

Dutch Airline found to have breached EU law and misled consumers with vague sustainability advertisements

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The Green Claims Directive (“**GCD**”) proposal was adopted by the European Commission in March 2023 and is expected to commence in the latter part of 2024. A more detailed note on the GCD can be found [here](#). The main objective of the GCD is to tackle the risk of consumers being misled by companies over the purchase of products with environmental claims. It aims to protect consumers from ‘greenwashing’ which is the process of conveying a false impression or misleading information about how a company’s product is environmentally sound.

The wording of the GCD (which will have to be transposed into the law of each individual Member State within the next two years) has been agreed as of January 2024. From an Irish perspective we await the precise wording of any Irish legislation emanating from the Directive but in the meantime developments in other parts of Europe may be indicative of the influence that this key change will have.

A recent court decision handed down in Amsterdam typifies the type of litigation that we are likely to see in the future as the EU begins to clamp down on so-called greenwashing by companies. The Dutch court held that the airline KLM has misled customers with vague environmental claims and painted “an overly rosy picture” of its sustainable aviation fuel.

Background

The plaintiffs, a campaign group named Fossilvrij, filed a collective action against Dutch airline KLM because it believed that KLM was engaging in greenwashing - specifically they alleged that various advertisement statements made by KLM were based on vague and general statements about environmental benefits and their use of ‘sustainable aviation fuel.’

KLM had made 19 statements which were challenged by Fossilvrij. KLM made various claims such as “travelling more sustainably is our best adventure ever”, “promoting sustainability is possible in almost all aspects of our business operations” and “We kindly invite you to join us in making aviation more sustainable.” KLM disputed that the controversial statements were misleading and argued that they are free to communicate about their sustainability efforts.

The Law

The question for the Dutch court was whether KLM’s advertising is in violation of the Unfair Commercial Practices Act (Article 6.193a to 6.193j of the Dutch Civil Code). The Dutch legislation is the implementation of the EU’s Unfair Commercial Practices Directive. The Directive does not provide for specific rules on environmental claims however, the Directive provides a legal basis to ensure that traders do not present environmental claims in a way that is unfair to consumers. As long as “green claims” are

not unfair, their use is not prohibited by the Directive. The Directive can help traders investing in the environmental performance of their products by allowing them to communicate these efforts transparently to consumers and by preventing competitors from presenting misleading environmental claims. This Directive will most likely be supplanted when the Green Claims Directive becomes operational as it deals in much more detail with the rules around greenwashing.

On the basis of Articles 6 and 7 of the Unfair Commercial Practices Directive, which cover misleading acts and misleading omissions, green claims must be truthful, not accompanied by incorrect information, and must be stated in a clear, specific, correct and unambiguous manner so that the consumer is not misled.

Judgment

On the basis of Article 12 of the Unfair Commercial Practices Directive organisations must be able to substantiate their claims and provide this evidence in an understandable manner to the competent enforcement authorities if the claim is contested. The court underscored that “environmental claims must also be demonstrably correct” and that “the more absolute the environmental claims are formulated, the more stringent requirements are placed on the evidence.” The Dutch court assessed each of the 19 impugned statements using the framework set out above and found 15 of the statements were misleading and unlawful. Accordingly, it was held that KLM acted in violation of the Unfair Commercial Practices Act and were ordered to pay the legal costs of the proceedings amounting to €18,211.53.

The Court did not order KLM to ban the expressions and remove them as they had already done so. Other, related reliefs, were also declined by the Court, to include an order for rectification due to the fact the case had already garnered significant media attention and the fact that the advertisements had already been removed..

Conclusion

This case demonstrates a willingness by EU member states to act on allegations of greenwashing and is a warning signal to businesses that environmental claims need to be substantiated, particularly in light of the coming into force of the GCD and other EU rules which will further bolster the ability of consumers to force businesses to provide clear evidence of any claims related to their sustainability.