The Role of Lawyers in Achieving the Transition to Net Zero

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Introduction

Managing our impact on the environment could scarcely be more important. Businesses and individuals alike have a role to play in the drive towards achieving a low-carbon economy. There are a variety of tools at our disposal and the legal profession is well placed to assist and advise parties seeking to achieve their goals. This may range from raising awareness among clients of current climate change legislation and upcoming changes to regulations (particularly for financial services clients), to helping clients to understand disclosure requirements and encouraging clients to make informative and clear reports to their stakeholders. The increase in environmental, social and governance (ESG) litigation shows that this too is an area in which lawyers can play a role in helping companies and clients to ensure their businesses achieve their sustainability goals and conversely, the risks of failing to do so.

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What are the current regulations designed to guide companies in the UK towards net zero?

Climate change legislation in the United Kingdom primarily focuses on reporting and disclosing the impact of companies' activities on the environment. For certain companies and organisations (primarily those with shares listed on the main market of the London Stock Exchange (LSE) and large companies and limited liability partnerships), reporting on their environmental impact is already required by law; for others, this may be subject to change as this area develops. The aim of the disclosure-based regulation is to achieve a market-led transition to net zero by improving information in the market and bringing climate-related information into the mainstream reporting frameworks for companies and organisations.

Climate Change Act

The Climate Change Act 2008 has as its objectives to make the UK's targets for reducing greenhouse gas emissions legally binding and provide a long-term framework for climate change policy in the UK. The Act came into force in January 2009 and, thanks to amendments made in June 2019,[1] enshrines the commitment to a *net-zero* reduction in greenhouse gas emissions by 2050.

The Climate Change Act provides an overarching commitment to a net-zero target. A criticism of the Climate Change Act is that if the government were to miss a target under the Act, there is no remedial course of action specified and, other than a judicial review to determine whether the government has failed to meet its targets, there is no legal mechanism to ensure that targets are met. However, as discussed below, in the Dutch *Urgenda*[2] case, the Supreme Court of the Netherlands considered whether the Court could order the government to strengthen its climate targets. The Court in this case decided that this was possible on the basis of Articles 2 and 8 of the European Convention on Human Rights to order the government to strengthen its greenhouse gas reduction targets owing to the risk that climate change posed to the inhabitants of the Netherlands.

Specific requirements for UK companies are contained in separate legislation, which will be considered below.

1 Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056).

2 *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:HR:2019:2006, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2006 accessed 24 April 2023.

Streamlined energy and carbon reporting

The streamlined energy and carbon reporting (SECR) requirements are applied to certain companies under the Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 (SI 2018/1155) for their financial years that started on or after 1 April 2019. The SECR extended existing climate crisis reporting requirements under the Companies Act 2006 to require quoted companies, large unquoted companies and limited liability partnerships to report on greenhouse gas emissions and energy consumption.

Companies reporting information under the SECR are required to report on two main factors. The first factor requires reporting the organisation's greenhouse gas emissions and their energy efficiency, while the second requires the organisation to consider how they would be affected by climate change. This risk-factor reporting will include reporting on the operational risk of the climate emergency on the company, the company's plans to adapt to the climate crisis and the financial risks to the company. An example of an operational risk would be whether there was a risk to the organisation operating if there was an increase in flooding or other severe weather events. A financial risk would include the organisation's sensitivity or exposure to changes fuel prices or changes to coal, oil and gas assets.

The SECR reporting methodology requires that organisations use clear, understandable and easily navigable information in their reports. Companies and organisations subject to the SECR are also required to explain the methodologies used to calculate their emissions and energy usage and detail to help users of the reports to understand and compare major climate crisis commitments. As part of ensuring that users understand the information provided, companies are required to include an explanation of which activities and emissions of theirs are aligned with commitments such as the 2050 net-zero target in the UK, or the commitment to aim to keep global warming to under 2 degrees Celsius as contained in the Paris Agreement.[3]

The emissions data and information disclosed under the SECR do not require independent verification, but this is recommended as good practice. Where a company has not been able to provide the information required, they must include a statement in its annual report explaining the omission.

3 The Paris Agreement is an international treaty on climate change, which was signed in 2015 and entered into force in November 2016.

