C L I F F O R D

C H A N C E

THE RISE OF CONSUMER COMPLAINTS, LITIGATION AND ENFORCEMENT ACTIONS TO CURB GREENWASHING

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INTRODUCTION

The investor-led boom in green products and services presents opportunities for growth. However, whether claims of green, climate-friendly, sustainability or support for biodiversity are borne out in practice is increasingly questioned. Regulators are turning their attention to investigating and regulating firms which may be 'greenwashing' – a term which generally refers to unsubstantiated, misleading or incomplete assertions, statements or claims regarding a company's environmental performance, processes or products. Meanwhile, legislators are introducing laws to curb greenwashing and incorporate climate-focused requirements on corporates to promote environmental sustainability.

Absent clearly defined regulatory frameworks, there is a significant risk of complaints, litigation or enforcement action and investigations associated with promoting products and services as green. Greenwashing is being challenged before national civil courts and non-judicial fora, using a range of laws and standards including consumer protection laws, advertising standards, securities regulations, fraud, and misrepresentation statutes. The stakeholders represented in these actions range from NGOs seeking corporate accountability for claims of environmental good deeds, to corporate competitors who are challenging their peers on the basis that another company's green claims could be seen as an act of unfair competition.

The outcome of litigation, investigations and complaints can include damages claims for monetary compensation as well as fines. Irrespective of the type of action brought, or the forum employed, greenwashing can generate significant reputational risk.

In this briefing we focus on greenwashing complaints, investigations and claims in respect of two areas: advertising, and financial products and services. In both areas statements, disclosures and claims made that products and services are 'green' are challenged by stakeholders both in the courts and in non-judicial fora. We outline some tips for avoiding greenwashing. We then provide an overview of the types of complaints, litigation and investigations we are seeing in several jurisdictions around the world.

AVOIDING GREENWASHING

Appropriate strategies for avoiding greenwashing complaints, litigation or investigations depend in part on the type of claim faced by the company. To avoid scrutiny of advertisements, labelling and in relation to statements and disclosures made about financial products and services, companies should:

1. examine factual claims to ensure that they have a basis, and that relevant and robust certifications or standards relied upon are vetted;
2. examine broad or aspirational claims committing to ethics or sustainability in their context, and against evolving standards, to consider whether they may be actionable;
3. focus closely on public disclosures and statements related to ESG issues including consumer-facing statements such as social media posts, securities filings, mission statements, and published reports. Ensure that any express or implied representations regarding green credentials or net zero target strategies are current, accurate and supported by reasonable grounds, as well as compliant with regulatory standards;
4. examine written supervisory policies and procedures around ESG topics, implement and follow procedures or policies for assessing the green credentials of a financial or other product or service;
5. conduct ESG risk assessments to identify opportunities for risk management and mitigation; and
6. closely monitor trends in consumer litigation, alongside regulatory and enforcement developments which focus on ESG issues.

GREENWASHING IN ADVERTISING

Companies, investors, and asset managers across all sectors are increasingly making 'green claims' about their businesses and the environmental credentials of their products or services. Statements such as "*environmentally friendly*", "*100% green*" and "carbon free", which are frequently used in advertisements with the aim of attracting customers, can be vague or generic, making them difficult to verify. Consumer protection laws, designed to protect consumers from unfair market practices, are increasingly being used to challenge these types of claims.

Across the world, 'green claims' involving advertising have arisen in four broad categories:

1. Claims brought before ordinary civil courts by consumers, or NGOs representing consumers, allegedly misled by a company's advertising campaigns;
2. Complaints to advertising standards bodies, the outcomes of which, although not binding in the same way as a court judgment, nevertheless have recognised advertising industry influence;
3. Challenges from competitors, alleging that 'green claims' constitute acts of unfair competition and/or unfair commercial practice; and
4. Complaints and allegations to state competition authorities and other government-related bodies, which can hold companies accountable for the misleading 'green claims', such as national ombudsmen or National Contact Points under the OECD Guidelines for Multinational Enterprises (NCP), with significant consequences for a company's reputation.

We consider examples of these types of claims in certain EU member States (i.e. Italy, Germany, France, the Netherlands), the UK, the US and Australia.

The European Union

The Unfair Commercial Practices Directive (UCPD) is a common tool with which EU States tackle misleading environmental claims. In force since 2005, it aims to improve consumers' confidence and help businesses trade across borders, through the regulation of unfair commercial practices that might occur before, during and after any business-to-consumer transaction.

Although the UCPD does not expressly provide specific rules on environmental claims, the Unfair Commercial Practice Directive Guidance published in December 2021 (UCPD Guidance), confirmed that it could be applied to marketing greenwashing.[1] The UCPD Guidance specifically explains how the UCPD is still the main instrument of horizontal legislation available in the EU able to hold an organisation accountable for their green claims, as "*it provides a legal basis that ensures traders do not present environmental claims that are unfair for the consumer*".

1. See here.

To remedy the lack of specific provisions on 'green claims', in March 2022, the European Commission proposed updating the UCPD to include rules to strengthen consumer protection against untrustworthy or false environmental claims and banning 'greenwashing'. The European Commission's proposals will now be discussed by the Council and the European Parliament, but it is a clear sign of the attention given by the EU legislator to greenwashing practices.

Italy

The UCPD has been used in Italy as the legal basis for challenging 'green claims', along with other *ad hoc* specific provisions created in domestic law. In 2014, Article 12 was introduced in the Code of Self-Regulation of Commercial Communication (the Code of Self-Regulation), enforced by the Italian advertising standards authority (*Istituto di Autodisciplina della Pubblicità or IAP*). Article 12 requires that advertising claims stating or suggesting a positive impact on the environment should: (i) be based on accurate, proper and scientifically verifiable data, and (ii) make it easy to understand which part of the product or service has the beneficial "green" impact. Although the Code of Self-Regulation is only binding on those companies within the scope to the IAP rules, it has been used by the Italian courts to help with the interpretation and application of the UCPD to 'green claims'.

