

ADVERTISING & MARKETING LAW

Are your environmental claims sustainable?

Businesses everywhere are facing significant pressure from customers and investors to reduce their environmental impact. Many are responding to this demand by making significant changes to the way they source and manufacture products and deliver services. Understandably, they are keen to promote their efforts to 'go green' as part of their marketing strategies, in order to attract the ever-growing number of conscious consumers.

Against this backdrop, regulators are increasingly focusing on environmental advertising, in order to ensure that 'sustainable', 'green' and similar claims are appropriately evidenced.

7 MIN READ

In Ireland, so-called ‘greenwashing’ is currently policed by the Advertising Standards Authority for Ireland (**ASAI**) and the Competition and Consumer Protection Commission (**CCPC**). There are some recent signs of increased enforcement activity in this space. As part of an EU and international coordinated ‘market sweep’, the CCPC recently wrote to a number of Irish businesses calling upon them to properly substantiate or withdraw certain ‘green claims’. The ASAI is also receiving increased numbers of complaints about environmental claims.

There are also developments underway at EU level. The European Commission is currently developing two complementary policy initiatives which are likely to bring further legislative developments in this space. One of the key objectives of the New Consumer Agenda is to empower consumers to make the ‘green transition’ and there are plans for legislation governing the level of information which must be provided to consumers on sustainability.

Also relevant is the Green Deal (the EU’s ambitious plan to become a climate neutral continent) in which the European Commission has flagged the need to ensure that relevant legislation is effectively enforced. This will be facilitated by increased penalties for breaches of consumer legislation due to come into effect in May 2022 under the EU Enforcement and Modernisation Directive¹ including fines of up to 4% of the trader’s annual turnover (or €2 million where turnover is not available).

With increased regulation and enforcement on the horizon, this article examines the current rules applicable to environmental claims, the consequences of non-compliance, and how best to mitigate the risks of complaint or prosecution.

¹ <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

Overview of current requirements

The ASAI Code

The ASAI is an independent self-regulatory body set up and financed by the advertising industry. It seeks to ensure that all commercial marketing communications are “legal, decent, honest and truthful”. It does this by monitoring compliance with the Code of Standards for Advertising and Marketing Communications in Ireland (7th Edition) (the **ASAI Code**). It includes both general rules relating to all types of advertising, as well as specific rules on certain types of claims.

Section 15 of the ASAI Code deals specifically with ‘Environmental Claims’. It distinguishes between ‘absolute’ and ‘qualified’ environmental claims. The starting point is that ‘absolute’ claims should be “*supported by a high level of substantiation*”². Such claims should not be “*used without qualification unless advertisers can provide substantiation that their product will cause **no environmental damage***”.

This applies over the course of the product’s lifecycle (from raw material to end-of-life), thereby setting a very high bar for absolute claims to sustainability.

² <https://www.asai.ie/asaicode/section-15-environmental-claims/>

There is a lower threshold for ‘qualified claims’. Section 15.3 of the ASAI code provides that “*qualified claims and comparisons may be acceptable if advertisers can demonstrate that their product provides an improvement in environmental terms, either against their competitors or their own previous products. Qualified claims should also be capable of substantiation*”.³

All qualified claims must therefore reflect a verifiable environmental improvement. This should be communicated in a clear and accurate way to the public. Furthermore, unless appropriately qualified, the environmental impact being claimed must relate to a significant aspect of the lifecycle of the goods or services, including its supply chain.

Consumer Protection Act 2007

Environmental claims also come within the scope of consumer protection law. The key legislation is the Consumer Protection Act 2007 (as amended) (the **CPA**), which prohibits misleading commercial practices⁴ including the provision of false information likely to cause the average consumer to be deceived into making a decision that they would not otherwise have made. For example, if the marketing of a product

incorrectly claimed that it was ‘organic’ or ‘recyclable’ without that claim being sufficiently backed up, this might mislead a customer into buying this item and could therefore constitute a “*misleading commercial practice*”.

