

Greenwashing – Is your avocado really as green as they say?

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This article considers the UK consumer protection law that may apply to the issues relating to what the Competition and Markets Authority ('CMA') has termed "Greenwashing".

What is Greenwashing?

"Greenwashing" does not yet have a widely accepted definition. However, it generally refers to the unsubstantiated and possibly misleading claims made by traders in relation to the "environmental benefit" or "eco-friendliness" of a particular product or service. Such a claim relating to the "environmental benefit" or "eco-friendliness" of a particular product or service is generally referred to as a "Green Claim".

What is the problem?

The public is becoming increasingly discerning in relation to the environmental impact of a given product or service. Consumers are no longer content with just finding a product at a financial price that they are content to pay – the environmental impact matters.

Therefore, it is understandable that traders wishing to attract or retain the custom of such discerning consumers will want to advertise the environmental benefit of their products or services. At present, such Green Claims and Greenwashing manifest in a few ways, including:

- (i) Ordinary claims made in relation to the environmental benefit of a product or service (e.g. a carbon neutral product);
- (ii) In relation to financial products, the beneficial selectivity of the finance or investment (e.g. Ethical Funds);
- (iii) Claims by companies as to their comparative beneficial environmental status (e.g. a Environmental, Social, and Governance ('ESG') standing).

The emerging concern is that unscrupulous traders may be misleading consumers with their Green Claims. This is particularly important given how it can be difficult for the consumer to "fact-check" such claims, especially in relation to matters pertaining the supply chain.

This article focuses on Greenwashing as it manifests in (i) above.

GREENWASHING – HOW GREEN IS YOUR AVOCADO? BY DAVID TRAVERS Q.C. & GEORGE SPENCE-JONES

How significant is the problem?

In 2019, it was estimated that the UK market for sustainable products was worth £41 billion.¹

In 2021, the International Consumer Protection Enforcement Network (ICPEN) conducted a global sweep of 500 websites. The results indicated that as many as 40% “*appeared to be using tactics that could be considered misleading and therefore potentially break consumer law*”:²

“These included:

- *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.*
- *Own brand eco logos and labels not associated with an accredited organisation.*
- *Hiding or omitting certain information, such as a product’s pollution levels, to appear more eco-friendly.”*

Although the ICPEN’s focus was on global websites, it is likely that the same questionable tactics are being deployed to influence consumers more broadly, and where such tactics exists in such a significant industry, the regulators are never too far behind.

UK Regulator’s current position

The CMA

In the UK, the CMA is the principal agency that addresses concerns relating to national consumer protection. However, local authority Trading Standards departments are often the first port of call for local consumers and their grievances, and the national Chartered Trading Standards Institute has published its own position on how it intends to tackle the issue.³

On 20 September 2021, following a consultation with the industry and stakeholders on the issue of Greenwashing, the CMA published their response.⁴ The key outcome has been for the CMA to publish draft guidance to assist businesses. Following the guidance will likely be useful but not conclusive for assessing compliance with the relevant general consumer protection laws governing the making of Green Claims.

¹ *Twenty Years of Ethical Consumerism*, Ethical Consumer Markets Report 2020 (Ethical Consumer, 2019)

² <https://www.gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading>
published 28 January 2021

³ https://www.tradingstandards.uk/media/documents/news--policy/press-releases/greenclaims_infographic_english.pdf

⁴ *CMA guidance on environmental claims on goods and services: CMA response to the consultation*, 20 September 2021, CMA147

The CMA's response has also been to publish the Green Claims Code, accessible through a dedicated website⁵, and from 2022, the CMA will be monitoring compliance with the Green Claims Code's 6 Key Concepts:

Green claims MUST:

1. *Be truthful and accurate: Businesses must live up to the claims they make about their products, services, brands and activities*
2. *Be clear and unambiguous: The meaning that a consumer is likely to take from a product's messaging and the credentials of that product should match*
3. *Not omit or hide important information: Claims must not prevent someone from making an informed choice because of the information they leave out*
4. *Only make fair and meaningful comparisons: Any products compared should meet the same needs or be intended for the same purpose*
5. *Consider the full life cycle of the product: When making claims, businesses must consider the total impact of a product or service. Claims can be misleading where they don't reflect the overall impact or where they focus on one aspect of it but not another*
6. *Be substantiated: Businesses should be able to back up their claims with robust, credible and up to date evidence*

