CAPPELLI RIOLO
CALDERARO CRISOSTOMO
DEL DIN & PARTNERS

CRCCD Studio Legale

Milan Rome London
crccdlex.com

CRCCD OBSERVATORY ON SUSTAINABLE FINANCE AND THE GREEN ECONOMY

March 2024
Issue 4

ANALYSIS

ESG-RELATED LITIGATION

1. Introduction

The so-called ESG-related litigation scenario, which is increasingly broader in terms of both quantity and geography[1], and whose financial implications are the subject of ever-increasing intervention, including by supervisory authorities[2], is currently showing particularly significant trends for economic operators that are only partly halted by underdeveloped theories, legislation and case law.

This is proven by the most recent industry surveys. The results of a survey of the in-house legal departments of 600 UK, US, Singapore and Brazilian companies with annual turnovers of over USD 500 million, published last January, showed that "*ESG-related litigation*" is a source of risk for 73 per cent of them, more than any other type of disputes. Nevertheless, the same survey report provides a merely illustrative definition of "ESG-related litigation", which may intersect with more traditional branches of environmental, labour and corporate litigation.

The same report on ESG-related litigation mainly relies on a few databases and systematic research projects (namely, those of the Sabin Center for Climate Change Law at Columbia University and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics) focusing on climate litigation, as well as the Network for Greening the Financial System (NGFS) – precisely on the basis of the inclusion criteria used in these databases - defines these as "*cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law*"[3].

It is therefore not surprising that the first seminars held on ESG dispute matters at the World Economic Forum in Davos and – in February 2024 – at the Bank of Italy also considered climate disputes. And so did two very interesting reports published by the NGFS in September 2023, one that gives an overview of the status and trends in climate-related litigation[4], the other that specifically addresses micro-prudential supervision of what are expressly termed "climate-related litigation risks (CLR)" and are considered for prudential purposes as a sub-category of physical risks and transition risks[5].

[1] It should be noted, for example, that as at 26 March 2024, the database maintained by the Sabin Center for Climate Change Law at Columbia University – on which please see below in the text – numbered 2,593 disputes brought before the courts of 55 different countries or before 19 supranational bodies.

[2] See, for example, the studies of T. Wetzer *et al*, *Climate Risk Assessments Must Engage With the Law*, in *Science*, 2024, page 152 ff. (abstract available at https://www.science.org/doi/10.1126/science.adj0598), M. Sato *and others*, *Impacts of Climate Litigation on Firm Value*, May 2023 (available at https://www.lse.ac.uk/granthaminstitute/publication/impacts-of-climate-litigation-on-firm-value/) and of J. Solana, *Climate Change Litigation as Financial Risk*, in *Green Finance*, 2020, page 344 ff. (available at https://www.aimspress.com/article/doi/10.3934/GF.2020019), as well as the specific attention given to the "ESG-related litigation claims" in the Draft Guidelines on the management of ESG risks on which the European Banking Authority opened a consultation last January (on which see **section 7** of this issue).

[3] See Network for Greening the Financial System (NGFS), *Climate-Related Litigation: Recent Trends and Developments*, September 2023, page 4.

[4] See footnote 3 above.

[5] See NGFS, *Report on Micro-Prudential Supervision of Climate-Related Litigation Risks*, September 2023.

On that occasion, the NGFS itself also pointed out that "*litigation may begin to expand beyond the topic of greenhouse gas emissions, to encompass the topic of biodiversity loss, due to increasing recognition of the climate-biodiversity nexus*", that "*some of that litigation may become more closely linked to the development of climate-related legislation, particularly in the fields of greenwashing, climate disclosures and corporate due diligence, with a consequent impact on transition risks*", and that this "*may become particularly relevant for the financial sector, where the recent expansion of regulatory reporting requirements may increase the likelihood of cases being taken directly against financial institutions*"[6].

And it is precisely these outlooks that Frank Elderson – member of the Executive Board and Vice-Chair of the ECB's Supervisory Board, as well as Co-Chair of the Basel Committee on Banking Supervision's Task Force on Climate-Related Financial Risks (TFCR) – referred to in a speech last September that "[f]*or supervisors and banks alike,* [climate and environment-related litigation] *is becoming a major source of risk that needs to be properly anticipated and addressed* [and] *is particularly important at a time when non-financial but also financial companies, including banks, are becoming the direct targets of such litigation.* [...] [L]*itigants are coming after the banks, "come hell or high water". And the banks need to be prepared*".

However, a few broader considerations will serve to clarify, from the outset, the difference between the varied litigation scenarios that unfold in this way – which is the main focus of the following analysis – and the "classic" climate-related litigation.

The latter is currently undergoing a phase known as the "third wave", the beginning of which can be traced back to the start in 2015 – the year in which the Paris Agreement on climate change was signed – of a number of disputes against sovereign states which hinged, on a judicial level, on an innovative concept of non-contractual liability for failure to combat climate change, with extensive references being made to constitutional rights and international human rights. From among these is the emblematic case of *Stichting Urgenda v. State of the Netherlands*, that was decided in 2019 in the last instance by the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), in which the ordinary Dutch courts – by applying Articles 2 (*Right to life*) and 8 (*Right to respect for private and family life*) of the ECHR – ordered their State to reduce greenhouse gas emissions generated by the Netherlands by 25 per cent by 2020 compared to 1990 levels.

The argument that succeeded in the *Urgenda* case was adopted, again before the Dutch courts, in the equally emblematic case of *Vereniging Milieudefensie e altri v. Royal Dutch Shell plc*, in which a number of environmental organisations, by invoking Article 6:162 of the Dutch Civil Code (homologous to Article 2043 of the Italian Civil Code) in combination with the aforementioned Articles 2 and 8 ECHR, obtained an order at first instance against a carbon major to reduce its greenhouse gas emissions – of scope 1, scope 2 or scope 3 – according to the jointly established tripartition introduced by the Greenhouse Gas Protocol or GHG Protocol[7]–, by 45% by 2030 compared to 2019 levels.

