

ERCST PAPER

‘Green Claims’ Frameworks – A Comparative Look at Recent Developments in EU and Non-EU Jurisdictions

Summary

The corporate race towards sustainability has given rise to the proliferation of commercial practices and information using green claims. This triggered a new regulatory response by governments mainly, but not exclusively, through consumer protection and fair competition regulation. The aim of the present analysis is to look at and take stock of several frameworks addressing the substantiation and communication of voluntary explicit environmental claims, namely climate-related claims, and see how the EU legal framework compares and fits within the international context and among some of the developments in other non-EU jurisdictions (e.g., UK, US, Australia and Canada).

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Executive Summary

This analysis reviews recent regulatory developments regarding green and climate-related claims in the European Union (EU), United Kingdom (UK), United States (US), Australia, and Canada. Across these jurisdictions, consumer rights and fair competition laws serve as the foundation for regulating green claims in commercial practices.

Common law countries like the UK, US, and Australia have issued non-binding guidance to assist companies in complying with existing consumer laws for environmental claims. In contrast, Canada has recently amended its Competition Act to specifically address misleading environmental claims, while the EU is moving towards legally binding regulations focused on the substantiation and communication of green claims, including climate-related claims. The EU's Green Claims Directive proposal is applicable to business-to-consumer transactions, while the guidance in the UK and US encompasses business-to-business transactions as well. All jurisdictions stress that environmental claims must be truthful, clear, specific, and evidence-based (substantiated), with the EU particularly emphasizing a life-cycle perspective when considering the relevance of the environmental characteristic. Concerning specifically climate-related claims based on carbon credits, common law countries focus on qualitative substantiation criteria, such as “what” information should be provided, rather than imposing strict substantive rules or impediments (as it may be EU's case). While the UK, US, and Australia do not mandate third-party verification for environmental claims, the EU envisages requiring *ex ante* verification by accredited bodies to ensure compliance with the proposed Green Claims Directive.

It is essential to highlight that the stated purpose of the proposed Green Claims Directive is to complement general consumer protection legislation; not to regulate voluntary carbon markets. Its goal is to address misleading claims by promoting transparency and accuracy; however, the directive may inadvertently regulate voluntary actions, exposing the contradiction and raising concerns that could suppress innovation and competitiveness in Europe.

While the integrity of corporate climate claims is tied to the environmental credibility of carbon credits, considerations about credit integrity must be left outside the directive's scope. Instead, several private initiatives are working to set standards for integrity, such as the Voluntary Carbon Market Integrity Initiative (VCMI) and Gold Standard Claims Guidelines. Additionally, existing disclosure-based regulations for investors include provisions related to carbon credits, including the EU Corporate Sustainability Reporting Directive (CSRD) and US SEC rules.

Given these developments, multinational companies must monitor regulatory trends globally, adopt consistent carbon offset strategies, and align their claims with diverse reporting requirements. This need for coherence raises concerns about the potential implications of regulatory asymmetries on competition and international trade, including the risks of forum shopping and increased bureaucratic fatigue that may discourage voluntary sustainability initiatives.

With EU trilogues on the proposed Green Claims Directive commencing in autumn 2024, discussions will likely revisit contentious issues, particularly the definition of “*residual*” emissions and “*net zero target*”, which could impose unnecessary restrictions on carbon credit usage. Such restrictions may hinder carbon market development, inflate compliance costs, and overlook the evolving nature of emissions targets.

In summary, the landscape of climate-related claims is complex, balancing the need for clear, substantiated communication with the imperative for market flexibility. Legislation should aim to define overarching goals while allowing companies the freedom to implement diverse strategies. A more restrictive approach could inadvertently stifle investment in carbon markets and diminish the potential for meaningful climate action. Thus, careful consideration is warranted to determine the necessity and impact of new regulations on voluntary green claims, especially in light of existing consumer protection legal frameworks.

1. Introduction

In the last few years, the shift towards a low-carbon economy and the corporate race towards sustainability has given rise to a new area of scrutiny related to what some stakeholders see as misleading commercial practices and information related to green credentials – i.e., the so-called “*greenwashing*” through lack of transparency and credibility of labels/claims. The incentive to make environmental claims stems from the market demand for *greener* products and services and a rising awareness among some consumers about how investments are made and how goods are produced.

This phenomenon triggered a regulatory response by governments tackling the issue mainly, and directly, through consumer protection and fair competition legal frameworks – which will be the focus of this analysis. Indirectly, although with clearly different scopes and purposes, disclosure-based regulations and/or private initiatives related to voluntary carbon markets may be linked with the former legislation.

By exploring recent regulatory and governance developments concerning “green claims”, and climate-related claims, in the European Union (EU), United Kingdom (UK), United States of America (US), Australia and Canada, this analysis identifies and describes the relevant legislation and/or related guidance using KPIs such as: scope, legal nature, purpose, structure, substantiation and communication requirements, (substantial and/or formal) pre-requisites for climate-related claims, verification and certification, and enforcement, among others.¹

The aim of the present analysis is to look at and take stock of several legal regimes addressing the substantiation and communication of voluntary explicit environmental, focusing on climate-related claims, and see how the EU legal framework compares and fits within the international context and among some developments in other non-EU jurisdictions. Considering the dynamic evolution of the global landscape of corporate claims, this analysis does not intend to be exhaustive.

2. “Green Claims” – description of recent legal developments

This section aims to provide an overview of how “green” claims, namely climate-related claims, are regulated in different countries by providing a description of their regulatory main features.

Thus, considering the fragmented analysis of the topic in “green claims” literature, the first objective is to thoroughly look at the state of art, without critical analysis or reflection. The subsequent sections will handle comparisons, evaluations and recommendations.

¹ See similar analysis: e.g., “*Governing Corporate Claims: Increasing transparency of climate-related claims*” in Carbon Mechanisms Research (Wuppertal Institute), by Nicolas Kreibich, Victoria Brandemann and Franziska Jüde, Policy paper No. 03/2022, November 2022; and “*The Green Claims Global Drive: Developments in the UK, US, and EU*”, by Laura Kim, Lindsay Brewer, Seán Finan, James Holloway, Rosa Oyarzabal & Cándido Molyneux, in Global Policy Watch: Key Public Policy Developments Around the World (Covington), 5 May 2023. Available at: <https://www.globalpolicywatch.com/2023/05/the-green-claims-global-drive-developments-in-the-uk-us-and-eu/#>.

2.1. European Union

In March 2023, the European Commission proposed a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive)². This proposal followed, in the context of union consumer law, the recent Directive (EU) 2024/825 empowering consumers for the green transition through better protection against unfair practices and through better information, amending Directive 2011/83/EU on consumer rights and Directive 2005/29/EC on unfair business-to-consumer commercial practices (hereinafter Empowering Consumers Directive)³. It is worth mentioning that – the now revised – Directive 2005/29/EC on unfair business-to-consumer commercial practices⁴ (‘Unfair Commercial Practices Directive’) has already been used as a legal basis to protect consumers against misleading environmental claims – since it was long transposed into national law. One example is the recent *Fossielvrij NL v. KLM Royal Dutch Airlines* case⁵ challenging the airline’s campaign “Fly Responsibly”. The District Court of Amsterdam has ruled in the claimants’ favour against the airline’s carbon offsetting offer.

The recent Empowering Consumers Directive now explicitly prohibits, in all circumstances, claims based on the offsetting of GHG emissions that a product has a neutral, reduced or positive impact on the environment in terms of GHG emissions – added as a misleading practice under Annex I of revised Unfair Commercial Practices Directive. In addition, the Directive clarifies that such prohibition should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects, as long as they provide such information in a way that is not misleading and complies with the requirements laid down in Union law. Nevertheless, the Empowering Consumers Directive does not specify what companies should do to properly substantiate their environmental claims. Therefore, the Green Claims Directive proposal aims to complement as *lex specialis* the existing set of EU rules on consumer protection (*lex generalis*)⁶.

On March 12, 2024, the European Parliament (EP) adopted, at first reading under the ordinary legislative procedure, several amendments to the Commission’s proposed Green Claims Directive. The Presidency produced a compromise text – which had several interim versions and revisions – based on discussions in the Working Party on the Environment (WPE) and written comments received from delegations. On June 17, 2024, the Council adopted its position (‘general approach’). The upcoming trilogues are soon to begin in Autumn, in the new legislative cycle.

² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>.

³ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information. Available at: <https://eur-lex.europa.eu/eli/dir/2024/825/oj>.

⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

See also Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01).

⁵ See District Court Amsterdam 7 June 2023, ECLI:NL:RBAMS:2023:3499.

⁶ While the revised Unfair Commercial Practices Directive covers all voluntary business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product; the Green Claims Directive proposal covers the substantiation and communication of explicit voluntary environmental claims in business-to-consumer commercial practices.

I. Scope, Purpose and Structure

According to the proposal and texts of the co-legislators, the EU Green Claims Directive applies only to voluntary explicit environmental claims⁷ made by traders⁸ about either their products⁹ (any goods or services) or themselves – and to environmental labelling schemes that allow for the use of the corresponding environmental labels – in business-to-consumer commercial practices (cf. article 1). Thus, this is a specific regime that, a *contrario sensu*, does not cover mandatory environmental claims (about products or traders) neither covers business-to-business commercial practices¹⁰.

As it is stated in the Commission’s explanatory memorandum, the purpose of the Green Claims Directive proposal is to: (i) increase the level of environmental protection and contribute to accelerating the green transition towards a circular, clean and climate neutral economy in the EU; (ii) protect consumers and companies from “greenwashing” and enable consumers to contribute to accelerating the green transition by making informed purchasing decisions based on credible environmental claims and labels; and (iii) improve the legal certainty on environmental claims and ensure a level playing field in the internal market, boost the competitiveness of economic operators that make efforts to increase the environmental sustainability of their products and activities, and create cost saving opportunities for operators that are trading across borders.

