Weightmans

July 2023

Greenwashing digest

This edition of Greenwashing Digest captures developments from a busy couple of months.

Key themes to note (expanded upon below) are:

- Recent ASA rulings (Shell, Petronas, Repsol SA, Anglian Water) provide further evidence of the ASA's crackdown on environmental claims, with a clear warning to businesses deemed to be providing a misleading overall impression of their environmental credentials.

- Updated ASA guidance consolidates lessons from recent decisions and provides useful guidance to those making environmental claims.

- Carbon offsetting continues to attract scrutiny, having been shown to be the primary source of confusion and misunderstanding in respect of carbon neutral and net zero claims. Recently published guidance in the form of the VCMI Code is a useful tool for businesses.

- With increased regulation of greenwashing comes concerns around 'greenhushing' – the ASA have recently addressed this issue, identifying accuracy and transparency in environmental claims as the solution.

Should you have any questions regarding the content of this month's Greenwashing Digest or want to understand more about how we can support you with emerging risks within your business, please reach out to a member of the Weightmans Greenwashing Team.

Insight

Last month saw Simon Colvin chair a panel discussion at the Workgroup Legal North event entitled *Is ESG Legal's time to shine?*

Immediately apparent was that increasing customer expectations on sustainability are feeding legal teams' commercial influence, perhaps no more so than in respect of environmental claims on goods and services.

The growing risks posed by greenwashing were something that all attendees were aware of but the degree and maturity of control measures often depend upon the sector within which they were operating, nature of their products/services and the consumer audience to which advertising was directed.

Effective governance arrangements are based on an initial assessment of these risks and often require coordination of legal, compliance, marking and sales teams.

For further insights contact a member of the team or register to receive our ESG Blog.

Rulings

ASA ruling on Shell

The ruling considered a poster, TV ad and YouTube ad for Shell. Full details of the ads are provided within the ASA ruling. However, broadly these referred to Shell initiatives to provide 'cleaner energy', including the provision of renewable electricity.

One of the grounds for challenging the adverts was that they were misleading, because they omitted significant information about the overall environmental impact of Shell's business activities.

Held - the ASA acknowledged that consumers were likely to understand that energy products derived from fossil fuels were environmentally detrimental. It also acknowledged that many consumers would closely associate Shell with petrol sales, and more broadly understand that the company was involved in oil and gas investment and extraction.

However, the ASA considered that consumers were increasingly concerned about the environmental impact of activities related to higher-carbon products and services, and would be interested in seeking out businesses, including oil and gas companies, that were making meaningful progress towards transitioning away from higher-carbon products and services.

The ads were considered likely to mislead consumers if they misrepresented the contribution that lower-carbon initiatives played, or would play in the near future, as part of the overall balance of a company's activities. Further information about the proportion of Shell's overall business model that comprised lower-carbon energy products was material information that should have been included.

Rulings

ASA ruling on Anglian Water Services

The TV ad, seen in September and October 2022, featured a girl who said "Right now Anglian Water is creating wetlands to clean water using nature and make homes for wildlife. By building a really long pipe to bring water to places that need it most, while protecting nature too. And huge tanks to collect rain so there's less chance of floods in the future. In fact, everything they do today is for tomorrow ..."

The ad included various scenes of a wetland and the wildlife living there, fields and wildlife, tanks collecting rainwater, a wind turbine, and an Anglian Water van with text on the side that stated "100% Electric 0% Emissions".

Nine complainants challenged whether the ads were misleading, because they omitted significant information about Anglian Water's history of releasing sewage into the environment.

Held – the ASA considered that the overall impression of the ad was that Anglian Water was making, and intended to make, a positive overall environmental contribution as a company. This was contradicted however by to Anglian Water's overall Environmental Performance Assessment rating of 2/4 stars (meaning that the 'company requires improvement') and recent record of enforcement action.

The ASA concluded that the ads omitted material information and were therefore misleading.

