities.
- **This report looks at the potential legal and litigation risks associated with biodiversity impacts and dependencies.** These give rise to financial risks for companies and financial institutions that may trigger corporate and financial law duties. Given the increasing risk of exposure to litigation related to biodiversity loss, it is important that companies and financial institutions engaged in the seafood and agriculture sectors fully understand these impacts and dependencies and take appropriate action so as to avoid causing or contributing to biodiversity loss and to ensure compliance with their legal obligations.



"Financial risks related to biodiversity impacts and dependencies may trigger corporate and financial law duties".

Introduction

Our global food system is one of the main contributors to biodiversity¹ loss, causing the degradation and destruction of ecosystems² through land and sea use, pollution, overexploitation of species, and the spread of alien species.³ Furthermore, food production is a major contributor to total greenhouse gas emissions, contributing significantly to the interconnected climate crisis.⁴

In turn, the loss of biodiversity and the effects of climate change are increasing the vulnerability of food systems in several ways, affecting food production and disrupting supply chains.⁵

Biodiversity loss (and the land-use change that often precedes it) can also disproportionately impact the livelihoods of people who depend on ecosystem services⁶, undermining the rights of Indigenous Peoples and local communities to land, to food, and to a clean, healthy, and sustainable environment.⁷

While climate change litigation is growing in scale,⁸ the analysis of legal and litigation risks arising from biodiversity loss is at an earlier stage of development.⁹ This report aims to contribute to this discussion by focusing on legal and litigation risks arising from biodiversity impacts and dependencies¹⁰ in the seafood and agriculture sectors, including their upstream and downstream value chains.

In **sections 2 and 3**, we show how the seafood and agriculture sectors depend on the preservation of biodiversity to provide them with ecosystem services that are essential to the continuity of their economic activities and are therefore negatively impacted by biodiversity loss. We also show how these sectors have impacts on biodiversity. In **section 4**, we set out some of the potential legal and litigation risks for companies and financial institutions¹¹ resulting from biodiversity impacts and dependencies and, therefore, highlight related commercial risks. We demonstrate why companies need to embed biodiversity considerations in their decision-making processes and properly identify and assess biodiversity impacts, dependencies, and risks through due diligence, and disclose them to relevant stakeholders accordingly.¹²

Similarly, we show why financial institutions should identify and address environmental and social risks in their seafood and agriculture-related investments and have policies in place to mitigate their own exposure to biodiversity-related risks.¹³

- 1 **Biodiversity** as defined by the IPBES is the variability among living organisms from all sources including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part. This includes variation in genetic, phenotypic, phylogenetic, and functional attributes, as well as changes in abundance and distribution over time and space within and among species, biological communities and ecosystems: [biodiversity | IPBES secretariat](#).
- 2 **Ecosystem** as defined by IPBES is a community of living organisms (plants, animals, fungi and various microbes) in conjunction with the non-living components of their environment (such as energy, water and mineral soil), all interacting as a system: [ecosystem | IPBES secretariat](#).
- 3 UNEP (2021). *Our global food system is the primary driver of biodiversity loss*: <https://www.unep.org/news-and-stories/press-release/our-global-food-system-primary-driver-biodiversity-loss>.
- 4 Chatham House (2022). *Aligning food systems with climate and biodiversity targets: Assessing the suitability of policy action over the next decade: 2022-10-14-food-systems-climate-biodiversity-harwatt-et-al* ([chathamhouse.org](#)).
- 5 WEF (2021). *Climate change and food: The potential impact on production and prices: How could climate change impact food production?* | [World Economic Forum \(weforum.org\)](#).
- 6 Ecosystem services are the benefits that flow to people from ecosystems. In this economic vision, ecosystem "benefits" (i.e., what they bring to people and nature) are often divided between:
 - Provisioning services, such as providing harvested food, raw materials, and medicinal resources;
 - Regulating services, such as sustaining the quality of air, water, and soils, providing pollination and pest control, regulating the climate, and reducing the impact of natural hazards such as storms and floods; and
 - Cultural services, offering non-material benefits such as aesthetic and spiritual appreciation and amenity.
 From De Groot, R.; Brander, L.; van der Ploeg, S.; Costanza, R.; Bernard, F.; Braat, L.; Christie, M.; Crossman, N.; Ghermandi, A.; Hein, L.; Hussain, S.; Kumar, P.; McVittie, A.; Portela, R.; Rodriguez, L.; ten Brink, P. and van Beukering, P. (2012). Global estimates of the value of ecosystems and their services in monetary units. *Ecosystem Services*. 1 (1) 50–61: <https://www.sciencedirect.com/science/article/pii/S2212041612000101>.
- 7 UN (2017). *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/34/49: 1700826 ([un.org](#)).
- 8 Grantham Institute, London School of Economics (2022). *Global trends in climate litigation: 2023 snapshot: Global trends in climate change litigation: 2023 snapshot – Grantham Research Institute on climate change and the environment* ([lse.ac.uk](#)).
- 9 Commonwealth Climate and Law Initiative (CCLI) (2020). *The emergence of foreseeable biodiversity-related liability risks for financial institutions: A gathering storm?*: [CCLI-Biodiversity-liability-risks-report-vFINAL.pdf \(commonwealthclimatelaw.org\)](#).
- 10 Dependencies are aspects of ecosystem services that an undertaking or other actor relies on to function. Dependencies include, for instance, the regulation of water flow, water quality, and hazards like fires and floods; provision of suitable habitats for pollinators (who in turn provide a service directly to economic activities), and carbon sequestration (in terrestrial, freshwater and marine realms). A business may have various dependencies on biodiversity both directly for its own operations and indirectly through its supply chain. From the Taskforce on Nature-Related Financial Disclosures TNFD (undated): [TNFD's definitions of dependencies and impacts » TNFD](#).
- 11 Financial institutions are a diverse group of economic actors that includes pension funds, asset managers, banks, and insurers.
- 12 WEF (2022). *What governments must agree at COP15 to accelerate business action on biodiversity and nature: COP15: What companies must do to accelerate action on nature* | [World Economic Forum \(weforum.org\)](#).
- 13 World Wildlife Fund (WWF) (2022). *Above board: 2022 Baseline assessment of banks' seafood sector policies: 2022: Above Board: Banks' Seafood Sector Policy Analysis | Publications | WWF (worldwildlife.org)*. WWF (2022). *Getting underway: 2022 Baseline assessment of asset managers' approaches to addressing environmental and social risks in seafood-related investments: Seafood-AM-Report.pdf (wwf.sg)*.

1. Background

1.1 Global food systems and biodiversity loss

Nature¹⁴ encompasses all life on Earth, as well as the science and knowledge systems that comprise our planet, including the water and climate systems.

Biodiversity is the variability among living organisms; it includes diversity within species, between species, and of ecosystems. Biodiversity supports all life on Earth, including humans, and has irreplaceable economic, social and cultural value. It is essential for the functioning of ecosystems and plays a crucial role. It provides food, energy, medicine and genetic resources. It sustains the air, water, and soils on which humanity depends. It allows for pollination and pest control and protection from natural hazards.¹⁵ It provides cultural benefits.¹⁶ However, this value is being rapidly eroded by unprecedented rates of biodiversity loss.¹⁷ The global rate of species extinction is tens to hundreds of times higher than it has averaged over the past 10 million years and is accelerating, threatening one million species with extinction within decades.¹⁸

Food production and downstream value chains are increasingly vulnerable to climate change and biodiversity loss. The EU Biodiversity Strategy recognises this dependence: "*Biodiversity is (...) crucial for safeguarding EU and global food security. Biodiversity loss threatens our food systems, putting our food security and nutrition at risk*".¹⁹ Furthermore, food systems are negatively impacted by the climate crisis as "*climate change is both a negative outcome of environmentally damaging food systems, and a threat to the future of food production and the livelihoods that depend on it (...). Rising temperatures, extreme and unpredictable weather patterns, and disruption to water cycles are already causing reductions in the yields of staple crops in some regions of the world*".²⁰

"Biodiversity is (...) crucial for safeguarding EU and global food security. Biodiversity loss threatens our food systems, putting our food security and nutrition at risk".

At the same time, the global food system has been identified as one of the main contributors to biodiversity loss.²¹ The conversion of natural ecosystems for crop production, pasture or aquaculture, the depletion of soils through intensified agriculture, and the use of toxic pesticides all contribute to the degradation and destruction of land and ocean ecosystems.²² Food production is also a major contributor to greenhouse gas emissions, contributing significantly to the climate crisis.²³

14 **Nature** as defined by the IPBES, refers to the natural world, with an emphasis on its living components. Within the context of western science, it includes categories such as biodiversity, ecosystems (both structure and functioning), evolution, the biosphere; humankind's shared evolutionary heritage, and biocultural diversity. Within the context of other knowledge systems, it includes categories such as Mother Earth and systems of life, and it is often viewed as inextricably linked to humans, not as a separate entity. IPBES. Glossary: [Nature: nature](#) | IPBES secretariat.

15 IPBES (2019). *Global Assessment Report on Biodiversity and Ecosystem Services*: <https://doi.org/10.5281/zenodo.3553579>.

16 FAO. *Ecosystems & Biodiversity: Ecosystem Services & Biodiversity (ESB)* | Food and Agriculture Organization of the United Nations (fao.org).

17 IPBES (2019). *Global Assessment Report on Biodiversity and Ecosystem Services*; and UN (2019). *Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'*; UN Report: *Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating' – United Nations Sustainable Development*. See also World Wildlife Fund and ZSL (2022). *Living Planet Report 2022: Building a Nature-Positive Society*: [lpr_2022_full_report.pdf](https://www.wwf.org.uk) (www.wwf.org.uk), which notes that more than half a million terrestrial species may become extinct because of habitat loss that has already happened, and global vertebrate wildlife populations have collapsed by 69% since 1970; and Dirzo, R.; Young, H. and Collen, B. (2014) *Defaunation in the Anthropocene*: <https://www.science.org/doi/10.1126/science.1251817>, pp. 401–406, shows that 67% of monitored populations of invertebrates show 45% mean abundance decline. Similarly, the number of invertebrate species has rapidly declined in recent years.

18 IPBES (2019). *Global Assessment Report on Biodiversity and Ecosystem Services*.

19 European Commission (2023). *EU Biodiversity Strategy for 2030: Biodiversity strategy for 2030* (europa.eu).

20 International Institute for Environment and Development and Hivos (2020). *Sustainable Diets for All: Food systems and climate change*: <https://www.iiied.org/sites/default/files/pdfs/migrate/16673IIED.pdf>.

