



Consultation:

Draft guidance on environmental claims on goods and services

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

Summary

Which? welcomes the CMA's work in this area and the publication of this much needed draft guidance. We support the focus on misleading, vague or false claims about the sustainability or environmental impact of products and services, and how failure to provide all relevant information about the sustainability of a product or service could mislead consumers and therefore break consumer law.

We welcome the comprehensive nature of the draft guidance, and agree with the six principles that the CMA has set out. We also have a number of recommendations for how the draft guidance could be further improved, as follows:

- More specific definitions for commonly used terms, complementing any sectoral rules or guidance that already exists. Our research has identified energy and packaging as key sectors where this would be particularly useful.
- More detail on the level of substantiation that would be appropriate for claims.
- Further detail on how the guidance may apply differently to different types of businesses, and where responsibility for compliance lies.
- Greater emphasis on the importance of businesses taking into account research into how consumers will understand and use claims.
- Guidance on how regularly companies will be expected to review comparisons to ensure that these are accurate and up to date.
- We welcome the emphasis that businesses should avoid an over-reliance on qualifying information.

- Given the nature of supply chains, we think that it is appropriate to include business-to-business as well as business-to-consumer relationships.
- More case studies that illustrate the different format in which claims may appear, including implied claims, as well as further examples of best practice.
- Further clarification on the level of information that would be required at the point of sale so that consumers have the information they need and companies are clear as to how prominent this information should be.
- Greater clarity on misleading by omission and lifecycle impacts as well as greater focus on the accessibility of additional information.
- Clarification of how companies can use different indicators of environmental impact comparatively, including how to avoid false equivalence where different measures are conflated.

Overall, we strongly welcome action to promote accurate and reliable environmental claims. It is essential that consumers have confidence in the information provided as they try to make more sustainable choices. This should also be beneficial for companies who are making genuine efforts to offer products or services that support environmental goals. However, a careful balance is needed so that the guidance does not dissuade businesses from providing information about the sustainability of products and services that would help consumers to make an informed choice.

As this is an area with the potential to cause real detriment to consumers who are trying to do the right thing in making greener choices, we urge the CMA to work with the Government and consider where further action needs to be taken in the UK beyond this guidance, including the need for more specific regulation. We also recommend that the CMA includes a strategy for how consumers will be made aware of companies' obligations in this area as part of its planned compliance campaign.

Introduction

Which? is committed to bringing sustainability into everything we do, including through our advocacy, product testing and investigations. We therefore welcome the opportunity to respond to the draft guidance on environmental claims on goods and services.

Misleading and confusing environmental claims have been the focus of several recent Which? investigations, including on 'green' energy tariffs, washing up liquid and detergents, gardening products and packaging. These investigations uncovered issues including a lack of agreed terms and definitions, misleading by omission, and a mismatch between claims and consumer understanding.

Which? research has also highlighted the influence that environmental claims can have on consumers' decisions. According to our December 2020 survey, for some products, around two-fifths of consumers have made a purchasing decision based on sustainability

considerations¹. Our survey also indicated that misleading green claims are an important concern for consumers, as more than half (55%) of those who had made or considered making a more sustainable purchase said that they didn't believe the green claims of companies at least some of the time².

Consultation questions

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?

The guidance is comprehensive and covers a broad range of consumer protection law issues. This is, however, an emerging area that consumers and businesses are increasingly engaging with. We would like to highlight the following areas where we consider the guidance could be strengthened, and made more explicit and more practical:

(i) Definitions and substantiation of commonly used terms

The guidance leaves a lot of complex issues relating to substantiation of evidence and burden of proof to the businesses concerned. We recommend that the guidance should be supported by some clarifications of how commonly used terminology such as 'organic' and 'eco' should be used³, including the level of evidence that will be required to substantiate their use.

At present, in many cases the definition of terms such as 'eco' and 'organic' are left to companies themselves to determine. For example, in the case of washing up liquid, Which? research found that there is no clear, set definition of what 'eco' is used to mean, and this can vary by manufacturer, while consumers also had differing views⁴.

A Which? Gardening investigation has also highlighted how the lack of a legal definition for the term 'organic' in gardening contexts means it is used very loosely, causing confusion. The terms 'chemical free' and 'natural' were also highlighted as regularly used terms which can be confusing⁵.

