

## LEGAL UPDATE

### **Proposal European Directive on sustainability claims and Dutch Code for sustainability advertising**

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Sustainability is increasingly a criterion for consumers when buying products or services. Companies respond to this by propagating their ESG policies and stating how sustainable their products and services are. However, research by the European Commission in 2020 found that over half of those sustainability claims were vague, misleading or unfounded, and 40% of the claims were even completely unsubstantiated. On 22 March 2023, the European Commission therefore proposed a new European Directive on sustainability claims. Moreover, in the Netherlands, the Sustainability Advertising Code came into force on 1 February 2023, as part of the Dutch Advertising Code. In this Legal Update, we discuss the proposal and the code.

### **BACKGROUND**

#### **What are sustainability claims?**

Sustainability claims are expressions that companies voluntarily use to promote their products and services. A sustainability claim can be an environmental claim or an ethical claim. An environmental claim suggests or creates the impression that a product or activity has a positive, less or no impact on the environment. An ethical claim creates the impression that the manufacture of a product or the performance of an activity has been done according to certain ethical standards. This may include, for example, general working conditions, animal welfare and/or corporate social responsibility.

#### **'Greenwashing': misleading consumers**

Greenwashing is misleading consumers by claiming products are more sustainable than they actually are. Greenwashing erodes consumer confidence in sustainability claims and ESG goals. In addition, greenwashing leads to distortion of competition. This is because companies that make ESG investments, investing in the sustainability benefits of their products or services and properly informing consumers about them, are disadvantaged. In the Netherlands, the Consumer & Market Authority (**ACM**) supervises this. The ACM can, for instance, impose fines or orders under penalty payments. In the [Guideline on Sustainability Claims](#), the ACM has drawn up five rules of thumb to help companies work with fair sustainability claims.

#### **European Green Deal**

The proposal for a directive on sustainability claims is part of the European Union's broader ESG goal of becoming the first climate-neutral continent by 2050. The proposal is part of the third package of proposals to promote the circular economy, as envisaged in the European Green Deal. Besides the proposal on sustainability claims, the European Commission also proposed common rules to promote the repair of goods on 22 March 2023. In our Legal Update '[Proposal European Directive on common rules promoting repair of goods](#)', we discussed this proposal.

### **SUSTAINABILITY ADVERTISING CODE**

From 1 February 2023, the Sustainability Advertising Code ("**CDR**") came into force as part of the Dutch Advertising Code. The CDR aims to encourage responsible sustainability advertising. Sustainability advertisements are defined as all advertisements with one or more sustainability claims. The CDR replaces the Environmental Advertising Code, which only covered environmental claims. The updated rules now apply to all sustainability claims, including ethical claims. The main rules have not changed:

sustainability claims must not mislead and must be demonstrably correct. Drawing attention to your sustainability ambition in advertising is allowed, provided it is clear that it is an aspiration, and that it is an achievable goal.

The Dutch Advertising Code and CDR were drafted by the Advertising Code Foundation, the advertising self-regulation body. With the new CDR, the Foundation aims to provide a regulatory framework in line with existing legislation and its interpretation by the ACM in the Sustainability Claims Guideline. Given the European proposals for legislation in the field of sustainability claims, the CDR will be reviewed after one year and adapted where necessary to keep the code current and relevant.

## **PROPOSAL NEW EUROPEAN DIRECTIVE ON SUSTAINABILITY CLAIMS**

### **New Sustainability Claim Directive = Supplement Unfair Commercial Practices Directive**

On 22 March 2023, the European Commission proposed a new directive to combat greenwashing. The proposal addresses "green claims" by companies, claiming a positive environmental impact, a less negative impact, no impact or an improvement over time for their products, services or mode of organisation (e.g. "*packaging consists of 30% recycled plastic*", "*bee-friendly juice*", or "*we promise to reduce CO2 emissions resulting from the production of this product by 50% by 2030 compared to 2020*"). The proposal shows that these green claims must be substantiated as well as verified beforehand.

The proposal on green claims complements the already existing Unfair Commercial Practices Directive (UCP) by setting specific rules for substantiating, verifying and communicating voluntary environmental claims and eco-labels in the EU market. The proposal aims to make better use of the OHP Directive. This will allow greenwashing to be combated more effectively, including by banning specific and persistent greenwashing practices in all circumstances and including them in a blacklist of unfair commercial practices.

### **Verification and enforcement of green claims**

Under the proposed directive, Member States must ensure that companies comply with the minimum requirements on substantiation of green claims and communication when using green claims on a voluntary basis. Member States must ensure verification and enforcement by independent and accredited verifiers.

The European Commission's proposal further provides that "competent bodies" such as consumer organisations can take legal action to protect the collective interests of consumers if a green claim is found to be untrue.

### **Impact on EU businesses**

The proposal thus sets minimum requirements on substantiating, communicating and verifying green claims. Companies must ensure the reliability of their voluntary environmental claims and communicate their ESG claims transparently. An independent verifier must verify that their claims meet the directive's requirements. The verifier then issues an EU-wide recognised certificate of conformity. Thanks to these common rules for the EU single market, the proposal provides a competitive advantage for companies that make a real effort to develop environmentally friendly products, services and organisational methods and reduce their impact on the environment.

To avoid the proposal having a disproportionate impact on smaller enterprises compared to larger enterprises, micro-enterprises (fewer than 10 employees and a turnover of less than two million euros) exempted from the obligations of this proposal, unless they want to apply the rules themselves.

### **Continued**

The proposal for the new European Directive must now be adopted by the European Parliament and the Council under the ordinary legislative procedure.

# VAN BENTHEM & KEULEN

ADVOCATEN | NOTARIAAT

On 3 May, the Council adopted its position on the new directive. This position (further) strengthens consumers' right to information. The Council proposes to ban generic environmental claims (such as 'environmentally friendly' or 'climate neutral'). Producers would no longer be allowed to advertise their products or activities using such generic terms, unless the operations can be substantiated by a publicly accessible certification scheme.

To make products more comparable and avoid confusion, the Council proposes to allow sustainability features based on official certification schemes only if certification marks are registered or issued by public authorities. The Council position also provides for a longer transposition period (from 18 to 24 months) to allow member states sufficient time to adapt their legislation.

Want to know more about this topic? Then listen to episode 82 of our podcast 'Licht op Legal' '[Sustainability claims: What should you consider as an organisation?](#)' (in Dutch only). In this episode, Mariska explains what a sustainability claim is, when you are allowed to use a sustainability claim and when greenwashing is involved.

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