The ASA

Unsurprisingly, the Advertising Standards Authority ('ASA') has also been considering this issue. In a similar vein to the CMA, the ASA is providing guidance and encouraging traders to:⁶

- *Be 100% sure about renewable energy claims*
- *Hold appropriate substantiation*
- *Take care with recycling claims*
- *Keep emissions claims in check*

The Law

The CMA and ASA guidance is useful and can have important commercial impacts, but the main concern for traders will likely be any potential criminal liability and prosecution.

⁵ <https://greenclaims.campaign.gov.uk/>

⁶ <https://www.asa.org.uk/news/ensuring-your-environmental-claims-are-more-than-just-hot-air.html>

GREENWASHING – HOW GREEN IS YOUR AVOCADO?
BY DAVID TRAVERS Q.C. & GEORGE SPENCE-JONES

One general area of law that may apply is the Consumer Protection from Unfair Trading Regulations 2008/1277 (“**CPUT**”). CPUT prohibits unfair commercial practices, which includes misleading actions, misleading omissions and automatically unfair commercial practices, and a trader engaging in such unfair commercial practices can be guilty of a criminal offence.

Although a full investigation of a particular trader’s Green Claim and commercial practice will be required, some preliminary observations about the following common elements for CPUT offences can be made:

- (1) Definitions - False information or accurate information but a nonetheless deceptive presentation
- (2) Causation and the “average consumer”

(1) Definitions - False information or accurate information but a nonetheless deceptive presentation

The first hurdle for both traders and consumers (or any prosecuting authority) will be determining what is false or what is factually correct but a nonetheless deceptive presentation. This requires an understanding of the relevant definitions of terms used in Green Claims. For example:

- Produced from “natural sources” – a long standing debate in the food sector - what defines the scope of “natural”, and how much needs to be natural to suffice?
- This product is “ethical”, “eco-friendly”, “sustainable”, “recyclable” – how are these terms assessed?

At present, there are no satisfactory definitions, and the CMA has recognised its inability to set definitions for the purposes of consumer protection legislation.⁷ By contrast and for example:

- If a trader wants to market processed food as “organic”, there is a legal requirement for at least 95% by weight of its ingredients of agricultural origin to be organic,⁸ where “organic” is clearly defined by reference to rules set out in the relevant regulations.
- If a trader wants to market chicken eggs as “free-range”, again, there is clear set of requirements that must be satisfied.⁹

⁷ *CMA guidance on environmental claims on goods and services*, CMA response to the consultation 20 September 2021 CMA147 at [2.56]

⁸ Retained Council Regulation (EC) 834/2007, Article 4

⁹ Commission Delegated Regulation (EU) 2017/2168, Article 1

It is trite that the law must be accessible, intelligible, clear and predictable. At present, there is significant ambiguity on this first hurdle.

What *is* clear is that consumer complaints on Green Claims and Greenwashing are being made and that the CMA has turned their attention to the same. Therefore, investigations and prosecutions are on the foreseeable horizon. However, the present level of ambiguity in the definitions is unattractive and problematic from an enforcement perspective, and assessing the same on a case-by-case basis is likely to lead to inconsistency.

(2) Causation and the average consumer

The second significant hurdle to note is that the use of the false information or deceptive presentation must be *connected with* the change in the consumer's behaviour. Because either:

- (a) it causes the average consumer to take a transactional decision he would not have taken otherwise, or;
- (b) it materially distorts economic behaviour, which means that it appreciably impairs the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise.

Transactional decision

The concept of a transactional decision appears strikingly broad. It includes not only the decision to purchase, to enter into a contract or not, but can also include the decision to attend a trader's premises after viewing an advertisement.¹⁰ Time will tell whether identifying the relevant transactional decision causes any great difficulty.

