

Sustainable investment management in a changing world

This special issue of the *Capital Markets Law Journal* is entirely dedicated to sustainable asset management. Over the past few years, many publications have been devoted to legal and regulatory aspects of sustainable asset management, but this is the first time that the theme has been studied from a global and comparative law perspective. This issue contains a total of 10 contributions regarding the regulatory and private law rules and standards that asset managers must take into account. In order of appearance, this special edition includes contributions on the following jurisdictions: the UK, the European Union (EU), Switzerland, Canada, the USA, India, China, Singapore, Australia, and Japan.

What stands out when comparing the rules and norms for sustainable asset management across the various jurisdictions covered in this issue? It is first of all apparent that sustainability considerations play a significant role in modern asset management activities in all jurisdictions discussed. The jurisdictions discussed represent a selection of common law and civil law traditions, forming the archetypical framework for comparative law discussions. However, there is a form of functional convergence in the adoption of fiduciary-type legal duties within the investment management sector. What is notable, with changing notions of what is material to investment management, is that material sustainability considerations are increasingly regarded as mainstream in the practice of investment management in these different jurisdictions, influencing the legal framing of the importance of sustainability in investment management. Nevertheless, whether sustainability considerations are incorporated as a matter of soft or mandatory law, the scope of such considerations being addressed, the level of detail, and the degree of enforceability vary considerably.

A key comparative observation we make is the difference in jurisdictions' chosen approaches to addressing sustainability considerations in investment management. In some jurisdictions, asset managers are mostly confronted with a top-down approach, where regulatory rules are issued by legislators, financial regulators, and other government bodies (EU, India, China). These can be rather wide-ranging in terms of scope and coverage of sustainability matters. In the UK in particular, although mandatory law is also at the forefront, its scope is limited to climate change, while other sustainability considerations are dealt with through market practice, subject to market discipline or in soft law (such as Stewardship). That said, other than China, whose public regulation implicates allocative steers led by state-based financing vehicles, there is still a significant reliance on market-based discipline to shape practice and allocation.

In some jurisdictions, soft law issued by financial regulators seems to be the preferred approach (eg Singapore, Japan). This approach signals the need for greater flexibility for policy-makers, so that the investment management industry can be nudged towards certain forms of transparency and practices, while being able to adapt to the changing demands and needs of their own constituents. In other jurisdictions, the asset management industry also plays a leading role by issuing self-regulatory standards (Switzerland, Japan).

Financial regulators and the government may take a wait-and-see approach to make sure that the asset management industry remains sufficiently competitive (Switzerland). Yet, in other jurisdictions, there is a greater reliance on ex post jurisprudential development of fiduciary duties to clarify the extent of sustainability obligations for the industry. These may also develop in tandem

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with, albeit to a lesser extent, regulatory and soft law. This is an approach that is mainly seen in common law systems (UK, USA, Canada, Australia, but also to some extent in Switzerland and in several Members States of the EU). A possible explanation for the USA is the politically charged nature of this issue, rendering it highly controversial for regulatory governance to be crystallized. This has affected Canada, which closely follows US regulatory developments for fear of becoming divergent and uncompetitive. Although the UK and Australia are common law jurisdictions that have seen recent lawsuits and opportunities for jurisprudential developments, the organic development of case law may still leave gaps to be clarified, such as in relation to a wide range of ‘materiality’ factors. In this manner, regulatory development can provide much-needed clarity in an *ex ante*, and hopefully precise way.

Which sustainability strategy works best? That is a difficult question to answer, partly because some jurisdictions are still at the beginning of their thinking about sustainable asset management (eg Japan, India), while other jurisdictions are already further along in developing a clear strategy (eg EU, UK). Even for jurisdictions where debate has featured extensively, including the EU, UK, USA, and Australia, for example, different policy options and mixes may be adopted due to institutional culture, market practice, and other cultural and socio-economic aspects. It may well be the case that seeking convergence in investment managers’ sustainability duties is not necessarily productive exercise.

Of the jurisdictions discussed in this special issue, the EU undoubtedly has the most comprehensive and detailed legal framework for sustainable asset management. This may seem positive, but the end result is far from satisfactory. The EU sustainability rules with which asset managers must comply are extremely complex and often unclear, creating practical application problems and legal uncertainty. This means that the costs of compliance (such as personnel costs and the costs of obtaining external advice) are high. The sustainability transparency provisions are so detailed and complex that retail investors struggle to understand them. Moreover, the EU sustainability rules are not always mutually consistent and, indeed, are sometimes downright inconsistent. This creates even greater complexity and legal uncertainty, and drives up compliance costs still further. Despite the EU’s introduction of all these new sustainability rules, reports of greenwashing have proved persistent. For all these reasons, it is doubtful whether the EU sustainability rules will effectively contribute to the transition to a more sustainable world.

Finally, it must be noted that this special issue appears at a turning point. Since Donald Trump began his second term as President of the USA in January this year, the geopolitical climate has undoubtedly changed. This also impacts the sustainable finance agenda, to begin with, of course, in the USA itself. In several states, it has now become illegal for asset managers to consider sustainability in their investment decisions. The idea here is that asset managers have only one goal: to generate as much return as possible for the client, whether that client is a retail investor or a large pension fund.

The developments on the other side of the Atlantic Ocean also have important implications for the European sustainability agenda. Sustainability was a top priority for the European Commission during the first term of its President Ursula Von der Leyen (2019–2024). However, partly against the backdrop of rising geopolitical tensions (the Trump administration, the ongoing war in Ukraine, and other parts of the world) and the authoritative reports by Mario Draghi¹ and Enrico Letta² on the EU’s deteriorating competitive position vis-à-vis other power blocs such as China and the USA, the Von der Leyen II Commission, which took office on 1 December 2024, is taking a different approach that attaches less absolute importance to sustainability. Von der Leyen II wants to improve Europe’s competitiveness, partly by weakening or, in any event, simplifying the EU’s sustainability rules, which in their current form impose excessively high compliance costs on European businesses. In addition, Europe no longer shies away from using a weakening or in any event the simplification of sustainability rules in its

¹ M Draghi, ‘The Future of European Competitiveness’ (2024) <https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en> (last accessed on 1 September 2025)

² E Letta, ‘Much More than a Market’ (2024) <<https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>> (last accessed on 1 September 2025). See also C Noyer, ‘Developing European Capital Markets to Finance the Future: Proposals for a Savings and Investments Union’ (2024) <<https://www.tresor.economie.gouv.fr/Articles/2024/04/25/developing-european-capital-markets-to-finance-the-future>> (last accessed on 1 September 2025)

negotiations with the USA on trade tariffs.³ In light of the shifts led by these jurisdictions, whose legal frameworks often produce leading effects for others, the sustainable finance legal framework is likely to remain dynamic, making flexible forms of legal framing, such as soft law, even more adaptable. For one, the UK's incoming 2026 Stewardship Code has refrained from any emphasis on sustainability or ESG considerations, making the stewardship code more fluid, subject to the industry's explanations. That said, important sustainable finance jurisdictions such as China have an array of domestic agendas in relation to greening and ESG concerns, which may shape their regulatory trajectory, led by state agencies that play the key roles in raising and allocating finance.

Due to the shift of the tectonic plates of power that is currently taking place, the future of sustainable asset management is difficult to predict. Let's hope that humanity succeeds in keeping planet Earth habitable, also for future generations.

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³ See the Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade (21 August 2025), point 12: 'The European Union commits to undertake efforts to ensure that the Corporate Sustainability Due Diligence Directive (CSDDD) and the Corporate Sustainability Reporting Directive (CSRD) do not pose undue restrictions on transatlantic trade. In the context of CSDDD, this includes undertaking efforts to reduce administrative burden on businesses, including small- and medium-sized enterprises, and to propose changes to the requirement for a harmonised civil liability regime for due diligence failures and to climate-transition-related obligations. The European Union commits to work to address US concerns regarding the imposition of CSDDD requirements on companies of non-EU countries with relevant high-quality regulations.' See <https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en> (last accessed on 1 September 2025)

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