Navigating the growing risks related to greenwashing: understanding legislative and enforcement trends in Belgium and the EU

Sustainability has become a top priority for companies across industries, largely fuelled by the increasing environmental consciousness among consumers. As businesses increasingly employ green marketing strategies, claiming products are "pure nature" or "eco-friendly", caution is advised. **Making exaggerated or unsubstantiated environmental claims, also known as greenwashing practices, may draw attention from consumers, competitors, and authorities, potentially resulting in legal action and liability risks for the undertaking in question.**

This liability risk has been apparent in the **Netherlands** in recent years. In March 2024, for example, the Dutch Amsterdam District Court ruled in favour of the interest organization "Fossielvrij" in a class action lawsuit against the Royal Dutch Airlines ("KLM"). The court found KLM's marketing claims in its "Fly Responsibly" campaign to be misleading and ruled that the published statements about the benefits for the environment were vague and exaggerated, which constituted a breach of the rules of fair advertising.

In **Belgium**, however, there is currently only limited known caselaw on environmental claims before Belgian courts. Nevertheless, enforcement efforts and the risk of litigation are expected to increase as the EU is adopting new initiatives to address greenwashing. Moreover, the Federal Public Service ("FPS") Economy recently expressed its intentions to actively monitor greenwashing activities.

In light of these developments, this alert provides an overview of the existing possibilities for private litigation and public enforcement against greenwashing practices in Belgium. It further delves into the above-mentioned European-level initiatives, Directive 2024/825 and Directive 2023/0085, providing a practical overview of the forthcoming changes.

a. Litigation and enforcement scene in Belgium

There is currently no specific Belgian legislation directly addressing and prohibiting greenwashing practices in absolute terms. Nonetheless, the general rules on **"unfair commercial practices"**, set out in Articles VI.92-VI.103 of the Belgian Code of Economic Law ("CEL"), are particularly relevant to green claims litigation. According to these provisions, environmental claims are prohibited if they qualify as "unfair commercial practices", i.e., if they deceive consumers into making transactional decisions they would not have made in the absence of the false or only partially accurate information.

Moreover, Article VI.100 CEL contains a "blacklist" of unfair commercial practices which are prohibited in business-consumer relationships in all circumstances, without the need to demonstrate an impact on consumer behaviour. Although the blacklist categories are broad and apply to business practises in general, they also prohibit a specific subset of greenwashing practises. For example, companies may not use unauthorised trust or quality seals to market the green nature of products.

When proceeding against alleged greenwashing practices outside of the general blacklisted practices, the burden of proof lies with the claimant. In the past, the burden of proof has made it challenging to litigate successfully greenwashing cases before Belgian courts. In a case from 2019, for example, Ecover labelled its packaging of its dishwasher detergent as an "Ocean Bottle". The Court of Appeal of Brussels ruled that this claim was not misleading as there was insufficient evidence of the claim's impact on consumer behaviour.

An environmental claim which a court ruled to be misleading or unfair can lead to a fine of up to EUR 80,000 or 4% of the company's annual turnover. The court may also require the judgement to be published on the company's website.

Alleged greenwashing practices may also be investigated through alternative channels in Belgium.

The **Economic Inspection Service of the FPS Economy** is authorized to conduct administrative investigations to ensure compliance with the aforementioned rules on misleading commercial practices.

Alternatively, alleged greenwashing may also be investigated by the **"Jury voor Ethische Praktijken inzake Reclame"** ("JEP"), an independent self-regulatory body. Notably, numerous companies active in sectors such as automotive (D'Ieteren), energy (Gas.be), and consumer goods (Nutella and Café Liégois), have undergone screening by the JEP. The JEP's ability to impose sanctions is, however, limited due to the non-judicial nature of the organisation. If the JEP identifies an infringement, it can issue a decision requiring the undertaking to amend or cease the misleading advertisement. Failure to comply may result in the case being referred to the "Communicatie Centrum vzw/asbl", the legal organization behind the JEP, which can initiate legal actions against the undertaking.

b. Expected increase of enforcement and litigation due to EU initiatives

Private litigation and public enforcement with regard to greenwashing is expected to gain momentum in the EU, including Belgium, in the near future due to several initiatives on EU level.

In March 2024, the EU adopted Directive 2024/825. This initiative aims to protect consumers from misleading communication on the environmental, social, or circularity aspects of a product. Most importantly, the directive **expands the afore-mentioned blacklist of unfair commercial practices**. By outright banning additional specific practices, the directive significantly lightens the burden of proof for claimants challenging alleged greenwashing practices in courts. Therefore, we advise companies to consider, for example, the following recommendations:

- Avoid making generic and vague environmental claims unless you can demonstrate excellent environmental performance through compliance with relevant legislation or recognized ecolabeling schemes.
- Ensure that environmental claims accurately reflect their true impact. For example, if a product is advertised as "made with recycled material", confirm that all relevant components are indeed recycled.
- Avoid claiming a product has a neutral or positive environmental impact based solely on carbon offsets. It is advised to only make such claims if the product's lifecycle impact is truly climate neutral.

In parallel, another significant initiative is Directive 2023/0085, commonly referred to as the Green Claims Directive, which is currently in the early stages of the legislative process. The proposed directive outlines **requirements for companies making explicit environmental claims in business-to-consumer relationships**, including the obligation to use scientific evidence, to consider life-cycle impacts, and to ensure transparency. Moreover, the proposed directive sets **requirements for environmental labelling schemes**, ensuring transparency and scientific robustness. EU Member States will designate competent authorities to monitor compliance with the obligations and give them the necessary powers to impose sanctions for non-compliance.

Should you have any queries, we remain at your disposal. Our teams will be happy to assist you.

Special thanks to Hannae Achak for her contribution to this alert.