

# G A \_ P

Gómez-Acebo & Pombo



## ESG Legal Practice

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Sustainability Group, Gómez-Acebo & Pombo

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## Editorial

### The S factor of corporate ESG strategies: from sustainable talent to due diligence and social taxonomy

Sustainability is not a fad or a trend, it is a reality and established paradigm for the corporate governance of organisations in their operations and supply chains.

The recent adoption of EU directives on non-financial and sustainability reporting and due diligence processes reinforces the ESG strategy of companies that go beyond the completion of indicators and, in particular, the S factor as a strategic element for the management of a double materiality that includes, on the one hand, non-financial risks and, on the other hand, impacts on employment.

The Corporate Sustainability Reporting Directive (CSRD) equates non-financial reporting with financial reporting and builds on the European Sustainability Reporting Standards (ESRS), which have more than 1500 general ESG reporting requirements for companies on impacts, risks and opportunities along the entire value chain. The first companies to be affected by the CSRD will be listed companies, which will have to start reporting in 2025 with 2024 data. By 2026, this obligation will apply to all European companies that meet two of the following three requirements: (a) 250 employees; (b) EUR 20 million in assets; and/or (c) EUR 40 million in net turnover.

The Corporate Sustainability Due Diligence Directive (CSDDD) requires European companies to conduct human rights and environmental due diligence processes when they have (a) 500 employees on average and (b) a worldwide net

turnover of 150 million euros, although these thresholds drop to 250 employees and 40 million euros in turnover if at least 20 million euros are generated in high-impact sectors. The CSDDD also applies to non-European companies with an EU turnover exceeding 300 million euros per year.

The business community has yet to delineate the conceptual framework of the S factor in corporate ESG strategies and to understand the extent of the convergence between talent and sustainability through the thematic areas outlined below.

#### 1. Equal opportunities, diversity and social inclusion and the legal limits of artificial intelligence

Equality is a major driver of sustainable talent and companies are required by operation of law to comply with obligations of pay transparency, reduction of the gender pay gap and prevention of discrimination, especially in the case of unfavourable treatment in the exercise of work-life balance and co-responsibility rights.

Diversity (closely linked to demographics) has legal backing in the 1945 UN Charter, which opens business practice to five building blocks of diversity: gender and social orientation; age; functional ability; racial origin; and religion or belief. Blind CVs are coming, as is the right of workers to information on the parameters, rules and instructions of algorithms or to human supervision of hiring decisions or working conditions reached with artificial intelligence so as to avoid bias and hiring exclusively on the basis of profiles. And it will also be necessary to manage the migration

revolution with the future European Single Permit Directive that will boost the recruitment of non-EU international talent as an essential resource for shared growth and prosperity.

Social inclusion has been given a priority legal framework through legislation for the protection of the disabled with direct hiring obligations (reserve quotas) and alternative measures in labour submarkets (inter alia, Special Employment Centres).

## 2. Occupational health and safety, mental health and physical and psychosocial well-being

Occupational health and safety has an intricate legal framework and new areas of employee protection in mental health and emotional well-being are also emerging strongly, shifting the focus from corporate interest and public scrutiny to factors such as psychosocial risks, workloads and the prevention of stress or harassment at work.

## 3. Human rights and the supply chain

The CSDDD takes a decisive step forward by incorporating new human rights obligations: (i) a risk-based approach requiring companies to adopt a due diligence policy; (ii) a system of compensation to harmed individuals and communities; (iii) a duty of care on directors to adapt corporate strategy to existing or potential adverse impacts; and (iv) a system of penalties that can be capped at no less than 5% of the company's worldwide net turnover.

Furthermore, companies will face a whole new legal front of tort liability claims based on alleged human rights abuses - within the parent company, subsidiaries or contractors - open to litigation in international courts and local jurisdictions.

## 4. Decent work: fair income and predictable and transparent working conditions

Through its eight fundamental conventions, the International Labour Organization (ILO) has pushed forward an international agenda for decent work that excludes undeclared work from legality and focuses on fair income (beyond minimum wages). For their part, EU directives also focus on the need for predictability and transparency in industrial relations.

Similarly, the United Nations has shown intense activity in respect of the 2030 Agenda for Sustainable Development, pushing for leading companies in sustainability to also integrate into their corporate strategies and their decision-making and governance processes the fulfilment of Sustainable Development Goals (SDGs) in the social sphere: no poverty (SDG 1); good health and well-being (SDG 3); gender equality (SDG 5); decent work (SDG 8); and reduced inequalities (SDG 10).