The IAP rules and the UCPD provided the legal basis for the investigation by the Italian Competition Authority (ICA) against a German car manufacturer in 2016. The ICA ruled that some of the manufacturer's environmental marketing claims were false and deceptive, and constituted a misleading commercial practice prohibited by the UCPD. The judgment, which imposed a fine of EUR 5 million, is currently being appealed. More recently, the 'environmental claims' made by the manufacturer in relation to its 'clean diesel campaign' exposed the company to a class action brought by an Italian NGO (Altroconsumo) and joined by over 63,000 Italian consumers. The court found that the manufacturer, by making false and deceptive claims about the green qualities of their vehicles, had violated consumers' right to freedom of contract, leading to consistent financial losses (equal to the decrease in value of the vehicle because it did not possess the promised green qualities). The manufacturer was ordered to pay EUR 3,000 to each member of the class action in financial damages, plus EUR 300 in moral damages (over EUR 200 million in total) and legal expenses. The decision has been appealed. For an in depth analysis of the case, please see our blog **here**.

In July 2021, a case was brought before the local Court of Gorizia in the north of Italy by a manufacturer of a micro-fibre products used in the automotive sector, against one of its main Italian competitors, which also markets a suede-like micro-fibre product. The Claimant argued that the 'green claims' made by the Defendant in relation to its micro-fibre product constituted an act of unfair competition under Article 2598, §3 of the Italian Civil Code in the form of misleading advertising as defined in the UCPD. The Claimant requested an interim injunction preventing the Defendant from continuing to make such environmental claims. The claim was upheld in the first instance but reversed on appeal for procedural reasons. For an in depth analysis of the case, please see our blog **here**.

Germany

There is not yet any specific law in Germany which regulates 'green claims' in advertising. However, the 'Act against Unfair Competition' (*Gesetz gegen den unlauteren Wettbewerb, UWG*), which is intended to protect against general "*unfair business practices*" by companies, has served as a legal basis for greenwashing claims challenging advertisements.

To date, greenwashing claims in Germany have been assessed on the basis of s. 5 and s. 5a UWG. Pursuant to s. 5 para. 1 No. 1 UWG, a company violates the standard of fair competition, *inter alia*, if it makes untrue or otherwise deceptive claims about material characteristics of an advertised product, which are likely to convince the consumer or other market participant to purchase those products. Pursuant to s. 5a UWG, a company violates the standard of fair competition, *inter alia*, if it withholds from consumers or other market participants, essential information about the product it advertises, where relevant to a decision to purchase such product. If an advertisement violates the provisions of the UWG, competitors, consumers and other market participants may pursue claims for injunctive relief or removal of the greenwashing advertisement.

The Federal Supreme Court (BGH) has noted that a strict standard applies to environmental advertising claims, similar to advertising in health care.[2] However, given that this is merely a general guideline, it falls short of providing a defined framework to be applied when considering greenwashing in advertisements. It only provides a general legal standard for the lower courts to assess individual cases.

As a result, the outcome of cases is strongly shaped by the facts and particularities of each case. For example, in its judgment dated 19 August 2021, the Higher Regional Court of Hamm prohibited a company from marketing lamps with the advertising claim "*CO2 reduced*", "*environmentally friendly products and sustainable packaging*", "*our contribution to sustainability*". The court explained that such claims were generic and leave open which aspect of the production process, packaging or distribution, was environmentally friendly or to which a CO2 reduction related.

In a different case, the Higher Regional Court Schleswig ruled that the term "*climate neutral*" in an advertisement is not per se misleading, particularly if the advertisement makes clear that climate neutrality is achieved through measures of carbon compensation.[3] The Higher Regional Court Frankfurt adopted a similar approach, classifying the term "*climate neutral*" as misleading unless the advertisement contains an explanation about the basic circumstances of the company's claim to climate neutrality.[4]

2. BGH, judgment of 20 October 1988, docket no. I ZR 238/87, margin no. 26.; cf. Higher Regional Court Hamm, judgment of 19 August 2021, docket no. 4 U 57/21, guiding note no. 9 (Leitsatz 9).
3. Higher Regional Court Schleswig, judgment of 30 June 2022, docket no. 6 U 46/21, guiding note no. 4 (Leitsatz 4).
4. Press release of the Higher Regional Court Frankfurt (see here).

France

In France, various legal mechanisms regulate greenwashing marketing. The French Consumer Code contains a general prohibition on misleading commercial practices, including misleading advertising. Under the Consumer Code, claims can be brought to challenge false allegations and misleading information as to the essential characteristics of goods or services, including those related to greenwashing marketing. The Climate and Resilience law of 21 August 2021 expressly extended the scope of misleading commercial practices to greenwashing. It also increased the existing fine for misleading commercial practices related to the environment to up to 80% of the false promotional campaign cost.

In March 2022, Greenpeace France and other NGOs filed a lawsuit against a French energy and petroleum company alleging that the company's objectives to achieve a carbon-neutral ambition by 2050 are misleading and made solely for marketing purposes. Further to this, in January 2023, it was reported the Nanterre public prosecution office confirmed it was investigating a complaint against the company for alleged "misleading commercial practices". In another case, a consumer association sued an electricity and gas supplier, claiming that it was committing misleading commercial practices in the marketing and promotion of its commercial offer which allegedly used "*carbon-neutral electricity*" in that it was "*produced from sources that emit almost no CO2*". The Paris judicial court dismissed the NGOs' claims, noting that all of the explanations relating to the offer on the company's website showed "*a desire to provide information on a relatively complex subject in the context of a commercial offer and not a scientific statement, leaving the consumer the possibility of perfecting his or her personal information*", a choice of communication that was "*not such as to create confusion in the mind of the consumer between the production and distribution of electricity*".[5]

In addition to the general prohibition of misleading commercial practices, there are other provisions in both the Consumer Code and the Environmental Code that can be used by consumers to challenge false allegations and misleading information in relation to greenwashing before courts. Article L. 229-68 of the Environmental Code prohibits advertisements which state that a product or service is carbon neutral, or use any wording of equivalent meaning or scope.

