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CLIMATE
Connecting Climate Change and the Law



April 9, 2024

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In this week's edition, we discuss the ever-increasing focus on greenwashing by way of enforcement action taken by regulatory authorities and incoming legislation aimed at enhancing consumer protection. The EU confirmed the expansion of its environmental crimes register to criminalize, among other things, illegal timber trade and depletion of water resources and ESMA looks to strengthen its green bond framework as it launched a consultation related to the registration and supervision of entities that wish to be external reviewers of EU green bonds. The Biden Administration also announced how it intends to allocate a further £6 billion brought in by the Inflation Reduction Act.

Greenwashing Glare Turns to Fashion

Following an investigation first launched in July 2022, [the UK's Competition and Markets Authority \(CMA\) announced](#) on March 27, 2024 that it had reached resolutions with several fashion retailers to change the way they advertised and promoted the environmental and sustainable characteristics of their products. UK retailers ASOS, Boohoo and George at Asda agreed to use only clear and accurate green claims. Each of the companies has signed a formal agreement containing a set of rules they each agree to follow. Those rules include:

- Green claims: All green claims will be accurate and not misleading. Key information will be clear and prominent, using plain language that is easy to read and clearly visible to consumers.
- Statements regarding fabrics: Statements about materials must be specific and clear, e.g., 'organic' and 'recycled' rather than 'eco', 'responsible' or 'sustainable', with no further explanation. Even when using the specific terms referenced, certain criteria must be met.
- Criteria for green ranges: The criteria used to determine which products form part of environmentally focused collections must be clearly set out. Products should not be included in such ranges if they do not meet all the minimum criteria.
- Use of imagery: 'Natural' imagery, logos or icons to suggest a product is more environmentally friendly than it is must not be used, e.g., green leaves.
- Product filters: Search filters must be accurate e.g. if a consumer searches "recycled trousers", only trousers made predominantly from recycled materials should be shown.
- Environmental targets: Claims relating to environmental targets must be supported by a clear and verifiable strategy and customers must be able to access further information about it.
- Accreditation schemes: Statements about accreditation schemes and standards must not be misleading.

The CMA will monitor the companies on an ongoing basis and require them to provide regular reports on how they are complying with their undertakings. More broadly, [the CMA published an open letter](#) to the sector urging businesses to review their claims in light of the undertakings by ASOS, Boohoo and George at Asda. The findings will inevitably have an effect on many fashion retailers and spur detailed reviews of existing green claims. However, the principle can

be universally applied across all sectors that would fall under the purview of the CMA. The undertakings do not cover anything new to those even vaguely familiar with the risks associated with greenwashing, i.e., ensure that any environmental or sustainability claims are clear, accurate, not misleading and can be substantiated. Some of the specific rules, such as the use of imagery, logos or icons to suggest a product is more environmentally friendly than it is, is also not new and is a **feature of other consumer protection frameworks** such as in the EU's Green Claims Directive.

The investigation is one of several opened by the regulator in its continued focus on greenwashing activity. In 2023, **the CMA announced** a wide-ranging investigation into the accuracy of green claims made about household essentials, such as food, drinks and toiletries, to prevent consumers from being misled.

Other regulatory authorities in the UK are also focused on the issue. On November 28, 2023, the Financial Conduct Authority (FCA) published the Sustainability Disclosure Requirements (SDR) and an investment labels regime. The SDR include an anti-greenwashing rule, rules around product labels and naming and marketing requirements to help investors make more informed choices when it comes to sustainable investment. In February this year, the FCA also established an industry-led working group for financial advisors, aimed to support them to advise consumers on products marketed to have sustainable characteristics. **As we covered recently**, the Advertising Standards Authority (ASA) released updated guidance for advertisers making environmental sustainability-related claims to consumers, including the use of the terms "carbon neutral" and "net zero." In February of this year, the ASA also warned the Mayor of London that **Transport for London's (TfL) environmental claims** relating to its Ultra Low Emissions Zone may be misleading.

There has been some notable litigation with a focus on misleading green or sustainable claims in the first quarter of 2024. In February, New York State Attorney General (NYAG) Letitia James **filed a lawsuit** with the New York Supreme Court against the U.S. subsidiary of a Brazilian meat processing company, JBS, for misleading the public about its environmental impact. On February 15, 2024, investors suing Oatly, an oat milk producer, proposed a figure of \$9.25 million to settle its **greenwashing lawsuit**.

From a regulatory perspective, the EU is taking **several anti-greenwashing measures** as part of the EU Green Deal including the implementation of the new Directive on Empowering Consumers for the Green Transition, a law banning exaggerated and unfounded claims relating to a company's environmentally friendly actions, including carbon neutral claims.

Unsurprisingly, this recent activity and attendant media coverage has increased corporate awareness of the significant risks presented by greenwashing allegations. Research conducted by Bloomberg Law in February 2024 showed that **greenwashing risk is a particular concern** for inhouse counsel for the year ahead.

It's Official: EU Environmental Crimes Register Expands

On March 11, **we discussed** the European Parliament's agreement to extend the Environmental Crimes Registers to include illegal timber trade, depletion of water resources, serious breaches of EU chemicals legislation, and pollution caused by ships. On March 26, **the European Council formally adopted** the expanded list of offenses. Under the legislation,

intentional offenses that cause the death of a person are punishable by a maximum 10-year term of imprisonment, with other offenses resulting in a maximum term of five years. For companies, fines will be at least 5% of global annual turnover or EUR 40 million, for the most serious offenses. Other offenses carry a 3% of turnover penalty (or EUR 24 million, whichever is higher). Member States will have two years to implement the new rules once the directive enters into force.

Biden Administration Commits \$6 billion to Industrial and Manufacturing Sectors

On March 25, **the U.S. Department of Energy (DOE) announced** that up to \$6 billion would be used to fund 33 projects aimed at decarbonizing energy-intensive industries, reducing greenhouse gas emissions, supporting good-paying union jobs, revitalizing industrial communities, and strengthening the country's manufacturing competitiveness. The funds emanate from the Inflation Reduction Act, which **as we discussed** on March 11, is also the source of funds for purchasing zero-emission port equipment and infrastructure, and contributing towards climate and air quality-planning at U.S. ports. In-scope industries for the newest measures announced by the DOE include aluminum and other metals such as iron and steel, cement and concrete, and chemicals and refining.

ESMA's Search for Green Bond Reviewers

On March 26, **the European Securities and Markets Authority (ESMA) published** a Consultation Paper on the Draft Regulatory Technical Standards (RTS) related to the registration and supervision of entities that wish to be external reviewers of EU green bonds. The topics to be covered include: (i) criteria to be assessed at the time of registration that relates to senior management, board members and analytical resources; (ii) criteria to assess sound and prudent management and management of conflicts of interest; (iii) criteria for assessing knowledge and experience of analysts; and (iv) criteria applicable to outsourcing of assessment activities; and v) the standard forms, templates and procedures for the provision of registration information. The EU's Green Bond Regulation entered into force on December 21, 2023 and will apply from December 21, 2024. The Consultation has no specific deadline, and all feedback will be submitted along with the Draft RTS to the European Commission by December 21, 2024.