Average consumer

Historically, consumers have mainly been concerned with the price of a product and the product itself. It is fair to say that the significance of non-financial factors, like Green Claims, is a more recent phenomenon. This then begs the question as to who, in 2022 and beyond, is "the average consumer" for the purposes of the legal test, not least as an interest in 'green issues' has, for some, achieved a life-defining belief system.

By Regulation 2(2) of CPUT, consumers are presumed to be reasonably well informed, reasonably observant, and circumspect. Further, it has been held that the underlying EU

¹⁰ *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato*, C-281/12 at [36]

GREENWASHING – HOW GREEN IS YOUR AVOCADO?
BY DAVID TRAVERS Q.C. & GEORGE SPENCE-JONES

directive to CPUT¹¹ exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over hasty.¹²

It is arguable that a consumer who is already concerned with the environmental impact of a product, and so considers a Green Claim as relevant to their decision, ought to not to be so easily persuaded by a contextless claim or something that might readily be described as mere advertising “puffery”. Moreover, the original Commission Guidance on the UCPD (the EU Directive underlying the domestic CPUT regulations) noted:¹³

“the test is based on the principle of proportionality. The UCPD adopted this notion to strike the right balance between the need to protect consumers and the promotion of free trade in an openly competitive market.

*... the average consumer concept under the UCPD should always be interpreted having in mind **Article 114 of the Treaty, which provides for a high level of consumer protection.***

*At the same time, the UCPD is based on the idea that, for instance, a national measure prohibiting claims that might **deceive only a very credulous, naive or cursory consumer** (e.g. ‘puffery’) would be disproportionate and create an unjustified barrier to trade.”*

With this in mind, some example questions to ponder may include:

- (a) If such a consumer is taken to be well-informed, is it their onus to ignore or unpick a generic claim that a product is “sustainable”, where there is clearly no context of that claim?
- (b) If a cosmetic product advertises that it is “micro-bead free”, as micro-beads have been banned in such products in England since 2017,¹⁴ should the average consumer know that this statement adds nothing special to the product’s desirability?

The difficulty of assessing who is the average consumer is compounded by the approach the court takes in relation to the test for causation.

The “but for” test

The issue of causation has been held to be a mere “but for” test – whether but for the relevant commercial practice of the trader, the average consumer would have made a different

¹¹ Unfair Commercial Practices Directive 2005/29/EC.

¹² *OFT v Purely Creative Limited* [2011] CTLC 45 at [62].

¹³ Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD/2016/0163

¹⁴ Implementation of the Environmental Protection (Microbeads) (England) Regulations 2017

transactional decision from that which he did make.¹⁵ Guidance on the 2018 Amendments to CPUT, which introduced private remedies for consumers, noted the following:¹⁶

A “significant factor” in the consumer’s decision

18. A consumer must show that he or she made the decision to enter the contract, or make the payment to the trader because of the misleading or aggressive practice. It is not necessary to show that the prohibited behaviour was the only, or even the main cause, to enter into the contract. It must, however, at least be a “significant factor” in the consumer’s decision. This is a question of fact.

So, drawing the strands together:

- (a) considering proportionality, balancing consumer protection and promoting market competition,
- (b) the use of the false information or the deployment of a factually correct but deceptive presentation must be a significant factor in a consumer’s decision, but not necessarily the only or main factor,
- (c) where that consumer is reasonably well informed, reasonably observant, and circumspect, rather than someone who is credulous, naive or cursory.

So, are the common Green Claims provably significant to the relevant average consumer’s decision? Are consumers ultimately concerned with just a price and a product and only swayed by Green Claims at the edges of decision making?

Proving the elements of the breach

As to what evidence is to be adduced, the test is generally to be assessed without ordering an expert's report or commissioning a consumer research poll. National courts ought to be able to assess, on the same conditions, any misleading effect of a description or statement designed to promote sales. However, such extrinsic evidence may assist.¹⁷ This view has been endorsed domestically:¹⁸

“If the evidence is given by too few of them, their views will not be sufficiently representative of the entire range of such consumers; if a large number, intended to cover the full range, gives evidence, the adverse effect on the cost and duration of the trial may be disproportionate to the value of their evidence.”

