

Retail Therapy:

Cleaning Up Greenwashing: Navigating Retail's Green Claims

2024

Transcript of Retail Therapy episode 5

Nicola	<p>Hello and welcome to Bird & Bird's Retail Therapy podcast – where we explore the trends, changes and legal aspects of the retail & consumer industries.</p> <p>I'm Nicola Conway and I'm a Senior Associate in Bird & Bird's R&C team.</p>
Sana	<p>And I'm Sana Malik, I'm a Trainee Solicitor also at Bird & Bird.</p> <p>In today's episode: We're going to discuss green claims and greenwashing in the retail and consumer industries. We're joined by Dr Constantin Eikel who is a Partner in the Bird & Bird Dusseldorf office. Constantin, would you like to kindly introduce yourself and a little bit about your practice?</p>
Constantin	<p>Thank you for having me! I'm Constantin, I'm a partner at Bird & Bird in the Dusseldorf office in Germany and I focus on soft IP, which is trademarks, designs, copyright under competition and especially advertising and within advertising in the last five or six years- a big focus of my practice has been green advertising, so environmental advertising but also social advertising.</p>
Nicola	<p>Amazing well thank you so much for joining us! Perhaps you could kick us off with defining – what is a green claim?</p>
Constantin	<p>That's a good question when we talk to clients or colleagues, at first when you hear green claim, most people think about text. So if you go to the supermarket and you see your bottle and, on the bottle, it says '<i>made from recycled plastic</i>'- so this is a text green claim but what do not consider is that it could also be an image, for example, an icon, a leaf, a droplet on the bottle that indicates some form of environmental aspect. It could also be a colour or a type, a way your product is made. For example if a product is printed to look like cardboard, this could also be a green claim so it's not just text. It can be anything that communicates an environmental aspect.</p>
Nicola	<p>I have to say at least in the UK we're seeing tons of green claims via text at the moment. So if I go to a supermarket or really any sort of retail door, I can see so much language such as:</p>

	<ul style="list-style-type: none"> - Carbon neutral or climate neutral - Plant origin - Without microplastics - Made with less plastic or made with recycled plastic - Fully recyclable or Biodegradable or Compostable
Constantin	<p>Yeah, it's really a lot what you see on the market, and you have the most common example I think, neutral in particular which you mentioned carbon neutral, climate neutral whatever you can be neutral in is the most used claim at the moment and then anything with recyclability and as mentioned icons imagery. If you'd ever go to the supermarket and consciously look at the packaging, you'll see that these claims are everywhere, and you really can't miss them anymore and I can't go to the supermarket anymore without seeing them- might be an issue with my job obviously! But they are everywhere.</p>
Sana	<p>Constantin, when does a green claim become greenwashing, and what's the key issue with greenwashing itself?</p>
Constantin	<p>So a claim becomes greenwashing when companies or a brand aims to make them self or a product try to have it look more environmentally friendly than it actually is, so if they have no basis for their claims, if the claim is going beyond what they have a basis for and at that moment you can talk about green washing, so when the claim is not in line with reality and then you have some environmental and consumer organisations that denounce the company or the brand and allege that they are greenwashing, there are many examples of that, as we mentioned climate neutral is one where sometimes you have organisations talking about greenwashing but it's also more general and ambiguous claims like <i>'good for the environment and the planet'</i> or <i>'sustainable'</i> which everyone uses because it's a good term that catches a lot of things but relatively quickly can become greenwashing, at least in the eyes of these organisations. And these claims have a very high risk if they aren't substantiated, so the green washing thing is not only a legal risk but also PR risk with these organisations putting out press releases and so forth so there's a lot at stake for the companies. Even imagine you put something, a claim on a packaging and it's objectively true but it cannot be understood by the consumer, it is misleading, it cannot be verified, or important information is not on the packaging that should be there, for example, the language is too complex, and consumers can't understand that. Even though the claims true, if the consumers can't understand that your already either in or very close to greenwashing.</p> <p>Let me give you some examples: you might fall into green washing if</p> <ul style="list-style-type: none"> - You are claiming to contribute to the reduction of global greenhouse gas emissions when this is not true. This could for example, be the case if companies use offsetting projects and South America, in Africa but they do not have the scope which the company might believe that the scope is, so it's much smaller than it actually is. - Or you are claiming that a product is "Good for the Planet" without specifying how it is good. Just for the bottle of cleaning agent and it is saying 'good for the planet' on it and there's no explanation- that's a good example of greenwashing.

