CADWALADER

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In this week's edition, we discuss the EU's continued push to develop its ESG regulatory framework by proposing changes to the regulation of credit ratings agencies to accommodate ESG factors. Regulating ESG ratings providers is a clear focus of authorities in a number of jurisdictions around the globe, including the EU, UK and Hong Kong. We also discuss yet another greenwashing complaint against an airline, upheld by a court. The decision adds to the growing bank of similar decisions – this time, in Germany. And, Australia sees the first court outcome in a greenwashing case, undoubtedly paving the way for more to come.

European Regulator Proposes ESG-focused Changes to Credit Ratings Regulation

The European Securities and Markets Authority (ESMA) **launched a consultation** on proposed changes to its Credit Ratings Agency Regulation (CRA Regulation) to account for ESG ratings and methodologies. ESMA's aim with the proposed changes is to ensure that relevant ESG risks are systematically captured in credit ratings, in order to enhance transparency on the inclusion of ESG risks by credit rating agencies. The changes form part of the EU's overall moves to better regulate the ESG ratings and methodologies space. **As we discussed in February 2024** for example, the European Parliament and Council announced that they had reached an agreement on the text of the ESG Ratings Regulation which seeks to introduce a new regulatory regime for ESG ratings providers operating within the EU. The aim of the ESG Ratings Regulation is to strengthen the quality and reliability of ESG ratings and enhance the transparency of the methodologies used to produce those ratings. The deadline for responding to the consultation is June 21, 2024.

We have discussed the lack of consistency among ESG ratings providers and established industry norms relating to disclosure, measurement methodologies, transparency and quality of underlying data in considerable detail. That has led to a number of jurisdictions proposing regulations, with the EU being chief among them. Elsewhere, the UK's Chancellor **confirmed in the Spring Budget** that the Financial Conduct Authority would regulate ESG ratings providers. In October 2023, the **International Capital Market Association (ICMA) announced** that it would be forming a working group to develop a voluntary code of conduct for Hong Kong-based ESG ratings and data providers.

Court Upholds Greenwashing Complaint Against German Airline

On March 28, 2024, the Cologne Regional Court in Germany **upheld a greenwashing complaint** brought by environmental protection organization Deutsche Umwelthilfe (DU) against Eurowings. The greenwashing complaint concerned advertisements by the German airline which claimed that certain of its flights were "CO2 neutral" because the airline offset the emissions if the customer paid extra. Eurowings made use of an offsetting calculator and would make financial contributions to projects related to, among other things, forest protection. The Court found that those projects were not in fact suitable for actual offsetting because the project duration was not commensurate with the length of time the carbon emitted by the flight remains in the atmosphere. The court ordered Eurowings to cease advertising carbon-neutral flights to customers by charging them more to offset carbon emissions by funding forest protection projects.

This verdict against airlines making misleading sustainability claims is the latest in a long line of similar cases. On March 20, **a Dutch court held** that airline KLM misled customers through vague environmental claims and depicted an "overly rosy picture" of its use of sustainable aviation fuel (SAF). In our April 1 edition, we discussed several similar findings by the UK's Advertising Standards Agency (ASA) against Ryanair, Etihad Airways and Lufthansa, as well as a consumer class action in California against Delta Air Lines' alleged false sustainability claims.

Australia Court's First Ever Greenwashing Finding

On March 28, a court in Australia found that Vanguard Investments Australia had made misleading claims about one of its ESG-focused funds. The claims included a failure to exclude companies that engage in fossil fuel activities from its portfolio, despite claims to the contrary in the firm's communication materials and disclosures. **As we discussed in December 2022**, the claim was brought by the Australian Securities & Investments Commission (ASIC) following a self-report by the company. It is one of a number of such actions taken by the regulator including against **LGSS Pty Limited**, **Future Super** and **Mercer Superannuation (Australia) Limited** in 2023. However, this latest action marks ASIC's first greenwashing decision made by a court, and as such, according to a statement, represents the regulator's "commitment to taking on misleading marketing and greenwashing claims made by companies in the financial services industry."

Part of ASIC's claim noted that insufficient research was conducted over a significant proportion of bond issuers in the fund, and that this in turn exposed investors to investments with ties to fossil fuels including issuers such as Abu Dhabi Crude Oil Pipeline. The importance of undertaking comprehensive due diligence, including into underlying investment products and linked projects, before making sustainability claims cannot be understated and this will not be the last formal greenwashing precedent we expect to see based on similar factors.