

What Green Claims Directive Proposal Means For Businesses

By **Marcus Navin-Jones and Juge Gregg** (September 12, 2024, 9:50 AM BST)

On June 17, the Council of the European Union adopted its general approach to the proposed Green Claims Directive, or GCD.[1]

The GCD is focused primarily on how companies would need to substantiate and verify green claims that are potentially permissible in the European Union. It complements the Directive on Empowering Consumers for the Green Transition, which entered into force in March. That directive focuses primarily on blacklisting and prohibiting certain greenwashing practices. Together these two directives will create a single regulatory framework concerning environmental, and to some extent, social claims.

Making green or social claims may seem an attractive way to distinguish one company or product from similar companies or competitor products, but such claims are becoming riskier to make. The last few years have seen a significant increase in litigation and regulatory requirements regarding such claims in the European Union, U.K., U.S. and beyond.

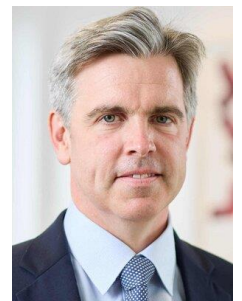
In the U.S., the Federal Trade Commission is updating its green guides. However, it is in the European Union where there is perhaps the highest volume of new law currently in the process of being adopted or implemented designed to prevent greenwashing and so-called social washing.

Companies with operations in the EU or in the European Economic Area — or whose products or services are placed on the market, or who make claims in these areas — will need to place close attention to what these new EU and EEA laws are, and how their businesses are affected.

This article summarizes some of the core requirements set to become EU law under the new GCD concerning green claims. It also highlights some of the challenges and practical considerations industry should bear in mind when seeking to comply and minimize disputes vis-à-vis green and social claims.

General Scope and Core Requirements

Although the wording on the scope of the proposed GCD is yet to be agreed, the GCD will be broad in scope. It would regulate certain environmental claims, meaning any statement — written and oral — or imagery that gives the impression that:



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- A product or organization has a positive or zero impact on the environment;
- Is less damaging to the environment than other similar products or organizations; or
- Has improved its impact over time.

In particular, the GCD will regulate environmental claims made voluntarily by traders in business-to-consumer commercial situations, and which relate to a product, service or the trader itself.

Before using explicit environmental claims, companies will be required to carry out an assessment to substantiate the claim. The GCD sets out detailed rules on what the assessment must entail, including the science-based data needed to support the claim such as life-cycle assessments and environmental footprint assessments. It also includes the need to use recognized EU or internationally recognized scientific approaches in measuring relevant issues, such as environmental impacts, and to not omit any relevant data.

That information would generally need to be made publicly available in physical form or online, including in relevant EU languages. In general, only claims based on the latest scientific evidence can be made, meaning, among other things, that companies will be required to keep the substantiation and communication of claims up to date and revised at least every five years.

Explicit environmental claims will need to be verified under certification schemes before being made publicly available or displayed. More specifically, an independent third party accredited conformity assessment body that is not engaged in any activity that may conflict with their judgment or integrity will need to verify the claim.

The verifier may indicate ways of how the company should communicate the environmental claim regarding compliance with the draft GCD. Once the verifier has carried out the verification of the submitted claim, it will decide whether to issue a certificate of conformity.

The certificate will then be recognized across the EU and shared between member states via the internal market information system. Exceptions to the general GCD rules are likely to be limited and to apply only to certain microenterprises, although microenterprises will remain able to obtain certificates of conformity, should they wish to.

The GCD sets down rules regarding specific types of explicit environmental claims. For example, explicit comparative environmental claims will require additional data and information — to ensure, for example, that comparisons are based on equivalent information and data.

Explicit environmental claims based on aggregated information, or aggregated parameters — geographical areas or general product types, etc. — will likely only be allowed where EU rules on the calculation of such aggregated data are established.

To prevent the proliferation of self-certification schemes, among other things, the draft GCD also introduces minimum criteria for environmental labels and environmental labelling schemes.

Environmental labels, i.e., a trust or quality mark, or equivalent markings promoting a product, process or business with reference to its environmental aspects, will need to be substantiated by an independent verifier. Environmental labelling schemes must satisfy minimum requirements regarding transparency, objectivity and independence.[2]

European Commission, Parliament and Council Positions

Following an initial negative opinion from the European Commission's Regulatory Scrutiny Board, the commission revised its proposal for a GCD, which was subsequently published on March 22, 2023.[3] On March 12 this year, the European Parliament adopted its first reading position, and on June 17, the commission adopted its general approach.

The EU institutions must now agree and adopt the proposed GCD. Currently there are a number of slightly differing visions expressed in the commission, Parliament and council positions.

The Parliament's initial position, adopted on March 12, generally supported the commission's proposal, although with some amendments. These included:

- A proposal for packaging to be included in the scope of the GCD, and subject to, among other things, the preapproval requirements; and
- The establishment of a simplified verification system for claims which, for example, do not require a life-cycle assessment.

The council's general approach, adopted on June 17, also generally supported the commission's proposal, but with some amendments. These included:

- Exempting certain claims and labels from the verification procedure;
- Allowing private operators to establish environmental labelling schemes that provide added value, as set out in an implementing act; and
- Delayed implementation.

Steps Following Adoption

The finalized GCD text is expected to be agreed and adopted early-mid 2025. Following its adoption, it is currently unclear how much time member states would be given to transpose the GCD — likely to be at least 18 months, and perhaps 24 months — with certain phase-in periods for industry, e.g., for small and midsize enterprises to comply.

Member states will be required to appoint a relevant national competent authority empowered to receive complaints concerning alleged breach of the proposed GCD requirements.

Member states will also be required to adopt measures to ensure penalties are effective, proportionate and dissuasive — where, according to the commission or Parliament drafts, the GCD would state that fines should be at least at 4% of the trader's total annual turnover in the member state or states concerned.

EU member states may decide to adopt measures that go beyond the requirements in the proposed GCD, although the legal basis for the adoption of the proposed GCD itself would be important in this context.

For example, the GCD itself would regulate business-to-consumer practices, although member states may choose to broaden the scope to include business-to-business commercial practices.

Concluding Thoughts

The CGD is just one of several EU or EEA legal instruments aimed at preventing green and social washing. As mentioned, the Directive on Empowering Consumers for the Green Transition blacklists a number of commercial advertising practices, including social washing.

In addition, there are a number of EU initiatives geared toward preventing green and social washing vis-à-vis the banking, insurance and financial services industries. These laws, in themselves, present companies with a number of challenges.

However, companies are also under increasing requirements to disclose environmental, social and governance data that may, in the longer term, serve to undermine or even contradict green and social claims currently being made.

Companies keen to publicize their green credentials therefore need to tread carefully. Not least because ESG data disclosable in the EU may serve to undermine green claims in the U.S., heightening the risk of litigation in the U.S. and elsewhere.

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[1] <https://www.consilium.europa.eu/en/press/press-releases/2024/06/17/green-claims-directive-council-ready-to-start-talks-with-the-european-parliament>.

[2] https://www.crowell.com/en/insights/client-alerts/the-green-claims-directive#_ftn1.

[3] https://www.crowell.com/en/insights/client-alerts/the-green-claims-directive#_ftn2.