Misleading green claims


2.5. Misleading environmental claims

2.5.1. Introduction / Definition

The expressions "environmental claims" or "green claims" refer to the practice of suggesting or otherwise creating the impression (in the context of a commercial communication, marketing or advertising) that a product or a service, is environmentally friendly (i.e. it has a positive impact on the environment) or is less damaging to the environment than competing goods or services. This may be due to, for example, its composition, the way it has been manufactured or produced, the way it can be disposed off and the reduction in energy or pollution which can be expected from its use. When such claims are not true or cannot be verified this practice can be described as "green washing".

Consumers may weigh environmental considerations when purchasing products. Increasingly, in planning their advertising and marketing campaigns traders are taking these factors into account and environmental claims have become a powerful marketing tool. However, in order for environmental claims to be informative for consumers and to be effective in promoting goods and services with lower environmental impacts, it is imperative that they are clear, truthful, accurate and not misleading. They must also not emphasise one environmental issue and hide any trade-offs or negative impacts on the environment. The use of truthful environmental claims is also important in order to protect traders who make genuine claims from unfair competition from those traders who make unfounded environmental claims50.

There is no EU legislation specifically harmonising environmental marketing. Environmental claims are partly covered by specific community legislation regulating the environmental performance of a category of products and prohibiting the misleading use of the claim, logo or label used in reference to this specific legislation. These laws provide for specific rules which take precedence over the broader provisions of the Directive as explained in section 1.9 above. Examples of such legislation are given in Section 2.5.2 below.

Outside those aspects covered by specific EU legislation, the general provisions of the Directive are to be used when assessing environmental claims and establishing whether a claim is misleading either in its content or in the way it is presented to consumers.

This was highlighted when, on 4 December 2008, the Environment Council adopted conclusions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan. Under point 18 of the conclusions, the Council "INVITES the Member States to fully implement the Directive on unfair commercial practices with regard to environmental

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50 See for example the recent survey on Green expectations – Consumers' understanding of green claims in advertising, by Consumer Focus, where it appears that 58% of consumers they consulted think that a lot of companies pretend to be green just to charge higher prices. To be consulted under:
http://consumerfocus.org.uk/en/content/cms/Publications___Repor/Publications___Repor.aspx
claims; INVITES the Commission to include environmental claims in any future guidelines on the Directive on unfair commercial practices”.

2.5.2. Overview of specific EU legislation on environmental claims

(a) Organic labels are defined and regulated under Regulation (EC) n°834/2007 which provides for a list of terms and abbreviations (such as "bio" or "eco") that can be used in the labelling, advertising material or commercial documents of products which satisfy the requirements set out under this Regulation.

The misleading use of such labels is prohibited under article 23 of the Regulation:

"2. The terms referred to in paragraph 1 shall not be used anywhere in the Community and in any Community language for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out under this Regulation, unless they are not applied to agricultural products in food or feed or clearly have no connection with organic production.

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used.

3. The terms referred to in paragraph 1 shall not be used for a product for which it has to be indicated in the labelling or advertising that it contains GMOs, consists of GMOs or is produced from GMOs according to Community provisions.”

The Regulation also provides for rules concerning processed food and for compulsory indications and logos.

(b) Energy labelling is regulated by Directive 92/75/EEC. Household appliances offered for sale, hire or hire-purchase must be accompanied by a fiche and a label providing information relating to their consumption of energy (electrical or other) or of other essential resources. Misleading use of such labels is prohibited under article 7(b) of the Directive:

"if this is likely to mislead or confuse, the display of other labels, marks, symbols or inscriptions relating to energy consumption which do not comply with the requirements of this Directive and of the relevant implementing directives is prohibited. This prohibition shall not apply to Community or national environmental labelling schemes”.

53 The proposal of a recast of Directive 1992/75/EEC is currently at the final stage of the legislative process. When it enters into force, it will give a mandate to the Commission to adopt labeling measures on specific products. The scope of the labeling Directive will be extended to all energy-related products which, when offered for sale, hire or hire-purchase, will have to be accompanied by a fiche and a label providing information relating to the product's energy consumption and, if relevant, other resources. The well-known A-G scale (and for fridges, A+ and A++ classes) will remain in use, with the possibility to open the scale up to classes A+/A++/A+++ and the consumers will, at all times, be aware of the best available class on the market as the Directive will require that the dark green color should always indicate the best class. Unauthorized use of the label will be prohibited and Member States will be able to put in various penalties in this
(c) The labelling of tyres will be regulated by the Regulation on the labelling of tyres with respect to fuel efficiency and other essential parameters\textsuperscript{54} which provides that tyre manufacturers will have to declare the fuel efficiency, wet grip and external rolling noise performance of C1, C2 and C3 tyres (i.e. tyres mainly fitted on passenger cars, light and heavy duty vehicles). From 1 November 2012, these performances will be displayed at the point of sale by means of a label in printed format displayed in the immediate proximity of the tyres at the point of sale or a sticker attached to the tyre tread. According to Article 4 and 5 of the Regulation, the performance of tyres will also have to be stated on or with the bill delivered to endusers when they purchase tyres as well as on technical promotional literature such as catalogues, leaflets or web marketing.

