

Focus on Greenwashing: The Latest Regulatory Proposals in the EU and the UK

The latest proposals show the direction of travel in the increasingly expanding web of consumer protection regulation on sustainable products and initiatives.

Background

The European Green Deal, presented by the European Commission (EC) in December 2019, sets out broad proposals to make the EU's climate, energy, transport, and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels, and transform Europe's economy into a greener, more resilient, and circular system. To reach this goal, the European Green Deal emphasised the need to mobilise private financial and capital flows to green investments, catalysing the rise of private investment in the sustainable finance sphere and the proliferation of "green" products and services.

A range of interconnected legislative developments swiftly followed. The EU Taxonomy Regulation¹ introduced an EU-wide classification system of environmentally sustainable activities. The Sustainable Finance Disclosure Regulation (SFDR)² imposed transparency and disclosure requirements relating to financial products for financial market participants and financial advisers. The Benchmark Regulation³ addressed accuracy and integrity of indices used as benchmarks in financial instruments or to measure the performance of investment funds. The Corporate Sustainability Reporting Directive (CSRD)⁴ will introduce wider sustainability reporting requirements on companies within the block.

Latest Regulatory Proposals

On 22 March 2023 the EC published a [proposal](#) for a directive on green claims (the Proposed Directive), an initiative under the European Green Deal umbrella.⁵ The overarching objective of the Proposed Directive is to (1) outline the first set of detailed EU rules on the substantiation of voluntary green claims made in the context of business-to-consumer commercial practices, applicable to all traders operating in the bloc and (2) target instances of alleged "greenwashing". This development reflects the growth in green claims made by traders who are responding to not only additional regulatory scrutiny, but also consumer demand for environmentally friendly products.

The Proposed Directive focuses on customers. Complementary initiatives are underway in the financial sphere, including the development of a voluntary standard for bond issuers that wish to use the "green"

designation in the EU.⁶ A European Securities and Markets Authority (ESMA) consultation is also underway on amending the SFDR and developing guidelines on fund names that use ESG or sustainability-related terms, expected later in 2023.⁷

To date, “greenwashing” has not been legally defined, but the term is broadly understood to refer to making false or misleading claims about sustainability or environmental compliance/performance. The Proposed Directive’s preamble recognises that claiming to be green and sustainable has become a competitive factor, with green products registering greater growth than standard products in the EU in recent years. In this growing market, the EC hopes that the Proposed Directive will provide a useful guide for businesses regarding best practices in this area and enable consumers to make informed decisions based on reliable information about the sustainability of products.

This Client Alert discusses key elements of the Proposed Directive and the implications for businesses operating in the EU. The Alert also analyses the latest developments in the UK for the benefit of companies operating in multiple jurisdictions.

The Proposed Directive

In 2020, a study commissioned by the EC found that a substantial proportion of environmental claims (53.3%) “provide vague, misleading or unfounded information about products’ environmental characteristics across the EU and across a wide range of product categories (both in advertisement as well as on the product)”.⁸ In light of this, the issue of greenwashing rose in prominence on the EC’s agenda.

As such, the EC started with a proposal for a directive on empowering consumers in the green transition (the Green Transition Directive), which includes a series of modifications of the Unfair Commercial Practices Directive⁹. More specifically, if enacted in the form proposed by the EC, the Green Transition Directive would introduce requirements to ensure that businesses do not mislead consumers about environmental and social impacts, the durability and reparability of products, and make fair comparison claims or claims related to future environmental performance.

It would also introduce: (1) a ban on displaying a sustainability label that is not based on a certification scheme or established by public authorities; (2) a ban on generic environmental claims used in marketing where performance cannot be demonstrated in accordance with EU Ecolabel,¹⁰ officially recognised eco-labelling schemes in the Member States, or other applicable Union laws; and (3) a ban on making environmental claims about an entire product, when the supporting evidence for such a claim only concerns a certain aspect of the product.

