



ESG Legal Practice

Sustainability Group, Gómez-Acebo & Pombo

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Editorial

As a new paradigm, ESG (Environmental, Social and Governance) criteria are increasingly present in the strategies and policies of organisations and this is reflected in the decisions of investors and consumers who continue to value more positively companies that behave responsibly and integrate sustainability into their recovery, growth and business development plans. The term ESG is used, for example, recurrently by Blackrock CEO Larry Fink in his annual letter to CEOs and clients in recent years.

In the international context, the strength of companies with a corporate purpose or triple impact (now with a new law in Spain called “create and grow”, a new business category is regulated: the common benefit and interest companies – SBICs –) that wish to (and do) align their mission with the generation of a social (or environmental) impact, pursuing a purpose that goes beyond the simple maximisation of financial profit and creating shared value, continues to advance as a great novelty. These are purpose-driven companies, and ESG criteria are the DNA of such purpose. The purpose is, therefore, the compass that allows aligning the corporate mission with the generation of positive impact on society and the environment and thus deploying to the maximum the wealth-generating capacity of companies. The legal recognition of SBICs is the result of the “purpose-driven companies” initiative coordinated and promoted by B Lab Spain and places Spain in a leading position in the world in the promotion of the so-called impact economy.

In terms of future ESG trends and challenges with an outlook to 2030, among others, we can anticipate the following:

1. Greater integration of ESG criteria in the functions of boards of directors, both through the inclusion of ESG expert directors or the creation of sustainability committees, and through the incorporation of the ESG approach in decision-making and in risk analysis and management.
2. Spectacular increase in financing and investment activity that integrates ESG criteria through sustainable finance and actively and passively managed investment funds with a sustainable matrix, with institutional investors increasingly giving a leading role to an ESG equity story. In this area, the role of proxy advisors and institutional investors is becoming increasingly important, especially in relation to non-financial information, and sustainability and corporate governance are also key levers to promote and encourage a favourable outcome in M&A transactions and even to conduct ESG due diligence.
3. Extraordinary progress in company policies and initiatives to meet the Sustainable Development Goals (SDGs) and address the global challenges of climate emergency; loss of diversity; and growing inequality with identification by company of the highest priorities in the different countries in which they operate.
4. Promotion and development of diversity and social inclusion policies with a gender, age, cultural or experience perspective and including the LGTBI collective in organisations through awareness-raising and training actions.

5. Increase of companies including ESG criteria in their executive remuneration policies and health and wellness policies and in emerging areas such as whistleblowing channels and internal investigations in situations of harassment or discrimination and social taxonomy reports.
6. Implementation of sustainable employee mobility plans and hybrid working models in companies to contribute to the reduction of the carbon footprint.
7. Increased awareness of companies on decent work and human rights both in their own workforce and in their supply chain, and on tackling inequality to reduce the wage gap and the digital divide.
8. Introduction of ESG criteria in the use of algorithms and artificial intelligence, both in relation to employees and other stakeholders or in the development of social applications in products or services.
9. Increased business policies linked to sustainability; biodiversity; and energy efficiency and the fight against climate change and for zero emissions with greater business involvement in the green and circular economy and in the processes of decarbonisation of the economy and prevention of infectious diseases.
10. Transformation and enhancement with an ESG approach of the audit, reporting (in accordance with GRI or SASB standards) and internal compliance and fiscal transparency functions in order to ensure compliance with regulations, especially taking into account non-financial and sustainability reporting and due diligence obligations.

From a legal perspective, ESG strategy in companies is more closely linked to legal practice

than ever before and so strict compliance with legal obligations will continue to be increasingly essential.

In relation to the “S” (Social) lever, the new frontiers include zero tolerance for harassment and discrimination; protection and safeguarding of diversity and inclusion and the gender pay gap; living wage (a concept that goes beyond the minimum wage); decent work and human rights in the value chain; occupational health and safety, which is starting to include wellbeing and mental health programmes; and social taxonomy and minimum safeguards reporting. Social taxonomy will probably be the most important mechanism in the near future and will mark companies’ social commitments and accountability in the social pillar of ESG.

In 2023, the approval of the future UNE 19604 Employment Compliance standard and the availability to clients of the **GA_P Employment Compliance electronic tool**, which will enable the identification and assessment of risks by impact and probability and the preparation of customised automated reports with action plans for their mitigation and control, will play a key role.

