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CLIMATE
Connecting Climate Change and the Law

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European Commission Approves Further State Aid to Support Transition-Related Initiatives

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On February 24, the European Commission **granted approval** under EU State Aid Rules for a German scheme supporting rail transport operators using electric traction. The €1.1 billion scheme will provide economic support for increased electricity costs and aims to preserve the viability of electric rail in line with the Commission's **Sustainable and Smart Mobility Strategy** and of the **European Green New Deal**. Freight and passenger rail transport operators using electric traction have been exposed to significant increases in electricity prices following Russia's invasion of Ukraine. Under the proposed scheme, electricity suppliers will provide reductions in the monthly electricity bills of rail transport operators, which the providers will then reimburse from the German state. This will only apply to electricity consumed in calendar year 2023.

Margrethe Vestager, the Commission's Executive Vice-President in charge of competition policy, recognized that "[the] scheme will enable Germany to support electric traction, which is a more environmental-friendly mode of rail transport compared to diesel-fuelled vehicles. It will help Germany meet its European Green Deal objectives, while reducing the burden of rising electricity costs for transport operators, to the benefit of passengers and freight customers."

On February 28, in **another development** demonstrating ongoing EU economic support for the electric transportation sector, the Commission approved €89.6 million in EU state aid to support the expansion of a Samsung battery cell production facility in Hungary. In December 2017, Samsung SDI announced plans to invest €1.2 billion into expanding its existing battery cell production facility for electric vehicles in Göd, Hungary. Hungary notified the Commission in 2018 of its plan to grant €108 million of public support for the project to incentivize Samsung to continue with the planned investment. After an in-depth investigation, the Commission ruled that the state aid was in line with EU State Aid Rules, but only to the extent that the aid does not exceed €89.6 million, which was ruled as the "minimum necessary to incentivise Samsung SDI to carry out the investment in Hungary."

Taking the Temperature: The Commission revised its Guidelines on Regional State Aid in April 2021 to reflect new policy priorities related to the European Green Deal, specifically that the assessment of balancing the positive impact of the aid against its negative effect on competition and trade may now also take account of other positive and

negative effects, such as a "substantial contribution to the green and digital transition or some related negative externalities." With global increases in energy prices, the German electric rail scheme is a clear example of the ways in which EU Member States are providing unprecedented economic support to a range of industries to offset the economic effects of the war in Ukraine.

In line with the policy priorities set out in the European Green New Deal, European Member States are starting to draw on economic support from EU institutions (in the form of state aid) to provide economic support to businesses aiming to tackle the impacts of climate change or other green transition-linked policy priorities. We recently commented on the Commission's approval of state aid from Spain and Germany to build Hydrogen-powered steel plants last month. While the Commission seems committed to increasing support for the applications of state aid related to tackling impacts of climate change, it is important to note that the initial decision to provide aid remains with the individual European Member State governments.

ICIJ Challenges Environmental Audits as Overlooking Deforestation

March 17, 2023

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The International Consortium of Investigative Journalists (ICIJ) recently **issued a report** raising concerns that certain auditing firms had certified client companies' practices and products as sustainable while ignoring that these same companies were engaged in deforestation activities. The ICIJ analyzed the inspection records, environmental violation data and court filings of companies in 50 jurisdictions and found many were accused of environmental crimes or other wrongdoing by local communities and government agencies despite their products and practices being certified as "sustainable."

Certification organizations, such as the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil, are private bodies that set standards and guidelines for how forests should be managed responsibly given their importance to the environment and that deforestation and forest degradation account for 8-10% of greenhouse gas emissions. Much attention has been focused on tropical forests of the Amazon as well as on Indonesia and Malaysia, where there is significant logging to produce palm oil. In Indonesia alone, the ICIJ claims that at least 160 organizations have disregarded environmental regulations over the past decade, including operating under false permits, and logging leading to the destruction of the habitats of endangered animals.

According to ICIJ, auditing firms that were engaged to carry out environmental audits of these organizations failed to flag these allegations of violations, thereby facilitating the ability of those companies to continue delivering commodities originating from potentially illegal deforestation practices. In one instance, a group of Canadian logging companies used what was labelled as a "sustainable" forest management plan to deforest indigenous land. The "sustainable" forest management plan was certified by a local auditor. In another example, a Brazilian wood products company that claimed to have been "certified with flying colors" had been fined 37 times since 1998 for environmental law violations.