21 UNEP (2021). *Our global food system is the primary driver of biodiversity loss*.

22 Chatham House (2021). *Food system impacts on biodiversity loss: Three levers for food system transformation in support of nature*.

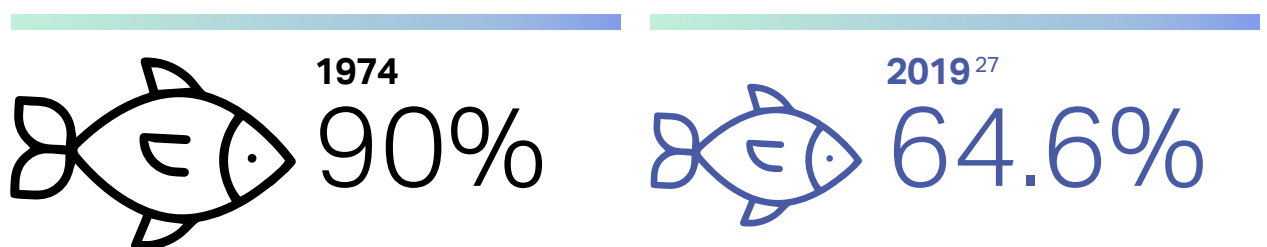
23 Chatham House (2022). *Aligning food systems with climate and biodiversity targets: Assessing the suitability of policy action over the next decade*.

1.2 The agriculture and seafood sectors

The agriculture and seafood sectors, which include aquaculture and fisheries, depend and rely heavily on biodiversity and ecosystem services to provide products and services. The adverse biodiversity impacts they may cause or contribute to, and their biodiversity dependencies, are significant.

On land, certain modern agricultural practices such as large-scale intensive farming and use of harmful pesticides, as well as increased demand for agricultural land and water for irrigation,²⁴ all lead to biodiversity loss. For example, monoculture, which is the practice of growing the same crops or rearing the same animal species, may increase production, but it also decreases agrobiodiversity on farms and plantations and can compromise biodiversity in adjacent environments.²⁵ In crop production, continuous monocropping can result in a buildup of pests and diseases, usually requiring higher volumes of pesticides, which can be toxic to many non-target species, including pollinators.²⁶

According to the Food and Agriculture Organization (**FAO**), the fraction of fishery stocks within biologically sustainable levels decreased from:



Unsustainable fishing, overfishing, and fish farming are the leading drivers of marine biodiversity decline and ecosystem services loss.²⁸ Overfishing leads to impacts on the biodiversity of marine ecosystems by altering the composition of species.²⁹ Several deadlines to reduce or eliminate illegal, unreported, unregulated (**IUU**) fishing, one of the main threats to marine ecosystems, have not been met.³⁰ Fish stocks are further degraded by high levels of by-catch – the incidental capture of non-target species during fishing³¹ – and use of unsustainable gear, such as bottom trawling and ghost fishing, which damages marine biodiversity. Similarly, aquaculture – the farming of aquatic organisms, including fish, molluscs, crustaceans, and aquatic plants in freshwater, brackish water, and saltwater³² – also has a track record of significantly impacting biodiversity through nutrient pollution,³³ the introduction of alien species (for example, farmed salmon that can escape, causing a negative impact on native species)³⁴ and diseases (which may also impact local wild populations of fish that come into contact with aquaculture sites or otherwise contract the disease).³⁵

Demand for the products of these sectors, especially for aquaculture products,³⁶ is projected to grow, driven by a growing population and changes in income levels. Future production will also be increasingly influenced by demographic, socio-cultural, and lifestyle changes, as well as by shifting consumer priorities and increased awareness of product sustainability.³⁷

24 UNEP (2021). Rethinking food systems: <https://www.unep.org/news-and-stories/story/rethinking-food-systems>.

25 GRI (2022). *Sector Standard for Agriculture, Aquaculture, and Fishing. Standard for sustainable production on land and sea*: GRI – Sector Standard for Agriculture, Aquaculture, and Fishing (globalreporting.org).

26. Ibid.

27 FAO (2022). *The State of World Fisheries and Aquaculture 2022. The State of World Fisheries and Aquaculture 2022* ([fao.org](https://www.fao.org)).

28 IPBES (2019). *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*.

29 GRI (2022). *Sector Standard for Agriculture, Aquaculture, and Fishing. Standard for sustainable production on land and sea*.

30 FAO (2020). *The State of World Fisheries and Aquaculture 2020; ClientEarth (2019). ClientEarth's key recommendations to decision-makers on meeting the 2020 MSY deadline*: [https://www.clientearth.org/latest/documents/clientearth-s-key-recommendations-to-decision-makers-on-meeting-the-2020-msy-deadline/#:~:text=ClientEarth's%20key%20recommendations%20to%20decision-makers%20on%20meeting%20the,%28TACs%29%20during%20the%20past%20five%20December%20Council%20processes;Pauly,D.and,Zeller,D.\(2016\).Catch%20reconstructions%20reveal%20that%20global%20marine%20fisheries%20catches%20are%20higher%20than%20reported%20and%20declining](https://www.clientearth.org/latest/documents/clientearth-s-key-recommendations-to-decision-makers-on-meeting-the-2020-msy-deadline/#:~:text=ClientEarth's%20key%20recommendations%20to%20decision-makers%20on%20meeting%20the,%28TACs%29%20during%20the%20past%20five%20December%20Council%20processes;Pauly,D.and,Zeller,D.(2016).Catch%20reconstructions%20reveal%20that%20global%20marine%20fisheries%20catches%20are%20higher%20than%20reported%20and%20declining%20;Catch%20reconstructions%20reveal%20that%20global%20marine%20fisheries%20catches%20are%20higher%20than%20reported%20and%20declining) | Nature Communications.

31 WWF. *What is bycatch? Understanding and preventing bycatch*: What is Bycatch? Understanding and Preventing Fishing Bycatch (worldwildlife.org).

32 FAO. *Definitions: 1. Definitions* ([fao.org](https://www.fao.org)).

33 Global Seafood Alliance (2019). *What is the Environmental Impact of Aquaculture on the Environment?: What Is the Environmental Impact of Aquaculture?* (globalseafood.org).

34 Oceana (undated). *Farmed Salmon Escapes: Farmed Salmon Escapes – Oceana USA*.

35 TNFD (2022). *Aquaculture – A case study of hypothetical report preparer Salmon Fresco: TNFD_Aquaculture_Case_Study_v03_A.pdf*.

36 Planet Tracker (2023). *Avoiding Aquafailure: Aquaculture diversification and regeneration are needed to feed the world: Aquafailure-VF.pdf* (planet-tracker.org).

37 Chatham House (2021). *Food system impacts on biodiversity loss. Three levers for food system transformation in support of nature*.

2. Biodiversity-related financial risks, impacts and opportunities

Seafood and agriculture companies may depend on ecosystem services such as raw materials, clean water, pollination, and a regulated climate to produce goods and services, and can likewise be responsible for significant impacts on biodiversity. These impacts and dependencies give rise to biodiversity-related risks and opportunities.

2.1 Biodiversity loss is a material financial risk for companies and financial institutions active in the food system

There is a growing consensus that biodiversity loss poses a material financial risk to companies operating in the food system and to their investors and financiers.³⁸ The World Economic Forum's (WEF) 2023 Global Risks Report lists biodiversity loss and ecosystem collapse as the fourth most severe risk in the next ten years.³⁹ Recently, the European Central Bank (ECB) warned that destroying nature will destroy the economy.⁴⁰ Our society is totally dependent on the natural world and, as outlined in an independent review of the economics of biodiversity commissioned by the UK Government: *"our economies are embedded within Nature, not external to it"*.⁴¹



38 Among others, OECD (2019). *Biodiversity: Finance and the Economic and Business Case for Action: Biodiversity: Finance and the Economic and Business Case for Action – OECD*; Network for Greening the Financial System (NGFS) and INSPIRE (2022). *Central banking and supervision in the biosphere: An agenda for action on biodiversity loss, financial risk and system stability*. [central_banking_and_supervision_in_the_biosphere.pdf \(ngfs.net\)](#); UN Principles for Responsible Investment (2020). *Investor Action on Biodiversity*: [download \(unpri.org\)](#); WEF (2020) *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy*. *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy* | World Economic Forum ([weforum.org](#)); TNFD (2021), *Nature in Scope: Nature in Scope – TNFD*; and UN Environment Programme (2023). *Banking on Nature: 21 – Banking-on-nature.pdf (unepfi.org)*. For an investor policy see BNP Paribas Asset Management (2021). *Sustainable by nature: our biodiversity roadmap*: [Sustainable by nature: Our biodiversity roadmap \(bnpparibas-am.com\)](#).

39 WEF (2023). *Global Risks Report 2023*: [WEF_Global_Risks_Report_2023.pdf \(weforum.org\)](#)

40 The ECB Blog (2023): *The economy and banks need nature to survive*: [The economy and banks need nature to survive \(europa.eu\)](#).

41 Dasgupta, P. (2021) *The Economics of Biodiversity: The Dasgupta Review: Headline Messages*. Available at: [The Economics of Biodiversity The Dasgupta Review: Headline Messages \(publishing.service.gov.uk\)](#).

The financial risks associated with biodiversity loss can be categorised (similarly to climate-related financial risks) as follows:⁴²

Table 1

Physical risks:

when biodiversity loss damages ecosystem equilibria and causes a decline in ecosystem services.⁴³



For example, the decrease of insect populations can negatively affect crop yields.⁴⁴ These risks could affect production processes via supply chains, as well as balance sheets, and be associated with market or credit risks.⁴⁵ Therefore, both businesses that depend on ecosystem services and financial institutions that finance economic activities that depend on ecosystem services are exposed to physical risks of biodiversity loss.⁴⁶

Transition risks:⁴⁷ when technological innovation,⁴⁸ stricter government policies, or regulations require companies to make their business processes and value chains more sustainable or limit the land or sea available for development and exploitation.⁴⁹



Financial institutions may also be indirectly exposed to these risks where they provide finance to companies that are dependent on natural resource exploitation and are not adjusting to a low-carbon economy sufficiently quickly, or companies that are lagging on sustainability.⁵⁰

Liability risks: when the mismanagement of biodiversity risks or impacts on biodiversity leads to legal risks. These can include litigation, regulatory penalties and insurance costs.⁵¹



These risks are exacerbated for industries that have strong impacts and dependencies on biodiversity through their activities, operations, or products, including the seafood and agriculture sectors. The banks, pension funds, investors, and insurers that finance, invest in, and insure these economic activities may also be exposed to biodiversity-related financial risks.⁵²

The economic impacts of biodiversity and ecosystem service loss thus present substantial material financial risks for companies and the financial institutions supporting them in the seafood and agriculture sectors. Materiality is a criterion used to assess whether specific information should be included in corporate disclosure and reporting. Information will typically be deemed financially material if omitting, misstating, or obscuring the information could reasonably

⁴² TNFD. *Definitions of Risk: TNFD's definitions of risks* » TNFD.

