



ESG POLICY GUIDE

THE FUTURE OF
SUSTAINABILITY LEGISLATION
FOR LUXURY

NOVEMBER 2023 UPDATE

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INTRODUCTION

“Against a backdrop of extreme weather events with far-reaching effects on populations across the globe – a clear sign that climate change is real and having a significant negative social impact – and the realisation that we are far from reaching the goals of the Paris Agreement, now more than ever there is a need for collective action to quickly correct course. Regulators across all regions have recognized the need for all organisations to improve their ESG performance in their own operations and beyond – including through their respective value chains, whether simple or complex. While navigating multiple sets of ESG regulations can be challenging, one thing is certain – by enhancing transparency and accountability for ESG performance, we will be able to better measure progress and take the necessary steps to reverse the effects of climate change – and provide hope for future generations.”



Alyssa Auberger
Chief Sustainability Officer,
Baker McKenzie

Following the success of the ESG Policy Guide in January 2023, we have updated this bulletin to reflect the fast-moving developments in this area, and provide an overview of key upcoming sustainability legislation the luxury sector needs to be aware of in order to help mitigate climate, material and financial risks to their business.

Sustainability-related legislation is here and targets are clear. Businesses must take action as the tide is changing, and all businesses must work to ensure they can ride the wave, rather than be swept up in this imminent current.

To help you navigate this changing tide, we have partnered with Baker McKenzie to explain key legislative changes across sustainability, with a focus on environment, social, governance and greenwashing, looking at near-term sustainability-related risks, as well as what the next four years will bring as outlined in our timeline.

“Environmental, social, and governance (ESG) concerns have risen to the top of business agendas in almost every industry around the world, and in particular in the consumer goods and retail industry. The ESG challenges and opportunities that consumer goods companies are confronted with span the entire value chain – from raw material sourcing, manufacturing, and working conditions, to transportation, sales, marketing, and product circularity. Whilst the ESG regulatory compliance requirements that lie ahead present significant challenges, consumer brands also have an unprecedented opportunity to shape a sustainable future. We are thrilled to collaborate with Positive Luxury on this report and provide insight into some of the key policies and regulations impacting ESG.”



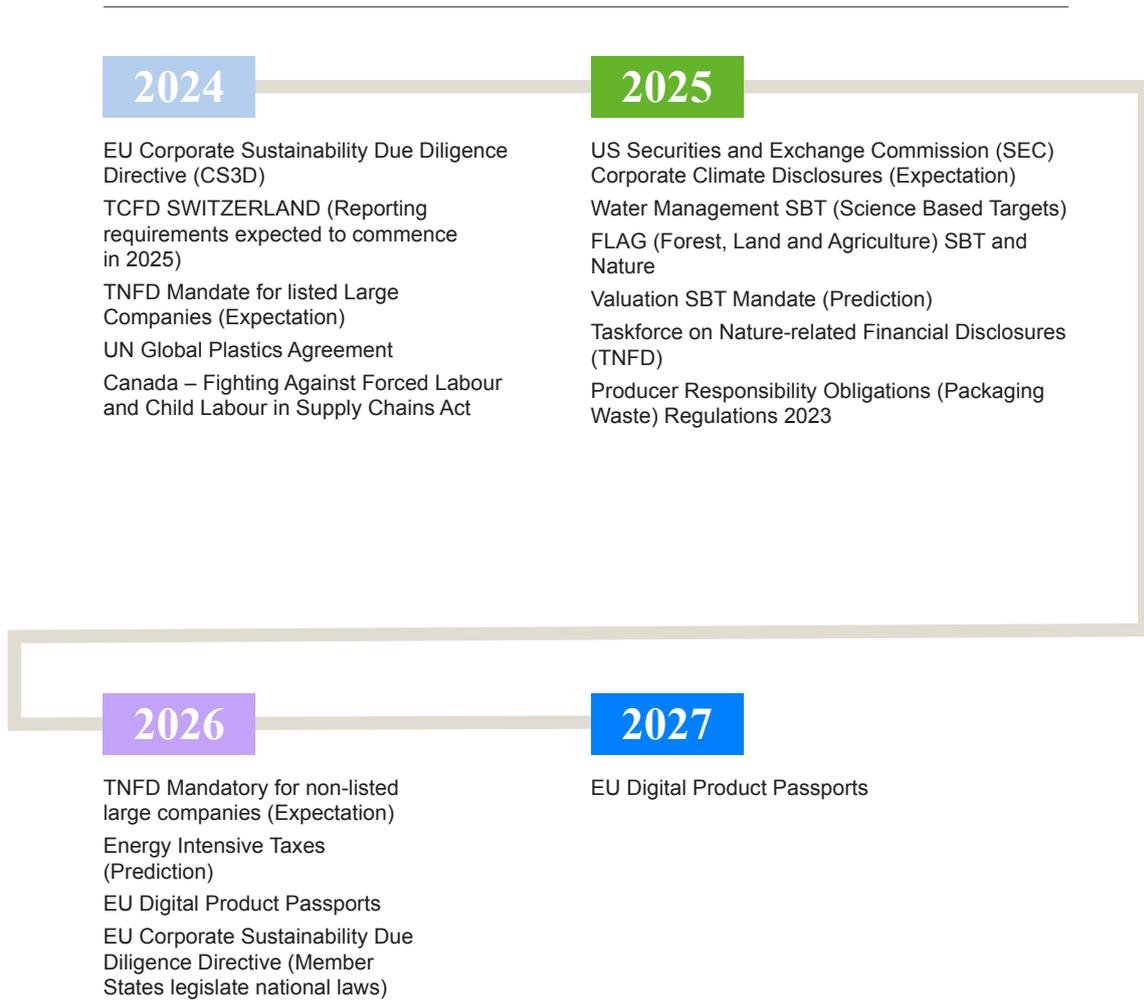
Kurt Haegeman,
Global Chair,
Consumer Good &
Retail Industry Group,
Baker McKenzie

LEGISLATION ROADMAP

Increasing regulatory action is growing the need for consistent, comparable and transparent information on climate and other environmental, social and corporate governance information.

The ESG regulatory landscape is a rapidly evolving area that businesses need to stay on top of. Below is an overview of some of the recent and proposed ESG regulations in key jurisdictions.





PART ONE:

ENVIRONMENTAL

EU GREEN DEAL

What is the EU Green Deal?

The European Green Deal, launched in 2019, is the European Union's ambitious decarbonisation strategy. The Green Deal sets the target of a carbon-neutral EU by 2050 (i.e., 'net-zero' – any residual emissions in the EU would be compensated by carbon removals) and aims to mainstream climate and environmental objectives into all sectors of the economy through legislative action.

