SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Advertising, Media and Brands Global Compliance Challenges

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry

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Introduction

2022/23 provides unique challenges for businesses operating across the advertising, media and brands industry. We are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

In this report, our legal specialists summarise the regulatory landscape at present relating to recession proofing your business, managing the cost of living crisis, data and technology, global brand and product anti-counterfeiting trends, tax policy and workforce challenges. We also provide insights into the rise of environmental, social and governance (ESG), mitigating risks, and the top advertising, media and brands hot topics.

All of our webinars and supportive resources are available on our website.

Please note that the information in this document does not constitute legal advice. For legal guidance, please contact one of our legal or tax specialists, whose contact details can be found throughout this report.

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Advertising, Media and Brands Sector Forecast

In the last 24 months, the world has experienced a series of unprecedented events that have had social, economic, legal and regulatory consequences. Today, businesses are still grappling with, and navigating, the resulting consequences.

Macro Issues

We have lived through an extraordinary period of change, political stress, economic stress and social stress.

This has impacted the way people work, how they consume and how they navigate the world. The COVID-19 pandemic was a major cause of that, along with political trends in several countries, the conflict in Ukraine and resulting pressure in the energy market. This is putting extreme pressure on several economies. These things are long term and are not going to be resolved in the short term.

A Word on Net Zero

Within this, there are three major trends, all of which fall against the backdrop of climate change, which is a major challenge for the planet as a whole. This challenge includes addressing the underlying issues of climate change and moving towards net zero.

It is increasingly obvious that governments are providing frameworks, objectives and ambition for net zero. However, governments cannot deliver the results. The results have to be created by businesses doing what they do well – adapting and developing for the future. Investors will need to invest, and businesses will need to change, if we are going to make the journey to net zero.

Three Major Themes

Global Terms of Trade Have Changed

The world that we have been used to for 30 years (acquiring consumers, materials, investment and trade wherever you want) has come to an end.

The status quo was already under pressure due to the pandemic, but intensified on the 24 February 2022 with the commencement of the Russia/Ukraine conflict. Global strategic risk is now in the boardroom in a way which it hasn't been for three decades. Companies need to consider their supply chains, markets, investments made in other countries, or how other countries are investing alongside them.

Businesses need to think in terms of a world where liberal movement of people, capital and goods is no longer taken for granted. We have seen the UK, the US, the EU, and other countries impose a range of sanctions on Russia, which has never been seen before. We have never seen a country that has such importance to the global economy being sanctioned to this extent. We have also never seen such a breadth and range of sanctions. This is an indicator of the kinds of stress that the global economy is now operating under.

We need to think about protecting the business and all parts of the operation, whether that is access to resources, people, consumers, markets or money. All things need protecting from geostrategic risk.

Digital

The world that you, your customers and your clients operate in is increasingly digital.

There is a lot of opportunity, creativity and growth that can come with a digital world. However, there are also huge challenges. This includes regulation, the way in which the movement from an analogue business to a digital business will change the type of business, governance, organisation, employee needs and skill set needs. These are enormous transformations that have to take place to be able to really grasp the benefits of being digital.

Alongside that, a factor of both challenges is the stress on the supply chain. We see that clearly with microchips, energy and food. We will see it with more things as the world adapts to the new situation. Businesses need certainty around the supply chain, resilience in the supply chain and assurance in the ability to procure what is needed to provide service.

Transparency and Disclosure

This will impact every company in internal organisation but also in the perception that others will have of the business.

Governments have recognised that the quickest way to effect change in companies is to make companies be open with stakeholders and the communities in which they operate. We are therefore seeing disclosure and transparency requirements increase in many jurisdictions.

We are also moving into a world where it will no longer be only financial information that listed companies share with investors (having to meet high standards of auditability and verifiability), it will be the entire description of the impact that the companies have on the planet, society, community, individuals and employees. Over time, all of that will need to reach an auditable standard.

The days of when companies could simply tell stories about the good things they are doing is gone. All businesses need to be prepared to give a frank description about the impact that the business has on those around it. That frank description can contain the good things but also needs to cover the negative impact that is had.

This will drive change in how companies think about their supply chains, themselves, their commercial partners and their customers. It will particularly drive change in how customers, regulators, legislators and commentators (NGOs, for example) think about them.

This will also leave businesses open to a whole new field of litigation about ESG issues. Preparing for that much greater level of transparency and disclosures is an essential part of every company when looking to the future.

The economy and businesses within it are still showing an extraordinary capacity to adapt to innovate to change to new circumstances. This is clearly demonstrated in the European energy market. Four to six months ago, people predicted that Europe would be in cold and darkness, on the basis that we would not have been able to supply ourselves with energy and resources. It is now clear that there will not be energy shortages. This is partly down to adaptations in the energy market, which has managed the changes at incredible speed.

The economic downturn is therefore likely not to be as bad as predicted six months ago. We can therefore be hopeful that, this year – and, looking to a coming year in which, even if growth is not spectacular – the worst effects of deeper recession can be avoided.

Impact on the Advertising, Media and Brands Sector

Against this backdrop, there are companies in advertising, media and brands spaces that are faced with learning how to harness the enormous purchasing power of young consumers, particularly millennials. These consumers tend to use their purchasing power to reflect their values and principles, many of which are reckoning with the global issues. This generation are avid social media users and use it to express themselves, but also to wield their purchasing power.

Where are the litigation risks for companies while trying to align advertising claims?

Green Claims of Companies

Consumers are trying to make purchasing decisions that reflect the value that they place around the climate and the transparency they demand from companies in respect of the green claims made.

Consumers clearly care about the climate and are addressing the concern through changing their purchasing behaviour. A recent report said that when we talk about global fashion consumers, 15% of them are reported to be highly concerned about sustainability and are trying to make purchasing decisions to lower their impact on the climate. That percentage is only going to increase. To reach those consumers, brands need to make effort to engage with consumers and provide information about their environmental impact. Sustainable purchases also need to be made easier and more appealing to consumers.

However, when it comes to green claims, studies show that consumers are confused about what the marketing terms mean. This creates a ripe landscape for litigation, and we can see that some is already happening in the US.

A recent study shows that consumers are specifically concerned and confused about what net zero means, as well as what carbon-neutral means. At the same time, these are two of the most widely used green claims in advertising. Increasing numbers of companies have introduced these terms in their advertising but there is very little consensus among consumers as to their meaning.

When it comes to the practice of carbon-offset (using carbon credits to lower their emissions by investing in projects around the world that reduce emissions elsewhere), survey participants in a recent survey thought that this was a direct offset of emissions and felt misled when it was discovered that companies were relying on offsetting rather than directly reducing emissions.

It is clear that consumers are not sure what green-centred claims are based on. The lack of legal definition (at least in the US) doesn't help.

Some companies are trying to get ahead of this and are issuing internal marketing guidelines for marketing departments. This reduces the risk of greenwashing-related legal issues and public relations backlash. It is therefore beneficial to have clear guidelines about what the terms mean to them as a company and how the terms are used.

Regulators are also stepping into this area. In the US, the Securities and Exchange Commission (SEC) have proposed a rule mandating publicly traded companies to disclose emissions that are relevant or material to company target emissions. That is going to increase the pressure on companies to make good on the environmental pledges.

The Federal Trade Commission is in the process of revising their green guides. These guides are designed to help marketers avoid making environmental claims that mislead consumers.

Regulators have also recently announced investigations and enforcement against several retailers regarding their misleading use of green claims in both the UK and the US. The time to internally review those green claims and what they mean internally to a company is now.

Consumers are not waiting for regulators to make the first move. Consumers are already taking steps against companies for their ESG and climate-related claims through the court system. Most targets of the consumer-led class action claims are fashion and beauty companies – for example, those claiming that their goods are conscious, recyclable, environmentally friendly or have a low carbon footprint, or that makeup is "clean". What do these words mean to consumers?

The Resale Market

Along the same lines, another interesting area is the proliferation of the resale market online, but also general online shopping practices.

In recent years, partly due to the pandemic, there has been a proliferation of consumers taking to online marketplaces to shop for goods needed in everyday life, but also taking to the second-hand retail market, with some online stores selling pre-owned goods. While the price discounts are appealing to consumers, some consumers are also appealed to by green practices that promote the recycling or upcycling of goods.

The second-hand market has always created challenges to intellectual property (IP) rights holders – for example, in raising questions about the reseller's liability for trademark infringement and counterfeit goods. Luxury brands have not been shy in holding other companies accountable for selling counterfeit goods. Such cases do not always have success, as online platforms have traditionally been shielded from liability in the US.

