

# Voluntary 'deforestation free' commitments

## Application of the Unfair Commercial Practices Directive

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### Introduction

Recent years have seen the emergence of voluntary 'deforestation free' commitments (hereinafter, 'voluntary commitments') by private companies. The commitments are varied, but generally involve a pledge from the company to address and reduce their contribution to deforestation.

As an example, as part of the 2014 New York Declaration on Forests, 53 companies signed up to "at least halve the rate of loss of natural forests globally by 2020 and strive to end natural forest loss by 2030" and "eliminat[e] deforestation from the production of agricultural commodities such as palm oil, soy, paper and beef products by no later than 2020".<sup>1</sup>

As members of the public and companies become increasingly aware of the negative impacts of producing goods - and companies respond by pledging to lessen the negative impacts of their supply chains on the environment - it matters that words are met with actions. This is important to give citizens confidence in what they are buying, to ensure a level playing field for companies and to ensure that levels of ambition among companies can flourish.

If a company does not take appropriate action, however, do legal means exist to hold that company to account?

With that question in mind, ClientEarth is exploring the legal arguments that could be made to ensure companies take appropriate action to meet their commitments. This briefing focuses on the Unfair Commercial Practices Directive (UCPD)<sup>2</sup> and enforcement rules in five Member States.<sup>3</sup> The briefing reviews the extent to which the UCPD may be a useful means to highlight inaction towards achieving voluntary commitments, to require greater accuracy in making voluntary commitments, and to make companies aware of the risk of not implementing their voluntary commitments or of making false or misleading claims.

The briefing will first examine what voluntary commitments are and what they mean, before providing an overview of the UCPD and how it relates to voluntary commitments. It will then provide some examples of how the UCPD could work in practice to hold companies making

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<sup>1</sup> New York Declaration on Forests - Action Statements and Action Plans: <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/New-York-Declaration-on-Forest---Action-Statement-and-Action-Plan.pdf>

<sup>2</sup> 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 ('Unfair Commercial Practices Directive').

<sup>3</sup> This briefing reviews UCPD national enforcement rules established in the United Kingdom (UK), France, Germany, Italy and the Netherlands, as a sample of EU Member States.

voluntary commitments to account. Finally, it will set out some key recommendations for companies making voluntary commitments and stakeholders looking to enforce the UCPD.

## 1 Voluntary commitments and what they mean

A close look at specific voluntary commitments reveals that no two pledges are identical: they have different scopes (the entire production and/or procurement supply chain, or just a section thereof) and concern different types of commodities, products or brands. Companies also have different types of targets (zero gross deforestation or zero net deforestation)<sup>4</sup> and timelines. Only some companies have adopted intermediary milestones and/or have transparent processes in place to implement commitments. These commitments may refer to specific policies (for example, the use of private certification), or focus on certain core principles such as conserving High Carbon Stock (HCS), High Conservation Value (HCV) or peatland areas, or ensuring the free, prior and informed consent of indigenous communities.<sup>5</sup> All of these variables create a confusing landscape, and the specificity of each commitment means that it is difficult to be clear about the concrete actions companies should be taking to implement their commitments.<sup>6</sup>

Particularly important to the application of the UCPD, voluntary commitments also typically vary according to how they are made public. They can take the form of:

- Pledges to abide by a private certification scheme, such as the Roundtable on Sustainable Palm Oil (RSPO);
- Pledges to adhere to the goals of a voluntary political commitment, such as the 2014 New York Declaration on Forests;
- Individual commitments published on a company's website or in a corporate reporting document that supply chains will be deforestation free by a certain date; or
- Individual company commitments, such as those mentioned above, added to product packaging or other advertising practice (for example, a 'deforestation free' label).

When voluntary commitments are made publicly, they may influence consumers' purchasing decisions - particularly in light of the recent rise in consumer environmental consciousness.<sup>7</sup> As a result, it is possible that when companies advertise their voluntary 'deforestation free' pledges, but have not acted to achieve those commitments, or where those commitments are inaccurate or too vague, this may constitute providing false or misleading information to consumers and a breach of the UCPD.

## 2 The Unfair Commercial Practices Directive

### 2.1 Objectives of the UCPD

The UCPD exists to protect the interest of consumers in commercial transactions, while also ensuring a level playing field for companies operating in the EU market. It aims to curb a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices.