¹ Survey conducted by Populus on behalf of Which? between 4th and 6th December 2020. A sample of 2,094 consumers was surveyed and weighted to be nationally representative according to a range of demographic characteristics.

² Survey conducted by Populus on behalf of Which? between 4th and 6th December 2020. A sample of 2,094 consumers was surveyed and weighted to be nationally representative according to a range of demographic characteristics.

³ For sectors where definitions and requirements have not already been set out in regulations or guidance.

⁴ Which?, *Do you still believe in Fairy?*, print, April 2019

⁵ Which? Gardening, *Organic pest and disease control*, print, June 2020

Although this issue is mentioned within the guidance under Principle A - *claims must be truthful and accurate*, we are concerned that the guidance allows for a significant degree of interpretation which could cause consumers to be misled.

As highlighted in the consultative workshop hosted jointly by the Competition and Markets Authority (CMA) and the British Retail Consortium (BRC), there are parallels with the use of health and nutrition claims on food and the evolution of their self-regulation and ultimate regulation, which led to clear definitions and a process for independent substantiation and approval being put in place.

As for nutrition claims, it would be beneficial to include some specific definitions within legislation (and at least within the CMA's guidance) for commonly used terms which would help businesses to know how they should use the terminology in claims, the level of evidence that will be required to substantiate the use of such claims, and help to give consumers confidence that terms are being used consistently.

Consideration should also be given to how decisions are made about whether a claim can be substantiated, beyond those that will be adjudicated by the Advertising Standards Authority (ASA) for claims that fall under its self-regulatory regime. This is particularly challenging where the science around environmental impacts, such as reducing carbon emissions, may still be evolving. It is important that consumers can have confidence that the evidence that supports environmental claims can be independently substantiated, reflecting a broad scientific consensus, and can therefore be trusted.

(ii) Clarification of responsibilities

Further detail would also be helpful on how the guidance applies to business-to-business relationships, including how it may apply differently to retailers, manufacturers and wholesalers; the levels of substantiation checks they would each need to undertake; and who is ultimately responsible for a claim's compliance.

For example, retailers and online marketplaces may make environmental claims about products which they aren't responsible for manufacturing. There may also be claims displayed on the products that they stock or sell. The guidance states 'retailers should therefore assure themselves that any claims made by manufacturers are accurate and not misleading.'⁶ It would be helpful to clarify the level of substantiation and burden of proof which would be required of the retailers and online marketplaces in these scenarios.

We also feel that the following section could be further clarified: 'where one business manufactures or supplies products to another, whether for resale or incorporation into other products, both businesses may be liable for claims and may have to substantiate them. Businesses should make sure they can do so. That may mean ensuring they obtain evidence from others in the supply chain.'⁷ Again, further information on the level of evidence required from different businesses would be helpful. Case studies would also be useful to demonstrate how different types of companies should comply.

⁶ Section 2.18, Introduction

⁷ Section 3.121, Principle F

It would also be helpful to provide further specific guidance and case studies for different types of companies, for example price comparison websites and review websites, in order to clarify the level of substantiation and transparency they may need to provide. A Which? investigation in 2018 found that price comparison websites were adding to the confusion around energy tariffs, with options for 'green' or 'renewable' plans whose definitions varied⁸.

(iii) Consumer understanding and perception

We welcome the emphasis within the guidance on implied as well as explicit claims. The guidance could be further strengthened by giving a greater focus to the importance of businesses considering, and ideally undertaking, consumer research which tests how environmental claims will be understood and used by consumers, in order to avoid misleading claims.

(iv) Regular review

We welcome the guidance under Principle F - *Claims should be substantiated* that 'it is also important to keep claims under review and it may be necessary to revisit them, and the evidence that supports them, over time.'⁹ The importance of ensuring claims are up to date could also be included under Principle D - *Comparisons should be fair and meaningful*, as guidance on how regularly companies will be expected to review comparisons to ensure that these are accurate and up to date would be useful. This is important to ensure that claims are not based on products or services which are outdated or no longer relevant.

