QUARTERLY POLICY BRIEF
SEPTEMBER 2022

SEPARATING THE '**GREEN**' FROM '**GREENWASHING**':

SOCIAL WAR ON THE 'PASSING' ANTI-ESG TREND

Featuring expert views from DLA PIPER

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To make the Policy Brief even more readable, we've adapted the structure; the main regulatory developments can be **accessed by clicking on the links provided in the boxes.** You can continue to monitor these and other developments with **Datamaran.**

EXECUTIVE SUMMARY

This Quarter we see policy-makers across jurisdictions, focusing on separating the **'green'** from **'greenwashing'** (EU GBS: new measures to reduce greenwashing; ESMA's Proposal of EU ESG Benchmark Label as a supporting tool against greenwashing). We also see the concept of what can and cannot be construed as 'green' evolving (EP backing labeling of gas & nuclear investments as 'Green'). This urgent need of separating 'green' from 'greenwashing' is propelled by the introduction of various **Standards (Exposure Drafts)**, **Proposed Rules**, and **Recommendations** by organizations such as **EFRAG, ISSB, US SEC, the TCFD** and the like, that form the basis for the forthcoming ESG Standards. A recent Harvard study shows the proliferation of greenwashing and its direct detrimental impact on businesses and consumers alike. It finds that **42%** of **green claims** by companies in Europe were **exaggerative, deceptive or false**. To tackle this, **UN SSE** notes that nearly **70 exchanges** are now **promoting TCFD's Recommendations that aim at fostering transparency, accountability, and reliability of ESG information**. As highlighted last Quarter, the focus has now shifted towards not treating ESG as a '**single**' risk but rather as **separate** Environmental (E), Social (S), and Governance (G) risks. While this trifurcation of ESG is gaining prominence, the issue of eradicating greenwashing is surfacing for each of these categories of risks separately.

As the efforts for eradicating greenwashing gain momentum, **it goes on to expose the hidden underbelly of the unbalanced treatment of 'S' risks in the EU when compared to its US counterpart**. The **EU remains committed in its wave of encouragement** for tackling the E, S and G risks that **foster trust** and **promote reliability in the ESG data**. However, the **US** (as a whole) has gone through a downward spiral. One example of this can be cited using the recent WEF Report that highlights the growing concerns around **'social risks' surrounding women's rights** and identifies that it would take the world **132 years to close the global gender pay gap**. The **US** has shown **"confusion"** in tackling its **'S' risks**. On the one hand, we see the Republican-led US states **unleash a** policy push on Wall Street punishing them for taking stance on issues such as **climate change**, **diversity** and **other allied social risks**, the introduction of the No ESG at TSP Act by the **US Congress** ('the anti-woke laws'), and the **overturning** of the landmark ***Roe v Wade***, that once **affirmed** the **constitutional right to abortion for women**, leaving the right to abortion merely discretionary as per each States autonomy (a massive step backwards). On the other hand, we see the **SEC** introducing **some landmark Proposed Rules to tackle greenwashing and promote sustainability reporting**; the US Senate passing the Inflation Reduction Act of 2022 **(effective 16 August 2022) that provides a flagship economic package (largest climate investment in US history), tax and healthcare**; and **President Biden's** Executive Order to protect reproductive healthcare services, showing glimmers of hope for the USA's commitment to effectively tackle the E, S and G risks. Some anti-ESG developments and several positive ESG developments highlight the need for more attention toward 'S' **as corporate leaders continue to face demands that they speak out on topics of social importance, at a Strategic level, these risks are far from being ignored** (Agenda).

