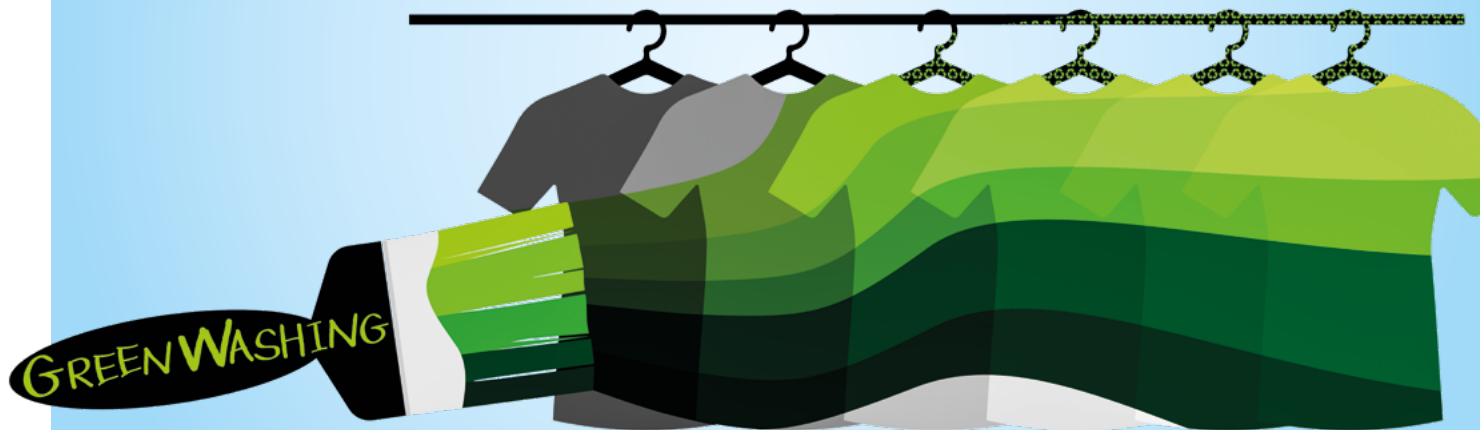


# “GREENWASHING”

## CMA INVESTIGATIONS ARE NOT GOING AWAY



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With more businesses using sustainability as a marketing tool, in a bid to attract environmentally aware consumers or to secure investment in environmental, social and governance (ESG)-related funds, it was only a matter of time before “green” or “eco-friendly” claims would attract the regulators’ attention.

In July 2022, the UK Competition and Markets Authority (CMA) launched an investigation into three fashion giants – ASOS, Boohoo and George at Asda – to scrutinise their so-called green claims. This probe follows on from the publication of the CMA’s “Green Claims Code” (the Green Code) in September 2021, the product of its inquiry into green claims that first began in 2020.

***The Green Code<sup>1</sup> explains that “misleading environmental claims occur where a business makes claims about its products, services, processes, brands or its operations as***

***a whole, or omits or hides information, to give the impression they are less harmful or more beneficial to the environment than they really are”.***

As of 26 January 2023, the investigation is ongoing according to a CMA press release<sup>2</sup>: “At this early stage, the CMA has not reached a view as to whether there have been any breaches of consumer protection law. The CMA’s wider review of the fashion sector and potentially misleading environmental claims in other sectors will continue as the CMA will also consider whether to open further investigations”.

On the same date<sup>3</sup>, the CMA announced that it would begin to scrutinise green claims made about fast-moving consumer goods (FMCG) such as food and cleaning products both online and in store to consider whether companies are complying with UK consumer protection law.



### Potential consequences

If the CMA concludes that companies’ green claims constitute “greenwashing”, potential outcomes include securing undertakings from the companies committing to change, taking no further action or starting litigation.

The Green Code sets out the legal framework for the guidance which is based on consumer protection rules under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs), which both contain powers of entry and investigation. The BPRs protect traders in business-to-business cases from misleading advertising.

