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Insights and perspectives on governance, disclosure & litigation

ESG Matters



This update provides a summary of the latest developments, insights, and perspectives on ESG-related governance, disclosure and litigation. The feature article focuses on real estate sustainability, the opportunities for companies and the benefits of being proactive. Do you have any questions or comments on a particular topic? Please do not hesitate to reach out to our Sustainable Business & Climate Change team.

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Building a sustainable real estate industry: mandatory energy label c for office buildings

As the world grapples with the escalating effects of climate change, the urgency to reduce carbon emissions has never been more apparent. In this context, the real estate industry has a critical role to play, given its substantial carbon footprint. From 1 January 2023, all offices measuring 100m² or more must hold at least an energy label C, otherwise they can no longer be used as an office. Companies that own, have invested in, or are looking to invest in real estate must consider and comply with such legislative requirements as well as the associated environmental responsibilities.

Opportunities for companies: combining TESs and solar panels

In the quest to making existing real estate more sustainable, two key technologies have emerged as game-changers: Thermal Energy Storage-systems (TESs or 'WKO-systemen') and solar panels. These technologies can serve as integral components in the transformation of buildings into sustainable assets.

TESs leverage the earth's stable temperature to provide heating, cooling, and hot water for buildings. Retrofitting existing buildings with TESs offers the opportunity of replacing aging and inefficient central heating and HVAC-systems (heating ventilating and air conditioning) with a sustainable alternative. While the upfront costs can be substantial, the long-term energy savings and reduced carbon footprint can make it a worthwhile investment. Additionally, governments often provide incentives and subsidies to encourage the adoption of TES technology.

Solar panels are a cornerstone of sustainability efforts in real estate, as they reduce a building's reliance on the grid, lower energy bills and mitigate carbon emissions. Installing solar panels on roofs and adjacent land can also provide additional benefits, such as feeding excess energy back into the grid for additional savings and potential income, although the latter is problematic now due to congestion of the grid. Alternatives, such as the use of batteries, are currently being explored in the market.

The synergy between TESs and solar panels is particularly compelling. TESs provide energy-efficient heating and cooling, while solar panels generate clean electricity. Together, they can create a holistic and sustainable energy system for a building.

The role of companies: taking a proactive stance

In the realm of sustainability, the onus is increasingly on companies to take a proactive stance in transforming real estate. It is imperative for corporate leaders to set ambitious yet realistic sustainability goals, as companies are both catalysts for change and subjects of scrutiny. Their actions, or lack of them, affect their own bottom line as well as the global effort to combat climate change and promote sustainable practices.

Therefore, real estate investors and project funders will increasingly want to see proof and legal confirmation of the ESG elements of project. Companies that embrace their role in advancing real estate sustainability will benefit not only in terms of reputation, but also in contributing to a greener and more resilient future.

As a firm with extensive knowledge on the parallels between property law and sustainability, we provide our clients with tailored advice on all legal aspects of the sustainability transition of their real estate, from permitting to contracting and property law structuring to (green) financing.

What it means for you:

- Review your asset portfolio in light of your corporate climate policy and goals for transparency and accountability.
- Develop a comprehensive plan to improve the sustainability of key assets with customised recommendations on how to make your current real estate more environmentally friendly, reducing carbon emissions, and cutting energy costs.
- Seek legal advice on the regulatory requirements that apply to your asset portfolio and the opportunities to invest in a more sustainable future.

Contact our experts



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Spotlight on ESG developments



Governance and transition

Speech by EC President Von der Leyen: “How can we close the global clean investment gap?”

On 21 September, EC President Ursula von der Leyen delivered a [keynote speech](#) at the Global Citizen NOW climate session. She stressed the importance of closer cooperation between public and private sectors. Von der Leyen identified four areas for improvement: (i) green bonds as a key tool to mobilise capital from private investors who want to make climate-positive investments, (ii) carbon pricing as a market-based instrument, (iii) trustworthy carbon credits, and (iv) accelerating the global transition to clean energy.

Provisional agreement on empowering consumers for the green transition

On 20 September, the European Council and the European Parliament have reached a [provisional political agreement](#) on the Directive to empower consumers for the green transition. The proposal aims at enhancing consumers’ rights by adapting the Unfair Commercial Practices Directive and the Consumer Rights Directive to the green transition. Of interest are the inclusion of certain types of greenwashing as unfair market practices, the clarification regarding unfair market practice claims and the introduction of a harmonised format for voluntary commercial durability guarantees. See our [previous newsletter](#) for more information on the proposed Consumer Empowerment Directive.



