

Competitions and Markets Authority Consultation Response

The Foodservice Packaging Association is the representative body for manufacturers, converters, distributors and users of packaging used by the UK's hospitality and catering sectors. This includes packaging used front of house (customer facing), back of house (kitchens / food preparation) and for home delivery. FPA members agree to abide by a strict code of practice as a condition of their membership. This includes the requirement for full evidence to be made available for all claims made for packaging. This covers independent certification from recognised certification bodies, peer reviewed evidence and reports from recognised research and testing facilities.

The last two years have witnessed a large increase in non-member packaging producers and importers making unsupported and misleading claims and using 'made up' certifications mostly for packaging sold to coffee shops and takeaway restaurants ie business to business. The packaging is sold at a premium price, primarily to operators seeking to do the right thing environmentally. We receive a regular flow of questions and complaints from our members all of which are followed up to ensure claims can be substantiated. To date we have yet to receive evidence from any of these errant packaging providers and make reference to them in this submission.

We therefore greatly welcome the CMA's draft guidance which we have incorporated into the [FPA Code of Practice](#).

We question why enforcement will not take place from day one, as we feel those that are currently offending are not doing so because of ignorance of the current laws or because their understanding of their claims is weak. They know exactly what they are doing and are totally exploitative, preying on the fears of retailers genuinely wanting to do the right thing and being seen by their own customers to be doing the right thing. We feel such abuse amounts to fraud. We therefore wish to ensure producers and distributors understand that a breach of the guidance will result in enforcement with punitive fines.

3. Questions for consideration

SCOPE

3.1 Does the draft guidance cover all the important consumer protection law issues relating to the making of environmental claims? If not, what else should this guidance include and why?

We believe the key consumer protection legislation is reflected in the guidance and that the scope of the guidance is likely to be consistent with most industry Codes of Practice that

seek to ensure high standards of trading from their members and the Code of Advertising Practice.

Also needing to be recognised is the Defra Green Claims Guidance which also contains examples of good practice. The guidance is widely recognised by packaging producers.

Some areas falling under the remit of the Food Standards Agency could be reviewed for inclusion. Some packaging companies are claiming environmental benefits but often use material inputs not to be food contact approved. Examples exist of unfilled packaging using higher than recommended percentages of optical brighteners or falling short of food contact regulations to fake the appearance of packaging using recycled content. Some unfilled packaging claiming environmental benefits is imported with falsified certification but crosses our borders unchecked. Importers should be responsible for the quality and claims about the packaging they import and not rely on statements made by their overseas suppliers. As an example, bamboo material is presented by some as being 'more environmental' and used in case study example 1. Not only do many fall short of environmental claims made (not recyclable and bamboo strands held together with plastic) but many contain PFAS and melamine, which means they fail to meet food standards regulations regarding materials.

Should more resource be made available to ensure imported goods are compliant with the guidance before they are placed on the market in the first place?

The guidance must also acknowledge the recycling labelling system emerging from the Government's Extended Producer Responsibility Requirements.

3.2 The draft guidance applies to business-to-consumer relationships, and to a more limited extent, to business-to-business relationships. Is it helpful to cover both?

It is essential the guidance applies to business to business trading and that the guidance is positioned as equally applicable to B2B as it is to business to consumer.

Many retailers have genuine concerns about the environment and wish to contribute to environmental improvement. Many also want to be seen to be doing 'the right thing' by their customers and some are finding they are being forced to respond to customer pressure by using specific types of packaging. Retailers, especially smaller ones, are therefore vulnerable to claims made about the environmental benefits of the packaging and products they buy, and many are being exploited into buying packaging which on the surface ticks environmental boxes but in reality will make no difference, especially since the majority of packaging is removed from their premises and disposed in litter bins or as litter. An example being claims made the packaging is 100% recyclable.

The major retailers employ specialist packaging technologists so are able to analyse packaging, so can see through claims and resist much of the packaging presented as

environmentally superior because their research shows this not to be the case or that to achieve the environmental benefits claimed is simply not possible in practice. Retailers may simply be promoting the claims made and are equally 'victims' as are their customers. They have not knowingly set out to exploit their customers.

The guidance should also cover the packaging used to contain empty packaging. This packaging often contains information not mentioned on the packaging itself.

2.18 states retailers have responsibility for claims made by brand owners. As explained above, retailers purchase in good faith and many do not have the insight and technical skills to question their suppliers on each and every claim. If retailers accurately reflect the claims made by their suppliers and do not alter the presentation or ordering of claims they should not be seen to be in breach of the guidance and any action taken should be against the supplier who has misrepresented the product and so mislead their customers.

Enforcement should however be taken against retailers who communicate claims out of the context in which their supplier has made them, omit caveats and conditions and reinterpret claims without substantiation.

All retailers must be encouraged to seek evidence from their suppliers as a matter of course.