Climate-focused regulatory and financial reporting

Taskforce on Climate-Related Financial Disclosures

The Taskforce on Climate-Related Financial Disclosures (the 'Taskforce') was established in 2015 by the Financial Stability Board and aimed to develop a global framework for the consistent reporting of climate-related financial risk disclosures. Bringing climate-related financial reporting into the mainstream corporate reporting cycle has meant that the Taskforce's recommendations are widely supported by many countries and jurisdictions, including the UK, and form the basis of many rules on climate-related financial disclosures in the UK, European Union and across the world.

The Taskforce's recommendations cover four areas: governance, strategy, risk management, and metrics and targets. All four of these areas are intended to be covered in an organisation's mainstream financial reporting in accordance with the company or organisation's national disclosure obligations.

Governance reporting will include disclosures on the company's governance processes around climate-related risks and opportunities. This could include consideration of potential positive impacts, such as opportunities to look at resource efficiency, low-emission energy or developing new products or services. It could also consider risks associated with the climate crisis and a transition to a low-carbon economy, such as resilience to market responses, reputation, policy or legal changes. Companies will also be expected to describe the board's oversight of climate-related risks and opportunities and management's role in assessing these.

Strategy reporting looks at the actual and potential impacts of climate-related risks and opportunities on the company's businesses, strategy and financial planning where such information is material and describes the following:

- climate-related risks and opportunities, which the company has identified over the short, medium and long term;
- the impact of climate-related risks and opportunities on the company's businesses, strategy and financial planning;
- the resilience of the company's strategy, taking into consideration different climate-related scenarios, including a 2-degrees or lower scenario;
- the company's greenhouse gas emissions and the related risks; and
- the targets used by the company to manage climate related risks and opportunities and performance against targets.

In reporting on risk management, companies need to describe how they identify, assess and manage climate-related risks and how these are integrated into the company's overall risk management process.

Finally, reporting on metrics and targets, companies are required to disclose their methodology for identifying climate-related information and risks.

Listing rules

Companies that have a premium listing on the LSE are required to comply with the Listing Rules. These rules were made under Part VI of the Financial Services and Markets Act 2000 and form part of the Financial Conduct Authority (FCA)'s regulatory handbook.

Under Listing Rule 9.8.6R, companies with a premium listing have been required to include certain climate-crisis-related reporting in their annual report for their financial year beginning on or after 1 January 2021. The annual report must include a statement on climate-related financial disclosures. This statement must be made in line with the recommendations made by the Taskforce discussed above.

The Listing Rules require a statement setting out whether the listed company has included in its annual financial report climate-related financial disclosures consistent with the Taskforce's Recommendations and Recommended Disclosures. In cases where the listed company has made climate-related financial disclosures consistent with the Taskforce's Recommendations and Recommended Disclosures, but has included some or all of these disclosures in a document other than the annual financial report, they must include:

- the recommendations and/or recommended disclosures for which it has included disclosures in that other document;
- a description of that document and where it can be found; and
- the reasons for including the relevant disclosures in that document and not in the annual financial report.

Where a company has not included climate-related financial disclosures consistent with all of the Taskforce's Recommendations and Recommended Disclosures in either its annual financial report or other document, the company must provide a statement setting out for which recommendations it has not included disclosures; its reasons for not including such disclosures and any steps it is taking or plans to take in order to be able to make such disclosures in the future; and a timeline for making such disclosures.

These rules currently operate on a 'comply or explain' principle, where relevant companies are legally required to include either a statement on

financial disclosures in line with the Taskforce's Recommendations or a statement explaining why they have not done so.

This information currently does need to be independently approved or verified by the FCA. However, a verification requirement may be introduced by the FCA as this area develops.

Strategic report

Certain large UK companies that have more than 500 employees or have a high turnover (of more than £500m) are required for financial years starting on or after 6 April 2022 to include a non-financial and sustainability information statement in their strategic report.[4] This must include climate-related financial disclosures following the broad requirements of the Taskforce's Recommendations.