As of the 1st of January 2023, in application of this article, administrative fines, ranging from 20 000€ for a natural person to 100 000€ for a legal entity, can be imposed by the Minister of the Environment for any failure to comply with the article's provisions. Also, Article L. 441-1 of the French Consumer Code ("délit de tromperie") contains a general prohibition on deceiving or attempting to deceive a contracting party, by any means or process, on the goods delivered, including their substantial qualities.

In addition to legal sanctions, the Advertising Ethics Board ("*Jury Déontologique de la Publicité*" the Board) can also issue opinions on the compliance of an advertisement. For example, in February 2022, the Board held that the advertisement claiming that the elimination of over-wrapping of water bottles reduced the plastic used by 90% was mathematically false, and therefore contrary to the rules of advertising ethics.

5. Civil Court of Paris, 19 April 2022, No 20/10498.

As opinions of the Board can be used as evidence in litigation, this opinion could be referred to in any future proceedings on the matter.

Additionally, in November 2022, the NGO Notre Affaire à Tous filed a claim against an International Football Association before this Advertising Ethics Board for misleading commercial practice in the marketing of the World Cup 2022
as a "carbon-neutral" event. Initially, the association had until the end of January 2023 to submit its response to the claim, however, upon request, it was granted a delay until 31 March 2023.

The Netherlands

In the Netherlands, there are a multitude of advertising standards potentially applicable to advertisements containing environmental claims. These include (i) the UCPD; (ii) provisions in the Dutch Civil Code (DCC); (iii) the Guidelines for Sustainability Claims (Guidelines) provided by the Authority for Consumers and Markets (ACM), a government regulator; and (iv) the Code for Environmental Advertising (COE), created by the Advertising Standards Foundation (ASF), a self-regulation mechanism comprised of representatives of both the advertising industry (advertisers, advertising agencies and the media) and the Dutch Consumer Association.

The UCPD and the DCC do not contain specific provisions for environmental advertising. In general, advertising that misleads consumers about essential elements of an advertised product or service is unlawful pursuant to article 6:193c and 6:193d DCC, both implementations of the UCPD. A similar provision exists for advertising that misleads professional parties under article 6:194 DCC. Pursuant to article 6:162 DCC, misleading advertising may also be an unlawful act under general rules of tort law. Claimants can rely on these provisions when bringing allegations of greenwashing in proceedings before the civil courts, and may attempt to seek rectifications, prohibitions on the usage of allegedly misleading terminology and potentially (but not likely) damages. Due to the expense and duration of civil proceedings, claimants are more likely to be NGOs than individual consumers. Currently, an airline is being sued by an NGO claiming that the airline's advertisements for environmentally responsible flights and claims of CO2 neutrality are false and misleading to consumers because there is no evidence for these claims. The litigation is pending.

The Guidelines contain five rules of thumb to help companies with formulating honest 'green claims': all environmental claims must be correct, clear, substantiated, up to date and honest. The Guidelines are enforced by the ACM, but do not themselves create sanctions for non-compliance. The ACM has the authority to penalise companies for false advertising, which includes greenwashing. Two Dutch energy companies recently agreed to amend or remove environmental claims from their websites and donate substantial sums to environmental charities, after the ACM found these environmental claims to contravene the Guidelines. The ACM did not levy fines but indicated that it may in future cases.

The COE is a specific set of rules that applies to all advertising messages referring, implicitly or explicitly, to environmental factors connected to the entire life cycle of all advertised goods and services. Under articles 1 and 2 of the COE, environmental claims may not (expressly or through omission) mislead the consumer concerning

environmental aspects of the products or the contribution of the advertiser to maintaining or promoting a clean and safe environment. Environmental claims are held to an extremely high standard: pursuant to article 3 of the COE, all environmental claims must be demonstrably fully correct, where the advertiser bears the burden of proof. If an advertisement makes an absolute claim (for example, that a good or service is 'carbon neutral'), it must provide absolute proof of the veracity of this claim. The ASF and its appeals body have held that claims of 'carbon neutrality' and 'CO2-compensated' are misleading where advertisers were unable to provide proof of 100% permanent compensation. Following a decision, the ASF provides recommendations and checks that the company complies with those recommendations. If it does not comply, the ACM may step in and use its regulatory enforcement mechanisms. Lodging a complaint with the ASF has a very low cost and time threshold, meaning that individual (and NGO) complainants can, and frequently do, bring greenwashing complaints against advertising companies in the Netherlands.

The United States

In the US, consumers and plaintiffs' lawyers are closely scrutinising representations in product packaging and advertising regarding a product's sustainable sourcing, organic ingredients, fair trade, and environmental benefits. Consumer claims are typically brought as class action lawsuits under state statutes and state tort law. While each consumer usually may only claim a nominal amount in damages, the class action mechanism allows plaintiffs' lawyers to sue for many thousands of similarly situated consumers, driving potential damages into the millions.

The principal government enforcers in this area are the Federal Trade Commission (FTC) and state Attorneys General (AGs), which initiate investigations and enforcement litigation under the Federal Trade Commission Act and analogous state statutes. These laws provide for injunctive relief and may also provide for significant civil penalties. For example, in 2021, environmental groups filed a first-of-its-kind false advertising complaint with the FTC, claiming that an US energy company used "unlawfully deceptive advertisements which overstate its investment in renewable energy and its commitment to reducing fossil fuel pollution". Although FTC complaints have no legal force on their own, they carry reputational risk and can prompt the FTC to take enforcement action. State AGs have also filed suits against oil companies for allegedly misleading public statements regarding their contribution to climate change – for example, in New York in relation to statements in an US oil and gas company's securities filings and in the District of Columbia for alleged greenwashing in advertising.

