

The legality of “100 % recycled” and “100 % recyclable” claims on water bottled in plastics – legal analysis under EU Directive 2005/29/EC on unfair business-to-consumer commercial practices

Study accompanying the external alert submitted by BEUC to the CPC-Network

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1. Introduction

The bottled water industry is a significant industry and the EU bottled water market is even expected to continue to grow considerably in the coming years, with increasing sales both in the sparkling and still water categories. Consumers drink bottled water due to a wide range of factors, including consumer perceptions on the accessibility and quality of tap water, consumer taste or lifestyle preferences, incumbent business interests of the water bottling industry, etc.

This paper focuses exclusively on water sold in plastic bottles (as opposed to glass bottles). It starts from the observation that it is increasingly common for bottled water products to carry some kind of commercial communication either on the label and/or in additional marketing materials (social media advertising, billboard and posters) relating specifically to the recycled and/or recyclable nature of the plastic bottles and/or relating more broadly to the neutral or even positive environmental impact of bottled water. This paper will analyze whether certain claims relating specifically to the recycled and/or recyclable nature on water bottles are legal under the EU Directive 2005/29/EC on unfair business-to-consumer commercial practices (“UCPD”).¹

1.1 The claims at issue

The alert identifies three main categories of claims on labels of plastic water bottles, as further mentioned and explained hereafter. In this paper, these claims are tested against the UCPD. The overall conclusion will be that these claims are highly problematic from a consumer protection and environmental protection perspective and illegal under the UCPD.

a. “100% (< 100%) recycled” claims

Variations in formulation of claims on bottled water labels include (*inter alia*): “100% rPET”, “100% rePET”, “100% recycled material”, and in a few cases, claims of less than 100% recycled content (e.g. “30% recycled PET”), “100% made of other bottles”. In some cases, these claims are accompanied by an asterisk with “excluding cap and label” written elsewhere on the bottle / no asterisk and “excluding cap and label” written elsewhere on bottle, in each case, less prominently than the original claim.

b. “100% recyclable” claims

Variations in formulation of claims on bottled water labels include (*inter alia*): “100% recyclable bottle”, “I am 100% transparent and recyclable”.

c. Additional environmental claims: ‘circular imagery’ and/or ‘green and sustainability imagery’

The two above-mentioned types of recycling claims are often accompanied by ‘circular imagery’ on bottled water labels, i.e. arrows going round in an infinite circle. Moreover, these two types of recycling claims are often made in green font and/or accompanied by imagery in the colour green. Furthermore,

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22–39/

some bottled water labels support these recyclability claims by including generic sustainability-related statements, such as ‘on nature’s side’ or ‘become an ally in the protection of the planet’.

1.2 Application of the UCPD as *lex generalis*

It is beyond doubt that the above-mentioned two main categories of claims, whether accompanied by the additional environmental claims or not, can be assessed under the UCPD as the applicable *lex generalis* and that the CPC Regulation² is hence also applicable as enforcement tool.

Article 3(1) of the UCPD provides that that directive is to apply to unfair business-to-consumer commercial practices, as defined in Article 5 UCPD, before, during and after a commercial transaction in relation to a product. Article 2(d) UCPD defines ‘commercial practices’ as “*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*”.

Because bottled water is part of the highly regulated food sector, the question arises whether there are *lex speciales* specifically applicable to the food law sector that would supersede the general UCPD. Art. 3(4) UCDP provides: “***In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.***” Recital 10 UCDP provides: “*It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. [...] This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectorial legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers’ economic interests.*”

It follows from the above provisions that the UCPD complements sector specific EU legislation and works as a safety net ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors³, including the food sector. The application of the UCPD is not excluded just because other EU legislation is in place which regulates specific aspects of unfair commercial practices.⁴ The UCPD is only disapplied if there is a conflict with a relevant sector specific provision. As the Court explained in *Wind Tre*, “*the term ‘conflict’ refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end. Accordingly, a conflict such as that envisaged in Article 3(4) of Directive 2005/29 is present only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings,*

² Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 345, 27.12.2017, p. 1–26

³ Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market C/2021/9320, OJ C 526, 29.12.2021, p. 1–129, point 1.2.1 (“Commission Guidance UCPD”).

⁴ Commission Guidance UCPD, point 1.2.1.

*in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29”.*⁵

Hence, in absence of such a conflict, cumulative application is possible, required and desirable. The UCPD can be applied together with food sector rules in a complementary manner because the latter rules simply confirm that the labelling, advertising and presentation of food and materials that come in contact with food, must not be misleading. The more specific requirements laid down under other EU rules simply add to the general requirements set out in the UCPD, as confirmed in the Commission UCPD Guidance.⁶ Article 3(2) of the EU Food Contact Regulation 1935/2004⁷ provides that “*the labelling, advertising and presentation of a material or article shall not mislead the consumers.*”⁸ Article 16 of the General Food Regulation 178/2002⁹ provides that “*without prejudice to more specific provisions of food law, the labelling, advertising and presentation of food or feed, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium, shall not mislead consumers.*” Article 7 of the Food Information Regulation 1169/2011¹⁰ provides that “*food information shall not be misleading ...*” As these specific food sector rules do not conflict with the UCPD, the UCPD is applicable.¹¹

This interpretation of the *lex specialis*-rule was confirmed in the more specific “Commission Notice on the application of EU food and consumer protection law to issues of of products — The specific case of food”¹², now superseded by the UCPD Guidance (which gives guidance in relation to the new specific prohibition on dual quality of food products introduced in Article 6(2)(c) UCPD by the Omnibus Directive)¹³:

“EU food legislation applies in parallel with the UCPD and it may be relevant also when dealing with ‘dual quality’ cases, since these appear to happen mainly in the food sector.

Specifically, Regulation (EC) No 178/2002 on general food law aims at ensuring a high level of protection of human health and consumers’ interest in relation to food, while ensuring the effective functioning of the internal market. It is the foundation of the Union food law. It establishes, amongst others, common principles of (Union and national) food law as well as responsibilities on food and feed business operators at all stages of production, processing and distribution of food and feed.

⁵ CJEU 13 September 2018, *Wind Tre and Vodafone*, C-54/17 and C-55/1, EU:C:2018:710, para 60-61.

⁶ Commission Guidance UCPD, point 1.2.1.

⁷ Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food, OJ L 338, 13.11.2004, p. 4–17.

⁸ Article 3(1) provides: “*Materials and articles, including active and intelligent materials and articles, shall be manufactured in compliance with good manufacturing practice so that, under normal or foreseeable conditions of use, they do not transfer their constituents to food in quantities which could: (a) endanger human health; or (b) bring about an unacceptable change in the composition of the food; or (c) bring about a deterioration in the organoleptic characteristics thereof.*”

⁹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1–24.

¹⁰ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, 22.11.2011, p. 18–63

¹¹ Commission Guidance UCPD, point 1.2.1.

¹² Commission Notice on the application of EU food and consumer protection law to issues of Dual Quality of products — The specific case of food (2017/C 327/01), OJ C 327, 29.9.2017, p. 1.

¹³ Commission Guidance UCPD, footnote 178.

In that respect, it establishes the protection of consumers' interests as a general principle of food law [reference to Article 8]. Accordingly, food law must aim at the protection of the interests of consumers and must provide a basis for consumers to make informed choices in relation to the foods they consume. In particular, it must aim at the prevention of: (a) fraudulent or deceptive practices; (b) the adulteration of food; and (c) any other practices which may mislead the consumer.

It also provides for a general obligation for the labelling, advertising and presentation of food or feed, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged, the setting in which they are displaced and the information which is made available about them through whatever medium, imposed on food and feed business operators, not to mislead consumers [reference to above-mentioned Article 16]. Only safe food and feed products may be placed on the Union market [reference to Article 14]. Finally, food and feed business operators at all stages of production, processing and distribution within the businesses under their control are required to ensure that foods or feeds satisfy all requirements of food law, which are relevant for their activities and must verify that such requirements are met [reference to Article 17(1)].

Furthermore, Regulation (EU) No 1169/2011 on the provision of food information to consumers (the FIC Regulation) lays down general labelling rules and requirements, including mandatory provision of a complete list of ingredients, the quantity of certain ingredients or categories of ingredients, allergen information, a nutrition declaration, etc. This enables consumers to be fully informed of the composition of the food products and preventing misleading food information. Food information must be clear, accurate, and easy to understand for the consumer. For that purpose, the FIC Regulation lays down specific requirements for presentation of mandatory information, including minimum font size.

EU food law puts in place a comprehensive legal framework aimed at ensuring not only a high level of protection of health of consumers and their social and economic interests, but also the free movement of safe food in the EU Single Market.

The information requirements established by the FIC Regulation is 'material' information within the meaning of Article 7(5) of the UCPD. The omission of this information could be, after a case-by-case assessment, considered misleading to the extent that it is likely to affect the transactional decisions of the average consumer."¹⁴

Finally, the caselaw of the CJEU confirms this analysis of the interplay with sector specific EU legislation and the application of the UCPD to the food sector. In *Mezina*, the Court confirmed the above-mentioned principles specifically in a case concerning the UCPD's interaction with Regulation (EC) No 1924/2006 on nutrition and health claims made on foods.¹⁵ The case concerned health claims that were made in relation to natural food supplements. Regulation (EC) No 1924/2006 applies to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer. The Regulation provides that "without prejudice to the [FIR] and the [UCPD], the use of nutrition and health claims shall not: (a) be false, ambiguous or misleading; ..." In so far as Regulation No 1924/2006 lays down specific rules on health claims made in the labelling, presentation and advertising of foods placed on the Union market, that Regulation constitutes, according to the Court, a special rule in relation to the general rules – such

¹⁴ Commission Guidance UCPD, point 2.8.5.

¹⁵ C-363/19, *Konsumentenombudsmannen v Mezina AB*, ECLI:EU:C:2020:693; Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404, 30.12.2006, p. 9–25.

as those laid down in the UCPD – which protect consumers against unfair commercial practices by undertakings.¹⁶ In the event of a conflict between the provisions of the *lex generalis* and those of the *lex specialis*, in particular the provisions of Chapter II of the Regulation, the provisions of the Regulation applicable to all specific aspects of unfair commercial practices relating to health claims shall prevail.¹⁷ The Court did not apply this priority rule, as interpreted by the Court, to the facts of the case, but left this to the national referring court. In the follow-up judgment, that national court apparently combined the provisions of the Regulation and of the Swedish Commercial Practices Act transposing the UCPD, in the absence of any conflict of content between general and sectoral legislation.¹⁸

There is furthermore ample national caselaw confirming the application the UCPD to the food sector, despite the existence of more sector specific legislation.¹⁹

1.3 Application of the CPC regulation

The above analysis is also relevant in terms of enforcement. The CPC Regulation²⁰ applies to infringements of Regulations and the Directives, as transposed into the internal legal order of the Member States, listed in the Annex to the Regulation.²¹ Whereas the UCPD is among the instruments enumerated in the Annex, this is not the case for some of the food sector specific instruments.²² The fact that some of the relevant sector specific instruments are not mentioned in the Annex, has however no effect on the possibility to use the CPC regulation for unfair practices in the food sector. As mentioned above, the UCPD is of complementary application.

