

Green claims

April 2024

Key takeaways from the CMA's first investigation

After much anticipation, the Competition and Markets Authority (CMA) has finally published the results of its investigation into green claims made by ASOS, Boohoo and George at Asda. All three retailers have signed undertakings committing to change the way they promote their green credentials and to set up robust internal processes to ensure future green claims are not misleading. Whilst the investigation focused on the fashion sector, there are important lessons for all businesses making green claims in the UK. We unpack these below (skip straight to the key takeaways).

The undertakings

As part of the undertakings agreed with the CMA, each of the three retailers has committed to remove or amend any existing misleading green claims within two months and ensure that future green claims are not misleading. This includes complying with strict rules for specific types of green claims (such as claims about green product ranges or fabric composition) and putting in place internal processes to prevent misleading green claims (such as supplier due diligence, spot checks, and internal training). Over the next two years, each retailer must regularly report to the CMA on the steps it has taken to comply with the undertakings. Further detail about what has been agreed is below and in the CMA's decision.

The undertakings are made voluntarily and without any admission of liability. They follow similar recent agreements between European regulators and fashion retail businesses relating to green claims in the EU.

A litmus test for green claims enforcement

The CMA's investigation and the subsequent undertakings are significant for many reasons. For ASOS, Boohoo and George at Asda, the undertakings set strict conduct and reporting requirements which, if breached, are enforceable through the courts (the CMA has previously shown it is prepared to issue legal proceedings to ensure businesses' compliance with undertakings).

More broadly, the CMA's investigation provides a helpful "litmus test" for the CMA's approach to green claims enforcement. This is relevant given the regulator's ongoing investigation into green claims in the FMCG sector, and its upcoming third limb of green claims investigatory work expected later this year (details tbc). As its first ever green claims probe, the investigation demonstrates the CMA's increasing willingness to flex its regulatory muscles, and sets out the regulator's expectations around certain types of green claims and the internal measures that companies should have in place to ensure green claims are compliant. In its open letter to the fashion retail sector (published at the same time as the decision), the CMA has made clear that it expects all businesses to take time

now to familiarise themselves with the undertakings, and ensure their own green claims and internal compliance systems are up to scratch. The CMA will publish further guidance for the fashion sector in due course. In the meantime, the CMA will continue to consider further enforcement action against non-compliant businesses, where appropriate.

Key takeaways for businesses

Whilst the undertakings are specific to each of ASOS, Boohoo and George at Asda, they provide a helpful insight into the CMA’s general expectations and approach to green claims. Our view of the key takeaways is set out below.

- 1. Presentation of material information:** the undertakings reiterate principles in the Green Claims Code (GCC) that where information is *material* to the green claim (eg where it qualifies the claim or where consumers need it to make an informed purchasing decision), it should be set out “clearly and prominently” with the claim. For example, where a claim relates to only part of the product life cycle, businesses should provide information about *which* lifecycle stages are included. However, the undertakings build on the GCC by explaining what “clear and prominent” means in practice – information must: (i) be clearly visible; (ii) in close proximity to the claim; (iii) must not require the consumer to take further action (eg by clicking on a hyperlink or scanning a QR code); and (iv) must not be displayed separately to the claim (eg on the other side of a product tag/label). In certain cases, it may be sufficient to include this information via a drop-down menu on a product page (see below). The CMA also endorses a “layered” approach whereby material information must be included clearly and prominently with the claim, but further details can be included elsewhere as long as businesses clearly signpost where consumers can find this (eg via a hyperlink to a sustainability hub on their website).
- 2. Green product ranges:** the undertakings build on the GCC by setting out the CMA’s expectations around the marketing and labelling of green product ranges. Where a business markets products as being part of a green product range, such as ASOS’s “Responsible Edit” collection, there must be an objective set of criteria for determining which products are included in the range. Businesses must not market products as being part of the range, or include them in any landing page, if they do not meet those criteria. Businesses must also include a clear and prominent summary of the relevant criteria for the green product range on their product website, on product labels, and in any marketing materials or social media posts promoting the range (as relevant). Finally, the name of any green product range cannot itself be misleading (whilst no specifics were given in the undertakings, this is likely to apply to product ranges labelled broadly as “sustainable”, “eco” etc).
- 3. Statements about fabrics:** claims about fabrics must be specific (eg “organic”) and not ambiguous (eg “sustainable fabrics”). Businesses must not claim that a product is “recycled” or “organic” if it contains more than a negligible proportion of non-recycled or non-organic fibres. Where a business does make recycled or organic claims, it must clearly set out the percentage of recycled or organic fibres contained in the product (this can be done via a drop-down menu on the product page). Whilst this provision of the undertakings relates specifically to claims about fabric composition, the general principles could also be applied to other kinds of claims and product types (eg claims about the percentage of recycled plastic in a “recycled” plastic bottle). The UK’s Advertising Standards Authority is [currently looking](#) in detail at these kinds of green disposal claims with increased enforcement activity expected this year.
- 4. Third party accreditation:** the undertakings enhance the GCC position by providing further detail about the information that businesses must give consumers when making green claims based on a third-party affiliation or accreditation schemes. This includes details about the environmental benefits of the affiliation or scheme, any material connection the business has to the third party or scheme, and a link to the third party’s and/or scheme’s website. Whilst no specific schemes were mentioned in the undertakings, this is likely to include sector or product-specific accreditation schemes such as those run by Textiles Exchange or the Forest Stewardship Council.
- 5. Supplier due diligence:** the undertakings make clear that where a business makes green claims about a product’s composition (eg “organic” or “recycled” fibres) or manufacturing process, the CMA expects