The abovementioned cases have inspired similar initiatives in several other countries, including

[6] NGFS, *Climate-Related Litigation*, cit., page 15.

[7] To summarise, under the GHG Protocol classification, for each entity (*i*) scope 1 emissions are the so-called direct emissions of greenhouse gases, generated by sources directly owned or under the direct control of that entity; (*ii*) scope 2 emissions are the so-called indirect greenhouse gas emissions related to the purchase and consumption of electricity, steam, heat or cooling by that entity; (*iii*) scope 3 emissions are the remaining so-called indirect greenhouse gas emissions generated upstream or downstream of the value and supply chains to which that entity is a party.

two court cases brought in Italy – modelled, respectively, on the *Urgenda* and *Milieudefensie* cases – in 2021[8]and in 2023[9].

While disputes such as those just referred to certainly attract media attention and public interest, it has been noted, however, that cases based on judgments such as *Urgenda* and *Milieudefensie* have not yet overcome, in many legal systems (including the Italian one), significant perplexities on the dual legal procedural and substantive levels, pertaining – for example – to the abstract possibility of judicial protection, the *locus standi* to bring a case and the main requirements of non-contractual liability (including the culpability of the defendant's conduct, the unfairness of the damages and the causal link between conduct and damages).

In particular, if it is undeniable that climate change is caused by and at the same time affects – to a varying degree – all persons in all legal systems, then in the absence of imposing precise regulatory obligations on individuals, it is no small task to recognise that certain claimants have a privileged and legally protected interest against certain defendants, as well as a causal link existing between them[10]. It is no less complex to imagine even an abstract possibility of judicial protection where the compensation for damages sought consists of an infungible act that encroaches on the sphere of legislative power[11].

[8] In June 2021, the environmental association A Sud and more than 200 other Italian claimants (including citizens and associations) sued the Italian State, represented by the President of the Council of Ministers, before the Court of Rome as part of a campaign called "*Giudizio Universale*". As a main claim, the claimants argued that the Italian State, by being negligently inactive in combating climate change (in particular, by disregarding the goals set forth in the Paris Agreement), would incur non-contractual liability against them pursuant to Article 2043 of the Italian Civil Code (in conjunction with rights based on the Constitution, treaties and legislative acts of the European Union, as well as the ECHR). On this basis, they requested that this liability be ascertained and, consequently, that the Italian State be ordered to pay specific compensation for damages (Article 2058 of the Italian Civil Code) by means of "*adopting every necessary initiative for the abatement, by 2030, of artificial national emissions of CO2-eq to the extent of 92% with respect to 1990 levels, or such other greater or lesser amount as may be ascertained*".

[9] In May 2023, the environmental organisations Greenpeace Onlus and ReCommon APS, together with 12 Italian citizens, brought an action before the Court of Rome against ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A. (the latter as controlling shareholders of ENI). On the basis of arguments similar to those put forward in the A Sud case, the claimants sought to establish the non-contractual liability of the defendants, pursuant to Articles 2043, 2050 and/or 2051 of the Italian Civil Code (in conjunction with Articles 2 and 8 of the ECHR), for any damage that the former have suffered or will suffer as a result of ENI's alleged inaction in pursuing the goals set out in the Paris Agreement. On this basis, the claimants requested that such liability be ascertained and, consequently, by way of specific compensation for damages, (*i*) an order that ENI reduce its scope 1, scope 2 or scope 3 greenhouse gas emissions by 45% by 2030 with respect to 2020 levels or any other measure deemed necessary to ensure, with respect to ENI, compliance with the goals set forth in the Paris Agreement, and (*ii*) an order for the MEF and CDP to adopt an operating policy to monitor ENI's effective pursuit of such goals. In addition to these claims for an infrangible duty of care, the claimants applied for indirect coercive pecuniary measures (pursuant to Article 614-*bis* of the Italian Code of Civil Procedure) for any subsequent breach, non-compliance or delay in compliance with the heads of order.

[10] Aspects which are not surprisingly put to the test in the important case *Liluya v. RWE*, pending before the German courts, whereby a person resident in Peru, the owner of a property threatened by the melting of an Andean glacier, claims a portion of the costs of damage limitation from the German energy multinational RWE, amounting to 0.47% thereof; *i.e.*, according to the percentage of global greenhouse gas emissions (from 1751 to 2010) attributed to RWE in a number of studies by the Climate Accountability Institute that have been published since 2014, which have proved to be extremely influential in the "third wave" of climate-related litigation because they make it possible to submit factual reconstructions of the causal link according to the parameter (not of the ordinary *condicio sine qua non* [a necessary condition], but rather) of the so-called market share liability.

[11] Lastly, it was against this very hurdle that the case of *A Sud* broke down at first instance, decided in the judgment of 26 February 2024 by the Court of Rome, in which the claims put forward by the claimants were declared to be inadmissible due to absolute lack of jurisdiction. The Court of Rome ruled, in particular, that "*decisions relating to the methods and timescales for managing the phenomenon of anthropogenic climate change* […] *fall within the sphere of powers of the political bodies and cannot be sanctioned in the present proceedings* [, in which] *the claimants essentially ask the Court to annul the measures, including primary and secondary regulatory measures* […] *that constitute the implementation of the political choices of the legislator and the government in order to achieve the aims undertaken at an international and European level (in the short and long term)*[,] *in infringement of a cardinal principle of the legal system represented by the principle of the separation of powers* […] *since any subjective right of citizens regarding the proper exercise of legislative power* […] *is excluded that the activity of exercising legislative functions cannot be disregarded*".