Future developments in green finance and regulation

Sustainability Disclosure Regulations (SDR)

The FCA has consulted on sustainability disclosure requirements and investment labels. The proposals recognise the importance of financial services and markets in the transition to a greener economy, and the FCA is tasked with supporting this transition through its regulation of the financial services industry. The introduction of a labelling regime, alongside the disclosure regulations, is designed to build 'transparency and trust' and help consumers, in particular, to understand sustainable investment products.[5]

This regime focuses on asset managers and portfolio managers, looking at authorised funds and unauthorised alternative investments funds (AIFs) based in the UK. However, the scope of this legislation is likely to expand as this area develops and the FCA is planning to consult on how the rules may apply to overseas funds offered in the UK market.

In preparing the proposed rules, the FCA is drawing on the Taskforce's Recommendations discussed above, and the international sustainability-related reporting standards developed by the International Sustainability Standards Board (ISSB). The use of these standardised, globally recognisable recommendations as a base should ensure that the FCA's rules are fairly consistent with the sustainability requirements adopted in other jurisdictions and the EU.

4 The requirements for this statement are set out in ss 414CA and 414CB of the Companies Act 2006.

5 FCA Sustainability Disclosure Requirements (SDR) and investment labels Consultation Paper CP22/20 October 2022 www.fca.org.uk/publication/consultation/cp22-20.pdf accessed 24 April 2023.

In a move to combat greenwashing, the FCA focuses on ensuring that companies that make sustainability-related claims are able to substantiate them. This includes an 'anti-greenwashing rule', which requires such claims to be 'clear, fair and not misleading'. This will be a familiar concept to lawyers and advisers to companies that have previously been required to apply the same rule to their communications with customers and financial promotions.

The labelling regime introduces the following labels for investments: 'sustainable focus', 'sustainable improvers' and 'sustainable impact', where 'sustainable impact' is the most focused on achieving positive real-world impacts and solutions to environmental problems. Whether this will achieve the FCA's objective to help accelerate the transition to a net-zero economy will ultimately depend on how consumers and institutional investors respond to labels and choose to invest.

Target setting

Target setting – in particular, appropriately ambitious target setting – will be key to ensuring the regulations introduced to encourage the net-zero transition are effective. These regulations will require that the regulators are equipped to analyse and assimilate large amounts of information about the companies they regulate; gathering and comparing the data provided may be a challenge. The aim of all the disclosure-based regulation is to improve the information available to the market in the hope that disclosures will lead to a market-led transition to net zero. The regulators can set targets and impose disclosure and labelling requirements; however, for these regimes to work, shareholders and investors need to respond to the information available and deploy their capital accordingly.

The risks of litigation: a driver for change?

We have already touched on the importance of ESG policies and how they might help a corporate to achieve its sustainability goals. However, the litigation market shows us that achieving those policy goals should not merely be aspirational, but that consumers and investors are increasingly requiring corporates to take active steps to meet the ESG standards they set for themselves.

ESG criteria have rapidly made it to the top of the agenda for consumers and investors alike, as consumer preferences shift towards sustainability and investors are increasingly mindful of the ESG impact of their investments. As a result, and as we have already discussed, ESG is an area that is fast becoming one of the main focuses of regulators.

Although, undoubtedly, those with robust ESG strategies have a greater opportunity to improve growth and profit by showing customers, investors and regulators that such matters are taken seriously, a failure to comply with applicable ESG frameworks is likely to result in regulatory enforcement action and a decline in profits owing to ESG-minded customers withdrawing their patronage.

Corporates may also find themselves subject to litigation brought by consumers, investors or even philanthropic enterprises seeking to hold companies to account.

However, although the risk of regulatory action or litigation could be taken as a cautionary tale, it should instead be used as an impetus for corporates to pursue their sustainability goals more robustly.

What is ESG litigation?

In general terms, it can be classified as legal proceedings related to environmental, social and governance (ESG) issues. Examples would include claims brought by activists and non-governmental organisations (NGOs) against governments for failing to do enough to reduce climate change; claims against car manufacturers for lying about emissions; and claims by investors for losses caused by a drop in share price as a consequence of ESG breaches or misleading statements about a company's ESG credentials.

Is it increasing?

In short, yes. ESG claims have doubled worldwide since 2015.[6] According to a recent report by the Grantham Research Institute on Climate Change (the 'GRI Global Report'), roughly 800 climate change cases were filed between 1986 and 2014, and over 1,200 cases have been filed in the subsequent eight years to mid-2022, of which roughly 300 were filed between 2020 and 2022.[7]

Why?

