CLEARY GOTTLIEB

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Climate and the Financial Sector

This weekly newsletter highlights climate-related regulatory, litigation and enforcement developments relevant to the financial sector.

General

6 February 2023 [International] – **NGFS launches public survey on climate scenarios**

Network of Central Banks and Supervisors for Greening the Financial System (NGFS), a group of central banks and supervisors sharing best practices in relation to environmental and climate risk management, launched a user feedback survey on climate scenarios. NGFS has highlighted that climate scenarios are used to carry out detailed analysis of the financial risks posed by climate change and are increasingly driving decisions in business strategy and risk management. The survey seeks feedback on user needs and on their experiences both with NGFS and non-NGFS climate scenarios. The purpose of the survey is to ensure that the NGFS scenarios capture all ingredients needed for an increasing range of climate risk assessment applications, thereby remaining relevant and comprehensive for a continuously growing user base. The survey is open until 27 February 2023; NGFS announced that it will publish the key findings of the survey in spring 2023.

8 February 2023 [EU] – **European Commission announces new members of EU sustainable finance advisory group**

After the previous two-year mandate of the Platform for Sustainable Finance (Platform) had ended, the Commission launched a new mandate and published a call for applications in October 2022. On 8 February, the Commission announced the Platform's new composition: 28 members and five observers from the private sector, seven permanent members among EU agencies and bodies (including EBA, EIOPA and ESMA), and nine EU institutions and international organisations observers (including ECB and EFRAG). Helena Viñes Fiestas, Commissioner of the Spanish Financial Markets Authority, will chair the Platform.

Under the Commission's mandate, the Platform will monitor the capital flows to sustainable investments and consult a wide range of stakeholders with a view to supporting the Commission's work on its sustainable finance agenda (e.g., further development of the Taxonomy).

The Platform's first meeting will be held on 7 March. [link and link]

9 February 2023 [UK] – **ClientEarth commences legal action against Shell board members for alleged failure to address climate risks**

In its capacity as minority shareholder, the environmental law NGO ClientEarth filed a lawsuit before the English courts against Shell's board of directors.

ClientEarth alleges that, by failing to take sufficient account of climate change impacts when planning for Shell's future, Shell's directors breach their duty to act in the way they consider most likely to promote the success of the company for the benefit of its members as a whole. Specifically, ClientEarth alleges that Shell's directors have been failing: (i) to manage material risks posed to the company by climate change; (ii) to adopt an energy transition strategy that is aligned with the Paris Agreement and as such protects the company and long-term shareholder value; and (iii) be on track to deliver a 45% reduction in the group-wide emissions by the end of the decade. [link]

10 February 2023 [UK] – **FCA publishes discussion paper on sustainability-related governance, incentives, and competence in FCA-regulated firms**

The UK's Financial Conduct Authority (FCA) published a discussion paper seeking stakeholder views on regulated firms' sustainability-related arrangements in respect of governance, incentives, and competence.

The paper highlights that firms' management of sustainability-related risks and opportunities has already come under closer scrutiny, e.g., through the work of the Taskforce on Climate-related Financial Disclosures, and sets out how expectations continue to evolve with the work of the International Sustainability Standards Board or the Transition Plan Taskforce. The paper further examines firms' sustainability-related objectives and strategies, and how these are supported by their governance and incentive arrangements. The paper also discusses training and competence on sustainability in regulated firms. Lastly, the paper includes a collection of 10 commissioned expert articles setting out different perspectives on firms' sustainability-related governance, incentives, competence and stewardship arrangements.

The FCA has invited feedback to be provided by 10 May 2023. [link]

10 February 2023 [France] – **AMF publishes summary of European Commission FAQs relating to the European Taxonomy**

On 19 December 2022, the European Commission published two sets of draft FAQs on certain implementing rules issued under the Taxonomy Regulation (see our newsletter of 2 January 2023).

On 10 February, the AMF published an outline of the objectives and content of those FAQs. The AMF's outline is aimed at helping companies navigate the extensive Commission guidance on the Taxonomy: it summarises in a table the relevant guidance with the respective publication date, to whom they apply and the link to the relevant document.

The AMF invites companies to take into account the EC's clarifications for a consistent application of these reporting requirements. [link]

Asset management

7 February 2023 [International] – **ASCOR seeks feedback on framework to assess sovereign bond issuers on climate change**

The Assessing Sovereign Climate-related Opportunities and Risks Project (ASCOR) is a project led by asset owners, asset managers and investor networks to develop a free, publicly available, independent tool that assesses countries on climate change.

