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Greenwashing in Aviation: The latest rules and regulations on environmental campaigns

The aviation industry has historically had a negative reputation of being greenhouse gas polluters. In an era where consumers are becoming more environmentally conscious of their actions, airlines in particular need to change the narrative and promote the sustainability initiatives they are involved in to help the industry reach its target of being carbon net zero by 2050. However, care should be taken when promoting these environmental initiatives, as we have seen an increase in both greenwashing claims against airlines alleging that their environmental campaigns are misleading, and calls from consumer groups for action by the courts and regulators to take a hard line against airlines in respect of their environmental campaigns. With a particular focus on aviation, this article covers the latest rules, regulations and legislation on environmental campaigns and summarises the approach taken by the courts and regulators both in the UK and EU against airlines in respect of their environmental marketing.

Is the aviation sector on track to reach carbon net zero by 2050?

The United Nations' COP28 Climate Change Conference held in Dubai in November and December 2023 was significant in that it marked the first global stocktake for countries and stakeholders to assess the progress made in reaching their climate change objectives under the Paris Agreement. The overarching goal of the Paris Agreement, which was adopted by 196 parties at COP21 in December 2015 and entered into force on 4 November 2016, was to limit the global temperature rise to 1.5°C. The COP28 global stocktake revealed that progress across all areas of climate change action has been too slow, meaning that global emissions are not on track to meet this goal.

At COP28, countries considered how to accelerate action across all areas by 2030. The main outcome of COP28 was for governments to focus their climate commitments on the **transition away from fossil**

fuels and towards renewable energies. For the aviation industry, this focus on transitioning away from fossil fuels is a welcome opportunity to advance the development of Sustainable Aviation Fuels (SAF), which have been heralded in recent years as the answer to aviation's environmental concerns.

Despite the efforts of the UK Civil Aviation Authority (the "**CAA**") and UK Government to work with the aviation and aerospace industry to support the development and use of SAF, the fact remains that **SAF is an expensive and limited resource.** For airlines, this is likely to result in increases to air fares which would be problematic for consumers. Coupled with the fact that consumers and businesses are becoming more conscious of their carbon footprint when booking flights, airlines are understandably keen to advertise how they are developing their sustainability practices in order to attract eco-conscious passengers and justify any increases in air fares, particularly for low-cost carriers.

What is greenwashing?



There is no single common legal definition of 'greenwashing' in the UK or in the European Union ("EU").

However, 'greenwashing' is commonly regarded as the practice of making unclear, unsubstantiated and misleading claims about the environmental benefits of a service, company and/or product in order to appeal to customers who are concerned about sustainability.

In September 2022, climate change activists turned their focus to the environmental claims made by major airlines and publicised their #BanFossilAds campaign on billboards across 15 European cities. This focused on sustainability claims by airlines and the impact of flying on global carbon emissions, which included KLM's controversial "Fly Responsibly" campaign (discussed further below). Brandalism, the climate change activists spearheading this campaign, put up satirical artwork across major European cities to demonstrate the role of aviation in increasing greenhouse gas emissions and called out several airlines, including Ryanair, easyJet, British Airways, KLM, Lufthansa and Etihad Airways, for their environmental claims and pledges.

Greenwashing undermines legitimate efforts made by airlines to improve sustainability in aviation. There is a misconception amongst climate change

activists and consumer groups that the aviation industry is not serious about reaching net zero by 2050, and that, in reality, it is not even plausible or possible to reach this target. Whilst it may be the case that progress in reaching this goal is slow, the aviation industry is still committed to deploying all its efforts to get back on track. There is a cynical view that environmental campaigns, initiatives and advertisements are creating a false impression of environmental responsibility and are purely a money-making tool to encourage more people to fly and therefore should be banned. It is against this backdrop that complaints are being made to the national advertising regulators across the EU and in the UK, and to the European Commission and Consumer Protection Cooperation Network (the "**CPC Network**"), and claims are being filed in the national courts by campaigners, activists, and consumer groups against airlines for greenwashing.