On the other hand, fewer such difficulties might be encountered in disputes that do not hinge entirely on innovative notions of non-contractual liability, but on the more or less creative reconsideration and valorisation of sustainability profiles within the framework of newly enacted or pre-existing sectoral regulations that had not previously been exploited for such purposes[12].

It is precisely disputes of this nature, which are brought against companies, that will be examined in the following paragraphs. Firstly, some sample types and examples of litigation will be examined (drawn mainly from foreign legal systems, owing to the fledgling stage of Italian case law on the subject), and then some overall considerations on some common trends and possible evolutionary lines will be made.

2. Litigation aimed at strengthening ESG policies or disclosures

Litigation proceedings that are aimed at enhancing defendant companies to take ESG factors into account in their business policies, due diligence and disclosure are clearly of particular interest.

One case stands out in this respect: that of *Notre Affaire à Tous e altri v. BNP Paribas S.A.*, brought by a number of environmental organisations before the Judicial Court of Paris (*Tribunal judiciaire de Paris*) in February 2023, which is based – in addition to Article 1252 of the French Civil Code governing non-contractual liability – on the 2017 French law on corporate sustainability due diligence[13]. This law, in amending the French Commercial Code, imposed on companies or groups exceeding certain size thresholds the obligation to adopt and implement a supervisory plan (*plan de vigilance*) containing "*mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle*". The writ of summons strategically advocates a synergetic and broad interpretation and application of the aforementioned provisions. In fact, on the one hand, the claimant organisations complain of methodological shortcomings in the supervisory plan prepared by BNP Paribas, complaining – for example – of an inadequate mapping of direct and indirect risks for the bank related to climate change, omitted or insufficient information on the bank's financing and investment flows in certain economic sectors (including fossil fuels), the failure to include scope 3 emissions, and an excessive use of references to other non-mandatory documents and policies. At the same time, however, the application classifies as a breach of French law the failure to incorporate, in BNP Paribas' supervisory plan, the goals set out in the Paris Agreement; and, conversely, asks the Judicial Court of Paris to order the bank to comply with a threefold alleged obligation to (*i*) refrain from any future financing or investment in favour of companies developing new activities in the fossil fuel sector, (*ii*) adopt and apply in its investments in place voting and shareholder engagement policies aimed at preventing new activities in the fossil fuel sector, and (*iii*) adopt and apply in its financing and investment activities any measures necessary to comply with the goals set out in the Paris Agreement.

---

[12] "[M]*any of the highest-profile climate change litigation cases have been based in pre-existing legal duties, such as obligations under constitutional, human rights, consumer protection, or tort law. In these cases, litigants are asking the courts to interpret how such well-established legal duties should be interpreted in the face of novel fact patterns involving climate change*" (J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, June 2023).

[13] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, which was discussed in **section 4.1** of Issue 3 of the Observatory.

No less ambitious is the lawsuit that was recently threatened by the association Milieudefensie against the ING group[14]. It is, however, not entirely clear here whether the claims formulated by Milieudefensie[15] will also be backed in law on the basis of sectoral regulations – as in the case of Notre Affaire à Tous – or rather by adopting the non-contractual approach previously adopted by the same association against Royal Dutch Shell[16].

Outwardly less disruptive, but no less significant in terms of its prospects for spreading to other jurisdictions, are a number of emblematic attempts by investors or shareholders to take legal action to direct the investment or financing policies of individual financial operators by exploiting remedies that are already available to them under the respective national sector laws.

This was the case, for example, in *Abrahams v. Commonwealth Bank of Australia*, decided in 2021 by the Federal Court of Australia. The claimants, who were shareholders of Australia's largest bank, applied in this case to inspect part of the bank's internal documentation relating to the financing of seven fossil fuel projects. To this end, they invoked the shareholders' right of inspection under Section 247A of the Corporations Act 2001, with the stated intention of scrutinising the bank's compliance with its own ESG due diligence policies. The Australian court upheld this claim, finding that the requirements of section 247A were met, namely that the request for inspection was made "*in good faith*" and "*for a proper purpose*"[17].

On the contrary, in the more recent case of *McGaughey e Davies v. Universities Superannuation Scheme Limited & Ors* the claimants were unsuccessful. The two claimants, university professors, had sued the directors of the management company of their pension fund, alleging that the latter had breached their duties of good management – prescribed by Sections 171 and 172 of the Companies Act 2006 – by retaining investments in fossil fuels in the fund despite their declared intention to make the fund carbon neutral by 2050. First the High Court of Justice, and subsequently the Court of Appeal in July 2023, dismissed the claimants' claim on the grounds that it did not meet the requirements that allow, under English company law, actions against directors brought by individual shareholders rather than by the company (so-called derivative actions). To this end, the Court noted in particular the absence of any proof of an actual loss suffered by the claimants as a result of the failure to disinvest from the fossil fuel sector.

[14] Milieudefensie sent a notice of liability to ING on 19 January 2024, which was answered by ING in a letter of reply dated 13 February 2024 signed by its Chief Executive Officer and its global head of sustainability.

[15] In this notice of liability, Milieudefensie formulates its claims against ING in these terms: "*1. ING sees to it that its climate policy is in accordance with the 1.5°C target of the Paris Agreement; 2. ING reduces its emissions by at least 48% CO_2 and at least 43% CO_2e in 2030 compared to 2019; 3. ING, in addition, ensures that it is not linked to adverse climate impacts of large business clients, such as:* [a.] *ING demands that all large corporate clients provide a good climate plan;* [b.] *ING ceases financing and supporting large corporate clients who do not have a good climate plan within one year;* [c.] *ING demands that fossil fuel clients stop fossil fuel expansion and draw up a good phase-out plan;* [d.] *ING ceases* new *financing and support for fossil fuel clients who continue fossil fuel expansion or who do not have a good phase-out plan;* [e.] *ING ceases* all *financing and support for fossil fuel clients who after a year still continue fossil fuel expansion or who do not have a good phase-out plan; and 4. ING engages in a conversation with Milieudefensie in order to properly give substance to the above-mentioned measures*".

