

January 2024

Insights and perspectives on governance, disclosure & litigation

ESG Matters



This monthly update helps you keep up with the latest developments in ESG governance, disclosure and litigation. In this edition, we take a special look at the Belgian Climate Case (*Klimaatzaak*).

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1 Highlight: Belgian Climate Case (*Klimaatzaak*)

The end of 2023 saw a landmark ruling in ESG litigation. In the Belgian climate case (*Klimaatzaak*), the Brussels Court of Appeal recently imposed a 55% emissions reduction order for 2030 on three Belgian governments. It is the most ambitious emissions reduction order imposed on a government by a standing judgment. While the judgment may still be overturned in cassation, the Court's extensive and partly novel reasoning is relevant to future climate litigation against both governments and corporates.

The judgment: a new development in climate litigation

In short, the Court [ruled](#) that the Belgian Federal Government, the Brussels Metropolitan Region and the Flemish Region failed to 'do their part' in the reduction of global greenhouse gas emissions. In doing so, the governments violated Articles 2 (right to life) and 8 (right to family life) of the European Convention on Human Rights (ECHR), as well as their duty of care based on Belgian tort law. As a relief, the Court ordered the governments to reduce Belgian greenhouse gas emissions by 55% by

2030 compared with 1990. The claim against the Walloon Region was dismissed, as it had achieved a 40% reduction in emissions in 2020 and was taking measures to implement the 55% reduction target.

A step further than *Urgenda*: at least 55% reduction required by 2030

The Court's reasoning that underpins the 55% reduction order is strongly influenced by the reasoning of the Dutch Supreme Court in the *Urgenda* climate case. The Court initiates by stating that Articles 2 and 8 ECHR require the governments to take the minimally required measures to do their part in preventing the crossing of a dangerous climate threshold for the right to life and private life of their citizens. Based on scientific and (international) political consensus, the Court establishes this dangerous threshold at 1.5°C.

The Belgian Court goes further than the Dutch Supreme Court in *Urgenda* by setting the most ambitious emission reduction order imposed on a government by a standing judgment. The claimants asked for a reduction order of 61% by 2030, which would align with a 2/3 probability of limiting global warming to 1.5°C. The Court rejected this claim, because there is political leeway in determining what probability of limiting global warming to 1.5°C is acceptable. Because of this, the Court cannot establish that 61% is the *minimum* target required to comply with Articles 2 and 8 ECHR.

However, the Court considers, based on European climate laws, that there is political consensus that EU Member States should reduce their greenhouse gas emissions by at least 55% by 2030 in order to avoid dangerous global warming. The Belgian State has also bound itself to this reduction target by the Government's coalition agreement of 30 September 2020. On these grounds and taking into account the best available climate science, the Court finds that Articles 2 and 8 of the ECHR require the Belgian governments to reduce Belgian emissions by at least 55% by 2030 and orders them to do so. It is left to the governments to choose the (legislative) means to achieve this target.

The binding reduction targets for EU Member States are pivotal in establishing the 55% reduction target for the Belgian governments. As such, the judgment shows how increasingly binding climate legislation, against the backdrop of the increasing human rights and environmental impacts of climate change, will increasingly provide new grounds for climate litigation in the years to come. The question remains whether a reasoning similar to the one developed in the Court's judgment could be developed to impose a fixed emissions reduction goal on private actors.

Penalty payments

The claimants also requested that the governments be subject to periodic penalty payments of EUR 1 million for each month of non-compliance with the Court's injunction as of 1 August 2031. NGO *Klimaatzaak* stated that it would spend any

penalty payments received in accordance with its statutory goals. The Court confirmed that it could indeed impose periodic penalty payments on the defendant governments for the benefit of NGO *Klimaatzaak* in order to induce them to comply with the Court's injunction, as long as the governments remain free to choose the measures to achieve the ordered result.