So far, the success of such claims has been mixed. The viability of claims has depended largely on the specificity and verifiability of the statements in question; challenges to specific statements that are factual and accurate on their face have not been successful. For an in-depth analysis of recent cases, please see our blog on ESG-focused consumer claims **here**.

Courts have shown reluctance to allow causes of action for omissions where no affirmative obligation exists to disclose facts or where "half-truths" would be misleading. For example, in June 2020 an appellate court affirmed a decision that the failure to state on candy wrappers the existence of known labour abuses in supply chains was not misleading.[6]

6. *Tomasella v. Nestle USA, Inc.*, No. 19-1130 (1st Cir. 2020).

Australia

Australian regulators, such as the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC), as well as the Australian Securities Exchange Ltd (ASX), have identified greenwashing as a priority issue. It is also an emerging area of focus for class action litigants.

False or misleading representations and misleading or deceptive conduct in the course of business are prohibited under s. 1041H of the Corporations Act 2001 (Cth) (Corporations Act) and s. 18 of the Australian Consumer Law (ACL). For corporations, a breach of the ACL provisions may attract a pecuniary penalty in the amount equivalent to the largest of: AUD 50 million; three times the value of the benefit to the corporate group from the contravention; or 30% of annual adjusted turnover in the preceding 12 months.

In October 2022, a class action was commenced in the Victorian Supreme Court against the Australian entity of a Japanese car manufacturer challenging the alleged use of diesel ‘defeat devices’ and representations made by the company relating to compliance with environmental standards. A similar class action is under investigation by plaintiff lawyers against a different car manufacturer relating to certification of various diesel engines in its trucks and reporting of fuel efficiency and emissions data.

In addition to civil litigation, following the publication of its guidance on ‘green’ marketing and the ACL in March 2021, the ACCC’s 2022/23 enforcement priorities include a particular focus on targeting misleading environmental and sustainability claims in the manufacturing and energy sectors. On 4 October 2022, the ACCC announced internet sweeps of at least 200 company websites to identify misleading environmental and sustainability marketing claims across a range of sectors including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, and clothing. The ACCC has indicated that it will publish its findings once collated and analysed, and this will likely be followed up by compliance and education initiatives, as well as potential enforcement action.

The ACCC has already brought several enforcement actions for greenwashing claims in Australia. The most notable is the enforcement action against a German car manufacturer, resulting in an AUD 125 million penalty in relation to false or misleading representations made by the car manufacturer when importing more than 57,000 diesel vehicles into Australia between 2011 and 2015, and listing those vehicles on the Australian Government’s ‘Green Vehicle Guide’ website. In a related consumer class action, a settlement was reached.

Consumer products have also been a focus of ACCC actions, including against an Australian provider of household cleaning products for a “*flushable*” cleaning product resulting in penalties totalling AUD 700,000, and against an Australian supermarket chain in relation to a claim that a range of disposable cutlery and crockery sold under the ‘Select Eco’ brand were “*biodegradable and compostable*” (although this action against the company was ultimately unsuccessful).

The United Kingdom

The UK Competition and Markets Authority (CMA) and advertising watchdog, the Advertising Standards Agency (ASA), have been cracking down on greenwashing claims made by firms operating within the UK. Both agencies protect consumers by investigating issues falling within their remit and responding to complaints directly made by consumers.

In September 2021, the CMA published its Green Claims Code, which is aimed at protecting consumers from misleading environmental claims and businesses from unfair competition. The Green Claims Code contains a set of six guiding principles to help businesses understand and comply with their existing obligations under consumer protection law when making environmental claims. The principles include ensuring that claims are substantiated and that they are truthful, accurate, clear and unambiguous.

Following the publication of the Green Claims Code, in July 2022 the CMA launched an investigation against three fast fashion chains to scrutinise whether their sustainability claims constitute greenwashing.[7] The CMA's investigation will scrutinise the credibility of sustainability statements and information provided by the fashion chains to advertise their sustainable clothing lines, as well as the criteria used by these businesses for including products in their sustainable collections. If the companies are found liable for greenwashing, the CMA's decision could lead to the companies being required to make changes to the way in which they operate and/or taking the firms to court for enforcement action. In January 2022, the CMA announced it was expanding the scope of its focus to include misleading environmental claims in the fast moving consumer goods (FMCG) sector.

In August 2022, the ASA banned a multinational consumer goods company's advertisement for one of its laundry detergents after a complaint was made by a viewer that the advertisement's claims that the detergent is "kinder" to the planet were unsubstantiated. The ASA upheld the complaint and found the company in breach of the ASA Broadcast Code on the basis that the advertisement was misleading and confusing for consumers, as the advertisement featured "*various strands of messaging*" about brand's environmental initiatives and the environmental benefits of the product. The regulator also held that claims about the environmental benefits of the product could only be justified if the product provided an environmental benefit over other similar products.

More recently, in October 2022, the ASA banned two advertisements of a British bank for being "misleading" about the bank's work to tackle climate change.[8] The first poster featured an aerial image of waves crashing on a shore with text that stated "*Climate change doesn't do borders. Neither do rising sea levels. That's why [the bank] is aiming to provide up to $1 trillion in financing and investment globally to help our clients transition to net zero*". The second poster featured an image of tree growth rings with text that stated "*Climate change doesn't do borders. So, in the UK, we're helping to plant 2 million trees which will lock in 1.25 million tonnes of carbon over their lifetime.*" The ASA concluded that despite the initiatives highlighted in the ads, the bank was continuing to significantly finance investments in businesses and industries that emitted

7. See here.
8 See here.

notable levels of carbon dioxide and other greenhouse gases. Consumers might not know that this was the case – and, as a result, the ASA considered this to be material information that was likely to affect consumers' understanding of the overall message of those advertisements, and so should have been made clear in the advertisements. The omission of this material information meant that the advertisements were misleading.