<sup>4</sup> 'Zero deforestation' means no deforestation has taken place anywhere; 'zero net deforestation' means forest loss might occur, but it is offset by restoration of forested land elsewhere.

<sup>5</sup> For a description of HCS and HCV see: <http://www.proforest.net/en/files/hcv-and-hcs-compared>.

<sup>6</sup> Although see [http://forest-trends.org/releases/p/supply\\_change\\_2017](http://forest-trends.org/releases/p/supply_change_2017) for a methodology used to track commitments by Forest Trends.

<sup>7</sup> [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/docs/factsheet\\_environmental\\_claims\\_non-food\\_02.pdf](http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/factsheet_environmental_claims_non-food_02.pdf).

In this section, we will focus on the specific areas of the UCPD most relevant to voluntary commitments, to shed light on where the two intersect.

As such, the most relevant of the UCPD's stated objectives are:

- To protect consumers from the consequences of unfair commercial practices that directly influence consumers' transactional decisions; and
- To protect businesses from competitors who do not play by the rules.

In addition, the most relevant sections of the UCPD are those that apply to misleading commercial practices:

1. The provision of false information (Article 6(1));
2. The presentation of a product in a way that is deceptive (Article 6(1));
3. The omission of material information (Article 7); and
4. The failure to comply with a code of conduct (Article 6(2) (b)).

According to the UCPD, the above misleading actions or omissions are prohibited if they have an impact on the consumer's purchasing decision. This means that, before any enforcement action can be taken, national authorities need to assess the practice on a case-by-case basis. Other types of commercial practices, which are 'blacklisted' by the UCPD, can be sanctioned without the need to carry out such an assessment.

This briefing will analyse the UCPD's scope and relevant articles in Sections 2.2 and 2.3, then will provide a brief overview of potential remedies and enforcement under the UCPD in Section 2.4.

## 2.2 Scope

The UCPD provides a number of definitions which limit the scope of the Directive, defined in Box 1.

With the first two definitions in mind, a commercial practice may include featuring a voluntary commitment on a company's e-commerce website, in broadcast or non-broadcast advertising, or on a product's packaging, as these activities are directly connected to promoting goods or services of a company to consumers. Importantly, however, a commercial practice is unlikely to extend to the mere practice of making a commitment publicly (and not in the context of the sale of goods and services), for example an announcement at a public event or corporate promotional literature.<sup>8</sup>

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<sup>8</sup> UCPD, recital 7.

### Box 1: Key definitions (Article 2, UCPD)

**Commercial practice:** 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.

**Transactional decision:** any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.

**Average consumer:** a reasonably well informed and reasonably observant and circumspect person, taking into account social, cultural and linguistic factors. Recital 18 states that where "a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group." In other words, if a product is aimed at a particular group of consumers, the average consumer is drawn from this group.

With the definition of an 'average consumer' in mind, the below case (Box 2) is an indicative example demonstrating that national courts could consider environmentally aware or concerned consumers as a 'particular group of consumers' under the UCPD.

### Box 2: 'Average consumer' in environmental claims - Case law

"A trader advertised the sale of bags of sweets by stating that for each bag sold, it would plant one tree. However, the trader had already agreed to plant a certain number of trees, independently from the number of candy bags sold. The Finnish Market Court upheld a claim by the Consumer Ombudsman that this statement took advantage of the credulity of consumers that were concerned about the environment."

Source: MAO: 157/11, the Market Court of Helsinki, 8 April 2011.

## 2.3 Core articles of the UCPD

### 2.3.1 False or misleading information or misleading omissions

In order to determine whether or not a company has made a false or misleading statement, the UCPD sets out a number of key questions to assess the likelihood of a breach.

As a starting point for an assessment, the UCPD asks the following questions:

- Is the statement regarding the commitment false and therefore untruthful? ('objective' misleading action);<sup>9</sup>
- Would the statement regarding the commitment deceive or be likely to deceive the average consumer (regardless of whether the information it contains is factually correct)? ('subjective' misleading action);<sup>10</sup> or

<sup>9</sup> UCPD, Art 6(1).

<sup>10</sup> UCPD, Art 6(1).