	<ul style="list-style-type: none"> - Or you are claiming that a product has less gas emissions than your competitors without having collected the relevant data. - Or you are omitting product features (for example related to its disposal) that might have an impact on the overall life cycle of the product. You do not look at what happens when my product is discarded and you ignore this part even though it has a major impact on the overall footprint of your product, so these are all examples of potential greenwashing.
Nicola	<p>It feels like everyone is talking about greenwashing, so there is greater awareness surrounding it but it's still really prevalent. The European Commission collected some Green Claims data in March 2023 that suggested that in 53% of green claims, the claim is vague, misleading or based on unfounded information – so these constitute an unfair commercial practice. Why is that still so high in your view?</p>
Constantin	<p>So, I think we have to awareness, and we have laws in Europe that should be used to tackle greenwashing, but in some states in Europe, and globally, these laws are not being enforced as much and because it's a complex issue even though there is awareness- still some claims will remain misleading simply because the consumers can't understand it.</p> <p>The 53% you cited comes from study of the year of, I think it was conducted in 2020, and while some experts disagree with the number and think it's slightly lower, I think it is clear that there are misleading claims on the market, and no one can really dispute that. We saw 2- 3 years ago, a very prominent example of that. Suddenly lots of things were made from ocean plastics- so you saw bottles, plastic bottles that said, or even bags and sunglasses, that were made from ocean plastics and if you take a moment and think about what is ocean plastics? And I do this as an exercise with lots of our clients and I asked the marketing departments of our clients- imagine ocean plastics -what is that? Do you think about an ocean, and you have plastic floating in it? Actually ocean plastic has, in most cases, not touched water so I want to repeat that- ocean plastics has not touched water. What ocean plastics is, is that plastics is being collected and recycled in communities that live close to rivers, in regions and countries where recycling is maybe not available and by offering the recycling systems the plastic is not thrown and flushed into the river and does not end up in the ocean, so it actually prevents ocean plastics. This is inherently a very good thing, but the branding is misleading because it is not ocean plastics and nowadays the term used for that is '<i>ocean bound plastics</i>' so whenever you see '<i>ocean bound plastic</i>' somewhere on the market you know- OK this has been collected in communities where there is a risk of plastic ending up in the ocean. So it is a good thing, companies are doing good things but when they talk about it, they create an impression that is not completely in line with reality. So that is often the case when we talk about greenwashing- there is a good thing beneath the surface, it's just the way you talk about it that needs to be improved.</p>
Sana	<p>That's really interesting Constantin, thank you so much for going into ocean plastics and just how much that means for the consumer and how pervasive and misleading marketing can be.</p> <p>Nicola, I know that the UK consumer team advises clients quite frequently on how they can do better with their green claims. What are some tips you're giving at the moment?</p>
Nicola	<p>Yeah, we do, and obviously the advice we give really depends on who we're talking to because clients in different sectors such as food versus beauty have different considerations that they need to keep in mind. But in general terms of</p>

	<p>some overarching ideas to think about, I can give you what I like to call our noteworthy 9:</p> <ol style="list-style-type: none"> 1. Consider what evidence you have before making any claims and ensure that you can substantiate each claim being made. 2. Base environmental claims on the full life cycle (not just part of the life cycle) of the product (unless you're clearly stating otherwise) 3. Ensure that the claim is true and easy to understand. 4. Double check that evidence you're using in support of the claim is up to date and from verified scientific sources. 5. Think of how your audience will interpret the claim as a whole, and what the overall impression will be. This isn't a question of what you as the company thinks – this is a question of what the average consumer will think and understand. 6. If because of space or sizing issues you can't easily fit all of the relevant information onto the advert or the packaging, don't just omit it, find another way. You must communicate it so maybe think about making it accessible in another way for example via a QR code or a link to your website, we're seeing a lot of that now. 7. Ensure that if there are conditions or caveats to the claim, these are written next to the claim, clearly set out and easy to understand 8. Ensure that all comparisons are fair, accurate and easy to understand, and that these don't disparage or discredit any competitor. That's actually a general rule for all advertising, not just when using green claims. 9. Where you can, choose specific claims rather than generic ones unless you have really strong evidence to support the general claim.
Sana	<p>Thank you so much Nicola, that was very practical, and I think that'll be super helpful for a lot of our clients to take note of.</p> <p>Constantin – Rather than looking at the Dos, and turning to some DON'Ts, so kind of flipping Nicola's answer on its head, what in your view should a company avoid doing instead, so that they're not greenwashing?</p>
Constantin	<p>That is a very good question, and it depends on where you are so every country has slightly different 'don'ts' but there are overarching themes and I think if you follow these you have a good chance of being compliant in many different countries because it's very hard to review your clients in all countries where you might have footprint for your business.</p> <p>So here are 10 rules I try to give to my clients to keep in mind when creating green claims:</p> <ol style="list-style-type: none"> 1. Don't make green claims about features of the product which are standard or necessary to comply with legal requirements. So, you cannot advertise for something you must do. 2. Don't make misleading statements. This is an obvious one.

