LEWIS SILKIN

The AdLaw Insights Podcast, with Brinsley & Geraint (Ep 6): Green claims

Geraint Lloyd-Taylor

Welcome to episode six of our series of podcasts on all things advertising and marketing. I'm Geraint Lloyd-Taylor.

Brinsley Dresden

and I'm Brinsley Dresden.

And we're co-heads of Lewis Tolkien's advertising and marketing team. And this time we are talking about green claims. Again, we've had an episode on green claims, but there have been some developments. So we thought we'd do another episode and tell you all about them, bring you up to speed to the extent that we're able.

So do you want exciting developments at the very end, end of June in the European Commission?

Geraint Lloyd-Taylor

Yes, so there was quite a lot of news around the fact that the Green Claims Directive that had been talked about for many, many years and was a long time in the making had been killed off. In fact, think around the 20th of June, I think there was an announcement then that it had been killed off or was about to be killed off. And there was some confusion. But then a few days later, there was news that it might not have been killed off.

Brinsley Dresden

Yes, people saying that when we said we're withdrawing it they in fact meant they're only threatening.

Geraint Lloyd-Taylor

We're not withdrawing it though, so it might still be withdrawn. We're just not clear. But anyway, let's talk about what is the Green Claims Directive and why does it matter? So this is all part of the directive. Actually, it's an expansion on the directive of empowering consumers for the green transition. There's a European trend that's been building for some years around empowering consumers around the green transition. And the broader directive that is called Empowering Consumers on Green Transition, that's staying, I think.

Brinsley Dresden

It is, it is.

Geraint Lloyd-Taylor

excellent. What does that entail? Can you tell us in a nutshell?

Brinsley Dresden

In a nutshell, that's the one that deals with things like prohibiting general claims of greenness and aspirational claims. It has in itself, it's quite a challenging set of rules. Although when you look at them, quite a lot of them are things which in the UK are already encapsulated by the CAP and BCAP codes administered by the advertising standards authority and would reflect things which are already prohibited by the ASA.

In practice, if you're already working to follow the ASA guidance and the CAP code, you probably wouldn't find so much new in the ECGT, I think it is, directive. That is due to be transposed into national laws in European community, I think in March of next year, and be enforced by September of next year. And that, just to be clear to listeners, that is a done deal. That is happening.

Geraint Lloyd-Taylor

And that's broader than just claims, it? That one touches on building in obsolescence and banning all of those sorts of things around, you know, making technology automatically obsolete in a year or two of something coming out.

Brinsley Dresden

Yes.

So it's a very important piece of law in its own right. But the Green Claims Directive, which had very detailed rules about substantiation requirements and verification and basically making sure that any green claims, any environmental claims, were substantiated in advance. One of the concerns was that this was going to require

whole new industry of verification consultants that companies would be able to go to to get them to sign off on their green claims, which seems to run the risk of making green claims just unfeasibly expensive for most companies to make and therefore is part of the move towards green hushing. Already, if you make a green claim and a regulator comes along and decides they don't like it, you risk huge environmental damage.

Geraint Lloyd-Taylor

And that was a step further than anything that we were considering in the UK, wasn't it? This sort of concept of having authorised claims ahead of time or having to go to somebody to validate your claims before you've made them.

Brinsley Dresden

I suppose to a certain extent there's an analogy with if you want to make a green claim on television then obviously you have to get it through Clearcast and get their sign off. But this would go much wider than that.

Geraint Lloyd-Taylor

Not just holding the proof ahead of time and being comfortable for yourself, if you like, you've got the substantiation, but actually getting it certified or verified in some way.

Brinsley Dresden

Yes, and it seems to, mean philosophically, seems to reflect this tension between on the one hand the kind of environmental purists who basically seem to see almost everything as greenwashing versus people who, you know, like me, perhaps like you, who would like to see industry and business and

commerce encouraged to improve their environmental performance. And the way you encourage them is by allowing them to advertise their improvements and their innovations.

Geraint Lloyd-Taylor

Yes, and it becomes both prohibitively expensive and just too complicated. Too hard, didn't try is the sort of approach that I think some companies were starting to say that they'd have to take. And of course, the main political controversy around this new directive was the fact that it would apply to even small businesses.

Brinsley Dresden

Yes, and this seems to have been the cause of this dust-up between the Commission and the Council. Because I think the Council was saying, we want this to apply to micro-businesses, which the EU define as businesses with fewer than 10 employees and a turnover of no more than 2 million euros, which is roughly 1.7 million pounds; and there are apparently about 30 million of those across the EU.