No doubt the timing of the ad - coming shortly after the Government's publication of the Storm Overflows Discharge Reduction plan and scrutiny of discharges into rivers/coastal waters – contributed to the scrutiny that it received and the number of complaints lodged with the ASA.

Other ASA rulings in brief

Petronas

A TV ad for Petronas misleadingly omitted material information about the balance of its current activities, its emissions, and the pathway to reducing them.

Repsol SA

A paid-for online display ad for Repsol misleadingly omitted material information including how and when Repsol would achieve net zero emissions and the role that the development of biofuels would play in that plan.

Intrepid Travel Group UK Ltd

A poster for a travel company misleadingly minimised the impact of their holidays on the environment.

Insight

The above decisions build upon last year's ruling on HSBC and shows that the ASA is determined to set a high bar for environmental claims. A key emerging theme is that a misleading overall impression (even where specific claims are made and can be substantiated) and the omission of context to explain the overall harm being done to the environment may be considered to be a breach of the CAP/BCAP Codes.

There is published guidance from the ASA as to how to get this right (see below) and some helpful examples have been shared with Weightmans as to how to provide balance and context to environmental claims.

Guidance

New guidance on environmental claims and social responsibility for advertisers published by the Advertising Standards Agency (ASA)

The ASA have released this new guidance on misleading environmental and social responsibility claims in advertising. The guidance updates the previous version (December 2021) and reflects key themes from recent ASA rulings.

It comes against the backdrop of the work of the Competition and Markets Authority and wider acknowledgement by the Government that consumer behaviour must change for the UK to meet its net zero targets.

Advertising is a key driver of such consumer behaviour and conversations with the ASA have made clear that it considers that it has an important role to play in helping the UK to meet these targets.

Points to note:

- The ASA note that environmental claims are likely to mislead if the basis of the claim is not clear. The guidance emphasises that absolute claims require strong supporting evidence. Substantiation will always be key.
- Advertisers should consider consumers' likely interpretation of a claim and how knowledgeable the audience of marketing communications is likely to be, and so they cannot assume a high level of understanding. See further the **ASA's Qualitative Research Report.**
- If an advertisement focuses on a net zero initiative, the guidance proposes it should provide context about how it fits into the broader net zero initiative of the business.

Guidance

- Imagery of the natural world may contribute to the impression that the advertised business is making a significant contribution towards reducing greenhouse gas emissions. The ASA state it is likely to mislead where such imagery is used in connection with a company responsible for a significant number of emissions or environmental harm unless there is balancing, qualifying information (unless the creative is obviously not portraying the organisation or product as environmentally positive).
- Guidance is provided on terms such as "carbon neutral" and "net zero". Advertisers should avoid using unqualified these terms and, if they do, they should include information explaining the basis for the claims to help consumers' understanding. Additionally, advertisements should include accurate information about whether they are actively reducing carbon emissions or basing claims on offsetting to ensure that consumers do not make assumptions on the business' emissions.

Guidance

Greenspeaking with confidence

Published alongside the new ASA guidance, an opinion piece sought to reassure businesses that the choice to be made is not between greenwashing or greenhushing and provide insight into the key lessons to be taken from recent ASA rulings.

The key message is one of balance; reducing the choices businesses face to a binary one between greenwashing and greenhushing fails to engage with the reality that there are usually simple, practical ways to construct claims in ads that won't fall foul of the Advertising Codes.

Guidance

VCMI Claims Code to accelerate corporate use of voluntary carbon markets as part of net-zero pathways

More and more clients are looking to voluntary carbon credits as part of a wider strategy to offset emissions.

The Voluntary Carbon Market Integrity Initiative has published its Claims Code of Practice to provide businesses with a rulebook to follow for making credible climate claims, helping to build market confidence in how they engage with voluntary carbon markets (VCMs).