The Proposed Directive seeks to complement the Green Transition Directive and would introduce measures aiming to ensure that:

1. methods used to substantiate environmental claims are reliable and sufficiently specific to help avoid misleading omissions and trade-offs between environmental impacts;
2. claims about future performance are made rigorously, regularly monitored, and transparent;
3. if products or traders are compared with other products and traders, these comparisons are fair and based on comparable information and data;

4. the way the claim is communicated allows for transparency towards consumers and other stakeholders and does not overstate benefits; and
5. environmental labels are reliable, transparent, third party-verified, and that the process for developing and updating them is transparent.

Scope

As set out in Article 1, the Proposed Directive would apply to explicit environmental claims made with respect to products available on the EU market (including those made available on the EU market by non-EU businesses) and to environmental claims of traders that provide activities in the EU market. It does not intend to amend any other EU legislation that already establishes requirements in terms of information provided to consumers. Therefore, if other EU legislation establishes specific rules on environmental claims for a particular sector or activity (e.g., the EU Ecolabel), those rules will prevail over those in the Proposed Directive.

Methodology Requirements

Article 3 establishes certain methodologies that traders would need to use to collect evidence to substantiate any environmental claim that they make. In their assessment, traders would need to:

1. specify if the claim relates to the whole product or part of the product, or all activities of the trader or part of the activities of the trader;
2. rely on widely recognised scientific evidence;
3. demonstrate that environmental impacts, aspects, or performance are significant from a life-cycle perspective;
4. take into account all environmental aspects of impacts that are significant to identify environmental performance;
5. demonstrate the claim is not equivalent to requirements imposed by law;
6. provide information on comparisons to other products or traders in the relevant sector;
7. identify whether improving the environmental impacts subject to the claim leads to significant harm to other environmental impacts;
8. separate greenhouse gas emissions offsets used from greenhouse gas emissions and provide further detail in relation to any offsets used; and
9. include primary information, and relevant secondary information if primary information is unavailable.

These requirements would not apply to what the EU defines as microenterprises,¹¹ unless such businesses seek to receive a certification of conformity from the relevant Member State authority (see below).

There are also specific rules under Article 5 that relate to the communication of explicit environmental claims. These rules would require that, among other things, any claims relating to future environmental performance of a product or trader must include a time-bound commitment for improvements inside own operations and value chains. Further, they would require that if the claim's accuracy is contingent on a

certain use of the product by a consumer, that such use is made clear alongside the claim. In addition, specific information relating to the product or trader that is covered by the claim would need to be made available alongside the claim, in physical form or via weblink, QR code, or otherwise.

Notably, earlier drafts of the Proposed Directive contained detailed provisions for environmental footprint methods allowing measurement of the environmental performance of a product or organisation throughout the value chain, from the extraction of raw materials to the end of life. These provisions faced opposition from industry bodies and are absent in the final draft. Based on the outcome of the consultation, the EC observed that the methods do not yet cover all relevant impact categories for all product types and may therefore give an incomplete picture of the environmental credentials. The EC ultimately concluded that prescribing a single method as the standard methodology of substantiation for all environmental claims would not be appropriate and would pose a risk for traders not being able to communicate on relevant environmental aspects or performance in relation to their products or activities. However, the EC reserved the power to adopt delegated acts to complement the requirements on substantiation for certain types of claims in the future.

Comparative Claims

Comparative environmental claims¹² would face additional restrictions under the Proposed Directive. For example, the data used to make the comparative environmental claims would need to be equivalent with respect to its source, scope, and coverage of environmental impacts. In addition, comparative claims would be prohibited to the extent that they are made against the environmental credentials of another product from the same trader or from a competitor no longer selling to consumers, unless the claim is based on evidence proving that the improvement is significant and was achieved in the last five years.

Governance and Transparency

Articles 7 and 8 set out information on environmental labels and labelling schemes. More than 200 environmental labels were in operation across the EU when the Proposed Directive was published. The Proposed Directive would tighten controls on the further proliferation of such labels by prohibiting new public national and regional environmental labelling schemes as of its entry into force. The EC would need to approve a new labelling scheme if a Member State wished to introduce one. Private labels face no outright prohibition, but any new labels would only be permitted if the provider can prove to the competent Member State authority that the new label adds value.