One way of tackling 'greenwashing' is by applying the principles of **'Double Materiality'** that now more than ever focus on **reporting** and **making disclosures** at an ***'entity level'*** of what is ***'materially significant'* for businesses both in terms of the ESG impacts of the business as well as ESG impact on the business.**

In this issue, we track this separation and highlight the evolving nature of ESG reporting and disclosure obligations across jurisdictions, with a **special emphasis on the EU and US**. While support is found in the new understanding of **Double Materiality** and the **stress on reporting & disclosure obligations at an *'entity level'*** various critics and stakeholders still struggle to understand what this means for their business, how to balance the building reporting obligations while remaining competitive (cost-benefit analysis), and the growing concerns of the lack of harmonization (ESMA's SFDR queries to the EC). With the introduction of numerous standards, businesses are struggling to cope with what to follow, how to eradicate duplicity of information and what to report on so as to reap the benefits of making material disclosures. There is an insistent pressure by regulators to amongst others, make disclosures surrounding Scope 3 emissions (EC's Green Deal: phasing down GHG and ozone-depleting substances, UK FCA's response to ISSB Exposure Drafts) and nature-based disclosures (The TNFD Nature-Related Framework Beta v0.2, launch of the TNFD's Nature-related Data Catalyst, and PBAF's Biodiversity Framework) as climate continues to trigger a host of environmental risks (Germany's 'Global Shield'; UNSSE's Reporting Guide to tackle climate risks-1.5 degrees warming).

KEY TAKEAWAYS THIS QUARTER:

- Even in the wake of some anti-ESG developments (limited) in the USA, **support for ESG is reinforced** by the **SEC with its landmark (Proposed Rules)** as the E, S, and G risks and opportunities continue to garner support from the EU in the form of the **new ESRS** and the rest of the world with global ESG developments.
- **Overturning** ***Roe v Wade*** has brought to the forefront the importance of **'social'** risks that **corporate leaders cannot ignore anymore** as the social war continues to strengthen ESG disclosures and reporting. While ESG is **not perfect** but is **necessary** for businesses to acknowledge to stay competitive in the market.
- Executives should focus on **entity-level disclosures** of what is **'materially significant'** for the business, i.e., **ESG impacts of the business as well as ESG impact on the business.**

Questions Corporate Leaders should be asking in the wake of the emerging Social risks include:

1. What is my company's response to and strategy for managing the E, S and G risks and opportunities? **(strategy should be prioritised over metrics).**
2. What measures are in place to tackle 'social risks' in my company? For example, **the employee benefits plan** being offered regarding the **physical and mental health & well-being of employees**, their reproductive health (not just abortion), but also fertility benefits, parental leave, **diversity & inclusion policy, human rights protection** across the supply chain and so on.
3. What is the **source** of my company's **ESG data** and what are the **supervisory measures** in place to ensure transparency and tackle greenwashing?
4. Is the company performing a **'double materiality analysis'** and **tracking, preparing** and **implementing** existing and forthcoming ESG regulations?

For the sake of readability, we have divided our Policy Brief into the Following Sections:

- SECTION 1: ESRS, CSRD DEVELOPMENTS, AND SEC's (PROPOSED) RULES

(Section 1 provides developments in the ***EU*** *and* ***US*** *that promote green investments and tackle greenwashing)*

- SECTION 2: GREEN DEVELOPMENTS, GLOBAL STANDARDS, AND BEST PRACTICES

(Section 2 provides critical ***Supranational & Country-Level*** *green and sustainable developments)*

SECTION 1. ESRS, CSRD DEVELOPMENTS, AND SEC's (PROPOSED) RULES

At the heart of these developments is the **ambition of separating the 'green'** from **'greenwashing'**. These developments are divided by jurisdiction and are discussed below:

EU
I. EFRAG STANDARDS (ESRS)
These Exposure Drafts are critical as they **lay the foundation** of the **forthcoming EFRAG Standards** that targets the various facets of the E, S and G risks and opportunities. These (draft) Standards promote **'green investments'**. They are based on the (draft) CSRD, which **reached a political agreement** between the European Parliament and the Council on **30 June 2022, with the aim of promoting sustainability reporting and tackling greenwashing**. The revised CSRD **amends four existing legislations**, these are the (a) Accounting Directive; (b) Transparency Directive; (c) Audit Directive; and (d) Audit Regulation. The CSRD now expects to **strengthen and standardize ESG information collection and disclosure on many dimensions, i.e., climate, due diligence, value chain, social and human rights** Exemption of subsidiaries is now possible, i.e., if the mother company reports consolidated information but not for listed subsidiaries. The **Sustainability Report** will be a **dedicated section of the Management Report (Article 19(a)1)**. There are **three layers of Disclosure Requirements (DRs)** under these Standards, these are (1) **sector-agnostic**; (2) **sector-specific**; and (3) **entity-specific**. The current Standards are only cross-cutting and sector-agnostic. The EU expects the first set of EFRAG's standards to be tentatively ready by **November 2022**, and its **adoption** by the **EC is expected by 2023**. A **second set for SMEs** and **sector-specific aspects** is expected for **2024**.

HIGH-LEVEL ANALYSIS OF THE ESRS:

Overall Architecture: a total of 11 new Standards have been introduced. They are designed to ensure sustainability information is reported in a careful and articulated manner following the **3 x 3 structure**. The **three** reporting areas in relation to sustainability reporting are-

- **Strategy, including**-(a) strategy and business model; (b) governance and organisation; and (c) materiality assessment.
- **Implementation measures, covering**-(a) policies, and targets; (b) actions and action plans, and allocation of resources.
- **Performance metrics**-when reporting on performance the undertaking shall provide key indicators in relation to its **impacts, risks** and **opportunities** and **explain** how it delivers against its related policies and targets. It should reflect the entity's trajectory based on its past performance and in relation to its forward-looking perspective. Reporting on performance measurement refers to the **current achievements** (qualitative and/or quantitative) and **results** (performance-oriented) of the undertaking's operations and activities based on metrics/KPIs.

Three Topical Sector-Agnostic Standards, have been introduced these are-

1. **Environmental Standards (E):**
   (a)ESRS E1 Climate Change;
   (b)ESRS E2 Pollution;
   (c)ESRS E3 Water and Marine Resources;
   (d)ESRS E4 Biodiversity and Ecosystems; and
   (e)ESRS E5 Resource Use and Circular Economy.

Total: 5 new (draft) Standards for environmental matters..

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2. **Social Standards (S):**
   (a)ESRS S1 Own Workforce;
   (b)ESRS S2 Workers in the Value Chain;
   (c)ESRS S3 Affected Communities; and
   (d)ESRS S4 Consumers and End Users.

Total: 4 new (draft) Standards for the social risks.

3. **Governance Standards (G):**
   (a)ESRS G1 Governance, Risk Management and Internal Control; and
   (b)ESRS G2 Business Conduct.

Total: 2 new (draft) Standards for the governance risks.

Key Points on the ESRS E1 Climate Change

A provisional comparison by EFRAG of the new E1 with the IFRS S2 and SEC's Climate Rule shows that they **cover congruent elements of climate reporting including**-(1) climate-related governance at different oversight levels; (2) processes for identifying, assessing, and managing climate-related risks and opportunities, and integration in risk management; (3) effects of climate-related risks and opportunities on strategy and business model; (4) financial effects of climate-related risks and opportunities; (5) capital deployment/resources;(6) reconciliation with line items in financial statements; (7) resilience in business model and strategy scenario analysis; (8) transitional plans, plans and actions to manage risks; (9) internal carbon prices; (10) GHG emissions Scope 1 and Scope 2; (11) GHG emissions Scope 3; (12) GHG intensity; (13) carbon credits.

In addition, the E1 also covers the following-

- impacts of the undertaking on climate change;
- more comprehensively climate change mitigation and adaptation policies and action plans;
- energy-related performance measurements (IFRS S2 only in sector metrics);
- GHG removal; and
- (optional) avoided emissions.

Making the ESRS E1 more comprehensive.

The UN-convened Net-Zero Asset Owner Alliance, a group of **74 leading investors with $10.6 trillion in assets** have already welcomed the ESRS E1.

Two Cross-cutting Standards, have been introduced these are-

1. ESRS 1 General Principles; and
2. ESRS 2 General, Strategy, Governance and Materiality Assessment Disclosure Requirements.

