

Green Claims – current developments

- *What to expect for Climate-related claims?*
- *A comparative look between the EU and some Non-EU jurisdictions.*

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A. Brief overview

- Regulatory approaches to “Green Claims”, and specifically to climate-related claims, are not novel. E.g.: The US Federal Trade Commission’s (FTC) “*Guides for the Use of Environmental Marketing Claims*” – first issued in 1992 and last updated in 2012;
- **Strong momentum for enhancing regulation and guidance aimed at tackling misleading environmental claims** is currently apparent.
- **Several trends and developments** in the examined jurisdictions – the EU and Non-Eu jurisdictions (e.g., UK, US, Australia and Canada) – **seek to expand or elaborate existing regulatory frameworks for such claims.**
- How the EU legal framework compares and fits within the international context developments concerning “green claims”, and specifically climate-related claims?

B. EU Legislative context and developments

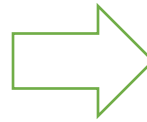
LEX GENERALIS EU rules on consumer protection

1. Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (**‘Unfair Commercial Practices Directive’** or **‘UCPD’**)

2. Directive 2011/83/EU on consumer rights

Both recently amended by:

3. Directive 2024/825/EU, empowering consumers for the green transition through better protection against unfair practices and through better information (**‘Empowering Consumers Directive’**)



LEX SPECIALIS

Proposed Directive on substantiation and communication of explicit environmental claims (**‘Green Claims Directive’**)

B.1. UCPD amended by the Empowering Consumers Directive

- **Explicitly prohibits, in all circumstances, claims based on the offsetting of GHG emissions that a product (i.e., good or service) has a neutral, reduced or positive impact on the environment in terms of GHG emissions.**
- **Adds as a misleading practice under Annex I of revised UCPD.**
- **Clarifies that such prohibition should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects.**
- Does not specify what companies should do to properly substantiate their environmental claims, and specifically climate-related claims.

B.2. Green Claims Directive proposal

➤ European Commission proposal text (22.3.2023)

Substantiation of corporate **climate-related claims**:

- General requirements (Article 3) +
- *separate any GHG emissions offsets used*
- *specify whether those offsets relate to emission reductions or removals, and*
- *describe how the offsets relied upon are of high integrity and accounted for correctly to reflect the claimed impact on climate.*

B.2. Green Claims Directive proposal (cont.)

➤ European Parliament amendments (12.3.2024)

- Distinction between “*compensation*” & “*contribution*” claim (however without providing specific definitions).
- For *compensation* claims:
 - (i) **only for residual emissions** (tbd by COM in delegated act);
 - (ii) **only** underpinning **credits certified under [Carbon Removals and Carbon Farming (CRCF) Certification Regulation]**, or other units/equivalent schemes in duly justified cases to be recognized by COM in DA);
 - (iii) **Disclose the share of residual emissions** (biogenic or fossil) & **quantity of credits used and for which activity** (permanent, storage in products, carbon farming, soil emission reductions)
 - (iv) **Compensation for fossil emissions only with permanent removals** as per CRCF;
 - (v) **For claims on future environmental performance** based on the use of carbon credits, need to **comply with ESRS**.

B.2. Green Claims Directive proposal (cont.)

➤ Council's General Approach (17.06.2024)

- Distinction between “offset” & “contribution” claim (provides definitions in article 2).

- For offset claims:
 - (i) **set a net zero target as per CSRD**, and is on a decarbonisation pathway to meet the target;
 - (ii) **disclose the percentage of total GHG emissions balanced out using carbon credits**, for a specific time-period.

- For all climate-related claims (including those involving carbon credits):
 - (i) identification of total GHG emissions, reductions, future performance regarding the emissions, and any carbon credits used, including the quantity of credits acquired in tCO₂eq;
 - (ii) specification of whether carbon credits used relate to emission reductions or carbon removals, **whether or not** the associated emission reductions or removals **represent a contribution to the reduction of GHG emissions in the host country**, whether removals are permanent or temporary, under which scheme the credits were verified and certified and by which registry they were issued.

B.2. Green Claims Directive proposal (cont.)

The cross-reference to CSRD needs to be exactly understood. According to CSRD delegated regulation (i.e., the European Sustainability Reporting Standards ('ESRS')):

“**[s]etting a net-zero target** (...) means: (i) **achieving a scale of value chain emissions reductions consistent with** the abatement required to reach global net-zero in **1.5°C pathways**; and (ii) **neutralizing the impact of any residual emissions** (after approximately 90-95% of GHG emission reduction (...)) by *permanently removing an equivalent volume of CO₂.*”

- Does this may **indirectly imply the need for a company to commit to at least 90% emissions reduction target, in order to make and, therefore, substantiate an explicit voluntary off-set claim?**

B.2. Green Claims Directive proposal (cont.)

➤ European Parliament amendments (cont.)

- For contribution claims:

- (i) financial contribution not to be used to claim any improvement of the product/trader (i.e. *compensation* claims);
- (ii) separate any financial contributions from climate or environmental impact.

➤ Council's General Approach (Cont.)

- Definition of contribution claim:

Where the trader claims to have contributed to climate action by purchasing carbon credits, but without using those carbon credits for balancing out a share of its emissions.

