

# Standardising truth – The proposed Green Claims Directive

Conference New Developments in the  
World of Standards  
Copenhagen, 2/3 May 2024

Prof. Dr. Peter Rott

# The starting point

- Unfair commercial practices shall be prohibited (Art. 5(1) UCPD)
- In particular, commercial practices shall be unfair which are misleading (Art. 5(4) UCPD)
- A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful (...) (Art. 6(1) UCPD)

## Burden of proof

- Member States shall confer upon the courts or administrative authorities powers enabling them to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice (...) (Art. 12(a) UCPD)

# The problem

- Green claims – what is „environmentally friendly“, „climate friendly“, „climate neutral“, and so on?
  - Greenwashing is a major problem in market as consumers have been identified to be relevant players in the green transition
  - EU Commission:
    - „proliferation of misleading commercial practices related to the environmental sustainability of products“
    - “proliferation and/or lack of transparency/ understanding/reliability of sustainability logos/labels on products and services”

## Illustration (1) – “environmentally friendly”

- Interpretation in (German) case law since the late 1980s (in the absence of concretisation), e.g.
  - Standard of relative environmental friendliness (meaning that, for example, environmental friendly cars are just less detrimental than others)
  - High transparency standard for statements and their substantiation
  - No cherry-picking (mentioning positive aspects while being silent on negative aspects)
  - No advertising of mere compliance with legal standards
  - No advertising with standards that the product does not comply with

## Illustration (2) – “climate neutral”

- Different views in case law whether or not compensation measures (buying CO2 certificates) can be included
  - Against: LG Oldenburg, 15.12.2021 –15 O 1469/21
  - In favour of: OLG Schleswig, 30.6.2022 – 6 U 46/21
  - Unfair due to lack of transparency: LG Kiel, 2.7.2021 - 14 HKO 99/20
- And how about a business that actually produces in a climate neutral way but then sells CO2 certificates?
  - Accepted by LG Berlin, 21.3.2023 - 52 O 242/22 (*Tesla*)

# Reducing vagueness of environmental claims (1)

- Directive (EU) 2024/825 amending the UCPD as regards empowering consumers for the green transition through better protection against unfair practices and through better information
  - Clarification that environmental or social characteristics and circularity aspects, such as durability, reparability or recyclability, belong to the “main characteristics of products”
  - Introduction of new misleading practices, such as:
    - making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is **regularly verified by an independent third party expert**, whose findings are made available to consumers

## Reducing vagueness of environmental claims (2)

- New blacklisted practices (Annex I of the UCPD), e.g.
  - Displaying a sustainability label that is not based on a **certification scheme** or not established by public authorities
  - Making a generic environmental claim for which the trader is not able to demonstrate recognised **excellent environmental performance** relevant to the claim
  - Making an environmental claim about the entire product or the trader's entire business when it concerns only a certain aspect of the product or a specific activity of the trader's business
  - Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions
  - Presenting requirements imposed by law on all products within the relevant product category on the Union market as a distinctive feature of the trader's offer



## Reducing vagueness of environmental claims (3)

- Benefits of the amended UCPD and remaining problems
  - Germany: Mostly codification of existing case law
  - EU: Clarification of the law, certainly new for many Member States
  - Vagueness, or legal uncertainty, has been taken to a higher level:
    - What is „recognised excellent environmental performance“?
    - What should traders do to substantiate their environmental claims?
    - Unresolved problem of unreliable certification schemes and related labels

# Standardisation and certification

- Proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final
- Double aim:
  - Empowerment of the responsible consumer
  - Sustainable consumption in general
- Mechanism:
  - Pre-market control of environmental statements and labels
  - Reduction of (mis-)information overload
- Safety net for all sectors where environmental claims or labels are not regulated at EU level

## The concept

- Traders must substantiate explicit environmental claims (Art. 3), and so must environmental labelling schemes (Art. 7)
  - And if they make comparative claims they must substantiate both sides of the comparison (Art. 4)
- Rules on the communication of environmental claims (transparency of related information) (Arts 5 and 6) and on environmental labels and labelling schemes (Arts 7 and 8)
- Third party verification of environmental claims and environmental labelling schemes by an accredited verifier (Arts 10 and 11)

## General observations

- Fairly drastic method of regulation
- Potentially high costs for environmental marketing
- Expected reduction of environmental marketing and labels
  - Including legitimate statements and labels – market entry barrier for innovative traders?
- Exclusion of audio-marketing – uneven playing field?

# Verification and standards

- Verifiers must be accredited in accordance with Regulation (EC) No 765/2008
  - The usual requirements of independence, qualifications, and so on
- But how shall verifiers verify the environmental impact of a product and therefore the truth of the related statement?
  - Original plan: Obligation to use the EU Environmental Footprint methods (Recommendation (EU) 2021/2279) - abandoned
  - Recital (15): substantiation should take into account internationally recognised scientific approaches to identifying and measuring environmental impacts, environmental aspects and environmental performance of products or traders
  - Recital (17): EF methods as one possibility

# Verification and standards

- In the absence of a compulsory methodology, verifiers will (have to) develop their own standards for verifying explicit environmental claims
  - Which may differ from one another
  - But which do not seem to be subject of the accreditation process
- Experience tells that the use of vague terminology (such as “significant“) may be interpreted quite differently by different verifiers
  - See the various schemes relating to the sustainability of biofuels
- Dysfunctionalities that are known from other schemes, such as medical devices law before its reform
  - EU-wide competition of verifiers and EU-wide “free movement of statements and labels” incentivizes verifiers to lower standards

## Counter-measures? – Only against traders

- Member States' public authorities shall undertake regular checks of explicit environmental statements by traders, Art. 15
- Environmental organisations can submit “substantiated complaints” to public authorities when they deem, on the basis of objective circumstances, that a trader is failing to comply with the provisions of this Directive and have access to court against the authority's decision, Art. 16
- Certificate of conformity issued by the verifier does not exclude remedies under the UCPD (no safe harbor), Art. 10(8)
- All measures are directed against traders, not against verifiers and their standards or the application of those standards in the individual case!
- What remains is the system of the Accreditation Regulation of 2008

# Conclusions

- The envisaged Green Claims Directive aims to ensure the truth of explicit environmental statements and of environmental labels
- It applies a certification (or verification) system to that end that is based on established certification systems
- But leaves it to the verifiers to establish the relevant standards, without establishing a system to control those standards
  
- As a result, EU-wide competition between verifiers may lead to the relaxation of truth, as we have seen the relaxation of safety in other areas