(d) Fuel and CO2 labelling: under Directive 1999/94/EC\textsuperscript{55} a fuel economy label must be displayed next to all new passenger cars at the point of sale. This label must be clearly visible and meet certain requirements set out in Annex I. In particular, it must contain the official data on fuel consumption, expressed in litres per 100 kilometres or in kilometres per litre (or in miles per gallon), and of CO2 emissions in g/km.

Article 7 provides that "The Member States shall ensure that the presence on labels, guides, posters or promotional literature and material referred to in Articles 3, 4, 5 and 6 of other marks, symbols or inscriptions relating to fuel consumption or CO2 emissions which do not comply with the requirements of this Directive is prohibited, if their display might cause confusion to potential consumers of new passenger cars."

Besides this, Annex IV provides for prescriptive rules regarding promotional literature for cars:

"The Member States must ensure that all promotional literature contains the official fuel consumption and official specific CO2 emissions data of the vehicles to which it refers. This information should, as a minimum, meet the following requirements:

1. be easy to read and no less prominent than the main part of the information provided in the promotional literature;

2. be easy to understand even on superficial contact;

3. official fuel consumption data should be provided for all different car models to which the promotional material covers. If more than one model is specified then either the official fuel consumption data for all the models specified is included or the range between the worst and best fuel consumption is stated. Fuel consumption is expressed in either liters per 100 kilometers (l/100 km), kilometers per liter (km/l) or an appropriate combination of these. All numerical data are quoted to one decimal place.

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\textsuperscript{54} The Regulation was adopted on 25 November 2009. It should be published in the OJ beginning of January 2010 and will enter into force 20 days after its publication.

Such values may be expressed in different units (gallons and miles) to the extent compatible with the provisions of Directive 80/181/EEC.

If the promotional literature only contains reference to the make, and not to any particular model, then fuel consumption data need not be provided."

(e) Fuel mix disclosure is required by the Electricity Directive 2003/54/EC\(^6\) which provides for an obligation on Member States to ensure that electricity suppliers specify in or with the bills and in promotional material made available to customers:

"(a) the contribution of each energy source to the overall fuel mix of the supplier over the preceding year;

(b) at least the reference to existing reference sources, such as web-pages, where information on the environmental impact, in terms of at least emissions of the CO2 and the radioactive waste resulting from the electricity produced by the overall fuel mix of the supplier over the preceding year is publicly available."

With respect to electricity obtained via an electricity exchange or imported from an undertaking located outside the EU, aggregate figures provided by the exchange or the undertaking in question over the preceding year may be used.

(f) Eco-labels may be awarded to products which meet certain environmental requirements during the life cycle of the product under Regulation 1980/2000\(^7\) (currently being recast).

Article 10(1) of the recast new Regulation provides that "Any false or misleading advertising or use of any label or logo which leads to confusion with the Community Ecolabel shall be prohibited".

2.5.3. The Directive and misleading environmental claims

The Directive does not provide for specific rules in relation to environmental marketing and advertising. However, its provisions apply to all claims made in the context of business-to-consumer commercial practices, including those related to the environment.

As stated in Recital 10 of the Directive, it indeed "provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products".

The Directive does not discourage the use of green claims and provides a legal basis to make sure that traders use green claims in a credible and responsible manner. The application of the provisions of the Directive to environmental claims can be summarised in two main principles:


(a) Based on the Directive's general clause, traders must, above all, present their green claims in a specific, accurate and unambiguous manner;

(b) Traders must have scientific evidence to support their claims and be ready to provide it in an understandable way in the case that the claim is challenged.

2.5.4. Annex I prohibits certain misleading environmental claims

Under Annex I of the Directive ("black list"), the following practices are always considered unfair, and therefore prohibited, regardless of the impact they have on the consumer's behaviour:

- n°2: displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
  Example: using any community or national label (e.g.: Nordic Swan label, Blue angel, or NF environment) without authorisation.

- n°4: claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
  Example: claiming that a product has been approved by an environmental agency, an NGO or a standardisation body when this is not the case.

- n°1: claiming to be a signatory of a code of conduct when the trader is not;
  Example: a trader displaying on his website that he is a signatory of code of conduct relating to the product's environmental performance when this is not the case.

- n°3: claiming that a code of conduct has an endorsement from a public or other body which it does not have.
  Example: a trader claiming that the code of conduct of his car-manufacturing company is endorsed by the national environment agency, ministry or a consumers' organisation when this is not the case.