	<ol style="list-style-type: none"> 3. Don't cherry pick information that suits the claim you want to make. So, don't omit something that might be a bad look. 4. Don't use symbols or words for which you do not know the precise meaning because if you do not know it, the consumer will not know it either. 5. Don't hide any clarifications or qualifications such that they are difficult for customers to see. I know this is something which the marketing always loves to do- have the big bold claim in font size 30 and then have the disclaimer in font size 4 in a white font on a white background, but this is not something you can do. It should be clearly visible to the consumers. 6. Obviously don't make untrue claims but also don't make claims which are only partially correct. 7. Don't exaggerate the evidence you have in order to make a more impressive claim. 8. Don't use statements without explanations. This is really a big one, a very common theme in all countries. You cannot make a green claim without an explanation. 9. Don't compare the environmental credentials of products or businesses which are not 'like for like'. 10. And don't make claims about future goals without any clear, objective and verifiable commitments and targets on how to achieve such goals. <p>I think this is something that goes out to almost all companies on the market which has goals like by 2030 we will be XYZ whatever they want to be. You should publish goals and ambitions with concrete steps so that you can be held accountable which is something that you will also bring as law and we will get it later already. Already we see this as an important step for courts nowadays.</p>
Sana	<p>Lots of food for thought here! And Constantin, I appreciate that you've mentioned that different laws and therefore enforcement regimes apply in different countries, but in a general sense – what are the possible repercussions for companies who are greenwashing?</p>
Constantin	<p>Your absolutely right, it depends on jurisdiction and question, but in many EU member states the local authorities can impose fines. Consumers can in some countries, bring a private action to sue for breach of contract. Consumers and regulators alike can apply to local courts to see consumer protection compliance if consumer rights are being infringed upon. Regulators and courts can also require that the advertisements or the offending products be removed or withdrawn. So, if you have a claim on the packaging of your product you could be forced to remove the product from the market and in particularly serious offences there may be options to pursue criminal actions but in reality these are rare cases, for example, the regulators in the Netherlands which force companies to make voluntary donations in the amount of up to €1 million and in Germany for example you could be faced with a preliminary injunction forcing you to remove your claim within five working days so there is really pressure on this depending on where you are. It might be fine; it might be simply that you're forced to remove certain claims.</p> <p>It is different on a country per country basis and whilst we are touching on the applicable law the EU have big plans for green claims, so (1)- you have the</p>

	<p>Directive on Empowering Consumers for the green transition, it has been adopted and it will come into effect in 2026 and (2)- you have the Green Claims Directive. The latter is still a draft but they will significantly change how green advertising is regulated in the EU and if you believe in the Brussels effect, which means that the laws of the EU have an effect outside of the EU as well simply because it's easier for companies to follow the stricter standard rather than doing the country by country approach, these laws will have an effect outside of the EU as well and these laws they will increase enforcement. So, if the EU wants every member state to set certain fines for greenwashing and the maximum which each member state must implement is 4% of the turnover of the company. This does not mean that the courts will necessarily impose 4% but it should be an option for the court and some member states will, and have already, for other laws, gone beyond and they have imposed or made available to the courts fines of up to 10% of your turnover so if you are accused of greenwashing and the court agrees, you might lose a significant portion of your turnover and not just for the product, but of your whole company additionally your revenue can be compensated and you can also be temporarily excluded for 12 months from public procurement processes and from access to public funding including tendering procedures, grants and concessions.</p> <p>So this might not be a big thing for everyone, but for those that are part of public procurement processes or funding, this is going to be a big one.</p>
Sana	<p>If the Directive on Empowering Consumers has been adopted already, could you possibly give our listeners a cheat sheet on what that one means for retailer?</p>
Constantin	<p>Yes absolutely, I've been closely following the developments around the Directive on Empowering Consumers for several years now.</p> <p>Essentially, it introduces several changes and prohibitions for businesses making environmental or social claims. Some of the key ones are to note are:</p> <ol style="list-style-type: none"> 1. Generic environmental claims (like "green" or "eco-friendly") will be prohibited unless they're backed by specific evidence. Will, if they are not used with context- so if you only used the claim, will be subject to very strict requirements and the requirements are so strict that some people talk about a ban for these terms, so it might be that certain words, like sustainable, eco-friendly, will almost be like they were banned because the requirements will be hard to be met! 2. Comparative claims (such as "greener than X brand") must be verifiable. Usually lawyers' advice for comparative claims to be careful because they are mindful already and to not name the competitors and so on so forth, but the EU will force you to name the competitors, name the product so there will be lots of laws about comparative green advertising. 3. Labels and symbols will be standardised to avoid confusion – particularly impactful since R&C clients will no longer be able to make their own labels for this purpose! <p>This is big change for everyone.</p>
Nicola	<p>This all sounds really interesting and with scope for massive impact on businesses and consumers alike – can we get into some more detail of this?</p>
Constantin	<p>Sure, so I already mentioned a bit about generic claim. So, essentially if you use one of the big words 'sustainable', 'eco-friendly' and so on so forth, if you</p>