[16] See page 4 above.

[17] There are also numerous disputes involving syndicated loans or investments in the fossil fuel sector by international or state-controlled financial institutions, such as the European Investment Bank (*ClientEarth Limited v. BEI*, 2019), the National Bank of Belgium (*ClientEarth Limited v Banque nationale de Belgique*, 2021) and UK export credit agencies (*Friends of the Earth Limited v. UK Export Finance e altri*, 2020) and South Korea (*Kang et al. v. K-SURE and KEXIM*, 2022).

3. Greenwashing litigation

If we now turn our attention to greenwashing litigation[18] within our national borders, applications regarding unfair competition tends to stand out. The leading and now famous Italian case is *Alcantara S.p.A. v. Miko S.r.l.*, in which the claimant company – a manufacturer of a microfiber product used in the automotive sector – applied for a precautionary measure against a competitor, requesting that the latter be prevented from disseminating advertising communications containing assertions on the green sustainability features of its product which (according to the claimant) were entirely generic and unproven. The Court of Gorizia, in November 2021, upheld this application for precautionary measures, by valorising – in application of the provisions under Italian Legislative Decree No. 145 of 2 August 2007[19]– the scope of Article 12 of the Code of Marketing Communication Self-Regulation[20].

In this respect, it is more than fair to expect a multiplication of Italian disputes hinging on green sustainability claims concerning products and services, following the publication in the Official Journal of the European Union on 6 March 2024 of Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information[21]. In parallel, the ordinary legislative procedure concerning the proposal for a directive on the substantiation and communication of explicit environmental claims (Green Claims Directive), submitted by the European Commission on 23 March 2023, continues.

With regard to the interplay between greenwashing and the financial sphere, while it is true that there are no Italian cases in this arena to date, the German precedent in *Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S. à r.l.* is certainly worth mentioning. This dispute was between a consumer representative organisation in the state of Baden-Württemberg and a Luxembourg-based asset management company that was a wholly owned subsidiary of Commerzbank of Germany, the promoter and manager of a mutual fund called "klimaVest". The claimant complained that, in online promotional communications concerning the product "klimaVest", the defendant had expressly stated that a certain number of tonnes of carbon dioxide would be saved for every EUR 10,000 invested in "klimaVest", without there being any relation between the amounts of CO_2 indicated on two different websites and, above all, without adequately clarifying that this was not a binding minimum value but merely a target. The consumer

---

[18] On the still uncertain definition and perimeter of greenwashing, the "*common high-level understanding*" expressed in June 2023 by ESMA, the EBA and the European Insurance and Occupational Pensions Authority (EIOPA), which (pending the publication of their respective final reports on the subject next May) qualifies greenwashing as "*a practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants*".

[19] *Implementation of Article 14 of Directive 2005/29/EC amending Directive 84/450/EEC on misleading advertising.*

[20] According to which "*Marketing communication claiming or evoking environmental or ecological benefits must be based on truthful, relevant and scientifically verifiable data. Such communication has to make it clear to which aspect of the advertised product or activity the claimed benefits relate*".

[21] The Directive, whose term of transposition is set for 27 March 2026, supplements the EU regulation of unfair business-to-consumer commercial practices by adding to the misleading commercial practices listed in Directive 2005/29/EC a series of practices related to the making of environmental claims (including generic ones), to information on the durability and reparability of products (including so-called planned obsolescence), to the advertising of characteristics already imposed by law, and to the use of sustainability labels that do not meet the transparency and credibility requirements set out in the directive under review (which, in particular, will only allow the use of sustainability brands based on a certification scheme or established by public authorities).

organisation's action, based on the provisions of the German Misleading Advertising Act[22], was upheld by the District Court of Stuttgart (Landgericht Stuttgart) in January 2022, with the defendant being ordered to cease and desist from the communications complained of by posting security and under penalty of civil pecuniary penalties.

Civil pecuniary sanctions relating to the marketing of mutual funds application, from the other side of the word occurred regarding the Australian counterpart of Consob in *Australian Securities and Investments Commission v. Vanguard Investments Australia Ltd*, which was brought before the Federal Court of Australia in July 2023 based on the Australian Securities and Investments Commission Act 2001. The ASIC argued that Vanguard misled the public about the characteristics of the securities included in a mutual fund called the "Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged)", by stating in various venues that securities of issuers operating in a range of environmentally unsustainable economic sectors (including fossil fuels) would not be included, or would be excluded from the fund, when in fact such securities were included and maintained in the fund. The case was adjourned for decision by the Federal Court of Australia at a hearing on 8 March 202[4].

In correlation with the two cases just examined, it is worth mentioning the focus given by the European Securities and Markets Authority ("**ESMA**") to regulating the use of terms related to the ESG sphere or sustainability in the names of investment funds. Indeed, while the consultation on the subject – which closed on 20 February 2023 – was followed by a postponement of the formal adoption of the relevant guidelines, in the communication announcing this postponement, the ESMA envisaged a strengthening of the sustainability requirements imposed on intermediaries[23].

4. ESG backlash litigation

In conjunction with litigation aimed, directly or indirectly, at the pursuit of ESG purposes, recent foreign – in particular, US – practice provides and perhaps anticipates examples of litigation designed, directly or indirectly, to *counter* the pursuit of ESG purposes.

In this respect, important precedents concerning the annulment of regulatory acts[24] are now accompanied by civil actions focusing, for example, on the alleged compensation for lower returns

[22] *Gesetz gegen den unlauteren Wettbewerb* (UWG).

