7 game-changing trends in **EHS enforcement.**

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Table of contents

Preface 3

Executive summary: Trends in environmental law 5

Trends in environmental law. 8

Trends in chemical safety 18

Trends in OHS 25

What's at stake for your organization? 32

The Enhesa difference and Regulatory Guides 35

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Preface

Enforcement. Of course, we all know that complying with environmental, health, and safety (EHS) regulations is serious business. But in today's compliance climate, enforcement is going through some serious changes – and your business must keep up.

It's defined as the process of making people obey a law or rule or making a particular situation happen or be accepted. In terms of EHS enforcement, it's ensuring that organizations comply with EHS regulations. And as the related requirements continue to evolve, so do the penalties for not following all of the new and changing rules.

With penalties for non-compliance potentially leading to (more) significant monetary losses and reputational damage for organizations, it's critical for EHS leaders to be aware of the current trends shaping today's – and tomorrow's – enforcement space.

In our recent research, we've identified 7 game-changing enforcement trends covering three distinct areas: environmental law, chemical safety, and occupational health and safety (OHS).

Let's dive in!

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Penalties for non-compliance are increasingly leading to (more) significant monetary losses and reputational damage for organizations.

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Executive summary.

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Executive summary:

Trends in environmental law.

1. Bottom-up enforcement.

Organizations must strictly follow all applicable compliance requirements or risk being reported to the authorities by private individuals and NGOs under so-called "bottom-up enforcement" frameworks, which are being pushed by bodies such as the EU.

2. Strengthening criminal liability.

Regulatory bodies and legislators all around the world are working to extend the scope of existing regulations that govern companies' impact on the environment. The result is often a lower threshold for criminal liability that could see anyone responsible for monitoring, supervising, and ensuring compliance with regulations being held accountable for violations.

3. More on-site inspections.

Compliance monitoring is something that most jurisdictions focus heavily on, and continuous monitoring is by far one of the most effective methods for assessing compliance. Regulators know this and thus are looking to increase the frequency of inspections and improve accuracy by relying on technology to transform inspection workflows.

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Trends in chemical safety.

4. Strengthened market surveillance.

Defective products pose a significant risk to the consumer and the environment and risk damaging an organization's reputation. As such, the regulatory spotlight is shining even brighter on product safety, especially in online marketplaces. One example is the EU Market Surveillance Regulation, involving much stricter scrutinization of products entering the market.

5. Demand for sustainable products.

Consumers have been demanding sustainable products, and, in response, organizations are trending towards producing them. However, there are many examples of cases where deceptive and misleading sustainability claims have been made, and these are leading to lawsuits and heavy enforcement action.

Trends in OHS.

6. More rigorous enforcement.

We're seeing a trend of more rigorous occupational health and safety (OHS) enforcement, primarily via the implementation of more frequent and rigorous workplace inspections which focus not only on the 'typical' requirements but also issues that are relatively new, where enforcement measures look at more 'novel' or niche areas, particularly in relation to equality and employee well-being.

7. The bar will keep rising.

As we look ahead to the future, it's clear that standards will continue to rise globally to usher in a new era of environmentalism, consumer safety, and occupational health and safety as countries outside of the Western bubble begin to implement new worker safety standards at a rapid pace.

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Trends in environmental law.

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Trend #1: Bottom-up enforcement.

There has been something of a shift away from public authorities when it comes to enforcement. Nowadays, it's increasingly the case that enforcement is being conducted by private individuals and other private actors such as environmental non-governmental organizations (NGOs).

This is known as the 'bottom-up' approach to enforcement, and in Europe it has become a central element of the EU's efforts to compensate for the lack of effective enforcement of environmental laws and regulations.

Shaping the EU's approach to enforcement

Indeed, the European Commission has even begun to scale back its own public enforcement efforts and has emphasized the importance of civil society in acting as a compliance watchdog and enforcing the European Green Deal.

This could potentially end up being enshrined in law due to the EU's proposal of the so-called *Corporate Sustainability Due Diligence Directive*, which will, if implemented, create a new private enforcement mechanism requiring organizations to allow individuals or NGOs to submit complaints.

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Public enforcement in the Supreme Court of India.

This trend isn't unique to Europe. Bottom-up enforcement is something that has been going on in other countries for decades, most notably India where the majority of environmental law enforcement measures are brought to court thanks to public complaints.

One example is the recent demolition of India's Noida Supertech Twin Towers. The towers were demolished in August 2022 after neighboring residents litigated in protest of non-compliance with approved plans and building regulations by the project's building company.

In short, plans for 14 nine-story buildings were approved by the New Okhla Industrial Development Authority, but as time went by, the project's developers made the buildings bigger and taller, culminating in two additional 40-story towers being built. After almost a decade of litigation, the case eventually found its way to the Supreme Court of India, where demolition of the towers was ordered due to the developer's non-compliance.