While the Court saw no reason to impose penalty payments at this stage, it suspended the decision on this matter and ordered the governments to provide the Court in due course with their EC emissions reports for the years 2022 to 2024 and the latest version of their national energy-climate plan. After receiving these documents, the Court will decide whether it will impose penalty payments. If it intends to do so, the Court will have to address several fundamental questions, including on the democratic legitimacy of an NGO receiving and spending large sums of state funds.

What this means for you:

- Key scientific and legal emissions reduction deadlines are approaching and the consequences of climate change are materialising. In light of these circumstances, courts around the world appear increasingly willing to force governments to 'do their part' to avoid dangerous climate change.
- Rulings such as the one in the Belgian *Klimaatzaak* can accelerate legislative processes and lead to firm legislative requirements being imposed on companies and organisations in the relevant jurisdictions. The indirect impact on corporations is apparent and important to be prepared for.

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Spotlight on ESG developments




Governance & transition

Dutch Ministry of Finance launches consultation on climate measures in the financial sector

On 21 December, the Dutch Ministry of Finance launched an [internet consultation](#) on additional measures to strengthen the financial sector's contribution to the climate transition. The consultation concerns both legislative and non-legislative measures. As described in the [consultation document](#), it specifically seeks input on three legislative options: (i) the inclusion of a duty of efforts to align loans and investments with the targets of the Paris Agreement in the Dutch financial supervision regime; (ii) an obligation to prepare and implement a specific climate plan; and (iii) additional legal obligations on engagement. Participants are requested to specifically consider European legislative initiatives in their answers. Decision making on the results of the consultation will be left to the next cabinet. The consultation closes on 15 February 2024.

ESMA presents methodology for climate risk stress testing and analysis of the financial impact of greenwashing controversies

On 19 December, the European Securities and Markets Authority (ESMA) published two articles: (i) a risk analysis on [Dynamic modelling of climate-related shocks in the fund sector](#) and (ii) a risk analysis on the [Financial impact of greenwashing controversies](#). The first article presents a methodological approach to modelling climate-related shocks in the fund sector, which includes dynamic impacts, such as investor inflows and outflows and portfolio rebalancing by managers. The analysis focuses on the overall direction of these effects, and shows that investor outflows can amplify fund value losses following an initial shock. The second article explores the impact of greenwashing controversies on companies' financial performance, and shows how data on past greenwashing controversies can be useful for monitoring greenwashing-related risks. It also outlines the challenges of using such data.



ECB and ESRB report ‘Towards macroprudential frameworks for managing climate risks to the EU financial system’

On 18 December, the European Central Bank (ECB) and the European Systemic Risk Board (ESRB) published a [joint report](#) setting out three detailed macroprudential frameworks for managing risks to the EU financial system. The first framework covers financial stability risk surveillance. It takes stock of advances in climate risk impact measuring and modelling, and proposes a list of indicators for regular financial stability risk monitoring. The second framework concerns macroprudential policy options. It outlines the features of a robust strategy as well as an initial operational design based on existing instruments, which can be scaled up as further information and more tailored policy options emerge. The third framework takes a first look at prospective financial stability impacts stemming from nature degradation, which could exacerbate the financial stability impacts of climate change.

EBA publishes opinion and report on green loans and mortgages

On 15 December, the European Banking Authority (EBA) published an [opinion](#) and [report](#) on green loans and mortgages, in response to a call for advice from the European Commission. The EBA highlights that green lending currently represents a limited share of the banking sector’s overall lending. In order to facilitate a more active participation of banks in the green loans market, the EBA proposes, amongst others, the introduction of a voluntary EU label for green loans based on a common EU definition. The EBA also proposes to integrate the concept of green mortgage and its key sustainability features in the Mortgage Credit Directive.



Provisional agreement on the CSDDD

On 14 December, the Council and European Parliament [reached](#) a provisional agreement on the Corporate Sustainability Due Diligence Directive (CSDDD). The CSDDD will require large companies (including certain non-EU companies) and mid-size companies active in ‘high-risk’ sectors to conduct due diligence on human rights and environmental impacts in their own operations and their subsidiaries’ operations, as well as the operations of ‘business partners’ in their ‘chains of activities’. Notable changes to the Commission proposal include that the mandatory climate plan must align with the European climate neutrality targets, including fossil fuel-related exposures. Among others, the plan should contain time-bound reduction targets in five-year steps from 2030 to 2050 for the company’s scope 1, 2 and 3 emissions.