EP study explores impact of EU due diligence legislation on SMEs

On 15 September, the EP published a [study](#) on the effects of the CSDDD proposal on small and medium-sized enterprises (SMEs) in the EU and third countries, using the German supply chain act (*Lieferkettengesetz*) as an example which may provide lessons for EU due diligence legislation. The study identifies key challenges which SMEs face when dealing with the requirements of the supply chain act, and discusses support measures that SMEs need or are already using. The study also provides a number of recommendations, such as targeted capacity building for SME suppliers in developing countries, and simplification of reporting requirements for SMEs in Europe.



First UN Global Stocktake report: “ambition and implementation must be accelerated rapidly”

On 8 September, the United Nations Framework Convention on Climate Change (UNFCCC) published the [Global Stocktake - synthesis report](#), which provides the most comprehensive overview of climate action since the adoption of the Paris Agreement in 2015, as well as a roadmap for governments. The technical findings highlight existing and emerging opportunities, and provide creative solutions to bridge well-known gaps. The report will serve as the basis for the first Global Stocktake meeting at the UN Climate Change Conference COP 28 in Dubai.



ECB economy-wide climate stress test: faster green transition would benefit firms, banks and households

On 6 September, the ECB published the results of its [second economy-wide climate stress test](#). The findings indicate that the best way to achieve a net-zero economy for firms, banks and households in the euro area is to accelerate the green transition. Immediate and decisive action (the accelerated transition scenario) would bring significant benefits for firms, households, and the financial system, not only by keeping the economy on the optimal net-zero emissions path (thus limiting the impact of climate change), but also by rapidly reducing their energy expenses and financial risks.



82 UN member states sign Treaty of the High Seas

Following its adoption in March of this year, 82 UN Member States (including the EU and the Netherlands) have signed the [Treaty of the High Seas](#), also known as the Biodiversity Beyond National Jurisdiction (BBJN). The Treaty's primary goal is to achieve the '30 by 30' objective, which means effectively conserving and managing 30% of the earth's land and sea by 2030. This target was established in the Kunming-Montreal Global Biodiversity Framework and aims to promote SDG 14. To accomplish this, the Treaty sets up a procedure to establish large-scale marine protected areas in the high seas. Furthermore, the treaty provides rules on the sharing of benefits from marine genetic resources and technologies, as well as rules on environmental impact assessments before conducting activities in the high seas and dispute resolution mechanisms.




Disclosure



TNFD publishes Nature-related Financial Disclosures Recommendations

On 18 September, the Taskforce on Nature-related Financial Disclosures published the final version of its [TNFD Recommendations](#), including a set of [Additional Guidance documents](#). The TNFD also published sector-specific [guidance for financial institutions](#). The TNFD Recommendations reflect the increasing attention for the interrelationships between economic activities and biodiversity, and builds upon the structure and voluntary approach of the Taskforce on Climate-related Financial Disclosures (TCFD).



Note of amendment to the proposed Dutch Act on Sustainable International Business Conduct

On 15 September, the six MPs who initiated the proposal for a Dutch Act on Responsible and Sustainable International Business Conduct (Wetsvoorstel verantwoord en duurzaam internationaal ondernemen) submitted a [note of amendment](#). In the [explanatory memorandum](#), the initiators express their desire to proceed with the proposal, pending European negotiations on the CSDDD, while taking into account the concerns expressed by various stakeholders. Both documents contain important changes and clarifications to the proposal, aimed at addressing concerns about the criminalisation of certain norms of the proposal, reducing regulatory pressure, and better aligning the proposal with Dutch corporate law and the EU CSDDD proposal. Of particular note are the removal of the mandatory separate climate plan, the adjustment of the definition of a ‘foreign company’ and the clarification that only fines, not imprisonment can be imposed for a breach of the proposed duty of care.

EC consultation on ‘SME size’ criteria

On 13 September, the EC submitted for consultation a [Draft Delegated Directive](#) amending the Accounting Directive as regards the adjustment of the size criteria for micro, small, medium-sized and large undertakings or groups. Since 2013, these ‘size thresholds’ have remained unchanged. An increase will mean that micro, small and medium-sized enterprises will not be subject to many EU financial and sustainability reporting requirements that apply to larger companies. Adoption by the Commission adoption is planned for Q4 2023.

SFDR Level 1 consultation launched by the EC

On 2 September, as part of a review of the SFDR framework, the EC published two targeted public consultation papers aimed at identifying potential shortcomings in the Sustainable Finance Disclosure Regulation (SFDR) framework. The EC appears to be considering potentially substantial adjustments in areas such as legal certainty, user-friendliness and the regulation’s ability to combat greenwashing. Given that the SFDR is often treated in practice as a labelling system, the EC is considering an ESG categorisation system for financial products instead of the disclosure regime that the SFDR intended to introduce. In addition, the EC is exploring whether entity-level disclosure is appropriate in addition to product-level disclosure. The consultation comprises two documents: [one](#) for financial market participants, investors, NGOs, relevant public authorities and national regulators, and a [second document](#) targeted at a broader group of stakeholders with a more general knowledge of the SFDR. Both consultations are open until 15 December 2023.