Labelling schemes would also be required to comply with certain governance and transparency requirements. The award of the label and ongoing monitoring would need to be made by a party that is independent from both the label owner and the operator being verified. Finally, labels with aggregated scores (i.e., a total “environmental” score across a number of metrics) would be prohibited.

Ongoing Monitoring

Article 9 requires a regular review of, and updates to, environmental claims no later than five years from the date of the underlying studies or calculations.

Articles 10 and 11 introduce the obligation for Member States to set up a verification system to substantiate environmental claims by independent verifiers, if such independent verifiers are to be recognised by the competent authorities responsible for enforcing the Proposed Directive.

Enforcement

Enforcement and monitoring under the Proposed Directive would be Member State-led. Article 17 provides that, when determining the type and level of penalties to be imposed for breaches of the Proposed Directive, Member States would need to consider:

1. the nature, gravity, extent, and duration of the infringement;
2. the intentional or negligent character of the infringement, if applicable;
3. the financial strength of the natural or legal person held responsible;
4. the economic benefits derived from the infringement;
5. any previous infringements;
6. any other aggravating or mitigating factor applicable in the circumstances; and
7. penalties imposed on the trader for the same infringement in other Member States in cross-border cases, if applicable.

Penalties would include fines (with increasing fines for repeated infringements), confiscation of revenues from a transaction involving the relevant products, and temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering processes, grants, and concessions.

Member States would have two years from the date of the Proposed Directive's implementation at the EU level to transpose it into national law. As explained above, the Proposed Directive is closely linked with the review of Unfair Commercial Practices Directive, proposed by the EC in March 2022, and it is expected that the Proposed Directive and the Green Transition Directive may be transposed jointly.

Developments in the UK

Regulators in the UK have also been looking at greenwashing and drafting proposals to ensure that consumers are protected and companies comply with guidance to avoid any allegations of greenwashing. Both the Competition and Markets Authority (CMA) and the Advertising Standards Authority (ASA) have been particularly active in this space.

The CMA and the ASA

In September 2021, the CMA published the Green Claims Code — a guide to help businesses understand how to communicate their green credentials, while avoiding the risk of misleading shoppers.¹³ Notably, the CMA's Annual Plan consultation 2023 to 2024 focuses on “an effective transition to net zero” and addressing “possible greenwashing.”¹⁴

The Green Claims Code guidance sets out principles that are designed to help businesses comply with the law. It gives examples of how each principle applies and provides more detailed case studies in which multiple principles apply. For example:

1. claims must be truthful and accurate;
2. claims must be clear and unambiguous;

3. claims must not omit or hide important relevant information;
4. comparisons must be fair and meaningful;
5. claims must consider the full life cycle of the product or service; and
6. claims must be substantiated.

The UK's independent advertising regulator, the ASA, has the power to enforce the Consumer Protection from Unfair Trading Regulations 2008 and has been active in pursuing alleged greenwashing claims. It administers the requirements for advertising in the UK Code of Non-Broadcast Advertising and Direct and Promotional Marketing and the UK Code of Broadcast Advertising (the CAP and BCAP Codes). If the CMA were to identify a consumer protection law issue relating to advertising, it could refer the issue to the ASA to consider rather than take enforcement action of its own. The principles in the Green Claims Code are intended to be consistent with the requirements of the CAP and BCAP Codes.

Moreover, the UK government could introduce a new digital markets, competition, and consumer bill that would give the CMA's enforcement powers more teeth. Under such bill, greenwashing companies could face civil penalties of up to 10% of global turnover, and individuals could face fines of up to £300,000 for breaches of consumer law.¹⁵

So far, the CMA has been focusing on industries it has identified to be at particular risk of greenwashing. Notably, in July 2022, the CMA launched a review of the sustainability claims of three major UK fashion brands.¹⁶ CMA officials clearly indicated that they may scrutinise additional companies across the fashion industry and that if they find businesses are using misleading eco claims, the CMA would not hesitate to take enforcement action — including through the courts if necessary.

