

Greenwashing: Corporate Practices Under Scrutiny – Part 1

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Greenwashing is a practice that can include overstating a company's environmental record, misrepresenting the sustainability of its corporate practices or claiming a product as environmentally friendly without any verifiable evidence. With a growing focus from consumers and regulators on sustainability and on Environmental Social and Governance issues ('ESG'), claims arising from the environmental impact of corporate practices are coming under increasing scrutiny.

In this first article of a two-part series, we will look at recent

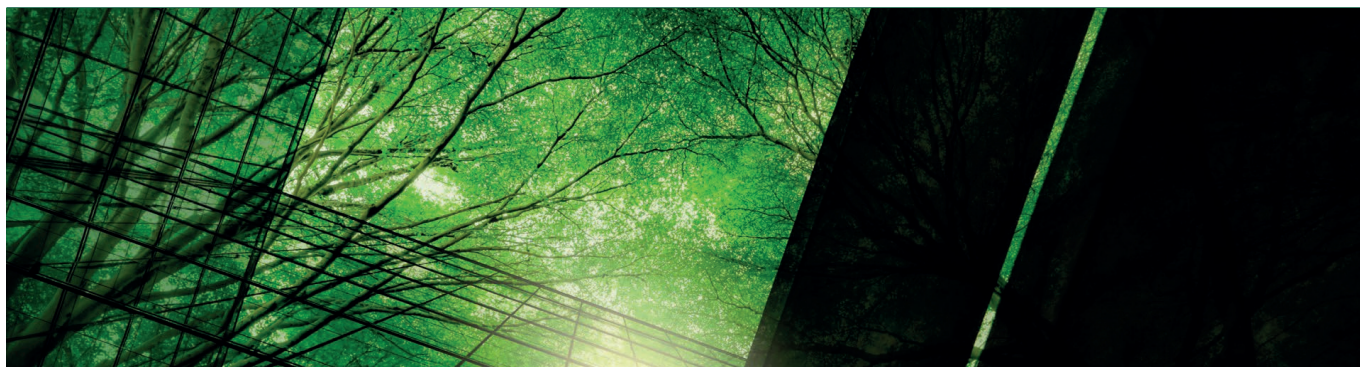
caselaw which considers whether alleged greenwashing practices amount to a breach of consumer legislation. We will also discuss an uptake in regulatory intervention against companies making unverified or misleading ESG related claims. In our second article, we will consider what steps the EU is taking to combat the practice of greenwashing.

Misleading Advertising

Cases by or on behalf of consumers challenging alleged greenwashing practices are on the increase in Europe.

In a class action taken by Fossielvrij NL (Fossil Free NL) in the Netherlands, the Amsterdam District Court held that marketing claims made by Royal Dutch Airlines ('KLM') as part of its *'Fly Responsibly'* campaign were vague and





misleading and in breach of Dutch Unfair Commercial Practices legislation. The court found that KLM statements provided an *'overly rosy picture'* of the benefit of certain measures, such as the use of Sustainable Aviation Fuels and CO2 offsetting practices like reforestation. The statements gave a false impression that flying with KLM was sustainable while advertisements relating to the airline becoming *'more sustainable'* were insufficiently specific about the environmental benefit that would be achieved and how this related to KLM.

The court further found that the use of absolute terms such as *'CO2ZERO'* in advertisements were not justified as environmental measures and were misleading to the consumer due to the advertisement indicating a direct link between a contribution from the customer and the impact of the relevant flight on the environment.

In total, the court held that 15 of the 19 claims the subject of the action were in breach of the relevant legislation and awarded costs against KLM. The court found that while KLM can make environmental based claims regarding sustainable flying going forward, it was obliged to do so in a true and accurate manner.

Regulatory Intervention

In the UK, the Competition and Markets Authority (*'CMA'*) launched an investigation into sustainability claims made by online fashion retailers ASOS, Boohoo and Asda, resulting in the companies making a range of voluntary commitments, with a requirement to file regular reports on compliance with the CMA. Commitments include ensuring that all green claims are accurate and statements about materials are specific and clear, with the percentage of recycled fibers clearly displayed. Natural imagery cannot be used to suggest a product is more environmentally friendly than it actually is and any claims made about environmental targets must be supported by a clear and verifiable strategy, which consumers can access.

In Germany, the financial regulator, BaFin, launched an investigation into fund company DWS, which is majority owned by Deutsche Bank, in respect of allegations of greenwashing whereby investors were misled with claims that more than half of the group's assets were invested using ESG related criteria. This investigation has led to a number of raids by German police on the offices of DWS, most recently in February of this year and the resignation of its CEO. While any possible sanction from the German regulator remains to be determined, in the US, DWS agreed to pay a total of \$25million in fines to settle a Securities and Exchange Commission investigation, which included a \$19 million fine for greenwashing offences.

The European Consumer Protection Cooperation (*'CPC'*), a network of Member State authorities established to protect consumers shopping across national borders, initiated an action against the online retailer Zalando. It had labelled product images on its website as being *'sustainable'* and subsequently replaced this with environmentally recognised symbols, such as trees and leaves. The CPC argued these descriptions were insufficiently explained and were misleading to consumers. The company committed to removing the icons displayed on its platform by April 2024. It also committed to no longer using the term *'sustainability'*, or other terms indicating an environmental or ethical benefit unless it can provide clear and specific information on the benefit. Zalando further committed to revising its *'Sustainability Page'* by introducing two new webpages with more information on product standards and information about its sustainability-related approaches and strategies.

In April 2024, the European Commission and EU consumer authorities sent letters to 20 airlines identifying several types of potentially misleading green claims. Statements made by airlines that the CO2 emissions caused by a flight could be offset by climate projects or through the use of sustainable fuels, to which consumers could contribute by paying additional fees, were highlighted. In addition,

several potentially misleading practices were identified, including using the terms '*green*', '*sustainable*' or '*responsible*' in an absolute way and claiming that an airline is moving towards net-zero greenhouse gas emissions without clear and verifiable commitments, targets and an independent monitoring system. The airlines in question were given a 30-day deadline to bring their practices within EU consumer law.

Conclusion

There is now a significant move towards protecting consumers from misleading, unsubstantiated or ambiguous sustainability claims. Companies who wish to continue to communicate with customers about the environmental impact of their business will need to be able to stand over the integrity of what is claimed, while transparency in terms of what can realistically be achieved cannot be overlooked.

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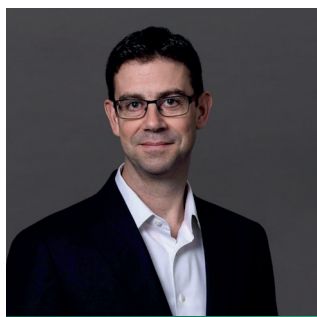
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