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Insights

Litigation & Arbitration Group

ESG Disclosures: UK Regulation and Litigation Risks

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Contact

William Charles, Partner
+44 20.7615.3076
wcharles@milbank.com

Vasiliki Katsarou, Associate
+44 20.7615.3282
vkatsarou@milbank.com

Ben King, Trainee Solicitor
+44 20.7615.3025
bking1@milbank.com

The prominence of Environmental, Social and Governance ("**ESG**") factors has increased dramatically in recent years, particularly in the financial services sector.[1] Regulatory authorities across jurisdictions, financial services firms and the wider investing public are also increasingly focusing on ESG-related disclosures and reporting, as well as the risk of 'greenwashing' (see below).[2]

In the UK, the Financial Conduct Authority ("**FCA**") has stated its "*commitment to enhancing both 'transparency' and 'trust' as ESG and sustainable products continue to grow in prominence*", as well as highlighting the "*risk of harm if the financial sector responds to rising consumer demand and awareness of ESG issues without a supportive regulatory foundation and adequate guard-rails*."[3] However, despite the significant focus on ESG factors, there remain important open questions about their definition, consistent application and precise scope, given the potential of these factors to encompass a wide array of different business sectors, priorities and internal policies, analysed across differing, and (at times) potentially conflicting, environmental, social and governance parameters.[4]

The existence of such questions, combined with the popularity of ESG investing, may expose firms and investors to various risks. In particular, as the FCA has highlighted: "*consumers, industry participants, civil society, regulators and the media are all increasingly questioning the integrity of some of the 'green' claims made by companies and financial firms. So, ESG matters are high on the regulatory agenda. If the financial*

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1 See, for example, Milbank's recent client alerts '*It's Easy, Being Green – The Development of ESG in the European Leveraged Finance Market*' here; and '*ESG and Euro CLOs: The Past, Present and Future*' here. The FCA has also commented on this phenomenon: https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities.

2 Greenwashing was the most frequently cited concern amongst respondents to the 2021 Schroders Institutional Investor Study: https://www.schroders.com/en/sysglobalassets/digital/institutional-investor-study-2021/assets/SIIS_2021_Sustainability.pdf.

3 See https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities and https://www.fca.org.uk/publication/discussion/dp21-4.pdf.

4 As the FCA stated in November 2021, "*terms such as 'climate', 'environment', 'sustainable' and 'ESG' are often used loosely across the financial sector; and sometimes interchangeably. There is of course an overlap between the terms. Climate change is a core focus of environmental work, which is itself one pillar of ESG. And ESG captures the key dimensions of wider sustainability; that is, how people, planet, prosperity and purpose come together to help enable 'the needs of the present [to be met] without compromising the ability of future generations to meet their own needs'*." https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities.

sector is going to help support the transition to a more sustainable future, market participants and financial services firms need high quality information, a well-functioning ecosystem and clear standards."[5]

It is, therefore, important for UK-listed companies and financial sector firms to review and manage their ESG-related disclosures and statements, in the interests of mitigating the risks of regulatory enforcement action, reputational damage and/or litigation. This briefing focuses on the development of the UK's regulatory framework for ESG disclosures, as well as the key risks arising.

UK Legal Framework: Past, Present and Future

The UK Government and regulators (including the FCA) have proposed or introduced a number of rules intended to "*ensure the UK… continues to lead the world in… shifting finance towards a net zero future*."[6] Key examples are discussed below.

November 2020: The UK Roadmap to Sustainability Disclosure Standards (the "Greening Finance Roadmap")

In November 2020, the UK Treasury outlined the UK's roadmap to sustainability-related disclosure standards. This included "*the introduction of more robust environmental disclosure standards so that investors and businesses can better understand the material financial impacts of their exposure to climate change, price climate-related risks more accurately, and support the greening of the UK economy*."[7] In particular, it was announced that the UK will become the first country in the world to make disclosures aligned with the Task Force on Climate-related Financial Disclosures ("**TCFD**") "*mandatory across the economy by 2025, going beyond the 'comply or explain approach'*."

By way of background, the TCFD was established by the Financial Stability Board to develop recommendations for climate-related disclosures in order to ensure more informed investment decisions. The TCFD published its recommendations in the 2017 Final Report.[8] The TCFD report focused on four principal areas applicable to all business sectors (with supplemental guidance for financial sector firms):

- Governance: disclosures concerning a company's governance around climate-related risks and opportunities (to include describing (a) the board's oversight of such risks and opportunities; and (b) management's role in assessing and managing those risks).