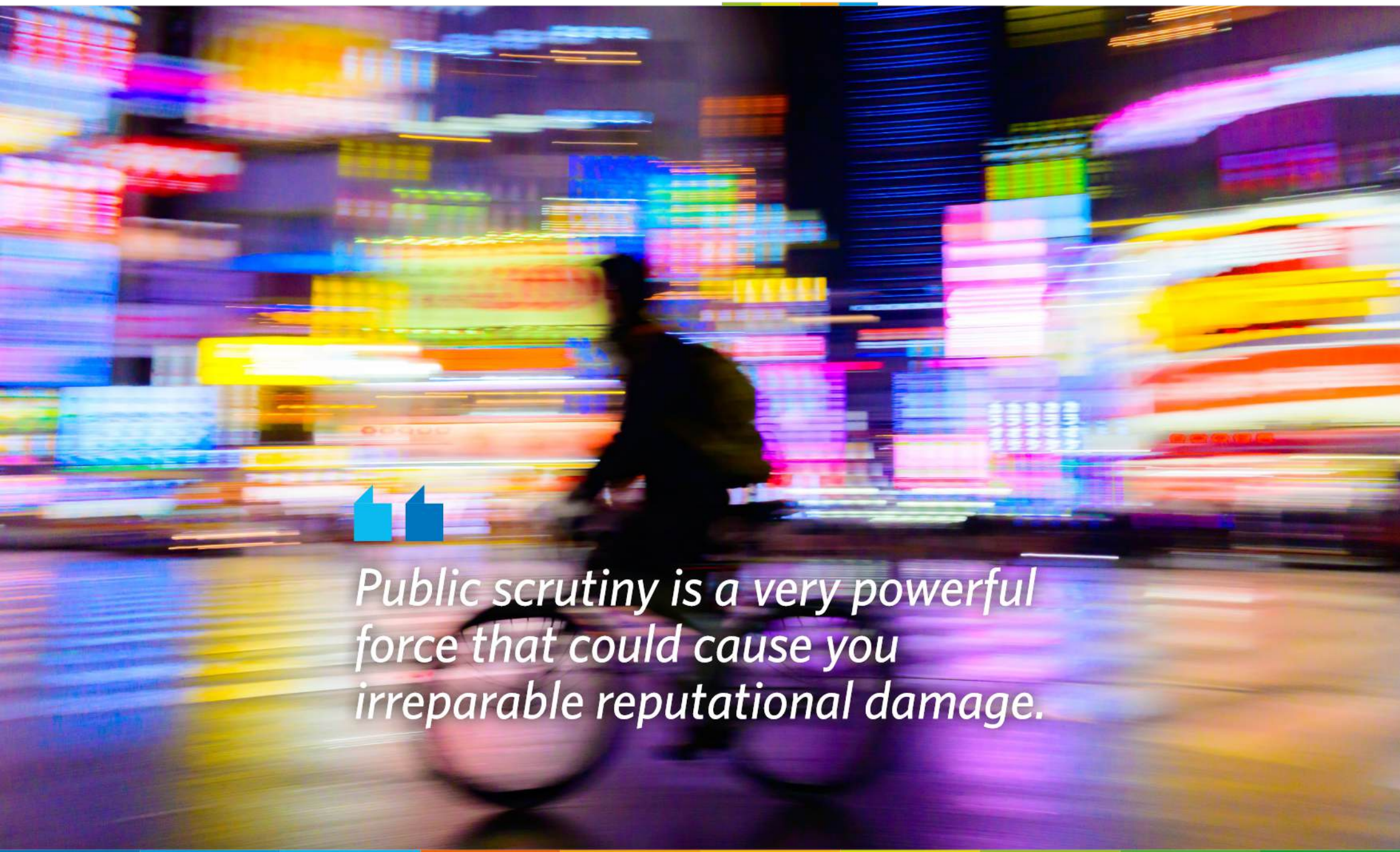
This is a great example of the bottom-up enforcement approach, and organizations should take note. Demolition of the towers inflicted great financial and reputational damage to the construction companies, making it very difficult for them to regain public trust.

The public is watching

The Indian Supertech case highlights exactly why it's imperative for organizations to comply with all applicable requirements. Not only is the government watching all your activities through innovative monitoring and enforcement strategies, but the general public is, too.

Public scrutiny is a very powerful force that could cause you irreparable reputational damage. Certainly, if the public is directly affected due to your non-compliance – but also indirectly as it can take time for some negative impact to be noticed, for instance, with climate change.

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Public scrutiny is a very powerful force that could cause you irreparable reputational damage.

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Trend #2: Greater focus on strengthening criminal liability.

Regulatory bodies and legislators all around the world are working to extend the scope of existing regulations that govern the environment and EHS. The result of this is simple: More activities are being defined as illegal and thus attract criminal sanctions and penalties for organizations that fall foul of their compliance requirements.

The EU Commission, for example, has proposed to introduce new categories of environmental criminal offenses. Under the proposals, new offenses such as illegal timber trade, water abstraction, and ship recycling will be introduced, and Member States will be obliged to support and assist people who report environmental offenses. This, like bottom-up enforcement, increases the likelihood of environmental offenses being discovered and robustly dealt with.

An environmental enforcement task force

The United States is a recent example of a success story when it comes to the concept of environmental justice, and several measures have been implemented on a federal and state level in a relatively short period of time. One of the strategies of the Environmental Protection Agency's newly established Office of Environmental Justice, for example, is prioritizing cases that could reduce environmental crime in underserved communities. To enforce this priority, the current administration is working on establishing an environmental enforcement task force that would coordinate with the Agency to ensure timely and effective remedies for violations.

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Stricter enforcement action

The new US agency hasn't only been strengthening enforcement measures but has also been coming down harder on violators with stricter enforcement action.

