

Caitlin Sarpal

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## **Green Deal or No Deal? How An Anti-Greenwashing Law Could Combat Harmful Practices in the EU**

### **Introduction**

The European Union (“EU”) is set to address the pervasive issue of greenwashing as part of broader efforts comprising the European Green Deal.<sup>1</sup> The “anti-greenwashing law” - the Proposal for a Directive on Green Claims (“Proposal”) will require “[c]ompanies making ‘green claims’ . . . [to] substantiate these against a standard methodology to assess their impact on the environment” in a sweeping change.<sup>2</sup> While the formalized Proposal is presently being finalized, legal and policy experts anticipate the draft EU law to be published in March of 2023.<sup>3</sup> The EU’s initiative on substantiating green claims aims to provide a broad new framework to combat greenwashing, and support the overall aims of the European Green Deal. This report will discuss the historical background of environmental governance leading up to the new proposal, examine efforts by the EU to combat greenwashing to date, and explore what the anticipated proposal may encompass when it is published shortly.

### **Background**

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<sup>1</sup> Directorate-General for Environment, *Initiative on substantiating green claims*, EC.EUROPA.EU, [https://ec.europa.eu/environment/eussd/smgp/initiative\\_on\\_green\\_claims.htm](https://ec.europa.eu/environment/eussd/smgp/initiative_on_green_claims.htm) (last visited Feb. 26, 2023). Rosa Oyarzabal, et al., *Upcoming EU Rules on Green Claims*, COVINGTON & BURLING (Jan. 23, 2023), <https://www.insideenergyandenvironment.com/2023/01/upcoming-eu-rules-on-green-claims/>.

<sup>2</sup> *Id.*

<sup>3</sup> Dave Keating, *EU prepares to ban greenwashing*, ENERGY MONITOR (Jan. 27, 2023), <https://www.energymonitor.ai/finance/reporting-and-disclosure/eu-prepares-to-ban-greenwashing/>.

Greenwashing is a pervasive, global issue. Leading scholars on greenwashing Jed Greer and Kenny Bruno put it best: “Welcome to the world of ‘greenwash,’ where transnational corporations . . . which increasingly dominate the world economy, are preserving and expanding their markets by posing as friends of the environment[.]”<sup>4</sup> Beginning in the 1970s, a global environmental movement gained traction with the United Nations Conference on the Human Environment (“Stockholm conference”) and the creation of the United Nations Environment Programme (“UNEP”).<sup>5</sup> During this period, the founding of environmental government agencies emerged in countries around the world, accompanied by a surge in new environmental law and governance, largely in response to the public outcry against previously long-accepted corporate activities causing environmental degradation.<sup>6</sup> By the late 1980s and early 1990s, corporations

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<sup>4</sup> JED GREER & KENNY BRUNO, GREENWASH: THE REALITY BEHIND CORPORATE ENVIRONMENTALISM 11 (1997)

<sup>5</sup> *United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm*, UNITED NATIONS, <https://www.un.org/en/conferences/environment/stockholm1972> (last visited Feb. 28, 2023).