The Green Deal, in itself, is neither a piece of legislation nor a specific policy but is a collective term that covers measures and regulations introduced as part of this strategy. Such measures are already being tremendously impactful for consumers and companies throughout the EU.

Which features of the Green Deal are most relevant to the luxury and fashion sector?

One of the Green Deal's objectives is the promotion of "longer lasting products that can be repaired, recycled and re-used". To achieve this aim, the European Commission has adopted two overarching policy plans:

- the **Circular Economy Action Plan**, which introduces a number of legislative and non-legislative actions to improve the circularity of products in the EU market, and
- the **EU Strategy for Sustainable and Circular Textiles**, which provides a framework for the sustainable production and consumption of textiles.

Under these two plans, the following legislative initiatives will particularly affect the business operations of the luxury and fashion sector:

1. The Ecodesign for Sustainable Products Regulation, which has been tabled as a draft and is being negotiated among the EU co-legislators ([click here](#) to view).
2. EU rules on 'green claims', including a proposal on empowering consumers in the green transition, which has been tabled as a draft and currently being negotiated among the EU co-legislators, and the Green Claims Directive to address environmental claims made by companies and to combat greenwashing, which has been proposed as a draft ([click here](#) to view).
3. The Corporate Sustainability Due Diligence Directive addresses value chain-related due diligence requirements and the obligation that impacted companies adopt – and possibly implement – a climate neutrality plan.
4. A revision of the Packaging and Waste Directive and the Waste Framework Directive, which has been tabled as a draft.
5. A revision of the Textile Labelling Regulation to introduce requirements for physical and digital labelling of textiles, including sustainability and circularity parameters.
6. The EU Directive on Common Rules Promoting the Repair Of Goods, seeks to achieve the product sustainability and circularity objectives of the European Green Deal by granting consumers the right to request the repair of products that fall under its scope. At present, the proposal is not specifically directed at textiles, however, the concept of "right to repair" could eventually be applied to textiles.

The proposed Ecodesign for Sustainable Products Regulation (Ecodesign Regulation) will replace the existing Ecodesign framework with the aim of significantly improving the circularity and energy performance of products. It extends the scope of the existing framework to cover the broadest possible range of products, meaning that textiles, furniture and a large number of other product types are in line to become subject to Ecodesign requirements in the future. To bring a product onto the EU market, manufacturers must ensure that it complies with specific criteria, which will vary depending on the product type relating to energy efficiency, the emission of harmful substances (such as CO2), recyclability, durability and the recycled content of products, among others. To evidence these properties, products would have to be accompanied by a Digital Product Passport (see box below). These requirements will no doubt prove impactful no matter where a business is positioned in the value chain.

What is an EU Digital Product Passport?

The Ecodesign for Sustainable Products Regulation regime will require certain products sold in the EU market to have a digital product passport (DPP).

A DPP is a digital record of a unique product’s complete life cycle, storing key traceability data about the product. This includes product information across the entire value chain, including data on raw material extraction, production, recycling, etc. This data aims to support the circular economy, decarbonization, and sustainability.

Requirements for the first product groups to have a DPP are expected to be adopted between 2024 and 2027, with another large range of products expected to be covered between 2028 and 2030. The European Commission has already specified eight priority industries, including textiles, electronics, plastics, and chemicals, in its Circular Economy Action Plan.

Of particular significance, the proposed Ecodesign Regulation contains measures aimed at preventing the destruction of unsold consumer goods. Large businesses discarding unsold products will have to report on the quantities discarded and the reasons why, while the European Commission will also have powers to ban the destruction of unsold consumer goods outright, where it proves to be particularly problematic for certain product categories. A direct ban on the destruction of unsold textiles, footwear and apparel, as well as electrical and electronic equipment, is also being discussed at political level and may be included in the final legislative text.

In March 2022, the European Commission published a proposal for a Directive “empowering consumers for the green transition.” The aim of this proposal is to combat greenwashing practices, by providing consumers with better information on the durability and reparability of products on the EU market, as well as the product’s impact on the environment. The proposal also prohibits the use of generic environmental claims such as “eco” or “green” where the excellent environmental performance of the product cannot be demonstrated or validated, as well as restricting the ability of companies to create their own voluntary sustainability labels. To further support this objective, the EU has also recently proposed the Green Claims Directive requiring companies to substantiate claims relating to the sustainability of their products. This proposal builds upon provisions already in place under the Unfair Commercial Practices Directive (UCPD). As a result of these proposals, the luxury and fashion sector will be required to be more transparent and more cautious regarding any claims made as to the sustainability of a particular product.

The draft Corporate Sustainability Due Diligence Directive (CS3D) would require the adoption and implementation of effective due diligence policies to identify, prevent, mitigate and bring to an end actual and potential human rights and environmental harms in companies’ business operations and value chains (both upstream and downstream). It also

aims to impose new duties on company directors in relation to decisions they make that impact sustainability matters; although this is still controversial at legislative level. The luxury and fashion sector, by virtue of its typically lengthy and complex value chains, and often reliant on high-impact textiles, will undoubtedly be significantly affected by the CS3D. Moreover, luxury and fashion companies impacted will be required to adopt a plan to ensure that their business model and strategy is “compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement”. With the proposed directive still being negotiated among the co-legislators, the political debate centers around whether there should be a specific obligation on companies to implement these plans, which would then also be subject to administrative penalties and civil liability. Another important aspect still being deliberated is whether such plans should be directly linked to the compensation of directors or managers of the companies adopting them.

The Waste Framework Directive, which was tabled by the European Commission on 5 July 2023, proposes to introduce mandatory Extended Producer Responsibility (EPR) requirements for textiles in all EU Member States, similar to the schemes already in place for Waste Electrical and Electronic Equipment (WEEE) and batteries. More specifically, the directive proposes that EPR be imposed on household textile products, articles of apparel, certain clothing accessories and footwear. Member States would be required to establish a register of producers of covered products to monitor their compliance with the requirements of the EPR, which would be organized – and many other EPR scheme – through a designated producer responsibility organization which would notably have to establish a separate collection system for used and waste textile.

In parallel, the European Commission also launched its Textiles Ecosystem Transition Pathway – Co-creation and co-implementation process ([see here](#)) inviting input and collaboration from EU textile ecosystem stakeholders in the co-creation of a transition pathway for the textiles ecosystem, and identifying what specific actions and commitments are needed.