businesses to have a supplier due diligence process in place to ensure these claims are accurate. The undertakings give an indication of what this should involve, including getting relevant certificates from suppliers (eg final scope and transaction certificates) or, failing that, a written declaration from the supplier that the product information is correct; conducting annual spot checks on a sample of certificates; and getting contractual assurances from suppliers that they will comply with the business’s green claims policies and contractual terms. Businesses should remove any green claims where the due diligence process is not complied with, or an error is identified which cannot be promptly rectified.

6. **Other internal processes around green claims:** the CMA expects businesses to have appropriate mechanisms in place to prevent misleading green claims and the undertakings give an indication of what the CMA may consider to be “appropriate”, including: (i) automated software solutions and weekly spot checks to ensure product listings are accurate and do not contain any misleading green claims; (ii) introducing prompts for employees during the product listing and advertising processes; (iii) developing internal green claims policies and implementing annual training for relevant employees on green claims compliance (eg in marketing and product sourcing teams); and (iv) ensuring that all new green claims are vetted by legal teams before they are published. Having these kinds of procedures in place will not only reduce the risk of making misleading green claims but will help demonstrate that the business has a robust internal system to uphold compliance.
7. **Substantiation and record-keeping:** all green claims must be substantiated with robust, credible and up-to-date evidence. Whilst the specific substantiation required will depend on the nature of the green claim, the undertakings give an indication of the kinds of records that businesses should have on file to back up their green claims and to evidence their internal green claims processes. These include: certificates and substantiation received from suppliers, supplier contracts, copies of internal green claims policies and training materials, and the results of any spot checks. (As per our [previous blog](#), businesses should also consider keeping a separate (confidential and privileged) record of any risk assessments conducted for each green claim. This can help inform any discussions with regulators should the claim be challenged further down the line.)

Tougher regulatory landscape

The CMA has issued a stark warning that future green claims enforcement could result in significant fines for the businesses involved once the [Digital Markets Competition and Consumers Bill \(DMCC Bill\)](#) enters into force (expected in the coming months). Under the DMCC Bill the CMA is expected to be given significant new powers to make direct findings of breaches of consumer protection law (currently limited to the courts) and impose fines of up to 10% of global annual turnover. This follows similar developments in the EU under the Omnibus Directive where regulators can now issue significant fines for such breaches.

Once it is in force, the DMCC Bill, requires the CMA to publish a policy statement in due course setting out how it will assess whether, and at what level, to issue a fine. Therefore, whilst it is not possible to know whether the investigations against ASOS, Boohoo and George at Asda would have resulted in a fine had the DMCC Bill been in force, the message from the CMA is clear: the potential liability for misleading green claims in the UK is set to increase and all businesses should review their green claims now to ensure they are compliant.

For further commentary on the green claims regulatory landscape in the UK and our “top tips” for compliance see [our previous blog](#). We regularly advise clients on their green marketing campaigns, so please reach out if you have any questions.

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