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# **ESG, Supply Chain and Product Compliance**

4 – 6 October 2022

**ANNUAL COMPLIANCE CONFERENCE**



# Annual Compliance Conference 2022

1

**Anti-Bribery and Corruption and Economic Crime**

6 – 8 September 2022

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2

**Customs and Key Compliance Developments**

13 – 15 September 2022

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3

**Export Controls and Sanctions**

20 – 22 September 2022

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4

**Antitrust Compliance**

27 – 29 September 2022

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**ESG, Supply Chain and Product Compliance**

4 – 6 October 2022

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# This week: ESG, Supply Chain and Product Compliance

## **Tuesday 4 October**

2.30 - 3.30 pm BST  
3.30 - 4.30 pm CEST  
9.30 - 10.30 am EDT

ESG Supply Chain Due Diligence: Evolving Legal Frameworks and Managing the Risk of Class Actions and Investigations

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## **Wednesday 5 October**

2.30 - 3.30 pm BST  
3.30 - 4.30 pm CEST  
9.30 - 10.30 am EDT

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Product Compliance & Liability: A Brave New World?

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## **Thursday 6 October**

2.00 - 3.00 pm BST  
3.00 - 4.00 pm CEST  
9.00 - 10.00 am EDT

The "G" in ESG: How Governance Can Help Address Climate, Environmental and Social Risks Within Your Business and Supply Chain

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## **Thursday 6 October**

3.45 - 4.45 pm BST  
4.45 - 5.45 pm CEST  
10.45 - 11.45 am EDT

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Sustainable Product Trends for In-house Counsel, Including Plastics, Greenwashing and Right to Repair

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# Speakers



**Rachel MacLeod**  
Senior Associate,  
London (Chair)



**Julia Hemmings**  
Partner,  
London



**Jessica Wicha**  
Counsel,  
Chicago



**Elisabet Cots**  
Senior Associate,  
Barcelona



**Rini Rashid**  
Associate,  
London



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# **Sustainable Product Trends for In-house Counsel, Including Plastics, Greenwashing and Right to Repair**

6 October 2022, 3.45 – 4.45 pm BST

**ANNUAL COMPLIANCE CONFERENCE**



1

# Introduction

# Importance of sustainability



Consumers are embracing 'circularity' with 53% claiming to have repaired an item instead of replacing it with new equivalent



40% of consumers have bought second-hand or refurbished goods and 38% paid extra for a more durable or longer lasting product



64% consumers have limited the use of single-use plastic



Materials account for more than 40% of the input costs of EU manufacturing companies. Manufacturing more circular and sustainable products leads to important cost savings and has reputational benefits as products increase in quality, with many companies already adopting this logic

# Four key trends

Extended Producer  
Responsibility



Greenwashing



Right to repair



Plastics



# Risks and consequences

## Potential consequences of non-compliance

Fines  
and other  
regulatory  
sanctions



Civil litigation  
for losses  
suffered



Reputational  
damage



Adverse impact  
on share  
price



Individual  
liability



Supply chain  
disruption



The background of the slide is a dark blue field filled with a dense pattern of small, multi-colored squares. The colors range from deep blue and purple on the left to bright cyan and yellow on the right, creating a sense of depth and movement. The squares are arranged in a way that suggests a large-scale data visualization or a complex network structure.

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# Plastics

# Overview of different ways plastics regulated



UN proposals: 2 March 2022, 175 nations at the UN Environment Assembly (UNEA-5) endorsed a resolution to End Plastic Pollution and adopt an international legally binding agreement by 2024. The resolution addresses the full lifecycle of plastic, including its production, design and disposal.



Taxes: Plastic Packaging Tax (UK); Proposed EU Packaging Levy under the Green Deal



Bans:

- Microbeads / Microplastics
- Single Use Plastics: 2020 UK Ban on straws, stirrers, etc.,...; EU Ban starting July 2021 on single-use plastic plates, cutlery, and containers made of expanded polystyrene, and all products made of oxo-degradable plastic.



