ESG View

December 2023

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Welcome to our December edition of ESG View!

"All I want for Christmas… is ESG Viewwwww". We hear you loud and clear! Good tidings we bring, in the form of a short, sweet and seasonal December edition of ESG View. In true festive spirit, we feature twelve highlights from December to wrap up the year.

This month, all eyes (and inboxes) were focused on developments from COP28 in Dubai. With reportedly close to 100,000 people attending from 197 countries, COP28 was by no means short on a diversity of views, particularly when it came to the ambition of the final legal text. Within this edition, we give you a snapshot of key developments from the conference.

COP fever did not mean the sustainability agenda stood still elsewhere. We saw a flurry of global updates including to the ICMA Guidance Handbook, the publication of the ICMA Code of Conduct for ESG ratings and data providers, and a live consultation from the Basel Committee on disclosure of climate-related financial risks, among others.

We also received long-awaited regulatory gifts in the form of the UK's Sustainable Disclosure Rules, agreement on the EU Corporate Sustainability Due Diligence Directive and launch of multi-sector transition taxonomy in Singapore. As no edition would be complete without a disputes dispatch, we've also included a sprinkling of high-flying green claims linked to the aviation sector.

The Simmons & Simmons GreenTech Fund is accepting applications until 15 January. For the third year running, we will offer free legal advice to a pool of climatetech and cleantech startups to help encourage the development of innovative solutions to solve the climate crisis. So if you know of any organisations that would qualify and would benefit from free legal advice tailored to their specific needs, please do share it with them and encourage them to apply.

We wish you and your loved ones a wonderful holiday season.

Best wishes,

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1. All eyes on COP28 (Global – multi-sector)

Historic agreement was reached with the *"UAE Consensus"* at COP28, with nearly 200 countries agreeing to transition away from fossil fuels and reach net zero emissions globally by 2050. Despite the historic inclusion of fossil fuel language, many remain unconvinced by the outcome of the final negotiations. The voluntary language of *"calling for"* key mitigation action, including the transition away from fossil fuels and the tripling of renewable energy, was described by the Alliance of Small Island States (AOSIS) as not advancing us *"beyond the status quo"*.

Beyond the official negotiations, there was much progress made on the climate mitigation front; with 130 national governments, including the European Union (EU), signing up to the Global Renewables and Energy Efficiency Pledge; 25 countries endorsed a Declaration to Triple Nuclear Energy Capacity by 2050; and the Netherlands led a group of 12 countries in releasing a new joint statement on the need to phase out fossil-fuel subsidies. Colombia also made a stand as the first major oil exporter to endorse the call for a fossil fuel non-proliferation treaty, making a total of 11 countries supporting a legal agreement for ending new fossil-fuel projects.

Some other key developments:

- **Loss and Damage:** the first day secured agreement on the operationalisation of the loss and damage fund, followed by voluntary pledges totalling US$792 million to support developing countries vulnerable to the adverse effects of climate change.
- **Food and Agriculture:** agreement was reached on the first declaration on food system transformation, with 158 countries signing and committing to the declaration to cut carbon emissions in the global food system.
- **Nature, Land Use and Oceans:** $186.6 million of new financing for nature and climate towards forests, mangroves, and the ocean was announced. There was also a Joint Statement on Climate, Nature and People made by the UAE and China, and an unexpected announcement that China was joining the High Ambition Coalition for Nature and People, pledged to protect 30% of land and ocean by 2030.
- **Finance:** Alongside many financial pledges, COP28 also saw 13 national governments endorse the UAE Leaders' Declaration on a Global Climate Finance Framework. There was also the Joint Declaration and Task Force on Credit Enhancement of Sustainability-Linked Sovereign Financing for Nature and Climate, which will aim to unlock sovereign debt for nature and climate through transactions like debt-for-nature swaps. Notably, agreement on Article 6 and carbon markets was not reached and will have to wait for COP29 in Azerbaijan in 2025 for the restart of negotiations.

Our view: Tune in to our Global Insights webinar to hear from our Simmons & Simmons team and their key takeaways from the ground at COP.

2. Updates to ICMA Guidance Handbook (Global – financial institutions)

What: On 29 November, the International Capital Market Association (ICMA) and the Executive Committee of the Principles published an updated edition of the Guidance Handbook.

