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Connecting Climate Change and the Law

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In this week's edition, the European Commission contacted 20 airlines requiring them to address potentially misleading or inaccurate green claims. The International Sustainability Standards Board (ISSB) launched its digital taxonomy, allowing for the digital reporting of sustainability-related financial information. Ratings agency Morningstar reported in its Q1 2024 Sustainable Funds Flow report that European funds saw an uptick in inflows, in contrast with the United States market which suffered a record USD 8.8 billion in outflows. And, President Biden's Administration takes action to streamline the federal permitting process for clean energy and infrastructure projects.

European Commission Commences Greenwashing Investigation Against 20 Airlines

On April 30, 2024, the European Commission announced that it had written to 20 airlines identifying potentially misleading green claims and asking that the companies bring their practices in line with EU consumer law within 30 days. The types of claims subject to the investigation include:

- creating the incorrect impression that payment of a fee to finance climate projects with less environmental impact or to support the use of alternative aviation fuels can offset carbon emissions;
- using the term "sustainable aviation fuels" (SAF) without justifying the environmental impact of such fuels;
- using terms such as "green", "sustainable" or "responsible" without substantiation or qualification;
- indications of future environmental performance without verifiable commitments, targets or an independent monitoring system;
- providing customers with the ability to calculate the CO2 emissions for a specific flight without providing scientific evidence as to the reliability of the calculation, and without providing information on the elements of the calculation; and
- providing comparisons of CO2 emissions between flights without providing sufficient and accurate information on the elements the comparison is based on.

The Commission notes that the practices are contrary to Articles 5 (prohibition of unfair commercial practices), 6 (misleading actions) and 7 (misleading omissions) of the **Unfair Commercial Practices Directive (UCPD)**.

The action was spurred by an alert from the European Consumer Organization (BEUC), and the Commission worked with the Network of Consumer Protection Cooperation (CPC) Authorities. The CPC network was led by the Belgian Directorate General for Economic Inspection, the Netherlands Authority for Consumers and Markets, the Norwegian Consumer Authority and the Spanish Directorate General of Consumer Affairs.

The airlines are encouraged to outline, in their response, how they propose to address the Commission's concerns. Once responses have been received, the Commission intends to meet with the airlines and the relevant national authorities to discuss proposed measures. Any agreed-upon changes will be monitored by the Commission and failure to take action, or to respond to the letter will result in enforcement by the national authority.

In addition to the UCPD, EU consumers are afforded several other protections against misleading environmental claims under: (i) **the Directive on empowering consumers for the green transition**, which explicitly bans claims, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions; and (ii) **the Proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive)**, proposed by the Commission in March 2023, provides that Member States shall ensure that traders carry out an assessment to substantiate explicit environmental claims. In particular, under the Green Claims Directive, traders are required to be transparent about which part of the claim concerns their own operations, and which aspects are based on buying offsets.

As we frequently discuss, greenwashing complaints against airlines are increasingly common. For example, in March 2024, the Cologne Regional Court in Germany **upheld a complaint** concerning advertisements by Eurowings in which it was claimed that certain of its flights were "CO2 neutral." That same month, a Dutch court held that **KLM misled customers** through vague environmental claims and depicted an overly optimistic picture of its use of SAF. KLM has also been the **subject of a greenwashing suit** in Amsterdam concerning its "Fly Responsibly" campaign. In 2023, Austrian Airlines AG was **held liable for greenwashing** in respect of claims related to carbon-neutral flights and the airline's use of SAF. In the UK, the Advertising Standards Agency has censured Etihad Airways, and Ryanair, which has also been warned about its **sustainability claims related to carbon offsets** by the Netherlands Authority for Consumers and Markets.

And, in the United States, a consumer class action was **filed in California** federal court, alleging that Delta Air Lines falsely claimed that it is the world's "first carbon-neutral airline." The plaintiff, on behalf of a putative class of California consumers who purchased a ticket on Delta Airlines after March 6, 2020, claims that Delta relied on carbon credits to offset its reported emissions, but the benefits from those carbon credits are exaggerated, rendering Delta's reported emissions data misleading.

As we observed in our recent article on the UK's Financial Conduct Authority's Anti-greenwashing Rule Guidance, greenwashing is a recurring theme across all sectors and the Commission's concerns reinforce the fact that the underlying message is the same for all: sustainability claims must be clear, accurate and capable of being substantiated.

