

CLEARY GOTTLIB



7 May 2024

Climate and the Financial Sector

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

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- FCA publishes final anti-greenwashing guidance
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- European Parliament approves regulation on ESG ratings
- ICMA, IsDB and LSEG publish guidance on green, social and sustainability sukuk
- EU delays sustainability reporting standards for certain sectors and third-country companies
- ESAs observe reduced investor appetite for ESG Investments

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- BCBS publishes updated Core Principles for Effective Banking Supervision

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- ESRB issues advice to EIOPA on prudential treatment of environmental and social risks

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- ECtHR rules that Switzerland failed to comply with Article 8 ECHR obligations by failing to take adequate measures to mitigate climate change
- English High Court declares UK Government's Carbon Budget Delivery Plan unlawful

General

19 April 2024 [EU] – EU issues Corrigendum to European Sustainability Reporting Standards

In late 2023, the European Commission published its first set of sustainability reporting standards (ESRS), which apply in respect of financial years beginning on or after 1 January 2024. On 19 April 2024, the EU published a corrigendum ([here](#)), effecting minor amendments to the ESRS.

23 April 2024 [UK] – FCA publishes final anti-greenwashing guidance

The UK Financial Conduct Authority (FCA) published its finalised guidance on the anti-greenwashing rule ([here](#)).

The FCA had introduced the “anti-greenwashing rule” in November 2023, as part of a package of measures on “Sustainability Disclosure Requirements” (UK SDRs). The anti-greenwashing rule requires firms to ensure that any reference to the sustainability characteristics of a product or service is (a) consistent with the sustainability characteristics of the product or service; and (b) fair, clear and not misleading.

The final FCA guidance clarifies the FCA's expectations under the rule, i.e., that sustainability references should be (a) correct and capable of being substantiated, (b) clear and presented in a way that can be understood, (c) complete (i.e., claims should not omit or hide important information), and that (d) comparisons to other products or services should be fair and meaningful. The guidance also sets out the scope of the rule and other existing requirements and related guidance.

The anti-greenwashing rule will come into force on 31 May 2024.

24 April 2024 [EU] – European Parliament approves Corporate Sustainability Due Diligence Directive

The European Parliament has approved ([here](#)) the Corporate Sustainability Due Diligence Directive (CS3D). The CS3D will introduce wide-ranging obligations on certain EU and non-EU companies to address adverse impacts across their value chain and to publish Paris-Agreement-aligned transition plans.

Following the Parliament's vote, the proposed directive still needs to be formally approved by the Council, signed and published in the EU's Official Journal. EU Member States will then need to transpose the directive's provisions into national law.

An analysis of the proposal is accessible [here](#), and an analysis of the CS3D and the German *Lieferkettensorgfaltspflichtengesetz* and the French *Loi de vigilance* [here](#).

24 April 2024 [EU] – European Parliament approves regulation on ESG ratings

The European Parliament has approved a proposed regulation on the transparency and integrity of ESG rating activities ([here](#)).

The new regulation will introduce an authorisation regime for EU-based ESG rating providers as well as certain regimes for non-EU based providers, as well as certain ongoing obligations, including with respect to organisational arrangements, disclosure and transparency, and management of conflicts of interest.

Following the Parliament’s vote, the proposed regulation still needs to be formally approved by the Council, signed and published in the EU’s Official Journal.

An analysis of the proposal is accessible [here](#).

29 April 2024 [International] – ICMA, IsDB and LSEG publish guidance on green, social and sustainability sukuk

The International Capital Market Association (ICMA), the Islamic Development Bank (IsDB) and the London Stock Exchange (LSEG) jointly published new guidance ([here](#)) on the issuance of sustainable sukuk (the primary capital market instruments in Islamic finance).

The guidance aims to foster the development of the sustainable sukuk market, by providing issuers and other key market participants with practical information on how sukuk may be labelled as “green”, “social” or “sustainability” and aligned with the ICMA Principles, including through examples, case studies and best practices. The guidance also includes data from LSEG reflecting the current state of the sustainable sukuk market.

29 April 2024 [EU] – EU delays sustainability reporting standards for certain sectors and third-country companies

The Council of the EU has approved ([press release](#)) a new directive extending the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings.

Sector-specific ESRS will now need to be issued by 30 June 2026 (i.e., 2 years later than originally envisaged), although the Commission should “endeavour” to adopt 8 of the sector-specific standards as soon as each is ready.

ESRS for sustainability reports concerning third-country undertakings will also be delayed by 2 years (to be published by 30 June 2026).

30 April 2024 [EU] – ESAs observe reduced investor appetite for ESG Investments

The European Supervisory Authorities (“ESAs”) – EBA, EIOPA and ESMA - issued their Spring 2024 Joint Committee update on risks and vulnerabilities in the EU financial system ([here](#)). The report includes the following observations:

- i. ESG funds (SFDR Art. 9 and Art. 8 funds) experienced outflows in 4Q 2023, although Art. 8 funds with “ESG” in their name had net inflows. The ESAs also noted that new disclosures under the SFDR increased transparency, despite data quality issues.
- ii. Green bond issuance slowed in H2 2023, with a 34 % decline in 2H 2023 compared to 2H 2022.
- iii. Banks’ ESG bond issuance volume increased in 2023 compared to 2022, driven by higher green senior non-preferred bond and issuance from holding companies.

Banking

16 April 2024 [International] – **BCBS publishes discussion paper on climate scenario analysis**

The Basel Committee on Banking Supervision (BCBS) published a discussion paper on the role of climate scenario analysis (CSA) in strengthening the management and supervision of climate related financial risks ([here](#)). The discussion paper follows the BCBS’ Principles for the effective management and supervision of climate-related financial risks, issued in 2022.