Litigation

State of California sues carbon majors for alleged climate damage and misinformation


On 15 September, the State of California added another [case](#) to the growing list of state climate lawsuits against carbon majors. The state filed a lawsuit against several carbon majors, their subsidiaries, and an industry group, alleging that the defendants have caused public nuisance and have knowingly misled the public and policymakers. Among other things, the state is asking the court to order the defendants to compensate the damages that have been or will be caused by climate change.

ECB's Frank Elderson urges banks and supervisors to get up to speed with climate litigation and risk mitigation

In his [keynote speech](#) of 4 September at the ECB Legal Conference, Frank Elderson discussed the rise of climate and environment-related litigation, which is increasingly targeting corporates, including in the financial sector. Such litigation is becoming a major source of risk that needs to be properly anticipated and managed by banks as well as supervisors. Elderson offered banks and regulators two strands of thought. The first is the 'bread-and-butter guidance': get up to speed on litigation trends and mitigate the associated risks for your institution, referring also to the Urgenda and Shell cases. The second refers to the importance of putting in place Paris-aligned transition plans while ensuring that an accurate data set and proper internal governance is in place.

NGFS reports on climate-related litigation trends and micro-prudential supervision

On 1 September, the Network of central banks and supervisors for Greening the Financial System (NGFS) published two complementary reports on climate-related litigation risks. The [first report](#) provides an update on the trends and developments in climate-related litigation risks and how this may affect the financial sector. It highlights, amongst others, that climate-related litigation is growing rapidly, in terms of the volume of cases being initiated as well as the legal arguments being used, and the diversity of the addressees of such claims. Such litigation can have a significant impact on the financial sector. The [second report](#) looks at how these developments need to be stressed from a supervisory perspective. The report highlights the important of supervisors identifying risk drivers, transmission channels and exposures in order to properly assess the resulting financial risks for financial institutions, and using a risk-based approach to prioritise supervisory activities.



DNB President Klaas Knot calls for action to curb nature-related financial risks

During his [speech](#) at the launch event of the NGFS reports, Klaas Knot urged for immediate action to assess and reduce the risks that the nature crisis poses to the economy and the financial system. “Services such as clean water, healthy air, food and materials are all essential to our economies and our very existence as humans. As central banks and supervisors, we have every reason to be concerned, because it’s an illusion to think we can preserve financial stability if this degradation continues.” Knot stressed that starting now, working together and keeping all eyes on the summit are essential to make meaningful progress.

USD 19 million settlement for greenwashing allegations by US financial supervisor

The US Securities and Exchange Commission (SEC) [announced](#) that asset manager DWS has agreed to pay USD 19 million in order to settle the SEC’s allegations of ESG misstatements (greenwashing). The SEC alleged that DWS made misleading statements about its controls for incorporating ESG factors into research and investment recommendations for ESG-integrated products, including certain actively managed mutual funds and separately managed accounts.

Hearings in ECtHR climate case of Duarte Agostinho and others v. Portugal and 32 other states

On 27 September, the Grand Chamber of the European Court of Human Rights (ECtHR) held hearings in the climate case of Duarte Agostinho and others (Portuguese youth) v. Portugal and 32 other states. In this case, the plaintiffs claim that the defendants are failing to do their part to avert climate catastrophe, thus allegedly acting in breach of their obligations under the European Convention of Human Rights. A recording of the hearings is available [here](#). During the hearings, the parties have amongst others responded to a number of [questions](#) (text in French) of the Grand Chamber. The Grand Chamber will now commence its deliberations on a decision in the case.



ITLOS hearings on climate responsibilities of states towards the marine environment

From 11 to 25 September, the International Tribunal for the Law of the Sea (ITLOS) held hearings on the responsibilities of states in regard to climate change under the UN Convention on the Law of the Sea (UNCLOS). More specifically, the hearings addressed the effects of climate change on the marine environment. The hearings follow the [request](#) of a group of island states on 12 December 2022 and have been [recorded](#). The ITLOS is now deliberating on this matter and expects to issue its advisory opinion by early to mid-2024. The group of island states has also submitted requests for climate change-related advisory opinions to the Inter-American Court of Human Rights and the International Court of Justice.

We regularly share our ESG insights and perspectives on our corporate website. If you or members of your team would also be interested to receive updates, you are most welcome [to sign up](#).

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