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The E in ESG: Beware Green Claims That Might Backfire

In Vivo's Rolling Series On Sustainability Addresses Greenwashing And How To Avoid It

by **Ashley Yeo**

Health care companies making carbon neutrality claims must tread a careful line while ensuring full accountability. CMS Vienna partner Gabriela Staber points to some of the risks businesses should be aware of when making sustainability claims.

Carbon neutrality activities and carbon offsetting claims are already a feature in many industries where they might be perceived by companies as a means of seeking a reputational boost or competitive advantage for their business and brands. But there are do's and don'ts for companies to be aware of.

Spurious claims made by companies outside the health care products industries, and the way these claims have been viewed and assessed by consumers and regulators, might offer salutary lessons for medtech and pharma businesses as they increase their participation in sustainability efforts within broader society goals on climate control.

The public's top three concerns about health care companies' activities in the debate around sustainability are specifically: their carbon emissions, high use of water during manufacturing operations and their generation of hazardous and non-hazardous waste.

That summary was given by CMS Vienna partner Gabriele Staber as she addressed CMS' Global Lifescience and Healthcare Forum 2022, in Brussels.

This ranking of concerns ties in neatly with companies' actual environmental performance activities, and where they are focusing their green efforts, said Staber, an attorney-at-

law specializing in intellectual property and unfair competition law. Her sector focus is on life sciences and health care, and technology, media and telecommunications.

Carbon Neutrality Is Aim No. 1

Pursuing carbon reduction and carbon neutrality objectives are companies' No. 1 sustainability drive, as disclosed by the companies themselves on their websites. Nevertheless, claims associated with green efforts must be targeted, trustworthy, transparent and justifiable if they are not to backfire and potentially give the claimer a massive setback in reputational terms.

The health care industry has so far not appeared on the radar of regulators or consumer organizations on the lookout for businesses making green claims that turn out to be misguided or questionable, Staber said. The finance and consumer products industries have been the subject of challenges to claims, and the energy sector, too, has provided both positive and negative examples:

Negative

The case of one company's offering to supply of climate-neutral gas, which turned out to be natural (not renewable) gas. The company's claim was backed by its agreement to pay for offsets in hydro-electricity generation. But its carbon emissions were not reduced, and gas deliveries increased.

In some countries, including Austria and Germany, advertising featuring carbon-neutral claims must also stipulate, if appropriate, that carbon offsetting measures that have been employed. This is to ensure clarity for the consumer.

Positive

The example of the Austrian federal government's pursuit of a target of completely decarbonizing its energy sector and the whole of its economic system by 2040. It has claimed that Vienna can become a solar-based city and has engaged in advertising based on these claims to the public.

These are aspirational claims that refer to future performance, Staber noted. They were backed up by a detailed report explaining how the aims would be achieved and how the plans would be funded. It is important that aspirational claims can be substantiated and are accompanied by a realistic and robust strategy, Staber said. The plans must also be funded adequately.

Setbacks as well as progress towards goals must be disclosed to avoid misleading the public. "These have to be communicated in a way that gets them noticed," Staber stressed.

EU Addresses Greenwashing In Green Deal

No universal standards currently exist to substantiate green claims or to regulate “greenwashing,” the process by which companies give a false impression of their environmental impact.

The term reportedly originated in the 1980s after US environmentalist Jay Westerveld observed that hotels had begun making the very public gesture of aligning themselves with the big picture of environmental protection by imploring guests to reuse their towels.

A more colorful definition of greenwashing, from UK company Enviral, is “the process whereby a business spends more time and money on marketing itself as being sustainable than on taking steps to actually minimize its carbon footprint.”

Consumer organizations describe this as disingenuous and a wilful distraction from the genuine environmental aims.

Under the [European Green Deal](#), presented in 2019, the EU has set out a number of commitments to tackle climate- and environmental-related challenges, and has pledged to mobilize industry to create a clean and circular economy.

The EU has set out two initiatives on substantiating green claims, one of which is a draft directive published in March 2022, “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.”

The directive must be adopted by member states and will come into force in 2025 or 2026. Under this directive, vague claims will be inadmissible and future environmental performance claims will need to be verified and independently monitored.

