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## Companies must prepare “scientific basis” for sustainability claims as MEPs ban greenwashing

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### **Sustainability claims will need to be specific and evidenced, with no use of carbon offsetting allowed under agreed directive.**



EU lawmakers have approved a new anti-greenwashing law banning the use of unproven generic claims such as “environmentally friendly,” or “climate neutral,” as well as sustainability statements based on carbon offsetting.

In a vote on 17 January 2024, Members of the European Parliament (MEPs) voted overwhelmingly to adopt the text of the “Directive on Empowering Consumers for the Green Transition,” which was provisionally

agreed in September 2023.

The directive is designed to complement another impending Directive on Green Claims, which the European Parliament says will be more specific regarding what companies can state in green credentials.

The new directive will now go to the Council of the EU for formal approval, after which member states will have 2 years to integrate the rules into national law.

### **Ensuring substance to green claims and the “circular economy”**

The Empowering Consumers Directive (the directive) will amend the Unfair Commercial Practices Directive (UCPD) 2005 and the Consumer Rights Directive (CRD) 2011.

The directive is part of the EU's Circular Economy package, and will also create a new labelling system focusing on the durability and reparability of products, promoting an existing EU requirement that products must come with two-year guarantees.

Environmental and social impact, durability and reparability would be added to the list of product characteristics about which traders are forbidden to mislead consumers (under the UCPD).

This information will be regulated under a harmonised EU-wide labelling regime, making guarantee information more visible, after MEPs argued that many people are not aware that all goods enjoy at least a two-year guarantee in the EU. The Commission will also create a new label for producers willing to highlight the quality of their goods by extending the guarantee period free of charge.

### **Broad terms and false durability claims banned**

The new rules aim to make product labelling clearer and more trustworthy by prohibiting the use of broad environmental claims like "environmentally friendly," "natural," "biodegradable," "climate neutral" and "eco" without proof.

Ten new commercial practices will be added to the list of those that are banned in all circumstances under the UCPD. These include:

- displaying a sustainability label that is not based on a certification scheme or not established by public authorities;
- making generic environmental claims;
- presenting requirements imposed by law on all products as a distinctive feature;
- omitting to inform the consumer about a feature of a product that limits its durability;
- false claims about durability;
- false claims about reparability; and
- persuading the consumer to replace a product earlier than necessary for technical reasons.

The directive will also ban claims that a product has a neutral, reduced or positive impact on the environment where the claim relies on a product's emissions being offset via carbon offsetting. This could have particular implications for industries where offsetting is commonly used to reduce emissions being reported, such as aviation and metalworks, and businesses may need to reconsider the role carbon offsetting can play in their overall ESG strategy.

### **New laws put pressure on businesses**

Several experts told Lexology PRO that the new directive should be seen in the wider context of increased regulatory enforcement over greenwashing. Regulators such as the European Securities and Markets Authority have shown they are ready to ensure companies are not misleading consumers and shareholders over their sustainability credentials.

Duncan Grieve, partner at Cadwalader, Wickersham & Taft in London told Lexology PRO:

*We are currently seeing an uptick in greenwashing litigation and investigations. These carry the risk of adverse reputational impact and, in response, many companies are undertaking a comprehensive assessment of any environmental claims, logos or even colours associated with their products and services that could be deemed misleading.*

*In response, companies need to be ever more prepared to substantiate such claims.*

Broad claims such as “environmentally friendly” can still be used if properly substantiated, according to the European Parliament. However, experts said the detail of the directive makes clear that doing so will be so difficult that companies may wish to think of such terms as banned, experts said.

On the other hand, Cyriel Ruers, partner at Maverick Advocaten in Amsterdam told Lexology PRO that businesses with genuinely sustainable products and marketing strategies should see the directive as advantageous.

“Genuine sustainable businesses will be given the tools to step-up against unfair ‘green’ competition,” he said.

The application of the directive will also apply to a “surprisingly broad” number of practices, Ruers told Lexology PRO, meaning companies will have to pay close attention depending on their current marketing practices. For example, prohibiting claims based on carbon offsetting will not affect all companies in the same way.

“This has a potentially huge impact, as various industries – especially the ones having difficulty [reducing] CO2 emissions in the value chain – rely on these CO2 compensation schemes,” he told Lexology PRO.

## **Regulatory confusion?**

Another risk for businesses is that this directive, in combination with the upcoming Green Claims Directive, could create regulatory confusion. Industry group Business Europe told Lexology PRO that it is important to avoid creating “unnecessary overlaps” between the two laws. “We must ensure workability and proportionality to enable companies innovate and market sustainable products,” the group said.

Such overlap or confusion also raises the risk of “greenhushing,” as companies try to avoid any risk of breaching the new rules by reducing their sustainability commitments entirely.

Viktor Josefsson, director at compliance-focused consultancy the Forensic Risk Alliance, told Lexology PRO that it is too early to say for sure whether the directive will encourage this, but that failing to properly comply with the directive raises serious risks for businesses, including “severe reputational damage, penalties and other legal implications.”

Davide Traina, partner at Dentons in Milan, also highlighted the risks created by the directive, including increased monitoring from regulators, potential market access restrictions, and increased scrutiny from investors and consumers.

However, he said that rather than shy away from environmental claims, companies needed to be more proactive when it comes to making such claims and knowing how to substantiate them.

"Companies should focus on enhancing their disclosure practices, providing consumers with detailed information about the environmental impact of their products," Traina told Lexology PRO. "This could involve transparent reporting on raw material sourcing, production methods, and waste management strategies."

Lubomila Jordanova, CEO of Plan A, an ESG reporting software company, said this directive shows that consumers are responding to sustainability labels, but companies must do more to justify using them:

*If you are stating that your product line is sustainable, make sure to conduct a complete life-cycle analysis to understand the environmental impact of your company's products and services. If you claim to be "carbon-neutral", use a rigorous carbon accounting framework. Similarly, ensure your claims' conformity – clients and partners should read the same claims backed up by data.*

"Simply avoid making claims if you are not able to back them up with scientific evidence," she said.

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