Geraint Lloyd-Taylor

I have another stat for you. Apparently it's 96 % of companies across the EU fall into that category, so it would be a significant chunk, almost all you could say, 96%.

Brinsley Dresden

Right, and apparently the council was saying, we want this to be included, them to be included. And the commission was saying, we don't. I think the Italians were saying, we don't. mean, if I can remember back to the dim and distant days of my A-level geography, I suspect the number of micro enterprises in Italy is probably very large, perhaps as a proportion compared with other EU member states. I mean, it does seem to me bonkers to say that such small companies would have to comply with this very, very rigorous law; and also, it to me, actually does nothing to advance the cause of environmentalism and environmental performance because…

Geraint Lloyd-Taylor

Let's be clear, though, on that point, yes, we're not saying that all of these companies, because they're small, could have made whatever claim they want to make. They still can't make misleading green claims, of course. It's just that we're saying all of these additional hurdles and requirements made no sense to apply those to smaller companies.

Brinsley Dresden

Exactly that. mean, for example, the Unfair Commercial Practices Directive prohibits misleading claims of any nature, but including misleading green claims and applies to all companies large and small. So it's not as if it's the Wild West for these micro enterprises. They are still covered by a range of laws and I think including the Empowering Consumers of Green Transition Directive, ~ but just not this one, which would be incredibly expensive.

The commission was saying we think these should come out and I believe some member states like the Italians, but I don't think it's only the Italians, were saying that they should come out, but the council was saying they should go in. So then just before a crucial meeting, the commission said, we're withdrawing it or we might withdraw it unless the council drops this insistence on micro enterprises being included. Then subsequently they said, no, we didn't withdraw it, we just threatened to withdraw it. Then there are various people, because there's a political underlying tension as well between some of the more right-wing elements within the European system who got elected at the last set of elections, seem to be at war with some of the more left-leaning political bodies and parties. And there's a bit of a sort of philosophical dust-up between them as well.

So where are we now? What is your understanding of the current position? Is it fair to say that rumours of the demise of this director have been greatly exaggerated?

Geraint Lloyd-Taylor

seems like that might be the case. It seems like it's possible that all of these micro businesses might be carved out and then the legislation might proceed to the next stage, which is essentially the final stage of just confirming it was in its final form and then introducing it. It does leave the problem that there is all of these additional layers of bureaucracy that will have to be complied with by large companies and it doesn't make them any better. I mean, yes, they're expensive and cumbersome, but does it mean that carving out small businesses is enough? Is it worth continuing with this piece of legislation? Does it have the political backing required to get it over the line? We don't know. We don't know. And in the UK, certainly, we think it's perfectly adequate to have all the legislation that we already have, the DMCC Act in particular, where you can't make misleading claims. Companies have to have substantiation, but they don't have to have all of this sort verification and certification before making claims. It just seems like an additional layer of bureaucracy at a time when there are political and economic pressures that have to be taken into account as well. So maybe the political wind has come out of the sails of this piece of legislation and it might not make it over the line, but let's see.

Brinsley Dresden

Yes,

I mean, it is this thing of independent verification on top of the pre-existing requirements of substantiation that we would both, I'm sure, endorse. It's this extra layer. And of course, you know, in the States, with changes in the political landscape in the States, the whole thing has rolled back a bit. mean, already advertising is pretty strongly controlled. So probably, it seems to me, it went too far and is actually counterproductive. Certainly, it seems just completely unviable to make these micro enterprises subject to it. But even big companies, even the kind of clients that we're working with, I think are going to be turned off. There will be a chilling effect on green claims if this goes through. So personally, I always thought it was misconceived and I hope this does now spell the end of it.

Geraint Lloyd-Taylor

I agree with you. The reports are really on ESG news. The reports are that it might still make it over the line. The Commission has reaffirmed its commitment to the proposal, but this is the same commitment that killed it, revived it, and is now sort treating it as some sort of Schrodinger’s cat. So we don't know whether it's going to get over the line or not. This is on the 7th July that we're recording this podcast, so we will bring you any updates on which way that goes. Certainly it looks like small businesses will not have to comply with this legislation if it is introduced but large businesses probably will if it does make it in.

Brinsley Dresden

But also, mean, you say large businesses, but I mean, if a large business means any business which isn't a micro business,

Geraint Lloyd-Taylor

Yes, 11 or more people.

Brinsley Dresden

We're talking about businesses with 11 employees and a turnover of more than £1.7 million, that is not a large business.