On 30 November 2022, the European Commission published its proposal for a new regulation which will replace the current Packaging and Packaging Waste Directive 94/62/EC. The regulation proposes to reduce the impact of packaging and packaging waste on the environment by making all packaging in the EU reusable or recyclable in an economically feasible way by 2030. Companies will need to comply with certain sustainability and manufacturing requirements, as well as labelling, marking, and information requirements. Packaging manufacturers will also need to submit an EU Declaration of Conformity confirming that the packaging complies with the applicable requirements. All packaging placed on the EU market will be impacted, with different obligations applicable to different players in the supply chain – packaging manufacturers, suppliers, importers, distributors, and fulfillment service providers.

The legislation is currently in proposal form and needs to be adopted by the European Parliament and Council before it can enter into force. Trilogue negotiations on the content of the final text are expected to commence in the coming months.

How will these measures affect the import of luxury products to the EU?

The Green Deal will have multiple effects on EU imports of luxury products. For example, under the Ecodesign Regulation, importers are required to ensure that any product entering the EU is compliant with Ecodesign requirements and has a verified Digital Product Passport (see text box on page 8). Customs officials are empowered to refuse to allow products without Digital Product Passports into circulation in the EU market. In addition, under the CS3D, a company must account for the environmental and human rights harms arising in its entire value chain – regardless of whether part (or all) of the value chain is located outside of the EU.

What's next?

Many of the proposals identified (including the Ecodesign Regulation, the CS3D and green claims legislation) have not yet been formally adopted at EU level, and therefore must go through the EU legislative process before entering into force. Agreement is likely to be reached by the end of 2023, and at latest by early spring 2024. Therefore, it will be important that the luxury and fashion industry closely monitors the development of these legislative proposals, makes its voice heard, and adequately prepares for future compliance requirements.

OTHER APPLICABLE LEGISLATION

US

Fashion Sustainability and Social Accountability Act – SB S4746:

This New York state bill requires fashion companies with more than USD 100 million in revenues doing business in New York to map their supply chains and address the human rights and environmental impacts of their operations and in their supply chain, including those related to carbon emissions, water footprint, and worker wages. If passed, this would be the first US law with sustainability requirements focused on large fashion companies.

FURTHER INFORMATION

[EU Publishes Draft Legislation to Address Imports of Commodities Linked to Deforestation and Forest Degradation](#) Baker McKenzie (6 Dec 2021)

[EU: European Parliament adopts report on corporate due diligence and accountability](#) Baker McKenzie (March 2021)

[EU: Wide-reaching proposals to make products more sustainable and protect consumers from greenwashing](#) Baker McKenzie (20 April 2022)

[EU: The Parliament adopts new Due Diligence Requirements to Tackle Deforestation and Forest Degradation](#) Baker McKenzie (5 May 2023)

[European Union: Commission tables proposal for Green Claims Directive](#) Baker McKenzie (24 March 2023)

PLASTIC & CIRCULARITY

For a long time plastics and their impact on our environmental and health has been a concern for environmentalists and policy makers. As a result, we are seeing more stringent legislation addressing this topic, and with the introduction of the UN Global Plastic Agreement (see below, on page 12), this will be a continuing trend.

UK'S PLASTIC PACKAGING TAX: WHAT BUSINESSES NEED TO KNOW

What is the plastic packaging tax?

The UK's Plastic Packaging Tax (PPT), which came into force on 1 April 2022, affects plastic packaging that contains less than 30% of recycled plastic content. As of 1 April 2023, a rate of GBP 210.82 per metric tonne is applied on such packaging manufactured or imported into the UK. The PPT aims to encourage the use of more sustainable plastic packaging, increase the use of recycled plastic, and help reduce plastic waste.

Who does it apply to?

UK manufacturers and importers of plastic packaging are required to register with the HM Revenue & Customs (HMRC) and pay the PPT if they either:

- Expect to import into the UK, or manufacture in the UK, 10 or more tonnes of plastic packaging components in the next 30 days.
- Have imported into the UK, or manufactured in the UK, 10 or more tonnes of plastic packaging components in the last 12 months.

Why should businesses conduct due diligence of their supply chain?

A crucial aspect of the PPT regime is that downstream businesses that buy plastic packaging on which the tax should have already been paid may be found jointly and severally liable for any unpaid tax. In connection with this, the HMRC published guidance on 30 December 2021 on due diligence checks businesses should undertake in connection with the PPT.

Are group registrations allowed?

Yes. Groups of companies can appoint a UK- established representative to register and pay PPT on behalf of the group. However, all members of the group will be jointly and severally liable for any unpaid PPT.

“THE PPT HAS BEEN PROMOTED BY THE UK GOVERNMENT AS A WORLD LEADING MEASURE AND OTHER JURISDICTIONS ARE ALREADY PUTTING IN PLACE SIMILAR REGIMES. WE EXPECT PLASTICS REGULATION TO CONTINUE GROWING WORLDWIDE IN COMING YEARS GIVEN THE CURRENT FOCUS ON SUSTAINABILITY.”



Graham Stuart
Partner, Baker McKenzie,
London

What records and accounts are required to be retained for purposes of PPT?

Manufacturers and importers should keep accounts and records to support the information submitted in their quarterly tax returns. To view the HMRC Guidance on record retention, [click here](#).

What are the penalties and what are the kinds of enforcement that we can expect?

Non-payment of PPT may result in the imposition of criminal and civil penalties. In terms of enforcement, HMRC focuses on deliberate tax evasion and targets willful or grossly negligent non-compliance and also scenarios where companies deliberately evade the application of the tax, such as businesses artificially splitting to fall below the de minimis threshold of producing or importing 10 tonnes of plastic packaging annually.

How will the PPT impact businesses in the luxury sector?

PPT will disrupt supply chains and challenge the operations of many businesses in the luxury industry — especially those in fashion who use clothes hangers, kimble tags, plastic labels, gift wrapping such as ribbon and sticky tape. Beauty businesses will also be forced to rethink primary packaging choices such as cream containers and bottles. Businesses will also have to deal with administrative reporting obligations and will have to factor in the costs associated with the implementation of the PPT, such as training employees, developing the necessary reporting framework to complete the required quarterly tax returns, and keeping the appropriate accounts and records.

FURTHER INFORMATION

For further information on the PPT, [click here](#) and [here](#)

To view Baker McKenzie's webinar on the PPT, [click here](#)

OTHER RELEVANT LEGISLATION

One recent proposal which is relevant to the cosmetics industry is the draft amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles, to limit the use of intentionally added microplastics in various products. This draft was published in September 2022 and proposes a restriction on leave-on cosmetics, involving skincare products, perfume, and lip care products. Once the new regulation is implemented, the EU will completely prohibit the use of microplastics in all cosmetics. The current transition period is 6-12 years.

The European Commission has also proposed measures to prevent the unintentional release of plastic pellets, the raw material used for producing all plastics, into the environment. The proposal lays out precautionary measures for operators handling plastic pellets and will impact both EU and non-EU operators.