This shield has weakened over the last few years. Some resellers have taken a more active role in promoting the goods, representing the authenticity of the goods, and being involved in the marketing of the goods. The more active the role of the reseller, the weaker the shield against liability has been. In the US, legislative efforts are also underway to increase protection of IP rights on e-commerce websites.

Many people are almost exclusively online shoppers. Brands have therefore had to increase their brand protection in the online space as a result. This came to a head during the pandemic; for example, many people were trying to buy health and safety materials such as masks online. There were then reports about some of the masks being counterfeit.

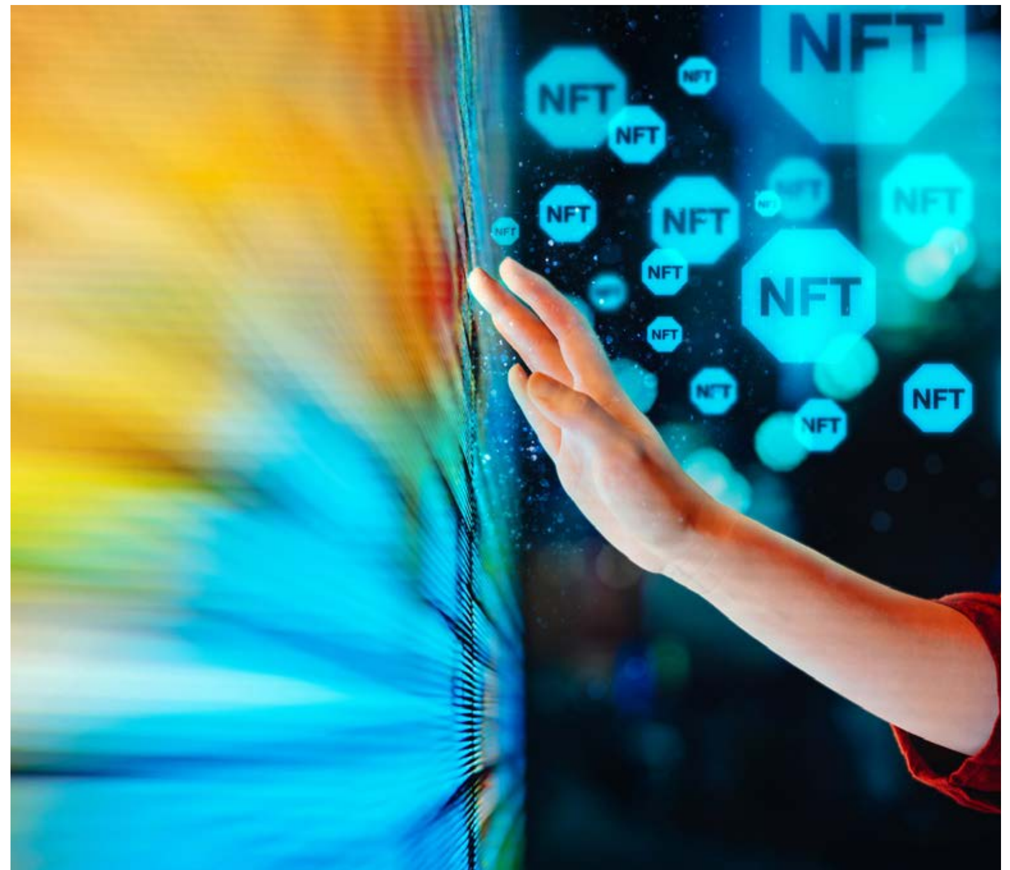
In 2021, the US Congress, taking note of potential health and safety issues in connection with goods sold online, introduced the Stopping Harmful offers on Platforms by Screening Against Fakes in E-Commerce Act (the Shop Safe Act). This act seeks to curb the harmful counterfeit items sold through online marketplaces. However, some criticise the act for giving trademark owners absolute control over online marketplaces. There are concerns that the act makes online marketplaces liable for contributory liability if they sell items with counterfeit marks or implicate health and safety. The onus is on online marketplaces to comport with expensive compliance obligations.

We will be keeping an eye to see how the bill plays out and makes its way through Congress.

Non-fungible Tokens (NFTs) and the Metaverse

Brands have been eager to take advantage of the metaverse and the marketing and branding opportunities that it creates.

There has been slew of activity at trademark office as brands rush to register their trademark for use in the metaverse. We are also starting to see legal challenges, with the first NFT and metaverse lawsuit having started on 30 January 2023. Issues discussed will include to what extent trademark protections extend to the metaverse or to what extent NFTs are creative expressions, protected by the first amendment as art.



Consumer Retail – Focus on the UK

There is a combination of different practices arising out of the cost-of-living crisis, rising interest rates, inflation and the UK heading into an impending recession that is likely to persist throughout the year.

In comparison to where we were towards the end of last year, with a brief spell of a Truss government, a mini budget that created a volatile market in financial markets, and a mini budget U-turn, it feels like the economy is on a more optimistic setting than it was during that time.

We are expecting to fall into a recession but that is not expected to be as deep or protracted as we were expecting a few months ago. Commentators believe some of that optimism has come through some of the latest trading updates from a range of trading retailers, whether that has been from grocers or some of the apparel retailers like Primark, Next or JD Sports. There is a range of retailers that have released more optimistic and upbeat Christmas trading results that have beaten expectations.

There has been a polarisation of retailers, where those retailers having a more omnichannel model –reliant on having a mix and blend of online and store presence – seem to have performed better than some of the purely online retailers that, over the Christmas trading period, have released figures that have been negative on last year.

Assessing the underlying consumer demand is difficult as there are so many moving parts. It was only last year in the UK that, running up to Christmas, we had fears around Omicron – fears of supply chain disruptions. Moving on to this year, we had the World Cup, which was beneficial to some parts of the sector, and inflation that inflated top-line growth for many retailers.

There are many moving parts within the retail space in the UK, and assessing underlying demand has been quite difficult. Data shows that retail sales have been up around 5.5% to 6% compared to this time last year. This sounds reasonable, but we have inflation running to about 11%. If you look at inflation specific to the retail sector, it is about 9.5%. The reality is that consumers are paying more but getting less in return. If you look at volumes of figures in terms of retail sales over the last few months, we have had nine consecutive months where consumers are buying fewer and fewer products compared to the year before.

This squeeze on personal finances – the cost-of-living crisis in the UK – is really holding back the ability of consumers to spend on discretionary items. We have a cost-of-living tracker with which we are looking at inflation and earnings growth, and really trying to better understand spending power for different types of households; what we see in the UK is that the least affluent households have seen a decline in their spending power of about £40 a month. This is a significant sum of money and really holding back their potential spend on discretionary items across the board.

As we progress through 2023, a lot of these themes continue, such as a continuous squeeze on the cost of living so this flight of value, an expectation to see recessionary behaviours unfold and also some consolidation in the market because of these factors.

The game changer in the UK is that we have had interest rates that have continued to rise aggressively, so the Bank of England has raised interest rates on nine consecutive occasions, rising to about 3.5% now. Another interest rate decision is coming in a few days' time, and we expect interest rates to arise to about 4%. This will be a significant squeeze throughout 2023.

There are approximately 25/26 million households in the UK. Around 40% of those households have a mortgage and, out of that pool of mortgage owners, about 80% are on fixed interest rates and 20% are on floating variable rates. So, 20% of them have already seen a significant increase in what they are paying on their mortgage. Of the 80% on fixed rate interest products, around 20% of them will have to renew their mortgage in the next 12 months. It is expected that around 3.6 million households over the next 12 months are going to see a significant rise in their mortgage repayments. There is going to be a squeeze on housing affordability.

For the average household in the UK, the mortgage is around £150,000, which, in real terms, means people are paying around £550 per month for their mortgage. That is going to rise to about £1,000, on average, as consumers renew their mortgages. If you have a mortgage of £500,000, repayments are likely to go up by £1500 per month, so there is a significant change. And even if you are going to renew your mortgage this year or next year, there is a general acceptance that the end of ultra-low interest rates over the last decade has come, and, whether reviewing next year or in subsequent years, people will be paying a significant additional amount on their mortgages.

The Bank of England estimate that we are going to see an erosion of real spending power for households of about 3.5% this year.