Point 2.18 also works in reverse and their examples of distributors of empty packaging making claims for packaging which misuse and abuse those made by the producers of the packaging. We believe it should be mandatory for producers and importers of packaging to include a link to the guidance as part of their terms and conditions of sale.

3.3 The draft guidance, and UK consumer protection law itself, applies across all sectors of the economy and to all businesses selling goods and services. Are there any sectors which require special treatment either in the draft guidance or separately? If so, which sectors and why?

With such a large number of unsubstantiated and misleading claims about packaging, some imported and some produced in the UK, we propose the setting up of a body by the CMA and reporting to it on a regular basis to identify breaches and monitor progress. Many claims are made verbally by sales personnel so the body would need to maintain dialogue with retailer procurement managers as well as with independent retailers. We suggest this body would mirror that of the ASA - The Packaging Standards Authority. Packaging is often the main platform used for claims and can be the first communication the consumer sees, supporting the need for such a body.

Many environmental claims for some packaging have been made by non-government organisations, pressure and consumer groups. This can be in the form of promoting one type of packaging, such as compostables, over another. Clearly in some situations such as closed environments or where local authorities accept compostables in food waste collections, this will be the case. However this is not the case in many situations and such bodies exert

significant influence on retailer buying decisions. The guidance should apply equally to all those in a position of influence including NGOs and broadcast and print media frequently stated in social media. Media very frequently reprint press releases without checking the claims contained within them. These articles especially in trade publications and occasionally in national publications have immense influence and media should be responsible for the claims made in their publications and programmes.

PRINCIPLES FOR COMPLIANCE

3.4 *The guidance sets out six principles for business compliance with consumer protection law to avoid ‘greenwashing’.*

3.5 *Are these principles the right principles under consumer protection law? If not, what other principles would help businesses comply with consumer protection law.*

We agree the six principles will give business clarity and should deter businesses from making misleading claims if enforced and that businesses must take all six into account when communicating environmental information about their products and packaging. We would suggest the ordering is changed with principle f *Claims should be substantiated* appearing second in the list. We appreciate the ordering is not meant to be significant but inevitably the businesses will view the ordering as an indication of relative importance. We view being substantiated as important as being truthful and accurate.

We propose two further principles which although overlaps with the other six needs to be spelt out and given prominence:

‘Claims based on standards awarded by certifying bodies should be stated as intended by the standard and always stated in the context applying to the standard’. This would ensure it is understood that it is a contravention of the law to take an individual element of what is certified and claiming this element is certified without explaining the element can only be achieved with the process required to fulfil another element covered by the certification. In the following example the certification for biodegradability is claimed through the standard EN13432, whereas this standard is for compostability of which biodegradation is part of the process: <https://www.delipac.com/what-is-delipac>
There are many examples of misappropriation of standards such as: <https://a1coffee.net/takeaway-cups-and-lids/cup-type/biodegradable-cups.html>

In this example cups designed to be industrially composted, of which biodegradation is part of the industrial composting process, have been presented as biodegradable with the heading of the page being Biodegradable and Compostable Cups. The ordering is misleading and the producers of the cups sell their cups as compostable, however the distributor has focussed on an attribute taken out of context. To what extent is a producer/manufacture responsible for the way in which distributors market the products they sell to them?

‘Claims must reflect real life conditions and not those achieved in laboratories’

Such claims would include some claims about recyclability where packaging is not widely collected by local authorities and no voluntary or other collections systems are operating.

We would like to see further examples quoted for products sold directly to businesses as well as those sold to the public, purely to ensure retailers fully understand the guidance protects their interests, know what questions to ask of their suppliers and are aware they are equally able to lodge complaints for breaches of the guidance. An example should include the packaging used to contain empty packaging sold to retailers.

The guidance literature review includes the statement '*A consumer notices the label but does not take the effort to understand what it means. This might mean that the consumer forms a positive attitude towards the label and uses it in decision-making without understanding it.*' The guidance would be further enhanced with more examples of the use of apparent certification symbols many of which are made up by suppliers to give the impression a claim is recognised by a certifying body or third party. There is little likelihood of the public and independent retailers knowing a symbol needs to be validated by an independent certification body for the claim to apply.

Again linked to the forming of a positive view of a product as result of the look of a label and although implicitly covered by the guidance, a further principle example could show the use of visual devices and colours to provide an albeit subliminal impression of an item being more environmentally sound than it actually is. References to plants, leaves, waterways, simply making the pack predominantly green in colour etc can add up to give a misleading impression. The principles also relate to printed words leaving the opportunity for sales personnel to mislead their customers.

