



Upcoming Challenges: Digital Product Passport and Green Claims

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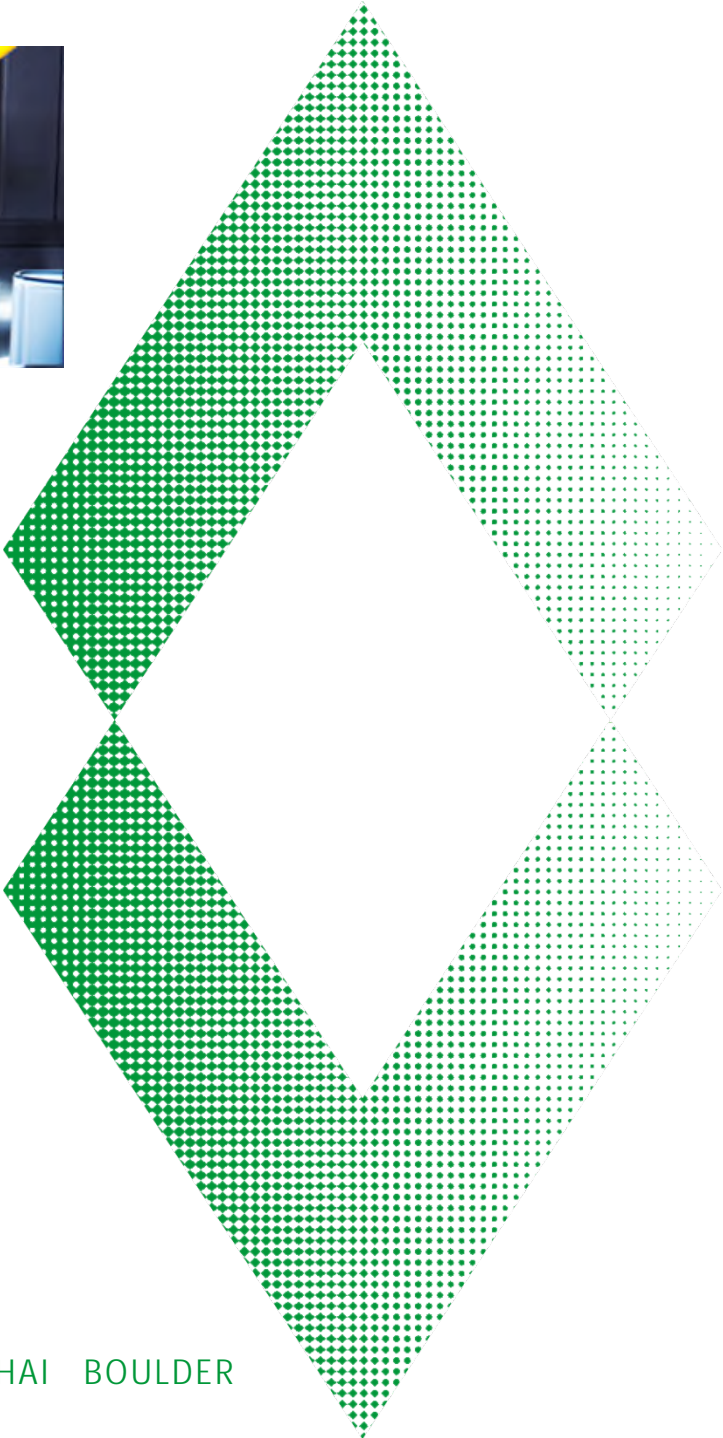
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Ales Bartl

- ◆ 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”*



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Thank You

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