## 5. Professional development and the attraction, motivation and retention of talent

Sustainable talent is also the dynamic talent that grows and is released with the acquisition of new competencies and skills in an environment of great uncertainty where digital and social skills devour mere technical knowledge and, together with lifelong learning, are essential for employability and productivity and for reducing unwanted turnover. The importance of new factors such as flexibility in micromanagement or job crafting, where responsibilities are tailored to the particularities of each employee, are new dynamics in the battle for talent and coexist with the paradox of a shortage of people to fill vacancies in some sectors and the low rate of job opportunities.

## 6. Employment law compliance and ethical behaviour in industrial relations

Undoubtedly, the optimal management of non-financial risks is anchored in the employment law compliance management systems following the approval of the new UNE 19604 standard and the new Whistle-blower Protection Act 2/2023.

Ethics in industrial relations in a vaguer concept linked to integrity and social justice and connects to internal policies (liquid law) that enhance legal obligations and identify in Codes of Conduct rights and obligations of all stakeholders.

## 7. Taxonomy and social leadership

Finally, the new social taxonomy that follows in the wake of environmental taxonomy and

sustainable finance will be strategic for the classification of activities with a positive social impact and, through it, for the generation of opportunities and flows of capital and investment towards sustainable projects free of employment fraud and social washing.

Sustainable talent leaders (CEOs, directors, managers and all those in roles with people management responsibilities), with their commitment, values and exemplarity, have the challenge to lead in a solid and visionary way the business transformation that places people at the centre of economic growth and social progress strategies and places the S-factor of ESG strategies and the (social) impact economy at the centre of the public and business debate.

**Carlos de la Torre Garcia,**  
*Partner, Employment Law*

## GA\_P News

- The Faculty of Law (Comillas ICADE) at Comillas Pontifical University and Gómez-Acebo & Pombo have jointly created the new Chair on Sustainability and Law, [link](#).
- GA\_P teams up with Forética, [link](#).
- GA\_P teams up with Spainsif, [link](#).
- GA\_P will attend the “1st National Green Hydrogen Congress”, link to be held from 7 to 9 February 2024 in Huelva.

## Legal practice: GA\_P Experience

### ESG advice

#### Governance and sustainable finance

- a) Advice on ESG priorities and strategies in the financial sector.
- b) Review of policies on sustainability of insurance companies.
- c) Advice on a transaction whose objective was to finance or refinance buildings below the Carbon Risk Real Estate Monitor (CRREM) target and a minimum percentage of Positive Energy Districts (PEDs), being an “eligible green project” under the Green Loan Principles (GLPs) of the Loan Market Association (LMA).

#### Environment, mobility and energy

- a) GA\_P is currently advising on the development of HPA templates<sup>1</sup> for large market operators.
- b) Advice to clients on the potential implementation of the proposed Green Claims Directive.

#### Social

- a) Advice on collective redundancies, including drafting of legal reports; bargaining with trade unions; and accompanying social plans with alternatives to terminations of employment and outplacement programmes.
- b) Advice in different sectors on equality issues with the preparation and negotiation of

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<sup>1</sup> Long-term green hydrogen purchase agreements, or Hydrogen Purchase Agreements.

equality diagnoses and plans with the statutory body of worker representatives or trade unions. Advice on the preparation of a register of average salaries broken down by sex and staff category.

- c) Investigating workplace bullying or harassment complaints. Review of workplace bullying and harassment protocols and diversity and inclusion policies.

- d) Payroll audits to identify possible risks of non-compliance with sectoral and regional collective agreements and to plan control and mitigation actions.

- e) Audits of working time records to prevent overtime and ensure legal compliance in the event of labour inspections.

## Current legislation

### News

#### Governance and Sustainable Finance

- a) Bill on equal representation and gender balance.

Transposes Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures. It incorporates the principle of balanced representation of women and men on boards of listed companies and public interest entities with more than 250 employees, a turnover of more than EUR 50 million or more than EUR 43 million in assets. The number of women holding director positions may not be less than 40% of the total number of board members.

- b) Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as

environmentally sustainable and for sustainability-linked bonds.

This Regulation has the following aims: (i) ensure that uniform requirements apply to the use of the designation “European green bond” or “EuGB”; (ii) regulate the use of the funds obtained by the issuer, which must generally be used for activities that are aligned with the European environmental taxonomy; (iii) establish the supervision of the issuance of EuGBs, which requires a prospectus and review by external reviewers registered and supervised by ESMA; and (iv) provide for pre- and post-issuance disclosure templates.