¹⁵ *OFT v Purely Creative Limited* [2011] CTLC 45 at [71].

¹⁶ Misleading and Aggressive Consumer Practices: New Private Rights for Consumers. Guidance on the Consumer Protection (Amendment) Regulations 2014, updated July 2018

¹⁷ *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* C-210/96 at [31] – [32] and [36] – [37].

¹⁸ *OFT v Officers Club* [2005] EWHC 1080 at [146] as per Etherton J

GREENWASHING – HOW GREEN IS YOUR AVOCADO?
BY DAVID TRAVERS Q.C. & GEORGE SPENCE-JONES

Firstly, this raises questions as to what evidence should be used and when. Should a prosecutor wait for several Green Claims to be made? Or should a simple single prosecution be run, where there may be a risk of no extrinsic evidence being called upon?

Secondly, this raises question as to which trader or consumer will be confident that their view of the average consumer will match that of their particular judge or jury who is making this finely balanced assessment on the day?

Greenwashing is a legitimate concern, but it seems enforcement action, at present, faces significant difficulty and ambiguity.

Consequences

Nevertheless, if the above elements can be made out, then a trader engaging in such a commercial practice can be committing a criminal offence. The penalty for this is (a) on summary conviction, an unlimited fine; or (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

There is also the possibility for local Trading Standards departments or even the CMA to pursue civil enforcement action (with the helpfully lower standard of proof), pursuant to Part 8 of the Enterprise Act 2002, if the misleading commercial practice is established and the practice “*harms the collective interests of consumers*”.¹⁹

What can stakeholders do?

In terms of practicalities, at present, there are several sources of guidance that can assist:

- CMA - Guidance^{20 21}
- ASA - Advice and Resources²²
- European Commission - Compliance Criteria²³
- DEFRA - Guidance²⁴

¹⁹ s.211 Enterprise Act 2002.

²⁰ <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>

²¹ <https://www.gov.uk/government/news/green-claims-cma-sets-out-the-dos-and-don-ts-for-businesses> 21 May 2021

²² <https://www.asa.org.uk/general/climate-change-and-environmental-claims.html>

²³ https://ec.europa.eu/info/sites/default/files/compliance_criteria_2016_en.pdf (Multi-stakeholder Dialogue on Environmental claims)

Until there is further and definitive guidance, these publications form a useful starting point for both traders and prosecuting authorities to sense check compliance.

The way the wind is blowing

Readers will likely be aware of several recent decision of the ASA in relation to Green Claims made during advertising campaigns. A useful example is the ASA's recent assessment of consumer complaints of misleading and unsubstantiated claims relating to several green claim statements made by alternative milk producer, Oatly, during a 2021 advertising campaign:²⁵

- *"Oatly generates 73% less CO2e vs. milk, calculated from grower to grocer. To verify see www.oatly.com/helpdad"*
 - This complaint was upheld. The ASA considered consumers would understand the claim *"Oatly generates 73% less CO2e vs. milk"* to mean that all Oatly products generated 73% less CO2e compared to any type of cows' milk. The ASA therefore expected to see evidence relating to the CO2e produced for all Oatly products and types of cows' milk. However, insufficient evidence to substantiate the claim had been submitted. Only Oatly Barista Edition had been compared with whole cow's milk.
- *"The dairy and meat industries emit more CO2e than all the world's planes, trains, cars, boats etc., combined. Need help talking to dad about milk? Go to oatly.com/helpdad"*
 - This complaint was upheld. The ASA considered consumers would understand the claim to mean that, worldwide, the transport industry had a lower environmental impact than the meat and dairy industry. The ASA also considered that, in the absence of qualification, consumers would understand that the comparison was based on an equivalent and full life cycle comparison of the emissions from those industries. Although the evidence for the environmental impact of the meat and dairy industry took into account the full life cycle, the evidence for the transport industry took into account part of the life cycle; accounting only for the emissions coming directly from using the vehicle. Therefore, the claim overstated the emissions from the meat and dairy industry compared to the transport industry.
- *"Today, more than 25% of the world's greenhouse gases are generated by the food industry, and meat and dairy account for more than half of that"*