Principle *Claims should not omit or hide important information* could be clearer for example *Claims should not omit or hide information which as a result of the omission enhances the environmental benefit*

An example being <https://ecocoffeecompany.co.uk/the-green-cup/> By stating the board is water-based the impression is given the board is plastic coating free, also by stating no PET or PLA, when it is in fact coated with acrylic, which is a polymer. This website also references a unique water-based dispersion barrier implying the barrier is only available to the company when it is also used by others while advice on disposal requires disclosure of evidence to prove that if placed in a recycling stream the item will indeed be recycled.

CASE STUDIES

3.6 To help businesses engage with the principles, guidance and consumer protection law compliance more generally, we have included a range of case studies. Would further case

studies be helpful? If so, please suggest topics for these case studies and, if possible, provide examples of when these issues would arise.

As mentioned in the answer to Q.5 the case studies greatly help to explain the guidance but further case studies referencing misuse of visual devices and false impressions given in artwork are needed as are positive case studies reflecting good practice. The range of case studies needs to ensure that the most frequently used environmental/green claims are included as by not doing so it may be assumed by readers that the missing claims are acceptable. As new claims seem to arise monthly it is important claims are updated on a regular basis.

The case studies referencing the use of recognised validated standards should quote those standards and relevant legislation.

An example of making up symbols to give the impression of environmental superiority can be seen here <https://www.cupkind.com/pages/fully-accredited> Many of the symbols are not from recognised or known standards organisations

Regarding (d) *Comparisons should be fair and meaningful* it is important to ensure the guidance covers top parity claims when clearly designed to mislead and when not substantiated, a good example being at the bottom of this web page <https://a1coffee.net/takeaway-cups-and-lids/cup-type/biodegradable-cups.html> ..there is no paper cup on the market more environmentally friendly than these, - no third party research or analysis is shown.

Regarding (e) *In making the claim you should consider the full life cycle of the product* - an additional case study to explain claims should not be based on the materials used but only on the finished item. There are examples of businesses making claims for products being plastic free because the material used may have evidence of being plastic free but the product itself may contain plastic such as in adhesives or additional components or to make it function requiring a plastic element such as a lid on a cup or closure on a container.

A case study is needed to reflect the ability of a pack or a product to respond in a specific way under laboratory conditions but not in real world conditions. Such claims would include some claims about recyclability where packaging is not widely collected by local authorities and no voluntary or other collections systems are operating.

Case study, example 1, in referencing the plastic element fails to mention bamboo is not recyclable and that in many instances bamboo strands, such as those used in bamboo cups, are bonded together with plastic.



A case study should also cover ensuring environmental information given to consumers will not encourage irresponsible actions. As an example an answer given in FAQs from <https://h-packglobal.com> the following advice is given

So, does that mean you can throw H-Pack bio cup in your back yard and degrades naturally?

Yes

Such advice can encourage littering irrespective of whether the claim made can be substantiated or not

Case studies should also show examples of NGO's, pressure groups and consumer groups publishing blanket support of specific packaging they consider to environmentally superior to others when this is applicable only in specific conditions which are not widely available. The press frequently publishes articles on so called biodegradable packaging which isn't certified as such and has no evidence to prove biodegradability without an industrial process. Such articles can encourage littering.

Paper straws could be used as a case study to cover claims which are simply complying with legislation as there are producers promoting paper straws as plastic free.

GENERAL AND ADDITIONAL ISSUES

3.7 Which, if any, aspects of the draft guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section of the draft guidance (and, where appropriate, the issue) each of your comments relate to.

The responsibility of the way distributors market the products they buy from producers/importers/manufacturers and ensure they don't misrepresent products and packaging by moving away from the claims used by producers or by taking them out of context . We suggest producers are mandated to include a link to the guidance as part of their terms and conditions of sale.

3.8 Overall, is the draft guidance sufficiently clear and helpful for the intended audience?

Most independent retailers do not have specialist procurement personnel and are essentially owner driven businesses where the owner does everything. A mini version of the guidance is therefore needed containing the guidance's key bullet points and should be published in a number of languages. We recommend all product and packaging websites make reference to the guidance with a link to it, offering customers the opportunity to check the compliance of products and packaging sold. While producers cannot be held responsible for the way in which their products are marketed, they could be encouraged to make adherence to the guidance a part of their terms and conditions.



3.9 Are there any other comments that you wish to make on the draft guidance?

We greatly welcome this guidance which is overdue and commend the CMA for producing it and for the literature review accompanying it. Our initial discussions with producers of packaging we know will be in breach of the guidance suggests a lack of desire to take the guidance seriously. For this reason alone, we strongly recommend enforcement of the guidance takes place from day one. If not, then those businesses following the guidance will lose out to those businesses who don't. Businesses must be made to understand breaching the guidance will result in court action and severe financial penalties. The guidance must therefore have teeth. The legal framework is laid out in the appendices however the guidance would have greater chance of being taken seriously and complied with, if there is a statement at the very beginning of the guidance that the CMA will take enforcement action in the event of a breach. Far better to state what the CMA will do rather than what it could do.