Following debate on this topic, financial service providers will only have to conduct due diligence on their own and upstream operations (subject to a review clause for future inclusion of downstream operations), while also being in scope of the climate plan obligation.

The disclosure requirements of the CSDDD will be aligned with the CSRD. Disclosures will need to be accessible through the European Single Access Point (ESAP). National supervisory authorities will be able to impose a minimum maximum penalty payment of 5% of the company’s net worldwide turnover if CSDDD provisions are violated. The provisional agreement also specifies the civil liability rules, for instance setting a minimum limitation period of five years and adding that companies can be held liable if they ‘intentionally or negligently’ failed to prevent, mitigate or end an adverse impact as listed in Annex I. The provisions on directors’ duty of care were deleted. A vote on the final text is expected in March 2024. See [here](#) for further insights.

EBA publishes roadmap on the implementation of the EU banking package

On 14 December, the EBA published its [roadmap](#) on the implementation timeline of the EBA mandates under the EU banking package that implements the final Basel III reforms in the EU. The banking package encompasses several innovations in the prudential framework for credit institutions. The first phase of the roadmap will also see the first mandates under the Capital Requirements Directive (CRD) in the area of ESG, which is reaffirmed as a clear EU priority.



NGFS publishes recommendations for assessing nature-related economic and financial risks

On 13 December, the Network for Greening the Financial System (NGFS) published [guidance](#) that addresses the growing consensus that nature degradation poses risks to individual financial institutions and the financial system in general. The guidance (i) suggests approaches for developing narratives that could serve as starting points for assessing nature-related financial risks; (ii) reviews a range of modelling approaches for nature-economy models and biophysical models; (iii) examines alternative modelling approaches; and (iv) concludes with a list of options for central banks and supervisors to develop quantified nature-related scenarios to guide them in responding dynamically to emerging nature-related risks.



EIOPA launches consultation on the prudential treatment of sustainability risks

On 13 December, the European Insurance and Occupational Pensions Authority (EIOPA) launched a [consultation](#) on the prudential treatment of sustainability risks by insurers. This consultation paper follows a 2022 [discussion paper](#) which outlined the scope, methodologies and data sources for the analysis on prudential treatment of sustainability risks. The consultation focuses on three conceptual areas: (i) the potential link between prudential market risks in terms of equity, spread and property risk and transition risks; (ii) the potential link between non-life underwriting risks and climate-related risk prevention measures; and (iii) the potential link between social risks and prudential risks, including market and underwriting risks. The consultation closes on 22 March 2024.




Disclosure



EFRAG publishes three draft ESRS implementation guidance documents

On 22 December, the EU's Financial Reporting Advisory Group (EFRAG) published its first draft ESRS implementation guidance documents for public feedback. Draft [EFRAG IG 1](#) deals with the materiality assessment requirements of the European Sustainability Reporting Standards (ESRS). Draft [EFRAG IG 2](#) addresses the value chain aspects of the ESRS. [Draft EFRAG IG 3](#) contains the detailed ESRS datapoints implementation guidance (as a Microsoft Excel workbook) with an accompanying [explanatory note](#). Stakeholders can provide feedback through the respective [surveys](#) until 2 February 2024.



Third draft EC Notice with FAQs about the reporting of Taxonomy-eligible and Taxonomy-aligned economic activities and assets

On 21 December, the European Commission published a [draft Notice](#) on the interpretation and implementation of certain legal provisions of the Disclosures Delegated Act under Article 8 of the EU Taxonomy Regulation, regarding the reporting of Taxonomy-eligible and Taxonomy-aligned economic activities and assets. The two previous Commission notices focused mainly on non-financial undertakings. This notice aims to provide financial undertakings with further guidance on the disclosure of their alignment with the EU Taxonomy applicable from January 2024, in the form of replies to Frequently Asked Questions (FAQs) on the reporting of their KPIs.