give it context on the same medium, you will be subject to the Green Claims Directive, which is yet to be adopted, but if you don't give it context and just use the big word and the big claim your subject to Empowering Consumers Directive and it's treated as a generic environmental claim. To use a generic environmental claim, you need to demonstrate excellent, recognised environmental performance and this long and very hard to decipher definition just means you need to fulfil certain EU or national member state standards, so official standards, and if you fulfil an official standard and if it's relevant to your claim you can still use the generic words but I'm fairly certain that for 'eco-friendly' for example, the EU who essentially wants to ban these words they will not put out the standard that justifies these words, so for many products the list of generic claims within the directors can be seen as- well almost a ban, and then you have the sustainability labels. If you go into a supermarket today you as a consumer see about 200 sustainability labels, different ones, so sustainability label means an icon, can also be text, but mostly icons they look like a seal, they indicate a certain quality and sometimes they do look like they were granted by a third party but many of them are actually owned by the brands and there's nothing inherently wrong with that, for example, if the brand highlights a more sustainable product category within the product portfolio and to highlight this they use a green tree icon on the back of the product, it's not inherently bad but this is what the EU want to prohibit and there's only two ways to use sustainability labels in the future-

- (1) It's made by public authorities which is not helpful for brand
- (2) Secondly, it must be based on the certification and the certification scheme essentially means a triangle of parties. The brand, the owner of the label and the verifier (whether or not the product fulfils the requirements) must be independent parties, so any brand that has a sustainability label, or something that is considered sustainable either needs to stop using it by September 2026 or transfer it to a third-party that is independent and open it up to everyone, so this is a very big change which many companies are not aware of and you could say no why should I care about something that happens in September 2026, well depending on what kind of product you make the product you designed today are still on the market or even only entered the market in September 2026, so this is a very big change.

Then you have new laws on future environmental performance which essentially means if you advertise your goals and ambitions (*by 2030 we will be..*) you need the clear objective and verifiable commitments I already talked about, but additionally, you need a third-party to verify your progress to watch the goal and you need to publish this and this new law has come in because too many lawyers, like myself, said -well if you're not absolutely certain just put '*we plan to be*' in front of your claim and then it was much less risk. The EU obviously noticed that and now any plans need monitoring and application.

The last big change is on greenhouse gas emission offsets, so the most common one is carbon neutral. If you use offsetting for your carbon emissions, you cannot claim or imply that your product or service is neutral positive for the environment based on offsetting. This cannot be justified any more of offsetting and this is going to change the use of neutrality on the market because almost all of these claims are based on offsetting. So, the Empowering Consumers Directive brings down the hammer on certain practices which the EU believes to be misleading, so it's for very specific things, and these are going to be very difficult in the future and the directives is only part of many different directives which the EU is bringing on the market, you have many EU related laws, for example, you will have the Eco-design for Sustainable Product Regulation. Very shortly put, the commission will get the