What is Next?

Two New Standards are coming later (still being developed), these are-

1. Sector-specific Standards; and
2. SMEs proportionate Standards.

ESMA's Response to the New ESRS: strongly supports the 'Materiality' assessments

In **August 2022**, ESMA published its response to the new ESRS, together with an Annex containing technical remarks on the details of the draft standards. The response focuses on **two key areas**-(1) it highlights its support for a **strong Materiality assessment but expresses its concern** with the suggested **'rebuttable presumption'** approach; (2) it **encourages EFRAG to keep engaging** with the **ISSB** to **ensure further alignment of the ESRS** and the **IFRS Sustainability Standards** to **benefit both users of sustainability reporting** and the **companies that prepare the reporting**.

CLICK HERE TO VIEW THE DRs UNDER ALL THE EXPOSURE DRAFTS (ESRS)

II. CSRD: CHANGES TO REPORTING REQUIREMENTS FOR COMPANIES

[**The first set of standards to be* ***adopted*** *by* ***30th June 2023***]

TRANSITION PLANS	New requirement to report on **"implementing actions and related financial investments"** in line with the 2050 climate neutrality objective (European Climate Law), as well as the Paris 1.5 C commitments and where relevant, the exposure of the undertaking to coal, oil and gas-related activities.
TARGETS	These must be **time-bound**, including where appropriate absolute greenhouse gas emission reduction targets at least for 2030 and 2050, and say whether the targets are science-based or not.
INTANGIBLES	Deleted from sustainability reporting requirements, but, there is a need for general disclosure requirements on intangibles in the **Management Report.**
INCENTIVE SCHEMES	Linked to sustainability matters (new).
DUE DILIGENCE AND ADVERSE IMPACTS	Due diligence should be in line with EU requirements on undertakings to conduct a due diligence process (based on the Corporate Sustainability Due Diligence Directive).
VALUE CHAIN INFORMATION	For **3 years**, if a company cannot obtain value-chain information, it should explain- (a) the efforts made; (b) why the information could not be obtained and (c) the plans to get information in the future.
LISTED SME(s) REQUIREMENTS	Requirements include (but are not limited to) providing a brief description of the undertaking's business model and strategy; a description of the undertakings policies regarding sustainability matters; principal actual/potential adverse impacts of the undertaking with regard to sustainability matters and any actions taken to identify, monitor, prevent, mitigate or remediate such actual/potential adverse impacts; principal risks to the undertaking related to sustainability matters and how the undertaking manages those risks; key indicators necessary to the disclosure referred above
MANAGEMENT TO INFORM AND DISCUSS WITH WORKERS	As per Article 19a, the management of an undertaking shall inform worker's representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying sustainability information. Their opinion should be communicated where applicable, to the relevant administrative, management or supervisory bodies.

US

(a) THE 'PASSING' TREND OF ANTI-ESG

All the controversial ESG developments mentioned above in the Executive Summary highlight this passing trend of **anti-ESG sentiments** in the **US**. A Special Report by the Economist in **July 2022** noted that although ESG is often well-meaning it is **deeply flawed**. The anti-ESG movement encompasses the **limited number of anti-woke laws**, that have been brought to the forefront by the **US's ignorance of the 'social' risk such as the overturning of *Roe v Wade***; the **US Congress** led No ESG at TSP Act **(Expected) banning 'woke ESG funds'** by prohibiting Thrift Savings Plan (TSP) from allowing participants to invest their retirement savings into funds that make investment decisions based on E, S, G or political criteria, seeing **ESG as a scam**, the situation of ESG, on the whole, has been critical in the US. Apart from ***Roe***, another anti-ESG development has been the **6-3 Supreme Court ruling curtailing EPA's power to regulate GHG emissions**, collectively showcasing a **massive step backwards for ESG developments just after the launch of the landmark SEC climate-risk disclosure proposal** last quarter.