<sup>6</sup> *Id.* A sampling of government environmental agencies founded in the 1970s: (1) In Canada, Environment and Climate Change Canada was founded in 1971. Government of Canada, *Timeline: Major milestones of Environment and Climate Change Canada*, [WWW.CANADA.CA](https://www.canada.ca/en/environment-climate-change/campaigns/50-years-environmental-action/eccc-timeline.html), <https://www.canada.ca/en/environment-climate-change/campaigns/50-years-environmental-action/eccc-timeline.html> (last visited Dec. 5, 2022); (2) in Denmark, the Ministry of Environment of Denmark was founded in 1971. Ministry of Environment of Denmark, *Objects and History*, [WWW.EN.MIM.DK](https://en.mim.dk/the-ministry/objects-and-history/), <https://en.mim.dk/the-ministry/objects-and-history/> (last visited Dec. 5, 2022); (3) in Indonesia, the Indonesia State Ministry of Environment was established in 1973. Working Group – Sustainable Industrial Areas, *Indonesia State Ministry of Environment and Forestry*, [WWW.SIA-TOOLBOX.NET](https://www.sia-toolbox.net/organization/indonesia-state-ministry-environment-and-forestry), <https://www.sia-toolbox.net/organization/indonesia-state-ministry-environment-and-forestry> (last visited Dec. 5, 2022); (4) in Iran, the Department of the Environment was established in 1971. Kaveh L. Afrasiabi, *The Environmental Movement in Iran: Perspectives from below and Above*, 57 *Middle E. J.* 432, 439 (2003); (5) in Japan, the Environment Agency was created in 1971. Ichiro Sumikura & Derek Osborn, *A Brief History of Japanese Environmental Administration: A Qualified Success Story?*, 10 *J. of Env't L.* 241 (1998); (6) in Malaysia, the Department of the Environment was established shortly after the passage of the Environmental Quality Act in 1974. S. Robert Aiken & Colin H. Leigh, *Environment and the federal government in Malaysia*, 8 *Applied Geography* 291, 298-99 (1988); (7) in Norway, the Royal Norwegian Ministry of Climate and Environment was established in 1972. Tethys Engineering, United States Department of Energy, *Norwegian Ministry of Climate and Environment*, [WWW.TETHYS.PNNL.GOV](https://tethys.pnnl.gov/organization/norwegian-ministry-climate-environment#:~:text=The%20Royal%20Norwegian%20Ministry%20of%20environmental%20policies%20of%20the%20Government), <https://tethys.pnnl.gov/organization/norwegian-ministry-climate-environment#:~:text=The%20Royal%20Norwegian%20Ministry%20of%20environmental%20policies%20of%20the%20Government> (last visited Dec. 5, 2022); (8) in Poland, the bulk of environmental governance began in the 1970s. Daniel H. Cole, *An Outline History of Environmental Law and Administration in Poland*, MAURER SCHOOL OF LAW: INDIANA UNIVERSITY, 318-24 (1995), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1692&context=facpub>; (9) in Singapore, the Ministry of Environment was founded in 1972. National Archives Singapore, *Ministry of the Environment*, [WWW.NAS.GOV](https://www.nas.gov.sg/archivesonline/government_records/agency-details/52), [https://www.nas.gov.sg/archivesonline/government\\_records/agency-details/52](https://www.nas.gov.sg/archivesonline/government_records/agency-details/52) (last visited Dec. 5,

had reframed their activities, co-opting environmentally-friendly terminology in public relations and advertisements, and self-proclaimed their entities to be “sustainable” while traditionally offering little to no guidance as to the definition’s parameters.<sup>7</sup> In the interceding decades, significant gaps remain, particularly in labeling standards which can, and do, mislead mindful consumers.<sup>8</sup>

Misleading labeling and greenwashing prevents consumers from making sustainable choices, hinders good corporate actors from attaining a due advantage over non-complying competitors, and impedes the transition to a green economy.<sup>9</sup> For decades, mounting calls have repeatedly been made for standardized labeling practices to combat greenwashing.<sup>10</sup> As the European Union strives to be the first climate-neutral continent, such standardization may finally be required as a component of the European Green Deal.<sup>11</sup> Greenwashing is a pervasive issue in the EU, where the European Commission found 53% of hundreds of assessed claims in a 2020 study to have contained “vague, misleading, or unfounded information about products’ environmental characteristics[.]”<sup>12</sup> In 2021, the European Commission found claims to be false or deceptive in 42% of the claims examined in an undertaking screening websites for

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2022); (9) in China, a temporary agency of the Leading Group of Environmental Protection of the State Council and its office began to oversee China’s ecological and environmental protection in 1972, and today the same is overseen by the Ministry of Ecology and Environment. Zhenhua Xie, *China’s historical evolution of environmental protection along with the forty years’ reform and opening-up*, 1 ENV’T SCI. & TECH. 100001 (2020); (10) in the 1970s in the European Union, the formerly “. . . European Economic Community[,] adopts its first Environment Action Programme, and starts developing a vast body of Community environmental legislation.” European Environment Agency, *1970s*, [www.EEA.EUROPA.EU](http://www.eea.europa.eu), <https://www.eea.europa.eu/environmental-time-line/1970s> (last visited Dec. 5, 2022). GREER & BRUNO, *supra* note 4, at 13-14.

<sup>7</sup> *Id.* at 14-15.

