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Informational notice – requirements when using sustainability claims in the marketing of garments and clothing collections

1. Introduction and background

The Norwegian Consumer Authority (NCA) is responsible for monitoring the contractual terms and marketing practices used by businesses when dealing with consumers, in order to guard against breaches of the Marketing Control Act (the “Act”). We also monitor businesses to ensure compliance with the Consumer Purchases Cancellation Act, the Financial Contracts Act, and rules intended to protect consumers under various other statutes. For more information, see <https://www.forbrukertilsynet.no/english>.

During 2019, The NCA investigated the use of sustainability claims in the marketing of clothing and clothing chains. Our findings suggested a need to circulate this informational notice to large parts of the clothing sector, to give businesses in the sector the opportunity to familiarize themselves with the Consumer Authority’s findings and amend their marketing practices as necessary. See the attached list of recipients. Please note that we have not conducted a detailed assessment of the marketing practices of all recipients of this informational notice.

The Consumer Authority has observed that the clothing sector is increasingly emphasizing sustainability, i.e. ethical and environmental benefits, when marketing its products. The reasons are various. An ever-increasing number of businesses wish to be socially responsible and develop and sell more sustainable products. But the marketing claims being used are also a reaction to the fact that a section of consumers are particularly committed to issues relating to sustainability and wish to express their commitment through their retail choices. Since consumers increasingly wish to choose sustainable products, many actors in the clothing sector are responding through an increased use of sustainability claims in their marketing.

We welcome the eagerness of businesses to offer garments with such benefits, and for these benefits to be communicated to consumers through marketing. It is important, however, for

businesses not to use sustainability claims in ways that are inaccurate or misleading, and thus in contravention of the Marketing Control Act, for example by exaggerating a garment's environmental benefits.

The fashion industry is particularly damaging to the environment. In light of this fact, businesses within this sector must be especially cautious when using sustainability claims to avoid misleading consumers.

However, the Consumer Authority will have less cause to intervene if information about a product or activity is provided in a factual, neutral and objective manner, without placing particular emphasis on ethical or environmental factors. Consumer protection is not as relevant in such cases, because information provided in such a way is not as likely to mislead the consumer.

In this notice, we firstly (in Section 2) provide a brief summary of our position. In Section 3 we explain the relevance of the Marketing Control Act to this area. Finally, in Section 4 we give a more detailed account of our assessment of problems that we see recurring in the marketing practices of several businesses in the sector.

2. Summary:

In light of the explanation below, the Consumer Authority requests you to:

- ensure that clothing is not marketed using sustainability claims such as “environmentally friendly”, “green”, “ethical”, and “sustainable” unless such claims are accompanied by an explanation of the product's specific benefit(s).
- explain alleged environmental and ethical benefits as precisely as possible in marketing materials, and avoid giving a distorted picture of a product's ethical or environmental advantages by emphasizing unimportant aspects of a garment's overall environmental impact.
- ensure that claims about ethical and environmental benefits are not used unless the collection or garment in question is better than a significant proportion of similar products on the market when it comes to the alleged advantage.
- distinguish clearly between general information about your company's efforts to be sustainable, and specific information about the benefits of each individual garment or collection.
- when environmental and ethical labelling schemes are used in marketing, we ask that they are presented in a precise and restrained manner that does not exaggerate the environmental criteria that are required to use of the label concerned.
- when using membership of the Better Cotton Initiative in your marketing materials, make it clear that the garments themselves are not guaranteed to contain “better

cotton”, but rather that purchasers of such garments are supporting the production of “better cotton” in the future.

3. Misleading marketing – the legal position

The bullet points above have their legal basis in the Marketing Control Act. Section 6 of the Act, first paragraph, prohibits unfair commercial practices. Pursuant to Section 6, fourth paragraph, a commercial practice is always unfair if it is misleading under Section 7 or Section 8 of the Act.