Discussed below are the anti-ESG laws in the Republican States:

- **Texas** (Senate Bill 13) **(Active)**: this Act from Texas is the **first state-level pushback against recent ESG developments undertaken by Wall Street investment funds**. It **prevents Texas from investing in ESG financial products** that **"boycott"** Texas energy companies.
- **West Virginia** (Senate Bill 262) **(Active)**: this **fossil fuel boycott Act** comes amid a **revolt against ESG investing** and **divestments** by certain US states. It **punishes banks from cutting oil ties** by creating a **list of restricted financial institutions** that *'have been shown to refuse, terminate or limit commercial activity with coal, oil or natural gas companies without a reasonable business purpose'*, in this way it furthers the anti-ESG agenda (i.e. favoring non-renewable over renewable) in the energy sector and facilitates capitalism.
- **Wyoming** (Firearms transactions-financial discrimination) **(Active)**: this Act notes that a financial institution **must not discriminate against a firearm entity** because the **firearm entity supports** or **is engaged** in the lawful commerce of firearms, firearm accessories or ammunition products.
- **Idaho** (Senate Bill 1504) **(Active)**: this Act notes that no public entity engaged in investment activities shall consider **environmental, social or governance characteristics in a manner that could override the prudent investor rule**.
- **Florida** (CS/HB 7: Individual Freedom or 'Stop Woke Act') **(Active)**: this Act limits **academic institutions** and **workplaces** from providing **mandatory training** that involves **endorsing or indoctrinating concepts related to discrimination and diversity**. This law is designed to stop students, faculty and workplaces from discussing subjects that conservative politicians dislike.

DLA Piper's Expert View on the Anti-ESG trend of laws in the USA

US companies find themselves caught between competing trends on ESG. At the federal level, spurred on by the Biden Administration's whole-of-government approach to climate change, the SEC is pushing for greater climate disclosures and demanding that issuers and funds substantiate their sustainability claims. Meanwhile, in many states with Republican-controlled legislatures, a backlash against ESG is gaining steam. Some whose economies depend on fossil fuels increasingly forbid the investment of state assets in funds that exclude oil and gas. And at least 19 state attorneys general have demanded answers about whether profit maximization is taking a backseat to ESG considerations in the investment of state pension funds. We expect the policies that emerge at both the state and federal level to ultimately be decided by the courts.

– Sanjay Shirodkar Partner DLA Piper LLP (US), Jesse Medlong Associate DLA Piper LLP (US)

(b) THE PRO-ESG REGIME ECLIPSES THE 'PASSING' ANTI-ESG TREND

While some critics have forecasted the growth of the anti-ESG regime, support for this is not found from the rest of the world, with **major jurisdictions such as the EU pushing for a pro-ESG regime**. ESG is relevant and has tangible impacts on the lives of consumers as well as corporations (FT, anti-woke rhetoric on ESG will harm society). The US (on the whole) **must curtail the anti-ESG movement in the limited number of anti-ESG Republican States** to remain lucrative as a jurisdiction, given the **large** and **detrimental impact this might have on the US companies that are competing in the international markets**. Not all hope is lost for the US. In the wake of the anti-woke ESG laws, we also see a wave of encouragement from the **SEC** with its two **landmark Proposed Rules** that **tackle 'greenwashing' and promote ESG** and from the US Senate with the passing of the Inflation Reduction Act of 2022 that provides **flagship economic package towards climate, tax and healthcare. The Act provides the largest climate investment in US history and makes major changes to health policy** by giving Medicare the power for the first time to negotiate the prices of certain prescription drugs and extending expiring health care subsidies for three years. The SEC developments are discussed below:

III. SEC'S NEW (PROPOSED) RULES:

1. Enhanced Disclosures by Investment Advisers & Investment Companies about E, S, & G Investment

The Proposed Rule requires registered investment advisers, certain advisers that are exempt from registration, registered investment companies, and business development companies, to provide additional information regarding their ESG investment practices. Its objective is to facilitate **enhanced disclosure of ESG issues to clients and shareholders**. They are designed to create a consistent, comparable, and decision-useful regulatory framework for ESG advisory services and investment companies to inform and protect investors while facilitating further innovation in this evolving area of the asset management industry. The consultation period ended on **16th August 2022**.

