



# Upcoming Challenges: Digital Product Passport and Green Claims

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# Ales Bartl

- ◆ Ales has a broad experience in EU product regulatory law, including REACH, CLP, POPs, biocidal legislation, food law, medical devices, electronic products, and product and food safety. He advises on regulatory compliance of a broad range of products marketed in the EU and represents clients before EU and national competent authorities on compliance and enforcement issues. Ales also advises on product recalls and withdrawals.
- ◆ Ales primarily focuses on EU regulation of chemicals and food, including representing clients in various procedures before the European Chemicals Agency (ECHA) and European Food Safety Authority (EFSA).



# Marie Escorneboueu

- ◆ Marie Escorneboueu counsels clients on regulatory and compliance matters related to food and drug law, with an emphasis on food and drug packaging, cosmetics, chemical control, and environmental issues.
- ◆ She assists companies in obtaining regulatory clearances for food-contact materials at the European Union (EU) and Member State level and advises clients with respect to mutual recognition. She also advises companies on sustainability initiatives; REACH matters; the Classification, Labelling, and Packaging (CLP) Regulation; and Biocidal Products Regulation (BPR).





# The Digital Product Passport (‘DPP’)





- ◆ Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products, 30 March 2022:
  - ◇ Adoption expected in 2024, entry into force likely in 2027
  - ◇ **Framework regulation:** defines general requirements, complemented by specific rules adopted per product group via delegated regulations
  - ◇ But: will be used in other legislation, not just eco-design: batteries, toys, and detergents
  - ◇ Linked to other similar databases (e.g., SCIP database)

# Main Goals of the DPP



- ◆ Helps consumers make sustainable choices
- ◆ Promote circularity
- ◆ Support legal compliance

# What Data Will (May) it Contain? (1)

## ◆ DPP is foreseen to include:

- ◆ Product identifier;
- ◆ Unique operator identifier(s);
- ◆ Content of substances of concern;
- ◆ Performance criteria;
- ◆ Information destined to treatment facilities on disassembly, recycling, or disposal at end-of-life

# What Data Will (May) it Contain? (2)

- ◇ Compliance documentation and information required for the product, such as the declaration of conformity, technical documentation, or conformity certificates;
- ◇ User manuals, instructions, warnings, or safety information, as required;
- ◇ Name, contact details, and unique operator identifier code of the economic operator established in the EU, for the purposes of market surveillance



# Example of Batteries

- ◆ **Proposal for a Regulation concerning batteries and waste batteries (December 2020)**
- ◆ **Requirements foreseen in the DPP**
  - ◇ Will apply to industrial and electric vehicle batteries
  - ◇ Public information disclosure requirement: full labeling and marking information + carbon footprint information, information on responsible sourcing, recycled content, expected lifetime, commercial warranty, and EU declaration of conformity
  - ◇ Disclosure to interested persons: dismantling information
  - ◇ Disclosure to competent authorities: results of tests demonstrating compliance with the requirements

## ◆ What do we already know?

- ◆ Decentralized system: obligation for each operator to provide and manage the data
- ◆ Likely QR Code
- ◆ Basic information will be directly included in data carrier, full information on a website
- ◆ The data carrier shall be physically present on the product, its packaging, or on documentation accompanying the product
- ◆ Central registry (for the authorities): under feasibility discussion



# Draft Standardization Request



# Harmonized Standards in General



- ◆ Harmonized Standards are adopted for **product categories**, harmonized at the EU level (CE marked products)
- ◆ They provide a presumption of conformity with **essential requirements**
- ◆ They are **not mandatory**: operators are free to achieve conformity by other means

# Scope of the Draft Standardization Requirement

- ◆ EU standardization bodies requested to prepare harmonized standards to implement the DDP system
  - ◇ Only concerning the **way the system will work** (design, functionality, and security) **not focusing on the data content of the DPP!**
    - Data content to be subject to specific consultations, for specific products
- ◆ To be completed by the end of 2025