The second EU initiative will be a regulation on substantiating green claims. The regulation’s publication has been delayed, having most recently been due in July 2022. Its current status is “in preparation. The regulation should help commercial buyers and investors make more sustainable decisions and increase consumer confidence in green labels and information, says the EU.

“It is very risky to use vague claims that will be considered to be misleading if they cannot be substantiated”— Gabriela Staber

In sum, these actions underline the EU's plans to regulate green and aspirational claims more tightly in the future. Independent monitoring systems will be a requirement from 2025 if aspirational claims are used in the EU, Staber said, adding that more guidance is both expected and needed.

The range of EU legislation in progress and links can be seen from a recent Eurobarometer European Parliament [background document](#).

Global Green Updates

Many countries' regulators have issued guidelines on green claims. France has a strict law, decree No. 2022-539 (of 13 April 2022), on [rules regarding carbon offsetting](#) and carbon neutrality claims in advertising.

CMS last fall launched a [Green Globe](#) website that includes the latest developments on green claims using surveys of many jurisdictions. It reports on the three most encountered trends currently being observed across the globe in relation to greenwashing and sustainability claims, specifically:

- The issuance of guidelines detailing legislation already in place, coupled with the adoption of new, relevant legislation in countries where greenwashing and sustainability claims are not yet fully regulated;
- An evident increase in the level of scrutiny applied by government authorities to greenwashing and sustainability claims; and
- Growing consumer awareness of greenwashing and sustainability claims, and increased readiness by consumers to act.

Climate Neutrality Labels

Climate neutrality labels are very popular and have so far not been closely monitored regarding the ability or record of the product in question to facilitate carbon reduction. Companies seeking to use such labels are advised to do due diligence on certification providers, checking, among other things, for certification criteria.

EU rules on third-party verification will be part of the EU directive that is likely come into force in 2025 or 2026.

Staber emphasized that green claims are subject to increasingly strict assessment given that they appeal to the public on an emotional level. She said: "It is very risky to use vague claims that will be considered to be misleading if they cannot be substantiated."

“Only emissions that cannot be avoided should be compensated for by offsetting”

Lawsuits can be filed for damages or injunctions ruled. In some countries, the judgements can be published. Fines might be levied by regulators. Under EU Directive 2019/2161, the EU can impose a fine of 4% of a company's sales for misleading business practices.

Reputational Damage

Potential reputational damage is the big one, however. “You want to be seen as a green and sustainable company but being put on the spot by ‘greenwashing’ can be very counter-productive,” Stadler said.

To mitigating the risks, companies should ensure the claims they make are balanced and specific and contain additional information where required and/or advisable.

Similarly, in Staber's view, health care and life sciences companies should:

- Avoid excessive promises or self-attributing the description “environmentally friendly”;
- Admit to any negative impact of activities, in order to ensure transparency about unforeseen or unexpected consequences of a genuine attempt to improve sustainability;
- Ensure claims are substantiated; and
- Be specific in statements that claim benefits.

Best practice examples involve substantiation being secured prior to a claim being made and using reputable institutions to do the calculations that back up a claim.

Manufacturers are also advised by Staber to examine their own footprint – offsetting payments cannot be the sole basis of a carbon neutrality claim, she said. Only emissions that cannot be avoided should be compensated for by offsetting.

Previously in this ad hoc monthly series:

No. 5 (Also see "[*The E in ESG: Medtechs Are Getting To Grips With The ‘True Purpose’ Of Carbon*](#)")

[Zero](#)" - In Vivo, 25 Jan, 2023.)

No. 4 (Also see "[The E In ESG: An Opportunity For The Medtech Industry](#)" - In Vivo, 14 Dec, 2022.)

No. 3 (Also see "[The E In ESG: Does PVC Have A Future In Health Care's Circular Economy?](#)" - In Vivo, 11 Oct, 2022.)

No. 2 (Also see "[Putting The E In ESG: A Global Medtech's Approach To Meeting The Climate Challenge](#)" - In Vivo, 21 Sep, 2022.)

No. 1 (Also see "[Putting The E In ESG: The Provider's View Of Sustainability Compliance](#)" - In Vivo, 15 Sep, 2022.)