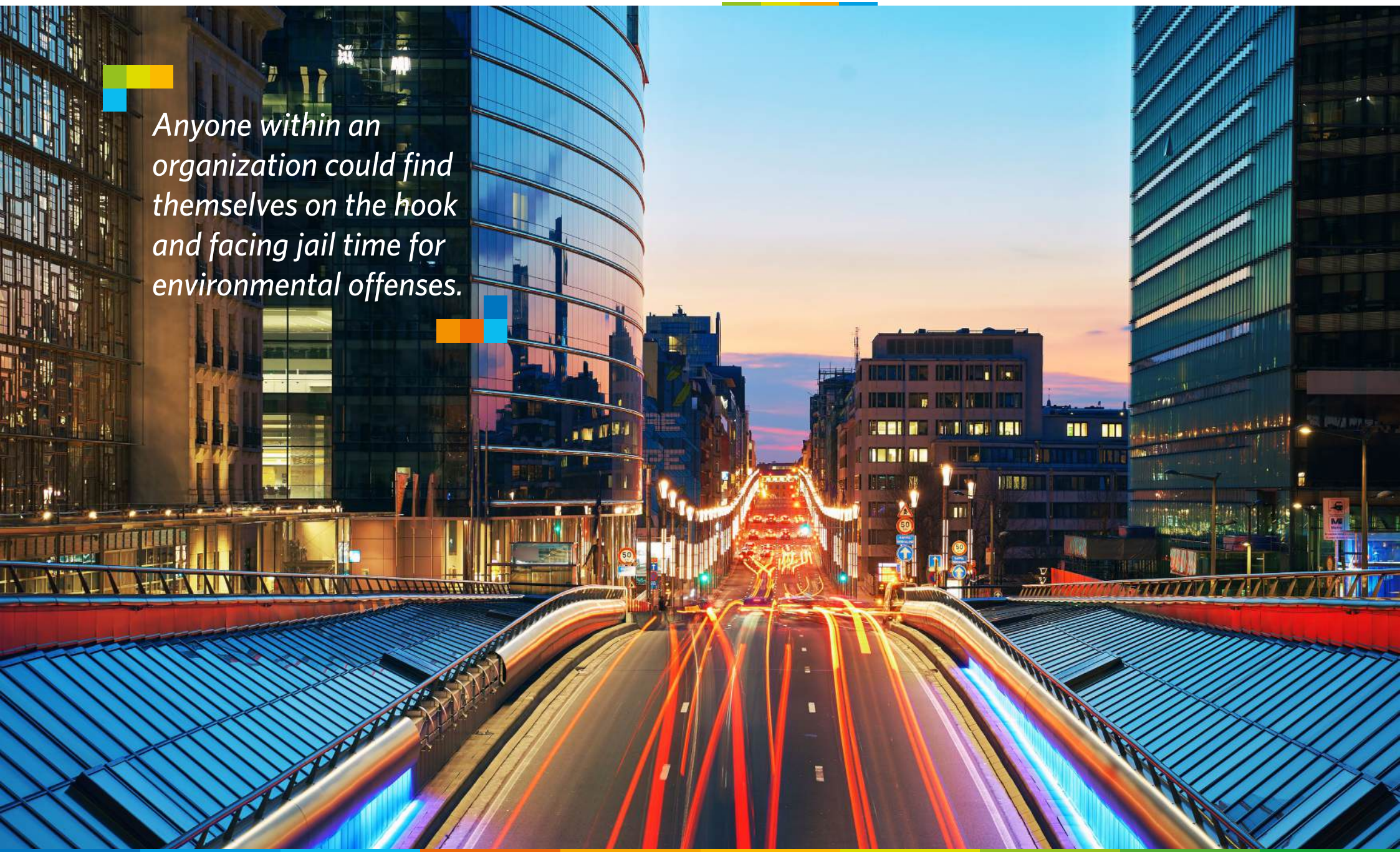
A stark example of this is when a manufacturing organization was found to be routinely violating the conditions of their air emissions and water discharge permits by repeatedly discharging contaminated substances into a river, among other violations.

Following a trial that lasted seven months, the organization and four of its senior managers were hit with criminal convictions for environmental crimes. While the organization was penalized with around US$8 million in fines, the senior managers, including a former human resources manager, were sentenced to prison terms ranging from 6 to 70 months.

This case makes clear that anyone within an organization could find themselves on the hook and facing jail time for environmental offenses.

Anyone responsible for monitoring, supervising, and ensuring compliance with environmental regulations could be held accountable for any violations. This demonstrates how critical it is that everyone works together to ensure compliance with all applicable regulations.

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Trend #3: Rising number of on-site inspections by authorities.

It's clear that authorities around the world are strengthening their enforcement efforts to ensure that organizations are meeting their environmental compliance obligations. To carry out enforcement action, most authorities are focusing on on-site inspections and/or are using new types of technological methods for surveillance.

Examples of such surveillance and enforcement action are plenty. In Argentina, the Ministry of the Environment and Sustainable Development recently carried out inspections to verify organizational compliance with hazardous waste management regulations. Inspectors visited facilities involved in the chemical and petrochemical industries but, in this instance, found that no violations had taken place. Panama is another example where the Ministry of Environment has been growing its team of inspectors who deal with environmental offenses.

One of the biggest recent developments, however, has come from China, where a new national Integrated Pollutant Discharge System (IPDS) has been implemented. The system compels organizations to carry out self-monitoring and inspection, mandating the use of continuous compliance with permit requirements through the likes of self-monitoring and recording, periodic reporting on compliance status, and the disclosure of pollutant discharge information to the public.

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Technologies transforming surveillance