In short, ESG criteria remain high on the agenda of companies and it will be essential to move from words to action and continue to advance towards a more sustainable future with more opportunities for all.

Carlos de la Torre García Partner,
Employment Practice Area

GA_P News

Ana Martínez-Pina García, Financial Regulatory Coordinator at Gómez-Acebo & Pombo and appointed member of the Sustainability Advisory

Committee of the Spanish Auditing and Accounting Standards Board (ICAC)¹.

Legal Practice: GA_P Experience

ESG advice

Governance and sustainable finance

- a) Design and drafting of a roadmap on sustainability regulations applicable to closed-ended collective investment entity managers (SGEICs).
- b) Advice to leading credit institutions on the granting of financing for the development and promotion of projects qualified and certified by an independent expert as sustainable and aligned with the Green Loan Principles published by the Loan Market Association.
- c) Training sessions on sustainability legislation affecting the insurance sector.

Environment and sustainable mobility

Environment

We have advised in the framework of the assessment of compliance with the criteria of the DNSH (Do No Significant Harm) principle in the context of the Recovery, Transformation and Resilience Plan, especially with regard to compliance with requirements related to the use of fossil fuels and greenhouse gas emissions. In particular, we have provided advice in the call for applications for public aid by the Ministry of Industry, Trade and Tourism and by the Ministry for Ecological Transition and the Demographic Challenge of the Spanish Government in the distribution of the funds granted as provided for in Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility and following the provisions of the Spanish Recovery and Resilience Plan,

¹ https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-12418#:~:text=A%2D2023%2D12418-,Resoluci%C3%B3n%20de%2012%20de%20mayo%20de%202023%2C%20del%20Instituto%20de,del%20Comit%C3%A9%20Consultivo%20de%20Sostenibilidad.

which the European Commission approved on 16 June 2021.

Sustainable mobility

- a) Drafting, together with Movea Consulting, of sustainable mobility to work plans, in which the adequacy of the plan with the applicable legislation will be certified;
- b) Ongoing advice on regulatory law for electric scooter and electric bicycle rental business activities;
- c) Ongoing advice in relation to vehicle subscription models to car manufacturers and other operators, where the vehicle is marketed as a service ("Mobility as a Service" (MaaS)).
- d) Ongoing regulatory and contractual advice on the rental for use of electric motorbikes and removable (MaaS) and rechargeable electric batteries in battery stations ("Battery as a Service" (BaaS)).
- e) Creation of a team in all European countries specialised in automotive and sustainable

mobility for ESG consulting at the request of a client with subsidiaries in several countries.

Employment

- a) Advice on collective redundancies, including drafting of legal reports; negotiation with trade unions; and accompanying social plans with alternative measures to redundancies and voluntary early retirement programmes.
- b) Investigations into allegations of harassment at work and/or sexual or gender-based harassment.
- c) Advice in different sectors on equality with the preparation and negotiation of equality plans with different worker representatives or trade unions.
- d) Advice on inclusion with drafting of legal documents for obtaining certificates of exceptionality and proof of alternative measures to the fulfilment of the reserve requirement in the recruitment of disabled staff.

Current Legislation

News

Governance

- a) Act 2/2023 of 20 February on the protection of persons who report regulatory offences and the fight against corruption

Transposes Directive 2019/1937 of the European Parliament and of the Council of 23

October 2019 on the protection of persons who report breaches of Union law, better known as the Whistleblower Protection Directive.

Among others, legal persons in the private sector that employ 50 or more workers must have an internal reporting system in accordance with the terms of the law. The aim of this law is to provide adequate protection to persons who report acts or omissions that



may constitute some of the infringements listed in the law.

GA_P Publications:

- LOZANO CUTANDA, B. *The Whistleblower Protection Act 2/2023: two problematic issues (one possibly unconstitutional)*, available at the following link².
- *The Whistleblower Protection Act (Act 2/2023, 20 February): 10 key issues*, available at the following link³.

- b) Draft Bill xx/202X, xx of xxxxxx, regulating the framework for corporate reporting on environmental, social and governance issues.

Approved by the Cabinet on 3 May 2023, the text is subject to Public Hearing until 25 May 2023. This Draft Bill seeks to incorporate into Spanish law the content of Directive 2022/2464 of the European Parliament and of the Council, of 14 December, as regards corporate sustainability reporting.