2.5.5. The application of the Directive's general provisions to misleading environmental claims

Under Article 6(1) (a) and (b) of the Directive:
"a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (...) and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise", in relation to one or more of the following elements: "(a) (...) the nature of the product; (b) the main characteristics of the product such as its (...) benefits, risks, composition, (...) method (...)of manufacture, (...) fitness for purpose, (...) geographical or commercial origin or the results to be expected from its use, or the results and material features or tests or checks carried out on the product;"

This provision applies to commercial communications including environmental claims (such as text, logos, pictures and use of symbols). It provides for a case-by-case assessment of the practice, the content of the environmental claim and its impact on the average consumer's purchasing decision.
Two different situations may occur:

(i) Objective misleading practice: the environmental claim is misleading because it contains false information and is therefore untruthful, in relation to one of the items of the list provided for by Article 6(1).
Example: use of the term "biodegradable" when that is not the case (e.g. on a product for which no tests have been carried out); use of the term "pesticides-free" when the product actually contains some pesticides.
In conjunction with Article 12 of the Directive, this means that any environmental claims must be made on the basis of evidence which can be verified by the competent authorities.

(ii) Subjective misleading practice: the environmental claim is misleading because it deceives or is likely to deceive the average consumer, even if the information contained therein is factually correct.
This situation relates more to the way environmental claims are presented and put in context and the impression the commercial communication produces on consumers, suggesting him an environmental benefit which may turn out to be misleading.
Example: advertisement showing a car in a green forest; use of natural objects (flowers, trees) as symbols; use of vague and general environmental benefits of a product ("environmentally friendly, green, nature's friend, ecological, sustainable"); greening of brand names or of a product's name.
Example: a manufacturer of a washing machine claims that his new model reduces water usage by 75%. This may have been true in certain laboratory conditions but within an average home environment it only reduces water by 25%.
Example: a food product is claimed to be produced in an environmentally friendly manner, based on a label or certification scheme which in fact only ensures that the farmer complies with the environmental baseline under EU law (cross-compliances).

– Clarity and accuracy of the claims are important criteria for the assessment by national enforcers. In particular, it should be mentioned in a way to be clear for the average consumer:
– whether the claim covers the whole product or only one of its components (e.g.: recyclable packaging where the content is not recyclable or a part of the packaging if the packaging is only partially recyclable);
– whether the claim refers to a company (applying to all its products) or only to certain products;
– if the claim does not cover the product's entire life cycle, which stage of the life cycle or the product characteristics the claim exactly covers;
– The environmental claim, label or symbol used must not cause confusion with official marks.
– The assessment should also take into account the product's nature. For certain products which are, in any case, harmful for the environment (cars, pesticides, products containing toxic substances), environmental claims related to one aspect of the product should not give the misleading impression that the product itself is environmentally friendly
Example: a French appeal court has confirmed recently that a pesticide labelled as "biodegradable" and "good for environment", where several of the substances contained in the pesticide are still harmful to soil, was misleading advertising58.
– Useful criteria and examples can be found in the Commission's non-binding guidelines published in 2000 for making and assessing environmental claims59, based on the international

58 France - Cour d'appel de Lyon, 29 October 2008, Case "Roundup" (Monsanto – Scotts France)
59 Guidelines for making and assessing environmental claims, December 2000, European Commission –
standard ISO 14201-1999. These guidelines contain references to environmental claims which should be deemed misleading, for example:
– claims based on the absence of a harmful product (e.g. chemical) when the product category does not generally include this harmful product;
– inappropriate use of "...-free" claims, when they refer to substances that have never been associated with the product or, if the substance referred to used to be associated with the product but is no longer (e.g. deodorant spray claiming to be "CFC-free", where this requirement is legally mandatory for all similar products).

2.5.6. Breaches of codes of conduct containing environmental commitments may also be considered misleading actions.

Under article 6(2) (b) of the Directive:
"A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise and it involves non compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
- the commitment is not aspirational but is firm and is capable of being verified,
- and the trader indicates in a commercial practice that he is bound by the code."
Breaches of codes of conduct containing commitments in relation to environment protection by an enterprise which has subscribed to such a code can be tackled under this provision. Example: a trader has subscribed to a binding code of practice that promotes sustainable use of wood and displays the code's logo on its website. The code of practice contains a commitment that its members will not use hardwood from unsustainably managed forests. However, it is found that the products advertised on the website contain wood from a deforested area.60
The average consumer would expect code members to sell products which comply with their code. National enforcers will then assess whether he or she is likely to take his or her purchase decision on this basis.

2.5.7. Product comparisons involving environmental claims must be assessed under the criteria set out by the Directive on Misleading and Comparative Advertising

Directive 2006/114/EC on misleading and comparative advertising (e-link) notably lays down the conditions under which comparative advertising is permitted (Article 1). Article 4 of this Directive sets out the criteria under which comparative advertising is allowed. These criteria apply to advertisements which compare the environmental impact or benefit of different products.

Under this Directive, such a comparison should therefore, among other things:
– not be misleading, within the meaning of the Directive on unfair commercial practices;
– compare goods or services meeting the same needs or intended for the same purpose;

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As regards environmental comparison, national enforcers and self-regulation bodies usually interpret this criterion to mean that the comparison should refer to the same product category.
– objectively compare one or more material, relevant, verifiable and representative features of those goods and services.
It should also be clear from the trader’s claim whether the comparison is made as against one or more of the following:
– the organisation’s own prior process;
– the organisation’s own prior product;
– another organisation's process, or;
– another organisation’s product.