Widespread criticism over 'misleading' comments about SAF

Although SAF has been seen as a potential solution for airlines, with over 450,000 flights having taken off using a mix of SAF with traditional fuels, there is a rising scepticism over how sustainable SAF really is. The main question being asked is how it will be possible to scale up the production of SAF enough to make it a sustainable, viable alternative to traditional kerosene jet fuel.

The UK Government and Virgin Atlantic were condemned by the campaign group Aviation Environment Federation (AEF) over what the AEF deemed to be "misleading" comments made about the "world's first 100% Sustainable Aviation Fuel" flight, Virgin Atlantic's Flight100, that flew from London Heathrow to New York JFK on 28 November 2023. The Boeing 787 aircraft flew using Rolls-Royce Trent 1000 engines and was fuelled purely by SAF consisting of used cooking oil and plant-based products.

The UK Government provided a one-million-pound grant for Virgin Atlantic's Flight100 project, and the UK Department for Transport remarked that this milestone in the development of SAF could lead to "guilt-free flying". This comment sparked challenges from environmentalists including Cait Hewitt, Policy Director of the AEF, who said that it was wrong to suggest that waste-based SAF could be scaled up enough to be sustainable, and pointed out that "*only 2.6% of UK aviation fuel is anything other than kerosene. And globally, the figure is more like 0.1%.*" The AEF's view was supported by Stay Grounded, a global network of climate crisis campaigners, who insist that SAF is not sustainable

as it relies on an inefficient use of renewables and described Flight100 as "greenwashing".

The hostile response to this groundbreaking 100% so-called SAF flight is one of several examples of the questions being raised about the sustainability of SAF, which are discussed further below. This includes the recent comments of the Amsterdam District Court in its ruling against KLM. In that case the Court found that, due to the limited availability of SAF, promoting the use of alternative fuels like SAF as a solution to reducing carbon emissions was not concrete enough to substantiate KLM's "Fly Responsibly" campaign. These recent sentiments have sent a clear message to airlines that they must tread carefully when advertising their sustainability.

The legal framework underpinning greenwashing claims

a. Consumer legislation

Most of the greenwashing claims that we have seen in the national courts of EU Member States are derived from the Unfair Commercial Practices Directive 2005/29/EC (the "**UCPD**"), which has been implemented across EU Member States. In the UK, the UCPD was implemented by the Consumer Protection from Unfair Trading Regulations 2008 (the "**Consumer Protection Regulations**") while the UK was still a member of the EU. The Consumer Protection Regulations prohibit unfair commercial practices (with an express blacklist of unfair commercial practices in Schedule 1), misleading acts and omissions, and aggressive commercial practices.

There are no specific rules in the Consumer Protection Regulations deeming greenwashing practices as unfair or misleading. However, the general rules on misleading practices are being applied on a case-by-case basis, especially where the environmental claims negatively affect consumers.

Examples of environmental claims that have been regarded as misleading are considered below.

Breaches of the Consumer Protection Regulations can provide a consumer with a claim against the airline, constitute a criminal offence resulting in a fine and can involve enforcement action by the CAA and Competition and Markets Authority (the "**CMA**"). The UK Government is currently in consultation regarding the enforcement powers of the CMA, including granting it the ability to issue fines for up

to 10% of global turnover for breaches of consumer law.

In UK law, an act or omission is misleading if:

- a) it contains false information; or
- b) its overall presentation is likely to deceive, in any way, the average consumer; or
- c) it omits or hides material information; or
- d) it provides material information in an ambiguous or unintelligible manner; and
- e) it causes or is likely to cause the average consumer to make a transactional decision that they would not otherwise have made (Regulation 5 and 6 of the Consumer Protection Regulations).

The CMA issued the 'Green Claims Code' on 20 September 2021 (CMA146)¹, which provides guidance for organisations to enable them to understand and comply with their obligations under consumer legislation when making environmental claims. The guidance sets out six key principles, with examples, and these include requiring claims to be truthful and accurate; being clear and unambiguous; including important relevant information; being fair and meaningful; being substantiated and considering the full life cycle of the product or service. However, the guidance is not legally binding nor exhaustive of every situation where an infringement may occur.