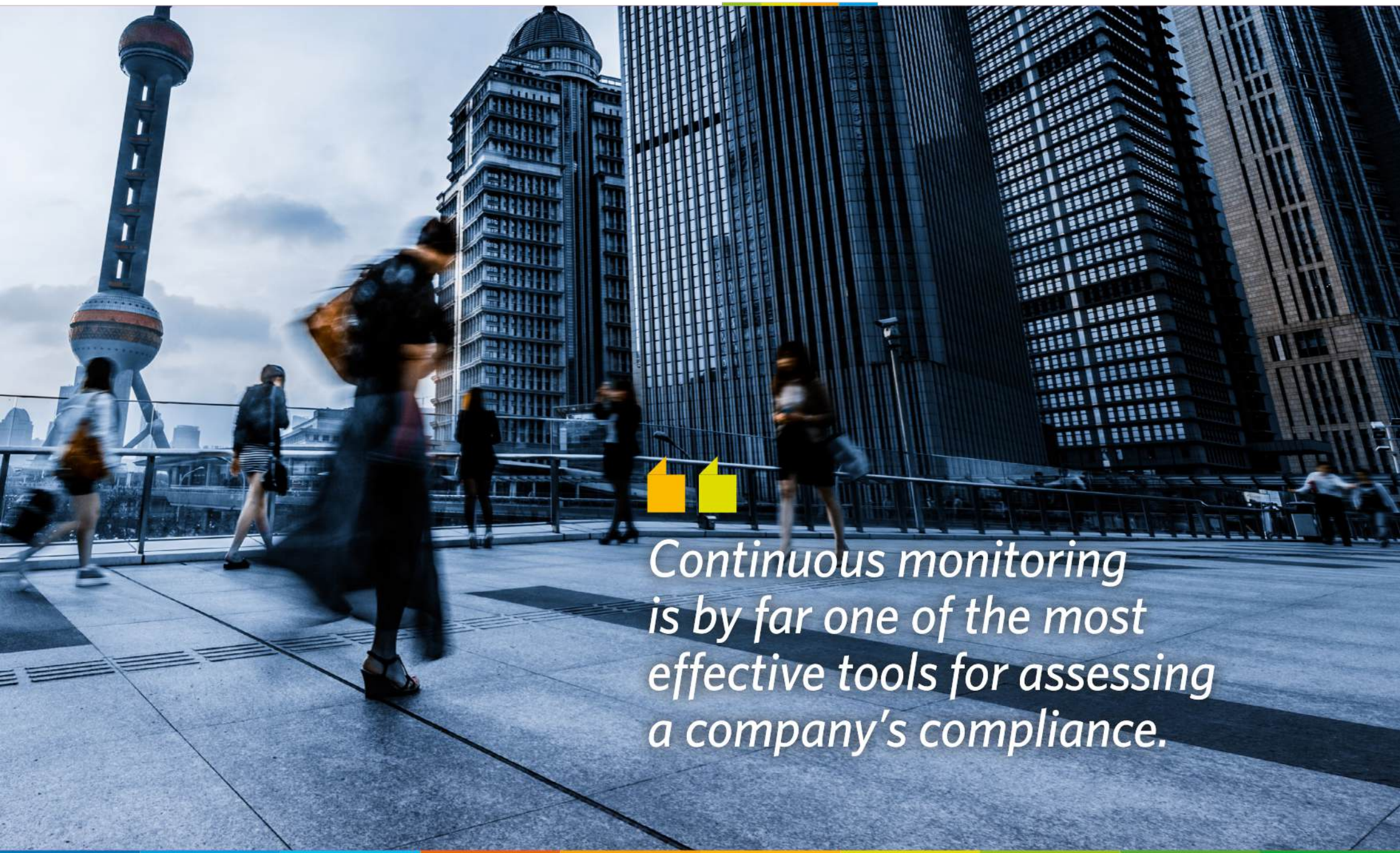
Authorities are relying more on technology to support their surveillance and enforcement efforts, reducing the possibility of instances of non-compliance slipping the net. The Asia Pacific region, in particular, has seen a noticeable uptick in the use of new technologies in the inspection process.

In China, new technologies and tools are being deployed for use in remote inspections. One of the latest trends has seen Chinese organizations compelled to install automatic emissions and effluent monitoring stations, and worksites are regularly being inspected with the use of drones. Meanwhile, in India, authorities are enforcing a nationwide ban on single-use plastics by implementing efficient and rigorous workplace inspections that preclude single-use plastics from existing in inventory, as well as by leveraging the power of bottom-up enforcement by introducing a new app and hotline to allow citizens to report violations.

Compliance monitoring is something that most jurisdictions are beginning to focus heavily on, and continuous monitoring is by far one of the most effective tools for assessing a company's compliance with applicable laws and regulations.



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Continuous monitoring is by far one of the most effective tools for assessing a company's compliance.

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Trends in chemical safety.

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Trend #4: Strengthened market surveillance of products.

The EU Market Surveillance Regulation, which came into force last year, streamlined procedures for controlling products within the European Union and its borders. This includes online trade, which has been identified as one of the European Chemical Agency's (ECA) enforcement priorities for the coming years.

Many countries in Europe have begun to strengthen their surveillance efforts as a result, in a bid to ensure that products entering the EU market, including chemicals, are safe for consumers, workers, and the environment.

Putting non-compliant products under the spotlight

The main impact of the EU Market Surveillance Regulation is that non-compliant products are being put under the spotlight in a much bigger way than ever before.

By way of example, Kemi, the Swedish Chemicals Agency, recently discovered during its retailer inspections that 63% of 1,300 examined biocidal and plant protection products in Sweden didn't comply with the law.

The findings made for grim reading as they showed that 62% of online advertisements lacked mandatory phrasing about 'reading the label' before use and using the product safely. 40% lacked information about hazards, while more than 35% of retailers failed to adequately inform consumers about the risk of pesticides.

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A stricter approach to product safety, globally

It's becoming increasingly apparent that the EU is taking a stricter approach to ensuring that products entering the EU market are safe and that they don't have a negative impact on consumer health or the environment. This isn't unique to the EU, though. It's a trend visible around the world.

