

EU tackles greenwashing: “Empowering Consumers Directive” and proposals for the future

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Significant progress has been made at the EU level in combating “greenwashing” through regulatory measures, particularly with the adoption of the “Empowering Consumers Directive” (Directive (EU) - 2024/825). This directive, among other provisions, includes greenwashing behaviors in the list of misleading practices outlined in the Unfair Commercial Practices Directive (UCPD) – Directive 2005/29/EC.

Directive (EU) 2024/825 amends the Unfair Commercial Practices Directive to address commercial greenwashing practices deemed misleading in Business to Consumers (B2C) relations, subject to case-by-case evaluation.

The EU is working on another proposal, the Green Claims Directive (GCD) which aims to establish specific requirements for substantiating environmental claims, providing clarity on the conditions under which businesses can make such claims. This proposal will be finalized by the European co-legislators (the European Parliament and the Council of the EU) in the next legislative term, which will begin after the European Parliament elections in June 2024.

Regarding the term “Greenwashing” in the context of commercial practices toward consumers, it is a commonly used term, not a legal one, that refers to a message conveying false or misleading information about the environmental credentials of a company’s products or the company itself.

Directive (EU) 2024/825 has introduced a definition of “environmental claim,” which, if unsubstantiated or false, aligns with the concept of greenwashing.

An environmental claim is defined as “a message or representation which is not mandatory under Union or national law, in any form (...) 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” (new article 2(1)(o) of the UCPD, as amended by the Empowering Consumers Directive).

Key provisions introduced by the Empowering Consumers Directive

Directive (EU) 2024/825 amends the UCPD to address commercial greenwashing practices deemed misleading in Business to Consumers (B2C) relations, subject to case-by-case evaluation. The amendment targets false information about a product’s main characteristics and introduces considerations related to “environment” and “circularity aspects,” (such as durability, reparability, or recyclability) among others (new article 6(1)(b) of the UCPD).

It also regulates the conditions under which companies are permitted to make future claims and prohibits claims that lack substantiation or are irrelevant to consumers (new article 6(2)(d) and (e) of the UCPD).

Additionally, the amendment addresses product comparisons based on environmental, social, or circularity attributes, requiring specificity in the comparison methodology, the products subject to comparison, the suppliers thereof, and the mechanisms for maintaining information up to date (new article 7 of the UCPD).

Directive (EU) 2024/825 amends Annex I of the UCPD introducing additional cases to the existing ones that are considered misleading and therefore prohibited, including:

- Displaying a **sustainability label** not based on a certification scheme or established by public authorities.
- Making **generic environmental claims** without demonstrating excellent environmental performance relevant to the claim (i.e., certified environmental performance compliant with relevant Union law or recognized eco labelling schemes).
- Making an **environmental claim about the entire product** when the claim pertains only to certain aspects of traded products or a specific business activity.
- **Making claims based on offsetting** greenhouse gas emissions.

A challenge remains about how to ensure that a claim is not considered “generic.” In that regard, according to the new article 2(1)(p) of the UCPD, the trader has to provide “specification of the claim” in “clear and prominent terms”, and this must occur on “the same medium,” meaning, for example, the packaging where the claim is displayed. Nevertheless, we note that this definition appears to be rather vague and thus potentially subject to challenge.

The regulatory landscape for environmental claims in the EU is going through important evolutions, emphasizing consumer protection and urging traders to exercise caution when making such claims.

Another noteworthy aspect given the widespread use of offsetting practices (measures aimed at reducing the environmental impact of companies, for example, through funding climate solutions projects like reforestation projects) is the fact that, according to the new regulatory framework, such practice will generally be prohibited. It will only be permissible if grounded in the actual lifecycle impact of the product (which is likely almost never the case in current practice), rather than on emissions offset outside the product’s value chain.

Impact of the Empowering Consumers Directive on businesses not involved in B2C transactions

While Directive (EU) 2024/825 primarily aims to protect consumers who have suffered direct harm in B2C relations, it is anticipated to also impact other businesses that are not directly involved in such B2C transactions. This is envisaged in Recital 6 of the UCPD, which refers to indirect harm to the economic interests of legitimate competitors.

