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UK CMA ADOPTS GREEN CLAIMS CODE AND CONSULTS ON ENVIRONMENTAL SUSTAINABILITY: TIME FOR A COMPLIANCE REVIEW

To Our Clients and Friends:

September 2021 was certainly the month of sustainability initiatives for the UK's competition watchdog.

On 20 September, the Competition & Markets Authority (CMA) published a [Green Claims Code](#) aimed at protecting consumers from misleading environmental claims amidst concerns over 'greenwashing'. Greenwashing refers to overstated, unsubstantiated green credentials of a product or service. The Code is also intended to protect businesses from unfair competition and ensure a level playing field.

And then on 29 September, the CMA launched a public [consultation](#), to help inform its advice to government on how competition and consumer regimes can better support the UK's Net Zero and sustainability goals. The consultation runs until 10 November 2021.

Impact: who needs to take the Green Claims Code into account

The new Code potentially impacts any company which puts forward claims of positive environmental impact in relation to its products or services. It is particularly important for businesses involved in textiles and fashion, travel and transport, and fast-moving consumer goods because the CMA has flagged these industries as priorities. These are the sectors where consumers appear to be most concerned about misleading claims. Any other sector where the CMA finds significant concerns could also become a priority in due course. Financial services, for example, is not currently one of the CMA's priority areas, but the Code would nonetheless apply in this sector. For example, to companies selling "ethical" or "green" investment services, which would also be a focus area of the UK's financial services regulator, the Financial Conduct Authority (FCA).

The purpose of the Code is to help businesses understand and comply with their existing obligations under consumer protection law when making environmental claims. The Green Claims Code is broad and applies to all commercial practices, including advertisements, product labelling, packaging, and even product names.

The Code will operate in parallel with and not to the exclusion of other applicable rules and regimes. Accordingly businesses should consider whether they are subject to any sector- or product-specific requirements and ensure they comply with them, as well as their obligations under general consumer protection law.

Consequences: what happens if the Code is breached?

The Code is not new legislation, it draws on enforcement powers derived from existing consumer protection rules under the Consumer Protection from Unfair Trading Regulations (CPUT) 2008 and Business Protection from Misleading Marketing Regulations 2008.

The CMA and other bodies (for example, Trading Standards Services) can bring court proceedings in relation to the Code.

Any business found to be in breach of consumer law can face civil action or criminal prosecution. Breach of CPUT can attract criminal liability, including for directors and other officers of corporate bodies.

There is also a direct civil right of redress by consumers against traders who conduct misleading or aggressive practices. If found to be in breach, companies may be required to pay redress to any consumers harmed as a result of the breach.

More generally, a company's reputation, and sales, could also suffer damage.

Timing: when will enforcement ramp up?

The CMA has announced that it will begin a review of misleading green claims in **January 2022**. It is not required to wait until January 2022 to take action, and has noted that where there is evidence of breaches of consumer law, it may take action **before** the start of the formal review.

The CMA shares consumer protection law enforcement powers with other bodies, such as Trading Standards Services and sectoral regulators. And, where appropriate, the CMA has flagged that it may work with other enforcement or regulatory bodies in relation to environmental claims.

Significance: why is greenwashing of importance to the CMA?

Consumers are increasingly environmentally-minded. A recent YouGov survey showed that 57% of UK consumers are willing to pay more for environmentally friendly products, increasing up to 69% of consumers for the younger generations. Mintel found in 2019 that nearly half of new UK beauty and personal care launches had an ethical or environmental claim, an increase of almost 100% compared to four years earlier. The CMA notes the increase in claims by businesses to meet this consumer demand, and considers that many of these claims may be misleading. A beauty product promoted as 'microbead free', for example, may be misleading in its suggestion of a benefit over other products because microbeads in rinse-off cosmetics and personal care products are, in any event, banned in the UK.

Earlier this year, the International Consumer Protection Enforcement Network (ICPEN) hosted its annual sweep of websites, led by the CMA and the Dutch Competition Authority. The [global review](#) found that 40% of green claims made online could be misleading consumers, through tactics such as:

- Making vague claims and unclear language including terms such as 'eco' or 'sustainable' or reference to 'natural products' without adequate explanation or evidence of the claims.

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- Using own brand eco logos and labels that are not associated with an accredited organisation.
- Hiding or omitting certain information, such as a product's pollution levels, to appear more eco-friendly.

More detail on the Code

In November 2020, the CMA announced an investigation into misleading environmental claims. The CMA's final guidance has now been published, with the Green Claims Code announced on Monday 20 September. This work ties in to the CMA's Annual Plan commitment to support the move towards a low carbon economy.

