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ESG Legal Outlook 2022

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ESG Outlook 2022

2022 will provide a practical demonstration of the appetite for ESG-led change that governments, major corporates and financial institutions all have, and how far this will feed into smaller businesses and everyday life.

COP26 in Glasgow resulted in a series of decisions and voluntary declarations that were actually towards the upper end of expectations. It also created a mechanism for States to return to COP27 in Cairo with improved national plans and rebooted the international carbon markets. It should become clearer to what extent a continued divergence remains between the willingness of governments to communicate to people about and set policy on the climate transition and the regulatory expectations of the private sector. We expect plenty more regulation from the EU and the UK, and some developments also in the US, albeit that any SEC proposals will likely face challenge through the courts. And we should also see further evidence of the emerging physical and related geopolitical and economic risks and opportunities that have started to form a part of ordinary life. In all this, litigation is likely to continue to play its part as a driver of policy and behaviour change. Increasingly financial institutions are engaging on a firmwide basis with how to implement ESG policies across their businesses and the sell side is becoming much more aware of the commercial and regulatory imperatives facing buy side firms which need to be factored into product design. ESG disclosures on a product and an entity basis will be a focus of attention for the next few years as the requirements flex to embed ESG factors into regulation and financial disclosure requirements and institutions and their professional advisors build out capacity to manage them effectively.

In the AGM season we anticipate that corporates and listed financial institutions will continue to be engaged in relation to "Say on Climate" votes. While proxy advisors are signalling some uneasiness about this trend, investor focus on transition strategy remains strong and the move towards detailed scrutiny is likely to build. There are real issues to navigate, as transition plans currently vary significantly in their levels of sophistication and it is easy to foresee bumps in the road on delivery and increasing impatience for laggards and with those who talk a good game but fail to deliver. Corporates will want to have good stakeholder engagement and to ensure investors are as well apprised of areas of difficulty (and the reasons for that difficulty) as they are in relation to successful outcomes.

A number of investors are starting to pay more attention to biodiversity and nature-based solutions and we envisage scrutiny of corporate impacts and activities in this area. The linkage between the interventions needed to address climate change and to improve biodiversity will increasingly come to the fore and nature-based reporting will become more important, including through the Taskforce on Nature-related Financial Disclosures, based on the widely applied TCFD. There is likely to be growth in the sometimes controversial areas of insets and offsets, including many that go beyond carbon and deliver nature or social benefits as well, and we can expect much more engagement in relation to sustainable agriculture and food supply chains. The outcome of the Biodiversity COP is also due in May.

More conventionally, the drive to replace older, high carbon technologies continues at pace. It feels like a tipping point in the automotive sector was reached last year, but there is much more to be done there and in other sectors, notwithstanding spikes in fossil fuel demand as the world resets following two years

Global themes

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of pandemic affected performance. There are real opportunities for funds focused on these new areas as low carbon infrastructure gets developed at speed and scale over the coming decade or two. With that in mind, funds and privately owned companies can expect UK and EU regulatory and global investor led moves to drive disclosure and to ensure visibility of their path towards sustainable activities.

As regards the "S" of ESG, attention will be not limited to demonstration of diversity and inclusion at board level, though this is likely to feature strongly as the focus on stewardship grows. In Europe and the US, social issues are rapidly moving up the agenda: in Europe proposals are expected to require large companies to implement environmental and social due diligence requirements across their group and into the supply chain. At a commercial level, factoring the social elements into a "Just Transition" is likely to be essential to the success of any heavily carbon based economy whatever the region, and there is a growing understanding of the importance of social planning to delivery of environmental aims. However, real challenges remain: social impacts are often harder to deliver and more controversial than environmental technological improvements. We can expect disclosure and supply chain obligations to encourage investments perceived to bring socially positive impacts, but these may prove harder to deliver in some places than others.

Good governance is critical to the successful conduct of business during such a period of significant change and complexity. As firms and businesses adjust to the growing expectations that ESG factors are integrated into their strategy and decision making, governance will be an important tool in identifying and solving problems where they arise. Having an informed and engaged board to provide oversight, executives with the right skill set to propose strategy, and a process for rolling out any transition plan across the business and its stakeholders with appropriate training and information for all involved will all help to explain and deliver the changes you have determined to be necessary. These structures and mechanisms also support any business in reducing its risks of greenwashing by ensuring controls are in place on sustainability related claims, disclosures and other communications.

Vanessa Havard-Williams – Global Head of ESG, London

Click to go to the relevant theme

Global themes

"Transition plans will continue to influence the type of activity we will see in the market, with record numbers of joint ventures and strategic M&As continuing to take place. Governments are starting to mandate detailed climate disclosure, and listed companies face increased investor pressure to deliver credible plans to reach net zero. Throughout this journey, data will play a crucial role in ensuring science-based targets are met and actual steps are being taken."

Simon Branigan – Global Head of Corporate, London

In this Outlook we provide an overview of some of the key global ESG legal themes for 2022 and the trends we see around the world.

What next in a post-COP26 world?

As the dust settles on COP26, what can we expect its legacy to be?

> Governments have agreed that we should be aiming to keep the increase in the global temperature to no more than 1.5°C rather than 2°C. According to the IPCC climate experts if this can be delivered, it will make a big difference.

> But at present, countries' current climate targets are likely to lead (on a best case analysis) to a 1.8°C increase or (on a more realistic but depressing analysis) a 2.4°C increase. So global leaders have agreed to revisit their 2030 climate targets before the next COP with the aim of doing better.

> Many companies were disappointed that global leaders were unable to send a more ambitious message at COP26. The Fringe events at COP26 demonstrated that a general consensus amongst key corporates and financial firms is that "net zero is now an organising principle of business". Now the business sector needs to focus on turning all its climate talk into action (see Climate transition plans section).

> We are expecting global capital flows increasingly to move towards net zero alignment. Under the Glasgow Climate Pact, investment in coal will be "phased down" (rather than "phased out") so although some key emerging economies are still heavily reliant on coal at present, bankers will increasingly be asking themselves whether this is something their investors want them to continue with. A number of global leaders have also indicated they will be targeting greater regulation of methane emissions in the energy sector.

> In the EU, the debate is more focused on whether natural gas is the "next coal" or, more realistically, whether it is needed as a bridging technology and energy source, provided future investment is focused on gas plants and infrastructure that are carbon capture, utilisation and storage ("**CCUS**") or hydrogen-ready. The inclusion (or otherwise) of nuclear power in the EU's green taxonomy is also causing a fair amount of controversy amongst Member States.

> COP26 pledges have placed technology at the heart of the solutions to climate change, and this will likely bring further momentum to climate tech investment. Delivering this technological innovation will require trillions of dollars of investment and rapid change across all aspects of the global economy. Governments will need detailed carbon reduction policies and broad ranging investment frameworks to enable the private sector to invest with confidence. Businesses will need to undertake more technology focused transactions and projects to transform the way they do business.

> One major win from COP26 was the newly agreed "Paris rulebook" which is expected to invigorate the carbon markets. Carbon markets provisions had been stuck for some years pending the agreement that was finally achieved in Glasgow. Article 6.4 creates a structure for a new market mechanism and allows for transition from and wind down of the Kyoto Clean Development Mechanism. This is also expected to give the voluntary carbon market a significant boost.

Global themes

Climate transition plans: "walking the talk" and increased stewardship and engagement

The focus in 2022 will be on ensuring that net zero targets and pledges made by businesses are translated into concrete and robust plans. Best practice will involve adopting externally verified science-based targets, setting interim targets not just 2050 net zero targets, devising a well thought-out action plan and disclosing climate data in line with the recommendations of the Task Force on Climate-related Financial Disclosures ("**TCFD**"). The effects of these plans will travel far down supply chains as corporates act on their commitments.

This also highlights the important role that increased investor stewardship and shareholder engagement play in holding those who have made climate pledges to account. 2021 gave us a taste for what's likely to come in 2022 on this front – from "Say on Climate" votes, to shareholder revolts at AGMs and investor coalitions setting out their net zero expectations for 2022. A clear message is emerging: investors on the whole would still prefer to engage with investee companies rather than challenge board appointments or divest, but patience is running out with climate laggards.

It's not just corporates who will be facing the pointy edge of climate engagement – asset managers can also expect asset owners to step up stewardship efforts and banks will also increasingly be asked to show how their financing activities and portfolios align with their climate pledges.

A number of governments and regulators (including in the UK) are considering making the publication of transition plans mandatory and have encouraged more active stewardship to help drive the net zero transition.

Greenwash fears

With the appetite for ESG financial products showing no signs of abating, and pressure on corporates and the financial sector alike to "walk the talk" on their climate pledges, comes concerns about greenwash allegations. This can take various forms, for example how an ESG fund is labelled and structured, whether climate issues have been properly factored within an organisation's decision-making process, whether a net zero claim or public disclosure in an annual or sustainability report is consistent with the company's climate strategy or whether a green claim in product marketing materials can be substantiated.

Regulators (in particular financial regulators) have said that greenwash is high on their agenda for 2022 and non-governmental organisations are also focused on the area. Along with brand damage and regulatory investigation, there is also an increased risk of civil litigation (see Litigation section).

"With the appetite for ESG financial products showing no signs of abating and pressure on corporates and the financial sector alike to "walk the talk" on their climate pledges, comes concerns about potential greenwashing. Investors and regulators in Asia have signalled that the mis-selling of "green" investment products poses a significant challenge to true sustainable investing."

Gilly Hutchinson – Head of ESG regional development (Asia), Hong Kong SAR

International disclosure standards inch closer to the finish line

With the lack of reliable and comparable ESG data still seen as a major obstacle to investors' ability to redeploy capital at scale to the net zero transition, the International Financial Reporting Standards' ("**IFRS**") announcement that it has launched the new International Sustainability Standards Board ("**ISSB**") was welcomed by many. The ISSB will develop a new single global baseline for climate disclosures by mid-2022 (and other sustainability disclosure standards later on). It is worth bearing in mind that once the ISSB standard has been developed, it will then be up to individual countries to decide whether they will adopt that standard into their national law. Having said that, the IFRS has a good track record and is a clear favourite with the UK and potentially other countries – if they can do for ESG reporting what they did for international financial reporting then there is room for optimism. 2022 may well turn out to be the beginning of the end for the ESG "alphabet soup".

The other new kid on the block, the Taskforce for Nature-related Financial Disclosures ("**TNFD**"), which has been dubbed the "TCFD for nature", is also likely to develop in 2022 more quickly than expected. If you were to have asked 18 months ago whether banks and asset managers really wanted to talk about the financial risks associated with biodiversity loss, you would have been met with a healthy degree of scepticism. That is no longer the case – there is now a general acceptance that biodiversity loss and the climate crisis go hand in hand even if there is an ongoing struggle to find bandwidth to engage with another, more complex new area.

Global themes

"We can expect to continue seeing increased calls by the SEC for certain climate change-related and workforce disclosures, plus disclosures about the diversity of board members and nominees. Companies should therefore carefully consider together with their legal counsel the substance and adequacy of any existing disclosures and the potential need for enhanced disclosures, as the SEC sharpens its focus."

Doug Davison – Partner, Dispute Resolution, Washington, D.C.

Human rights due diligence and global supply chains

While climate change dominated the ESG agenda in 2021 (for good reason), the "S" in ESG will likely come into greater focus in 2022 with the development of the EU's new due diligence regime, which is likely to have a particular focus on human rights. A number of countries including France, the Netherlands and Germany already have in place legislation requiring some form of human rights due diligence. What the EU is hoping to do is take this a step further – not just with a new regime that would apply in all Member States but one that is likely to send a significant ripple across global supply chains. The Covid-19 pandemic has brought into sharp focus the complex global interconnectedness of supply chains. The proposed EU regime will add an extra level of complexity which many economic operators are ill-prepared for. But when adopted, it will hopefully result in a much-needed level playing field for businesses.

Employment issues – the other "S" in ESG is still alive and kicking

Workplace activism and the future of work: Workplace activism is not a new concept, but one which has been amplified in recent times by social movements and the circumstances of the Covid-19 pandemic. Falling neatly within the "S" limb of ESG, it is increasingly becoming a defining feature of the workplace. With a heightened awareness of workplace rights, along with changes in technologies and workplace communication channels, employees can become activists within their workplaces (whether macro or micro) very quickly. These issues can impact share price, drive consumer trends and challenge the status quo. Whilst workplace activism has the potential to cause business harm, it can also facilitate change, add value and be part of long-term growth and sustainability as it helps organisations respond to change. As workforces around the globe return to the workplace following the Covid-19 pandemic, employers are having to grapple with the evolving landscape of hybrid working models and changes in attitudes towards remote, flexible and agile working. Looking forward, the focus on workplace culture, a living wage, health & safety, mental wellbeing and the rise of the collective voice across workplaces will be high on the agenda for many boards and senior leaders.

Diversity & Inclusion ("D&I"): In the past 12 months, D&I issues have once again been elevated to board and management level as a result of societal movements, increased regulatory focus and the circumstances of the Covid-19 pandemic as the experiences of lockdown, furlough and the impact on the labour markets has impacted demographic groups in different ways. As regulators, stakeholders and shareholders continue to monitor the ways in which organisations are driving change in diversity within their organisations, businesses around the globe are increasingly looking at how they can measure and report on diversity within their organisations. For many, the focus is still on gender, but increasingly organisations are also looking to measure and report on ethnicity, social-mobility and disability, in line with evolving regulatory and governance expectations. However, the challenges relating to the collation, retention and use of diversity data remain, particularly for global businesses with cultural variations and societal pressures to consider.

ESG and the link with pay: The focus on the role that non-financial performance drivers play in supporting a better culture continues, as organisations and regulators engage with the question of how ESG metrics can be an effective way to drive accountability and progress. As investors, shareholders, the media and other stakeholders increasingly hold companies to account for pay-outs which, while meeting financial or business targets, are considered to be out of line with ESG objectives, many organisations are already considering and implementing the use of non-financial metrics in their performance and remuneration assessments. This is an area we expect to develop in sophistication over the next year.

Global themes

"In recent years the 'E' of ESG has been front of mind for policymakers and asset managers, while the 'S' has started gaining momentum too. The UK Government's expectations for heightened investor engagement on climate and other sustainability issues will mean greater focus on mandatory reporting around how financing activities and portfolios align with climate pledges, underpinned by the criteria of the UK Green Taxonomy which is expected to be finalised by the end of 2022."

Rahul Manvatkar – Partner, Investment Funds, London

Continued growth in sustainable derivatives and structured products

2021 saw a wide range of sustainable derivatives and structured products being issued, and this is set to continue in 2022 with investors under increasing pressure to seek sustainable investment opportunities. On the structured products side, we expect a very significant rise in sustainable repackagings, with carbon remaining a particularly attractive commodity to repackage. To date, this has largely been confined to the compliance market, but with more and more focus on the voluntary market it is likely that we will see new and innovative structures utilising voluntary carbon credits. With the securitisation market now focused on establishing a framework for sustainable securitisation, sustainable securitisations/CLOs are also likely to be an important growth area in 2022. And outside of the "E", we expect to see bespoke social financing structures designed to address the "S" in ESG. Sustainability-linked derivatives ("**SLDs**"), which work by introducing an ESG-linked payment to vanilla interest rate/FX swaps based on a counterparty's ESG performance, received a lot of attention in 2021, with the International Swaps and Derivatives Association ("**ISDA**") publishing a helpful paper looking at guidelines for key performance indicators ("**KPIs**"). This is positive as it may incentivise the market to move towards an element of standardisation, strengthening the integrity and increasing the credibility of the SLD market.

Green, social, sustainable and sustainability-linked bond issuance continues unabated

Green, social and sustainable ("**GSS**") bonds and other labelled bonds such as blue bonds, transition bonds and sustainability-linked bonds ("**SLBs**") were expected to exceed US$1 trillion in 2021, overtaking the already record-breaking total from 2020. Whilst the big theme for ESG bond issuance during 2021 was the continued development of the SLB market, GSS use of proceeds bond issuance has also exceeded all expectations.

Notable transactions from 2021 include the European Commission's €12 billion debut NextGenerationEU green bond, on which we advised the managers. This represents the world's largest green bond issuance ever and with its NextGenerationEU green bonds, the EU is set to become the world's largest green bond issuer. Another notable development was the debut £10 billion Green Gilts issued by the UK government, marking the launch of the UK's green financing programme. This was swiftly followed by a second Green Gilt in October 2021.

The typical structural feature of the SLB market has been a coupon step-up linked to an issuer meeting pre-defined targets set in relation to selected KPIs. Given the flexibility this offers, compared to a GSS use of proceeds bond which requires issuers to have sufficient eligible projects for the issue proceeds, this product has attracted a wider range of issuer types in 2021. Whilst a high percentage of KPIs in SLBs are related to CO_2 reduction, the increase in issuer types has resulted in an increase in more idiosyncratic KPIs, which make it more difficult for the market to assess the level of ambition and the likelihood of triggers applying. More issuers are also now including more than one KPI in their SLBs, further adding to the complexity of analysing a product and the risk of a step-up being triggered. Other innovations include combined SLB/green use of proceeds bond issuances and an issue by New World Development where if pre-defined targets are not met the issuer will purchase certified carbon offsets equal to 0.25% of the outstanding principal amount of the notes for the remaining life of the bond until it is fully redeemed. It remains to be seen what further developments in this still nascent market 2022 will bring.

The use of proceeds bond market has and will continue to evolve, driven by market and regulatory developments. The International Capital Market Association ("**ICMA**") Principles were updated in June 2021, incorporating two new key recommendations designed to increase transparency alongside the four components, and the European Commission published its proposal for the EU Green Bond Standard which lays the foundation for a common framework of rules for issuers to use the designation European Green Bond for green use of proceeds bonds. A key feature of this legislative proposal is the requirement for alignment with the EU Taxonomy. Final rules for the EU Green Bond Standard will continue to take shape via the legislative process during 2022. In the UK, the FCA is seeking input from stakeholders on whether it should explore supporting the green use of proceeds bond market by recognising existing standards (eg the ICMA Principles) or alternatively by developing a UK bond standard, starting with green bonds.

Global themes

Litigation

2021 was a hugely significant year for climate and other ESG litigation. It is not only striking that many claims have been and are being pursued for strategic reasons, with increasing degrees of creativity, but that some notable claims are succeeding – a trend which is set to continue.

There has been a wave of claims brought against governments and public authorities in connection with climate change in the courts, including successful challenges in Germany, France, Belgium and Australia (and claims brought in Italy, Poland, the UK and South Africa), in 2021. The trend in project-specific challenges under administrative and planning laws has also continued apace. We have seen investment arbitration claims brought by adversely affected foreign investors in the energy sector against States, in the context of energy transition. Several cases are also pending against States before the European Court of Human Rights. We expect these trends to continue in 2022.

Not only government conduct and legislative/regulatory change are in focus. Corporates are also in the firing line. Companies are subject to growing reporting/due-diligence obligations on a wide range of ESG issues and under pressure from stakeholders to act, with increased scrutiny of greenwashing and "social washing". Against this backdrop, we expect that disclosure-related claims (brought by investors or other interested stakeholders) will continue to rise. We also expect to see an increase in claims seeking to challenge what corporates have done and are planning to do, not just what they are saying. So look out for more civil claims (and soft law complaints) against corporates focused on ESG harms, future emissions and emissions reduction targets in the year ahead. In this context, parent company liability and corporate responsibility for wider value chains may well be key themes.

In that regard, in May 2021, a Dutch district court found (in a landmark judgment) that Shell's decarbonisation plan was not ambitious enough and ordered it to reduce its CO_2 emissions by 45% by 2030. The court found that Shell had an obligation of result to reduce the CO_2 emissions from the activities of the whole Shell group (Scope 1 and Scope 2) and a significant best efforts obligation to reduce the emissions of its end users (Scope 3). In doing so, the Court placed significant weight on the UN Guiding Principles on Business and Human Rights, despite their "soft law" nature. Since then, we have seen a number of claims commenced with a view to changing corporate conduct in Germany. Meanwhile, in Australia, a court has granted a shareholder access to the records of a bank to check whether it has complied with its climate change policy in lending to oil and gas projects. Watch this space for more ground-breaking developments in 2022.

European Union

The EU has continued rolling out its sustainable finance legislative package at pace, and this is likely to continue. The pace slowed, as the second half of 2021 brought delays and some changes to the detail of regulation as Member States, the European Supervisory Authorities ("**ESAs**") and the Commission engaged with actual implementation. The volume of proposals and extent of change required of business is likely to remain high for the next few years. We will also start to see the roll out of the "Fit for 55" measures focused on the real economy to reduce carbon emissions in line with the EU's 2030 target. There is also a suite of proposals under development reframing corporate sustainability and related governance, diligence and disclosure requirements for a large proportion of EU undertakings (financial and non-financial).

Taxonomy Regulation

> **Climate Delegated Act** – The Delegated Act containing the technical screening criteria ("**TSC**") for climate change adaptation and mitigation was published in the Official Journal in December 2021 and applies from 1 January 2022.

Read more: EU Taxonomy Delegated Act with technical screening criteria for climate objectives published in OJ

> **TSC for the other four environmental objectives** – The Platform on Sustainable Finance ("**PSF**") consulted in 2021 on draft TSC for the remaining four environmental objectives under the Taxonomy and are expected to submit a report to the Commission with their final recommendations in Q1 2022.

Read more: EU Taxonomy: Platform on Sustainable Finance publishes preliminary draft technical screening criteria for remaining 4 environmental objectives

> **Article 8 Delegated Act** – The Delegated Act setting out the content, methodology and presentation of the KPIs that non-financial and financial undertakings are required to disclose under Article 8 of the Taxonomy Regulation was published in the Official Journal in December 2021. In-scope undertakings (ie those covered by the Non-Financial Reporting Directive) will be expected to report their taxonomy eligibility from 1 January 2022 (for financial year 2021). In-scope corporates will be required to report on taxonomy alignment from 1 January 2023 (for financial year 2022). In-scope financial organisations will be required to report on taxonomy alignment from 1 January 2024 (for financial year 2023). The Commission has published an FAQ with guidance on taxonomy-eligibility reporting for the reporting year 2022 and legal interpretation of the Delegated Act. The Commission is also considering complementing this before January 2023 with Level 3 guidance on reporting taxonomy-alignment with the ESAs (see SFDR section). In practice, companies and financial institutions are finding reporting taxonomy eligibility a complicated process. The next year will bring learning and hopefully improvements to available guidance.

Read more:

EU Taxonomy Delegated Act with details of Article 8 disclosures published in OJ

Commission FAQ

PSF: Considerations on voluntary information as part of Taxonomy-eligibility reporting

> **Supplementary delegated act for nuclear and natural gas** – Nuclear and natural gas power generation are not included in the Climate Delegated Act. Instead, the Commission intends to adopt a supplementary delegated act that will cover inclusion of nuclear energy, natural gas and related technologies as transitional activities in the Taxonomy (insofar as they fall within the limits of Article 10(2) of the Taxonomy Regulation). The Commission is expected to adopt the delegated act before the end of January 2022, although the proposal to include nuclear and natural gas in the green taxonomy is causing a great deal of controversy. The Commission has also committed to consider specific legislation to support the financing of certain economic activities in the gas sector that contribute to reducing greenhouse gas emissions but which fall outside the scope of the EU Taxonomy.

Read more: EU Taxonomy Delegated Act with technical screening criteria for climate objectives published in OJ and next steps on other taxonomy developments

"The new, detailed information and calculations required in the course of non-financial reporting, as well as the envisaged significant extension of the number of companies obliged to report, will pose major challenges to all entities concerned."

Claudia Schneider – Partner, Corporate/M&A, Frankfurt

European Union

> **"No significant impact" and "significant harm" taxonomies** – The PSF consulted in 2021 on options to extend the existing Taxonomy to activities that either have "no significant impact" ("**NSI**") or which cause "significant harm" to the Taxonomy's environmental objectives. The PSF is expected to submit a report to the Commission with their recommendations in Q1 2022.

Read more: EU Taxonomy – Platform on Sustainable Finance consults on draft brown and social taxonomies

> **Social taxonomy** – The PSF consulted in 2021 on a social taxonomy, which is intended to identify projects that deliver a "substantial contribution" or cause "significant harm" to social objectives, mirroring the approach of the existing environmental Taxonomy. The PSF is expected to submit a report to the Commission with their recommendations in Q1 2022.

Read more: EU Taxonomy – Platform on Sustainable Finance consults on draft brown and social taxonomies

> **Minimum social safeguards guidance** – The PSF is expected to publish a report clarifying how the minimum social safeguards under Article 18 of the Taxonomy Regulation work in practice.

Sustainable Finance Disclosure Regulation

The Sustainable Finance Disclosure Regulation ("**SFDR**") requires various product and entity level disclosures to be made by in-scope firms (known as financial market participants or "**FMPs**"), which are broadly EU fund managers and financial advisors. At the entity level, they must publicly disclose how they integrate sustainability risks within their investment management/advisory services and in their remuneration policies and procedures and how they assess the principal adverse sustainability impacts of their investment management/ advisory activities on the environment, society, etc. on a "comply or explain" basis (although this is mandatory for large FMPs). At the product level, they are also required to classify their products based on their green ambitions, and then comply with detailed disclosure and product eligibility requirements that flow from the categorisation at various points along the product's life cycle. The Level 1 SFDR (the framework regulation which sets out the core principles) came into force on 10 March 2021. However, FMPs are still waiting for the detailed provisions which are contained within the Level 2 Regulatory Technical Standards ("**RTS**"). This has been delayed and will not be in force until 1 January 2023. As such, until that time, firms are required to comply with the Level 1 provisions only. This is not straightforward as the detail (eg the detailed templates for use in the disclosures) are provided in the Level 2 RTS. The Commission has (rather unhelpfully) suggested that firms can demonstrate Level 1 compliance in this interim period by following the draft Level 2 RTS, although it is nonetheless hoped that supervisors will show forbearance in this period.

Read more:

EU SFDR: ESAs publish revised draft RTS on Taxonomy alignment disclosures

SFDR RTS: application delayed to 1 January 2023

MiFID II, UCITS, AIFMD and IDD

In order to ensure that ESG considerations are taken into account appropriately across the breadth of the financial services, amendments have been proposed to key pieces of EU sectoral legislation – MiFID II, UCITS, AIFMD, and the insurance directives, Solvency II and Insurance Distribution Directive ("**IDD**"). Broadly, these changes require uplifts to existing frameworks around risk management, conflicts, suitability assessments, and organisational policies and procedures to ensure that ESG risks and factors are appropriately considered. The majority of these amendments will come into force from 1/2 August 2022, and firms will need to be compliant with the relevant requirements as of that date, although one set of the MiFID amendments (those on product governance) will need to be implemented into national law and should apply a little later, from 22 November 2022.

Read more: EU: ESG regulations and directives amending MiFID II, UCITS, AIFMD and Insurance regimes published in the OJ

European Union

Solvency II and insurance

As part of its ongoing review of the EU Solvency II framework, the Commission has proposed that (re)insurers should be required to identify any material exposure to climate change risks and, where relevant, to assess the impact of long-term climate change scenarios on their business. The Commission has said that it may, at a later stage, consider extending this climate scenario analysis requirement to other environmental risks. It has also proposed that the European Insurance and Occupational Pensions Authority ("**EIOPA**") should assess whether a dedicated prudential treatment of exposures related to assets or activities associated substantially with environmental or social objectives would be justified. EIOPA would be required to submit a report on its findings to the Commission by 28 June 2023. The Council and the European Parliament are currently considering the Commission's proposals.

Read more: EU Commission proposals for reform of EU Solvency II Directive and new recovery and resolution framework

Banking Package – Integration of ESG risks in the prudential framework

Following the EBA's report on ESG risks and the Commission's new Sustainable Finance Strategy, the Commission has adopted legislative proposals for a review of the EU banking rules (CRR/CRD). While this Banking Package 2021 primarily aims to ensure stronger resilience of EU banks to potential future economic shocks by finalising the implementation of the Basel III rules, it is also intended to contribute to the transition to climate neutrality. According to the proposals, financial institutions will be required to systematically identify, disclose and manage ESG risks as part of their risk management. To this end, in addition to establishing official definitions for ESG risks for the first time, new requirements are envisaged for business strategies, processes, governance, stress tests, the management body and disclosure relating to these risks. Furthermore, the EBA is tasked with submitting its report on its assessment of possible options for applying a dedicated prudential treatment of exposures subject to impacts from environmental and social factors earlier, namely by 28 June 2023.The Council and the European Parliament are now considering the Commission's proposals.

Read more: EU Banking Package 2021: Commission proposals to integrate ESG risks in EU prudential framework

ECB's assessment of risk management in the banking sector

In November 2021, the European Central Bank ("**ECB**") published the results of its first large-scale assessment of the preparedness of EU banks to manage and disclose climate and environmental risks ("**C&E risks**") as provided for in the ECB's guide of November 2020. The assessment covered 112 banks under ECB supervision, representing €24 trillion of combined assets. According to the ECB, none of these banks met the expectations completely. While almost all banks have developed implementation plans, there is still a high divergence in the quality of these plans. Despite large efforts being made in areas such as management bodies, risk appetite and operational risk management, there are still deficiencies in the areas of internal reporting, market and liquidity risk management, and stress testing. However, the ECB also observed good practices for each of its 13 expectations and the report highlights some of the existing good practices (eg in the area of credit risk management.) The ECB will now gradually integrate C&E risks into its Supervisory Review and Evaluation Process ("**SREP**") methodology which will eventually have an impact on Pillar 2 capital requirements. For 2022, it plans to continue its supervisory dialogue with the supervised institutions as well as a full review with thematic deep dives and a stress test. Furthermore, it will publish its findings on banks' C&E risk disclosures in Q1 2022.

Read more: ECB report on the supervisory review of banks' approaches to manage climate and environmental risks

European Union

EU Green Bond Standard

As part of its new Sustainable Finance Strategy, the Commission published its proposal for a regulation on European Green Bonds in July 2021. Once adopted, green bonds that will be issued by European investors will have to comply with the European Green Bond Standard ("**EU GBS**") if marketed as "European Green Bond" or "EUGB". Such bonds will need to be Taxonomy-compliant in the sense that the issue proceeds are to be exclusively and fully allocated to economic activities that meet the requirements of the EU Taxonomy Regulation. Furthermore, to safeguard transparency, the issuer will have to prepare, on the basis of prescribed templates, and make available on their website, a European green bond factsheet (similar to green bond frameworks currently being used), annual reports demonstrating that the proceeds of the bonds have been allocated correctly, and an impact report on the environmental impact of the use of proceeds. Given the importance of transparency, the EU GBS also foresees a regulatory regime for external reviewers which will play a crucial role under the EU GBS and will, among others, be vetting the green bond factsheet and impact report. Interestingly, while the draft EU GBS has been put forward as a voluntary regime, the ECB has called to make it mandatory for all green bonds issued in the EU or by issuers based in the EU. The draft regulation is still at the early stages of the EU legislative process and accordingly, it is expected that it will not apply until 2023 at the earliest.