Noting that the BCBS had previously found that uses and methodologies of CSA vary across jurisdictions and banks, and data availability and methodological uncertainty can be limiting factors in CSA meeting its stated objectives, the discussion paper raises the following questions:

- (i) How does the role of CSA vary based on the objectives listed [in the discussion paper], and are there other prudential objectives where CSA could be relevant?
- (ii) What are the key challenges in the application of CSA and how can they be overcome?
- (iii) What are the key areas where CSA methodologies and capabilities need to be further developed to be useful and relevant for the different objectives listed in this paper?
- (iv) Are the key features listed [in the discussion paper] appropriately calibrated for a range of CSA exercises, and should other features be considered?
- (v) How does the design of CSA exercises vary depending on the objectives?
- (vi) What additional usage-specific considerations are relevant for each of the different objectives of CSA listed in this paper and why?
- (vii) Which scenario and scenario features are used for the different objectives listed?
- (viii) What features and measures could be adopted in the future to enhance the utility of currently available scenarios?
- (ix) What alternative or novel approaches could supervisors consider for CSA and how might these be used for prudential purposes?
- (x) How could the effectiveness and efficiency of supervisory exercises be improved?

Comments can be made until 15 July 2024.

25 April 2024 [EU] – BCBS publishes updated Core Principles for Effective Banking Supervision

The BCBS published an updated version of its Core Principles for Effective Banking Supervision ([here](#)).

Amongst other things, the revisions introduce a definition of climate-related financial risks and include climate risks among the types of potentially material risks that banks are required to identify, measure, evaluate, monitor, report and control or mitigate. Supervisors, in turn, must consider climate risks in their risk assessment of banks, and have the power to require banks to submit information that allows for the assessment of the materiality of these risks.

Asset Management

23 April – UK FCA consults on extending sustainability disclosure requirements to portfolio managers

Following the introduction of the UK SDRs in November 2023, the FCA now published a consultation paper on extending the UK SDR regime to portfolio management ([here](#)).

The SDRs included the anti-greenwashing rule for all FCA-authorized firms and, for asset management firms, 4 voluntary investment labels, new rules for firms marketing investment funds based on their sustainability characteristics, and associated disclosure requirements. The FCA now proposes to extend these measures to portfolio management services. For these purposes, portfolio management services are services provided to clients which comprise either (a) managing investments, or (b) private equity or other private market activities consisting of either advising on investments or managing investments on a recurring or ongoing basis in connection with an arrangement, the predominant purpose of which is investment in unlisted securities.

The consultation ([here](#)) is open until 14 June 2024.

Insurance

23 April 2024 [EU] – ESRB issues advice to EIOPA on prudential treatment of environmental and social risks

The European Systemic Risk Board (ESRB) has published its Advice ([here](#)) to the European Insurance and Occupational Pensions Authority (EIOPA) on the prudential treatment of environmental and social risks.

The Advice considers dedicated prudential treatment under Pillar I, the use of revised Solvency II provisions beyond Pillar I, the use of Level 2 and 3 provisions to support an effective implementation of the revised Solvency II Directive, and a macroprudential perspective on sustainability risks applying newly agreed provisions/tools (e.g., systemic risk buffer tailored to insurers).

The ESRB concludes that it is important to act on sustainability risks as a matter of urgency, that supervisors should make the best possible use of the new provisions/tools available under the revised Solvency II Directive, that national supervisors and EIOPA play an important role in ensuring that these new tools/provisions are transposed and implemented consistently and swiftly, and that scenario analysis could be particularly suited to better identify and help address sustainability risks.

Litigation

23 April 2024 [International] – ECtHR rules that Switzerland failed to comply with Article 8 ECHR obligations by failing to take adequate measures to mitigate climate change

In November 2020, after exhausting domestic remedies in Switzerland, the applicants (an association and 4 individuals) lodged with the European Court of Human Rights (ECtHR) an application, complaining of various omissions of the Swiss authorities in the areas of climate-change mitigation. On 9 April 2024, the Grand Chamber of the ECtHR found for the applicants, ruling that Switzerland had violated its obligations under Article 6 (Right to a fair trial) and article 8 (Right to respect for private and family life).

Following the judgment, Convention States' obligations under Article 8 require them to:

- i. take measures for substantial and progressive reduction of GHG emissions, to reach net neutrality within the next three decades;
- ii. set adequate intermediate reduction goals for the period leading to net neutrality; and
- iii. act in good time (i.e., take immediate action) to mitigate climate change and in an appropriate and consistent manner.

A detailed analysis of the judgment and its implications (including on litigation between private parties) is accessible [here](#), and a slide deck summarising the key points coming out of the judgment [here](#).

3 May 2024 [UK] – English High Court declares UK Government's Carbon Budget Delivery Plan unlawful

On 3 May 2024, the English High Court held that the Government's Carbon Budget Delivery Plan was unlawful ([here](#)). The Carbon Budget Delivery Plan had been laid before Parliament in March 2023. This had been done pursuant to obligations under the UK Climate Change Act 2008 and followed an earlier High Court judgment ([here](#)) where a prior version of the report had been declared unlawful.

The High Court upheld the following 4 (out of a total of 5) challenges brought by the applicants: (i) the Secretary of State failed to take into account mandatory material considerations; (ii) the Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies for meeting the relevant carbon budgets would be delivered in full, and this assumption was not supported by the information

as to risk to delivery with which the Secretary of State was provided; (iii) the Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational; and (iv) the Secretary of State applied the wrong legal test to the relevant statutory provisions.



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