

Client Alert: Greenwashing, Power, Modern Slavery & ESG

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Introduction

It is common these days for organisations to make claims about their ESG credentials including claims that they are “*kind to the environment*,” “*doing their best for the planet*,” or “*carbon-neutral*.” However, in this complex and changing world, how can they justify those claims? Many jurisdictions around the world have fair trading laws in place which put the burden of proof on the organisation making the claims to be ready to back them up with hard facts. For example, in the UK, The Consumer Protection from Unfair Trading Regulations 2008 could make statements like these a criminal offence in some circumstances punishable by a fine, a prison term of up to 2 years or both. Will action over false ESG claims become a new compliance trend?

Recent reports about issues with green energy in particular have put these obligations into focus and suggest that organisations will need to have proper processes in place when making ESG-related claims. The areas where special care may be needed include the following:

Solar Power

Many organisations support their ESG claims by suggesting that their focus on renewable energy is doing good. That is not to undermine the effort that many are making however in our experience some organisations have not checked to see if the claims they are making are correct and whether they have taken into account the harm that can be done to the environment in the making, transportation and installation of solar panels.

As an example of some of the issues Sheffield Hallam University (SHU) looked at the global solar panel supply chain in their report “In Broad Daylight: Uyghur forced labour and global solar supply chains” in May 2021. The report makes for depressing reading and concludes that most, if not all, of the solar panel supply chain may be tainted by Uyghur forced labour. The SHU report concluded that the solar industry is particularly vulnerable to forced labour in the Xinjiang Uyghur Autonomous Region of China (XUAR) because:

1. 95% of solar modules rely on one primary material – solar-grade polysilicon
2. Polysilicon manufacturers in XUAR account for around 45% of the world's solar-grade polysilicon supply
3. At least one major silicon producer has participated in labour transfer programs
4. All four of XUAR's polysilicon manufacturers have reportedly participated in labour transfer or labour placement programs and/or been supplied by raw materials companies that have

It has been suggested by others that only one producer worldwide may have a XUAR-free supply chain and from what we are told, pricing from that supplier may not be competitive for many projects.

Concerns about conditions in XUAR have attracted UK Parliamentary attention and led to sanctions for some individuals involved in XUAR. You can read more about that here <https://www.corderycompliance.com/xinjiang-supply-chains-alert/>. Aside from slavery risks, there are also particular issues with workers' exposure to hazardous chemicals such as cadmium in the manufacturing of solar panels. How can you be sure that your suppliers (and their suppliers) take health and safety issues as seriously as you do?

The origin of solar panels and component raw materials could also have implications with pending new EU rules. In September 2021 the President of the European Commission announced plans to ban the importation of goods made with forced labour. There are more details of those plans here <https://www.corderycompliance.com/eu-proposed-ban-forced-labour-products/>. Some respondents to the UK Parliamentary enquiry have also suggested that the UK should use legislation introduced in 1897 to impose similar import bans for the UK.

Import bans are not confined to Europe. This is an area where the US Customs & Border Protection agency has already been active and in March 2021 two US Senators introduced a Bill that would prevent the US Government from buying solar panels “*manufactured or assembled by entities with ties to the Chinese Communist Party*.”

In addition, in the UK many organisations are subject to obligations under the UK Modern Slavery Act 2015 (MSA 2015). The official guidance on MSA 2015, says that organisations must “*paint a detailed picture*” of all of the steps that they have taken to stamp out slavery in their supply chain. There are proposals to amend the MSA 2015 which include extending the law to prohibit the falsification of slavery and human trafficking statements, to establish minimum standards of transparency and to prohibit companies using supply chains which fail to demonstrate minimum standards. There is more detail on the existing law and the proposed changes here <https://www.corderycompliance.com/uk-modern-slavery-compliance-rules-draft-amends/>.

There are a number of statements and traceability protocols which could help but there are substantial issues with traceability, not least that it will be difficult for any organisation to inspect facilities in XUAR to satisfy themselves that their suppliers are beyond reproach.