The Commission Guidance clearly confirms the application of the CPC Regulation to unfair practices concerning food products in its specific section on the application of EU food and consumer protection law to issues of dual quality of food products:

*“Due to the cross-border nature of ‘dual quality’ cases, the competent authorities must, where applicable, cooperate under **the CPC Regulation (EU) 2017/2394**. In particular, the CPC Regulation establishes clear mutual assistance obligations between competent authorities to ensure that the authorities of the Member State where the trader is established take the necessary measures to cease infringements which affect consumers in other jurisdictions of the Union.”²³*

“Investigation of potentially misleading ‘dual quality’ enforcement practices by the national authorities in charge of the UCPD will normally be based on the information about the product’s composition provided on the packaging in accordance with EU food law requirements. However, ‘dual quality’ misleading practices could also occur in cases where the product differences are not apparent from the product label. In these situations, the authorities in charge of food law will check the compliance with the FIC Regulation and the applicable product-specific regulations setting composition standards. In

¹⁶ Para 60, with reference to judgment of 16 July 2015, Abcur, C-544/13 and C-545/13, EU:C:2015:481, para 80 and the case-law cited.

¹⁷ Para 61 to 62, with reference to CJEU of 16 July 2015, Abcur, C-544/13 and C-545/13, EU:C:2015:481, para 81.

¹⁸ See also B. Keirsbilck, “Zaak C-363/19, KO t. Mezina AB: iets over gezondheidsclaims over gember, rozenbottel, boswellia, artisjok, paardenbloem en bosbes”_ Consumentenrecht / Droit de la Consommation 2022, 69 - 79

¹⁹ As illustrated by the cases cited further in this document.

²⁰ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, p. 1–26.

²¹ Art. 2, 1) CPC Regulation and Art. 3 CPC Regulation.

²² E.g. the EU Food Contact Regulation 1935/2004 and the EU food Regulation 178/2002 are not listed.

²³ Commission Guidance UCPD, point 2.8.5.

those Member States where different authorities are responsible for enforcing the UCPD and the relevant food legislation, these authorities should cooperate closely to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent."²⁴

It is however not excluded that the national authorities competent to enforce food legislation (that may be different from the national authorities competent under the CPC regulation) also take initiative, possibly with the coordinated assistance of the Commission.²⁵ The national authorities have the competence according to the Official Controls Regulation (EU) 2017/625²⁶ to investigate and verify compliance with rules aimed to ensure fair practices in trade and protecting consumers in the area of food,²⁷ including the mentioned specific provisions prohibiting misleading in the food sector. The Official Controls Regulation requires competent national authorities to regularly control compliance and to take appropriate action in case of non-compliance.²⁸ Such action may include ordering the alteration of labels or the provision of corrective information to consumers.²⁹ Close cooperation between the authorities of the CPC network and the authorities competent to enforce food legislation is in any event warranted to ensure that the findings of potentially parallel investigations are consistent.

2. General legal analysis on the basis of the UCPD

2.1 Three-fold relevance of correct information on the environmental impact of products

The importance of correct information for consumers on the environmental impact of products cannot be underestimated. This is high on the agenda at EU level, and was stressed in the *New Consumer Agenda*,³⁰ the *Circular Economy Action Plan 2020*³¹ and follows from the specific proposals that were recently adopted to ensure correct environmental information.³² Unfortunately, many environmental claims – i.e. claims that suggest or create the impression that a product has a positive or no impact on the environment or is less damaging to the environment than competing products (*inter alia* due to its

²⁴ Commission Guidance UCPD, point 2.8.5. See also point 1.4.1.

²⁵ Art. 108 Official Controls Regulation.

²⁶ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation), OJ L 95, 7.4.2017, p. 1–142

²⁷ Art. 1, 2) a) Official Controls Regulation.

²⁸ Art. 138, 1) Official Controls Regulation.

²⁹ Art. 138, 2) Official Controls Regulation.

³⁰ Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening consumer resilience for sustainable recovery (COM(2020) 696 final), 13.11.2020.

³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan: For a cleaner and more competitive Europe (COM(2020) 98 final), 11.3.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514-ntr278-C_2021526EN.01000101-E0278.

³² Proposal for a directive 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, COM(2022) 143 final; Proposal for a green claims directive, COM (2023) 166 final.

composition, how it has been manufactured, how it can be disposed of and the reduction in energy or pollution expected from its use)³³ – are deceptive.³⁴

Misleading environmental claims are particularly harmful, (i) for consumers, (ii) for competitors, and (iii) for the environment. Consumer detriment is caused by sub-optimal choices; as consumers might choose a product over other alternatives (that are in reality no less environmentally friendly than that product) based on misleading claims, sometimes paying a premium in order to buy a supposedly more environmentally friendly product.³⁵ Competitors who play by the rules suffer from a competitive disadvantage compared to businesses making misleading environmental claims, in particular where those competitors themselves offer and correctly market truly sustainable products. Misleading claims, according to the European Commission Impact Assessment, also lead to undesired environmental impacts (i.e., the difference between the environmental impact of the purchased product based on misleading claims and the environmental impact of the product that would have been purchased in the absence of greenwashing).³⁶

2.2 General environmental impact of the sale of mineral water bottled in plastics

There is no doubt that bottled water has an important negative environmental impact and that this negative impact is much greater for bottled water than for tap water. The pro capita consumption of bottled water is however still increasing and the bottled water industry is the fastest-growing sector of the packaged beverage industry.³⁷ This section summarizes recent academic research that provides an overview of the negative environmental impacts of bottled water. This analysis is important for the below-described in-depth legal analysis.

In 2022, the average consumption of bottled water in Europe was 121 liters per capita. 64 percent of the bottles consumed contained still water. The question arises as to why so many people keep on preferring bottled water over tap water. Research showed that consumers have several different reasons.³⁸ Some consumers reference bottled water as a symbol of status and a modern lifestyle. For others, bottled water is tastier, handier, and more convenient. Finally, a share of consumers believe that bottled water is the only source of clean water,³⁹ notwithstanding the strict quality regulation⁴⁰

³³ Commission Guidance UCPD, point 4.1.1.

³⁴ See e.g. the 2021 sweep, Press release of 28 January 2021, Screening of websites for ‘greenwashing’: half of green claims lack evidence, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269.

³⁵ Impact Assessment Report Accompanying the document Proposal for a Directive 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, p. 152

³⁶ Impact Assessment Report Accompanying the document Proposal for a Directive 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, p. 152.

³⁷ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>.

³⁸ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>.

³⁹ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>; DBK Admin, ‘Bottled Water Loses to Tap in Taste Test’ https://dbknews.com/2010/11/09/article_307d7d40-46_fe-5816-a16e-f38dbc54df62-html/; Statista, ‘Leading Reasons Consumers Drink Bottled Water in the United States as of November 2019’ <https://www.statista.com/statistics/1178166/bottled-water-reasons-for-consumption-us/>; A. Ragusa and A. Crampton, ‘To Buy or Not to Buy? Perceptions of Bottled Drinking Water in Australia and New Zealand’ *Hum. Ecol.* 2016, 44, 565–576. <https://link.springer.com/article/10.1007/s10745-016-9845-6>.

⁴⁰ Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption, OJ 23.12.2020.

and the fact that tap water can generally be considered of high quality in the EU.⁴¹

It is clear that tap water consumption has a much lower environmental impact than bottled water. The life cycle of bottled water is associated with numerous adverse effects, such as resource depletion, energy and water consumption, as well as the release of greenhouse gases and harmful substances. These negative impacts are evident **across all stages of the bottled water supply chain**, spanning from the manufacturing of the bottles to the extraction of water, bottling, packaging, transportation to consumers, disposal and recycling. Research shows that the **environmental footprint of bottled water is more significant across the board**.⁴²

More specifically, in contrast to tap water – distributed relatively energy-efficiently – the manufacturing of PET bottles, filling, packaging, transport, sorting, recovering, or recycling involves considerably **more energy**. A 2009 study calculated that the total energy consumed in the life cycle of PET bottled water was **2000 times** as much as that of tap water.⁴³ Linked to the consumption of energy / fossil fuel is the **emission of greenhouse gasses and other pollutants** to the atmosphere.⁴⁴

In addition, the **water footprint** (amount of fresh water consumed along the life cycle) is considerably higher than for tap water. The amount of water involved in the production may be 17 to 35 times greater than the water delivered to the consumer in the bottle.⁴⁵ For tap water, this was reported at 2.4 times greater than the tap water consumed.⁴⁶

Although the mass of an individually manufactured PET bottle was considerably reduced over the past decades due to technological developments, increasing consumption implies that plastic water bottles continue to contribute to the production of enormous and increasing amounts of **waste**.⁴⁷ Not all plastic is recycled. The 2022 OECD report puts the recycling rate of plastic waste (in general) for EU countries at (only) 14 %. Globally even as little as 9 % is recycled.⁴⁸ Many plastic bottles are incinerated

⁴¹ J. Tosun, U. Scherer, S. Schaub, Making Europe go from bottles to the tap: Political and societal attempts to induce behavioral change, 2020, <https://doi.org/10.1002/wat2.1435>.

⁴² Y. Parag, E. Elimelech, T. Opher, "Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity", *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>; G. Lagioia, G. Calabró and V. Amicarelli, 'Empirical Study of the Environmental Management of Italy's Drinking Water Supply' *Resour. Conserv. Recycl.* 2012, 60, 119–130 <https://www.sciencedirect.com/science/article/pii/S0921344911002461?via%3Dihub>; M. Garfí, E. Cadena, D. Sanchez-Ramos, I. Ferrer, 'Life Cycle Assessment of Drinking Water: Comparing Conventional Water Treatment, Reverse Osmosis and Mineral Water in Glass and Plastic Bottles' *J. Clean. Prod.* 2016, 137, 997–1003 <https://www.sciencedirect.com/science/article/pii/S0959652616311234?via%3Dihub>

⁴³ P.H. Gleick, H.S. Cooley, "Energy Implications of Bottled Water", *Environ. Res. Lett.* 2009, 4, 014009. <https://iopscience.iop.org/article/10.1088/1748-9326/4/1/014009/pdf>

⁴⁴ Y. Parag, E. Elimelech, T. Opher, "Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity", *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>. Point 4.2.2.