The Guidance Handbook was created with reference to; the ICMA Green Bond Principles (GBP); Social Bond Principles (SBP); Sustainability Bond Guidelines (SBG); Sustainability-Linked Bond Principles (SLBP) (together, "the Principles"); as well as the Climate Transition Finance Handbook. The Guidance Handbook responds to calls from the market for additional information on how to interpret this guidance, especially regarding its practical application for transactions, as well as in the context of market developments and complementary initiatives.

Details: The November updates of the Handbook integrate Q&As that were initially published on a stand-alone basis for Secured green, social or sustainability (GSS) Bonds, Sustainability-Linked Bonds and GSS bonds related to pandemic or to support fragile and conflict states. As well as this, it included further guidance on some additional topics including: Relabelling, Net Asset Value, Pure play companies, Impact reporting and Social Bonds.

This publication is structured to support the development and integrity of the GSS Bond Market.

3. ICMA Code of Conduct for ESG ratings and data providers (Global – ESG ratings and data)

What: On 14 December, the International Capital Markets Association (ICMA) published a Code of Conduct (Code) launched by the Data and Ratings Working Group (DRWG) for ESG ratings and data products providers.

Details: The Code aims to promote market transparency and bolster governance, controls and conflict of interest management. The Code is grounded in the International Organization of Securities Commissions' (IOSCO) recommendations for ESG data and ratings, with a view to enabling the Code to be adopted internationally. The Code will be maintained by ICMA and is a voluntary, industry owned code which is intended to play a key role in increasing transparency and trust in the ESG data and ratings market. In an announcement made on the same day, the UK FCA encouraged all ESG data and ratings providers to engage with and sign up to the Code.

Key observations: It is expected that the Code will provide a benchmark for any providers that fall outside the scope of potential future regulation and as the market evolves expectation will be that relevant firms adhere to the standards and have suitable systems and controls in place to meet their commitments. The launch of this Code follows shortly after the MAS launched a Code for ESG ratings providers in Singapore (see below).

4. The Basel Committee consults on disclosure of climate-related financial risks (Global – financial institutions)

What: On 29 November the Basel Committee on Banking Supervision (BIS) published a consultation on disclosure of climate-related financial risks. It forms part of its holistic approach to address climate-related financial risks to the global banking system.

Details: The BIS is proposing a Pillar 3 disclosure framework for climate-related risks, which would require banks to provide information on their risk management and governance procedures. The proposals intend to complement the work of other standard setters, including the International Sustainability Standards Board (ISSB) and provide a common disclosure standard for internationally active banks. The proposals include disclosing scope 1, 2 and 3 emissions, covering direct bank emissions and indirect emissions.

Next steps: The consultation is open until 29 February. BIS proposes a potential implementation date of 1 January 2026, and welcomes views on whether any transitional arrangements would be required and, if so, the rationale and duration. It also invites feedback on which elements of the framework should be mandatory and which would be subject to national discretion.

5. IOSCO report published on Supervisory Practices to Address Greenwashing (Global – multi-sector)

What: On 4 December, the International Organization of Securities Commissions (IOSCO) published a final report on supervisory practices to address greenwashing.

Details: The report provides an overview of the initiatives undertaken in various jurisdictions to address greenwashing in line with the IOSCO recommendations published in 2021 and maps the current or planned regulatory and supervisory approaches and practices by regulators to address greenwashing in the areas of asset management and ESG ratings and data product providers. The main findings of the report indicate:

- Most jurisdictions have in place supervisory tools and mechanisms to address greenwashing in asset management and their products.
- The market for ESG ratings and data products is in a phase of rapid growth. The ESG ratings and data products market remains largely unregulated although some jurisdictions are developing mandatory or voluntary policy frameworks for ESG ratings and data products providers.
- The cross-border nature of sustainable finance investments requires adequate cross-border cooperation, which has been observed in the case of some regulators using tools to assist each other (i.e., licensing, oversight, and enforcement).
- Greenwashing will remain a high risk until the quality and reliability of information available to investors improve.

There is an expectation that all stakeholders support good practices aimed at preventing harm to consumers and markets. Industry engagement is therefore crucial to this goal.