UN Global Plastic Treaty

In March 2022, at the UN Environment Assembly in Nairobi, representatives from UN Member States endorsed a resolution titled "End Plastic Pollution: Towards an internationally legally binding instrument" to end plastic pollution and agree an international legally binding agreement by 2024. The next step towards this goal is for the UN Environment Programme to convene a stakeholder forum to share knowledge and best practices in different parts of the world. The treaty will be based on the Paris Agreement model allowing Member States to adopt their own rules and regulations dependent on their own national policies and plans, and their own capabilities and circumstances. This may lead to a complex collection of differing requirements for global retailers and will be something for brands to actively monitor.

US

While the US does not have federal laws regulating packaging, a growing number of states are considering such legislation. Several US states have passed laws, including:

1. Extended Producer Responsibility for Packaging

SB 54: Establishes a producer responsibility program in California for paper and plastic packaging and will require certain reductions in single-use plastic packaging.

LD 1541: Establishes a producer responsibility program in Maine for certain types of packaging material.

SB 582: Establishes producer responsibility program in Oregon for plastic packaging, paper, and food service ware.

2. State Procurement Standards for Recycled Products – AB 661

Requires California state agencies to purchase recycled products when recycled products are available at no more than 10% greater the total cost of nonrecycled products.

WHAT TO DO?

Transitioning to a circular economy is a great strategy for businesses to avoid waste production not only on the upstream end of their product but on the downstream as well.

The European Strategy for Plastics in a Circular Economy was adopted by the European Commission in 2018 and stems from the 2015 Circular Economy Action Plan, which identified plastics as a key priority and committed to addressing the challenges posed by plastics throughout the value chain.

As part of their plan, the European Commission has prepared toolkits and guidelines to help businesses understand circular principles and transition their business model to a closed loop one:

- EU Circular Economy Toolkits
- EU Product Environment Footprint (PEF)

PLASTIC AND RECYCLABILITY LITIGATION: BEST PRACTICES TO MINIMIZE RISK

In a recent trend, citizen advocates and environmental groups have been filing lawsuits asserting novel theories against major companies that use or rely on plastic, even if the companies do not produce plastic products or are not involved in the disposal of plastic products. The disruptive increase in plastic-related ESG litigation is poised to affect companies in virtually all industries, including luxury and fashion, as environmental organisations target companies that use plastic anywhere in their supply chains, even if the use of plastic is ancillary to their actual business.

The steep increase in lawsuits against companies suggests that recyclability and other plastics-related litigation is only going to continue to increase. Companies should become actively involved in overseeing and helping mitigate the litigation risks that have arisen or may arise in the future. [Click here](#) to read Baker McKenzie's article discussing some notable developments around plastic litigation and recommended best practices that companies should consider to mitigate the risk of litigation.

BIODIVERSITY

Biodiversity and its importance for current and future generations continues to be a key focus. In 2022 some key cornerstones were laid out:

- The UN established access to a clean, healthy and sustainable ecosystem as a human right. While the resolution is not legally binding on the 193 UN Member States, advocates are hopeful it will have a trickle-down effect, prompting countries to enshrine the right to a healthy environment in national constitutions and regional treaties, and encouraging businesses to implement those laws.¹
- At COP15 of the Convention on Biological Diversity in December 2022, world leaders adopted the Kunming-Montreal global biodiversity framework, encouraging public and private sectors to align their financial flows and nature related commitments. It will influence the next decade – hopefully changing our relationship with nature into the more harmonised one our planet deserves.
- The Taskforce for Nature-related Financial Disclosures (TNFD) framework, published September 2023, sends a clear message on what companies need to prepare in relation to disclosures.

It is clear biodiversity is an area where more regulation and reporting are expected. [Click here](#) for Positive Luxury’s Biodiversity Report.

“THE INFLUENCE OF THE GLOBAL BIODIVERSITY FRAMEWORK IS OFF TO A STRONG START: THE EU HAS ADOPTED DEFORESTATION FREE SUPPLY CHAINS, WHILE THE TASKFORCE ON NATURE-RELATED FINANCIAL DISCLOSURES (TNFD) IS BEING ADOPTED AS A NORTH STAR FOR NATURE PERFORMANCE BY HUNDREDS OF COMPANIES.”



Elke Schrader
Sustainability Lead,
Positive Luxury,
London

HOW COUNTRIES ARE REACTING

UK - Environment Act 2021

Under this act, all planning permissions granted in England (with a few exemptions) will have to deliver at least 10% biodiversity net gain (BNG) from November 2023, and smaller sites from April 2024. BNG will be measured using Defra's biodiversity metric and habitats will need to be secured for at least 30 years. The aim is to help halt the decline in species abundance by 2030.

EU – Regulation on Deforestation-Free Supply Chains

With the intention of preventing further biodiversity loss, the EU Regulation on Deforestation-Free Supply Chains entered into force on 29 June 2023. The Regulation requires companies to conduct due diligence if they export or place on the EU market a wide range of products made from or containing commodities such as palm oil, cattle, soy, coffee, cocoa, timber, and rubber, to ensure that they have not been obtained as a result of deforestation. This is particularly relevant to luxury and fashion companies as it would potentially cover a wide range of imported materials and ingredients used in EU manufacturing processes, including **leather** (to be used, for example, in leather jackets or handbags) and **rubber** (to be used in rubber soled footwear) as well as various ingredients used in cosmetic products such as **cocoa**, **soy** and **palm oil**.

Under the Deforestation Regulation, such commodities must be produced on land that has neither been deforested after 31 December 2020, nor has seen primary and naturally growing forests converted into plantations. Importantly, before placing on the market or exporting such commodities, businesses will be required to submit to the authorities a due diligence statement to confirm that the relevant checks have been undertaken and identify the specific geolocation of all plots of land where the relevant commodities were produced to help facilitate compliance checks. Further, commodities must have been produced in compliance with all applicable and relevant laws in force in the country of production and that the rights of affected indigenous peoples have been respected.

Companies have until 30 December 2024 to implement the requirements of the Deforestation Regulation. Penalties will be established at Member State level for non-compliance potentially leading to products being confiscated and access being denied to the EU market. Fines can also be issued, with the maximum fine corresponding to 4% of total annual turnover in the EU.

The Deforestation Regulation further reinforces the need for companies to have a transparent and well documented supply chain and put in place appropriate processes to ensure that signed due diligence statements can be prepared in respect of all shipments. For further information [see here](#).

BIODIVERSITY NET GAIN IN THE UK WILL BE IN FORCE APRIL 2024

[Click here](#) for more information.