⁴³ Commonwealth, Climate and Law Initiative (2022). *Biodiversity Risk: Legal Implications for Companies and their Directors*: https://commonwealthclimatelaw.org/wp-content/uploads/2022/12/CCLI_Biodiversity_risk_paper_2022.pdf.

⁴⁴ Financial Times (2023). *ECB flags stark economic risks from biodiversity loss*: [ECB flags stark economic risks from biodiversity loss | Financial Times \(ft.com\)](https://www.ft.com/content/2023-08-08/ecb-flags-stark-economic-risks-from-biodiversity-loss).

⁴⁵ OECD (2021). *Biodiversity Natural Capital and the Economy: A Policy Guide for Finance, Economic and Environmental Ministers*: [Title] ([oecd-ilibrary.org](https://www.oecd-ilibrary.org/)).

⁴⁶ De Nederlandsche Bank (2020). *Indebted to nature: Exploring biodiversity risks for the Dutch financial sector*: [Indebted to nature – Exploring biodiversity risks for the Dutch financial sector – 2020 – DNB-PBL](https://www.dnb.nl/nl/insights/publications/indebted-to-nature-exploring-biodiversity-risks-for-the-dutch-financial-sector-2020-dnb-pbl).

⁴⁷ We acknowledge that there are many definitions of transition risks in existence, and have chosen the one that is most relevant to the topic at hand.

⁴⁸ EFRAG (2022). *Exposure Draft: Biodiversity and ecosystems*: [Download \(efrag.org\)](https://www.efrag.org). On p. 24 on transition risks: e.g., substitution of products or services with a lower impact on biodiversity or dependence on ecosystem services, lack of access to data or access to poor quality data that hamper biodiversity-related assessments, transition to more efficient and cleaner technologies (i.e. with lower impacts on biodiversity), new monitoring technologies (e.g. satellite), adaptation technologies required to cope with new future scenarios and trends (e.g. climate resistant crops, mechanical pollinators, water purification, flood protection) used by regulators.

⁴⁹ For example, as a consequence of the 30x30 target included in the Kunming-Montreal Global biodiversity framework (2022): [RECOMMENDATION ADOPTED BY THE WORKING GROUP ON THE POST-2020 GLOBAL BIODIVERSITY FRAMEWORK \(cbd.int\)](https://www.cbd.int/doc/2022/05/2022-05-01-recommendation-adopted-by-the-working-group-on-the-post-2020-global-biodiversity-framework-cbd-int_en.pdf). Target 3 is to ensure that by 2030, at least 30% of land and sea are effectively conserved.

⁵⁰ De Nederlandsche Bank (2020). *Indebted to nature: exploring biodiversity risks for the Dutch financial sector*: [Indebted to nature – Exploring biodiversity risks for the Dutch financial sector – 2020 – DNB-PBL](https://www.dnb.nl/nl/insights/publications/indebted-to-nature-exploring-biodiversity-risks-for-the-dutch-financial-sector-2020-dnb-pbl).

⁵¹ Commonwealth Climate and Law Initiative (2023). *Biodiversity Risk: Legal Implications for Companies and their Directors*: [CCLI-Biodiversity-Risk-Legal-Implications-for-Companies-and-their-Directors-December-2022.pdf \(commonwealthclimatelaw.org\)](https://commonwealthclimatelaw.org/wp-content/uploads/2022/12/CCLI_Biodiversity_risk_paper_2022.pdf).

⁵² De Nederlandsche Bank (2020). *Indebted to nature: Exploring biodiversity risks for the Dutch financial sector*: [Indebted to nature – Exploring biodiversity risks for the Dutch financial sector – 2020 – DNB-PBL](https://www.dnb.nl/nl/insights/publications/indebted-to-nature-exploring-biodiversity-risks-for-the-dutch-financial-sector-2020-dnb-pbl), p. 17-18.

be expected to influence decisions by users of the undertaking's corporate reporting (such as the undertaking's investors, lenders or other creditors) based on their assessment of the undertaking's financial position (including cash flows, development, performance, position, cost of capital, or access to finance).⁵³

This consideration of biodiversity-related financial risks may trigger corporate and financial law duties for companies in these sectors and the financial institutions supporting them. To manage these material financial risks responsibly, companies and financial institutions need to take them into account in their financial management practices. This means they need to formally identify, manage, and report on material financial risks associated with biodiversity loss.

2.2 Double materiality: integration of financially-material biodiversity dependencies and biodiversity impacts

Section 2.1 above summarised how companies engaged in the food system, and the seafood and agriculture sectors in particular, are exposed to biodiversity-related financial risks. In addition, companies can have adverse impacts on biodiversity through their operations, business relationships, and products, even where this does not give rise to a specific material financial risk.

The concept of "double materiality" refers to the disclosure and management by companies of not only the material biodiversity-related financial dependencies affecting the company, but also the material adverse impacts of the company⁵⁴ on biodiversity (even where those impacts do not have a material financial impact on the company). A matter is material from an impact perspective when it pertains to the undertaking's actual or potential, positive or negative impacts on people or the environment (over short-, medium- or long-term time horizons). Materiality is judged according to the severity of the impact (including its scale and scope, and whether it is remediable) and, for potential impacts, their likelihood. This includes impacts the undertaking itself causes or contributes to, as well as impacts directly linked to the undertaking's own operations, products, or services through its business relationships (including its upstream and downstream value chain).⁵⁵

As **Figure 1** (page 10) illustrates, impacts on biodiversity can be direct, when businesses impact biodiversity directly through their own operations, or indirect, when businesses (including financial institutions) impact biodiversity indirectly through their business relationships, or their value chain or investment decisions.⁵⁶

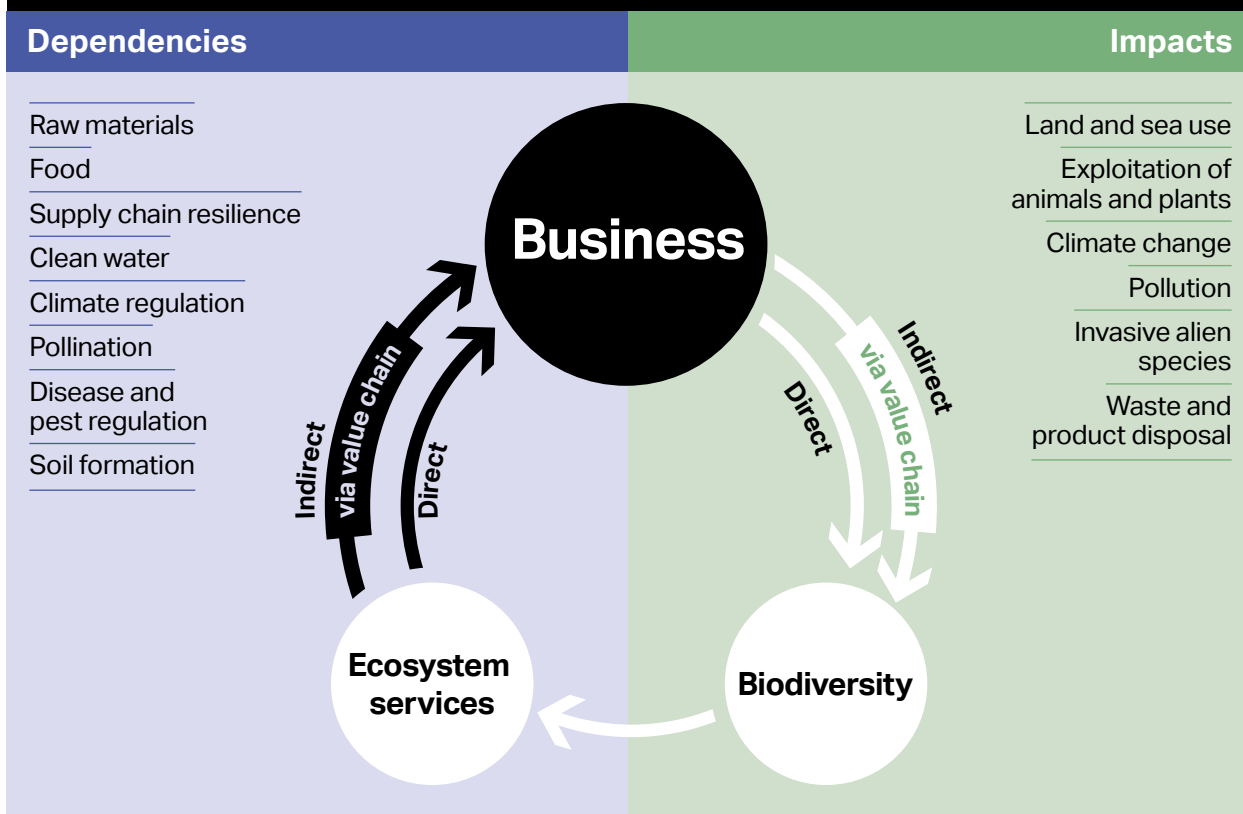
53 EFRAG (2022). *Draft European sustainability reporting standards. ESRS 1 General requirements*: [Download \(efrag.org\)](https://www.efrag.org), Section 3.3

54 Directive 2014/95/EU: [DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL – of 22 October 2014 – amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups – \(europa.eu\)](https://eur-lex.europa.eu/eli/dir/2014/95/oj).

55 EFRAG (2022). *Draft European sustainability reporting standards. ESRS 1 General requirements*. Section 3.5.

56 EFRAG (2022). *Draft European sustainability reporting standards. ESRS 1 General requirements*. Section 3.5.

Figure 1. Biodiversity dependencies and impacts



Source: Accounting for Sustainability (A4S), Briefing for Finance: Biodiversity (22 May 2020).