Wind Power

Similar concerns have also been expressed about the wind power supply chain. In January 2018 Action Aid published a study of human rights in wind turbine supply chains which looked at the overall impact of wind turbines, particularly in connection with their use in The Netherlands. The report looks at concerns about the mining of minerals such as iron ore and chromium which are needed for the production of new wind turbines. It also looks at the impact of the wind turbine supply chain on human rights. It highlights the fact that many of the minerals used in wind turbines are mined in low and middle-income countries in Asia, Africa and Latin America. It also highlights the fact that issues connected with this mining include armed conflict, corruption, tax evasion, forced labour, displacement, destruction of eco-systems and depletion or pollution of water supplies. Children, women and members of indigenous populations were seen to be especially vulnerable.

There have also been allegations of land grab for wind farm projects in Kenya, Taiwan, Morocco and Mexico.

In June 2021 Apple was criticised for allegedly involving companies associated with forced labour in XUAR in its drive to carbon neutrality. It was alleged that 7 Apple partners were involved in possible Uyghur forced labour issues. It was also alleged that one of Apple’s suppliers (through an Ireland-based Apple subsidiary) was dealing with a sanctioned organisation.

Wind farms have also been criticised for being a danger to wildlife. It has been estimated that up to 500,000 birds in the US alone may be killed by wind farm turbines. In June 2021 the development of a wind farm off the coast of Brittany by a Spanish utility company was suspended over concerns about disruption to marine life, threats to local fishing and alleged threats made by those connected to the utility company to the protestors.

Battery Power

Concerns have also been expressed about the use of batteries in the move to electric vehicles. There are challenges in particular about the mining of cobalt in lithium-ion batteries with the presence of child labour in Congolese cobalt mines. It is estimated that around 60% of the world’s cobalt is mined in the Democratic Republic of Congo (DRC). It has been reported that children as young as 7 work in cobalt mines for up to 12 hours a day.

There are also substantial risks in the disposal of batteries including risks from both fumes to the air and chemical releases towards water sources or the surrounding environment. Batteries are commonly sent for recycling to Asia and there are high or extreme risks for modern slavery in many of the countries used for recycling.

Biofuels

Biofuels are also a concern. The cultivation of palm oil and sugar cane to be used in biofuels has led to deforestation in some areas of the world. The rights of vulnerable communities can also be at risk by major renewables projects developed on lands occupied traditionally by indigenous groups. Working practices can also be a particular issue with biofuels with long hours in inhospitable climates.

Migrant labour has been used in India, Malaysia and Indonesia increasing the risks of modern slavery occurring.

Child labour has also been found in the production of these crops in all three countries. There have also been issues with soy farming in Brazil.

There is also a significant corruption risk with biofuels. The UK's Serious Fraud Office has a long-running biofuels investigation which includes allegations of fraud and money laundering. This is a joint investigation with authorities in the Netherlands and has included dawn raids in the UK, Netherlands and Belgium. The trial of one individual connected with the investigation is expected to start in the UK in September 2022.

Electricity Crisis

It is important to remember in addition that supply chains are not constant and many organisations will respond to the environment around them. For example, last week it was reported that a number of rail operators in the UK were moving from electricity to diesel given the rising price of electricity on the network. One operator, Freightliner, suspended the use of its electric locomotives and has replaced them with diesel-hauled services. Freightliner is the largest intermodal freight transport operator in the UK and the switch is likely to affect many organisations operating or selling in the UK. This may well be bad news for the environment as there is a shortage across the rail network of energy efficient diesel locomotives. Some rail freight operators have rented diesel locomotives built between 1960 and 1965 including from museums and heritage collections to fulfil their obligations.

As a result it is important to make sure that your processes and procedures include regular reviews of your supply chain. Do your contracts with logistics providers for example include a commitment to notify you before the mode of transport is changed? If you are involved in carbon offsetting can you respond quickly to world events to make sure that commitments you have made are honoured?