The Act’s definition of a “commercial practice” is broad, and covers more than just marketing and advertising in the traditional sense, see Section 5, letter e. For example, a commercial communication that is intended to market a product will be regarded as a communication under the Act regardless of the form it takes (an example would be information provided by an online shop).¹

Pursuant to Section 7, a commercial practice is misleading if it contains false information and is therefore untruthful, or if it is otherwise likely to deceive consumers in relation to one or more specific elements, listed in letters a to h. However a practice is only regarded as misleading if it is likely to cause consumers to make economic decisions that they would not have made otherwise.

In connection with the marketing of ethical and environmental advantages, Section 7, letter b of the Act is particularly relevant. This provision refers to the main characteristics of the product, such as, for example, its benefits, specifications, accessories, usage or fitness for purpose, and so on.

The starting point for assessing whether marketing is misleading under Section 7 of the Act should be the overall impression that the marketing is likely to give to the average consumer. Accordingly, claims that are factually correct could be regarded as misleading in light of the context in which they are presented.

A commercial practice is also misleading if, in its specific context and pursuant to an overall evaluation, it omits or conceals material information that consumers require in the context of being able to make an informed economic decision, or if it presents such information in an unclear, unintelligible, ambiguous or unsuitable manner (see Section 8 of the Act).

Traders must ensure that consumers obtain a correct and complete impression of the product or service that is being offered. Consumers must not be misled into making economic decisions as a result of material information being either omitted or presented in an inappropriate manner that makes it easy for consumers to overlook.

In the assessment of whether information has been omitted, account must be taken of limitations of space or time in the medium used to communicate the commercial practice, and of any measures implemented by the trader to make the information available to consumers by other means (see Section 8, first paragraph, second sentence of the Act).

The prohibition of misleading marketing must be viewed in the context of the obligation to provide documentation pursuant to Section 3, second paragraph of the Act. The

¹ See Proposition to the Odelsting no. 55 (2007–2008) page 191 (notes to Section 5, letter e)

documentation must cover the whole claim in order to prevent the marketing from being regarded as misleading and in contravention of Section 7 of the Act. The documentation proving that the claims are accurate must be in the possession of the advertiser at the time that the marketing takes place, and it must include research conducted by independent bodies of professional experts to be sufficient.

4. Sustainability claims used in clothing-sector marketing

4.1 General sustainability claims

In 2019, the Consumer Authority has become aware of several marketing campaigns where traders have described their garments/collections using general terms such as “sustainable”, “environmentally friendly”, “ethical” and so on, without supplying any further explanation. Such terms are vague and undefined, and accordingly may easily be misunderstood by consumers. To some people these terms may suggest that the garment/collection has been produced using less-toxic chemicals, while to others they may mean that the manner of production has a lower carbon footprint. Some people may be particularly concerned about employees’ working conditions and will assume that these are covered by the claim. Such general claims will also be understood by many people to mean that a garment or a collection is better in all these areas than comparable products.

If such terms are used in marketing, without any additional explanation of the specific advantages of the products concerned, the marketing will often oversell the ethical or environmental benefits of a product, and accordingly be likely to give the consumer a misleading impression.

In order to avoid consumers being misled by marketing, it is essential to provide an explanation of the specific environmental benefits of the garment. This explanation must be presented in such a way that consumers read it in the context of the general claim. For example, if you claim that a collection is “more sustainable”, you must explain in the immediate proximity that it is “more sustainable” because the garments are made from recycled materials, if this is the basis for the claim.

In light of the above, we ask you to refrain from making general sustainability claims, such as “environmentally friendly”, “green”, “ethical”, and “sustainable” when marketing garments unless such claims are accompanied by an explanation of the product’s specific advantages(s).

4.2 Requirement to explain a product’s ethical or environmental benefits

As explained in point 4.1 above, marketing materials must explain the specific nature of a product’s ethical or environmental advantages. The more this explanation opens up for misinterpretation, the more likely it is that the marketing may mislead consumers. Accordingly we require such explanations to be as precise as possible.