In the EU, for now, the position is similar to that in the UK, in that greenwashing claims are likely to fall within the general rules of a misleading act or omission under the UCPD (as implemented in the relevant national law of the EU Member States). The added benefit for consumers in the EU is that a breach of these rules can also lead to class actions being brought by passengers under domestic law introduced following the Collective Redress Directive (EU) 2020/1828 whereby the passengers can seek compensation and injunctive relief.

However, the legal framework on greenwashing claims in the EU is due to change soon. On 26 March 2024, Directive (EU) 2024/825 regarding empowering consumers for the green transition through better protection against unfair practices and through better information (the "**Empowering**

¹ CMA guidance on environmental claims on goods and services. Helping businesses comply with their consumer protection law obligations. 20 September 2021, CMA146

Consumers Directive") came into force. This new directive amends the UCPD and prohibits businesses from making misleading or unclear environmental claims to consumers. The directive introduces set definitions for green claims and makes significant additions to the rules on misleading business practices, such that the main characteristics of a product that must not be misleading now includes environmental and sustainability characteristics. It also adds new commercial practices into the "blacklist" at Schedule 1 to include unsubstantiated environmental claims that will be regarded as unfair under all circumstances, without the need to investigate the individual claim.



The Empowering Consumers Directive is primarily concerned with *"generic environmental claims"*. These are messages or representations (including text, graphics and audio representations), that state or imply a business, product or service has either a positive, less damaging or no impact on the environment, and the specification of such claims is not provided in clear and prominent terms. The recitals of the directive provide examples of generic environmental claims, and this includes terms like *"environmentally friendly"*, *"biodegradable"*, *"climate friendly"* and *"climate neutral"*. Generic environmental claims that have no *"excellent environmental performance demonstrated or whenever the specification of the claim is not provided in clear and prominent terms on the same medium"* are to be prohibited and automatically regarded as an unfair commercial practice.

EU Member States have two years to implement the Empowering Consumers Directive into their national law, i.e. until 27 March 2026. Businesses will then have six months to adapt to the new regulations. When the regulatory framework takes effect, enforcement will be a priority. The driving force behind the Empowering Consumers Directive is to address the concern of the CPC Network for the need to strengthen the rules on environmental claims to facilitate enforcement in this area.

The changes do not stop there, however, as the EU Commission has proposed a further directive on 22 March 2023, namely the 'Green Claims Directive' (*Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims*). This is intended to supplement the Empowering Consumers Directive by setting firm requirements for substantiation, verification and communication in connection with explicit environmental claims and environmental labelling schemes. When businesses make environmental claims about their services or products, they will have to comply with minimum requirements on how to substantiate and communicate these green claims, which will include verifying the claims independently and using proven scientific evidence. The relevant committees of the EU Parliament and European Council are still negotiating the proposal.

Following the UK leaving the EU at 23.00 GMT on 31 January 2020, the UK is not required to implement the Empowering Consumers Directive and nor will it have to implement the Green Claims Directive (if approved). It remains to be seen whether the UK will amend the Consumer Protection Regulations in a similar manner to the EU by way of the Empowering Consumers Directive to expressly include environmental claims. The CMA is lobbying the UK Government to include greenwashing as a prohibited and automatic unfair commercial practice in Schedule 1 of the Consumer Protection Regulations, to enable the CMA to take enforcement action more swiftly. For the time being, there is no suggestion of the UK Government adhering to this request, nor has there been any consultation on this to date.

Key legislation and rules

In the UK

- Consumer Protection from Unfair Trading Regulations 2008 ("Consumer Protection Regulations")
- CMA guidance on environmental claims on goods and services. Helping businesses comply with their consumer protection law obligations. 20 September 2021, CMA146 ("Green Claims Code")
- The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ("CAP Code")
- The UK Code of Broadcast Advertising ("BCAP Code")
- The environment: misleading claims and social responsibility in advertising. Advertising Guidance (non-broadcast and broadcast)

In the EU

- Unfair Commercial Practices Directive 2005/29/EC (N.B. each Member State was required to implement this directive into national law, therefore you would need to review the national legislation for the exact rules) ("UCPD")
- Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information ("Empowering Consumers Directive")
- Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims ("Green Claims Directive")
- Each Member State will also have its own advertising standards authority, which will most likely have rules on what advertisements are permitted. Please consider the national laws of each Member State that you intend to run your environmental advertisement in to ensure you are compliant with the rules.

