

EU PROPOSAL FOR A DIRECTIVE ON GREEN CLAIMS: A FURTHER PIECE OF THE PUZZLE TO PROTECT CONSUMERS FROM "GREENWASHING" IN ADVERTISING

On 22 March 2023, the European Commission (EC) published its proposal for a ["Green Claims Directive"](#) to tackle "greenwashing", by imposing new requirements on environmental claims stopping the proliferation of public and private environmental labels.

THE THREE DRIVERS BEHIND THE PROPOSAL

European consumers' awareness of their environmental footprint and interest in sustainable products is reaching ever new heights. Claiming to be "green" and sustainable has become a competitiveness factor that attracts consumers wanting to make responsible decisions. That is why "greenwashing" in advertising continues to be perceived by the EU as a problem for both consumers and companies.

As Frans Timmermans, Executive Vice-President of the European Commission, responsible for the European Green Deal, said: "*Green claims are everywhere: ocean-friendly t-shirts, carbon-neutral bananas, bee-friendly juices, 100% CO₂-compensated deliveries and so on.*" Can these claims be trusted? According to a study carried out in 2020 by the EC¹ they often cannot.

The EC study finds that 53.3% of the analysed environmental claims (150 in total) provided vague, misleading, or unfounded information about products' environmental characteristics, and 40% were completely unsubstantiated. Moreover, the study identified more than 230 'green' labels, which are subject to different levels of robustness, supervision, transparency, and governance models.

As a result: on the one hand, consumers willing to buy sustainable products from sustainable traders may be prevented from making informed and environmentally-friendly choices when buying products, as they are misled by potentially unfounded green claims, and confused by the proliferation of unregulated sustainability labels and logos; while on the other hand, companies offering truly sustainable products or conducting a truly sustainable

Key issues

- On 22 March 2023, the European Commission (EC) published its proposal for a "Green Claims Directive".
- The proposal is aimed at tackling "greenwashing", by imposing new requirements on environmental claims targeting the proliferation of public and private environmental labels.
- Traders targeting EU customers will be required to conduct an ex-ante third party assessment and communicate the exact environmental aspects, impacts or performance relevant to their products.
- The new rules are hoped to contribute to improving the reliability of the information provided to consumers and facilitate decision making for consumers.
- Stakeholders have until 25 May 2023 to submit their views on the GCDP to the Commission.

¹ See, the Final report on Environmental claims in the EU: Inventory and reliability assessment, EC, 2020 (https://ec.europa.eu/environment/eussd/smgp/pdf/2020_Greenclaims_inventory.zip).

business may suffer from unfair competition and are likely to bear higher compliance costs without seeing the return on their investment.

Protecting, maintaining, and enhancing consumers' trust in the green economy, fighting greenwashing in advertising, and boosting fair competition are the **three main goals** of the new [Green Claims Directive Proposal](#) published on 22 March 2023 (the "GCDP").

With this new proposed piece of legislation, the EC is furthering the ambitions of the European Green Deal and aiming to achieve these three goals by creating:

- 1) harmonised minimum requirements for market participants to provide evidence when making voluntary 'environmental claims', including a resilient system for independent verification of environmental claims,
- 2) an EU labelling scheme, stopping the proliferation of public and private labels, and
- 3) new enforcement procedures and subsequent penalties, in case of non-compliance.

The GCDP covers all voluntary and explicit claims concerning environmental aspects of a product, service, or the market participant itself, to the extent not already covered by existing EU rules (*i.e.*, the EU Ecolabel or the organic food logo) or subject to future EU regulation.

NEW RULES ON GREEN CLAIMS

According to the proposed new rules, before making B2C voluntary environmental claims (such as "*packaging made of 30% recycled plastic*", "*100% eco-friendly*", "*commitment to reduce CO2 emissions linked to the production of this product by 50% by 2030 as compared to 2020*," or similar) companies will be required to:

- conduct an ex-ante assessment to substantiate the environmental impacts, aspects, or performance relevant to their products, which will need to be verified by a third-party assessment body and backed by scientific evidence that is widely recognised (Article 3), and
- communicate the exact environmental aspects, impacts, or performance covered by the claim and the underlying studies or calculation used to assess, measure, and monitor such environmental features (Article 5).

In addition, when making explicit environmental claims that rely on greenhouse gas emission offsets (such as "*carbon compensated ride*" or "*climate neutral*", "*carbon neutral*", "*100% CO2 compensated*", or similar), companies will be required to provide information on what part of that claim concerns their own operations, and what part relies on buying offsets.