"In 2022, we will see the first reporting under the EU taxonomy classification. Even though it will not be until 2024 before we see the full effect, it can be expected to already have a significant impact on EU green bond and bank financing more generally as finance parties will want to beef up their green credentials in anticipation of the reporting requirements that will apply to them as from 2024."

David Ballegeer – Partner, Finance, Brussels

Find out more:

- Long awaited proposal for EU Green Bond Standard published
- ECB calls for clear commitment to making EU Green Bond Standard mandatory
- The EU Green Bond Standard: what is it?
- EU GBS progressing through European Parliament

EU Ecolabel for Retail Financial Products

The Commission is currently developing an EU Ecolabel for Retail Financial Products. The objective is to provide clear guidance on the financial products retail investors can invest in if they wish to support environmentally sustainable projects and activities. Once developed, the criteria will be adopted through a Commission Decision under the existing EU Ecolabel Regulation defining the minimum environmental performance of a designated product group. The product group may encompass undertakings for collective investment in transferable securities ("**UCITS**"), retail alternative investment funds, life insurance products and deposit accounts.

Corporate Sustainability Reporting Directive

The European Parliament and Council are considering a proposal for a Corporate Sustainability Reporting Directive ("**CSRD**"), which will revise and extend rules introduced by the Non-Financial Reporting Directive ("**NFRD**"). The aim of the CSRD is to require consistent reporting on sustainability risks and impacts by all large companies. In particular, the CSRD proposal extends the scope of the regime from large public interest entities to all large companies (listed or not) and all listed companies, except listed micro-enterprises. In-scope companies would have to report information on the full range of ESG issues relevant to their business, in accordance with mandatory EU sustainability reporting standards being developed by the European Financial Reporting Advisory Group ("**EFRAG**"). EFRAG is expected to have the first set of draft standards ready by mid-2022 so that the Commission can adopt these by 31 October 2022. The Commission is expected to adopt a second set of reporting standards by 31 October 2023. In-scope entities will likely need to start applying the new CSRD standards to reports published in 2025, covering financial year 2024.

Read more: European Commission publishes proposal on Corporate Sustainability Reporting Directive

"Fit for 55" package

The Commission published a "Fit for 55" package of proposals in July and December 2021 amending the EU's climate, energy, land use, transport and taxation policies designed to enable the EU to meet its new climate target of achieving at least a 55% reduction in greenhouse gas emissions by 2030, as required by the EU Climate Law. The "Fit for 55" package encompasses a suite of legislative initiatives across various sectors, including energy, transport and buildings, which is intended to overhaul the EU's climate policy and legislative framework. The Commission is proposing a combination of stricter regulation and emissions standards for industry, rules for carbon pricing and taxation, as well as rules to promote investment in low-carbon fuels, including green and blue hydrogen, technologies and infrastructure. This includes proposals to create a Carbon Border Adjustment Mechanism ("**CBAM**"), extend the EU ETS, and amend the Renewable Energy Directive, Energy Taxation Directive, Energy Efficiency Directive, Energy Performance of Buildings Directive, Third Gas Package and new legislation on methane emissions from the energy sector. It also includes a substantive transport and green mobility initiative. Each of these proposals will need to be considered separately by the European Parliament and Council during the course of 2022 before being finally adopted.

Read more: "Fit for 55" microsite

European Union

European Green Deal initiatives

In addition to the "Fit for 55" package (see Fit for 55 package section), the Commission is expected to publish a number of proposals in 2022 under the European Green Deal, including: a proposal for a sustainable products policy initiative; a proposal for a regulation on substantiating environmental/green claims; and a proposal empowering the consumer for the green transition.

The creation of a circular economy is at the heart of the European Green Deal, with the focus on ensuring products are fit for a climate-neutral and resource-efficient economy. One of the key initiatives is to develop a framework to make sustainable products, services and business models the norm and ensure products are efficient, affordable, last longer and are designed for reuse, repair and recycling, thus moving away from a "take-make-use-dispose" model. There is a also a focus on providing consumers with better information and tackling false green claims.

Human rights due diligence regime and sustainable corporate governance

The Commission consulted in 2021 on a sustainable corporate governance proposal which includes a new mandatory due diligence regime covering human rights and environmental issues, as well as changes to directors' duties (among other things). However, publication of the proposal has been delayed to Q1 2022.

Read more:

EU sustainable corporate governance and human rights due diligence proposal delayed until early 2022

Human rights due diligence: ambitious European Parliament proposal backed in landslide vote

Managing supply chain risks: reporting and due diligence

Regulation of ESG data and ratings providers

The Commission is expected to consult in 2022 on the functioning of the market for ESG ratings. Subject to an impact assessment, the Commission will take action (likely to be a legislative proposal) to strengthen the reliability and comparability of ESG ratings by Q1 2023. The Commission may assess certain aspects of ESG research, to decide whether an intervention is necessary and on the possible appropriate measures.

Read more:

Letter from ESMA to Commission

EU Renewed Sustainable Finance Strategy

European Union

Competition and sustainability goals

As climate change continues to rocket up the political agenda, so does the debate around how competition policy can, and should, be used to tackle climate challenges. This debate is now also resulting in policy updates.

> The ambition for the EU to become the first climate-neutral continent is bold. It will require massive public investment to enable shifts in the EU's energy, consumer and travel patterns. The EU's State aid rules have been advanced as a key means of driving this green transition. The Commission is now updating its State aid rulebook to ensure it is fit for purpose. The flagship rules to guide Member States in their green investments – the Commission's new Climate, Energy and Environment Aid Guidelines – were adopted in December 2021 and enter into force in January 2022.

> A further key development will be the publication of the Commission's draft revised guidelines on "horizontal" agreements. The guidelines are expected to provide greater advice and clarity on what businesses can – and cannot – do to achieve sustainability goals within competition law. The updated rules are expected to provide more guidance on technical co-operation and sustainability, including on buyer cartels and joint purchasing alliances.

> The Commission has also signalled that it will be more open to giving guidance on a case-by-case basis for sustainability-related cases. Yet it remains to be seen if the Commission will adopt a more flexible and progressive approach to incorporating sustainability considerations into its legal analyses for cases.

Read more:

Commission endorses new Guidelines on State aid for Climate, Environmental Protection and Energy

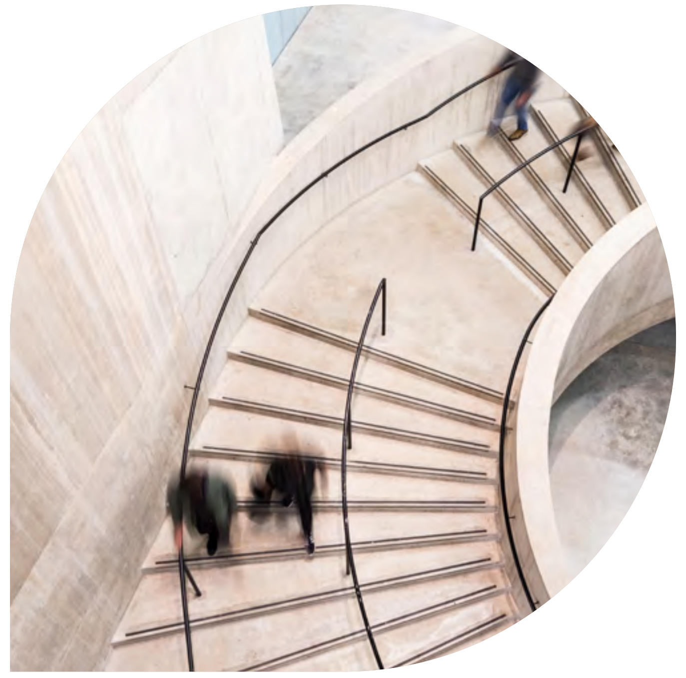
The greening of competition law: horizontal guidelines update

The Commission's sustainability guidance

The Commission's competition policy for the green transition

"In 2022 we anticipate agencies will start deciding on ESG policy changes and putting them into practice. While EU guidance on sustainability co-operation is expected only 2023, companies are advised to get in touch with the EU Commission, which has signalled its open door policy for any feedback on the current rules."

Daniela Seeliger – Partner,
Antitrust & Foreign Investment, Düsseldorf



European Union

Employment & Incentives

Proposal for Pay Transparency Directive and increased gender pay discrimination litigation

The Commission published a proposal for a Directive on Pay Transparency in March 2021. Key aspects of the proposal include enhanced information rights for (prospective) employees, an obligation for companies with more than 250 employees to report on their gender pay gap, as well as enhanced enforcement mechanisms, including collective redress actions. The European Parliament and Council are in the process of negotiating the draft proposal. The earliest that the new rules would be adopted is 2022. If adopted, Member States will then have two years to transpose the Directive into national law, hence until 2024. However, companies should start anticipating the upcoming regulatory framework now, as complying with it will not be an overnight exercise. In addition, gender pay discrimination litigation is on the rise both at EU and national level based on the already existing regulations. Against this trend, local legislators are strengthening their gender pay laws (see Italy: National Code of Equal Opportunities – gender pay gap).

Read more: Pay Transparency in Europe: Commission's Proposal

Proposal on Platform Work Directive

In December 2021, the Commission published a proposal for a Directive aimed at improving the working conditions of people who work through digital labour platforms and would cover companies in a variety of sectors. The draft Directive will be considered by the European Parliament and Council in 2022. The earliest the rules are likely to be adopted is 2023. If adopted, Member States will have two years to transpose the Directive into national law, so the new rules are not expected to come into force until 2025 at the earliest.

Read more: New proposed EU rules on Platform Work

Implementation of EU Whistleblowing Directive

One of the key regulatory developments arising from ESG in the employment space is the expectation to implement whistleblowing policies as a rule. The EU Whistleblowing Directive obliges all companies with at least 50 employees to set up an internal reporting channel for reporting breaches of EU law. The Directive also imposes adequate protection standards for whistleblowers against retaliation. Member States had until 17 December 2021 to implement the Directive. Companies should monitor national implementation in their Member State and start preparing for the (forthcoming) whistleblowing laws as part of a robust ESG strategy. With the increase of mandatory ESG disclosures at EU level, whistleblowers will have an additional venue for raising ESG concerns. Adequately protecting those who raise concerns will be crucial as the protection of whistleblowers is one of the "S" factors in ESG. Finally, well-functioning internal channels can provide companies with an opportunity to resolve concerns (eg potential greenwashing claims) internally. We can expect increased scrutiny from investors on the existence of sound whistleblowing frameworks as a testimony to good governance and workplace culture.

Read more: Listen up! The EU Whistleblowing Directive – are you ready?

Labour and Health & Safety standards

- Legislative work on the Adequate Minimum Wages proposal is advancing rapidly. Discussions (trilogues) with the Council and European Parliament will take place in 2022.
- The Commission announced in its 2022 Work Programme that it will present a legislative initiative in Q3 2022 on the protection of workers from asbestos exposure. In October 2021, the European Parliament adopted a resolution with recommendations to the Commission on this topic. This initiative follows from the Commission Communication in 2020 on a Renovation Wave for Europe (part of the European Green Deal), which aims to double annual building renovation rates in the next 10 years.

Belgium

As in many countries, sustainability will continue to play a key role in Belgium. In 2022, we are expecting to see a surge in ESG legal matters, whether in the form of legislation, court cases, government policy or supervisor activity. A selection of the most important developments is set out in the following.

Rise of climate change litigation

On 17 June 2021, in a landmark case, the Brussels French-Speaking Court of First Instance ruled that the Belgian federal and regional governments had breached their general duty of care and the rights to life and to private and family life by failing to take all necessary measures to prevent the impact of climate change on the Belgian population. However, on the basis of the principle of separation of powers, the court refused to order the Belgian governments to meet stricter targets for the reduction of greenhouse gas emissions. The injunction was sought by the claimant NGO (*Affaire Climat/ Klimaatzaak*), which lodged an appeal against the decision in November.

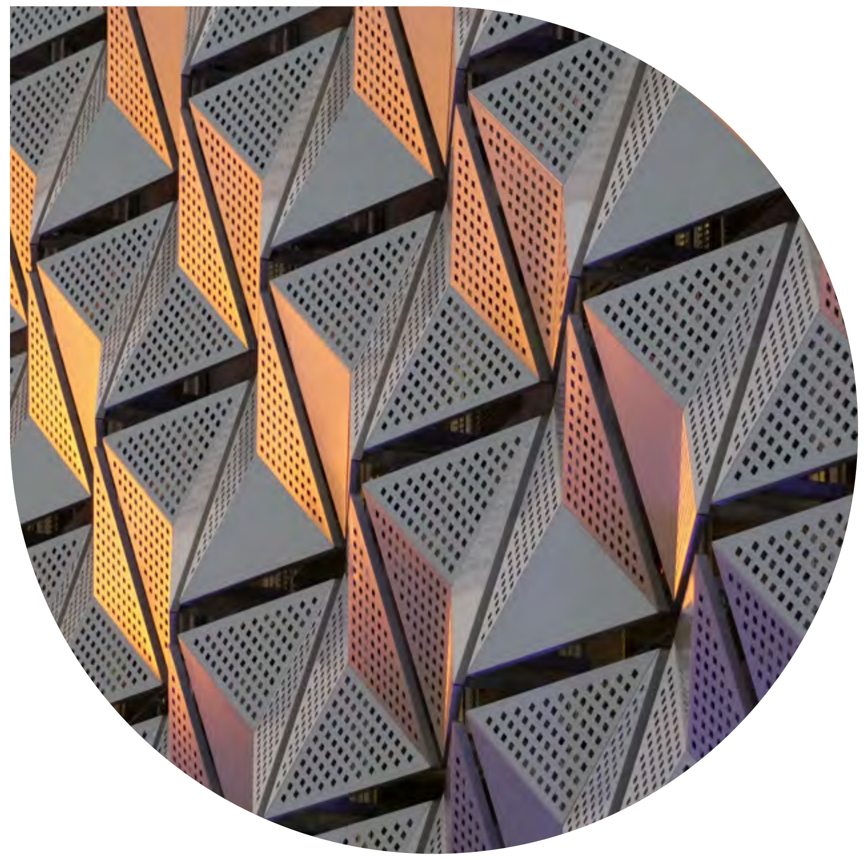
Read more: Belgian federal and regional governments condemned by the Brussels Court of First Instance for negligent climate policy

On 13 April 2021, another NGO (Client Earth) announced the filing of a legal action in Belgium against the National Bank of Belgium's implementation of the European Central Bank's Corporate Sector Purchase Programme, "to stop 'quantitative easing' from European central banks flowing to fossil fuel companies and polluting firms that are exacerbating the climate crisis".

Read more: ECB's quantitative easing programme challenged before Belgian Courts for "fuelling the climate crisis"

"Boosted by the Klimaatzaak and Dutch Shell cases, NGOs and other activists are likely to bring new climate change litigation claims in Belgium in the near future, including against companies. While, under Belgian law, it has not been ruled that private companies would have the same legal responsibility as public authorities in the fight against climate change, companies should nevertheless continue working on their sustainability programmes, and the documentation of the same, as a matter of priority."

Guillaume Croisant – Managing Associate, Dispute Resolution, Brussels



Federal government proposes hydrogen strategy

On 29 October 2021, the Belgian federal government approved its hydrogen strategy, to be further fine-tuned in the coming months, together with the regional governments. The strategy outlines the government's intention to turn Belgium into a hub for the import and onward transport of hydrogen. As early as 2026, the first part of a hydrogen backbone should be in place, consisting of 100 to 160 km of hydrogen pipelines connecting the industry port clusters. This should allow Belgium to import on a large scale green hydrogen to help green heavy industry (which is harder to electrify). On a secondary basis, renewable hydrogen could be used to reduce CO_2 emissions from heavy road traffic, the maritime and air traffic sectors. The use of hydrogen as a fuel for light vehicles or for heating buildings will not be encouraged, given the availability of more efficient alternatives.

Read more: Summary of hydrogen use case in Belgium

Belgium

Non-financial reporting on the rise

ESG reporting as part of non-financial reporting is gaining further momentum. Testimony to that is publication of the Belgian Financial Services and Markets Authority ("**FSMA**") study on non-financial reporting by Belgian listed companies in June 2021. The study covers reporting on ESG topics such as climate change due diligence, physical and transitional climate change risks, KPIs concerning environmental and climate policy, the share of sustainable activities in total turnover, etc. In its study, the FSMA formulates non-binding recommendations and good practices to enhance the quality of reporting and to give the reporting entities reference points to work with in the future. While some companies included in the report are already anticipating future legal developments, qualitative reporting will inevitably gain further importance in the years to come, starting with the Taxonomy Regulation and (once adopted) the EU Corporate Sustainable Reporting Directive ("**CSRD**").

NBB focus on energy efficiency of real estate exposures and climate-related risk management

The National Bank of Belgium ("**NBB**") is increasingly focused on incorporating ESG considerations in its risk management. As of 1 January 2022, it will require credit and (re)insurance institutions to collect and report information on the energy efficiency of their real estate exposures. Given the importance of these institutions' exposures on Belgian real estate, the energy performance of real estate is a key factor in the climate transition risk of the Belgian financial sector, which justifies this extended monitoring. The NBB has also expressed support for the greening of the financial system. It is working to further integrate climate-related risks in its prudential supervision and its financial stability monitoring, both at macro- and micro-prudential levels. In addition, the NBB will pursue its efforts to bridge existing data gaps, develop indicators for sustainable finance and improve climate-related risk assessments. Interestingly, the NBB also intends to increase the sustainability of its own corporate bond and equity portfolio (see the Client Earth case against the NBB in the "Rise of climate change litigation" section). The NBB's strategy is expected to result in further policy implementation in 2022.

Belgian duty of vigilance bill

In April 2021, a Belgian duty of vigilance bill was introduced before the Chamber of Representatives. The current text, inspired by the French regime, foresees the imposition of a vigilance duty on companies established or active in Belgium with respect to the protection of the environment, human rights and labour rights throughout the value chain. The text envisages a specific liability regime, ranging from criminal liability to collective redress actions. It remains to be seen whether it will be impacted by the upcoming EU sustainable corporate governance legislative initiative, which also foresees extensive supply chain due diligence obligations.

Implementation of the Whistleblowing Directive in Belgium

In Belgium, the obligation to set up a whistleblowing mechanism at company level and to protect whistleblowers currently only exists for financial institutions and the public sector. Due to the implementation of the EU Whistleblowing Directive, private companies with more than 50 employees will soon also be obliged to establish secure and confidential internal reporting channels to report breaches of EU law and provide for adequate protection of whistleblowers. The draft implementing bill is already at an advanced stage, and companies should start preparing for the new rules whose implementation/entry into force is expected in Q2 2022.

Read more: Listen up! The EU Whistleblowing Directive – are you ready?

Flanders tightens energy performance obligations for non-residential buildings

To further enhance the energy efficiency of buildings, the Flemish government recently approved new rules. As of 1 January 2022, in case of a sale or vesting of a long-term lease right or a right to build in respect of a non-residential building (eg office, retail, etc.), that building will need to meet certain minimum energy performance levels (ie concerning roof insulation, glazing, central heating generators and cooling systems) within a period of maximum five years as of the passing of the deed. Non-compliance can lead to substantive administrative fines.

Impact of Flemish nitrogen judgments on the granting of permits

In recent decisions, the Flemish Council for Permit Disputes has declared unlawful the Flemish government's temporary non-binding guidelines to assess the effect of nitrogen deposits on protected nature areas. In its recent case law, the Council considers that the guidelines (applying a general 5% threshold margin on such deposits) fail to protect these areas from excessive nitrogen deposition and are therefore not in compliance with the EU Habitats Directive. As a result, all projects located in the Flemish Region and emitting nitrogen are currently facing serious legal uncertainty concerning their (im)pending permit applications. Meanwhile, the Environment Minister issued new instructions to deal with nitrogen deposition when reviewing permit applications. A few highly visible projects (all gas-fired power plants) have recently seen their permit refused on that basis. Until the Flemish government finds a more final solution (which will involve a trade-off between building, agriculture and industry), more are likely to follow.

For more information visit our ESG in Belgium homepage

France

AMF calls for harmonised regulation of ESG data providers

ESG data has become a key part of sustainable finance investments: asset managers and investors need more and more reliable ESG data to support the shift toward greener economies, avoid misallocation of investments and comply with the European regulatory framework. In its recent mapping of the provision of non-financial data, the French financial markets authority (the "**AMF**") also highlighted that growing market concentration due to the small number of providers and recent mergers between financial data providers and rating agencies create higher risks of conflicts of interest. ESG data providers remain largely unregulated, which led the AMF to officially call for an EU mandatory regulatory framework. The AMF view is to set up an ad hoc regulation (rather than extending the existing credit rating agencies regulation) which would be supervised by ESMA in order to ensure the reliability and transparency of methodologies as well as the enhancement of a good governance (eg adequate resources, internal control) and the management of conflicts of interest. The AMF also supports the development of a common data space for companies' ESG information provided that it is construed as a single point of access and: (i) the objective(s) of this ESG data space are clear and realistic; and (ii) the links between such ESG data space and other databases are thoroughly examined, to avoid multiplication of databases and overlaps.

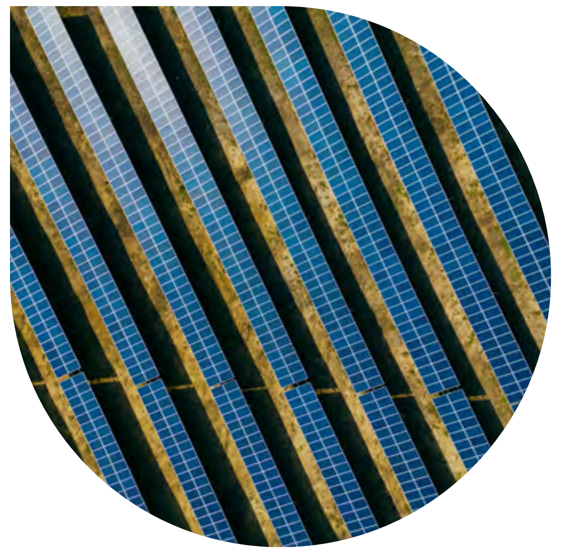
AMF calls for EU Responsible Investment or ESG label(s)

The AMF notes that close to 1,000 sustainable and green funds were labelled at the end of March 2020 in Europe, representing more than €300 billion in assets under management. This rapid growth of sustainable and green labels at the national and European levels creates new challenges: these labels do not trigger the same obligations, do not use the same terminology, and remain very varied. This results in a complex and fragmented European market which creates unnecessary additional costs for management companies, barriers that hinder cross-border distribution of funds in the EU, and lack of comparability of the different labels offered. In response, the AMF is urging the European Commission to launch work on the creation of a European Responsible Investment ("**RI**") or ESG label(s) which would complement the ongoing work on the EU Ecolabel. The AMF also stress the need to consider the development of an EU label for social investments or an EU label for impact funds, another segment raising more and more interest from investors.

Fossil fuels and thermal coal commitments of French financial institutions

The AMF and the French banking regulator (the "**ACPR**") published their second report on climate engagement by financial and banking institutions in France. This report analyses the policies and commitments set out by the largest financial institutions in the French market (nine banks, 17 insurers and 20 asset management companies) in relation to fossil fuels (oil and gas) and thermal coal policies and their alignment with the Paris Agreement. The report reveals that exposure of market participants to coal remains very small (lower than 1% of assets) and all the French banks and insurers analysed had announced exit dates (2030-2040 horizon) from coal investments (although the French regulators note that these commitments are rarely accompanied by a gradual timetable). As for asset managers who were only three in 2020 to have coal exit policies, this number now rose to 15 out of the 20 asset managers in the study.

Nevertheless, the AMF and ACPR encourage financial firms to strengthen their efforts for fossil fuels by drawing inspiration from the lessons and positive work done for coal. The policies in place for other fossil fuels across the French financial sector, according to the regulators, were described as lacking precision when compared to their thermal coal policies.



France

Creation of a CAC 40 ESG Index

On 22 March 2021, Euronext launched the CAC 40 Index (the main Paris stock market index). This new index has been designed to reflect the performance of the top 40 companies demonstrating strong ESG practices within the Large 60 Index.

Insurance sector: as of 2022, unit-linked insurance contracts must offer at least one "solidarity" unit, one "green" unit, and one SRI unit

The insurance sector has also been identified by the French legislator as a lever to promote and develop sustainable finance. The French Pact Law (*Loi Pacte*) has introduced the obligation for insurance undertakings offering unit-linked insurance contracts to propose to invest them in funds financing solidarity-based companies (*entreprises solidaires d'utilité sociale agréées*), Socially Responsible Investment ("**SRI**") funds or green finance funds. From 2022, unit-linked insurance contracts must also offer at least one (cumulatively): (i) "solidarity" unit; (ii) "green" unit; and (iii) SRI unit.

Energy and Climate law: publication of the implementing decree in May 2021

On 27 May 2021, the French government published a decree detailing the information required by Article 29 of the French Energy and Climate Law, and how such information should be presented. Indeed, ahead of the official publication of the EU SFDR, the French legislator published on 8 November 2019 the French Energy and Climate Law in which Article 29 broadens and redraws the new transparency obligations aimed at amending the provisions of article 173 of the LTECV Law and complying with the new requirements of the SFDR. Article 173 sets out the information obligations of public and institutional investors concerning the consideration of environmental and social parameters. Since the end of FY2016, investors are required to publish information on the way they integrate ESG criteria into each of their investment operations. Article 29 thus completes the provisions relating to the information provided by financial market participants on the methods used to take into account, in their investment policy, criteria relating to compliance with ESG quality objectives (in particular in terms of climate and biodiversity).

AMF ESG Doctrine (French funds requirements) and its articulation with SFDR

The AMF ESG Doctrine dealing with ESG considerations for funds distributed in the French market to French retail investors applies since 10 March 2021. In its public communication dated 20 January 2021, the regulator confirmed that the French ESG Doctrine and the EU SFDR have complementary objectives, with some overlaps. The AMF has also provided clarifications concerning the articulation between SFDR and the ESG Doctrine. It is not expected that the AMF will amend or update its ESG Doctrine in the near future. The reason would be that the minimum standards under the ESG Doctrine are deemed to be more robust than the SFDR rules at this stage.

Read more:

Implementation of the SFDR regulation for asset management companies

Articulation between SFDR and the AMF ESG doctrine

AMF involvement in respect of sustainable bonds

The AMF, which has made sustainable finance a major focus of its #Supervision2022 strategic plan, recently reinforced its commitment to supporting the development of the green, social and sustainable bond market, in particular by ensuring that investors are provided with transparent information on how the proceeds of securities issuances are applied.

The AMF has chosen to adopt a pragmatic approach with issuers, verifying that the green projects funded by the issue of green bonds are correctly described in the use of proceeds section of the prospectus and encouraging issuers to specify, where applicable, that the key principles of the ICMA's Green Bond Principles are or will be complied with by the issuer. Ahead of the requirements of the proposed EU Green Bond Standard published in July 2021 by the European Commission and amended in November 2021 by the European Parliament (which will be negotiated at EU level in 2022) and according to which the framework will be considered "regulated information" and so may be incorporated by reference in a prospectus prepared pursuant to the EU Prospectus Regulation, the AMF already encourages issuers to include a hyperlink to their website in their prospectus to indicate where to find the documentation relating to the issue (ie the framework and the second-party opinion). Combatting greenwash is one of the AMF's priorities.

This year, the AMF also approved, for the first time, several bond prospectuses allowing sustainability-linked bonds to be listed on Euronext Paris. The rapid growth of SLBs is expected to continue in 2022.

France

ESG is high on the agenda of the French Competition Authority

Competition law in France in 2021 followed the path set out at the end of 2020 as far as sustainability is concerned. The French Competition Authority ("**FCA**") has laid down its top priorities for the year to come in its 2020 annual report and, not surprisingly, sustainability is one of the eight priorities.

The FCA's roadmap with respect to ESG is threefold:

> addressing anti-competitive practices that endanger ESG principles;

> contributing to European and international thinking on ESG issues; and

> contributing to ESG thinking and regulatory developments in France.

"ESG and sustainability are becoming key topics in competition law in France where the French Competition Authority has always been at the forefront of innovative thinking in this sphere."

Charlotte Colin-Dubuisson – Partner, Antitrust & Foreign Investment, Paris

Addressing anti-competitive practices detrimental to ESG

In its 2020 overview, the FCA pledged to focus its efforts going forward on targeting anti-competitive practices that endanger ESG principles. While at this stage only one FCA decision in 2021 has some ESG aspects, we are of the view that this will become a real focus for the FCA in the coming years with a shift from traditional price or volume-related cartels towards more innovative "theories of arms".

The rise of ESG awareness creates new challenges for the FCA which must adapt to new practices or co-operation between competitors. According to the FCA, the risk is that those practices or co-operation are in fact a smokescreen concealing anti-competitive behaviours.

Contribution to multilateral thinking on ESG principles

At the European level, the FCA participates in the discussions around the European Green Deal whose overarching goal is to make the European Union carbon neutral by 2050. The FCA assists the European Commission on the revision of the European exemption guidelines for vertical restrictions and of certain types of R&D agreements, by introducing an ESG component.

At an international level, the FCA is actively taking part in discussions on those topics in the framework of the International Competition Network.

For all of those workstreams, the FCA aims at clarifying how sustainable actions and behaviours should be taken into account from an antitrust perspective (whether under antitrust rules applicable to agreements between competitor, merger control or State aid rules).

Contribution to ESG thinking and regulatory developments in France

Finally, in France, eight independent administrative or public authorities (the AMF, the CSA, the ARCEP, the CNIL, Hadopi, ART, CRE and the FCA) met at the end of 2019 to compare their action on climate change. In May 2020, they pledged to better take into account climate urgency in the definition and exercise of their missions. In addition to this group, they intend to have a more concrete impact by developing new learning tools and regulators' expertise in the ESG field.

New prerogatives of French work councils in relation to environment

The Climate Act No. 2021-1104 of August 2021 has introduced the ecological transition into works councils' scope of action and into various aspects of the information given to them (eg including environmental data in the "economic and social database"). Among these new prerogatives, the works council must now: (i) be informed on the environmental consequences of the company's activity as part of the three statutory recurrent consultations; and (ii) be consulted on the environmental consequences of a project when it is consulted on questions related to the management and general running of the company. Therefore, employers must assess the potential environmental impact(s) of their decisions, include this assessment in the information note delivered to the works council's members before their consultation on a project and discuss it with them.