Advertising rules

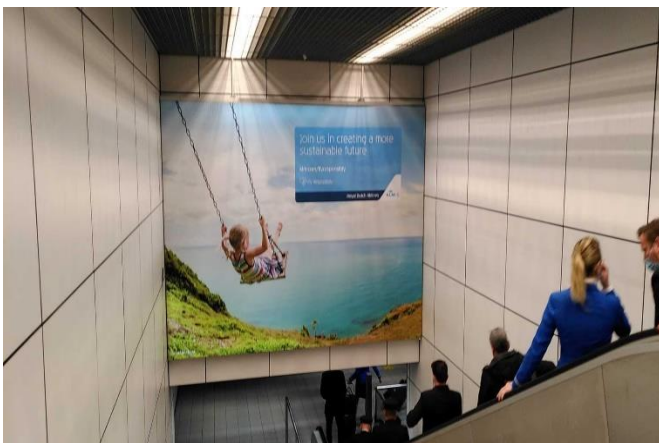
In the UK, the Advertising Standards Authority ("**ASA**") is the independent regulator of advertising across all media platforms. The ASA enforces rules under the UK Code of Broadcast Advertising ("**BCAP Code**") and the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ("**CAP Code**"). The Committees of Advertising Practice ("**CAP**") write the advertising codes as well as any guidance in respect of these codes and rules. Both the BCAP Code (Section 9) and CAP Code (Section 11) have historically contained rules on environmental claims. This includes ensuring that the basis of the claim and the terms used in the claim are both clear to consumers, absolute claims are supported by high level of substantiation, the claim is not misleading, and the claim is based on the full life cycle of the product / service.

Sitting alongside the BCAP and CAP Code is dedicated guidance from CAP on misleading environmental claims and social responsibility that applies to both non-broadcast and broadcast adverts (the "**Advertising Guidance**"). This guidance has been updated on a few occasions to incorporate the findings of the ASA and CAP from their study, "*Climate Change and Environment Project*", which took place between 2021 and 2022. The ASA identified that consumers misunderstood terms like "carbon neutral", "net zero" and "carbon offsetting" and therefore CAP updated the Advertising Guidance in 2023 to reflect the six key principles in the CMA's Green Claims Code and to provide guidance to advertisers on the use of these environmental terms. CAP and the ASA do not prohibit the use of these environmental terms, but caution that there is a low level of public understanding and lack of consensus around the meaning of these terms, which can result in an environmental claim that uses these terms being misleading. As such, the CAP and the ASA advise that the use of such terms should be avoided. By way of example, the ASA found that consumers thought that the term "carbon neutral" meant that an absolute reduction in carbon emissions had taken place.

The key with environmental claims is to ensure that they are clear, readily understandable to consumers, accurate, and supported by robust, relevant and recent evidence.

The ASA is conscious of the UK Government's ambitious environmental targets and the role that advertising may play in working towards these agreed climate goals. The ASA is allegedly committed to providing guidance on what environmental claims are likely to be acceptable and the level of substantiation required and wants to support the industry to *"greenspeak with confidence"*. This seems at odds with the recent increase in rulings from the ASA in respect of environmental claims by airlines, which we suspect will only get worse through the ASA's use of its Active Ad Monitoring Artificial Intelligence (AI) tool. Between January and February this year, the ASA analysed a sample of around 300,000 online ads across 200 major brands in nine sectors, which included the aviation sector, using AI. The aim of the tool is to identify and flag problematic environmental claims for the ASA to review and investigate. The ASA is aiming to monitor 10 million online adverts this year using the tool.

Whilst the ASA's use of AI is somewhat terrifying for the aviation industry, the ASA has no power to enforce fines or to actively remove adverts itself. The ASA can make referrals to the CMA to investigate a business and commence enforcement action under the Consumer Protection Regulations (explained above), but this should only be in the most serious cases of breach of environmental claims standards. A negative ruling from the ASA can lead to bad publicity and reputational damage, which is not just isolated to the airline itself but will impact the industry as a whole.