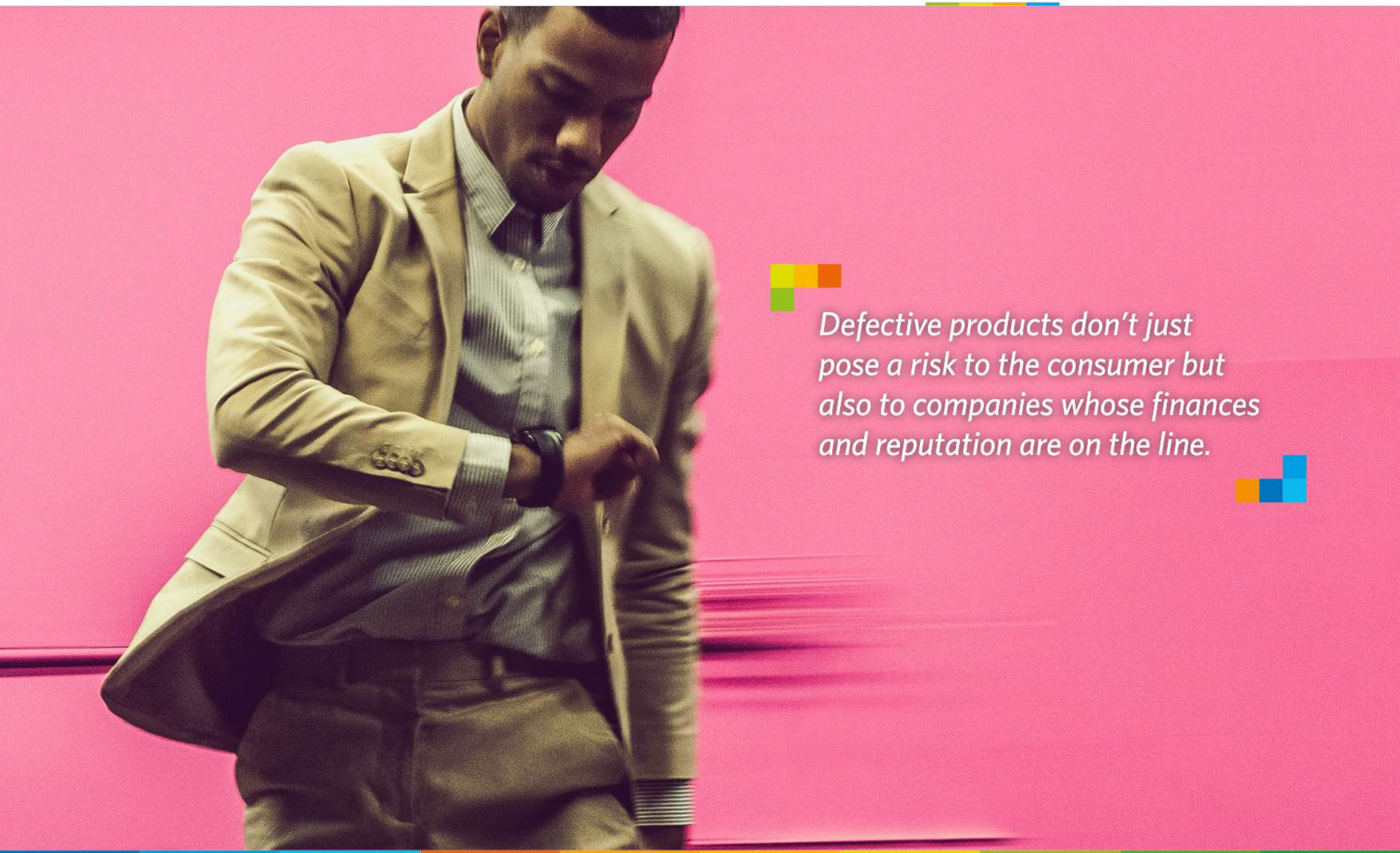
The United States is a prime example of the burgeoning impact of this trend. One billion products were recalled in the US up to August 2022, a "milestone" for want of a better word, that had previously only been surpassed twice – in 2018 and 2021. This is a clear indication of how product safety inspection and enforcement action are increasing as all industries face stricter regulations and must contend with the prospect of large fines and criminal liability for non-compliance.

Market surveillance policies and market dynamism

Although market surveillance policies are developing globally, they're not always able to match market dynamics. An example of this is a recent case whereby 1 million sports smartwatches were recalled due to lithium-ion battery overheating. Although production of the watch ceased in 2020, they were still sold internationally until December 2021.

Defective products don't just pose a risk to the consumer or the environment but also present a significant risk to companies whose finances and reputation are on the line.

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Defective products don't just pose a risk to the consumer but also to companies whose finances and reputation are on the line.

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Trend #5: Demand for sustainable products.

It's hardly a secret that chemical substances are hazardous and can be harmful to both our health and the environment. It's also no secret that they're widely used in consumer products, and several restrictions and regulations exist to negate and limit the impact of chemicals that are used in these products.

All eyes on sustainability

There has been a recent shift in focus, however, and chemical substances are now being looked at more widely, especially in terms of their sustainability and how this is being communicated to consumers. Governments are especially keen to promote product sustainability and restrict the use of chemicals that negatively affect the reusability and recyclability of materials used in the product.

An important element of sustainability requirements is that they provide consumers with all the relevant information on a product's attributes. As such, we've seen that market authorities now have increased regard for product sustainability claims and whether they are truthful.

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Investigating sustainability claims

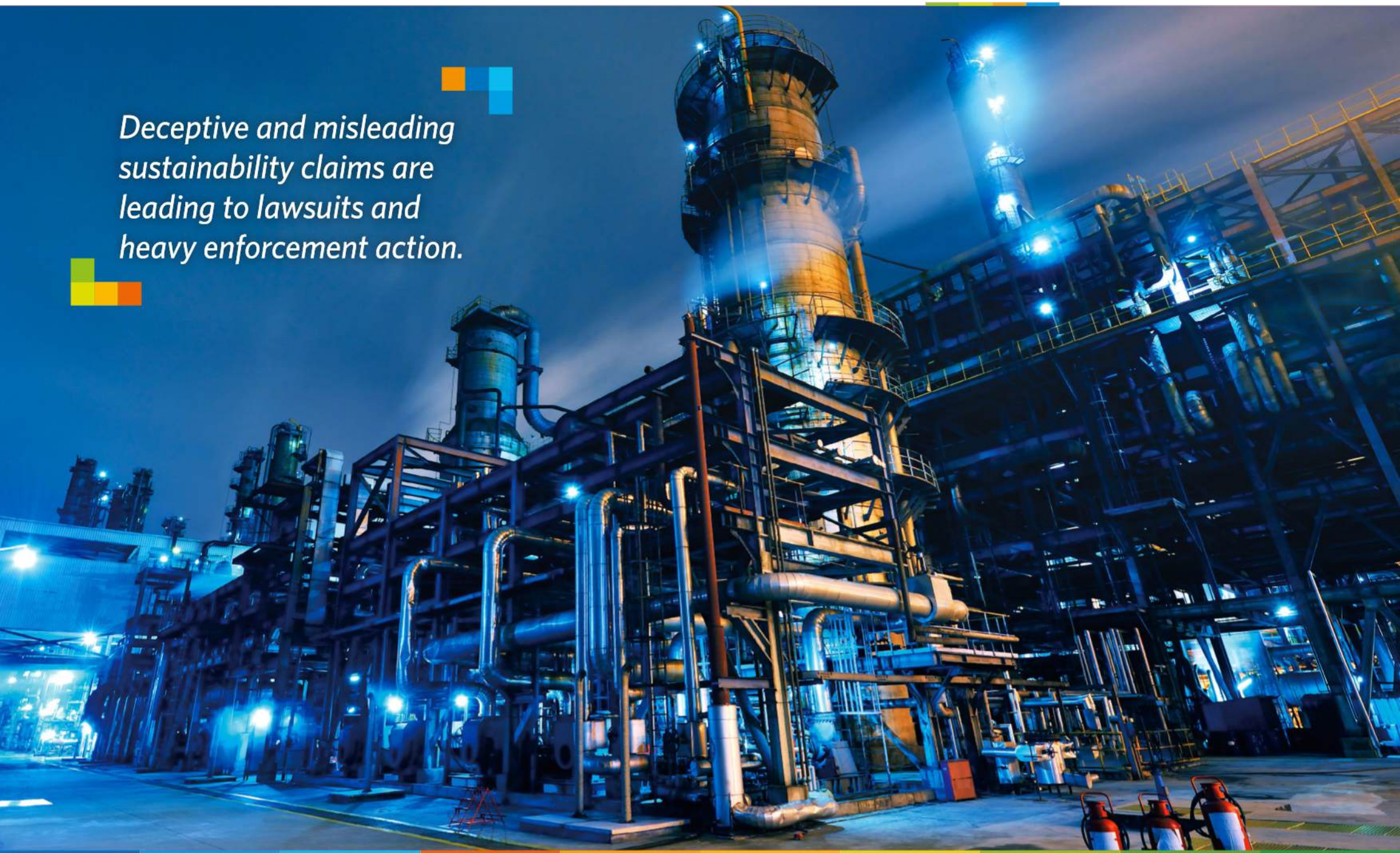
The UK Competition and Markets Authority (CMA) developed the Green Claims Code (GCC) in 2021 for organizations making such claims when selling their products. One year on, the CMA has now launched investigations into green claims made by three fashion retailers in a bid to scrutinize misleading claims on the use of chemicals in products and across the supply chain.