The statutory body responsible for enforcing this legislation is the Competition and Consumer Protection Commission (the **CCPC**). It has a broad range of enforcement powers, including powers to prosecute businesses in respect of misleading commercial practices. ‘Greenwashing’ appears to be a current area of particular focus for the CCPC. As noted above, it recently participated in a coordinated ‘sweep’ by individual national regulators of green claims. This was largely targeted at the websites of clothing, cosmetics and household equipment retailers to identify breaches of EU consumer laws.⁵

The sweep found that, in 42% of cases, the European Commission and national regulators had reason to believe that the claim may be false or deceptive and could therefore potentially amount to an unfair or misleading commercial practice. Where the CCPC identified issues, it contacted the relevant organisations, detailing the ways in which certain environmental claims were

misleading and making recommendations about the actions necessary to achieve compliance with the CPA. The CCPC reserved its right to take enforcement action and indicated that it would be carrying out further inspections of the relevant websites. We expect that this will continue to be a key area of focus for the CCPC given the backdrop of developments at EU level flagged above. It is likely that the broader findings of this sweep across various EU member states will also feed into the EU legislative proposals to combat ‘greenwashing’ as part of the ‘New Consumer Agenda’.

Monitoring compliance: Consequences of misleading environmental claims

The ASAI Code is not legally binding. However, the ASAI investigates and publishes decisions in response to complaints which are often reported on in the media. A negative ruling can lead to adverse coverage in both traditional media, as well as on social media from activists calling out ‘greenwashing’.

The CCPC has a variety of enforcement mechanisms available to it under the CPA, from compliance notices to criminal

³ <https://www.asai.ie/asaicode/section-15-environmental-claims/>

⁴ See section 43(1) and section 43(2) of the CPA available at <http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/html>

⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269

prosecution. The CCPC hasn't pursued prosecutions in this space to date. However, as noted above, it has engaged directly with businesses which it believed were not compliant with consumer legislation arising from the 'sweep'. This aligns with the CCPC's general enforcement approach of first seeking compliance by the relevant business,⁶ and apply 'prioritisation principles' in relation to the enforcement actions they pursue.⁷

It remains to be seen whether the CCPC will take a tougher stance when it gains new powers to impose fines under the Enforcement and Modernisation Directive.⁸ The potential application of fines of up to 4% annual turnover or €2 million for "widespread infringement" or infringements with an inter-member state element is likely to change the enforcement landscape.

Mitigating the risk of complaints

While increased regulation of 'greenwashing' is on the way, businesses wishing to promote environmental features or sustainability improvements should in the meantime be alert to the relevant provisions of the ASAI Code and consumer protection legislation. The following practical guidelines may also be helpful:

- Use **clear and specific language** rather than vague, ambiguous terms (e.g. 'green', 'eco', 'planet-friendly').
- Consider whether **qualifying statements** should accompany environmental claims to avoid the risk that it will be considered an 'absolute claim'.
- **Substantiation is key!** Make sure that you have robust and verifiable information available to validate all claims.
- Ensure that the **positioning of ads** doesn't create the impression that the claims apply to a broader range of products, creating a 'halo effect'.
- **Aspirational claims** should be accompanied by **clear targets and timelines**.
- Be aware that it could be considered misleading to suggest a **benefit in comparison to other products** if that benefit is **prescribed by law**.
- Bear in mind that you must take the **whole lifecycle** of a product (from raw material to recovery) into account when making an environmental claim.
- Make sure that all environmental claims are **reviewed and updated regularly**.

⁶ See the CCPC's Strategy Statement 2021-2023 available at <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2020/12/CCPC-Strategy-Statement-2021-2023.pdf>

⁷ <https://www.ccpc.ie/business/about/decide-take-action/>

⁸ EU Directive (2019/2161/EU) amends existing EU consumer protection law under the Unfair Contract Terms Directive (93/13/EEC), the Price Indications Directive (98/6/EC), the Unfair Commercial Practices Directive (2005/29/EC) and the Consumer Rights Directive (2011/83/EU). A consultation on the Scheme of the 'Consumer Rights Bill' implementing the Omnibus Directive concluded on 30 June 2021. The current scheme is available at: <https://enterprise.gov.ie/en/Consultations/Consultations-files/Scheme-of-Consumer-Rights-Bill-2021.pdf>



If you require advice on any of the issues raised in this bulletin, please contact a member of our Advertising and Marketing team. For further information on this topic please contact [Katie O'Connor](#), [Denise Daly Byrne](#), [Mairead O'Brien](#) or any member of the [Litigation & Dispute Resolution team](#).

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