C) Non-EU recent developments about green claims

- The UK Competition & Markets Authority (CMA) “*Green Claims Code: making environmental claims on goods and services*” of 2021 and the recently adopted UK “*Digital Markets, Competition and Consumers Act*” (DMCC) 2024;
- The on-going update of the *US FTC Green Guides* and the new US Government “*Voluntary Carbon Markets Joint Policy Statement and Principles*” 2024;
- The recently issued Australian Competition and Consumer Commission (ACCC) guide about “*Making Environmental Claims*” 2023;
- The Canadian latest Bill C-59 (June 2024) which adds new provisions to the *Competition Act* explicitly addressing environmental claims [the Canadian “*Environmental Claims: A Guide for Industry and Advertisers*”, issued in 2008 by the Competition Bureau (is now archived since 2021)].

D) Comparative Look

Common basis, among all selected jurisdictions: existing consumer rights and/or fair competition laws serve as the foundation for dealing with green claims made by businesses in commercial practices.

- **Common-law jurisdictions** (i.e., the UK, US, Australia and Canada) **chose to issue guidance** – which is, by nature, usually not binding – **intended to assist companies in interpreting their obligations under the existing general consumer law** when making environmental claims.
- **The EU intends to adopt legally binding legislation on the substantiation and communication of green claims** (including climate-related claims) as *lex specialis*.

D) Comparative Look (cont.)

Scope	<ul style="list-style-type: none">• In the UK and US, green guides have a broader scope applying to business-to-business (B2B) transactions.	<ul style="list-style-type: none">• EU narrowed it down to business-to-consumer (B2C) commercial practices
Substantiation criteria	<ul style="list-style-type: none">• Broadly, environmental claims must be truthful, accurate, specific, clear, substantiated (evidence-based/ rely international standards), relevant, not exaggerated, do not correspond to requirements imposed by law/ necessary standard features, and do not hide or omit important information.• EU: significance of the claim <i>vis-à-vis</i> life-cycle perspective.• UK: full life-cycle of the product/service/whole of a business's activities <i>may be relevant.</i>	

D) Comparative Look (cont.)

Climate-related claims	<u>Formal requirements</u>	<u>Substantive requirements</u>
	<p>UK, US, Australia Canada:</p> <ul style="list-style-type: none">• Conducting due diligence – providing information about schemes, standards, methodologies, counting, reductions, quality, integrity, reliability, project identification, and type of credits underpinning the claim, climate strategy (prioritising reductions) rather than prescribing specific material rules or imposing prohibitions.• E.g.: the UK Government declined to add any misleading environmental claims to the list of banned practices in Schedule 20 of the DMCC Act 2024, despite the advice and recommendation from the CMA	<p>EU?</p> <p>EC: less prescriptive provisions, in line with the examples of other jurisdictions.</p> <p>EP: (i) restricts ‘compensation’ (off-set) claims to residual emissions only; (ii) foresees that the used carbon credits are certified units under CRCF (or equivalent in justified cases); and (iii) alludes to the “like-for-like” principle.</p> <p>Council: (i) set a net zero target as per CSRD/ESRS?; and (ii) quantity of emissions offset.</p>

D) Comparative Look (cont.)

Verification/ certification

EU:

- Verification *ex-ante* by accredited verifiers of the substantiation of explicit environmental claims (environmental labels and environmental labelling schemes);
- Issue a certificate of conformity to be used across the internal market.

Common law jurisdictions:

- Do not foresee such procedure of prior verification and certification of the substantiation of environmental claims before their commercial usage.
- E.g., in Australia is specifically stated that it is not mandatory for businesses to hold a third-party certification to make an environmental claim, however businesses may choose to use third-party due to credibility concerns.

E) Takeaways (1)

- In many cases, **climate-related claims are underpinned by carbon credits issued in voluntary carbon markets** to offset emissions.
- It merits emphasizing that the proposed Green Claims Directive is presented as **intending to ensure consumer protection and fair competition, and not to regulate (voluntary) carbon markets.**
- While it may not intend to do so, it ends up influencing voluntary actions, exposing the contradiction in terms of “regulating voluntary actions and behaviors”.
- Thus, effectively preventing a market-based approach to green claims and consumer protection more generally.
- Companies will need to track regulations (consumer protection legislation, private initiatives on VCM and disclosure-based regulations) across multiple regions, adopt a globally consistent approach to carbon offsets, and ensure that their offset-related claims and disclosures align with the varying requirements of different reporting frameworks.

E) Takeaways (2)

- Since trilogues will begin in autumn 2024, the discussion around certain topics will resurface, **questioning the EU approach, namely the term “residual” as it may be subjective. It may:**
 - (i) undermine the ongoing development of (voluntary) carbon markets** and the investments in third countries outlined in the Paris Agreement;
 - exponentially increase the cost of carbon abatement and the cost of aligning with a decarbonization pathway for European companies, ultimately forcing them to meet a 90% to 95% reduction target (without offsets); and
 - overlook the fact that residual emissions targets will evolve with technological advancements and economic conditions, and are sector-specific.

E) Takeaways (3)

➤ This raises important questions:

- 1) What do asymmetries in the existing and emerging rules, as well as related implementation practices, mean for competition and for distorting international commerce?
- 2) Could this result in forum shopping, avoidance of certain markets, and bifurcation of product lines and activities?
- 3) Could it increase risks to companies, potentially leading them to underreport, downplay or altogether abandon their voluntary sustainability initiatives to evade scrutiny?

Thank you!