Report Spotlights Legal Risks of Biodiversity Loss in Agricultural, Seafood Industries

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By Sara Bussiere
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On September 27, 2023, environmental law organization ClientEarth released a report highlighting the growing potential for legal risk associated with biodiversity loss in the agriculture and seafood sectors, the currently applicable legislation, and ways to help mitigate risk. **In a statement** released alongside the report, ClientEarth explained that legal risk in those sectors is a consequence of a dependence on ecosystem services, such as raw material, clean water, pollination and a regulated climate to produce goods and services.

According to the report, biodiversity loss in the seafood and agriculture sectors, biodiversity dependencies and negative impacts can lead to legal risks in various areas, including:

- **Deforestation-risk commodities regulations.** According to the report, the expansion of agriculture and aquaculture is the main driver of deforestation, forest degradation and biodiversity loss on land. Globally, deforestation and forest degradation are also the second largest source of greenhouse gas emissions. The **European Union Deforestation Regulation (EUDR)** prohibits the import, export and subsequent trade in the EU of palm oil, cattle, soy, coffee, cocoa, timber, and rubber, as well as derived products such as beef, furniture, and chocolate, to the extent tied to deforestation. The law took effect in June 2023, with companies required to comply starting December 30, 2024.
- **Pollution negligence and nuisance claims.** Pollution, including from plastic, pesticides and waste, is a major driver of biodiversity loss and ecosystem degradation. Marine plastic pollution has increased tenfold since 1980, and plant and insect populations are dwindling as a result of dangerous, non-selective insecticides. Legal risks may arise in several ways, according to ClientEarth, including from, for example, the use of pesticides. Liability may arise under civil or local environmental laws when the use of pesticides causes alleged nuisance or harm to neighboring properties or the health of the local population or environment. The increasing regulation of pesticides may also increase companies' compliance costs.
- **Misleading commercial practices.** The EU Unfair Commercial Practices Directive (UCPD) prohibits misleading business-to-consumer commercial practices containing false information or omissions that are likely to deceive the average consumer or prevent the consumer from making an informed buying decision. The UCPD, along with other EU-enacted or proposed laws (such as the **Empowering Consumers for the Green Transition Directive** and the **Green Claims Directive**), target alleged greenwashing by companies in their consumer communications.

To avoid or mitigate legal risks related to biodiversity loss, the report advises agriculture and seafood sector companies and their investors to conduct appropriate due diligence to identify and disclose their dependencies and negative impacts on biodiversity, and any actions taken, in accordance with recently adopted and upcoming legislation. Earlier this year, the European Parliament **adopted amendments** to the Corporate Sustainability Due Diligence Directive (CSDDD), which requires large companies to identify, prevent, mitigate or end negative impacts on pollution, biodiversity loss and environmental degradation, among other areas. The final text of the CSDDD is subject to ongoing negotiations, but in order to help companies mitigate the financial risks associated with biodiversity loss, due diligence obligations should explicitly include biodiversity impacts.

Taking the Temperature: As we have noted regularly, nature and biodiversity are increasingly the focus of sustainability discussions across industries and sectors, as governmental agencies, NGOs, investors and industry participants recognize the risks that nature-related biodiversity loss and ecosystem degradation pose. Litigation over biodiversity loss on land and in the water is also an emerging area of climate-related litigation, as evidenced in suits filed by ClientEarth itself. In May, the organization sued Cargill, seeking disclosure of Cargill's due diligence policies and procedures with respect to its soy operations in Brazil. The organization and others also sued French food-products company Danone earlier this year under France's Corporate Duty of Vigilance Law. ClientEarth argues that Danone must develop an adequate plan to reduce its production of single-use plastic, including social and environmental due diligence measures across the company's entire supply chain.

Report: Asset Owners Increase Intermediate Target Commitments While Decreasing Emissions

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According to an **annual report** published on October 18, 2023, members of the Net Zero Asset Owner Alliance (NZAOA) have stepped up their commitments by setting new intermediate targets in four key areas, *i.e.*, sub-portfolio targets, sector targets, engagement targets and climate solution investment targets. NZAOA is a UN-convened initiative of institutional investors committed to transitioning their investment portfolios to net-zero greenhouse gas emissions by 2050.

