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# GLOBAL INVESTIGATIONS BULLETIN

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## RECENT PUBLICATIONS //

*Beginning an Internal Investigation: The UK Perspective* by Jonathan Cotton, Holly Ware and Ella Williams; in Global Investigations Review's *The Practitioner's Guide to Global Investigations* (6th edition).

## THE EVOLVING THREAT OF REGULATORY INTERVENTIONS ON ENVIRONMENTAL CLAIMS //

### Overview

The environmental regulatory risk landscape is evolving in ways that companies may not yet have considered. It is already well-known that financial regulators and authorities are working to protect capital market participants from greenwashing through the adoption of sustainability disclosure standards and the creation of green taxonomies. Comparatively less attention has been paid to authorities with broad regulatory remits covering most or all sectors of the economy, who are increasingly brandishing their powers to take enforcement action or cause reputational harm in respect of companies who engage in greenwashing. Meanwhile, private actors such as non-governmental organisations (NGOs) with ESG mandates can opportunistically seek to trigger or encourage investigations by such authorities, so as to pressure businesses to rectify behaviours.

These developments are unfolding in a time of increasing public consensus that consumer choices have a significant impact on the environment, and that companies should be held accountable for influencing consumer choices. This month's Bulletin examines several considerations and risks associated with interventions by non-financial authorities: the Competition and Markets Authority (CMA), the National Contact Point (NCP), and the Advertising Standards Authority (ASA) in the UK, which may be aggravated by NGOs and climate activists.

### Competition and Markets Authority

The CMA has powers to investigate suspected breaches of consumer law, such as the prohibitions against misleading actions and misleading omissions within the Consumer Protection from Unfair Trading Regulations 2008. In November 2020 the CMA launched a consultation project into misleading environmental claims, with the goal of better understanding how consumer protection legislation might be used to tackle misleading environmental claims made by businesses. Through the consultation, the CMA wanted to produce guidance for businesses on how they can avoid making misleading environmental claims —for example, that a product, process, brand, or business provides benefits which are in fact standard features, or is less harmful to the environment than it really is. The resulting final guidance, entitled "Making environmental claims on goods and services" (also known as the "green claims code") was published in September 2021.

The CMA launched a compliance review in January 2022 to examine environmental claims made by businesses in order to determine whether businesses are greenwashing. The compliance review is progressing sector by sector, starting with fashion retail and soon extending to others. As part of this review, the CMA is inviting the public to submit details of their experience of the issues covered in the green claims code. This presents an avenue for activists to report allegedly misleading green claims to the CMA and highlight areas where they hope the CMA will focus its compliance monitoring and enforcement action. Several NGOs have already engaged in the CMA's consultation process in finalising the green claims code last year, including to provide suggestions on the draft code and to offer support for the CMA's enforcement work.

In respect of businesses that are deemed to be greenwashing their environmental credentials, the CMA's enforcement powers include bringing civil claims, seeking a criminal enforcement order, or having a company undertake to stop breaches of consumer protection law. Companies may also be required to pay redress to consumers who have been harmed by their actions, and take measures to ensure that similar breaches do not recur.

## Advertising Standards Authority

The ASA has a long history of investigating complaints about advertisements for products and activities that contain allegedly misleading environmental claims. The ASA can investigate suspected breaches of the applicable advertising codes either in response to complaints, or on its own initiative.

In recent months, the ASA has said it will focus more attention on environmental claims. The agency recognises the role advertising plays on influencing consumer behavioural changes, where governments have set ambitious environmental targets. The ASA announced plans to carry out enquiries into several priority areas that require consumer behavioural change and carbon reduction. These enquiries involve the ASA scrutinising existing advertisements to identify issues for further investigation, and will inform the ASA's preparations to produce issue-specific advertising guidance. The ASA's enquiries are being progressed incrementally across a number of priority areas. Aviation, heating, energy, and cars were examined in Autumn 2021; waste will be examined in Spring 2022; and animal-based food will be examined in Autumn 2022. The ASA also indicated in December 2021 that it expects to investigate complaints on social responsibility issues impacting the environment.

