

International **Comparative** Legal Guides



Environmental, Social & Governance Law **2021**

A practical cross-border insight into ESG law

First Edition

Featuring contributions from:

BAHR
Bowmans
Brown Rudnick LLP
Galicía Abogados, S.C.
Grimaldi Studio Legale
Haynes and Boone, LLP
Herbert Smith Freehills

Herbert Smith Freehills LLP
Herzog Fox & Neeman
Macfarlanes LLP
Mannheimer Swartling
Advokatbyrå
Maples Group
Nagashima Ohno &
Tsunematsu

Schellenberg Wittmer Ltd
Stikeman Elliott LLP
SustainAdvisory
Travers Smith LLP
Wachtell, Lipton, Rosen & Katz
Wolf Theiss

ICLG.com

Expert Chapters

- 1** **Moving Forward With ESG: Considerations for Boards and Management**
David M. Silk & Carmen X. W. Lu, Wachtell, Lipton, Rosen & Katz
- 7** **Incorporating Sustainability into Debt and Equity Financing**
Emma Russell, Emily Fuller & Deborah Low, Haynes and Boone, LLP
- 12** **ESG and UK Pension Schemes: Challenges and Opportunities**
Andy Lewis & Jonathan Gilmour, Travers Smith LLP
- 16** **ESG and Litigation: The Outlook for Shareholders and Listed Companies**
Ravi Nayer, Razzaq Ahmed & Tom McDonnell, Brown Rudnick LLP
- 28** **ESG and Corporate Strategy: A Cross-Sectoral View**
Rebecca Perlman, Silke Goldberg & Iria Calviño, Herbert Smith Freehills LLP

Q&A Chapters

- 34** **Australia**
Herbert Smith Freehills: Heidi Asten, Timothy Stutt & Jacqueline Wootton
- 43** **Austria**
Wolf Theiss: Sarah Wared, Florian Kuszner & Claus Schneider
- 48** **Canada**
Stikeman Elliott LLP: Vanessa Coiteux, Ramandeep K. Grewal & Catherine Grygar
- 57** **Ireland**
Maples Group: Peter Stapleton, Ronan Cremin & Jennifer Dobbyn
- 63** **Israel**
Herzog Fox & Neeman: Janet Levy Pahima, Liat Maidler & Daniel Kaczelnik
- 71** **Italy**
Grimaldi Studio Legale: Riccardo Sallustio SustainAdvisory: Francesca Fraulo
- 79** **Japan**
Nagashima Ohno & Tsunematsu: Kiyoshi Honda
- 85** **Mexico**
Galicia Abogados, S.C.: Mariana Herrero, Maurice Berkman, Carlos Escoto & Lorena Kiehnle Barocio
- 92** **Norway**
BAHR: Svein Gerhard Simonnæs, Asle Aarbakke & Lene E. Nygård
- 97** **Poland**
Wolf Theiss: Marcin Rudnik & Joanna Gąsowski
- 104** **South Africa**
Bowmans: Ezra Davids & Ryan Kitcat
- 112** **Sweden**
Mannheimer Swartling Advokatbyrå: Patrik Marcelius, Cecilia Björkwall & Joel Palm
- 119** **Switzerland**
Schellenberg Wittmer Ltd: Christoph Vonlanthen, Lorenzo Olgiati, Fabio Elsener & Giulia Marchettini
- 126** **United Kingdom**
Macfarlanes LLP: Tom Rose & Olivia Seeley
- 136** **USA**
Wachtell, Lipton, Rosen & Katz: David M. Silk & Carmen X. W. Lu

Austria



Sarah Wared



Florian Kuszniar



Claus Schneider

Wolf Theiss

1 Setting the Scene – Sources and Overview

1.1 What are the main substantive ESG-related regulations?

In Austria, there are various substantive ESG-related regulations. The principal sources of law in this regard are regulated in several federal laws as well as in state laws, such as the Environmental Impact Assessment Act, the Waste Management Act, the Water Rights Act, the Animal Protection Law, the Labour Protection Act, the Stock Corporation Act, the Stock Exchange Act, the Austrian Commercial Code (*UGB*), and the Consumer Protection Act. Furthermore, EU regulations and directives have become the main source for ESG-related regulations and must be considered accordingly.