In February 2023, the ASA published updated guidance for advertisers making environmental sustainability-related claims to consumers, including on the use of the terms "carbon neutral" and "net-zero". The updated guidance includes, amongst others, rules on the inclusion of claims based on future sustainability goals and the standards of evidence for claims based on offsetting. The ASA has stated it and intends to monitor the impact of the new guidance for up to six months following its publication.

Greenwashing claims have also emerged recently as key issues in antitrust damages litigation between rival companies. In September 2021, a supplier of gowns made of recycled plastic bottles, sued a competitor for abusive market position before the UK's Competition Appeal Tribunal. The Defendant alleged by way of counterclaim that the Claimant's "*recycled materials*" claim is misleading because it is untrue. Though pending, the claim shows how greenwashing practices can easily amount to an act of unfair competition. Most recently, a swathe of multiparty claims have been brought against car manufacturers and car dealerships in the UK in connection with the 'dieselgate' emissions case. Recent reports suggest that the lawyers in the case act for more than 245,000 claimants.[9]

Aside from actions in the courts, several complaints have also been filed with UK NCP relating to allegedly misleading statements made by companies about the environmental credentials of their operations. In 2019, the NGO ClientEarth brought a complaint against a British oil and gas company, questioning the accuracy of statements made by the company in advertising campaigns focused on its renewable energy operations. The advertisements were withdrawn before the UK NCP issued a decision. In 2022, another landmark complaint was filed by a group of NGOs before the UK NCP against a UK wood-burning electricity generator, which allegedly misled consumers about its climate impacts. The UK NCP has decided that the complaint has merits and that it will proceed to the next stage of consideration. See our blog post on the ruling **here**.

9 . The Lawyer, 'City firms line up to defend fresh claims over car emissions', 2 December 2022.

FINANCE GREENWASHING

As more green financial products and services are available in the market, greenwashing is becoming a growing priority for financial market regulators. Their focus is on protecting the public and investors from misleading claims about companies' roles in climate change in general, about the impact that climate change poses for the companies' long-term business prospects, and on the features of their financial products and services.

Financial institutions, financial advisers and asset managers (and their insurers) are also facing mis-selling litigation based on the greenwashing of financial products and services, and breaches of investment mandates.

We provide an overview of the position in the US, the UK, certain EU member States (i.e. France, Germany, Italy), Australia, Hong Kong, Singapore and the United Arab Emirates.

The United States

The US Securities and Exchange Commission (SEC) is the authority responsible for investigating financial greenwashing in the US. Recent SEC actions against US and non-US companies for greenwashing sound a warning for companies active in ESG investing or which make ESG-related public statements. They also offer a preview of the significant risks awaiting if the SEC can finalise its unprecedented new disclosure requirements for public companies, investment managers and funds.

The SEC Division of Enforcement established a Climate and ESG Task Force (Task Force) in March 2021. Amongst other matters, the Task Force reviews disclosure and compliance issues relating to investment advisers' and funds' ESG strategies, and identifies material gaps or misstatements in climate risk disclosures by public issuers. The Task Force has pursued several enforcement actions related to ESG issues. For example:

- In November 2022, the SEC charged an asset manager of a US bank for policies and procedures failures involving two mutual funds and one separately managed account strategy marketed as ESG investments. To settle the charges, the asset manager agreed to pay a USD 4 million penalty. The SEC investigation found that from April 2017 until February 2020, the asset manager had several policy and procedural failures involving the ESG research its investment teams used to select and monitor securities. Additionally, the asset manager had shared information about its ESG policies and procedures, which it failed to follow consistently, with third parties, including intermediaries and the funds' boards of trustees.
- In February 2023, Global Witness, an international NGO, filed a complaint against a listed oil company requesting that the SEC investigate claims that the company may be making misleading statements regarding its financial investments in renewable energy sources.

These greenwashing risks will only increase as the SEC adopts formal ESG-related reporting requirements. The new rules are only at the proposal stage; they are likely to change and will almost certainly be challenged in US courts. But if they come into effect, even in modified form, the rules are widely expected to be some of the most significant new public company and investment manager disclosure and compliance

requirements in a generation. See **here** our blog on SEC greenwashing enforcement for further analysis of these rules.

ESG-related securities claims that involve alleged misrepresentations in issuer disclosures in securities filings or other public reports pose significant risks of parallel private claims and enforcement actions for the same conduct. For example, in April 2022, following a deadly dam collapse in Brazil, shareholders of a South American mining company brought a securities fraud class action against the company's senior executives for the alleged failure to disclose material information that the company's dam risk management and sustainability practices were insufficient in light of known risks. The complaint survived a motion to dismiss and proceeded to discovery, but the parties eventually settled for USD 25 million. The SEC brought a parallel enforcement action on substantially the same basis, thus underscoring the risk of parallel private and enforcement actions for the same conduct.

The United Kingdom

In the UK, the Financial Conduct Authority (the FCA) has also committed to taking swift action to protect consumers where the practices of firms regulated by the FCA do not meet its expectations, although it has not (to date) taken enforcement action against any firm.

In July 2021, the FCA released a letter and guiding principles regarding the "*clear and accurate*" ongoing disclosures expected of funds making ESG-related claims. The letter states very directly that the FCA is dealing with several "*poor-quality [ESG] fund applications*" which may impact consumers.

The guiding principles part of the document contains just three core principles, each to be read in light of the overarching principle of 'Consistency':

- The design of responsible or sustainable investment funds, including the fund's name, financial promotions or fund documentation, should fairly represent the materiality of ESG considerations.
- ESG investment funds must apply appropriate resources in pursuit of its stated ESG objectives, consistently and on an ongoing basis.
- Pre-contractual and ongoing disclosures on ESG investment funds should be easily available to consumers and contain comprehensive information to enable them to make informed investment decisions.