Against this backdrop, the proposal sets minimum requirements on the substantiation (Article 3), including a simplified procedure, and communication (Article 5) of explicit voluntary environmental claims and environmental labels (as well as comparative explicit environmental claims and labels) in business-to-consumer practices which are subject to verification to be delivered *ex-ante* its usage in commercial communications (Article 10) by an accredited verifier (Article 11). It also foresees requirements for environmental labels and environmental labelling schemes (Article 8).

II. Substantiation and communication requirements

Article 3 of the Green Claims Directive proposal (and positions of the co-legislators) essentially requires that the substantiation of explicit environmental claims shall be based on an assessment that: (i) specify if the claim is related to the whole product, part of a product or certain aspects of a product, or to all activities of a trader or a certain part or aspect of these activities, as relevant to the claim; (ii) rely on widely recognised scientific evidence, use accurate information and take into account relevant methods and international standards as defined in the relevant EU regulation; (iii) demonstrate that environmental

⁷ According to the amended Directive 2005/29/EC (Article 1“(o)): “‘environmental claim’ means any message or representation which is not mandatory under Union or national law, in any form, including text, pictorial, graphic or symbolic representation, such as labels, brand names, company names or product names, in the context of a commercial communication, and which states or implies that a product, product category, brand or trader has a positive or zero impact on the environment or is less damaging to the environment than other products, product categories, brands or traders, or has improved its impact over time”.

⁸ According to the amended Directive 2005/29/EC (Article 1 (b)): “‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.”

⁹ Directive 2005/29/EC (Article 1(c)) foresees that: ‘product’ means any goods or service including immovable property, rights and obligation.”

¹⁰ Directive 2005/29/EC (Article 1(d)) foresees that: ‘business-to-consumer commercial practices’ (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

characteristics that are subject to the claim are relevant and significant in particular from a life-cycle perspective; (iv) where a claim is made on environmental performance, take into account all environmental aspects or environmental impacts which are significant to assess the environmental performance; (v) demonstrate that the claim is not equivalent to requirements imposed by law on products within the product group, or traders within the sector; (vi) demonstrate that improving environmental characteristics subject to the claim, does not lead to significant harm to any of the environmental objectives as set out in the relevant EU regulation; (vii) include primary information available to the trader for environmental characteristics, which are subject to the claim; and (viii) include relevant secondary information for environmental characteristics, which is representative of the specific value chain of the product or the trader on which a claim is made, in cases where no primary information is available.

When communicated, all environmental claims (Article 5) shall at least: (i) cover environmental impacts, aspects or performance that are assessed in accordance with the substantiation requirements and are identified as significant for the respective product or trader; (ii) where relevant for the claim made, shall include information on how consumers may appropriately use the product to decrease environmental impacts; and (iv) shall be accompanied by information on the substantiation (including information on product or activities of trader; aspects, impacts or performance covered by the claim; other recognised international standards, where relevant; underlying studies and calculations; how improvements that are subject to the claim are achieved; the certificate of conformity and coordinates of the verifier).

III. Climate-related claims¹¹

Particularly concerning climate-related claims, the Commission's proposal foresees that the assessment shall *"separate any GHG emissions offsets used from GHG emissions as additional environmental information, 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"* (cf. article 3(1)(h)).

The position of the European Parliament¹² introduces a new provision foreseeing that: *"Compensation claims based on the use of carbon credits may only be made in respect of the residual emissions of a trader."* And that *"the carbon credits used must be certified units issued in accordance with [EU Carbon Removals and Carbon Farming Certification (CRCF)]"*, or other units in duly justified cases¹³ (new article 3b)¹⁴.

¹¹ For a detailed analysis, see ERCST's Policy Brief *"Green Claims Directive: what to expect for climate? (Working Paper)"*, May 13, 2024. Available at: https://ercst.org/ercst-policy-brief_working-paper_green-claims-directive-what-to-expect-for-climate-related-claims/.

¹² European Parliament legislative resolution of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) (COM(2023)0166 – C9-0116/2023 – 2023/0085(COD)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0131_EN.html.

¹³ New article 3c.: *"Certified units other than those issued in accordance with CRCF may be used in duly justified cases where those schemes are recognised by the Commission as part of the list of compliant schemes corresponding to at least equivalent requirements to those provided by CRCF, in particular with regard to monitoring, reporting, verification and liability requirements, and ensuring no double counting. The Commission is empowered to adopt delegated acts to list recognised carbon credit schemes that are considered to comply with such equivalent requirements."*

¹⁴ In these cases, the assessment shall indicate the share of residual emissions expressed as a share of base-year emissions, the share of biogenic and fossil emissions within these residual emissions and the quantity and type of activity (permanent carbon removal, carbon storage in products, carbon farming sequestration, or soil emission reductions, as defined in CRCF underlying the credits used, providing evidence that the credits have been appropriately retired from the registry of the certification scheme, in order to avoid double counting (new article 3(ha)).

Moreover, “where the use of units is for compensation of fossil emissions, the claim shall be substantiated by permanent removals as defined in [the CRCF]” (new Article 3b).

Finally, the Council’s general approach¹⁵ further specifies the substantiation requirements for climate-related claims, including those involving carbon credits (Article 3.1a.): it foresees that when an explicit environmental claim is related to climate the assessment shall take into the account the specific nature and aspects of that claim, to ensure that consumers are well informed about the use of the carbon credits and their effects. This assessment shall include but not be limited to: (a) identification of the companies’ total GHG emissions, as well as their reductions, future performance regarding the emissions, and any carbon credits used, including the quantity of credits acquired in tCO₂eq, each presented separately, indication the relevant time period; (b) 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. In case the explicit environmental claim is an offset claim, claiming that a trader has a neutral, reduced or positive impact on the environment in terms of GHG emission, the assessment shall as well: “(i) demonstrate that the trader has set a net zero target as set out in Directive 2013/34/EU as regards sustainability reporting standards, 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.”

IV. Verification and/or certification

The Green Claims Directive proposal requires EU Member States (MS) to accredit the verifier – a conformity assessment body in accordance with Regulation (EC) No 765/2008¹⁶ – that will be specifically tasked with the evaluation of compliance with the Directive of explicit environmental claims, as well as of any certification schemes. Verifiers will be able to issue certificates of conformity to the effect that a company has substantiated their claims in accordance with the Directive. The certificate of conformity shall be recognised by the competent authorities responsible for the application and enforcement of this Directive. This certificate will be recognised across the EU, shared between MS via the Internal Market Information System, and will allow companies to use the claim in a commercial communication to consumers across the internal market.¹⁷ However, it is specifically mentioned that the certificate of conformity shall not prejudice the assessment of the environmental claim by national authorities or courts in accordance with Directive 2005/29/EC. The Green Claims Directive proposal also foresees rules on certification schemes and environmental labels, which must comply with the methodological requirements of the Green Claims Directive.

¹⁵ Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) – General approach, 7777/23 - COM(2023) 166 final, Interinstitutional File: 2023/0085(COD), Brussels, 17 June 2024. Available at: <https://data.consilium.europa.eu/doc/document/ST-11312-2024-INIT/en/pdf>.

¹⁶ Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ L 218, 13.8.2008).

¹⁷ The Commission will be empowered to adopt an implementing act specifying the format of certificate of conformity of claims.

V. Enforcement

EU MS will be required to transpose the Green Claims Directive into national law. Therefore, enforcement approaches will vary across EU MS, as different national regulators have different powers and different enforcement strategies. That said, the Directive foresees that MS shall designate, and confer powers to, one or more competent authorities as responsible for the application and enforcement of the Directive. The powers conferred, related to the infringement of the Directive, shall at least include: (i) access to any relevant documents, data or information; (ii) require any natural or legal person to provide any relevant information, data or documents; (iii) start investigations or proceedings on their own initiative about the cessation or prohibition of infringements; (iv) require traders or owners to adopt adequate and effective remedies; and (v) impose penalties. The competent authorities of the MS shall undertake regular checks of the explicit environmental claims made and the environmental labelling schemes applied. MS must also allow consumers, competitors, and third parties with a legitimate interest (e.g., NGOs, affected groups and communities) to challenge claims before national courts or administrative bodies against businesses. Regarding the type of penalties, and the process for imposing them, MS have some discretion, but the EU stipulates that those penalties must be effective, proportionate and dissuasive. The penalty must consider e.g. the nature, gravity, extent, the intentional or negligent character and duration of the action, business's mitigation actions or remedies, any previous infringements, the financial strength (e.g., total turnover or annual income), and penalties imposed for the same infringement in other MS in cross-border cases.¹⁸

2.2. United Kingdom

In September 2021, the Competition & Markets Authority (CMA) published the “*Green Claims Code: making environmental claims on goods and services*” (the Green Claims Code)¹⁹ which is intended to help businesses comply with their existing obligations under consumer protection law when making environmental claims. The principal consumer protection piece of legislation in UK is now the recently adopted “*Digital Markets, Competition and Consumers Act 2024*”²⁰ (DMCC) which has repealed and recast, under its Part 4, the “*Consumer Protection from Unfair Trading Regulations 2008*”²¹ (CPTU), in May 2024. From the most part, the law is restated only subject to few changes that will come into force in the Spring of 2025. It is worth noting that the UK Government declined to add misleading environmental

¹⁸ The Commission's proposal also foresees, although deleted in the Council's general approach, that penalties and measures for infringements shall include: (i) fines which effectively deprive those responsible of the economic benefits derived from their infringements; (ii) confiscation of revenues gained; (iii) temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding. As well as, for the purposes of (i), when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394 (i.e. for the widespread infringement or the widespread infringement with a Union dimension), the maximum amount of such fines being at least at 4% annual of turnover in the EU MS(s) concerned.