⁴⁵ Y. Parag, E. Elimelech, T. Opher, "Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity", *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>. Point 4.2.3.

⁴⁶ Y. Parag, E. Elimelech, T. Opher, "Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity", *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>. Point 4.2.3.

⁴⁷ Y. Parag, E. Elimelech, T. Opher, "Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity", *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760>. Point 4.2.4.; see also OECD 2022, "Plastic pollution is growing relentlessly as waste management and recycling fall short", <https://www.oecd.org/environment/plastic-pollution-is-growing-relentlessly-as-waste-management-and-recycling-fall-short.htm>.

⁴⁸ OECD 2022, "Plastic pollution is growing relentlessly as waste management and recycling fall short", <https://www.oecd.org/environment/plastic-pollution-is-growing-relentlessly-as-waste-management-and-recycling-fall-short.htm>

or end in landfill or nature.

Furthermore, recycling as a process, although preferable to incineration or landfill, is *not* environmentally neutral and still causes significant GhG emissions, it involves the use of energy and water and creates micro-plastics in wash water.⁴⁹

There is furthermore **no closed loop recycling** in the plastic beverage bottle industry. Closed loop recycling can be understood as the process in which post-consumer waste is collected and recycled preserving the value of the material so it can be used again to make the same product category it came from with minimal loss of quality or function.⁵⁰ It is clear that no such system currently exists in the EU. There are several reasons why closed loop recycling is currently nonexistent in the beverage bottle industry. Losses occur at each stage of the recycling process such that the recycling rate across Europe falls far short of 100% and is currently estimated at approximately 50% for the PET beverage bottle bodies.⁵¹ There is already considerable leakage at the collection stage. Only about 60 % of beverage bottles are collected for recycling.⁵² Furthermore, full circularity is not attainable due to the need to incorporate virgin inputs to rectify degradations in quality that occur across multiple use/recycling cycles.⁵³ Finally, currently less than a third of the PET body of the bottles is actually recycled back into products of the same type (beverage body bottles).⁵⁴ Sorted PET bottles are indeed increasingly used / **downcycled** into materials used in the non food sector (including the textile sector) that are no longer recyclable, neither for new non-food applications, nor for new bottles.⁵⁵ This is highly problematic as is explicitly acknowledged in the EU Strategy for Sustainable and Circular Textiles.⁵⁶

These data refer to the PET beverage bottle bodies. The Client Earth report points out that there is even less data available on the other components (caps, usually made from polypropylene (**PP**) or high-density polyethylene (**HDPE**) and labels, generally, from PP or low-density polyethylene (**LDPE**) or , less

⁴⁹ E. Brown, et al, "[The potential for a plastic recycling facility to release microplastic pollution and possible filtration remediation effectiveness](https://doi.org/10.1016/j.hazadv.2023.100309)", *Journal of Hazardous Materials Advances* – Volume 10, 100309, <https://doi.org/10.1016/j.hazadv.2023.100309>.

⁵⁰ See the position paper of AIJN, Natural Mineral Waters Europe, UNESDA, the Changing Markets Foundation and Zero Waste Europe, https://aijn.eu/files/attachments/5334/27_04_2022_Collection_Closed_Loop_recycling_Access_to_recycled_content_FIN_AL_Statement.pdf. Closed loop recycling is even defined more strictly in the proposal for a regulation on packaging waste (Annex to the proposal): (a) 'closed loop system' shall mean a system for re-use in which reusable packaging is circulated by a system operator or a co-operating group of system participants without the change of the ownership of packaging; (b) 'open loop system' shall mean a system for re-use in which reusable packaging circulates amongst unspecified number of system participants, and the ownership of the packaging changes at one or more points in the re-use process. Proposal for a Regulation on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, COM(2022) 677 final.

⁵¹ A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET », 2022, https://zerowasteurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, p. 8, calculated using the weight of PET material at the stage after wash and flake vs the weight of PET bottles (including caps, lids and labels) placed on the market.

⁵² A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET », 2022, https://zerowasteurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, p. 7.

⁵³ Client Earth Report. See also A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET », https://zerowasteurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, 44 p.

⁵⁴ A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET », 2022, https://zerowasteurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, p. 18: 'Bottle producers use an estimated 17% average recycled content in their production'.

⁵⁵ See policy report AIJN, Natural Mineral Waters Europe, UNESDA, the Changing Markets Foundation and Zero Waste Europe 2022, <https://aijn.eu/en/news/towards-a-policy-framework-that-enables-efficient-waste-collection-closed-loop-recycling-and-access-to-recycled-content>.

⁵⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0141>, at 2.5.

commonly, paper). Caps can be recycled if collected along with bottles; labels are much less likely to be recycled. In both cases, they will not be recycled back into caps and labels (i.e. beverage bottle components / food contact material) since this is currently not permitted under EU law ⁵⁷.

It follows that beverage bottle recycling is currently **neither closed-loop nor fully circular**. Recycling rates may be further improved but a 100% recycling rate or full circularity so that no virgin materials would need to be added - cannot be attained in practice even with substantial investments. This is particularly relevant in view of the claims that imply circularity, infinity or a closed loop (cf. section 3). Given the environmental impact of recycling and the inherent losses in the process, there is no doubt that recycling is at most a second best solution and that the focus should be on waste prevention and reduction instead of recycling, in accordance with the waste hierarchy.

Other environmental impacts of the water bottling industry include **damage to ecosystems** and a **reduction in biodiversity** through land use changes, the presence of microplastics and other pollutant emissions.⁵⁸ A modeling study that compared different options to meet the need for drinking water of Barcelona estimated relying entirely on bottled water would lead to approximately 1400 times more species lost per year compared to tap water.⁵⁹

Both tap water and bottled water were found to contain **microplastics**. However, bottled water is found to contain substantively higher amounts of microplastics than tap water.⁶⁰

Considering the described and important negative environmental impact, the bottled water industry can be considered a highly polluting sector, and this has clear consequences in terms of the potential misleading character of claims (section 2.3.1).

There is furthermore no doubt that in places where the quality of tap water is good – like in the European Union – tap water / reusable bottles is the far more sustainable option and also the cheaper option for consumers. It is therefore all the more important that consumers are correctly informed when choosing bottled water, especially in the EU where they have a choice between tap water and bottled water. The message conveyed by the “100% recycled” and “100% recyclable” claims at issue to consumers is not correct and creates an overall deceptive impression (see below, 3.1 and 3.2).

⁵⁷ Client Earth Report with reference to Commission Regulation (EU) 2022/1616 of 15 September 2022 on recycled plastic materials and articles intended to come into contact with foods, and repealing Regulation (EC) No 282/2008, OJ L 243, 20.9.2022. The Regulation sets out the standards applicable to the manufacturing process of plastic with recycled content to ensure that the decontamination process leads to the plastic being safe. The European Food Safety Authority (‘EFSA’) must assess recycling processes to verify that they are capable of producing safe plastics used for food contact. Currently, these standards are met for PET beverage bottle recycling, but for other plastics, like HDPE, the EFSA could not yet decide whether recycling processes are suitable, so recycled HDPE FCMs cannot be expected on the market, see Client Earth Report and https://food.ec.europa.eu/safety/chemical-safety/food-contact-materials/plastic-recycling_en.

⁵⁸ ⁵⁸ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760..> <https://doi.org/10.3390/su15129760>, Point 4.2.5.

⁵⁹ ⁵⁹ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760..> <https://doi.org/10.3390/su15129760>. Point 4.2.5., with reference to Villanueva, C.M.; Garfí, M.; Milà, C.; Olmos, S.; Ferrer, I.; Tonne, C. Health and Environmental Impacts of Drinking Water Choices in Barcelona, Spain: A Modelling Study. *Sci. Total Environ.* 2021, 795, 148884. <https://www.sciencedirect.com/science/article/pii/S0048969721039565>.

⁶⁰ ⁶⁰ Y. Parag, E. Elimelech, T. Opher, “Bottled Water: An Evidence-Based Overview of Economic Viability, Environmental Impact, and Social Equity”, *Sustainability* 2023, 15, 9760. <https://doi.org/10.3390/su15129760..> <https://doi.org/10.3390/su15129760>, Point 4.2.6.

2.3 Application of the UCPD to environmental claims: general principles

2.3.1 Misleading environmental claims

The application of the UCPD to environmental claims can be summarized as follows.⁶¹

Articles 6 and 7 UCPD imply in essence, according to the Commission UCPD Guidance, that environmental claims must be truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner, so that consumers are not misled.⁶²

Article 6(1) UCPD prohibits **misleading actions**: “A commercial practice is misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”.⁶³ The enumerated elements include: the **nature of the product**⁶⁴ and the **main characteristics of the product**⁶⁵, which also includes **whether the product, or its packaging, is recycled or recyclable**, and more generally also **the environmental impact of a product**.⁶⁶ Indeed, the material composition of a product is considered of essential importance to the market, as certain characteristics or effects are inferred from this information. Statements about the material quality that do not correspond to the truth are generally misleading.⁶⁷ Misleading statements about the composition of the product may not be used in advertising even if the advertised product ultimately has the quality expected by the consumer.⁶⁸

Misleading actions cover not only practices that contain “false information and is therefore untruthful”, but also practices that include factually correct information, if the **overall presentation** deceives or is likely to deceive the consumer.⁶⁹ The misleading character is indeed determined holistically and requires an analysis of how information is presented to consumers.⁷⁰ Also non-verbal elements (like symbols and visuals) can play an important role in how consumer interpret information.⁷¹ Indeed, as mentioned in the Commission Guidance, insights from behavioural economics show that not only the content of the information provided, but also **the way the information is presented can have a significant impact on how consumers respond** to it.⁷² For example, consumers may experience an “information overload”, in which an excessive amount of complex information exceeds their limited

⁶¹ See also Commission Guidance UCPD, point 4.1.1.2.

⁶² Commission Guidance UCPD, point 4.1.1.2.

⁶³ Art. 6(1) UCPD.

⁶⁴ Art. 6(1) a) UCPD.

⁶⁵ Art. 6(1)(b) UCPD. main characteristics defined in the UCPD as: “availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method [and date] of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product”.

⁶⁶ Commission Guidance UCPD, point 4.1.1.3.

⁶⁷ Köhler/Bornkamm/Feddersen/Bornkamm/Feddersen, 41. Aufl. 2023, UWG § 5 Rn. 2.9, 2.10 with reference to BGH GRUR 1960, 567 (570) - Kunstglas; BGH GRUR 1961, 361 (364) - Hautleim; BGH GRUR 1967, 600 (601) - Rhenodur I mAnm Droste; BGH GRUR 1969, 280 (282) - Scotch-Whisky; BGH GRUR 1991, 852 (855) - Aquavit).