Consumer Charges: e.g., carrier bag charges



US: Extended Producer Responsibility regime

# Plastic taxes

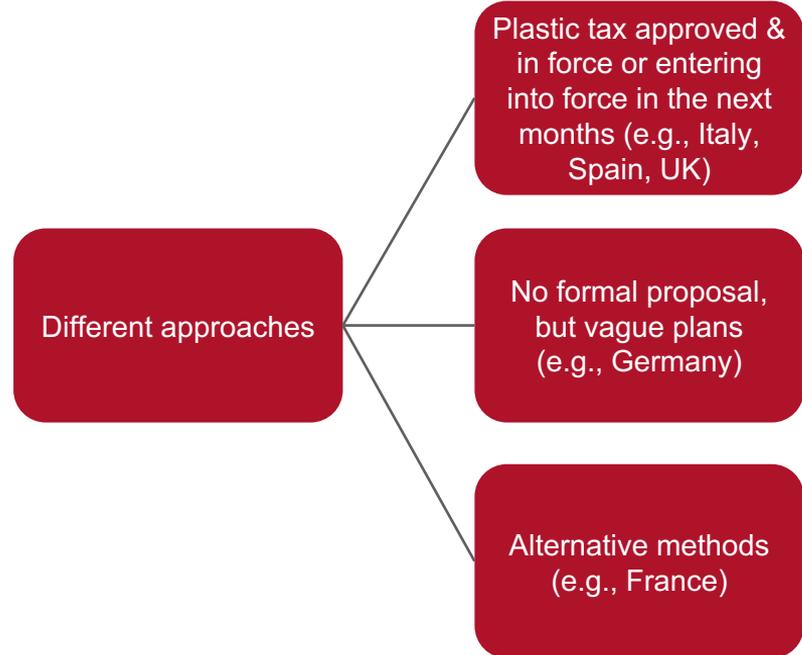


Proposed EU Packaging Levy under the Green Deal → rate of EUR 0.80/Kg to the total weight of plastic packaging waste that is not recycled



If there is a plastic tax, you should take into account:

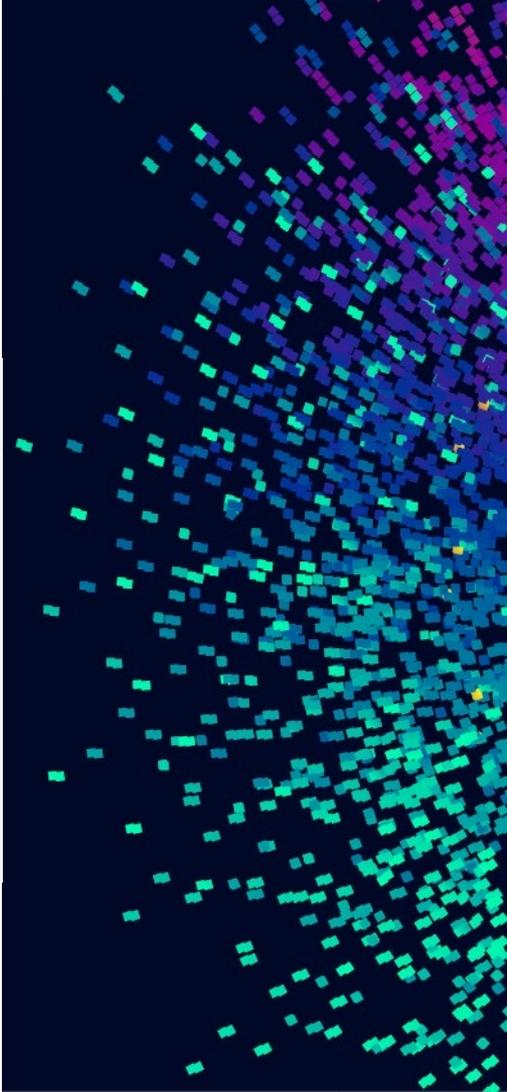
- Plastics/products object of the tax;
- Subject operations; and
- Taxpayers



# Plastic taxes

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UK: The tax is payable by UK manufacturers of plastic packaging as well as businesses that import plastic packaging into the UK. Crucially, even if not liable for the PPT, downstream businesses in the UK that handle plastic packaging need to **undertake due diligence** on their suppliers to ensure that they are not found jointly and severally liable for any unpaid tax within their supply chains.



# Key takeaways



## Supply Chain Due Diligence:

- E.g. UK PPT provides for secondary or joint and several liability for any unpaid tax within the supply chain



## Civil & Criminal Penalties:

- E.g. UK Sanctions: Criminal offence: the fraudulent evasion of PPT is liable on summary conviction
  - 12 months imprisonment and/or to a fine not exceeding £20,000 or (if greater) three times the total amount of PPT that was (or was intended to be) evaded; and on conviction on indictment to imprisonment for a term not exceeding 7 years and/or to a fine. Civil penalties – £500 fixed penalty and a daily penalty of £40 per day
  - Potential **corporate criminal offence** liability: failure to prevent the facilitation of tax evasion if employees or associates of the business have facilitated the evasion of PPT by another person and the business does not have reasonable procedures in place.



