CADWALADER

March 7, 2023

March 7, 2023

Table of Contents:

- Global Bank Sued in France Over Fossil Fuel Financing
- PRA to Consider Impact of Climate Change on Financial Stability
- UK Proposes Guidance to Shield Competitor Agreements on Climate Change
- Australia’s Securities and Consumer Protection Regulators Pursue Alleged Greenwashing

Global Bank Sued in France Over Fossil Fuel Financing

March 7, 2023

By Sukhvir Basran
Partner | Financial Services

By Sara Bussiere
Special Counsel | Global Litigation

On February 23, three climate advocacy groups—Friends of the Earth France, Notre Affaire à Tous and Oxfam France—filed a **lawsuit** alleging that a global financial institution violated Article L. 225-102-4.-I of the French Commercial Code ("Duty of Vigilance Act"), which **requires** companies to establish a "Vigilance Plan" to "identify and prevent risks of severe violations of human rights and fundamental freedoms, health and safety of people and to the environment in their entire sphere of influence." The lawsuit criticizes BNP Paribas (BNP) for, among other things, failing to "require" its clients in the fossil fuel industry "to immediately stop developing new fossil fuel projects and engage in a progressive exit from the sector," despite allegedly committing to "take these kinds of measures" with respect to the coal industry in 2020. The lawsuit seeks to compel BNP to comply with the Duty of Vigilance Act by inquiring into the activities it finances in compliance with UN and OECD guidelines and, potentially, divest activities causing damage.

In October 2022, the organizations **served BNP** with notice of their alleged violations and asked it to address the issues being raised within three months, as provided for in the Duty of Vigilance Act. Despite engagement, claimants contend that BNP did not meet their demands, and this litigation ensued.

In **response** to the lawsuit, BNP stated that it was disappointed that plaintiffs opted to litigate instead of engaging in continued dialogue, but stated that BNP is "convinced that the ecological transition is the only viable path for the future of our economies" and that it is "focused on [its] fossil-fuel exit path, accelerating financing for renewable energies and supporting our customers, without whom the transition cannot be made."

Taking the Temperature: This lawsuit marks the second time within a few months that NGOs have asserted sustainability-related claims under the Duty of Vigilance Act, which was passed in 2017. Earlier this year, the NGO ClientEarth and other claimants commenced litigation in a Paris court against Danone, the global food products company. The claimants contend that Danone breached the Duty of Vigilance Act because it does not have an adequate plan to reduce its plastic footprint. Here, the BNP claimants' press release observes that the action "is part of a global litigation movement" targeting emissions financing. We have commented on this trend, whether via shareholder proposals, regulatory enforcement or civil suits. That trend is being

driven by the challenges companies, including banks, confront in establishing that their current sustainability efforts are sufficient to meet their articulated net-zero or other climate goals. For example, according to the BNP claimants, "BNP states that, by joining the Net Zero Banking Alliance, it has committed itself to 'funding a carbon-neutral world by 2050, which means that the temperature increase should not exceed 1.5°C compared to the pre-industrial era.'" Claimants argue that "in reality, its current policies cannot guarantee successful results," and that the bank's statements about its emissions financing and other sustainability efforts are not accurate. For issuers like BNP, the focus on a supposed divergence between publicly articulated climate goals and the implementation of transition plans sufficient to meet those goals will remain an area of concern from both a regulatory and litigation perspective. To mitigate those risks, companies should focus on climate-related governance (monitoring and assessing material risks and opportunities), data collection/assessment (including alignment with SBTi or other data standard setters) and disclosure (including necessary caveats or qualifications on articulated climate goals).

PRA to Consider Impact of Climate Change on Financial Stability

March 7, 2023

By Jason Halper
Partner and Co-Chair | Global Litigation

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

Under a proposed amendment to the **UK's Financial Services and Markets Bill**, the **Prudential Regulation Authority (PRA)** could be empowered to review appropriate risk weighting and capital requirements associated with a financial institution's exposure to fossil fuel exploration, exploitation and production. The PRA is the UK's prudential financial services regulator and is responsible for the supervision of around 1,500 banks, insurers and investment firms. The Financial Services and Markets Bill, which we **reported on** when it was first announced on July 20, 2022, is currently being considered by the House of Lords, the upper chamber of the UK Parliament. The proposed bill, which is at the "committee stage" in the House of Lords and was debated on March 1, 2023, would grant UK regulatory authorities new powers and revoke retained EU laws governing the regulation of financial services. The **proposed amendment** provides that in "setting the capital adequacy requirements of a credit institution, the Prudential Regulation Authority shall have regard to—(a) the level of exposure of an institution to climate-related financial risk; (b) the level of compliance of the institution with the recommendations of the Task Force on Climate-Related Financial Disclosure; and (c) the objectives of the Climate Change Act 2008 as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (S.I. 2019/1056)."