- Strategy: disclosures concerning actual and potential impacts of climate-related risks and opportunities on a company's business (to include (a) identifying short, medium and long-term risks; (b) the impact of such risks on the business, strategy and financial planning; and (c) the resilience of the company's strategy, taking into account different climate-related scenarios).

- Risk management: disclosures concerning how the company identifies, assesses and manages climate-related risks (to include describing (a) the company's processes for identifying, assessing and managing such risks; and (b) how those processes are integrated into the company's overall risk management).

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5 *Ibid.*
6 See https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services.
7 *Ibid.*
8 https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf. Guidance on implementing the TCFD recommendations was updated in 2021.

- Metrics and targets: disclosures concerning the metrics and targets used to assess and manage relevant climate-related risks and opportunities (to include describing (a) greenhouse gas emissions and (b) targets used by the company to manage climate-related risks, as well as performance against targets).

July 2021 ESG Guiding Principles – FCA 'Dear Chair' letter

On 19 July 2021, the FCA published a 'Dear Chair' letter addressed to authorised fund managers, outlining its "*expectations on the design, delivery and disclosure of* [ESG] *and sustainable investment funds*."[9] This followed what the FCA described as a number of applications for authorisation of investment funds with a purported ESG focus, which were "*poor-quality and* [fell] *below our expectations*", several examples of which were included in the letter.[10] The FCA's letter included, therefore, "*a set of guiding principles… to help firms apply our existing rules…*[and] *to ensure that any ESG-related claims are clear and not misleading, both at the time of application and on an ongoing basis, so that consumers can make informed choices.*"

As an overarching principle, the FCA noted that a "*fund's focus on ESG/sustainability should be reflected consistently in its name, stated objectives, its documented investment policy and strategy, and its holdings*." The FCA expects authorised investment funds claiming an ESG focus to take into account both the overarching principle and the following supporting principles: (a) the design of responsible or sustainable investment funds and disclosure of key design elements in fund documentation; (b) the delivery of ESG investment funds and ongoing monitoring of holdings; and (c) pre-contractual and ongoing periodic disclosures on responsible or sustainable investment funds should be easily available to consumers and contain information that helps them make investment decisions.[11]

October 2021: The UK Treasury Greening Finance Roadmap

The Treasury's Greening Finance Roadmap was published in October 2021.[12] This contemplated three phases to 'green' the financial system: (a) informing investors and consumers by ensuring that decision-useful information on sustainability is available to financial market participants; (b) acting on this information by mainstreaming it into business and financial decisions; and (c) shifting financial flows to align with the UK's net zero commitment and wider environmental goals.

The roadmap also highlighted the risks of 'greenwashing' (discussed below), defined as "*when misleading or unsubstantiated claims about environmental performance are made by businesses or investment funds about their products or activities. This can lead to the wrong products being bought – undermining trust in the market and leading to misallocation of capital intended for sustainable investments.*" Relatedly, it was noted that the FCA has received increasing numbers of "*low-quality*" applications from ESG-themed funds, "*many of whose sustainability claims did not stand up to scrutiny.*"

As part of the first ('informing') phase, the Greening Finance Roadmap envisaged the introduction of economy-wide Sustainability Disclosure Requirements ("**UK SDRs**"), intended to integrate global standards

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9 https://www.fca.org.uk/news/news-stories/guiding-principles-on-design-delivery-disclosure-esg-sustainable-investment-funds. The guiding principles support the existing regulatory framework in the FCA Handbook (e.g., PRIN 2.1: Principle 7, COBS 4.2.1R – clean, fair and not misleading communications).

10 E.g., "*A proposed passive fund had an ESG-related name that we found misleading as it was looking to track an index that did not hold itself out to be ESG-focused.*"

11 In respect of each of the above principles, the FCA letter outlined a number of "*key considerations*", as well as additional information and examples on interpretation and application.

12 https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing.

and allow investors and decision-makers to make informed decisions about investment products. UK SDRs will cover new requirements (aligned with the TCFD recommendations referred to above) as follows:

- Corporates, to make sustainability disclosures (this will, subject to consultation, include reporting under proposed international standards and concerning environmental impacts using a UK Green Taxonomy (see below));

- Asset managers and asset owners (e.g., life insurers providing investment products and FCA-regulated pension schemes), to disclose how they take sustainability into account; and

- Creators of investment products, to report on the products' impact on sustainability, as well as relevant financial risks and opportunities, and the degree to which such products are aligned with the relevant taxonomy.