- c) Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

These European sustainability reporting standards (ESRS) are grouped into three categories: cross-cutting (general and characteristic), topical (climate change, pollution, water and marine resources, biodiversity and ecosystems, resource use and circular

economy) and sector-specific (workers, value chain, affected communities, consumers and end-users and business conduct).

- d) On 14 December 2023, the European Parliament and the Council reached a provisional agreement on the Corporate Sustainability Due Diligence Directive.

Among other issues, they were in favour of excluding the financial sector from the scope of application of this Directive, including, however, a clause in the Directive to review this exclusion in the coming years.

- e) Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023, Regulation (EU) 2023/2869 of the European Parliament and of the Council of 13 December 2023 and Directive (EU) 2023/2864 of the European Parliament and of the Council of 13 December 2023.

It regulates a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability.

- f) The Spanish Securities Market Authority (CNMV) analyses ESG information of listed companies required by the EU taxonomy.

In the Report on breakdowns regarding European Taxonomy published by the CNMV for the financial year 2022, the Spanish watchdog analyses the presentation by issuers of information, quantitative and qualitative, regarding the EU taxonomy for sustainable activities.

- g) On 30 November 2023, the three European supervisory authorities (EBA, EIOPA and ESMA) published an interactive factsheet entitled “Investments, loans, insurance or pen-

sions with a sustainable focus” that answers consumers’ most frequently asked questions about sustainable finance.

- h) Platform on Sustainable Finance (PSF) report on a compendium of market practices.

Report issued by the PSF on 29 January 2024, providing case studies on how different sectors are implementing the Taxonomy Regulation and other sustainable finance legislation.

## Environment, mobility and energy

### Environment

- a) Commission Regulation (EU) 2023/1670 of 16 June 2023 laying down for electrical and electronic equipment specified in the title, design and information requirements for repair and reuse by obliging those responsible for placing it on the market to: (i) comply with disassembly, preparation for reuse and recyclability requirements, (ii) have spare parts available on the market, (iii) facilitate access to repair and maintenance information, (iv) deliver spare parts within a predetermined period of time, (v) guarantee users the reliability of the durability of their products, (vi) mark plastic components and (vii) comply with the technical information availability requirements for their products through their websites. Therefore, the adoption of this Regulation contributes substantially to the transition towards a circular economy, an environmental objective identified in the EU’s Taxonomy Regulation.
- b) Commission Regulation (EU) 2023/2055 of 25 September 2023 amending Annex XVII to



Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles.

This Regulation contributes to the objectives of prevention and control of pollution in water and land, as well as to the protection of water and marine resources, insofar as it includes synthetic polymer microparticles among the dangerous substances with restrictions on their manufacture, placing on the market and use (amendment to Annex XVII of the REACH Regulation).

- c) Commission Delegated Regulation (EU) 2023/2485 of 27 June 2023 amending Delegated Regulation (EU) 2021/2139 establishing additional technical screening criteria for determining the conditions under which certain economic activities qualify as contributing substantially to climate change mitigation or climate change adaptation and for determining whether those activities cause no significant harm to any of the other environmental objectives.
- d) Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Commission Delegated Regulation (EU) 2021/2178 as

regards specific public disclosures for those economic activities.

## Mobility

- e) Order PCM/814/2023 of 18 July amending Schedule I to Royal Decree 265/2021 on end-of-life vehicles.

This ministerial order incorporates Commission Delegated Directive (EU) 2023/544, which details several modifications regarding the use of lead in aluminium alloys, copper and batteries for various applications such as machining, soldering and electrical connections in integrated circuits. In addition, it divides the exemption related to lead in batteries into two categories, setting expiry dates for its phase-out.

- f) Commission Delegated Regulation (EU) 2023/2502 of 7 September 2023 amending Regulation (EU) 2019/631 of the European Parliament and of the Council as regards the adjustment of the mass values of new passenger cars and new light commercial vehicles.

It provides for adjustments to the mass values of new vehicles, defines obligations for manufacturers in relation to CO<sub>2</sub> emission targets and amends Regulation 2019/631 to reflect these changes. It provides for periodic adjustments to the mass values of new light commercial vehicles until 2024, based on data from previous registrations. Indicative values are determined for 2025 based on the average mass of vehicles registered in 2021. Manufacturers must use these adjusted values to calculate CO<sub>2</sub> emission targets.

- g) Regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September

2023 on the deployment of alternative fuels infrastructure, establishing technical standards, interoperability and coordination between Member States to promote the use and accessibility of alternative fuels, contributing to the reduction of emissions and a transition to more sustainable transport.