Baroness Sheehan, a sponsor of the bill, **explained** during the committee debate, that "[c]limate risk is not specifically factored into either the regulatory capital risk requirements for banks or the solvency requirements for insurers." Sheehan further argued that "billions to trillions of pounds will be invested over the near to medium term into an economy that is transforming with increasing rapidity into a low-carbon one. It is clear that climate risk is financial risk: returns on investments and the ability to pay back loans are exposed to the risks of rising temperatures, as evidenced by recent catastrophic climatic events, and action taken by policymakers to transition to a low-carbon economy, such as the US Inflation Reduction Act. Businesses, big and small alike, are poised to pull the start trigger on investments but are held back in the UK by lack of clarity about the Government's intentions."

The proposed climate-related amendments to the Financial Services and Markets Bill will, if enacted, also impact investment managers. Under one of the **amendments** to the bill, the FCA would be required to publish guidance for investment managers to consider "the impact of their investments on society and the environment" and "the long term consequences of investment decisions." The amendment states that FCA-regulated firms must make these assessments

"without undermining their fiduciary duty to act in the financial interests of clients." On February 20, the FCA **published** a discussion paper seeking views on the current regime for regulating funds and asset managers. The paper has proposed changing the rules regarding a fund's prospectus to include "example information and labelling around environmental, social and governance matters." Interested parties have until May 22, 2023 to respond.

Taking The Temperature: The question of the impact of climate change and climate transition on financial stability remains subject to significant debate. We have reported, for instance, on climate activists advocating the adoption of a "one for one" rule, whereby for each euro/pound/dollar that finances new fossil fuel exploration or production, banks and insurers should set aside a euro/pound/dollar of their own funds against potential losses. The "rule" is based on the idea that fossil fuel assets of financial institutions will diminish in value or become worthless in connection with climate transition and that they will suffer significant losses as a result. While that rigid type of approach (sensibly) does not appear to be gaining traction, regulators are demanding that financial institutions account for risks associated with climate challenges.

Meanwhile, the complexities and the scope of the changes proposed by the Financial Services and Markets Bill, together with the implications of revoking parts of the EU law-derived legislative framework, have slowed the bill's progress through the UK's legislative process. On the other hand, the extensive consultation and review phase currently underway could result in clear regulation that is informed by, and, to the extent possible, aligned with, other initiatives in the EU and the U.S. As we have reported, climate-related regulation in other jurisdictions, such as the EU's Sustainable Finance Disclosure Regulation, has come under criticism for lack of clarity. The final House of Lords committee session will be held on Tuesday, March 7. At the conclusion of the committee stage, the bill will move onto the "report stage" where all members of the Lords will be permitted to examine, and suggest amendments to, the bill. This typically commences 14 days after the committee stage has concluded.

UK Proposes Guidance to Shield Competitor Agreements on Climate Change

March 7, 2023

By Joel Mitnick
Partner | Antitrust

The UK's Competition Markets Authority (CMA) has issued a **proposed rule**, subject to public comment through April 11, 2023, that would provide guidance on the application of UK competition law to agreements between or among competitors relating to "environmental sustainability agreements." Recognizing that the Competition Act of 1998 already contains an exemption for competitor agreements where pro-competitive benefits outweigh anti-competitive effects, the goal of the Guidance would be to establish an analytical framework under the Act that would constitute a "more permissive approach" to competitor agreements aimed at combating or mitigating climate change.

Although the Guidance refers both to "climate change" and "environmental sustainability agreements," the latter phrase is intended to be broader than the former and would include agreements that are not directly related to climate. Environmental sustainability agreements are described in the Guidance as "agreements or concerted practices between competitors and potential competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability."

The CMA's more permissive approach to climate change reflects "the fact that climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into, set it apart. Additionally, by reducing negative externalities which contribute towards climate change, climate change agreements merit this more permissive approach."

The CMA's goal is to ensure that "businesses are not unnecessarily or erroneously deterred from lawfully collaborating in this space due to fears about competition law compliance. This is particularly important for climate change because industry collaboration is likely to be necessary to meet the UK's binding international commitments and legislative obligations to achieve a net zero economy, and to play an essential part in delivering the UK's net zero ambitions."

The proposed Guidance covers three broad "legal situations":

- First, environmental sustainability agreements that are unlikely to be anticompetitive. CMA cites as examples agreements that do not focus on the nexus of competition between firms, such as competitor agreements to reduce internal consumption of plastics or to jointly fund

greenhouse gas mitigation efforts. Industry standard-making also be may be included in this category.