In October 2022, the FCA announced a proposal for a new set of measures to try to protect consumers from greenwashing and improve trust in sustainable investment products and services.

Amongst other matters, the FCA is proposing to introduce three new categories of sustainable investment product labelling (which will be underpinned by objective criteria) and more disclosure requirements to help consumers understand the key sustainability features of an investment product. As part of these measures, the FCA plans to step up its supervisory engagement on sustainable finance and enhance its enforcement strategy.

More investigations are expected to be brought against financial institutions and asset managers, as attention on the green marketing of financial products and services is continuing to grow. Notably, the findings of these investigations will also be subject to such attention, as evidenced by a claim brought by ClientEarth against the FCA. The claim argues that the FCA acted unlawfully by approving the prospectus of a UK oil and gas company despite the company's disclosures allegedly failing to adequately describe the climate-related risks faced by the company and therefore breaching legal requirements. In light of this increasing scrutiny, it is likely that investigations by regulatory authorities will not only be more frequent but more comprehensive in nature.

Besides investigation from the FCA, English courts could potentially see greenwashing actions or broader ESG-washing related actions advanced by stakeholders. A key avenue for pursuing such actions is through large-scale shareholder group claims, which have become increasingly prevalent in the UK in recent years due to the proliferation of third-party litigation funding, aggressive marketing by claim managers and claimant law firms, and the use of group litigation orders (which allows numerous retail investors to collectively pursue large-scale securities claims).

Sections 90 and 90A of the Financial Services and Market Act 2000 (FSMA) provide potential redress for investors in UK-listed companies seeking compensation from issuers for losses suffered as a result of inaccurate ESG disclosures made in a prospectus (in the case of section 90 claims) or any published information, such as annual reports, accounts, directors' reports and corporate governance statements (in the case of section 90A claims).

The evidential thresholds for establishing liability under section 90 and section 90A are different. In a section 90 claim, an issuer will be liable if it makes a negligent misstatement (i.e., it publishes an objectively untrue or misleading statement that it did not reasonably believe to be true). The objectivity of the statement is key. ESG statements are often generic and forward-looking. Claims may fail to the extent there is any ambiguity in a statement, unless it can be established that the ambiguity was intentional. However, section 90 only creates liability for false or misleading statements contained in a prospectus or listing particulars.

The evidential threshold in a section 90A claim is much higher. It requires a claimant to establish deliberate or reckless conduct on the part of a person discharging managerial responsibilities (PDMR) such as a director of the issuer. That involves an element of dishonesty, which can be difficult to establish. Section 90A also requires claimant(s) to prove reliance on the allegedly untrue or misleading statement. This can be difficult, particularly for investors involved in a group litigation, as reliance must be established by each individual claimant.

To date, there has only been one trial judgment handed down by the English Courts in respect of a section 90A claim since its enactment in 2006 - in *HP v Autonomy*, a post-closing M&A dispute in which the defendant (Autonomy) was sued by HP for fraudulently inflating company revenue. The long-awaited judgment in *Autonomy*, which was handed down in early 2022, has provided some helpful guidance on some of the key elements of section 90A claims (for example, confirmation that the knowledge of the PDMR, as opposed to the issuer, is relevant). However, many uncertainties remain

around other components of section 90A liability, for instance on reliance. The *Autonomy* case also involved a unique set of facts involving the purchase of a business by a single shareholder. As such, the judgment provided limited guidance as to the level of reliance that would be reasonable in a group context or where non-financial information was relied on. UK issuers should continue to be prudent in taking legal advice on statements to the market and acting on that advice to mitigate the risks of ESG-related securities litigation.

The European Union

The European Securities and Markets Authority (ESMA), the EU's securities markets regulator, is also focusing on curbing greenwashing in financial markets. Indeed, to protect investors from potentially misleading behaviour, ESMA sets "*tackling greenwashing and promoting transparency*" as the first priority in its Sustainable Finance Roadmap 2022-2024 (the Roadmap) published in February 2022. More specifically, ESMA stated that "*[i]nvestigating the complex issue of greenwashing, getting to defining its fundamental features and taking co-ordinated action in multiple sectors (…) is key to deliver on ESMA's (…) mandate to secure investor protection.*" To do so, ESMA will (i) assess greenwashing practices and develop a common understanding on greenwashing, including by analysing disclosures under Article 8 and 9 of the Sustainable Finance Disclosure Regulation (SFDR) and (ii) examine wrongful disclosure, mis-selling and the lack of clear labels in addition to the availability and quality of data, when investigating greenwashing.

In line with ESMA's Roadmap is the request for input addressed to the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the ESMA by the European Commission in June 2022.[10]

To show the commitment of the EU regulators to crack down on practices that could be misleading to investors and to highlight the key role in monitoring greenwashing risks and compliance with European sustainable finance legislation played by supervisors, the European Commission asked the three European Supervisory Authorities (ESAs), individually but in a coordinated manner, to provide their respective input by means of both a progress and final report. The reports are to touch on (i) several aspects related to greenwashing and its related risks, as well as (ii) the implementation, supervision and enforcement of sustainable finance policies aimed at preventing greenwashing. The progress reports are due by 16 May 2023, with the final reports due 12 months later. In November 2022, the ESAs published a Call for Evidence on greenwashing to gather comments from stakeholders on how to understand the key features and risks associated with greenwashing in the financial sector. It also sought examples of potential greenwashing practices. The deadline for submissions was the 16 January 2023. During this period all actors involved in the financial market, along with their financial practices, will be monitored closely.

