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Sense and Sustainability: Is the new Green Claims Directive going to advance the cause of green consumerism?

By David Nagode

'Eco-friendly' and 'climate-neutral' have become beloved phrases when it comes to marketing and labelling of everyday products. Apparently to such an extent that companies have decided to include such stickers on the packaging of their products, without actually doing, i.e. contributing anything towards the fight against climate change. This 'eco-frenzy' has gone so far that inherently environmentally unsustainable products and services are marketed as 'eco-friendly', such as [airline flights or plastic bags](#). The European legislator has finally responded and proposed the so-called [Green Claims Directive](#). This piece of legislation seeks to combat greenwashing commercial practices by harmonising the requirements and labelling schemes of Member States. From the consumer's perspective, greenwashing is not merely a matter of preference; it is a question of credibility. Under current regulations, companies can often evade their environmental commitments, with the European Commission estimating that [40% of such claims](#) are entirely unsubstantiated. For consumers, who truly strive towards more sustainable consumer habits 'to wish was to hope, and to hope was to expect' (Jane Austen, *Sense and Sensibility*). Will the Green Claims Directive improve consumer confidence regarding green claims?

The legislative framework – The European Green Deal and the Unfair Commercial Practices Directive

In a legislative framework sense, the [European Green Deal](#) is the authoritative text and, coincidentally, the basis for legislation regulating the circular and sustainable economy. It sets out a comprehensive strategy to transform the EU into a climate-neutral, clean, and circular economy ([Staff Working Document, p. 5](#)). In order to achieve this, the concepts of production and consumption require a reorientation. [Directive 2005/29/EC](#) concerning unfair business-to-consumer commercial practices in the internal market ('UCPD') is the preferred piece of legislation to achieve the above-mentioned objectives from the *business* side of the business-to-consumer (B2C) relation.

Greenwashing is a by-product of information campaigns from public authorities and NGOs, by awakening the sense for sustainability and environmentally friendly actions in consumers ([Horiuchi and Schuchard, p. 9](#)). What companies did in response was to use environmental terminology on a wide variety of their products, regardless of the fact that their products are intrinsically not beneficial for the environment. In essence, greenwashing is the dissemination of disinformation used by a business to convince consumers that said business is socially responsible in terms of the environment ([Jakubczak and Gotowska, 2020](#)). Such practices can be considered as textbook examples of a misleading commercial practice, which is precluded by the UCPD (Article 5). However, the process of regulating other areas included in the green transition, e.g., energy efficiency labels or reducing CO₂ emissions, has proven to be [more cumbersome than originally expected](#).

The root of the problem from the business side is one of regulatory framework failures ([Staff Working Document, p. 10](#)). There are no specific rules requiring producers to provide information regarding sustainability dimensions, which would inform the consumer. As the current regulatory framework stands, there is nothing explicitly preventing businesses from using general statements or even implicit claims to try and convince the consumer that their products have no or little impact on the environment. In other words: determining unfair commercial practices, if a producer is selling his product in a green

packaging with the words 'climate neutral', is left to national legal orders (see the [Drogeriemarktkette dm case](#)). In terms of a holistic and Union-level approach, the European legislator should establish clear rules determining what is permitted, what is forbidden and what is a possible 'grey' area, where commercial practices would have to be evaluated on a case-by-case basis.

The UCPD has proven to be flexible up to a point. Under the present version of the UCPD, the Commission has issued a [notice](#) on the application of the UCPD, where 'green claims' have also been addressed. According to the notice, circumstances in which the UCPD should be applied can include all types of statements, information, symbols, logos, graphics and brand names, and their interplay with colours, on packaging, labelling, advertising, in all media (including websites) and made by any organisation, if it qualifies as a 'trader' and engages in commercial practices towards consumers ([Commission Notice, p. 72](#)). In the following paragraphs, the Commission clearly states that the UCPD does not provide specific rules on environmental claims. Articles 6 and 7 UCPD contain provisions on misleading actions and omissions, where green claims must be truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner, so that consumers are not misled. Effectively, consumers must be able to trust the environmental claims on products. Thus far, we find ourselves in the classical field of protecting consumers against unfair commercial practices.

How is the UCPD applied in such cases?

The most obvious case is, when a trader or producer make claims about their product, without any scientific backing or if the executed tests prove to be inconclusive. Imagery and overall product presentation are also included. As soon as the product is overstating its achieved benefits with excessive use of green colours, trees or animals, this might prove to be a case for the UCPD. The more problematic case is, when an excessively vague or general statement on environmental benefits is used (e.g., 'climate neutral', 'green', 'eco-friendly', etc.). In such cases, it is necessary that such vague claims cannot be misunderstood in any other way than the way the trader intended. In some cases, even

the factual correctness of the claims may not stand in the way of subsuming it under an unfair commercial practice.

Considering omissions, i.e. omitting valuable information from the consumer, Article 7 UCPD covers vague and general sentences. In that light, such claims are less likely to be misleading if they are supplemented by prominent specifications or explanatory statements on the product's environmental impact. Claims must also be attributed to the product itself, not to general environmental practices of the producer or trader. In both above-mentioned cases, the UCPD is an instrument used on a case-by-case basis, but still a *lex generalis* since it covers *all* voluntary business-to-consumer commercial practices. While the new Green Claims Directive should address misleading environmental claims, it should be considered as a *lex specialis*, complementing the general consumer *acquis*.

The Green Claims Directive

According to the former Executive Vice-President for the European Green Deal, [Frans Timmermans](#):

'Many Europeans want to contribute to a more sustainable world through their purchases. They need to be able to trust the claims made. With this proposal, we give consumers the reassurance that when something is sold as green, it actually is green.'

