Baker McKenzie.

Annual Compliance Conference 2022

ESG, Supply Chain and Product Compliance

Key Takeaways from the Annual Compliance Conference 2022

Session 4: Sustainable Product Trends for In-House Counsel, Including Plastics, Greenwashing And Right to Repair

6 October 2022

Consumers are increasingly embracing sustainability and are exploring product options that generate a positive impact on the environment. We are seeing a willingness on the part of consumers to pay more for sustainable products and businesses becoming more purpose-driven (rather than just being profit-driven). Here is an overview of some of the evolving trends in consumer, environmental, and product-related legislation in the EU, UK and US that should be top-of-mind for in-house counsel when embedding sustainability in their business operations.

Sustainability – what does it mean? Sustainability pertains to fulfilling our current needs without compromising the ability of future generations to meet their own needs. In the context of products, this means that goods and services should be produced in ways that do not use resources that cannot be replaced or cause harm to the community producing them, and that do not damage the environment.

Why is it important for businesses to invest in sustainability? Consumers are demanding more from their brands and are basing their purchasing decisions on the sustainability of products and companies. Investors are looking to bolster their green investment portfolios by investing in sustainable businesses. Sustainability will benefit businesses in the long run. For example, escalating raw material costs can be avoided through circular practices that avoid the take-make-break linear model. It can also lead to important cost-savings and reputational benefits as products improve in quality.

What are the four key sustainability trends that in-house counsel should be aware of?

1. **Plastics:** Countries are approaching plastic regulation in different ways with measures adopted including plastic taxes, single use plastic bans, microbead bans, deposit return schemes and consumer charges to discourage consumption (e.g., carrier bag charges).

EU: The EU has a plastic strategy under the Green Deal. One of the measures consists of a Plastics Own Resource known as the EU Packaging Levy (in place since January 2021), which requires Member States to pay a contribution based on the amount of non-recycled plastic packaging waste (rate is EUR .80 per kilogram of the weight of plastic packaging waste) that is not recycled. To assume this contribution, Member States have adopted different approaches: (i) some such as Spain and Italy have approved a new plastic tax to levy the non-recycled plastic packaging waste; (ii) others have not yet approved such tax, but plan to do so such as Germany; and (iii) the rest, such as France, have decided not to approve a specific tax and assume the Plastics Own Resource by other means.

UK: The UK has a Plastic Packaging Tax (PPT) payable by UK manufacturers of plastic packaging as well as businesses that import plastic packaging into the UK. Crucially, even if not liable for 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. Non-payment of PPT may result in the imposition of criminal and civil penalties. In terms of enforcement, it is expected that the regulator will be focusing on deliberate tax evasion and will target willful or grossly negligent non-compliance where companies deliberately evade the application of the tax, (e.g., businesses artificially splitting to fall below the de minimis threshold).

Global: Earlier this year, a UN resolution was endorsed to end plastic pollution and propose an international legally binding agreement by 2024. The resolution addresses the full life cycle of plastic including its production, design, and disposal and establishes an international intergovernmental negotiating committee to work out the details. With this, we anticipate that more regulatory action is likely to be in the pipeline over the next few years across jurisdictions.

Tips for in-house counsel: When reviewing plastic taxes: (1) Determine the plastics or products that are in scope of the tax regulation, plus the exceptions noting relevant thresholds. (2) Review taxable operations or transactions. (3) Determine the relevant taxpayer. (Is it the manufacturer? Is it the company who uses the packaging?)

2. **Greenwashing:** Greenwashing - the practice of publishing misleading sustainability claims by companies - is a hot topic for regulators. Companies should review online representations to ensure that they are accurate, honest and can be substantiated.

EU: In March 2022, the European Commission published a proposal for a Directive "empowering consumers for the green transition" with the aim of combating greenwashing practices by providing consumers with better information on the durability and repairability of products on the EU market. It will also include amendments to the Unfair Commercial Practices Directive, addressing additional issues such as misleading product characteristics, misleading greenwashing practices, and the addition of practices to the 'black list' of prohibited unfair commercial practices.

UK: In 2021, the UK published a Green Claims Code, which serves as a checklist for businesses to consider before making any green claim. The UK regulator promised that regulatory action would follow and has already launched investigations into greenwashing claims involving the fashion sector - with other sectors coming under review in due course. Now is the time to be thinking about compliance.