The most obvious risk arising from an ASA investigation is reputational. The ASA notes that one of its "most persuasive sanctions is bad publicity – an advertiser's reputation can be badly damaged if it is seen to be ignoring the rules designed to protect consumers… their name and details of the problem with their advertising may be featured on a dedicated section of the ASA website, designed to appear in search engine results when a consumer searches for a company's website. If necessary, we can also place an ASA advertisement appearing in search engine results". In the event of a formal investigation, the ASA Council's ruling will be published on the ASA's website. Even in the event of an informal investigation, the ASA will respond to press enquiries regarding the nature of the complaint, and will publish on its website the names of the advertisers who have agreed to amend or withdraw their advertising.

Companies may face additional legal risks if the ASA refers complaints to other bodies, such as the National Trading Standards (for non-broadcast advertising) or Office of Communications (for broadcast advertising), which have enforcement powers under communications, competition and consumer protection laws. Such referrals are admittedly rare, and tend to be reserved for those who persistently breach the advertising codes or are uncooperative with the ASA.

## UK National Contact Point

The NCP is responsible for promoting the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct (the Guidelines), and considering complaints brought against companies for alleged breaches of the Guidelines.

The NCP process can be used to lodge complaints concerning a wide range of issues, including the environment, consumer interests, human rights, corporate governance, and employment and industrial relations. The Guidelines often refer to broad concepts that are open to interpretation, such as "sustainable consumption", "environmental performance" and "potential environment, health and safety impacts". Complainants may use these broad terms to call out behaviours ranging from allegedly misleading green claims to lapses in human rights protections.

The NCP process poses reputational risks for companies because of its potential to generate negative publicity. If the NCP accepts the complaint, it will publish an initial assessment finding that refers to the names of the parties, details the nature and substance of the complaint, and confirms that the complaint is "material and substantiated". Having a complaint accepted is a relatively low hurdle to pass, not least because the NPC will not undertake a thorough merits assessment at the initial stage. Should the NCP find that the issues raised deserve to be considered at the next stage, the NCP will either facilitate a mediation, or undertake further detailed investigation if mediation fails or is refused.

According to the NCP's website, it is currently handling six open complaints which have passed the initial stage. There may be other complaints under consideration at the initial stage, for which the NCP has yet to complete its initial assessment. The use of the NCP process to pressure companies to take corrective actions is likely to rise in the coming months and years. Although the NCP complaints process is non-binding, businesses faced with a complaint will almost invariably be pressured to engage so as to manage the risks of negative publicity resulting in reputational damage, and other potential knock-on consequences.

## Closing comments

The remits of the above authorities overlap in their potential to hold companies accountable for their impact on consumer choices, through taking enforcement action or threatening reputational harm. The authorities are likely to find themselves under increasing social and political pressure to be seen to be doing so. NGOs and activists are likely to increasingly take advantage of the complaints processes and other regulatory engagement opportunities to pressure companies into rectifying environmentally harmful behaviour. Companies need to stay alert to the evolving risks arising from regulatory pronouncements which can damage their reputations and trigger further risks, such as litigation and enforcement action in other forums. For a brief overview of the potential risks of public and private enforcement against greenwashing, please refer to our briefing "Greenwashed? The intensifying Scrutiny of Sustainability Credentials" (November 2021).

***With thanks to associate Ying-Peng Chin for the above piece and trainee Olivia Dawson for research assistance.***

# RECENT NEWS //

## SFO update: bribery conviction of former Unaoil exec overturned; Attorney General retains confidence in SFO director; convicted former Petrofac executive ordered to forfeit annual bonuses

Former Unaoil executive Ziad Akle had his conviction and five-year jail sentence for bribery overturned by the Court of Appeal in December 2021. In July 2020, Akle was found guilty of paying bribes to an Iraqi official to win contracts worth millions of dollars for Unaoil, a Monaco-based consultancy. Akle was granted leave to appeal his conviction and sentence in April this year after alleging an abuse of process by the Serious Fraud Office (SFO) leading up to his 2020 trial. On 10 December 2021, however, the Court of Appeal quashed Akle's conviction and denied the SFO's request to retry Akle, holding that Akle could be released immediately. The ruling stated: "We are satisfied that the convictions of Akle are not safe. He was prevented from presenting his case in its best light". The judges criticised the SFO for allowing David Tinsley, a Miami-based investigator representing the founding family of Unaoil, to become embroiled in its case. Director Lisa Osofsky and other SFO colleagues met and exchanged messages with Tinsley throughout the Unaoil investigation.