ASCOR published a report setting out a framework intended to facilitate assessments of governments' climate-related commitments, their policy frameworks (including carbon pricing, energy subsidies, the phase-out of combustion vehicles, deforestation and land use policies) and the actions they are taking to ensure that the benefits of the low-carbon transition and of adaptation are shared among their citizens.

Feedback on the proposed framework may be submitted by 31 March 2023. ASCOR will then publish a summary of feedback results and how these were incorporated to update the proposed framework, following which it will use the new framework to assess a number of countries (listed in the report). [link]

9 February 2023 [EU] – **ESMA publishes report on trends, risks and vulnerabilities, highlighting greenwashing risk and ongoing popularity of sustainability-linked products**

ESMA published its latest report on market trends, risks and vulnerabilities, based on its assessment of the second half of 2022.

While the report finds overall high levels of uncertainty and fragile market liquidity, ESMA's key concern in the area of sustainable finance relates to greenwashing risk. ESMA notes that the energy crisis has put in jeopardy private sector decarbonisation targets. This, in turn, causes increased scrutiny of companies' net-zero commitments which may lead to greenwashing complaints. A further potential source of greenwashing risk is the misuse of SFDR classifications as marketing tool.

At the same time, ESMA notes a resilient appetite for sustainability-related products. This is evidenced not only by the continued growth of this market segment but also by the relative popularity of SFDR Article 9 funds compared to Article 8 (or other) funds. [link]

10 February 2023 [France] – **The AMF proposes minimum environmental standards for Article 8 and Article 9 products under SFDR**

The EU Sustainable Finance Disclosure Regulation (SFDR) requires financial firms to disclose information about their sustainability practices, but does not set minimum expectations for the sustainability of Article 8 and 9 products. In a position paper published on 10 February, the AMF states that it is critical that the Commission introduce minimum expectations that financial products would have to meet in order to be categorised under Article 9 or Article 8 of the SFDR, in order to help investors assess the sustainability of their investments and thus reduce greenwashing.

Among other things, the AMF suggests (i) maintaining the Article 8 and 9 categories but introducing minimum standards that a product must meet to be classified in either category, (ii) clarifying the definition of ‘sustainable investment’, (iii) requiring that a minimum proportion of the underlying assets of Article 9 products be invested in economic activities aligned with the taxonomy, (iv) requiring manufacturers of Article 8 and 9 products to adopt a binding ESG approach when making investment decisions regarding the underlying assets of these products, and (v) excluding investments in fossil fuel sector activities that are not aligned with the taxonomy for Article 9 products and imposing strict conditions on them for Article 8 products. [link]

Banking

7 February 2023 [UK] – **ShareAction requests leading banks to stop financing new oil/gas fields by the end of 2023**

With the backing of 27 investors with USD 1.4 trillion AuMs, the UK NGO ShareAction sent a letter to five major European banks, asking them to stop directly financing new oil and gas fields by the end of 2023 at the latest, to demonstrate its commitment to tackling the climate crisis and keeping global warming to 1.5° C. The letter highlights that some banks have already made commitments along these lines, and that the International Energy Agency has warned against opening new oil and gas fields beyond 2021.

Insurance

6 February 2023 [EU] – **EIOPA report finds insufficient implementation of climate-related adaptation measures in European non-life insurance products**

EIOPA published a report on insurers' use of climate-related adaptation measures in non-life insurance underwriting practices. The report highlights the importance of adaptation measures for ensuring future availability and affordability of insurance products, but notes that current levels of implementing climate-related adaptation measures in insurance products are low by comparison with other insurance markets around the world.

In particular, EIOPA identified three key challenges and proposed ways of addressing these: (i) lack of awareness by policy-holders about climate change and adaptation measures, which could be addressed through dedicated information campaigns and web-based information tools; (ii) lack of risk-based recognition of adaptation measures, which could be addressed through improvements in risk-based modelling of adaptation measures (e.g., open-source modelling and data sharing) and standardisation of underwriting practices (e.g., common risk assessment programs or risk labels); and (iii) lack of financial incentives for policy-holders to implement risk prevention measures, which could be addressed through appropriate premium discounts or tax reductions.

EIOPA stated that it will continue promoting the implementation of adaptation measures, and also that it will seek to ensure appropriate recognition of these aspects in the prudential framework by assessing the potential for a dedicated prudential treatment of adaptation measures. [link]

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