**Legal challenges for credible sustainability commitments in the financial and insurance sectors**

University of Glasgow

School of Law

12 July 2024

**Summary report**

**Prof Iain MacNeil**

**Dr Liv Naidoo**

**Prof Javier Solana**

# Background

On 12 July 2024, the Corporate and Financial Law research group at the University of Glasgow School of Law organised a workshop to discuss the legal challenges that the financial and insurance sectors face to make credible sustainability commitments. Attendance to the event was restricted to approximately 25 participants from academia and the private sector, including representatives from two insurance companies and one financial institution. The organisers would like to thank all attendees for sharing their time and expertise, and for their valuable contributions on the day of the event.

The workshop was organised around two different (yet somewhat related) perspectives on the legal challenges facing credible sustainability commitments in the financial and insurance sectors: a private law perspective and a corporate governance perspective. In each panel, panellists were invited to share their reflections on the said challenges in order to stimulate an open discussion among all attendees. In an opening panel, attendees reflected on the enabling role that financial institutions and insurance companies can play in the transition to a low-carbon economy and these reflections helped to frame and contextualise the discussions throughout the rest of the day.

This note highlights some of the main ideas that cut across the various discussions that took place in the room during the workshop. They do not do justice to the depth and richness of the discussions that took place throughout the day but they provide a meaningful glimpse into those discussions. Our hope is that, in doing so, this note will motivate readers to further reflect on these ideas and to join us at future events where we will continue to explore these and related issues.

# The agency of financial actors as conduits for sustainability

One of the questions that came up in the discussions that we held during the day was the extent to which financial actors actually have any leverage over their clients that will allow them to serve as conduits for sustainability. In this regard, one of the issues that was discussed was the extent to which fiduciary duties impose a constraint on the ability of financial actors to serve as agents of change. Many in the room opined that there is not as much uncertainty about this. Here, reference was made to the recent [paper](https://fmlc.org/publications/paper-pension-fund-trustees-and-fiduciary-duties-decision-making-in-the-context-of-sustainability-and-the-subject-of-climate-change/) on pension fund trustees and fiduciary duties in the context of sustainability published by the Financial Markets Law Committee in the UK, for example.

Another important consideration was the role of competition law and the extent to which it might limit the ability of financial actors to organise themselves to address sustainability challenges collectively. Here, attendees noted the seemingly different approaches to this question from competition law authorities in the US, where the “anti-ESG” narrative has gained considerable traction amongst certain politicians and policy-makers, and in the EU and the UK, where competition law authorities have indicated that this kind of coordinated action is unlikely to infringe competition law. Here, reference was made to the position of the Dutch ([2022](https://www.whitecase.com/insight-alert/recent-guidance-sustainability-cooperation-dutch-competition-authority), [2023](https://www.eversheds-sutherland.com/en/global/insights/dutch-competition-authority-continues-to-provide-more-room-for-sustainability-agreements)) and UK ([2023](https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf)) competition law authorities, for example.

Attendees also discussed the ambiguous effect that regulation can sometimes have on sustainability ambitions, sometimes providing incentives for financial actors to engage in more sustainable practices, sometimes constraining their ability to do so. Here, reference was made to conflicting standards and requirements across the investment chain, for example. Reference was also made to the view often expressed by banks that financial regulation (and, in particular, capital requirements) hinders their ability to fund innovative solutions to address the climate crisis.

One of the panellists presented their research on the potential for behavioural economics insights to inform regulatory and private law approaches to more sustainable practices, particularly in the context of consumer agreements. They focused on the role of “nudge” and “sludge” in diving consumer behaviour, and this was an issue that attracted a lot of attention throughout the day. Many attendees were sceptical about the appropriateness of these approaches to drive consumer behaviour, raising questions about effectiveness and accountability, for example.

Lastly, an important consideration about the actual leverage that financial actors have over their clients relates to the challenge of identifying effects and causality. There was degree of scepticism in the room about disinvestment, for example, with some attendees questioning whether it really has any effects when there are firms ready to step in as soon as existing financiers exit. Some attendees also pointed to the fact that most regulatory attention seems to be on the supply side of finance but that action was also needed on the demand side for finance to actually realise its potential as an agent of change.

# Techniques relevant for sustainability commitments

There was a lot of discussion about the different techniques that financial actors (and their regulators) are using to ensure that sustainability commitments are credible. Discussions throughout the day were framed around the following general classification of the different techniques:

* Disclosure – across a range of activities such as underwriting, investing, lending, ESG ratings etc. Attendees noted that this technique faces challenges regarding data availability and it faces issues of reliability and verifiability of information. Moreover, the opinion was expressed that the EU’s approach to double materiality may not gain global traction when international standard setters like the ISSB are championing single materiality.
* Contract – e.g. covenants in green financial products such as green loans, green bonds, green securitisations, and various sustainability-linked products, as well as insurance contracts. The representatives from the two insurance companies that attended the workshop shared with the room how they viewed the evolution of wording in insurance policies and were of the opinion that, generally, insurance companies continue to underwrite climate-related risks. Attendees in the room noted that as climate change continues to aggravate that position might change, and it may do so quickly and systematically across the sector.
* Voice for investors, where corporate governance mechanisms are mobilised in an attempt to influence business decision-making processes that are relevant for sustainability. Some attendees were very critical of the impact that sustainable finance regulation in the EU was having on the ability of investors to really exercise their voice.
* Voluntary commitments such as the Glasgow Financial Alliance for Net Zero (GFANZ) and similar initiatives. Nevertheless, one of the panellists brough to the group’s attention the fact that the Net-Zero Insurance Alliance (NZIA) was discontinued earlier this year, in part as a result of the challenges around compliance with competition law (see point 1 above).

# Social and distributive justice considerations

One of the panellists presented their ongoing work on the potential for insurance markets and their regulation to be used as a (re)distributive tools. This presentation introduced the question of social and distributive justice into the discussion, and this was a topic that attendees brought up in several occasions, often wondering how to frame and integrate these issues into sustainability policy. Remarks were made about the role of the “S” in ESG, e.g. with regard to corporate purpose at the operational level and impact investing at the investor level. Some attendees brought to the discussion the concept of “Just Transition” as a mechanism to bring equity into the green transition, i.e. as the distributive aspect of sustainability policy. Lastly, some attendees raised the question of whether social and distributive justice were issues that sustainability policy needed to address or whether these issues would be better addressed through taxation. In this regard, building on some of the specific examples used to illustrate the role for insurance markets and their regulation to serve as (re)distributive tools, some attendees shared interesting ideas about the potential for income tax and council tax to achieve some of the sustainability objectives.

# The Corporate and Financial Law research group at the University of Glasgow

The Research Group on Corporate and Financial Law creates a space for substantial research in the School of Law focusing on company law, corporate finance, corporate governance, corporate social responsibility, and financial regulation. It comprises around 25 Glasgow University academics and doctoral researchers from diverse international backgrounds. Members of the Research Group are recognized internationally for their research and regularly contribute to leading journals and other publications. This research informs their teaching, which spans a range of undergraduate/honours options as well as a dedicated master's programme in [Corporate and Financial Law (LLM)](https://www.gla.ac.uk/postgraduate/taught/corporateandfinanciallaw/).  The Research Group is led by Professor Iain MacNeil and Dr Javier Solana.

Sustainability and the impact of technology on Corporate and Financial Law are themes that cut across members’ research. Many of the groups’ activities converge around these two broad themes. You can learn more about the group’s activities and stay up to date with upcoming events by visiting the group’s [website](https://www.gla.ac.uk/schools/law/research/groups/corporate-and-financial/).