⁶⁸ Köhler/Bornkamm/Feddersen/Bornkamm/Feddersen, 41. Aufl. 2023, UWG § 5 Rn. 2.9, 2.10 with reference to BGH GRUR 1960, 567 (570) - Kunstglas; BGH GRUR 1961, 361 (364) - Hautleim; BGH GRUR 1967, 600 (601) - Rhenodur I mAnm Droste; BGH GRUR 1969, 280 (282) - Scotch-Whisky; BGH GRUR 1991, 852 (855) - Aquavit).

⁶⁹ Commission Guidance UCPD, point 2.8.1.

⁷⁰ CJEU 26 October 2016, C-611/14, *Canal Digital Danmark*, ECLI:EU:C:2016:800.

⁷¹ CJEU 4 June 2015, C-195/14, *Teekanne*, ECLI:EU:C:2015:361.

⁷² Commission Guidance UCPD, Point 2.8.

cognitive capacity and results in more confusion and a less informed decision compared to a situation where less information would have been made available.⁷³ In addition, time constraints, actual complexity and uncertainty are all crucial factors that can influence the quality of individual decisions of consumers.⁷⁴

The fact that the overall presentation is crucial in determining the misleading character of a commercial practice, is specifically important for environmental claims, such as the “100% recycled” and “100% recyclable” claims at issue. *“Accordingly, also **the imagery and overall product presentation** (i.e. layout, choice of colours, images, pictures, sounds, symbols or labels), should be a **truthful and accurate representation of the scale of the environmental benefit**, and should **not overstate the benefit achieved**. Implicit claims may, depending on the circumstances of the case, include the use of **images** (e.g. trees, rainforests, water, animals) and **colours** (e.g. blue or green backgrounds or text) that are associated with environmental sustainability.”*⁷⁵ Moreover, environmental claims are likely to be misleading if they consist of vague and general statements of environmental benefits without appropriate substantiation of the benefit and without indication of the relevant aspect of the product the claim refers to.⁷⁶

Especially relevant for environment claims in general and for the specific claims at stake, is furthermore that environmental claims should relate to **aspects that are significant in terms of the product’s environmental impact over its lifecycle**; the product’s main environmental impacts over its lifecycle, including its supply chain, are relevant.⁷⁷ The Commission Guidance furthermore clarifies that highly polluting industries may be required, in order not to mislead, to make it clear to the consumer in their environmental claims that the product has an overall negative impact on the environment. They should ensure that their environmental claims are accurate in a sense of being relative, e.g. ‘less harmful for the environment’ instead of ‘environmentally friendly’. This enables the average consumer to better understand the relative impact of the product.⁷⁸

Claims should be clear and unambiguous regarding which aspect of the product or its life cycle they refer to. If a trader makes an environmental claim by highlighting just one of several impacts the product has on the environment, the claim could be misleading within the meaning of Article 6 or 7 of the UCPD. Furthermore, traders should not distort claims about the composition of the product (including raw materials), or, for example, its end-of-life impacts, for example by unduly emphasising the importance of positive aspects, which are in reality only marginal or whereas the overall environmental impact resulting from the product’s life cycle is negative.⁷⁹ Ambiguous statements are

⁷³ See E. Van Gool “‘Climate-washing’: B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving”, DCCR 2023, 1-60 and furthermore. N. Malhotra, “Information Load and Consumer Decision Making”, *Journal of Consumer Research* 1982, 419-430; B-K. Lee and W-N. Lee, “The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment”, *Psychology & Marketing* 2004, 159-183.

⁷⁴ See E. Van Gool “‘Climate-washing’: B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving”, DCCR 2023, 1-60 and. D. Kahneman, “Maps of Bounded Rationality: Psychology for Behavioral Economics”, *American Economic Review* 2003, (1449) 1467-1469; L. Reisch and M. Zhao, “Behavioural economics, consumer behaviour and consumer policy: state of the art”, *Behavioural Public Policy* 2017, (190) 198-200; G. Phillips-Wren and M. Adya, “Decision making under stress: the role of information overload, time pressure, complexity, and uncertainty”, *Journal of Decision Systems* 2020, 213-225.

⁷⁵ Commission Guidance UCPD, point 4.1.1.2.3.

⁷⁶ Commission Guidance UCPD, point 4.1.1.2.

⁷⁷ Commission Guidance UCPD, point 4.1.1.3 and 4.1.1.4.

⁷⁸ Commission Guidance UCPD, point 4.1.1.3.

⁷⁹ Commission Guidance UCPD, point 4.1.1.3.

misleading if they convey (at least) in one interpretation a statement to the public that is not accurate.⁸⁰ What matters for the prohibition of misleading omissions is which information an average, attentive, informed, and reasonable member of the relevant audience derives from the commercial practice.⁸¹ Indeed, also the national guidance is clear in the regard. Thus, the Dutch guidance of the ACM (2023) provides: *“Highlighting minor sustainability benefits when a product has a (significant) negative impact on humans, animals, and the environment can be misleading. **Companies in heavily polluting sectors (for example: clothing and fossil fuel industries) should exercise extra caution when using sustainability claims, as their products often have a (significant) negative impact on sustainability. A claim can easily become misleading in such cases.**”*⁸²

The Dutch ACM recently applied these principles to the aviation industry. The explanation of Edwin van Houten, Director of ACM’s Consumer Department, is very clear and relevant: *“Businesses must be honest and clear about the sustainability claims they make. Even with CO2-compensation schemes, flying remains a highly polluting way of traveling. Airlines may offer CO2 compensation schemes, but they cannot give the impression that CO2 compensation will make flying sustainable.”*⁸³ Exactly the same reasoning can be applied to the claims of the bottled water industry: *“Even with a recyclable/ recycled bottle, offering bottled water remains a highly polluting way of providing drinking water. Companies may offer water in recyclable or (partially) recycled bottles, but they cannot give the impression that recyclable or (partially) recycled bottles will make bottled water a sustainable choice”.*

In this area, Article 6(1) overlaps with Article 7(1) and (2) UCPD on **misleading omissions**. Article 7(1) prohibits any commercial practice, *“if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”*. Article 7(2) UCPD states: *“It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.”*

Articles 7(1) and (2) UCPD establish in very general terms a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision. This is what is called ‘material information’ in Article 7.⁸⁴ Not only omissions in the strict sense, but also providing material information ‘in an unclear, unintelligible, ambiguous or untimely manner’ is covered.⁸⁵

Green claims can be misleading if they consist of vague and general statements of environmental benefits. Environmental claims are less likely to be misleading under Article 7 UCPD if they are

⁸⁰ BGH GRUR 1969, 546 (548) – med; GRUR 2000, 436 (438) – Ehemalige Herstellerempfehlung; GRUR 2012, 1053 Rn. 17 – Marktführer Sport; Harte-Bavendamm/Henning-Bodewig/Dreyer, 5. Aufl. 2021, UWG § 5 Rn. 242-245

⁸¹ BGH GRUR 1969, 546 (548) – med; GRUR 2000, 436 (438) – Ehemalige Herstellerempfehlung; GRUR 2012, 1053 Rn. 17 – Marktführer Sport; Harte-Bavendamm/Henning-Bodewig/Dreyer, 5. Aufl. 2021, UWG § 5 Rn. 242-245

⁸² (own translation) [Leidraad Duurzaamheidsclaims versie 2, 2023 \(acm.nl\)](#), p. 11.

⁸³ [Ryanair clearer about CO2 compensation following ACM action | ACM.nl](#) (communication of 20 January 2023).

⁸⁴ Commission Guidance UCPD, point 2.9.1.

⁸⁵ Commission Guidance UCPD, point 2.9.3.

supplemented by prominent specifications or explanatory statements on the product's environmental impact, for example by limiting the claim to specific environmental benefits.⁸⁶

Under Article 7(3) UCPD, when assessing whether material information has been omitted, account should be taken of the **limits of space and time of the communication medium used** and of any measures taken by the trader to make the information available to consumers by other means.⁸⁷ In case environmental claims are made on the packaging of products, which may have limited space for specifications, supplementary information should not be provided in an unclear or ambiguous manner. The location of the main environmental claim and supplementary information about the claim should enable an average consumer to understand the link between both. **If there is no space to specify the environmental claim, then the claim should generally not be made.**⁸⁸ However, it should be recalled that, unlike Article 7(1) and (2), Article 6(1) UCPD contains no reference to limitations of space or time related to the communication medium used. Accordingly, it must be held that the constraints that may apply to the medium, such as packaging, cannot be taken into account when assessing whether a commercial practice is misleading under Article 6(1) UCPD.⁸⁹

The Commission UCPD Guidance rightly notes that environmental claims may suggest that a product has a more positive impact on the environment or is less damaging to the environment than competing products. Such (explicit or implicit) **comparative environmental claims** should be assessed against similar products (products within the same product category) and the same assessment method has to be applied in a consistent manner to allow for such a comparison. *“For example, depending on the products in question, comparative environmental claims are likely to be misleading if they exclude factors, such as transportation in particular where such factors contribute the most towards a product's environmental footprint.”*⁹⁰

2.3.2 Burden of proof

As mentioned above, substantiation is crucial for any environmental claim.⁹¹ The burden of proof regarding the accuracy of the environmental claim rests on the trader.⁹² It follows from Article 12 UCPD⁹³ that **traders must have the evidence to support their claims**, such as the “100% recycled” and “100% recyclable” claims at issue, and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged.⁹⁴ Traders should either have the evidence necessary to support their claims from the time the claims are put into use or be certain that it can be obtained

⁸⁶ Commission Guidance UCPD, point 4.1.1.4.

⁸⁷ Commission Guidance UCPD, point 2.9.4.

⁸⁸ Commission Guidance UCPD, point 4.1.1.4.

⁸⁹ CJEU 26 October 2016, C-611/14, *Canal Digital Danmark*, ECLI:EU:C:2016:800, para 42.

⁹⁰ Commission Guidance UCPD, point 4.1.1.5.

⁹¹ The proposal for a Directive on Green Claims by the European Commission puts substantiation even more on the forefront: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>.

⁹² Commission Guidance UCPD, point 4.1.1.5.