On the retail side, while the consumers are facing the cost-of-living crisis, retailers are facing an operating-cost crisis. We are seeing ongoing issues around supply chains – nowhere near as bad as they were this time last year – but we are seeing an increase in labour costs because of the shortage of labour, an increase in the costs of logistics and utilities, in transport costs, and in operating costs for stores in terms of lighting – and refrigeration, in the case of grocery. There is a real squeeze on profitability for retailers in this country, and we are going to see that as an important theme over the next 12 months.

In terms of consumer behaviours, consumers are already adopting recessionary behaviours. Some of the common practices we are seeing show consumers forensically focused on value, and willing to sacrifice other things in exchange for lower prices. We are seeing these constant trade-offs of higher value in exchange for lower quality, or the prioritising of price over the experience or price over convenience. Consumers are also delaying the replenishment cycle of some products, trading down to cheaper brands and cheaper retailers.

According to Retail Economics research, they have found that there are four distinct consumer cohorts that have emerged. About a third of consumers are essentially cancelling all product purchases and cancelling all their expenditure where they can. About a third of consumers are genuinely financially distressed.

About a quarter of consumers are those who have been labelled as "squeeze spenders" – these are consumers who are cutting back on necessities but are still looking to for credit to try to fulfil their purchases.

There is another group of consumers who we see as being squeezed in terms of their finances, but who still have the financial means to purchase. It's just that they are deciding to increase their levels of savings out of choice.

This leaves around 13% of consumers who we call "financially immune". These are the consumers who have a "Keep Calm and Carry On" approach, and the cost-of-living crisis is not affecting their spending patterns at all. This is an important cohort of consumers because, in the UK, 20% of affluent households are responsible for 40% of spending.

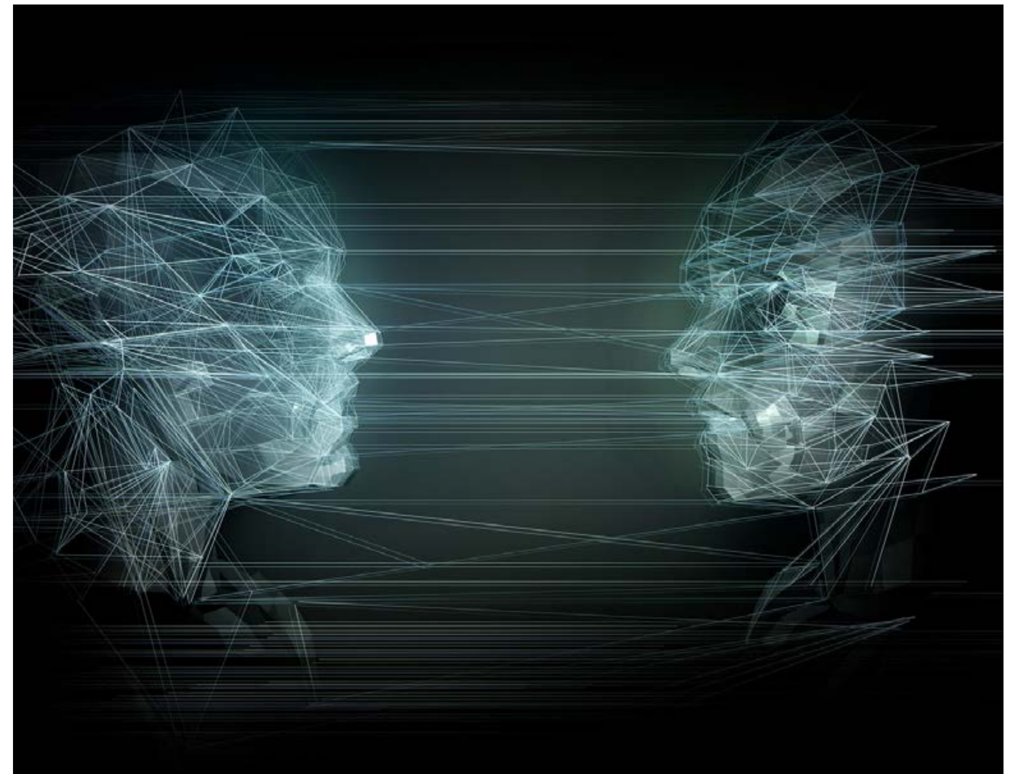
In terms of what that means for brands, it is important to focus on the most profitable consumers. In the market, we are likely to see consolidation and polarisation. We expect to see higher-end brands perform better because of the trading down to cheaper retailers and cheaper brands. We are going to see a squeeze in the middle, and this is the point at which we are likely to see consolidation in the market.

We are going to see the pre-loved and circular economy really accelerate into action over the next 12 months. Driven by concerns over sustainability and the cost-of-living crisis, people are turning to preloved goods to manage their finances.

One To Watch – Artificial Intelligence (AI)

One to watch is the awareness of AI, and this year is going to be a big year for consumer awareness of AI. The launch of ChatGPT will give many consumers the first glimpse of the impact of AI and the potential disruption this will have on their lives, and this could be the year where there is real recognition of the fact that AI will impact the way everyone lives their lives.

Listen to a recording of our podcast, recorded in January 2023.



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Managing and Understanding the Cost-of-Living Crisis, Recession Proofing Your Business and Prioritising Your ESG Strategy

Understanding the Cost-of-Living Crisis – Economic Update (as of November 2022)

We are currently in an extraordinary economic context. There has been a curve of global inflation (4.7% last year to 8.8% this year) and an upwards curve in terms of global growth, which highlights the acute pressure on many countries.

Many countries are facing similar declines in growth. In 2022, in the developed economies, growth was in decline, for example:

- USA, Germany and Japan showed only 1.5% growth
- France, Italy, the UK and Canada showed only 2.5% growth

Next year, it is predicted that Germany and Italy will experience a slight decline, with the UK barely growing and the USA, Japan, France and Canada either side of 1% growth.

In China, one of the effects of the pandemic and China's pursuit of zero COVID-19 is that Chinese growth has slowed into the 3-4% range, which is a low number when considering the scale of growth that China has been experiencing. In emerging markets generally, there has also been a halving of growth.

Many areas have contributed to the uncertainty, including:

- **US Midterm Elections** – This has led to a shift in the ability of the US administration to pursue economic policies; however, this shift was less than anticipated. The House and the Senate ending up in different hands will complicate the ability of the Biden administration to pursue its agenda.
- **Management of the Euro** – There is extreme tension for central banks, as there is the difficult balance between fighting inflation and fighting recession (for one, rates are increased; for the other, rates are decreased). Quantitative easing measures from 2008, 2012 and the COVID-19 pandemic are still in place. This has led to a difficulty within banks in achieving a balance with different companies in differing jurisdictions.
- **Overhang of COVID-19** – The COVID-19 measures put in place have left a huge public debt and are coming home to roost, creating increased taxes, the potential for the return of austerity in the UK, and labour shortages.
- **Russia/Ukraine conflict** – This has created a less certain energy market, caused an increase in food prices and a driving rate of inflation that we have not seen in developed countries for over 20 years.
- **Emergence of alternative and direct lenders** – This means that many banking relationships have fundamentally changed in nature.
- **Consumer confidence and spending** – This area is more likely to feel the pain first, rather than any economic crisis starting in big business and banking.

The world that we are used to and have been used to for 30 years, where you could broadly invest and buy and sell where you wanted to, without considering geopolitical risk, no longer exists. Geopolitical risk is now a key factor and will drive differences in the way companies think of the markets and how they conduct themselves. It has a reputational impact and coincides with the link to climate and societal change, leading to an expectation of greater company transparency.

Over the past few months, there has been a decline in major online tech platforms, reflecting a decline in advertising revenues, showing another factor to consider in the changing economic landscape that companies have to consider. Additionally, greater regulation means customers are now concerned with how their brands are represented and what content they are shown alongside.

Managing the Cost-of-Living Crisis and Recession Proofing Your Business

Recession Proofing Your Business

Lots of businesses are uncomfortable at the moment, particularly regarding unpredictable energy costs. The recession we are likely to see in the future is different to those in the global financial crisis (which had a sudden liquidity squeeze that caught people out), as it is more relevant to consumer and supply chain issues.

Challenges Businesses Are Facing

As noted, there are various economic issues for businesses to navigate. The supply chain issue in particular has led to many large corporations creating their own supply chains to prevent issues with current chains (such as Walmart, Amazon and Costco). In the US specifically, there is a proactive approach to the economy, and steps are being taken sooner to prevent economic issues. The volatility is expected to continue in the US, particularly in relation to the midterm elections, but politicians are expected to work across the aisle to cover economic acts.

What Can Business Leaders Do Now to Prepare Their Businesses for the Recession?