Speaking to the Justice Committee in relation to Osofsky's leadership of the SFO, Attorney General Suella Braverman said: "There have been some high-profile failures and case collapses recently, not least the Unaoil case". She continued, however: "I still do have confidence in the director. Under her watch there have been some high profile and significant wins". The Attorney General said that, following an "urgent meeting" with the SFO director in which she "probed her on what happened and why", her legal team "are in the process of confirming the person carrying out the review" of the SFO. The Attorney General was also questioned about SFO funding and whether they were receiving enough of it, given the lack of prosecutions. She countered that she did believe the SFO had the right resources and tools to make the UK an attractive place for business. Watch the discussion on Parliament Live (starting at 15:10).

A former top sales executive at oil services company Petrofac must disgorge £141,000 in profits from his role in several foreign bribery schemes. A judge at Southwark Crown Court ordered David Lufkin on 15 December to hand over the funds after finding they were the illicit proceeds of his involvement in the schemes. "It's clear that David Lufkin has benefitted from his criminal conduct and it's accepted that the amount is £140,937," said Her Honour Justice Deborah Taylor at the virtual hearing. HHJ Taylor handed Lufkin a two-year suspended prison sentence in October after he pleaded guilty to 14 counts of bribery for taking part in corrupt schemes in Iraq, Saudi Arabia and the United Arab Emirates between 2012 and 2018. Significantly reducing Lufkin's sentence, the judge praised his "moral courage". Without his entering a formal cooperation agreement, the judge opined that Petrofac would not have pleaded guilty to some of the bribery schemes. During the same hearing, HHJ ordered Petrofac to pay £77 million after the company admitted seven counts of failing to prevent bribery between 2011 and 2017 when its employees paid bribes of $44 million to win construction and maintenance in the Middle East worth $3.7 billion. Read the SFO press release here.

## FCA update: NatWest fined £264 million for MLR 2007 breaches; HSBC fined £64 million for "serious weaknesses" in AML controls; 2021 fines statistics published; fraud proceedings brought against Currie brothers

On 13 December 2021, National Westminster Bank Plc (NatWest) was sentenced at Southwark Crown Court for three offences related to failing to discharge its ongoing anti-money laundering (AML) monitoring obligations under the Money Laundering Regulations 2007 (MLR 2007), and was fined £264 million. The sentence followed NatWest's guilty plea in October 2021. The charges related to failures in its MLR 2007 obligations in relation to a single customer – Fowler Oldfield – and concerned standard monitoring, under Regulation 8, and enhanced monitoring, under Regulation 14. The £264 million represented a reduction on account of the bank's early guilty plea, and included a confiscation order of £46,000 and the Financial Conduct Authority's (FCA) costs of over £4 million. For additional reading, see the FCA's comments, the sentencing remarks, and the Agreed Statement of Facts.

The FCA fined HSBC £63.9 million in December for "serious weaknesses" in its anti-money laundering controls over an eight-year period. The FCA said that between March 2010 and March 2018, HSBC used automated processes to monitor hundreds of millions of transactions each month, but that these systems showed serious weaknesses during this period. In particular, HSBC did not consider the scenarios it was using to: pick up the risk of suspicious activity; appropriately test and update its systems that flagged suspicious activity; and check the accuracy and completeness of the data it was gathering for AML checks. "HSBC's transaction monitoring systems were not effective for a prolonged period despite the issue being highlighted on numerous occasions," said Mark Steward, executive director of enforcement and market oversight. "These failings are unacceptable and exposed the bank and community to avoidable risks, especially as the remediation took such a long time." The fine would have been just over £91 million without a 30% discount for early settlement.

The FCA reported that it issued fines totalling £568 million in the calendar year ending 2021. This represents a significant increase from prior years, which saw £60 million paid to it in 2018, £392 million in 2019, and £192 million in 2020. The largest fines issued in 2021 included £265 million against NatWest, £64 million against HSBC, and £147 million against Credit Suisse. The highest annual total of fines issued by the FCA remains that set in 2015, where the total amounted to £905 million.