The Claims Code aims to bring integrity to the demand-side of VCMs, providing businesses with a rulebook for high integrity voluntary use of carbon credits and associated environmental claims on the pathway to net zero. It does so by setting out four key steps when making a VCMI Claim:

1. Comply with the Foundational Criteria
2. Select which VCMI Claim to make (Silver, Gold or Platinum)
3. Meet the required carbon credit use and quality thresholds
4. Obtain third-party assurance following the VCMI Monitoring, Reporting and Assurance Framework

Further guidance upon the application of the VCMI Code can be provided by a member of the Weightmans Greenwashing Team.

In other news

‘Greenwashing’ lawsuit against KLM to proceed

Back in June, a Dutch court allowed to proceed to the next phase a civil suit brought by environmental groups against KLM for commercials that allegedly misled consumers about the airline’s environmental credentials.

The lawsuit – the first of its kind to challenge airline industry greenwashing – argues that KLM’s climate ads and offset marketing breach EU consumer law standards by creating a false impression that its flights do not contribute to the worsening climate emergency.

Judges found that the lawsuit brought by Fossil Free Netherlands is admissible. KLM, the Dutch subsidiary of Air France, has denied so-called “greenwashing” allegations and argued in April the group did not represent most KLM customers and did not have the right to bring a suit.

FAQs regarding the case can be found **here.**

The legal risk of advertising carbon offsets

ClientEarth lawyers have developed a legal briefing that considers the problems with carbon offset advertising. Key concerns relate to:

- Getting to net zero by 2050 is not possible without a hard and fast reduction in emissions
- Carbon credits not ‘offsetting’ the harmful climate impacts of the things we buy in the way that a profit offsets a loss.
- Quality in the unregulated carbon credit market

The risks identified by ClientEarth extend beyond greenwashing claims in the narrower sense, including non-compliance, shareholder action, litigation, and regulatory enforcement.

Consideration of these risks makes it even more important for businesses to take care with offset claims, the VCMI Code detailed above being one such tool for doing so.

In other news

Nestlé to walk away from ‘carbon neutral’ claims

Having announced in recent years ‘carbon neutral’ targets for brands including KitKat and Nespresso coffee, the world’s largest food maker says said it will instead invest in cutting its greenhouse-gas emissions.

> “We are moving away from investing in carbon offsets for our brands to invest in programs and practices that help reduce GHG emissions in our own supply-chain and operations, where it makes the most difference to reach our net zero ambition,” a Nestlé spokesperson said. “Our net zero roadmap does not rely on offsets. We focus on GHG emissions reductions and removals within our value chain to reach our net zero ambition.”

Further details on Nestlé’s road to net zero can be found **here.**

Ask the team

Simon Colvin

Partner
simon.colvin@weightmans.com

Simon leads the firm's environmental law team and is also head of the firm's energy and utilities sector. He is also closely involved in the development of the firm's ESG programme (internal and external).

Simon provides regular updates on greenwashing developments, including training sessions to members of the Institute of Environmental Management and Assessment (IEMA).

Nick Barker

Principal Associate
nick.barker@weightmans.com

Nick is a specialist environmental lawyer with expertise in environmental compliance, regulatory investigations and enforcement action. Nick helps clients understand how environmental regulations impact their business and reviews their compliance arrangements.

Nick has a particular interest in the challenges around claims to carbon neutrality and offsetting, with practical experience of how to navigate these topics.

Abhay Srivastava

Environmental, Social & Governance Manager
abhay.srivastava@weightmans.com

Abhay is an experienced ESG professional and leads on our ESG activity. He has worked across international brands such as Shell, Coca-Cola and IBM and is a changemaker in helping to shape ESG integrated business strategies for effective stakeholder engagements.

Abhay, by qualification, is an engineer and postgraduate in sustainability and carries rich hands-on experience on Health, Safety & Environment (HSE) management systems, sustainability reporting, ESG risk management, and assurance/governance processes setup.

Weightmans