

What is your Greenwashing Risk?

Why should your business care about Greenwashing Risk?

The Competition and Markets Authority ("CMA") is taking an increasingly active role in scrutinising "sustainability" labels and "green" claims.

Following an investigation into marketing strategies in the fashion sector launched in 2022, the CMA have recently [announced](#) that they had reached agreement with ASOS, Boohoo and George at Asda that the brands would "use only accurate and clear green claims".

The CMA has issued an open letter to the entire fashion sector advising all fashion retailers to review their "green" claims, in light of the commitments made by these three market leaders. Fashion brands should now consider carefully the statements they make in advertising, including by reference to certain [examples](#) provided by the CMA.

In December 2023, the CMA [announced](#) an investigation into green claims made by the consumer goods giant Unilever the outcome of which is not yet known.

The Advertising Standards Authority ("ASA") have also stepped up their scrutiny, including by using AI to review commercial advertising.

In recent years, the likes of [HSBC](#) and [Shell](#) have been sanctioned by the ASA in relation to adverts which were found to be misleading due to their omission of significant information about the overall

environmental impact of their businesses. Whilst the ASA does not have the power to impose financial sanctions, the potential reputational damage from its decisions could be far-reaching.

The Financial Conduct Authority ("FCA") are introducing an anti-greenwashing rule, applicable to any authorised firms making statements about their products or themselves.

For more information about the FCA's guidance, see our recent [article](#).

Similarly, competent authorities in other jurisdictions across the European Union are also scrutinising "green" claims. This is the case in France, for example, where the French Directorate-General for Competition, Consumer affairs and Fraud control ("DGCCRF") has conducted an unprecedented investigation in 2021 and 2022, dedicated to the control of environmental claims used to promote non-food products and services. In a statement published in May 2023, the DGCCRF indicated that, out of 1,100 entities inspected, it found that one in four was in breach. Consequently, the DGCCRF's investigators issued 141 warnings, 114 injunctions and 18 criminal or administrative proceedings to put an end to practices that were misleading consumers with the most serious practices being the subject of proceedings and referral to the competent courts.

What are the rules?

England and Wales

In England and Wales, green regulation already exists in the form of the recent amendments to the Companies Act 2006, as well as the guidance for companies contained in the Green Claims Code.

However, the most significant piece of regulation is the Digital Markets, Competition and Consumers Bill which is due to become law in autumn 2024. The Bill will enhance the CMA's enforcement powers to tackle misleading practices, including through the imposition of unprecedented fines. The current draft of the Bill proposes a maximum fine of the greater of £300,000 or 10% of an entity's global turnover.

France

In France, the regulation of "green" claims is the result of the transposition of the EU directive on unfair commercial practices¹ into the French Consumer Code.

French law also contains provisions on practices relating to labels, logos or certificates guaranteeing respect for the environment. Under French consumer law², a professional who uses a label must be able to prove that he or she has adhered to the label and that the specifications have been complied with by means of checks carried out by a third party.

Finally, certain terms are prohibited under French law or strictly regulated (such as references to "carbon neutral" or "biodegradable").

European Union

There are two main EU directives dealing with green claims which have the potential to transform the environmental rule book.

- The ECGT Directive³, which Member States must implement into national law by 27 March 2026, is primarily concerned with "generic environmental claims". These are messages or representations, including text, graphics and audio representations, that state or imply a business, product or service has either a positive, less damaging or no impact on the environment and where the specification of that claim is not provided in clear and prominent terms.

- The Green Claims Directive⁴, which was proposed by the European Commission on 22 March 2023, will, if it becomes EU law, require businesses to comply with minimum requirements on how to substantiate and communicate their green claims, including by third-party verification of claims. The current draft of the Directive states that the maximum level of fine set by member state for non-compliance should be dissuasive and at least 4% of the company's total annual turnover.

Top questions to ask yourself

1. What evidence do you have to support any "green" claims your business makes?
2. Does the imagery or colours used in your branding imply sustainable or green credentials? And are the graphic representations (including symbols, images or labels) relevant to the claim being made?
3. Does the "green" claim provide additional benefits compared to what already exists or what is legally required?
4. Does the "green" claim use simple language that is neither vague nor ambiguous, or vocabulary that is likely to be difficult to understand?
5. Who signs off on marketing campaigns in your business and what factors do they consider in doing so?
6. Do you rely on any third-party or supply chain disclosures to support your "green" claims and what do you do to verify them?
7. What procedures you have in place to mitigate regulatory risk in all jurisdictions you operate in?

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

² Article L. 121-4 of the French consumer code.

³ The Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards

empowering consumers for the green transition through better protection against unfair practices and better information

⁴ The Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims

How can we help?

At Stephenson Harwood, we have expertise in all aspects of greenwashing risk: regulatory compliance, civil fraud, commercial and corporate litigation, competition and consumer protection. We are well placed to advise in every major industry and sector, ranging from multinational corporations, financial institutions, large and medium sized companies, and professionals.

What sets us apart is our experience of advising clients in relation to allegations of greenwashing, including in the context of ASA investigations.

Our Greenwashing Risk team is international with specialists spread across our offices in Europe, Asia, and the Middle East, which means that we can support you wherever your business interests are based.

We would be delighted to review your marketing campaigns and talk to you about your businesses' specific Greenwashing Risk.

Contact



Genevieve Quierin

Partner, corporate and commercial disputes

T: +44 20 7809 2174

E: genevieve.quierin@shlegal.com



Jonathan Cripps

Partner, head of decarbonisation, projects, energy and infrastructure

T: +44 20 7809 2084

E: jonathan.cripps@shlegal.com



Trudy Feaster-Gee

Partner, competition

T: +44 20 7329 4422

E: trudy.feaster-gee@shlegal.com



Sean Jeffrey

Partner, regulatory litigation

T: +44 20 7809 2034

E: sean.jeffrey@shlegal.com



Laetitia Ghebali

Of counsel, ethics, investigations and defense

T: +33 14 415 8202

E: laetitia.ghebali@shlegal.com