In 2022, we can hopefully expect regulatory and case law clarifications, especially on the following questions:

> What is the content and the level of detail of the information to be communicated?

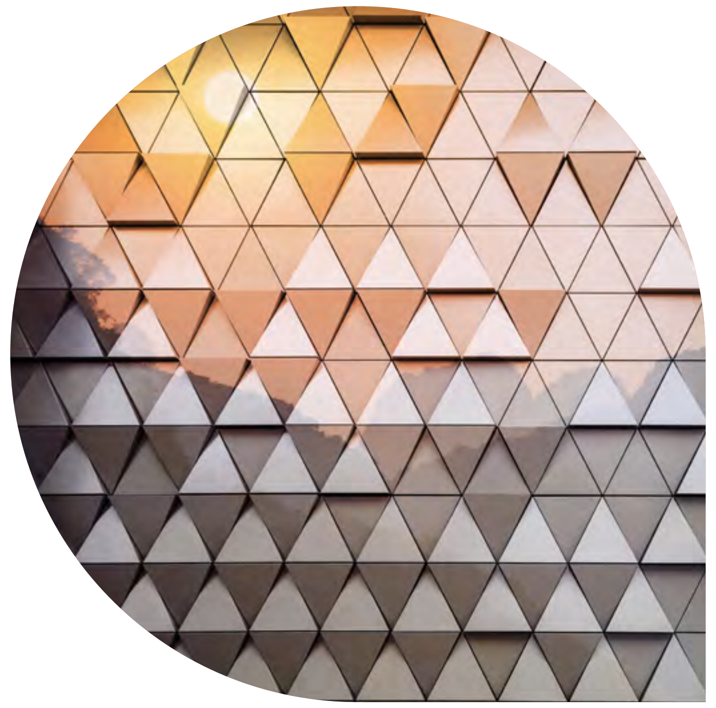
> How should the "company's activity" be defined (ie should only on-site production be considered or the whole supply and distribution chain)?

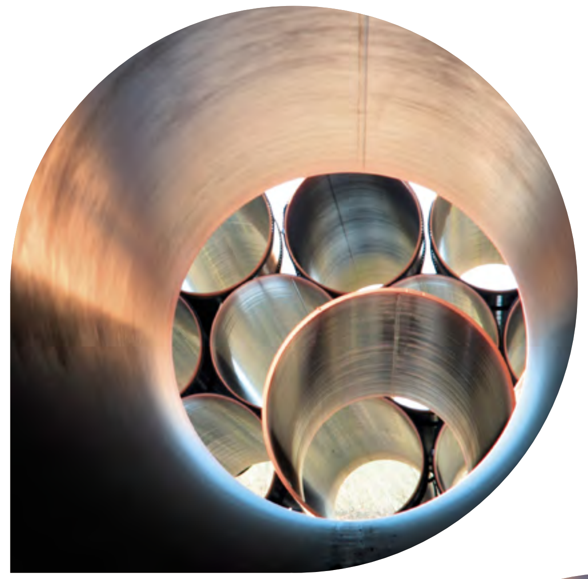
> In the context of a company's project, should two separate consultations be carried out, one on said project and the other exclusively on its environmental consequences, or should only one opinion be requested?

> Are all the company's important projects subject to this new obligation (including those mentioned by Article L. 2312-37 of the FLC, eg restructuring and downsizing projects, mergers and insolvency proceedings) or only those falling within the scope of "questions related to the management and general running of the company"?

Pending such clarifications, there is a risk that a works council may request in court an extension of the consultation period and the communication of more documents if it considers that the level of information provided on the environmental consequences of the project is insufficient.

France





French courts issued two judgments ordering the French government to take measures to meet its greenhouse gas reduction targets

To achieve its Paris Agreement's reduction target of -40% by 2030 compared to 1990 levels, the French Government has adopted a trajectory through CO_2 budgets for four periods (2015-2018, 2019-2023, 2024-2028 and 2029-2033), each with its own reduction targets. It has recently faced two proceedings, where plaintiffs argued that France is not meeting these objectives.

The Grande-Synthe case: the French government must take actions to achieve its target of reducing greenhouse gas emissions

The first case was initiated by the municipality of Grande-Synthe and four NGOs (Oxfam France, Greenpeace France, the Nicolas Hulot Foundation and Notre Affaire à Tous) before the Conseil d'Etat, French highest administrative jurisdiction. They asked the Conseil d'Etat to annul the French government's refusal to take additional measures to reach the target resulting from the Paris Agreement of reducing greenhouse gas emissions by 40% by 2030.

On 19 November 2020, a first judgment was issued which (i) noted that France failed to meet its CO_2 budget for 2015-2018 and (ii) gave the Government three months to provide evidence showing that the greenhouse gas reduction trajectory for 2030 could be met without additional measures.

On 1 July 2021, following new investigation and hearing, the Conseil d'Etat issued a second judgement whereby it annulled the Government's refusal to take additional measures. *Inter alia*, it noted that compliance with the trajectory, which provides for a 12% decrease in emissions over the period 2024-2028, does not appear to be achievable if new measures are not adopted quickly. The Conseil d'Etat therefore ordered the Government to take additional measures by 31 March 2022 to achieve the target of reducing greenhouse gas emissions by 40% by 2030.

The "Affaire du Siècle" case: the French government must repair ecological damage

The other case was brought before the Administrative Court of Paris (the "**Court**") by the same four NGOs (ie Oxfam France, Greenpeace France, the Nicolas Hulot Foundation and Notre Affaire à Tous) and was backed up by more than 2.3 million people who had shown their support by signing a petition.

On 3 February 2021, the Court held the French State responsible for the ecological damage caused by its failure to meet its CO_2 budget for 2015-2018.

In a later judgment, on 14 October 2021, the Court eventually ordered the French government to "*repair the ecological damage*". The French Prime Minister has until 31 December 2022 to "*take all useful sectoral measures likely to repair the damage*" but also to "*prevent the aggravation of this damage*". The Court does not specify which specific measures should be taken, considering that the content of these measures is at the discretion of the government.

For both cases, the measures taken by the French government should take the form of the implementing decrees of the recent Climate and Resilience Law, which came into force in August 2021.

Germany

German Sustainability Strategy for the coming years

The previous German government already intensively promoted a sustainable future and pursued the goal of making Germany a leading sustainable finance location. The new government is putting an even greater focus on sustainability. In its coalition agreement, it has addressed a wide range of ESG-related projects. As expected, climate protection and renewable energy will be key issues of the coming legislative period. In this context, a preponement of the phase-out of coal production to 2030 (instead of 2038) and a significant expansion of wind power are intended. The coalition parties back up the Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) enacted by the old government and will make new attempts to revise the law on corporate sanctions and implement the Whistleblower Directive. Also, equality between women and men is to be pursued in further areas including a more effective enforcement of employees' rights under the Pay Transparency Act (*Entgelttransparenzgesetz*).

Read more: Der deutsche Koalitionsvertrag (German/English)

Climate change legislation and litigation

Following a landmark decision of the Federal Constitutional Court (BVerfG), the government introduced more ambitious emission reduction targets. The court had stated that the Climate Protection Act (*Klimaschutzgesetz*) only inadequately regulated emission reduction targets post-2030 and thus fell short in recognising the freedom rights of the younger generation. Now, Germany is to be climate neutral by 2045 instead of 2050 and to reduce its emissions by 65% instead of 55% compared to 1990 levels. The individual reduction trajectories to be met by the different economic sectors until 2030 have been increased as well, in particular in the energy and industrial sectors.

After the BVerfG's decision, public enforcement gained enormous importance in Germany. Private enforcement is also on the rise: *Deutsche Umwelthilfe*, an NGO active in environmental protection, and Greenpeace are taking legal action against three car manufacturers to stop the production of combustion engine cars by 2030 and against an oil and gas manufacturer to refrain from exploring any new oil and gas fields after 2025. This trend will continue in the coming year, when first developments in the pending cases will emerge and copycat lawsuits are expected to be filed. Companies from a wide range of sectors need to prepare for such proceedings and adopt strategies to minimise risks – both in anticipation of possible lawsuits and in response to actual lawsuits.

Read more:

Constitutional complaints against the German Climate Change Act

BMU press release on trajectories towards climate neutrality

"After the Constitutional Court's landmark decision in 2021, climate change litigation initiated by NGOs is on the rise in Germany and this trend will certainly continue. Companies should therefore be prepared and have strategies in place how to mitigate the risk of being targeted, sued or sentenced, in particular by setting up credible transition plans for their business."

Markus Appel – Partner, Environment and Planning, Berlin

Germany

Supply Chain Due Diligence

Companies will find themselves exposed to a whole range of new obligations along their supply chains when the new Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) becomes applicable on 1 January 2023. In 2022, they need to take various legal and operational steps to comply with the far-reaching new requirements and to avoid liability risks. Supply chains and compliance management systems need to be reviewed carefully to check whether additional measures must be taken. The Federal Office for Economic Affairs and Export Control ("**BAFA**"), which will enforce the new regulations, is tasked with preparing compliance guidelines to provide companies with legal certainty, which is urgently needed in view of the many unresolved issues. If not already involved, companies are well advised to engage in BAFA's consultations that have just begun.

Find out more:

The new German Supply Chain Due Diligence Act

Podcast: The New German Supply Chain Due Diligence Law – what companies need to know

Participation of women in leadership positions

The German Second Act on Equal Participation of Women in Management Positions (FüPoG II) introduces a mandatory minimum participation of women on the management boards of larger companies and extends existing rules on gender quotas for supervisory boards. Board members (of all genders) are afforded the right to request leave for personal reasons, such as childcare. The law provides for a staggered applicability. The minimum participation requirement for members of AG and SE management boards applies to appointments made on or after 1 August 2022. Existing board mandates may be exercised until their scheduled end.

Read more: Zweites Führungspositionen-Gesetz – FüPoG II

New impact fund regime

The German legislator has introduced a regime designed to promote the formation of development impact funds (*Entwicklungsförderungsfonds* – "**EF-Funds**"). The flexible EF-Funds regime attempts to resolve and reconcile several key issues so that public-private partnerships (or blended finance structures) can be used to effectively leverage the impact of public development funding. The fund regime, allowing for greater structuring flexibility than any other German fund type, may also be used for entirely private funding.

Read more: Der neue Entwicklungsförderungsfonds im KAGB

"While many companies are making considerable efforts to prepare for their new due diligence obligations, they are looking anxiously to Brussels: the EU is preparing a due diligence regime which might even go further than the new German law and require significant adjustments in the future."

Julia Grothaus – Partner, Dispute Resolution, Frankfurt

BaFin Guideline for Sustainable Investment Funds

In August 2021, the German Federal Financial Supervisory Authority ("**BaFin**") consulted on a draft guideline for sustainable investment funds. With a view to the risk of "greenwashing", the guideline sets minimum standards, similar to an ESG-label, for German investment funds (i) which include a reference to their sustainability profile in their name (such as "ESG", "sustainable" or "green") or (ii) which are marketed to investors as sustainable. For determining if an investment qualifies as (environmentally) sustainable, the guideline uses the definitions and concepts established in the EU Disclosure Regulation and EU Taxonomy Regulation. The consultation ended in September 2021. BaFin is expected to publish the final version of the guideline by early 2022.

Read more:

Draft BaFin Guideline (in German)

BaFin Consultation on Guideline for Sustainable Investment Funds

Germany

Green Schuldschein trademark

The Association of German Public Sector Banks (VÖB), together with five German banks, developed a new trademark for green Schuldschein loan agreements. The "Green Schuldscheindarlehen" published in April 2021 intends to set a green quality standard for the widely used corporate financing instrument. Users of the trademark have to conclude a licence agreement with the VÖB. The use of funds must be based on the six environmental objectives of the EU Taxonomy Regulation and a so-called Green Framework has to be prepared, currently based on ICMA's Green Bond Principles. Once the EU Green Bond Standard has been finalised, the framework will be based on the EU Green Bond Standard. It will be interesting to see to what extent the new trademark will be welcomed in the market.

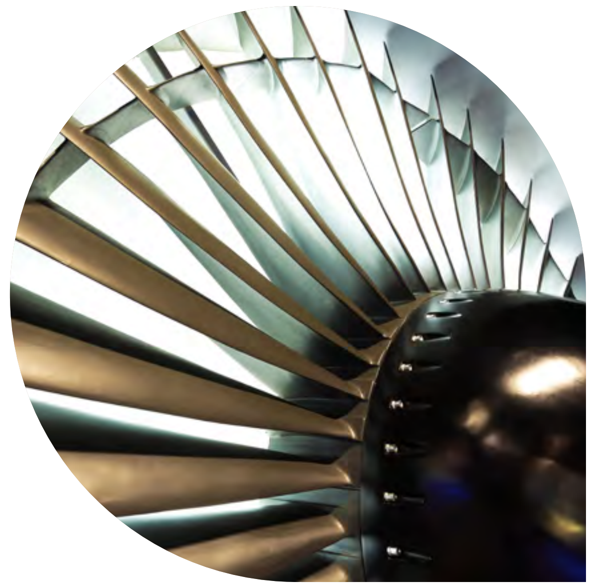
Read more:
VÖB press release
VÖB factsheet

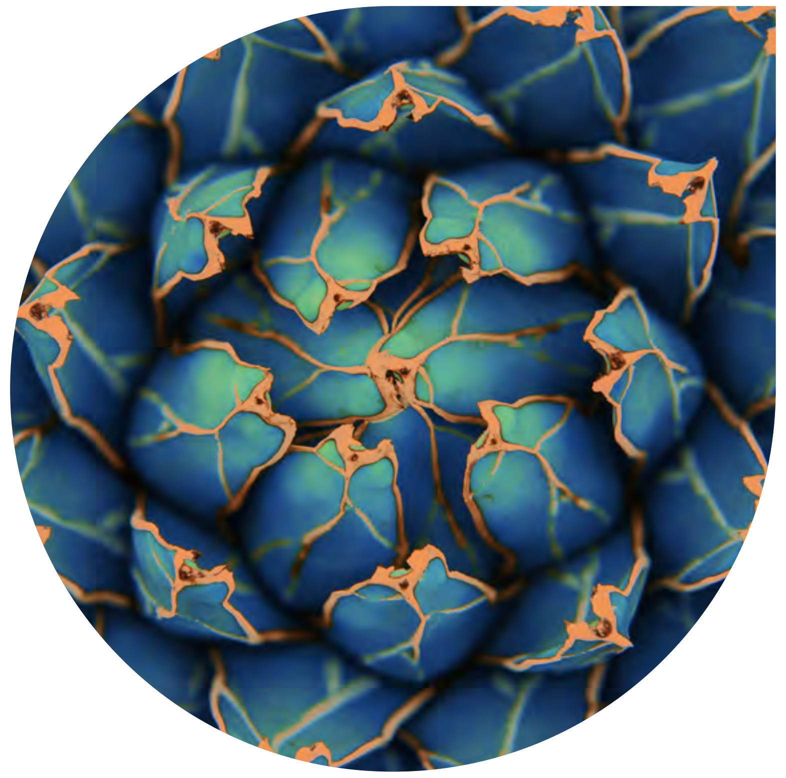
Whistleblowing

The EU Whistleblowing Directive obliges the EU member states to protect whistleblowers in order to uncover and prevent breaches of EU law. Member states must ensure the creation of internal and external reporting channels with confidentiality requirements and prohibit any retaliation against whistleblowers. For legal entities in the private sector with 50 or more employees, the directive provides for an obligation to set up suitable internal reporting channels. In court proceedings relating to a detriment suffered by a whistleblower it must be presumed that the detriment was made in retaliation for the whistleblowing. The implementation of the Directive into German law, which was due by 17 December 2021, was discussed in 2021. However, the accomplishment of this task, including the decision on the actual scope and details of the implementation, has been left to the new federal government and is likely to occur in the course of 2022.

Read more: The EU Whistleblowing Directive – are you ready?

For more information visit our German ESG homepage





Italy

National recovery and resilience plan

In order to obtain EU funding, in addition to the €24.894 billion already received, Italy must adopt 51 targets by the end of 2021, of which 27 reforms and 24 investments. Overall, only 15 of these have been achieved so far, while the others are already in the initial phase.

In the Italian Recovery Plan (*Piano Nazionale di Ripresa e Resilienza – PNRR*):

> €49.04 billion is allocated for the digital transition sector and is intended to reduce structural gaps in competitiveness, productivity and digitalisation;

> €68.66 billion is devoted to the green and sustainable transition so as to contemplate a progressive and complete decarbonisation of the system (net zero) by improving the sustainability and resilience of the economic system through a fair and inclusive transition; and

> €31.46 billion has been invested in reforms and investment projects in the infrastructure and mobility sector to carry out the works necessary to address those weaknesses that have penalised the country's economic development, contributing to the achievement of European targets for reducing emissions and the progressive decarbonisation of mobility.

Reforms and projects included in the Italian Recovery Plan are aimed at boosting Italian economy in 2022 and in subsequent years in order to allow a steady recovery from the Covid-19 crisis.

Read more: Piano nazionale di ripresa e resilienza

Implementation of EU RED II Directive on renewable energy

Legislative decree No.199 of 8 November 2021 implemented Directive 2001/2018 ("**RED II**"). The purpose of the relevant provisions is to accelerate the energy transition in 2022 (and in subsequent years) by phasing out fossil fuels in favour of renewable energies, setting Italy's target share of energy from RES in gross final consumption to at least 30% by 2030. The main provisions include: simplification and stability of the incentive system, streamlining of authorisation procedures; introduction of a comprehensive regulation of the renewable energy communities; innovation and evolution of the energy system and realisation of related infrastructures; completing the liberalisation of retail markets while protecting the most vulnerable customers; and introduction of a system of long-term supply of storage capacity with the aim of promoting the development of the investments necessary to implement the objectives of the National Energy and Climate Plan ("**PNIEC**").

Moreover, the legislative decree has provided the key features of the new incentive mechanism for renewable energy plants, including: simplification of access system to incentives with the elimination of registers for small competitive plants up to 1 MW; and auctions-based mechanism for plants over 1 MW and five-year horizon period for the scheduling of auctions and relevant quota to be allocated.

Semplificazioni Decree

The Italian Recovery and Resilience Plan, by setting ambitious key targets for 2030 and enhancing the green transition, strengthened the need for a strong intervention aimed, in the first place, at streamlining the administrative procedures for the construction and operation of renewable energy plants. Law Decree No. 77/2021 as amended and modified by Law No. 108/2021 (the "**Semplificazioni Decree**") was aimed (among other things) at narrowing the "permitting gap" and boosting in 2022 (and in the subsequent years) the development of renewable energy and storage plants, with a particular focus on solar PV plants. Among other things, the Semplificazioni Decree: (i) provided simplified authorisation procedures for solar photovoltaic ("**PV**") plants; (ii) introduced the possibility to request the relevant public incentives for PV plants located in areas for agricultural use (so called "agri-voltaic plants"); and (iii) extended the application of PAS regime to the installation of electrochemical storage plants.

Read more: Semplificazioni Decree Streamlining of authorisation procedures: a first step for a real boost in the Italian renewable energy sector

Italy

Bank of Italy – sustainable investment strategy

As a central bank, investor and supervisory authority, the Bank of Italy is committed to addressing the global and systemic risks posed by climate change, as much as considering sustainability factors to facilitate the smooth development of sustainable finance. Together with the Italian Ministry of Economy and Finance, the Bank of Italy chairs the G20 Financial Strand on Sustainable Finance, which has restarted the work of the "Sustainable Finance Study Group" ("**SFSG**"), co-chaired by the United States and China, giving it the status of a permanent working group ("**Sustainable Finance Working Group**"). Moreover, at the Finance Day at COP26, the Bank of Italy confirmed its willingness to contribute to the global action necessary to contain temperature increases and achieve the objectives of the Paris Agreement, joining the collective commitment made on 3 November 2021 by the Network for Greening the Financial System ("**NGFS**") under the Glasgow Declaration. The NGFS is a global network of central banks and supervisors in which the Bank of Italy actively participates. Its support for the development of more sustainable finance, the integration of sustainability criteria into its investment decisions, and its initiatives to reduce the ecological footprint of institutional activities is what made the Bank of Italy among the "greenest" central banks in the G20 countries. In particular, in integrating sustainability into its investment strategies, the Bank is inspired by the principles of the United Nations Global Compact, the Sustainable Development Goals of the United Nations 2030 Agenda, the 2015 Paris Climate Agreement; the recommendations of the NGFS; and the Eurosystem's common position on the climate sustainability of investments in portfolios for non-monetary policy purposes. In 2022, the Bank of Italy will publish its annual report on sustainable investments disclosing the progress that has been made by the Authority with respect to their responsible investments in terms of reducing its ecological footprint.

Read more:

La transizione verso un'economia a basse emissioni di carbonio e la finanza sostenibile: l'impegno della Banca d'Italia in vista della COP26

Carta degli investimenti sostenibili della Banca d'Italia

CONSOB – Strategic Plan for 2019-2021

CONSOB (Commissione Nazionale per le Società e la Borsa) is actively engaged in the development of sustainable finance, and this was also evident in the Strategic Plan for 2019-2021. In particular, with Objective 2 of the Plan, the Commission proposed to "accompany companies in the process of applying the new regulations on non-financial information by encouraging the introduction of Environmental, Social and Governance (ESG) issues". While the Strategic Plan for 2022-2024 has not been published yet, it is currently expected that CONSOB will focus even more on ESG issues. In February 2019, CONSOB set up a Steering Committee to give concrete implementation to this objective and enhance interventions in the regulatory and supervisory spheres related to the development of finance in support of sustainability, whose main areas of intervention are: monitoring regulatory interventions under consideration at European institutions and analysis of issues related to the correlation between regulations in the financial and accounting spheres; monitoring studies and researches in progress and preparing discussion papers on relevant sustainability issues. Since then, various initiatives have been undertaken in several areas. In 2021, for the third consecutive year, CONSOB has published a report in which it examined the effects of the European directive regarding minimum standards to be reported on environmental and social matters, and the data collected shows a clear improvement for Italian listed companies, which in the past year have developed a greater awareness of the relevance of non-financial issues than they did in 2019.

Read more: Piano strategico 2019-2021 CONSOB

Implementation of EU Sustainable Finance Disclosure Regulation

The European Delegation Law 2019-2020 (Law No. 53, 22 April 2021), which entered into force on 8 May 2021, sets out the principles and criteria on how the Italian legislative framework would need to be adapted to implement the EU SFDR, which entered into force on 10 March 2021. In particular, Article 24 provides that implementation will take place through one or more legislative decrees that will be adopted by the Italian government within 18 months from the date of entry into force of the European Delegation Law 2019-2020 (such legislative decree(s) have not been adopted yet but are expected in the coming months).

Directors' duties: Assonime report

In March 2021, Assonime (the Association of Italian Joint Stock Companies) published a report entitled "Directors' duties and sustainability" confirming the intention of the Italian companies to promote the initiatives launched at European level on sustainable corporate governance with the scope to create a European model of sustainable enterprise. Considering the importance of environmental and social factors for the companies' strategies and for the evaluation of the risks, after an examination of the rules in different European countries and of the practices of large companies, Assonime has affirmed the opportunity of a European Recommendation requiring Member States to include in their respective legal system:

- the duty for the directors of large companies to take into account the environmental and social sustainability of the company's activities in the creation of long-term value, as already indicated in the Italian Corporate Governance Code;
- the duty for the directors to balance the interests of the relevant stakeholders in the context of their management activities; and
- the sole right of the shareholders to act for the breach of the duties by the directors (also on the basis of their attention to the stakeholders' interests).

The adoption of a recommendation of this type will have an impact of the evaluation of the directors' duties and their liabilities.

Read more: Doveri degli amministratori e sostenibilità

Italy

Principles for engagement with shareholders

In response to the increasing attention by investors on ESG factors (eg environmental impact, governance systems, remuneration) and requests from investors to engage with companies on these aspects outside of shareholder meetings, in July 2021 Assonime published a set of principles aimed at identifying and addressing the major issues to be considered by listed companies when drafting their policies for managing their dialogue with shareholders (the "**Principles**"). The Principles were also discussed with several major Italian and international institutional investors and asset managers active in the Italian market. Assonime's Principles rely on three tenets: (i) the supervisory role of the Board of Directors, which steers the company's dialogue with investors, through the approval and possible updating of the policy, and monitors its implementation; (ii) the operational tasks of the "Responsible Directors", namely the CEO and/or the Chair of the Board, who are in charge of implementing the policy by managing each step of the dialogue; and (iii) the role of the contact point (usually the company's "Investor Relations" or the "Corporate Affairs" offices), entitled to receive investors' engagement requests. Based on these three pillars, each company can tailor its policy according to its concrete operational needs and investors' demands. While orienting the companies in the definition of their own policy, the Principles identify the key issues to reflect upon in the tailoring exercise.

The Italian listed companies will take into consideration these Principles in the drafting and adoption of their policies for the managing of the dialogue with shareholders.

Read more: Principles for Listed Companies' Dialogue with Investors

Corporate Governance Code – ESG Committee

The Italian Corporate Governance Code provides that the Board as a body shall contribute to sustainable success. From a practical point of view and as a best practice, many Italian listed and large companies have created ESG/sustainability committees at board level in order to better identify, analyse and manage ESG issues and reach ESG objectives. In such respect it has been highlighted that it is necessary to accurately define the tasks of this committee, analyse its composition to reflect different ESG competencies and evaluate the inclusion of executive directors in consideration of the connection of ESG topics with companies' strategy. For a good and efficient functioning, it is necessary that the Committee is supported at managerial level (ie an ESG point of reference in each function and geography).

Looking at Italian listed companies, according to a 2020 report on non-financial reporting of Italian listed companies published by CONSOB (the Italian authority regulating the Italian financial markets), approximately 35% of listed companies have a sustainability committee (of which around 3% a standalone committee and 32% a combined committee, eg sustainability topics included in the remit of the internal control and risk management committee or in the corporate governance committee).

The creation of a dedicated ESG Committee and/or the attention to the accurate definition of its tasks and composition may represent a new corporate governance trend for 2022 and the following years.

Annual competition law 2021

The annual competition law 2021, which is currently being reviewed, includes the integration of the objectives of competition and environmental sustainability in the waste collection and energy sectors. The introduction of the provisions envisaged by the measure in question would show its effects over the upcoming year.

National Code of Equal Opportunities – gender pay gap

With Law No. 162 on 5 November 2021, the Italian Parliament approved a gender wage parity, which came into force on 3 December 2021. The provision, which is very ambitious, addresses a multitude of extremely different aspects: from the purely economic aspect (ie equal pay for equal work), to gender inequalities and maternity protection. Among other things, the main measures, with which companies will have to comply from 2022 onwards, include: (i) the introduction of the certification of gender equality, which aims at certifying the measures taken by employers to reduce the gender gap; (ii) provision of economic bonuses for the "virtuous" employer; and (iii) the introduction of the obligation for public and private companies with more than 50 employees (the threshold was previously 100) to draw up a biannual report on the situation of male and female staff in each of the professions and in relation to the state of recruitment.

Read more: Legge 5 novembre 2021 n. 162

"In Italy, market and regulatory pressures are increasingly shifting ESG focus onto governance and strategy. Net zero and sustainability initiatives are also a core part of the Italian Resilience and Recovery Plan, with structural changes such as the simplification of the authorisation process expected to unblock 70GW of renewable energy development."

Tessa Lee – Partner, Banking and Energy & Infrastructure, Milan

For more information visit our ESG in Italy homepage

Luxembourg

Luxembourg, an international hub for sustainable finance

While the shift towards sustainability in finance has accelerated significantly over the past few years, Luxembourg's key priorities (as set out in its Sustainable Finance Strategy) remain clear: to build a sustainable finance ecosystem in line with the country's commitments to a climate-neutral world by 2050; to adhere to the United Nations 2030 Agenda; and to develop positive, innovative private sector initiatives.

Firmly established as a European leader in green and sustainable finance, Luxembourg's financial centre is home to some 32% of all assets under management in European sustainable funds (ALFI 2021). In addition, over 50% of all worldwide sustainable bonds are listed on the Luxembourg Green Exchange ("**LGX**"). Meanwhile, Luxembourg is also a world leader in microfinance, currently accounting for some 50% of all assets in microfinance.

In recognition of the growing and critical importance of ESG in finance, credit rating agency Moody's recently introduced an ESG performance category to its assessment methodology. Luxembourg was awarded a triple-A rating in February 2021. The Grand Duchy's "positive ESG" credit impact score reflects its low exposure to environmental and social risks, top-performing governance, as well as a very high capacity to respond to shocks. Luxembourg's AAA rating underlines the country's robust financial status and low level of debt, together with its far-sighted economic policy and stable political environment.

Legislating for climate change

The Climate Law was adopted in December 2020 and is based on the principles of climate justice and social equity. Through the Climate Law, Luxembourg acknowledges that a more significant effort is required to mitigate climate change. As such, the law includes a target of reducing greenhouse gas emissions by 55% by 2030 compared to 2005 levels, and to be carbon free by 2050 at the latest. The Climate Law also introduces compulsory sectoral climate change objectives for the following five sectors thus giving them greater responsibility for the reduction of emissions: energy industries and manufacturing, construction; transport; residential and tertiary buildings; agriculture and forestry; and waste and wastewater treatment.

The Climate Law creates the framework for the implementation of the "Integrated National Energy and Climate Plan" for 2021-2030. It provides a roadmap, illustrating the measures and policies needed to achieve Luxembourg's national objectives in these five sectors.

Further action taken includes the submission in May 2021 to the Luxembourg Parliament of draft law 7821 which concerns climate loans and the repeal of the existing law. Currently, residents and companies are encouraged to renovate their properties for greater energy efficiency. The draft law aims to simplify the existing criteria, procedures and terminology to make climate loans more easily accessible and to ensure that every property owner is eligible for an interest free loan.

While the European Central Bank has started evaluating major banks on climate-related and environmental risks, the Commission de Surveillance du Secteur Financier ("**CSSF**") also published Circular 21/773 on the management of climate-related and environmental risks for all less significant institutions ("**LSI**"), credit institutions under the Single Supervisory Mechanism ("**SSM**"), and all branches of non-EU credit institutions. The objective of this circular is to raise awareness among CSSF-supervised credit institutions about the need to consider and assess climate-related and environmental risks. It sets out CSSF guidance on what credit institutions need to consider and integrate into their operations and climate-related and environmental risks as drivers of existing categories of risks.