EU legislation (including the Non-Financial Reporting Directive and the Corporate Sustainability Reporting Directive)⁵⁷ already incorporates the concept of double materiality, as it requires companies that fall within their scope to disclose information on their material biodiversity-related risks and opportunities, as well as on their impacts and dependencies on biodiversity.⁵⁸

2.3 Opportunities

There are significant business opportunities for those committed to maintaining and restoring natural ecosystems, including increased reputation, efficiency, and market share.⁵⁹

This is closely linked to companies' business continuity, transformation and success. Those businesses that identify and address biodiversity risks early on are likely to have a "first-mover" advantage and may outperform their competitors. Similarly, identifying other issues – human rights abuses, modern slavery, climate change impacts – will also enable businesses to foresee and address them early on. Increasingly, due diligence and reporting on these issues is required under legislation.⁶⁰ New and upcoming legal changes are also providing greater legal certainty about what companies are required to do – alleviating risk by making obligations clear. Finally, there are signs of shifts in customer and employee preferences towards environmentally responsible businesses,⁶¹ although this trend needs to be confirmed in the longer term. Companies that take steps to address their biodiversity risks now are therefore likely to experience an increase in market share and attract new talent, and can do so under the guidance of a clear legal framework. All of these opportunities are linked to the increased transparency that arises from tracing biodiversity impacts and dependencies across corporate value chains.⁶²

Legal risks related to biodiversity loss in the seafood and agriculture sectors

57 Directive 2014/95/EU, Article 19(a)(1) and 29(a)(1): DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL – of 22 October 2014 – amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups – (europa.eu). Also, Directive 2022/2464/EU, Article 19(a)(1): Publications Office (europa.eu).

58 This is also the approach to materiality proposed under the TNFD Framework. See TNFD (2022). *The TNFD Nature-related Risk & Opportunity Management and Disclosure Framework 220321-TNFD-framework-beta-v0.1-FINAL.pdf*. It states that "the TNFD framework recognises that consideration of both nature-related dependencies and impacts is required for a comprehensive assessment of risks and opportunities, and that impacts on nature become relevant to enterprise value when assessed over a future time horizon".

59 Accounting for Sustainability (2022). *Briefing for finance: biodiversity*. Briefing for Finance – Biodiversity.pdf.downloadasset.pdf (accountingforsustainability.org).

60 For example, the French Vigilance Law; the EUDR; and the EU CSRD.

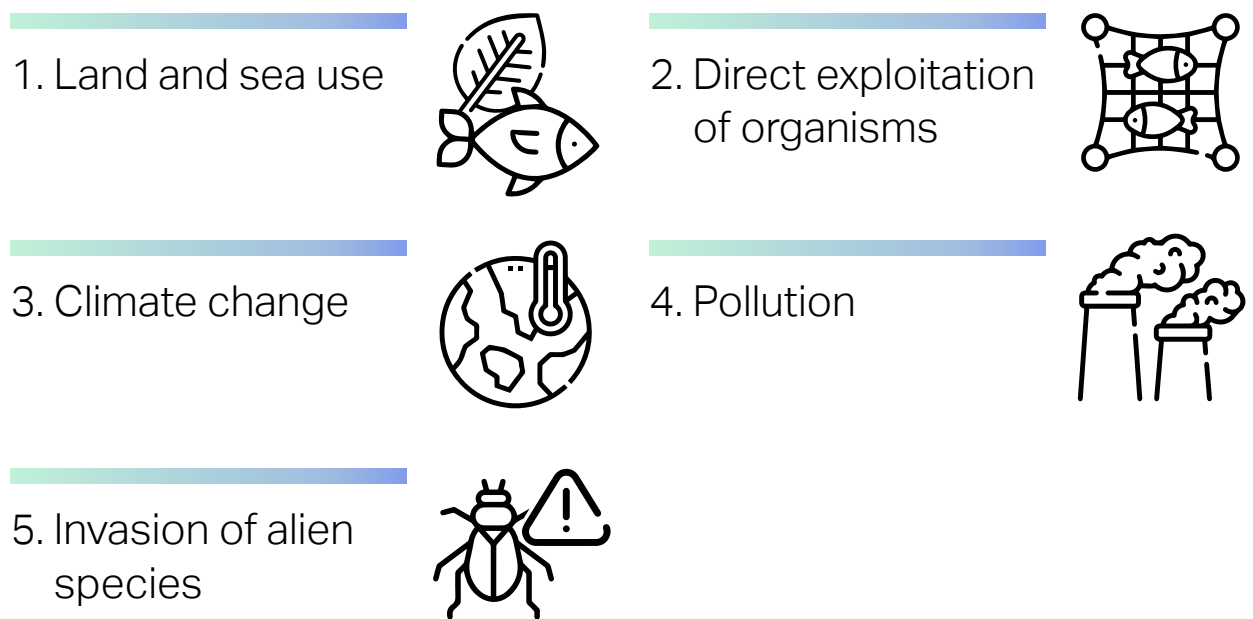
61 Forbes (2022). Consumers demand sustainable products and shopping formats: *Consumers Demand Sustainable Products And Shopping Formats* (forbes.com).

62 Zaneta Sedilekova, Zili Duniya Bungwon (2023). *Time is now – biodiversity risks and opportunities explained – The Commonwealth Climate and Law Initiative: Time is now – biodiversity risks and opportunities explained | The Commonwealth Climate and Law Initiative – investESG.eu*.

3. Legal and litigation risks arising from biodiversity impacts and dependencies

The sections above show that the agriculture and seafood sectors' biodiversity impacts and dependencies should be properly understood, addressed, and disclosed by companies to mitigate risk and avoid potential losses and liabilities.

The Intergovernmental Panel on Biodiversity and Ecosystems Services (**IPBES**) classification of the five main drivers of biodiversity loss provides a useful framework for identifying some of the material topics that must be disclosed by companies in these sectors and by the financial institutions supporting them. A 2022 study⁶³ analysed the relative importance of these drivers and ranked them in the following order of dominance:



In this section, we look at a non-exhaustive set of EU and national laws which provide the framework in which to understand these risks and to reduce them. We use examples taken from the drivers listed above to give colour to these legal frameworks and show how these risks can be reduced.

3.1 Deforestation-risk commodities and the EU Deforestation Regulation (EUDR)

The main driver of biodiversity loss is the commercial exploitation of land and sea ecosystems such as forests and wetlands for agricultural use. The expansion of agriculture and aquaculture continues to be the main driver of deforestation, forest degradation, mangrove deforestation, and biodiversity loss on land. The Intergovernmental Panel on Climate Change (**IPCC**) predicts that 50% of agricultural lands in Latin America and the Caribbean will be affected by desertification and salinisation by 2050.⁶⁴ Deforestation has adverse impacts on local communities, including Indigenous Peoples, who depend on forests for their livelihoods and for whom forests have significant cultural meaning.⁶⁵ Deforestation and forest degradation are also the second largest source of greenhouse gas emissions globally.

63 Jaureguiberry, P.; Titeux, N.; Wiemers, M.; Bowler, D.; Coscieme, L.; Goldern, A.; Guerra, C.; Jacob, U.; Takahashi, Y.; Settele, J.; Díaz, S.; Molnár, Z.; and Purvis, A. (2022). *The direct drivers of recent global anthropogenic biodiversity loss: The direct drivers of recent global anthropogenic biodiversity loss* (science.org).

64 IPCC (2007). *Impacts, Adaptation and Vulnerability*, Chapter 13: Latin America.

65 FAO (2020). *The State of the World's Forests: State of the World's Forests 2020* (fao.org).

Palm oil, cattle, soy, coffee, cocoa, timber, and rubber, as well as derived products such as beef, furniture, or chocolate are subject to the new **EUDR**. The EUDR prohibits the import, export, and subsequent trade in the EU of certain products linked to deforestation or produced illegally.⁶⁶ The Regulation entered into force on 29 June 2023, with companies required to comply from 30 December 2024. From that date, companies will not be able to import into the EU products that contain, have been fed with or have been made using these forest-risk commodities that were produced on land that has been deforested after December 2020 or produced illegally.⁶⁷ As of 30 December 2024, operators will only be allowed to place these products on the EU market if there is no risk or only a negligible risk that they do not comply with EUDR requirements.⁶⁸

“Palm oil, cattle, soy, coffee, cocoa, timber and rubber as well as derived products such as beef, furniture, or chocolate are subject to the new EUDR. The EUDR prohibits the import, export, and subsequent trade in the EU of certain products linked to deforestation or produced illegally”.



⁶⁶ Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation repealing Regulation (EU) No 995/2010: [L_2023150EN.01020601.xml \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2023/1115/oj). According to the EUDR, “deforestation” means the conversion of forest to agricultural use, whether human-induced or not (EUDR, Article 2(3)); “forest degradation” means structural changes to forest cover, taking the form of the conversion of: (a) primary forests or naturally regenerating forests into plantation forests or into other wooded land; or (b) primary forests into planted forests (EUDR, Article 2(7)).

⁶⁷ EUDR, Art. 2(13).

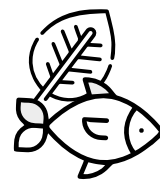
⁶⁸ Ibid, Article 4(b).

The EUDR requires Member States to designate national enforcement agencies by 30 December 2023.⁶⁹ Those agencies can impose a range of penalties (administrative or criminal, depending on how the EUDR is enforced at Member State level) on companies which are not in compliance. These include: fines; confiscation of non-compliant products; confiscation of revenues gained from transactions involving those products; temporary exclusion from public procurement processes and from access to public funding, including tendering procedures, grants, and concessions; and temporary prohibition from placing such products on the EU market, making them available on the EU market, or exporting them from the EU.⁷⁰ Where products are found to be non-compliant, the importing company will be obliged to cooperate with the enforcement agencies to recall those products from the EU market and inform buyers of the company's non-compliance.⁷¹

By complying with the EUDR, companies avoid not only these penalties but significant commercial risks from their impacts and dependencies on biodiversity. Compliance with the EUDR will also prevent a host of commercial risks that take the form of value-chain disruption and reputational damage. Compliance also reduces the legal uncertainty that prevailed when it came to companies' responsibilities regarding forest-risk commodities. This new legislation provides clarity about what "deforestation-free" means, what level of deforestation risk is acceptable, what will be expected at customs controls, when products face recall, and what consumers can expect, as they are no longer reliant on companies' own claims to satisfy themselves that what they are consuming is not contributing to deforestation.