The Greening Finance Roadmap also referred to introducing a sustainable investment labelling system and a UK Green Taxonomy (to define the criteria against which products are to be labelled in terms of their sustainability). Under the proposed taxonomy, the following six environmental objectives were identified (each to be underpinned by detailed standards): (i) climate change mitigation; (ii) climate change adaptation; (iii) sustainable use and protection of water and marine resources; (iv) transition to a circular economy; (v) pollution prevention and control; and (vi) protection and restoration of biodiversity and ecosystems. In order to be considered taxonomy-aligned, a business activity or financial product must: (a) make a substantial contribution to one of the six objectives; (b) do no significant harm to any of the other objectives; and (c) meet certain minimum standards promulgated by the OECD and UN.[13]

November 2021: UK SDRs and sustainability product labelling – FCA Discussion Paper

On 3 November 2021, the FCA published a Discussion Paper (DP21/4) concerning its proposed approach to the new UK SDRs, as well as a sustainable investment labelling system.[14] The FCA's proposals envisage that the UK SDRs will apply to UK asset managers and certain FCA-regulated asset owners, although the extent to which the proposed requirements will apply to overseas funds marketed in the UK remains under consideration. The Discussion Paper focuses on "*manufacturers*" (i.e., creators) of financial products, as opposed to "*distributors*" (and investment advisers), although the FCA has invited views on whether that limited approach gives rise to any practical difficulties.

At a high level, the proposed UK SDRs are aimed at the provision of information (both at an entity and product level) on how firms are managing sustainability risks, opportunities and impacts, and the sustainability characteristics of particular financial products. The entity- and product-level disclosure requirements would build on the TCFD-aligned requirements, "*widening the scope beyond climate to other sustainability factors*."[15]

Disclosures are broadly intended to have two audiences:

- consumers, with a number of consumer-facing disclosures aimed at retail investors to facilitate informed investment decisions (including product labels (see further below), investment strategy, proportion of assets allocated to sustainable investment, among other things); and

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13 Specifically, the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights.

14 https://www.fca.org.uk/publication/discussion/dp21-4.pdf.

15 *Ibid*.

- sophisticated/institutional investors, with additional (and more detailed) disclosures on both the entity and product levels (including information on how metrics were calculated, data sources (including the quality and limitations of those data sources), and information about benchmarking and performance, among other things).

In relation to product labelling, the FCA has suggested a new classification system, which would "*cover the full ranges of investment products available to retail investors*", using the following categories:

- "*Not promoted as sustainable*" (sustainability risks have not been integrated into investment decisions and there are no specific sustainability goals);

- "*Responsible*" (no specific sustainability goals, but products could be "*characterised by the integration of ESG factors and stewardship, directed towards the delivery of long-term sustainable investment decisions and returns. 'Responsible' products may have high, low or no allocation to sustainable investments*");

- "*Transitioning*" (products have sustainable characteristics, themes or objectives, but where the proportion of allocated assets to taxonomy-aligned sustainable activities would be low);

- "*Aligned*" (products have sustainable characteristics, themes or objectives with a higher allocation of assets to sustainable taxonomy-aligned activities compared to the 'Transitioning' products outlined above); and

- "*Impact*" (products have the objective of delivering positive environmental or social impact).[16] This category, along with "*Aligned*" and "*Transitioning*", would be classed as "*Sustainable*".

In addition, the FCA has recognised that many UK firms are subject to EU rules in respect of their EU business and, therefore, has suggested how products already classified under the EU rules can be mapped against the proposed UK framework. The relevant EU rules – principally the Sustainable Finance Disclosure Regulation ("**SFDR**") and Taxonomy Regulation – are outside the present scope. However, although SFDR does not directly apply in the UK, it is likely to be relevant for UK firms in certain circumstances.[17]

The deadline for responses to the FCA Discussion Paper closed on 7 January 2022 and the FCA is intending to consult on policy proposals to implement the new system in Q2 2022.