The Code of Commerce, the Companies Act and the Audit Act are amended to regulate the new consolidated and individual sustainability report, as well as its verification.

Some of the most important changes it introduces are the following: (i) the obligors, (ii) the content of the sustainability information, (iii) the rules according to which the information must be prepared, (iv) its presentation format, (v) the requirement for verification of this information and (vi) the regulation of

the essential aspects of this verification. In particular, it puts the rules governing verifiers of sustainability information on a par with those governing auditors.

- c) Royal Decree Bill regulating the content of reports on the estimation of the financial impact of risks associated with climate change for financial institutions, listed companies and other large companies.

Implements Article 32(5) of the Climate Change and Energy Transition Act 7/2021 of 20 May to specify the content of the reports on financial risk associated with climate change risk that financial institutions, listed companies and large companies must draw up.

- d) Public consultation on taxonomy criteria for certain activities.

The European Commission has launched an initiative that envisages a new set of EU taxonomy criteria for economic activities that substantially contribute to one or more of the following environmental objectives: (i) *sustainable use and protection of water and marine resources*, (ii) transition to a circular economy, (iii) prevention and control of pollution, and (iv) protection and restoration of biodiversity and ecosystems.

The Commission also proposes specific amendments to the delegated act on climate taxonomy and the delegated act on disclosure of taxonomy-related information.

- e) Public consultation on the amendment of Delegated Regulation 2021/2139 of 4 June.

² https://www.ga-p.com/wp-content/uploads/2023/03/Ley_de_proteccion_informante_eng-3.pdf

³ https://www.ga-p.com/wp-content/uploads/2023/02/Nueva_Ley_22023_20_febrero_eng-2.pdf

The European Commission has launched an initiative to amend Delegated Regulation 2021/2139 of 4 June 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 climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

GA_P Publications:

- ORTEU BERROCAL, E. *¿Es la desalación una actividad medioambientalmente sostenible?* 10 May 2023. Available at the following link⁴.

Environment and sustainable mobility

Environment

Proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive)

The Proposal for a Directive seeks to establish a legal framework to regulate environmental claims in trade and to combat greenwashing, i.e. environmental claims that are false and unfounded, in order to avoid misleading practices that may lead to confusion or misperception by consumers. It aims to apply greater control and transparency

to those labels that are voluntarily used by some manufacturers to promote their products.

In addition, the Proposal introduces a number of specific requirements for environmental claims, such as the need to be based on recognised scientific and technical criteria, and the obligation to disclose relevant information on the methodology used to support the claims.

It is relevant for the purposes of the six environmental objectives of Article 9 of the Taxonomy Regulation.

Royal Decree-law 4/2023 of 11 May adopting urgent agricultural and water measures in response to the drought and the worsening of conditions in the primary sector resulting from the war in Ukraine and the weather, as well as measures to promote the use of public transport by young people and to prevent occupational hazards during high temperatures

In response to the drought and its consequent impact on the functioning of the primary sector, this Royal Decree-law was published in Spain's Official Journal (BOE) on 12 May, which contains a new package of urgent measures for water and agriculture, among other affected sectors.

From an ESG point of view this law is important because it regulates the new legislative framework for wastewater reuse.

It is important for the purposes of Article 9(c) of the Taxonomy Regulation, “the sustainable use

⁴ <https://www.expansion.com/catalunya/2023/05/21/646a5d8a468aeb170a8b45f0.html>

and protection of water and marine resources” relating to environmental objectives.

The Sustainable Fishing and Fishery Research Act 5/2023 of 17 March on

Keeping this activity is essential for the fulfilment of the objective of sustainability, in accordance with EU fisheries legislation.

One of the main changes of this Act is the provision that “fishing gear” containing plastic and its waste will be defined and subject to the provisions regulated under the provisions of the Waste and Contaminated Soils for a Circular Economy Act 7/2022 of 8 April, as well as the implementation of the extended producer responsibility (“EPR”) scheme provided for in Article 60(5) of Act 7/2022.

It is important for the purposes of Article 9(c) and (f) of the Taxonomy Regulation “sustainable use and protection of water and marine resources” and “*the protection and restoration of biodiversity and ecosystems*”, respectively, relating to environmental objectives.