Example 1

Land and Sea Use change



A large public company imports deforestation-risk products into the EU. The products are within the scope of the EUDR and made from raw materials grown in one of the most deforested places on Earth, which provides ecosystem services to many people and businesses.

As a company placing products within the scope of the EUDR on the EU market, the company will have the obligations of an "operator" under the EUDR.⁷² As of 30 December 2024, this operator will only be allowed to place those products on the EU market if there is no risk or only a negligible risk that they do not comply with the EUDR requirements.⁷³ Therefore, this company must make sure its due diligence processes are fully EUDR compliant, that it can complete the required due diligence process (including gathering all the required information), and can demonstrate that the relevant products are EUDR compliant in order to continue placing them on the EU market. This will be necessary to avoid liability risks and disruption in its supply chain.

69 ClientEarth (2023). *The new EU Deforestation-free Products Regulation. Key obligations for EU Member States*. [The new EU Deforestation-free Products Regulation](https://www.clientearth.org) (clientearth.org).

70 EUDR, Article 23.

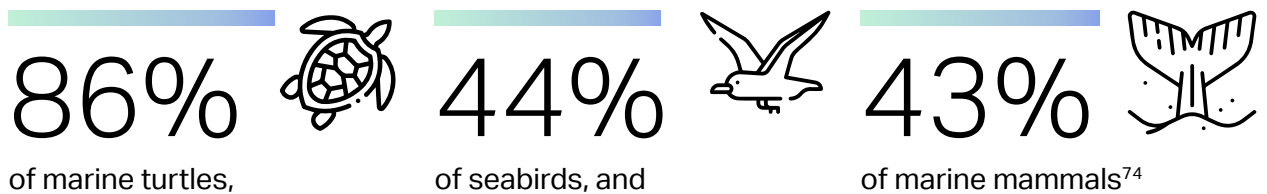
71 Ibid, Whereas clause, para. 73.

72 Under the EUDR, Article 2(15), an operator is the entity that first places products to which the law applies on the EU market. Large and medium-sized companies will have obligations under the EUDR as of 30 December 2024. Small or micro enterprises will have obligations as of 30 June 2025.

73 Ibid, Article 4(b).

3.2 Negligence and nuisance claims

Pollution, including from plastic, chemicals, and waste, is a major driver of biodiversity loss and ecosystem degradation, with especially devastating direct effects on freshwater and marine ecosystems. Plant and insect populations are dwindling as a result of the persistent use of highly dangerous, non-selective insecticides. Marine plastic pollution has increased tenfold since 1980, affecting:



Air and soil pollution are also on the rise.⁷⁵ Pesticide pollution has already given rise to litigation in Europe that shows how companies face risk in this area. The use of many classes of pesticides causes risks to biodiversity and human health. Some pesticides that are approved for use in the EU have severe adverse impacts on biodiversity, killing indiscriminately with disastrous impacts on bee, butterfly, and other insect populations, and harming much of the wildlife they touch.⁷⁶ The widespread use of chemicals in agriculture is recognised as one of the key drivers of biodiversity loss, with Europe identified as a hotspot.⁷⁷

Legal and litigation risks may arise in several ways from the use of pesticides. In the EU, use of neonicotinoids, the most dangerous class of insecticide affecting bee populations, has been banned, a decision which was upheld by the European Court of Justice in 2021 following a legal challenge by the company Bayer. In early 2023 the Court found that Member State derogations, which had been granted by Belgium, among others, from the prohibition on the use of neonicotinoids were not compliant with EU law. The Court noted that it is the obligation of all Member States to take all necessary measures to:

“promote low pesticide-input pest control, giving priority to non-chemical methods wherever possible. Such an obligation implies that professional users of pesticide switch to practices and products with the lowest risk to human health and the environment among those available for the same pest problem”.⁷⁸

Companies whose operations rely on legally questionable derogations such as the one struck down by the Court find themselves at risk of disruptions.

Further, in respect of the use of pesticides that cause nuisance or harm to neighbouring properties or the health of local populations or the environment, legal risks can arise under civil or local environmental laws. Claims of negligence or nuisance resulting from adverse biodiversity impacts that cause ecological, human and economic losses may become more common.

⁷⁴ UN News (2019). *World is 'on notice' as major UN report shows one million species face extinction*. World is 'on notice' as major UN report shows one million species face extinction | UN News.

⁷⁵ European Environmental Agency (2022). *Land and soil pollution: widespread, harmful and growing*. Land and soil pollution — widespread, harmful and growing – European Environment Agency (europa.eu).

⁷⁶ Le Monde (2023). *Biodiversity: Pesticides have widespread, harmful effects on soil fauna*. Biodiversity: Pesticides have widespread, harmful effects on soil fauna (lemonde.fr).

⁷⁷ Chemsec (2023). *This is the secret cause of biodiversity loss*. <https://chemsec.org/this-is-the-secret-cause-of-biodiversity-loss/>; Sigmund et al. (2023). *Addressing chemical pollution in biodiversity research*, *Global Change Biology*; <https://doi.org/10.1111/gcb.16689>.

⁷⁸ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-01/cp230012fr.pdf>.



For example, in the Netherlands, a lily grower was recently ordered to cease using pesticides on certain plots of land in order to protect the health of the local population.



This is a groundbreaking ruling in which the Court found that the economic interest of the farmer did not outweigh that of local residents and affected persons. The judge used the precautionary principle and the evidence linking the use of the chemical to Parkinson's disease, Alzheimer's disease, and amyotrophic lateral sclerosis to justify ordering the farmer to cease using the chemical, despite it being legally authorised.⁷⁹ The Court relied on the provisions of EU Regulations 1107/2009 (concerning the placing of plant protection products on the market) and 528/2012 (concerning the making available on the market and use of biocidal products). Article 4, paragraph 3, of Regulation 1107/2009 requires that:

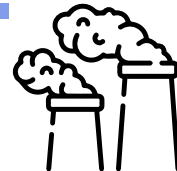
“a plant protection product, consequent on application consistent with good plant protection practice and having regard to realistic conditions of use, shall... have no immediate or delayed harmful effect on human health, including that of vulnerable groups, or animal health, directly or through drinking water (taking into account substances resulting from water treatment), food, feed or air, or consequences in the workplace or through other indirect effects, taking into account known cumulative and synergistic effects where the scientific methods accepted by the Authority to assess such effects are available; or on groundwater”.

The impacts and risks posed by the use of pesticides are material and should be identified, reported on, and mitigated within companies' reporting and internal due diligence processes. These risks arise from the increasing regulation of pesticides such as neonicotinoids by the EU, which may also increase compliance costs. They also include civil litigation risks, which could result in court orders to pay damages or remediation costs, as well as the associated reputational risk and accompanying risk of a change in the market value of the business. Increased compliance costs as well as disruption to commercial activity may have negative commercial and financial consequences for the company.

The extent to which risks related to pesticides have already materialised in Europe illustrates with particular clarity what is at stake for companies whose value chains entail pesticide use. These cases already make it possible for actors along the value chain to assess their risk and make changes.

Example 2

Pollution



A large agricultural company headquartered in Europe continues to use neonicotinoid-based pesticides on its farms, relying on exemptions granted by national authorities. This has caused several adverse impacts both on the health of adjacent residents and on the biodiversity in waterways close to the area, as identified and recorded by a local nature protection group.

Under existing legislation, this company is exposed to several litigation risks associated with its use of high impact pesticides that can be brought by people and businesses affected. The possibility of the national exemptions being ruled unlawful adds to that risk as well as posing its own risks of disruption. To mitigate the risks of negligence claims, the company should map its impacts in its supply chain and shift away from use of pesticides that have direct or delayed impacts on human health and nature.

3.3 The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive (**UCPD**)⁸⁰ prohibits unfair business-to-consumer commercial practices⁸¹ including misleading commercial practices. Under the UCPD, a commercial practice is misleading where it “contains false information”, including on “the main characteristics of the product,” that is “likely to deceive the average consumer” or where “it omits material information that the average consumer needs [...] to take an informed transactional decision” and thereby “causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”.⁸² Misleading omissions are also prohibited.⁸³

At present, the UCPD and EU law in general do not contain explicit provisions about green (i.e., environmental) claims. This creates some uncertainty, which the European Commission has attempted to resolve through guidance. According to the Commission’s UCPD Guidance, green claims must be truthful, not contain false information, and be presented in a clear, specific, accurate and unambiguous manner. In addition, they should be based on robust, independent, verifiable, and generally recognised evidence which takes into account updated scientific findings and methods. Finally, the imagery and overall product presentation (i.e., layout, choice of colours, images, pictures, sounds, symbols, or labels), should be a truthful and accurate representation of the scale of the environmental benefit, and should not overstate the benefit achieved.⁸⁴ Examples⁸⁵ the Commission mentions include: using the term “biodegradable” for products where no tests have been carried out; presenting bamboo tableware as a sustainable alternative to plastic when the products were in fact a mixture of plastic, bamboo, and resin made of melamine and formaldehyde; and schemes to compensate for CO₂ emissions that involve poor accounting, double counting (e.g. of trees planted), or which are of poor environmental quality.

Risks related to the UCPD do not only arise from actions by consumers. Competitors and competition regulators are also a major source of risk in this area. Recent Italian case law shows that, where false and vague green claims harm the interests of competitors, those competitors can sue the company making the claims.⁸⁶ In January 2022, a company in the manufacturing sector brought a case against a competitor whose “green claims”, it argued, were misleading

80 Directive 2005/29/EC: [EUR-Lex – 32005L0029 – EN – EUR-Lex \(europa.eu\)](#)

81 Unfair Commercial Practices Directive, Articles 3(1) and 5.

82 Unfair Commercial Practices Directive, Articles 6 and 7.

83 Unfair Commercial Practices Directive, Article 7.

84 See the [European Commission’s guidance](#) on the interpretation and application of the UCPD, Sustainability section (which runs to 14 pages).

85 *Ibid*, pages 76–77.

86 Forbes (2021). [Alcantara Wins Major Court Battle Against Greenwashing: Alcantara Wins Major Court Battle Against Greenwashing \(forbes.com\)](#).