1.2 What are the main ESG disclosure regulations?

In Austria, there are several regulations in place with respect to the disclosure of ESG criteria. The relevant disclosure regulations are partly contained in the substantive ESG-related regulations mentioned above, in particular, in the *UGB*. For example, since 2017, certain large companies are required to prepare a sustainability report on how they deal with environmental, social and employee matters, corruption, bribery and human rights. Such companies must include a non-financial report in the management report (*Lagebericht*) or prepare a separate non-financial report. In recent years, transparency requirements with respect to ESG factors have been further tightened. In particular, institutional investors and asset managers are required to supervise the companies in which they have invested with regard to certain ESG criteria and to publish an ESG-related policy.

1.3 What voluntary ESG disclosures, beyond those required by law or regulation, are customary?

In Austria, we are not aware of a uniform voluntary and customary ESG disclosure. However, we increasingly see Austrian companies that are not subject to the disclosure regulations

set out in question 1.2, but nonetheless disclose ESG-relevant information on their website or through other marketing tools, showing their commitment and long-term view with respect to ESG and their strategies with respect to sustainability risks considering international standards.

1.4 Are there significant laws or regulations currently in the proposal process?

Currently, the Renewable Energy Extension Law (*Erneuerbaren-Ausbau-Gesetz, EAG*) is in the proposal process. Austria aims to cover the electricity demand exclusively from renewable energy sources from 2030 and is aiming for climate neutrality from 2040. In order to achieve these goals, high investments in the expansion of generating capacities, as well as in the infrastructure network, are required. The *EAG* shall create the required legal framework in this context, which, *inter alia*, takes into account the generation technologies, specific subsidies and the required network reserve. Further, several EU regulations and directives aimed at, in particular, further tightening the transparency requirements and at climate neutrality are currently being discussed in Austria, which need to be considered on a national level (in the near future).

1.5 What significant private sector initiatives relating to ESG are there?

Generally, we have observed in recent years that the private sector increasingly shows commitment regarding climate change and aims to reduce emissions and participate in the transition to a low-carbon economy. We have observed that the private sector – regardless of regulatory provisions – aims to comply with certain ESG criteria. For example, the promotion of gender diversity has been a prominent topic in recent years (since 2018, listed companies as well as certain large companies have been required to have a diverse supervisory board, i.e. at least 30% of the board members must be female).

Furthermore, we increasingly see investors conducting comprehensive due diligence with respect to ESG factors before entering into a transaction or a legal relationship with relevant third parties.

2 Principal Sources of ESG Pressure

2.1 What are the views and perspectives of investors and asset managers toward ESG, and how do they exert influence in support of those views?

Investors and stakeholders increasingly support impact investing and aim to achieve more than financial profit with respect to their investments. Such investors are actively looking for opportunities that focus on ESG and thus promote a positive social change. Investors, asset managers and other stakeholders increasingly conduct comprehensive due diligence with respect to ESG factors before entering into a transaction or a legal relationship with relevant third parties. Additionally, certain investors and asset managers have implemented specific transition strategies reflecting their (long-term) view with respect to specific ESG factors. Furthermore, institutional investors and asset managers are required by law to monitor the companies in which they have invested with regard to certain ESG criteria and to publish a corresponding participation policy (*Mitwirkungspolitik*).

2.2 What are the views of other stakeholders toward ESG, and how do they exert influence in support of those views?

Please see question 2.1.

2.3 What are the principal regulators with respect to ESG issues, and what issues are being pressed by those regulators?

As the ESG concept combines many different issues, such as human rights, equality and diversity, consumer protection and animal welfare, corporate governance issues and climate change, there are several regulators in Austria responsible for overseeing the various areas of the ESG, such as:

- (i) the Ministry of the Interior, responsible, in particular, for protecting human rights in Austria;
- (ii) the Ministry of Economy, Family and Youth, responsible, in particular, for family affairs and the general implementation of the Austrian Trade Act, such as the issuance of gas trading permits;
- (iii) the Ministry of Agriculture, Forestry, Environment and Water Management, responsible for general environmental affairs (e.g. air pollution control and environmental protection policies);
- (iv) the Ministry of Transport, Innovation and Technology, responsible for environmental impact assessment procedures with respect to federal motorways and railways;
- (v) several non-governmental organisations aiming at protecting and promoting nature, animals and the environment; and
- (vi) several organisations aiming at protecting and promoting employees' rights (e.g. the Austrian Chamber of Labour).