GA_P Publications:

- ORONDO IGLESIAS, A., ORTEU BERROCAL, E., POVEDA GÓMEZ, P. *Artes de pesca y responsabilidad ampliada del productor*, published on 10 February 2023 in the journal RETEMA. Available at the following link⁵.

The Circular Economy (Andalusia) Act 3/2023 of 30 March

The main objective of this Act is the sustainable development of the circular economy in

Andalusia, in a way that is compatible with economic growth through the appropriate use of existing natural resources.

Changes introduced include (i) circularity measures in green public procurement such as the inclusion of mandatory minimum green public procurement criteria and targets in sectoral regulations and the establishment of environmental clauses in the public procurement process and (ii) the creation of the Andalusian Public Register of Life Cycle Assessment.

It is important for the purposes of Article 9(d) of the Taxonomy Regulation “*the transition to a circular economy*” relating to environmental objectives.

The Environmental Quality (Principality of Asturias) Act 1/2023 of 15 March

The main purpose of this Act is to establish a procedural and regulatory framework through which a high level of environmental quality protection can be guaranteed in the Principality of Asturias. Thus, it regulates the different environmental intervention schemes for the carrying out of economic activities in the Principality.

A new development introduced is the creation of the Register of Environmental Authorisations of the Principality of Asturias in which integrated environmental authorisations granted in the Principality of Asturias, including their updating, revision and/or modification, will be registered.

It is important for the purposes of Article 9(d) and (e) of the Taxonomy Regulation “*the transition to a circular economy*” and “*pollution prevention and control*”, respectively, relating to environmental objectives.

⁵ <https://www.retema.es/actualidad/artes-de-pesca-y-responsabilidad-ampliada-del-productor>

Sustainable mobility

Sustainable Mobility Bill (121/000136) of 27 January 2023

The Sustainable Mobility Bill is currently at the committee stage in the Lower House of the Spanish Parliament. It is expected to be approved by urgent procedure in the coming months.

The current wording of the bill recognises that much of its content is purely programmatic in nature. However, it also has mandatory content and establishes sustainable mobility as a right of all citizens, which will be ensured by a new National Sustainable Mobility System.

Among its obligatory content is that relating to the sustainable mobility to work plans that companies and public entities must present, in due time, for their workplaces with more than five hundred workers or two hundred and fifty workers per shift. The bill provides for infringements and penalties for non-compliance with this obligation.

RENTERÍA TAZO, A. *Planes de movilidad sostenible al trabajo: nueva obligación para determinadas empresas bajo el Proyecto de Ley de Movilidad Sostenible*. 16 May 2023. Available at the following link⁶.

Decision of the State Secretariat for Energy, of 11 May 2023, determining the national average values of life-cycle greenhouse gas emission intensity in relation to the electricity consumed by motorbikes and electric vehicles

Approves “the national average value of the life-cycle greenhouse gas emission intensity in relation to the electricity consumed by motorbikes and electric vehicles” (the National Average Value) under the provisions of Article 3(3) of Royal Decree 235/2018 of 27 April establishing calculation methods and reporting requirements for the greenhouse gas emission intensity of fuels and energy in transport.

The decision sets the National Average Value at 82 gCO₂eq/MJ, which must be taken into account by the obligors in Article 5 of Royal Decree 235/2018 when reporting greenhouse gas emissions.

RENTERÍA TAZO, A. In greater detail in the Automobile and Sustainable Mobility Newsletter of June 2023.

Commission Recommendation (EU) 2023/550 of 8 March 2023 on National Support Programmes for Sustainable Urban Mobility Planning

It directs Member States to update the Sustainable Urban Mobility Plan contained in the 2013 Urban Mobility Package to reflect “new EU strategies and integrate new policy priorities”, and calls on them “to put in place a national SUMP support programme aimed at supporting cities, strengthening governance and increasing nationwide coordination, planning and ensuring the uptake of sustainable urban mobility policies, and improving coordination among regions, cities and towns, and between urban and rural areas”.

⁶ Gómez-Acebo & Pombo, *Análisis, Planes de movilidad sostenible al trabajo: nueva obligación para determinadas empresas bajo el Proyecto de Ley de Movilidad Sostenible*, available at: https://www.ga-p.com/publicaciones/https-www-ga-p-com-wp-content-uploads-2023-05-proyecto_ley_movilidad_sostenible-1-pdf/.