- Has the trader omitted material information (or provided such information in an unclear, unintelligible, ambiguous or untimely manner)?<sup>11</sup>

If the response to any of the above three questions is 'yes', then the issue turns on the following:

- Does the alleged false, misleading or omitted information relate to one of the matters listed in Articles 6 or 7 UCPD?<sup>12</sup> (the list is wide-ranging, including 'main characteristics of the product' and most claims will fall within its scope); and
- Would the practice be likely to cause the 'average consumer' to make a 'transactional decision' they would not otherwise have made?

This latter point is determined on a case-by-case basis by national courts and authorities, taking into account the definitions of the key terms set out in Boxes 1 and 2.

Although the UCPD does not provide for specific rules on environmental claims, guidance provided by the European Commission<sup>13</sup> (hereinafter 'UCPD guidance') specifies that clarity and accuracy of an environmental claim is key:

1. Traders must present their environmental claims in a "specific, accurate and unambiguous manner"; and
2. Traders must be able to substantiate their factual claims with scientific evidence and provide it in an understandable way if challenged.

The first requirement obliges companies that make an environmental claim to phrase it clearly, including identifying the scope or boundaries of the claim (for example, is the entire supply chain deforestation free, or only certain elements thereof?; is the packaging only deforestation free or the product also?). It is also a requirement for companies to include all key information (for example, does a claim relate to a 'zero-deforestation' policy or actually only to 'zero net deforestation'?).

Regarding the second requirement, the UCPD Guidance does not specify what type of evidence is required, nor does it necessitate a certain level or amount of technical or scientific information, leaving the question of what is sufficient, open.

### 2.3.2 Failure to comply with a code of conduct

The UCPD also aims at protecting the trust which consumers may have in self-regulatory codes. A statement referring to commitments in a code of conduct may breach the UCPD, and constitute a misleading commercial practice, if those commitments have not been complied with.<sup>14</sup>

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<sup>11</sup> UCPD, Art 7. The use of Article 7 on misleading omissions might come into play in combination with Article 6 where a statement relating to a company's commitment on deforestation is too vague, such that the addition of material information is needed for a consumer to understand the policy or commitment correctly. This scenario could support alternative arguments: that material information is missing (Article 7) or that the information presented is likely to deceive (Article 6(1)).

<sup>12</sup> UCPD, Art 6(1).

<sup>13</sup> See Commission Staff Working Document, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices', Brussels, 25.5.2016 SWD(2016) 163 final, p.108. The UCPD Guidance reflects the views of the Commission services on how the UCPD should be interpreted and applied but is not legally binding.

<sup>14</sup> UCPD, Art 6(2).

The definition of a code of conduct includes any agreement or set of rules not imposed by national law, regulation or administrative provision and that defines the behaviour of traders who undertake to be bound by it.<sup>15</sup> This implies that the code of conduct cannot be internal to a company, and more than one company must have agreed to follow certain rules (individual commitments should rather be assessed against Articles 6(1) and 7 UCPD, as set out under Section 2.3.1. in this briefing).

### Box 3: Environmental codes of conduct

A trader has subscribed to a binding code of practice that promotes sustainable use of wood and displays the code's logo on its website. The trader's code of practice contains a commitment that its members will not use hardwood from unsustainably managed forests. However, it is found that the products advertised on the website contain wood from a deforested area. Since the trader has undertaken to be bound by the code that he breaches, the display of the code's logo on its website is a misleading action.

Source: Guidance on the UK Regulation (May 2008) implementing the Unfair Commercial Practices Directive - Consumer Protection from Unfair Trading - Office of Fair Trading/Department for Business Enterprise and Regulatory Reform.

Non-compliance with a code of conduct could constitute a breach of the UCPD where the related claims are not merely aspirational, but are firm and capable of being verified.<sup>16</sup> This is a broad definition which leads to possible ambiguity as to whether a particular set of rules would constitute such a code of conduct. However, a qualifying code might well have an oversight mechanism, whereby failure to comply would lead to specified consequences. The trader must also have indicated in a commercial practice that they are bound by the code of conduct.

### Box 4: Are certification schemes such as RSPO, FSC and PEFC 'codes of conduct'?

The Roundtable for Sustainable Palm Oil (RSPO), Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification (PEFC) are private certification schemes for palm oil and forest products (such as wood and paper). Each has a logo, which may be displayed on a complying companies' product.