The main things to be done fall into three (overlapping) categories:

Cash management	Corporate governance	Supply chain management

Cash Management

A board should closely monitor its rolling cash flow, in terms of monthly sources and uses of cash, and also by setting out quarterly cash flows, as any discrepancies from what is expected can act as an early warning sign of potential problems. The cost of goods sold should also be discussed with boards, as it will note what inflation will do to the profits of a business.

Working Capital

A business needs to ensure that it has sufficient working capital to be resilient in the face of declining consumer demand, which can mean having early discussions with lenders. We have seen clients ensuring that they have drawn down on facilities, and credit providers are far more likely, in our experience, to engage constructively and positively where they see a proactive management team in the business, in whom they have confidence and who are putting forward credible forecasts and risk assessments.

Look at your sector and do a scenario planning exercise, understanding what financing options may be available, how they work and who the reputable players in the market are. In the USA, rating agencies are being aggressive about doing updates, creating a rush to draw down on any facilities that are out there, as there is the assumption that the rating will not hold. The Federal Bank is not responding to any markers that people will expect, creating a large amount of uncertainty, which is adding to the volatility in the USA.

Other Factors

- Boards should focus on what they can control, whether that be restructuring their businesses or reducing overheads.
- Stay on top of debtors – if customers that previously paid promptly are now taking longer, determine why and put pressure on those customers.
- Note changing patterns – for example, if accounts are being filed late, there are changes in senior management, or customers that previously paid promptly are now taking longer. Determine why this is happening in each case, and put pressure on those customers. Please see our handout on the signs to look out for.
- Make sure books are in good order.
- Assess your organisational risk tolerance – can you downsize your inventory, are there particular pieces of inventory where you need to do the opposite?

Prioritising Your ESG Strategy

It is more important than ever that ESG strategy remains at the front of the agenda, particularly where a business is in a chain or is consumer facing. The meaning of "brand" is about consumer buying decisions, and factors that shape those decisions.

While some businesses, when dealing with crisis, will lose the correlation between ESG and business performance, boards should be wary of losing the long-term view and should, in turn, stick to their ESG strategy. This is because customers are dealing with regulatory pressures, meaning companies with stronger ESG performances will benefit financially, due to:

- Increased attraction to customers versus their competitors.
- Access to resources.
- Energy – cost reduction if there is a low energy consumption (for example, by reducing the cost of the waste process).
- Employee retention – this is obvious and important, as it is about the way a business is generating loyalty. Businesses need to ensure they are bringing their employees with them in times of crisis.
- There will be a better allocation of capital.
- ESG is value enhancing. While people may have views on how ESG is delivered, no one would disagree that getting ESG wrong is destructive. Greenwashing and wokewashing, for example, can have a huge impact on business.

While businesses may see consumers not looking beyond price in the immediate picture, the long-term plan should be considered, including the impact on the direction of travel for the business and potential future opportunities. For consumer-facing businesses, it is a great opportunity to start a journey of differentiation against competitors, and a brand can be damaged quickly if the business moves away from this. When dealing B2B, where a consumer is at the end of a chain, there is also pressure within these businesses to satisfy financial and corporate requirements to meet targets, including investor conditions. There is a larger focus on transparency and a greater requirement for transparency from consumers. Pricing might be at the top of the list tomorrow, but consumers still expect greater brand and retail performance than they did pre-pandemic.

ESG – Governance

Governance is a focus noted above. Discussions we have been hearing are businesses seeing governance as the broader good order of business, including looking at potential risks and scenario planning. Consider – what is a rainy day in the current climate?

It is more relevant now as, if you are looking at finance, the way you are approaching the longer-term period is specific to the decision-making processes. We have seen a vast move to the ESG atmosphere in relation to regulation, reporting, metrics and culture, and businesses need to look at scenario planning to see what the current year is going to bring.

How businesses monitor, measure and report on metrics (transparency) will be crucial going forwards, and making sure finance providers, investors and partners see how businesses are approaching it is key. Look at both internal and external risk and engagement. Consideration should also be given to supporting your employees – in the broadest terms of sustainability, if you are going to be a sustainable business, you need to be around in the future and continue having business partners.

Consumers deal with regulatory pressures and companies with a stronger ESG performance will benefit financially, due to greater attraction to customers, access to resources, employee retention, energy (cost reduction if your energy use is low) and a better allocation of capital. Alternatively, while people may have views on how it is delivered, no one would disagree that getting ESG wrong is destructive. While climate change has fallen below the economic crisis and cost of living in a survey with consumers, it is still a high priority and still considered by consumers. For B2B customers where there is a consumer at the end of the chain, these businesses are also under pressure to satisfy financial and corporate requirements to meet targets, including investor conditions.

Are Boards Equipped?

- In terms of change, businesses should have an ESG compliance officer and larger PLCs will have a committee for ESG responsibility.
- A diverse board is included in ESG, and there is no dispute that this is being looked at from all angles.
- Younger companies with no trading through difficult times may not have the experience or be able to spot the warning signs previously listed.
- In the US, in response to SEC's proposed regulations, we are seeing the ESG component being detached from the audit committee, with separate professionals to deal with ESG compliance. The USA is nowhere near as advanced as the EU and the UK. The US is playing catch-up in a hurry, and directors are focused on it and how to do over and above what is necessary.

Listen to a recording of our webinar, broadcast in November 2022.

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Global Data, Technology and Tax

This year has provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures. We expect this to continue into the year ahead.

Adtech and Cookies

UK and EU GDPR

The decision by the Belgian Data Protection Authority (DPA) against the Interactive Advertising Bureau (IAB) regarding their transparency and consent framework, and more specifically their advertising preferences, concerned the use of personal data and cookies for the purposes of targeted advertising.

Firstly, GDPR requires a lawful basis to process personal data. The bases that were relevant in this case were legitimate interest and consent. The DPA concluded that the legitimate interests of IAB did not override the interests of the data subjects affected and thus this lawful basis would not work. Obtaining consent was also discarded, as for consent to be GDPR compliant, it needs to be clear, transparent and granular enough for the data subject to understand what they are consenting to. Data subjects receive many targeted ads, and this is a complex space, so users are not going to be able to understand enough to give informed consent. This decision has raised questions about the lawfulness of targeted advertising in the EU/UK, but, so far, we have not observed clients withdrawing from these activities.

The DPA's decision has been ruled illegal on procedural grounds on appeal by IAB, but it will take at least a year for the Court of Justice of the European Union (CJEU) to reach a decision, and it is likely to get back to the DPA for further considerations.

The market is moving away from the use of cookies to using technologies like fingerprinting. However, this is not a silver bullet as these techniques still involve personal data and even tracking technology, which could be even more intrusive. Players in this arena need to take the necessary steps to ensure they are as compliant as possible.

USA

The cookie regime in the USA works primarily on an opt-out basis, but there are still technical implementation challenges to consider. Some state privacy laws have considered the use of cookies for targeted advertising as a data sale, which means that companies need to provide users the option to opt out from targeted advertising. These states are also making companies honour browser privacy extensions to communicate the wish to opt out from advertising. This includes creating a cookie banner to accept, decline, or choose cookie preferences, or the provision of a link to a cookie manager interface. Many clients are looking to implement these measures before 2023, as laws come into effect on January 1, 2023.

All states have privacy laws, but Utah's give individuals the right to opt out from profiling. This is also used for targeted advertising. The regulators are paying attention to this, and there has been enforcement action even before laws have entered into effect (e.g., Sephora). Lawmakers and regulators are seeing this issue as a priority going forward.

Digital Markets Act (DMA) and Digital Services Act (DSA)

The DMA and DSA have recently come into force. The EU has adopted these regulations for three reasons – to introduce contestability in digital markets (some of the obligations that are introduced by these regulations only impact a few companies but the implications will be wide); general competition law is insufficient to deal with these issues (it is difficult to bring competition enforcement actions, but now we have do's and don'ts for companies, and companies must decide if they are subject to these regulations); and the EU was trying to prevent each member state from coming up with its own way to deal with these issues.

Big players can act as gatekeepers and are effective at observing and replicating successful services offered by third parties. The DMA will affect these key gatekeepers, which will have to meet requirements and enter into discussions with the EU Commission. As it deals with market access issues, it provides for substantial sanctions.

The DSA concerns consumer protection, warranties and rules for selling services in platforms. This applies to everyone, not just a handful of gatekeepers. There are different levels of sanctions according to member state implementation.

