



## **Consultation on CMA Guidance on Misleading Green Claims**

**July 2021**

### **Comments from the BRC**

#### **About the BRC**

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future

**Contact:**  



### **Response format**

*BRC members welcomed the opportunity to submit comments to the CMA orally in two sessions. The observations below broadly bring together those comments for the record. We would be happy to engage further at an appropriate time.*

*As such you can take our comments as an answer to the final free-form question.*

### **Overview and scope**

1. Broadly speaking, the BRC believes the principles are the right ones – not least because they are virtually the same as any principles that reflect the UCPD as transposed. They are therefore familiar to those responsible for consumer protection in member companies.
2. Indeed, we note that nothing has changed in respect of the rules and requirements for consumer protection – this is an attempt to explain the considerations a business should bear in mind when applying those legal obligations to the area of environmental claims, in itself an area of growing consumer interest. However, it is important that the Guidance does not give the impression – or result in reality – that innovation is a concern rather than to be encouraged.
3. As such, we believe this is useful guidance.
4. In general we welcome the structure - in particular where there are questions that a business should ask of itself when making a claim.
5. Some people were concerned that mixing the B2B requirements and the B2C requirements in one document might be confusing. However, they accept that the B2B requirements do have a bearing on having the supporting evidence for B2C claims. The conclusion was that the Guidance would benefit from a clear explanation of the link and potentially a separate section on B2B requirements.
6. We also welcome the inclusion of examples – both good and bad practices. Indeed we would propose that these be expanded because, as one member put it, the examples

can be even more useful than the text. Members will try to suggest further ideas. The ASA should also be encouraged to submit examples of good and bad practice from its perspectives based on recent adjudications.

7. Finally, in terms of structure, given the significance of retail as the ultimate point of contact with the consumer, we believe there is a good case for a separate section on some retail specific issues such as the extent to which retail can be – and is – expected to take responsibility for the claims made by manufacturers and also the role and responsibilities of marketplaces – though we recognise that these should be no different from acceptance or otherwise of other marketing material that makes claims in other areas.

### **The Principles**

8. As we have said, we believe the principles are the right ones. Our one question is whether the principle that claims should be substantiated is totally clear. For practical purposes, it is important to distinguish between when the substantiation should appear next to the claim and when it is reasonable not to do so including for reasons of space. It might be preferable to state the principle as claims should be capable of substantiation and make it clear that the substantiation should be held by those making the claim in the first place and should be made prior to the claim being made – not as an afterthought.

### **Role of retail**

9. The Guidance needs to be very clear as to the role of retail where it is not also the manufacturer or brand owner. The current wording seems to suggest that retail must always take responsibility for claims made by manufacturers. We do not believe this is entirely in keeping with common practice or practicality. For example, in product safety the general approach is that each actor in the chain is responsible in so far as it is within its competence and capacity to be so. This approach is also clearly spelled out in food legislation, which covers nutrition and health claims.
10. The plain fact is that large manufacturers, many of which may be based outside the UK, are unwilling to provide retailers with the basis for the claims they make. A retailer has to take the claim on trust. This is partly because the manufacturers see no reason for a retailer to challenge them and partly because some retailers are competitors with their own brands. In addition many of these brands supply goods with all the marketing material ready made and would be reluctant – unwilling probably – to change them for one retailer which had concerns but which did not have all the information. Many of



these big brands often make those claims based on research for which they have proprietary data which they will not be willing to share with the retailer. This also limits the capacity for due diligence by the retailer.

11. Indeed a large supermarket may have 10,000 items on its shelves and would find it very time consuming and expensive to subject the claims on every item to its own independent examination.
12. Instead we believe that a retailer should be able to take on trust claims made by large reputable brands – though if a reasoned misleading claim is brought to their attention they should actively pursue it with the manufacturer. Enforcers should also look to the manufacturer for substantiation in the first place. It is important that the ASA is aligned with this approach.
13. This mirrors the responsibilities that Marketplaces have for those on the sites – they cannot be expected to monitor each and every placement but if a breach of regulations is brought to their attention they are required to deal with the matter. In the case of marketplaces we believe this approach should also apply to environmental claims.
14. With respect to smaller less established manufacturers, we believe it is reasonable for retailers to ensure the claim is not misleading by requesting the substantiation – and even if necessary refusing to stock the item if the substantiation is refused. The extent to which a smaller retailer may be able to accept or reject the substantiation based on its own assessment is clearly limited and the Guidance may need to reflect that.
15. In view of the importance of the relationship with manufacturers, we recommend a fuller explanation of what is expected of each party in the guidance. It is against this background that we regard the inclusion of the b2b as reasonable demonstrating as it does the obligations of a manufacturer to another business.