[23] *"In the consultation paper, ESMA had proposed the introduction of a threshold of 50% in sustainable investments for the use of sustainability-related words in funds' names. ESMA no longer considers that this threshold should be retained. Following the consultation, ESMA considers it more appropriate that sustainability-related terms in funds' names should be used along the following lines: the fund should (1) apply the 80% minimum proportion of investments used to meet the sustainability characteristics or objectives, (2) apply the Paris-aligned Benchmark (PAB) exclusions* [referred to in Article 12(1)(a) to (g) of the Delegated Regulation (EU) 2020/1818, editor's note]*, and (3) invest meaningfully in sustainable investments defined in Article 2(17) SFDR, reflecting the expectation investors may have based on the fund's name"*.

[24] In cases *State of Utah et al. v. Walsh e United States Department of Labor* (United States District Court for the Northern District of Texas, 2023) and *Braun e Luehrs v. Walsh* (United States District Court for the Eastern District of Wisconsin, 2023), numerous states and citizens of the USA have challenged the legality of the regulatory measure *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* (adopted by the US Secretary of Labour in December 2022) that – as part of the Employee Retirement Income Security Act of 1974 (ERISA) – has interfered with the duties of pension fund managers by allowing them, *inter alia*, to consider for the purposes of their investment decisions "[r]*isk and return factors* [which] *may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action*". The claimants invoked a number of profiles of unlawfulness centred on the alleged arbitrariness and unreasonableness of a regulatory intervention which – according to them – would sacrifice on the altar of ESG goals the guiding principles of the protection and return of the retirement savings of 152 million US workers, without providing any objective reassurance as to the adequacy of future financial returns and the transparency of managers and recipients of future investments.

of pension funds that have been geared towards greening[25], on the alleged exclusion of shareholders proposals on ESG matters from company meetings[26], and on accusing the world's largest asset manager of misleading the investing public by implying that its regard for ESG purposes is less extensive than it actually is (so-called "greenhushing")[27].

5. Concluding observations

The value of the aforementioned precedents intended as - naturally, non-exhaustive – terms of comparison for possible legal developments is now reflected, at EU level, in the detailed disclosure obligations prescribed by virtue of Regulation (EU) 2019/2088 (Sustainable Finance Disclosure Regulation o "**SFDR**")[28] and of Directive (EU) 2022/246 (Corporate Sustainability Reporting Directive or "**CSRD**")[29].

Of utmost interest in this respect is the proposal for a European Directive on corporate sustainability due diligence (or CSDDD)[30], which is proceeding through the legislative process despite having suffered a major setback in the Council last February[31].

Such regulatory frameworks, if and to the extent correctly complied with, could in abstract mitigate the risk of ESG litigation. At the same time, however, due to the fact that the exact boundaries of the obligations imposed on operators are not always timely and precise, there is the risk of ESG litigation centred precisely on the correct interpretation and the correct way of complying (if not on the very possibility of operators complying) with EU provisions[32].

Increasingly, EU regulatory developments, which have already been transposed into Italian law, heighten the interest in potential ESG litigation brought through collective redress mechanisms, by – for example – groups of investors, consumers or shareholders.

[25] In *Wong et. al v. New York City Employees' Retirement System et. al.* (Supreme Court of the State of New York, 2023), current and future beneficiaries of New York City's public employee pension schemes sued their managers, complaining about the latter's decision (taken as of 2021) to progressively divest from the fossil fuel sector in favour of green investments. According to the claimants, such a decision would be unlawful because it would conflict with the fiduciary duties imposed on the matter by common law and New York State law. This would justify the related claims for (*i*) an order that the managers refrain from pursuing that investment policy, (*ii*) the appointment of an independent third party to monitor compliance with that order, and in any event for (*iii*) an order that the beneficiaries be compensated for any reduction in their retirement benefits resulting from the implementation of the challenged decision.

[26] In *Exxon Mobil Corporation v. Arjuna Capital, LLC* (United States District Court for the Northern District of Texas, 2024), Exxon Mobil asked a federal court to exclude a shareholder proposal for a more stringent scope 1, scope 2 and scope 3 emissions reduction plan for the company from the ordinary shareholders' meeting called to approve the 2023 annual financial statements ("*Shareholders support the Company, by an advisory vote, to go beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarize new plans, targets, and timetables*"). According to Exxon Mobil, such a proposal could be excluded under Rule 14a-8, adopted by the Securities and Exchange Commission (SEC), as it concerned "*ordinary business operations*" of the company. The defendant shareholders have since withdrawn their proposal, but it appears that Exxon Mobil intends to continue with its action in order to obtain clarity for any future similar cases.

[27] See Reuters, *Tennessee Sues BlackRock Citing 'Misleading' ESG Strategy*, 18 December 2023.

[28] For an examination of the SFDR and the relevant regulatory technical standards (RTS), please refer **section 4** del Issue 2 of the Observatory.

[29] For an examination of the proposed CSRD, and the relevant *European Sustainability Reporting Standards* (ESRS) please refer to **section 3** of Issue 2 of the Observatory.

[30] For an examination of the proposed CSDDD, please refer to **section 4** of Issue 3 of the Observatory.

[31] See Reuters, *Panel of EU Lawmakers Backs Watered Down Supply Chain Audit Law*, 26 March 2024.

[32] On this subject, see, for example, C. Higham *et al.*, *Climate Change Law in Europe: What Do New EU Climate Laws Mean for the Courts?*, March 2023.