Companies (and their products) are certified as adhering to one of these schemes based on an inspection and documentation against detailed standards. Compliance with the standards is monitored by third party auditors and enforced by the self-regulatory bodies of the schemes. Companies that do not adhere to the rules in principle face a review procedure and expulsion from the scheme.

However, the robustness of such enforcement mechanisms has been criticised, which could put in question the qualification of such schemes as codes of conduct.

Source: Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO

<sup>15</sup> UCPD, Art 2 (f).

<sup>16</sup> UCPD, Art 6(2)(b)(i).

### 2.3.3 General misleading information

If none of the above conditions are met, the general clause in Article 5(2) of the UCPD might be applicable. According to this clause, a commercial practice is 'unfair' if it is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

### 2.3.4 Blacklisted practices

The UCPD blacklists certain commercial practices that are considered 'unfair' and therefore prohibited in all circumstances.<sup>17</sup> Under the UCPD, it is necessary only to show that a company committed one of these practices, without the need to consider its impact on the purchasing decision of the average consumer. The following practices are particularly relevant to voluntary commitments, as they target the irresponsible use of and reference to codes of conduct:<sup>18</sup>

1. Falsely claiming to be a signatory of a code of conduct (e.g. displaying that the company has signed up to a code of conduct relating to the product's environmental credentials);<sup>19</sup>
2. Displaying a trust or quality mark without the necessary authorisation (e.g. the FSC certification logo);
3. Falsely claiming that a code of conduct has the endorsement of a public or other body;<sup>20</sup> and
4. Claiming that the trader, its commercial practice or a specific product have been approved, endorsed or authorised by a public or other body when this is not the case, or where the trader is not complying with the terms of such approval.

## 2.4 Remedies and enforcement under the UCPD

The UCPD sets out the framework to be applied at national level in relation to unfair commercial practices. However, the decision on how to adequately enforce these rules (including who should have a right to take legal action in relation to potentially misleading claims) rests with Member States.<sup>21</sup>

As a result, a wide variety of regimes coexist. In most Member States reviewed, enforcement of the UCPD is mainly conducted by administrative authorities, including consumer protection bodies. Direct rights of action of consumers are typically restricted to damages claims.<sup>22</sup> Under national law, administrative authorities have a broad discretion to decide how to allocate their resources (and so whether or not) to follow-up on a complaint brought to them, which will require the submission of a compelling scenario (see Section 3) and strong evidence.

The remedies available under the UCPD implementing laws in the five Member States reviewed include: **cease and desist orders** to stop the statement,<sup>23</sup> claims for **damages or other forms**

<sup>17</sup> UCPD, Art 5(5) and Annex 1.

<sup>18</sup> UCPD Guidance, §1.10.2.

<sup>19</sup> UCPD Guidance, §2.5.4.

<sup>20</sup> UCPD Guidance, §2.5.4.

<sup>21</sup> UCPD, Art. 11(1) and 13. Remedies are determined by Member States' implementing legislation, with the UCPD only providing limited guidance that any remedy must be "effective, proportionate and dissuasive".

<sup>22</sup> Such monetary compensation is likely to be nominal given that most consumer products containing palm oil, beef or soy for example are low value goods and therefore damages are unlikely to have a significant deterrent effect.

<sup>23</sup> In Germany: Art. 8 Unfair Competition Act (UCA), the Netherlands, and France.

of **monetary compensation** for loss suffered,<sup>24</sup> **administrative fines**<sup>25</sup> or **criminal sanctions**, including imprisonment.<sup>26</sup> **Injunctions** may also be available: the UK provides personal remedies to a consumer to unwind the transaction or claim a discount.<sup>27</sup> None of the Member States studied require compliance with an advertising statement or the underlying company commitment as a means of redress.

In many Member States (the UK, France and Italy, for example), self-regulatory industry authorities may also hear complaints. Although they are only able to provide recommendations (for example, to **withdraw statements**), this 'soft' enforcement has been effective in practice, with a high level of compliance (particularly in the UK).<sup>28</sup>

These remedies could therefore, arguably, be used to highlight non-compliance with the UCPD, insofar as the proceedings are public. They could also be used to require greater accuracy in voluntary commitments that are made, particularly if that were achieved by the withdrawal of a false statement.

