If you have problems viewing this email, you can view it in a web browser.

CLEARY GOTTLIEB

9 January 2024

Climate and the Financial Sector

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

General

19 December 2023 [EU] – **New EU ETS auctioning rules published in Official Journal**

Commission Delegated Regulation (EU) 2023/2830 (here), laying down new rules on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances under the EU Emissions Trading System (ETS), has been published in the Official Journal of the EU. The regulation repeals its predecessor legislation (Commission Regulation (EU) No 1031/2010).

The new auctioning rules reflect, and take into account, new rules and elements introduced in the EU ETS, including the extension of the scope of the existing EU ETS to maritime transport and the introduction of a new and separate ETS for buildings, road transport and industrial activities not covered by the existing ETS. They also address changes in the auctioning of allowances for the Recovery and Resilience Facility and the Social Climate Fund, as well as changes in the functioning of the Innovation Fund.

The new auctioning rules also clarify and fine-tune some existing provisions, reflecting lessons learnt from the previous auctioning rules. The new regulation entered into force on the day following its publication in the Official Journal. The 2024 EU ETS auction calendars, which reflect this new regulation, were published on the 21 December 2023 and can be found here.

19 December 2023 [EU] – **ESMA publishes methodology for analysis of financial impact of greenwashing controversies**

The European Securities and Markets Authority (ESMA) published an article (here) exploring the role and financial impact of greenwashing controversies. The article forms part of ESMA's broader mandate from the European Commission related to greenwashing risks and supervision of sustainable finance policies.

The article highlights that, between 2020 and 2021, the frequency of greenwashing controversies involving European firms increased. The allegations tend to be concentrated within a few firms belonging to three main sectors, including the financial sector. A growing greenwashing-related news flow highlights the increasing relevance of the topic which warrants future monitoring, in particular in the financial sector, to ensure that public trust in the ability and willingness of the financial sector to finance the low-carbon transition remains.

Regarding the financial impact of greenwashing controversies on firms, ESMA's analysis shows that greenwashing controversies did not have a clear, systematic negative financial impact on firms in 2020 and 2021. ESMA infers from this finding that investors and markets did not pay close attention to greenwashing-related controversies at the time, and, on that basis, warns that growing levels of public scrutiny on sustainability-related claims may imply that investor and market reactions to greenwashing controversies may well change in the future. Moreover, ESMA considers that its findings highlight the absence of an effective market-based mechanism to help prevent potential greenwashing behaviour; this, in turn, underscores the importance of clear policy guidance by regulators and efforts by supervisors to ensure the credibility of sustainability-related claims.

ESMA will hold a public webinar on the article's findings on 7 February 2024 (registration is possible here).

20 December 2023 [EU] – **Council agrees negotiating mandate on ESG ratings**

Following the European Commission's proposal (here) for a regulation on ESG rating activities, the Council has now reached an agreement on its negotiating mandate (here) on the proposal.

The main changes the Council's position envisages include: (i) clarification of the proposed regulation's scope (including of the concept of 'ESG ratings', details of applicable exemptions, and the regulation's territorial scope); (ii) clarification of the proposed endorsement regime for non-EU-based providers, (iii) introduction of an optional registration regime which would allow existing small ESG rating providers and new small markets entrants, for a period of three years, to be subject to lighter requirements and not to have to pay supervisory fees); and (iv) regarding the proposed separation of business and activities, that, except for consulting or audit activities provided to rated entities, ESG ratings providers need not establish a separate legal entity for certain activities, provided that there is a clear distinction between activities and that they put in place measures to avoid conflicts of interests.

The Council's agreement on its negotiating mandate paves the way to interinstitutional negotiations that are expected to start in January 2024.

22 December 2023 [EU] – **European Sustainability Reporting Standards published in Official Journal**

Commission Delegated Regulation (EU) 2023/2772, containing the European Sustainability Reporting Standards (ESRS), has been published in the Official Journal of the EU (here).

The objective of the ESRS is to specify the sustainability information that in-scope undertakings must disclose in accordance with the Accounting Directive (as amended by the Corporate Sustainability Reporting Directive). They comprise two cross-cutting standards (applicable to all sustainability matters covered by topical standards and sector-specific standards), and ten topical standards on specific environmental, social and governance matters (applicable when the reporting undertaking concludes that the relevant sustainability matter is material as a result of its materiality assessment). Additional sector-specific standards (applicable to all undertakings within a certain sector) are to be adopted by the European Commission by June 2024.

The Regulation began to apply on 1 January 2024.

Asset Management

19 December 2023 [EU] – **ESMA publishes methodology for dynamic modelling of climate related shocks in the fund sector**

In line with its mandate relating to regular climate stress testing (here), ESMA published an article (here) outlining a first approach to dynamic modelling of the impact of asset price shocks resulting from various climate scenarios.

ESMA's model breaks the impact of a price shock to underlying assets down into (i) static effects (e.g., immediate reductions in asset values), and (ii) dynamic effects (e.g., investor inflows/outflows, portfolio rebalancing, and knock-on price effects resulting from large-scale buying or selling of certain assets). With regard to dynamic factors, the model suggests that, while portfolio balancing has no immediate effect, investor flows amplify the shock in an adverse scenario. As such, the investment fund sector may be less resilient to climate-related shocks than a simple static analysis might suggest. The article therefore concludes that dynamic effects may exacerbate short-term falls in asset values due to climate-related risks, which, in turn, may impede the sector's capacity to finance the green transition.

ESMA will hold a public webinar on the article's findings on 7 February 2024 (registration is possible here).

Insurance

21 December 2023 [EU] – **EIOPA publishes its Supervisory Convergence Plan for 2024**

The European Insurance and Occupational Pensions Authority (EIOPA) has published its Supervisory Convergence Plan for 2024 (here), aiming to promote a common supervisory culture and consistent supervisory practices in the EU.

As part of the practical implementation of the common supervisory culture and the development of supervisory convergence tools, EIOPA will continue working on its supervisory approach to ESG risks. Specifically, EIOPA plans (i) to assess the need to review the EIOPA supervisory handbook chapter on supervision of climate related risks in Solvency II Pillar II (including assessment of the content to be made public); (ii) to monitor the application of the EIOPA Opinion on the supervision of the use of climate change risk scenarios in Own Risk Solvency Assessment (ORSA)(here); (iii) to oversee the assessment of the materiality of climate-related risks, in particular natural catastrophes, and hold discussions on the integration of climate risk assessment in the ORSA; and (iv) to monitor and supervise greenwashing cases (both in relation to transition plans and targets) as well as test whether Supervisory Technology (SupTech) can effectively identify greenwashing cases and occurrences.

Amélie Champsaur
Partner, Paris
achampsaur@cgsh.com

Andreas Wildner
Associate, London
awildner@cgsh.com

Pierre Mathé
Associate, Paris
pmathe@cgsh.com

Camille Kernevès
Associate, Paris
ckerneves@cgsh.com