ISSB Publishes Sustainability Taxonomy

On April 30, 2024, the International Sustainability Standards Board (ISSB) published the **IFRS Sustainability Disclosure Taxonomy (ISSB Taxonomy)**, to enable investors and other capital providers to efficiently analyze sustainability-related financial disclosures digitally. Using the ISSB Taxonomy, investors will be able to search, extract and compare sustainability-related financial disclosures. The ISSB Taxonomy is designed to be consistent with the ISSB's inaugural Standards, IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, IFRS S2 Climate-related Disclosures and their accompanying guidance, as well as the IFRS Accounting Taxonomy, and ensures that it does not create new requirements for companies. The ISSB views the initiative as a way to facilitate enhanced digital engagement between companies and their stakeholders, making sustainability-related data easily accessible and actionable. This is due to the fact that the ISSB Taxonomy helps companies to ensure their reports are machine-readable – the ISSB Taxonomy is not the type of taxonomy developed to classify economic activities as environmentally sustainable. A key feature of the ISSB Taxonomy is the ability to tag narrative information in financial reports prepared in line with the ISSB Standards (and other compatible standards). Narrative information traditionally appears more frequently in sustainability-related reporting than it does in traditional financial reporting, and as such, the ISSB Taxonomy aims to simplify the process of tagging narrative information in financial reports.

Morningstar Publishes Latest Quarterly Sustainable Fund Flows Report

Morningstar reported that, in the first quarter of 2024, the global market in sustainable open-end and exchange-traded funds rebounded slightly from the final quarter of 2023, attracting nearly USD 900 million of net new money. In addition, while European sustainable funds registered close to USD 11 billion of inflows, the United States-based funds saw record redemptions of USD 8.8 billion. This outflow is the United States' worst ever and can be attributed to several factors including political and market volatility affecting investor confidence. Morningstar observed that although Europe, the world's largest market for sustainable funds, attracted more than double the subscriptions over the previous quarter, the market continues to navigate "ongoing inflationary pressures and uncertainties around interest rates." The agency also noted that passive funds garnered more interest than those that employ more active strategies, especially from equity-focused and allocation funds, signaling a "continued preference for passive strategies."

The "sustainable open-end and exchange-traded funds" that Morningstar collects data from to inform its reporting are funds that claim to focus on sustainability, impact, or ESG factors through their prospectus or other regulatory filings. The data is then segmented by jurisdiction – Europe, the United States and the rest of world, all of which experienced subdued inflows save for Japan where sustainable funds recorded outflows of USD 1.7 billion.

The report concludes that the sustainable-funds market is expected to continue to grow due to enduring investor interest in ESG, but that this growth is likely to be influenced by ongoing economic uncertainties and impending regulatory changes that may reshape the strategies such funds employ.

Biden Administration Streamlines Permitting Process to Accelerate Clean Energy and Infrastructure Projects

On May 1, 2024, **the Biden Administration announced** that significant changes to the federal permitting process would be introduced, with the aim of accelerating the development of infrastructure and clean energy projects across the United States. Under previous administrations, protracted permitting and environmental-review processes led to significant delays to infrastructure projects. The changes, implemented by the so-called Bipartisan Permitting Reform Implementation Rule secured by President Biden in the Fiscal Responsibility Act of 2023, include:

- Establishing firm deadlines: Setting strict timelines for completing environmental review – two years for comprehensive environmental-impact statements and one year for less extensive assessments. This particular change is aimed at reducing uncertainties and improving efficiency in project planning and execution.
- Simplifying and streamlining procedures: Making environmental documents shorter and easily comprehensible, improving accessibility for all stakeholders. This will enhance transparency and facilitate easier participation from the public and other interested parties.
- Expanding categorical exclusions: Expanding the use of categorical exclusions such that the environmental review for projects deemed to have minimal environmental impacts will be the fastest track. Sectors such as electric vehicle (EV) charging infrastructure, broadband expansion, semiconductor manufacturing, and clean-energy projects will benefit in particular.

As a result, it is hoped by the Administration that the changes will:

- Accelerate project delivery: Streamlining the permitting process facilitates faster launches and completion of projects, helping the United States meet climate goals.
- Stimulate economic and job growth: The reforms are expected to stimulate economic growth by job creation particularly in nascent industries such as clean energy and technology.
- Enhance environmental and community outcomes: The focus on reducing environmental impacts of projects and increased community involvement will allow for better environmental outcomes and greater community buy-in, potentially reducing conflict and legal challenges.
- Encourage sustainable, durable projects: the reforms encourage projects that are sustainable and durable, aligning with long-term environmental and social goals.

The announcement of reforms will undoubtedly be welcome news for developers who often incur costs or suffer economic losses caused by significant permitting delays. Ultimately, it is hoped that streamlining such processes will reduce delays and contribute to reaching sustainability and climate goals.