Council agrees on negation mandate on ESG ratings

On 20 December, the Council determined its [negotiating mandate](#) for a proposed regulation on ESG ratings, with the aim of boosting investor confidence in sustainable products. It is interesting to note that the Council (i) clarified the circumstances under which ESG ratings fall within the scope of the regulation and provided further details on the applicable exemptions; (ii) introduced a lighter, temporary and optional three-year registration regime for existing small ESG rating providers and new small market entrants; and (iii) introduced the possibility for ESG rating providers not to have a separate legal entity for certain activities, provided that there is a clear distinction between the activities and that they take measures to avoid conflicts of interest. Inter-institutional negotiations are expected to start in January 2024.

ESMA launches consultation on draft guidelines on enforcement of sustainability reporting under CSRD

On 15 December, ESMA [launched](#) a consultation on [draft guidelines](#) on the supervision of sustainability reporting by national competent authorities (NCAs). The draft guidelines cover topics such as (i) basic concepts (e.g. the objective of enforcement); (ii) the internal organisation of enforcement bodies; (iii) the selection of issuers whose sustainability information is to be verified; (iv) the verification of sustainability information; (v) the enforcement action to be taken if a violation is discovered during verification; and (vi) the European coordination of enforcement. The consultation is open until 15 March 2024. ESMA expects to publish the final guidelines by Q3 2024.




AFM welcomes the introduction of sustainability product classifications under the SFDR

On 14 December, the Dutch Authority for the Financial Markets (AFM) published its [response](#) to the European Commission's consultation on the Sustainable Finance Disclosure Regulation (SFDR). The AFM supports a transition to sustainability labels that are more consumer-friendly than the current transparency categories. The AFM believes that a system with product classifications ('transition', 'sustainable' and 'sustainable impact') will be better tailored to investors' perceptions and experiences and will facilitate sustainable investment decisions. The AFM also supports minimum disclosure requirements for all financial products, including 'grey' and 'brown' products. The AFM's response is based on its previously published [position paper](#).

ESMA proposes changes and updates timeline for its guidelines on funds' names

On 14 December, ESMA published a [statement](#) updating its plans for the adoption of guidelines on funds' names using ESG- or sustainability-related terms. The statement follows a [consultation paper](#) published in November 2022 and the responses to it. Of note are the following changes to the guidelines: (i) the introduction of a new category for transition-related terms; (ii) the separation of 'E' from 'S' and 'G' terms; and (iii) the clarification that funds using 'transition'- or 'impact'-related terms in their names should ensure that the relevant investments generate measurable impacts or are on a clear and measurable path towards social or environmental transition. ESMA will postpone the adoption of the final guidelines to allow for full consideration of the outcome of the reviews of the Alternative Investment Fund Managers Directive and the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive.




Platform on Sustainable Finance calls for feedback on proposals for EU Taxonomy-aligning benchmarks

On 13 December, the Platform on Sustainable Finance (PSF) [published](#) for feedback a [draft report on two voluntary EU taxonomy-aligning benchmarks](#) (TABs). EU Taxonomy-aligning benchmarks are defined as benchmarks where the underlying assets are selected, weighted or excluded in such a manner that (i) the resulting benchmark portfolio is on a scaling environmentally sustainable CapEx trajectory; while (ii) the non-environmentally sustainable CapEx proportion is on a decarbonisation trajectory and is also constructed in accordance with the minimum standards laid down in the delegated acts of Paris-Aligned Benchmarks (EU PABs). The two proposed types of benchmarks are pursuing similar objectives, but differ in terms of their level of restrictiveness and ambition. EU TABs with exclusions are designed for more ambitious climate-related investment strategies and characterised by stricter activity exclusion requirements. EU TABs without exclusions allow for greater diversification and serve the needs of institutional investors with reciprocal business relationships with fossil fuel issuers. The consultation closes on 13 March 2024.