Recent rulings and decisions against airlines

a. KLM's "Fly Responsibly" campaign: decision of the Amsterdam District Court

The widely publicised case involving KLM's *"Fly Responsibly"* campaign, which commenced on 6 July

2022, came to a conclusion in March 2024. The Amsterdam District Court found that KLM's sustainability advertisements – which included claims such as *"Be a hero, fly CO2ZERO"* and *"CO2 neutral"* – breached both the Dutch Civil Code and the UCPD and gave a false impression that flying with KLM is sustainable. KLM's campaign highlighted the actions taken by the airline to achieve sustainability, which included fleet renewal, use of SAF and carbon offsetting, and operational improvements. The campaign was publicised on billboards, online, and on TV and featured 19 statements of how KLM was reducing its carbon footprint and used imagery to depict the environmental benefits brought by KLM's initiatives. These statements included phrases like: *"on the road to sustainable travel together"* and *"create a more sustainable future together with [us]"* and gave the impression that flying with KLM was *"more sustainable"* or *"responsible flying"*. Following the issue of proceedings, KLM withdrew its campaign yet the case was allowed to continue.

The case was brought by two Dutch environmental campaign groups who alleged that the environmental claims were misleading and many of the initiatives used by KLM were not as environmentally friendly as implied by the adverts. The campaign groups provided significant scientific evidence to support these allegations.

The Dutch court found that KLM's advertisements breached both the Dutch Civil Code and the UCPD and held that 15 out of the 19 advertising campaigns were *"based on vague and general statements about environmental benefits, thereby misleading consumers"*. KLM's initiatives were found to only slightly reduce its environmental impact and the environmental advertisements overemphasised the positive effect of these measures, including the benefits of SAF. The court found that the environmental ads painted *"...an overly rosy picture of the consequences of measures such as Sustainable Aviation Fuels and reforestation."* The court noted that there is currently limited availability of SAF and therefore promoting the use of alternative fuels like SAF as a solution to reducing carbon emissions was not concrete enough. KLM retains the right to continue to promote its sustainability efforts, but it must do so in a substantiated, accurate and honest manner.

b. Advertising regulators

As mentioned above, we have seen a flurry of activity from the ASA in the UK in the last year. In February 2023, the ASA found that Ryanair's press ad *"Europe's Lowest Fares, Lowest Emissions Airline"* and its TV and radio ad *"Fly Ryanair. Europe's low*

fare, low CO2 emissions airlines..." were unsupported by sufficient and relevant evidence to substantiate the claims and therefore were in breach of the CAP and BCAP Codes.

A common concern for the ASA is that there are no current technologies or initiatives in the aviation industry to support absolute green claims. This was the cause of the downfall of environmental claims run by Lufthansa in March 2023 on a poster with the text "CONNECTING THE WORLD. PROTECTING ITS FUTURE #MakeChangeFly" accompanied with images of the earth and an aircraft, and the Facebook ads run by Etihad Airways in April 2023 which claimed that the airline is "taking a louder, bolder approach to sustainable aviation." The ASA found that "protecting its future" and "sustainable aviation" were absolute claims that could not be supported by concrete evidence.

In December 2023, the ASA found that environmental ads from Lufthansa, Air France-KLM and Etihad were misleading. These ads were flagged by the ASA's Active Ad Monitoring system. Lufthansa encouraged passengers to "fly more sustainably"; Air France-KLM promoted that it was "committed to protecting the environment: travel better and sustainably", and Etihad's campaign was "Explore the World With Confidence and Total Peace Of Mind With Etihad Airways. Environmental Advocacy." The ASA found that these environmental claims lacked substantiating information and failed to include crucial and material information to enable consumers to understand them.

As a further example of action taken by regulators within the EU, in 2022 Austrian Airlines ran a campaign for the Biennale music festival, in which it advertised that SAF makes carbon neutral air travel possible, advising passengers that they could reduce their carbon emissions by purchasing a SAF flight from Vienna to Venice. The Austrian advertising regulator found that Austrian SAF is not 100% carbon neutral, as it comes from biofuels, and therefore it is incorrect to say that SAF makes carbon neutral flying possible. Further, the regulator criticised the airline for using terms that the average consumer would not be familiar with. Most consumers do not know what SAF is, the way it is manufactured and the potential environmental benefits of using SAF, and the airlines' campaign failed to explain in any detail how SAF can make carbon neutral flying possible. The regulator cautioned the airline and told them to be more sensitive and precise in their wording of environmental claims.