⁹³ *“Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11: (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; (b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.”*

⁹⁴ Commission Guidance UCPD, point 4.1.1.2.

and presented upon request; they should also make sure that documentation for claims is up to date for as long as the claims remain in use in marketing.⁹⁵

Claims should be based on robust, independent, verifiable and generally recognized evidence, which takes into account updated scientific findings and methods.⁹⁶ If expert studies give rise to significant disagreement or doubt over environmental impacts, the trader should refrain from the claim altogether.⁹⁷

2.3.3 Contrary to professional diligence: 'unfair' green claims

Environmental claims can also constitute unfair commercial practices within the meaning of Article 5(2) UCPD, if they are contrary to the requirements of professional diligence and if they are likely to materially distort the economic behaviour of the average consumer.⁹⁸ The general clause of Article 5(2) UCPD works as a safety net and can capture unfair practices which are not specifically prohibited by other provisions of the UCPD.⁹⁹

“Professional diligence” as defined by Article 2(h) UCPD means “*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity*”. The concept encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as ‘honest market practice’, ‘good faith’ and ‘good market practice’. These principles emphasise normative values that apply in the specific field of business activity. It may include principles derived from national and international standards and codes of conduct.¹⁰⁰

The UCPD Guidance further clarifies that “professional diligence” may require that certification schemes that traders use to promote the environmental virtues of their products adhere to such standards and provide substantial benefits to consumers and that they are independently controlled and audited. Practices contrary to professional diligence will be unfair if they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise, such as purchasing a specific product as a result of the expected benefits derived from the claimed adherence to a certification scheme.¹⁰¹

2.3.4 Potential substantial impact on the economic behaviour of the average consumer

For a practice to be prohibited by Articles 6 or 7, or alternatively Article 5(2), of the UCPD, it is not only required that a practice is misleading or contrary to professional diligence, but also that the practice is **capable of distorting the economic behavior of the average consumer, thereby causing or being likely**

⁹⁵ Commission Guidance UCPD, point 4.1.1.5.

⁹⁶ Commission Guidance UCPD, point 4.1.1.5.

⁹⁷ Commission Guidance UCPD, point 4.1.1.5. The Commission Guidance refers to the following, particularly relevant example: “A mineral water company presented its products with the claim ‘Zero Impact’, stating that the manufacture and sale of the bottles of water had no impact whatsoever on the environment. However, the company could not demonstrate that it was involved in specific activities reducing the environmental impact of its products, other than participating in a project to compensate environmental damage. On this basis, the national consumer enforcement authority concluded that the ‘Zero Impact’ campaign constituted an unfair commercial practice capable of influencing consumers’ transactional decisions.” See Decision by the Italian Competition Authority, 8 February 2012, ref. PS7235.

⁹⁸ Commission Guidance UCPD, point 4.1.1.2.

⁹⁹ Commission Guidance UCPD, point 4.1.1.2.

¹⁰⁰ Commission Guidance UCPD, point 2.7.

¹⁰¹ Commission Guidance UCPD, point 4.1.1.2.

to cause the consumer to take a transactional decision he would not have taken otherwise.¹⁰² The capability to distort the economic behavior can be assumed if the commercial practice is capable of deterring the average consumer from weighing up the advantages and disadvantages of a transactional decision and, on that basis, from making a decision that is useful to him.¹⁰³

Transactional decisions within the meaning of Article 2(k) UCPD are to be **interpreted broadly**: they include actions without legal consequences in national contract law and encompass pre- and post-purchase decisions.¹⁰⁴ This broad definition was clearly established by the CJEU.¹⁰⁵ A transactional covers “*not only the decision whether or not to purchase a product, but also the decision directly related to that decision*”, such as the decision whether or not to enter the shop¹⁰⁶, but also post-purchase decisions,¹⁰⁷ or decisions not to switch to another product.¹⁰⁸ As regards “100% recycled” or “100% recyclable” claims, also decisions not to switch to tap water would for example be covered by the notion of transactional decision.

It is important to recall that the behaviour of the consumer must not be shown to have actually been distorted. It suffices that a commercial practice is **capable to have an impact** on a transactional decision of the average consumer.¹⁰⁹ The benchmark for assessing the impact of a commercial practice is the ‘average consumer’. This is not a statistical test,¹¹⁰ but a normative test, whereby courts should take into account the ‘presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect’.¹¹¹

When assessing the **impact of environmental claims** on the average consumer, several elements make clear that **such claims are indeed likely to affect the behaviour of the average consumer**. Several studies confirm the importance of the environment for consumers in general and the increasing importance of the environment in the purchasing behavior.¹¹² A recent Eurobarometer shows that almost three quarters of respondents think they should do more than they currently do to contribute to the green transition.¹¹³ There is furthermore evidence of consumer’s willingness to buy environmentally friendly packaging¹¹⁴ as well as evidence of consumers’ willingness to pay (WTP) or

¹⁰² Commission Guidance UCPD, at 2.4.

¹⁰³ Harte-Bavendamm/Henning-Bodewig/Keller, 5. Aufl. 2021, UWG § 2 Rn. 210; with reference to *Köhler WRP* 2014, 259 Rn. 17 ff.; *Köhler/Bornkamm/Feddersen*, § 2 Rn. 146.

¹⁰⁴ Commission Guidance UCPD, at 2.4.

¹⁰⁵ CJEU 19 December 2013, C-281/12 *Trento Sviluppo*, para. 36.

¹⁰⁶ CJEU 19 December 2013, C-281/12 *Trento Sviluppo*, para. 36.

¹⁰⁷ Commission Guidance UCPD, at 2.4.

¹⁰⁸ Commission Guidance UCPD, at 2.4.

¹⁰⁹ Commission Guidance UCPD, at 2.4.

¹¹⁰ Recital 18 UCPD.

¹¹¹ Case C-210/96, *Gut Springenheide and Tusky*, 16 July 1998, para 31.

¹¹² V. Wells, C. Ponting and K. Peattie, “Behaviour and climate change: Consumer perceptions of responsibility”, *Journal of Marketing Management* 2011, 808-833; IPSOS, “Climate Change and Consumer Behavior”, 2019, <www.ipsos.com/sites/default/files/ct/news/documents/2020-01/global-advisor-climate-change-consumer-behavior.pdf> 2-4.; CARBON TRUST, “Product carbon footprint labelling: Consumer research 2020”, 2020, www.carbontrust.com/our-work-and-impact/guides-reports-and-tools/product-carbon-footprint-labelling-consumer-research; First insight; ‘The sustainability disconnect between consumers & retail executives’ www.firstinsight.com/white-papers-posts/the-sustainability-disconnect-between-consumers-and-retail-executives.

¹¹³ “Special Eurobarometer 527: Fairness perceptions of the green transition”, 2022, <europa.eu/eurobarometer/api/deliverable/download/file?deliverableid=84755> (accessed 7/8/2023) 8

¹¹⁴ M. Ketelsen et al. / *Journal of Cleaner Production* 254 (2020) 120123, p. 11, <https://doi.org/10.1016/j.resconrec.2022.106219>; .

intention to pay a price premium for environmentally-friendly packaging.¹¹⁵

A Mc Kinsey – NielsenIQ study of February 2023 is very clear: “consumers care about sustainability and back it up with their wallets”. The study of sales data,¹¹⁶ including food and beverage products, found that consumers are shifting their spending toward products with ESG related claims. Products making such claims averaged 28 % cumulative growth over the past 5 y – versus 20 % for products with no such claims.¹¹⁷

3. The illegality of the “100 % recycled” / “100 % recyclable” claims

3.1 “100% recycled” claims are misleading within the meaning of Article 6(1) and 7(1)-(2) UCPD

The claims on water bottles that they are “100% recycled” can be considered misleading insofar as they provide factually incorrect information on one of the main characteristics of the product (the nature of the packaging); in addition such claims can be misleading in providing an overall deceptive impression on the actual environmental impact of bottled water and the actual environmental benefit of the use of recycled materials.

3.1.1 Factually incorrect information on recycled nature of packaging

Insofar as the **cap and label are not made of 100 % recycled plastics and only the body of the bottle is made of 100 % recycled plastics**, “100% recycled” claims are factually incorrect and therefore misleading. An asterisk and/or smaller print indicating that the cap and label are excluded from the 100 % recycled claim does not alter this analysis, as these clarifications are clearly less prominent and visible than the “100%” claim as such. As mentioned, the overall presentation and impression determines whether a claim is deceiving or likely to deceive the consumer.¹¹⁸

It is perfectly possible to indicate the correct percentage of recycled material used in the packaging and to omit the misleading round number. This is the more important as consumers are particularly sensitive to ‘round’ numbers, such as a “100 %” score, as such a score is clear and conveys a simple message that does not incite questions on their part.¹¹⁹

There are several decisions in the Member States stating that a claim that a bottle is “100 % recycled” when this does not apply to all parts of the bottle is misleading. For example, the Dutch “Reclame Code Commissie” upheld a claim against a Coca-Cola ad showing a bottle with the claim “100 % made of recycled plastic from bottle to bottle” (own translation).¹²⁰ The claim was held too absolute as the bottle and cap were not made from recycled plastic: “Due to the absolute nature of the claim, the average consumer will interpret the statement to mean that the bottle is made from 100% recycled plastic, with no exceptions. However, there is an exception for the cap and label (own translation).” The

¹¹⁵ M. Ketelsen et al. / Journal of Cleaner Production 254 (2020) 120123, p. 11, <https://doi.org/10.1016/j.resconrec.2022.106219>.

¹¹⁶ Analysis of 5 years of US sales data from 2017- 2022.

¹¹⁷ McKinsey, Nielsen, joint study 2023, “Consumers care about sustainability – and back it up with their wallets”, 13 p., <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets#/>, accessed 10 August 2023.

¹¹⁸ Commission Guidance UCPD, point 2.8.1.

¹¹⁹ See the French study on the perception of consumer of environmentally responsible packaging– CITEO ETUDE SHOPPER 2018 final.pdf, p. 8.

¹²⁰ Reclame Code Commissie 2021/00421: Coca Cola 12 October 2021, <https://www.reclamecode.nl/uitspraken/recycle/voeding-en-drank-2021-00421/330913/>

small print was not considered sufficient to counter misleading character of the claim: *“The fact that it is indicated in very small (complainant refers to this as “minuscule”) letters that the cap and label are not “100% made from recycled plastic” does not change this. The claim is still too absolute and the exception (reference to it) is too unclear.”*

Similarly, the Advertising Standards Authority in the UK considered the claim “100 % recycled*”, alongside images of the bottle with label and cap, to be misleading.¹²¹ The ASA considered consumers would understand all components to be made entirely from recycled materials. The qualification (in small print and in the corner of the ad) was not considered sufficient to counter the overall impression. The ASA confirmed the misleading character of a similar claim by Aqua Pura, that stated “100% recycled & recyclable bottle with eco-friendly cap*”.¹²² The asterisk linked to text on screen that said “* relates to 500ml bottles only”. The ASA demanded the trader not to use the claim “100% recycled bottle” unless all the components of the bottle were recycled.