Furthermore, whilst a company may give a date for when the comparison was made, if this is not given prominence then the comparison may still be misleading. This should also be mentioned explicitly within the guidance.

(v) Qualifying information

We welcome the requirement in the guidance that any caveats or conditions should be disclosed prominently and close to the main claim, and support the message that 'the more conditions or caveats are hidden away in small print, where the average consumer is unlikely to see and understand them, the more likely consumers will be misled'¹⁰. It is very important that businesses avoid an over-reliance on qualifying information, as consumers are likely to use claims as a shortcut to making a choice, and so should not need to read additional small print in order to gain all the relevant information that could inform this choice.

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?

⁸ Which?, The Energy Tariff Greenwash, print, October 2019

⁹ Section 3.119, Principle F

¹⁰ Section 3.85, Principle C

Given the nature of supply chains, we think that it is appropriate to include business-to-business as well as business-to-consumer relationships. Businesses will be reliant on information provided by other businesses who supply them in order to ensure that they can make appropriate claims. It is therefore important that the guidance provides clarity on the requirements within these relationships. This will ensure that consumers can have greater confidence in the information and claims that they see.

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?

As set out above, we consider that there are some environmental claims that will need to be more explicitly defined so that businesses understand the level and quality of evidence required to back them up. We therefore think that the guidance should establish an approach for defining environmental claims in key sectors, complementing any sectoral rules or guidance that already exists.

In particular, we believe the energy sector merits special attention in order to clarify the definition of 'green' or 'renewable' tariffs, and to make it easier for consumers to make informed decisions based on meaningful comparisons. Which? research has found that it is not currently clear to consumers what a 'renewable' tariff is, as when we asked more than 3,600 people to choose from a list of possible definitions for renewable energy tariffs, a third said that they didn't know¹¹.

Which? research has also revealed a mismatch between claims made about 'green' energy tariffs and consumer expectations. In a survey of almost 4,000 people in late 2018, a third told us that if an energy tariff was marked 'green' or 'renewable', they expected that 100% renewable electricity was supplied to their home¹². This isn't technically possible, showing the lack of consumer understanding of what they were buying. Our investigation also found that companies' marketing materials, staff on the phone and price comparison websites weren't helping customers to understand different types of renewable tariff¹³.

Currently, Ofgem stipulates that tariffs that make 'environmental claims' must be backed-up by companies holding the relevant number of Renewable Energy Guarantee of Origin (REGO) certificates to match their customers' use with renewable electricity, but this doesn't provide a set definition of what a 'green' or 'renewable' tariff is. Companies take a wide variety of approaches, ranging from solely buying REGO certificates to owning and building new renewable generation. However, as our research highlights, these differences aren't always clear to consumers, and our investigation concluded that the Ofgem rules were not clear enough to avoid confusion and help customers to make an informed decision¹⁴. We understand that the Government will be exploring how to ensure consumers receive

¹¹ Which?, [Differences between green energy suppliers](#), online, June 2021. This data is from an online survey of 3,622 members of the general public in September 2020.

¹² Which?, *The Energy Tariff Greenwash*, print, October 2019

¹³ Which?, *The Energy Tariff Greenwash*, print, October 2019

¹⁴ Which?, *The Energy Tariff Greenwash*, print, October 2019

transparent information when choosing an energy product, and we would be happy to work with the Government on this.

Packaging is another key sector which we believe requires special treatment. Which? research has found issues where consumers may be misled due to the omission or lack of clear information on recyclability. For example, in February 2020, Which? analysed the recycling information of a basket of twenty common toiletries, and found that twelve of the products had no recycling information on the label, despite being wholly or partially recyclable¹⁵. Our investigation into branded food packaging in October 2020 also found a lack of clarity - for example, while the packaging for many soft cheeses was recyclable, the labelling was poor, with only one brand being clearly labelled¹⁶.

We understand that the Government is currently investigating how to make packaging recycling labelling clearer for consumers, and we have responded to the consultation on Extended Producer Responsibility for Packaging. It will be important that any specific guidelines on environmental claims complements this work.

Finally, Which? is currently investigating the sustainability of certain clothing, and interim results have found evidence that some clothing labelling uses vague and potentially confusing language such as 'responsible'. As such, the CMA could consider whether the clothing sector would also merit special attention in this guidance.