ESMA to launch a CSA on ESG disclosures for benchmark administrators

On 13 December, ESMA [announced](#) that it will launch a Common Supervisory Action (CSA) with National Competent Authorities (NCAs) on ESG disclosures under the Benchmarks Regulation (BMR). The CSA will focus on supervised benchmark administrators, located in the Union or in a third country that have obtained authorisation, registration, recognition or endorsement of their benchmarks under the BMR. The CSA will cover (i) disclosure of ESG factors in the benchmark statement and benchmark methodology; and (ii) specific disclosure requirements related to the climate benchmarks methodology. This is the first CSA for ESMA in its role as a direct supervisor of benchmark administrators.



EIOPA launches public consultation on its draft opinion on sustainability claims and greenwashing in the insurance and pensions sectors

On 12 December, the European Insurance and Occupational Pensions Authority (EIOPA) [launched](#) a consultation on its [draft opinion](#) setting out four principles that should be observed when providers make sustainability claims. Sustainability claims should be (i) accurate, precise, and consistent; (ii) kept up to date; (iii) substantiated with clear reasoning and facts; and (iv) their substantiation should be accessible by the targeted stakeholders. To make the proposed principles more concrete and to demonstrate how greenwashing can occur in practice, EIOPA has compiled examples of good and bad practices for each principle. The consultation closes on 12 March 2024.

ESMA publishes an update to the ESEF XBRL taxonomy files 2022 and ESEF Conformance Suite 2023

On 7 December, ESMA published an update to the [European Single Electronic Format \(ESEF\) XBRL taxonomy 2022 files](#) and the [ESEF Conformance Suite 2023](#) to facilitate the implementation of the ESEF Regulation. It is limited to minor corrections aimed at improving usability, and updated Conformance Suite test fields.

Provisional agreement on the Ecodesign Regulation

On 4 December, the Council and the EP reached a [provisional agreement](#) on a Regulation for Ecodesign requirements for sustainable products, which will replace the existing Directive of 2009. The new regulation will cover almost all product categories. It establishes a harmonised framework for setting requirements for product groups to make them energy- and resource-efficient, as well as more durable, reliable and circular. It would also introduce a ban on destroying unsold clothing and footwear, which could be extended to other product groups at a later stage. Lastly, the regulation would introduce a 'Digital Product Passport' containing information on the product's environmental sustainability.



IOSCO publishes report on supervisory practices to address greenwashing

On 4 December, the Board of the International Organization of Securities Commissions (IOSCO) published a [report](#) on supervisory practices to address greenwashing. The report follows the IOSCO on [sustainability-related practices and disclosures](#) and [ESG Ratings](#), both published in November 2021, and the subsequent [Call for Action](#) published in November 2022. The report provides an overview of initiatives undertaken in different jurisdictions to address greenwashing, as well as regulatory best practices. The report also highlights the challenges in implementing the IOSCO recommendations. These challenges include data gaps, a lack of transparency, quality, and reliability of ESG ratings, inconsistent labelling and classification of sustainability-related products, evolving regulatory approaches, and capacity building needs.

ESAs: final report on Principal Adverse Impacts and financial product disclosures under SFDR

On 4 December, the three European Supervisory Authorities (ESAs) published the [final report](#) containing draft regulatory technical standards (RTS) on the review of Principal Adverse Impacts (PAI) and disclosure of financial products in the SFDR Level 2 Delegated Regulation. The ESAs propose to: (i) extend the list of social indicators for PAI; (ii) refine a number of other PAI indicators for adverse impacts; and (iii) introduce new financial product disclosures on greenhouse gas (GHG) emission reduction targets. Notably, the ESAs went beyond the explicit request of the EC by considering further changes, such as enhanced disclosure of how sustainable investments comply with the ‘do not significantly harm’ (DNSH)-principle and simplification of the templates contained in Annexes II to V of the SFDR Delegated Regulation.