On 7 January 2022, the FCA announced it had commenced criminal proceedings against brothers Peter and Andrew Currie, each a former director of Collateral (UK) Ltd (Collateral). The individuals were charged with false representation, fraud by abuse of position, and converting criminal property, under sections 1 and 2 of the Fraud Act 2006, sections 1 and 4 of the Fraud Act 2006, and section 329 of the Proceeds of Crime Act 2000. The FCA alleges that the individuals dishonestly represented to investors that Collateral was authorised and regulated by the FCA to operate as a peer-to-peer lender, knowing this was untrue, and abused their positions by transferring funds to a separate company and transferring further sums that they knew or suspected were the proceeds of crime into one of the individual's bank accounts. The brothers took these steps after being asked by the FCA to cease conduct of all regulated activities. Collateral is insolvent and now in liquidation.

## ESG update: Environment Agency CEO envisions post-Brexit environmental regulation; update on EU Taxonomy Regulation

Environment Agency (EA) Chief Executive Officer Sir James Bevan delivered a speech at the Westminster Energy, Environment & Transport Forum conference, in which he considered environmental regulation after Brexit. Bevan said that we should set higher standards of environmental protection; ensure that regulation is forward-thinking and flexible; define which goals should be achieved and when; and have fewer, simpler, and better frameworks to achieve those goals. Bevan considered that "the default approach would be the carrot of advice and guidance to help operators comply before any resort to the stick of enforcement", stressing that the future model of regulation should also "carry a much bigger stick" in order to "make regulated industries pay the full cost of their regulation". Bevan also argued that punishment for the biggest polluters should be tougher to "put a major dent in companies' bottom lines and sentences that would put their bosses in jail". Finally, Bevan stated that

he hoped there would be greater co-operation between regulators, emphasising the need for adequate funding in order to ensure “robust and effective regulation”.

The EU Taxonomy Regulation ((EU) 2020/852) came into force on 1 January 2022, providing businesses and investors with a common language to identify to what degree economic activities can be considered environmentally sustainable, or “green”. The regulation sets definitional criteria for determining whether an economic activity is environmentally sustainable, and will introduce new disclosure requirements for certain financial services firms and large public interest entities.

## PRA update: Standard Chartered fined £46 million; Metro Bank fined £5 million

The Prudential Regulation Authority (PRA) issued a fine against Standard Chartered Bank (SCB) amounting to £46.55 million, for failings in its regulatory reporting governance and controls, and for failing to be open and cooperative with the PRA. The PRA’s investigation identified that the internal controls and governance arrangements underpinning SCB’s regulatory reporting in relation to the liquidity metric were not implemented or operating effectively. These issues contributed to SCB’s liquidity miscalculations and misreporting, and also to its failure to be open and cooperative with the PRA. SCB qualified for a 30% reduction to its penalty.

The PRA also imposed a financial penalty of £5.3 million on Metro Bank Plc (Metro Bank) for failing to act with due skill, care, and diligence in relation to the regulatory reporting of its capital position, and for failing in other reporting requirements between 2016 and 2019. The PRA found on 22 December that Metro Bank breached Fundamental Rule 2 and Fundamental Rule 6 of the PRA Rulebook. Fundamental Rule 2 requires that a firm conducts its business with due skill, care and diligence, and Fundamental Rule 6 requires that a firm organises and controls its affairs responsibly and effectively. Metro Bank qualified for a 30% reduction to its penalty.

## Eighty-six percent of countries have made “little to no progress” in combatting corruption over last decade, claims Transparency International

According to a statement from campaign group Transparency International (TI) following the release of its 2021 Corruption Practices Index (CPI), corruption levels worldwide have remained static over the last 10 years. On a scale of zero (highly corrupt) to 100 (very clean), public sector corruption globally has remained unchanged at 43 for the tenth year running, and two-thirds of countries score below 50. “The global COVID-19 pandemic has been used in many countries as an excuse to curtail basic freedoms and side-step important checks and balances,” TI said. Denmark, Finland and New Zealand scored highest, at 88, while Somalia and South Sudan were ranked last, at “unrated”. The UK is ranked 11th, just ahead of Hong Kong and behind Germany, with a score of 78.