Key observations: The report sends a clear message that corporates, asset managers, ESG ratings and data products providers, investors, information providers, regulators and policy makers will need to act together to combat greenwashing risks and to build reliability and trust in sustainable finance markets.

6. Biodiversity and Nature Credit Markets continue to evolve at pace (Global – multi-sector)

This month has been significant for biodiversity and nature credit markets globally:

INTERNATIONAL ADVISORY PANEL ON BIODIVERSITY CREDITS (IAPB) CALL FOR VIEWS

What: The IAPB was created to facilitate the creation and growth of high-integrity biodiversity credit markets, and encourage enabling policy and regulatory mechanisms that are credible, timely and coherent on an international level. The IAPB has launched a call for views with 40 questions that will inform its working groups focused on the five key design challenges of high-integrity biodiversity credit markets: measurement, supply, demand, stewardship, and governance. Deadline for responding is 12 January 2024.

AUSTRALIA'S NATURE REPAIR MARKET BILL RECEIVES PARLIAMENTARY APPROVAL

What: On 7 December, the Australian Parliament passed the long awaited Nature Repair Market Bill, creating a framework for the world's first voluntary market for private investment in nature. Approval was achieved with a few key trade-offs following political stagnation within the Senate. For example, under the finalised Bill, market participants will not be able to rely on nature repair projects to offset damage elsewhere.

Next steps: The Bill is now awaiting royal asset before it becomes law and it is expected to be operationalised next year. In the meantime, the Australian Government are looking to introduce further reform to their nature positive laws and are consulting on their proposals until 30 March 2024. Responses can be submitted here.

UK'S BIODIVERSITY NET GAIN (BNG) AND MARINE NET GAIN (MNG)

What: The On 29 November, the government published six draft statutory instruments which set out some key details for the new mandatory biodiversity net gain (BNG) framework. In addition to the draft regulations, several pieces of draft guidance were also issued: DEFRA guidance and Department for Levelling-up, Housing and Communities draft biodiversity net gain planning practice guidance.

The new statutory requirements are expected to apply to developments that come forward in England following planning applications submitted 'from January 2024'. The exact date is yet to be confirmed. Read more about the BNG framework in our client note here.

The current BNG framework does not include marine ecosystems as more work was needed to define an appropriate methodology and approach for marine spaces. On 9 December, the Department for Environment Food & Rural Affairs (DEFRA) published a response to its MNG consultation outcome, that was conducted in 2022. Notably, in its response, DEFRA confirms MNG is intended to become a mandatory requirement for new in-scope development activities and the Government will be developing detailed policy and running further consultations in the future.

7. Agreement at long last: the EU corporate sustainability due diligence directive (EU – multi-sector)

What: On 14 December, after months of negotiation, the European Council and Parliament reached a provisional agreement on the corporate sustainability due diligence directive (CSDDD) (see the EU Parliament press release and European Council press release for details). CSDDD will create obligations for large companies regarding actual and potential adverse impacts on human rights and the environment, with respect to its own operations, those of its subsidiaries, and those carried out by business partners.

Details: Whilst the final text of the agreement is yet to be published, some key developments have been confirmed:

- *Scope:* CSDDD will apply to large companies i.e. those that that have more than 500 employees and a net worldwide turnover over €150 million. It will also impact certain non-EU countries three years from its entry into force. Notably, financial services will **not** be included in the scope of CSDDD but this will be reviewed for future inclusion.
- *Transition plans:* Firms, including those in the financial sector, will have to adopt a plan ensuring their business model complies with limiting global warming to 1.5°C.
- *Sanctions and supervision:* Each EU Member State will have a designated supervising authority that will be able to launch inspections and investigations and impose penalties on non-compliant companies, including "naming and shaming" and fines of up to 5% of their net worldwide turnover.

Next steps: The provisional agreement reached now needs to be endorsed and formally adopted by both institutions before it can be published and enter into law. We will be sharing further details once the full text of the agreement is published, so watch this space.