# Areas to be Standardized

## ◆ Eight areas to be standardized:

- ◆ Unique identifiers
- ◆ Data carriers (QR code but several other means also possible)
- ◆ Links between physical product and digital representation (URL?)
- ◆ Access rights management (public data vs. restricted data)
- ◆ Interoperability (during life cycle, other databases)
- ◆ Data storage and data persistence
- ◆ Data authentication
- ◆ Data security and privacy





# Green Claims



# What is a 'Green Claim'?

- ◆ Defined in the Proposal for a Directive empowering consumers for the green transition as:
  - ◆ Any **message or representation**: incl. text, pictogram, symbol, label, brand, company and product name, color
  - ◆ Which is **not mandatory** under Union law
  - ◆ Which is shown in the context of **commercial communications**: only addresses B2C communications
  - ◆ Which states or implies that a product or its trader has **a positive or no impact** on the environment, is **less damaging** than others, or has **improved its impact** over time

# How are Green Claims Regulated in the EU?

## ◆ Current framework

- ◆ Unfair Commercial Practices Directive 2005/29/EC ('the UCPD') & UCPD Guidance
    - Catch-all legislation, not providing specific norms for green claims but applicable to them on a case-by-case basis
    - Under revision - Proposal for a Directive empowering consumers for the green transition, 30 March 2022 ('UCPD Revision proposal')
  - ◆ Proposal for a Directive on the substantiation and communication of explicit environmental claims, 22 March 2023 ('Green claims Directive')
- ## ◆ Green claims in chemicals legislation
- ◆ Art. 25 CLP Regulation prohibits statements 'non-toxic', 'non-harmful', 'non-polluting', and 'ecological' that are inconsistent with the CLP classification of the substance/mixture

# When are Green Claims Considered ‘Unfair’?

## ◆ Prohibition of ‘unfair’ commercial practices (Article 5 UCPD)

### ◆ ‘Unfair’

- 1) contrary to the requirements of professional diligence, and 2) materially distorts or is likely to distort consumers’ economic behavior

### ◆ Annex I of the UCPD lists unfair practices that are systematically prohibited:

- Does not specifically include green claims, but includes:
  - Displaying a trust mark, quality mark, or equivalent
  - Presenting rights given to consumers in law as a distinctive feature of the trader’s offer

## ◆ For cases not fitting the list of Annex I, catch all clause: compliance evaluated on a case-by-case basis by enforcement authorities

# When are Green Claims Considered Misleading? (1)

## ◆ Prohibition of ‘misleading’ commercial practices (Article 6 UCPD)

### ◆ ‘Misleading’

- Contains false information and is therefore **untruthful** or in any way **deceives or is likely to deceive** the average consumer
- E.g., wrongful statements, vague statements, partial representations, misleading omissions, explicit, or implicit (e.g., use of imagery such as trees, forests, or animals) that are not appropriately substantiated

### ◆ Concerns a **wide range of characteristics**:

- Composition, method of manufacture, origin, imagery of the product (incl. layout, colors, images, etc.)

# When are Green Claims Considered Misleading? (2)

## ◆ Principles:

- ◆ Claims shall be **truthful**, must not contain false information, and shall be presented in a clear, specific, accurate, and unambiguous manner
- ◆ **Full life cycle** approach:
  - Shall take into consideration the environmental impact of the product throughout its whole life cycle
  - The benefit claimed should not result in an undue transfer of impacts, i.e., creating negative environmental impacts at other stages of the life cycle
    - Exp: artificial turfs consume less water, but generate more pollution at the end of the life cycle of the product



# When are Green Claims Considered Misleading? (3)

- ◆ **Examples of misleading environmental claims in the UCPD Guidance:**
  - ◇ Vague and general statements: ‘environmentally friendly,’ ‘eco-friendly,’ ‘eco,’ ‘green,’ ‘nature’s friend,’ ‘ecological,’ ‘environmentally correct,’ ‘climate friendly,’ and ‘conscious’
  - ◇ Wrongful/unsubstantiated statements: biodegradable claims used for a product that is not actually biodegradable or for which no tests have been carried out
  - ◇ Use of imagery suggesting the positive environmental impact of a product
- ◆ **Margin of appreciation of the Member States:**
  - ◇ Compliance is ultimately assessed by Member States’ authorities, on a case-by-case basis