Of course, “100% recycled” claims are ***a fortiori* misleading, if the trader cannot even substantiate that the body of the bottle is effectively made of recycled plastics.** Such claims too are factually incorrect and therefore misleading. As a matter of fact, it follows from the responses of some of the companies contacted by BEUC that in some cases the body of the bottle was not made from 100 % recycled PET, but that pre-consumer plastic scraps had been incorporated during the production process. These are virgin plastics that have not been used before. This is not how an average consumer interprets the word “recycled”. The average consumer assumes that recycled refers to materials that have previously completed their own life cycle.

The Guidance on green claims of the Hungarian competition authority is clear in this regard: *“Consumers interpret the word ‘recycled’ as meaning that the product was made of another product or products which have previously completed their own life cycle. If a new product is manufactured using scraps resulting from the manufacturing process of another product, this does not constitute recycling. Therefore, it is recommended to describe a product (or a part thereof) as recycled only if the product would have ended up as waste if not for the recycling process.”*¹²³

This is also the approach taken by the EU institutions. Thus, the draft implementing decision of the Single Use Plastics Directive¹²⁴ explicitly defines ‘recycled plastic’ as ‘plastic which was post-consumer plastic waste before recycling as defined in Article 3(17) of Directive 2008/98/EC and which has been produced by recycling’.¹²⁵ Recycled plastic is clearly limited to post consumer plastic.

¹²¹ Advertising Standards Authority A21-1120048 Pepsi Lipton International 19 January 2022, <https://www.asa.org.uk/rulings/pepsi-lipton-international-a21-1120048-pepsi-lipton-international.html>.

¹²² Advertising Standards Authority G21-1120958 Roxane: UK Ltd Aqua Pura 14 June 2023, <https://www.asa.org.uk/rulings/roxane-uk-ltd-g21-1120958-roxane-uk-ltd.html>.

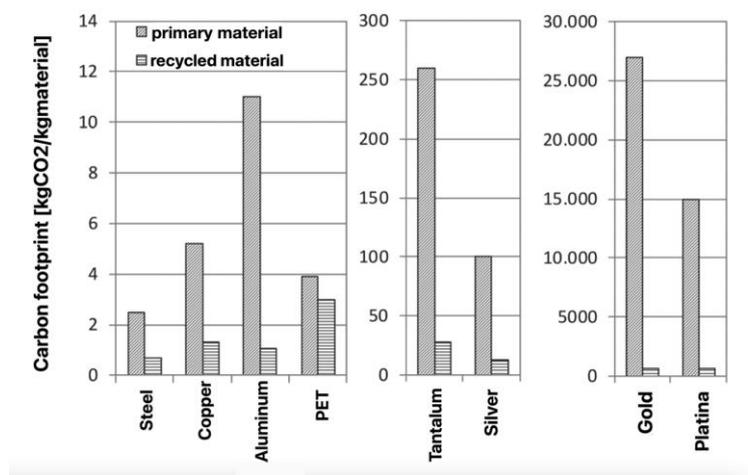
¹²³ Green marketing – Guidance for undertakings from the Hungarian Competition Authority’ https://www.gvh.hu/pfile/file?path=/en/for_professional_users/guidance-documents/szakmai_felhaszn_tajekoztatok_zold-iranymutas_2020_a&inline=true.

¹²⁴ Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019.

Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019. as regards the calculation verification and reporting of data on recycled plastic content in single-use plastic beverage bottles

3.1.2 Creating an overall deceptive impression of the environmental impact of the use of “100% recycled” packaging

“100% recycled” claims are furthermore also deceptive in combination with ‘circular’ or ‘green’ imagery or generic sustainability statements, because they create a false overall impression concerning the environmental benefit of the use of recycled material and of the general environmental impact of water sold in plastic bottles. More specifically, such claims may convey a misleading message of a closed loop and of an environmental advantage of a product that has a much higher impact than its alternative: tap water. For example, in terms of carbon emission, there is only a limited difference in the production of virgin PET compared to recycled PET (see more in detail, section 2.2 and section 4):



K. Van Acker, Table 10: the difference in CO2 emissions of the production of raw material vs recycled material in *Wat met recyclage* p. 50, <https://www.kuleuven.be/metaforum/downloads/bw-wat-met-recyclage.pdf> (own translation)

As mentioned (section 2.3.1), traders in highly polluting industries should exercise additional caution when making sustainability claims and may be required to provide additional information. The Commission Guidance is very clear in this regard, traders should not distort claims about the composition of the product (including raw materials), [...], which are in reality only marginal or whereas the overall environmental impact resulting from the product’s life cycle is negative.¹²⁶ Claiming an absolute environmental benefit without clarifying the overall negative impact of the bottled water on the environment, can therefore be considered misleading and capable of distorting the behavior of the average consumer. The relative character of the environmental benefit is not sufficiently clear.

3.2 “100% recyclable” claims are misleading within the meaning of Article 6(1) and 7(1)-(2) UCPD

Recyclability is currently not defined in EU law. However, Article 6(2) of the draft Regulation on packaging and packaging waste provides: *“Packaging shall be considered recyclable where it complies with the following: (a) it is designed for recycling, (b) it is effectively and efficiently separately collected, (c) it is sorted into defined waste streams without affecting the recyclability of other waste streams, (d) it can be recycled so that the resulting secondary raw materials are of sufficient quality to substitute*

¹²⁶ Commission Guidance UCPD, point 4.1.1.3.

the primary raw materials, (e) it can be recycled at scale".¹²⁷ ISO norm 14021 states that "recyclability" is: "The characteristic of a product, packaging, or associated component that can be extracted from the waste stream through available processes and programs, and that can be collected, processed, and reused in the form of raw materials or products".¹²⁸

Making claims on "recyclability", which merely represents a **limited and relative environmental benefit** (as compared to incineration or landfill or the use of virgin materials) and in addition a **theoretical environmental benefit that depends on the actions of the consumer and the waste management system**, requires particular attention of traders in order to avoid deception of consumers. Admittedly, it is important that the message that a packaging can be recycled is correctly conveyed, so that the packaging is sorted through the appropriate local waste management system. However, that information should aim to give consumers instructions to recycle correctly and not be a marketing instrument that conveys the deceptive message that recyclable bottles are a sustainable way to drink water.

The need to convey a message that a package should be sorted through the appropriate waste management system, does not allow traders to deceive consumers. In conveying the message that a packaging *can* be recycled, traders should refrain from conveying the misleading message that "recyclable" water bottles are bottles that *will* be effectively recycled (in new water bottles), provided that they are disposed off correctly by the consumer. They should also refrain from conveying the message that buying a "recyclable" bottle of water is an act with a positive or no environmental impact.

It is submitted that the claim on water bottles that they are "100% recyclable" does indeed convey such a misleading message, certainly in combination with 'circular imagery' or generic sustainability statements. It creates the false impression of a closed loop as well as the false impression that a 100 % recyclability rate can be achieved. It furthermore creates the false impression of an absolute environmental benefit.

The "100% recyclable" claims, especially where accompanied by 'circular imagery', falsely suggest that bottles are recycled into other bottles in a closed loop and fully circular manner. Furthermore, such absolute claims give consumers the misleading impression that these bottles will unfailingly undergo effective recycling, which is contingent on various factors in the recycling chain. Lastly, these absolute claims are fundamentally at odds with the substantial negative environmental footprint of the water bottling industry as a whole (cf. section 2.2). These claims can therefore be considered contrary to Article 6(1) and 7(1)-(2) UCPD as they provide misleading information and fail to provide material information allowing the average consumer to correctly assess the environmental impact of bottled water.

3.2.1 False impression of a closed loop and a 100 % recyclability rate

Packaging is either recyclable or not. The addition that packaging is "100 %" recyclable gives the claim an absolute character and suggests a closed loop system that does not exist (cf. section 2.2).

Caps, labels, glue – if recycled at all – are not recycled back into caps and labels for beverage bottles

¹²⁷ Proposal for a Regulation on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, COM/2022/677 final.

¹²⁸ <https://www.iso.org/standard/66652.html>

but are at most ‘downcycled’ into applications that cannot necessarily be recycled themselves.¹²⁹ Absolute “100% recyclable” claims are also misleading even if limited to the body of the bottle, because **the body is also not recyclable at a 100% rate**. As mentioned, losses occur at each stage of the recycling process such that **the recycling rate across Europe falls far short of 100%** and full circularity is furthermore not attainable due to the need to incorporate virgin inputs to rectify degradations in quality that occur across multiple use/recycling cycles.¹³⁰ Less than a third of the PET body of the bottles is actually recycled back into products of the same type (beverage body bottles). More commonly, recycled PET derived from bottle bodies is recycled into applications that cannot then be recycled themselves (e.g. textiles).¹³¹ It follows that **“100% recyclable” claims, even if limited to the body of the bottle, are misleading, certainly in combination with ‘circular imagery’, because such a percentage is not attained, and more importantly, cannot be attained in practice.**

The Guidance on green claims of the Hungarian competition authority is clear in this regard: *“If an undertaking refers to the recycled nature of a product, it is important to let consumers know whether the packaging, certain parts, the whole product or both the product and the packaging were manufactured using recycled materials. In addition, the proportion in which the product or the packaging contains recycled material is also advised to indicate in the communication. Example: It may be misleading to claim that the box of a soft drink is 100% recyclable if this is not true for the cap or the label.”*¹³²

The Guidance of the French National Council on Packaging 2021 explicitly warns against the use of “100% recyclable” claims: *“Do not use the notion of percentage (especially 100%) attached to the term “recyclable” because the packaging is or is not recyclable. In addition, because of the presence of printing inks, glues, etc. and related elements: labels, handles, caps, etc. this rate of 100% is not achievable, therefore, indicating “100% recyclable” may constitute a **misleading claim** within the meaning of the Consumer Code (Article L121-2 and following).”*¹³³ The “Guide de la communication responsable” by CITEO – a company ‘à mission’ set up by companies in the retail sector to reduce the environmental impact of their packaging and paper, by offering them solutions for reducing, reusing, sorting and recycling¹³⁴ – is also clear: *“Packaging is rarely (if ever) fully recyclable. The presence of associated components, glues or inks that will not be recycled during the process, often prevents this 100% rate from being achieved. **Therefore, indicating “100% recyclable” about a packaging could constitute a misleading claim within the meaning of the French Consumer Code (art. L.121-1 et seq.).***

¹²⁹ See section 2.2.

¹³⁰ Client Earth Report. See also A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET” 2020, https://zerowasteeurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, 44 p.

¹³¹ Client Earth Report; See also A. Grant, V. Lahme, T. Connock, L. Lugal, « How circular is PET” 2020, https://zerowasteeurope.eu/wp-content/uploads/2022/02/HICIP_V13-1.pdf, 44 p.