8. The FCA publishes final SDR and greenwashing rules (UK – asset management)

What: On 28 November the Financial Conduct Authority (FCA) published its long awaited Policy Statement (PS23/16) (the Policy Statement) setting out its final rules on UK Sustainability Disclosure Requirements (SDR) and investment labels. The Policy Statement follows the FCA's Consultation Paper (CP22/20) from 25 October 2022 (the Consultation Paper). The FCA also published general guidance for consultation (GC23/3) on the anti-greenwashing rule, alongside information for consumers on identifying sustainable investments. The deadline to respond to the consultation is the 26 January 2024.

Details: The FCA has made several changes to its original proposals, including introducing a new fourth "sustainability mixed goals" label. New rules and guidance for firms marketing investment funds based on their sustainability characteristics have been introduced along with consumer-facing information to enable consumers to understand the key sustainability features of a product and detailed information in pre-contractual, ongoing product-level and entity-level disclosures. It also contains requirements for distributors (for example, platforms and advisers. Portfolio management, pension products and overseas funds are excluded from scope at this stage. See here for our briefing note with more details.

Next steps: In Q1 2024, the FCA will consult on the extension of the investment labelling and disclosure regime to discretionary portfolio strategies. From 31 July 2024 firms can begin to use labels, with accompanying disclosures and from 2 December 2024, the naming and marketing rules come into force, with accompanying disclosures.

On the topic of sustainable funds, ESMA also released a Public Statement on 14 December updating its Guidelines on funds' names using ESG or sustainability-related terms. Fund managers should refer to the updates announced in the statement and more specifically consider exclusions which ESMA has provided further clarity on. Find out more in our client note here.

9. Misleading claims cases against the airlines industry (UK – airline industry)

Whilst this month saw exciting news of the first transatlantic flight using sustainable aviation fuel (SAF), the airline industry has been in the spotlight this month over 'misleading' environmental claims.

What: On 6 December, the UK Advertising Standards Agency (ASA) banned advertisements from Air France, Lufthansa and Etihad Airways on the basis that the environmental claims made were misleading to customers. In both the Air France and Etihad cases, the ASA found insufficient evidence for the green claims made. The Lufthansa case was slightly different as the ASA acknowledged the use of sustainable aviation fuel among other things but stated that the basis of the claim in the advert that customers can *"Fly more sustainably"* had not been made clear. The ASA held that although the space in the advert was limited, this should not be a reason why 'information of such relevance could be omitted'.

OECD complaint: This month we have also seen a complaint brought by the charity Possible, to the Organisation for Economic Co-operation and Development (OECD) UK National Contact Point against British Airways and Virgin Atlantic. The complaint argues that the airlines are misleading consumers about their environmental credentials given analysis that suggests a continued failure to meet emissions targets and over reliance on technology like SAF that is not yet commercially viable as a climate-friendly solution.

Looking ahead: The number of green claims in the UK shows no signs of stopping, with the Competition Markets Authority also announcing this month that it is looking into Unilever's green claims. Read about this and further disputes updates in our ESG Disputes Radar.

10. A global first: MAS launches transition taxonomy (Singapore – multi-sector)

What: On 3 December, the Monetary Authority of Singapore (MAS) launched the Singapore-Asia Taxonomy for Sustainable Finance (Singapore-Asia Taxonomy) which sets out detailed thresholds and criteria for defining green and transition activities that contribute to climate change mitigation across eight focus sectors. The eight focus sectors are: Energy, Real Estate, Transportation, Agriculture and Forestry/Land Use, Industrial, Information and Communication Technology, Waste/Circular Economy, Carbon Capture and Sequestration.

The Singapore-Asia Taxonomy (amongst others) pioneered the concept of a "transition" category. Transition activities are comprehensively defined through two new approaches:

A. a traffic light system, in that the Singapore-Asia Taxonomy includes a list of economic activities and projects that are classified as "Green" (environmentally sustainable), "Amber" (transition) or "Ineligible" on the basis of their contribution to at least one of the Singapore-Asia Taxonomy's five environmental objectives, whilst at the same time not causing any significant harm to the other four; and

B. a "measures-based approach" for certain sector(s) that seeks to encourage capital investments into decarbonisation measures or processes that will help reduce the emissions intensity of activities and enable the activities to meet the green criteria over time.

MAS has also commenced an exercise to map the Singapore-Asia Taxonomy to the International Platform for Sustainable Finance's Common Ground Taxonomy to enhance interoperability (details can be found in the MAS press release).