In January 2023, the CMA further announced that once it completes its current review, it will move on to claims in the travel, transport, and “fast-moving consumer goods” sectors — particularly food, cosmetics, and household cleaning products.¹⁷ The CMA will analyse environmental claims made about such products — both online and in store — to consider whether companies are complying with UK consumer protection law.

Consumer protection is also a priority for the financial markets regulator. In its Sustainability Disclosure Requirements Consultation Paper, the Financial Conduct Authority (FCA) introduced rules to combat greenwashing and increase transparency and trust in sustainable investing. The Consultation Paper is a vital step in implementing the UK government's Greening Finance Roadmap¹⁸ and informing investors and consumers on best practices. The Consultation Paper constitutes a comprehensive proposal addressing several areas: sustainable investment labels, disclosure requirements, an anti-greenwashing rule, and restrictions on using sustainability-related terms in product naming and marketing.¹⁹

“Soft” Law

In addition to legislative developments, companies should be aware of soft law instruments, which, although not legally binding, may give rise to serious reputational risk in the context of greenwashing. In addition to the advertising standards mechanism discussed above, in recent years NGOs in the UK have used the national contact points (NCP) complaints mechanism under the Organisation for Economic Co-operation and Development (OECD) to allege that misleading green claims constitute breaches of OECD guidelines. Given that soft law forums are often more accessible for consumer groups and claimants, we

expect to see these complaints mechanisms continue to have relevance in the greenwashing discussion, notwithstanding the increasing proliferation of specific legislation.

Conclusion

Analysis of the regulatory activity across the EU and the UK shows that greenwashing remains a significant focus for all stakeholders in the sustainability market. Companies with strong green credentials can attract significant customer interest, creating a premium value relative to their competitors. On the other hand, allegations of greenwashing can carry serious consequences, most notably on companies' reputation and market standing. ESG litigation and related claims and complaints have proliferated in Europe and beyond.

Companies should be aware of best practices and the multiple binding rules in the pipeline to ensure they are vigilant with their products and marketing efforts.

Latham & Watkins will continue to track global developments in this fast-moving area.

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Endnotes

- ¹ Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable lending.
- ² Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector.
- ³ Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ((EU) 2016/1011).
- ⁴ Directive (EU) 2022/2464.
- ⁵ Directive (EU) 2023/0085.
- ⁶ <https://www.consilium.europa.eu/en/press/press-releases/2023/02/28/sustainable-finance-provisional-agreement-reached-on-european-green-bonds/>
- ⁷ <https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-funds%E2%80%99-names-using-esg-or-sustainability-related>
- ⁸ Directive (EU) 2023/0085.
- ⁹ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information COM(2022) 143 final.
- ¹⁰ Regulation (EC) 66/2010.
- ¹¹ Businesses with fewer than 10 employees or a turnover of under €2 million.
- ¹² Those environmental claims that state or imply that a product or trader has less environmental impacts or a better environmental performance than other products or traders.
- ¹³ <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>
- ¹⁴ <https://www.gov.uk/government/consultations/competition-and-markets-authority-annual-plan-2023-to-2024-consultation/cma-annual-plan-consultation-2023-to-2024#areas-of-focus-for-2023-to-2024>
- ¹⁵ <https://www.theguardian.com/environment/2023/feb/19/greenwashing-firms-face-steep-new-uk-fines-for-misleading-claims>
- ¹⁶ <https://www.gov.uk/government/news/asos-boohoo-and-asda-investigated-over-fashion-green-claims>
- ¹⁷ <https://www.gov.uk/government/news/cma-to-scrutinise-green-claims-in-sales-of-household-essentials>
- ¹⁸ <https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing>
- ¹⁹ At the core of the FCA consultation paper is a proposal to introduce three sustainable investment labels: (1) sustainable focus; (2) sustainable improvers; and (3) sustainable impact which together would guide the appropriate description and qualifications of various instruments and avoid greenwashing pitfalls. The FCA envisages that each of the product types will deliver a different asset profile and risk appetite to meet consumer preferences. Only labelled funds will be allowed to use certain sustainability-related phrases.