Luxembourg

Implementing EU initiatives: SFDR and the Taxonomy Regulation

With regards the implementation of the EU SFDR and the Taxonomy Regulation in Luxembourg, draft law 7774 was introduced on 3 March 2021. It aims to appoint the CSSF as supervisory authority for the compliance with SFDR and the Taxonomy Regulation by financial market participants and financial advisors under its supervision. Draft law 7774 defines the supervisory and investigative powers necessary for the performance of its supervisory duties and gives the CSSF the power to impose administrative sanctions. On 2 December 2021, a CSSF press release on regulatory requirements and fast track procedure in relation to Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investments (the so called "Taxonomy Regulation" "TR") and Regulation 2019/2088 on sustainability-related disclosures in the financial services sector ("**SFDR**") was published. The CSSF TR fast track procedure aims to facilitate the submission and CSSF visa stamp of prospectus/issuing documents regarding TR updates for Luxembourg regulated funds.

Read more: New CSSF taxonomy fast track procedure

Launching climate bonds initiatives

The Luxembourg Stock Exchange ("**LuxSE**") has been a pioneer in the development of Europe's green bond market. In 2016, it established the LGX, a dedicated platform for green, social impact, sustainable or ESG-focused securities restricted to issuers that are fully transparent. In 2021, LuxSE added a new section to the LGX dedicated to Climate-Aligned Issuers ("**CAI**"). This refers to those issuers of debt securities that are active in climate-aligned sectors (such as clean energy, low-carbon transport, and sustainable land use) but that may not have issued bonds in the labelled format.

"Luxembourg's unwavering commitment to sustainable finance is an increasingly important driver in helping the financial services sector meet the soaring demand from investors seeking to build a better, cleaner and brighter world. Working in collaboration with the private sector, sharing public research and resources, Luxembourg continues to lead the way in innovative thinking and flexible solutions."

Silke Bernard – Partner, Investment Funds, Luxembourg

Netherlands

Climate policy and greenhouse gas emission reductions

The Netherlands has set some ambitious targets in recent years which may become stricter in light of EU developments. In the National Climate Agreement (*Klimaatakkoord*), the central theme is to reduce greenhouse gas emissions in the Netherlands by 49% in 2030 compared to 1990 levels. This reduction target is laid down in the Climate Act (*Klimaatwet*) as well as a goal to arrive at a 95% reduction in CO_2 by 2050.

Pursuant to the Climate Act the following mechanisms apply:

(i) a climate plan which contains the key points of the government policy to be implemented in the next 10 years for which the Minister of Economic Affairs and Climate is responsible;

(ii) a climate and energy report (*KEV*) which provides a report of actual and forecast CO_2 emissions in the Netherlands; and

(iii) a climate memorandum which contains the appraisal by the Dutch government regarding the targets, accompanied by any additional policy intentions to achieve those targets.

Since the inception of its climate policy, significant steps have been taken by the Dutch government to abide by the targets set herein. Partly this was due to the *Urgenda* court ruling in which the Dutch State was ordered to reduce greenhouse gas emissions by the end of 2020 by at least 25% compared to 1990. Amongst other things, the obligation on the Dutch government to comply with the *Urgenda* ruling resulted in the early closure of a coal-fired power plant in Amsterdam.

Further compliance with the *Urgenda* ruling will be achieved among other things by: (i) the Coal Phase Out Act (*Wet verbod op kolen bij elektriciteitsproductie*) which introduces a production cap for coal-fired power plants; (ii) a call for the owners of each of the three modern coal plants to close a plant voluntarily in consideration for a subsidy award; (iii) increased budgets under incentive schemes for renewables; and (iv) development of CO_2 reduction projects in joint consultation with the industrial players. Recently, Riverstone reached agreement with the Minister of Economic Affairs and Climate on a €212.5 million subsidy for the closure and dismantling of the Onyx coal fired power plant in Rotterdam. The Dutch government will consider further suitable measures to comply with the *Urgenda* ruling, also in light of its long-term climate policy towards 2030 and 2050. Urgenda's view is that the Dutch State does not (sufficiently) comply with the *Urgenda* ruling. It announced in June 2021 that it will ask the court to impose a judicial penalty (*dwangsom*) on the Dutch State for its (alleged) non-compliance with the ruling. It is also considering starting new proceedings for the Dutch State's alleged failure to meet the 2030 climate goals.

Lastly, with effect from 1 January 2021, the Dutch government introduced a CO_2 levy on emissions from industrial installations. The amount of the CO_2 levy per tonne of CO_2 depends on the EU ETS price, as it is calculated as the difference between the rate set out in the Environmental Taxes Act (*Wet belastingen op milieugrondslag*) and the EU ETS price. The CO_2 levy for the industry is in addition to a minimum carbon price to produce electricity. The minimum carbon price applies to the emission of greenhouse gas from electricity generation by companies that fall under the EU ETS. Details of this legislative proposal are still being discussed in the Dutch Upper House (*Eerste Kamer*) of the Dutch parliament.

Read more:

Climate Litigation: An overview of the Urgenda decision

See here for an unofficial translation of the *Urgenda* ruling: Dutch Supreme court I Urgenda v Netherlands

Netherlands

Renewable energy and incentive schemes

The Regional Energy Strategies (*Regionale Energiestratiegiëen (RES)*) are a key feature of the National Climate Agreement. Currently, local governments, social partners, network operators, the private sector and residents collaborate on the energy transition in an aim to become regionally supported choices of projects. In the RES, there is a particular focus on processing and creating local support as well as spatial implementation of future projects. On 1 July 2021, the RES 1.0 was adopted for each of the 30 regions in the Netherlands. In 2022, the Netherlands Environmental Assessment Agency (*Nederlands Planbureau voor de Leefomgeving (PBL)*) will provide further detail on its appreciation of RES 1.0. In the next decade, the RES will determine the development of renewables in the relevant regions as well as the pace of the implementation of the wider energy transition at a local level. The primary goal of the RES 1.0, being the generation of 35 TWh renewable energy onshore, is on track.

"The energy transition requires (local) support. In the Netherlands 30 regions will co-determine the location and pace of renewables development by formalising regional energy strategies."

Gijs Smit – Counsel, Head of Energy Sector, Corporate/M&A, Amsterdam

At the end of 2021, certain amendments to the Offshore Wind Energy Act (*Wet windenergie op zee*) entered into force. Since 2015, this Act constitutes the legal framework for the construction and operation of offshore wind farms. The amendments demonstrate that the offshore wind market has matured in recent years. The amendments made relate to a more robust and future proof tender mechanism and an increase of the permitted operational period of offshore wind farms. On a national level, offshore wind is one of the key drivers to reduce CO_2 emissions by 2030. This would require a total operational capacity of approximately 11 gigawatt (GW) by 2030. The Offshore Wind Energy Roadmap (*Routekaart windenergie op zee*) for 2024-2030 lays down the sequence for the development of the wind farms. Furthermore, it is expected that offshore wind capacity in the North Sea should be between 38 and 72 GW in 2050. In this context, the Dutch government will prepare an updated offshore wind roadmap up to 2040. This roadmap will not only target new offshore wind locations but also the integration of offshore wind with other energy systems (eg hydrogen) and the development of the relevant transport infrastructure. New offshore wind locations will take place in connection with the North Sea Programme 2022-2027 (*Programma Noordzee 2022-2027*) which is expected to be finalised early 2022.

The Stimulation of Sustainable Energy Transition (the SDE++) subsidy scheme replaced the SDE+ regime. Under the SDE++ subsidy scheme, in addition to renewable energy, other CO_2 reduction technologies will become eligible for incentives as well. Consequently, technologies will no longer compete based on the amount of renewable energy produced, but rather on the amounts of CO_2 that have been avoided. In fact, the SDE++ subsidy scheme offers an operating premium feed-in tariff subsidy for renewable energy and other CO_2 reduction techniques compensating the difference between the cost price of the technology and the market price of avoided CO_2. The Dutch government announced that in 2022 an additional €3 billion will be made available for the SDE++ budget.

"The offshore wind market has matured in recent years. Within the next decade an exponential growth of the market is expected with a target installed offshore wind capacity of 11 GW by 2030."

Gijs Smit – Counsel, Head of Energy Sector, Corporate/M&A, Amsterdam

Hydrogen

In its Government strategy on Hydrogen (*Kabinetvisie waterstof*) from March 2020, the Dutch government envisages that hydrogen will be an indispensable part of the sustainability strategy for industrial clusters, ports and the transport sector generally. Within all industrial clusters in the Netherlands, market parties are preparing for hydrogen to play a growing role, including through feasibility studies, the development of business cases and proposed investments. Hydrogen production plans collectively add up to 6–7 GW of electrolysis capacity in 2030.

A major milestone was reached by the end of June 2021 when it was proposed that Gasunie would take the lead in the development of the hydrogen backbone in the Netherlands. Following research undertaken, the Dutch government will re-use the existing gas infrastructure and the roll-out plan for the hydrogen backbone will include details where (and where not) hydrogen transport infrastructure will be developed.

The National Hydrogen Programme (*Nationaal Waterstof Programma*) was launched in January 2021. A work plan is currently being developed. This will describe in further detail the activities to be undertaken by the National Hydrogen Programme to facilitate and realise the potential of hydrogen in the context of the energy transition. The work plan focuses on the period 2022-2025 with a further view towards 2030 and was published and handed over to the Minister of Economic Affairs and Climate on 9 July 2021.

Read more: Getting Hy? Ambition and the art of the possible in the search for a hydrogen economy

Netherlands

Sustainable companies and collaboration by companies for sustainable objectives

The Netherlands is considering introducing a legal framework for social enterprises (*besloten vennootschap met maatschappelijk doel (BVm)*). Social enterprises will have a specific social purpose, which could include one or more ESG elements, as set out in their articles of association (*statuten*). The managing directors of such an enterprise will need to consider and act in accordance with such social purpose and report on the social purpose in the management reports.

Currently, no national or international framework on sustainable standards exists but the EU is rolling out its Taxonomy rules. Also the IFRS Foundation announced in November 2021 the formation of the new ISSB which will develop international sustainability disclosure standards.

The Netherlands Authority for Consumers and Markets ("**ACM**") wants to increase the opportunities for competing businesses to collaborate in pursuit of sustainability objectives and proposes to allow this in cases where the benefits for society as a whole outweigh the disadvantages of any restriction of competition. For this reason, the ACM's revised "Sustainability Agreements" Guidelines, which include examples illustrating the opportunities for business collaboration that contributes to a sustainable society have been drawn up. The ACM believes it is important that European guidelines are drawn up, which offer clarity to businesses that wish to make anti-competitive agreements that, for example, combat the climate crisis. We note that the ACM currently takes a firm stance on misleading sustainability claims from companies in the clothing, energy and dairy sectors and is currently conducting investigations into practices by several companies in those sectors.

Corporate governance

In the Netherlands a debate is ongoing on the introduction in Dutch law of a duty of care on management board members and supervisory board members to participate responsibly in social and economic life. This would involve, among others, climate change, tax ethics, pay ratios within the business and diversity. Alternatively, scholars proposed to explicitly elaborate on the corporate purpose in the articles of association. Dutch government will further analyse how these proposals could be enshrined in Dutch law.

With regard to board diversity, Dutch law used to prescribe a non-binding quota regarding gender diversity in the boards of certain large companies. These quotas ceased to apply on 1 January 2020 due to the fact that no sufficient progress was made. With effect from 1 January 2022, Dutch listed companies are required to meet a quota of at least one-third women and one-third men on their supervisory board or one-tier board. Appointments that are not in accordance with this quota should be regarded as null and void (*nietig*), without affecting the validity of passed (supervisory) board resolutions. In addition, all "large" public and limited liability companies must formulate a plan including appropriate and ambitious target figures for the supervisory board, the management board and the junior management and report it reported to the Socio-Economic Council (*Sociaal Economische Raad (SER)*). The SER will publish reports on the progress of these companies' achievements of the targets set. These obligations are envisaged to apply for a period of eight years and will be evaluated after a period of five years.

The Royal Netherlands Institute of Chartered Accountants (*Koninklijke Nederlandse Beroepsorganisatie van Accountants (NBA)*) is further defining the role of accountants regarding analysing, verifying and auditing climate targets and objectives of Dutch listed companies. The NBA has taken the stance that every annual report should contain a report on climate performance and published a sustainability manual containing guidance for accountants relating to both existing and future standards and regulations, including the forthcoming EU CSRD.

A significant shift has also been taking place in the stance of investors, trade unions and other stakeholders in the Netherlands on companies' responsibilities in relation to ESG. Eumedion, a representative body of institutional investors in Dutch listed companies has set out its focus points for 2022: (i) the establishment of Net Zero Emissions Transition Plans; (ii) transparency on the implementation of the diversity and inclusion policy within the total workforce; and (iii) transparency on human rights due diligence. Furthermore, ABP and other pension funds announced they will stop investing in producers of fossil fuels.

"Corporates and listed companies are increasingly recognising the importance of ESG matters for their business continuity. Investors require transition plans from companies towards a net zero economy and accountability in their annual reports."

Gijs Smit – Counsel, Head of Energy Sector, Corporate/M&A, Amsterdam

Netherlands

Green loans and sustainability-linked loans

The Loan Market Association ("**LMA**") published new versions of its Green Loan Principles and Sustainability-Linked Loan Principles in the first half of 2021. As a reminder:

- green loans are loans allocated for "green" projects such as energy efficiency upgrades or replacing gasoline-driven vehicles with electric ones; and
- sustainability-linked loans are loans for a general purpose where the pricing is linked to the borrower's performance against certain ESG-related KPIs, such as a target to reduce carbon emissions.

Certain Dutch banks led the initial charge in developing ESG products for their clients and, as a result, several Dutch lenders have considerable experience in the field. Many of these lenders go out of their way to encourage their clients to make use of ESG products and develop sustainability KPIs. Some act as sustainability co-ordinators, with specialist teams advising on ESG elements such as selecting and auditing KPIs, and there are also a range of third-party providers offering similar services.

Perhaps partly as a result of their lenders' enthusiasm, green loans and sustainable loans are both popular options for Dutch borrowers. An increasing number of Dutch SMEs borrow green loans in order to finance a range of relevant projects, and larger businesses are following suit. With the encouragement of Dutch banks, and a growing awareness among borrowers of the available products, sustainability-linked pricing is also increasingly popular in large syndicated loans. As in other European jurisdictions, sustainability has mostly been integrated into investment grade lending, but there is growing interest in incorporating sustainability KPIs into leveraged finance transactions and the mid-market as well.

The LMA also released new Social Loan Principles in April 2021, aimed at developing a framework within which new "social loan" products will be created. These loans would be similar to green loans, in that they would fund projects. However, rather than environmental change, social projects would be aimed at bettering society through uses such as affordable infrastructure, essential services, affordable housing, or food security. This has not been a focus in the Dutch market to date, but the publication of the social loan principles may provide the necessary framework to encourage lenders and borrowers to begin developing those products – if only to agree a path for change with borrowers active in sectors with less of a sustainability footprint.

Rounding off a busy first half of the year for ESG loans, in July 2021, the LMA published a Best Practice Guide to Sustainability-Linked Leveraged Loans, produced in conjunction with the European Leveraged Finance Association and a working group consisting of various financial institutions and law firms (including Linklaters). Along with our report on the subject (see Sustainability linked lending in the European leveraged loan market), this represents the increasing interest in ESG from the leveraged market – particularly sustainability-linked loans. We have held discussions with several financial institutions (in the Netherlands and elsewhere) to discuss the emerging market practices, and how to implement them in the unique, often challenging, context of leveraged finance.

Read more:

Changes to ESG loan market standards;

Sustainability-linked lending in the European leveraged loan market

"ESG pricing adjustments are now a theme in almost every syndicated financing. They are no longer the realm of the frontrunners in the ESG transition alone. While the commercial incentive for lenders and borrowers is clear, in the 'brown sectors' above all parties will need to be really ambitious in order to stay clear of greenwashing allegations."

Mees Roelofs – Partner, Banking & Finance, Amsterdam

Netherlands

Prudential supervision of banks

The Dutch Central Bank (*De Nederlandsche Bank (DNB)*) promotes a sustainable economic development. DNB advocates accelerating and scaling up climate investment. The Dutch government must create favourable conditions. The newly formed Dutch government is called up to do so by deploying a mix of pricing, supporting and regulating measures.

DNB's Sustainable Finance Platform is a co-operative venture which brings together the Dutch financial sector, the Dutch government and the supervisory authorities to find ways of preventing or overcoming constraints for sustainable funding and to boost sustainability by working together.

A key priority of DNB's supervision is the financial sector's management of climate-related and environmental risks. Financial institutions are to be aware of sustainability risks and to be able to manage them. Commitment to sustainability and future orientation is one of three focus areas in DNB's Supervisory Strategy 2021-2024.

Climate-related risks are now also part of the fit and proper assessments of (co)policymakers of banks, insurers and pension funds. The financial undertaking in question must include in its screening application the candidate's knowledge and experience with regard to such risks. DNB amended its suitability matrices to explicitly include this. Moreover, climate-related and environmental risks take a more prominent role in DNB's screening interviews. When conducting its assessment, DNB takes a proportional approach. This means that DNB takes into account the candidate's proposed position, the financial undertaking's nature, size, complexity and risk profile, and the composition and functioning of the board as a whole.

DNB published guidance documents on climate-related and environmental risks, *inter alia*:

> Good Practice Integration of climate-related risk considerations into banks' risk management; and

> Good Practice Integrating climate-related risks in the ORSA.

In September 2021, DNB published the draft "Good Practice climate-related and environmental risks managers investment firms (AIFMD and UCITS)" (only available in Dutch) for public consultation. Climate-related and environmental risks can have a material financial impact on the financial soundness and reputation of funds. In order to manage these risks, DNB prepared this Good Practice document with guidelines for integrating climate-related and environmental risks into the strategy, governance, risk management and information provision of Fund managers. The final document is expected to be published soon.

"Regulators in the Netherlands have increasingly prioritised climate-related and environmental risks within the financial sector and have embedded these topics in their supervisory strategies and approaches towards financial market parties, by formal and informal means."

Bas Jennen – Partner, Financial Regulation Group, Amsterdam

Conduct of business supervision

The Dutch Authority for Financial Markets (*Autoriteit Financiële Markten (AFM)*) is committed to promoting fair and transparent financial markets. Contributing to sustainable financial well-being in the Netherlands is part of the AFM's mission as reflected in its Strategy 2020-2022. In this context, among other things, the AFM supervises the reporting of sustainable developments, climate-related issues and oversees that sustainability principles are being adhered to in an honest and transparent manner.

In September 2021, the AFM published a report on the implementation of the requirements of the EU SFDR by managers of Dutch collective investment schemes (funds). Fund managers must disclose how they integrate sustainability risks in their investment policy and describe the likely effects of sustainability risks on the returns of the Funds concerned. On the basis of its review, the AFM established that all managers of funds with sustainability characteristics or objectives on the date that the SFDR came into effect had included information on this in their prospectuses. Among the 46 funds that were selected for the review, the AFM sees room for improvement in the quality of this information and has queries regarding the sustainability classification for a significant proportion of the selected group. The AFM's findings concern the following three points: (i) the integration of sustainability risks in investment policies could be more clearly stated; (ii) observance of the transparency obligations in Article 8 or 9 SFDR could be clearer; and (iii) the objectives of Funds are frequently too vaguely defined.

Supply chain due diligence and human rights

In 2019, the Child Labour Due Diligence Act (*Wet Zorgplicht Kinderarbeid*) was adopted, which obliges companies to investigate whether their goods or services have been produced using child labour. Also, companies must develop a plan to prevent child labour in their supply chains. The obligations shall apply to all companies that sell or supply goods or services to Dutch consumers, regardless of where such company is based or registered, without exemptions for legal form or size. In addition, companies shall affirm to a regulator, which is to be determined, that they have exercised an appropriate level of supply chain due diligence to prevent child labour. Fines for breaches under the Child Labour Due Diligence Act could be up to €870,000 or 10% of the company's total worldwide revenue. The Child Labour Due Diligence Act will become effective by mid-2022.

Read more: Human rights: What does it mean for businesses?

Netherlands

Certain members of the Dutch parliament have proposed a new legislative proposal which obliges all Dutch incorporated companies with international operations to comply at least with the OECD guidelines for multinational companies. If this initiative becomes law, it would mean that all such companies pursuant to the (to be introduced) Act on responsible and sustainable international operations (*Wet verantwoord en duurzaam internationaal ondernemen*) are by law required to take measures to prevent their supply chain making use of child and/or forced labour, slavery or that in their supply chain unsafe working conditions, discrimination, exploitation, breach of freedom rights to form trade unions or environmental damages are present. The Dutch Council of State adopted its non-legally binding advice in respect of the legislative proposal in July 2021. This advice is, pending the reaction of the initiators of the legislative proposal, not yet publicly available. It is unclear when this will become publicly available. Also refer to DNB's supervisory priorities for 2022 here (only available in Dutch) and their report on the integration of sustainability risks in the core processes of the financial sector (only available in Dutch), which were both published early December 2021.

Climate litigation

On 26 May 2021, the district court in The Hague ordered Royal Dutch Shell to reduce its global carbon emissions by 45% by 2030 compared with 2019 levels – that is, the emissions of the Shell group, its suppliers and its customers. This was considered a ground-breaking decision as, for the first time, a court has intervened to force a company to reduce its carbon emissions and bring its strategy in line with the goals of the Paris Agreement. For the Netherlands, this decision was as important as the *Urgenda* case (see Climate policy and greenhouse gas emission reductions section).

Undoubtedly, this is another important decision in the field of climate litigation that is on the rise on a global scale. Commentators have stated that the Shell decision is a "tipping point" in climate litigation but time will tell if that is indeed the case. However, this decision is the latest in a series of cases and investor decisions that, together, have very significant implications for companies' climate strategies, not just in the oil & gas or energy sector.

Shell has indicated that it will appeal the decision.

Read more:

Shell climate case: digging deeper into the court's legal reasoning

Shell climate decision: companies' climate plans and targets under fire

For more information visit our ESG in the Netherlands homepage

Poland

Government commitment to sustainability

Poland is already taking measures to improve air quality, rationalise waste management and develop electromobility. These projects are, by their very nature, capital-intensive and require greater involvement of the capital market. The government adopted the Capital Market Development Strategy for the period 2019-2023, which constitutes the first detailed and comprehensive plan for the development of the capital market in Poland, with an ESG development factor. It is stressed that the Polish capital market must take into account actions undertaken by international organisations promoting sustainable finance and the growing group of investors interested in financing activities carried out for the benefit of sustainable development.

The measures taken by the government in the area of sustainable finance development include:

> establishment of a working group on sustainable finance at the Financial Market Development Council;

> analysis of opportunities for further development of the green bond market;

> undertaking a two-folded effort to educate and promote sustainable investments and products;

> lobbying activities of Polish entities and energy companies at the international forum; and

> analysis of the rationale of introducing the low-carbon index by WSE Benchmark.

Read more: Capital Market Development Strategy

"ESG is currently a key priority for Polish market participants. The Polish government has taken measures to improve air quality, rationalise waste management and develop electromobility which, although not exhaustive, a trend is strongly visible. By their very nature these projects are capital-intensive and require greater involvement of the capital market. We also observe a number of initiatives by Polish industry associations and organisations covering specific ESG issues. Many times in the past private sector initiatives have triggered fundamental system changes and also now, in terms of ESG it looks promising."

Piotr Zbyszyński – Senior Associate, Corporate, Warsaw

Warsaw Stock Exchange guidelines on ESG reporting

In May 2021, the Warsaw Stock Exchange ("**WSE**") published its guidelines on ESG reporting for listed companies. The purpose is to support issuers in disclosing ESG information in line with investor expectations and to work towards harmonised and consistent reporting. This document demonstrates the WSE's commitment to effectively support issuers in identifying and managing ESG risks and opportunities and creating an attractive market, enabling investors to better assess value drivers. This in turn will contribute to the development of a more resilient and efficient capital market focused on investments addressing climate and sustainability priorities. The guidelines consist of two parts; first describing scope and rationale for ESG reporting, and second defining companies' ESG reporting.

Read more: ESG Reporting Guidelines: Guide for issuers

Women on boards as potential ESG investment criteria

CFA Society Poland issued a report on the 140 largest Polish listed companies during the period 2010-2019, aimed at verifying the hypothesis of outperformance of companies with gender-diverse boards. The conclusion indicated that companies with boards dominated by one gender did not perform better that their more diverse counterparties. The report also showed that women were still a minority on supervisory and management boards and their representation rarely exceeded a 30% threshold. However, over the past 10 years, the share of women in surveyed companies has increased, but the process seems to be slow. Lack of sufficient diversity on boards has been observed by capital markets participants, which may be the first step in integrating this criterion into investment decisions.

Read more: Women on boards and company performance

Poland

Report on basic ESG indicators in relation to SFDR

The Association of Polish Banks, the Association of Listed Companies, the Insurance Association, the Association of Assets and Funds Managers and Foundation on Reporting Standards jointly published a report on basic ESG indicators in relation to the EU SFDR. The aim of the report is to support Polish financial markets participants in understanding ESG indicators, gathering information required for ESG indicators and their calculations in order to properly fulfil their reporting obligations.

Read more: The report

Green financing: current market and trends

The majority of carried out or planned investments in the energy and infrastructure sectors in Poland can be financed through green loans. Project finance remains the most popular financing structure in renewables and infrastructure assets. However, the new formulas on the market (such as issuing of portfolio backed notes) are also seen. It is worth noting that using green loans is not limited merely to the development of new green assets. As a rule, market-wide principles and EU Taxonomy Regulation allow the use of green loans for financing investments within already existing assets if their effect is to improve the asset's efficiency or reduce its environmental footprint.

All major European banks are active on the ground, either through a head office or local outlet. Local banks focus their activity on financing green investments by Polish corporates and participating in larger syndicates on international transactions. Insurance companies have become increasingly visible in the debt sector. There is still strong presence of multilateral development banks, but Polish development agencies have become increasingly involved in the renewables sector.

Banks continue to grow in green bonds and supervise over the climate risk assessment

Based on the report "Green Finance in Poland 2021 (*Zielone finanse w Polsce 2021*), prepared by the UN Global Compact Network Poland, sustainable finance is one of the most dynamic trends on the financial markets in the last few years. The report cites the European Investment Bank's estimation that Europe will need additional investments of about €350 billion per year to meet climate policy goals in energy systems alone by 2030. Green bonds allow the funds to be directed to climate change and decarbonisation projects. Poland was the first country in the world to issue green government bonds, which met tremendous interest. The government would like to use the green bond's success and develop the segment of green municipal and corporate bonds. The Ministry of Finance, as part of the implementation of the Capital Market Development Strategy, is preparing conclusions and recommendations concerning the development of the green bond market in Poland.

The report also noted that the climate risk assessment activities undertaken by the Polish Financial Supervision Authority ("**PFSA**") are at an early stage. However, some initiatives have already been introduced, such as establishing an informal working group aimed at analysing draft regulations, active participation of PFSA employees in international sustainable development forums, co-operation with Polish bank associations in the form of training and joint work on interpreting regulatory changes. Other activities, such as scenario analysis and stress tests or broad inclusion of climate risk in periodic assessments, are waiting for guidance from European regulators and the European Commission to ensure their completeness and correctness.

Read more: Green Finance in Poland 2021

Green Finance Group

As a next step in the collaboration between the Warsaw Stock Exchange and UN Global Compact Network Poland ("**UN GCNP**"), the Green Finance Group (established in 2018) has expanded its activities to include meetings of the banking sector, investment funds, and the insurance sector with representatives of the Ministry of Finance and development banks represented by entities such as the World Bank, the European Bank for Reconstruction and Development ("**EBRD**"), and the European Investment Bank ("**EIB**"). Meetings of the Green Finance Group focus on capital allocations resulting from the European Green Deal, investment packages and long-term implementation strategies necessary to implement specific "green" initiatives. The goal of the Green Finance Group is to conduct an active dialogue between representatives of the financial sector and the administration on the European, national and local government levels, facing challenges related to the climate crisis, energy transition processes and decarbonisation in Poland, also activities resulting from the Paris Agreements and regulations of the European Green Deal.

Read more: Warsaw Stock Exchange press release

Energy transition

The capacity of Polish power plants will soon be insufficient to cover the growing demand for electricity, which poses an additional challenge in the country's ongoing energy transition. Currently, three quarters of Poland's energy is sourced from coal. Renewable energy sources still comprise less than 20% of the national energy mix. Poland has no choice but to grow its onshore and solar PV capacity, and develop offshore capabilities. The Polish government has approved a plan for transition from coal, whilst green investments and financings continue to flourish.

Read more: McKinsey: Carbon-neutral Poland 2050

"Polish utilities have implemented energy transition strategies to gradually reach net zero by 2050, although currently fossil fuels remain a key component of the Polish energy mix for the next few decades. ESG policies are key to successful energy transition. Achieving net zero will not only require eliminating emissions by developing more renewables but also involve socio-economic costs triggered by energy transition of the regions concerned."

Patryk Figiel – Partner, Energy & Infrastructure, Warsaw

Portugal

New Climate Framework

A new climate framework was approved in November 2021 setting out comprehensive guidelines for the climate policies to be developed in the upcoming years.

It establishes that the Parliament shall approve on a five-year basis and within a 30-year horizon national targets for the reduction of greenhouse gas emissions, assuming that Portugal should reduce (by reference to 2005 values) emissions by at least 55% by 2030, between 65% and 75% by 2040 and at least 90% by 2050 and foresees the possibility of anticipating the 2050 climate neutrality target. This framework provides additional specific targets, such as the progressive elimination of the current benefits provided to fossil fuels and their utilisation by 2030, the full elimination of fossil natural gas in the Portuguese energy system by 2040 and the alignment of public buildings with environmental taxonomy principles by 2030. Other relevant measures are the prohibition of new hydrocarbon exploration or exploitation concessions in Portugal and, more broadly, the need for strategic environmental assessment in any new legislation or large-scale public investments as well as the basis for future measures aiming at carbon capture.

Resilience and Recovery Plan

The Portuguese Resilience and Recovery Plan, dated April 2021, establishes goals for equal pay, gender equality and fighting occupational segregation. The first two goals have been legislated on previously and compliance is now to be enforced. The fight against occupational segregation has not been legislated on, although some initiatives have been put in place to start acting on this important goal.

The most relevant social problems are also tackled: increasing the minimum wage, combatting precarious work, investing in a stronger collective bargaining agreement system, continuing to combat gender inequality in management roles and remuneration and increasing the inspection powers of the Labour Authorities. New legislation addressing these topics should be approved soon.