## Circular Economy Trends & Global Movements:

- Staying ahead of the curve



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# Greenwashing

# Examples of problematic green claims

40% of green claims made online could be misleading\*



1

'Toothbrush X contains 50% less plastic compared to other toothbrushes on the market'

2

A 'Save our seas – these are micro bead free' statement on the label of shower gel

3

'Product X is now 50% more environmentally friendly'

# EU updates



Proposed update to the EU consumer rules to 'empower consumers for the green transition'



A ban on 'greenwashing'

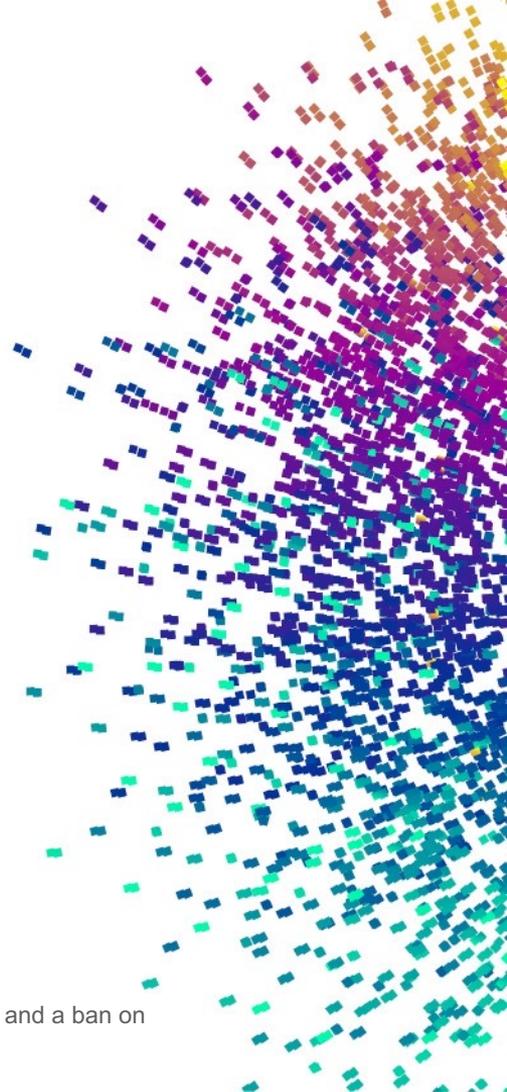


Amendments to the Unfair Commercial Practices Directive which will include:

- Expansion of product characteristics about which a trader cannot mislead consumers;
- Addition of misleading practices, following a case-by-case assessment;
- Addition of practices to the 'black list' of prohibited unfair commercial practices



ACM investigation in the clothing sector has resulted in two retailers committing to adjusting or no longer using sustainability claims



# UK updates



## Green Claims Code Principles – Sept 2021

Green claims must:

1. Be truthful and accurate
2. Be clear and unambiguous
3. Not omit or hide important information
4. Only make fair and meaningful comparisons
5. Consider the full life cycle of the product
6. Be substantiated



## CMA's investigations into greenwashing

- July 2022: Investigations into 'green' claims of three fashion brands
- Wider investigation into misleading environmental claims in fashion sector
- Other sectors will come under review in due course

# US Litigation Trends

## No Signs of Slowing



Greenwashing lawsuits continue to be brought under state consumer protection laws (e.g., CA) and federal securities laws.



Focus on packaging labels, ESG reports, websites, and other media

- "Dolphin-safe," "sustainably sourced" and "sustainably caught" claims
- Sustainability of bamboo textiles
- Recyclability of single-use plastics



Courts allowing claims to proceed past motion-to-dismiss phase to discovery



TBD if cases can provide sufficient evidence to survive summary judgment



Seeing settlements to avoid litigation – companies agreeing to make corrections in reporting/marketing to avoid discovery.