Generally, managers of Austrian private equity funds, as well as financial institutions and publicly listed companies, are subject to the ongoing supervision of the Austrian Financial Market Authority (*FMA*). The FMA has recently published its draft consultation for a guide on how to deal with sustainability risks, and expects that the guide will be respected by the relevant companies.

2.4 Have there been material enforcement actions with respect to ESG issues?

Depending on the relevant ESG factor, ESG requirements can be enforced by the relevant regulator in different ways. For example, environmental requirements and laws are enforced by the relevant district authorities. Commonly, administrative fines are imposed with respect to the violation of the environmental laws, whereby, in case of severe breaches, the relevant permit may be revoked by the relevant authority. In Austria, we are not aware of any recent material enforcement action that is public information.

2.5 What are the principal ESG-related litigation risks, and has there been material litigation with respect to ESG issues, other than enforcement actions?

Generally, it is not surprising that poor ESG standards can damage the image of a company. Therefore, reputational risk and potential litigation are two of the main reasons why companies take ESG into account. Most recently, an activist shareholder of a large Austrian listed company initiated a lawsuit to challenge a resolution to appoint members of the supervisory board for lack of gender diversity. Other than that, we are not aware of any recent material litigation regarding ESG issues in Austria.

2.6 What are current key issues of concern for the proponents of ESG?

In Austria, no consistent and comparable information with respect to the ESG criteria of Austrian companies exists. Austrian legislators are trying to increase the relevance, consistency and comparability of ESG-relevant data. However, this has not yet been entirely successful, as the quality of the information can in most cases be improved.

In general, there are currently no uniform regulations with respect to, for example, a type of seal of quality (*Gütesiegel*), meaning whether a product or service can be described as “ESG-compliant”, “green” or “sustainable”. However, the EU Taxonomy intends to remedy this at the EU level, i.e. introduce binding criteria and framework specifications for a uniform classification system, which can be viewed as “environmentally sustainable economic activity”. It remains to be seen whether the ESG trend in general – regardless of the regulatory framework – will result in better information quality and more transparency with respect to ESG factors.

3 Integration of ESG Into Business Operations and Planning

3.1 Who has principal responsibility for addressing ESG issues? What is the role of the management body in setting and changing the strategy of the corporate entity with respect to these issues?

Under Austrian company law, the management board (*Vorstand*) in the case of a stock corporation, and the managing directors (*Geschäftsführer*) in the case of a limited liability company, are responsible for running the operations of the company. While certain measures, including, *inter alia*, setting the strategy of the company, require the approval of the supervisory board (in a stock corporation), or the shareholders (in a limited liability company), the “right of initiative” belongs to the management

also in these areas. The management board is thus responsible for (i) identifying where addressing ESG issues is either required under applicable rules and regulations or appropriate under best practice considerations as part of their general obligation to ensure compliance of the company with laws, and (ii) proposing appropriate measures to be taken as part of their role *vis-à-vis* the supervisory board and/or shareholders (meeting).

3.2 What governance mechanisms are in place to supervise management of ESG issues? What is the role of the board and board committees?

Austrian companies' corporate governance at its core has a two-tier board system, comprising a management board and a supervisory board. In a limited liability company, depending on the number of its employees, respectively, shareholders and its registered capital, a supervisory board may not be mandatory, and the supervisory board's role may then be taken over by the shareholders' meeting.

The supervisory board (respectively, in smaller companies, the shareholders' meeting) is responsible for monitoring the conduct of the management and ensuring compliance with overall business strategy, etc. In addition, in a stock corporation, the supervisory board approves the annual accounts (unless the management board and the supervisory board decide to submit the accounts to the shareholders' meeting for approval). As noted above (see question 1.2), this includes a review of the management account (*Lagebericht*). The supervisory board must provide an annual report to shareholders stating how it conducted its affairs and exercised its duties of supervision and monitoring towards the management board.

The supervisory board of (*inter alia*) listed companies must set up an audit committee which is, pursuant to Sec. 269 para. 3 of the UGB, part of the annual audit whether the non-financial report (where required) has been prepared.