By outlawing claims that do not meet the minimum criteria, **the new rules are hoped to contribute to improving the reliability of the information provided to consumers** and facilitate decision-making for consumers seeking products that offer a better environmental performance. In addition, the new rules should **benefit those businesses that make credible statements about the sustainability of their products/services** with supporting evidence, creating a fair competitive market.

THE EU ENVIRONMENTAL LABELLING

The EC proposes tightening controls and enforcement based on certification with independent verifiers. Environmental labels must be transparent, verified by a third party, and regularly reviewed.

New public labelling schemes will not be allowed once the directive is implemented, and new ones will be allowed only if they are in line with EU Law. Existing national or regional environmental labelling schemes may continue to exist if they meet the requirements of the GCDP.

New private labels must provide a "significant added value" when compared to existing national or regional schemes in terms of (i) environmental ambition of the criteria to award the label, (ii) coverage of relevant environmental impacts, and (iii) completeness of the underlying assessment.

Member States are required to establish a corresponding procedure for approval of new labelling schemes. At the same time, existing labels will have to be checked regarding their transparency and regularly assessed in terms of their compliance with the requirements set out in the GCDP.

This new approach will help **control the proliferation** of new labels and **reinforce trust** in existing ones.

MICROENTERPRISES AND NON-EU TRADERS

The GCDP is broad in scope. In order to avoid potential disproportionate impacts, however, microenterprises (*i.e.* fewer than 10 employees and with an annual turnover not exceeding EUR 2 million) will be exempted from the proposed requirements, unless they wish to receive a certificate of conformity for any environmental claims they make.

The framework of the GCDP also extends to traders domiciled outside the EU if and to the extent that they raise claims directed at EU consumers.

ENFORCEMENT AND ACCESS TO JUSTICE

The enforcement approach is two-pronged in that local public authorities may impose fines (*public enforcement*) and qualified entities, *e.g.* consumer organisations, may pursue violations of the GCDP by means of civil litigation (*private enforcement*).

In terms of public enforcement, the EC will require Member States to grant local public authorities powers to **monitor compliance** with the new proposed rules and to **apply penalties** in case of non-compliance.

Penalties for infringements may include

- fines up to 4% of the respective total annual revenue in the affected Member State or Member States, which may be increased in case of widespread infringements that have a Union-wide dimension as well as in case of repeated infringements,
- confiscation of revenues gained by the market participant from a transaction with the relevant products concerned, and
- temporary exclusion from public procurement processes and public funding for up to 12 months.

Local public authority investigations can be triggered by third-party complaints or at their own initiative and can be followed by a first round of Q&A within ten

business days. Authorities may take immediate corrective actions to end the non-compliance as well as impose appropriate penalties should the Q&A not lead to self-correction.

If the enforcement rules are adopted as proposed, companies will need to consider how to address any complaints made by consumers/NGOs swiftly and accurately in order to head off investigations.

Private enforcement is also provided for by the GCDP; Annex I of the Representative Actions Directive² shall be amended to include a reference to the GCDP. This will enable "qualified entities", e.g. consumer protection organisations, to take legal action in civil court to protect the collective interests of consumers.

HOW THE PROPOSED GREEN CLAIMS DIRECTIVE FITS INTO THE EXISTING CONSUMER RIGHTS LANDSCAPE AND THE NEW PROPOSED INITIATIVES

In March last year, the EC proposed to amend two key pieces of EU consumer protection legislation, namely the Unfair Commercial Practices Directive and the Consumer Rights Directive³. The declared goal was to ensure consumers are better informed and better protected against false environmental claims and greenwashing. The GCDP is a further piece of that puzzle. While the Unfair Commercial Practices Directive allows consumers, NGOs, and authorities to challenge environmental claims once made, forcing companies having made such claims to provide evidence to prove them *after* a claim has been made, the new GCDP requires companies to make this effort *before* making an environmental claim.

The GCDP echoes many of the principles included in most of the existing green claims guides which offer voluntary guidelines for businesses wishing to use green marketing techniques (see, for example, the [UK Green Claims Code](#), the [US proposed amendments to the existing Green Guides](#), or the Italian IAP rules). The EU initiative takes things one step further. Principles such as truthfulness, accuracy, unambiguity, and substantiation will become mandatory for companies when making environmental claims.

WHO PAYS?

Businesses wishing to make environmental claims will have to bear the costs of certification and substantiation upfront. Estimating the costs of compliance to the new proposed rules is difficult to predict at this stage. The EU's main point is that using green marketing techniques will be part of each company's marketing strategy and, therefore, companies can control their own costs, as they will determine the type of environmental claim to make and for how many products, and the scope of the claim (if any) considering its expected return on investment.