¹⁹ “*Green claims code: making environmental claims*”, Guidance for businesses making environmental claims in the UK, from Competition and Markets Authority (CMA), published 20 September 2021. Available at <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims>.

²⁰ *Digital Markets, Competition and Consumers Act 2024*, UK Public General Acts, 2024 c.13. Available at: <https://www.legislation.gov.uk/ukpga/2024/13/contents>.

²¹ *Consumer Protection from Unfair Trading Regulations 2008*, UK Statutory Instruments, 2008 No. 1277. Available at: <https://www.legislation.gov.uk/uksi/2008/1277/introduction>.

claims to the list of banned practices in Schedule 20 of the Act, despite the advice and recommendation from the CMA²².

The Green Claims Code outlines key principles intended to help businesses stay within the law, not only explaining each principle in detail but also providing examples of how these principles apply in practice – including more comprehensive case studies where multiple principles are involved. Additionally, it outlines the legal framework underpinning these principles. However, the guidance is not a comprehensive manual on making environmental claims nor a substitute for the law itself. It focuses on areas the CMA considers most relevant and of concern to enforcement authorities, but it does not cover every possible situation where an infringement may occur.

On February 2023, in the realm of advertising industry self-regulation, the Committee of Advertising Practice (the CAP) – which offers guidance on the interpretation of the “UK Code of Non-broadcast Advertising and Direct & Promotional Marketing” (the CAP Code)²³ – published an update to its guidance “*The environment: misleading claims and social responsibility in advertising*”²⁴ to include specific advice on making “carbon neutral” and “net zero” claims in UK advertising. The Advertising Standards Authority (ASA) is the independent body that endorses and administers the CAP Code, ensuring that the self-regulatory system works in the public interest. The CAP Guidance draws on the principles contained in the Green Claims Code; therefore, this section specifically focuses on the latter only.

I. Scope, Purpose and Structure

The Green Claims Code – aimed not only at protecting consumers from misleading environmental claims but also intended to protect businesses from unfair competition and ensure a level playing field – applies to environmental claims²⁵ (and sustainability claims²⁶) made by businesses about goods or services as well as about a process, a brand or a business as a whole, in both business-to-consumer and business-to-business transactions. It applies to all commercial practices, which can include various dimensions of a trader’s behaviour, namely: advertisements, product labelling and packaging or other accompanying information, and even product names. Where claims are ultimately aimed at consumers, the Green Claims Code will apply, even if the claims are made by a manufacturer, wholesaler or distributor which does not have direct contact with a consumer. It does not replace or override other sector- or

²² *Correspondence Environmental Sustainability and the UK competition and consumer regimes: CMA advice to the Government*, published 14 March 2022. Available at: <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.

²³ The CAP Code – The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, v12.2.75.

²⁴ “*The environment: misleading claims and social responsibility in advertising*” – Advertising Guidance (non-broadcast and broadcast), published 10 February 2023.

²⁵ Cf. § 2.5 “*Environmental claims are claims which suggest that a product, service, process, brand or business is better for the environment. They include claims that suggest or create the impression that a product or a service: (i) has a positive environmental impact or no impact on the environment; (ii) is less damaging to the environment than a previous version of the same good or service; or (iii) is less damaging to the environment than competing goods or services*”.

²⁶ Cf. § 2.10 “*Businesses should also have regard to this guidance when making sustainability claims. By ‘sustainability claims’, we mean claims which suggest that a product is made, a service delivered, or a business run in accordance with principles of sustainability, sustainable consumption or sustainable development. This could include claims relating to the environment and climate change, biodiversity, animal welfare, workers’ welfare or corporate social responsibility*”.

product-specific rules (e.g., eco-labelling; packaging and waste disclosures; or reporting of environmental impact under corporate reporting and disclosures rules).

The code covers specific issues and claims (e.g. recycled content; compostability; offsets, etc.), but as applications of general principles, rather than prescription of rules. It sets out six principles: (i) claims must be truthful and accurate²⁷; (ii) claims must be clear, unambiguous and identifiable²⁸; (iii) claims must not omit or hide important relevant information²⁹; (iv) comparisons must be fair and meaningful³⁰; (v) claims must consider the full life-cycle of the product or service³¹; (vi) claims must be substantiated³².

II. Substantiation and communication requirements

Requires businesses to substantiate claims with sufficient evidence, preferably robust, independent, up-to-date scientific analyses by independent parties; while providing a series of questions that a business can use to assess the quality of their evidence. It emphasizes that claims need to be appropriately qualified and should not overstate the extent of the benefit. Claims should not just focus on minor positive environmental aspects of a product, service, process, brand or business, where other aspects have a negative impact, and consumers could be misled; neither omit important information. The Code specifies that: “[c]herry-picking information like this is likely to make consumers think a product, service, process, brand or business as a whole is greener than it really is”³³.

Where it would be impracticable to provide detailed information or substantiation alongside the claim, the UK CMA Green Claims Code encourages businesses to provide consumers with a link or QR code, directing them a website with more information.

III. Climate-related claims

The Green Claims Code stresses that, considering the difficulties that consumers have in understanding terms such as “net-zero” or “carbon neutrality”, it is important that claims are as clear as possible. Therefore, it provides the e.g., that businesses should ensure that they use the correct terminology and include accurate information about whether (and the degree to which) they are actively reducing the carbon emissions created in the production of their products or delivery of their services or are off-setting emissions with carbon removals. Where they are off-setting, businesses should provide information about any scheme they are using (which should be based on recognised standards and measurements, capable of objective verification). If not, consumers could be misled into thinking that products or processes themselves generate no (or few) emissions.³⁴

²⁷ Cf. § (3.4).

²⁸ Cf. § (3.46).

²⁹ Cf. § (3.64).

³⁰ Cf. § (3.97).

³¹ Cf. § (3.108).

³² Cf. § (3.122).

³³ “Green claims code: making environmental claims”, Printable version, p. 24.

³⁴ For instance: “[a]n explanation of the steps the company takes to buy or invest in renewable energy, or what it does to off-set its carbon footprint. This explanation should be provided in the advertisement (or, only if space does not permit, by including a clear indication of the way consumers can obtain it (such as a link to a website))” (“Green claims code”, Printable version, p. 25).

IV. Verification and/or certification

The Green Claims Code does not refer to any officially accredited body within the jurisdiction that needs to verify the green claims *ex-ante* and to issue a certificate of conformity before using it for commercial purposes. In turn, it urges businesses to be cautious when using certifications, logos, and seals of approval, and to only use third-party certifications that they have been authorized to use. In addition, it notes that certifications awarded by independent third parties on the basis of a formal assessment against objective criteria are less likely to be misleading than self-assessed certifications.

V. Enforcement

The Green Claims Code, as a practical guidance for businesses, is not law and is not directly enforceable. Nevertheless, since it contains the CMA's interpretation on the types of environmental claims that might be considered unfair, deceptive or misleading, it provides grounds for the CMA to challenge a business's environmental claims under the general consumer protection law. The CMA has the power to launch investigations against companies where it believes the company has breached consumer protection legislation. It can take several enforcement actions: from "soft enforcement" actions like seeking voluntary cooperation or a civil undertaking; to "hard enforcement" actions, like issuing enforcement orders, seeking court mandated injunctions, and bringing civil or criminal proceedings against a business. In addition, the DMCC extends the CMA's powers to impose penalties up to 10% of global turnover on business that breach consumer law (without court proceedings). Finally, the CMA is also getting much extensive powers to force companies to hand over sensitive internal documents during consumer protection investigations³⁵.

2.3. United States

In 2012, the US Federal Trade Commission's (FTC) last reviewed its "*Guides for the Use of Environmental Marketing Claims*"³⁶ (hereinafter "Green Guides"), first issued in 1992. The Green Guides help marketers and companies avoid making environmental marketing claims that may be considered unfair or deceptive under Section 5 of the FTC Act. Therefore, it provides guidance on: (i) general principles that apply to all environmental marketing claims; (ii) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and (iii) how marketers can qualify their claims to avoid deceiving consumers. The Green Guides are also used by the National Advertising Division of the Better Business Bureau, a self-regulatory mechanism for the advertising industry, before which green marketing claims are often challenged.³⁷

³⁵ Cf. "*Digital Markets, Competition and Consumers Act 2024*", UK Public General Acts, 2024 c.13.

³⁶ "*Guides for the Use of Environmental Marketing Claims*", Part 260, Federal Trade Commission. Available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

³⁷ Some states have explicitly incorporated the Green Guides by reference into state law (e.g., such as Rhode Island and Maine) and other, such as California, have enacted statutes with their own guidelines for environmental marketing claims while also incorporating the Green Guides by reference.