From a client perspective, the DMA and the DSA create regulatory obligations that intersect with each other. Many actors will be impacted, from core providers to new ones. There is also new legislation in the pipeline, such as the EU Data Act and the e-Privacy Regulation. We can provide a table summarising the overlap, to assist companies in developing a compliance strategy. It is important, as a company, to have a unified narrative that can be shared with authorities.

Other countries are also looking to replicate EU legislation, such as the UK, which has set up the Digital Markets Unit and is working on its Online Safety Bill.

Tax

Pillar I and Pillar II

The global effort to harmonise tax rules is bringing uncertainty to the global businesses likely to be affected. G20 Members mentioned ongoing work on these pillars in their latest statement.

Pillar I involves changing the traditional rules that establish which country gets to tax international income, and which countries get to regulate, through taxation, the sales of multinational businesses. This would require a multilateral tax treaty. The USA has not ratified a tax treaty in 10 years, and this has been opposed by the Republican Party.

Thus, there is no prospect of the US adopting Pillar I in the foreseeable future, delaying general implementation. As a result, unilateral digital services taxes, which often cover online advertising, may proliferate around the world over the next few years.

Pillar II concerns a global minimum tax. The OECD has developed model rules and published an implementation framework at the end of 2022. There is an active legal debate regarding Pillar II, especially regarding a rule allowing countries to impose top-up tax on profits arising in other countries. There are also issues regarding its interaction with double tax treaties.

Implementation will be difficult. The EU member states have agreed to implement the Pillar II rules by the end of 2023, and the UK and numerous other countries are taking definite steps toward implementation of the rules in their domestic laws. In the US, however, neither the global intangible low-taxed income (GILTI) rules nor the 15% corporate alternative minimum tax enacted in 2022 are aligned with Pillar II, and thus countries that have enacted the Pillar II rules could impose top-up tax on US-owned companies, which could result in retaliation by the US.

Businesses should check how likely this is to impact the jurisdictions they are present in, and make sure they have the necessary data to calculate if they are within the rules. As the global landscape is changing constantly, it is important to keep an eye on trends and OECD projects. The more companies prepare, the fewer problems they will encounter in the future.

Listen to a recording of our webinar, broadcast in December 2022.

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Anti-counterfeiting, Brand Protection Trends and Advertising, Media and Brands Hot Topics

Brand Protection and Anticounterfeiting Trends

Counterfeiting has become a huge business – based on a study from the Intellectual Property Office (IPO) conducted in 2019, profits from global counterfeit trade amounted to more than €400 billion. This does not include the amount made from transportation, which was more than €119 billion It is an incredibly profitable business, run by organised crime groups.

Counterfeiting networks operate incredibly professionally and are very responsive to trends. Even during the pandemic, it did not take long until items such as fake coronavirus test kits became available. Another example of how efficiently they operate is a recent investigation undertaken regarding fake watches in the German market, via an online platform. When trying to source the counterfeiters, we discovered that the location of their services changed every eight hours, from Russia to Latvia and so on, around the globe. They became impossible to locate.

It is vital to remember that the fight against counterfeiting is not a level playing field – there is an imbalance here. We are bound by laws, but counterfeiters do not adhere to laws! Moreover, when it comes to production of counterfeit goods, ultimately it will always end in China.

China remains (alongside Hong Kong) accountable for 80% of the import and export of counterfeit goods. Hong Kong is included in this statistic not necessarily from a manufacturing perspective, but from a transport perspective. Hong Kong is a harbouring place for counterfeit goods that is essential to distribution.

Investigating counterfeit goods presents a lot of challenges, including not only the language barrier, but also the different IP legislation. For example, we have had cases where clients want to enforce a trademark against counterfeiters in China, but they needed to register a trademark in China to do so, which they had failed to do.

Why Do Business Want To Enforce Anticounterfeiting Measures in China?

Seizures of counterfeit goods in Europe account for 1% of all the counterfeit goods that land in the market. Considering this, it is important to balance global strategies and ensure that this includes a China strategy – dealing with the production of counterfeit goods at the production source. Counterfeiters in China will not be deterred by a seizure in Rotterdam! They will just take it on the chin and make another shipment in its place.

When trying to enforce your trademarks in China, you will meet challenges. Chinese authorities will not actively pursue counterfeiters. It is not how their system is designed. Their government may occasionally launch campaigns on some instances of counterfeiting – for example, tobacco – but the reality is that, with consumer goods, luxury products and so on, you cannot expect the authorities to pursue counterfeiters of these items.

Companies will need to set up an investigatory team, which is a service that we provide for our clients. We locate the factories and warehouses that hold counterfeit goods and enforce against the counterfeiters.

It is also important to remember that not only will the government not intervene in your favour, they could intervene against you. This is regarding local protection laws, so you need the know-how on how to bypass these.

The government/local authorities have a busy political and economic agenda that they need to achieve, and the protection of IP rights does not form a part of this.

The big challenge now with counterfeiting comes from the introduction of e-commerce, including websites. Legislation was introduced which forced big e-commerce brands like Amazon to filter their goods and services to identify counterfeit products, but then social media came along and added an entirely new dimension to the combat of counterfeit. Brands were not asked to monitor their Instagram, Facebook or Twitter accounts and consumers were overwhelmed with targeted ads. Most counterfeit goods are now sold through TikTok or Facebook and shipped directly from China, making it increasingly difficult to detect packages containing fake items. It takes speed and efficiency to tackle these issues – you need to have an efficient service provider to help you deal with them.

However, when it comes to brand protection in an online world, in the fight against counterfeit goods, social media is not just bad. Social media can also be used as a useful tool to investigate infringers. Social media platforms can be a mine of information in this regard. It is a weakness for infringers, who are having to provide information about themselves and their location to be able to trade on social media, which allows us to identify them and trigger actions.

When people ask, "How do you stop counterfeiting online?", we highlight that we cannot stop them; this is not the goal, but we can work alongside companies to reduce the impact of counterfeiting on their brand. One of the key takeaways from an enforcer's perspective is that we need social media to coordinate online takedowns and coordinate movements to tackle on-the-ground activities. This can then culminate in lawsuits, which, in China particularly, act as a very useful deterrent and can be very threatening. The counterfeiters then have far more to lose and will be deterred from attacking your brand.

A few key takeaways on these questions include:

- You cannot stop all counterfeiters; your goal as a brand instead should be to destroy the profitability of your counterfeiters
- The fight against counterfeiters must be global, and there are four pillars to consider:
  - Online investigations
  - Raids on the ground
  - Customs applications for action
  - Consumer education (convincing consumers not to buy fakes)
- Data collection is key; build databases with the intelligence you are gathering

Use of Trademarks and Other IP to Protect Your Brand

Trademarks are the strongest form of IP protection, but there is also an entire ambit of protection similar to trademarks; for example, passing off. Moreover, you can also think about design rights, which protect a product's shape, how it looks, its functionality, its configuration and so on. Similarly, registered designs can also protect the appearance of a product, i.e. its shape, colour and augmentation.

You can obtain between three and 25 years' protection through these IP rights; they are a useful tool in the armoury against counterfeiting. Patents, for example, if novel, have protection that lasts for 20 years, which is an effective tool in combatting rip-offs. You can also use the law of confidence; for example, if a counterfeiter is infringing your rights, you can think about whether they have somehow had access to your legitimate product (i.e. if they were a consultant in the making process) and how you can enforce any confidentiality provisions that were in their contract.

What Are the Latest Developments in the US Regarding the Liability of Platforms for Counterfeit Goods?

There have been calls from Congress to open up the doors for platform liability under the Communications Decency Act. This act is up for review by the Supreme Court and this demonstrates the type of blockbuster review for media law that the US will see across 2023.

Q&A – Current Hot Topics in Brand Protection

Web3 and the "metaverse" – we have heard this referred to as the "new frontier for IP", but what does this mean for businesses?

It means that as a practical matter, the IP area continues to expand. NFTs present trademark and copyright issues for brand owners, but they also present the opportunity for brand extension and promotion.

The danger zones that NFTs present for brand owners are illustrated in several cases we have seen recently, including the *Tarantino v Miramax Pulp Fiction* case or *Nike v StockX* case. Plaintiffs are asserting that NFTs published or used by the defendants are violating their traditional IP rights. These cases look to the essence of what an NFT is.

There are other issues presented by NFTs; for example, who owns them? Are they derivative works? Who is the creator? We need to wait for more judicial guidance on this, but recently the United States Patent and Trademark Office (USPTO) copyright office announced that they are conducting a study regarding public commentary on many NFT related issues. This includes the fields they are used in, their associated IP rights and the challenges that brand/copyright/IP owners are facing to try and protect their rights. They are aware of these new frontiers and legislative adjustments will certainly arise out of this study.