EU – Biodiversity Strategy 2030

The European Commission has adopted the new EU Biodiversity Strategy for 2030 and an associated Action Plan – a comprehensive, ambitious, long-term plan for protecting nature and reversing the degradation of ecosystems. It aims to put Europe's biodiversity on a path to recovery by 2030 with benefits for people, the climate and the planet.

Nature restoration proposal

As part of the EU's biodiversity strategy 2030, the European Commission has adopted a new Nature Restoration Law, a continent wide law aiming to restore degraded ecosystems in response to an alarming 80% biodiversity decline across the EU. Covering terrestrial, coastal and freshwater ecosystems, the law aims to protect and restore habitats and recovery of species in the EU by setting out binding targets.

EU Soil Strategy for 2030

Soil and the multitude of organisms that live in it provide us with food, biomass and fibres, raw materials, regulate the water, carbon and nutrient cycles and make life on land possible. Healthy soil is essential to reverse biodiversity loss, provide healthy food and safeguard human health. A key deliverable of the 2030 strategy, the EU soil strategy for 2030 provides the framework and concrete steps to restoring soils and ensuring sustainable use – and will contribute to several objectives of the European Green Deal. Find out more [here](#).

US – California specific

- Nature-Based Climate Solutions – AB 1757: Requires the state to set targets for 2030, 2038, and 2045 to remove greenhouse gas emissions from the atmosphere with nature-based methods such as planting trees and restoring wetlands.
- Neonicotinoid Pesticides – AB 2146: Prohibits the sale, possession, or use of neonicotinoid pesticides for most nonagricultural uses.

WHAT IS NEW?

International funding for biodiversity approved

Six months following the historic Kunming-Montreal Global Biodiversity Framework (GBF) that set new goals surrounding the conservation, restoration, and sustainable use of biodiversity and ecosystems by 2030, the Global Environment Facility (GEF), the financial mechanism for several multilateral environmental agreements including the Convention on Biological Diversity (COP15), approved plans in June 2023 to establish the GBF Fund to help implement the goals and targets of the framework. The GBF Fund was ratified at the Seventh GEF Assembly, which took place on 22-26 August 2023 in Vancouver, Canada, and is expected to strengthen national-level biodiversity management, planning, policy, governance, and finance approaches needed to fully implement the GBF. After receiving pledges from Canada and the UK, the GBF Fund needs USD 40 million more to become fully operational by December 2023.

“
ALL IN ALL, IT IS CLEAR THAT THE STAKES ARE HIGH AND A LOT REMAINS TO BE DONE. A GLOBAL CONCERTED EFFORT IS NECESSARY IF WE ARE TO ACHIEVE THE GOAL OF STEMMING AND REVERSING THE NEGATIVE RAMIFICATIONS OF CLIMATE CHANGE AND LOSS IN BIODIVERSITY. ”



Renata Amaral
Partner, Trench Rossi
Watanabe*, Sao Paulo

The private sector has also been exerting pressure on governments and regulators to develop laws and regulations to set standards across industries and establish a level playing field. Having the appropriate laws and regulations in place will facilitate action and compliance by businesses and avoid greenwashing claims. Following the UN biodiversity conference, CBD COP15, the summit for the Convention on Biological Diversity, which is a sister Rio convention of the UNFCCC, pressure from NGOs and other stakeholders – including more than 330 businesses and finance institution

that have signed the Business for Nature statement – is mounting for companies to report and disclose their impacts and dependencies on biodiversity. There is likewise a strong call for businesses to leverage technology, e.g. implementing tracking systems, to demonstrate efforts to protect biodiversity. All in all, it is clear that the stakes are high and a lot remains to be done. A global concerted effort is necessary if we are to achieve the goal of stemming and reversing the negative ramifications of climate change and loss in biodiversity.

FURTHER INFORMATION

GEF press release

Read about the biodiversity pledge [here](#)

Download Positive Luxury's report Understanding Biodiversity [here](#)

*Trench Rossi Watanabe hold a strategic cooperation agreement with Baker McKenzie

PART TWO: SOCIAL

HUMAN RIGHTS AND FORCED LABOUR

New and developing legislation around the world is forcing organisations to more closely address issues of human rights and forced labour in both their own businesses and their supply chains. Whilst the initial legislative framework in this area was primarily focused on reporting requirements, which is an area that continues to develop, new and proposed legislation is now placing more substantive obligations on organisations in terms of human rights due diligence and supply chain accountability.

CONTINUED DEVELOPMENT OF REPORTING OBLIGATIONS

EU Corporate Sustainability Reporting Directive (CSRD)

The CSRD expands the range and detail of existing sustainability reporting requirements; it also significantly extends the number of organisations to which these reporting requirements will ultimately apply. Reports must be drafted according to detailed prescribed reporting standards on a broad range of issues relating to sustainability. These include the organisation's approach to identifying and managing any actual and potential material impact of its operations on the human rights of its own workforce and workers in its value chain including in relation to child labour and forced labour.

UK Modern Slavery Act 2015

This Act requires certain commercial organisations to publish an annual modern slavery statement setting out the steps they have taken to ensure that their business and supply chains are slavery free, or a statement that they have taken no steps to do this. The legislation is set to be updated and reformed and this will have a major impact on the way the UK's modern slavery legislation works. Some of the expected updates to the legislation include:

- Mandated specific reporting topics that modern slavery statements must cover.
- Setting a single reporting deadline for the publication of statements and the introduction of a central registry for statements.
- The introduction of financial penalties for organisations that fail to meet their obligations.

Other relevant legislation

Similar modern slavery reporting obligations are continuing to develop across the globe. The California Transparency in Supply Chains Act 2010 is now well established and preceded the UK Act.

There are also similar reporting obligations in Australia under the Modern Slavery Act 2018, and Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act.

Actions

This growing trend of reporting requirements across the globe has forced organisations to think about how best to deal with the requirements given their global nature and complex corporate structures. In particular, organisations have to consider the following:

- Which of their legal entities are caught by which reporting requirement, bearing in mind most legislative requirements can apply to non-local legal entities.
- Is it plausible and efficient to deal with the reporting obligations at a global level (i.e. report on a global basis) and still comply with local requirements?
- How should policies, training and due diligence be approached to ensure not only local compliance but also readiness for the other changes in the pipeline (see more below)?
- Whether to go through an independent certification, like Positive Luxury's Butterfly Mark.

DUE DILIGENCE REQUIREMENTS AND BAN ON GOODS IN THE EU

A number of jurisdictions across Europe have already introduced mandatory due diligence requirements. For example:

- France's Duty of Vigilance law places the onus on large companies in France to identify and prevent risks to human rights and the environment.
- In the Netherlands, the Dutch Child Labour Due Diligence Law obliges companies to investigate whether their goods or services have been produced using child labour.
- Germany's Supply Chain Due Diligence Act 2021 imposes due diligence obligations on companies with a footprint in Germany.