December 2021: Climate-Related Disclosures – FCA Policy Statement (asset managers and asset owners)

Following the Greening Finance Roadmap and the FCA 'Dear Chair' letter, on 17 December 2021, the FCA published a policy statement (PS21/24) containing final rules and guidance for a climate-related disclosure regime for FCA-authorised asset managers and owners.[18] The new rules are set out in the ESG Sourcebook in the FCA Handbook.[19]

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[16] Although the FCA did not define such 'social' impacts in DP21/4, it noted that the '*Principal Adverse Impact Indicators*' in SFDR (see below) may be a starting point for a "*set of minimum safeguards for social indicators*."

[17] See also Milbank's recent client alert, '*ESG and Euro CLOs: The Past, Present and Future*' here, for further details on the scope and application of SFDR in relation to Euro CLOs.

[18] https://www.fca.org.uk/publication/policy/ps21-24.pdf. This followed feedback which the FCA received on a consultation paper issued in June 2021 (CP 21/27).

[19] https://www.handbook.fca.org.uk/handbook/ESG.pdf.

The rules will require in-scope firms to make annual, public disclosures on two levels: (a) entity-level disclosures (setting out how the firm takes into account climate-related matters in managing or administering investments on behalf of clients and consumers); and (b) product-level disclosures (including a core set of climate-related (and TCFD-aligned) metrics on the firm's products and portfolios, contextual information and historical calculations for these metrics, and any disclosures under the TCFD recommendations where the firm's approach in relation to a TCFD product "*materially deviates from the firm's overarching approach disclosed in the firm's TCFD entity report*").[20]

The entity-level and product-level disclosures must comply with the recommendations across the four key areas identified in the TCFD Final Report (see above). Firms must also take reasonable steps to ensure their disclosures reflect relevant sections from the TCFD Report Annex (updated in 2021), which includes general and sector-specific guidance on implementing the TCFD recommendations (including materiality assessments), describing transition plans, and assessing financial impacts of climate-related risks (among other things).[21] Further, a member of the firm's senior management will be required to sign a compliance statement confirming that the disclosures comply with the ESG Sourcebook's requirements. In recognition, however, of the fact that key data may not be available at this stage, firms need not disclose metrics or quantitative data analyses where "*there are gaps in underlying data or methodological challenges*", which cannot be adequately addressed with "*proxy data or assumptions.*"[22]

The rules came into force on 1 January 2022 for larger firms (i.e., those with more than £50 billion in assets under management for asset managers, or £25 billion in assets under administration for asset owners) operating from an establishment in the UK. Such firms will have to make their first set of reports by 30 June 2023. Firms that do not fall within these parameters, but with assets under management/administration greater than £5 billion, will be subject to the new rules from 1 January 2023, as part of the second phase, with reports due by 30 June 2024.[23] The new disclosure rules will not apply to firms with less than £5 billion of assets under management.

December 2021: Climate-Related Disclosures – FCA Policy Statement (standard listed companies)

On the same day as the publication of the above rules aimed at asset managers and owners, the FCA also published a policy statement (PS21/23) finalising its proposals for TCFD disclosures for UK issuers of standard listed shares and Global Depositary Receipts representing equity shares, for financial periods from 1 January 2022.[24] Previously, in December 2020, the FCA had introduced a 'comply or explain' requirement for premium-listed companies to make climate-related TCFD disclosures.[25] In the December 2021 policy statement, however, the FCA confirmed that standard-listed issuers would also be required to

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20 *Ibid*. Under the rules, a firm "*must take all reasonable steps to publish its TCFD entity report and its public TCFD product reports in a way that makes it easy for prospective readers to locate and access, including, as a minimum, by making the most recent of these reports available in a prominent place on the main website for the business of the firm*" (ESG 2.1.3R).

21 https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

22 ESG 2.1.10R.

23 According to the FCA, the rules will apply to 34 asset management and 12 asset owner firms in the first phase of implementation from 1 January 2022 (i.e., the largest firms). Once fully implemented, they will apply to 140 asset management and 34 asset owner firms. The in-scope firms represent £12.1 trillion in assets under management and administered in the UK, capturing 98% of both the UK asset management market and held by UK asset owners. https://www.fca.org.uk/publication/policy/ps21-24.pdf.

24 https://www.fca.org.uk/publications/policy-statements/ps-21-23-enhancing-climate-related-disclosures-standard-listed-companies. The FCA confirmed that the rules do not apply to investment entities and shell companies. The FCA also confirmed that, at this stage, the regime would not extend to standard listed issuers of debt and debt-like securities, although it will consider the appropriate regime for such issuers.