The procedural tools available in the Italian legal system for this purpose now include, in addition to the class action and the collective injunction action under the Italian Code of Civil Procedure[33], the representative action for the protection of the collective interests of consumers introduced in the Italian Consumer Code[34] by Italian Legislative Decree No. 28 of 10 March 2023, transposing Directive (EU) 1828/2020. In this regard, the circumstance that class actions and actions for injunctions do not (any longer) presuppose the title of "consumer" or "user" on the part of the claimants but are addressed to each case for the protection of "*homogeneous individual rights*" (Article 840-*bis* of the Italian Code of Civil Procedure) of natural persons or entities proves to be of potentially crucial importance. This new and broader scope of lawfulness, together with the regime of mandatory advertising and the possibility of subsequent adherence that characterise such proceedings, is capable of accentuating their likelihood and burdensomeness for the defendant companies. This is all the more so in a context where there is no shortage of foreign examples of ESG class actions, emblematically represented in US greenwashing lawsuits brought against listed companies.

Finally, it is worth highlighting how the cross-border nature of ESG litigation is not limited to the bringing of proceedings based on foreign precedents (as the example of *Urgenda* and *Milieudefensie* demonstrates), but is reflected in an increasingly lively interest in the intersections – still largely to be explored – between ESG litigation and the profiles connected with applicable law, the choice of competent court (including the problem of forum shopping), alternative dispute resolution mechanisms (including arbitration), bilateral investment treaties[35] and third-party litigation funding.

***

UPDATES

1. The draft Italian Legislative Decree transposing the CSRD

18 March 2024 marked the end of the consultation by the Italian Ministry of Economy and Finance (Treasury Department) opened on 16 February 2024 on the draft legislative decree aimed at transposing the CSRD into Italian law[36] (the "**Draft Decree**"), which is the subject of delegation in the European Delegation Act 2022-2023.

It should be noted that, pursuant to Article 5 of the CSRD, its transposition by the Member States must take place by 6 July 2024.

In the Draft Decree, "sustainability reporting" replaces "non-financial reporting" – with respect to

[33] Regulated, respectively, by Articles 840-*bis* to 840-*quinquiesdecies* of the Italian Code of Criminal Procedure, and 840-*sexiesdecies* of the Italian Code of Criminal Procedure.

[34] Italian Legislative Decree No. 206 of 6 September 2005, Articles from 140-*ter* to 140-*quaterdecies*.

[35] With regard to these last two issues, please note the *Report on Use of ESG Contractual Obligations and Related Disputes*, published in October 2023 and carried out by the ESG sub-committee within the Committee on Arbitration of the International Bar Association (IBA).

[36] For an analysis of CSRD and the relevant European Sustainability Reporting Standards (ESRS), please refer to **section 3** of Issue 2 of the Observatory.

which it has broader and more specific content – and becomes an integral part of the management report. The Draft Decree also contains a provisional regulation of the principles for the statutory audit of sustainability reports, while awaiting the guiding principles to be adopted by the European Commission by 1 October 2026[37].

2. *The Draft Guidelines on Enforcement of Sustainability Information of the ESMA*

15 March 2024 marked the conclusion of the consultation on the Draft Guidelines on Enforcement of Sustainability Information, published by the ESMA on 15 December 2023 in compliance with Article 28d of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "**Transparency Directive**"), introduced by the CSRD.

The Draft Guidelines developed by ESMA aim to promote a strong and uniform supervisory approach by national competent authorities to sustainability disclosures made by companies falling under the Transparency Directive and required to publish sustainability reports under the CSRD.

The final Guidelines are expected to be published by the third quarter of 2024.

3. *The Bank of Italy's publication on sustainability in corporate meetings in France, Germany and Italy*

On 16 February 2024, the Bank of Italy published a new issue of the series "*Markets, Infrastructures, Payment Systems* titled *Sustainability at shareholder meetings in France, Germany and Italy*, which investigates the way ESG factors were addressed in the 2021 and 2022 shareholders' meetings of leading non-financial listed companies based in France, Germany and Italy[38].

This paper shows that ESG factors surfaced at all shareholders' meetings in the three countries considered, albeit with varying emphasis, mainly through asking direct questions to directors. Shareholders mainly focused on the company's environmental policy, including transition plans, alignment with international climate agreements, and the effects of business activities on the environment. As for social issues, the attention was largely on gender equality in the workforce, human rights, and the protection of health and wage conditions. As for corporate governance, there was a recurring interest in gender equality in management bodies, as well as in the opportunities to attend shareholder meetings remotely introduced during the pandemic.

With specific reference to Italy, the most frequent shareholders' meeting questions related to corporate choices on remuneration and compliance with codes of conduct.

[37] The Draft Decree provides that such principles at the national level – drawn up with the cooperation of supervisory authorities, sector associations and professional bodies – are to be adopted by the Italian Minister of Economy and Finance after having consulted Consob. The Draft Decree also provides that, until such adoption and in cases of necessity and urgency, the principles and procedures may be governed by Consob's own regulations.

[38] For 2021, the analysis looked at the entire sample of companies, while for 2022 it focused on companies in the sectors most exposed to the risk of climate transition and the effects of geopolitical tensions on energy supply.

4. The provisional agreement between the Council and the European Parliament on ESG rating activities

On 5 February 2024, the Council of the European Union and the European Parliament reached provisional agreement on the proposal for a regulation on the transparency and integrity of ESG rating activities of companies or investments.

The main aspects of this proposal can be summarised as follows:

(i) unitary ESG ratings will be possible for environmental (E), social (S) and governance (G) factors, as well as separate ratings for each factor;

(ii) ESG rating providers established in the EU will have to be authorised by ESMA, will be subject to its supervision and will have to comply with specific transparency requirements;

(iii) SG rating providers established outside the EU, who wish to operate in the EU, will have to have their ESG ratings endorsed by an ESG rating provider authorised in the EU, obtain recognition by the ESMA based on quantitative criteria, or be established in a country benefiting from an equivalence decision by the ESMA;

(iv) a simplified, optional and temporary (three-year) registration regime will be introduced for small ESG rating providers and groups;

(v) the SFDR will be amended so that financial market participants and financial advisors may use ESG ratings in their marketing communications only if accompanied by the online publication of information on the methodologies underlying such ratings.