Similar enforcement action has been taken in the Netherlands by the Authority for Consumers and Markets (ACM) against a large sporting goods retailer and a clothing retailer. Following the ACM's investigation, the retailers have committed to removing or adjusting the sustainability claims made on their clothing and websites, in addition to making donations of EUR 400,000 and 500,000, respectively, to sustainability causes to compensate for their unsubstantiated sustainability claims.

It's likely that investigations such as these are likely to increase and expand to other product groups, particularly in Europe, where the EU is playing a leading role in fighting inaccurate claims.

Consumers have been demanding sustainable products, and in response, organizations are trending towards producing them. However, there are many examples of cases where deceptive and misleading sustainability claims have been made, and these are leading to lawsuits and heavy enforcement action.

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Deceptive and misleading sustainability claims are leading to lawsuits and heavy enforcement action.

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Trends in OHS.

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Trend #6: More rigorous OHS enforcement.

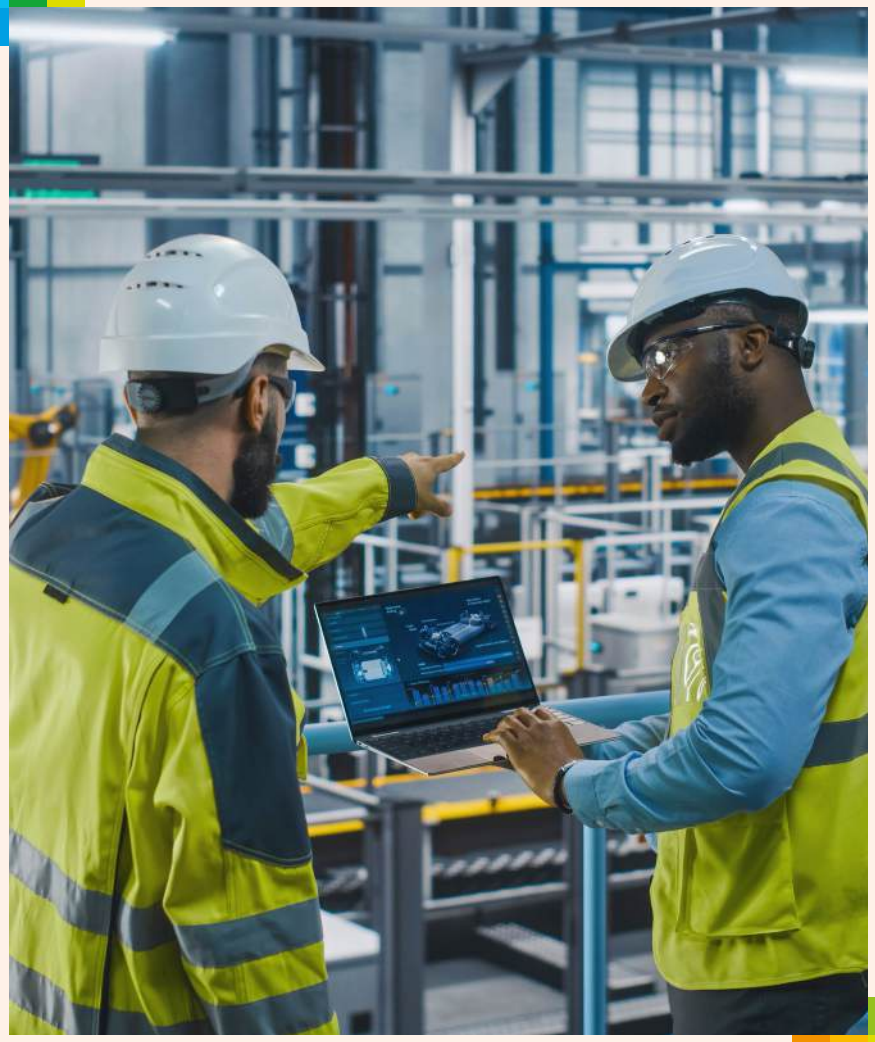
Just like in environmental law, we're seeing a trend of more rigorous occupational health & safety (OHS) enforcement. This is primarily through the implementation of stricter and more rigorous workplace inspections, which focus not only on the 'typical' OHS requirements but also issues that are relatively new.