It highlights the obligations of Member States to ensure the development of the market for alternative fuels and for the implementation of publicly accessible recharging stations for light electric vehicles, setting targets for power output available power and time milestones for their implementation. It also promotes the installation of publicly accessible hydrogen refuelling stations by 2030. Operators of refuelling points must offer electronic payment options and comply with smart recharging standards. It requires the availability of statistical data on alternative fuels infrastructure. The Commission will establish a common European access point to facilitate data exchange.

- h) Commission Delegated Regulation (EU) 2023/2867 of 5 October 2023 supplementing Regulation (EU) 2019/631 of the European Parliament and of the Council by setting out the guiding principles and criteria for defining the procedures for the verification of the CO<sub>2</sub> emissions and fuel consumption values of passenger cars and light commercial vehicles in-service (in-service verification).

The type-approval authorities will annually select samples of vehicles for verification tests, ensuring correspondence between recorded and actual values. Manufacturers must provide the documentation and test reports to the authorities, and the authorities will verify the accuracy of the values recorded in the certificates of conformity.

- i) Commission Implementing Regulation (EU) 2023/2767 of 13 December 2023 establishing a procedure for the approval and certification of innovative technologies for reducing CO<sub>2</sub> emissions from passenger cars and light commercial vehicles pursuant to Regulation (EU) 2019/631 of the European Parliament and of the Council.

Manufacturers or suppliers may submit applications proposing an innovative technology as an eco-innovation, demonstrating its effectiveness in reducing emissions. The application must include a verification report produced by an independent body. A minimum threshold of 0.5 g/km of savings per innovation should be set. The Commission will assess applications and decide as to whether or not approve or reject them within nine months.

## Energy

- j) Royal Decree-law 8/2023, of 27 December, adopting measures to address the economic and social consequences of the conflicts in Ukraine and the Middle East, as well as to alleviate the effects of the drought.

This piece of primary executive legislation introduces significant changes in the regulation of the electricity and hydrocarbons sectors, including (i) the extension of milestones for the processing of renewable electricity generation facilities, (ii) the release of capacity for self-consumption in nodes reserved for capacity tenders, (iii) the adoption of various measures relating to the regulation of access and connection permits for demand, (iv) the extension of measures adopted to counteract the economic and social consequences of the Ukrainian war, and (v) the amendment of the Water Act in relation to the electricity sector.

## Social

- a) Royal Decree-law 6/2023, of 19 December, approving urgent measures for the implementation of the Recovery, Transformation and Resilience Plan for the public justice service, the civil service, local government and patronage.

This Royal Decree-law incorporates measures aimed at improving the efficiency of the public justice service by amending various procedural laws. The aim of these amendments is to bring civil, criminal, judicial review and employment litigation legislation into line with the electronic processing framework. Specifically, in the employment sphere, a significant amendment to the Employment Jurisdiction Act is made.

- b) Royal Decree-law 7/2023, of 19 December, adopting urgent measures to complete the transposition of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, and to simplify and improve the level of unemployment protection.

On 12 January 2024, the measures established by the aforementioned Royal Decree-law ceased to be in force as a result of the non-consolidation of the aforementioned text, and therefore their effects (extension of breastfeeding leave in terms of its accumulation, unemployment assistance allowance and priority application of regional collective agreements or collective bargaining arrangements, among others) are limited to the

period from 21 December 2023 to 12 January 2024.

- c) Royal Decree-law 8/2023 of 27 December adopting measures to address the economic and social consequences of the conflicts in Ukraine and the Middle East, as well as to alleviate the effects of the drought.

This text presents important legislative changes in employment and Social Security matters, including the introduction of rules for determining contributions for internships, with transitory provisions until 31 March 2024 for reporting registrations and removals to the Spanish Social Security Agency relating to internships between 1 January and 20 March 2024.

- d) Royal Decree 1011/2023, of 5 December, amending the General Regulations on procedures for the imposition of penalties for social security infringements and for proceedings for the settlement of social security contributions, approved by Royal Decree 928/1998 of 14 May 1998, and the Regulations on the Organisation and Operation of the Labour and Social Security Inspectorate, approved by Royal Decree 138/2000 of 4 February 2000, with regard to electronic administration.

This Royal Decree amends two Regulations in order to apply certain aspects of the general provisions of the Administrative Procedure Act and the Public Sector Legal System Act to sanctioning procedures in the employment sphere and to the settlement of Social Security contributions conducted by the Labour Inspectorate.



If you have any questions regarding the contents of this document, please contact any one of the following GA\_P lawyers:

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