As members increased their target-setting ambitions, they also saw absolute financed greenhouse gas emissions drop 3.5% to 213.4 million tons of carbon dioxide equivalent (tCO2e) in 2022, from 221.2 million tCO2e in 2021, the NZAOA said in the report. It also urges government policymakers to ramp up the reform of finance and investment policies to support the net-zero transition.

According to the report, of NZAOA's 86 members with $9.5 trillion assets under management (AuM), 69 members with $8.4 trillion AuM set intermediate climate targets, up from 44 members with $7.1 trillion in AuM in 2022. The intermediate climate targets are in line with the third edition of NZAOA's Target-Setting Protocol, issued earlier this year, which **we discussed** in February.

To comply with the Target-Setting Protocol, members must set a target on three out of four target types: 1) sub-portfolio targets (corporate debt, listed equity, and directly-held real estate); 2) sector targets (oil and gas, utilities, cement and steel, shipping, light and heavy duty, and aviation); 3) engagement targets (eight key performance indicators); and 4) climate solution investment targets (including corporate bonds, listed equity, real estate, sovereigns and agency bonds, private assets, and infrastructure).

A total of 67 members set sub-portfolio targets; nine members set sector targets; all 69 members set engagement targets as required by the Target-Setting Protocol; and 68 members set climate solution investment targets, dedicating a total of $380.6 billion to investments in 2023. Eight members reporting on their targets in 2023 went above and beyond the Target-Setting Protocol's "three out of four targets" requirement.

Finally, the report also calls on government policymakers to support asset owners by taking the following actions as soon as possible:

1. Scale up reforms of finance and investment policy frameworks to enable and attract private capital and create investable business models that are aligned with Paris Agreement goals.

2. Implement overarching policies that integrate transition planning across all government entities.
3. Continue to reform current multilateral financial architecture and prioritize the mobilization and alignment of private finance towards "billions to trillions."
4. Enable the transition towards net zero through accelerating the implementation of holistic, long-term domestic policies.

Taking the Temperature: The NZAOA report reflects the importance of investor engagement and influence in connection with climate change and sustainability, driven in part by investor coalitions, as evidenced by investor engagements in a variety of situations which we have discussed, including here, here, here, and here. In the United States, the U.S. Treasury in September published guidance for private sector financial institutions that have made net-zero commitments. And in the UK, as we reported, the Financial Conduct Authority in June launched a consultation aimed at developing a voluntary vote-reporting template for asset managers.

While the report notes an increase in NZAOA membership, from 74 to 86 members in 12 months, as well as the increased commitment to net-zero targets and a decrease in financed greenhouse gas (GHG) emissions, headwinds remain, particularly in the U.S., as financial industry participants navigate the politicization of ESG. We have reported, for instance, that in the U.S. overall support for climate-related shareholder resolutions declined in 2023 and there have been certain high profile withdrawals from net-zero industry alliances, such as Vanguard's withdrawal from the Net Zero Asset Managers initiative, and the withdrawal of Munich Re, Zurich and Hannover Re from the Net-Zero Insurance Alliance.

UN Environment Programme Report Calls for Disclosure Standards for Non-State Actors

December 5, 2023

By Duncan Grieve
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On October 26, 2023, the UN Environment Programme (UNEP) **published a report** with recommendations for linking climate-related actions taken by non-state actors (NSAs) to the **Enhanced Transparency Framework (ETF)** established by the Paris Agreement. Among other recommendations, the report, "Strengthening transparency of non-state actors: How national experiences and new digital technologies can strengthen the transparency efforts of non-state actors," calls for the establishment of centralized data clearinghouses for climate action disclosures by both countries and NSAs, and proposes standardized disclosure rules for NSAs.

Countries that adopted the Paris Agreement in 2015 established the ETF, the mechanism that facilitates the process of documenting climate actions and tracking the progress of individual countries. NSAs can play a key role in enhancing and directing national climate change efforts by creating their own climate plans and emission-reduction goals, and assisting with the local implementation of national policy objectives. NSAs can also encourage other NSAs to make net-zero emissions pledges and help raise the credibility of those pledges.