The main driver, simply, is the increasing importance that consumers and investors place on ESG. Consumers and investors are keenly aware of the importance of achieving net zero – one only has to look at changing weather patterns in the last 18–24 months – which has led to a sizeable shift in societal attitudes and, correspondingly, consumer behaviour.

6 *Global trends in climate change litigation: 2022 snapshot* (GRI Global Report), June 2022, Joana Setzer and Catherine Higham, p 1.

7 *Ibid* at 1.

This growing awareness, coupled with an enhanced global ESG regulatory framework, recent legal developments and access to litigation funding, means that it is easier for those suffering loss or otherwise wishing to hold corporates to account to bring their claims.

Regulation, of course, has an important and wide-reaching effect,[8] but we are also seeing a growing diversification in the range and scope of ESG litigation (ie, it's not just a case of more of the same).

Where?

Historically, the United States has been the global leader in ESG claims.[9] However, in recent years, ESG claims have been brought more widely across the world, with the most high-profile, innovative and ambitious cases now arguably being seen in Europe. In 2019, for example, in a case brought by a Dutch environmental group and 900 Dutch citizens, the Supreme Court of the Netherlands found that the Dutch government has a positive obligation to reduce greenhouse gas emissions,[10] and, in 2021, the Hague District Court ordered Shell to cut its carbon emissions by 45 per cent by 2030 compared with the 2019 level, setting a precedent for the scope of rulings against corporations.[11] Most recently, in January 2023, residents of the Indonesian island of Pulau Pari commenced legal action against Swiss cement manufacturer Holcim, arguing that the 1,500 people living on Pari are at significant risk of losing their livelihoods owing to sea-level rise and flooding and seeking recovery of damages suffered and impending. In response to the claim, Holcim highlighted its commitment to climate targets and said that it does not 'believe that court cases focused on single companies are an effective mechanism to tackle the global complexity of climate action.'[12]

More than 60 cases have now been filed before the Court of Justice of the EU, and at least ten cases are pending before the European Court

8 See, eg, the decision by the Advertising Standards Authority (ASA) in October 2022, which found that HSBC had misled customers by making unqualified claims and omitting material information about its environmental credentials in two high street adverts, www.asa.org.uk/rulings/hsbc-uk-bank-plc-g21-1127656-hsbc-uk-bank-plc.html accessed 24 April 2023.

9 As of May 2022, the GRI Global Report identified 2,002 ongoing or concluded cases of climate change litigation from around the world. Of these, around three-quarters (1,426) were filed before courts in the US, while the remaining 576 were filed before courts in 43 other countries.

10 *Urgenda Foundation v State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007.

11 *Vereniging Milieudefensie et al v Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2021:5339.

12 www.france24.com/en/live-news/20230201-indonesian-islanders-file-holcim-climate-complaint accessed 28 April 2023.

of Human Rights.[13] Cases continue to be filed in Latin America and the Caribbean, Asia Pacific and Africa at a steady rate (with an increase from 58 cases in 2021 to 88 cases in 2022).[14]

The willingness and ability of the courts to force corporates to change their behaviour is ever expanding.

What claims are being seen in the UK?

In the courts of England and Wales, there are several tools available to consumers and investors to seek to hold corporates to account.

Collective actions

Climate group litigation is on the rise in the UK, as are the size of such claims. Consider the recent and well-known conclusion of the 'DieselGate' saga, where Volkswagen agreed to pay £193m to settle the 91,000 legal claims brought against it in England and Wales following the emissions scandal.[15]

Such a high level of return will be attractive not only to consumers but also to litigation funders seeking to invest in high-value disputes. The UK litigation funding market is well equipped to help advance such claims, having grown at a swift rate in the last ten years. We are also seeing a more philanthropic approach to litigation funding, with funders actively looking to back claims that are likely to have a positive social impact and aiming to change a company's behaviour by holding it to account.

Securities litigation under FSMA, sections 90 and 90A

Sections 90 and 90A of the Financial Services and Markets Act 2000 (the 'FSMA') provide a cause of action for shareholders of listed companies, allowing them to sue a company for loss suffered as a result of false statements published by a company in prospectuses (section 90) or other published information, such as annual reports and corporate governance statements (section 90A).