Alongside these, there are two important legislative proposals in Europe, which will significantly impact how organisation approach human rights and forced labour issues within their businesses and supply chains. The first is the EU Directive on Corporate Sustainability Due Diligence (CS3D), which will impose a number of obligations relating to corporate supply chain due diligence regarding environmental and human rights issues. Second, the European Commission has recently proposed a ban from the EU market on goods that have been made with forced labour.

These two legislative proposals mark a significant ramping up of human rights-related requirements for businesses, both in Europe and beyond. Although these new requirements are not yet in force and may take some time to be implemented, the changes are significant and all organisations potentially impacted by these changes will need to start thinking now about what changes they need to make and implement to ensure they are ready to comply.

US

Like in the EU and the UK, in the US forced labour is an area attracting legislative reform.

California – The Garment Worker Protection Act

Senate Bill 62, also known as the Garment Worker Protection Act, came into effect on 1 January 2022. The law addresses the proper payment of garment industry employees in California and the responsibility of contracting parties for garment operations performed on their behalf. Under the Act, every person engaged in the business of garment manufacturing must register with the Labor Commissioner. In addition to requiring hourly wages for garment workers, the Act also bans the practice of paying workers per garment, otherwise known as piecework. The Act focuses on establishing new precedents of accountability for brands and manufacturers, including new recordkeeping practices, contract provisions, and licensing/registration requirements. These new accountability precedents include clarification that manufacturers, brands, and contractors that have their garments manufactured may be liable as guarantors for the unpaid wages and overtime of the workers, even if they are not the employer.

GARMENT WORKER PROTECTION ACT FAQs

[Click here](#)

Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act (UFLPA) took effect on 21 June 2022. The UFLPA establishes a rebuttable presumption that any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China, are not entitled entry to the United States.

Previous Withhold Release Orders (WROs) against goods from the Uyghur Region have been in effect, however the standard of evidence under the UFLPA is higher than a WRO. Compliance with the UFLPA requires companies to provide clear and complete documentation, which traces the origin of the parts, components and materials to US Customs immediately upon detention. The UFLPA has identified certain sectors as “high-priority”. Cotton is included in this high-priority list and therefore is relevant to any company exporting cotton or cotton items, such as clothing, to the US. Any company importing goods into the United States that originate, even in part, from the Uyghur region should consider preemptively preparing the compliance documentation to expedite the release of any detained goods.

UFLPA FAQs

[Click here](#)

The Fashioning Accountability and Building Real Institutional Change (FABRIC) Act

The Fashioning Accountability and Building Real Institutional Change (FABRIC) Act was introduced in the Senate on 12 May 2022. As the first federal fashion bill, it seeks to improve conditions for US garment workers by, among others, eliminating piece-rate pay, holding brands accountable for wages in their supply chain, and encouraging brands to re-shore manufacturing. The bill was reintroduced in the Senate on 14 September 2023.

“
THE UFLPA REINFORCES THE NEED FOR
A BRAND TO HAVE FULL TRANSPARENCY
AND EVIDENCE OVER THEIR SUPPLY CHAIN,
GOING BACK TO THE ORIGINS OF RAW AND
COMPONENT MATERIALS”



Christine Streatfeild
Partner, Baker McKenzie
Washington, DC

UPCOMING LEGISLATION

EU Ban on products made with forced labour

The EU executive does not name any country in its proposal, but it follows a European Parliament call for such a law in June 2022 that highlighted concerns over human rights in China's Xinjiang region.

Canada Fighting against forced labour and child labour in supply chains

New legislation regarding forced labour in the supply chain comes into force in Canada in 2024: Fighting Against Forced Labour and Child Labour in Supply Chains Act. [See more here.](#)

PRACTICAL ISSUES LUXURY AND FASHION COMPANIES SHOULD CONSIDER

There are several legal and practical issues businesses should consider including:

- Reviewing existing risk assessment practices to ensure these will be effective in scrutinizing their own business operations and those in their value chain and identifying where these may adversely impact human rights.
- Ensuring robust policies and processes are in place to enable appropriate preventative or remedial action – these include effective whistleblower reporting and protection, development of company policies reflecting due diligence requirements, monitoring mechanisms and workforce training.

PART THREE: GOVERNANCE

The recognition of the impact of business on society and the environment has led to increased demand for sustainability reporting and disclosures to facilitate the transition to net zero. Banks and larger companies have been encouraged for a number of years to make climate-related financial disclosures. This trend has been supported by governments and regulatory bodies in the UK, US, EU and elsewhere that have set their own sustainability frameworks or expectations.

Among the key bodies proposing rules for ESG reporting are three in particular – in the US, the Securities and Exchange Commission (SEC); in the EU, the European Commission in consultation with the European Financial Reporting Advisory Group (EFRAG), and at a global level, the International Sustainability Standards Board (ISSB).

STRATEGY FOR FINANCING THE TRANSITION TO A SUSTAINABLE ECONOMY

The Paris Agreement introduced the concept of Transition Finance (TF), which is defined by the OECD as “the dynamic process of becoming sustainable or reaching net-zero, rather than for already sustainable or net-zero activities based on a point in time assessment.”

In July 2021, the European Commission adopted a series of measures aimed at financing the transition to a sustainable economy, including a new sustainable finance strategy (“the strategy”) proposing action in four areas: transition finance, inclusiveness, resilience and contribution to the financial system and global ambition. The strategy emphasizes the need for a more supportive framework in financing interim steps in the urgent transition of activities towards the EU’s climate neutrality and environmental objectives.

“
THE KEY IMPLICATION
FOR LUXURY AND
FASHION COMPANIES
IS THAT THOSE WITH
CREDIBLE TRANSITION
FINANCE PLANS SHOULD
INCREASINGLY BE ABLE
TO ACCESS PRODUCTS
AND SERVICES TAILORED
TO LOW-CARBON
BUSINESS MODELS AT
LOWER COST.”



Nick Tostivin
Partner, Baker McKenzie,
London

More recently, in 2023 the Commission has proposed recommendations to help ease the adoption of TF by both businesses and the financial sector. While only a limited number of businesses have developed and published credible transition plans that allow their alignment with the Paris Agreement to be assessed, there are a growing number of initiatives to support those that chose to do so, including disclosure frameworks and services such as validation, assessment, data collection and analysis to support the development and disclosure of plans. To be noted, in Asia, Japan is leading the way in the adoption of TF finance products and initiatives.