No meaningful links between the ETF and NSAs currently exist, however. The report makes five recommendations on how to build strong links between the ETF and NSAs:

1. Ensure a good understanding among countries and NSAs of the benefits from harmonized and integrated approaches to monitoring, reporting and verification, and climate data management.
2. Provide specific guidance for national governments to include and reference NSA actions in official communications and reports.
3. Establish central clearinghouses for both country-level and NSA actions, utilizing digital tools to facilitate interoperability between existing and future datasets.
4. Encourage international institutions like the United Nations Framework Convention on Climate Change (UNFCCC) Secretariat and UNEP to play a more active facilitation role in creating dialogues between NSAs and country parties to enhance mutual understanding of actual and planned efforts.
5. Support NSAs, especially in developing countries, in improving data collection and reporting through the use of digital technologies.

The report also outlines recommended NSA disclosure standards. NSAs should:

- Annually disclose their greenhouse gas data, net-zero targets and the plans for, and progress towards, meeting those targets against an established baseline, along with comparable data to enable effective tracking of progress toward their net-zero targets.
- Report in a standardized, open format via public platforms that connect to the UNFCCC Global Climate Action Portal (GCAP) to address any data gaps, inconsistencies, and inaccessibility that slow climate action.
- Verify their reported emissions reductions using independent third parties, with special attention on building sufficient capacity in developing countries to verify emission reductions.
- Submit disclosures that are accurate and reliable, with large financial and non-financial businesses seeking independent evaluation of their annual progress reporting and disclosures, including independent evaluation of metrics and targets, internal controls evaluation, and verification on their greenhouse gas emissions reporting and reductions.

Taking the Temperature: The UNEP report follows the UNFCCC's introduction of the Recognition and Accountability Framework earlier this year to recognize voluntary climate change pledges by NSAs and ensure greater transparency and accountability regarding those commitments. As we also reported at the same time, voluntary pledges by non-party stakeholders will be recognized on UNFCCC's GCAP. These measures bring NSAs around the world into the climate action disclosure fold to help ensure the accuracy and credibility of data disclosed. The UN has taken a leading role in encouraging NSAs, particularly those in developing countries, to follow the same standards as government entities. In late 2022, we reported that the UN established five principles to guide NSAs in setting and achieving net-zero targets, as well as a series of ten recommendations for avoiding greenwashing that include, among others, avoiding use of inexpensive carbon credits that lack integrity or undermining government climate initiatives, including through lobbying activity.

UK's Competition Authority Launches Investigation into Green Heating and Insulation Sector

December 5, 2023

By Duncan Grieve
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On October 17, 2023, the Competition and Markets Authority (CMA) **announced** that it had opened an investigation into a distributor of heating and insulation products, following allegations that it had made misleading claims about the use of hydrogen in boilers. The investigation concerning the so-called 'hydrogen-blend ready' boilers will ascertain whether the company, Bosch Thermotechnology Limited (which trades as Worcester Bosch) misled consumers regarding the environmental characteristics of its product.

The marketing practices subject to the CMA's investigation involve the use of:

- labels or text stating that the company's boilers can run on a blend of 20% hydrogen and natural gas. The CMA states that this may have suggested that this is a special feature when this has been a legal requirement in the UK since the mid-1990s.
- information and messaging on the use of hydrogen for home heating in the UK. However, this technology is not yet available, its introduction being years away and subject to future government policy decisions.
- descriptions and information about the environmental benefits of 'hydrogen-blend ready' boilers, which may falsely suggest that the boilers will reduce a household's carbon footprint.

The CMA's investigation into Worcester Bosch forms part of the regulator's **broader deep dive into the sector**, which included a call for information on consumer protection in green heating and insulation. The CMA looked at three key areas: people's experience of buying green heating and insulation products; business practices; and the landscape of standards bodies that provide quality assurance and consumer protection standards for member businesses. The investigation focused on the marketing and sale of specific products for the home, including heat pumps, home solar, insulation, biomass boilers, and hydrogen-ready boilers.