Pending complaints

On 22 June 2023, European consumer rights body BEUC and 23 of its member organisations from 19 countries lodged a complaint at the European Commission and the CPC Network against 17 airlines – including major carriers like Air France, Lufthansa, Vueling, Wizz Air and Ryanair – alleging that the use of terms such as "sustainable", "responsible" and "green" is deceptive and misleading. The complaint alleges that such claims are in breach of the UCPD and requests an EU-wide investigation into the issue of claims suggesting that flying is sustainable. BEUC have taken particular issue with claims about paying extra credits to "offset", "neutralise" or "compensate" the CO2 emissions of a flight and challenge the climate benefits of SAF given that it currently only represents a small proportion of the fuel mix in the aircraft tanks. The EU Commission and CPC Network have not responded publicly to the complaint. It will be interesting to see the stance taken by the EU especially in light of the recent adoption of the Empowering Consumer Directive and prohibition of generic environmental claims.



Towards the end of 2023, the climate charity Possible filed a complaint under the formal mechanism set out by the Organisation for Economic Co-operation and Development (OECD) against British Airways and Virgin Atlantic over their messages to consumers about their efforts to reduce carbon emissions from flights. Possible criticise the airlines' roadmaps to reaching net zero carbon emissions by 2050 and are of the view that claims about reducing carbon emissions by using alternative fuels like SAF are misleading. The complaint was filed a week before Virgin took its historic test flight Flight100 using entirely SAF from London to New York which, as mentioned above, has received its own criticism regarding the true sustainability of SAF.

Conclusion

It is clear that consumer groups, climate change activists and regulators alike are all watching the aviation industry with a close eye and it can be expected that the scrutiny of airlines' environmental claims will continue, especially once the Empowering Consumers Directive is implemented and if the Green Claims Directive is approved. The obvious solution is for entities to say nothing about their environmental initiatives, also known as "*greenhushing*". However, this may also be unhelpful as airlines may still be criticised for failing to take any action to reduce their environmental impact and could discourage a whole group of passengers who are environmentally conscious.

There are many positive steps being taken in the aviation industry to reach net zero by 2050 and airlines should be able to talk about these. It is possible to promote sustainability initiatives in a compelling way without being accused of greenwashing. To help navigate the various rules, guidance and legal framework in the UK and EU, in our first podcast series on ESG / Decarbonisation matters in Aviation we have identified five top tips for you to consider when preparing your next environmental campaign. You can listen to our podcast via the QR code below.

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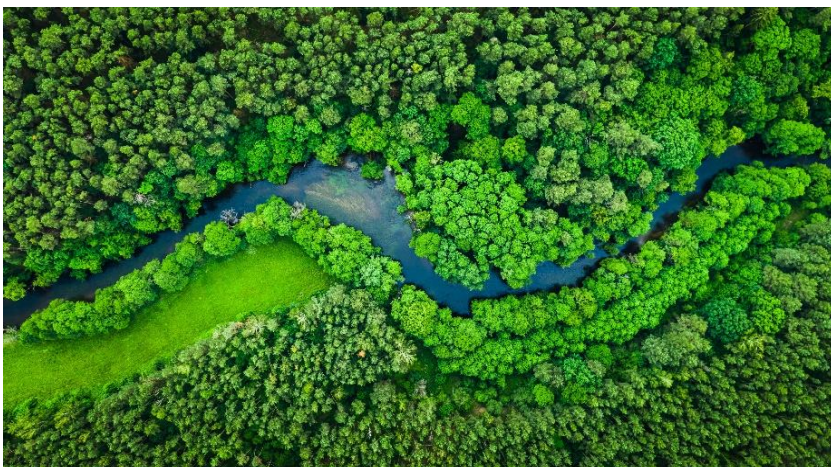


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