In December 2022, the FTC published a notice requesting public comments³⁸ within the context of updating the Green Guides. It is worth noting that the FTC sought comment: (i) on a set of substantive questions about certain types of environmental marketing claims, the efficacy of the Green Guides in the market, and whether the Green Guides overlap or conflict with other US federal, state, or local laws; and (ii) on whether it should consider any international laws, regulations, or standards as it reviews the Green Guides. Particularly, the FCT sought specific comments on whether it should revise the section relating to carbon offsets (16 CFR 260.5) or provide additional guidance addressing other types of advertising claims related to carbon offsets and/or climate change. In addition, the FCT also sought comment on evidence of deceptive climate-related claims in the market and any consumer research available regarding consumer perception of climate-related claims.³⁹ Although the public comment period ended in April 2023, it is not certain when the FTC will issue the revised version.⁴⁰

Against this backdrop, it is important to reference two recent developments which may very well influence the outcome of the Green Guides review. First, the “*Voluntary Carbon Markets Joint Policy Statement and Principles*”⁴¹ – issued by the U.S. Department of the Treasury with the U.S. Department of Agriculture, the U.S. Department of Energy, and the White House, on 28 May 2024 – enshrine the government’s approach to advance high-integrity VCMs. It recognizes the need for: credit integrity, including protections regarding climate and environmental justice (i.e., “supply integrity”) (Principles 1 and 2); credible credit use (i.e., “demand integrity”) (Principles 3, 4, and 5); and market-level integrity, including facilitating efficient market participation and lowering transaction costs (Principles 6 and 7). Second, the California’s Assembly Bill-1305⁴², relating to voluntary carbon market disclosures, which became effective in January 2024. Among other things, the bill requires, within the state of California, an entity that purchases or uses voluntary carbon offsets that makes claims regarding the achievement of net zero emissions or other, similar claims, as specified, to disclose on the entity’s internet website specified information⁴³ pertaining to each project or program as well as all the information pertaining to all GHG emissions associated with its claims⁴⁴.

³⁸ See [FTC Seeks Public Comment on Potential Updates to its ‘Green Guides’ for the Use of Environmental Marketing Claims](#), Regulatory Review Schedule, 86 Fed. Reg. 35239 (July 2, 2021); Guides for the Use of Environmental Claims, 87 Fed. Reg. 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260)

³⁹ Guides for the Use of Environmental Claims, 87 Fed. Reg. 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260).

⁴⁰ “The Future of Green Marketing: Anticipated Changes to the FTC’s”, in *Latham & Watkins Environmental, Social & Governance Practice*, Number 3124, 27 June 2023.

⁴¹ “*Voluntary Carbon Markets Joint Policy Statement and Principles*”, issued by the U.S. Department of the Treasury with the U.S. Department of Agriculture, the U.S. Department of Energy, and the White House, on 28 May 2024. Available at: <https://www.whitehouse.gov/wp-content/uploads/2024/05/VCM-Joint-Policy-Statement-and-Principles.pdf>.

⁴² Assembly Bill No. 1305 “Voluntary Carbon Market Disclosures”. Approved by Governor, October 07, 2023. Available at: https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1305.

⁴³ (a) The name of the business entity selling the offset and the offset registry or program; (b) the project identification number, if applicable; (c) the project name as listed in the registry or program, if applicable; (d) the offset project type, including whether the offsets purchased were derived from a carbon removal, an avoided emission, or a combination of both, and site location; (e) the specific protocol used to estimate emissions reductions or removal benefits; (f) whether there is independent third-party verification of company data and claims listed.

⁴⁴ I.e.: documenting how, if at all, a “carbon neutral,” “net zero emission,” or other similar claim was determined to be accurate or actually accomplished, and how interim progress toward that goal is being measured (this information may include, but not be limited to, disclosure of independent third-party verification of all of the entity’s GHG emissions, identification of the entity’s science-based targets for its emissions reduction pathway, and disclosure of the relevant sector methodology and third-party verification used for the entity’s science-based targets and emissions reduction pathway); and whether there is independent third-party verification of the company data and claims listed.

I. Scope, Purpose and Structure

The FTC Green Guides apply to environmental claims, made in both business-to-consumer and business-to-business transactions, in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means. The Green Guides outline the FTC’s current stance on environmental claims and marketing, providing guidance to marketers. Therefore, it sets out general principles, supported by examples and guidance. These guides do not replace or override other federal, state, or local laws related to greenwashing, although compliance with those laws will not necessarily prevent FTC enforcement in case an environmental claim may be consider unfair, deceptive or misleading, as prohibited under Section 5 of the FTC Act (15 U.S.C. § 45).

II. Substantiation and/or communication requirements

The FTC requires all marketing claims to be substantiated before the claim is made, and communicated clearly using prominent qualifying language. Section 260.2 of the Green Guides advises that “[m]arketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.” And specifically within the context of environmental marketing claims, this “reasonable basis” often requires competent and reliable scientific evidence, which consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Furthermore, such scientific evidence should be based on standards generally accepted in the relevant scientific fields – when considered in light of the entire body of relevant and reliable scientific evidence – to substantiate that each of the marketing claims is true.

III. Climate-related claims

Specifically considering the complexities of carbon offsets (cf. § 260.5 FTC Green Guides), the guides prescribe that sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time. The FCT emphasizes that it is deceptive: (i) “to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.”; and (ii) “to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law”.

In addition, the “Voluntary Carbon Markets Joint Policy Statement and Principles” foresee that: public claims⁴⁵ by credit users should: (i) accurately reflect the climate impact of retired credits and should only rely on credits that meet high integrity standard; (ii) rely only on the impact of credits that meet current high integrity standards at the time the claim is made and that avoid adverse impacts; and (iii) be in the context of a corporate climate strategy that prioritizes within-value-chain emissions reductions. Credited

⁴⁵ Public claims often extend beyond disclosure and are intended to communicate to a broader public the users’ commitment to emissions mitigation efforts.

emissions reductions or removals that have been reversed, revealed as inflated, or exposed as failing environmental or social safeguards should not be used as the basis for any claims unless remediation, such as replacement by buffer pool credits, has taken place (cf. Principle 5).

IV. Verification and/or certification

The FTC does not refer to any officially accredited body within the jurisdiction that needs to verify the green claim *ex-ante* and to issue a certificate of conformity before using it for commercial purposes.

The Green Guides emphasize that companies should disclose any material connections with third-party certifiers and note that obtaining a third-party certification “[d]oes not eliminate marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.” The use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guides, 16 C.F.R. Part 255.

V. Enforcement

The US Green Guides are not law and are not independently enforceable. But the FTC can take action if marketers make environmental claims that are inconsistent with the Guides, proving that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act. The FTC can launch investigations and bring civil proceedings against businesses where it believes the business has violated the FTC Act. FTC enforcement action can lead to injunctions, compliance monitoring, and reporting requirements. In addition, as part of the FTC’s current review of the Green Guides, the FTC has requested public comment on whether it should consider a rulemaking under the FTC Act related to deceptive or unfair environmental claims. If the FTC successfully promulgates a trade regulation rule related to green claims, it would be entitled to seek civil penalties of up to USD 50,120 per violation of the rule. Businesses should not use environmental certifications or seals that do not clearly convey the basis for the certification.

2.4. Australia

In December 2023, the Australian Competition and Consumer Commission (ACCC) published a guide about “*Making Environmental Claims*”⁴⁶ for business (hereinafter “ACCC guide”). The ACCC is an independent Commonwealth statutory authority that promotes competition, fair trading and product safety for the benefit of consumers and businesses. The primary responsibilities of the ACCC include enforcing compliance with the Competition and Consumer Act 2010, which includes the Australian Consumer Law (ACL) in its Schedule 2. Hence, the guide sets out what the ACCC considers to be misleading conduct under the ACL and highlights good practice when making environmental claims, helping businesses meet their obligations under the ACL⁴⁷ and engage in trustworthy claims.

⁴⁶ “*Making Environmental Claims: A guide for business*”, published by the Australian Competition and Consumer Commission (ACCC) in December 2023, ACCC 12/23_23-86. Available at: <https://www.accc.gov.au/system/files/greenwashing-guidelines.pdf>.

⁴⁷ Essentially, the ACL prohibits conduct in trade or commerce that is misleading or deceptive, namely the making of false or misleading representations or misrepresentations about/ in promoting goods or services, in the course of trade or commerce. The law applies even if a business did not intend to mislead, or no one has suffered any loss or damage.

The regulatory framework of the ACCC is supplemented by the Australian Association of National Advertisers (AANA)' self-regulatory system and its “*Environmental Claims Code*” published in 2018. Three key principles underpin the code: (i) truthful and factual presentation; (ii) genuine benefit for the environment; and (iii) substantiation⁴⁸. Following the announced review of the Code, AANA has released, in January 2024, an Exposure Draft⁴⁹ of its Environmental Claims Code for further public comment. The aim of the review is to update the Code and supporting Practice Notes to ensure that the Code reflects: (i) the changing of technical and community standards; (ii) the ACL and ACCC guidance; and (iii) the international best-practice.

Finally, it is important to mention that Australia, unlike other countries, has a government-associated carbon neutrality certification scheme available for organisations, products, services, events, buildings and precincts: i.e., the Climate Active Carbon Neutral Standard (Climate Active), which was first introduced in 2010 as the National Carbon Offset Standard, and is administered by the Department of Climate Change, Energy, the Environment and Water (DCCEEW)⁵⁰. While the program has historically been perceived as a positive opportunity and incentive for companies to take climate action and make such claims, recent developments may severely affect that perception. In February 2023, the Australia Institute filed a complaint against Climate Active with the ACCC, alleging that the certification scheme may be misleading and deceptive under ACL⁵¹. At the time of the writing, the case is still pending⁵².

I. Scope, Purpose and Structure

The ACCC guide applies to environmental claims – defined as any representation made by a business in relation to its environmental impact⁵³ – in all forms of marketing, such as information on packaging, in advertisements, on store signs, social media, websites or told to consumers in writing or verbally, and more generally to representations in connection with the supply or possible supply of goods or services, or to conduct, in trade or commerce. The ACCC guide explicitly states that environmental claims “*may also appear in corporate reporting materials*”.⁵⁴

The goals of the ACCC guide are to: (i) encourage truth and accuracy by businesses who choose to make environmental claims about their product or services; (ii) demonstrate how businesses can make true,

⁴⁸ “*Environmental Claims Code*”, Australian Association of National Advertisers (AANA), 1 May 2018. Available at: https://aana.com.au/wp-content/uploads/2024/08/AANA_Environmental_Code_V2.pdf. See also Practice Note, available at: https://aana.com.au/wp-content/uploads/2024/08/AANA_Environmental_PracticeNote_V1.pdf.