Effective 2024, an **EU Regulation** on deforestation-free supply chains will require companies to show that the products they are selling within the territory do not come from forest destruction.

In order to sell their products in the EU, companies will have to show their geographical origination, which in practice means providing the relevant GPS coordinates to prove the area has not been deforested. Enforcement authorities in the relevant Member State will then carry out inspections on a percentage of operators and traders and check cargo originating from deforestation hot spots on a regular basis.

The provisions are similar to the Biden Administration's **FOREST Act**, which also prohibits the importation of designated products containing commodities sourced from land that was illegally deforested.

Taking the Temperature: Environmental auditing is increasingly being employed by companies to increase investor confidence but unlike traditional auditing, it is not highly regulated and for the most part, is taken up on a voluntary basis. While engaging an environmental audit ensures that a company has systems in place to collect data to be used in the audit, the lack of regulation implies that the specific data collected and/or the assessment of that data may differ among different firms or in different industries or jurisdictions. The ICIJ report suggests that attempts by Western governments to encourage green forestry by, among other tactics, imposing sanctions on companies logging in conflict zones, have not been effective. In the consultation period leading up to the agreement of the EU Regulation on deforestation-free supply chains, a number of Member States amended the original proposal to lower the number of inspections that will need to be conducted by enforcement authorities on cargo originating from deforestation hot spots, thereby minimizing the impact of the legislation.

The ICIJ investigation is another example of NGOs and investor groups increasingly scrutinizing supply chains and otherwise challenging companies on their sustainability targets and progress. We have previously commented on this increasing trend, including situations where NGOs have filed challenges with respect to issuer disclosure with the U.S. Securities and Exchange Commission or sued companies under sustainability focused laws (such as the Corporate Duty of Vigilance law in France) for conducting business in ways alleged to be inconsistent with sustainability goals and pledges. We also have commented on how regulators around the world are taking an aggressive approach to alleged greenwashing.

GTAG Says UK Needs to "Significantly Raise Its Own" Climate Game to Compete for Capital

March 17, 2023

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On February 23, 2023, the Green Technical Advisory Group ("GTAG"), an independent advisor to the UK government, published a paper entitled "**Promoting the International Interoperability of a UK Green Taxonomy**." In the paper, GTAG argues that the UK must "significantly raise its own game" on net-zero to avoid losing out to international competitors, as "the race to attract global capital to support green industry and market development is well and truly on again."

Ingrid Holmes, chair of GTAG and executive director for the Green Finance Institute, stated that "with the US and EU – the two biggest markets that UK investors currently deploy capital into – raising the stakes with a massive green subsidy and pro-green business regulatory push, the UK will need to significantly raise its own game to attract capital seeking net zero opportunities and secure its role as the world's leading net-zero financial centre."

The paper highlighted 10 recommendations to enable UK investors to deploy capital towards pro-green businesses by harmonizing green taxonomies, as listed below:

1. Adopt the same broad concepts, methodologies and metrics as the EU taxonomy where possible and advocate that other non-taxonomy countries do the same.
2. Ensure UK taxonomy TSC [technical screening criteria] are robust and science-based to demonstrate international leadership.
3. Every three years conduct reviews to assess the UK green taxonomy's effectiveness in light of the developing international taxonomy landscape.
4. Streamline language and requirements to maximize interoperability with non-EU jurisdictions.
5. To promote international comparison – if not interoperability – in the short-term, adopt green taxonomy-related rules and guidance that cover subsidiaries and assets held in as many jurisdictions as possible, regardless of the existence of any local green taxonomy.
6. Develop and publish a list of equivalent units, where needed, in the first instance, to allow for differences in the measurement practices carried out in respective jurisdictions and help with the comparison of data.
7. Related to recommendation 5, for non-OECD countries without a green taxonomy, lend support to work to develop general international base principles for reporting.
8. For the U.S. and non-taxonomy OECD countries, produce guidance to encourage reporting on a voluntary basis against the UK Green Taxonomy, for UK-based corporates and financial institutions that are required to report against the UK Green Taxonomy under SDR.

9. Provide guidance on how companies and financial services firms can report on their performance abroad when using key performance indicators (KPIs) under the future UK reporting regime.
10. Advocate for the harmonization of taxonomies and promote international cooperation to develop a list of core economic activities that can be deemed equivalent to the UK Green Taxonomy.