Read more: Resilience and Recovery Plan

Whistleblowing

Following the EU Whistleblowing Directive, a new legal framework enhancing the protection against retaliation to the whistleblowers who report or publicly disclose a breach shall be implemented in Portugal. Companies with more than 50 employees will be required to introduce or enhance their internal reporting channels which persons with a work-related relationship can safely use.

Remote working regime

A new remote working regime was recently approved. The new law gives increased protection to employees in terms of work tools and consumption costs and entitles employees with children up to eight years to impose remote working on their employers. If both parents' roles are compatible with the remote work, they must share this entitlement.

Right to disconnect

Employees' right to disconnect was recently approved in the Parliament and establishes that employees may only be contacted by the employer outside of working hours in force majeure situations. Discrimination of employees who exercise their right of disconnection is punished under the new law and includes a reversal of the burden of proof.

New framework for the National Electric System

A deep revision of the organisation and operation of the National Electric System ("**NES**") is currently under public consultation. The hot topics include: (i) major simplification of the NES activities' licencing; (ii) network planning; (iii) enhancement of competition mechanisms for NES's activities; (iv) development of consumers participation in production and energy markets; and (v) revamping and densification of self-consumption (individual/collective), repowering, hybridisation and storage, key to comply with targets and tackle grid scarcity. New developments are expected to occur during 2022.

Portugal

Implementation of the National Strategy on Anti-Corruption

The National Strategy on Anti-Corruption 2020-2024 was approved on 6 April 2021 and the Portuguese government has proposed amending existing legislation as a top priority. The hot topics include: (i) a clear regulation on whistleblowing and its different consequences; and (ii) the responsibility of companies in corruption crimes, particularly the relevance of adopting and implementing internal compliance programmes.

Non-financial statements

Large companies that are public interest entities (eg issuers of traded securities; banks; investment firms; collective investment undertakings; insurance companies; holding companies in the banking and insurance sectors), which at the end of their financial year exceed an average of 500 employees during that year, must issue a non-financial statement.

The non-financial statement must allow for an understanding of the evolution, performance and impact of the company's activities, on environmental, social and employee-related issues, gender equality, non-discrimination, human rights, anti-corruption and bribery, including: (i) a description of the policies followed and their results; (ii) the main risks associated with these issues, linked to the company's activities; and (iii) relevant KPIs to the company's specific activity. If there are no policies in place in relation to these issues, the non-financial statement must present an explanation.

Although there are no mandatory standards to be used, Portuguese companies generally report their non-financial information using the Global Reporting Initiative standards.

Corporate governance reports

Issuers of shares trading on a regulated market in Portugal must disclose a detailed report on corporate governance, drafted according to the corporate governance code previously adopted by the issuer, on a "comply or explain" basis. Most issuers have adopted the governance code prepared by the Portuguese Institute of Corporate Governance ("**IPCG**"), which was amended in 2020 to include that the management body should describe how the strategy and the main defined policies seek to ensure the long-term success of the company and what are the main resulting contributions to the wider community. Most issuers have already prepared their report pursuant to the 2020 version of the IPCG's corporate governance code, which is monitored by the IPCG on a yearly basis.

In addition, in February 2021, the Portuguese Securities Market Commission ("**CMVM**") approved its own sustainability reporting model (a non-mandatory reporting model designed to be compatible with the different international reporting standards) for listed companies to present their non-financial information annually.

Read more: The CMVM Agenda for Sustainable Finance

ESG disputes

The European Commission announced that it was referring Portugal to the European Court of Justice over poor air quality, as it considered that *"Portugal has continually and persistently exceeded the annual nitrogen dioxide limit value"* in three areas, including Portugal's two major cities, Lisbon and Porto. This decision follows former calls to action from the European Commission for Portugal to take the necessary measures to monitor air pollution, with the efforts by the Portuguese authorities to date deemed unsatisfactory and insufficient by the European Commission.

"In 2022, being an active ESG player is no longer a choice for businesses. Investors, stakeholders, business partners and even consumers' choice of counterparts will be driven by ESG positioning. It is time to step up!"

Vera Ferreira de Lima – Counsel, Capital Markets, Lisbon

Spain

Drive toward ecological transition and demographic change

The Spanish Ecological Transition and Demographic Challenge Ministry's budget for 2022, including funds out of Spain's national budget and EU recovery funds, totals €10.2 billion. This is the second largest in its history, for a year of projected social and economic recovery. The ministry will make great strides in investment in energy transition and in implementing Spain's national recovery plan, with over €2.2 billion aimed at sustainable mobility, the deployment of renewables and supporting green hydrogen. Significantly more funding will also be directed at policies for protecting the environment.

Climate Change and Energy Transition Law

With the approval of the long-awaited Climate Change and Energy Transition Law ("**CCETL**") in May 2021, Spain has started on the path to achieving climate neutrality by 2050. Specific targets include: (i) to reduce greenhouse gas emissions by at least 23% by 2030 compared to 1990; (ii) to achieve at least a 42% share of renewable energy in final energy consumption by 2030; (iii) for at least 74% of electricity in Spain to be generated from renewable energy sources by 2030; and (iv) to improve energy efficiency by reducing primary energy consumption by at least 39.5% compared to the EU baseline. Although it is a key step, the legislation has received criticism for not being ambitious enough. The government seems to have taken heed and has agreed to raise the targets for 2023.

Climate change disclosure

The CCETL includes a requirement for issuers, credit institutions, insurers, reinsurers and other "large" companies (ie companies required to include non-financial information in consolidated or individual management reports) to report annually on the financial impact of climate change-related risks, including the transition to a sustainable economy, and measures taken to address those financial risks. From 2023, credit institutions would also be required to publish concrete investment and portfolio decarbonisation targets in line with the Paris Agreement.

The contents of these reports should be determined by regulations before 20 May 2023, for which purpose the government has launched a public consultation. In any case, reports must refer to: (i) the role of the company's governing bodies in identifying, assessing and managing climate change risks and opportunities; (ii) the firms' strategic approach to managing the financial risks related to climate change; (iii) the actual and potential impacts of climate change risks and opportunities on their activities; (iv) any climate risk identification, assessment, control and management processes they have; and (v) the metrics, scenarios and objectives used to assess and manage any relevant risks related to climate change.

Renewable energy auctions

The Spanish government continues to hold auctions for renewable energy capacity under the new support framework, according to the indicative timetable for 2020-2025. The first auction of 3 GW capacity was held in January 2021. The second, to allocate 3.3 GW of solar PV and wind capacity, was held in October 2021. A third renewables auction is planned before the end of 2021, aimed at solar thermal, biomass and other technologies.

CNMV – Guidance on the application of EU Sustainable Finance Disclosure Regulation

The Spanish Securities Market Commission ("**CNMV**") has published interpretative criteria on which its authorisations and supervision will be based applying the EU SFDR. The guidance is aimed at identifying and responding to the issues that are raising interpretative uncertainties or concerns among financial market participants. Aspects include the scope of application, definition of adverse impact and periodic reporting obligations.

Equality plans

Companies are speeding up their equality plans to have them in place before March 2022, the legal deadline for all firms with 50 to 100 employees. Firms that already have equality plans are adapting these to the new regulations, as required by January 2022.

Read more: Spanish Government approves new legislation on equal pay and equality plans

Spain

Listed companies

Corporate Governance Code – Diversity and Sustainability

In June 2020, the CNMV amended its Corporate Governance Code for listed companies (based on the "comply or explain" principle). Certain recommendations were modernised in significant areas such as gender diversity on boards and sustainability.

Female presence on boards continues to increase and, according to the CNMV's 2020 report, stood at an average of around 30% in companies on the Ibex 35 index. For 2022, the recommendation is for female directors to form 40% of board members before the end of the year.

As regards sustainability, in the last few years there has been an increase in listed companies creating dedicated ESG Board committees. Amongst the companies on the Ibex 35 index, around half have a dedicated ESG Board Committee.

Pay of listed companies' directors

According to the Spanish Companies Act, amended in 2021, boards' remuneration policies in listed companies should foster companies' long-term profitability and sustainability. The Corporate Governance Code recommends that bonuses should also be aimed at fostering companies' long-term sustainability and include non-financial award criteria that are relevant for creating long-term value for the company.

In their annual reports on remuneration for the year ending on 31 December 2021, listed companies must include an explanation of how the remuneration accrued and vested in the financial year contributes to the company's long-term and sustainable performance.

"There is a clear focus on ESG matters in Spain. It is a topic at the top of the agenda for the Government, boards and market players. Embedding ESG in strategy is a rising issue and will certainly continue under the spotlight in the coming years."

Sweden

Contributing to a "green restart" with "*Klimatklivet*"

"*Klimatklivet*" is an initiative focused on providing support for local climate investments. Introduced in 2015, it now acts as part of Sweden's plan for a "green restart" of the economy following the pandemic. The aim of the initiative is to contribute to a greener and more sustainable infrastructure and society by investing in local and regional strategies developed by companies to reduce their emission levels.

The appropriation for these investments has been increased by SEK800 million in the budget proposition for 2022, with further increases expected during the coming years. The scope of the investment aid has also been broadened to cover additional types of emissions, including investments in projects related to biofuel, hydrogen production, recycling plants and battery production.

As part of the "green restart" the appropriation for relevant authorities' work with permit assessment has been increased, which is expected to result in more efficient permitting processes. As an example, the Swedish electricity market is expected to expand due to shorter processing times for electrification permits.

Swedish cities join strategic innovation program for climate-neutral cities

14 new Swedish cities have joined the strategic innovation programme, Viable Cities, aimed at establishing climate-neutral and sustainable cities. In total, 23 Swedish cities, accounting for 40% of Sweden's population, as well as four Swedish authorities, have now committed to collaborating with the initiative – which is Sweden's largest initiative to date focused on the climate transition in cities, with a total budget of over SEK200 million. The program has over 100 member organisations and seeks to accelerate the climate transition process and to ensure Sweden's international competitiveness within the area.

State credit guarantees for green investments

In June 2021, the Swedish National Debt Office (*Riksgälden*) was mandated to issue state credit guarantees for new loans raised for financing large industrial investments in Sweden that will contribute to the goals of the Swedish environmental objectives system and climate policy framework, so-called green investments. To be eligible for a credit guarantee, a loan must amount to at least SEK500 million and meet certain environmental requirements, evaluated against the taxonomy developed by the European Commission.

For the year 2022, the government appropriation for the credit guarantees will increase from SEK15 billion to SEK50 billion with further increases expected.

Sustainable funds – implementation of the EU SFDR

The EU SFDR has been in force since 10 March 2021. The Regulation with complementary technical standards is estimated to be in place by July 2022 and fully implemented in Swedish law by December 2023. While Sweden has previously had a local standard for sustainability information within the financial service sector, implementation of the SFDR and harmonisation throughout the EU is expected to provide increased possibilities to compare funds, as well as to increase transparency and minimise the risk of greenwashing.

Swedish influence on the EU Taxonomy Regulation and delegated acts

The EU Taxonomy Regulation, which entered into force on 12 July 2020, provides a classification system for determining which economic activities should be considered environmentally sustainable, a so-called green taxonomy. The first delegated act of the Taxonomy, which provides clarity on which economic activities can be considered environmentally sustainable, was formally adopted on 4 June 2021 for scrutiny. The Swedish government has been actively working to influence the Commission's draft of the delegated act, pointing out certain flaws as well as emphasising the importance for the legislation not to become counterproductive in relation to its purpose of achieving climate-neutrality and phasing out fossil fuels. The delegated act is intended to apply from 1 January 2022 according to the Regulation.

United Kingdom

2022 will see the roll out by the UK of regulation and guidance focused on sustainability disclosures, climate transition plans and TCFD reporting as outlined in the Greening Finance Roadmap published ahead of COP26. This should start to put flesh on the bones of earlier policy statements and the UK's highly ambitious target to cut greenhouse gas emissions by 78% by 2035 (compared to 1990 levels).

TCFD climate reporting for companies

Premium listed companies, whether or not UK-incorporated, need to state in their annual financial reports published from 2022 onwards whether and where they have included climate-related financial disclosures which are consistent with the recommendations of the TCFD. The Financial Conduct Authority ("**FCA**") will apply the same rule to standard listed companies for financial years from 1 January 2022 (with first reports due in 2023). Large UK-incorporated companies and LLPs will also become subject to a new mandatory reporting obligation under which they will need to disclose climate-related information as part of the non-financial information statement in the annual strategic report. These changes to the Companies Act 2006 will apply to financial years starting from 6 April 2022. The Financial Reporting Council ("**FRC**") has indicated that climate reporting will be a priority for 2022 and has warned that it will be reviewing closely how companies report against the new TCFD-aligned requirements. Looking ahead, the government has announced a plan for a new integrated Sustainability Disclosure Requirements ("**SDR**") regime (see SDR regime, Green Taxonomy and mandatory transition plans section).

Read more:

UK listed companies: Climate & Sustainability Reporting Overview

Non-listed UK companies & LLPs: Climate & Sustainability Reporting Overview

FRC names climate change as key area of focus

TCFD climate reporting for asset managers and asset owners

The FCA published Policy Statement 21/24 in December 2021 under which FCA-regulated asset managers and asset owners, including life insurers and pension providers, will have to disclose how they take climate-related risks and opportunities into account in managing investments. They will also have to make disclosures about the climate-related attributes of their products. There is a phased approach to implementation:

> from 1 January 2022 for large UK asset managers (ie enhanced SMCR firms that have AUM of more than £50 billion) and large asset owners (ie FCA-regulated life insurers and pension providers that have £25 billion or more assets under management/ administration) – with the first annual report due by 30 June 2023;

> from 1 January 2023 for all other UK asset managers and asset owners that are not excluded under the £5 billion threshold above - with the first annual report due by 30 June 2024.

The FCA will publish a consultation paper in Q2 2022 on policy proposals on how the UK SDR regime can build on its TCFD-aligned disclosure rules and guidance (see SDR regime, Green Taxonomy and mandatory transition plans section). The FCA has also confirmed that it will introduce a new ESG Sourcebook to the FCA Handbook containing the rules and guidance for asset managers to make disclosures consistent with the TCFD recommendations.

Read more:

FCA Policy Statement 21/24

FCA finalises TCFD disclosure rules for FCA-regulated asset managers and standard listed companies

"In the next year we will see the UK government develop further ESG regulation and guidance for businesses after a turbocharged run up to COP26. Early engagement with incoming regulation as well as shifting stakeholder expectations will be critical to ensure businesses are able to respond successfully in this area. For those who do not, the risk of litigation, activism and reputational damage looms."

Rachel Barrett – Partner,
Environment & Climate Change, London

United Kingdom

SDR regime, Green Taxonomy and mandatory transition plans

The government announced in its Greening Finance Roadmap in October 2021 that it will be introducing a new integrated regime, the SDR, for the disclosure of climate and other sustainability issues for companies, asset owners, asset managers and investment products. It also announced details of the forthcoming UK Green Taxonomy, which will be closely based on the EU Taxonomy. The Roadmap also set out the government's expectations for heightened investor engagement with investee companies on climate and other sustainability issues. A consultation on the SDR framework is expected in the first half of 2022. A consultation on the Green Taxonomy is expected in early 2022, with the technical screening criteria for climate change expected to be finalised by the end of 2022. Under the SDR, in-scope organisations will be required to make climate-related and sustainability disclosures in line with international standards to be developed by the ISSB, and to report on environmental impact using the UK Green Taxonomy. The SDR will also require UK listed companies, asset managers and regulated asset owners to publish climate transition plans on a "comply or explain" basis from 2023. This forms part of the government's wider plan to make the UK the world's first net zero financial centre.

Read more:

Greening Finance: A Roadmap to Sustainable Investing

UK wants to be world first net zero financial centre and more detail about mandatory climate transition plans

FCA advances the UK's approach to ESG regulation

In November 2021, the FCA published a discussion paper on a proposed classification regime for investment labels, as part of the wider SDR regime. Whilst similar in principle to the EU's SFDR, key differences in the UK approach centre around its alignment with the TCFD, and other global principles and the FCA's suggestion of five distinct categories of product label, which have, so far, been received as seeming much clearer and more intuitive that the three product types set out in SFDR. The discussion paper was open for comment until 7 January 2022, with a further consultation planned for Q2 2022 which will include detailed rules.

The discussion paper was accompanied by publication of the FCA's ESG strategy, in which management of climate risk is aligned with the FCA's objective to maintain the stability of the markets – thereby putting ESG at the top of the FCA's supervisory focus. The importance of trust in the market for green products was also a key theme of the strategy, with messages around prevention of greenwashing, mis-selling and "treating customers fairly" – clear statements of the FCA's supervisory and enforcement purview in 2022. Also, the role and value of stewardship was a focus, and we can expect to see the regulator working to encourage greater investor engagement in 2022 in order to help drive green objectives.

Read more:

Dates for the diary: FCA sets out upcoming ESG programme of work

FCA publishes Discussion Paper on UK SDR and investment labels

UK regulators call on financial industry to meet the climate change challenge

PRA/BoE prudential regulatory regime

Capital framework and supervisory expectations: In October 2021, the Prudential Regulation Authority ("**PRA**") published a Climate Risk Report in which it noted that the regulatory capital framework is not the right tool to address the causes of climate change, but, in the PRA's view, it could provide resilience against the financial consequences of climate change. The PRA will continue to use the existing prudential framework to mitigate climate-related financial risks and in 2022 will undertake further analysis to explore enhancements to regulatory capital frameworks, including potential changes to Pillar 1 requirements such as incorporating climate-related financial risks in risk weights or buffers (eg an escalating climate buffer) or Pillar 2 on a more discretionary basis. To support this work, the Bank of England ("**BoE**") will put out a "Call for Papers" and host a Research Conference on the interaction between climate change and capital in Q4 2022. The Climate Risk Report confirms that the PRA will apply its expectations proportionately across firms based on their size, complexity and exposures to climate-related financial risks, taking into account differences in business models. From the beginning of 2022, the PRA will undertake firm-specific work to determine continued progress against its Supervisory Statement 3/19 expectations. This includes asking the largest supervised firms to prepare a short report on how they have embedded the management of climate-related financial risks into their existing risk management frameworks alongside their 2021/22 ICAAP. The PRA expects firms to demonstrate effective management of climate-related financial risks through regulator supervisory engagements and reviews. Firms judged not to have made sufficient progress in embedding PRA expectations may be asked to provide a roadmap explaining how they intend to overcome the gaps.

Read more: UK financial regulators publish their Climate Change Adaptation Reports

Stress testing: In June 2021, the BoE launched its Climate Biennial Exploratory Scenario 2021 ("**CBES**"), which is the BoE's first climate-risk related stress-testing exercise, involving the eight largest UK banks and

United Kingdom

building societies, together with some of the largest UK insurers. The CBES supplements the BoE's pre-existing stress tests to help assess the resilience of the UK financial system and individual institutions but is different in certain regards, most notably given its focus on climate risk. The CBES is meant to explore the vulnerability of current business models to future climate policy pathways and the associated changes in global warming over time. Participants will measure the impact of the scenarios on their end-2020 balance sheets, which represents a proxy for their current business models. The BoE expects to publish aggregated CBES results in May 2022 after running a second round of the exercise, which would launch around the end of January 2022. A decision on the form and content of this second round will be based on analysis of participants' initial submissions. If no such second round of the exercise is launched, the results will be published earlier.

Read more: Bank of England launches stress testing for climate risks

Basel III and disclosures: The UK implementation of the remaining UK Basel III standards (mostly through PRA PS17/21 and PRA PS22/21) does not include ESG-related provisions similar to those in the EU Capital Requirements Regulation II. However, UK CRR firms might be subject to disclosure requirements in respect of ESG risks under the Pillar 3 regime, as the Climate Change Report confirmed that ESG is one type of material risks to be disclosed in Pillar 3 where relevant consistent with the PRA's expectations in Supervisory Statement 3/19.

Regulation of ESG data and ratings providers

In June 2021, the FCA published a consultation paper on enhancing climate-related disclosures by standard listed companies. The paper also addressed the role of ESG data and ratings providers and identified various policy issues for ESG rating providers and areas of potential harm in the FCA's view. The FCA is considering various policy options, including: guidance for firms using third-party ESG data and ratings (including in relation to risk management, outsourcing arrangements, due diligence and use of ratings in benchmarks and indices); "soft" regulation for ESG data and rating providers (such as a Best Practice Code that encourages voluntary, industry-led adherence to minimum conduct standards); or formal regulation of ESG data and ratings providers, focusing on transparency, governance and managing conflicts of interest. The consultation ran until September 2021 and the FCA's final policy is expected in the first half of 2022.

Read more: FCA Consultation Paper 21/18

Pensions

From 1 October 2022, occupational pension schemes with £1 billion or more in assets will join schemes with £5 billion or more in assets and master trusts in being required to align their governance processes and disclosures with the TCFD recommendations. Amongst other things, trustees of schemes in scope must carry out scenario analysis, calculate and use metrics and measure performance against trustee-set targets. The government has also consulted on proposed amendments to those requirements, with the changes also expected to come into force on 1 October 2022.

These changes will require trustees to measure and report on the extent to which their investments are aligned with the Paris Agreement goal of pursuing efforts to limit the global average temperature increase to 1.5°C above pre-industrial levels. The government is starting to focus on other elements of ESG, having already published a consultation seeking views on the effectiveness of occupational pension scheme trustees' current policies and practices in relation to social factors (the "S" in ESG). The consultation was an information-gathering exercise which the government said may or may not lead to new requirements for trustees, but it seems likely that changes will be forthcoming.

Read more:

New climate change requirements for larger pension schemes

Enhanced climate change reporting requirements coming soon

"As the market grows, regulators are waking up to the prominence of ESG data and ratings providers and to the risks they pose where there is no requirement for standardisation or transparency in their methodology. We should expect regulation of ESG ratings in a similar way to the regulation of benchmarks or credit ratings, for example, having a focus on transparency, governance and conflicts of interest."

Peter Bevan – Global Head of Financial Regulation Group, London

United Kingdom

UK government green bonds

The UK government launched its widely anticipated green financing programme in September 2021 with a 12-year £10 billion green bond ("**Green Gilt**"). This inaugural issue followed the publication by HM Treasury and the UK Debt Management Office of the UK Government Green Financing Framework in June 2021. The Framework details the types of expenditures that will be financed by Green Gilt issuance to help meet the government's green objectives, and also commits the government to reporting on the social co-benefits (such as job creation) arising from these expenditures. The debut issue was swiftly followed by a second Green Gilt in October 2021 and retail Green Savings Bonds via NS&I which went on sale in October 2021. The government has indicated its intention to build out a "green yield curve" with further issuances to follow. Green Gilt issuance for the financial year 2021/22 is planned to raise a minimum of £15 billion, with £16.1 billion raised via the first two Green Gilt transactions.

Read more:

UK Government Green Financing

UK DMO: Green Gilts

Competition and sustainability goals

As in the EU, a similar "moment of green truth" is imminent in the UK. The government has required the Competition and Markets Authority ("**CMA**") (which published relatively generic competition law guidance on sustainability agreements in 2021) to advise it on how competition and consumer law can support net zero goals. Following a public consultation, the CMA is expected to report in early 2022 and could potentially propose significant changes to the law. The CMA, which has recently published its Green Claims Code, is also planning a crackdown on greenwashing claims in early 2022 and "stands ready to take action against offending firms" – which will be a key test of whether the CMA can and will use its consumer enforcement powers to pursue sustainability goals.

Read more:

Greener competition law: coming to the UK in 2022?

UK CMA publishes Green Claims Code to combat 'greenwashing'

Employment & Incentives

D&I is a regulatory issue: The UK financial services regulators are focused on the role D&I plays in supporting better decision-making, better outcomes for firms and customers, and enhanced risk management. In summer 2021, the UK regulators published a joint Discussion Paper on their plans to monitor, track and improve D&I in regulated financial services firms. The paper sets out a wide range of policy options across various D&I topics, including targets for board composition and succession planning, individual accountability, folding D&I into SMCR, policies and disclosures and linking D&I to remuneration. The regulators have committed to considering views across the sector and will publish a consultation in 2022, following which, they will consider how to incorporate D&I into their supervisory and enforcement framework.

Read more: Diversity in financial services microsite

Diversity reporting: In July 2021, the FCA published a consultation on proposals to introduce a requirement for listed companies to disclose a "comply or explain" statement on whether they have achieved diversity targets for gender and ethnicity reporting on their boards, as well as the make-up of their senior executive management. As part of an ongoing effort to encourage UK businesses to appoint more women to senior leadership roles, the UK is also relaunching the Hampton Alexander Review (under a new badge of FTSE Women Leaders) – this time with a new target seeking 40% of female board directors.

In 2018, the government consulted on the introduction of mandatory ethnicity pay gap reporting. The consultation closed in January 2019 but the government is yet to take further action to introduce a mandatory obligation. Nevertheless, it remains a live issue in the UK as industry bodies increasingly call for the government to take action. In the meantime, many UK companies are voluntarily reporting on their ethnicity pay gap, with recent statistics showing that as many as 25% of large employers now produce ethnicity pay data in the UK.

Read more:

FCA consultation

FTSE Women Leaders

Ethnicity pay gap reporting

What next for UK gender pay gap reporting?

Russia

Climate targets and national plans for meeting those targets

At the end of 2020, the Russian president (for the first time) officially requested the government to take measures to decrease greenhouse gas emissions. In response to that, the government has adopted a new development strategy under which it has announced a new interim target to reduce greenhouse gas emissions, by 2030, by 70% in comparison with 1990. By 2050, emissions of greenhouse gases should be reduced by 60% in comparison with 2019 and by 80% in comparison with 1990, while carbon neutrality should be achieved by 2060.

A variety of measures are proposed to achieve these targets, including partial replacement of coal-based energy generation with non-coal or low-coal sources, increase in utilisation volumes of associated gas and intensification of hydrogen exports.

Climate disclosures for companies and financial companies

Starting from 2023, the key greenhouse gases producers (with emissions exceeding 150K tons of CO_2 per year until 1 January 2024 and 50K tons per year after this date) will be subject to carbon reporting requirements. However, no liability for non-reporting has been established yet.

The Central Bank of Russia also issued in 2021 its recommendations for voluntary disclosure of ESG-related information by public legal entities (ie large corporates and financial institutions). Recommendations are based on various international standards, including the Paris Agreement, EU guidelines on non-financial reporting and reporting climate-related information, and OECD recommendations. The key aim is to provide companies with a structured approach on how they may disclose ESG-related information.

However, there are no ESG reporting requirements or climate stress tests for banks and other financial institutions.

Law on limitations on greenhouse gas emissions

The new law on limitations on greenhouse gas emissions enacted in 2021 and coming into force from 30 December 2021 introduces the “carbon unit” concept. Each company developing a climate project (ie the project which is intended to reduce emission levels) will be allocated a certain amount of “carbon units”. However, it is not yet clear how companies will be able to use these carbon units as neither incentives nor calculation mechanics have been introduced yet.

Sakhalin experiment – carbon neutrality by 2026

A new draft law is currently being considered by the Russian Parliament to establish a special experimental regime of carbon neutrality for Sakhalin projects. The experiment should take place in 2022-2025, and, if successful, will be extended to other Russian regions.

The key purpose of the experiment is to reach “carbon neutrality” of Sakhalin projects by the end of 2025. The draft law proposes to establish obligatory carbon reporting for all affected companies, emission quotas and penalties for exceeding them, incentives (including tax incentives) for use of new technologies and in the event a company reaches “carbon neutrality”. VEB.RF (the Russian state owned corporation) should coordinate the experiment.

Russian taxonomy

The Russian government introduced in November 2021 the first level of the Russian taxonomy, which contains criteria for sustainable projects in key sectors of the economy, requirements for verification of such projects, criteria for financial instruments of sustainable development, valuation standards, criteria for verifiers and the documents required for verifications. VEB.RF is generally responsible for development of investment activity in the field of sustainable (green) projects.

Read more: COP26: Russia announces new green taxonomy

United States

Climate change disclosure

The Securities and Exchange Commission ("**SEC**") is expected to issue in early 2022 its long-awaited proposal requiring public companies to make certain climate change-related disclosures. The issues the proposal is expected to address include: governance, strategy, and risk management related to climate risk; specific metrics (such as greenhouse gas emissions) that are most relevant to investors; and potential requirements for companies that have made forward-looking climate commitments, or that have significant operations in jurisdictions with national requirements to achieve specific, climate-related targets. SEC Chair Gary Gensler has indicated that he prefers that these disclosures be mandatory rather than voluntary, and included in the annual report rather than outside SEC filings. However, several Republican state attorney generals have already threatened to file lawsuits if the SEC mandates climate change disclosure.

Read more: SEC Chair speech

Human capital disclosure

The SEC is working on a proposal that could require companies to make more disclosure about workforce or "human capital" metrics, possibly including metrics on workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety.

Read more: SEC Chair speech

Board diversity

The Nasdaq Stock Market adopted a "comply or explain" board diversity rule that will require Nasdaq-listed companies to have, or explain why they do not have, at least two board of directors members who are diverse (ie female, an underrepresented minority or LGBTQ+), including: (i) at least one female director; and (ii) at least one underrepresented minority or LGBTQ+ director. Beginning in 2022, Nasdaq-listed companies will also have to begin to provide annual board diversity statistics, and in 2023 will have to comply with its board diversity requirements. The SEC staff is also working on a proposal to enhance disclosures about the diversity of board members and nominees.

Read more: SEC approves Nasdaq's comply-or-explain board diversity requirement

Department of Labor Fund Investment Rule

In October 2021, the Department of Labor released a proposal that would reverse rules adopted during the Trump administration requiring fiduciaries to select investments and investment courses of action based solely on consideration of "pecuniary" (ie financial) factors, which was widely seen as a bar to ESG investing by pension funds.

Read more: New DOL proposed rule would facilitate ESG investments by pension funds

FSOC report identifies climate change as threat to US financial stability

In October 2021, the Financial Stability Oversight Council ("**FSOC**") released a new report in response to President Biden's Executive Order 14030 on Climate-related Financial Risk. For the first time, the FSOC has identified climate change as an emerging and increasing threat to US financial stability. Among other things, the report recommends that FSOC members (such as the SEC) review their existing public disclosure requirements and consider updating them to promote the consistency, comparability, and decision-usefulness of information on climate-related risks and opportunities. The FSOC also recommends that its members consider whether such disclosures should include disclosure of greenhouse gas emissions (as appropriate and practicable) to help determine exposure to material climate-related financial risks. In addition, FSOC members should evaluate standardising data formats for public climate risk disclosures to promote comparability.