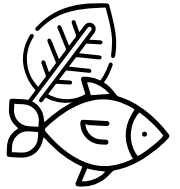
advertising as defined in the UCPD and constituted an act of unfair competition under Article 2598(3) of the Italian Civil Code. The claimant argued that its business had been harmed since customers favoured the defendant manufacturer thanks to its green claims.⁸⁷ The case is pending but it shows that a company may have to pay civil damages if it is proven that its unfair activities harm competitors.⁸⁸ There is also the possibility of misleading claims triggering criminal liability.⁸⁹ In Italy, for example, greenwashing could constitute fraud in the exercise of trade, which is a criminal offence under Article 515 of the Criminal Code.⁹⁰

The current state of EU law has created considerable risk around messages that seek to satisfy consumers' concerns about whether their purchases are having negative impacts on nature. Fortunately the law is developing in a way that will provide greater certainty to businesses, and enable those who can back up their claims to secure the market advantage this ought to bring.

Example 3

Land and Sea Use change

A company sells farmed shrimp from outside Europe in EU markets. It recently spent a significant amount on an advertising campaign which claims the underlying activity is sustainable.



Shrimp farming is internationally recognised as having an impact both on biodiversity and on climate,⁹¹ due to the clearance of mangroves which disrupts critical fish nurseries⁹² and protects communities from storms and hurricanes.⁹³ In addition, loss of mangroves may impact the human rights of Indigenous Peoples and local communities, including their right to food (through the reduction in food such as crabs and fish which live in mangroves), to life (through the reduction of climate regulatory services), and to a clean, healthy and sustainable environment.⁹⁴

If a sustainability claim could be construed as misleading, the company could be exposed to claims under the UCPD from consumers or competitors and, in future, under forthcoming rules on green claims⁹⁵ (see section 3.4). Companies should therefore ensure that marketing claims of sustainability can be substantiated and are not misleading, so as to avoid this area of legal risk.

87 Court of Gorizia, Supervision Order of 26 November 2021, R.G. 2021/712. As the decision is based on the UCPD, the case could have potential transactional implications for companies in other European jurisdictions applying the Directive. See: Clifford Chance (2022). *Italy's first greenwashing case between corporates: Italy's first greenwashing case between corporates* (cliffordchance.com).

88 We note that, in the US, consumers who have suffered a financial loss as a result of deceptive claims, may also be entitled to damages. Ongoing cases suggest that where a deceptive claim causes customers to purchase more expensive products because of their alleged sustainable qualities, customers could bring class action claims for consumer fraud, breach of warranty, common law fraud, and unjust enrichment, and seek damages, injunctive and declaratory relief, interest, costs, and reasonable attorneys' fees. For example, see Lawsuit against Aldi for the label: "Simple. Sustainable. Seafood" on its fresh Atlantic Salmon products. The plaintiffs allege that Aldi gets its salmon, at least in part, from fish farms in Chile that use net pen aquaculture that crowds thousands of fish into cages or "pens" in natural waterways and therefore it is not sustainably sourced *Rawon v. Aldi Inc. – 1:21-cv-02811* (classaction.org). Lawsuit against Mowi USA, smoked Atlantic Salmon products marketed under the brand name Ducktrap River of Maine <https://shublawyers.com/wp-content/uploads/2020/11/0001.-11-05-2020-COMPLAINT-against-Mowi-Ducktrap-LLC-Mowi-USA-LLC.-Filing-Fee-400.00-Receipt-Number-ANYSDC-224-1.pdf>. Lawsuit against Gorton, claiming that the "sustainably" sourced tilapia label suggest to consumers that the tilapia is sustainably sourced in accordance with high environmental and animal welfare standards; instead, the plaintiffs claim the product comes in part from China, a country of origin from which the Monterey Bay Aquarium Seafood Watch recommends avoiding tilapia <https://truthinadvertising.org/wp-content/uploads/2022/06/Spindel-v-Gortons-complaint.pdf>.

89 *Salvis Juribus* (2023). *Il fenomeno del greenwashing e le possibili conseguenze penali nell'ordinamento giuridico italiano: Il fenomeno del Greenwashing e le possibili conseguenze penali nell'ordinamento giuridico italiano* | *Salvis Juribus*

90 Criminal Code, R.D. 19 October 1930, n. 1398: *Art. 515 codice penale – Frode nell'esercizio del commercio – Brocardi.it*. Under Decree 231/2001, criminal liability (which is usually reserved for natural persons) is extended to companies and entities for Art. 515 of the Criminal Code, among others: *Gazzetta Ufficiale*.

91 An assessment made in the Ex Post Evaluation Study of the Trade Agreement between the European Union and Colombia, Peru, and Ecuador concludes that "given the continued increase in shrimp exports, the Agreement is likely to intensify pre-existing biodiversity and climate pressures related to shrimp farming, e.g. degradation and deforestation of mangrove areas, water pollution and CO₂ emissions": *Draft Final Report – Vol I: Main report* (fta-evaluation.eu), page 146. See also IUCN (2021). *My mangroves, my livelihood. My Mangroves, My Livelihood* | IUCN.

92 IUCN (2017). *Mangroves: nurseries for the world's seafood supply*. Mangroves: nurseries for the world's seafood supply | IUCN.

93 WWF (2022). *Mangroves as a solution to the climate crisis*. Mangroves as a solution to the climate crisis | Stories | WWF (worldwildlife.org).

94 The Conversation (2019). *How mangroves protect people from increasingly frequent and powerful tropical storms*. How mangroves protect people from increasingly frequent and powerful tropical storms (theconversation.com). The right to a clean, healthy and sustainable environment is enshrined in Article 14 of the Ecuadorian Constitution: *2021.01.25 constitucion_de_la_republica_del_ecuador_-_cre.pdf* (cancilleria.gob.ec). See also: ClientEarth (2023). *Tackling human rights violations in seafood value chains* | ClientEarth.

95 *Proposal for a Directive on green claims* (europa.eu); *Empowering consumers for the green transition: Council adopts its position – Consilium* (europa.eu).

3.4 Forthcoming EU rules on green claims

There are two complementary proposals for new directives currently emerging in the EU. These are the proposal for a Directive on Green Claims and for a Directive on empowering consumers for the green transition.⁹⁶ These will introduce more requirements and rigour to making green claims, allowing companies to manage the related risks better. These rules as currently proposed will require companies to substantiate environmental claims before their publication. They will have to do this by producing evidence to back up green claims and securing independent verification by an officially accredited verifier. These proposals provide for prohibitions on (among other things) vague or general claims used in marketing towards consumers, where the product or trader's excellent environmental performance cannot be demonstrated. If it were to be demonstrated that a company made vague and inaccurate claims, those companies could be found liable for misleading their customers. While such practices already face risk of enforcement under the UCPD, these proposals will give more clarity to what is and is not likely to be found lawful. Where claims are deemed likely to influence consumer decision-making, the company making them would, under the new rules, face a heightened legal risk. The consequences are potentially considerable. Not only could consumers bring complaints against such companies to court (including through the collective redress mechanism⁹⁷ that will be available throughout the EU from 2024); administrative authorities can also impose fines which, in certain circumstances involving multiple Member States, can amount to 4%⁹⁸ of the company's annual turnover. The proposed rules, once adopted, will create more certainty for companies as to when these risks might materialise.

Agriculture and seafood companies should welcome these proposals to clarify when they face liability risk and to allow the true environmental leaders to be able to trade on their credentials.



⁹⁶ Proposal for a Directive on green claims (europa.eu) and Circular Economy: Commission proposes new consumer rights (europa.eu).

⁹⁷ Directive (EU) 2020/1828, whose provisions Member States must apply from 25 June 2023.

⁹⁸ Article 13(3) of the UCPD requires Member States to provide for the possibility of imposing fines of a maximum amount of at least 4% of a trader's annual turnover in certain circumstances. Member States can set the maximum fine even higher.

3.5 The EU Corporate Sustainability Reporting Directive

The first EU-wide obligations on reporting sustainability information were introduced in 2014 through the Non-Financial Reporting Directive (**NFRD**).⁹⁹ In response to widespread feedback from investors, civil society, and companies that information disclosure under the NFRD was not meeting their needs, an overhaul of the law was launched, to make it more granular and specific in its requirements. This overhaul took the form of the EU Corporate Sustainability Reporting Directive (**CSRD**) (Directive 2022/2464),¹⁰⁰ which came into effect in December 2022, replacing the NFRD. In addition to expanding the scope of companies covered and the extent of sustainability information required to be disclosed, the new rules introduce a mandatory audit and assurance regime to ensure the reliability of data.¹⁰¹

Under the CSRD, most EU listed companies, as well as non-listed companies of a certain size (assessed according to a combination of balance sheet total, net turnover and number of employees),¹⁰² will be required to report information that is material from an environmental and financial perspective in their management reports.¹⁰³ Obligations under the CSRD kick-in first for companies that are already reporting under the NFRD. They will have to apply the new rules for the 2024 financial year, to be included in reports published in 2025¹⁰⁴

"Under the CSRD, most EU listed companies, as well as non-listed companies of a certain size will be required to report information that is material from an environmental and financial perspective in their management reports".

On 31 July 2023, the European Commission adopted delegated acts on the first "European Sustainability Reporting Standards" (**ESRS**) which specify in detail the sustainability disclosure requirements under the CSRD.¹⁰⁵ The 12 ESRS adopted include disclosure standards on the topics of water and marine resources (ESRS E3) and biodiversity and ecosystems (**ESRS E4**).¹⁰⁶ Therefore, where these topics are considered material (either financially or in terms of impact – see paragraph 28 of ESRS 1) by a company, the company will be required to provide the information detailed in the applicable disclosure standard in its management reports. Sector specific standards setting out further disclosure requirements are planned for the agriculture, fishing, and farming sectors, among others.¹⁰⁷

Where a company has failed to disclose information on its material impacts on biodiversity or on the material financial risks it faces in relation to biodiversity, or where it has otherwise failed to provide the information required by the CSRD and the applicable ESRS (in particular, ESRS E4 on biodiversity and ecosystems and the forthcoming sector specific requirements on the agriculture, fishing, and farming sectors), the company may face enforcement action by the national regulator. Enforcement action may result from the regulator's own supervision activities or as a result of a notification from a third party, including civil society organisations. National regulators could eventually take the company to court.

99 Directive (EU) 2014/95.

100 Directive (EU) 2022/2464.

101 Harvard Law School Forum on Corporate Governance (2022). *EU Corporate Sustainability Reporting Directive—What Do Companies Need to Know. EU Corporate Sustainability Reporting Directive – What Do Companies Need to Know (harvard.edu)*.