- Second, environmental sustainability agreements that *could* be anticompetitive. Such agreements would include sustainability agreements where the "object" of the agreement is to reduce competition by fixing prices, dividing or allocating markets or limiting output.
- Third, environmental sustainability agreements that otherwise likely would be anticompetitive but which qualify for the exemption because their benefits outweigh their anti-competitive effects. Parties must demonstrate that their agreement meets each of the following four conditions:

    1. "the agreement must contribute to certain **benefits**, namely improving production or distribution or contribute to promoting technical or economic progress";
    2. "the agreement and any restrictions of competition within the agreement must be **indispensable** to the achievement of those benefits";
    3. "**consumers must receive a fair share of the benefits**"; and
    4. "the agreement **must not eliminate competition** in respect of a substantial part of the products concerned."

See **Draft Guidance, § 5.2** (emphasis in original).

The CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, "that clearly correspond to examples used in this Guidance and are consistent with the principles set out in this Guidance."

Taking the Temperature: The Guidance does not apply to biodiversity-specific concerns notwithstanding the increasing attention being paid by regulators and companies globally to that issue: "While we recognise that agreements which aim to conserve biodiversity are also of critical importance, we do not consider that they fall into the same category as climate change agreements and they therefore will not benefit from the more permissive approach that will be taken for climate change agreements." Nonetheless, the CMA's proposed guidance has the potential to help resolve the significant uncertainty prevalent in the market about the extent to which industry climate collaborations raise antitrust concerns. In the U.S., such concerns have led certain financial institutions to threaten to withdraw from the Glasgow Financial Alliance for Net Zero and Vanguard to withdraw from the Net Zero Asset Managers Initiative. Likewise, certain elected officials, raising antitrust concerns, have sought documents and other information from certain of these organizations. However, in our view, such collaborations, if used lawfully and appropriately, are important mechanisms for companies to benchmark their own climate-related efforts, develop best practices and even pool resources to facilitate the transition to a net-zero economy, and assess the anticompetitive impact of being a first-mover in adopting a particular sustainability initiative.

Australia's Securities and Consumer Protection Regulators Pursue Alleged Greenwashing

March 7, 2023

By Rachel Rodman
Partner | Corporate & Financial Services Litigation & Regulation

By Sharon Takhar
Associate | White Collar Defense and Investigations

On February 28, 2023, Australia's securities regulator, the Australian Securities and Investments Commission (ASIC), **announced** that it had commenced "civil penalty proceedings" in federal court against Mercer Superannuation (Australia) Limited (Mercer) for "making misleading statements about the sustainable nature and characteristics" of some of its investment options.

ASIC accused Mercer of making misleading statements about the sustainability of seven of its so-called Sustainable Plus investment options, which Mercer describes as suitable for investors who are "deeply committed to sustainability" by virtue of the fact that they prohibit investments in companies involved in carbon intensive fossil fuel extraction, alcohol production and gambling. However, ASIC alleges that the Sustainable Plus funds had in fact invested in companies involved in those industries, including Australian mining, metals and natural gas company, BHP Group Ltd, Budweiser Brewing Company and hotel and casino group, Caesars Entertainment Inc. In total, the regulator identified 49 such companies—15 fossil fuel extraction companies, 15 alcohol production companies and 19 gambling companies.

According to ASIC, taking action against greenwashing is one of its key 2023 enforcement priorities. ASIC has recently issued a number of infringement notices in connection with greenwashing allegations, **including in December 2022** against a large U.S.-based asset manager, which was fined nearly A$40,000 in connection with three funds that were set up to exclude certain tobacco investments but excluded only manufacturers of cigarettes and related products, not companies involved in the sale of such products. We also reported on the penalty imposed against **Black Mountain Energy**, an upstream oil and gas company and a similar fine for **Tlou Energy Limited** "over concerns about alleged false or misleading sustainability-related statements."

Taking the Temperature: ASIC's action against Mercer is one of several developments in Australia related to greenwashing. On March 2, 2023, the country's competition regulator, the Australian Competition and Consumer Commission (ACCC), announced that it "will be investigating a number of businesses for potential 'greenwashing', following an internet sweep which found more than half" of the businesses surveyed made questionable statements regarding their sustainability practices. According to the

ACCC, the “cosmetic, clothing and footwear and food and drink sectors were found to have the highest proportion of concerning claims among the industries targeted in the operation.” ACCC Deputy Chair Catriona Lowe added that “our sweep indicates a significant proportion of businesses are making vague or unclear environmental claims” at a time when consumers are “more than ever, making purchasing decisions on environmental grounds. Unfortunately, it appears that rather than making legitimate changes to their practices and procedures, some businesses are relying on false or misleading claims. This conduct harms not only consumers, but also those businesses taking genuine steps to implement more sustainable practices.” We have commented earlier and in a companion piece today on the increasing regulatory enforcement and civil litigation activity focused on sustainability issues. The developments in Australia underscore the global nature of this trend.