¹³² Green marketing – Guidance for undertakings from the Hungarian Competition Authority/ https://www.gvh.hu/pfile/file?path=/en/for_professional_users/guidance-documents/szakmai_felhaszn_tajekoztatok_zold-iranymutatas_2020_a&inline=true.

¹³³ Translation of : « Ne pas utiliser la notion de pourcentage (notamment 100%) accolé au terme « recyclable » car l’emballage est ou n’est pas recyclable. Par ailleurs, du fait de la présence des encres d’impression, des colles, etc. et d’éléments associés : étiquettes, poignées, bouchons, etc. ce taux de 100 % n’est pas atteignable, en conséquence, indiquer «100% recyclable » peut constituer une allégation trompeuse au sens du Code de la consommation (article L121-2 et suivant). », [CNE-Document-allegations-environnementales-relatives-aux-emballages-de-produits-mars-2021.pdf \(conseil-emballage.org\)](https://www.conseil-emballage.org), p. 24 (accessed 14 August 2023).

¹³⁴ Citeo est une entreprise à mission créée par les entreprises du secteur de la grande consommation et de la distribution pour réduire l’impact environnemental de leurs emballages et papiers, en leur proposant des solutions de réduction, de réemploi, de tri et de recyclage, [Nous connaître | CITEO](https://www.citeo.com), accessed 14 August 2023.

What's more, such a claim is de facto forbidden by [French] regulations [...], which restrict the possible mentions that can be used to communicate recyclability. Furthermore, packaging is either recyclable or not, in the eyes of consumers. The two claims enjoy an identical level of perception, and obtain similar comprehension, usefulness and confidence scores when shown separately.”¹³⁵

3.2.2 Creating an overall deceptive impression of the environmental benefit of the use of “100% recyclable” packaging

“100% recyclable” claims are furthermore also be considered misleading, especially in combination with ‘circular’ or ‘green’ imagery or generic environmental claims, because they can create a false impression concerning the environmental benefit of the use of recyclable material and of the overall environmental impact of water sold in plastic bottles.

The Dutch guidance of the ACM (2023) provides: *“Highlighting minor sustainability benefits when a product has a (significant) negative impact on humans, animals, and the environment can be misleading. Companies in heavily polluting sectors (for example: clothing and fossil fuel industries) should exercise extra caution when using sustainability claims, as their products often have a (significant) negative impact on sustainability. A claim can easily become misleading in such cases.”¹³⁶*

The “100 % recyclable” claim indeed highlights a mere theoretical and minor benefit of the packaging of a product and an industry with an important negative impact on sustainability (cf. section 2.2). The claim conveys a message of an ecological advantage of drinking water in a PET bottle which does not exist and can therefore be considered misleading. Drinking water from a “100 % recyclable” bottle does not make drinking bottled water a sustainable choice.

In this respect, there is a starting body of caselaw denouncing the usage of “100% recyclable” claims. The OLG Köln, decided that even if “recyclable” in its literal meaning does not say anything about whether the product at stake will effectively be recycled, but only refers to the theoretical possibility, it was considered misleading to use the term in combination with “environmentally friendly” as it suggest that the product will effectively be recycled.¹³⁷ Additionally, the regional Court of Düsseldorf found a claim that a ‘can is green’ and ‘infinitely recyclable’ was considered misleading, as it suggested

¹³⁵ [20230613 Guide Com Responsable CITEO.pdf \(dev-dropteam.com\)](#), p. 28 (accessed 14 Augustus 2023). *‘Un emballage est rarement (voire jamais) intégralement recyclable. La présence d’éléments associés, de colles ou d’encre qui ne seront pas recyclés au cours du processus, empêche souvent d’atteindre ce taux de 100 %. Aussi, indiquer « 100 % recyclable » à propos d’un emballage pourrait constituer une allégation trompeuse au sens du Code de la consommation (art. L.121-1 et suivants). De plus, cette allégation est de facto interdite par la réglementation [française] (cf. encadré), qui restreint les mentions possibles pour communiquer sur la recyclabilité. En outre, un emballage est recyclable ou ne l’est pas aux yeux des consommateurs. Les deux allégations bénéficient d’un niveau de perception identique et obtiennent des scores de compréhension, d’utilité et de confiance similaires lorsqu’elles leur sont montrées séparément’* (Etude « allégations sur l’emballage », Citeo/Action plus 2020)

¹³⁶ (own translation) [Leidraad Duurzaamheidsclaims versie 2, 2023 \(acm.nl\)](#), p. 11.

¹³⁷ OLG Köln, Beschluß vom 04-12-1992 - 6 U 75/92. „Zwar hat die Bekl. zu Recht darauf hingewiesen, daß der Begriff “recyclingfähig” von seiner wörtlichen Bedeutung nichts über die tatsächliche Verwendung des so angepriesenen Produktes, sondern nur etwas über dessen theoretische Fähigkeit, wiederverwert zu werden, aussagt; jedoch ist diese Aussage im Zusammenhang mit dem Begriff “umweltfreundlich” geeignet, dem flüchtigen Betrachter zu sugerieren, daß die benutzten Produkte auch der Wiederverwertung zugeführt werden. Zumindest wird ein nicht unerheblicher Teil der Verbraucher erwarten, daß es sich um Produkte handelt, die separat gesammelt werden, um wiederverwert werden zu können. Dies ist jedoch - wie dargelegt - nach dem unstreitigen Vorbringen der Parteien nicht der Fall“, Köhler/Bornkamm/Feddersen/Bornkamm/Feddersen, 41. Aufl. 2023, UWG § 5 Rn. 2.187, 2.188

an ecological advantage of the cans produced by the defendant, which could not be demonstrated.¹³⁸

3.3 “100% recycled” and “100% recyclable” claims are likely to have a substantial impact on the economic behaviour of the average consumer

When assessing the impact of environmental claims, such as the “100% recycled” or “100% recyclable” claims at issue, on the average consumer, several elements make clear that such claims about the recycled / recyclable nature of the packaging are indeed likely to affect the behaviour of the average consumer.

According to a 2020 Deloitte survey, **recycling and re-use** is a topic that consumers feel strongly about. Indeed, when questioned about topics that consumers feel most strongly about, ‘recycling and re-use/circular economy’ came out as the top category, with 64% ranking the issue in the top 3 of the issues they felt most strongly about.¹³⁹ Recycling and re-using materials also came out as top category of environmental issues whether the public feels most strongly the sector needs to do more. 77% of respondents expect CEO’s to do more on recycling and re-using materials for a circular economy.¹⁴⁰

The importance consumers attach to the **recyclability of packaging** was confirmed in a French 2018 study. 63% of surveyed French consumers spontaneously mention recyclability as the most important criterion for an environmentally friendly packaging.¹⁴¹ Particularly relevant is furthermore that “**100 % recyclable**” was considered *the* most important indicator of an environmentally friendly packaging. 97% of the French consumers surveyed found “100 % recyclable packaging” to indicate an environmentally friendly packaging when given the choice between different claims.¹⁴² The claim “**100% recyclable**” was also considered to provide **the highest incentive for a purchase**.¹⁴³ The study furthermore mentions that the survey indicates that consumers are **sensitive to ‘round’ numbers**, such as a “100%” score, as such a score is clear and conveys a simple message that does not incite questions on their part.¹⁴⁴ This findings were **confirmed and corroborated when the study was repeated in 2021**.¹⁴⁵ The importance of recyclability only increased in comparison with the 2018 study. Thus, 72 % of the French consumers surveyed now spontaneously mentions recyclability as a criterion to judge whether packaging is environmentally friendly.¹⁴⁶

It is clear that recycling is an issue that consumers consider important and that is therefore capable to impact their economic behaviour. In the context of the “100% recycled” and “100% recyclable” claims, it is beyond doubt that such incorrect or otherwise misleading information is likely to cause the average consumer to a transactional decision that he would not have taken otherwise, such as a decision not

¹³⁸ LG Düsseldorf, Urteil vom 25.4.2013 – 37 O 90/12, BeckRS 2013, 07356 – Die Dose ist grün

¹³⁹ <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-get-out-infront-final.pdf>, p. 11 (accessed 14 August 2023), p. 11.

¹⁴⁰ <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-get-out-infront-final.pdf>, (accessed 14 August 2023), p. 28..

¹⁴¹ A far higher score than the other criteria (spontaneously) mentioned: biodegradability (32%), cardboard packaging (26%), glass packaging (14%), limited packaging (13%), no additional packaging (9 %), https://bo.citeo.com/sites/default/files/2019-06/CITEO_ETUDE%20SHOPPER_2018_final.pdf, p. 6, accessed 14 August 2023.

¹⁴² Study on the perception of French consumers of responsible packaging, [CITEO_ETUDE SHOPPER_2018_final.pdf](https://bo.citeo.com/sites/default/files/2019-06/CITEO_ETUDE%20SHOPPER_2018_final.pdf), p. 8.

¹⁴³ [CITEO_ETUDE SHOPPER_2018_final.pdf](https://bo.citeo.com/sites/default/files/2019-06/CITEO_ETUDE%20SHOPPER_2018_final.pdf), p. 8.

¹⁴⁴ [CITEO_ETUDE SHOPPER_2018_final.pdf](https://bo.citeo.com/sites/default/files/2019-06/CITEO_ETUDE%20SHOPPER_2018_final.pdf), p. 8.

¹⁴⁵ https://bo.citeo.com/sites/default/files/2022-07/220705_2021_CITEO_ETUDE%20SHOPPER_20x26%20VDEF.pdf, the study involved a survey of 2300 consumers in store as well as 20 interviews (accessed 14 August 2023).

¹⁴⁶ https://bo.citeo.com/sites/default/files/2022-07/220705_2021_CITEO_ETUDE%20SHOPPER_20x26%20VDEF.pdf, p. 14 (accessed 14 August 2023).

to switch to tap water.

An important precedent in the field of claims with an environmental impact that confirms the broad interpretation of the possible impact on consumer behavior, is the decision of the Dutch Consumer and Market Authority ('CMA') in the VW case. VW had argued that this element of the test was not met as less than 2 % of consumers would make transactional decisions solely based on the environmental impact their vehicle would have. The Dutch CMA held that even if the environmental impact is not a leading cause for consumers when making a transactional decision, it still plays a role in the process of transaction decision-making.¹⁴⁷

4. The illegality of additional environmental claims: 'circular imagery' and/or 'green imagery'

As mentioned, the two above-mentioned types of recycling claims are often accompanied by 'circular imagery' on bottled water labels, i.e. arrows going round in an infinite circle. Moreover, these two types of recycling claims are often made in green font and/or accompanied by imagery in the colour green.