Read more: FSOC report on climate-related risk

United States

SEC guidance will make it easier for shareholder ESG proposals to get on proxy statements

The SEC staff has issued guidance (Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)) that will make it significantly easier for shareholders to get ESG proposals on the company's proxy statement. The guidance revises the SEC's approach to the most common bases that companies use to exclude shareholder proposals, particularly those related to ESG: (i) that a proposal that deals with a matter relating to the company's "ordinary business operations"; and (ii) that a proposal is not economically relevant to the company. This means the SEC staff will not concur in the exclusion on micromanagement grounds of shareholder proposals requesting companies adopt timeframes or targets to address climate change, as long as the proposals afford discretion to management as to how to achieve such goals. Also, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company. Essentially, the guidance makes it more difficult for companies to satisfy the exclusions' requirements.

Read more: SEC Staff Legal Bulletin No. 14L (CF)

Disclosure of proxy votes by funds and managers

The SEC is expected to adopt rules proposed in September 2021 that would require more disclosure by certain funds regarding their proxy votes. Among other things, the proposed rules would require funds to categorise each voting matter by type – such as environment or climate, human rights, human capital/workforce, diversity, equity and inclusion, and political activities – to help investors identify votes of interest and compare voting records.

Read more: SEC press release

More greenwashing actions expected

2022 will likely bring more greenwashing claims, both by the government and private plaintiffs, against corporates and investment funds. The SEC is also expected to issue a proposal targeting funds that market themselves as "green" or "sustainable", and could require fund managers to disclose the criteria and underlying data used. The SEC may also take a holistic look at the "Names Rule", which requires funds to invest at least 80% of their assets in the investment type their names suggest.

Read more:

Latest developments on greenwash allegations

Greenwashing concerns on hyperdrive: how to protect yourself against the risks

Revisiting proxy advisor rules

The SEC staff has issued a proposal that revisits Trump-era rule changes that codified the view that proxy voting advice generally constitutes a solicitation and imposed new disclosure and liability requirements on proxy advisory firms. Proxy advisors argued that the 2020 rule changes compromised the independence of their voting advice.

Read more: SEC imposes new disclosure and liability rules on proxy advisory firms

> "With the Biden Administration's Build Back Better agenda as the backdrop, the US government is evidencing a renewed commitment to tackle climate, social and governance challenges through legislative and enforcement action. This commitment reflects an apparent 'step change' in the desire of the US to no longer lag behind the European Union, the UK and other nations which continue to push the ESG agenda at an ever more rapid pace and, instead, to partner with them to effect real and lasting change."

Jason Manketo – Partner, Global Co-Head of Equities, Capital Markets, London

Latin America

Given the abundant biodiversity in all countries in Latin America, the development, expansion and public awareness regarding ESG matters is consistently rising. It has also helped that Latin America has traditionally looked towards the United States as a source of legal, market and business inspiration. We expect to see further ESG developments in the region in 2022, with consistent increased interest from regulators, market participants and society, adopting the international ESG agenda and translating it into binding, legal obligations.

"The continuance of growth of ESG in Latin America will depend on the standardisation of the frameworks and regulations among countries, making ESG projects a more reliable investment option for investors. This context of law-making process is an opportunity for every country in the region to shape the laws and regulations that will define how business is done in the future in Latin America."

Alejandro Gordano – Counsel, Finance, New York

Argentina

Paris Agreement on Climate Change – Update of the national emissions goal

Argentina is fully committed to ambitious national and global climate action to achieve the goals of the Paris Agreement and has put the environmental and climate agenda at the centre of its public policies priorities. In December 2020, aligned to the request of the Secretary-General of the United Nations, Argentina submitted a Second National Determined Contribution ("**NDC**") committing to the goal of not exceeding the net emission of 359 million tons of carbon dioxide equivalent ($MtCO_2e$) by 2030. In November 2021, this goal was updated by 2 percentage points, so as not to exceed the net emission of 349 by 2030. This represents a reduction in the limit to emissions of 27.7% compared to the First NDC submitted in 2016. The proposed goal is absolute, unconditional, and applicable to all sectors of the economy in compliance with article 4.4 of the Paris Agreement.

Guides on ESG aspects in the capital market

In July 2021, the National Securities Commission ("**CNV**") passed Resolution No. 896/2021 which includes three Sustainable Guides relevant for a Socially Responsible Investment ("**SRI**"): (i) the Guide for Socially Responsible Investment in the Argentine Capital Market; (ii) the Guide for the Issuance of Green, Social and Sustainable Bonds; and (iii) the Guide for External Evaluators of Green, Social, Sustainable Bonds. None of these guides are mandatory. They are intended to provide a set of common definitions with the goal of standardising language in the field of SRI used by the participants in the capital markets to raise awareness and convey objectives, advantages, and other aspects of sustainable financing, as well as provide participants and the public alike with guidance on disclosure. As the SRI process requires giving importance to non-financial considerations for making investment decisions, the securities regulator believes that it is necessary to begin building capacities of ESG factors by developing tools to evaluate the ESG aspects involved in the investment of securities.

The CNV has said that these Guides constitute the first step in this field, through which, as the market expands and new tools emerge, progress would be made in the creation of specific regulations to generate incentives to lead market participants to incorporate sustainability in all areas of their businesses, tending to align them with international practices.

Biofuels regime

In 2021, the Argentine Congress passed National Law No. 27,640 for the "Regulation and Promotion Regime for the Production and Sustainable Use of Biofuels", replacing National Law No. 26,093 (2006) which expired in May 2021. Law 27,640 will expire on 31 December 2030 and can be extended five more years.

This new law reduces the mandated biodiesel blend rate to 5% and gives the enforcement authority the power to lower it to a minimum of 3%. Regarding bioethanol, Law 27,640 maintains a minimum ethanol blend rate of 12% but enables the enforcement authority to adjust the blend rate downward, although not lower than 9% (6% from sugarcane and 3% from corn feedstocks).

According to some sectors, this regulation runs contrary to Argentina's climate change commitments and will negatively affect biofuels production and future investment in the sector. Biofuels are not taxed by the Carbon Tax applicable to fossil fuels, including fuel oil, mineral coal, and petroleum coke (Law 27,430).

Registry of integrity and transparency of companies and entities

Consistent with the provisions of National Law No. 27,401 on Criminal Liability of Legal Entities, in April 2021, the Anticorruption Office ("**OA**") resolved to implement an integrity and transparency registry for companies and entities with the goal of preventing corruption by promoting the development and consolidation of integrity programs by legal entities.

The registry is expected to promote the adoption of the integrity programs in accordance with the provisions of Law No. 27,401, particularly by suppliers of the government. In creation of the registry, the OA is using the experiences of similar registries already put in place in Mexico and Colombia. The Inter-American Development Bank is assisting the OA in the creation of the registry.

Argentina

Monitoring system of government officials' private activities

In July 2021, the OA resolved to begin designing a system to monitor private activities of government officials prior and subsequent to the exercise of their public function. This system will record the background, connections, and private interests of the persons who assume senior positions in the national government (up to three years before assuming the position) as well as the activities carried out by them upon termination of their public mandate (up to one year after their tenure) for the comparison and verification of compliance with public office employment rules and regulations, enabling citizen control and active transparency mechanisms.

As provided in the Law on Ethics of Government Officials, those officials whose mandate is not a direct result of public elections are required to declare their employment background to allow control over possible conflicts of interest that may arise. In addition, such Law states that those who perform public functions must refrain from intervening, during their tenure, in matters particularly related to persons or matters with which they have been associated during the prior three years or in which they have equity interests. Lastly, the Code of Ethics for Public Officials sets forth a one-year period applicable to government officials leaving their office, during which they must neither carry out or sponsor administrative procedures or formalities in favour of third parties, nor should they enter into contracts with government agencies which are related to the activity they performed during their tenure.

The system is intended to record and preserve background information that would verify the full compliance with the above-mentioned rules and prevent public decisions that may harm the public interest for the benefit of specific private interests through the sharing of privileged information or lack of impartiality and independent criteria, among other conducts contrary to public ethics.

Bill of a new Public Ethics Law

In October 2021, the OA made available to the public a draft of a new bill on Public Ethics Law applicable to public officials. The draft of the new bill addresses general principles of integrity and ethics in the public function, duties and rights of public officials, rules to submit affidavits on property and owned assets, rules on conflict of interests, incompatibilities to be appointed as public officials, and penalisations, among other aspects. Any natural or legal person who invokes any kind of right or interest was invited to present their proposals and comments on the bill. During such process, the OA will hold meetings with experts on integrity and public ethics.

Gender gap

In 2020, the Ministry of Women, Gender and Diversity launched: (i) the National Plan of Action against Gender Based Violence (2020-2022) which is a plan drawn up with the participation of over 3,000 people from across the country with the support and commitment of other Ministries and State agencies, including the Ministry for the Environment and Sustainable Development; and (ii) the National Plan for Equality in Diversity ("**IGUALAR**" (2021-2023)) which adopts targeted measures to reverse the legal and factual obstacles faced, historically and structurally, by women and LGBTI+ for the effective exercise of all their rights, to dismantle situations of inequality and reduce the gaps that persist in the different areas of social life, including education, health, work, the digital world, care tasks, and political public participation. Some autarchic governmental agencies, such as the CNV and the Central Bank of Argentina, have formally adhered to the IGUALAR Plan. In 2021, as part of the implementation, the CNV passed a regulation in which they approved a "Guide of recommendations for equality of genders in the capital markets" which includes courses on the subject matter to issuers, securities brokers, and other persons subject to its jurisdiction.

Work violence

In December 2020, the National Congress approved the Convention 190 on the Elimination of Violence and Harassment in the World of Work of the International Labor Organization (2020) (the "**ILO Convention 190**"). Argentina is the fourth state in the world to be bound by this convention which will become effective for Argentina on 23 February 2022.

Note: We'd like to thank Argentinian law firm Mitrani, Caballero & Ruiz Moreno – Abogados who contributed to this section.

Brazil

Over the past few years, ESG practices have become increasingly relevant in the context of M&A and capital markets transactions in Brazil. Not only institutional investors and multilateral finance agencies are pushing for robust ESG standards, but also retail investors are progressively understanding and demanding products that are better aligned with the most relevant ESG guidelines.

Social impacts from the Covid-19 pandemic, as well as very significant environmental accidents caused by some of the biggest Brazilian companies, have significantly contributed to shaping public awareness regarding ESG practices, prompting all players to reassess their practices and provide ESG-focused alternatives.

Following the global trend, ESG discussions are expected to continue accelerating in Brazil, and Brazilian issuances of green, sustainability-linked and social bonds are expected to be ever more relevant to the Brazilian capital markets.

Green, sustainability-linked and social bonds market

The Brazilian market for green bonds has been growing significantly since its first steps in 2015. In the first quarter of 2021, Brazil issued 79% of the total amount raised with green bonds and SLBs in Latin America.

More broadly, Brazil has one of the largest green, sustainability-linked and social bonds markets in the region, reaching US$11.7 billion in 2021.

Additionally, the Brazilian Development Bank (BNDES – *Banco Nacional de Desenvolvimento Econômico e Social*) has taken an important step towards the development of the sustainable credit market and launched its Sustainability Bond Framework. The document facilitates the issuance of green, sustainability-linked and social bonds by BNDES in Brazil and abroad.

New CVM ESG disclosure requirements

The Brazilian Securities and Exchange Commission (CVM – *Comissão de Valores Mobiliários*) has reformed Instruction No. 480, which now requires companies to disclose more detailed ESG information (in a standardised form), including, for example, specific risk factors for social and environmental issues and clarifications on whether the compensation of directors is related to ESG goals. If companies do not supply the necessary ESG information, they will be required to provide the reasons for such non-compliance. Overall, the reform is a response to increasing investors' demands for more transparency on companies' ESG issues and for more standardised practices.

B3 Stock Exchange's sustainability index

The B3 Stock Exchange announced that it will implement (starting on January 2022) certain adjustments to its corporate sustainability index, in order for it to show which companies are leading the way on ESG matters. The index will grade the companies, taking into consideration their environmental policies, share capital, governance, human resources' structure, among other key elements.

Central Bank of Brazil's ESG regulation

The Central Bank of Brazil has enacted new rules (which will become effective in 2022) regarding social, environmental and climate risks concerning the National Financial System (SFN – *Sistema Financeiro Nacional*). Among other items, the new rules require preparation and disclosure of a Social, Environmental and Climate Risks and Opportunities Report (*Relatório de Riscos e Oportunidades Sociais, Ambientais e Climáticas*) by the financial institutions, higher levels of transparency concerning the risks to the stakeholders and specific details on the implementation of the Social, Environmental and Climate Responsibility Policy (PRSAC – *Política de Responsabilidade Social, Ambiental e Climática*).

*Like all international law firms, Linklaters LLP is not licensed to practice Brazilian law and does not provide advice on Brazilian law. The contents set out above do not constitute any opinion, advice, determination or certification in respect of the application of Brazilian law. Any comments concerning Brazil are based on our transactional experience and our understanding of the practice in Brazil. In cross-border transactions in which Linklaters LLP acts as international legal counsel, it provides advice on matters of non-Brazilian law, such as the laws of New York or the United Kingdom, closely collaborating with leading Brazilian law firms on Brazilian law matters.

Chile

Constitutional Process, Presidential elections and ESG

In May 2021, the process of adopting a new Constitution began with the election of the 155 members of the Constitutional Convention and, in July 2021, the Constitutional Convention was formally installed. From that date, the Convention will have nine months to present a new constitutional text, which can be extended once for three more months. Upon its drafting and approval by two-thirds of the constitutional convention's members, the final draft of the new constitution will be submitted to a further public referendum expected to be held during 2022. In October 2021, the Constitutional Convention started the discussion of the new constitutional text.

Sustainable development and the adoption of new policies and regulations to fight climate change have been up for public comment in the context of the new constitution, as well as among the candidates for the presidential election of November 2021. It is expected that the Constitutional Convention will propose a new constitution by April or July 2022 depending on whether the original deadline to do so is extended.

Green, social and sustainable bonds

The social unrest of 2019, the Covid-19 pandemic and certain political measures adopted during 2020-2021 in relation to the Covid-19 pandemic (eg partial withdraws of pension funds) have affected the local bond market which has been relatively inactive and volatile during 2021.

As a response to the volatility of the local bond market, both the Chilean government and the private sector have turned to the international markets, including the issuance and placement of green, social and sustainable bonds. Currently, the government's social and green bonds represent around 24% of the total public government debt, which shows the commitment of the Republic of Chile to a sustainable economic development.

Likewise, in 2021, many Chilean publicly traded companies have conducted several private placements of sustainable and green bonds in the international markets. This trend reflects the private sector's interest in the green and sustainable international bonds market aligned with the activity of the Chilean government in recent years.

Read more: Chile issues bonds for US$2.1 billion in foreign currency

Disclosure requirements

In 2020, the Financial Market Commission (*Comisión para el Mercado Financiero* or CMF) started a public consultation regarding ESG disclosure which will include the issuance of a new regulation. Throughout 2020 and early 2021, feedback and suggestions to this regulation were made by both the public and private sectors. As a result, several modifications were incorporated to the proposed regulation and a new public consultation took place in March 2021. One of the main amendments was to include publicly traded companies in the annual report, specific indicators on energy consumption and information on sustainability indicators by industry type under the Sustainable Industry Classification System ("**SICS**") and the definitions and metrics contained in the Sustainability Accounting Standards established by the Sustainability Accounting Standards Board ("**SASB**").

In this regard, if a company considers that climate change metrics are not compatible with the metrics recommended by the TCFD, the latter standard should be applied. The public consultation period is now completed and this new ESG regulation is expected to be enacted by the end of 2021.

Read more: CMF incorporates modifications to consultation process in March 2021

Chile

Climate change strategy, green tax and circular economy

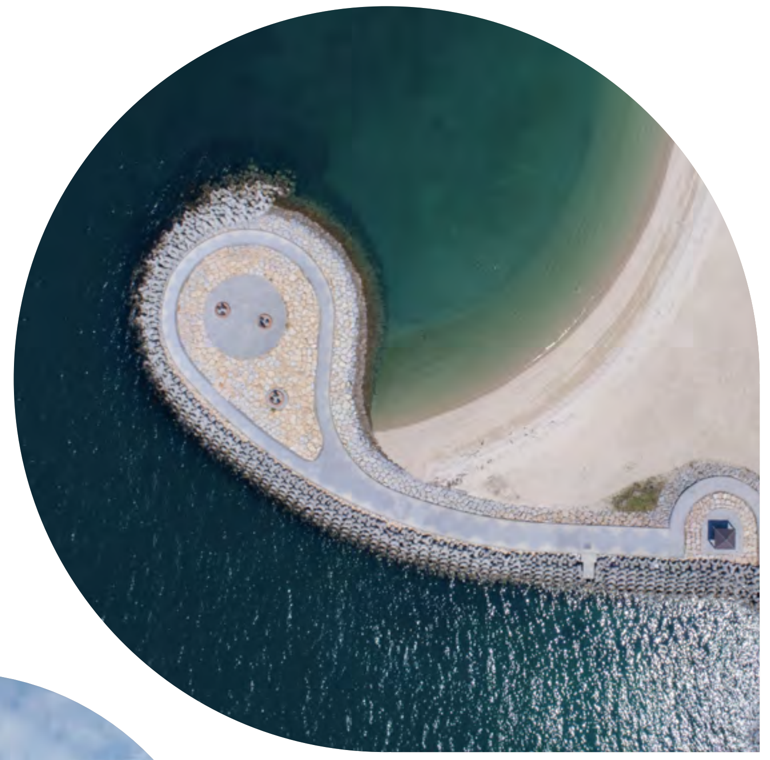
In October 2021, the Senate approved the Climate Change Framework bill which started its legislative discussion in January 2020. The legislative discussion and review of this bill will continue in the Chamber of Deputies. This bill will set out the country's carbon neutral goal by 2050 (with intermediate goals by 2030) and will establish a set of climate change regulations, including a long-term climate change strategy, regional and sectorial mitigation plans, as well as a strategic hydric resources plan in watersheds.

Additionally, the Ministry of the Environment started a public consultation on the long-term strategy on climate change and, for the first time, established carbon budgets for different sectors of the economy. A cap is set for specific sectors of the economy so that the Paris Agreement goals can be fulfilled.

Furthermore, in 2021, the Ministry of the Environment launched a public consultation on a new regulation that establishes the obligations and procedures related to the evaluation, verification and certification of projects for the reduction of pollutant emissions in order to compensate emissions taxed by green taxes. Pursuant to this new regulation, taxpayers may compensate all or part of their taxable emissions through the implementation of emission reduction projects.

Finally, the Ministry of the Environment has been promoting the implementation of Recycling Goals to producers of some priority products established in Law No. 20,920, which regulates the Extended Liability of Producers and the Recycling Promotion. In March 2021, the Ministry of the Environment enacted the Decree Law for the application of Law No. 20,920 to set out the goals for recollection, valuation and other obligations associated with containers and packaging in priority products in order to prevent the massive waste production of containers and packaging. 70% of the regulated industry will be covered by this goal.

Note: We'd like to thank Chilean law firm Morales & Besa who contributed to this section.



Mexico

ESG criteria are crucial to achieve economic development without sacrificing the environmental, social and corporate governance principles of companies, encouraging them to implement practices with the highest levels of sustainability. Although Mexico has not been the exception to this global trend, unfortunately implementation has certainly slowed down recently.

While some ESG criteria have been formally incorporated into national laws, others remain only a part of good corporate practices. This is due to the fact that social dynamism is usually faster than legislative processes. Sustainable development is an international requirement, which is why Mexico has signed and ratified international treaties (Paris Agreement, Kyoto Protocol, Nagoya Protocol and Escazu Agreement, among others) to mitigate environmental damage and maintain a responsible economic development. Every international treaty entered into by Mexico pertaining to human rights and the jurisprudence issued by the Inter-American Court of Human Rights are a part of the Mexican Constitution (a Constitutional Block) and (as interpreted by the Supreme Court of Justice) an active part of the Mexican legal system. However, even though the range of human rights recognised by Mexico is broad and progressive, local implementation remains slow and disorganised.

Read more: International Chamber of Commerce Guidelines

Indigenous Consultation Law

It is estimated that 10% of the Mexican population is indigenous, divided into 63 indigenous groups consisting of thousands of communities. Mexico has finally taken a long-awaited step towards local implementation of the human right to free, prior, and informed consent ("**FPIC**") of indigenous peoples. The Indigenous and Afro-Mexican Consultation Law is currently following the process of indigenous consultation throughout the Mexican territory in order to move forward with the corresponding legislative process.

This piece of legislation will enshrine the obligations assumed by the Mexican Government in 1991 through the execution of the Indigenous and Tribal Peoples Convention in 1989 (also known as the "**ILO Convention 169**"). Under this treaty, through appropriate procedures, the Mexican Government agreed to consult with those concerned, in particular through their representative institutions, whenever consideration was being given to legislative or administrative measures which may affect them directly. Even though the ILO Convention 169 is a part of the Mexican Constitutional Block, implementation has always been challenging due to lack of adequate local legislation which allocates responsibilities to specific authorities and lays down a formal process to be followed in order to achieve an adequate and culturally appropriate consultation process.

If this law is approved, we expect it to apply throughout Mexico's legal system. The three levels of government will likely carry out FPIC as part of any legislative or administrative act that could potentially have an impact on the rights of indigenous peoples. This will naturally trigger the need to include a Social Impact Assessment as part of the standard permitting process in Mexico for every type of project or legislative act.

Read more: Final report of the consultation for the Indigenous Consultation Law

Escazu Agreement

Mexico ratified the Escazu Agreement in 2018, which was finally enacted in 2021. The Escazu Agreement seeks to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in environmental decision-making processes as well as access to justice in environmental matters and should therefore also be reflected in Mexico's national law. The Escazu Agreement is a landmark that guarantees the right to access environmental information and participate in environmental decision-making, thereby promoting access to information and access to justice related to environmental matters. Similarly to the ILO Convention 169, it is expected that the human rights foreseen in this agreement will be localised through amendments to federal, state, and municipal legislations, which will naturally empower local communities, individuals, and human rights defenders.

Read more: Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

Mexico

National Emissions Program

In January 2020, the Mexican government implemented the national emissions program which will continue for three years in the pilot stage. In 2023, it will require relevant industries (including mining and automotive) exceeding 100,000 tons of direct carbon dioxide emissions per year to reduce their emissions and to implement a mandatory "cap and trade" emissions trading system to reduce greenhouse emissions.

Read more: National Emissions Program

Federal climate change program

The federal climate change program was enacted in September 2021, bringing particular attention to the adaptation and mitigation measures that must be taken in order to build community resilience to the future adverse effects of climate change. It stands as the foremost national instrument to tackle public climate change issues and takes governmental responsibility to decrease the vulnerability of the population, biodiversity, and productive industries with determined gender equality goals. Along with the General Climate Change Law and the National Strategy to Combat Climate Change, the climate change program offers a better legal framework to help align Mexican regulations with the goals of the Paris Agreement and the UN SDGs.

Read more: Climate Change Program 2021 – 2024

Historic sustainable bonds

It is expected that 2021 will be a remarkable year for sustainable bonds in Mexico with the issuance of at least 11 green, social, and sustainable bonds, valued over US$1 billion, offered by the Mexican Stock Exchange ("**BMV**"). This is consistent with the national effort and private interest in investing in options that have a positive impact on the environment and communities.

Wastewater discharge regulations

The Ministry of Environment and Natural Resources approved an update to Mexican Official Standard NOM-001, which regulates the wastewater discharges into federal bodies, strengthening the maximum allowable limits of pollutants discharged into bodies of water of Federal jurisdiction. This regulation has not yet been formally enacted but its publication is imminent. This update will make the maximum tolerable limits of pollutants in wastewater more stringent, in order to protect, conserve, and improve the quality of the nation's water bodies and promote the human right to a safe environment, health, and water. This update represents a historical landmark for the communities affected by polluting discharges into water bodies.

Read more: Updated Mexican Official Standard NOM-001

General Law of Corporate Responsibility and Corporate Due Diligence

In 2020, the Mexican Senate proposed the enactment of the General Law of Corporate Responsibility and Corporate Due Diligence. This draft was based on the United Nations Guiding Principles on Business and Human Rights. In essence, the draft attempted to create one single integrated body of law that organises the multiple obligations assumed by entities in order for them to actively participate in respecting human rights and building more resilient communities. Among other topics, the draft aimed at promoting constant due diligence within the standard process of companies, resulting in making visible potential impacts to human rights, granting access to relevant information of the company, implementing culturally pertinent grievance mechanisms, and opting for alternative dispute resolution mechanisms in order to address potential human rights impacts. Unfortunately, this law was not enacted and remains subject to discussion in the legislature. Nevertheless, it must be appreciated as one of the first attempts in Mexico to bring attention to the need to enact legislation on ESG due diligence.

Read more: Proposed Enactment of the General Law of Corporate Responsibility and Corporate Due Diligence

Note: We'd like to thank Mexican law firm Ritch Mueller y Nicolau, S.C., who contributed to this section.

Peru

Green Finance Roadmap

In February 2021, the Peruvian Ministry of the Environment ("**MINAM**") published the Green Finance Roadmap, a tool that sets out the Peruvian government's objectives to implement actions that incorporate sustainability into the operations of Peruvian entities that play a part in financial markets (ie financial institutions, insurance companies, private pension funds administrators, development banking entities, including financing providers not regulated, which seek to improve their social, environmental and economic impact).

According to the Green Finance Roadmap, the main themes of green finance for the Peruvian market are climate change, biodiversity and ecosystem services, circular economy, eco and bio-business, clean production and natural infrastructure.

This roadmap is divided into two phases. The aim of the first phase "Transformation" (2021-2025) is to raise awareness, strengthen capacities, and support the adaptation of strategies, policies and financial tools with an environmental sustainability approach. The aim of the second phase "Sustainability" (2025-2030) is to strengthen green and sustainable finance initiatives, products and instruments within financial institutions and capital markets participants.

It is reasonable to expect that, in the following years, the MINAM and other Peruvian government agencies will adopt certain regulations to enact the Green Finance Roadmap which will enable Peruvian financial institutions to channel significant resources to generate sustainable development in the country within a regulatory framework.

Benefit corporations regulations

Following the approval in 2020 of the law on "B Corporations" (newly incorporated Peruvian companies or existing ones that establish or adapt their by-laws (*estatutos*) to include in their corporate purpose the obligation to generate a positive social impact), the regulation under said law was approved in February 2021.

The regulation includes a specific list of activities that are believed to generate a positive social impact, hence allowing a company to qualify as a "B Corporation". Social and environmental activities that contribute to the achievement of the UN's Sustainable Development Goals are part of this list, including among others: (i) improving health services; (ii) supporting scientific, technological research and innovation; and (iii) collaborating with projects related to the study, dissemination, management, conservation, and care of natural protected areas.

The regulation also includes an obligation for "B Corporations" to hire an external entity to prepare an annual audit report that demonstrates such company's positive social impact (or a reduction of negative social impact) in compliance with its corporate purpose. The external entity in charge of preparing the audit report has to be an independent entity not related to the "B Corporation".

The regulation also provides for circumstances under which the "B Corporation" status is lost by a company, including the failure to fulfil its corporate purpose of producing a positive social impact, and provides for a framework within which the "B Corporations" can advertise their activities, as well as the corrective measures that may be dictated by government authorities against "B Corporations" for failure to comply with the law and its regulations.

It is important to mention that "B Corporations" (Benefit Corporations) should not be confused with "Certified B Companies". According to Peruvian law, "B Corporations" are Peruvian corporations which, by complying with the requirements established by the law and its regulations related to the obligation to generate a positive social impact, can add the "B" label to their pre-established corporate form. On the other hand, "Certified B Companies" are the ones that meet the standards prescribed by B Lab within the process of the "B Impact Assessment" that implies an evaluation of the company's impact on its workers, customers, community, and environment. Nevertheless, please note that the "B Corporations" regulations state that the external entity in charge of preparing the annual audit report previously described in order to demonstrate the positive social impact caused by the company, may use for the analysis, among others, the standards of the "B Impact Assessment".

National Action Plan on Business and Human Rights

In June 2021, the National Action Plan on Business and Human Rights 2021-2025 was published. According to the ex-Vice Minister of Human Rights and Access to Justice, "*the purpose of this plan is to promote from the State, in a strategic alliance with the business sector, indigenous people, trade unions and organized*

Peru

civil society, a culture of respect for human rights in all business activities in the country. This will have an important impact on improving the quality of life of people, especially the most vulnerable, strengthening democratic institutions and the exercise of citizenship, the prevention of conflict, the establishment of social peace, as well as improving competitiveness, productivity, and sustainable development of the country".

The plan, which shall be implemented by the Ministries and other governmental entities within their own competence, contains five strategic guidelines, with their corresponding goals: (i) promotion and diffusion of a culture of respect for human rights in the business environment; (ii) design of public protection policies to prevent human rights violations; (iii) design of public policies that promote respect for human rights by companies; (iv) promotion and design of due diligence procedures to ensure respect for human rights by companies; and (v) design and strengthening of mechanisms to offer to those affected by human rights violations, suitable judicial, administrative, legislative and other means to access damage reparation.

The implementation of this plan at the ministries and other governmental entities level may result in an opportunity for companies to adopt certain social parameters that would promote sustainable development related to human rights protection in the country.

New ESG standards in the Lima Stock Exchange

In July 2021, the Lima Stock Exchange published a press notice in which it was reported that S&P Dow Jones Indices and the Lima Stock Exchange will launch a new ESG index, which will include ESG criteria in order to provide guidance to investors as to whether an investment qualifies as sustainable. This index will replace the current S&P/BVL IBGC (Good Corporate Governance Index).

The new launch will take place for the Peruvian market in December 2021 and will provide local and international market participants with a new performance benchmark that incorporates global ESG principles and scores. This new index will present a challenge for issuers in the Peruvian market as increased reporting and transparency will be necessary in order to be able to monitor compliance with the ESG criteria in the new index.

Sustainable bond framework

In July 2021, in the context of recently enacted Peruvian government policies that contemplate the potential issuance of a sustainable sovereign bond, the Ministry of Economy and Finance approved the "Peru Sustainable Bond Framework" which (among other things) determines the criteria for the allocation of proceeds from bond issuances in order to qualify as a sustainable bond.

The Peru Sustainable Bond Framework has been developed following the ICMA Green Bond Principles 2021, the ICMA Social Bond Principles 2021, the ICMA Sustainability Bond Guidelines 2021 and the United Nations Sustainable Development Goals and comprises four main pillars: (i) use of proceeds; (ii) process for project evaluation and selection; (iii) management of proceeds; and (iv) reporting and external review.

The Framework includes certain obligations that the government, through the General Directorate of the Public Treasury, will need to comply with as an issuer of a sustainable bond.