# When are Green Claims Acceptable?

- ◆ To be deemed admissible, claims shall be substantiated (Article 12 of the UCPD):
  - ◇ Burden of proof placed on the trader making the claim
  - ◇ Claims must be based on evidence, preferably hard evidence (studies, data, and testing)
  - ◇ That can be verified **by the competent authorities**

# What will Change with the UCPD Revision? (1)

## ♦ Proposal for a Directive empowering consumers for the green transition, March 2022:

- ♦ Environmental claims explicitly addressed
- ♦ Adds a definition for ‘environmental claims’ (see slide 16)
- ♦ Expands Annex I, to include new unfair practices, including:
  - Display of **sustainability labels** which are not based on a certification scheme or not established by public authorities
  - Making **generic environmental claims** without a recognized environmental performance, demonstrated via the use of a label
  - Presenting requirements **imposed by law** on all products in the relevant product category on the EU market as a distinctive feature
    - e.g., a ‘PFAS’ free claim following EiF of the restriction
  - Making an environmental claim **about the entire product** when it relates only to a part of it

# What will Change with the UCPD Revision? (2)

- ◆ Amends provisions defining misleading claims to include the following practices:
  - ◆ False information on the **environmental impact, durability, and reparability**
  - ◆ Making an environmental claim related to **future environmental performance** without clear, objective, and verifiable commitments and targets and without an independent monitoring system
  - ◆ Advertising benefits for consumers that are considered a **common practice** in the market

# What will Change with the UCPD Revision? (3)

## ◆ Status of the proposal:

- ◆ EP position adopted on 11 May 2023:
  - Expands Annex I list to include ‘Making an environmental claim which cannot be substantiated in accordance with legal requirements’
- ◆ Pending before the Council

# Green Claims Directive (1)

## ◆ Proposal for a Directive on the substantiation of Green Claims, 22

### **March 2023:**

- ◆ Complements the UCPD revision
- ◆ Defines modalities under which green claims may be substantiated
- ◆ And thereby avoid qualification as ‘misleading’
- ◆ Proposal pending before the EP and the Council (EP position adopted on 12 July 2023)

## ◆ Regulates the following aspects:

- ◆ Obligation for traders to perform an assessment to substantiate their explicit claims, with a defined methodology
- ◆ Limitations on the means and wording to communicate such claims
  - E.g., specify if it relates to a part or entirety of the product
- ◆ Regulation of the use of environmental labels



# Green Claims Directive (2)

- ◆ **From a procedural standpoint, the proposal foresees:**
  - ◆ Regulation of the use of **environmental labels**:
    - Creation of environmental labelling schemes: conditions for joining, information collected, and modalities of the development of the schemes
    - Limitations on the creation of new labelling schemes: goal to promote EU-wide labels
    - Verification bodies to be set out and accredited by each Member State
  - ◆ Possibility for members of the public having a sufficient interest or maintaining the impairment of a right OR for legal persons to **submit complaints**
  - ◆ **Penalties** in case of breaches further harmonized (calculation method and modalities)

# Green Claims Directive (3)

- ◆ **Presence of hazardous chemicals and possibility to make green claims:**
  - ◇ Rec. 67 of the proposal foresees that the Commission may, on the occasion of a revision of the Green Claims Directive, insert:
    - a “*prohibition of environmental claims for products containing hazardous substances except where their use is considered essential for the society*”



## **Register Today for Basics of EU Chemical Regulations and Upcoming Revisions**

Ales Bartl will provide invaluable information to Japanese companies looking to sell REACH-compliant products to the EU. Ales will be joined by Takashi (TK) Namba, Keller and Heckman's Advisor on Japanese Relations, who will provide the translation and augment the discussions surrounding these complex regulations.

This webinar will be presented orally and in written form, in both Japanese and English.



Please join us at 1:00 PM Eastern U.S.  
Wednesday, September 20, 2023  
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Please join us at 1:00 PM Eastern U.S.  
Wednesday, September 27, 2023  
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Please join us at 10:00 AM Eastern U.S.  
Wednesday, October 11, 2023  
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# Thank You

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