Where such information is false or misleading, investors and shareholders may have a claim, providing them with a clear avenue to seek recompense.

Further, even if a misleading or false ESG statement has not affected a company's profitability, 'greenwashing' may still affect the company's reputation and thus its share price, opening the door for section 90/90A FSMA claims.

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13 *Climate litigation in Europe: A summary report for the European Union Form of Judges for the Environment* (GRI Europe Report), December 2022, Joana Setzer, Harj Narulla, Catherine Higham and Emily Bradeen, p 6.

14 GRI Global Report, p 10.

15 See www.reuters.com/business/autos-transportation/volkswagen-242-mln-uk-dieselgate-settlement-2022-05-25 accessed 24 April 2023.

Regulatory challenges

Regulation is there to hold public bodies, as well as private businesses, to account. For example, in 2022, Friends of the Earth, ClientEarth, the Good Law Project and Joanna Wheatly successfully challenged the UK government's net-zero strategy, resulting in the Court ordering the government to explain how its policies and proposals will enable carbon reduction targets to be met by April 2023.[16] Further, in July 2022, the Competition and Markets Authority (CMA) launched its first investigation under the Green Claims Code into the eco-friendly and sustainability claims made by ASOS, Boohoo and George at Asda;[17] the three companies are cooperating with the investigation.

In addition, although we have not yet seen any significant cases brought in England and Wales relating to human rights and ESG, it is interesting to note the increasing role of human rights law and remedies to address concerns related to climate change; see, for example, *Leghari v Pakistan*; *Urgenda Foundation v State of the Netherlands*; and *Juliana v United States*:[18] all cases that aimed to link the dangers posed by the climate crisis with the legal duties of governments to their citizens to prevent such dangers.[19]

The range of defendants

Historically, there has been a focus on claims made against governments; however, claims against individual corporations are on the rise, with at least 40 per cent of all climate cases filed since 2020 in Europe being targeted at private entities rather than governments.[20] Further, claims brought against corporate entities are not limited to fossil fuel companies: in 2021, out of 38 climate change cases filed against corporations, 22 were against defendants outside the fossil fuel sector, including companies involved in the food and agriculture, transport, plastics and finance sectors.[21] It seems, therefore, as though litigants are increasingly likely to target high-emitting industries

16 *R (Friends of the Earth Ltd and others) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin).

17 www.gov.uk/government/news/asos-boohoo-and-asda-investigated-over-fashion-green-claims accessed 24 April 2023.

18 *Ashgar Leghari v Federation of Pakistan* (2015) WP No 25501/2015; *Urgenda Foundation v State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007; *Kelsey Cascadia Rose Juliana, et al v United States of America*, 947 F 3d 1159 (9th Circuit 2020).

19 GRI Europe Report, p 9.

20 *Ibid* at 7.

21 *Ibid* at 14.

that have so far avoided much public scrutiny, including fashion, aviation and shipping.

There has also been a shift towards personal responsibility for directors and individual actors.[22] For example, in March 2022, ClientEarth, in its capacity as a shareholder, announced that they were taking derivative action against Shell plc's 13 executive and non-executive directors, seeking to hold them personally liable for non-compliance with the Paris Agreement.[23] In perhaps the first ever case of its kind, ClientEarth allege that the board's failure to adopt and implement a climate strategy that is in keeping with the Paris Agreement goal is a breach of the directors' duties under sections 172 (the duty to promote the success of a company) and 174 (the duty to exercise reasonable care and skill) of the Companies Act 2006. A Shell spokesperson said: 'We do not accept ClientEarth's allegations. Our directors have complied with their legal duties and have, at all times, acted in the best interests of the company.'[24] While the claim remains in its early stages, if successful, it is anticipated that this landmark case will set an important precedent, enabling action to be taken against not only businesses, but also the individuals in control.

Risk and opportunity

It can be said with relative certainty that the focus on ESG, and therefore the quantity of this kind of litigation, is only going to increase.