The CMA's findings from the call for information were set out in a report following concerns identified in the feedback received. The concerns prompted the CMA to **publish a consumer guide** setting out key rights and protections afforded to consumers, along with a set of **good practice principles** for standards bodies to enhance the level of protection provided in the sector.

The CMA has written to twelve other companies selling ‘hydrogen-blend ready’ products, warning them that they could also be breaching consumer protection laws, reminding them of their legal obligations, and encouraging them to review their marketing to consumers. The CMA stated its intention to continue its work in the sector to identify further misleading and greenwashing claims that may have been made by businesses. As of yet, the regulator had not reached any conclusions as to whether consumer protection laws may have been broken.

Taking the Temperature: The CMA’s focus on anti-greenwashing consumer protection action is a continuing trend in activity for the regulator. Earlier this year, the CMA announced a wide-ranging investigation into the accuracy of green claims made about household essentials, such as food, drinks and toiletries, to prevent consumers from being misled. The CMA also produced the Green Claims Code to help companies understand how to communicate their green credentials and avoid greenwashing. In the UK more broadly, a number of regulatory authorities have published guidance and increased enforcement activity in the greenwashing space, including the Financial Conduct Authority, which also announced on November 28 that after a period of consultation, and some delay, it will implement Sustainability Disclosure Requirements (SDR) and an investment labels regime. We will report on this in detail in an upcoming edition, but the SDR will include an anti-greenwashing rule, rules around product labels and naming and marketing requirements to help investors make more informed choices when it comes to sustainable investment. And, the Advertising Standards Authority released updated guidance for advertisers making environmental sustainability-related claims to consumers, including the use of the terms “carbon neutral” and “net zero.”

Outside of the UK, regulatory authorities are active on this issue in the EU, U.S., and Australia. The European Union has an ongoing legislative campaign, the Green Claims Directive, to address misleading sustainability claims in advertising. In the U.S., the Federal Trade Commission announced that it is seeking public comment on potential revisions to its Green Guides for the Use of Environmental Marketing Claims, in particular to address carbon offsets and climate change-related marketing claims. The Securities and Exchange Commission adopted amendments to the Investment Company Act 1940 to include the “Names Rule,” which regulates appropriate naming of funds to ensure that they do not mislead investors regarding the fund’s risks and investment characteristics. The Names Rule is consistent with the SEC’s overall focus on ESG issues, including, as we have noted previously, the formation of the ESG Task Force within the Division of Enforcement “to develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment.” Likewise, in July 2023, the Australian Competition and Consumer Commission released draft guidance for businesses making environmental and sustainability claims (the Draft Greenwashing Guidance). The Draft Greenwashing Guidance establishes best practices under the Australian Consumer Law, setting out how businesses operating in Australian jurisdictions can avoid greenwashing.

EU Council Adopts New European Green Bond Standard

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On October 25, 2023, the European Council adopted the **European Green Bond Standard (EU GBS)**, a new voluntary regime for green bonds that aims to solidify the EU's position as a leader in sustainable finance, reduce greenwashing, and enhance investor protections. The EU GBS is intended to be the "gold standard" for green bonds and requires that all bond proceeds be allocated in alignment with the EU Taxonomy for sustainable activities. Issuers from both within and outside the EU can issue and market their bonds as "European green bonds" (EuGBs) if they adhere to the requirements of the EU GBS.

The EU GBS was first proposed by the European Commission on July 6, 2021, setting out requirements for environmentally sustainable bonds marketed in the European Union as EuGBs, and has been the subject of extensive negotiations between the European Commission, the European Parliament, and the European Council. In February 2023, the legislators reached a **"provisional agreement on European green bonds"** and on May 10, 2023, a draft overall compromise was agreed to by the Council's permanent representatives' committee.