What are brand owners currently doing to protect their rights?

A positive step that brand owners are taking to protect their rights in the US is filing trademark applications in their relevant jurisdictions, which protect their brands in NFT contexts. There are currently 7,000 live trademark applications for NFTs in the US in the goods and services ID. A handful have already registered, including Playboy and Blockhead Buddy.

Many companies are jumping on the registration bandwagon, because if they don't, someone else will.

Are brand owners doing a similar thing in the EU?

Yes, in fact the most-watched webinar across our European offices was on brand protection in the metaverse! Currently, we are also filing a lot of trademark applications, as part of the brand protection strategies of our clients. Our clients are also worried about their ability to enforce their brands in the metaverse classes, particularly as we have already been flooded with counterfeit NFTs. We look forward to these issues coming before the European courts!

What would you say the biggest challenges facing your clients are?

There are three main ones:

1. How can I future-proof my trademark portfolio?
2. Should I file metaverse trademarks and can I enforce metaverse infringement in the real world?
3. How do trademarks work as territorial rights in the metaverse?

Regarding the infringement aspect, the case law so far indicates that judges will assess the issues on a case-by-case basis; there is no written rule on how infringements will be handled.

Ultimately, a good IP strategy is a matter of communication across your marketing, legal and commercial departments.

What is the UK filing trend?

Our clients are asking us to tailor-make their portfolio to cater to the metaverse and we are consequently filing fresh applications considering these requests. This is a trend shown in the report by Clarivite in 2022, which notes that the UK IPO has been the fastest growing trademark register in the world in relation to the metaverse, with application amounts growing by 3% overall in 2021.

Noted above are the issues with the territorial application of these trademarks, and where to file applications is being questioned. Trademarks are territorial in nature, but the metaverse is not a website that can be targeted in jurisdictions. It is unlikely that the metaverse will be associated with a territory, so brand owners will have to be careful where they register, considering the peculiarities of each of the countries selected and the way they interact with metaverse registrations. Until we know the status of the metaverse, unfortunately, we cannot elaborate much more on this! Before we do receive further guidance on this, we are instructing our clients to follow the real-world strategies when filing for now.

Q&A – Private Prosecutions – How They Can Be Used as an Effective Tool for Brand Protection

What is a private prosecution?

For all intents and purposes, a private prosecution looks and operates much like a state prosecution. A company or an individual can bring a private prosecution; it will still need to meet the relevant tests, but they can have private lawyers acting on their behalf.

How is it used for brand protection?

Many people are aware that they have been used in this jurisdiction for some time, particularly in the creative arts and media industries. There have been a number of cases, including about online piracy, for example, the Dancing Jesus case! They have also been used for other areas of brand protection, such as the fight to combat counterfeit goods.

A useful case that outlines their use in this context is the Supreme case (a case prosecuted by one of our team members in their former role). A UK corporate and its two Italian directors were prosecuted for fraud offences relating to widespread counterfeiting in the EU, UK and in China. The individuals were in Italy at the time of the trial but were prosecuted in absentia in the UK court. The individuals got eight and three-year sentences respectively, and the company was fined £7.5 million pounds. Neatly illustrating why a private prosecution was an effective alternative to more traditional civil options for enforcing trademark breaches, the sentencing Judge said the defendants "exploited weaknesses in trademark protection in Italy. Like ticks, they jumped from one company and jurisdiction to another, and carried on regardless."

What are the factors that a brand owner should think about when considering a civil process or private prosecution?

There are some significant differences. For example, prosecutors have more onerous duties in criminal cases than in other litigation. This includes a higher standard of proof and proactive disclosure obligations. However, private prosecutions can also be excellent deterrents where companies are experiencing serial brand protection issues. They can offer an alternative in situations where the civil process may be ineffective in obtaining the results you need or want. They also have different jurisdictional and limitation requirements. For example, to establish jurisdiction here, you generally just need one relevant part of the offence to have occurred here. Clients will need to consider each of these things when choosing the option that is right for them.

Final Remarks

One practical point to be aware of is that 2023 continues to be the year of customisation. Products are increasingly being targeted at specific groups of consumers, which, in the fight against counterfeiting, is a useful trend. Counterfeiters do not have the time to imitate specifically customised products. Instances of this include the medtech space, where drugs and devices are being tailored in this way, as well as the beauty and leisure sectors.

There is one more point regarding developments in the NFT space for those in advertising and marketing – recently, in the US, there have been many instances of disgruntled investors suing influencers, whereby they are alleging that some of the cryptocurrency meltdown was participated in by them, and they had a hand in facilitating it. This is going to lead to a host of potential advertising liabilities under many state and federal laws, resulting in the need for further review of insurance policies. This is certainly on our list as a hot topic, as it continues to develop.

Listen to a recording of our webinar, broadcast in January 2023.

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The Rise of ESG and Global Workforce Challenges

A View From the US – ESG Trends

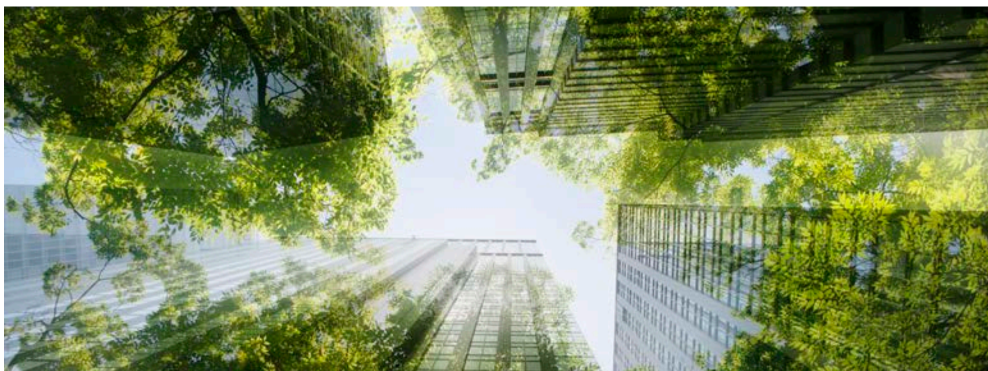
There is a large emphasis on the E of ESG. Corporations are becoming more thoughtful on ESG issues, though there are criticisms from the left and right. The left predominantly focuses on the concept of greenwashing, whereas the right focuses on "wokeness" on the part of corporations. It is important to assess the values of ESG and ensure they are addressing shareholder concerns, relating to share value and corporate risk.

The SEC's proposed rule on climate reporting has generated large comments in response, one theme being on the maths of the accounting of the SEC, the second theme being on materiality and whether it is within the functions of the SEC, informing shareholder risk. It is an ongoing issue and those roles will be finalised in what we expect in the next year.

What are the pitfalls of ESG reporting?

We will highlight one, and that is doing the maths appropriately. There has been a focus for years on carbon reporting and carbon accounting; however, our experience is that different elements of large corporations are doing different calculations for carbon accounting. One significant pitfall is that the maths needs to line up – everyone needs to be calculating the same way to not have different public disclosures that conflict with each other.

The US Federal Trade Commission (FTC) has an obligation to enforce against unfair trade practices, mostly focused on consumer product claims. The commission has published a series of rules known as the Green Guides, which establish practices with general environmental claims and proper qualifications around them, while also addressing verification of those claims. Then they develop into specifics like ozone protection, carbon emission reduction and recycled content. If someone is making claims on their green or environmental aspects, then it is worth looking at the Green Guides and understanding what they provide, as it is a safe harbour against FTC enforcement.



A View from the UK – ESG Trends

It is similar to the US with different elements of ESG, with the E in ESG moving beyond climate change, biodiversity and deforestation. On social factors, we are shifting onto human rights, workers' rights and wellbeing across supply chains. In governance, we are seeing a shift towards regulating transparency, with an emphasis on disclosures, and businesses integrating their controls and frameworks on this.

In the US there has been a series of anti-ESG legislation, whereas, on the UK side, there is some scepticism around the types of data used. Shareholders are demanding greater transparency on how companies measure ESG performance, which has led to stricter regulation on ESG reporting. We are reaching a crossroads on how companies will respond on this.

When evaluating those risks, what does effective governance look like?