### 3 The UCPD in practice

This section considers what types of voluntary commitments might be in breach the UCPD, and the evidence that would be required to prove such a breach.

The views presented here are only indicative, and in every case the practical application of the UCPD would depend on how it has been transposed in the legislation of different Member States and specific conditions laid down in such laws. In addition, it should be noted that only certain groups or people may be able to pursue such legal action according to national rules.

#### Scenario 3.1

A company using language on its products' packaging suggesting, or stating, that the products have been produced through a 'deforestation free' supply chain, when this is false or misleading, could breach the UCPD

1. Is it a commercial practice?

The claim made by the company must be made in the context of a commercial practice in order to be challengeable under the national laws implementing the UCPD. Communications on product packaging should be considered a commercial practice, as the packaging is designed to entice the consumer to purchase the products.

2. Is it a blacklisted practice?

Depending on the language used, the claims on the packaging could be banned outright as a blacklisted practice. For example, this might be the case if the wording claims that the product is

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<sup>24</sup> In the United Kingdom: Regulation 27J(1) and 27J(2), Consumer Protection from Unfair Trading Regulations (CPUTR), and also France, Germany, Italy and the Netherlands.

<sup>25</sup> In Italy, the Netherlands: Art. 2.9 Consumer Protection Enforcement Act, and Germany (profit surrender), Art. 10 UCA.

<sup>26</sup> In the United Kingdom: Regulation 15(1-2), CPUTR and France FCC Art L. 121-6 ; Criminal Code, art. 131-39.

<sup>27</sup> Regulation 27A(6), CPUTR.

<sup>28</sup> [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/docs/green-claims-report.pdf](http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/green-claims-report.pdf)

certified as 'deforestation free' by a private certification system, when it is not (see list of relevant blacklisted practices in Section 2.3.4).

### 3. Is it false or misleading information?

If not a blacklisted practice, the scenario may still breach the UCPD if it can be proven to be a false or misleading action or omission. First, the information conveyed by the advertisement must relate to one of the matters specified in Article 6 of the UCPD. In this case, it relates to the nature and characteristics of the product, which is a relevant matter.

Second, the information communicated on the packaging could be considered false if the products cannot legitimately be described as having been produced through a 'deforestation free' supply chain. The company, if challenged by national courts or administrative authorities, may be required to produce scientific evidence to support their factual claims in an understandable way, as per Article 12 of the UCPD. Where no clear processes have been put in place to improve supply chains, then evidence may not be available to substantiate the claim. If the company cannot produce such information, then the claim may be deemed to be false.

Alternatively, the information may be misleading if it deceives the average consumer. As an environmental claim, this may particularly be the case if it is expressed in a vague manner, which deceptively suggests sustainability. The 'deforestation free' claim may be vague if it is broadly worded: for example, where a product's packaging references the company's 'zero deforestation' claims, but where that particular product's supply chain has not changed since the making of the commitment by the company (even if the supply chains of other products produced by that company may have improved). The UCPD Guidance states that no confusion should be created between general 'corporate attitude claims' and the specific product that is presented with the claim.<sup>29</sup> Unless the company can provide evidence that the specific product has been produced with a 'zero deforestation' supply chain or, perhaps, that there is significant progress towards achieving a 'zero deforestation' supply chain, it may be deemed misleading.

Finally, if material information has been omitted from the packaging, or is unclear, unintelligible, or ambiguous, this may be prohibited under Article 7 of the UCPD. In the above scenario, if the packaging mentions 'zero deforestation' while the company is actually only aiming at zero *net* deforestation, for example, then the claim may be considered as a misleading omission.

### 4. Would the information influence the purchasing decision of an average consumer?

Using an explicit sustainability claim on packaging which is clearly visible at the point of browsing and purchase would likely influence the decision of an average consumer as to whether to purchase or otherwise consider engaging with the product.

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<sup>29</sup> [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf), p. 114.