Italy

Italy's financial market regulator authority, the Commissione Nazionale per le Società e la Borsa (CONSOB), is responsible for monitoring the risks deriving from incorrect communications on sustainability profiles. Pursuant to this objective, the CONSOB is

10. See here.

strengthening its supervisory actions on the correct disclosure of 'sustainable investments' and the methodologies and criteria used to verify sustainability claims.

To effectively address the challenges that sustainability issues pose to regulation and supervision, in 2021, CONSOB renewed the Steering Committee on Sustainable Finance, established in 2019, and set up a task force aimed at launching a model of integrated supervision of ESG compliance for supervised entities and at preventing and combating greenwashing and underestimation of ESG risks of instruments, products and services. No investigations have started yet.

In March 2022, the CONSOB published its 2022-2024 Strategy Plan, which expressly states that CONSOB will continue to monitor the operations of intermediaries in the investment services sector with reference to ESG issues, in order to improve disclosure of sustainable investments by operators in the sector and counteract greenwashing phenomena. In a press released dated 7 February 2023, Consob confirmed its focus on fighting greenwashing in the financial market, as it could truly undermine investors' trust.

Misrepresentation in relation to financial products and services could also be potentially challenged by directly affected investors. Although there are no specific provisions in Italian law addressing greenwashing in financial products, potential claimants could rely on existing contract law and tort law remedies. If the ESG features of a product or services represented by the financial institutions issuing such a product or marketing a services are proven to be false or misleading, investors could sue the issuer under the ordinary contractual remedies, claiming the annulment of the contract for mistake or fraud pursuant to Article 1439 of the Italian Civil Code, plus damages. Where applicable, investors could also bring a prospectus liability claim under Article 94 of the Italian Financial Act. This provision provides for a specific civil liability regime vis-à-vis investors, which could arise as a result of the content and use of a defective prospectus. Amongst the persons that can be held liable, the law expressly refers to the issuer, the offeror and any guarantor "*as well as any other persons responsible for the information contained in the prospectus*".

Germany

The German Federal Financial Supervisory Authority (BaFin) published a draft directive for sustainable investment on 2 August 2021 (Draft).[11] The Draft contains several criteria for labelling funds as 'green' or 'sustainable', with the principal goal of protecting investors from greenwashing. However, BaFin subsequently withdrew the Draft in May 2022 explaining that the environment was "*not sufficiently stable*" for "*permanent regulation*".[12] Nevertheless, in September 2022, BaFin President, Mark Branson, confirmed that BaFin would adhere to the requirements set out in the Draft and, in particular, apply its standards in the process of authorising sustainable funds, which is why "*for example, sustainable funds must invest at least 75 per cent in sustainable investments, have a sustainable investment strategy with at least 75 per cent of the investment assets or track a sustainable index*".[13] BaFin has increased its focus on combating greenwashing, investigation allegations in recent years.

11. See here.
12. See here.
13. See here.

Examples of complaints relating to greenwashing in the finance sector concern advertisements for investment products that were offered online in the context of a so-called "CO2 impact calculator". Impact calculators are an online tool which have been marketed as enabling potential investors to calculate the (positive) impact of their investments – in advertised fund products - on the environment. The consumer advice centre in Baden-Württemberg successfully brought a complaint against a German bank, alleging that its use of its impact calculator was misleading and thus improper advertisement. The advertisement had not clarified that the calculations were solely based on estimates without further transparency on the relevant factors. The bank subsequently removed the impact calculator from its website.[14]

In a similar case, the Regional Court Stuttgart held that an online impact calculator of a fund management company was misleading because using the calculator created the erroneous impression that the investors could contribute to savings of a specific amount of greenhouse gas emissions by way of investing in a particular fund product.[15] In fact, the numbers shown to the prospective investors were actually non-binding goals, as had been correctly specified in the prospectus.

France

France's financial market regulator, the Autorité des marchés financiers (AMF) is eager to foster the development of sustainable finance. In March 2020, the AMF published its first guidelines on sustainable finance. These guidelines apply to funds that include ESG criteria in their non-financial information.[16] In its guidance, the AMF stressed the importance of addressing risks of greenwashing for non-professional clients. These guidelines were updated on 27 January 2022. The AMF and the French Prudential Supervision and Resolution Authority (ACPR) have encouraged companies to follow these guidelines.

Both the AMF and ACPR included ESG considerations in their top priorities published in 2022, which outline the key areas for action over the coming year.[17] Among the top focus areas identified by the AMF were the development of sustainability reporting standards and protecting investors against greenwashing risks. As for the ACPR, top priorities include better mitigating the risks in relation to climate change.

The AMF recognises two labels for sustainable finance funds: ISR and Greenfin, created by the Ministry of Economy and Finance and by the Ministry of the Environment, Energy and Sea respectively in 2015.[18]

In 2019, the AMF began conducting ESG audits on some financial actors. The importance of conducting more "SPOT"[19] audits to better protect investors against the specific risk of financial greenwashing was pointed out by Robert Ophèle, the AMF President, during a press announcement in January 2022.[20] These audits are intended

14. See here.
15. Regional Court Stuttgart, judgment of 10 January 2022, docket no. 36 O 92/21 KfH.
16. See *Guidelines* n°DOC-2020-03, updated on 27 January 2022.
17. See notably the AMF's priorities for action in 2022, pp. 4-8 and the AMF's supervision priorities for 2022, p. 6, see here
18. See the AMF and ACPR Joint report on climate action of October 2020, 3rd ed. and the AMF's doctrine about ESG labels
19. Supervision of Operational and Thematic Practices.
20. See the AMF's press greetings for 2022 (17 January 2022).

to be "quick and targeted" and target specific financial actors to establish best practices. Currently these audits are not conducted with a punitive purpose. Instead, their aim is to compare commitments stated in a company's financial regulated documentation with its policies in practice. These audits, however, signify AMF's intention to adopt a more stringent approach on these topics in the future.