<sup>8</sup> Directorate-General for Environment, *supra* note 1.

<sup>9</sup> Directorate-General for Environment, *supra* note 1.

<sup>10</sup> Jessica E. Fliegelman, *The Next Generation of Greenwash: Diminishing Consumer Confusion through a National Eco-Labeling Program* 37 Fordham Urb. L.J. 1001 (2010).

<sup>11</sup> *A European Green Deal*, EUROPEAN COMMISSION, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en) (last visited Feb. 28, 2023). Directorate-General for Environment, *supra* note 1.

<sup>12</sup> Alice Hancock & Camilla Hodgson, *Half of green claims used to sell products in EU are misleading, Brussels finds*, FINANCIAL TIMES (Jan. 12, 2023), <https://www.ft.com/content/5dde3181-3112-4280-8357-9b7881b7ae4c>.

greenwashing.<sup>13</sup> The EU's initiative on substantiating green claims is therefore the next necessary step in EU environmental governance. It is capable of combatting greenwashing while supporting the overall aims of the European Green Deal.

### **How have EU regulations combatted greenwashing to date?**

Traditionally, the EU has had much stricter labeling requirements than elsewhere in the world. For example, it is a global leader in consumer right-to-know laws for labeling genetically engineered foods.<sup>14</sup> Yet presently, there are no EU laws that specifically regulate greenwashing claims, with only Directive 2005/29 on Unfair Business-to-Consumer Practices and Directive 2006/114 on Comparative Advertising attempting to fill the current gap.<sup>15</sup> Directive 2005/29, while offering a high level of consumer protection, is aimed predominantly at regulating the marketing of foodstuffs, versus the Proposal's much broader and more focused requirement of companies – not just food-related entities – to substantiate claims made about the environmental footprint of their products and services.<sup>16</sup> Meanwhile, Directive 2006/144 involves prohibitions on misleading and comparative advertising, which can be helpful in reducing green claims.<sup>17</sup> For example, if a non-complying actor would otherwise tout exaggerated “sustainability” practices vis-à-vis a complying competitor actor, such a comparison would not be allowed under current

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<sup>13</sup> European Commission, *Screening of websites for 'greenwashing': half of green claims lack evidence*, EC.EUROPA.EU (Jan. 28, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269).

<sup>14</sup> *International Labeling Laws*, CENTER FOR FOOD SAFETY, <https://www.centerforfoodsafety.org/issues/976/ge-food-labeling/international-labeling-laws> (last visited Feb. 28, 2023).

<sup>15</sup> Rosa Oyarzabal, *supra* note 1.

<sup>16</sup> Council Directive 2005/29, 2005 O.J. (L 149/22). Luis González Vaqué, *Directive 2005/29/EC on Unfair Commercial Practices and Its Application to Food-Related Consumer Protection*, 10 Eur. Food and Feed L. Rev. 210 (2015). European Commission, *Environmental performance of products & businesses – substantiating claims*, EC.EUROPA.EU, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12511-Environmental-performance-of-products-&-businesses-substantiating-claims\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12511-Environmental-performance-of-products-&-businesses-substantiating-claims_en) (last visited Feb. 28, 2023).

<sup>17</sup> Council Directive 2006/114, 2006 O.J. (L 376/21). Tim W. Dornis & Thomas Wein, *Trademarks, Comparative Advertising, and Product Imitations: An Untold Story of Law and Economics*, 121 DICK. L. REV. 421, 424 (2016).

marketing law under this directive - but ultimately does not fully ban nor regulate the practice of greenwashing.<sup>18</sup> Conversely, the Proposal would negate the necessity of gap-filling regulation, and instead provide a comprehensive set of rules regarding the substantiation of voluntary green claims, and apply to all companies making such claims and operating in the EU.<sup>19</sup>

There are additional environmental, social, and corporate governance (“ESG”) regulations as well as various other policy instruments that, while beyond the scope of this Report, have served to stifle some greenwashing attempts. However, the new rules are aimed at all products and services in the EU, but do not include - as ESG and other policy instruments typically do - financial services, including banking and investment products, which are already regulated, separate from the Proposal here.<sup>20</sup> There are other additional labeling requirement schemes that are out of scope for this Proposal, which is instead focused solely on voluntary green claims made by companies for business-to-consumer purposes.<sup>21</sup> Yet, all of these are interconnected, and as such, clear EU laws regulating against greenwashing can strengthen the regulatory environment for other directives and policy instruments, including ESG, and vice versa, in putting an end to harmful practices.