DLA Piper's Expert View on Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices

The proposed rules focused on the investment community are a key component of the SEC's broader ESG-related initiatives and if adopted, would represent a significant enhancement in the agency's regulation of the marketing and reporting of ESG practices and strategies by investment advisers and funds.

– Brent L. Bernell Partner DLA Piper LLP (US)

2. **Investment Company Names**

This landmark ESG Rule is designed to tackle '**greenwashing**' and protect investors. SEC aims to enhance and modernize the Investment Company Act's '***Names Rule***'. Its goal is to eliminate the use of "**materially deceptive and misleading ESG terminology in certain funds**." The amendments enhance the rule's protections by requiring more funds to adopt an **80% investment policy**. They extend the requirement to any fund name with terms suggesting that the fund focuses on investments with particular characteristics. This includes fund names with terms such as "*growth*" or "*value*" or indicating that the fund's investment decisions incorporate one or more ESG factors. The amendments also limit temporary departures from the 80% investment requirement and clarify the rule's treatment of derivative investments. The consultation period ended on 16th August 2022.

3. **Stakeholders-centric Amendments to Rule 14a-8 (Proposed Rule) & Proxy Voting Advisers (Final Rule)**

When it comes to **Governance risks (G)**, the SEC has proposed two important stakeholder-centric proposals. Firstly, it proposed amendments to the **rules governing shareholder proposals** at annual meetings. The shareholder proposal process has become a **cornerstone of engagement** between **shareholders** and **company management**. The amendments would improve the shareholder proposal process and promote consistency by **revising three** of the **substantive bases for excluding a shareholder proposal under the rule**. It is open to public comment until **13 September 2022**. Secondly, it amended the rules governing **proxy voting advice companies**. The amended rules, adopted in 2020, were seen as overly burdensome on proxy advisers and created confusion around liability. The SEC aims to **remove barriers to providing proxy advice** as a service and provide clarity for market participants. The amendments and the rescission of the Guidance are **effective September 19, 2022**.

SECTION 2: GREEN DEVELOPMENTS, GLOBAL STANDARDS, AND BEST PRACTICES

Apart from the new ESRS and the SEC proposed rules, this Quarter we have also seen the emergence of other noteworthy ESG developments, Standards and Best Practices tackling '**greenwashing**' and **promoting 'sustainability reporting' and 'green investments' from various global entities across jurisdictions**. For example, **Canberra's lower house** has passed the historic Climate Change Bill 2022 that mandates a **minimum 43% reduction in carbon emissions (GHG emissions reductions) below 2005 levels by 2030**, which is expected to be approved soon, furthering the **green agenda** for **Australia**. Similarly, in the **UK**, we see the **Financial Conduct Authority (FCA) strengthening ESG reporting** with-(a) its new ESG Sourcebook;(b) its first-ever own climate-related disclosure 2021/22 (July 2022); and (c) previously published ESG provisions in the FCA Handbook **(effective from 1 January 2022)** that has **introduced disclosure obligations** for the **largest in-scope firms** (asset management firms with over £50 billion in assets under management ("AUM") and asset owner firms with assets over £25 billion). The rules in the Handbook will apply to smaller firms above a threshold of £5 billion in AUM from **1 January 2023**. FCA's ESG Sourcebook specifically requires in-scope asset managers and asset owners to publish-**(1) a TCFD Entity Report**, and **(2) a TCFD Product Report**. In line with its concerns surrounding '**greenwashing**' FCA is also actively taking numerous actions to promote transparency and reliability of ESG data. For example, recently, it met with **asset managers regarding their commitments to ESG and is to conduct several greenwashing investigations**. It aims to promote a **"zero-greenwashing" regime**. In **August 2022**, similar '**greenwashing**' concerns surrounded **EU's amendments to the Mifid II**. The two amendments are as follows-(a) the Delegated Regulation 2021/1253 amending the Delegated Regulation 2017/565 with regards to the **integration of sustainability factors, risks and preferences** into certain organisational requirements and operating conditions for investment firms; and (b) the Delegated Directive 2021/1269 amending the Delegated Directive 2017/593 with regards the integration of **sustainability factors into the product governance obligations**, which will become effective from **22 November 2022**. Collectively, the amendments require financial advisers to **mandatorily consult investors on their sustainability preferences**. Distributors note that it reflects the client's needs and expectations, however, **its implementation has faced challenges**. The **lack of guidance** and **data** could further raise '**misselling**' and '**greenwashing**' risks. **Reliable ESG data is key in ensuring transparency and building trust**. Some other developments are listed below:

I. TNFD NATURE-RELATED DISCLOSURE FRAMEWORK (BETA VERSION 0.2)

This Framework provides **additional guidance on nature-related metrics, for pilot testing and further market feedback**. It should be read alongside the additional draft guidance(s) issued by TNFD for corporates on evaluating Phase of the **TNFD's Leap Approach for Dependency and Impact Analysis**. This second iteration of the TNFD Beta Framework includes **several enhancements and additional elements** carefully developed by the Taskforce, these are- (a) a **draft architecture** for **metrics and targets**; (b) an **illustrative set of Assessment Metrics** for dependence and **impact analysis** as well as **additional guidance** on how to evaluate the entities dependencies and impacts developed in partnership with the Capitals Coalition and aligned with the Natural Capital Protocol; (c) **further guidance** on the identification of priority locations in the **'Locate' Phase of the LEAP approach**; (d) an overview of the TNFD's proposed **sector classification aligned with the approach taken by ISSB and TCFD**; (e) **enhancements** to the **LEAP approach for financial institutions (LEAP-FI)** as providers of capital. Two more update releases of the Beta Framework are scheduled for **November 2022** (previously October 2022) and **February 2023**, before the **final recommendations are published in September 2023**.

II. NEW RULES: RED II-RENEWABLE FUELS OF NON-BIOLOGICAL ORIGIN ('RFNBOs')

The REPowerEU Plan released in May 2022 sets the stage for **Europe's independence from Russian fossil fuels by 2030**. One of the key roles the REPowerEU plays is to use **'hydrogen'** as a replacement for fossil fuels in industry and transport. The **achievement of these ambitions is only possible with appropriate regulation on renewable hydrogen for both domestic and import production**. In order to address this problem, on **23 May 2022**, the EC finally published the long-awaited RED II (draft) delegated acts. These are the-(1) DA I (GHG Emissions Rules) **(Proposed)**; and (2) DA II (Green Hydrogen Rules) **(Proposed)**. These Acts should be read alongside the EU's recent updates surrounding the Green Deal: proposals to restore nature by 2050. The **first-ever Nature Restoration Law** will set **restoration targets and obligations across a broad range of ecosystems on land and sea**. Ecosystems with the greatest potential for **removing** and **storing carbon** and preventing or reducing the impact of natural disasters such as floods are the **top priorities for the EU**. Collectively, they foster the various **'green' agendas at the EU Level**. The two Delegated Acts are discussed below:

a. Delegated Act 1 ('DA I'): GHG Emissions Rules: Articles 25(2) and 28(5) DA I set a **minimum threshold** for GHG emissions savings of recycled carbon fuels and the **methodology** by which to **assess** the GHG emissions savings from RFNBOs and recycled carbon fuels (GHG Gas Emissions Rules). It proposes to **set the fossil fuel comparator** for RFNBOs at **94 gCO2eq/MJ**. In light of the **70% reduction requirements**, this fossil fuel comparator **translates to a threshold of 28.2 gCo2eq/MJ** that the **fuel has to meet in order to be considered an RFNBO**. In order to **determine this threshold**, the EC highlights that the **full life-cycle emissions must be taken into account**. The consultation period for the DA I expired on **17th June 2022**.

b. Delegated Act 2 ('DA II'): Green Hydrogen Rules: The Article 27(3) DA II establishes the criteria for RFNBO, classification **(Green Hydrogen Rules)**; sets the criteria for products that **fall into the "renewable hydrogen" category**, important to meet the renewable energy targets for the transport sector. The consultation period for this expired on **17th June 2022**.