The more 'typical' targets of OHS inspections include the prevention of lung disease. This is addressed in the EU through legislation that regulates chemicals. In the same vein, the UK has, in the past year, carried out inspections regarding workers' respiratory health when the Health and Safety Executive (HSE) looked at the risk from exposure to dust in the construction industry and welding fumes in the metals industry.

Inspections can also be focused on more novel matters. However, that might be overlooked by employers. A great example of this comes from Panama, where the Ministry of Labor recently reminded organizations of their obligation to provide breastfeeding rooms and announced inspections will follow to verify compliance.



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Workplace inspections

The overall trend we're seeing is that authorities are taking a stricter approach to enforcing OHS laws around the world. This is expected to continue in the near future, especially in the US, where Douglas Parker, an official known for prioritizing workplace safety through aggressive enforcement measures, was recently appointed as the head of the Occupational Health and Safety Administration (OSHA).

OSHA focuses on enforcing programs identified in the National and Regional Emphasis Program, a series of programs that aim to protect the health and safety of workers in higher-risk industries. For organizations operating in these industries, there's likely to be heightened scrutiny of how they're meeting benchmark compliance obligations.

One industry that's currently of special interest to OSHA is the warehousing sector in the Mid-Atlantic states. A five-year initiative has been launched to reduce worker illnesses and injury rates, which have more than doubled in recent years due to the growth of the burgeoning e-commerce sector. Firms operating in this sector should expect more on-site inspections and enforcement measures in the short-to-mid term.

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There's likely to be heightened scrutiny of how companies meet benchmark compliance obligations.

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Trend #7: Raising the regulatory bar.

As we look ahead to the future, it's clear that standards will continue to rise globally to usher in a new era of environmentalism, consumer safety, and OHS. This is perhaps best illustrated by the fact that countries outside of the West are beginning to implement new worker safety standards.

This year, for example, the United Arab Emirates (UAE), a regime that has in the past been criticized for its lax approach to employee safety, introduced new laws and requirements that strengthen the obligations to guarantee a safe workplace for everyone. These requirements vary from protecting young workers and preventing occupational disease to falling exposure to hazardous materials and accidents.

Lebanon has similarly made new strides in worker safety by taking steps to make sexual harassment in the workplace a criminal offense.



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Filling regulatory gaps

Although some jurisdictions have come a long way in implementing and enforcing stricter OHS laws, others are still ironing out the details and playing catch-up.

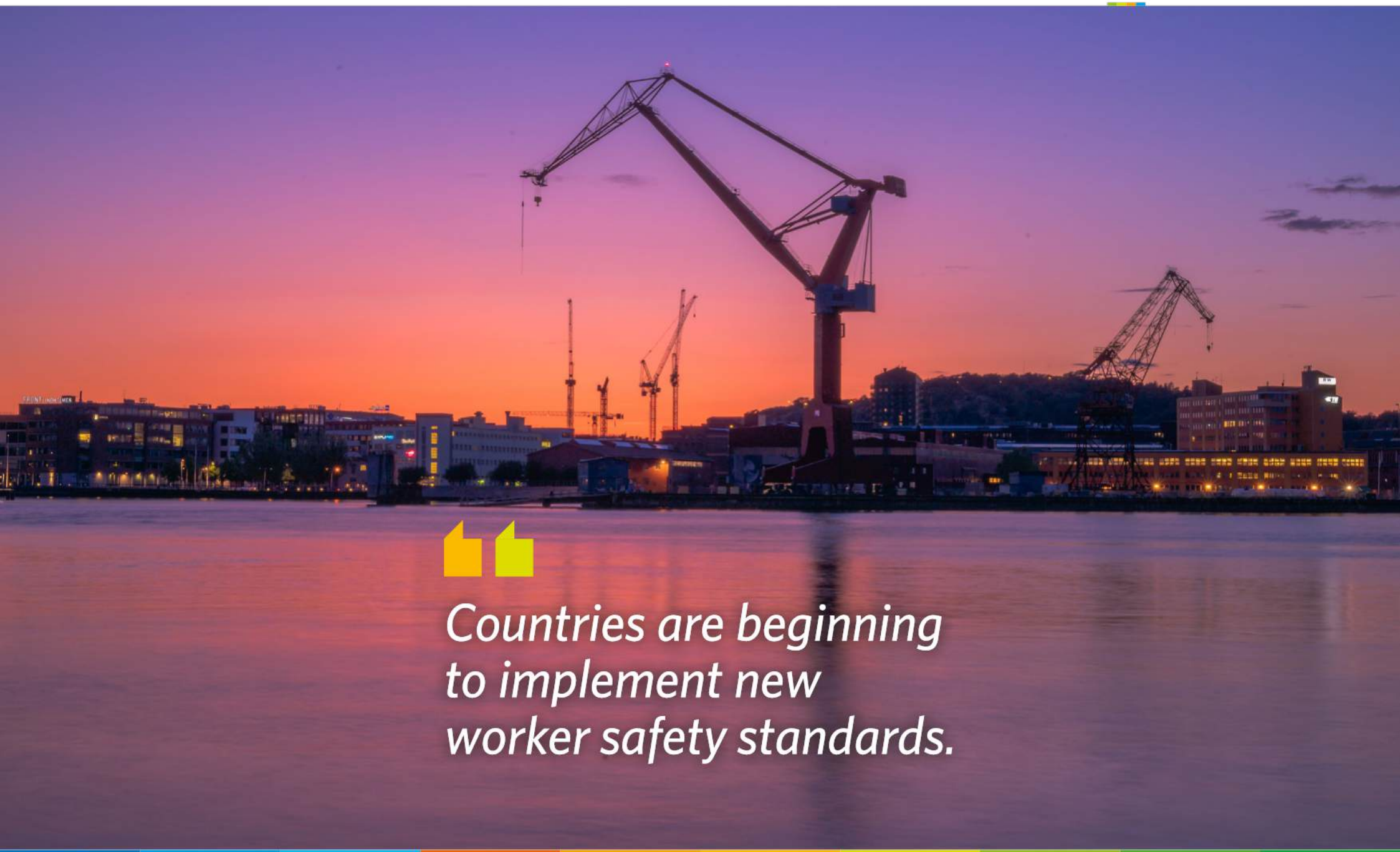
India, for example, currently covers the OHS of workers in hazardous industries. To extend the applicability of its OHS laws to the entire workforce, India has proposed a revamp that will require all companies to provide medical surveillance and report workplace accidents and illnesses, among other things.