102 CSRD, Article 1(1). The CSRD will apply to all large EU companies, that is, EU companies (including EU subsidiaries of non-EU parent companies) exceeding at least two of the following criteria: more than 250 employees; a turnover of more than €40 million; or total assets of €20 million. The CSRD will also apply to companies with securities listed on an EU-regulated market, irrespective of whether the issuer is established in the EU or a non-EU country. This includes listed small and medium-size enterprises (SMEs), except for certain listed micro-enterprises.

103 Companies reporting under the NFRD will continue to do so until 2025 (in respect of the 2024 financial year (Article 5(2)(a)). Most companies that have not previously reported under the NFRD will start reporting under the CSRD from 2026 (in respect of the 2025 financial year (Article 5(2)(b)). From 2028, the CSRD will also apply to certain companies outside the EU meeting criteria relating to their presence and activity in the EU (Article 1(14) and Article 5(2)). Under CSRD Article 1(4) which replaces Article 19(a), public-interest entities must report on their impacts on sustainability matters.

104 CSRD, Article 5(2)(b).

105 Pursuant to CSRD, Article 1(8) inserting new Article 29b into Directive 2013/34/EU. New Article 29b(1) states: "The Commission shall adopt delegated acts in accordance with Article 49 supplementing this Directive to provide for sustainability reporting standards. Those sustainability reporting standards shall specify the information that undertakings are to report in accordance with Articles 19a and 29a and, where relevant, shall specify the structure to be used to present that information". See further *EU Commission adopts the European Sustainability Reporting Standards (31 July 2023): Daily News 31 / 07 / 2023 (europa.eu)*.

106 Draft standards ESRS E4 (Biodiversity and ecosystems) are available here: [Download \(efrag.org\)](#).

107 EFRAG Sector Specific ESRS: [EFRAG Sector Specific ESRS – EFRAG](#).

As well as avoiding a potential source of legal liability, disclosing in line with the detailed requirements of the CSRD should provide companies with tools to understand their biodiversity related impacts and risks, and empower companies to provide an appropriate level of information about their biodiversity impacts to their stakeholders. **This will be directly relevant to the many European corporate actors involved in fishing, logging, hunting, and trade in wildlife, which are the most significant direct drivers of biodiversity loss.**¹⁰⁸ **Compliance with this legal framework allows European companies to address these impacts and reduce their related risks.**

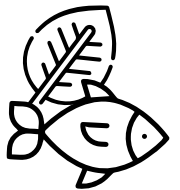


Example 4

Land and Sea Use change

A seafood company relies heavily on destructive gear for its catches and operates in areas of high biodiversity value.

It should, therefore, report on the impacts of its fishing methods, and on how regulatory changes might affect its business. If it does not, it could face possible sanctions under the CSRD, together with complementary actions by national regulators.



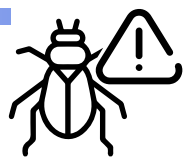
Example 5

Invasion of Alien Species

A non-listed EU company imports a non-native and highly invasive species of fish from farms it owns into Europe.

These farms face the common issue of escapees,¹⁰⁹ which can have catastrophic impacts on native species, together with negative impacts on water quality due to nutrient pollution.¹¹⁰ This company should assess and report on these impacts as required under the relevant disclosure standard adopted under the CSRD. If not, it could be at risk of exposure to the sanctions provided in the transposed national legal text.

Reporting is also an important step for assessing and mapping risks and ensuring transparency with investors.



¹⁰⁸ Jaureguiberry, P.; Titeux, N.; Wiemers, M.; Bowler, D.; Coscieme, L.; Golden, L.; Guerra, C.; Jacob, U.; Takahashi, Y.; Settele, J.; Díaz, S.; Molnár, Z. and Purvis, A. (2022). *The direct drivers of recent global anthropogenic biodiversity loss: The direct drivers of recent global anthropogenic biodiversity loss* | Science Advances.

¹⁰⁹ U.S. Department of Commerce, National Oceanic and Atmospheric Administration (2022). *Fact Sheet 2022: Potential Risks of Aquaculture Escapes*. [Fact Sheet: Potential Risks of Aquaculture Escapes \(noaa.gov\)](https://www.noaa.gov/factsheets/potential-risks-of-aquaculture-escapes); and E.U., Community Research and Development Information Service (2021). *Assessing the causes and developing measures to prevent the escape of fish from sea-cage aquaculture*. Final Report Summary – PREVENT ESCAPE (Assessing the causes and developing measures to prevent the escape of fish from sea-cage aquaculture) | FP7 | CORDIS | European Commission (europa.eu).

¹¹⁰ Seafish. *Tilapia: Nutrient Pollution*. [Nutrient Pollution – Seafish](https://www.seafish.org/~/media/Seafish/Files/Nutrient-Pollution-Tilapia.pdf)

3.6 France's Duty of Vigilance Law and similar legislation

The French Duty of Vigilance Law, incorporated into the French Commercial Code, applies to French companies with over 5,000 employees based in France or over 10,000 employees globally.¹¹¹ It requires companies to produce and implement a "vigilance plan" which contains measures to identify, assess, and prevent serious impacts on the environment, health, and human rights resulting from the company's activities, those of their subsidiaries, and those of subcontractors and suppliers linked to their commercial relationships. Companies must report their actions to mitigate risks and prevent serious harm. They should prepare their plans in collaboration with stakeholders.¹¹²

"The Duty of Vigilance Law permits anyone demonstrating an "interest" to bring a claim against a company.¹¹³ This means that claimants based outside France can also have standing to bring a claim".

If a French company's vigilance plan does not adequately address the risks of its activities to the environment and/or if it has failed to implement the risk prevention and mitigation measures detailed in its plan, interested parties, including affected local communities, could request an injunction ordering the preparation, publication, and effective implementation of due diligence measures within a certain timeframe.¹¹⁴ The Law also provides for claims for damages resulting from a company's failure to comply with its due diligence obligations where compliance would have prevented the harm from arising.¹¹⁵ Judges are empowered to issue fines to companies for failure to comply with their orders.¹¹⁶

Several large French fast-moving consumer goods companies are reliant on plastic for their activities. Plastic, of course, represents a major risk to biodiversity (as well as human health and the climate). In September 2022, ClientEarth, together with its French partners Surfrider Foundation Europe and Zero Waste France issued legal warnings to nine French companies, including Danone, Nestlé France, McDonald's France, and several supermarkets for inadequately addressing the risks related to the plastic pollution they produce. Following the responses and discussions with several companies, ClientEarth and the organisations took Danone to court in January 2023.

The claim is still pending, but aims, among other things, to secure judicial recognition of a legal obligation on Danone to put in place a pathway to "deplastification".¹¹⁷

Similar laws exist elsewhere. For example, under the Norwegian Transparency in Supply Chains Act,¹¹⁸ large Norwegian-based companies¹¹⁹ that offer goods and services in or outside Norway¹²⁰ must carry out due diligence in accordance with the OECD (Organisation for Economic Cooperation and Development) Guidelines for Multinational Enterprises.¹²¹ In particular, they must identify, prevent, and mitigate the adverse impacts of their operations on fundamental rights¹²² and decent working conditions.¹²³ The Transparency Act applies to adverse impacts on

¹¹¹ French Commercial Code, Article L. 225–102–4 of the: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ French Commercial Code, Article L. 225–102–4 I.

¹¹⁵ French Commercial Code, Article L. 225–102–4 II. Pursuant to Articles 1240 and 1241 of the French Civil Code, available online: [Code civil – Légifrance \(legifrance.gouv.fr\)](https://www.legifrance.gouv.fr/).

¹¹⁶ European Commission for Corporate Justice (2017). *A historic first step: France adopts corporate duty of vigilance law*. A historic first step: France adopts corporate duty of vigilance law – ECCJ ([corporatejustice.org](https://www.eccj.europa.eu/)).

¹¹⁷ <https://www.clientearth.org/latest/latest-updates/news/we-ve-issued-legal-warnings-to-nestle-danone-and-others-over-plastic/>.

¹¹⁸ The English translation of the Act is available here: [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions \(Transparency Act\) – Lovdata](https://www.transparencyact.no/).

¹¹⁹ The size and volume threshold for in-scope companies is substantially lower than for other human rights due diligence laws across Europe. Under Section 3 of the Act, large companies are defined as companies that meet at least two out of the three following criteria: (1) at least 50 full time employees during the fiscal year (or equivalent man hours); (2) an annual turnover of at least NOK 70 million (€6.9 million or US\$7.94 million); (3) a balance sheet of at least 35 million NOK (€3.5 million, or US\$3.97 million).

¹²⁰ Norwegian Transparency in Supply Chains Act, Sections 2 and 3.

¹²¹ OECD (2023). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*: OECD Guidelines for Multinational Enterprises on Responsible Business Conduct | OECD iLibrary ([oecd-ilibrary.org](https://www.oecd-ilibrary.org/)).

¹²² Fundamental human rights covered by the Act are the internationally recognised human rights that are enshrined, among others, in the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. The European Convention on Human Rights is also covered. The Transparency Act, Section 3 para. 1 b, Prop. 150 L (2020-2021), Comments to Section 3b.

¹²³ Norwegian Transparency in Supply Chains Act, Section 4.



the environment that infringe on fundamental rights.¹²⁴ A parent company will be considered a large company for the purposes of the Act where the parent company and subsidiaries together reach the size threshold.¹²⁵ Where a parent company falls within scope of the Act because of the size of the group, it must conduct due diligence in relation to its subsidiaries' operations and supply chains.¹²⁶ Companies must publish reports on their due diligence, with the first report due on 30 June 2023.¹²⁷ Any person, e.g., other businesses, public bodies, civil society organisations, journalists, and the general public, has the right to information about how the company addresses actual and potential adverse impacts discovered by its due diligence.¹²⁸ The Consumer Authority (the Norwegian market regulator and enforcer of consumer protection laws¹²⁹) is the enforcement body for this Act.¹³⁰ Where it finds that a company is in breach of its due diligence and reporting obligations, it can impose fines¹³¹ and order the company to conduct due diligence and publish relevant information.¹³² Where the company fails to comply with such an order, the Consumer Authority can issue fines.¹³³ Fines, the cost of defending a lawsuit, and loss of clients¹³⁴ as a result of reputational damage all present commercial risks to the company.