	<p>power to say certain products like jeans has to be made from 20% recycled fibre. I'm making up the example, but this is what it could be and if the commission says jeans have to be made from 20% recycle fibre you cannot advertise anymore that you use 20% recycle fibre because you only doing the minimum so this is what the EU is planning with the Empowering Consumers Directive and next to the advertising part mentioned they also regulate parts about durability, reparability and recyclability, you cannot withhold certain information and you must communicate how and if your product can be repaired, so overall it, as the name implies, shall empower the consumers to make greener choices.</p>
Sana	<p>Thanks so much for that detailed look at what is to come from a legislative perspective. It's clear how monumental this is going to be as you've touched on really pervasive issues.</p> <p>Can you provide some insight into the practical side of this? So what are some of the tangible and commercial implications we're going to see?</p>
Constantin	<p>I think the commercial implications right now are that companies should think about- can we sell off all current stock with claims that will not be possible anymore by September 2026? Or what we designed today, programs we invest in today, will they still be relevant in September 2026? If so, they should consider this now, consider the law adjust the marketing. They should also start implementing data collection the supply chain because the data you can collect will be relevant for many of the ESG laws which the EU is bringing out like the Green Claims Directive for example, where you need to communicate the data and environmental data of your product, and this is the theme for all these laws that are coming. Transparency and accountability will be more key than ever, if and when the Green Claims Directive comes, every green claim will have a little QR code next to it for products and services that you can scan as a consumer, and it will tell you all about the environmental aspects of that specific product so transparency and educating the consumers is what the EU is doing. Because of that, business will need to provide clear information about the products environmental impact and I think consumers deserve to know if your products packaging is recyclable, if it contains harmful substances or if it's energy efficient and the Directive also helps with the enforcement against companies that do not follow these rules and because of the fines that will be possible I think businesses would think twice before greenwashing, even though you can fall subject to green washing without knowing it, I'm not saying that every company is actively greenwashing but can just happen and because of that, the law should be carefully read. I think this can also start shifting in the marketing approach. You need to be authentic in what you communicate and there are brands on the market that are very good at that, it's just not everyone is, and the ones that not yet need to follow the ones that are the trailblazers and that are authentic and if you then have to substantiate and communicate honestly with the consumers, you will have success on the market, and you will have nothing to fear from the law.</p>
Nicola	<p>Alright, businesses need to get busy but what should consumers be doing or thinking in light of this?</p>
Constantin	<p>I think consumers should educate themselves, understand the labels, ask questions and support the brands that genuinely care about the environment. The consumers entering purchasing decisions have to power to drive the change and the companies are only doing green advertising because studies show that consumers buy the greener product at least as long as the money allows, so essentially, it's not just companies that become greener, but it should also be to consumers that make greener choices for a greener future.</p>

Nicola	I love that phrase- consumers can vote with your wallets so we can also be playing our part here, I think!
Sana	Ok so looking at all of this together – it seems like greenwashing is a relatively high-risk offence at the moment. Just to tie a bow around today's conversation, we should mention that we have a Green Claims Tracker on the Bird & Bird website. If you're interested in knowing what legislation in this sphere applies to your company across different jurisdictions, you can use that free online tool to find out.
Nicola	Let's close the episode with a fun little question – Constantin and then Sana, what's something that you purchased or were gifted recently and loved?
Constantin	We have recently moved into a new house, and I just bought two trees, which seems to be very fitting to the theme of today's podcast, that I planted on the weekend and even though I don't necessarily have a green thumb they spark joy, and I had the opportunity to plant trees by myself which has been a fun exercise!
Nicola	Oh that sounds lovely! I have a loosely related one. I have a new fragrance – it's billed as a unisex scent called Vanilla Woods, so not quite a tree but a similar theme, and it's from a brand named The 7 Virtues which I haven't bought from before and I'm glad I did. So relevant to what we were talking about RE Labels - The packaging says that it's made with sustainably sourced vanilla from Madagascar and with organic sugar cane oil. I'm not usually drawn to a vanilla scent profile, but this is really quite unusual, and I think quite special. When I smell it, I get a powdery warm amber vanilla. But when I read on Fragrantica here it says that the top note is Pear; the middle note is Rose; and the base notes are Vanilla, Caramel and Amber. So there's actually quite a bit going on in there but it however they've composed it, it's come out as something really sweet, soft and comforting. What about you Sana, what's something you purchased or were gifted recently that you've loved?
Sana	That sounds so lovely, Nicola! I absolutely love vanilla. I guess my answer would be more along the lines of Constantin's. I recently bought some chilli pepper seeds which I'm really excited to start planting. This is the first time I've started planting and growing my own kind of herb garden and vegetable stuff at home so I'm really excited to start with chillis!
Sana	Alright that's the end of our episode – thanks for joining us! If you'd like to join us for more Retail & Consumer discussions, don't forget to subscribe or follow wherever you listen to your podcasts so that you're notified when the next episode goes live. Bye for now!

Thank you

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai
• Dublin • Dusseldorf • Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Lyon
• Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco • Shanghai • Shenzhen • Singapore
• Stockholm • Sydney • Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority (SRA) with SRA ID497264. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.