5. The report of the Platform on Sustainable Finance on market practices for climate transition

On 29 January 2024, the Platform on Sustainable Finance – an advisory body of the European Commission established under Article 20 of Regulation (EU) 2020/852 (the "**Taxonomy Regulation**") – published a report summarising market practices, financial products, instruments and initiatives used by financial sector players to transition their business models and investments.

This report shows how EU regulatory requirements for sustainable finance are used by operators in defining their transition strategies, structuring transactions and reporting on their sustainability commitments, even going further than mere regulatory compliance. The report thus serves, in turn, as a tool to support operators' transition efforts.

6. The BCE's report on risks from misalignment of banks' financing with the EU climate objectives

On 23 January 2024, The European Central Bank published a report on decarbonisation transition risks emerging from the credit portfolios of Eurozone banks.

The main observations made in this report can be summarised as follows:

(i) decarbonisation transition risks have a significant impact on the credit portfolios of credit and financial institutions, not least because of the increase in credit risks linked to the rising cost of energy and regulatory compliance;

(ii) as part of a non-homogenous transition, such transition risks can be assessed using the Paris Agreement Capital Transition Assessment (PACTA), methodology, which measures the degree of alignment between certain financial portfolios and certain climate targets;

(iii) in the context of a non-homogeneous transition, such transition risks can be assessed using the methodology that measures the degree of alignment between certain financial portfolios and certain climate targets;

(iv) the use of the PACTA methodology shows significant misalignments between the credit portfolios of Eurozone banks and the climate targets pursued by the European Union;

(v) further analysis shows that such misalignment largely stems from the funding of counterparties that fail to reduce their carbon footprint;

(vi) Eurozone banks can adopt the approach described above to develop their transition risk assessment capabilities and meet the disclosure requirements of the Implementing Regulation (UE) 2022/2453[39].

7. *The provisional agreement between the European Council and the European Parliament on ESG prudential supervision and the EBA's Draft Guidelines on the management of ESG risks*

On 6 December 2023, the Council of the European Union and the European Parliament reached provisional agreement on the proposal of a directive amending Directive 2013/36/EU on supervisory powers, sanctions, third-country branches and environmental, social and governance (ESG) risks.

This proposal envisages, inter alia, the inclusion in Directive 2013/36/EU of a new Article 87a on ESG risks, paragraph 5 of which mandates the European Banking Authority ("**EBA**") to adopt guidelines on the identification, measurement, management, monitoring and assessment of ESG risks by credit institutions and investment firms.

[39] In this respect, please see **section 3** of Issue 3 of the Observatory.

In response to this mandate, on 18 January 2024 the EBA opened a consultation on the Draft Guidelines on the management of ESG risks. The Draft Guidelines set out, in particular: (*i*) minimum standards and reference methodologies for the identification, measurement, management and monitoring of ESG risks, on the basis of which supervised bodies should develop a strong approach to the management of such risks in the short, medium and long term (including a time horizon of at least 10 years); (*ii*) quantitative and qualitative criteria for the assessment of the impact of ESG risks on the solvency of institutions in the short, medium and long term; and (*iii*) the content of the plans to be prepared by the management body – pursuant to Article 76(2) of the proposed directive – to monitor and address financial risks stemming from ESG factors.

This consultation will be open until 18 April 2024.

8. *Assonime's guidelines on voluntary sustainability reporting for companies listed on Euronext Growth Milan*

On 12 January 2024, the Association of Italian Joint-Stock Companies (Assonime) published *Guidelines for the sustainable reporting of companies listed on Euronext Growth Milan*, which – in order to support these companies and at the same time foster the development and sharing of good practices – contain recommendations on the content and method of voluntary sustainability reporting.

Indeed, it should be pointed out that companies listed on Euronext Growth Milan[40] are not required as such to comply with the CSRD's corporate sustainability reporting obligations, and that most of them have neither the status of public interest entity nor the size that would make these obligations applicable to them.

The guidelines drawn up by Assonime are divided into four sections: (*i*) general principles for drafting sustainability reports; (*ii*) content of the sustainability report; (*iii*) report drafting process and governance profiles; and (*iv*) positioning of the sustainability report.

9. *The European Commission and ESA consolidated Q&A document on the SFDR and the Delegated Regulation for Sustainability*

On 12 January 2024, the EBA, the ESMA and the European Insurance and Occupational Pensions Authority (EIOPA) – jointly, the "European Supervisory Authorities" or "**ESAs**" – published a consolidated question and answer (Q&A) document relating to the SFDR and the Delegated Regulation (UE) 2022/1288 (the "**Delegated Regulation for Sustainability**"). This document combines the answers given by the European Commission to questions concerning the interpretation of the SFDR (published as of 14 July 2021) and the answers given by the ESAs to questions concerning the application of the Delegated Regulation on Sustainability (published on 17 November 2022).

The document consists of eight sections, respectively on: (*i*) the scope of application of the SFDR; (*ii*) the definition of "sustainable investment"; (*iii*) the concept of "current value of investments" for

[40] Euronext Growth Milan is a multilateral trading facility primarily dedicated to small and medium-sized companies and companies with high growth potential.

the purpose of disclosing the so-called principal adverse impacts (or "**PAIs**") of investment decisions on sustainability factors; (*iv*) disclosure on PAIs; (*v*) financial product disclosures; (*vi*) multi-option products; (*vii*) disclosure on the degree of eco-sustainability of investments; and (*viii*) financial advisors and intermediaries under the so-called execution-only regime.