⁴⁹ Environmental Claims Code Exposure Draft, Australian Association of National Advertisers (AANA), January 2024. Available at: https://info.aana.com.au/hubfs/Exposure%20Draft%20Environmental%20Claims%20Code.pdf?_gl=1*1p8khe7*_gcl_au*MTM0NzE3MjY1NC4xNzI1MjIzNzQx*_ga*MjA0NjkxNDk4Mi4xNzI1MjIzNzQw*_ga_9ESFZFZ8MK*MTcyNTIyMzc0MC4xLjEuMTcyNTIyODcxNS41OS4wLjA.

⁵⁰ Cf. Australian Government, Department of Climate Change, Energy, the Environment and Water, ‘Climate Active’, *Climate Change* (Web Page) <<https://www.dcceew.gov.au/climate-change/climate-active>>; and Climate Active (Web Page) <<https://www.climateactive.org.au/be-climate-active/certification>>.

⁵¹ The complaint particularly raises that Climate Active’s approach to assessing carbon neutrality emphasises the use of emission offsets rather than reductions and has awarded a number of fossil fuel companies and retailers with certification for offsetting a small portion of their emissions. See Australia Institute, ‘Australian Government Breaching Consumer Law Following Four Corners’ (14 February 2023), <<https://australiainstitute.org.au/post/australian-government-breaching-consumer-law/>>.

⁵² ACCC Carbon Neutral Claims, see: <https://climatecasechart.com/non-us-case/accc-carbon-neutral-claims/>.

⁵³ Including claims that give the impression that the business, products or services (a) have a neutral or positive impact on the environment, (b) are less harmful for the environment than alternatives, (c) have specific environmental benefits.

⁵⁴ ACCC Guide, p. 4.

clear, evidence-based claims that consumers can understand and trust; (iii) decrease instances of *greenwashing*; (iv) assist consumers make more informed choices; (v) help businesses understand and comply with their obligations under the ACL; and (vi) explain the general approach the ACCC will take in investigating whether environmental claims are likely to contravene the ACL and potential enforcement outcomes. The ACCC guide sets out eight principles (and elements under each principle) that businesses can follow to mitigate risk when making environmental and sustainability claims: (1) make accurate, truthful, meaningful and factually correct claims; (2) have evidence to back up claims; (3) do not hide or omit important information; (4) explain any conditions or qualifications on claims; (5) avoid broad and unqualified claims; (6) use clear and easy-to-understand language; (7) visual elements should not give the wrong impression; and (8) be direct and open about your environmental sustainability transition.

II. Substantiation and/or communication requirements

The ACCC guide, under principle (2), state that it is good practice to be able to substantiate any environmental claim with clear evidence, whether from internal data or third-party sources. Where relevant, evidence that is scientific and independent is most credible. The guides include several suggestions when choosing supporting information, for example: (i) Internal Data – retain all relevant records, such as purchase records or test results; (ii) Third-Party Evidence – verify claims made by suppliers or other third parties instead of relying solely on them; (iii) Scientific Studies – use widely accepted or peer-reviewed studies; (iv) Lab Testing – ensure lab results reflect actual consumer conditions; (v) Impact Reduction Claims – use accepted methodologies and keep thorough records; (vi) Industry Standards – compliance with industry standards helps but does not guarantee automatically mean compliance with ACL obligations. Transparency is encouraged by making supporting evidence easily accessible and understandable to consumers through various methods like direct links, summaries, or detailed information on dedicated platforms.

III. Climate-related claims

The ACCC guide specifically focus on “*emissions-related claims*”, under principle (5). It starts by asserting that consumers are unlikely to readily understand what is meant by broad headline claims like “carbon neutral”, “climate neutral” or “net-zero”. Accordingly, it stresses that businesses should exercise caution when making representations to consumers about the GHG emissions associated with their products, services or business and their overall impact on climate change. The guide then describes as good practice to: (i) undertake a thorough emissions baseline assessment, using established Australian or internationally recognised methodologies; (ii) provide clear information to consumers about what emissions are included and excluded from any assessment; (iii) clearly and transparently communicate the actions the business has taken which underpin the claims – for instance, being transparent about emissions reductions activities versus reliance on purchased offsets, and explain how the business accounted for its emissions, including emissions associated with electricity use; (iv) provide information about the types of projects that offsets have been generated from and ensure the business: a) has verified them (including verifying that the emissions abatement attributable to the offset project has not already been claimed by the project owner) and that offsets representing the same emissions benefit have not been issued under multiple different

registries, b) provide up-to-date information about the registry on which they are listed with the details of the offsets relinquished or cancelled each year, and c) where practicable, make this information readily accessible to consumers; (v) account for all types of GHG emissions, singling out particular types of emissions (e.g. carbon dioxide) and excluding other risks creating a misleading overall impression; and (vi) ensure that consumers can understand from the information provided what emissions have been accounted and avoid using headline claims which create a misleading impression⁵⁵.

Finally, in terms of claims about future goals and ambitions, businesses should have reasonable grounds to make the claims, for example by having appropriate business plans and investment approvals in place to make the changes necessary to meet the goals⁵⁶.

IV. Verification and/or certification

The ACCC guide does not refer to any officially accredited body within the jurisdiction that needs to verify the green claim *ex-ante* and to issue a certificate of conformity before using it for commercial purposes. In turn, it clearly states that businesses do not need to hold a third-party certification to make an environmental claim, however businesses may choose to use third-party certifications to provide credibility to their claims. Importantly, if a business relies on a third-party certification to make a claim, it should ensure that it is not creating a false or misleading impression about what the certification means or does⁵⁷. If the claims go beyond what it has been certified for, or you use the certification to imply a greater benefit than there really is, businesses risk misleading consumers.⁵⁸

Under Climate Active⁵⁹, entities seeking to certify a claim must: (1) define an emissions boundary for the product and calculate emissions; (2) develop and implement an emissions reduction strategy; (3) purchase offsets to compensate for remaining emissions (which are limited to offsets verified through “internationally recognized standards”); (4) secure third-party validation; and (5) issue a public statement of the carbon neutrality claim.

⁵⁵ E.g., disproportionately emphasising a claim in relation to a product service or segment of the operations if it only represents a small proportion of the overall emissions profile; or prominently advertising the offering of a “*carbon neutral product*” but not making clear it is not a default option and instead is dependent upon individual consumers opting in (and potentially paying a premium to do so).

⁵⁶ ACCC Guide, pp. 24-25.

⁵⁷ When selecting a third-party certification scheme, it is good practice to take the following steps: (i) choose a certification scheme that is independent, transparent, reputable, and robust; (ii) check that the certification is suitable for the specific needs, and that it adequately reflects the characteristics of the product, service, inputs or business; and (iii) offer consumers details of further information on the scheme or direct them to where they can access this information. See ACCC Guide, pp. 14-15.

⁵⁸ When using a third-party certification to back up claims, businesses should ensure that: (i) the product or service does what the business claim it does, even where it has complied with the third-party certification; (ii) the claims clearly and accurately reflect what it has been certified for, and the scope of certification (this can be particularly important for certification schemes relating to inputs); (iii) the business has not mischaracterised the nature of the certification scheme; (iv) the business ensures continuous and ongoing compliance with the rules of the certification scheme, it is not simply a one-off achievement; (v) the certification scheme is independent and there is no conflict of interest between the business and the scheme; (vi) any promotion of the fact that a particular product or service provided meets the requirements of a certification scheme is not disproportionately emphasised in the context of your product or service offering as a whole. See ACCC Guide, pp. 14-15.

⁵⁹ The abovementioned government-associated carbon neutrality certification scheme. Cf. Climate Active (Web Page), Certification section, <<https://www.climateactive.org.au/be-climate-active/certification>>.

V. Enforcement

The ACCC enforces the ACL in conjunction with State and Territory consumer and fair-trading agencies.⁶⁰ The ACCC has compulsory information gathering powers under section 155 of the Competition and Consumer Act 2010. Thus, it can use these powers to obtain information and documents and/ or require a person to attend an examination and give evidence to investigate potential contraventions of the ACL. The ACCC may also issue a substantiation notice – preliminary investigative tool – requiring a person to give information and/or produce documents that could be capable of substantiating or supporting an environmental claim. In addition, the ACCC may issue an infringement notice where it has reasonable grounds to believe that a person has contravened certain consumer protection provisions in the ACL. Finally, the ACCC can take court action against a person for making false or misleading representations and for engaging in misleading or deceptive conduct. It is for the court to determine liability and an appropriate penalty, which will depend on the circumstances of each individual case.⁶¹

2.5. Canada

In Canada, misleading environmental claims have been regulated primarily as a form of deceptive marketing, recognized as anti-competitive conduct, under the *Competition Act*⁶². In 2008, the “*Environmental Claims: A Guide for Industry and Advertisers*” (“Environmental Claims Guide”)⁶³ was jointly released by the Competition Bureau and the Canadian Standards Association. Nevertheless, this was archived in 2021 – as the Competition Bureau considered its content may not reflect the Bureau’s current policies or practices and does not reflect the latest standards and evolving environmental concerns⁶⁴.

