



ALERTS

The EU's New Green Claims Directive – It's Not Easy Being Green

March 30, 2023

Highlights

On March 22, 2023, the European Commission proposed the Green Claims Directive, which is intended to make green claims reliable, comparable and verifiable across the EU and protect consumers from greenwashing

Adding to the momentum generated by other EU green initiatives, this directive could be the catalyst that also spurs the U.S. to approve stronger regulatory enforcement mechanisms to crackdown on greenwashing

This proposed directive overlaps the FTC's request for comments on its Green Guides, including whether the agency should initiate a rulemaking to establish enforceable requirements related to unfair and deceptive environmental claims. The deadline for comments has been extended to April 24, 2023

The European Commission (EC) [proposed the Green Claims Directive](#) (GCD) on March 22, 2023, to crack down on greenwashing and prevent businesses from misleading customers about the environmental characteristics of their products and services. This action was in response, at least in part, to a 2020 [commission study](#) that found more

RELATED PEOPLE



Bruce White

Partner
Chicago

P 312-214-4584
F 312-759-5646
bruce.white@btlaw.com

RELATED PRACTICE AREAS

Environmental
Environmental, Social and Governance

than 50 percent of green labels made environmental claims that were “vague, misleading or unfounded,” and 40 percent of these claims were “unsubstantiated.”

This definitive action by the European Union (EU) comes at a time when the U.S. is also considering options to curb greenwashing and could inspire the U.S. to implement stronger regulatory enforcement mechanisms, including promulgation of new enforceable rules by the Federal Trade Commission (FTC) defining and prohibiting [unfair and deceptive environmental claims](#).

[According to the EC](#), under this proposal, consumers “will have more clarity, stronger reassurance that when something is sold as green, it actually is green, and better quality information to choose environment-friendly products and services.”

Scope of the Green Claims Directive

The EC’s objectives in the proposed GCD are to:

- Make green claims reliable, comparable and verifiable across the EU
- Protect consumers from greenwashing
- Contribute to creating a circular and green EU economy by enabling consumers to make informed purchasing decisions
- Help establish a level playing field when it comes to environmental performance of products

The related [proposal for a directive on empowering consumers for the green transition and annex](#), referenced in the proposed GCD, defines the green claims to be regulated as follows:

“any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time.”

The GCD provides minimum requirements for valid, comparable and verifiable information about the environmental impacts of products that make green claims. The proposal sets clear criteria for companies to prove their environmental claims: “As part of the scientific analysis, companies will identify the environmental impacts that are actually relevant to their product, as well as identifying any possible trade-offs to give a full and accurate picture.” Businesses will be required to provide consumers information on the green claim, either with the product or online. The new rule will require verification by independent auditors before claims can be made and put on the market.

The GCD will also regulate environmental labels. The GCD is proposing to establish standard criteria for the more than 230 voluntary sustainability

labels used across the EU, which are currently “subject to different levels of robustness, supervision and transparency.” The GCD will require environmental labels to be reliable, transparent, independently verified and regularly reviewed. Under the new proposal, adding an environmental label on products is still voluntary. The EU's official [EU Ecolabel](#) is exempt from the new rules since it already adheres to a third-party verification standard.

Companies based outside the EU that make green claims or utilize environmental labels that target the consumers of the 27 member states also would be required to comply with the GCD. It will be up to member states to set up the substantiation process for products and labels' green claims using independent and accredited auditors. The GCD has established the following process criteria:

- Claims must be substantiated with scientific evidence that is widely recognised, identifying the relevant environmental impacts and any trade-offs between them
- If products or organisations are compared with other products and organisations, these comparisons must be fair and based on equivalent information and data
- Claims or labels that use aggregate scoring of the product's overall environmental impact on, for example, biodiversity, climate, water consumption, soil, etc., shall not be permitted, unless set in EU rules
- Environmental labelling schemes should be solid and reliable, and their proliferation must be controlled. EU level schemes should be encouraged, new public schemes, unless developed at EU level, will not be allowed, and new private schemes are only allowed if they can show higher environmental ambition than existing ones and get a pre-approval
- Environmental labels must be transparent, verified by a third party, and regularly reviewed