The preliminary text of the proposed [Directive on substantiation and communication of explicit environmental claims](#) ('the Green Claims Directive'), adopted in March 2023, is currently with the Council of the European Union ([Article 294 TFEU](#)). As the former Commissioner Timmermans stated, it seeks to tackle false environmental claims by giving the consumers information of better quality, already in the stage before completing a transaction. The Green Claims Directive is essentially part of the consumer *acquis* and simultaneously empowers consumers for the green transition ([Factsheet Empowering Consumers, March 2022](#)). According to the Commission, Articles 169 (consumer policy) and 114 ('internal market clause') TFEU are the most pertinent legal basis for the adoption

of the Green Claims Directive. Effectively, it aims to eliminate obstacles to trade ([C-491/01 Ex p. BAT, para. 64-5](#)).

What the proposed Directive seeks to implement is the provision of reliable, comparable, and verifiable environmental information, which include clear criteria on substantiating environmental claims. Such claims will also have to be scrutinised by an independent and accredited verifier. As a final measure, new rules on governance on transparency and reliability will be adopted. In the internal market, there are currently around 230 sustainability labels in all Member States, which naturally causes fragmentation and frustration in cross-border activities (Staff Working Document, p. 17).

Key provisions and terminology of the Green Claims Directive

The proposal consists of three essential elements: introducing the concept of 'green claims', setting requirements for business to substantiate claims, and establishing environmental labelling schemes ([Carreño, p. 608](#)). 'Green claims' or environmental claims are already defined in [Article 2, point \(o\)](#) of the [proposed amendment](#) of the UCPD, which has yet to be adopted. Luckily, the term 'environmental claims' seems to be consistently elaborated as any non-mandatory message or representation – text, image, symbol, label, brand, company, or product name – that suggests a product or trader has a positive or neutral environmental impact or is more environmentally friendly than others (see [Commission's Proposal on empowering consumers](#)).

Claims made by businesses shall be scrutinised according to Article 3 of the Green Claims Directive. Article 3 requires traders to make certain specifications and clarifications about the statements they use. Firstly, the specification regarding the nature of environmental claims – if this is related or accurate for the whole product or just part of it. Secondly, such claims must be based on recognised scientific evidence and, thirdly, these claims cannot be made if they are simply requirements made by law.

As regards environmental labelling schemes, the lack of EU-wide harmonisation of this particular area of labelling left the power to legislate and implement to Member States. This, in turn, lead to roughly [230 different labels](#) connected to environmental claims across

the EU. The Green Claims Directive would prohibit any additional labels being implemented on a national level. Article 8(3) spells out that all new national or regional labelling schemes shall not be permitted, unless they comply with existing EU legislation and meet the requirements set out in Article 8(2). Existing labelling systems are permitted, as long as they fulfil the same requirements. These requirements are, in essence, conditions regarding scientific accountability, stakeholder participation in the creation of the scheme, and participation of SMEs in labelling schemes. The Commission is also tasked with creating a list of officially recognised environmental labels that are allowed to be used on the Union market, pursuant to Article 8(3)–(5).

Consumer's reality – a case of common sense or genuine misleading?

The European Commission is continuously striving toward empowering consumers and ensuring that this also contributes to the green transition and achieving the goals [of the EU and UN environmental agendas](#). But is the average consumer *mised* to a point where legislative intervention is necessary? Referring back to the title of this post, does the average consumer not have enough *sense* to know when environmental claims are not true?

The results from the Commission's market research included in the [Staff Working Document](#) on empowering consumers for the green transition and [preparatory studies](#), in 2019, 33% of consumers agreed that 'changing the way we consume' was the most effective way to tackle environmental problems. According to the [Commission's estimates](#), approximately 40% of non-food products have voluntary sustainable or environmental labels. About a quarter of consumers identified 'difficulty to verify the reliability of environmental claims (including climate related) on products' (25%) as a key obstacle that prevents them from adopting more sustainable consumption behaviours. There would seem to be a considerable body of consumers, who are susceptible to environmental claims. Considering 53% of green claims give vague, misleading, or unfounded information, there is arguably a clear mandate for legislative intervention.

In light of these statistics, there is a considerable argument that environmental claims be treated as 'material information' for the average consumer (Article 7(1) UCPD) – omitting

them would be a breach of the Article 7 UCPD. This should, however, become immaterial, since the Green Claims Directive will be a Union rule regulating specific aspects of unfair commercial practices (Article 3(4) UCPD). Information requirements in commercial communication (including advertising or marketing) established by Union law are regarded as 'material' and will be subsumed under Article 7(4) UCPD.

Conclusion

The question whether consumers tend to be genuinely misled by traders with statements of 'eco-friendly' or 'CO₂-neutral' claims is to be answered by the European legislator with a new set of rules presented as a *lex specialis* of the Unfair Commercial Practices Directive. In the words of [Commissioner Reynders](#):

'If we do not start consuming more sustainably, we will not achieve our European Green Deal goals – it is as simple as that. While most consumers are willing to contribute, we have also seen an increase in 'greenwashing' and early obsolescence practices. To become the real actors of the green transition, consumers must have a right to information to make sustainable choices. They must also be protected against unfair commercial practices which abuse their interest in buying green.'

The Green Claims Directive certainly empowers consumers on paper, by ensuring the claims on products will be covered by actual scientific evidence and not just meagre marketing statements. Accordingly, if we accept that the consumer's (common) sense is no longer enough to distinguish between valid and misleading environmental claims – the Green Claims Directive is certainly necessary from a consumer protection point of view. Consumers, or at least a subgroup of them, are entitled to expect their wishes and hopes be fulfilled by these legislative proposals.