On June 20, 2024, new provisions were added to the *Competition Act* that explicitly target “greenwashing”, following Royal Assent of Bill C-59, the *Fall Economic Statement Implementation Act*, 2023⁶⁵. Succinctly, businesses are now legally required to have testing or substantiation to support certain environmental claims. On July 22, 2024, the Competition Bureau launched a public consultation on the new

⁶⁰ *Greenwashing* conduct can also contravene laws administered by other regulators, including the Australian Securities and Investment Commission (ASIC). The ACCC and ASIC work closely together on the detection and investigation of misleading environment claims, including corporate sustainability claims and claims in connection with financial products and services. The ACCC will focus on consumer facing products and services, whereas ASIC is primarily responsible for financial products and financial services. However, misleading environmental claims may sometimes fall within both ASIC’s jurisdiction and the ACCC’s jurisdiction, in which case the ACCC and ASIC work closely together to address any misconduct. The ACCC is more likely to take enforcement action in respect of representations about future matters regarding environmental claims where a business did not have reasonable grounds for making the representation, does not have an intention or plan to implement initiatives, or knew or was reckless about whether the claim was untrue or incorrect.

⁶¹ See ACCC Guide, pp. 34-36.

⁶² Competition Act (R.S.C., 1985, c. C-34). Available at: <https://laws-lois.justice.gc.ca/eng/acts/c-34/fulltext.html>.

⁶³ Environmental Claims: A Guide for Industry and Advertisers, June 25, 2008, developed in partnership with Competition Bureau Canada and Canadian Standards Association. Available at: <https://competition-bureau.canada.ca/environmental-claims-guide-industry-and-advertisers>.

⁶⁴ The guide will remain available for reference, research and recordkeeping purposes, but it will not be altered or updated as of the date of archiving.

⁶⁵ Assented to June 20, 2024, Bill C-59, the *Fall Economic Statement Implementation Act*, 2023. Available at: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-59/royal-assent>

provisions that will inform its future enforcement guidance about environmental claims – feedback can be submitted until September 27, 2024⁶⁶.

The new amendments to the Competition Act introduce a more targeted prohibition against the misleading practice and expand the means of enforcement. Firstly, Bill C-59 introduces explicit prohibitions against deceptive environmental claims, requiring that such claims be based on “adequate and proper testing” or “substantiation in accordance with internationally recognized methodologies”. These concepts and standards are still, to a certain degree, ambiguous since they are not defined under the Competition Act, however, allegedly, the Competition Bureau is actively monitoring parallel guidance (i.e., in the US and EU), where new directives and updates are also underway to standardize environmental claims⁶⁷. Secondly, the bill expands the private rights of action available under the Act, allowing private parties to challenge potential misleading (environmental) claims before the Competition Tribunal more easily. Thirdly, it introduces a certification regime to protect environmental collaborations from legal challenges, provided these agreements do not substantially prevent or lessen competition.

Finally, worth mentioning is Bill C-372 which enacts the Fossil Fuel Advertising Act to prohibit the promotion of fossil fuels except in accordance with the provisions of the Act. Under provision 7(1) “False Promotion”, the act states that: “[i]t is prohibited for a person to promote a fossil fuel or the production of a fossil fuel in a manner that is false, misleading or deceptive with respect to or that is likely to create an erroneous impression about the characteristics, health or environmental effects or health or environmental hazards of the fossil fuel, its production or the emissions that result from its production or use”⁶⁸.

I. Objectives, Purpose and Structure

Prior to Bill C-59, the *Competition Act* (subsection 74.01(1)), created a civil prohibition against deceptive marketing that allows the Bureau or private litigants to seek redress for a “representation to the public that is false or misleading in a material respect.” This indirectly captured “greenwashing” claims, but the new amendments explicitly prohibit deceptive environmental claims by forbidding: (i) *claims that promote the environmental, social and ecological benefits of using or supplying a product if the claim is not based on an adequate and proper test* (Section 74.01(1)(b.1); and (ii) *claims that promote the environmental and ecological benefits of a business or business activity that are not based on adequate and proper substantiation in accordance with internationally recognized methodology* (Section 74.01(1)(b.2)).

II. Substantiation and/or communication requirements

While prior to Bill C-59, an “adequate and proper” test was required under the Act for claims as to the “performance, efficacy or length of life of a product”, the recent amendments apply this standard to environmental claims as well. New is the requirement that the substantiation be “in accordance with

⁶⁶ See “Public consultation on *Competition Act*’s new greenwashing provisions”, <<https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/public-consultation-competition-acts-new-greenwashing-provisions#>>.

⁶⁷ Cf. “Clearing the air: Canada adopts new greenwashing laws under the *Competition Act*” by Aweis Osman, Christopher Oates and Melissa Tehrani, (Gowling Wlg), 27 June 2024, <<https://gowlingwlg.com/en/insights-resources/articles/2024/new-greenwashing-laws-under-the-competition-act>>.

⁶⁸ Bill C-372, February 5, 2024. Available at: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-372/first-reading>.

internationally recognized methodology.” The Bureau is assessing the impact of these requirements and expects to provide guidance, in due course, that will offer transparency and predictability for the business and the legal communities in the enforcement of the law.

III. Climate-related claims

No specific provisions concerning climate-related claims based on carbon credits were included in the Competition Act (nor in the now archived Environmental Claims Guide) neither introduced by Bill C-59.

IV. Verification and/or certification

No specific provision referring to any officially accredited body within the jurisdiction that needs to verify the substantiation of the environmental claim *ex-ante* and to issue a certificate of conformity.

Bill C-59 introduces a new certification regime aimed at protecting environmental collaborations from legal challenges under the Competition Act. The new certification mechanism under section 124.3, empowers the Commissioner of Competition to certify certain environment-related agreements. This certification exempts the parties from the criminal and civil competitor collaboration provisions of the Competition Act, provided the agreement or arrangement proposed by a party, or parties: (i) is intended to protect the environment; (ii) is unlikely to substantially prevent or lessen competition in a market. Certificates issued under this regime are valid for a period of 10 years. There is an option for extension upon request, allowing parties to continue to benefit from the immunity provided. It is important to note that certificates do not provide immunity for abuse of dominance provisions under the Act.

V. Enforcement

Prior to Bill C-59, private litigants were required to show that their business was “*directly and substantially*” affected by the alleged conduct to be allowed to bring a private action before the Tribunal.

The amendments in Bill C-59 broaden the criteria, allowing private actions to bring *greenwashing* claims before the Competition Tribunal where: (i) only part of the applicant’s business is substantially affected; (ii) the Tribunal is satisfied that it is in the “public interest” to grant leave.

The introduction of a “public interest” criterion is expected to increase the number of *greenwashing* claims brought by environmental groups, competitors, and consumers – potentially via a form of class action – before the Tribunal. Such a claim may result in an order that the business pay an amount not exceeding the value of the benefit derived from the conduct that is the subject of the order. This amount is to be distributed among the applicant and “*any other person affected by the conduct*”, suggesting a form of class action without the formal certification process. While private rights of action have been deferred for one-year, effective June 2025, the amendments permit private actions relating to claims made (or continuing to be made) as of June 20, 2024. This will require proactive compliance measures and strategic planning to mitigate potential challenges.

3. A Comparative Look

The common basis, among all selected jurisdictions, is that existing consumer rights and fair competition laws serve as the foundation for dealing with green claims made by businesses in commercial practices. So far, most of the common-law jurisdictions (*i.e.*, the UK, US and Australia) 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. Canada – its environmental claims guide is now archived – amended, so far, the Competition Act adding a short section dedicated to deceptive environmental claims. The EU intends, however, to adopt legally binding legislation on the substantiation and communication of green claims (including climate-related claims) as *lex specialis*.

Unlike the UK and US, where the green guides have a broader scope applying to business-to-business transactions, the EU narrowed it down to business-to-consumer commercial practices. A literal interpretation of the scope of the EU Green Claims Directive proposal seems reasonably clear, however there may be space for a broader (mis)interpretation (or lack of legal certainty) concerning the aim of the claims – also because the expression “*in the context of a commercial communication*” (within the ‘environmental claim’ definition) is not defined anywhere. Thus, to avoid uncertainties – *i.e.*, the potential risk of claims with purposes other than influencing consumers falling within the Green Claims scope – a clarification in the text could benefit players, as it is done in the Unfair Commercial Practices Directive (Recital 7): “*This Directive covers commercial practices which are directly aimed at influencing consumers’ commercial decisions with regard to products. It does not apply to commercial practices carried out primarily for other purposes, including, for example, investor communications such as annual reports and company promotional materials.*”

In the examined jurisdictions, legislation and related guidance documents usually require, or indicate as good practice, companies to adhere to basic criteria and principles when marketing their goods or/and services. Broadly, these criteria foresee that environmental claims must be truthful, accurate, specific, clear, substantiated (evidence-based), relevant, not exaggerated, do not correspond to requirements imposed by law/ necessary standard features, and do not hide or omit important information. Particularly, in the EU, a life-cycle perspective of the good or service must be considered *vis-à-vis* the relevance of the environmental characteristic underlying the claim; as well as the environmental trade-offs. It seems that these two requirements are meant to capture all impacts holistically, including unintended consequences and spillover effects (whilst this is relevant, it is also often very hard to capture). The UK ‘Green Claims Code’ only mentions that the full life-cycle of the product or service, and the whole of a business’s activities, *may be relevant* – and that all aspects of a product’s or service’s environmental impact over its life-cycle, including its supply chain, *could be important*.

These overarching criteria and principles do also apply to climate-related claims based on carbon credits, but most governments have further developed specific requirements and/or guidance for such claims, since – as explicitly recognized by the UK, US and Australia guidance – such claims are more complex and difficult to understand by the general consumer. Though, not only the level of detail provided varies, but, more importantly, the type of the prescribed requirements/criteria differs significantly among the compared jurisdictions (*i.e.*, substantive *versus* formal).