1 <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>

2 <https://www.gov.uk/cma-cases/asos-boohoo-and-asda-greenwashing-investigation#launch-of-investigation>

3 <https://www.gov.uk/government/news/cma-to-scrutinise-green-claims-in-sales-of-household-essentials>

The CPRs introduced a general prohibition across all sectors preventing traders from engaging in unfair commercial practices towards consumers. Under the CPRs, sanctions include both criminal prosecution and enforcement through the civil courts; they also give consumers a civil right of redress.

Where an offence under the CPRs is said to have been committed with the consent or connivance of an officer of the company (a director, manager, secretary or similar officer) or is attributable to any neglect on their part, under regulation 15, the officer as well as the body corporate, are guilty of the offence.

In addition, the CMA works closely with other enforcement and regulatory bodies, such as the Trading Standards Service and the Advertising Standards Authority (ASA), and will consider “which authority is best placed to act, when taking decisions about enforcement action on misleading environmental claims”.



## Do not “wait and see”

It is interesting to note that on 28 August 2022, it was reported<sup>4</sup> that ASOS had removed its sustainable fashion collection, “the Responsible Edit” from its website. An ASOS spokesperson stated that “ASOS took the decision to proactively remove the functionality of the Responsible Edit, including filters, from the website in June as we co-operated with the CMA’s review of the fashion retail sector and we informed them of this move”.

It is clear that the CMA expects corporates to be prepared to justify and substantiate any claims they make on sustainability, including by co-operating and providing access to internal documentation to evidence any claims made. This means looking into the business introspectively as well as looking across to what competitors are doing and preparing to engage with the regulator.

## *Internally, corporates should be deploying two strategies in parallel: (i) a communications strategy; and (ii) a sustainability strategy.*

In relation to communications, it is clear that ultimately, consumers are looking for businesses to be “authentic” and want the messaging to coincide with the product they purchase or in which they invest.

Regarding a sustainability strategy, corporates would be well advised to engage lawyers at an early stage to ensure that the internal documentation on which any sustainability claims are made will withstand scrutiny and is evidence-based.

Finally, the notion of working with competitors should not be ruled out as resources can be pooled to formulate sector-tailored commitments and standards which may reassure the regulator.

Extensive reforms to the CMA’s powers are on the horizon by way of the Digital Markets, Competition and Consumer Bill, which the government announced in its Autumn Statement 2022<sup>5</sup> would be brought forward into the third parliamentary session. The Draft Bill as of 10 February 2023 is yet to be published<sup>6</sup> but a look at the government’s response to the consultation on reforming competition and consumer policy published in April 2022<sup>7</sup> refers to a significant strengthening of the CMA’s enforcement and evidence-gathering powers.

## *Notably, the CMA is not the only enforcement agency with a close eye on greenwashing: the Financial Conduct Authority is also looking to reinforce its supervisory and enforcement powers in this area.*



## Looking forward

ESG compliance has become an increasingly complex and challenging regulatory environment for companies to navigate. Increased levels of corporate transparency have been brought about by whistleblowing, corporate leaks, and the huge dissemination of corporate information online, often through social media campaigns. These factors have forced companies to look more closely at their health and safety, environmental and wider human rights practices to ensure compliance not only with legislation, but also with product and industry standards as well as consumers’ moral and ethical expectations.

Corporations must start looking at their sustainability and communications policies now, be open to dialogue with the authorities and their competitors and be ready to provide the evidence that supports and substantiates their respective environmental claims.



4 <https://inews.co.uk/news/asos-quietly-got-rid-of-its-responsible-clothing-collection-ahead-of-cma-greenwashing-probe-1820500>

5 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1118417/CCS1022065440-001\\_SECURE\\_HMT\\_Autumn\\_Statement\\_November\\_2022\\_Web\\_accessible\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118417/CCS1022065440-001_SECURE_HMT_Autumn_Statement_November_2022_Web_accessible_1_.pdf)

6 <https://publications.parliament.uk/pa/cm5803/cmselect/cmbeis/1078/report.html>

7 <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>