For example, if a garment is now made of a less environmentally-damaging material than was the case before, and the company wishes to emphasize this when marketing the garment, it is not adequate to describe the garment as “now made of a less environmentally-

damaging material”. You must also inform the consumer what material is involved, how much of the garment is made from this material, and why this material is less environmentally damaging. All this information must be easily accessible and presented in a way that is easy for consumers to understand.

We understand that it could be appropriate to present the information using a “layering” strategy, so that a consumer does not get all the information at once, but rather is told where to find further information. It is thus of key importance for even the very first “layer” of information to be as precise as possible. For example, if a garment is made from 80 percent recycled materials, the most precise approach will be to provide this information upfront, and then provide a link to a webpage where the consumer can read more about the composition of the recycled material and why it has an environmental benefit.

If an entire collection consists of garments that are made from a number of different materials with environmental benefits, the Consumer Authority realizes that space considerations will make it inappropriate to list all the materials upfront when marketing the entire collection. In such a case it will be adequate to refer to the fact that all the garments are made of less environmentally-damaging materials, and if relevant what proportions of such materials are used in the garments. Consumers must be given access to more information about the individual materials and their environmental impact, however.

In addition, the marketing must not refer to immaterial aspects of the collection’s environmental impact. The emphasis that marketing materials place on an environmental benefit or ethical benefit must be proportional to the actual magnitude of the benefit when considering the environmental impact of the product as a whole. If a company emphasizes a product’s environmental benefit, and this benefit comprises only a marginal part of the product’s overall environmental impact, this can easily cause consumers to be misled.

In light of the above, we ask that when describing the nature of an environmental or ethical benefit of a collection or garment, you are precise and don’t give a distorted picture of the product’s possible benefits. The information must also be easily understandable and accessible for consumers.

4.3 The requirement for a product to be considered in the context of the rest of the market

Emphasizing an environmental or ethical consideration as a benefit of a product gives the consumer the impression that the product is less damaging in light of environmental/ethical concerns than comparable products on the market. In order to avoid misleading consumers, traders must also assess whether the product is actually better than a material proportion of other products on the market.

For example, emphasizing that a pair of jeans is made of organic cotton would be misleading if a significant proportion of other jeans on the market are also made from organic cotton.

As a guideline the product should fall within the best third of comparable products on the market in respect of the claimed benefit, to ensure that the claim is not misleading.²

² See the Norwegian Market Council’s decision MR-1997-25.

The development of alternative textiles that have less environmental impact than conventional textiles, and of new production methods that consume less water and other resources, may cause products that previously ranked as among the best products on the market to lose this status. Accordingly one must be aware of developments in the market when one is marketing the environmental or ethical benefits of one's products.

Accordingly, we ask businesses not to make claims about ethical or environmental benefits unless a collection or garment is better than a significant proportion of comparable products on the market in relation to the alleged benefit.

4.4 Use of a company's objectives and future aspirations in marketing materials

The Consumer Authority has observed that many clothing chains provide general information on their websites about their efforts to make the clothing industry more sustainable, and their future goals in this respect.

It is important for businesses to be aware that such marketing claims must also be substantiated and cannot not mislead consumers. Any future goals that are communicated must be realistic and specific.

In addition, this information must be presented in a way that makes it clear whether it relates to the business as a whole or only to specific garments or collections. Consumers must not be misled into thinking that something that applies to the entirety of the company's products, is a particular benefit to a specific garment.

For example, we have seen cases where marketing information about garments that are claimed to be better for the environment than the company's other garments, includes information about the company's aspirations for the future. This can easily give the impression that these aspirations are a particular characteristic of these garments, despite the fact that the aspirations actually applies to the whole company, and thus to all garments sold by the company.

Accordingly we ask businesses to distinguish clearly between information about the company's general efforts to be sustainable, and specific information about the benefits of each individual garment or collection.