25 See Listing Rule 9.8.6R(8).

make parallel climate-related disclosures in their annual financial reports, in line with the TCFD recommendations.

In outline, in-scope companies must provide (in their annual financial report): a statement confirming whether they have included disclosures consistent with the TCFD's recommendations; and, if not, an explanation of why, and a description of any steps they are taking to be able to make consistent disclosures in the future, and the timeframe within which they expect to be able to make those disclosures.

In determining whether climate-related financial disclosures are consistent with the TCFD recommendations, the listed company should: (a) undertake a detailed assessment of those disclosures, taking into account the relevant sections from the TCFD Final Report, the (updated) Annex and other relevant TCFD publications referred to in the FCA rules; (b) consider whether it has provided sufficient detail to enable users to assess its exposure, and approach, to climate-related issues; and (c) carry out its own assessment to ascertain the appropriate level of detail for its climate-related disclosures, taking into account the level of its exposure to such risks (and opportunities), and the scope and objectives of its climate-related strategy (by reference to the nature, size and complexity of its business).[26]

The new rules apply from 1 January 2022, with the first annual reports subject to these requirements expected to be published in early 2023.

UK Competition and Markets Authority ("CMA") Green Claims Code

Other UK regulators have also demonstrated their focus on ESG-related issues, including the risks arising from misleading statements. On 20 September 2021, the CMA published a 'Green Claims Code' and 'Guidance on making environmental claims on goods and services'. The publications contain principles intended to help ensure companies comply with existing consumer protection law when claiming that their products, services or businesses make a positive impact on, or minimise harm to, the environment.[27] Under the principles (which are accompanied by detailed guidance and examples): (a) claims must be truthful and accurate, clear and unambiguous, consider the full lifecycle of the product or service, and substantiated; (b) claims must not omit or hide important relevant information; and (c) comparisons must be fair and meaningful.

The CMA has announced that it will begin reviewing companies which make misleading environmental claims from January 2022.[28] In particular, on 10 January 2022, the CMA announced that it would be reviewing such claims in the fashion retail sector, following concerns that certain businesses may be seeking to engage in 'greenwashing'.[29]

UK Regulatory Enforcement and Litigation Risks

The expanding regulatory frameworks for ESG disclosures, combined with clear statements of intent by regulatory authorities to police such disclosures and combat 'greenwashing', mean that we are likely to see increasing levels of enforcement activity in this area. Firms may also (or alternatively) be exposed to costly and reputationally-damaging litigation arising from inaccurate or misleading ESG disclosures, with a number of factors pointing towards increased litigation associated with these issues.

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26 See Listing Rules 14.3.27-30.
27 https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims.
28 https://www.gov.uk/government/news/greenwashing-cma-puts-businesses-on-notice.
29 https://www.gov.uk/cma-cases/misleading-environmental-claims.

Regulatory enforcement action

The FCA has made clear that, as regards the December 2021 climate-related disclosure rules for asset managers, asset owners and pension funds under PS21/24 (described above), *"Supervision will act reactively where needed and start carrying out work to assess firms' implementation of the rules once the first disclosures are published in 2023. Enforcement could consider taking action if firms failed to make disclosures or if these were misleading/constituted serious misconduct*."[30]

Relatedly, the CMA's review into 'greenwashing' in the fashion industry (referred to above) provides an early example of a UK regulator seeking to hold businesses accountable for misleading ESG disclosures which harm consumers and investors. More recently, on 15 March 2022, the CMA announced that it had launched an investigation (working closely with the European Commission ("**EC**")) into suspected anti-competitive conduct among vehicle manufacturers (and certain industry bodies) relating to the recycling of 'end-of-life vehicles'.[31] Although the investigations by the CMA (and EC) concern potential infringements of UK (and EU) competition law, they are also in line with both authorities' focus on ESG-related issues: as the CMA noted in its announcement, "*this investigation reflects the CMA's commitment – outlined in its draft Annual Plan 2022 to 2023 – to prioritise promoting environmental sustainability through effective competitive markets*"; and as Commissioner EVP M.Vestager commented in October 2021, "*a cartel that holds back improvements in the quality or the sustainability of the products we buy can be just as harmful as one that fixes prices*."[32]