Litigation



ACM addresses sustainability claims of Dutch supermarket chain

On 21 December, the Netherlands Authority for Consumers and Markets (ACM) [announced](#) that Dutch supermarket chain Plus will remove unsubstantiated sustainability claims from its stores and brochures, following a 'normative discussion' with the supermarket chain. The supermarket's green claims, such as 'climate neutral supermarket', 'conscious' and 'sustainable', were based on external research on consumer perceptions of the supermarket, but lacked factual substantiation. The supermarket chain has agreed to remove the green claims and will apply the ACM's updated [Guidelines on sustainability claims](#). The enforcement action follows large-scale greenwashing enforcement actions by the ACM in H2 2022.



State of Tennessee subpoenas BlackRock in anti-ESG lawsuit

On 18 December, the Attorney General of the US State of Tennessee [subpoenaed](#) BlackRock Inc. in an ESG-related consumer protection lawsuit. This follows a [subpoena](#) issued on 15 December by the Judiciary Committee on the US Congress regarding possible antitrust law violation by BlackRock's agreements to decarbonise its assets. The state alleges that BlackRock made misleading statements about the influence of ESG considerations on its investment strategies. The complaint states that BlackRock has made firm-wide ESG-related commitments, while at the same time marketing several funds as exclusively pursuing financial goals. The State argues that these two positions are fundamentally conflicting. BlackRock's statements that ESG is a driver of companies' financial performance would not be supported by facts and contradict other statements made by BlackRock. The State requests, among others, a civil fine of USD 1.000 for each violation of the Tennessee Consumer Code and restoration of damages.



Australian superannuation fund to pay USD 11.3 million greenwashing fine

On 7 December, the Australian Securities and Investments Commission (ASIC) requested the Australian Federal Court to approve a settlement agreement with Australian superannuation fund Mercer. Under the terms of the agreement, the fund will pay USD 11.3 million to settle the greenwashing case brought by ASIC earlier this year. The case concerned the fund's statements that it excluded investments in the fossil fuel, gambling and alcohol sectors, when in fact it had extensive holdings in these sectors. The Federal Court is expected to approve the settlement agreement. Two other greenwashing cases brought by ASIC are still pending at the Australian Federal Court.

French company La Poste ordered to improve its due diligence on social circumstances of subcontractors

On 5 December, the Paris Judicial Tribunal in first instance [ruled](#) that the 2019 and 2020 due diligence plans of post company La Poste violated the French *loi de vigilance* or due diligence law. The SUD PTT trade union brought the case after it was discovered that undocumented workers were illegally working night shifts at a French subcontractor of a La Poste subsidiary. The tribunal ruled that La Poste's risk mapping as prescribed by the *loi de vigilance* did not adequately reflect the risks associated with, among other things, illegal labour, resulting in a lack of the necessary evaluation procedures for subcontractors. The tribunal therefore ordered La Poste to improve its due diligence plan by adding a risk map, to establish subcontractor assessment procedures that are based on the specific outcomes of its risk mapping, and to improve its whistleblowing mechanism and internal controls. The union's ancillary claims were rejected. Several other *loi de vigilance*-based cases against French corporates are pending.

Friends of the Earth files OECD complaint against US credit agency for fossil fuel project investments

On 5 December, Friends of the Earth filed a [complaint](#) with the OECD National Contact Point (NCP) against the Export-Import Bank of the United States (US EXIM). The NGO highlights EXIM's role in projects that would not otherwise be financed and argues that EXIM fails to act in line with governmental commitments, the Paris Agreement and the Clean Energy Transition Partnership as it invested almost USD 1 billion in the fossil fuel sector in 2023. The NGO calls on EXIM to bring its policies in line with the OECD Guidelines, by fully and publicly reporting on its total greenhouse gas emissions, including financed emissions, and by setting clear and rapid goals to align its portfolio with the 1.5°C goal of the Paris Agreement. If the dialogue between the parties fails, the NCP is expected to issue a statement on the case in approximately one year, which may include recommendations to EXIM.

Do you have any questions or comments on a specific ESG topic? Please do not hesitate to contact our Sustainable Business & Climate Change team. If you or members of your team would also like to receive updates, please [sign up](#).

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