On the one hand, common law jurisdictions (UK, US and Australia) opt for requirements that can be defined as more of a qualitative nature – i.e., related to the form and which content should be provided. To substantiate the climate-related claim, the focus is thus placed on conducting due diligence and providing information about schemes, standards, methodologies, counting, quality, integrity, reliability, and type of credits underpinning the claim, rather than prescribing specific material rules or imposing prohibitions. To illustrate: the UK Government declined to add any misleading environmental claims to the list of banned practices in Schedule 20 of the DMCC 2024, despite the advice and recommendation from the CMA; yet, the EU introduced several forms of *greenwashing* as practices prohibited in all circumstances, namely “[t]he making of claims, based on the offsetting of GHG emissions, that a product has a neutral, reduced or positive impact on the environment in terms of emissions” (cf. Annex I of the Unfair Commercial Practices Directive revised by the Empowering Consumers Directive).

In addition, although still subject to up-coming negotiations, both the EP amendments and the Council’s general approach to the EU Green Claims Directive seem to go in the direction of prescribing substantive and/or quantitative requirements. The 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); (iii) distinguishes, without definition, between *contribution* and *compensation* claims; and (iv) alludes to the “like-for-like” principle.

The Council’s general approach, while dropping these addendums – and others, such as the reference to “*corresponding adjustments*”, which was included at some point in several interim versions of the compromised text – still explicitly: (i) distinguishes and define “*off-set*” and “*contribution*” claims; and (ii) foresees that when an explicit environmental claim is an *offset claim*, claiming that a trader has a neutral, reduced or positive impact on the environment in terms of GHG emission, the substantiation assessment shall demonstrate that the trader has *set a net-zero target* as set out in Directive 2013/34/EU as regards sustainability reporting standard (CSRD). Now, this cross-reference may raise questions: Is the intention merely to ensure coordinated compliance with reporting and disclosure obligations? Or does it go further?

According to CSRD delegated regulation (i.e., the European Sustainability Reporting Standards (‘ESRS’)), “[s]etting a net-zero target at the level of an undertaking aligned with meeting societal climate goals 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 with the possibility for justified sectoral variations in line with a recognized sectoral pathway) by permanently removing an equivalent volume of CO₂. ” Does this indirectly imply the need for a business to commit to at least 90% emissions reduction⁶⁹, in order to make and substantiate an explicit voluntary *off-set claim*?

As far as verification and certification are concerned, a major distinctive feature among the jurisdictions is easily identified: it falls on EU MS the obligation to set procedures for verifying *ex-ante* the substantiation of explicit environmental claims (environmental labels and environmental labelling schemes). The verification shall be undertaken by an accredited verifier – a conformity assessment body – which will be able to issue certificates of conformity to the effect that a company has substantiated their claims in accordance with the Green Claims Directive. The common law jurisdictions do not foresee such procedure of prior

⁶⁹ Even though ESRS E1-4 ‘GHG emission reduction targets’ does not impose such metric.

verification and certification of the environmental claims before their commercial usage, namely 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.

Finally, regarding enforcement, the growing public scrutiny of environmental claims created the perception there may be gaps and shortcomings in general consumer protection and competition law, thus justifying the current regulatory response, namely by expanding enforcement powers of the relevant authorities. For instance, in the EU, the Commission conducted two inventories of environmental claims, one in 2014⁷⁰ and another in 2020⁷¹, assessing 150 claims against the principles of the Unfair Commercial Practices Directive for clarity, accuracy, and verifiability. The 2020 inventory found that 53.3% of environmental claims provide vague, misleading or unfounded information about products' environmental characteristics across the EU and across a wide range of product categories. It also revealed that 40% of these claims were unsubstantiated (lacked verifiable evidence). A separate 2020 review by Consumer Protection Cooperation⁷² authorities found that 57.5% of the sustainability claims assessed lacked sufficient elements for verifying their accuracy. In many cases, authorities had difficulties identifying whether the claim covered the whole product or only one of its components (50%), whether it referred to the company or only certain products (36%) and which stage of the products lifecycle it covered (75%)⁷³.

In the UK, since the Green Claims Code's introduction, the CMA has initiated investigations into claims made by fashion businesses ASOS, Boohoo, and George at Asda (July 2022); the boiler manufacturer Worcester Bosch (October 2023); and the consumer goods group Unilever (December 2023). On March 27, 2024, the CMA announced that the ASOS, Boohoo, and George at Asda have accepted and signed voluntary undertakings to use only accurate and clear green claims. All 3 firms must also regularly provide the CMA with reports on how they are complying with the commitments they signed – as well as taking steps to improve their internal processes. At the same time, the CMA also published an open letter to the fashion retail sector stressing that players should ensure that all the green claims they make comply with UK consumer protection law. The CMA concludes its open letter by highlighting that its new powers under the DMCC will, for the first time, allow it to impose financial penalties for breaches of consumer protection law, such as misleading green claims, without going to court.⁷⁴

In the US, in 2021, three NGOs (Earthworks, Global Witness and Greenpeace USA) jointly filed an FTC complaint against Chevron in relation to allegedly deceptive advertisements overstating Chevron's investment in renewable energy, and its commitment to reducing fossil fuel pollution. The complaint accused Chevron of several direct violations of the FTC's Green Guides. Ultimately, the FTC did not end up taking action against Chevron in response to the complaint. However, more recently on April 8, 2022,

⁷⁰ Consumer Market Study on Environmental Claims for Non-Food Products, European Commission 2014. Available at: <https://op.europa.eu/en/publication-detail/-/publication/ae7f9aa1-bdea-4ad2-82d1-835549c3ce2a/language-en>.

⁷¹ Environmental claims in the EU: Inventory and reliability assessment Final report, European Commission 2020. Available at: https://www.qualenergia.it/wp-content/uploads/2023/01/Envclaims_inventory_2020_final_publi.pdf.

⁷² 2020 – sweep on misleading sustainability claims. Available. At: https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en#ref-2020--sweep-on-misleading-sustainability-claims.

⁷³ Screening of websites for 'greenwashing': half of green claims lack evidence. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269.

⁷⁴ Cf. "ASOS, Boohoo and Asda: greenwashing investigation", published January 26, 2023, and last updated March 27, 2024. Available at: <https://www.gov.uk/cma-cases/asos-boohoo-and-asda-greenwashing-investigation#compliance-review>.

the FTC used its Penalty Offense Authority to take action against Kohl's and Walmart “*for falsely marketing dozens of rayon textile products as bamboo.*” According to separate FTC settlements, the companies’ misleading representations violated the FTC Act and the Textile Act. In addition, the FTC says the Kohl's and Walmart engaged in “*greenwashing*” by making deceptive eco-friendly claims for those products. The US retailers agreed to pay \$5.5 Million in combined penalties for the alleged deceptive violations⁷⁵.

Finally, in Australia, the ACCC launched in October 2022 a ‘sweep’ of 247 different businesses and/or brands to ‘*identify industries or sectors which commonly use environmental and sustainability claims, and to assess whether these claims have the potential to mislead consumers*’⁷⁶. The ACCC concluded that the ‘sweep’ had identified several high-level concerns. It indicated that it would conduct ‘further analysis’ and ‘undertake enforcement, compliance, and education activities where appropriate’, including producing updated economy-wide guidance material, as well as targeted guidance for specific sectors⁷⁷. As a result of its findings, the ACCC published its guidance in December 2023.

4. Takeaways

As described above, approaches to “green” claims, and specifically to climate-related claims, are not novel, as e.g. evidenced with the US FTC “*Guides for the Use of Environmental Marketing Claims*”, first issued in 1992; the Canadian “*Environmental Claims: A Guide for Industry and Advertisers*” of 2008; Australia’s carbon neutral certification scheme (Climate Active) introduced in 2010; and the UK “*Green Claims Code: making environmental claims on goods and services*” of 2021.

Nevertheless, a strong *momentum* for enhancing regulation aimed at tackling misleading environmental claims is currently apparent. Several trends and developments in the examined jurisdictions seek to expand or elaborate existing regulatory frameworks for relevant claims: (i) the upcoming trilogues of the EU Green Claims Directive; (ii) the recently adopted UK DMCC 2024; (iii) the on-going update of the US FTC Green Guides and the new White House “*Voluntary Carbon Markets Joint Policy Statement and Principles*”; (iv) the recently issued ACCC Guide and the AANA Environmental claims exposure draft code in Australia; and (v) the latest Bills C-59 and C-372 in Canada.

Worldwide, companies have been making a growing number of claims about their current climate efforts and their future mitigation commitments. In many cases, these climate-related claims are underpinned by carbon credits issued in voluntary carbon markets to offset emissions. For decades now, carbon markets – including the very notion of offsetting and the crediting systems themselves – have been subject to criticism. To some extent, such criticism is unavoidable because a methodological framework premised on counterfactual assumptions can never be entirely foolproof.

⁷⁵ FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl's and Walmart, April 8, 2022 <<https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls>>.

⁷⁶ ACCC, ‘Greenwashing by businesses in Australia – Findings of the ACCC’s internet sweep of environmental claims’ (March 2023) 3 (ACCC’s March 2023 Greenwashing by Australian Business Report). Available at: <https://www.accc.gov.au/system/files/Greenwashing%20by%20businesses%20in%20Australia.pdf>.

⁷⁷ ACCC’s March 2023 Greenwashing by Australian Business Report, p. 9.

Voluntary carbon markets and, more specifically, the claims that companies can make when they engage in such markets, continue to be insufficiently understood⁷⁸ and are continuously questioned by many stakeholders, but especially civil society. This casts a shadow over companies' climate strategies and their engagement in voluntary carbon markets, posing reputational, litigation, and regulatory risks. However, the risks associated with corporate claims should not necessarily discourage investments in carbon markets. On the contrary, such investments not only provide a valuable opportunity through which companies can contribute to climate change mitigation, but also can have positive spill-over effects by facilitating knowledge generation, technology transfer, and access to finance in regions that do not normally benefit from private investments⁷⁹.