Past judicial cases on unfair commercial practices (see for example: Galatea BVBA (C-299/07) v Sanoma Magazines Belgium NV) confirm how this directive indirectly safeguards the interests of other businesses, who, in the majority of cases, are plaintiffs against traders who have used misleading claims in their commercial activities.

Furthermore, although according to the legislator’s intentions, the Directive is meant to cover misleading claims “directly” affecting consumers’ interests (Recital 6 of the UCPD), the case law suggests the evolution of the European Court of Justice (see for example C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v ‘Österreich’-Zeitungsverlag GmbH) that such protected interest may also be “indirect.” This ultimately results in also encompassing the protection of the interests of other businesses (competitors).

Another aspect worth mentioning is that although the law primarily applies to the B2C relationship, in cases of a preceding business to business (B2B) transaction, the supplied business entity might expect to be legitimate to repeat any claims made by its supplier. In such cases, unless organized otherwise contractually, joint liability between the two parties would be presumed. As a result, the supplied entity may seek recourse for any consequent losses suffered because of misleading claims made by its supplier.

Integration of the Green Claims Directive with the existing regulatory framework

The regulatory framework outlined above will be complemented by another proposal, the Green Claims Directive (GCD), which also concerns B2C transactions and aims to establish a verification mechanism to substantiate voluntary environmental claims. Once in force, the GCD will define how environmental claims should be substantiated and environmental labels verified, ensuring their validity and preventing them from being considered misleading.

In this context, the relationship between the new rules of the GCD and the requirement to provide a clear and prominent specification of the claim to avoid it being deemed “generic” under the revised UCPD will be worth analysing further. This “specification” could, for instance, be considered automatic if the environmental claim follows the verification process outlined in the future adoption of the GCD. If this understanding is confirmed, the GCD would provide greater certainty for businesses operating within its framework.

“Fly Responsibly” advertising campaign

At the level of EU Courts, no judicial cases have yet emerged concerning greenwashing within unfair commercial practices. Nonetheless, national judges have frequently addressed this issue both within EU Member States, and outside the European Union,

A significant judgment was given by a Dutch court on March 20th, 2024, when the District Court of Amsterdam ruled against an airline’s “Fly Responsibly” advertising campaign. This followed a 2022 lawsuit initiated by an NGO. This ruling, enabled by recent Dutch class action law, allows environmental nonprofit organizations to bring greenwashing claims before national courts. Therefore, similar class action-based claims can be expected in the Netherlands.

The lawsuit primarily focused on the airline’s use of carbon offsetting schemes, with the court deeming them misleading for consumers. This sets a precedent that could impact other airlines with similar messaging and potentially extend to other industries.

The findings of the Dutch court are based on the original version of the UCPD, which allowed, and still allows in its updated form, a case-by-case assessment to determine whether the nature of a claim is misleading, based on articles 5 to 9. This means that a practice can be considered misleading even if it is not listed in the outline provided in Annex I (as was the case with greenwashing practices until the amendment of 2024).

With the UCPD now explicitly including misleading environmental claims in the aforementioned Annex I, this could streamline the

possibility for consumers or other stakeholders to challenge what they consider to be baseless claims that they deem misleading, potentially making it easier to claim a deceptive practice.

In a very recent development on April 30, the EU Commission, along with EU consumer authorities, took action against certain airlines for misleading consumers about the environmental impact of several initiatives aimed at reducing flying emissions. The Commission sent letters to 20 airlines, warning them that their environmental claims may be misleading according to the EU rules in force and giving them 30 days to provide scientific evidence to support their claims.

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Conclusion

The regulatory landscape for environmental claims in the EU is going through important evolutions, emphasizing consumer protection and urging traders to exercise caution when making such claims. To comply with the new rules, it's crucial for businesses to promptly familiarize themselves with the revised UCPD, as member states must integrate the new rules into their national legal systems by Sept. 27, 2026.

In the future, a notable increase in case law related to greenwashing is to be expected. The recent Dutch judgment on the "Fly Responsibly" campaign provides useful insights in that regard.

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