# US Litigation Trends

## New CA State Law



### *"The Truth in Labeling for Recyclable Materials" (SB 343)*

- Signed into law in October 2021; Effective January 1, 2024
- Intended to eliminate confusion about which plastics are recyclable. Limit use of the chasing arrows symbol or the word "recyclable" to those products that **actually get recycled** (versus being capable of being recycled).
- Primary focus is on increasing amount of plastic that actually gets recycled.
- Ancillary focus is on greenwashing – avoid the illusion of recycling



The California effect – potential that we will see similar legislation in other states soon (e.g., OR, NY)

# US Litigation Trends

## Key Takeaways



### Re-emergence of the FTC "Green Guides"

- Avoid general benefit environmental claims (e.g., "good for the planet" or "sustainable")
- Back-up claims with reliable scientific evidence
- Ensure claim is made with enough specificity and/or is properly qualified to be meaningful and not misleading



### Greenwashing lawsuits in the U.S. expected to increase as companies are faced with more ESG disclosure requirements (e.g., proposed SEC rules)

- Need to be aware of how speaking about ESG issues in product claims and other public documents/disclosures to ensure **consistency and accuracy**
- Lawsuits targeting **aspirational, nuanced and forward-looking** statements/claims tend to be dismissed. Greater risk with statements/claims that are **specific and verifiable**.

# Key takeaways



Check usage of key terms: eco-friendly, conscious beauty, sustainable etc



Does the claim follow the Green Claims Code? Use the checklist



Number one question: can the claim be substantiated?



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# Right to repair

# EU Sustainable Products Initiative



This Regulation establishes a framework to improve the environmental sustainability of products and to ensure free movement in the internal market by setting ecodesign requirements that products shall fulfil to be placed on the market or put into service.



Those ecodesign requirements will be further elaborated by the Commission in delegated acts. They refer, among others, to **durability, reusability, upgradability and reparability**.



The proposal also includes the creation of **a digital product passport to electronically register, process and share product-related information amongst supply chain**. Information that can be included, among others –to be confirmed and specified by delegated acts-:

- ease of repair and maintenance of the product;
- ease of upgrading, re-use, remanufacturing and refurbishment the product;

# Right to Repair – consumer impact



Proposed amendment to the EU Sale of Goods Directive

Expected before the end of 2022



Ensure that products are designed in a way that they last longer and that they can be repaired



Empower consumers to choose repairable products



Strengthen consumer rights and guarantees to enable a longer use of goods

# Key takeaways



Check and plan: keep up to date with the latest measures approved by each State, and assess as soon as possible to prepare a strategy for implementing requirements



Review the whole supply chain: consider the impact of the measures on other supply chain entities



Remember these measures affect the entire product lifecycle from its design to its disposal



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# Extended Producer Responsibility

# UK & EU Developments



## EU/UK WEEE, Batteries and Packaging Waste Schemes:

- Obligations to contract with schemes, register and report data are linked. A qualifying entity (producer) will generally need to comply with all of these obligations.
- End of 2024: EU countries should ensure that producer responsibility schemes are established for all packaging.
- EU Packaging and Packaging Waste Directive Revision
- Fee Modulation: advanced criteria can lead to more granular cost distribution and create incentives for improved recyclability by influencing changes to design, packaging mix etc.
- Marketplace liability



Fast Fashion & circular economy: 74% of low-value, post-consumer textiles can be used for fibre-to-fibre recycling in six European countries: a total of 494,000 tonnes via reintroducing sorted and recycled textiles.