4.5 Use of labelling schemes or symbols in marketing materials

4.5.1 Labelling schemes in general

Labelling schemes can be a good way of informing consumers about why a product or business is more sustainable or ethically advantageous.

In particular, official labelling schemes can be a good way of providing reliable information. In our opinion, the use of unofficial labelling schemes should be avoided, as such labels are likely to generate ambiguity and mislead consumers. This is particularly the case if official labelling schemes relating to the same issue already exist. Whether or not the use of an unofficial labelling scheme is misleading will depend on a factual assessment of the overall

situation. For example, labels developed by individual businesses will be more likely to mislead consumers than so-called sector labels.

When using either official or unofficial labelling schemes in marketing, the criteria for the use of the label must be evidence-based and substantiated, and the business must be able to document that the criteria for use of the label have been satisfied. In addition, consumers must be informed of where they can find more information about the labelling scheme in question.

It is also important not to exaggerate the benefits to an environmental or ethical label. For example, the requirements to provide an explanation when making general claims will also apply if a product has an environmental label (see point 4.1 above).

Labelling schemes may also not be emphasized in marketing materials, beyond a restrained use of the scheme's logo, if the product is not better than a significant proportion of comparable products on the market (see point 4.3 above). Typically this becomes an issue when most products within a product category qualify for a particular label. In such cases, using the label means only that the product is on par with comparable products, not that it is materially better.

Accordingly we ask that environmental and ethical labelling schemes are used in a precise and restrained manner that does not exaggerate the environmental criteria that are required to achieve certification or use of the label concerned.

4.5.2 Using your membership in the Better Cotton Initiative in marketing

The Better Cotton Initiative is an organization that works to reduce the environmental impact of cotton production. The Consumer Authority has observed that many clothing chains are members of this organization and use this fact actively in their marketing. We see some particular challenges associated with the use of membership of this organization in marketing materials, and in the following paragraphs we will comment on these challenges.

The Better Cotton Initiative operates a scheme it calls “mass balance”, which has parallels with similar schemes in other sectors, for example the guarantees of origin issued for renewable electricity.³ A shared feature of such schemes is that the specific environmental benefit provided by the scheme cannot be linked directly to the product purchased by the consumer. In other words, the consumer, by buying the product, will be contributing to increasing demand for, and production of, a less environmentally damaging alternative. It cannot be guaranteed, however, that the product purchased by the consumer is less environmentally damaging in itself. When referring to such schemes in marketing materials, this fact must be made clear, so that consumers are not given the misleading impression that the product is better for the environment in itself.

When using membership of the Better Cotton Initiative in marketing materials, it is important to be clear that the garments themselves are not guaranteed to contain “better cotton”, but rather that purchasers of such garments are supporting the production of “better cotton” in the future.

³ For more information about “mass balance”, please refer to: <https://bettercotton.org/resources/key-facts/fact-3-use-of-mass-balance-traceability/>.

We have also noticed that many clothing chains are currently members of the Better Cotton Initiative. If you decide to emphasize your membership of the Better Cotton Initiative when marketing your garments, apart from merely using the initiative's logo in a neutral way in your marketing, we remind you of the requirement for your products to be better than a significant proportion of other products on the market in relation to more environmentally friendly cotton production (see points 4.3 and 4.5.1 above).

The Consumer Authority asks you to review any sustainability claims made in your marketing materials and ensure that you are complying with the provisions of the Marketing Control Act. We expect you to implement any changes pursuant to our requirements by May 1st 2020 at the latest. For a summary of our requirements, see Section 2 above.

After this deadline, we will consider conducting inspections to check that marketing materials comply with our requirements.

If you have questions, please contact Inga Gundersen by telephone on + 47 476 04 316 or by email at ihg@forbrukertilsynet.no, or Cecilie Røer by telephone on + 47 909 12 197 or by email at cr@forbrukertilsynet.no.

Kind regards
from

Bente Øverli
Deputy Director General

This document was approved in electronic form and accordingly does not have a handwritten signature.

Attachment: List of recipients