²⁴ <https://www.ukcpi.org/Assets/custom-docs/publications/pb13453-green-claims-guidance.pdf>

²⁵ <https://www.asa.org.uk/rulings/oatly-uk-ltd-g21-1096286-oatly-uk-ltd.html>

GREENWASHING – HOW GREEN IS YOUR AVOCADO?
BY DAVID TRAVERS Q.C. & GEORGE SPENCE-JONES

- This complaint was upheld in part. The ASA understood that there were both natural and human generated greenhouse gases. However, taking the claim in the context of the whole ad, the ASA considered that consumers would understand that Oatly were describing greenhouse gases caused by human activities only. The evidence submitted substantiated the first half of the advert: *“Today, more than 25% of the world’s greenhouse gases are generated by the food industry ...”*.
- However, the evidence submitted discussed the greenhouse gas emissions for meat, aquaculture (including fish and shellfish), eggs and dairy, and concluded that those together accounted for 56-58% of the food industry’s emissions. Therefore, the egg and aquaculture industries would have been a significant contributor to the figure for greenhouse gas emissions reported in the evidence. Because the green claim would be understood by many consumers as relating only to meat and dairy, as defined narrowly, when that was not the case, the ASA concluded that the advert as a whole was misleading.
- *“Climate experts say cutting dairy and meat products from our diets is the single biggest lifestyle change we can make to reduce our environmental impact”*
 - This complaint was upheld. The ASA considered consumers would understand this to be a definitive, objective claim that was based on scientific consensus. However, the evidence submitted by Oatly only provided the opinion of one climate expert, and the word “probably” had been omitted from the green claim. Therefore, the ad overstated what the evidence supported.
- *“If everyone in the world adopted a vegan diet, it would reduce food’s annual greenhouse emissions by 6.6bn metric tons (a 49% reduction)”*
 - This complaint was not upheld. The ASA considered consumers would understand the term “vegan diet” to mean a diet that excluded animal products. The evidence submitted indicated that the authors had calculated that moving from current diets to ones that excluded animal products would reduce the annual food’s greenhouse gas emissions by 6.6 billion metric tons of CO₂e, which was a 49% reduction. The green claim had been substantiated.

Conclusion

Green Claims are not new. They are a tool increasingly used by traders to appeal to the growing number of consumers who consider environmental benefit and sustainability important factors in their purchasing habits.

Greenwashing is not new. Just as with ordinary advertising and marketing, some traders will exaggerate or mislead in relation to these Green Claims, and just as rules were introduced to govern how traders could display prices or advertise generally, the CMA has now published rules and guidance on the making of Green Claims.

The CMA's present focus is on traders to up their standards on their Green Claims. For those who are non-compliant, the CPUT criminal offences and civil enforcement action are one option available. There will likely also be sector-specific rules²⁶ and laws that apply in a given context. However, the significant ambiguity in assessing non-compliant Green Claims will impact effective enforcement action.

At present, the CMA may be giving traders the opportunity to remedy any errant Green Claims first before pursuing enforcement action. However, consumer complaints in relation to Green Claims are not new.²⁷ Therefore, local authority Trading Standards departments may already be lining up prosecutions for particularly egregious offenders. The time limit for prosecuting a CPUT offence is three years from the date of commission or one year after discovery by the prosecutor,²⁸ and so the CMA's recently published position and Green Claims Code may simply be the catalyst to prompt a series of new prosecutions.

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Disclaimer: This article is intended for informational purposes only and does not constitute legal advice. It will always be necessary to consider the specific facts of a case before reaching a conclusion.

²⁶ See, for example, the FCA's rules on Financial Promotions and the requirement for communications to be "fair, clear and not misleading"

²⁷ <https://www.theguardian.com/media/2008/mar/26/asa.advertising>

²⁸ Regulation 14