3.3 What compensation or remuneration approaches are used to align incentives with respect to ESG?

One of the core competencies of the supervisory board of an Austrian stock corporation is the right to appoint (and recall) the members of the management board. This goes in line with the duty of the supervisory board to negotiate the terms of employment, including remuneration of the management board members.

Following implementation of the EU's 2nd Shareholder Rights Directive in Austria, supervisory boards of listed companies must draw up a remuneration policy for the management board. The remuneration policy must then be submitted to the shareholders' meeting for approval. While such vote is only of an advisory nature, the management board may only be compensated in accordance with a remuneration policy that has been put to a vote by the shareholders' meeting. In addition, an annual remuneration report needs to be prepared to ensure *ex post* transparency. In practice, (supervisory) boards have taken to including various ESG criteria in the determination of variable compensation components. The clear focus is on sustainability, and very often, performance in relation to ESG metrics also forms part of a wider "leadership assessment" of board members. The consequence is that management board members' (variable) remuneration is directly linked to how demonstrably successful and persistent a company is in pursuing its ESG agenda.

On staff levels below the C-suite, a variety of (fringe) benefits, internal policies and codes of conduct may be used to align employees' interest and performance with the wider strategic goals of a company.

3.4 What are some common examples of how companies have integrated ESG into their day-to-day operations?

ESG is becoming increasingly more important for Austrian companies. As noted above, it forms, for instance, an integral part of the remuneration of management board members. This ensures direct exposure and scrutiny by shareholders, be it small investors or professional investors who increasingly tailor their investment criteria in order to take ESG topics into account (see also below at question 6.1). In addition, companies participate in international ESG rankings (such as, e.g., by ISS ESG or MSCI ESG Research) and regularly publish details on their sustainability and/or ESG goals.

4 Finance

4.1 To what extent do providers of debt and equity finance rely on internally or externally developed ESG ratings?

In our experience, prior to the issuance of ESG bonds (in particular, green bonds), issuers usually mandate a recognised second-party opinion provider, which is a provider of ESG research and analysis to deliver (an) ESG rating letter(s). We cannot assess to what extent providers of debt and equity finance rely on internally or externally developed ESG ratings.

4.2 Do green bonds or social bonds play a significant role in the market?

In the Austrian market, we see that the issuance of green bonds has been consistently increasing in the last few years and that green bonds play a significant role for (re-)financing purposes. To our knowledge, social bonds do not yet represent a significant volume of the Austrian market.

4.3 Do sustainability-linked bonds play a significant role in the market?

We are not aware of any issuance of sustainability-linked bonds in the Austrian market.

4.4 What are the major factors impacting the use of these types of financial instruments?

In our view, major factors include, but are not limited to, the establishment of new business areas for financial providers, extension of the issuer's group of investors, reputation incentives for investors and issuers, pricing and tax incentives. We are not in a position to comment on whether these instruments obtain favourable economic terms when compared to traditional debt.

4.5 What is the assurance and verification process for green bonds? To what extent are these processes regulated?

The assurance and verification processes for green bonds are not yet regulated in the EU. However, in March 2020, the EU Technical Expert Group on Sustainable Finance (the TEG) published the proposal of a "Usability Guide EU Green Bond Standard" (the *Usability Guide EU GBS*) and an EU Green Bond

Standard which was in the consultation process of the European Commission until 2 October 2020. Based on the outcome of the consultation, the European Commission should make a decision in the fourth quarter of 2020 on how to take the Green Bond Standard forward.

In the Usability Guide EU GBS, the TEG described the importance of a verification process. Accordingly, external reviews are essential to reduce informational asymmetries for market participants. Furthermore, it has become common practice for issuers to have an EU Green Bond voluntarily verified by an external verifier and has typically been made available to investors before or at the time of issuance.

According to the Usability Guide EU GBS, the assurance and verification process for green bonds should assure and verify: (i) before or at the time of issuance, through an initial verification, that the green projects of the respective issuer are in line with the EU Taxonomy within the parameters set out by the EU Green Bond Standard and within the issuer's green bond framework; and (ii) after full allocation of proceeds, the actual allocation of these proceeds to green eligible projects as listed in the issuer's allocation reporting.