### **What could the Proposal encompass?**

The initiative is a proposal for regulation.<sup>22</sup> The European Commission has stated that the Proposal will require companies making green claims to substantiate these claims and the environmental footprint of the companies’ products and/or services under the developed standardized methods.<sup>23</sup> The goal of the Proposal is to ensure that claims are “reliable,

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<sup>18</sup> *Id.*

<sup>19</sup> Directorate-General for Environment, *supra* note 1. European Commission, *supra* note 17.

<sup>20</sup> Hancock & Hodgson, *supra* note 13.

<sup>21</sup> Directorate-General for Environment, *supra* note 1.

<sup>22</sup> European Commission, *supra* note 17.

<sup>23</sup> *Id.*

comparable and verifiable across the EU - reducing ‘greenwashing’ . . . [in order to] help commercial buyers and investors make more sustainable decisions and increase consumer confidence in green labels and information.”<sup>24</sup>

The adoption of the initiative by the European Commission was slated for the first quarter of 2022 so companies, consumers, legal and policy leaders, and others, are currently eagerly awaiting the emergence of the new regulation.<sup>25</sup> Both the feedback period and the consultation period have concluded as of the end of 2020.<sup>26</sup> Reports indicate a likely presentation of the proposed Green Claims Directive by the European Commission in March 2023, at which point the European Parliament and Council will then begin a consideration period wherein the proposal will be put through the legislative process and open to amendments.<sup>27</sup> “The hope is that the new EU anti-greenwashing law . . . will . . . curb the explosion of greenwashing claims currently seen on the market.”<sup>28</sup>

A cornerstone of the Proposal centers on standardized methodology for assessing and substantiating green claims. There is current methodology in use in the EU called Product Environmental Footprint (“PEF”) which is likely to be adopted in this new regulation.<sup>29</sup> PEF has been in use in various capacities since 2010 and updated periodically in the interceding years.<sup>30</sup> PEF is a multi-criteria measure of the environmental performance of a good or of a service and it examines the entire life cycle of what is at issue.<sup>31</sup> The “PEF Guide provides a method for

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Keating, *supra* note 3. Directorate-General for Environment, *supra* note 1.

<sup>28</sup> Keating, *supra* note 3.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

European Commission, *The Environmental Footprint Pilots*, EC.EUROPA.EU, [https://ec.europa.eu/environment/eussd/smgp/ef\\_pilots.htm](https://ec.europa.eu/environment/eussd/smgp/ef_pilots.htm) (last visited Feb. 28, 2023).

<sup>31</sup> Simone Manfredi et al., *Product Environmental Footprint (PEF) Guide*, EC.EUROPA.EU, 1 (July 17, 2012), <https://ec.europa.eu/environment/eussd/pdf/footprint/PEF%20methodology%20final%20draft.pdf>.

modelling the environmental impacts of the flows of material/energy and the emissions and waste streams associated with a product throughout its life cycle.”<sup>32</sup> In other words, it is a fairly exacting methodological system of requirements, capable of inputting and accounting for various factors and variables, that provides a standardized review of the PEF of a good or service, which can then be compared to similar goods or services on the market as well as evaluated for its overall environmental impact.<sup>33</sup> The measurements account for the full lifecycle of a good or a service, from any extraction of raw materials all the way through to decommissioning or end-of-life for the good or service, and utilize sixteen environmental impact categories to do so.<sup>34</sup> Any category of goods or services that is not covered by PEF may be covered by an alternate methodology, but unless and until it is covered by an approved alternate methodology, the company is not permitted to make the green claim.<sup>35</sup> There are, as with any complex methodological system assessing such a wide repertoire of goods and services, limitations to PEF, but overall the system has proven successful in a variety of capacities.<sup>36</sup> Further, it is anticipated that businesses will have at least some level of flexibility in choosing which sub-methodology within PEF to utilize.<sup>37</sup>

Identifying green claims through use of the PEF technology will not conclude the anti-greenwashing process. From there, the national governments of the individual countries within the EU will need to monitor and assess green claims and issue penalties to violators of the new EU regulation.<sup>38</sup> These governments will need to do so via regular compliance checks,

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Keating, *supra* note 3.