False Claims

There have already been concerns that some organisations have been opportunistic in proclaiming their environmental credentials without doing appropriate due diligence. For example, in 2019, the UK Advertising Standards Authority banned adverts from fashion retailer Boohoo after it took a stand against the use of animals in clothing. Boohoo advertised garments featuring "*faux fur*". A pressure group purchased garments which (according to their tests) in fact featured rabbit fur. Boohoo said that it had made a real commitment to protecting the environment, that it had a supplier code and contract in place with its suppliers and it also inspected samples of stock in line with industry practice. Nonetheless, the ASA felt that Boohoo did not have enough evidence to support the claims it had made.

Another possible cause for concern with false claims may be in connection with an organisation's statements to comply with its MSA 2015 obligations. Statements are often included on an organisation's website and, from March 2021, some organisations also file on the UK Modern Slavery Register. There is more background on the Register here <https://www.corderycompliance.com/uk-modern-slavery-online-statement-registry/>. Currently, filing a statement on the Register is voluntary but 21,867 statements have been filed as at 18 October 2021. It is important to make sure that any statement made is legal, decent, honest and truthful too.

For publicly listed entities, the risks are possibly greater still. Many countries have laws which prohibit false claims being made by listed entities particularly where those claims could mislead investors.

What should organisations do?

It is clear that organisations need to check the claims that they are making. Good intentions are no substitute for proper compliance processes. Those processes could include:

1. **Do appropriate due diligence.** You'll need a proper due diligence program for your supply chain. This shouldn't just be a one-off exercise. Resources like the Humanium database of children's rights per country can help - <https://www.humanium.org/en/children-world/>. The EU has introduced draft guidelines on due diligence too (summarised here <https://www.corderycompliance.com/eu-modern-slavery-guidance/>) which may also help.

2. **Check the claims made.** This is a difficult task when dealing with some parts of the world. We know that some suppliers don't always tell the truth. Some third parties compiling independent reports have been misled too. Just because it is difficult doesn't mean that there's no legal obligation to try – as a simple rule if you can't verify any claims you make don't make them. As we've said the burden of proof is on the organisation to prove any claims it makes.
3. **Make sure your supply chain contracts reflect what you expect.** You will need to check not only what your organisation does but also your supply chain. For example, if your transport company is switching from electricity to fossil fuels, is it under a contractual obligation to tell you? Is there a right of veto or a right to be notified or a right to be consulted?
4. **Make sure that you can trace goods and raw materials back to the place of production.** This might be particularly important if EU or UK laws are introduced banning the import or forced labour products.
5. **Adopt a communications strategy, internal and external.** Make sure that your marketing team and your investor relations team in particular know the issues with claims you can't prove.
6. **Get the Board on board.** Sometimes claims are made by those at the very top of the organisation because they want to show firm leadership on an issue or because they feel under pressure from a journalist or a shareholder at an annual meeting. Your board may need a briefing on the risks involved in ESG claims and the particular risks with renewable energy.
7. **Train the appropriate staff, such as those involved in procurement and purchasing.** In our experience sometimes procurement people aren't as alive to the risks as those in the compliance team. Awareness sessions can help.
8. **Be ready to investigate concerns.** Complaints must be taken seriously especially from whistleblowers given the rising number of concerns in this area. Again this sometimes isn't easy. We have had experience of whistleblowing claims in Asia from business rivals of a client's existing supplier who think they may benefit if their competitor is dropped. As we've said some people don't tell the truth but you'll need to apply the same rigour to a whistleblower complaint in this area as you would with other compliance concerns.

There is more information about this and other modern slavery and supply chain topics here <https://www.corderycompliance.com/category/modern-slavery-supply-chain-management/>. You can find out more about Cordery's work in this area and some recent projects here <https://www.corderycompliance.com/modernslavery/>.

We will be discussing these issues in more detail in our seminar with the Society for Corporate Compliance & Ethics next month. Details of the event are here <https://www.corderycompliance.com/scce-webinar-modern-slavery-supply-chain-mgt-eu-and-uk-2021-las-vegas-conference-2/>.

You can download a pdf copy of the SHU report here <https://bit.ly/shureport>.

You can download a pdf copy of the ActionAid report here <https://bit.ly/3FVcy4R>

The Boohoo ruling is here <https://www.asa.org.uk/rulings/boohoo-com-uk-ltd-a18-465166.html>.

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