## John Edwards begins term as new Information Commissioner

The Information Commissioner’s Office (ICO) confirmed that new Commissioner John Edwards’ five-year term began on 4 January 2022. Prior to his appointment, Mr Edwards practised information law for 20 years before serving as New Zealand's Privacy Commissioner. He is currently advising on the new Online Safety Bill and government proposals to reform the UK data protection regime. "My role is to work with those to whom we entrust our data so they are able to respect our privacy with ease whilst still reaping the benefits of data-driven innovation. I also want to empower people to understand and influence how they want their data to be used, and to make it easy for people to access remedies if things go wrong,” Mr Edwards said.

## HMRC update: £1 billion recovered from fraudsters; no reported movement on failure to prevent facilitation of tax evasion investigations

HMRC announced that its Fraud Investigation Service (FIS) has recovered more than £1 billion in proceeds of crime and from tax offenders since the team was formed in April 2016. FIS has pursued suspected illicit funds via criminal and civil enforcement channels, making over 1,200 seizures of cash and other property assets. HMRC secured 157 criminal convictions in the UK during the 2020/21 financial year. Director Simon York said: "HMRC deploys cutting-edge technology to investigate unexplained wealth and uncover hidden assets", recouping over £218 million in 2021 alone. As part of HMRC's broader attack on serious and organised crime, the FIS has increasingly relied on powers to freeze and recover unexplained assets. During the 2020/21 financial year, HMRC issued 151 Account Freezing Orders to secure more than £26 million.

HMRC has not published an update on its investigations into suspected breaches of Part 3 of the Criminal Finances Act 2017 (corporate offences of failure to prevent facilitation of tax evasion) since May 2021. A Freedom of Information Act request revealed that as of 27 May 2021, HMRC had 14 live investigations into the corporate offence, with no charging decisions having yet been made. A further 14 "opportunities" were under review at that time. As of May 2021, it had reviewed and rejected an additional 40 opportunities. HMRC's next update is awaited.

## Government publishes first sanctions report

On 13 January 2022, the Foreign, Commonwealth and Development Office (FCDO) published its Sanctions Annual Report for 2021, detailing for the first time the impact of the UK's post-Brexit autonomous sanctions regime. Over the past year, the UK added 160 autonomous sanctions designations across 13 regimes; created one new regime—the Global Anti-Corruptions Sanctions regime; added 10 new measures to the Belarus regime; and created 16 pieces of secondary legislation.

## Council of Europe urges UK and other countries to strengthen AML corporate liability

In its review of compliance with the Warsaw Convention seventeen years after the treaty was first published, the Council of Europe urged fourteen of the thirty-six party countries to more effectively hold companies liable for criminal money laundering offences. The UK, France, and Russia are among those that were deemed not compliant, or only compliant "to a very limited extent", with the requirement that companies are held liable for criminal offences caused by a director's "lack of supervision or control". "The liability of legal persons can be particularly valuable for the effective fight against money laundering since criminals often use corporations, charities and businesses to launder their illicit gains," the Council of Europe said in a statement.

## US FinCEN proposes SAR sharing with foreign affiliates

The US Financial Crimes Enforcement Network (FinCEN) is seeking comment on a proposed rule that would allow banks to share suspicious activity reports (SARs) with foreign branches, subsidiaries, and affiliates. The pilot programme would permit a financial institution with a SAR reporting obligation to share that SAR and related information with the institution's foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risks, subject to FinCEN's approval and any set conditions. FinCEN has invited comments on the programme until 28 March 2022.

## OECD publishes data on enforcement of Anti-Bribery Convention

The Organisation for Economic Co-operation and Development (OECD) published data on compliance with its Anti-Bribery Convention of 15 February 1999 up to 31 December 2020. The report highlighted that between 25 OECD members, 684 natural and 245 legal persons were convicted or sanctioned for foreign bribery through criminal proceedings. Colombia, Latvia, and the Russian Federation imposed sanctions for the first time in respect of foreign bribery. The highest number of sanctions (agreed or imposed) against natural persons came from Germany (348 people) followed by the United States (133); the UK had 25 such sanctions made. The highest number of sanctions against legal persons came from the United States (154), followed by France (15), the UK (13), and Germany (12).