A similar law also exists in Germany: the Lieferkettensorgfaltspflichtengesetz (**LkSG**), adopted in 2021 and known in English as the German Supply Chain Act. The LkSG came into force on 1 January 2023 and applies to companies with their central administration, principal place of business, administrative headquarters, domicile, or a domestic branch office in Germany and with over 3,000 employees in Germany.¹³⁵ This employee threshold will be reduced to 1,000 in 2024. Similar to the French Duty of Vigilance Law, the German Supply Chain Act requires in-scope companies to establish a due diligence and risk management system in relation to risks of certain human rights and environmental impacts arising from their activities (whether carried out in Germany or abroad and including activities of subsidiaries over which the German company exercises a decisive influence) and actions of direct suppliers related to the

¹²⁴ Prop. 150 L (2020–2021), Section 7.2.3.3.

¹²⁵ Norwegian Transparency in Supply Chains Act, Section 3(a).

¹²⁶ Ibid., Sections 3 and 4.

¹²⁷ Ibid., Section 5.

¹²⁸ Ibid., Section 7.

¹²⁹ The Consumer Authority: [The Consumer Authority – Forbrukertilsynet](#).

¹³⁰ Norwegian Transparency in Supply Chains Act, Section 9.

¹³¹ Ibid., Sections 11 and 14.

¹³² Ibid., Sections 11–12.

¹³³ Ibid., Sections 11 and 13.

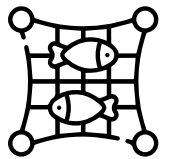
¹³⁴ For example, in 2015, Costco, the third largest retail company in the United States, decided to reduce their import of Chilean salmon due to the amount of antibiotics consumed by farmed salmon in Chile: [EE.UU. saca de las tiendas a salmones chilenos por adicción a los antibióticos – La Tercera](#).

¹³⁵ LkSG, s. 1.

production of products or provision of services necessary for the German company's business enterprise.¹³⁶ The due diligence and risk management system must enable the company to identify and minimise or prevent risks of impacts caused or contributed to by the company's supply chain and, in some cases, take remedial action for impacts that have occurred.¹³⁷ These obligations can extend to indirect suppliers (i.e. the actions of other actors in the company's supply chain beyond their direct suppliers) where the company is put on notice of risks of in-scope human rights or environmental impacts that have arisen due to the actions of an indirect supplier.¹³⁸ Individuals or groups who claim that their rights have been violated are given capacity to bring proceedings in Germany to enforce their rights against the German company responsible.¹³⁹ Individuals may also file a formal complaint to the regulatory agency responsible for implementing and enforcing the LkSG if their rights have been violated or they perceive a violation as imminent, in response to which the regulatory agency is obliged to take action.¹⁴⁰ Non-compliance with the requirements of the LkSG can lead to a range of administrative and financial penalties, including exclusion from public procurement processes, sanctions under the Administrative Enforcement Act, and administrative fines of up to €800,000 or up to 2% of average annual turnover for companies with an annual average turnover of more than €400,000.¹⁴¹

Example 6

Direct exploitation of organisms



A company headquartered in the EU produces aquaculture feed products based on raw material which comes from fish processing plants around the world. This raw material is produced using high quantities of fish.

Some of the plants producing this raw material are situated in regions where local communities are increasingly affected by the overexploitation of fish destined to a growing number of these processing plants. If the company were subject to due diligence requirements, it would have to identify if its value chain is associated with overexploitation of fish, if so it would have to demonstrate that it has produced and implemented a plan to address these adverse impacts and clearly report on its mitigation measures, or be at risk of sanction.

3.7 The 11 Principles for businesses that apply to UK financial services firms

The Financial Conduct Authority (FCA), the UK's financial conduct regulator, requires regulated firms to follow its 11 Principles for Business, including the requirement that firms:

- Conduct their business with integrity, by avoiding facilitation of criminal activity;¹⁴²
- Conduct their business with skill, care and diligence;¹⁴³ and
- Take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems.¹⁴⁴

¹³⁶ LkSG, s2(5–7).

¹³⁷ LkSG, ss. 3–7.

¹³⁸ LkSG, s. 9.

¹³⁹ LkSG, s. 11.

¹⁴⁰ LkSG, s. 14.

¹⁴¹ German Supply Chain Act, s. 22–24.

¹⁴² Financial Conduct Authority (FCA) Handbook, Prin.2.1.1., Prin.1.

¹⁴³ Ibid., Prin. 2.1.1., Prin.2

¹⁴⁴ Ibid., Prin. 2.1.1., Prin. 3

The FCA principles are “fundamental obligations of firms” and are binding obligations.¹⁴⁵

The FCA regulates a wide range of firms – nearly 50,000¹⁴⁶ businesses involved in financial services. Many of these regulated firms are connected to economic activities that have biodiversity impacts through financing or insuring firms involved in the agriculture and seafood sector. The FCA has criminal, civil, and regulatory enforcement powers to deal with breaches of its 11 Principles, including breaches resulting from due diligence failures.¹⁴⁷ It has the power to investigate potential breaches of its Handbook and can impose financial penalties or issue public statements detailing a firm’s misconduct where it finds that a regulated insurer has breached the rules.^{148, 149}

Illegal, unregulated, and unreported (**IUU**) fishing¹⁵⁰ by insured vessels is a particularly significant risk to businesses that insure fishing vessels, not least because of IUU fishing’s inherent link to criminal activity, which insurers are therefore at risk of facilitating. UK-based insurers involved in insuring fishing vessels therefore face clear risks connected to IUU fishing and arising from the FCA’s regulatory remit.

Insuring vessels that may engage in IUU fishing exposes insurers to several risks in addition to breaching the FCA’s Principles for Business (if applicable), including: increased likelihood of insurance claims due to lower standards of vessel safety; legal and reputational risks from association with IUU fishing, as well as the increased possibility of association with other crimes (e.g. human trafficking, slavery, the transportation of illegal arms or drugs, and trading in breach of financial sanctions); and increased exposure to fraud as owners of IUU vessels may opt to destroy their own vessels and file fraudulent claims where the vessels are otherwise at risk of being impounded by authorities as a result of IUU fishing.¹⁵¹

Due diligence on matters such as IUU fishing therefore allows insurers to avoid hidden risks leading to commercial losses.



¹⁴⁵ Ibid., Prin.1.1.2.

¹⁴⁶ <https://www.fca.org.uk/about/what-we-do/the-fca>.

¹⁴⁷ FCA (2022). *Enforcement*. Enforcement | FCA.

¹⁴⁸ FCA (2023). *The Decision Procedure and Penalties Manual*, DEPP 6.1: DEPP.pdf (fca.org.uk).

¹⁴⁹ FCA (2022). *Enforcement*. Enforcement | FCA.

¹⁵⁰ EU Regulation No 1005/ 2008 (IUU Regulation) establishes a community system to prevent, deter, and eliminate IUU fishing, requiring EU Member States to take action against nationals supporting or engaged in IUU fishing. IUU fishing encompasses a wide range of fishing activities that are conducted in violation of international, national, or regional conservation measures (illegal fishing), unreported or misreported activities (unreported fishing), or conducted in areas where no conservation or management measures exist (unregulated fishing). From Regulation (EC) No 1005/2008 (the “IUU Regulation”), Article 2: CL2008R1005EN0020010.0001_cp 1..1 (europa.eu).

¹⁵¹ UN PRI and UNEP FI (2019). *Fiduciary Duty in the 21st Century: Final Report*. download (unpri.org).

4. Mitigating risks

Under corporate law and incoming regulations, companies and investors are well advised to know and show that they are managing the risks to their business and the risks to others their business causes.

Given the developments described above, companies should not ignore their impacts and dependencies on biodiversity. They should identify their biodiversity impacts and risks and take effective action to avoid or mitigate them – by conducting appropriate due diligence.

New and upcoming mandatory disclosure and due diligence legislation in the European Union provides a further reason to start implementing effective management of biodiversity issues, and it provides a detailed framework for how. Meaningful compliance with these requirements will play a crucial role in mitigating biodiversity-related financial risks for companies operating in the agriculture and seafood sectors, as well as financial institutions supporting them. This should be done also as part of their risk management processes, in order to comply with incoming regulations and directors' and investors' fiduciary duties.

"Meaningful compliance with these requirements will play a crucial role in mitigating biodiversity-related financial risks for companies operating in the agriculture and seafood sectors, as well as financial institutions supporting them".

Due diligence will be regulated in the European Union by a cross-sectoral due diligence law, the Corporate Sustainability Due Diligence Directive (**CSDDD**), which draws on the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. While the final text is still subject to ongoing negotiations, this future legislation will require companies operating on the EU market to conduct human rights and environmental due diligence encompassing their own operations, subsidiaries, and business relationships across their value chain. For the CSDDD to bring the necessary clarity, ensure a level playing field, and help companies to mitigate the financial risks associated with biodiversity loss, it will be crucial that the material scope of due diligence obligations explicitly includes biodiversity impacts.¹⁵²

For disclosure, the EU's Corporate Sustainability Reporting Directive has already been adopted. It applies to both companies and the financial sector, mandating disclosure information about their sustainability-related due diligence processes, including biodiversity and ecosystems specifically. The recently adopted reporting standards (ESRS) provide detailed metrics, including a biodiversity-specific standard (ESRS 4). The parameters of this reporting standard are likely to feed through into the inputs, process, and outputs of mandatory due diligence on biodiversity impacts and risks.

Companies and financial actors may see the long-heralded EU regulatory framework on sustainability matters described above as increasing liability risks. However, it is the underlying facts of biodiversity crises which drive litigation risks. Far from exacerbating liability risks, the disclosure of sustainability risks and impacts under granular reporting rules, and the mandatory due diligence process, are likely to be significant risk mitigants. The disclosure of forward-looking risks and plans in relation to sustainability matters, with adequate specificity and relevance, and with appropriate caveats and explanations of limitations or uncertainties, is the best way for companies to minimise the risk of misleading or inadequate disclosure. Avoiding such disclosures, taking a 'tick box' approach, or making high-level or aspirational disclosures under broad reporting rules is going to increase such risks, even absent mandatory disclosure and due diligence legislation.

Without a clear legal framework provided by the CSDDD, companies and financial institutions may struggle to handle biodiversity-related risks and impacts appropriately, potentially leading to liability towards stakeholders and shareholders, and to extra-legal risks from shareholder pressure and reputational impacts. The CSDDD provides the means to mitigate these risks.

Businesses and financial institutions should see biodiversity due diligence and disclosure for what it is – a mechanism for preserving and maintaining the long-term value of their operations, and ultimately a way to protect their license to operate in a society where it is no longer possible to ignore the wide-ranging impacts of biodiversity loss.



ClientEarth is a registered charity that uses the power of the law to protect people and the planet.

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