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Greenwashing: Emerging Compliance and Cross-Border Legal Risks

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Greenwashing, or the use of green 'claims' to improve a business' or product's environmental credentials with consumers, has come under significant scrutiny in recent years. Both the Advertising Standards Authority and the Competition and Markets Authority (**CMA**) have taken action recently and, in the case of the CMA, obtained onerous voluntary undertakings from alleged wrongdoers.

These undertakings, combined with recent changes to criminal law in the UK under the Economic Crime and Corporate Transparency Act 2023, and the already sophisticated regulatory civil regimes, mean green claims can come with real risk if not properly managed and considered.

In July 2022, the CMA publicly indicated that it was concerned about the way three companies in the fashion industry (ASOS, BooHoo and Asda) were marketing their products. In particular, the CMA was concerned that statements and language describing the products as responsible, sustainable, recycled and eco-friendly were materially misleading.

The CMA opened an investigation and on 24 March 2024, the three companies gave broad and onerous voluntary undertakings which included the following, among other things:

1. a commitment to ensure that all green claims (wherever made) are accurate and not misleading;
2. objective criteria for including products in "green" ranges;
3. ensuring that any claims made to consumers around environmental targets are supported by a clear and independently verifiable strategy, and customers are able to access more details including, what the target aims to achieve, when they expect to meet it and precisely how they will meet it; and

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4. regular reporting on how they are complying with the undertakings given.

While these companies are outside of the energy sector, the parallels to activity in the energy industry are easy to see. Examples include statements around becoming net zero by a particular date, or the green nature of newer products such as sustainable aviation fuel or hydrogen. Energy companies need to take steps to manage and mitigate these risks, and with the CMA already looking at fashion and fast-moving consumer goods, energy seems an obvious target for future scrutiny – particularly where there is a consumer interaction.

Furthermore, recent criminal law changes in the UK have created a strict liability offence for corporates who fail to prevent fraud by their employees, agents and other associated persons. This can include fraud by misrepresentation – an offence that will often be triggered by a dishonest green claim. For offences not within the fraud category, such as unfair commercial practices, new provisions around corporate liability for the conduct of senior managers can create similar risks.

But it is not just UK regulatory risks that need to be considered. Sophisticated global energy companies will also need to consider the following:

1. the risk of enforcement in other jurisdictions, in particular, the US. Jurisdiction can arise from being present in the United States, using US Dollars or from being an issuer on US markets. US enforcement authorities remain aggressive, particularly where consumers are affected by corporate dishonesty.
2. the risk of civil actions brought by shareholders, counterparties, consumers and NGOs, all of which can lead to significant liabilities, legal costs and the distraction of senior individuals.

Energy companies must, therefore, take a holistic view of the risk in this space. Companies will want to consider what controls are appropriate to minimize the risk of investigation or litigation across the full range of risk scenarios, recognizing that much of the harm a company may suffer occurs during the process of a regulator or third party taking action, regardless of the ultimate result. This is an extra compliance burden, but it should not be ignored.