Visibility is key for the E, S and G. Each business will have its own ESG strategy and response plan. When evaluating the risk of ESG, communication is key, and that is possible within the right management structures. Boards need to consider how that information flows within the company, externally to it and then back up to the board. Annual reporting is a key way of reviewing issues and seeing if there are any new issues that might trickle onto the market. It allows companies to see how they would regularly review, ask the right questions, and self-assess appropriately.

On greenwashing, there is a perception that, if a company isn't disclosing something, then it is deemed to be hiding something, although really it could be that the issue is not material to the company. If knowledge of an issue is not being addressed, then it is important to ask why it is not being addressed and why it is not relevant.

What are the main things you expect for boards to be looking at for the year ahead?

The main things are climate transitions and how workers will be supported through their goals with regards to reskilling. Increasing numbers of companies will set targets around net zero. The targets that companies have set will be analysed on how achievable they are. Other threads of ESG will be businesses looking at their carbon footprint through the lens of biodiversity. We are seeing new standards and guidance, and many businesses might be voluntarily engaging with those initiatives. Finally, we expect that the "equity" in DEI will take on further significance for businesses. The increased cost of living in the UK will be a key factor for business staff. Supply chain management will be a key focus too, with blockchain technology implementing further transparency.

A View From the UK and EU – Greenwashing

Does the UK's Advertising Standards Agency (ASA) have any rules that regulate environmental claims?

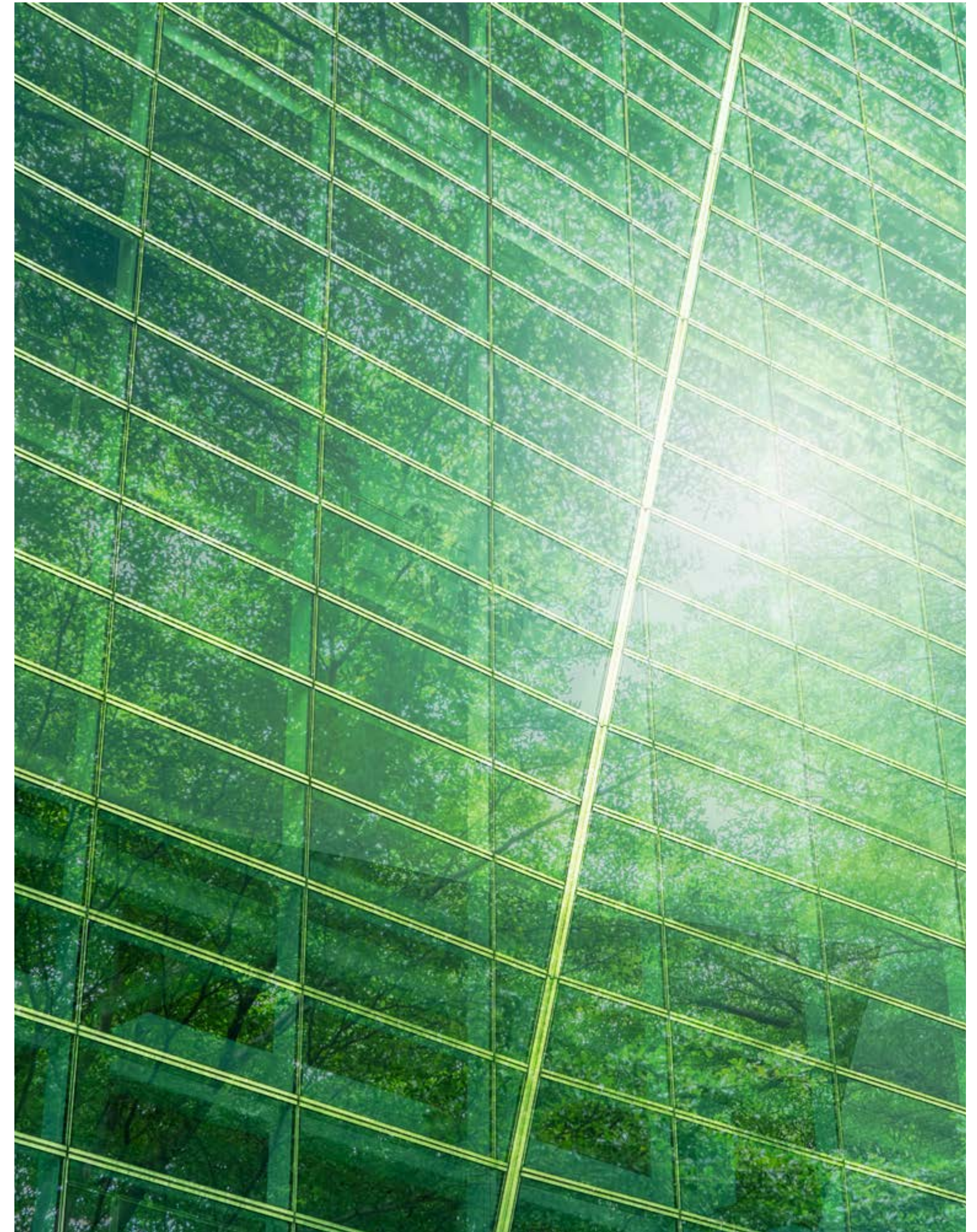
The UK's main codes of conduct on controlling advertising content are known as the Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) and the Code of Broadcast Advertising (BCAP Code), and they are enforced by the ASA. The codes prohibit marketing communications that are materially misleading, and there are also specific rules in relation to making "green" claims for products and services. One of the key rules is that advertisers must ensure that the meaning of an environmental claim is clear. For example, the ASA investigated an ad for dairy-free milk alternatives that included the claim "good for the planet". It ruled that the ad breached the code because it did not make clear whether the claim should be understood in isolation (i.e. "This product is better for the planet.") or as a comparison with equivalent dairy products (i.e. "This product is better for the planet than others."). This ambiguity in meaning meant the ad was in breach of the code.

Claims that are unqualified can be deemed misleading if they omit significant information. Another example is that of a bank saying that it was "helping to plant two million trees". The ASA found such a claim to be misleading, despite being accurate in isolation, as the bank was, at the same time, embarking upon environmentally damaging causes and had neglected to include this information in its ad.

Absolute claims (e.g. "the greenest" or "the most environmentally friendly") must be supported by a high level of substantiation and, therefore, should be backed up by robust evidence. Comparative claims such as "greener" or "friendlier" are generally easier to justify, but the ad must make it clear exactly what the product is being compared against.

Claims also must not mislead consumers about the product's environmental benefit, e.g. the ad should not highlight the absence of an environmentally damaging ingredient if the ingredient is not usually found in other competing products. Claims must be based on the full life cycle of the product, and claims centred around only part of the product's life cycle must not mislead consumers about the total environmental impact. For example, the ASA investigated an ad for an electric scooter that included the claim "be environmentally friendly". The advertiser argued that it was an implicit comparative claim and that the scooter had less of a negative impact on the environment than alternative modes of transport do, but the ASA concluded that the claim made it sound as if the scooter caused no environmental damage over its full lifetime (which the advertiser could not demonstrate).

Also, the ASA is in the process of reviewing its rules, so be mindful that new guidance may be issued in due course.



The ASA is sometimes, unfairly perhaps, labelled a toothless regulator. What can it do if advertisers fall foul of the rules?

The ASA can impose sanctions on advertisers that breach the codes, such as publicising upheld complaints on its website, causing advertisers to be refused advertising space and even imposing pre-vetting requirements on advertisers' ads. Where well-known brands are involved, ASA rulings often can attract adverse media coverage in response. The ASA does not have power to fine or imprison violators, but it can refer persistent breachers to the National Trading Standards or to the Competition and Markets Authority (CMA), which do, ultimately, have the power to levy fines and take court action.

How does liability for greenwashing arise?

The CMA are investigating many different sectors of the economy. They have investigated fashion and have just started on household essentials, meaning we can expect regulatory action to come out of that. They have the power to impose fines too.

The Financial Conduct Authority also have threatened to start their own punishments for greenwashing and unsubstantiated claims in corporate financial reporting. The ASA may not have the power to impose fines, but the environmental press will heavily report their statements so there are still consequences attached to receiving a negative ruling from the ASA.

How is greenwashing more generally regulated? Is there special legislation on green claims and product labels?

The legal landscape is evolving and fragmented. The UK does not have specific greenwashing legislation, but we do have the ASA codes and the CMA " Green Claims Code". The CMA Code generally says similar things to the ASA, but the CM A has more teeth. So, in the UK, there is no specific legislation but lots of guidance.

