

Green Marketing Claims to Receive Increased Scrutiny

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Green Marketing Updates in the European Union (EU)

Background

On March 22, 2023, the European Commission (Commission) published a [Proposal for a Directive on Green Claims](#) (Proposal). The Proposal is part of the EU's larger efforts under its Green Transition to “establish a strong and coherent product policy framework that will make environmentally sustainable products and business models the norm.” The Proposal intends to complement existing Directives that set out specific requirements on environmental claims and comes after recent [actions to amend ESG reporting and disclosure requirements](#).

The Proposal intends to establish a uniform approach and ensure consumers receive reliable, comparable, and verifiable environmental information on products to leverage their purchasing decisions to reward better environmental performance. It would apply to explicit environmental claims made regarding products available on the EU market, including those made available on the EU market by non-EU businesses.

Key takeaway: ex-ante verification of environmental claims and labeling schemes

The most significant aspect of the Proposal is that the substantiation and communication of environmental claims and labels be third-party verified and certified to comply with Proposal requirements before businesses can use the claim in commercial communication.

An official third-party conformity assessment body, or verifier, will conduct the ex-ante verification of

claims submitted by the company that wishes to use it. The Proposal notes that this requirement will “ensure every claim that the consumer will be exposed to had been verified to be reliable and trustworthy.” Once a verifier completes the verification of the submitted claim, it will decide whether to issue a certificate of conformity.

The Proposal directs Member States to set up specific procedures for verifying the substantiation and communication of explicit environmental claims and labeling schemes.

Other key provisions within the Proposal

- **Covered environmental claims are split into two buckets.** The Proposal carves out different requirements for two different types of environmental claims: explicit environmental claims, and comparative environmental claims. An explicit environmental claim is a claim that is in text or contained in an environmental label. Comparative environmental claims are explicit environmental claims that state or imply that a product or trader has less environmental impacts or better environmental performance than other products or traders.
- **Substantiation requirement for explicit claims.** Traders that operate in the EU market must carry out an assessment to substantiate explicit environmental claims in business-to-consumer communications. The assessment must, among other things:
 - Specify if the claim relates to the whole product, part of the product, or certain aspects of the product.
 - Rely on widely recognized scientific evidence. For the assessment to be “robust,” it should include primary, company-specific data for relevant aspects contributing significantly to the product’s environmental performance.
 - Demonstrate that the claimed environmental impacts, environmental aspects, or environmental performance are significant from a lifecycle perspective. The Proposal does not prescribe a single method of substantiation and does not require conducting a full lifecycle analysis for each type of claim.
- **Substantiation requirement for comparative claims.** The Proposal also outlines specific substantiation requirements for comparative explicit environmental claims. When making comparative claims, traders must comply with the substantiation requirements for explicit environmental claims, and specific requirements related to comparative claims. Some of these requirements include:
 - Ensuring that the data used to assess the product’s environmental impact, aspect, or performance is generated or sourced in the same manner as the data used for assessing the comparable product’s environmental impact, aspect, or performance.
 - Ensuring that the scope of the stages along the value chain included are equivalent among compared products and that the most significant stages are considered for all products.
- **Detailed requirements for communicating explicit environmental claims.** The Proposal outlines criteria traders must follow when communicating explicit environmental claims. Some of the criteria include:
 - Explicit environmental claims may only cover environmental impacts, aspects or performance that are substantiated and identified as significant for the product or trader in question.
 - If the claim relates to a final product, and the use phase is one of the most significant lifecycle stages of that product, then a trader must include information in the claim on how a consumer should use the product to achieve the expected environmental performance. As mentioned above, the Proposal identifies additional communication criteria traders must follow when making comparative environmental claims.

- Where the claim relates to the future environmental performance of a product, it must include a time-bound commitment for improvements inside its own operations and value chains.
- Information on the product or trader that is the subject of the claim, and the related substantiation, must be made available in a physical form or in the form of a weblink. The information required is detailed. For example, for climate-related explicit environmental claims that rely on GHG emission offsets, the information must explain the extent of the product's reliance on offsets and whether these offsets are reductions or removals.
- **Explicit criteria for environmental labels.** Environmental labels must meet the abovementioned substantiation requirements and communication requirements. Under the Proposal, environmental labeling schemes must comply with specific requirements, such as ensuring that information about the ownership and decision-making body of the scheme is easily and freely accessible. The Commission must publish and keep an up-to-date list of officially recognized environmental labels that are allowed to be used on the EU market.
- **Complaint mechanism.** The Proposal provides individuals and organizations with a “legitimate interest” with the ability to submit substantiated complaints to competent authorities when they deem that a trader has failed to comply with the Proposal. Competent authorities would then assess the complaint and, if necessary, conduct inspections.
- **Penalties for violation.** In developing penalties and measures for infringements, Member States must include fines that “effectively deprive those responsible of the economic benefits derived from their infringements;” confiscation of revenues gained by the trader from the transaction; and temporary exclusion from public procurement processes and access to public funding.

The Proposal must be negotiated and approved by both the European Parliament and Member States before it becomes law, meaning the content of the Proposal could change. It will be important to understand the changes to the final Directive to ensure compliance.

Green Marketing Updates in the United States

Parallel efforts to the EU's Proposal are also in progress in the United States, where the U.S. Federal Trade Commission (FTC) initiated a long-awaited [refresh of the Guides](#) for the Use of Environmental Marketing Claims (Green Guides). Stakeholders must submit [comments](#) on the Green Guides by April 24, 2023. FTC will host a [public workshop](#) on May 23, 2023, regarding recyclability-related claims, where they will seek input related to their update of the Green Guides. Stakeholders may submit comments on the webinar content on or before June 13, 2023. During the last revision of the Green Guides in 2012, the [FTC added new sections to the Green Guides](#) regarding certifications, carbon offsets, “made with renewable energy” claims, and “made with renewable materials” claims. The current refresh could see the addition of new sections and alterations of existing sections. One of the major changes under consideration includes the potential to make the Green Guides enforceable and binding through rulemaking, similar to the Commission's Proposal. Companies can use this review period to help inform FTC regarding consumer perception of certain claims.

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