However, it would be unfortunate if costs of certification and substantiation lead to businesses not making perfectly valid claims or, even worse, to go silent on their green credentials altogether to avoid the risk of being exposed to scrutiny and penalties⁴, as that would defeat the goal of facilitating the

² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

³ See our blog [here](#).

⁴ This phenomenon is known as green-hushing or green-bleaching. The term was first applied by academics in 2008, but this attitude seems to be spreading in recent times: according to a 2022 survey carried out by South Pole, one out of four companies surveyed having set science-

ability of consumers to make more informed choices. Therefore, we should hope for competition to play its role in the market for accreditation and for costs to decrease over time.

In terms of competition, additional transparency may also benefit businesses living up to their (truly) environmental claims, especially if they are perceived by consumers as clear, transparent, and reliable. This will not just have an impact on consumer consumption choices at the point of sale but should also shine a positive light on the companies behind the environmental claims and labels.

CONCLUSIONS AND NEXT STEPS

When (and if) the new rules come into force, all environmental claims targeting EU consumers will need to comply with the above requirements. Claims that do not meet these minimum criteria will have to be removed. The EU appears to have realised that the existing volume of green claims is too large to be checked ex post and has chosen instead to reset and start over in this area.

The EC's proposal will now be discussed by the Council and the European Parliament. This process will allow for the introduction of amendments, a process that normally takes at least 18 months. The European elections in the spring of 2024 create a timing challenge for the institutions, however, as they must either swiftly pass the legislation in early 2024 before the legislature ends or carry over the proposal to the new legislature. If and when adopted, the proposed Green Claims Directive must be transposed into the Member States' national legislation.

Stakeholders have until 25 May 2023 to submit their views on the GCDP to the Commission. Should you wish to discuss making a submission, please contact a member of the team listed at the end of this briefing or get in touch with your usual Clifford Chance contact.

based emission reduction targets, are choosing not to declare them (see, [Going green, then going dark – One in four companies are keeping quiet on science-based targets, Web Page, 18 Oct. 2022](#)).

AUTHORS



Carolina Piovano
Senior Associate

T +39 02 8063 4277
E carolina.piovano
@cliffordchance.com



Dr. Stefan K. Lohn
Counsel

T +49 211 4355 5366
E stefan.lohn
@cliffordchance.com



Maximilian Sondermann
Associate

T +49 211 4355 5368
E maximilian.sondermann
@cliffordchance.com

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Clifford Chance, Junghofstraße 14, 60311
Frankfurt am Main, Germany

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CONTACTS



Dr. Thomas Voland
Partner

T +49 211 4355 5642
E thomas.voland
@cliffordchance.com



Tim Rose
BD Manager

T +49 211 4355 5241
E tim.rose
@cliffordchance.com



Jeroen Ouwehand
Partner

T +31 20 711 9130
E jeroen.ouwehand
@cliffordchance.com

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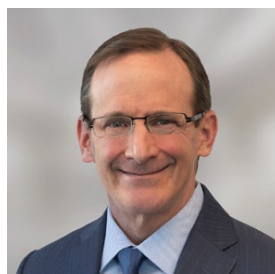
Clare Burgess
Partner

T +44 207006 1727
E clare.burgess
@cliffordchance.com



Angela McEwan
Partner

T +31 20 711 9142
E angela.mcewan
@cliffordchance.com



Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg
@cliffordchance.com



Nigel Howorth
Practice Area Leader
T +44 207006 4076
E nigel.howorth
@cliffordchance.com



Lily Marcel
Partner
T +44 207006 4158
E lily.marcel
@cliffordchance.com



Roger Leese
Partner
T +44 207006 8710
E roger.leese
@cliffordchance.com



Nadia Kalic
Partner
T +61 2 8922 8095
E nadia.kalic
@cliffordchance.com



Michael Coxall
Knowledge Director
T +44 207006 4315
E michael.coxall
@cliffordchance.com



David Alfrey
Lawyer
T +44 207006 4559
E david.alfrey
@cliffordchance.com



Anna Kirkpatrick
Senior Associate
T +44 207006 2069
E anna.kirkpatrick
@cliffordchance.com



Michelle Williams
Partner
T +1 202 912 5011
E michelle.williams
@cliffordchance.com



Gail Orton
Head of EU Public Policy
T +33 1 4405 2429
E gail.orton
@cliffordchance.com