Beyond its 2020 guidelines on sustainable finance, the AMF has also called for the application of a general principle of "clear, exact and non-misleading information" within the financial sector.[21] Any breach of this principle, especially with regards to greenwashing and non-financial commitments, could lead to deterrent administrative/financial actions and sanctions, in addition to the general reputational risk.[22]

For the new year 2023, the AMF published a press release detailing its priorities, among which is improving the regulatory framework for sustainable finance by advocating for a clarification of European legislations to allow their proper application and increase efficiency in spotting and preventing greenwashing. Furthermore, the AMF published another press release indicating that it was advocating for increased clarity with regard to the newly applicable articles 8 and 9 of the Sustainable Finance Disclosure Regulation. The authority has also suggested the introduction of minimum environmental requirements at the European level to best identify and determine whether a product should be categorized as falling within the scope of articles 8 or 9 of the aforementioned Regulation.

Australia

Section 1041H of the Corporations Act 2001 (Cth) (Corporations Act) and s. 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) are both relevant tools for tackling false or misleading representations and misleading or deceptive conduct in the context of financial greenwashing.

Two recent claims have related to statements made in annual reports regarding green credentials (e.g., "clean energy") and management of climate risks or net zero targets, with the relief sought being injunctive or declaratory relief requiring correction of the statements.

In a 2021 case filed in the Federal Court of Australia against an energy company, a public interest advocacy group, the Australasian Centre for Corporate Responsibility (ACCR), brought a claim for misleading or deceptive conduct based on representations made by the company in its 2020 annual report. The annual report referred to natural gas providing "clean energy" and the company having a "credible and clear plan" to achieve "*net zero*" emissions by 2040. The ACCR brought the claim as a shareholder of the company and alleges that the company engaged in greenwashing by "*embellishing its environmental credentials in a way that is misleading or deceptive, or likely to mislead or deceive*" contrary to the Corporations Act and/or the ACL. The ACCR alleges that misrepresentations have occurred both by representation and omission. No judgment has yet been handed down in this case.

21. See Guidelines n°DOC-2020-03, updated on 27 January 2022.
22. See Guidelines n°DOC-2020-03, updated on 27 January 2022.

In another case, two shareholders of the an Australian bank alleged that the bank violated the Corporations Act by failing to disclose climate change-related business risks in its 2016 annual report. The shareholders sought a Federal Court declaration that the bank had violated the Corporations Act, and an injunction to either restrain bank from continuing to fail to report on climate change-related risks and its responses, or positively requiring it to report on them.[23]

Australian financial regulators, namely the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) as well In particular, the ASIC has increasingly taken a robust approach to tackling greenwashing in financial products and services. In June 2022, the ASIC released guidance on the term 'greenwashing', with the release of Information Sheet 271 on how to avoid greenwashing when offering or promoting sustainability-related products. In the document, the ASIC describes greenwashing as "*the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical*". Following the publication of the Information Sheet, in August 2022 the ASIC communicated that it was undertaking greenwashing investigations into several entities, focusing on listed entities, superannuation funds and managed funds.

On 27 October 2022, the ASIC announced that it had issued fines totalling AUD 53,280 on listed energy company, for alleged false or misleading sustainability-related statements made to the Australian Securities Exchange in October 2021. The statements were contained in an investor presentation which included various claims on the company's carbon neutrality and the environmental aspect of its projects.

Tlou reported to the market on 27 October 2022 that the ASIC had concluded its investigation and infringement notices had been paid without admission of any contravention of the Corporations Act or ASIC Act. A failure to pay fines of this nature could lead to criminal or civil proceedings being brought against a company by the Commonwealth Director of Public Prosecutions or ASIC.

In February 2023, ASIC also launched its first court action against alleged greenwashing conduct, commencing civil penalty proceedings in the Federal Court against a superannuation fund for alleged false and misleading statements on the basis that the fund's investment allocations did not appear consistent with the product information for its "Sustainable Plus" fund. ASIC is seeking changes to the fund's website, declarations of wrongdoing and civil penalties.

Other jurisdictions

In other jurisdictions, greenwashing complaints, litigation and enforcement action have yet to come to the fore. However, there have been developments to promote sustainable finance and combating greenwashing. By way of example:

- In the United Arab Emirates, the independent regulator of financial services conducted in or from the Dubai International Financial Centre (DIFC), the Dubai Financial Services Authority (DFSA), published a discussion paper in September 2020 titled "*Championing Sustainable Finance in the DIFC*", which considered (amongst other matters) introducing guidelines on a 'comply or explain' basis to

23. *Abrahams v Commonwealth Bank of Australia* (2017): this case was settled.

cater for where financial instruments are marketed as 'sustainable' to counter the risk of greenwashing. The DFSA has yet to introduce any enforceable measures in this regard.

- In Singapore, the Monetary Authority of Singapore has emphasised that it is "*fully committed to working with the industry to combat greenwashing, at both the fund and firm level*".[24]
- In Hong Kong, regulators, including the Hong Kong Monetary Authority, Securities and Futures Commission and Insurance Authority formed a steering group in May 2020 to co-ordinate the management of climate and environmental risks to the financial sector.

In these jurisdictions, increased enforcement action, litigation and complaints regarding greenwashing in relation to financial products and services is very likely. Focus is likely to be on either ESG disclosure failures vis-à-vis firms' obligations as regulated entities, or breaches of ESG-specific regulatory obligations in respect of the funds that regulated firms are involved in managing.

24. Tan Keng Heng, Executive Director, Monetary Authority of Singapore, January 2022.

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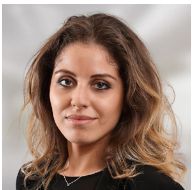

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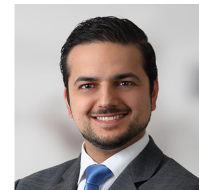

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