Against this backdrop, 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. Its ultimate goal is to tackle misleading and/or insufficient information in green claims by ensuring transparency and accuracy – nonetheless, the risk that consumers will misinterpret such claims is only reduced, and never fully eliminated. While that is the stated objective, the proposed directive, both in principle as well as in some of its more granular features, requires deeper reflection. While it may not intend to do so, it ends up regulating voluntary actions, exposing the contradiction in terms of “regulating voluntary actions and behaviors”. When purportedly voluntary initiatives become subject to an increasingly dense regulatory fabric, it adds to existing concerns about the burden of overregulation and enforced protectionism that alternatively contributes to the dense regulatory puzzle facing companies operating in Europe and the decreased levels of innovation and competitiveness currently diagnosed in the EU.

At a second level, some of the aspects included in the proposal call for reconsideration, as they impose conditions that, while on the surface reasonable and well-intended, result in onerous requirements and constraints for companies, and will effectively prevent a market-based approach to green claims and consumer protection more generally.

Whilst recognizing that the accuracy of corporate climate claims is strongly dependent on the environmental integrity of the underlying carbon credits, a discussion of the integrity of voluntary carbon credits is necessarily beyond the scope of the proposed Green Claims Directive. By now, several private initiatives are addressing the topic and issuing standards that aim to secure integrity: e.g., the Voluntary Carbon Market Integrity Initiative (VCMI) Claims Code of Practice (demand-side), the Gold Standard Claims Guidelines, the Integrity Council for the Voluntary Carbon Market (ICVCM) Core Carbon Principles (CCPs) (supply-side), the Oxford Principles for Net Zero Aligned Carbon Offsets, the IETA Guidelines for High Integrity Use of Carbon Credits, among others. Also, a hybrid governance arrangement has been created under the auspices of the International Organization for Standardization (ISO).

In addition, other disclosure-based regulations aimed at investors – with provisions regarding the use of carbon credits – are already in place, such as: (i) the EU Corporate Sustainability Reporting Directive (‘CSRD’) and its delegated regulation, the European Sustainability Reporting Standards (‘ESRS’); (ii) the

⁷⁸ *Understanding the Use of Carbon Credits by Companies: A Review of the Defining Elements of Corporate Climate Claims*, by Trouwloot, Danick & Streck, Charlotte & Chagas, Thiago & Martinus, Glenpherd, in *Global Challenges*, 7, (2023), pp. 2-3.

⁷⁹ *Ibid.*

UK Sustainability Disclosure Requirements (‘SDR’); (iii) the US Securities and Exchange Commission (‘SEC’) Rules to Enhance and Standardize Climate-Related Disclosures for Investors; (iv) the Australian Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024, introducing climate-related financial reporting requirements; and (v) the proposed sustainability-related disclosure standards by the Canadian Sustainability Standards Board (‘CSSB’).

In that sense, (multinational) companies will need to expand their focus beyond monitoring regulatory trends within their own jurisdictions. They must actively track 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. This raises important questions: What do substantial asymmetries in the existing and emerging rules, as well as related implementation practices, mean for competition and for distorting international commerce? Could this result in forum shopping, avoidance of certain markets, and bifurcation of product lines and activities? Could this prompt bureaucratic, procedural, or reporting fatigue and thereby exacerbate the backlash already observed in some sectors against voluntary sustainability initiatives? Could it increase risks to companies, potentially leading them to underreport, downplay or altogether abandon their voluntary sustainability initiatives to evade scrutiny?

Furthermore, while the scope and intent of Green Claims legislation differ from other distinct disclosure-based regulations, there is potential for overlap. It is therefore essential to ensure efficient coexistence and harmonization between climate-related disclosure regulations targeted at investors and consumer protection laws, fostering clear, transparent, and consistent communication of sustainability efforts.

For instance, the proposed Green Claims Directive clarifies that it does not apply to explicit environmental claims regulated by or substantiated by rules established in EU legislation listed in Article 1(2). Since the CSRD is included in this list, the mandatory sustainability reports published by companies under its scope are logically exempt from the Green Claims obligations. However, if an environmental claim from such a report is reused on a voluntary basis in another context, it must then comply with the Green Claims Directive obligations, including the requirement for verification and certification by an accredited body.

This duplication of verification processes – already covered by the CSRD’s sustainability audit – seems unnecessary. Thus, a new paragraph could be introduced, stating that the Directive shall not apply to explicit environmental claims that (i) are made outside the context of the reports or other materials required by the regulations referenced in Article 1(2) above, and (ii) provided the content of these claims accurately reflects the explicit environmental statements contained within those reports or materials.

Since trilogues will begin in autumn 2024, the discussion around certain topics will resurface. Particularly, one still needs to question the term “residual” as it may be subjective. It introduces an unnecessary and arbitrary restriction, and will also limit the uptake of solutions such as removal credits. It would (i) undermine the ongoing development of (voluntary) carbon markets and the investments in third countries outlined in the Paris Agreement; (ii) 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 (iii) overlook the fact that residual emissions targets will evolve with technological advancements and economic conditions, and are sector-specific.

Between claiming that a commercial business is carbon neutral – relying exclusively on offsets – and using carbon credits for residual emissions only, there is a spectrum of possibilities that could play a role in the companies’ decarbonization strategy. This use, and the correspondent claims, should be allowed when, and if, clearly substantiated and communicated. These are policy and political decisions and not necessarily technical ones.

Legislation should prescribe the goal, but not necessarily seek to regulate all aspects of the “how”. When it comes to use of carbon credits, offset claims ought to encompass both counterbalancing companies’ emissions on the pathway to achieving net zero and residual emissions. Restricting claims solely to residual emissions could severely stifle investment in carbon markets for the next ten to twenty years, limiting the supply of relevant projects, and constraining the necessary technology learning processes and emergence of institutional frameworks to enable greater uptake by then. For the same reason, all categories of carbon credits (reduction and removals) should be eligible for offset claims. Reduction credits are essential now to curb further emissions, while removal credits must be substantially increased if we are to reach net zero.

Will a more restrictive approach, if it prevails, paralyse companies in the efforts to mitigate? After all, we are talking about voluntary explicit climate-related claims. Hence, there is a potential outcome: commercial businesses will simply choose not to make the claims in their voluntary commercial communications.

The whole effort to legislate climate-related claims can be seen beneficial from the point of view of those that provide credits, and those that may want to use them, but perhaps with little or no real impact on consumer decisions. In other words, are the new rules necessary, or could more have been achieved with the existing consumer protection regimes (which after all have to contend with all kinds of evolving issue areas all the time; climate is not the first new issue area such existing regimes have had to adapt to)? Ultimately, the question thus also has to be asked: do we need to regulate voluntary claims in the first place – if, by default, they cause claims to no longer be voluntary (at least in part)?

5. Recommendations

Businesses operating in multiple jurisdictions should advocate for greater harmonization of green claims regulations across regions. While each jurisdiction has its unique regulatory environment, multinational corporations would benefit from a globally consistent approach to substantiating and verifying green claims, particularly those related to carbon offsets. This will help minimize market distortions, prevent regulatory arbitrage, and reduce the risk of companies abandoning voluntary sustainability efforts to evade scrutiny.

Policymakers must provide clearer distinctions between voluntary and mandatory climate-related claims and disclosures to avoid misinterpretations and/or overlapping between consumer protection laws and investor reporting requirements. Legislation addressing voluntary climate-related claims must focus on protecting consumers through appropriate information and should not exceed their mandate by attempting to regulate corporate net zero strategies or companies’ use of carbon credits.

Legislation should allow companies the flexibility to use carbon credits not only for residual emissions but also as part of broader decarbonization strategies. Limiting offset claims solely to residual emissions

could stifle investment in carbon markets, delaying progress toward net-zero targets. A balanced regulatory approach is needed to encourage continued corporate engagement in carbon markets without imposing overly restrictive conditions.

In some cases, existing consumer protection laws may already provide sufficient tools to address “*greenwashing*”. Rather than introducing entirely new regulations, policymakers could focus on enhancing implementation and enforcement of current frameworks, thereby reducing the need for additional regulatory burdens.

6. ANNEX: Comparative table

Jurisdiction	<i>Lex Generalis</i> / Legal basis for guidelines	<i>Lex specialis</i> / Guidelines	Initiator / key actor	Scope	Binding/ non-binding	Substantiation criteria/ requirement(s)	Climate-related claims specific requirements (substantive versus formal)	Verification	Certification	Enforcement/ legal cases
EU	Unfair Commercial Practices Directive	Green Claims Directive proposal	COM	B2C	Binding (legal act)	Yes	Yes (EC – formal; EP and Council – substantive)	<i>Ex-ante</i> verification by EU accredited verifiers	Certificate of conformity	Yes
UK	Digital Markets, Competition and Consumers Act 2024	CMA <i>Green Claims Code</i>	CMA	B2B	Non-binding (guides)	Yes	Yes (formal/ content-wise)	No	No	Yes
US	Federal Trade Commission Act	FTC <i>Guides for the Use of Environmental Marketing Claim</i>	FTC	B2B	Non-binding (guides)	Yes	Yes (formal)	No	No	Yes
Australia	Australian Consumer Law	ACCC <i>Making Environmental Claims</i>	ACCC	Not explicit (to all business activities)	Non-binding (guides)	Yes	Yes (formal)	No	Government certification scheme (not mandatory)	Yes
Canada	Competition Act (Bill C-59)	<i>Environmental Claims: A Guide for Industry and Advertisers</i> [archived]	Competition Bureau	The Act applies to all business activities	Binding (general law/ legal basis)	Yes	No	No	No	Yes