In a similar vein, Tunisia has recently joined the Promotional Framework for Occupational Safety and Health Convention. This means that organizations operating in Tunisia will face new compliance requirements as the country's legislators seek to develop additional laws, regulations, and policies for OHS in the near future.

Finally, Quebec has devised stricter health and safety requirements by mandating that organizations implement preventive programs in the workplace. These will compel companies to identify all primary sources of risk and implement measures to mitigate them.

Some jurisdictions have already implemented stricter OHS regulations and enforcement measures. At the same time, many others are in the process of doing so. In jurisdictions where the regulatory framework is still being strengthened, strict enforcement measures are likely to be established once new laws come into force. Organizations must therefore stay up-to-date with the latest regulatory developments and be prepared to pivot around the enforcement measures that follow.

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Countries are beginning to implement new worker safety standards.

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What's at stake for your organization?

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What's at stake for your organization?

Current developing enforcement trends could see organizations facing serious legal action for violations that might have once gone unnoticed - or at least unpenalized. Most notable is the potential for citizens and other private actors to begin enforcement action without warning or prior investigation – something that is being supported by European Union officials who are coming down harder on violators with a growing list of offenses – and in other regions, criminal liability on management rather than solely an organizational level.

Organizations must be aware that they are and will continue to be targets of more rigorous inspections and stricter enforcement. In short, it's becoming increasingly difficult for organizations to escape their mistakes and missteps, and those who find themselves in non-compliance should be prepared for significant punitive action. These include high fines, significant reputational damage, and personal criminal liability for organizational officials who enable – willingly or negligently – non-compliance. For these reasons, it's never been more important for organizational leaders to equip themselves with the knowledge of what's coming in the future and understand how their compliance status stacks up.

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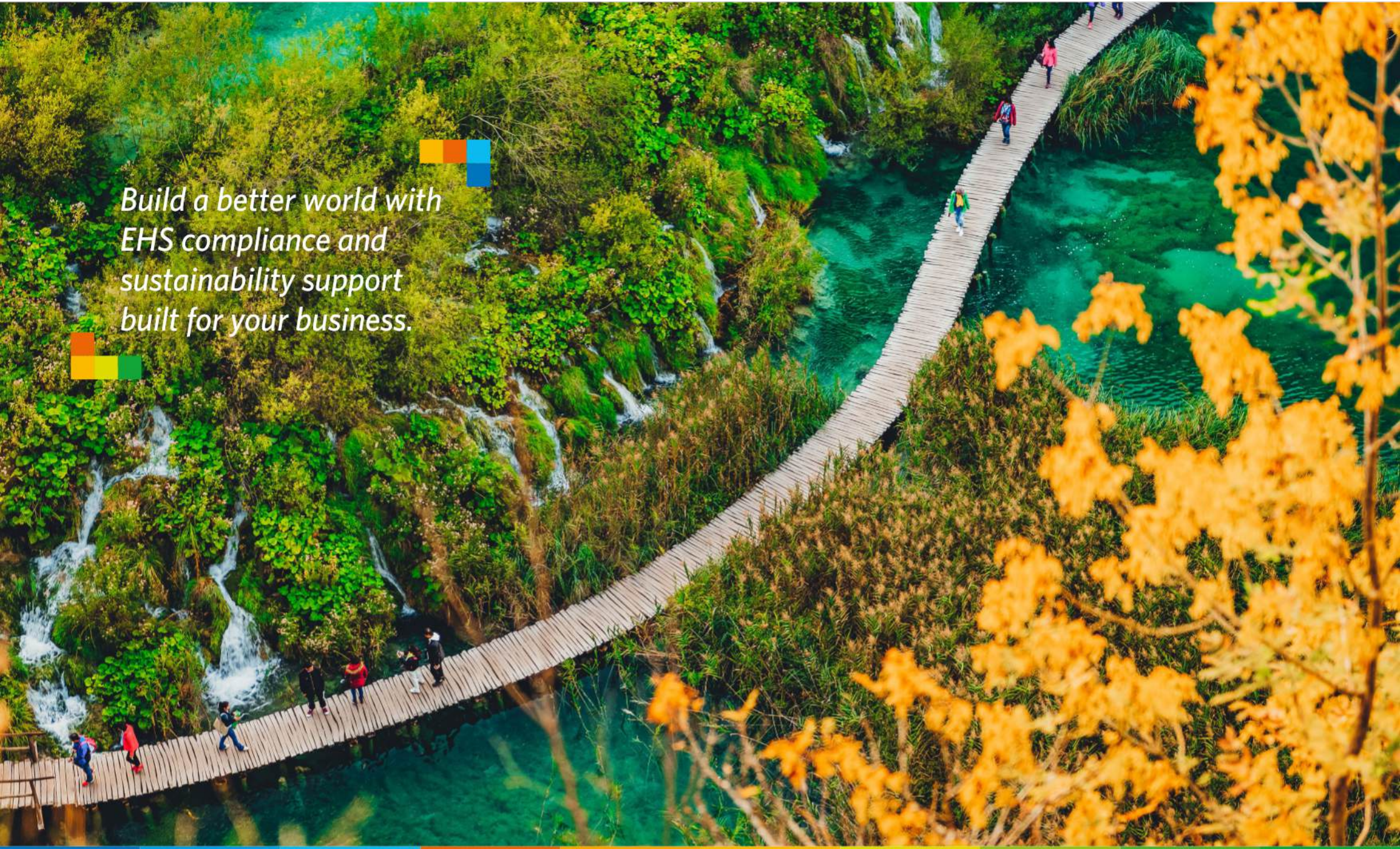
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