In November 2021, the Peruvian government issued U.S. Dollar-Denominated 3.000% Global Bonds due 2034, 3.550% Global Bonds due 2051 and 3.600% Global Bonds due 2072, in an aggregate principal of US$4 billion. The intention of the government is to invest an amount equal to the proceeds from the issuance of the 2034 bonds and the 2072 bonds in expenditures that may qualify as "eligible green and social categories".

ESG disclosure in the Peruvian capital markets

It is now more common that certain institutional investors ask Peruvian issuers in which they invest about their ESG practices and policies as part of investment eligibility analysis. Before these institutional investors approve investment in a specific security, the issuer often needs to complete an ESG questionnaire prepared by the investor which allows it to identify and assess the company's standards, its level of implementation, as well as its commitment in connection with ESG matters.

The Peruvian Securities Market Regulator (*Superintendencia del Mercado de Valores*) is also reviewing the parameters of ESG standards that companies under its supervision must reveal annually to the market as part of their disclosure obligations, with the purpose of adapting them to the best international practices. As part of this effort, in 2020, a new Corporate Sustainability Report template was approved, putting more emphasis on certain aspects of the disclosure of policies, actions and standards implemented by the supervised companies related to their governance and labour practices, as well as the impact of their operations on the environment and social development.

In June 2021, the Peruvian Securities Market Regulator published a consolidated report gathering the information provided by the supervised companies through their Corporate Sustainability Report for 2020. In summary: (i) within the corporate sustainability aspects included in the Report, the highest degree of progress corresponds to those related to social development, with an average of 72%; (ii) the aspects associated with environmental policy (76.2%) and labour rights (74.7%) also stand out for their level of implementation; (iii) the question with the highest level of progress in its implementation corresponds to whether the company has not had any controversy or social conflict with its stakeholders (93.5%); (iv) the question with the lowest level of progress in its implementation corresponds to whether the company measures its water footprint (9.7%); and (v) of the 30 companies that have an international certification in Corporate Sustainability, five are part of the Dow Jones Sustainability Index, highlighting that all belong to the S&P/BVL Peru General Index.

It is expected that the Peruvian Securities Market Regulator will continue to improve the content of the corporate sustainability report template in the coming years, as well as focusing its supervising role in order to assure that the information provided by the issuers to the market is transparent, complete, true and clear, so that investors can fully incorporate ESG parameters in investment evaluations.

Note: We'd like to thank Peruvian law firm Rodrigo, Elías & Medrano – Abogados who contributed to this section.

Uruguay

Overview

The level of public awareness regarding the need for an ESG-focused development is slowly but consistently rising. The traditional driver has been the private and business sectors, but government is steadily following.

With the National Budget now tied to the Sustainability Development Goals ("**SDGs**"), the government presented its fourth Voluntary National Report ("**VNR**") under the Paris Agreement and new regulation is expected to promote and develop sustainable finance. The country's traditional framework of clean, renewable energy is now focused on hydrogen projects.

There is no regulatory requirement for ESG reporting, but the private sector is adopting international ESG principles and voluntarily presenting reports, a trend that we expect will continue to grow in 2022.

Read more: Uruguay Voluntary National Report 2021

BIC Companies

In July 2021, Law 19.969 was passed allowing both new companies and those already incorporated in Uruguay to become "BIC Companies" (*Sociedades de Beneficio e Interés Colectivo*) without changing their corporate form. To adopt this new legal regime, companies' articles of association or bylaws must expressly state that their corporate purpose includes the obligation to generate a positive social and environmental impact through business activities. This regime is also available for trusts which can become BIC Trusts.

BIC Companies and BIC Trusts will be obliged to measure and disclose their impact, as well as be subjected to review from an independent entity and can lose their BIC status in case of non-compliance with their disclosure obligations.

It is expected that the regulatory decree for this law will be in place by 2022. Hopefully, additional regulation will be passed providing fiscal incentives or public purchase advantages to BIC Companies and Trusts to encourage sustainability-focused business models.

Read more: Guyer – BIC Companies

Growth in sustainable investment and financing: sustainable sovereign bond

Both multilateral financial institutions and banks with local presence have been increasing their focus on sustainable finance, looking to provide funds to companies and/or projects that have a social or environmental impact at their core and demanding ESG reporting.

Some banks are publicly disclosing their own Sustainability Reports. A first private SDG Bond was recently issued, and another bank has just announced that it is working on a gender bond.

In line with this, at the macroeconomic level, the Ministry of Economy and Finance has announced that it is working jointly with the Ministry of Environment and the Ministry of Agriculture in the design of a new sovereign debt bond that will be tied to environmental milestones. Technical advice to the government is being provided by IDD and United Nations Development Programme.

The government has further supported the re-launch of the Uruguayan chapter of the Global Compact that took place in October 2021. It is expected that the finance sector in Uruguay will keep demanding projects that comply with international ESG standards, thus being a powerful driver for a sustainability-driven market in the country.

Read more: Uruguay sovereign bonds issuance/ *Uruguay diseña un bono soberano sostenible en coordinación con organismos internacionales*

Uruguay

Renewable energy and hydrogen strategy

The Uruguayan government seeks to carry out a new step in energy transition linked to the decarbonisation of transport and industry in order to reduce dependence on fossil fuels in these sectors and take advantage of surpluses in renewable energies.

The Ministry of Industry, Energy and Mining of Uruguay announced that the first green hydrogen pilot project operating in Uruguay will be carried out based on the articulation of public and private efforts. A data room has been set up in order to launch the pilot project and promote feedback from different stakeholders.

The pilot project may be in heavy transport or another such project related to green hydrogen (ie production of green fertilisers, production of green ammonia as fuel for ships, etc.). These projects may compete for the benefits that will be granted. Furthermore, Uruguay is exploring the possibility of becoming an exporter of green hydrogen and is discussing its first National Green Hydrogen Strategy.

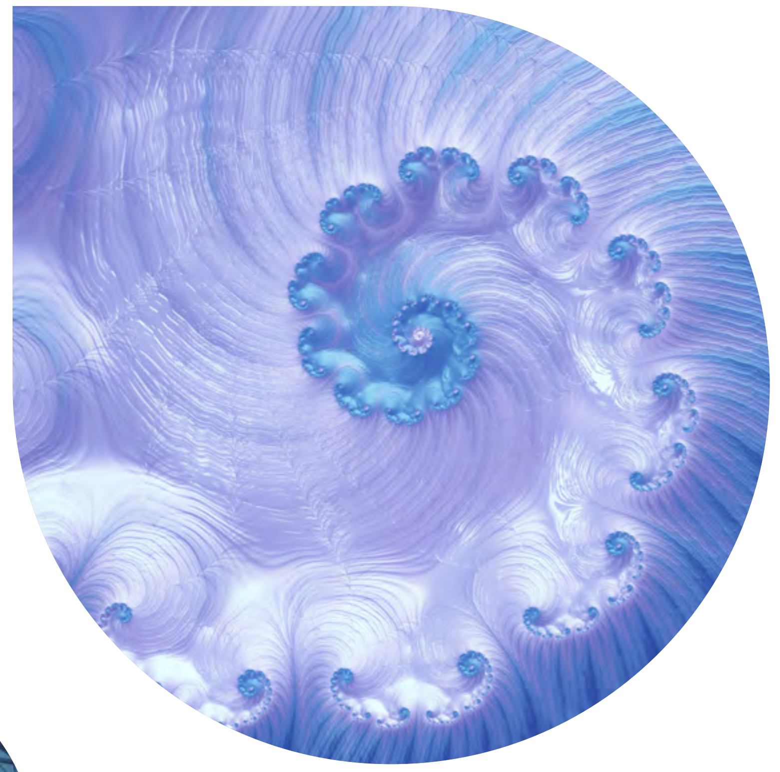
Read more: The Green Hydrogen Pilot Project/ *Hidrógeno verde*

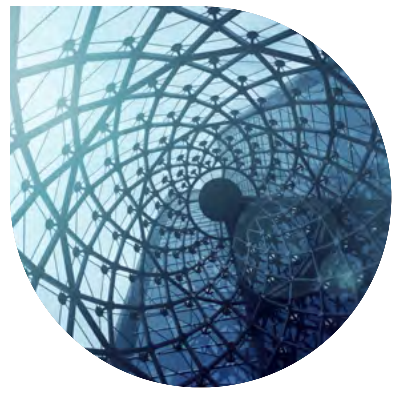
Employment promotion law

In August 2021, a new law was passed promoting the employment of people between 15 and 29 years old, those over 45 years old, as well as people with disabilities. In September 2021, this law was regulated by Decree of the Executive Power. Companies that hire young workers, as well as those over 45 years of age or with disabilities within the framework of the established programs, will obtain subsidies for the payment of special social security contributions.

Read more: Employment Promotion Law N.° 19.973

Note: We'd like to thank Uruguayan law firm Guyer & Regules who contributed to this section.





Asia

Climate action plans and renewed national targets

Across Asia, governments have continued to set carbon neutrality targets and signalled significant shifts in public policy. Japan, South Korea, Malaysia, and Vietnam have announced net zero targets by 2050. Building on the momentum of COP26 in November 2021, India committed to achieve net zero emissions by 2070 and China reconfirmed its commitment to carbon neutrality by 2060.

COP26 also saw Asian countries sign up to a host of pledges – Indonesia, Japan, South Korea, Singapore and Vietnam were among the 100 countries to sign up to the Global Methane Pledge to cut methane emission levels by 30% by 2030. Also closely watched was the Global Coal to Clean Power Transition Statement which has been signed by 40 countries, including South Korea and Vietnam, committing them to scale up clean power and stop issuing licences for new coal plants. Singapore was the first country in Asia to join the Powering Past Coal Alliance, an international coalition of countries, cities, regions and businesses that promotes the transition from coal to clean energy.

We also saw countries setting out detailed decarbonisation and net zero roadmaps – perhaps the most notable being China's "1+N" policy framework (discussed below) and the publication of its guidance document and action plan setting out how China would hit peak carbon emissions by 2030 and achieve carbon neutrality by 2060.

Read more: COP26: what does the outcome mean for business in Asia?

China issues action plan for achieving carbon peak emissions and carbon neutrality

Climate change remains high on the investor and regulatory agenda

Headlines on climate change, ethical supply chains and large-scale corporate fraud continue to keep ESG issues in the spotlight in Asia. This year has seen an increasingly complex regulatory environment emerge for businesses operating in Asia.

Each jurisdiction has developed its own codes and guidelines, and the degree to which these apply varies. For now, there is no convergence or common set of standards that apply across Asia. However, regulators have acknowledged the importance of consistent if not identical standards across jurisdictions – as the Head of the HK SFC observed in a June 2021 speech: "*we cannot work in jurisdictional silos when the climate emergency does not respect national boundaries*".

In this respect, the work of the International Organisation of Securities Commission ("**IOSCO**") and its engagement with the IFRS Foundation's efforts to develop globally consistent climate disclosure standards has the support of many Asian regulators and will be one to watch, having announced an ambitious target date of June 2022 to publish a global baseline climate disclosure standard. In a significant step towards this goal, the IFRS Foundation Trustees formally announced at COP26 the launch of the new International Sustainability Standards Board ("**ISSB**"), tasked with developing a "comprehensive global baseline of high-quality sustainability disclosure standards to meet investors' information needs". As complete convergence is unlikely in the short term and ESG standards that could hold the region's investments industry accountable are fragmented and often voluntary, businesses will need to continue to be aware of and navigate potential differences in standards across markets while there is likely to be greater pressure from regulators and stakeholders to disclose and improve ESG practices over the next 12 months.

Read more: IFRS announces creation of International Sustainability Standards Board and publishes disclosure prototypes

As ESG investing becomes mainstream, the need for companies to strengthen their ESG credentials and disclosures has never been higher. Gradually, we are seeing companies in Asia consider human rights and modern slavery issues in relation to risks in their supply chains and operations in addition to the predominate focus on environment and climate risk. On the climate front, we expect attention to broaden beyond carbon to other climate risk issues such as biodiversity.

Read more: Managing supply chain risks: reporting and diligence

Launch of the Taskforce on Nature-related Financial Disclosures

Asia

Investors and regulators across the region, including in Hong Kong, Singapore, Taiwan, and Japan, have signalled their concerns that "greenwashing" poses a significant challenge to true sustainable investing. In this respect, we are seeing the development of ESG taxonomies in the Asia region (for example, in Singapore), with Malaysia and China already having existing regulation or frameworks in place and the ASEAN member states publishing the ASEAN Taxonomy for Sustainable Finance. A notable development at COP26 was the official announcement of the "Common Ground Taxonomy" – an effort to identify common ground or areas of convergence between the green/ESG taxonomies in the EU and China that will be one to watch.

Find out more: Greenwashing Podcast

"Changes in societal expectations, public intolerance of corporate governance failures and the increasing focus on climate change and other environmental impacts are transforming investor focus in respect of company performance. 'Walking the talk' and strategic alignment with ESG goals are now critical to unlocking new investment opportunities, strengthening business relationships, sustaining returns and attracting and retaining talent."

Rob Elliot – Partner, Corporate, Singapore

Continued growth in sustainable finance products

The volume of ESG bonds issued in Asia continued to grow in 2021 with a more than five-fold increase compared to the 2016 issuance level. Green bonds remain the most popular source of fundraising, representing approximately 60% of ESG bond issuances in Asia for 2021.

In the Asia region, China led in terms of volume of ESG bond issuances, followed closely by countries such as South Korea, Japan and India. With climate change remaining high on the agenda of all Asian governments and regulators, issuers in the region are accelerating their ESG plans and raising their ESG commitment to meet specific targets, fuelled by abundant liquidity and strong demand from global investors.

Building upon the established "use of proceeds" model for ESG bonds (such as green bonds and sustainable bonds), we have also seen sustainability-linked bonds ("**SLBs**") gain momentum in Asia following their success in Europe and elsewhere. The proceeds of SLBs can be applied for general corporate purposes, and are not restricted to "green" or "sustainable" activity. The rate of interest, however, depends upon the issuer's performance against predefined sustainable development goals. In this way, a wider range of issuers can utilise SLBs as, traditionally, issuers outside of energy, utilities and similar sectors may not have sufficient green or sustainable projects to allocate large amounts of funds on an ongoing basis. The emergence of SLBs presents an exciting opportunity for a broader range of Asian issuers looking for innovative ways to demonstrate their commitment to meet ESG targets.

Read more: The rise of green loans and sustainability-linked lending

Although European markets currently lead global sustainability-linked loan volumes, green and sustainability-linked loans are also attracting noticeable attention in Asia and the trend looks set to continue in the same direction. Singapore continues to feature in the top 10 countries by aggregate sustainability-linked loan volumes. The derivatives and structured products space has likewise seen increased interest in sustainable investment opportunities in ESG derivatives, sustainability-linked derivatives and other sustainable structured products and we are likely to see such products evolve in 2022. We have also seen the development of emissions trading in Asia and growth of emissions-related structured products. In September and December 2021, ISDA also published a number of new white papers examining key aspects of the fast-growing ESG market, including the role of derivatives in the compliance and voluntary carbon markets, guidelines on the setting of KPIs and regulatory considerations for sustainability-linked derivatives and the impact on derivatives of accounting analysis in relation to ESG-related transactions, with the aim of establishing robust standards and best practices for the derivatives sector.

We have also seen the growth of "blended finance" to help support private investments in sustainable infrastructure in developing countries in Asia. Notably, the Asian Development Bank signed a MoU with HSBC, Temasek, and Clifford Capital Holdings to set up a debt financing platform to boost commercial development of sustainable infrastructure projects in Asia, with an initial focus on Southeast Asia. However, with up to 65% of Asia's infrastructure projects still not considered "bankable" by the private sector, there remains a significant financing gap to bridge.

Hong Kong SAR

On 8 October 2021, the Hong Kong government published its Climate Action Plan 2050 which affirmed the target of achieving carbon neutrality by 2050 and commits to a more aggressive medium-term target to reduce total carbon emissions of Hong Kong by half against 2005 levels before 2035.

Increasing regulatory focus on ESG

Over the course of 2021, regulators in Hong Kong have picked up the pace in introducing prescriptive regulation and guidance to tackle perceived deficiencies in risk management and disclosure regarding ESG matters. The Hong Kong market has seen regulators' ambitions for the jurisdiction to be a hub for green and sustainable finance crystallise into several targeted initiatives.

The Hong Kong Monetary Authority ("**HKMA**") last year published a white paper setting out its initial thinking on how it will supervise banks in relation to climate-related issues. A recurring theme in the white paper is that sustainability can be a double-edged sword: it can give rise to opportunities; however, a depletion of resources and increased regulation may adversely affect banks and their clients. Much of the thinking in the white paper has been carried over into the July 2021 consultation on the proposed guidelines on the management of climate-related risks by authorised institutions. The proposal requires banks to demonstrate that they meet HKMA expectations in the four core areas of governance, strategy, risk management and disclosure in their management of climate risk. In December 2021, HKMA also published guidance in the form of practices adopted by banks to support the transition to carbon neutrality and strongly encourages banks to incorporate such practices it highlights in the circular and annex to strengthen their green and sustainability programmes.

The HKMA also released details of its Green and Sustainable Finance Grant Scheme in 2021 which will subsidise costs for: (i) eligible first-time green and sustainable bond issuers, including arrangement, legal, audit and listing fees; and (ii) transaction-related external review fees for eligible first-time and repeat green and sustainable bond issuers and loan borrowers.

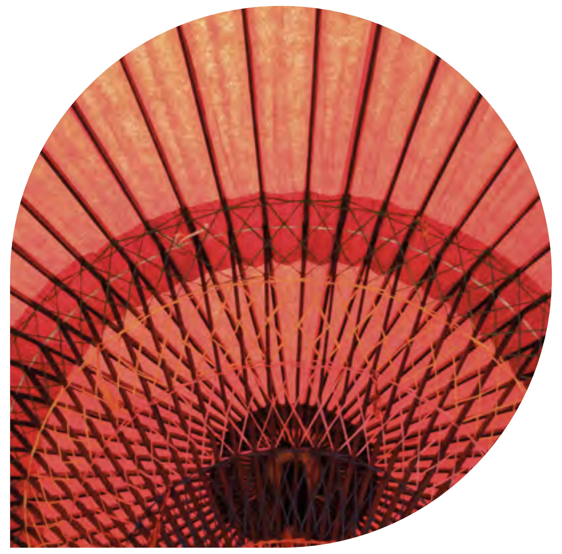
The Securities and Futures Commission ("**SFC**") too has been focused on climate risk, specifically in relation to funds and fund managers. It has updated its previous 2019 circular to management companies of SFC-authorised unit trusts and mutual funds which incorporate ESG strategies which are reflected in the fund's name. This updated circular requires enhanced disclosures to clients and provides additional guidance specifically for ESG funds with a climate-related focus. The updates must be complied with from 1 January 2022. The SFC also published a conclusions paper on amendments to the Fund Manager Code of Conduct ("**FMCC**") (developed based on the recommendations of the TCFD) to introduce measures related to managing and disclosing climate-related risk. A separate circular setting out additional baseline and enhanced standards in relation to complying with the new FMCC measures supplements the conclusion paper. Fund managers need to comply with the new FMCC measures by August or November 2022, depending on their size.

In November 2021, the Hong Kong Stock Exchange ("**SEHK**") published Guidance on Climate Disclosures to facilitate issuers' compliance with the TCFD disclosure recommendations. In December, SEHK also published the conclusions to its April 2021 consultation paper which made clear that a "single-gender board is not considered to be a diverse board", requiring existing listed issuers with single gender boards to appoint a director of a different gender by 31 December 2024. SEHK's initiatives also show an expectation for increasing sophistication around carbon neutrality planning and transparency, with its Net-Zero Guide for Business published in December 2021 and an announcement that they will partner with leading ESG data providers to display SEHK-listed companies' ESG metrics.

Hong Kong's Green and Sustainable Finance Cross-Agency Steering Group announced on 15 July 2021 that it is seeking to align climate-related disclosures with the TCFD requirements by 2025 and make such disclosures mandatory across certain sectors. The Steering Group has also set up a Carbon Market Work Stream (co-chaired by the SFC and SEHK) to assess the feasibility of developing Hong Kong as a regional carbon trading centre; and it has launched the Centre for Green and Sustainable Finance, to help the financial industry manage risks and capture opportunities presented by climate change.

Directors' liability on climate risk

In December 2021, the Commonwealth Climate and Law Initiative released a white paper covering directors' duties and disclosure obligations in relation to climate-related issues under Hong Kong law. The white paper and a legal opinion commissioned by the initiative opine that since Hong Kong law requires directors to act in good faith in the best interests of their company and to exercise reasonable care, skill and diligence in doing so, directors are legally both entitled and obliged to take into account in their decision-making process risks and considerations arising from the effects of climate change.



Mainland China

2021 has witnessed some key policy developments made by the Chinese government following the announcement made by President Xi in 2020 to reach carbon peak emissions by 2030 and carbon neutrality by 2060. Some highlights among these developments include the following.

"1+N" carbon peak emissions and neutrality policy framework being rolled out

The Chinese government has been formulating an "1+N" policy framework following the announcement by President Xi in 2020. "1" stands for an overarching plan to achieve both peak emissions and carbon neutrality while the "N" stands for different action plans to help achieve peak emissions in various sectors. In late October 2021 and ahead of COP26, the "Working Guidance for Carbon Dioxide Peaking and Carbon Neutrality in Full and Faithful Implementation of the New Development Philosophy" ("**Guidance**") and the "Action Plan for Carbon Dioxide Peaking Before 2030" ("**Action Plan**") were issued by the State Council of China. The Guidance, which sets out specific targets and measures for both reaching peak emissions and carbon neutrality is the "1" in the equation and is a quasi-constitutional set of guidelines. The Action Plan is an essential part of the "N" as it sets out the main objectives for the following two "Five-Year" periods to achieve peak carbon emissions by 2030.

Read more: China issues action plan for achieving carbon peak emissions and carbon neutrality ahead of COP26

First National Carbon Emission Trading Scheme launched

On 16 July 2021, mainland China launched its first national carbon emission trading scheme ("**ETS**"), with a view to eventually consolidating the existing nine local trading markets after approximately eight years of local trading activities. While the local trading markets have evolved to have some level of maturity with regards to the types of participants and trading products, the new-born national ETS remains at the early stage of its lifecycle. Further developments of the national ETS are to be watched, in particular the inclusion of foreign invested participants or institutional investors as well as the introduction of diversified tradeable products.

Read more: China Launches its First National Carbon Emission Trading Scheme

Other "E" related developments

On 28 June 2021, China's Securities Regulatory Commission issued revised guidelines with regards to the preparation of annual and semi-annual reports by listed companies, which require key polluting companies and their main subsidiaries to disclose environmental information and encourage all listed companies to disclose information on ecological protection, social responsibility, and poverty alleviation, in a specific section in their annual and semi-annual reports. Furthermore, a mandatory environmental information disclosure system is to be established by 2025 to primarily cover heavy polluters, listed companies and bond issuers with a poor record in environmental protection.

In September 2021, President Xi Jinping also announced a halt to investments in greenfield coal-fired power stations abroad. In early November 2021, the People's Bank of China ("**PBOC**") rolled out a mechanism to support national financial institutions which will provide qualified green financings to entities in key sectors. Among others, PBOC would provide funding support to these financial institutions to be capped at 60% of the total lending amount and at an interest rate of 1.75% p.a.

Read more: China announces cessation of coal fired power plants abroad

Developments in the "S" space

A highlight of this year's regulatory development with regards to "S" is the various labour protection-related policies issued by the authorities in China. In response to the rapid growth of the gig economy and disputes in this sector, the authorities in China released three opinions in June and July 2021 that aim to enhance the employment protection of gig workers (with regard to matters such as employment relationship, workplace discrimination, minimum wage, holidays and social insurance). The requirements set out in these three opinions are not compulsory at this stage but will be an area to watch.

Japan

Japan positioning itself

Japan has continued to show commitment to its goal of cutting greenhouse gas emissions by 46% by 2030 and achieving net zero emissions by 2050 and has established a framework to support the transition. The Sixth Strategic Energy Plan was approved by the Cabinet on 22 October 2021 and is focused on increasing the share of power generation from renewable energy sources. The proposed energy mix in FY2030 is to be: (i) 36-38% renewables; (ii) 1% hydrogen/ammonia (this is the first time hydrogen has been mentioned in any Energy Plan); (iii) 20-22% nuclear; (iv) 20% LNG; (v) 19% coal; and (vi) 2% petroleum. While this is a step in the right direction, it may be seen as a modest target and there will continue to be scrutiny of the reference to 19% coal. The scaling up of offshore wind and restarting of nuclear reactors are likely to be key factors in the next revision (due in 2024).

The Japanese Financial Services Agency ("**JFSA**") is focused on positioning Japan at the forefront in Asia in relation to sustainable finance, and in playing a leading role in relevant international discussions. With increasing stakeholder engagement and more disclosure tools, corporate Japan is reviewing its risk management frameworks to assess how ESG issues may already be embedded in corporate strategy.

Transition roadmap

On 7 May 2021, the Ministry of Economy, Trade and Industry ("**METI**"), the Ministry of the Environment and the JFSA jointly published the Basic Guidelines on Climate Transition Finance with a view to procuring financing for businesses that are already decarbonised (eg renewable energy) or transitioning towards decarbonisation, in particular transitions in "hard-to-abate" sectors. The guidelines also look to increase the credibility of transition finance and make clear that this is, in part, determined by the credibility of the strategies and the practices of the fundraiser. METI is formulating sector-specific roadmaps to supplement the guidelines; roadmaps for each of steel, chemicals, electric power, gas, petroleum, cement and paper/pulp will be prepared by March 2022.

Technology and innovation are integral to Japan's transition roadmap. A Y2 trillion green innovation fund was established by METI in March 2021 to support companies for 10 years from research and development through to implementation, aiming to further the green innovation fund's policy goals. The initial group of 11 recipients selected for funding all relate to hydrogen projects which gives some indication of the role hydrogen is to play in Japan's transition.

JFSA and increasing regulation

2021 saw accelerated progress in regulation around ESG. In its July 2021 "Strategy on Climate Change", the Bank of Japan ("**BoJ**") stated that it was working with the JFSA on pilot exercises of scenario analysis targeting large financial institutions to assess the impact of climate change on the stability of the financial system. In August 2021, JFSA further announced in its financial administration policy ("**Administration Policy**") that, with the BoJ, it intended to carry out pilot scenario tests for the three Japanese mega banks (SMBC, MUFG and Mizuho) and three major non-life insurance companies based on the NGFS scenarios.

Japan is unlikely to adopt a taxonomy similar to that being established in the EU, but we are likely to see more focus on regulation to support transition into green (as opposed to classifying what is green today) and the adoption of a "learning by doing" approach – implementing relevant measures and making adjustments where necessary.

The JFSA is also strengthening its efforts to promote investment in climate-related financial products, and deepening the local currency-denominated green bond market with the establishment of an ESG data platform, green bond certification framework and the issuance of the social bond guidelines (draft guidelines published in July 2021 are being finalised). By way of example, the Green Finance Portal (set up by the Ministry of Environment) and the Japan Securities Dealers Association provide publicly available information about the issuance of ESG-related bonds. In March 2020, the Japan Exchange Group published a "Practical Handbook for ESG Disclosure". The Japan Exchange Group also

Japan

provides real time information about ESG-related indices and ESG-related financial products. It is expected that the further developed information platform and certification system will lead to the reduction of costs related to information gathering and disclosure.

The Administration Policy also indicates that the JFSA shall actively participate in the process of developing sustainability reporting standards at the IFRS Foundation. The Financial System Council (an advisory body of the JFSA) is looking at sustainability reporting standards to be adopted by Japanese companies aligned with TCFD recommendations and IFRS standards.

The JFSA also indicated that it will promote sustainable finance through, in particular, the enhancement of corporate disclosure and has indicated that it is likely to introduce mandatory ESG disclosures aligned with TCFD recommendations. The Tokyo Stock Exchange revised its Corporate Governance Code with effect from 11 June 2021 to emphasise the focus on, and importance of, ESG for companies. In particular, it introduced a new principle indicating that the board should recognise that dealing with sustainability issues – such as taking care of climate change and other global environmental issues, respect for human rights, fair and appropriate treatment of the workforce, including caring for their health and working environment, fair and reasonable transactions with suppliers – are important management issues and that boards should think about how to consider these issues positively and proactively.

In July 2021, METI established the Business and Human Rights Policy Office to enhance human rights initiatives in the industry, including human rights due diligence on the supply chain. This continues to be an area of focus for corporates and financial institutions in Japan and we may see more published guidance in this space.

However, in terms of corporate governance more broadly, companies are under pressure from external and internal stakeholders to embed more accountability, inclusion, and transparency into their organisational structures and decision-making and cross-shareholdings are coming under more scrutiny.

The road to net zero

Japan remains focused on the transition and is paying close and thoughtful attention to the regulatory developments in Europe and the US. While there is clearly more work to be done, the commitments made at COP26 set the right tone for the road to net zero.

> "While the government is taking an active role in mapping out a route to net zero (with a particular emphasis on the importance of offshore wind and hydrogen) – the role of private investment, and the extent to which stakeholder expectations are shaping this, cannot be underestimated. Companies are coming to the view that issues thrown up in setting ESG goals are business critical and are in many cases transforming a company's strategy."

Hirofumi Taba – Partner, Energy & Infrastructure, Tokyo

Singapore

Singapore Green Plan 2030

The Singapore Green Plan 2030 was unveiled in February 2021 to advance Singapore's sustainable development agenda and charts Singapore's green targets over the next decade.

The Green Plan includes targets for Singapore to become a leading centre for green finance in Asia and globally. Various requirements were identified for green finance to work effectively: a consistent set of global disclosure and reporting standards must be implemented; the quality, availability and comparability of data must be improved; and taxonomies for green and transition activities must be developed. Over the next few years, we would expect further governmental initiatives to advance the Green Plan's implementation.

Directors' liability on climate risk

In April 2021, a team of independent legal counsel (at the Commonwealth Climate and Law Initiative's ("**CCLI**") request) issued a legal opinion on directors' responsibilities and climate change under Singapore law that concluded that directors are obliged to consider climate change risks as part of their duties to act in the company's best interests. The CCLI also published a white paper exploring the risks to directors for breaching their duties, climate change-related disclosure obligations and the standards of conduct all directors must meet to fulfil their duties.

Key takeaways from the two publications are:

- all company directors must take into account ESG considerations in their decision-making;
- directors should seek to ensure that the companies on whose boards they sit develop ESG policies to provide frameworks for effective consideration of ESG factors in strategy-setting and decision-making;
- directors cannot claim ignorance of ESG issues; and
- failure to take account of ESG issues may constitute a breach of directors' statutory and common law duties.