<sup>35</sup> Hancock & Hodgson, *supra* note 13.

<sup>36</sup> Keating, *supra* note 3. Emil Pedersen & Arne Remmen, *Challenges with product environmental footprint: a systematic review*, 27 INT’L J. OF LIFE CYCLE ASSESSMENT 342 (2022). Zampori Luca & Pant Rana, *Suggestions for updating the Product Environmental Footprint (PEF) method*, JOINT RESEARCH CENTRE, EUROPEAN COMMISSION, 6 (2019), [https://eplca.jrc.ec.europa.eu/permalink/PEF\\_method.pdf](https://eplca.jrc.ec.europa.eu/permalink/PEF_method.pdf).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

whenever they have sufficient reason to believe a green claim is in violation, and in response to any complaints they receive regarding any green claims.<sup>39</sup> Additional sub-systems and processes will be needed to be developed by these governments to ensure enforcement of and compliance with the anti-greenwashing regulation.<sup>40</sup> Overall, the standardized methodology, in conjunction with active enforcement by member countries of the EU, will prove crucial in assessing and substantiating green claims across the EU.

In addition to complying with the PEF (or approved alternate) methodology, there are other general rules the Proposal is anticipated to require companies to follow. First, it is anticipated that clarity and honesty in green claims will be required through the insistence that companies only make positive green claims when a product or service has only a positive environmental impact (as opposed to both positive and negative environmental impacts of a good or service, in which case, both should be disclosed).<sup>41</sup> Second, the information backing up the green claim should be made available, ideally fairly robust information and made available through weblinks, QR codes, or similar means.<sup>42</sup> Finally, corporations will need to ensure the accuracy of their green claims with a required substantiation review of such claims to be made, at a minimum, every years - or immediately if changes in methodology or science may impact the truthfulness of the green claim - beginning from the date of the studies or calculations that provided the information at the basis of the claim.<sup>43</sup>

Overall, the stricter regulations and the amendments to the Unfair Commercial Practices Directive can have a significant impact on reducing greenwashing and providing enhanced

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<sup>39</sup> Directorate-General for Environment, *supra* note 1.

<sup>40</sup> Keating, *supra* note 3.

<sup>41</sup> In other words, companies are required to not hide negative environmental impacts by only touting positive ones. Directorate-General for Environment, *supra* note 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



clarity to consumers.<sup>44</sup> Yet, the idea that companies must be prevented from making greenwashing claims should be seen as the floor, not the ceiling, of anti-greenwashing measures.<sup>45</sup> Ideally, hardline consequences – including providing more accessible opportunities and information for consumers to bring suit against companies perpetuating greenwashing – should be implemented. Otherwise, a risk remains that companies will continue greenwashing and internalize any fines or costs resulting from getting caught doing so, and pass-through such costs to the consumers. In that way, consumers are hit twice, being victim to the greenwashing and paying for the consequences of it.

## **Conclusion**

In conclusion, the EU's initiative is set to address the pervasive issue of greenwashing as part of broader efforts comprising the European Green Deal. This Proposal, through its substantiating requirements, PEF methodology, enforcement and compliance requirements for member countries, and more, is aimed at achieving a significant reduction in false and misleading green claims, while also leveling the playing field for complying corporations who otherwise are negatively impacted by the dishonest claims made by competitors, as well as protecting consumers. While the Proposal still needs to be officially published and work its way through the EU legislative procedure to become an enforceable anti-greenwashing law, the initiative is already being anticipated to have a significant global impact.

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<sup>44</sup> Specifically, amendments to Articles 6 et seq. and Annex I. Bolko Ehlgen et al., *EU Commission proposes ban on greenwashing and new consumer rights to promote sustainable products*, LINKLATERS (Apr. 8, 2022), <https://sustainablefutures.linklaters.com/post/102hmfg/eu-commission-proposes-ban-on-greenwashing-and-new-consumer-rights-to-promote-sus>.

<sup>45</sup> *Id.*