5 Impact of COVID-19

5.1 Has COVID-19 had a significant impact on ESG practices?

In the short term, COVID-19 has had the effect of slowing, or in certain cases even stopping (or at least pausing), investments and this has hit a variety of companies, including companies with a strong ESG agenda. We believe this is primarily due to the short- to mid-term uncertainty that the pandemic has brought with it and, furthermore, the need for companies to focus their attention on other, currently more pressing, matters in the immediate aftermath of the (first wave of the) pandemic, such as, e.g., securing supply chain certainty, shoring up liquidity, and protecting the health and well-being of their staff.

In the medium term, in line with international expectations, awareness of long-term sustainability risks may well increase in the aftermath of the COVID-19 crisis, and this should be a positive catalyst for ESG.

6 Trends

6.1 What are the material trends related to ESG?

ESG investing has already moved up, and is still moving up, on the agenda. Regulatory trends both in Austria and at the EU level reinforce this tendency and increase pressure on companies to put more emphasis on this topic. International institutional investors as well as proxy advisers play a pivotal role in this trend. Key investors have started to embrace ESG and sustainable investing in their investment strategies, and leading international financial advisers have started to build or expand dedicated research capabilities in both equity and index research into developing special ESG products. Companies thus need to be acutely aware that their governance structures, reporting standards and levels and overall strategies need to ensure that ESG topics are duly taken into consideration and presented to stakeholders in a manner that allows market-standard review and assessment of their company.

6.2 What will be the longer-term impact of COVID-19 on ESG?

For Austria, as for many other jurisdictions around the world, the COVID-19 pandemic could become a turning point for ESG investments in the longer-term view. The economic crisis following the pandemic is regarded by many as a potential catalyst. The crisis itself accelerated the trend for a more sustainable approach in investing. Pursuant to market research, high-rated ESG funds showed at least some resilience towards the fallout from the pandemic, and we believe this tendency will continue beyond the immediate remits of the currently ongoing COVID-19 crisis.



Sarah Wared is a partner in the Corporate/M&A team based in Vienna, Austria. With an important emphasis on private equity and venture capital, she specialises in cross-border transactions in the fields of M&A, corporate, and private foundation law. Sarah has expertise in a wide range of industry sectors including financial institutions and TMT. Before joining Wolf Theiss, she has lived and practised in the USA, Singapore and Germany. Sarah is admitted to the Bar in both Austria and in Germany and is the author of numerous publications on a variety of Austrian corporate law issues.

Wolf Theiss
Schubertring 6
1010 Vienna
Austria

Tel: +43 1 51510 5200
Email: sarah.ared@wolftheiss.com
URL: www.wolftheiss.com



Florian Kuszniar is co-head of the firm-wide Corporate/M&A team and specialises in cross-border M&A transactions, takeovers and start-up services. He advises strategic and financial investors in a range of industry sectors but has a particular focus on healthcare and life sciences, as well as on technology and digitalisation. In addition to his Austrian law degree, Florian has an LL.M. from the London School of Economics. He regularly publishes on healthcare, corporate and takeover law as well as on selected capital markets topics.

Wolf Theiss
Schubertring 6
1010 Vienna
Austria

Tel: +43 1 51510 5590
Email: florian.kuszniar@wolftheiss.com
URL: www.wolftheiss.com



Claus Schneider is a member of the Banking & Finance team as well as the firm's Management Board. Claus specialises in debt, hybrid and structured capital market issues and regulatory advisory for financial institutions. He is consistently recognised as one of the leading lawyers in Austria in these fields. Claus has worked on some of the most innovative and first-time debt and hybrid issues in Austria and has been one of the key legal advisors in relation to bank support measures since the 2008 financial crisis. Prior to joining the firm, Claus gained valuable experience working at the World Bank in Washington, D.C.

Wolf Theiss
Schubertring 6
1010 Vienna
Austria

Tel: +43 1 51510 5390
Email: claus.schneider@wolftheiss.com
URL: www.wolftheiss.com

Wolf Theiss is one of the leading law firms in Central, Eastern and South-Eastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

We have been at the vanguard of development of the private and public M&A markets across the region, and our clients benefit from our experience in successfully negotiating and closing all types of transactions ranging from share deals, asset deals, leveraged buy-outs, management buy-outs, to management buy-ins including regulatory advice.

www.wolftheiss.com

WOLF THEISS

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs

Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms