



Risk, Resilience  
and Reputation

## Focus on Funds | Risk, Resilience and Reputation

# ESG litigation risk

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| Laura Houët  
| Kenny Henderson  
| Tilman Niedermaier

# Presenting today



## Moderator



**Laura Houët**  
Partner | CMS UK  
CMS Funds Group  
T +44 20 7367 3582  
E [laura.houet@cms-cmno.com](mailto:laura.houet@cms-cmno.com)

## Speakers



**Kenny Henderson**  
Partner | CMS UK  
Dispute Resolution  
T +44 20 7367 3622  
E [kenny.henderson@cms-cmno.com](mailto:kenny.henderson@cms-cmno.com)



**Tilman Niedermaier**  
Partner | CMS Germany  
Dispute Resolution  
T +49 89 2380 7196  
E [tilman.niedermaier@cms-hs.com](mailto:tilman.niedermaier@cms-hs.com)

# What will we cover?

The advent of  
ESG regulation



Behaviours and  
litigation risks



SFDR/  
Taxonomy risks



Corporate  
sustainability  
due diligence



Evolving  
ESG risks



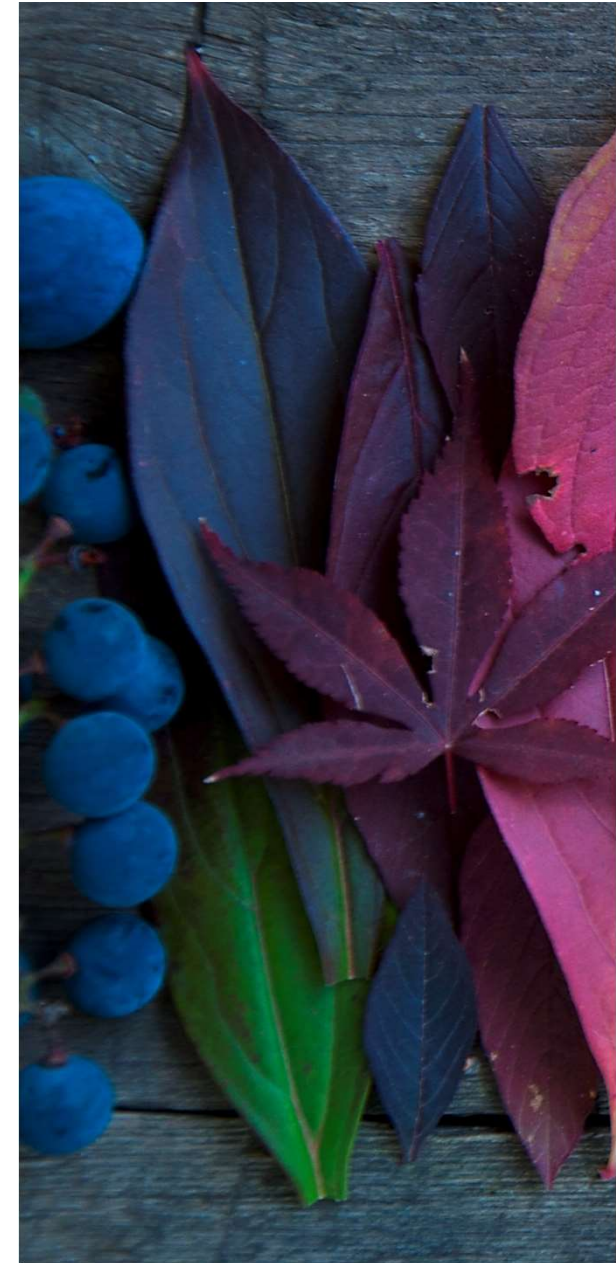


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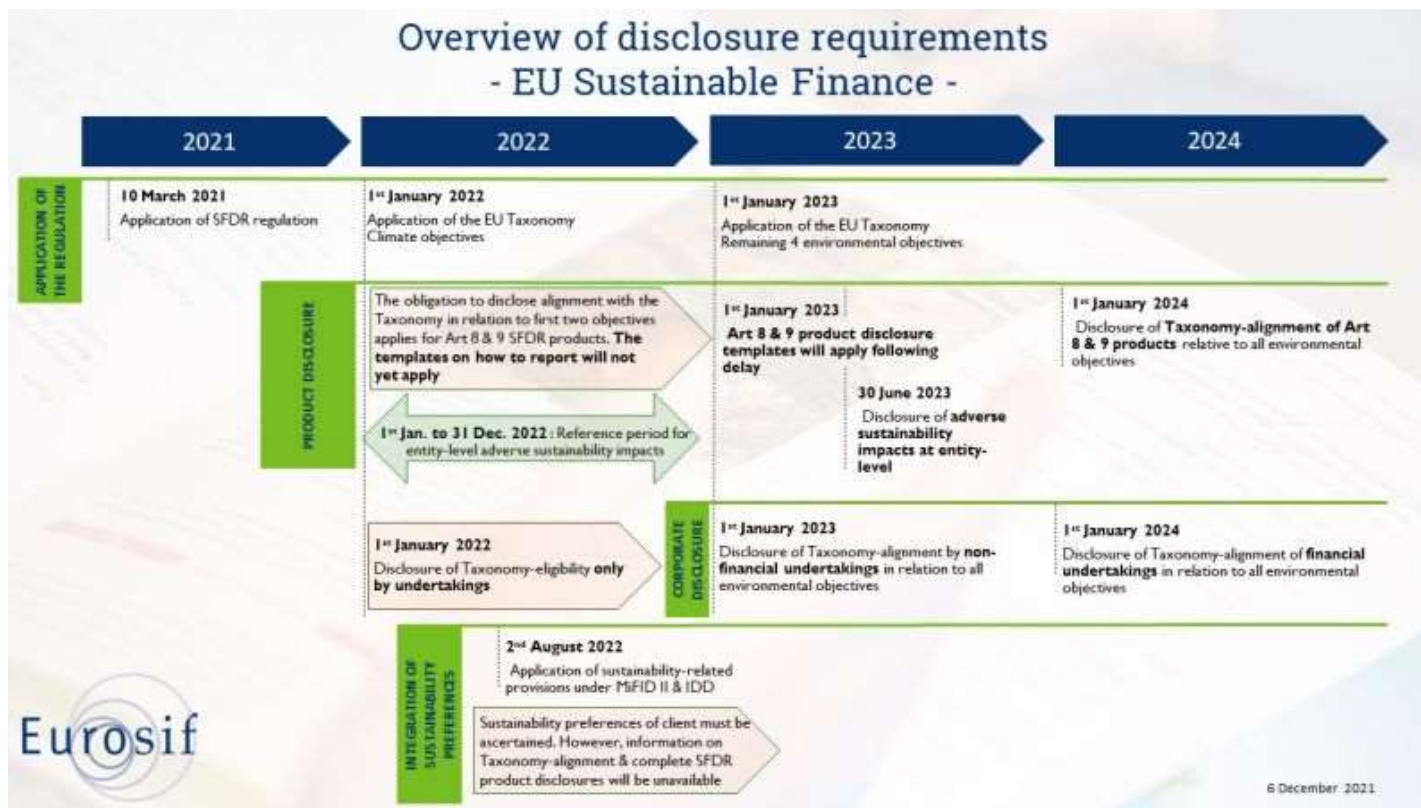
# The advent of ESG regulation

# The advent of ESG regulation

UN PRI – global approach (voluntary)	TCFD – global approach (voluntary ex UK)	The EU Green Deal – and updates: Fit for 55	EC Sustainable Finance Package and updates: revised finance strategy	Sustainable Finance Disclosure Regulation
EU Taxonomy	New Benchmarks: Paris Aligned and Carbon Transition	UCITS, AIFMD and MiFID changes	UK Stewardship Code – all new, all change	Changes to the Non-Financial Reporting Directive
Jurisdictional differences: Germany, France and Spain	UK differing approach: TCFD and SDR	Directive on Corporate Sustainability Due Diligence	Asset level regulation	The list goes on...



# ESG Regulation Timeline





2

## Behaviours and litigation risks



# Behaviours and litigation risks

Behaviour	Subject matter	Types of claim	Potential consequences
Non provision of disclosure <ul style="list-style-type: none"> <li>Conscious choice</li> <li>Insufficient data</li> </ul>		Injunction to require disclosure	Forced disclosure
Inaccurate information	Corporate conduct	Investor claim (Typically for listed companies)	Damages
		Injunction requiring compliance (Disclosure may be in/voluntary)	Behavioural change (Possibly significant)
	Product/service	Misrepresentation	Damages Rescission
		Breach of contract	Damages - <u>contractual measure of harm</u>
Inaccurate advice	Investment decisions	Tort	Damages
		Breach of contract	Damages

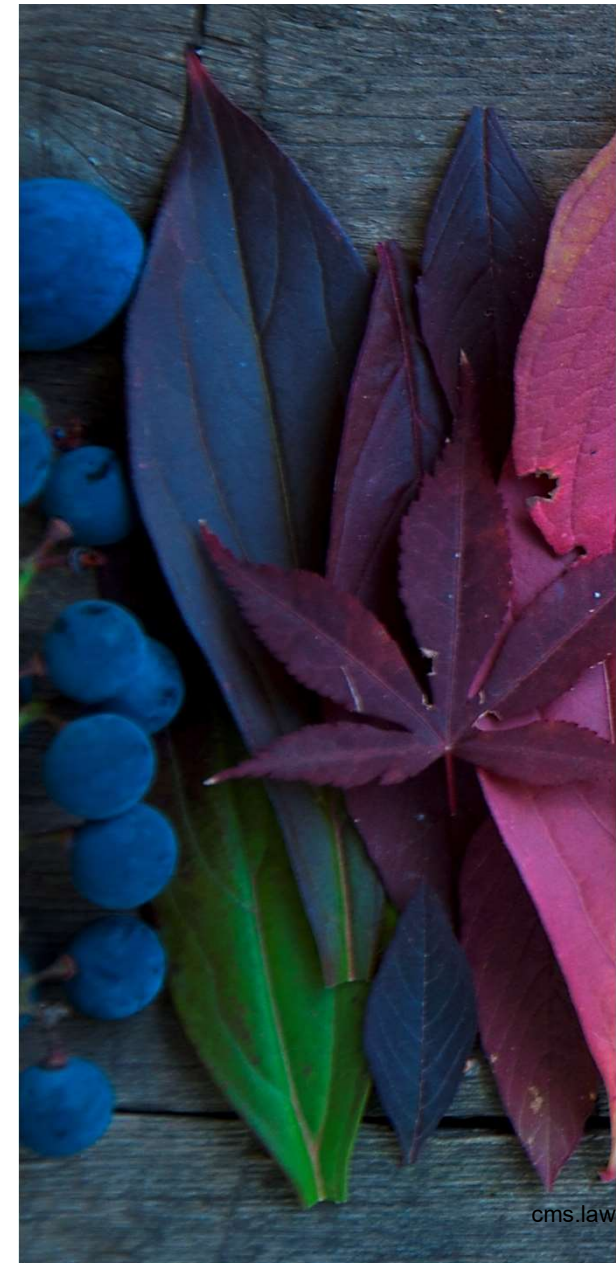
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## SFDR/ Taxonomy risks

# Legal entity level disclosure

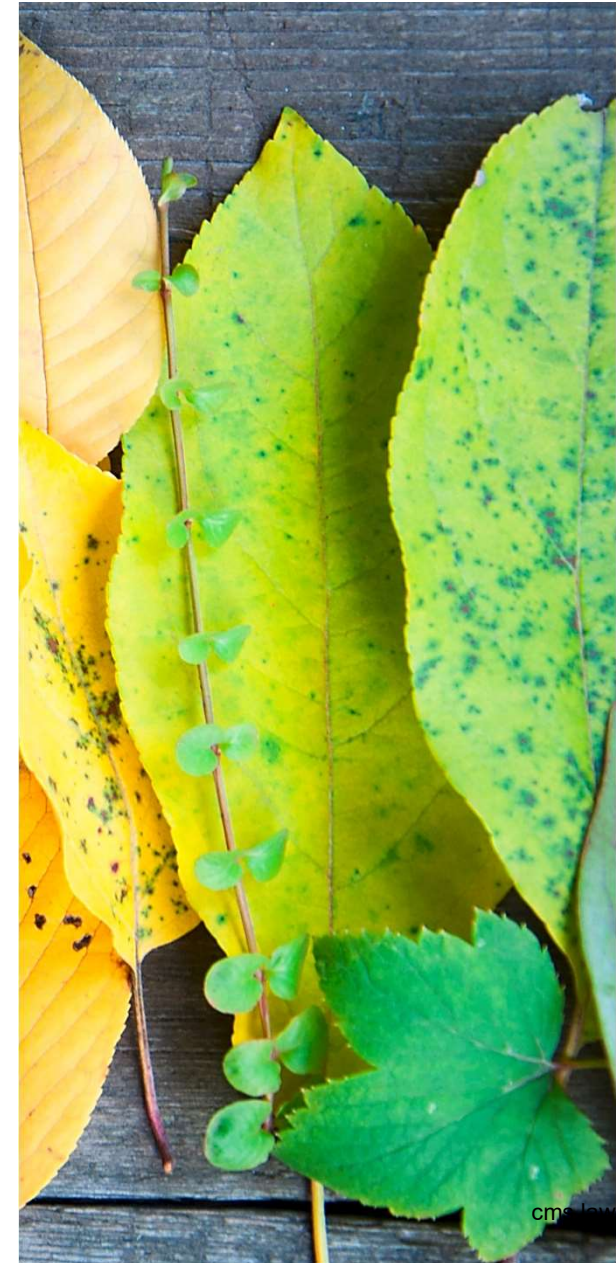
## Information to be disclosed on the website

Financial Market Participants	Financial Advisers
Sustainability Risk Policy (Art.3 SFDR)	Sustainability Risk Policy (Art.3 SFDR)
Adverse Sustainability Impact (Art.4 SFDR) Mandatory for large entities and large holdings Comply or explain for all other entities	Adverse Sustainability Impact (Art.4 SFDR) Comply or explain for all other entities
Remuneration Policies (Art.5 SFDR)	



# Product level disclosure

Product-level disclosure	Mainstream products	Article 8: Products promoting environmental or social characteristics	Article 9: Products with sustainable investment objective	
<b>Pre-contractual disclosure</b>	Integration of sustainability risks (Art.6 SFDR)			FMP and FA
	Principal adverse impact (Art.7 SFDR)			FMP
<b>Product website disclosure obligations</b>	N/A	Product website disclosures (Art.8 SFDR)	Product website disclosures (Art.9 SFDR)	FMP
<b>Product periodic reports (Art.11 SFDR)</b>	Principal adverse impact			FMP
		Additional sustainability disclosures	Additional sustainability disclosures	FMP
<b>Taxonomy aligned disclosures</b>	"The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities"	Additional taxonomy-related information	Additional taxonomy-related information	FMP



# Changes to UCITS / AIFMD / MiFID

Focus on governance to support the requirements of SFDR / Taxonomy  
Organisation, resource, conflicts, product governance

**UCITS**

Incorporate sustainability risks into procedures and organisation

Ensure necessary resource to manage risks

Integrate into activities including product approvals, compliance, risk reviews and RMPs, conflicts of interest

PAI incorporated into due diligence requirements

**AIFMD**

Incorporate sustainability risks into DD and monitoring, ensure adequate knowledge within the AIFM

Ensure necessary resource to effectively integrate risks

PAI incorporated where relevant in all related activities

Integrate into senior management activities and take into account in decision making procedures, organisational structure, internal reporting etc.

**MiFID**

Ensure sustainability risks are considered in decision-making procedures, organisational structure, compliance controls, internal reporting, record keeping, and risk management policies and procedures

Include client sustainability preferences in identification of conflicts

Suitability assessment

Incorporate into product governance (November 2022)



4

## Corporate sustainability due diligence

# Directive on Corporate Sustainability Due Diligence

- Imposes significant obligations on companies to identify, then avoid/eliminate “adverse human rights impacts” and “adverse environmental impacts”
- Will apply to company with:
  - 500+ employees and turnover €150m+; or
  - 250+ employees and turnover €40+ with 50% or more turnover derived from certain manufacturing or extractive activities; or
  - non-EU companies with EU turnover of
    - €150m+; or
    - €20m+ derived from certain manufacturing or extractive activities
- Applies to companies’ own conduct and also their value chains
- “Adverse human rights impacts”
  - Range of international treaties/obligations, including
    - Universal Declaration of Human Rights
    - International Covenant on Economic, Social and Cultural Rights
      - Right to a fair wage, safe working conditions
    - Right to Organise and Collective Bargaining Convention
    - Causing measurable environmental declaration, including impacting drinking water and normal conduct of economic activity of a person
- “Adverse environmental impacts”
  - Range of international treaties/obligations, including
    - Minimising harm to biodiversity
    - Improper treatment of mercury
- Companies must have a plan to ensure their activities are compatible with limiting global warming to 1.5C

# Directive on Corporate Sustainability Due Diligence | Litigation risk / enforcement

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## Companies are liable in damages if:

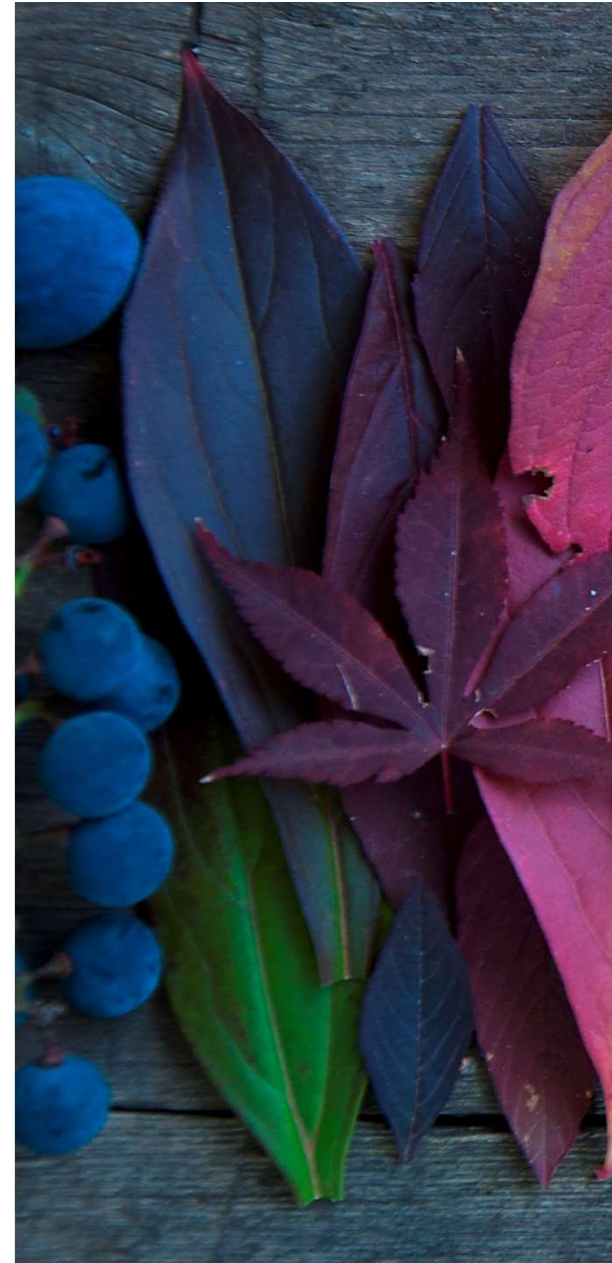
- They fail to take appropriate measures to prevent “adverse human rights impacts” and “adverse environmental impacts” from their own conduct and their value chain
- They fail to take appropriate measures to bring “adverse human rights impacts” and “adverse environmental impacts” to an end

## Examples:

- European company causing identifiable environmental degradation in Europe
- U.S. company with poor working conditions in Asia

## Regulatory enforcement:

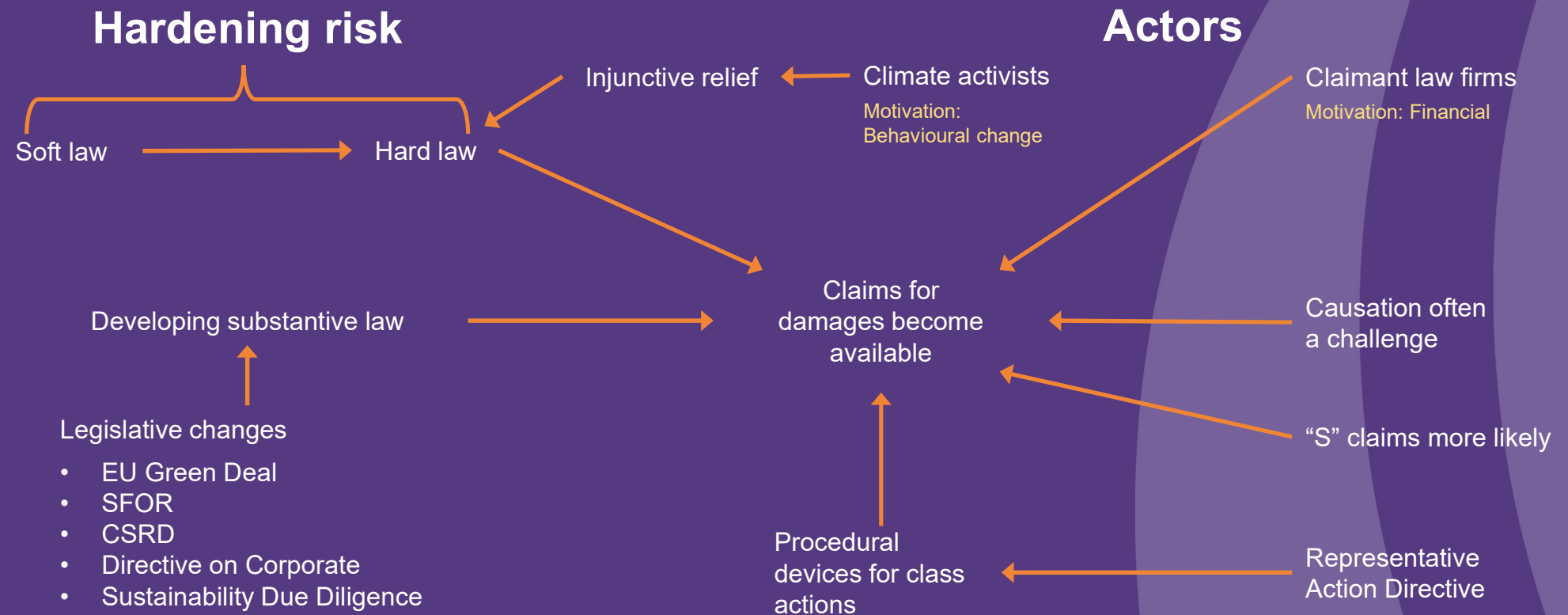
- Regulator can investigate, require cessation of infringement and can impose “proportionate and dissuasive” fines based on company’s turnover



5

## Evolving ESG risks

# Evolving ESG Litigation Risk



**Example:** Dutch court ordered Shell to reduce carbon emissions by 45% (1) NGO claimant (2) Injunctive relief (3) Soft law → Hard Law (4) Damages risk +

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## Moderator



**Laura Houët**  
Partner | CMS UK  
CMS Funds Group  
T +44 20 7367 3582  
E [laura.houet@cms-cmno.com](mailto:laura.houet@cms-cmno.com)

## Speakers



**Kenny Henderson**  
Partner | CMS UK  
Dispute Resolution  
T +44 20 7367 3622  
E [kenny.henderson@cms-cmno.com](mailto:kenny.henderson@cms-cmno.com)



**Tilman Niedermaier**  
Partner | CMS Germany  
Dispute Resolution  
T +49 89 2380 7196  
E [tilman.niedermaier@cms-hs.com](mailto:tilman.niedermaier@cms-hs.com)



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