11. MAS Publishes Code of Conduct for Providers of ESG Rating and Data Products (Singapore- ESG Ratings and Data)

What: On 6 December, MAS published its finalised Code of Conduct for ESG Rating and Data Product Providers (CoC) and an accompanying Checklist for Providers to self-attest their compliance to the CoC (Checklist).

The CoC aims to establish baseline industry standards for transparency in methodologies and data sources, governance, and management of conflicts of interest that may compromise the reliability and independence of the products. It is largely modelled on the recommended good practices set out in the International Organisation of Securities Commissions' Call for Action paper, with some additional Singapore specific requirements.

The CoC is to be applied by Providers on a "Comply or Explain" basis and Providers are encouraged by the MAS to disclose their adoption of the CoC and publish their completed checklist within 12 months from the publication of the CoC.

A list of Providers who adopt the CoC will be published on the International Capital Market Association's (ICMA) website, to enable Users to identify such Providers with greater ease. Providers should inform ICMA when they have publicly published their Checklists in adoption of the CoC.

12. UAE Sustainable Finance Working Group publishes Principles for the effective management of climate-related financial risks (UAE – financial institutions)

What: On 13 November, the UAE Sustainable Finance Working Group (SFWG) launched the 'Principles for the Effective Management of Climate-related Financial Risks' (the Principles). The SFWG was established in 2019 with the goal of developing sustainable finance in the UAE and facilitating co-operation between regulatory authorities. The Principles, the first initiative of its kind in the Middle East region, set out minimum standards for considering and managing climate-related risk. They are the product of industry consultations earlier in the year and have been developed with international standards in mind.

Key regulatory authorities that have adopted the Principles include the Central Bank of the UAE, Securities and Commodities Authority, Dubai Financial Services Authority (the Dubai International Financial Centre regulator) and Financial Services Regulatory Authority (the Abu Dhabi Global Market regulator).

Next steps: These authorities will now formally issue the Principles to their respective licenced entities.

LATEST SIMMONS ESG INSIGHTS

Upcoming Webinars

- 11 January 2024
  Simmons SDR "deeper dive" webinar series - The Anti-Greenwashing Rule - what is it and how do you avoid breaching it?

- 16 January 2024
  Global Insights: COP28 Debrief and Roadmap for 2024

Past Webinars – Watch on demand

- FCA UK SDR/investment labels - flash call (30 November 2023)
- ESAs publish draft RTS for PAI changes under SFDR (11 December 2023)
- Non-labelled ESG products" - what are they and what do you do if you have one? (14 December 2023)
- The EU Data Act & Data Governance Act (14 December 2023)

Recent Publications

- ESMA publishes explanatory notes on concepts under the ESG framework (22 November 2023)
- ESG: new Taxonomy Regulation delegated acts published in OJ (22 November 2023)
- ESG – FCA publishes final SDR rules (28 November 2023)
- COP28 through a legal lens (28 November 2023)
- ESAs publish draft RTS for PAI changes under SFDR (4 December 2023)
- Fuelling investment: the rise of blended finance (5 December 2023)
- ECON adopts draft report on ESG Ratings Regulation (7 December 2023)
- "Going green" green energy certificates in China – A practical guide (11 December 2023)
- UK ESG – Simmons menu of templates for firms subject to FCA TCFD rules (12 December 2023)
- Predictions 2024: Disputes and Investigations (12 December 2023)
- ESG: client note 'Top 10 talking points from the ESAs' SFDR proposals' (12 December 2023)
- ESMA updates guidelines on funds' names using ESG or related terms (18 December 2023)
- ESG Disputes Radar (18 December 2023)
- Biodiversity Net Gain (18 December 2023)

CONTACT US

Simmons & Simmons is a leading international law firm with over 320+ partners and 2,500 employees throughout our network of 22 offices in Europe, Asia, the Middle East and the US*.

Our ESG approach is not to have an ESG practice but to adopt an integrated, holistic, cross-discipline approach so that we can combine ESG experts and deep technical knowledge with product/business line expertise.

If you need help understanding the current and upcoming ESG legislative and regulatory landscape or your supply chain obligations or supply chain best practice, or you would like assistance in mitigating your supply chain risk, we can help.

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