Increased regulatory action in other jurisdictions concerning ESG disclosures is also relevant context, given the prominence of ESG issues and 'greenwashing concerns' across major financial markets. In addition to the EC (and CMA) investigation referred to above, in January 2020, the Italian regulators fined the energy company, Eni, EUR 5 million for false claims relating to its 'green' diesel. And in the US, the formation of the SEC Climate and ESG Task Force was announced in March 2021, with a mandate to "*develop initiatives to proactively identify ESG-related misconduct…* [and] *the initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules*."[33] Accordingly, the SEC has been scrutinising companies' voluntary climate change disclosures and, on 14 February 2022, published the first of its climate-risk exchanges with operating companies.[34]

Litigation risks

The number of claims involving ESG issues is substantial and increasing. By way of a very recent example, on 15 March 2022, ClientEarth (a Shell plc shareholder), announced that it was bringing a claim in the English courts against Shell's Board for its alleged failures "*to adopt and implement a climate strategy that truly aligns with the Paris Agreement*."[35] The claim is understood to be proceeding as a derivative action

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30 https://www.fca.org.uk/publication/policy/ps21-24.pdf.
31 https://www.gov.uk/government/news/cma-launches-investigation-into-recycling-of-cars-and-vans.
32 *Ibid.* and https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.
33 https://www.sec.gov/news/press-release/2021-42.
34 See Milbank's recent client alert, "*SEC Increasingly Scrutinizing Companies' Voluntary Climate Change Disclosures*" here.
35 https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/.

(which shareholders can pursue on behalf of a company in certain limited circumstances for breaches of duty by a director).[36]

In addition to claims based on alleged breaches of directors' duties, firms should be alive to the risk of securities claims pursued under the statutory regime in sections 90 or 90A of the Financial Services and Markets Act 2000 ("**FSMA**"), arising from false or misleading ESG-related statements and disclosures.

First, section 90 FSMA provides a remedy for investors who acquire securities and suffer losses consequent on false or misleading statements in, or the omission of required information from, a prospectus or listing particulars (original or supplementary) concerning those securities. The claims can be brought against any person responsible for the relevant document, including the issuer itself and any others stated as having responsibility for the contents of the document, such as (potentially) the issuer's directors and sponsors. Among other statutory defences, a person will not incur liability under s.90 FSMA for loss caused by a statement if he or she reasonably believed that the statement was true and not misleading.[37] Further, there is no express requirement in s.90 FSMA for claimants to demonstrate that they relied on the false or misleading statement, or the omission, in acquiring the securities.[38]

Second, section 90A FSMA provides a remedy for buyers, sellers or holders of securities who suffer losses resulting from untrue or misleading statements in, or omissions from, company announcements (not limited to a prospectus or listing particulars), where a "*person discharging managerial responsibilities*" (principally, the issuer's directors) knew that, or was reckless as to whether, the statement in question was untrue or misleading, or that the omission was a dishonest concealment of a material fact. Unlike the s.90 FSMA regime, claims under s.90A FSMA may only be brought against issuers; and, importantly, claimants must establish that they relied on the statement or omission in connection with buying, selling or holding the securities in question (and that such reliance was reasonable).[39]

Although securities class actions are increasing in the UK, they currently remain relatively uncommon (unlike in the US). It is possible, however, that claims relating to alleged false or misleading ESG disclosures will proceed on the basis of the statutory framework in FSMA, as described above.[40] The likelihood of such claims will increase if, as foreshadowed above, we begin to see regulators levying substantial fines against firms responsible for 'greenwashing' in respect of their ESG disclosures and/or if publicity around such cases leads to significant falls in a company's share price. Even so, there will remain important hurdles for claimants to surmount in demonstrating that they relied on the statements or omissions in question (at least under s.90A FSMA), and that statements or omissions caused identifiable losses (under both s.90 and s.90A FSMA), although authority on these claims is limited.

ESG disclosure-related claims may well take a number of forms (not necessarily limited to those outlined above). In addition, there are several broader trends in the UK litigation market which appear likely to

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36 Under s.172 of the Companies Act 2006, a director has a duty to promote the success of the company and, in doing so, must have regard to (among other matters) "*the impact of the company's operations on the community and the environment.*"

37 See Schedule 10 FSMA 2000.

38 See the *RBS Rights Issue Litigation*, where claimant shareholders brought claims against RBS and the bank's former directors under s.90 FSMA, alleging that a prospectus accompanying the £12 billion RBS rights issue of April 2008 contained misleading information on RBS's financial condition. The case settled shortly before trial, in 2017.