Enforcement of the GCD will take place at the member state level, subject to the proviso in the GCD that “penalties must be ‘effective, proportionate and dissuasive.’” Penalties for violation range from fines to confiscation of revenues and temporary exclusion from public procurement processes and public funding. The directive requires that consumers should be able to bring an action as well.

The EC's intent is for the GCD to work with the Directive on Empowering the Consumers for the Green Transition, which encourages sustainable consumption by providing understandable information about the environmental impact of products, and identifying the types of claims that are deemed unfair commercial practices. Together these new rules are intended to provide a clear regime for environmental claims and labels. According to the EC, the adoption of this proposed legislation will not only protect consumers and the environment but also give a competitive edge to companies committed to increasing their environmental sustainability.

Initial Public Reaction to the GCD and Next Steps

While [some organizations, such as the International Chamber of Commerce, offered support](#), several interest groups quickly issued public critiques of the proposed GCD. The [Sustainable Apparel Coalition asserted](#) that: “The Directive does not mandate a standardized and clearly defined framework based on scientific foundations and fails to provide the legal certainty for companies and clarity to consumers.”

[ECOS lamented that](#) “After months of intense lobbying, what could have been legislation contributing to providing reliable environmental information to consumers was substantially watered down,” and added that “In order for claims to be robust and comparable, harmonised methodologies at the EU level will be crucial.” Carbon Market Watch [was disappointed](#) that “The draft directive fails to outlaw vague and disingenuous terms like ‘carbon neutrality’, which are a favoured marketing strategy for companies seeking to give their image a green makeover while continuing to pollute with impunity.”

The EC’s proposal will now go to the European Parliament and Council for consideration. This process usually takes about 18 months, during which there will be a public consultation process that will solicit comments, and amendments may be introduced. If the GCD is approved, each of the 27 member states will have 18 months after entry of the GCD to adopt national laws, and those laws will become effective six months after that. As a result, there is a reasonably good prospect that there will be variants in the final laws enacted.

Will the GCD Influence the U.S.’s Approach to Regulation of Greenwashing?

The timing and scope of the GCD is of no small interest in the U.S., where regulation of greenwashing has been ramping up as well. In May 2022, the Securities and Exchange Commission (SEC) issued the proposed Names Rule and ESG Disclosure Rule [targeting greenwashing in the naming and purpose](#) of claimed ESG funds. The SEC is expected to take final action on the Names Rule in April 2023.

Additionally, as part of a review process that occurs every 10 years, the FTC is receiving comments on its [Green Guides for the Use of Environmental Claims](#), which also target greenwashing. However, the Green Guides are just that – guides that do not currently have the force of law that are used to help interpret what is “unfair and deceptive.”

It is particularly noteworthy that the FTC has asked the public to comment, for the first time, on whether the agency should initiate a rulemaking under the FTC Act to establish independently enforceable requirements related to [unfair and deceptive environmental claims](#). If the FTC promulgates such a rule, it will have new enforcement authority to impose substantial penalties.

The deadline for comments on the Green Guides was recently extended to April 24, 2023. It is anticipated that there will be a substantial number of comments and it will take some time for the FTC to digest them. It will be interesting to watch the process unfold as the GCD moves toward finalization and the FTC decides whether to commence rulemaking in connection with its Green Guide updates. Once again there is a reasonable prospect that the European initiatives and momentum on green matters, including the GCD, could be a catalyst for the US to step

up as well – in this case to implement stronger regulatory enforcement mechanisms to crackdown on greenwashing.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Bruce White at 312-214-4584 or bwhite@btlaw.com.

© 2023 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.