Most climate cases in Europe have had favourable outcomes for the claimants, with 113 judgments from successfully advancing climate action, compared to 86 with unfavourable outcomes.[25]

It goes without saying that involvement in ESG litigation can lead to a decline in reputation and profits: ESG-minded customers may withdraw their patronage, there may be negative press coverage, and penalties from a regulator can be highly damaging. There may even be the potential for criminal investigations.[26]

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22 See, eg, *Ewan McGaughey et al v Universities Superannuation Scheme Limited* [2022] QLC 21.

23 See www.clientearth.org/latest/press-office/press/clientearth-starts-legal-action-against-shell-s-board-over-mismanagement-of-climate-risk/#:~:text=ClientEarth%20starts%20legal%20action%20against%20Shell%27s%20Board%20over%20mismanagement%20of%20climate%20risk,-%E2%80%A2%20First%20of&text=LONDON%20%E2%80%93%20ClientEarth%20has%20today%20started,breach%20of%20their%20legal%20duties accessed 24 April 2023.

24 www.theguardian.com/environment/2023/feb/09/shell-directors-personally-sued-over-flawed-climate-strategy accessed 4 May 2023.

25 GRI Europe Report, p 15.

26 By way of example, in May 2022 German police raided the office of asset manager DWS and Deutsche Bank (its majority owner) as part of an investigation into alleged greenwashing. The companies deny the allegations.

However, this evolving field of law should not be a cause for fear for companies, but rather should be used as an impetus to drive change. Consider the following:

- Conducting risk assessments of current ESG policies: how are these monitored and how are identified issues addressed?
- Reviewing marketing and PR strategies carefully: ensure that the public and interested parties cannot be misled.
- Making sure that targets and commitments are realistic: unachievable ESG claims that turn out to be exaggerated or that are carried out inconsistently may prove to be very costly for companies.
- Mitigating the risk of litigation by anticipating and being prepared for regulatory developments: it is highly likely that there will be more legislation on this area and therefore a greater risk of litigation.
- Understanding how ESG litigation could affect a business by looking to claims faced by others: it is not always about seeking damages but can be about seeking a change of behaviour.
- Ultimately risk avoidance is the key: that will both protect business and help that business to achieve its sustainability goals.

What can lawyers do aside from advising/assisting when clients have a live issue relating to net zero?

The following resources and initiatives may help lawyers to assist their clients.

Chancery Lane Project

In-house lawyers or those within the commercial teams at a business can also access third-party resources, such as the Chancery Lane Project (which Fladgate has signed up to). The Chancery Lane Project is a collaborative initiative of international legal and industry professionals whose vision is a world where every contract enables solutions to climate change.[27] The Project creates new clauses, which can be used in agreements across industries, practice areas and jurisdictions with the intention of delivering climate solutions.

The intention of the Chancery Lane Project is to create free-to-use content that enables businesses and law firms to promote more environmentally friendly practices by means of clauses that passively or actively encourage the parties to the agreement to consider the environmental impact of their actions in implementing an agreement.

27 See https://chancerylaneproject.org/about accessed 24 April 2023.

Lawyers for Net Zero

Lawyers for Net Zero is a network of in-house lawyers, which aims to provide the tools and guidance to assist in-house lawyers in shaping the conversation around the net-zero transition at the organisations at which they work. While law firms and lawyers in private practice are not able to join Lawyers for Net Zero, they can alert in-house counsel to its existence.

Common areas in which the green agenda is starting to have an impact away from regulatory requirements include the following.

Green leases

For some businesses, particularly those that are more institutional, which are looking to attract institutional capital and investment or are more likely to be subject to public scrutiny, there is an increasing focus on whether they should include climate crisis focused provisions in their lease documentation. The form that these provisions can take varies significantly. On one end of the scale, there are 'light green' provisions that require information sharing or other obligations with a climate change focus but that are relatively easy to comply with. At the other end of the scale are 'dark green' provisions, which are much more onerous to comply with. These are likely to require the buy-in of both landlord and tenant before they are incorporated into a lease. Lawyers can assist their clients in bringing to their attention the existence of green lease provisions and guiding them on market practice in this area.

ESG policies

While some businesses have implemented ESG policies due to a market or regulatory requirement to do so, there are other business that are implementing these policies so as to obtain the benefits referred to above. These ESG policies commonly include a net-zero target and other sustainability goals.

Green finance

Lawyers are well positioned to advise their clients on financing arrangements, which includes provisions (eg, margin reductions) if certain covenants that have a net-zero or wider sustainability focus are met by the borrower.