US: Greenwashing lawsuits continue to be brought by NGOs, consumers, competitors and investors, primarily under state consumer protection laws and federal securities laws. These suits have targeted claims on packaging labels, in ESG reports, on websites, as well as other media. While these cases have generally been unsuccessful to date, we are seeing a growing number of courts allowing greenwashing lawsuits to proceed past the motion-to-dismiss phase and onto discovery. In California, the Truth in Labeling for Recyclable Materials, which will come into force on 1 January 2024, will limit the use of the chasing arrows symbol ♻ or the word "recyclable" to products that actually get recycled (versus being capable of being recycled). While the primary focus of the law is to increase the amount of plastic that actually gets recycled, its ancillary focus is on greenwashing to avoid the illusion of recycling.

Tips for in-house counsel: As greenwashing lawsuits in the US and UK are expected to increase as companies are faced with more ESG disclosure requirements, businesses need to be aware of how to speak about ESG issues in product claims and other public documents/disclosures to ensure consistency and accuracy. It is imperative for businesses to continue to be rigorous in the review of company communications across the board. Be on the lookout for new regulatory developments on the horizon, including in the US a long-awaited review of the FTC Green Guides and the new proposed SEC rules. The latter are expected to mandate public disclosure of a greater amount of climate-related information that could potentially have material impacts on the veracity of claims businesses make on products and packaging.

3. **Right to repair:** This trend is being driven by the idea of the "circular economy," and the need to move away from the take-make-break linear model. The consumer "right to repair" is being introduced through both product and consumer laws.

The EU Sustainable Products initiative (SPI) establishes a framework to improve the environmental sustainability of products and to ensure free movement in the internal market by setting ecodesign requirements (durability, reusability, upgradeability and repairability) that products need to fulfill to be placed on the market or put into service. The main objective of the SPI is to make sustainable products the norm of the EU market. The proposal also includes the creation of a digital product passport to electronically register, process and share product-related information in supply chains. In terms of the consumer impact, there is a proposed amendment to the EU Sale of Goods Directive to ensure that products are designed to last longer and be repairable. As a result of the proposals, businesses will be required to be more transparent with consumers regarding a product's lifespan and carbon footprint as well as the availability of repair services, spare parts, and repair manuals for the product. This information will need to be easily accessible via a quick response (QR) code.

Tips for in-house counsel: Ensure that you keep up to date with the latest measures approved by EU Member States and assess as soon as possible to prepare a strategy for implementing the requirements. Businesses should also review the whole supply chain and consider the impact of the measures on other supply chain entities. Always remember that these measures affect the entire product lifecycle from the design stage to disposal.

4. **Extended Producer Responsibility (EPR):** EPR schemes provide for the financing and the organization and return of used packaging, packaging waste and waste products and are underpinned by the "polluter pays" principle. They ensure that businesses are responsible for bearing at least part of the cost of dealing with the waste generated by their products at their end of life. EPR has been around for years but is still evolving and expanding to capture additional types of products and to require greater financial contributions by obligated businesses.

Tips for in-house counsel: As building a cross-jurisdictional EPR program can be resource-intensive, it is crucial to have business buy-in early on to ensure compliance. Consider EPR at the front-end of product development and sustainability throughout the lifecycle of a product.

What are the potential consequences of non-compliance? These types of laws are often backed up with penalties and enforcement provisions which will vary across jurisdictions. In addition to fines and other regulatory sanctions, risks include civil litigation for losses suffered, reputational damage, adverse impact on share price, individual liability, and supply chain disruption. In some jurisdictions, it is possible that officers or directors of the company could be held personally liable for non-compliance of laws and regulations. Businesses need to be considering now how they will adapt and modify products to comply with developing product sustainability requirements.

Annual Compliance Conference 2022

Our popular Annual Compliance Conference, which attracts over 6,000 in-house senior legal and compliance professionals from across the world, took place across five weeks from 6 September - 6 October 2022. These sessions virtually delivered our cutting-edge insights and guidance on key global compliance, investigations and ethics issues.

The sessions provided practical insights and analysis on significant developments across:

- Anti-bribery, corruption and economic crime
- Customs and FTAs
- Export controls, sanctions and foreign investment
- Antitrust and competition
- ESG, supply chain and product compliance

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