

ESG — RISK AND/OR OPPORTUNITY? WHAT ARE THE LIABILITIES AND
LITIGATION RISKS TO BE AWARE OF AND HOW TO COMMUNICATE OR NOT
COMMUNICATE? HOW TO DETECT AND WHY TO AVOID GREEN WASHING

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Context

Greenwashing puts reputations on the line. As global heating and other environmental issues have come to the forefront of public consciousness in recent years, with extreme weather events and increasingly urgent warnings about the damage humans are doing to the planet, consumers have taken a greater interest in the environmental impact of the products they buy and use. Dozens of surveys have revealed that consumers prefer environmentally-friendly products, and that they are willing to pay a premium to get them. Naturally, business have responded to this concern, with brand-owners increasingly highlighting the benign or even beneficial effects their products and services have on the natural world.

However, environmental issues are highly technical, and therefore raise a significant risk of confusing and misleading consumers, who may be persuaded to part with their cash to obtain products whose environmental benefits may be less than they appear. A European Commission website screening project, which reported in January, found that green claims were exaggerated, false or deceptive in 42% of cases, and more than half the time the information provided was inadequate.

2021 therefore saw an increased focus from regulators on misleading green claims. In the UK, the Competition and Markets Authority recently published a new Green Claims Code, setting out six key principles for traders to follow when making environmental claims, together with over 100 pages of examples and more detailed advice, and has implied that enforcement in this area may follow soon in 2022. The Advertising Standards Authority recently carried out a review of its regulation of green claims regulation, announcing its decisions following the first stage of its review in September. In January 2021 the Netherlands Consumer and Markets Authority published Guidelines on Sustainability Claims, and in August 2021, the French government issued its Climate and Resilience Law. Similar developments are in train across Europe.

Given the level of public concern about the environment, we expect that a finding that a business has been misleading consumers about its environmental credentials has the potential to be even more damaging to its reputation than other advertising breaches.

At our panel, we will look at specific cases of green claims / greenwashing litigation that are as mentioned on the rise in Europe and which illustrates how courts are being used to drive change and discuss some key points to remember when making green claims such as:

1. Be clear

Environmental claims are often technical and complex. Where terms are unclear, explain what you mean by them. Use appropriate qualifications and clarifications in the ad – significant qualifications should not be on a separate web page or another location where they are likely to go unread – but remember that these must be genuine qualifications of clarifications, and must not contradict the main claim. Avoid industry jargon, or explain it when used.

2. Be specific

Identify the specific environmental benefit of your product or service and state it clearly. Avoid terms like “sustainable”, “green”, “environmentally friendly”, “eco-friendly” or “kind to the planet”, which are largely meaningless. Comparative claims, such as “more sustainable” or

“greener”, may be acceptable if you explain the specific environmental benefit clearly. A claim made for a product or service generally should be based on a “cradle-to-grave” assessment, taking into account the environmental effects of inputs such as raw materials, water and electricity, manufacturing, transport, use and end-of-life disposal. Even with more narrowly-framed claims, make sure you consider all aspects – a common pitfall is to claim that packaging is recyclable or plastic free, without considering whether inner packaging, glue or tape, all of which form part of the packaging, meet that description.

3. Limit your claims to what you can prove

Start with the evidence you have, and work out what claims you can make based on that evidence. A common pitfall is to start with the claim and then cast about for evidence to support it, which often leads to a broader claim than can be substantiated. If you have taken waste out of the supply chain, limit your claim to the supply chain. If you have reduced CO₂ emissions from transport, limit your claim to transport.

4. Substantiation should be thorough and detailed

Because they are often technical and detailed, environmental claims may require in-depth substantiation, and you may need to expend significant time and effort compiling it. For example, claims regarding carbon neutrality or reduced carbon require a thorough survey of a business’s operation and supply chain over a significant period, first to determine its baseline carbon emissions and then to track its progress towards reduced carbon or carbon neutrality. Be aware that terms such as “biodegradable”, “organic”, “renewable”, “compostable”, “recycled”, “recyclable”, “reusable” and “carbon-neutral” have specific technical meanings, and be ready to substantiate them accordingly. Substantiation by reference to an independent test standard, such as ISO 14021 on self-declared environmental claims, tends to be more persuasive than a standard developed in-house. Take care with symbols, which have specific meanings and rules for use. Make sure evidence is up to date. Make sure claims are accurate for normal use of the products, or qualify them accordingly – for example, if a product is only biodegradable in a specialist facility, and is likely to go to landfill where it will not degrade any quicker than normal products, do not claim “biodegradable”, or at least state that specialist facilities are required.

5. Don’t claim normal product features, or things you are required to do by law, as environmental benefits

For example, in the UK, rinse-off toiletry products must not contain micro beads. Claiming such products are “micro bead free” is misleading, as it implies that the products have a particular environmental advantage over other products, which they do not.

6. Take care with comparisons

Comparative advertising raises its own specific issues, and, where it refers to a competitor or its product or service by name, can substantially heighten risks by opening up the possibility of trademark infringement. Make sure you compare like with like – the comparison should be of products or services meeting the same needs or intended for the same purpose. The features compared should be material and representative, and also “verifiable”, which requires the detailed basis of the comparison to be disclosed proactively, either in the advertising itself or by way of a “signpost” in the ad directing readers to the source of information.