The aim of the new Code is to protect consumers from misleading environmental claims, and to protect businesses from unfair competition. The CMA intends to create a level playing field for businesses whose products or services genuinely represent a better choice for the environment, thus incentivising them to invest in the environmental performance of their products.

There are six principles set out in the Code:

1. claims must be truthful and accurate
2. claims must be clear and unambiguous
3. claims must not omit or hide important relevant information
4. comparisons must be fair and meaningful
5. claims must consider the full life cycle of the product or service
6. claims must be substantiated

The focus of the Code is on environmental claims made by businesses, but the guidance is also relevant to the wider category of sustainability claims.

The CMA is not alone: a trending initiative across Europe

The CMA's new Green Claims Code forms part of a broader trend where competition regulators are taking an interest in the link between competition regulation and the green economy. This includes clamping down on suspected greenwashing practices.

There is also ongoing work in the advertising space in the UK by the Advertising Standards Authority, with new guidelines covering environmental claims in advertising. There are separate and specific regulations in place and being developed in relation to financial services products, for example the EU's Sustainable Finance Disclosure Regulation and EU Taxonomy. Earlier this year, HM Treasury announced that a new advisory group had been set up to advise the UK Government on standards for green investment, and will oversee the creation of a Green Taxonomy.

The Dutch Competition Authority published new guidelines for sustainability claims in January 2021, which set out five rules for companies to follow, for example to substantiate sustainability claims with evidence.

The European Commission launched an initiative last year which aims to harmonise green claims across Europe, including the prevention of overstated environmental information ('greenwashing') and the sale of products with a covertly shortened lifespan. The EC held a public consultation on the initiative which closed in October 2020, and intends to propose a new directive as a result.

These recent developments are part of a trend in which failings traditionally thought to have fallen into soft-edged Environmental, Social and Governance territory are being hardened into actionable standards. Companies are increasingly being held to account for the claims they make about their own ethical and sustainability performance, particularly where these claims can negatively impact outcomes or choices for customers.

Dos and Don'ts: some practical tips for Green Claims

Companies potentially affected are well advised to review current business practices, in order to ensure compliance with the CMA's new Code and avoid potentially incurring civil and criminal penalties and reputational damage for misleading consumers.

In particular, they should:

- Avoid using broad, general terms, such as 'green', 'eco' and 'sustainable'. These claims will be considered to apply to the whole life cycle of the product and must be substantiated with evidence.
- Avoid conflating the environmental goals of the business with specific product claims.
- Clearly state any caveats that apply to product claims.
- Consider implicit claims being made by a product, for example through the use of images and colours on packaging.
- Avoid claiming as environmental benefits any features or benefits that are necessary standard features or legal requirements of that product or service type.

Following the CMA's guidance is a good starting point. But multinational companies will also need to consider guidance available in other jurisdictions besides the UK.

The future: environmental sustainability and competition rules

There has been a lot of global interest in the interaction between climate change and competition law in recent years, with thought-provoking debate around how to tackle a global crisis through collaboration, without encouraging harmful collusion between competitors.

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On 29 September 2021, the CMA opened a consultation on advice to the UK government. The consultation, which runs until 10 November 2021, calls for views to help inform its advice to government on how competition and consumer regimes can better support the UK's Net Zero and sustainability goals, including preparing for climate change. The key areas in which the CMA is seeking information are:

- competition law enforcement;
- merger control;
- consumer protection law; and
- market investigations.

The CMA's consultation is similar to the EU consultation on competition policy and the Green Deal, which ran in late 2020. Both consultations consider how antitrust policy and environmental and climate policies work together, and how the merger control regimes could better contribute to protecting the environment and supporting sustainability goals. The EC's consultation is somewhat wider, as it also considered State aid rules, which is not within the scope of the CMA consultation.

On 10 September the EC published a Brief titled *Competition Policy in Support of Europe's Green Ambition* which gives an overview of its consultation. Executive Vice-President Vestager recently stated in a speech at the IBA Competition Conference that "one of the main messages from our consultation and the conference was the need to support the green transition by enforcing our rules more vigorously than ever." DG COMP's ongoing reviews of its vertical and horizontal block exemption regulations (and accompanying guidelines) provide a perfect opportunity for the EC to take a more proactive approach to promote sustainability through the application of EU competition law. The new vertical guidelines are expected to be in place by May 2022, with the new horizontal guidelines following by the end of December 2022 and so we will need to wait until then to see how Vestager's message will translate in practice.

We expect the results of the UK consultation process to yield similar results to the EU consultation. But how the CMA will respond in its application of UK competition laws going forward is a development to be watched carefully.



Gibson Dunn's lawyers are available to assist in addressing any questions that you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following authors:

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