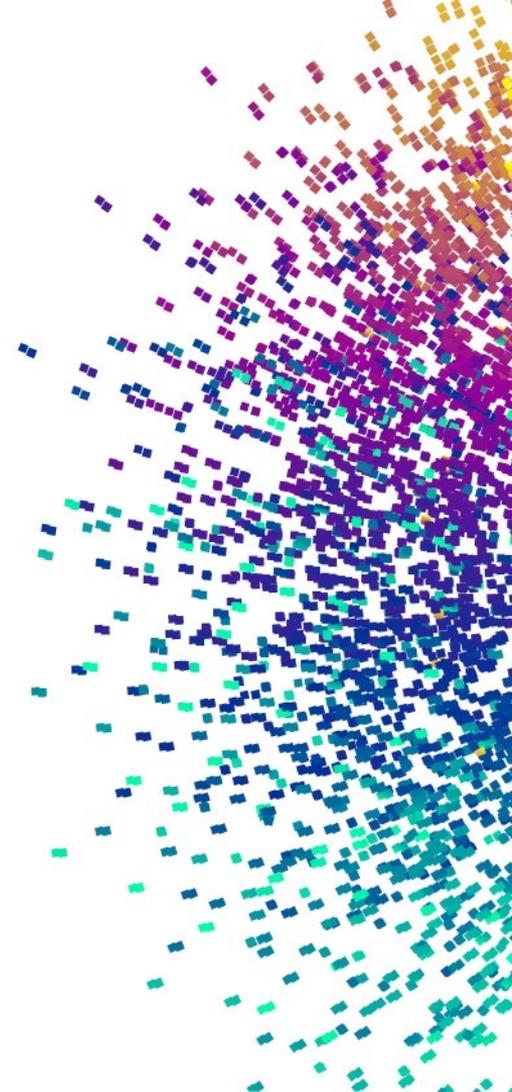
# US Developments

## Electronics & E-Waste



### Patchwork of state requirements

- The original EPR effort in the U.S.
- 25 states and D.C. have e-waste take-back requirements
- Significant variation in covered electronics (main focus is TVs and computer monitors)
- Company take-back requirements typically determined by market share
- Limited state enforcement



# US Developments

## Renewed Focus on Batteries



CA - *"Responsible Battery Recycle Act of 2022" (AB 2440)*

- Signed into law Sept. 16, 2022; Effective April 1, 2027
- Revamp of prior EPR battery program – replaces Cell Phone Recycling Act and Rechargeable Battery Act
- Requires battery producers to establish, fund and operate takeback program for covered batteries. Covers all battery chemistries, including Li ion batteries.



Evolving state patchwork (e.g., VT and DC). MN and WA considering similar programs.



Possible federal program?

- Infrastructure Investment and Jobs Act includes funding for battery recycling BMPs and requires DOE to develop task force to develop EPR framework

# US Developments

## Setting Sights on Plastics & Packaging



Four state laws over the past year. 40 EPR-related bills in 19 states currently under consideration.



Most recent and comprehensive – CA *"Plastic Pollution Prevention and Packaging Producer Responsibility Act"* (SB 54).

- Signed into law July 2022
- Requires reduction in single-use plastics; sets targets for plastic recycling; establishes \$5 billion fund to help low-income communities
- Establishes EPR regime for plastic recycling – by January 2024



Currently also laws in ME, CO, and OR.

# Key takeaways



Building a cross-jurisdictional EPR program can be resource intensive (multiple entities and differing reporting thresholds); business buy-in can be critical to maintaining compliance.



Enforcement Activity can be hard to trace but there is both enforcement and reputational risk, particularly because of financial gain arising from non-compliance.

- e.g., UK enforcement undertakings are published; the regulator retains the right to publish the details on the GOV.UK website and include it in the public register.



A Long View is essential: changing regimes can have an outsized administrative burden.



Consider EPR at the front-end of product development; sustainability throughout the lifecycle of a product.

# Questions



# Catch up on-demand

ESG Supply Chain Due Diligence: Evolving Legal Frameworks and Managing the Risk of Class Actions and Investigations

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# Catch up on-demand: Annual Compliance Conference 2022

**1** Anti-Bribery and Corruption and Economic Crime

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**2** Customs and Key Compliance Developments

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**3** Export Controls and Sanctions

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**4** Antitrust Compliance

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**5** ESG, Supply Chain and Product Compliance

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Tier 1 in Legal 500 UK in 2023 for:

- Trade, WTO, anti-dumping and customs (for over 20 years)
- Customs & Excise
- Product Liability

Export Controls: Law Firm of the Year (Europe)

Runner-up, WorldECR Awards 2021

Top 12 Investigations Firm Global Investigations Review (2021)

## Leading Investigations, Compliance & Ethics Practice



### Sanctions and Export Controls Blog

<https://sanctionsnews.bakermckenzie.com/>



### Supply Chain Compliance Blog

<https://supplychaincompliance.bakermckenzie.com/>



### Global Compliance News

<https://www.globalcompliance-news.com/>



### Import and Trade Remedies Blog

<https://www.internationaltradecomplianceupdate.com/>



### Distribution Antitrust Risk Tool

<https://resourcehub.bakermckenzie.com/en/resources/dart>



### Litigation

**Intelligence Tool**  
<https://litigationinteltool.bakermckenzie.com/>



### Foreign Investment and National Security Blog

<https://foreigninvestment.bakermckenzie.com/>



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