In turn, it points out that Member States should adopt financing measures for sustainable urban mobility plans and highlights the European funding instruments available for this purpose.

RENTERÍA TAZO, A. In greater detail in the Automobile and Sustainable Mobility Newsletter of June 2023.

Local Sustainable Urban Mobility Plans

The City Council of Las Palmas de Gran Canaria starts the preparation of the new Sustainable Urban Mobility Plan (SUMP) by putting out to tender the preparation of the new SUMP. The city councils of Elche, Huelva and Gijón already have their sustainable urban mobility plans, and the city councils of L'Estartit, Barberá del Vallès, Reus, Sant Boi de Llobregat, Sant Joan d'Alacant, Torrebaja and Guadasséquies have announced updates, initial and final approvals or submission to public consultation of their respective urban mobility plans.

Social

International Labour Organization (ILO) Violence and Harassment Convention No. 190. Entry into force on 25 May 2023

Adopted on 21 June 2019 by the ILO and signed and ratified by Spain, Convention No. 190 on violence and harassment at work was published in the BOE of 16 June 2022 and has now entered into force.

This Convention addresses and defines the concept of violence and harassment, as well as gender-based violence and harassment and sexual harassment, entrusting employers - in line with national legislation - with the implementation of specific protocols to prevent and act in the event

of "reports" in this regard and indicating that the workers' representatives must participate in the drafting of these protocols. It also mandates employers to implement other measures such as the need to assess the risks of harassment as part of the psychosocial risk assessment.

With regard to the Convention, the definition of harassment at work is significant, one which can be ambiguous and could even erode the traditional definition of our case law on harassment at work and, particularly, on the need for repetition of the harassing conduct to be characterised as such. Notwithstanding the above, Article 1(2) of this Convention allows for some discretion in the definition of violence and harassment by national legislation, so we will have to wait for the application of this Convention by our courts.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

The Directive, which has a transposition deadline of 7 June 2026, advances the principle of pay transparency and the principle of equal pay for work of equal value by establishing minimum requirements that will apply to employers and employees in the public and private sector.

Among the different measures of the Directive, there are requirements for pay transparency in access to employment, in the setting of pay and pay progression or the right of workers to information on pay issues, including the gender pay gap.

Measures are also established in relation to the carrying out of pay assessments (similar to those provided for in the domestic legislation as pay

audits, although it is indicated that these pay assessments will be “joint”, indicating a possible collaboration with worker representatives, whose particular participation in the assessments should be clarified and specified by the national legislator), although the critical point of the pay gap is reduced to 5% instead of the 25% currently established in the Spanish legislation.

Royal Decree-law 13/2022, of 16 March, on urgent measures to extend pensioners’ rights, reduce the gender gap and establish a framework for the sustainability of the public pension system

The following changes, among others, are introduced: (i) increase of the maximum annual ceiling for the Social Security contribution bases by a percentage equal to that established for the revaluation of contributory pensions (Art. 193 LGSS); (ii) establishment of a new solidarity contribution; (iii) extension of the period of validity of the contribution for the intergenerational equity mechanism (MEI); and (iv) modification of the calculation of the retirement pension.

The Employment Act 3/2023 of 28 February

The Employment Act also amends Art.51(2) of the Workers’ Statute Act, introducing a significant change in relation to the report of the Labour Inspectorate in collective redundancies, which can now explicitly cover the causes and which must be issued within 15 days from the end of the consultation period, although it remains under discussion whether the Inspectorate can also rule on the causes when there is an agreement between the parties in the consultation period.

As of 2 March 2023, the ninth final provision of the Employment Act also eliminates the *sua sponte* procedure regulated in Art. 148(d) of the Employment Jurisdiction Act, which allowed companies to suspend the Settlement (and, where appropriate, Infringement) Reports and registrations by the Spanish Social Security Agency at the request of the Labour Inspectorate with administrative reclassifications to employment relationships in the case of false self-employed workers and to request the General Government to file claims in the employment jurisdiction to determine the nature of the relationship. As a result, the discretionary, but in practice almost obligatory, option for the Labour Inspectorate to submit the question of employment status to the Employment Court is no longer available and the companies must pay the Reports when the rulings confirming them are final and conclusive without the option of suspending the administrative proceedings, being able to appeal to the judicial review courts.

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