### **Overall context of a claim requirement**

16. Members have noted references in a number of places to taking into account the overall context of a claim if it is not to be misleading. They understand that providing clarity and precision can help but are concerned that excessive emphasis on ensuring the claim stands up in the overall context of the business and the product could in some situations inhibit innovation. For example, a business that has not hitherto been green in its approach may wish to start by introducing a new line and clearly would want to advertise that new approach. If it feels it cannot do so that could stifle an expansion of environmentally friendly approaches or goods. While accepting use of terms such as more or less friendly to the environment are dubious, members would hope for some more specific examples to indicate how they might couch such claims.

17. Issues also arise over the extent to which the whole life cycle of the product needs to be considered. While accepting use of terms such as more or less friendly are dubious, members would hope for some more specific examples to indicate how they might couch such claims.
18. Businesses should not be discouraged from reducing the environmental impact of products, even if it is not in the area of most impact. For example, a company could be disincentivised from using cotton with a lower environmental impact in its jeans if the focus of a claim has to be on the area of greatest environmental impact, which in this case would be the washing of the jeans in homes. Members understand that the key here is the reference to 'considered'; and that the more specific the claim is the less likely it is to breach the rules. In this case we understand it should be acceptable if it is clear that the claim is not about the whole life cycle of the product but about the specific use of cotton.

#### **Use of specific terms and claims against standards**

19. Some members have called for specific terms such as sustainability to be defined more closely but there is no consensus on this. This does not mean they want strict definitions in the Guidance but rather that there could be some sort of glossary of terms as a guide. The balance is on the side of those who would rather not have anything like the definitional requirements in the Nutritional Claims rules, for example – and the UCPD/CPR basis for this Guidance would preclude that in any case we believe.
20. However, members do point to the value of reputable standards being used as a point of reference for those who wish to use them and would ask that there be some reference in the Guidance to those that are recognised as properly developed and enforced and which could be used on a voluntary basis by those who so wished. Specific rules/guidelines are being developed in certain areas and this document should be reviewed regularly to include cross references to these specific definitions and rules and ensure there is no confusion on the obligations of retailers and manufacturers.
21. We also note that legislation is being developed that is defining terms such as recyclability. The Guidance needs to indicate the relationship between those definitions – which we recognise may be specific to a defined circumstance and context – and the use of the same words in making a claim. It should include a glossary of such terms as and when they are legally defined.



### **Implementation and enforcement**

22. The BRC would expect the CMA to adopt its usual approach of advice and education preceding any formal enforcement action. This applies to advice to a specific company on a specific issue as well as in a broader sense.
23. While we understand that the law itself is not new and this is a further explanation of what might be expected of a business in the area of environmental claims rather than a new legal requirement, clearly it will – and should – lead to a reassessment of how such claims are being used. Where a business determines that as a result of the reassessment a claim might in fact be misleading, it would hope that the CMA would recognise that changes in packaging and labelling do take time – not least for non-food products where a product might stay on the shelf for some time – even months.
24. It should also be understood that packaging for non food is developed a year in advance for some products and other products may be held over from one season to another. While the actual regulations may not have changed, the Guidance emphasises certain aspects that may lead to further examination. Enforcers need to understand that it may not be easy to change rapidly without excessive cost that would ultimately be passed on to the consumer and possibly undermine further innovation. This should be dealt with on a case by case basis but some indication of a generic approach would be useful.
25. As we have indicated elsewhere it is important that the ASA be fully onboard with what is expected and should adopt a similar approach and understanding.
26. The use of Primary Authorities is also to be commended.

### **Placement of substantiation**

27. Some further Guidance on where any substantiation is required to accompany a claim and where it should be placed would be useful. For example, to what extent should it be placed near a product on an online website where products are offered for sale – as opposed to a website that advertises the product in general. Online for sale websites are constantly updated with new products and the space can be limited particularly on mobiles which are now the favoured form for consumers.
28. It is also important to include a few examples of what level of substantiation is to be expected; this has caused very big problems in food. For example, could a business rely



on publicly available data on the environmental merits of a certain material, if they can prove that their product contains/is made with this material? Or would they be expected to have undertaken some research themselves?

### **Communication and Promotion of the Guidance**

29. In communicating the new Guidance, the CMA should be careful to emphasise there are no new legal requirements. It would be unfortunate if there were a rash of consumer claims of misleading material that might need to be investigated rather than giving business time to fully understand the regulations in this context.
30. It would be useful if CMA could ensure that there is co-ordination and alignment of advice across government in terms of claims and how they are made. For example, the Treasury has a new Green Technical Advisory Group to advise on green standards for investment purposes and their impact on the environment.

### **Concluding thoughts**

31. Given the international nature of the market for many products, it is important to place this guidance in an international context. Requiring different labelling or packaging for the UK or indeed for NI would lead to additional cost and complicated negotiations with manufacturers.
32. In that context we also note that this legislation was transposed from an EU Directive that did not allow Member States to go beyond its terms. The UK Regulations have not changed and so we assume that the requirement not to be more definitive remains. In any event this is useful for trade with EU Member States.