Upcoming key requirements include:

- The EU Corporate Sustainability Reporting Directive (CSRD)
- The EU Taxonomy
- The International Sustainability Standards Board (ISSB) Standards
- The proposed EU Corporate Sustainability Due Diligence Directive (CS3D)
- Proposed Rules from the US Securities and Exchange Commission (SEC) on Climate-Related Disclosures

While some of these are still in the consultation phase, now is the time for businesses to start preparing for them.

What does this mean for luxury and fashion companies?

Although predominantly targeted towards carbon-intensive industries such as oil, gas, steel and cement for example, the key implication for luxury and fashion companies is that those with credible TF plans should increasingly be able to access products and services tailored to low-carbon business models at lower cost. In contrast, companies that do not have credible transition plans may face higher costs and/or restricted access to financial products and services depending on the underwriting process of their lender.

EU ESG REPORTING

The EU Taxonomy Regulation, Sustainable Finance Disclosure Regulation (SFDR) and CSRD are legislative instruments introduced to increase the transparency of business activities and reorient capital flows towards sustainable investments and activities in the EU.

- The CSRD introduces wide-ranging and mandatory sustainability (ESG) reporting requirements for more than 50,000 large companies, not only those based in the EU but also third country companies active within the EU.
- The Taxonomy Regulation establishes the framework for the classification system which must be used to label investments and economic activities as “sustainable” and introduces a yearly reporting exercise under which companies must report the share of their revenues, capital and operational expenditure derived from sustainable activities.
- The SFDR introduces mandatory disclosure requirements for financial market participants regarding how their investments align with sustainable activities and other ESG objectives.
- The CS3D would create a corporate due diligence duty to identify, prevent and mitigate negative human rights and environmental impacts from the business, as well as requiring adoption of a TF plan.

These rules introduce more transparency regarding the sustainability of business and investments in the EU and are expected to increase the volume of sustainable finance in the EU.

Luxury and fashion companies based or active in the EU will therefore be required – or, at least, come under increased pressure from investors and financiers – to report detailed ESG information on their business and on the sustainability of their economic activities, often on a value chain basis. Over time, “unsustainable” companies that are not on a transition pathway will likely find it more difficult to access private finance.

Moreover, in June 2023, the European Commission proposed a Regulation on ESG rating activities, which would lay down transparency requirements related to ESG ratings, as well as rules on the organization and conduct of ESG rating providers. According to the Commission, ESG ratings are increasingly used by investors and benchmark administrators to take into account risks and/or impacts linked to ESG issues in their sustainable investment strategies. Given the fact that in some cases voluntary ESG reporting by undertakings is based on – or inspired by – ESG rating, the new proposal laying down rules to regulate ESG rating activities could limit or at least affect voluntary reporting approaches by certain companies.

US SEC PROPOSAL FOR CLIMATE DISCLOSURES

In March 2022, the SEC released its long-awaited proposed rule changes on climate disclosures. The proposed rule will require listed companies to disclose climate-related risks that are reasonably likely to have a material impact. Specifically, the proposed rule would require listed companies to disclose information related to the following four key areas:

1. Governance – how the corporate board and management is set up to evaluate and monitor the registrant’s climate-related risks.
2. Strategy, business model and outlook – how climate-related risks materially impact the registrant.
3. Risk management – how the registrant identifies, assesses and manages climate-related risks.
4. Greenhouse gas emissions metrics.

What are Scope 1, 2 and 3 emissions?

Scope 1 and Scope 2 greenhouse gas emissions are tied to the company’s direct and indirect emissions linked to operations and energy purchases, whereas Scope 3 emissions are all other indirect emissions that are generated from sources that are neither owned nor controlled by the company but are nonetheless a consequence of the company’s activities (e.g., emissions linked to the company’s supply chain).

Although originally scheduled to be finalized in 2022, the proposed climate disclosure rulemaking has been repeatedly delayed and is currently scheduled to be considered for finalization in the fall of 2023.

POLITICAL AGREEMENT REACHED ON THE PROPOSED STANDARD FOR EUROPEAN GREEN BONDS

Green bonds are committed to financing or re-financing investments, projects, expenditure or assets helping to address climate and environmental issues. Both governments and companies use them to finance the transition to a more sustainable and low-carbon economy. Since the European Investment Bank (EIB) inaugurated the green bond market in 2007, the International Capital Markets Association (ICMA) has set the standard with its Green Bond Principles (GBPs), which allow market participants to determine whether a bond is green by examining:

1. Use of proceeds (typically being to finance or refinance “eligible green projects”).
2. Process for project evaluation and selection.
3. Management of proceeds (e.g. ringfencing or tracking).
4. Reporting (using third-party verifier or self-reporting, annually and publicly available if possible).

The proposed European Green Bond Standard (EUGBS) marks the first major “competitor” to the GBPs. It is another voluntary standard, based on the recommendations of the Technical Expert Group on Sustainable Finance, but it is aimed at scaling up and raising the environmental ambitions of the green bond market to create a “gold standard”. The EUGBS is, for example, more prescriptive than the standard set down by the GBPs.

The intention is that it will ultimately require issuers to allocate 100% of the proceeds of their bonds to economic activities that meet the EU Taxonomy requirements, by the time the bond matures, though a lower 85% threshold compromise has been agreed for the initial years of its implementation, meaning that the bond issuers will benefit from up to a 15% leeway for economic activities that are not yet covered by the EU taxonomy regulation. It will also create a more standardised, transparent system for supervision by requiring external reviewers to register with, and agree to be supervised by, the European Securities and Markets Authority (ESMA). If issuers elect to issue bonds with an EUGBS label, the proposed EUGBS would also impose mandatory annual reporting requirements on such issuers and a requirement (not just a recommendation per the GBPs) for an aforementioned ESMA-registered external third-party reviewer to confirm, pre- and post-issuance, that the use of the Green Bond’s proceeds:

1. Substantially contribute to at least one of the six environmental objectives adopted by the European Commission.
2. Do no significant harm to the others.
3. Comply with certain minimum social safeguards.
4. Comply with the technical criteria published for the relevant environmental objective.

“
THE SIMPLE PUBLIC VS PRIVATE DICHOTOMY OF COMPANIES IS OUTDATED FOR THE RISING SUSTAINABILITY-FOCUSED CORPORATE GOVERNANCE REGIME”

Suren Gomtsian, Financial Times

WHAT DOES THIS MEAN FOR LUXURY AND FASHION COMPANIES?