Deep Dive into the Key Aspects of the DA II

- **Definition**: a deeper analysis of the DA II reveals that it contains the **first-ever European statutory definition** of **renewable hydrogen** under **Article 2 (4): 'renewable hydrogen' means hydrogen derived only from renewable energy sources other than biomass'. Biomass** is not a desired renewable energy source and is excluded from the production of renewable hydrogen. This will most likely lead to a change of national provisions.
- **The recitals (explanations) do not contain any further background on the exclusion of biomass.** Some stakeholders hoped that it **would at least be included for a transitional period** as it could help produce renewable hydrogen in higher capacities until the wind and solar capacities have been extended. It is also **unclear why biogenic waste shall be excluded**. Furthermore, the definition of '**installation generating renewable electricity**' under **Article 2 (3)** not only **excludes** units producing electricity from biomass but also storage units.
- **Electricity taken from the grid can be renewable energy: Article 4** of the DAII contains the rules for counting electricity taken from the grid as **fully renewable**. Fuel producers have three options to count electricity taken from the grid as fully renewable.
- **Transitional Provisions**: a transitional provision is contained in **Article 7**, which states that **Article 4 (2) (a)** and **(b) (rules for counting electricity taken from the grid as fully renewable)** shall only apply from **1 January 2027**. A **further transitional provision** refers to **Article 4 (2) (c) (i) and (ii)** stipulating that **until 31 December 2026**, the renewable power **must not be produced within the same calendar hour but only the same calendar month**. However, this transitional provision does not apply to projects involving state aid unless the state aid only remunerates capital expenditure. **Article 8** outlines that **Article 4 (2) (a)** and **(b)** do not apply to hydrogen production units that come into operation **before 1 January 2027**.
- **Can apply to several Sectors**: while, in a technical sense, it is only directly relevant to renewable fuels in the transport sector, it is expected that this Delegated Act is in fact **establishing the rules for the production of green hydrogen in all sectors**.
- **Stakeholder perspectives**: while support is found in the new DA II, some stakeholders view the provisions as being '**too strict**' and demand a '**new approach**'. They fear that the DA II will **obstruct** the increase of renewable hydrogen production capacities **instead of facilitating it**.

III. GRI 13: SECTOR STANDARD FOR AGRICULTURE, AQUACULTURE, AND FISHING

[Effective reporting from 1 January 2024, with early adoption, encouraged]

This is the **first** global and holistic sustainability reporting standard for all companies in the upstream production of crops, animals and seafood, **setting expectations for disclosure of their shared and distinct impacts**. Adding to a growing suite of Sector Standards, GRI 13 addresses: (1) the topics likely to be '**material**' for any agriculture, aquaculture or fishing organization, based on the impacts of these sectors; (2) **new disclosures** on food security, land and resource rights, living wage and income, natural ecosystem conversion, animal welfare, soil health, and pesticides use; and (3) the **multiplying effect of the sectors** when it comes to the SDGs – supporting companies to make the connections between their impacts and all **17 Global Goals**.

CLICK HERE TO SEE OTHER GREEN DEVELOPMENTS, STANDARDS, AND BEST PRACTICES

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Datamaran is the only software in the world that provides a fully automated solution for identifying and monitoring material ESG risks and opportunities.
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DLA Piper is a global law firm that operates across all geographies and sectors, advising corporates, governments and institutions across the whole spectrum of legal issues. DLA Piper is helping its clients and communities transition to, and thrive in, a more sustainable future by advising on a wide variety of sustainability and ESG matters, while always framing the advice through a sector lens. For more information on the DLA Piper offering please visit **www.dlapiper.com/sesg**


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