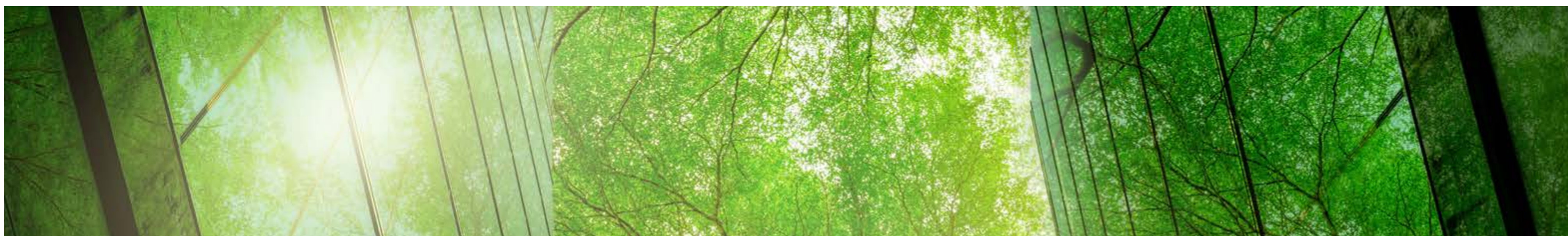
In the EU, the Unfair Commercial Practices Directive has recently been bolstered in terms of its coverage of green claims. The EU is also developing legislation on substantiating green claims, specifying the parameters and evidence to substantiate claims.

There is also member state activity; France is a great example of this, with outright bans for many products on claims about being carbon neutral or biodegradable. This fragmented approach will be seen across the EU, but the position is evolving.

Are there any mandatory green labelling schemes?

Yes, there are many different schemes dealing with different aspects of green claims and environmental information. In the EU, there is the Single Use Plastics Directive – certain products must be labelled as being made of, or containing, plastic.

There are early stage proposals at EU level about recycling and waste management labelling, as part of the packaging waste legislation reforms. We have had a voluntary labelling regime at EU level on packaging for some time, but Italy has just made it mandatory, as of the 1 January 2023. France, once again, has its own regime, with a special " tri-man logo", which refers to the recyclability of certain products. In the UK, we have a proposal for recycle/do-not-recycle labelling on packaging, currently used on a voluntary basis, that will become mandatory from 2026.



A View from the US – ESG and Workforce Challenges

Have clients in the US seen an impact on recruitment from their investment into ESG?

College graduates are doing further research into the companies they join. There is a lot of impact in entry level recruiting but less so in mid-level. There is a potential cynicism relating to ESG for those already further advanced in their career. New recruits are doing research and don't want to go back to their friends saying they are applying to companies that are guilty of greenwashing.

However, with DEI initiatives, the failure to make progress is impacting businesses at the senior level when they are recruiting, especially if applicants do not see someone above them who is of the same gender or orientation. In the US employment market, the tangible efforts of DEI are more important to retention and recruitment than efforts in ESG. People are evaluating if it is a stable company or a likely to be a strong company five years from now, for which ESG will be a big factor, but it is not driving recruitment or retention trends currently.

What developments do employers have to look forward to?

There will be rising sets of transparency laws in advertising for job positions. California and New York have laws to post the pay range expected for a position. The challenge is that you have to pay more for getting someone externally, but now existing employees are seeing someone hired for the same job they are already in, but for more pay, which might cause some internal issues. Regulatory issues might further form as the rise in remote working makes it more difficult to identify what is a California or New York job.

Plaintiff lawyers will be looking for large class action claims with the rise of new employment-related laws. In the coming year, a lot of states will follow California with its pay transparency laws. Employers with multistate operations will have to look closely at compliance on those issues.

What FTC rules have been imposed about non-competition agreements?

The FTC wanted to wake us all up by issuing a proposed rule that hasn't come into effect just yet. But, what the rule would do (for those aware of California law) is purport to make a national standard barring non-competition agreements. This allows employees to walk out of the door today and, tomorrow, work for your competitor.

The functional equivalent of non-competition, which stops employees calling their colleagues and customers, could disappear. The FTC says this could help employees and force companies to pay more to them by creating a more competitive environment in trying to retain them. The FTC estimates it will help employees make an additional $300 billion a year, as companies will have to pay more to keep them.

As a regulatory action, it doesn't require congressional approval, while being an issue which plays well for both sides of the aisle. Democrats say it is great for employees and Republicans say it removes big government and restricts the high-tech nemesis of the Republican Party.

We do not have concepts like garden leave; therefore, protecting the goodwill and assets that you invest in your employees is going to be much harder, depending on the final version of this rule.

A View from the UK – ESG and Workforce Challenges

It is similar to the US. Employers doing the best are the ones that are looking into DEI and ESG related issues. The UK is probably further down the track than the US, as mid- to high-level employees are looking at ESG and every level is looking at DEI. Where we are not as far down the track is on the ESG side, but there is a focus on legislation about people with an impact on retention and recruitment.

The majority of challenges centre around retention and recruitment in the post COVID-19 world, and attracting people to the workplace. The new workforce wants flexible, hybrid and agile working models whilst we are seeing the return of businesses wanting their employees to be in the office five days a week.

More traditional areas of industry will be challenged, and the advice for clients is to be flexible if you want to recruit and retain that talent.

What are the consequences of DEI awareness in the UK?

There is a significant increase in workplace investigations, as employees are more aware of their rights and being more empowered by them. Employers are taking complaints and grievances more seriously, and the tribunals are recognising that employers are being penalised more when they do not have a workspace that is fair and equitable. As a consequence of the rise of DEI, employees are more empowered and aware of their rights, which means employers are also willing to do more. We are close to the lowest rates of unemployment we have ever had and are flushing out unscrupulous employers while encouraging more inclusive ones.

As a positive, if we embrace our DEI initiatives then it makes an attractive prospect for employees to join new employers.

A View From the UK – Immigration Law Developments

The lead up to Brexit, and then COVID-19, have caused large swathes of people to leave the country, which leads to a shortage of workers and skills in the UK. Employers are sponsoring workers and recruiting from overseas, which helps them achieve their DEI initiatives. The Home Office, however, has seen a rise in sponsorship licence applications, which has caused delays with the process. Sponsorship is not cheap; a single applicant costs a company up to £10,000, which poses an issue for smaller companies recruiting from overseas. Once all the fees are paid, then a worker changing their employer later means the first employer has lost all those fees.

British nationals wanting to work in the EU have found it more difficult since Brexit to get work visas, which have a three- to six-month wait for them – significantly longer than the UK and requiring more planning among the different laws and requirements with different EU countries. An individual working eight weeks each in Germany, Poland, Croatia, and Bulgaria on a roadshow was an example of a difficult situation to navigate.

British nationals visiting the EU find difficulty with different countries having different requirements. France might be more difficult to visit than Germany, which requires further preparation ahead. With hybrid working, companies will have employees working in different countries, which means employers have to ensure they have the right to work in those different places.

Will the challenges get easier?

The competition for skilled workers will not improve, but the UK is becoming more digitalised, meaning a much quicker process and faster paperwork. Lots of EU countries need notarised, original documents, which the UK is slowly moving away from. UK companies need to think about getting a licence in order to be much more competitive at getting employees. They need to make sure their HR processes are in order and that right to work checks are also compliant. They need to ensure their recruitment process is also in order and if they have the right candidate for the company.

Listen to a recording of our webinar, broadcast in January 2023.

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Our client base spans every type of business, both private and public, worldwide. We advise a diverse mix of clients, from Fortune 100 and FTSE 100 corporations to emerging companies, and from individuals to local and national governments. In the private sector, we provide the full range of legal advice required to implement practical strategies and resolve disputes. In the public sector, we counsel governments on privatisation of whole industries and on establishment of regulatory systems under which new private businesses can compete. We also serve the regional needs of the countries and cities we call home. Whatever is needed, we are able to deliver the cross-practice, cross-border and industry-specific support that clients require for success in today's competitive markets.

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Our truly global nature has seen us focus for a long time on the media, advertising and brand hotspots across the globe. Our team of first-class lawyers recognises the demand for forward-thinking advice in these industry sectors, which are increasingly revolutionised and disrupted by technology. Our understanding of the most complex deals and our depth of knowledge in these areas make us genuinely proud of the insight and outstanding service we provide.

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- Governments
- Regulators

We draw on a wealth of experience advising the above clients, and many more, that are engaged in the media, advertising and brands industry, to provide an unparalleled level of support. We have an excellent track record of helping these organisations diversify their revenue-generating operations, protect their interests and navigate an increasingly complex global regulatory landscape.

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