39 On 28 January 2022, the summary of the first judgment relating to a s. 90A claim was published (although it did not relate to ESG matters) in *Autonomy Corporation Limited and others v Lynch and another*, case no. HC-2015-001324.

40 English common law claims (for example, in negligent misstatement and deceit) may also be possible in relation to ESG disclosures. See, for example, *Sharp v Blank* [2019] EWHC 3078 (Ch) (the *Lloyds/HBOS Litigation*).

support increasing numbers of claims, in particular the rise of collective (or class) actions, the growing availability of third-party litigation funding, and the perceived procedural and substantive advantages of the English courts (e.g., the scope to compel defendants to disclose a wide variety of internal, confidential documents).

Considerations for Companies

The developing regulatory framework for ESG-related disclosures, combined with the risks of related enforcement action and litigation for false or misleading statements, mean that companies within the scope of the UK rules (and proposed rules) should, in general, make every effort to keep abreast of developments in those rules and ensure that any and all ESG-related disclosures are fully compliant with the relevant rules and guidance, and not otherwise incomplete or misleading.

In particular, it is likely to be advisable for companies to: (a) review how ESG performance is operationalised, monitored, recorded and verified; (b) review and verify public statements and regulatory announcements on ESG measures/credentials; (c) conduct a comprehensive review of their UK disclosure requirements relating to ESG factors, as well as requirements in any other relevant jurisdictions (and seek to align internal processes to accommodate all applicable rules); (d) review any internal requirements for updated training, policies, procedures and/or audits concerning ESG factors and disclosures; and (e) work with external advisers familiar with the relevant requirements, the key authorities, and how to mitigate the attendant risks.

Global Litigation Contacts

London	100 Liverpool Street, London EC2M 2AT	
Tom Canning	tcanning@milbank.com	+44 20.7615.3047
William Charles	wcharles@milbank.com	+44 20.7615.3076
Julian Stait	jstait@milbank.com	+44 20.7615.3005
Mona Vaswani	mvaswani@milbank.com	+44 20.7615.3002
New York	55 Hudson Yards, New York, NY 10001-2163	
George S. Canellos	gcanellos@milbank.com	+1 212.530.5792
Daniel Perry	dperry@milbank.com	+1 212.530.5083
Scott A. Edelman	sedelman@milbank.com	+1 212.530.5149
Alexander Lees	alees@milbank.com	+1 212.530.5161
Grant Mainland	gmainland@milbank.com	+1 212.530.5251
Antonia M. Apps	aapps@milbank.com	+1 212.530.5357
Fiona A. Schaeffer	fschaeffer@milbank.com	+1 212.530.5651
Jed M. Schwartz	jschwartz@milbank.com	+1 212.530.5283
Alan J. Stone	astone@milbank.com	+1 212.530.5285
James G. Cavoli	jcavoli@milbank.com	+1 212.530.5172
Robert C. Hora	rhora@milbank.com	+1 212.530.5170
Sean M. Murphy	smurphy@milbank.com	+1 212.530.5688

Atara Miller	amiller@milbank.com	+1 212.530.5421
Tawfiq S. Rangwala	trangwala@milbank.com	+1 212.530.5587
Christopher J. Gaspar	cgaspar@milbank.com	+1 212.530.5019
Stacey J. Rappaport	srappaport@milbank.com	+1 212.530.5347
David R. Gelfand	dgelfand@milbank.com	+1 212.530.5520

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

Samir Vora	svora@milbank.com	+44 20.7615.3047
Aaron L. Renenger	arenenger@milbank.com	+1 202.835.7505
Andrew M. Leblanc	aleblanc@milbank.com	+1 202.835.7574

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Adam Fee	afee@milbank.com	+1 212.530.5101
Y. John Lu	jlu@milbank.com	+1 424.386.4318
Lauren N. Drake	ldrake@milbank.com	+1 424.386.4320
David I. Gindler	dgindler@milbank.com	+1 424.386.4313
Gary N. Frischling	gfrischling@milbank.com	+1 424.386.4316
Alex G. Romain	aromain@milbank.com	+1 424.386.4374

Munich | Maximilianstraße 15, 80539 Munich

Ulrike Friese-Dormann	ufriese@milbank.com	+49 89.25559.3646
Alexander Rinne	arinne@milbank.com	+49 89.25559.3686

Christoph Rothenfusser crothenfusser@milbank.com +49 89.25559.3656

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