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 that the six principles for compliance are the right principles.

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.

Case studies are a helpful way to illustrate how to comply with the guidance. It would be useful to include further case studies which illustrate the different formats that claims may appear in, for example the use of implied claims.

¹⁵ Which?, 'Bathroom Plastics: it's time to clean up', print, February 2020

¹⁶ Which?, Big Brands Exposed on Packaging, print, October 2020

It would also be useful to include additional case studies which illustrate best practice, as in example nine, as most of the other case studies illustrate examples of misleading claims that would not meet the guidance when it is published.

Mock-ups of products and other forms of communication displaying environmental claims would be particularly useful in demonstrating the level of information that it is appropriate to include in a claim, its necessary prominence, and what additional information it may be appropriate to provide elsewhere.

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.

(i) Information at point of sale

As mentioned above, it would be useful for the guidance to provide further details and examples of the level of information that would be required at the point of sale for products and services, and the level of information and what type it may be appropriate to provide elsewhere, taking into account different types of display, packaging and wider communications.

For example, it would be useful to provide companies selling smaller products such as certain food items with guidance on the level of information that would be required to be provided on packaging, and what additional information it may be appropriate to provide elsewhere. This should reflect the importance of consumers having clear and accessible information at the point of purchase.

(ii) Misleading by Omission (Principle C, Section 3.64)

The guidance states that 'consumers can be misled where claims do not say anything about environmental impacts.' Further explanation of what this means as well as illustrative case studies would be useful to provide greater clarity on this.

(iii) Accessibility of additional information (Principle C, Section 3.88)

The guidance also states that if an environmental claim cannot fit the information consumers need to make an informed decision, that businesses could consider providing this 'through information on a website accessed via a link that is clearly signposted, or via a QR code on a product label.' It is important to consider that there may be issues of accessibility, whereby consumers who do not own smartphones or have internet access could be excluded from this additional information, and may therefore be more likely to be misled. It would therefore be helpful if further alternatives were suggested within the guidance that would include these groups, which businesses could be encouraged to use where possible.

(iv) Life cycle assessments (Principle E, Section 3.99)

Transportation is not explicitly mentioned in the list of aspects of a product/service's environmental impact over its life cycle which could be important, although it is mentioned in examples ten and eleven. It would be clearer for businesses using the guidance if transportation was listed.

(v) Potential for false equivalence (Section 3.97, Principle D)

While we note the guidance that 'businesses should make sure products are compared using the same measures', we believe there is a need for further clarification on how far companies would be expected to measure the various environmental impacts of a product, for example by carbon emissions, water use, biodiversity loss etc., and how far these can be used comparatively. For example, one product may be 'greener' than another on packaging weight, but not on carbon emissions by transport miles. We are concerned that there may be potential for false equivalence to be drawn if different measures are permitted to be conflated into one.

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

From our perspective as a consumer organisation, the draft guidance is generally clear and helpful.

Nevertheless, while we strongly welcome action to promote accurate and reliable green claims and welcome the comprehensive nature of the draft guidance, we also recognise the need to encourage and incentivise companies to take positive steps towards becoming more environmentally friendly by being able to clearly and accurately promote these steps to consumers.

While we certainly agree that it is important for consumers to be able to make an informed assessment of the environmental impact of a product as a whole, there is also a need to recognise that these steps may be made incrementally, and in certain circumstances, it could be counterproductive for companies to feel unable to communicate their positive improvements, that consumers also want to know about, because the standards for green claims are unattainably high. It is therefore essential that the right balance is struck.

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

We welcome the CMA's intention to run a compliance campaign to raise awareness of the guidance and encourage compliance, following the publication of the final guidance. It is important that any such campaign includes a strategy for how consumers will be made aware of this guidance and of companies' obligations in this area. It is also essential that businesses and consumers are made aware of how they can report any concerns they may have about environmental claims that they have seen. This will be critical to the ability of the guidelines to make a difference for consumers.

Finally, as this is an area with the potential to cause real detriment to consumers who are trying to do the right thing in making greener choices, we urge the CMA to work with the



Government and consider where further action needs to be taken in the UK beyond this guidance, including the need for more specific regulation.

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