Carbon trading marketplace

The Singapore government is continuing its efforts to develop Singapore into a carbon trading and services hub. In May 2021, SGX, DBS, SCB and Temasek established Climate Impact X ("**CIX**"), a global carbon exchange that leverages on satellite monitoring and blockchain to meet the demand for high quality carbon credits. CIX completed its first pilot auction in November 2021 and regular auctions are targeted for early 2022.

Enhancing disclosure standards

The Monetary Authority of Singapore ("**MAS**") expects financial institutions to meet climate-related disclosure standards in June 2022 (under its Environmental Risk Management Guidelines), in accordance with international reporting frameworks such as the TCFD recommendations. MAS is expected to consult the industry in late 2021 on how to transition these expectations into legally binding requirements.

Early in 2022, MAS will set out regulatory expectations on the disclosure standards that Singapore retail funds with ESG investment objectives must meet to help investors better understand an ESG fund's investment selection criteria and investment process. Investors will also receive updates on whether the fund's investment objectives have been met.

SGX requires all issuers to provide climate reporting on a "comply or explain" basis in their sustainability reports from the FY commencing 2022, and climate reporting will be mandated for issuers in some sectors from FY 2023/24 on a phased approach. Issuers must also adopt a board diversity policy and disclose various components of the policy in their annual reports from 1 January 2022, which goes further than the existing "comply or explain" basis for board diversity reporting of listed companies.

Data

MAS has launched Project Greenprint, which aims to harness technology to support green finance in conjunction with the financial industry – establishing data platforms to mobilise capital for green projects, facilitating the acquisition and certification of climate-relevant data, and monitoring the financial industry's commitments to emissions reductions.

Taxonomies

The Green Finance Industry Taskforce has issued for consultation a proposed "traffic light" system to classify sustainable activities and develop a more granular criteria, including metrics and thresholds, to help operationalise the classification system.

India

COP26: the way forward

Prime Minister Modi announced India's "*amit tatva*" or five commitments to tackle the climate crisis at the COP26 climate change summit in Glasgow. As a part of this commitment, India has set a net zero target for the first time. India promised to cut its emissions to net zero by 2070.

India was in focus ahead of the summit, as the world's third-largest greenhouse gas emitter. While the world's two largest emitters – the US and China – had 2050 and 2060 net-zero deadlines, Modi argued that maintaining economic development required "carbon space".

At COP26, Modi said India would place climate change at the centre of its policies. Along with a net zero target, it committed to getting half its energy from renewable sources by the end of this decade. It also promised to increase its non-fossil capacity to 500 GW, reduce 1 billion tonnes of the total projected carbon and reduce its economy carbon intensity to less than 45% within that time frame. However, he demanded that developed countries make US$1 trillion available in climate finance, to assist developing countries in reaching their goals.

Sustainability reporting requirements

The Securities and Exchange Board of India ("**SEBI**") on 10 May 2021 implemented new sustainability-related reporting requirements for the top 1,000 listed companies by market capitalisation. This replaces SEBI's existing disclosure requirements under the Business Responsibility Report with a new Business Responsibility and Sustainability Report ("**BRSR**"). SEBI noted that this change was a significant step towards bringing the sustainability reporting in line with financial reporting. SEBI has made BRSR voluntary for FY 2021/22, and mandatory from FY 2022/23 but has urged companies to be early-adopters at the forefront of sustainable reporting.

The BRSR was finalised after conducting a benchmarking exercise with internationally accepted disclosure frameworks and deliberations with relevant stakeholders. The disclosures required are structured around the performance of companies based on the nine principles laid down by the National Guidelines on Responsible Business Conduct issued by the Ministry of Corporate Affairs. Reporting under each principle is divided into essential indicators that are mandatory and leadership indicators that are voluntary but encouraged.

The key disclosures include:

- An overview of the company's material ESG risks and opportunities, their financial implications and approach to mitigation.
- Setting and performance of sustainability goals and targets.
- Environment-related disclosures including resource usage, air pollutant and greenhouse emissions, biodiversity, and waste generation and management practices.
- Social-related disclosures covering workforce, value chain, communities, and consumers. This includes employee metrics looking at gender, differently abled employees, turnover rates, median wages and welfare benefits.
- Community-focused disclosures on Social Impact Assessments, Rehabilitation and Resettlement and Corporate Social Responsibility, as well as consumer disclosures around product labelling, product recall, consumer complaints in respect of data privacy and cyber security.

The aim of BRSR is to ensure quantitative and standardised disclosures on ESG parameters to enable investors to make better long term sustainability decisions. It is also expected to encourage companies to focus on the social and environmental impact of their activities.

Middle East

MENA region to host next two COP sessions

With the UAE being selected to host the COP28 international climate conference in 2023, there is renewed focus on the Middle East to show leadership and initiative on climate issues. The selection is significant and positions the COP in the Middle East and North Africa (“**MENA**”) region for two years, with Egypt scheduled to host COP27 in 2022. The UAE conference is being pitched as the “solutions COP” as it will aim to assess how countries have implemented their climate pledges and the required next steps in bridging the gap between targets and action. In the meantime, the Gulf States have pledged ambitious targets on their transition to achieving net zero carbon emissions.

Journey to net zero: pledge and targets

The UAE was the first country in the Middle East to announce a “net zero by 2050 strategic initiative”, pledging to reduce carbon emissions by 23.5% (equivalent of 70 million tonnes) by 2030. To help achieve these targets, the Abu Dhabi Department of Energy announced new clean energy generation projects focusing on solar and nuclear sources and the Dubai Future Council of Energy developed a detailed roadmap to achieve a carbon neutral economy.

Saudi Arabia aims to reach net zero by 2060 while Saudi Aramco, the national oil company and one of the biggest oil companies in the world, has pledged net zero carbon emissions from its operations a decade earlier. The country has pledged US$1 billion in climate change initiatives as a part of the Saudi Green Initiative programme, which looks to establish a regional carbon capture and storage centre, early storm warning centre and cloud seeding programmes in its endeavours for a greener future.

Qatar aims to reduce greenhouse gas emissions by 25% by 2030 while Iraq has committed to 1-2% reduction in emissions. It also adopted the “Mesopotamian Revitalization” project as a framework for the nation’s environmental strategy, to include afforestation, modernising of water administration and generating clean energy. Bahrain is not far behind with a net zero emissions commitment for 2060 and pledges to reduce emissions by 30% by 2035, including investing in carbon removal solutions.

While most states in the Middle East have committed to ambitious targets in line with global expectations, it will be interesting to see is how these pledges are put into action in the next few years with strategic planning and targeted investments.

“It is an exciting time for the MENA region, particularly with Egypt and the UAE hosting the next two COP editions. In particular the region sees itself as a natural hub for the development of a clean hydrogen market and more generally we are witnessing real momentum as the Gulf states transition from their historical reliance on hydrocarbons to becoming more balanced and sustainable economies focused on a greener future.”

Matt Keats – Partner, Energy & Infrastructure, Dubai

Middle East

What's next on the agenda?

Mandatory ESG disclosures are already underway in the UAE where public joint stock companies listed on the Abu Dhabi Securities Exchange or Dubai Financial Market are required to publish an annual sustainability report. The Saudi Stock Exchange, Tadawul, followed suit in October last year with its own set of ESG disclosures guidelines requiring listed companies to report on their sustainable practices. The launch of disclosure guidelines, which were developed in line with the UN SSE model guidance, were seen as a crucial step to improve market transparency and raise awareness on the importance of ESG within the Middle East capital markets.

We are also seeing a growth of investments linked to sustainable project development in the Middle East and North Africa region as policymakers encourage sustainability in regional buildings, infrastructure and utilities projects. The UAE's state utility Dubai Electricity & Water Authority reached a milestone last year with its installed renewable energy capacity reaching 1,300MW, with the inauguration of a new 300MV solar park. Saudi Arabia has also shown promise with US$18 billion renewable projects in the pipeline, with around US$13 billion worth of investments in renewable energy already at or close to tendering stage.

In particular, there is a greater push towards building balanced economies with focus on the clean hydrogen sector, which is perceived as the sustainable fuel of the future. The UAE's Hydrogen Leadership Roadmap goes a step further by setting out clear objectives on how the country plans to leverage its investments and existing knowledge from renewable energy to accelerate development in the low carbon hydrogen. It already has seven low carbon hydrogen projects and pilots underway targeting a 25% market share in the hydrogen export markets, which coupled with cost-competitive solar PV energy, and carbon capture and storage capacities, highlights the nation's commitment to decarbonising its economy.

Saudi Arabia has a similar trend, with the Public Investment Fund being the world's first sovereign wealth fund that plans to issue its green bonds with borrowing linked to sustainable ESG benchmarks. The Kingdom is also ramping up its circular carbon economy approach, which involves developing technology for capturing and storing carbon dioxide in an attempt to reduce carbon emissions from the atmosphere.

In the Gulf nation of Oman, climate scientists are exploring a new direct air capture technology that captures CO_2 and injects it into peridotite rocks that are found in abundance in Oman. The technology is still being tested and has so far been prohibitively expensive, but it is a promising proposition for carbon removal in the Gulf region that is still reliant on the hydrocarbon sector.

Making a case for oil in the energy transition

In response to growing international pressure to avoid the worst impacts of climate change, the Gulf states have shown commitment and initiative but the transition to a net-zero future will be based on realistic outcomes for countries that continue to be economically and fiscally dependent on their oil income.

Mariam Almheiri, the UAE's minister of climate change and environment, noted that "*this is a transition, we can't just switch off the tap*". She added that "*as we ramp up clean and renewable energy, we will also be ramping down oil and gas production – but at the moment there is still a global need, so we will still be supplying*". Saudi Arabia's oil minister, Prince Abdulaziz bin Salman, voiced a similar concern that his nation was adopting a *"holistic approach to transition to include oil, gas, and hydrogen production, and that it could act as an incubator for collective efforts"*.

However, climate activists have criticised the approach, noting that it is too slow in adopting meaningful changes and the primary focus should be on reducing carbon output.

Australia

Allens > < Linklaters

Climate change litigation

2021 proved to be a ground-breaking year in Australian climate litigation, with an emerging trend of litigants using administrative and tort law principles to argue that government bodies owe statutory and common law duties to incorporate climate considerations into their decision-making processes. Those arguments have found traction with the courts. In one instance, a Federal Minister was found to owe a duty of care to consider climate change when deciding whether to approve a major fossil fuel project (although the decision is subject to an appeal). In another case, a court found that a State-based environmental protection authority was legislatively required to create instruments that protect the environment from climate impacts. Another State environment authority now faces a claim that it failed to consider climate change when reviewing and amending coal-fired power station licences.

Meanwhile, climate change class actions gathered momentum, with a Federal Court judge giving the all-clear to an investor class action alleging misleading or deceptive conduct by omission against the Federal Government, and members of the Torres Strait Islander community filing a duty of care tort claim against the Federal Government that echoes the hallmarks of the landmark *Urgenda* decision in the Netherlands. If successful, this claim may lead to the court ordering the Government to set a greenhouse gas emissions reduction target consistent with limiting global warming to 1.5°C, and to reduce national emissions in line with that target.

Greenwashing has also become a focal point for regulators and businesses alike. Australia's chief financial regulator, the Australian Securities and Investment Commission ("**ASIC**"), recently committed to targeting misleading ESG claims relating to financial products, and public interest group, the Australasian Centre for Corporate Responsibility filed a misleading or deceptive conduct claim against an Australian energy company, challenging its statements about gas as a "clean fuel" and its net zero strategy. The case is claimed by the strategic litigants bringing the action to be the first in the world to challenge the accuracy of a company's net zero emissions target.

These trends are showing no sign of slowing as we head into 2022.

Read more:

Australian and Dutch courts find climate-related duties of care in Sharma and Shell

Climate Change Litigation in Australia: key trends and predictions

A growing tide? Climate change proceedings issued against the Federal Treasury

Cultural heritage

In October 2021, the Federal Parliament released its final report into the destruction of two Aboriginal rock shelters located in Juukan Gorge in the Pilbara region of Western Australia. While the report and the recommendations within it are not binding on Federal, State or Territory governments, they do have the potential to become the de facto expected standard of conduct for companies.

The key recommendations most likely to become a focus point for stakeholders are:

> project proponents' engagement with traditional owners should reflect the principle of free, prior and informed consent ("**FPIC**"), regardless of domestic law requirements; and

> traditional owners' decisions and consent to certain activity can be reconsidered if significant new information about cultural heritage comes to light.

Other recommendations which may be picked up by stakeholders include:

> project proponents should identify appropriate traditional owner representatives with whom to engage, based on principles of self-determination and recognition of native title or land rights statutory bodies (where they exist);

> site surveys involving traditional owners should be conducted on country at the beginning of any decision-making process;

> adequate buffer zones should be provided around cultural heritage sites;
> traditional owners have a right of timely access to protected cultural heritage sites;
> traditional owner resourcing (including funding and expert advice) for negotiations should come from an independent source (with proponents contributing to this independent source); and
> project proponents should recognise culturally significant species of flora and fauna as part of cultural heritage management (rather than focusing only on objects).

Regardless of the official response from Commonwealth, State, and Territory governments, the report's recommendations will likely be a crucial touchstone for engagement and activism on cultural heritage issues in the future.

Read more: Protection of Cultural Heritage and FPIC

Non-judicial dispute resolution

In October 2021, the UN Human Rights Council recognised the right to a clean, healthy and sustainable environment as a human right. Shortly afterward, five young people lodged complaints to the UN Special Rapporteurs for human rights and environment, the rights of Indigenous people, and the rights of persons with disabilities, over the Australian Government's inaction on climate change and its current 2030 emissions reduction target, asserting that the Government is in breach of the Paris Agreement and several UN human rights instruments. The complaints highlight the close relationship between climate change impacts and human rights.

There has also been an increase in complaints under the OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**") to Australia's National Contact Point ("**AusNCP**"). The AusNCP process continues to be an attractive avenue for complainants where domestic remedies may be denied or too costly to pursue. Six complaints were received by AusNCP in the first 10 months of 2021, which is twice the number received throughout 2020 and the largest number of complaints received by AusNCP in a single year.

A significant number of complaints have been made against mining companies with respect to their operations outside of Australia. We are also seeing a focus on renewables and the energy sector more broadly. In one instance, AusNCP upheld a complaint that an electricity transmission company failed to act in accordance with the OECD Guidelines in its engagement with local Indigenous groups.

AusNCP has also taken a broad interpretation of "multinational enterprise" – requiring companies only to have international shareholders or management to accept a complaint. This is a broader interpretation than that taken by other NCPs and increases the number of companies which may be subject to scrutiny against the OECD Guidelines in Australia.

Read more:

The ESG remedy ecosystem – working backwards from an OECD National Contact Point complaint

Navigating the energy transition

Investor engagement and corporate strategy

Investor activism remains firmly on the agenda for Australian boards in 2022. With growing shareholder support, global initiatives such as the "Say on Climate" campaign have garnered corporate attention in Australia, particularly in the mining and energy sectors. The "Say on Climate" campaign calls for boards (rather than shareholders) to voluntarily propose advisory resolutions at their annual general meetings, seeking member approval for science-based climate transition action plans.

Activists have also self-nominated for the boards of listed entities, challenging companies to do better in their ESG commitments. In September 2021, an 18-year-old university student announced a campaign to become a director of AGL Energy Ltd, Australia's largest electricity generator. While unsuccessful, the student's goal of shifting the company towards more sustainable practices, including a transition to a 100% renewable energy base before 2030, received considerable attention.

Growing ESG activism is also directly impacting the value of businesses in Australia. Companies failing to meet corporate governance expectations may find it increasingly difficult to access capital. For example, Australia's "big four" banks have committed to exiting thermal coal by 2030. The Net-Zero Banking Alliance, a group committed to net-zero investment portfolios by 2050, has also recently garnered its first Australian banking signatories.

Australian businesses are now rethinking their corporate strategies, undertaking initiatives such as refinancing their debts into sustainable loan facilities, offering ESG-based products and prioritising the consideration of corporate governance issues in future transactions.

Read more:

The 'Say on Climate' – what do boards need to know?

ESG activism is growing – what should boards do?

"Our clients are increasingly focused on the impact that ESG issues have on their transactions and the opportunities that ESG best-practice presents. ESG considerations are no longer an optional agenda item for Australian businesses, becoming a pivotal factor in corporate strategy, growth opportunities and meeting the standards of both Australian and international investors."

Michelle Bennett – Partner (Allens), Mergers, Acquisitions & Capital Markets, Melbourne

Australia

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Corporate crime

Reforms to Australia's corporate criminal responsibility laws picked up pace in 2021, following the Australia Law Reform Commission's Final Report on corporate criminal responsibility in August 2020. The Federal Government has proposed amendments to the Australian Criminal Code which will introduce a new offence of failing to prevent bribery of a foreign public official: this is similar to the failure to prevent bribery offence in the UK Bribery Act 2010. Under this new offence, a company is automatically liable for bribery committed by an "associate" (including a subsidiary, officer, employee, agent, contractor, or third-party service provider) for the company's gain, unless the company can demonstrate that it had "adequate procedures" in place designed to prevent the bribery from occurring. This amendment in essence expands the range of conduct for which a company will be strictly liable.

The Federal Government finalised its consultation of its "adequate procedures" guidance and is expected to finalise its guidance before the new bribery offence is passed into law. Initial indications are that this guidance will largely follow similar guidance issued by authorities in the US and the UK.

The Federal Government has passed reforms to Australia's sanctions regime, including the introduction of "Magnitsky" style sanctions. In addition to establishing a human rights sanctions program, the Government has indicated that it may also establish sanctions programs targeting grand corruption, malicious cyber activity and the proliferation of weapons of mass destruction. Other conceivable thematic sanctions which may be introduced are programs targeting foreign interference, transnational drug trafficking and other forms of transnational crime, given these are already targets of US sanctions programs.

These changes are likely to increase the sanctions risks to businesses operating in Australia as, until now, Australia's sanctions regime has been state-focused. However, once Australia adopts sanctions that are issues-focused, sanctions risks will be more likely to materialise in countries not subject to comprehensive sanctions.

Read more:

Take Two: anti-bribery reforms revived and long-awaited draft regulatory guidance released

Magnitsky and more: human rights abuses, malicious cyber crime and grand corruption based designations among major changes to Australia's sanctions framework

Long-awaited sanctions reform may result in more dispersed sanctions risk

Human rights and modern slavery

There are growing stakeholder expectations that companies will align their operations with international human rights standards covering everything from modern slavery to engagement with indigenous peoples. This increase in stakeholder expectations has also driven greater uptake of human rights due diligence in M&A transactions and large-scale supply agreements, which we expect to increase, given the Federal Government's recent law reform to enable a Magnitsky style sanctions regime as discussed previously.

Modern slavery compliance continues to be a focus for corporate Australia with the Federal reporting regime entering its second round. Civil society ranking exercises have garnered significant attention and are serving to fulfil the Federal Government's stated aim of driving a race to the top in this area.

In June 2021, the Federal Parliament recommended that the review of the Modern Slavery Act 2018 (Cth) be brought forward as soon as possible following the conclusion of the first reporting cycle on 30 June 2021, and that the review should consider provisions for strengthening and broadening the Modern Slavery Act – together with the establishment of an independent body to oversee and enforce its implementation.

New South Wales ("**NSW**") has recently proposed amendments to its own modern slavery regime by removing the NSW-specific reporting regime and instead establishing (amongst other things) an Anti-Slavery Commissioner, and introducing new criminal offences to prohibit slavery, servitude, child forced labour and child forced marriage. It is also likely that NSW businesses with total turnover of between AUD$50 million and AUD$100 million will be encouraged by the new Anti-Slavery Commissioner to report voluntarily under the federal regime.

Read more:

Recent developments set to shake up modern slavery landscape for Australian businesses

"The ESG megatrend continues to build in Australia due to increasing stakeholder expectations and legislative developments. It is crucial that companies actively embed their ESG policies and positions into day-to-day operations and work to forge a robust ESG risk and compliance culture."

Rachel Nicolson – Partner (Allens), Disputes & Investigations, Melbourne

South Africa

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Overview

There is a growing acceptance and integration of ESG principles among South African corporates, who recognise that this is not only essential to attract investment but it also aligns with global expectations of corporate responsibility and sustainable impact.

South Africa's recently agreed ZAR130 billion "Green Deal" following COP26 is likely to stimulate more green deals and infrastructure builds. It will also bolster South Africa's just energy transition to decarbonise its sources of energy, in line with recent legislative developments.

Overall, South Africa's most established sectors (namely mining, energy and financial services) are ahead of other sectors in terms of embedding ESG into organisational practices, but we expect others will follow rapidly.

Mining

Mining companies remain focused on internalising and embedding an integrated approach to ESG. In 2021, Anglo American divested its South African coal interests to its shareholders through a new entity, Thungela Resources, which was listed in Johannesburg and London. Webber Wentzel and Linklaters advised Anglo American on the transaction. Key strategic portfolio divestments are expected to rise in the near future.

We also expect a continuation of the exercise by various mining companies, both in South Africa and elsewhere in Africa, on integrating, consolidating and transforming splintered community initiatives, community shareholding structures or socio-economic development schemes to make them more manageable, relevant and ESG-focused.

In light of COP26, South Africa has also strongly emphasised its trajectory for its just transition to a low-carbon economy. President Ramaphosa has indicated that, as part of ensuring a just transition, South Africa will need to put measures in place that plan for workforce re-skilling and job absorption, social protection and livelihood creation, incentivising new green sectors, diversifying coal-dependent regional economies, and developing labour and social plans as and when ageing coal-fired power plants are decommissioned. In building a climate-resilient society, South Africa's focus is on ensuring decent work for all, social inclusion and the eradication of poverty.

Read more: Presidential Climate Commission

Renewable energy

By 2030, the Integrated Resource Plan 2019 envisages that South Africa will have about 8,000 MW of solar PV, 17,000 MW of wind power and 6,000 MW of gas/diesel. Together, solar PV and wind would contribute about a third of installed capacity, or about 24% of annual energy generation, by 2030.

However, this roadmap for an energy mix to 2030 needs to become more ambitious to align with climate change goals and ensure the availability of and access to reliable power in a time where the country's grid is suffering from severe capacity and technology constraints.

Through the Renewable Energy Independent Power Procurement Programme ("**REIPPP**"), the private sector has already contracted to provide 6,500 MW and this contribution is set to increase under the IRP 2019. At the end of October 2021, the Minister of Mineral Resources and Energy announced that 25 projects would proceed under Round 5 of the REIPPP. The request for proposals for Round 6 of the REIPPP is expected to be issued shortly and Round 7 is expected to follow in the first half of 2022.

Market discussions are currently focused on whether the REIPPP should be structured to favour South African businesses and whether it needs to be realigned to match grid capacity.

Outside of the public procurement process, legislative reforms are making South Africa's energy sector greener and more competitive, which will encourage economic growth and help the country meet its climate change commitments. The recent gazetting of amendments to Schedule 2 to the Electricity Regulation Act 2006

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(regulating exemptions from licensing by the national regulator), which increases the licensing threshold for embedded generation projects from 1 MW to 100 MW, is good news for South Africa's biggest energy users. The reforms on embedded generation are encouraging further private sector participation in the generation space. These reforms will create new generation capacity without the government guarantees required by the REIPPP.

Amendments to the Electricity Regulations on New Generation Capacity 2011 have also seen municipalities gearing up to apply to the Minister for the procurement or purchase of new generation capacity in accordance with the IRP 2019 (where previously, only organs of state active in the energy sector were permitted to procure new generation capacity). The Durban, City of Cape Town and City of Johannesburg municipalities have each issued RFPs in this space.

Read more:

IPP Renewables

South Africa's energy landscape evolves, partly driven by climate change goals

Sustainability-linked instruments

Demand for sustainability-linked loans is surging, with banks competing to offer this new form of finance in South Africa. A sustainability-linked loan could be used for any purpose, such as making an acquisition, but the interest rate applicable is informed by the achievement of certain targets by the borrower on key ESG indicators.

Social impact bonds

South Africa has launched four social impact bonds (including Inclusive Youth Employment Bonds4Jobs Pilot Project and Imagine SIB). We expect this number will increase over the coming year as activity in this sector ramps up.

Biodiversity tax incentive

South Africa has introduced its first dedicated biodiversity tax incentive, section 37D of the Income Tax Act. This unique tax deduction can be utilised by companies buying land for biodiversity offset purposes to claim back the full purchase price of that land over 25 years if they meet certain requirements. South Africa was the first country in the world to grant this income tax concession and many other countries may soon follow. This provides a sustainable landscape financing solution that has helped to drive a number of international biodiversity projects.

Webber Wentzel is represented on the Sustainable Landscape Finance Coalition, on which a number of public and private sectors are represented. The Coalition takes a multi-pronged approach towards finding financing solutions for land conservation activities, which could include water treatment or agri-processing, both in South Africa and elsewhere in Africa. The work of the Coalition could result in further changes to legislation as well as the launch of ring-fenced funds by some of the banks.

Read more: 37D Fact Sheet

Climate change legislation and guidelines

The Climate Change Bill, published for comment in 2018, was adopted by Cabinet in September 2021 and tabled in Parliament in October 2021. The Bill seeks to enable the development of an effective climate change response and a long-term, just transition to a climate-resilient and low carbon economy and society for South Africa in the context of sustainable development.

In June 2021, a draft national guideline for consideration of climate change implications in applications for key environmental authorisations and licences ("**CC Guideline**") was published for public comment. The CC Guideline will provide guidance on the implementation of the environmental impact assessment regime and its minimum assessment and reporting criteria, where climate change considerations are relevant. National and international frameworks were taken into consideration in the drafting of this CC Guideline, and it is the next step in South Africa's development of legislation specifically regulating climate change.

Carbon tax

South Africa recently promulgated the Carbon Tax Act 19 of 2019 ("**CTA**"). The CTA serves as South Africa's primary climate change mitigation mechanism, to enable it to comply with the NDC commitments made under the UNFCCC's Paris Agreement. The CTA introduces a carbon tax on identified sectors based on their greenhouse gas emission concentrations and is being implemented in a phased manner in recognition of South Africa's developmental challenges. The first phase will run until 31 December 2022, with the first carbon tax payment having been levied in October 2020 (delayed due to the Covid-19 pandemic).

The carbon tax is assessed, collected and enforced as an environmental levy in terms of the Customs and Excise Act 1964, and is administered and collected by the South African Revenue Service. The carbon tax rate is currently ZAR134 per tCO_2-eq which will increase annually at a rate of inflation plus 2% until 31 December 2022, and then in line with inflation.

South Africa

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Changes to the Companies Act – ESG disclosure requirements

From a governance perspective, ESG reporting and disclosure remains largely voluntary in South Africa (with only nuanced aspects of ESG-related disclosures being required in terms of sector- or resource-specific legislation). But, with pressure mounting to agree on a single global ESG reporting methodology, we expect South Africa's ESG disclosure requirements to follow suit in the coming years.

A new Companies Amendment Bill 2021 has been published for public comment, with the aim of aligning the provisions of the Companies Act with the recommendations of the King IV Report on Corporate Governance in South Africa ("**King IV**") in relation to remuneration governance.

The proposed amendments would provide commendable integration of ESG principles enforced worldwide. Specifically, the definition of a "*true owner*" seeks to establish the ultimate party who owns an interest in a company by attributing such ownership upon the ultimate owner, regardless of interwoven group structures and complicated share structures. It also seeks to increase corporate accountability by requiring certain disclosures from companies. It introduces two additional reporting regimes, namely remuneration reporting and social and ethics committee reporting.

The legislature is engraining the "S" and "G" aspects of ESG into the day-to-day considerations of companies, and, by requiring the Financial Reporting Standard Council to adapt international reporting standards through the issue of financial reporting pronouncements, the legislature is seeking ongoing benchmarking of the aforementioned reporting regimes against international best practice. The positive impacts of such reforms are likely to be felt for companies who will be forced to become more transparent to the market and have the opportunity to create or improve their reputations.

ESG-related litigation

Class action litigation is increasing in South Africa and has become the forum through which various ESG concerns have been considered. To mitigate the risk of ESG-related litigation, companies and state institutions should increase their focus on this emerging area. Recent cases such as those against Tendele Coal Mining and protests by rural women in Limpopo against Sefateng Chrome demonstrate the detrimental effect that ESG-related concerns and litigation can have on a company's operations and reputation.

Black Economic Empowerment

The Broad-Based Black Economic Empowerment ("**BEE**") Commission issued a Practice Note giving welcome certainty on discretionary black empowerment schemes, namely that Employee Share Ownership Plans ("**ESOPs**") and trade unions qualify, it is acceptable to have an identifiable class that benefits each year, minors in BEE schemes can count as black ownership, and distributions in kind (such as bursaries) are allowable. Evergreen Employee Shareholder Ownership Plans are also permitted.

South Africa's Minister of Trade, Industry and Competition is expected to appoint a panel to investigate shortcomings in BEE and make recommendations. Future developments are likely to include increased benefits for employees, board appointments for workers, and zero tolerance for "fronting".

Competition law

Transformation, which is sometimes referred to as the "S" in ESG, is also a focus of the South African Competition Act. The powers of the Competition Act were demonstrated in the recent rejection of the sale of Burger King by Grand Parade Investments to a US company, on public interest grounds, in that levels of black ownership would have fallen from 65% to zero (although other commitments were made). This ruling is likely to compel companies to take a more proactive stance on public interest considerations to avoid proposed mergers from being rejected.

Draft taxonomy

In October 2021, South Africa's National Treasury published a detailed draft green finance taxonomy for "financing a sustainable economy", setting out the technical and legal criteria that would allow a project or activity to be classified as ESG-aligned.

Read more: Draft Green Finance Taxonomy

"Lawyers have traditionally always been custodians of risk. ESG has not changed this, but has simply broadened the risk profile which we must advise our clients on, and opened the doors for identifying opportunities in the pursuit of sustainable growth in the long term."

Garyn Rapson – Partner (Webber Wentzel), Environmental, South Africa

ESG resources

- Linklaters ESG global homepage
- Sustainable Futures blog
- Linklaters ESG newsletters
- In conversation with the ESG team – media hub
- COP26 and beyond – the make-or-break decade for climate action
- Sustainable Finance Sources: survival guide (publication)

Global contacts and acknowledgements

We welcome the opportunity to discuss our publication with you and to hear your thoughts and feedback.

Linklaters ESG Team

Key contacts by jurisdiction

The ESG Legal Outlook is a true collaboration of our teams across the globe.

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