GTAG was formed by the UK government in 2021 to provide guidance on the development and implementation of the **UK green taxonomy**. The organization is composed of "key financial market stakeholders and subject matter experts" who "provides independent, non-binding advice to Government on the design and implementation of a UK Green Taxonomy."

Taking the Temperature: The GTAG's recent paper highlights the steps that governments are continuing to take to help companies and investor achieve their net-zero goals, while also trying to compete for the economic opportunities presented by a green transition. In the preface to the paper, Ingrid Holmes drew attention to the U.S. Inflation Reduction Act, which "could cut US greenhouse gas emissions by 40% by 2030" and the EU's Green Deal Industrial Plan. We have recently reported on substantial state subsidies approved by the European Commission to support companies investing in sustainable practices. GTAG suggests that the UK must accelerate its strategy and align, where possible, with existing frameworks in order to remain competitive in attracting global capital to support the green industry. As we have previously written, taxonomies are critical to help companies and investors to understand what businesses or products are consistently deemed sustainable among different jurisdictions. If adopted, GTAG's proposed approach would further this goal and help companies navigate the regulatory burden and complexity in complying with disparate regimes across jurisdictions. As Holmes noted, correctly in our view, "for UK companies and investors with subsidiaries and assets abroad and conversely, international companies and investors with subsidiaries and assets in the UK, there is a very real danger that cross border companies may face multiple regulatory difficulties and significant extra costs, if taxonomies lack interoperability."

Patent Climate Change Program Targets Greenhouse Gas Emissions

March 17, 2023

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In June 2022, the US Patent and Trademark Office ("USPTO") launched the **Climate Change Mitigation Pilot Program** (the "Program"). This program was enacted to support President Biden's January 27, 2021 **Executive Order**, which emphasized that "[t]here is little time left to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory." The Program aims to encourage businesses to prioritize climate change mitigation by offering faster and more affordable intellectual property protection. The Program has a particular focus on patent applications directed to technologies related to greenhouse gas reduction, including transportation (*e.g.*, electric vehicles), waste management (*e.g.*, recycling), energy generation (*e.g.*, wind turbines), energy transmission (*e.g.*, batteries) or other similar green technologies.

The Climate Change Mitigation Pilot Program is open to applicants who **certify** that:

- the application includes at least one claim that covers a product or process that mitigates climate change;
- the invention covers a product or process designed to reduce greenhouse gas emissions;
- the applicants have a good faith belief that expediting examination of the application will likely have a positive impact on the climate; and
- none of the inventors has been named as the inventor or a joint inventor on more than four other nonprovisional applications with a "special status" under this Pilot Program.

Qualifying applications are granted a "**special status**," enabling them to obtain a quicker response. Typically, applications are reviewed in the order they were filed but a "special status" allows an application to **jump the line**. Without this "special status," applicants typically wait eighteen months for a **first response**. By contrast, special applications, on average, receive a first response **within two months**. Additionally, the Program grants qualifying applications this "special status" free of charge—a request for special status **typically costs** $4,200.00. In addition, no pre-filing search is required, providing yet another incentive to applicants.

The program will continue until either June 5, 2023 or until 1000 patent applications have been granted "special status," whichever occurs first. To date, 165 applications have been granted special status under the Program.

Taking the Temperature: Although the Climate Change Mitigation Pilot Program currently is limited to one year, the USPTO appears committed to facilitating inventions that aid in climate change mitigation. For instance, the USPTO has expanded its Patents for Humanity award program to include a Green Energy Category, which rewards and publicly recognizes those "who are responding rapidly to the challenges of climate change by developing green energy sources using game-changing technologies." The USPTO also has become a partner to the World Intellectual Property Organization's global green-technology platform ("WIPO Green"), which is an online platform that supports global efforts to address climate change by connecting providers and seekers of environmentally friendly technologies. These initiatives reflect the USPTO's focus on "innovation-to-impact" and understanding that "[p]atents are the primary vehicle" for universities, government labs, and businesses "to turn new inventions and technologies into commercial products and entirely new industries." However, it is unclear whether and to what extent the increasing politicization of climate-related issues will impact the USPTO's efforts to mitigate climate change, as the USPTO's mandate is, in part, to advise the President, the Secretary of Commerce, and U.S. government agencies on intellectual property policy, protection, and enforcement. If there is a change in administration following the 2024 presidential election, it is by no means certain that the new administration would continue to support these efforts.