Geraint Lloyd-Taylor

I think if they reopened that debate of, you know, should we not just carve out micro-businesses but maybe mini-businesses or whatever the other definitions are along the way before you get to the giant businesses, I think that would slow it down further and probably put too many spanners in the works.

So, that's the European position, which is to say it's somewhere between passing and not passing, and we'll know more in a few weeks. So it's a very uncertain position. But across in the UK, we have a very defined and certain position now, don't we? We have the DMCC Act, we have the Competition Markets Authority, which is very interested in green claims. And if there are misleading green claims being made, then they certainly fall under the DMCC Act and you could face fines of up to 10 % of annual global turnover for making such misleading claims in the UK. And that already in itself is having a slight chilling effect, do you think, anecdotally on businesses and their desire to make green claims or their confidence in green claims that they're making.

Brinsley Dresden

Good question. I'm not sure that I've yet detected a chilling effect. Certainly, think all of our clients are being very careful asking for an independent pair of eyes to look over the substantiation and confirm that it actually matches the claims being made. But I think people are still willing to back themselves. mean, part of the problem, I think, is that, and we have talked about this, as much as we go out of our way to voice be big cheerleaders for self-regulation and the ASA. Unfortunately, there is sometimes a degree of inconsistency in ASA decisions and sometimes decisions at which one thinks are rather harsh. Although recently, I think there have been a couple of ASA decisions where they did seem to be a little bit more nuanced and reasonable. And one in particular, there was one that involved Barclays Investment Bank that was in The Economist and the ASA did put quite a weight on the fact that it was in The Economist and therefore would be read by people of a, not your average consumer, well, your average consumer of that group. So the kind of person who worries that they might find themselves sitting on a plane next to Henry Kissinger and not be able to maintain a conversation at 30,000 feet over a gin and tonic.

Geraint Lloyd-Taylor

yeah flown around the world three times but offset their carbon with their £1.25 contribution to the flight.

Brinsley Dresden

Yes, indeed. The ASA don't administer fines, but large companies, by which I mean not just those with more than 11 employees, do take the ASA seriously. The ASA is always very proud to point to their compliance rates. It does have an impact.

Geraint Lloyd-Taylor

And I think an area I've seen it have an impact is around offsetting claims, which is one of the things in the Green Claims Directive that we're essentially going to be banned making green claims based mainly on offsetting and carbon offsetting rather than carbon reduction was going to be an area of some controversy, might still be an area of some controversy in the Green Claims Directive. Whereas in the UK, I think we're still making offsetting claims, but less so.

Brinsley Dresden

I mean, it's definitely less so.

One of our clients that's a fairly large player in the energy utilities sector, they said to me recently they've stopped using any substantiation based on offsetting. think there might be something about that in the ECGT as well. I think people know that those claims now are just insufficiently robust. People are pretty loathe to rely on them. That's probably run its course, I think.

Geraint Lloyd-Taylor

Yes, I think that's probably right. It's on its way out, I think we could say.

Brinsley Dresden

Yes, unless somebody comes up with a much more robust scheme of doing it, but I mean they are quite difficult. And I suppose the environmental lobby groups would claim that as a victory.

Geraint Lloyd-Taylor

Yeah. So there we are. think, you know, it's always frustrating not to be able to give people a definitive indication either way as to whether this Green Claims Directive is going to go ahead or not. It looks like if it does, it's going to impact larger clients of ours and larger businesses generally, rather than smaller businesses. But to your point, I mean, that just means everybody who's got more than 11 employees. So really, it will have a huge impact if it crosses the line. And watch this space. We'll update you as soon as we know more.

We did a week ago have a definitive view on this. Green Claims Directive was dead, but those reports were premature. So we will have to keep you updated.

Brinsley Dresden

Yes, yes. in the meantime, there will be other developments coming through from the advertising standards authority. There are always calls for further restrictions and bans of various kinds, particularly with our friends at adfree cities are always agitating to have more bans on outdoor advertising and various kinds, including for things like SUVs. So it's an area where there's a constant change all the time.

Geraint Lloyd-Taylor

Yes, a perennially hot topic.

Brinsley Dresden

To wrap up then, we hope you've enjoyed this podcast. If you want to keep on top of new developments in advertising law, whether that's ASA decisions or new rulings or developments with the Competition and Markets Authority or anything else touching on the exciting, fast-moving and dare I say sexy world of advertising law, you can check out our blog at adlaw.lewissilkin.com

With that, I shall say goodbye from Brinsley and

Geraint Lloyd-Taylor

goodbye from Geraint. See you next time.

Brinsley Dresden

Thank you, bye.