It does not come as a surprise that environmental claims are accompanied with extensive use of non-verbal stimuli, such as images and colours, often related to nature. Behavioural economics research clearly demonstrated the existence of the **"picture superiority effect": on average, images are remembered better than words.**¹⁴⁸ Where products and brands coincide with affective visual stimuli, consumers are influenced in their evaluation in a way that they typically cannot control despite their best efforts to correct for this influence.¹⁴⁹ In addition, specific research on greenwashing has shown that the use of images, colours, symbols and words evoking elements of nature can mislead consumers in their evaluation of the ecological character of a brand, especially if they have limited prior knowledge, and that providing raw figures on environmental performance is ineffective as a contradiction to remedy this deception.¹⁵⁰

In *Teekanne*, the Court held that in certain situations a correct and comprehensive list of ingredients cannot be sufficient to correct an erroneous or misleading impression resulting from other elements of the packaging, such as depictions, location, size, colour, font, language, syntax and punctuation.¹⁵¹ In doing so, the Court clearly does not simply make a purely textual assessment, but looks more broadly

¹⁴⁷ CMA ACM/17/003870, 18 October 2017, 87-88.

¹⁴⁸ See E. Van Gool, "'Climate-washing': B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving", DCCR 2023, 1-60; and more specific research on picture superiority: M. Hamilton and L. Geraci, "The Picture Superiority Effect in Conceptual Implicit Memory: A Conceptual Distinctiveness Hypothesis", *American Journal of Psychology* 2006, 1-20; W. Hockley, "The picture superiority effect in associative recognition", *Memory & Cognition* 2008, 1351-1359; T. Ensor, T. Bancroft and W. Hockley, "Listening to the picture-superiority effect: Evidence for the conceptual-distinctiveness account of picture superiority in recognition", *Experimental Psychology* 2019, 134-153.

¹⁴⁹ See E. Van Gool, "'Climate-washing': B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving", DCCR 2023, 1-60; M. Hütter and S. Sweldens, "Dissociating Controllable and Uncontrollable Effects of Affective Stimuli on Attitudes and Consumption", *Journal of Consumer Research* 2018, (320) 344,

https://www.researchgate.net/publication/321837479_Dissociating_Controllable_and_Uncontrollable_Effects_of_Affective_Stimuli_on_Attitudes_and_Consumption (accessed 14 August 2023).

¹⁵⁰ See E. Van Gool, "'Climate-washing': B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving", DCCR 2023, 1-60; B. Parguel, F. Benoit-Moreau and C. Russell, "Can evoking nature in advertising mislead consumers? The power of 'executional greenwashing'", *International Journal of Advertising* 2015, 107-134.

¹⁵¹ CJEU 4 June 2015, C-195/14, *Teekanne*, ECLI:EU:C:2015:361, para 40-43

and holistically at all elements, including non-verbal elements and unconscious psychological processes.¹⁵²

Such a holistic approach, as required by the UCPD,¹⁵³ that takes into account non verbal elements also leads to the conclusion that the “100% recycled” and “100% recyclable” claims, especially where accompanied by ‘circular/green imagery’, can be considered misleading. The claims suggests that bottles are recycled into other bottles in a closed loop and fully circular manner. This further contributes to the **deceptive overall impression of a neutral or even positive impact on the environment**. As mentioned, a closed-loop, fully circular recycling system for water bottles does not exist in practice and is not even possible in theory. Moreover, even if such a closed-loop, fully circular system could exist, the recycling process itself is *not* environmentally neutral and has significant impacts on the environment in terms of energy use, water use and pollution. By omitting relevant information regarding the overall impact of the production, distribution and disposal of bottled beverages – which is substantial, and goes beyond plastic-related impacts – these claims inaccurately imply that consumption of bottled water can be environmentally neutral/sustainable, or even in some cases, have a positive impact on the environment. Circular/green visuals provide a wrong impression of the sustainability benefit of PET water bottles and do therefore not comply with the UCPD.

This is also confirmed by national guidance documents. For example, the Guidance of the Dutch ACM provides: *“Rule of thumb 5: Make sure that visual claims and labels are useful to consumers, not confusing. Visual claims and labels can provide in a simple manner information about certain sustainability characteristics of products. However, visual claims and labels can also be confusing. [...] Visual claims must support your claim, and they cannot give a false impression of your product’s characteristics. There needs to be a direct and verifiable link between the illustration and the sustainability benefit. ...”*¹⁵⁴

And more specifically: *“5.1 Visual claims. When using visual claims, please keep in mind the following points for attention: Only use symbols, colors or pictures if these support your claim. **Make sure that your visual claims do not give the wrong impression of your product’s characteristics. Only use pictures of nature or other objects if there is a direct and verifiable link between the pictured object and the claimed sustainability benefit.** For example, research has shown that the use of the color green or the picture of a tree or leaf may wrongfully give the impression among consumers that a product has certain environmental benefits (even though it does not) or meets a label’s criteria [see for example E. van der Zee and A. Fischer, *Green Pictograms on EU Foods: A Legal Study Informed by Behavioral Science, Journal of Europe*]. Attention! **Visual claims can easily come across as absolute claims** (see rule of thumb 1).”*¹⁵⁵

The combination of the words (100 %) and visuals (images and colors) used (circular / green) indeed further contributes to the absolute character of the claims, thus creating an impression that the

¹⁵² E. Van Gool, “Climate-washing’: B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving”, DCCR 2023, 1-60; H. Schebesta and K. Purnhagen, “The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court’s Case Law? Reflections on Teekanne”, *European Law Review* 2016, (590) 594, P. Verbiest, “Arrest Canal Digital: naar een bescherming van de real life consument bij oneerlijke handelspraktijken?”, DCCR 2017, 54-71.

¹⁵³ See also Commission Guidance UCPD, Point 2.8.

¹⁵⁴ https://www.acm.nl/system/files/documents/guidelines-sustainability-claims_0.pdf, p. 4.

¹⁵⁵ https://www.acm.nl/system/files/documents/guidelines-sustainability-claims_0.pdf, p. 25.

consumption of water in PET bottles has sustainability benefits or does not have a negative effect on the environment,¹⁵⁶ which is clearly misleading.

Moreover, **even without the “100 %”, claims on the use of recycled content/recyclability combined with circular imagery / (green) colours implying sustainability benefits can still be considered to be misleading.** The visuals imply an absolute environmental benefit whereas such benefit is absent. Indeed, these characteristics at most provide a relative environmental benefit and extensive information would be required to correctly inform consumers.¹⁵⁷ Given the ‘picture superiority’ effect, providing detailed information on the limited and relative environmental benefit is unlikely to counterbalance the simple and positive environmental message conveyed by the circular/green imagery.¹⁵⁸ Indeed, as the ACM rightly stresses, visual claims are easily interpreted as absolute claims and in this case, no such absolute claims are possible given the (negative) environmental impact of the water bottling industry.

5. Main findings

There is no doubt that in places where the quality of tap water is good – like in the European Union – tap water / reusable bottles is the far more sustainable option and also the cheaper option for consumers. It is therefore all the more important that consumers are correctly informed when choosing bottled water where they have a choice between tap water and bottled water, like in the European Union. The message to consumers conveyed by the “100% recycled” and “100% recyclable” claims on water bottles is not correct and creates an overall deceptive impression.

Absolute / “100 %” claims on recycled content / recyclability in the water bottling industry can be considered misleading on the basis of the UCPD, either because they are factually incorrect and in any event because they create a misleading impression about the environmental impact of bottled water. This is *a fortiori* the case when such absolute claims are combined with circular / green imagery that implies a closed loop / a positive or no environmental impact. They can also be considered to mislead by omission as they fail to provide the material information consumers need to correctly assess the environmental impact of bottled water.

The use of circular / green imagery in combination with claims on recycled content / recyclability that omit the “100 %” can moreover also be considered misleading. Such visuals / imagery imply an absolute environmental benefit of the use of recycled / recyclable bottles that cannot be substantiated in the water bottling industry. The “picture superiority” effect makes it unlikely that the provision of

¹⁵⁶ https://www.acm.nl/system/files/documents/guidelines-sustainability-claims_0.pdf, p. 11.

¹⁵⁷ As explained in the Client Earth Report, information would be required on: *“the extent of the relative environmental benefit derived from using recycled plastic, which is less harmful for the environment than using virgin plastic but still results in significant environmental impacts overall and much greater and more harmful than those of drinking tap water, and/or; the extent of the relative environmental benefit of the PET element of the beverage bottle being recycled at end of life, which again, is less harmful for the environment than alternative methods of waste disposal such as incineration or landfill but still results in significant environmental impacts and is contingent on the bottle actually being recycled, which is far from guaranteed, and the overall environmental impact of bottled beverages, which is substantial and goes beyond the impacts of the plastic packaging.”*

¹⁵⁸ See E. Van Gool, *“Climate-washing’: B2C communicatie in de klimaatcrisis beoordeeld in het licht van oneerlijke handelspraktijken, soft law en nieuwe wetgeving”*, DCCR 2023, 1-60; and more specific research on picture superiority: M. Hamilton and L. Geraci, *“The Picture Superiority Effect in Conceptual Implicit Memory: A Conceptual Distinctiveness Hypothesis”*, *American Journal of Psychology* 2006, 1-20; W. Hockley, *“The picture superiority effect in associative recognition”*, *Memory & Cognition* 2008, 1351-1359; T. Ensor, T. Bancroft and W. Hockley, *“Listening to the picture-superiority effect: Evidence for the conceptual-distinctiveness account of picture superiority in recognition”*, *Experimental Psychology* 2019, 134-153.

detailed information on the limited and relative environmental benefit of such packaging counterbalances the misleading effect of the simple and positive environmental message conveyed by the circular/green imagery.

There is furthermore no doubt that misleading information on the recycled / recyclable nature of the packaging is capable of affecting the economic behaviour of the average consumer. There is ample evidence of the importance consumers attach to the environmental impact of packaging.

Given the fact that these claims are taking place in several Member States and harm the collective interests of consumers, they at least qualify as a widespread infringements under the CPC regulation and justify a coordinated action and a common position making clear that traders in the water bottling industry should abstain from misleading consumers about the environmental impact of bottled water and more specifically from the following claims:

- Recyclability claims implying a positive or neutral environmental impact or an absolute environmental advantage of the product, including “100% recyclable” claims. This does not cover instructions to correctly sort and dispose of the materials in the relevant market and waste management system.
- Recycled content claims that are not factually correct or imply a positive or neutral environmental impact or an absolute environmental advantage of the product. Where recycled content is included, the quantity should be indicated correctly, taking into account all components of the product. Imagery and visuals suggesting a closed loop, ‘bottle to bottle’, circular system should be avoided.
- Claims relating to recyclability / recycled content in combination with green / circular imagery / generic sustainability claims as such claims convey a message that plastic water bottles have no or a positive impact on the environment.