The Regulation

The key aspects of the regulation are as follows:

- **Use of proceeds:** At least 85% of the net proceeds raised by an EuGB must be invested in environmentally sustainable activities aligned with the EU Taxonomy Framework. The EU GBS allows for a "flexibility pocket," permitting up to 15% of the net proceeds to be allocated to activities for which there are no technical screening criteria in force at the date of issuance, provided the activities comply with the generic criteria for 'Do No Significant Harm,' as set out in Delegated Regulation (EU) 2021/2139, and/or activities in the context of international support, provided those activities comply with the appropriate technical screening criteria on a best effort basis.
- **Transparency:** Issuers of EuGBs will be subject to specific and standardized disclosure requirements to ensure full transparency on the allocation of proceeds and the environmental impact of the EuGB. This will enable potential investors to evaluate and compare EuGBs.
- **External Reviewers:** EuGBs must be reviewed by external reviewers (registered with and supervised by the European Securities Market Authority) for compliance with the EuGB standard.
- **Required Documentation:** Issuers of EuGBs must publish a prospectus that complies with the EU Prospectus Regulation (the "EU PR"), unless they are exempt from the requirement

to issue a prospectus, such as EU sovereign or quasi-sovereign issuers. Essentially, this means that EuGBs will need to be listed on a regulated market. The prospectus must explicitly state that the bonds are designated as "European Green bonds" or "EuGB" and that they are issued in accordance with the EU GBS. Where the use of proceeds relates to capital expenditure and operating expenditures that meet the EU Taxonomy requirements, the issuer is required to publish a “CapEx plan” in accordance with Commission Delegated Regulation (EU) 2021/2178, and a summary of the issuer’s CapEx Plan must also be included in the prospectus.

- **Factsheet:** Issuers of EU GBS bonds must prepare a “green bond factsheet,” which must be reviewed pre-issuance by an external reviewer. The EU GBS sets out a prescribed template for the factsheet and content requirements, which will be considered “regulated information” for the purposes of the EU PR and may be incorporated by reference in the bond prospectus.
- **Sanctions:** Issuers of EU GBS bonds will need to have their prospectus approved by a national competent authority (NCA) in the relevant Member State and the NCAs will be responsible for supervising an issuer’s compliance with the EuGB standard. Pursuant to the regulation, the relevant NCA has an array of powers to ensure compliance, including the power to suspend approval of a prospectus, withdraw the EuGB label, or prohibit an issuer from issuing EuGBs for up to a year. In addition, the regulation includes the power to issue monetary fines of up to 0.5% of an issuer’s turnover, and EU member states may choose to impose criminal sanctions for non-compliance.

Next Steps

The regulation will enter into force 20 days from the date of publication in the Official Journal of the European Union and will start applying 12 months after its entry into force.

Taking the Temperature: The EU GBS is an ambitious standard, surpassing existing guidelines and labels in the green bond market. It is expected to be initially utilized by EU institutions and “pure play” issuers, but broader adoption hinges on the usability of the EU Taxonomy. Challenges related to assessing criteria like Do No Significant Harm and Minimum Safeguards, data availability, and reliance on EU legislation raise concerns about the flexibility provided for issuers.

The EuGB label's relevance may primarily extend to EU issuers reporting in line with the Corporate Sustainability Reporting Directive, while non-EU issuers might be more inclined towards voluntary disclosures aligned with wider sustainable finance market standards. It is becoming increasingly common for such standards to be designed to be cohesive with one another, and this latest development will help towards closing any gaps. The success of the EU GBS depends on factors such as investor demand, pricing advantages, and incentives for issuers to shift from existing market practices.

The stricter penalties associated with the EU GBS will undoubtedly influence issuers, which are becoming increasingly aware of the reputational and legal risks involved in issuing EuGBs, including based on disclosures in the ESG bond prospectuses. While the EU GBS is the first formal effort to regulate the green bond market, the growing emphasis on accountability and transparency likely will lead other regulators to follow

suit. The UK's Financial Conduct Authority has stated that it will examine various approaches to ESG disclosure in prospectuses as part of UK prospectus reforms. It remains to be seen how this evolving regulatory landscape, along with shifting investor expectations, will impact the global sustainable bond market, and whether the EU GBS will eventually encourage issuers to adopt more ambitious strategies when seeking funding for their green projects.