Energy infrastructure

In the UK, the government has set out its intention for the electricity grid in Britain to be net zero by 2035. The UK has already made significant

progress towards the decarbonisation of the grid through the subsidies that were available for the majority of the 2010s and a push to make the UK the largest generator of electricity through offshore wind. The era of subsidies, particularly those that a business that is not focused on energy infrastructure would have been able to benefit from, has largely passed but there are still opportunities for businesses to participate in this area. Such participation could be through the generation of electricity or, for more energy intensive businesses, participation in the demand-side response market (agreeing not to use, or to reduce use of, electricity at specific times so as to avoid demand on the grid that is in excess of supply). Lawyers can advise their clients on the contracts that are commonly entered into in connection with renewable generation assets, battery storage and demand-side response arrangements.

EV charging

The adoption of electric vehicles is rapidly increasing in the UK. According to the Society of Motor Manufacturers and Traders, the sale of new battery electric vehicles saw a year-on-year increase in 2022 as against 2021 of over 40 per cent and is now the second-most popular powertrain behind petrol, overtaking diesel for the first time in 2022.[28] It is clear that consumer appetite for electric vehicles has grown significantly and, when combined with the looming deadline of 2030 for the ban on petrol and diesel cars businesses, particularly those with fleet operations, will need to plan for facilitating the use of electric vehicles. Lawyers can assist their clients by advising on the various agreements that are common to electric vehicle and charging infrastructure sector as well as assisting clients in their arrangements with aggregators and optimisers.

Construction

The construction industry uses a significant number of natural resources and is a material contributor to both climate change and waste. There is, however, a push within the construction industry to adhere to more sustainable working practices and to use more sustainable materials in the construction process. Increasingly, there is a focus within the industry on circularity and resilience, protecting biodiversity and greenhouse gas emission reduction. Lawyers can assist their clients by providing guidance on steps other participants in the sector are taking to make their business practices more sustainable, and advise on clauses within construction and supply chain agreements that promote greenhouse gas reduction and improve sustainability.

28 See www.smmt.co.uk/2023/01/chip-crisis-subdues-new-car-market-but-evs-now-second-only-to-petrol accessed 24 April 2023.

Projects and infrastructure

The Infrastructure and Projects Authority released its Transforming Infrastructure Performance: Roadmap to 2030 in 2021. In the Roadmap there was a focus on sustainability and aligning long-term infrastructure projects with the UK government's statutory commitment to reach net zero by 2050. The private and public sectors will need to work together to deliver solutions to the challenges facing infrastructure projects to decarbonise and improve their sustainability. Lawyers have a role to play in assisting the various participants in the projects and infrastructure sector in understanding and working within the – often complex – contractual framework surrounding a long-term infrastructure project.

Net-zero targets for law firms

Law firms are increasingly putting in place their own net-zero targets. Fladgate, for example, has a target of reaching net zero by 2030. In taking their own steps along the path to net zero, law firms are better able to understand the issues that their clients face in reducing their greenhouse gas emissions. While it is obviously the case that a manufacturing business faces very different challenges and opportunities in respect of its decarbonisation to those of a professional services company, there is still commonality in some of these.

Most businesses will, when seeking to put in place a plan for greenhouse gas emissions reduction, put in place an overall target for reaching net zero. Setting a target year by which a business will be net zero is a relatively easy concept for a business to understand and promote internally and externally. That said, it is important that a business avoids accusations of greenwashing. Simply setting a target without understanding the organisation's overall greenhouse gas emissions and the source of these emissions could result in an unrealistic target or a heavy reliance on carbon offsetting rather than actions that actually cut emissions. Law firms that have already begun this process can provide guidance to their clients as to the initial process using their own experience, as well as advising on relevant regulations.

In improving the sustainability of the economy in the UK and working towards achieving its net-zero target, we cannot rely on a single strategy or rule change. We must use all the tools at our disposal, whether it is encouraging and educating clients on their regulatory obligations; examining their firm's sustainability targets; or assisting parties in understanding and managing the risks around ESG litigation. Lawyers should feel well placed and confident in their ability to help with the challenges and opportunities offered by the transition to a net-zero, low-carbon economy.