10. The Bank of Italy's analysis of action plans for the integration of climate and environmental risks into the operations of less significant institutions and non-banking intermediaries

On 28 December 2023, the Bank of Italy published two reports – one on the so-called less significant institutions and another on non-banking intermediaries[41] – aimed, on the one hand, at analysing the action plans for the integration of climate and environmental risks in business processes developed by operators for the three-year period 2023-2025, and, on the other hand, at updating the good practices for aligning with supervisory expectations on climate and environmental risks issued in April 2022 by the Bank of Italy itself.

The analysis conducted by the Bank of Italy shows, as far as less significant institutions are concerned, a mixed picture, but overall characterised by a low level of alignment with supervisory expectations (given the lack of start-up, or the merely preliminary stage, of most ESG initiatives); with regard to non-banking intermediaries, instead, it highlighted a general awareness of the growing strategic and operational relevance of climate and environmental risks for the sustainability of their business models, but with overall margins for improvement in action plans in terms of both content and implementation timescales.

11. The first delegated regulation on ESRS

On 22 December 2023, Delegated Regulation (EU) 2023/2772 was published in the Official Journal of the European Union, supplementing Directive 2013/34/EU (the so-called Financial Statements Directive) with regard to the European Sustainability Reporting Standards (ESRS), adopted by the European Commission on 31 July 2023 and examined in **sections 3.2 and 3.3** of Issue 2 of the Observatory.

12. The EBA report and opinion on green loans and mortgages

On 15 December 2023, the EBA published a report and an opinion in response to the *call for advice* of the European Commission dated 22 November 2022, with the purpose of defining green loans and mortgages, aimed at retail and small and medium-sized business borrowers, through an analysis of the market for such instruments[42].

In its opinion, the EBA notes that the definition of green loans and mortgages should build, to the

[41] These include, but are not limited to, asset management companies (SGRs), collective investment schemes with variable capital (SICAVs), collective investment schemes with fixed capital (SICAFs), investment firms and financial companies.

[42] The advisory function of the EBA in this matter was already envisaged in the Communication *Strategy for Financing the Transition to a Sustainable Economy* published by the European Commission on 6 July 2021.

extent possible, on existing market practices and standards in line with the EU's environmental goals. With regard to green loans, the EBA also notes that – in the current transitional phase and until markets have reached a higher level of maturity – such market practices and standards should be taken into account even if they are not specifically based on the European taxonomy. On the other hand, as regards green mortgages, the EBA recommends that this concept be integrated into Directive 2014/17/EU in terms of detail consistent with the broader EU regulatory framework on sustainable finance.

13. The Final Report of the ESAs on the RTS for the implementation of the SFDR

On 4 December 2023, the ESA published the Final Report containing the results of the consultation launched on 12 April 2023[43] on proposed amendments to the regulatory technical standards ("**RTS**") referred to in the Delegated Regulation for Sustainability[44].

On the basis of the responses received, the ESAs amended their proposed amendments to the RTS with the aim of: (*i*) expanding the list of social indicators for the disclosure of PAIs; (*ii*) refining the content of a number of other indicators related to PAIs and their definitions, methodologies and presentation modalities; and (*iii*) clarifying the scope of the RTS with respect to GHG emission reduction targets. In the Final Report, the ESAs also proposed some improvements and simplifications to the financial product disclosure templates in the SFDR.

14. The ESMA statement on the definition of the "do no significant harm" principle within the EU regulatory framework on sustainable finance

On 22 November 2023, the ESMA published a statement aimed at clarifying the so-called "do no significant harm" (or "**DNSH**") principle, which is incorporated in multiple EU regulatory acts on sustainable finance, including the Taxonomy Regulation, the SFDR and Regulation (EU) 2016/1011 (the so-called Benchmark Regulation).

In this statement, among other things, the ESMA points out that the DNSH principle is reflected, with reference to the Taxonomy Regulation and the SFDR, in the technical screening criteria[45] and in the RTS[46], respectively.

15. Delegated Regulation (EU) 2023/2485

On 21 November 2023, Delegated Regulation (EU) 2023/2485 was published in the Official Journal of the European Union, supplementing the technical screening criteria set out in Delegated Regulation (UE) 2021/2139 (the "**Climate Delegated Act**")[47] by broadening the range of economic activities that can be considered environmentally sustainable in relation to the first two

[43] Which was accounted for in **section 4.4** of Issue 2 of the Observatory.
[44] In this respect, please see **section 4** of Issue 2 of the Observatory.
[45] In this respect, see **section 1** of Issue 2 of the Observatory and **section 15** of this issue.
[46] Please see **section 13** of this issue.
[47] For an analysis of the Climate Delegated Act, please refer to **section 1.2** of Issue 2 of the Observatory.

environmental objectives set out in the Taxonomy Regulation (climate change mitigation and climate change adaptation)[48].

[48] The additional economic activities identified by the European Commission with regard to climate change mitigation relate to a large extent to the transport sector and its value chains; with regard to climate change adaptation, these are economic activities aimed at, *inter alia*, the sustainable use and protection of water and marine resources, the transition to a circular economy, the prevention and reduction of pollution or the protection and restoration of biodiversity and ecosystems.

The Observatory was drafted by Michele Crisostomo and Federico Morelli
in collaboration with the Dedicated Group on Sustainable Finance composed of
Alessandra Davoli (*coordinator*) | Nicolò Orlich (*contact person*)
Martina Baldi | Caterina Guitti | Nicolò Piccaluga | Giulia Sforza | Lucrezia Vincenzi

Should you wish to raise any questions or provide your comments on Sustainable Finance issues, please contact the practitioners listed above or send an e-mail to

CRCCDFinanzaSostenibile@crccdlex.com

The previous issues of the Observatory are available at the following links:
Issue 1 (March 2021)
Issue 2 (November 2023)
Issue 3 (December 2023)