Now that political agreement has been reached on the EUGBS, adoption only remains contingent upon formal approval by the EU Parliament and the EU Council (expected in the near future). We currently expect the EUGBS to be published in the EU Official Gazette in the fourth quarter of 2023, with expected entry into force in early 2024. While it is likely that issuers will continue to use the existing ICMA GBPs in the short term, even once the EUGBS is adopted, brands should be prepared for the possibility that the EUGBS will displace the issuance of green bonds that are only ICMA GBP compliant, particularly for EU issuers, as more entities become subject to reporting requirements frames around the Taxonomy. It is possible that the ICMA GBPs will remain in place as an easier hurdle for brands to clear – however, brands should be prepared to comply with the reporting requirements set out by the EUGBS to ensure they meet the “gold standard” for green bonds.

USEFUL LINKS

- [The International Sustainability Standards Board \(ISSB\)](#)
- [Proposed Climate Disclosure Rule](#)
- [10 things you need to know about CSRD](#)
- [Europe: European Commission adopts a proposal of Directive on Corporate Sustainability Due Diligence](#)
- [European Union Corporate Sustainability Reporting Directive](#)
- [Provisional agreement reached on the European Green Bond Standard](#)

PART FOUR:

GREENWASHING

GREENWASHING RISKS

Greenwashing is where green marketing or green reporting is deceptively or inaccurately presented and misrepresents that an organisation's products, processes and policies are more environmentally or ethically friendly than is actually the case.

Fueled by the fact that companies recognise the customer appeal of being a "sustainable" brand and the desire to make representations about one's ethical and green credentials, greenwashing is becoming a concern in a number of industries including luxury and fashion. In turn, this has led to increased scrutiny by consumers and regulators about the authenticity and accuracy of the claims being made.

In addition, the increasing demands on ESG reporting has made companies more vulnerable to scrutiny. Consumer-facing companies have been particularly susceptible to third party challenges.

Businesses must ensure they use clear and accurate language in their marketing and be in a position to support any claims made. Failure to do so risks reputational damage, regulatory enforcement and potential financial penalties as well as the possibility of litigation.

APPLICABLE LEGISLATION

EU

EU Consumer Proposal

In March 2022 a package of EU Green Deal proposals were put forward. This package includes a proposal for a Directive on empowering consumers for the green

transition ('Consumer Proposal'), with the aim of enabling consumers to make informed and environment-friendly choices when buying their products. As part of this, consumers will have a right to be provided with information on the durability and reparability of products, enabling them to make more informed decisions when making purchasing decisions.

In addition, the Consumer Proposal will strengthen consumer protection against untrustworthy or false environmental claims, banning greenwashing and practices that mislead consumers about the durability of a product. Generic and vague environmental claims such as "eco" or "green" will be prohibited where the excellent environmental performance of the product cannot be demonstrated. The display of voluntary sustainability labels will also be prohibited where these are not based on a third-party verification scheme or established by public authorities.

EU Green Claims Directive

In addition, to enable consumers and other buyers to have access to reliable, comparable and verifiable information on environmental impacts of products, the European Commission has published a proposal for a Green Claims Directive aimed at harmonizing the evaluation and monitoring of green claims made to EU consumers. Under the proposed Directive, any green claims must be substantiated using widely recognized scientific evidence and consumers must be able to access detailed information relating to the claim, which can be provided by a weblink or QR code. The substantiation and communication of the green claim must then be verified by an accredited third-party conformity assessment body before the claim can be used. Further conditions are imposed in respect of comparative claims comparing a product's sustainability performance against that of a competitor.

By ensuring that environmental claims are fair, consumers will be able to choose products that are genuinely better for the environment than their competitors, encouraging competition toward more environmentally sustainable products.

FURTHER INFORMATION

[So You Think You Want To Stay On Top of Greenwashing Legislation in the EU](#) – Baker McKenzie

UK

UK - Competition and Markets Authority

In the UK the Competition and Markets Authority (CMA) are also becoming highly active in reviewing and taking action against infringers, with the CMA undertaking investigations into misleading green claims in the fashion, fast-moving consumer goods (FMCG) and travel sectors. The CMA have issued a helpful checklist to consider when preparing marketing material, which you can read [here](#) and the full guidance on green claims from the CMA can be found [here](#). The Financial Conduct Authority has also recently made proposals to clamp down on greenwashing which you can read [here](#).

UK - Advertising Standards Agency

Alongside the CMA activity, the Advertising Standards Agency (ASA) has adopted a number of recent decisions in respect of misleading environmental claims. Read more about ASA's decisions [here](#).

US

US - Federal Trade Commission

In the US, the Federal Trade Commission (FTC) is also proactive in reviewing green claims and taking action where such claims are considered inaccurate or cannot be justified. The FTC relies on its "Green Guides" to evaluate whether green claims are improperly deceptive. Currently, the FTC is considering whether to revise these Green Guides.

US - Securities and Exchange Commission

The Securities Exchange Commission (SEC) has also begun enforcement action against companies who make false or misleading ESG statements with the potential for large financial penalties.

CLASS ACTION LITIGATION

Alongside regulatory action, class action litigation is becoming increasingly prevalent in relation to ESG claims. This has been evident in the US, the EU and the UK and is a risk for companies who do not implement adequate measures to prevent greenwashing, even inadvertent greenwashing. Indeed, in the US, the risk of private litigation related to greenwashing is a greater risk than regulatory enforcement.

NEGATIVE PR

Action being taken by regulators on greenwashing grounds are being widely publicised. Making false or inaccurate ESG claims can have a negative effect amongst the consumer base and may undo the progress genuinely made in respect of other ESG activity. It also breeds general distrust in ESG statements across the industry as a whole.



CUSTOMER PREFERENCES AND EXPECTATIONS TOWARD SOCIALLY RESPONSIBLE CORPORATE BEHAVIOUR ARE SHIFTING RAPIDLY

Harvard Business Review

RECOMMENDATIONS

- Ensure that claims made can be evidenced in the event the claim is challenged.
- Be particularly diligent in your review of claims that are specific, measurable, and/or verifiable.
- Do not omit information that may alter the meaning of the claims made.
- Implement policies around the making of ESG statements.
- Implement realistic targets and goals.
- Use third party verification programmes to substantiate credentials.
- Make marketing departments aware of greenwashing concerns and provide adequate training.
- Monitor the changing regulatory landscape in relation to greenwashing and ESG reporting.

CITATIONS & FURTHER READING

1. <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>

Strategy for financing the transition to a sustainable economy:

- EU Strategy for financing the transition to a sustainable economy, July 2021: [click here](#)
- G20 Sustainable Finance Working Group report, October 2022: [click here](#)
- OECD Guidance on Transition Finance, October 2022: [click here](#)

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- ✓ Prepare for legislative shifts
- ✓ Communicate with credibility
- ✓ Future-proof your business

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