### Box 5: Example of a misleading advertisement

In 2008, the UK Advertising Standards Authority (the UK's self-regulatory authority) heard a case about a Malaysian Palm Oil Council (MPOC) advertisement shown on BBC World that made misleading claims about the sustainability of its palm oil. The advert showed a palm oil plantation interspersed with shots of a rainforest and wildlife, a voiceover stating that "its trees give life and help our planet to breathe, and give home to hundreds of species of flora and fauna", and claimed that the oil had been "sustainably produced" since 1917. The ASA upheld the complaint, brought by Friends of the Earth International and Friends of the Earth Europe, stating the advertisement was misleading because much of the palm oil was produced in a way that the MPOC could not prove was socially or environmentally sustainable. The ASA ruled that the ad "was likely to mislead viewers as to the environmental benefits of palm oil plantations compared with native rainforest".

Source: [Watchdog criticises misleading Malaysian palm oil advert](#) – The Guardian

In conclusion, a communication on product packaging of a broad or general 'deforestation free' claim is likely to be found misleading or false if it can be shown that: (a) the specific product has not been made with a 'deforestation free' claim, (b) the company cannot provide sufficient evidence to support their claim, and/or (c) the company is actually not aiming at zero deforestation, but at a different standard.

### Scenario 3.2

A company stating on their company website that it is a member of the RSPO, when it is actually not a member and/or does not yet implement this standard, could breach the UCPD

#### 1. Is it a commercial practice?

Claims made on a website may appear in a variety of different contexts, not all of which may be found to be in the context of a commercial practice. If the statement is on the company's e-commerce website, next to products that may be bought via the website, then this is likely to be included in the definition of commercial practice under the UCPD. However, if the company's claim is only made on the trader's general website, in the About or Corporate Social Responsibility sections, for example, which do not include specific product references, then this action, in and of itself, may not be found to be directly related to influencing consumers' transactional decisions. In the latter case, it would not be within the scope of the UCPD. Nonetheless, it could be argued that the nature of consumer decisions today includes internet research and general knowledge of a company's environmental credentials and, therefore, that information on a general website would influence consumers' transactional decisions.

#### 2. Is it a blacklisted practice?

If the claim is found to be made in the context of a commercial practice, falsely claiming to be a signatory of a binding code of conduct is a blacklisted practice. The question whether the RSPO could qualify as a code of conduct is unclear given the definition of a code of conduct under the UCPD.<sup>30</sup> (See Section 2.3.2, for more information on the definition of code of conduct).

<sup>30</sup> To our knowledge, no case law has examined this question yet.

If made in the context of a commercial practice and depending on whether the RSPO could be qualified as a code of conduct, this scenario could be a blacklisted practice, and the only evidence required would be proof of the statement. There would be no requirement to show that the claim would distort the transactional decision of an average consumer.

In conclusion, a company claiming on its website to be a member of the RSPO or other private certification standard when it is not, could contravene the UCPD.

### Scenario 3.3

An individual company making an explicit statement on its general website that it has adopted a zero-deforestation policy for all its products, while this is actually only true for food products but not for all products that it sells, such as cosmetics, could be breaching the UCPD

#### 1. Is it a commercial practice?

Making a public announcement does not always constitute a commercial practice. In this case, the commitment is made public on the company's general website, which may not directly target consumers of a particular good or service (see analysis in Section 3.2). Therefore, it may not be a commercial practice.

#### 2. Is it a blacklisted practice?

There is no evidence that suggests that the conduct falls within the blacklist. However, depending on the language used, the practice could be blacklisted and it is important to consider the blacklist against the facts of each case.

#### 3. Is it false or misleading information?

The statement relates to one of the matters specified by the UCPD, namely the nature and attributes of the product.

If the claims are made in the context of a commercial practice, the claim could be challenged on the basis it is false or misleading. The claim is false where it relates to the company's cosmetics, as the trader has not adopted a zero deforestation policy for these products. The claim may also be found to omit material information, since the claim is general and does not specify to which products it refers.

#### 4. Would the information influence the purchasing decision of an average consumer?

Whether an average consumer would be influenced depends on the details of the commercial practice that invokes the claim. The more consumer-facing the practice, the more likely it is to have influenced the average consumer. In the above scenario, the website statement would have to be directly aimed at consumers.

In conclusion, if a zero deforestation claim on a general website can be demonstrated to be a 'commercial transaction', and the claim is broad, covering products to which it doesn't apply, then this could be a breach of restriction on providing false or misleading information under the UCPD. This would require the company to use greater accuracy in making voluntary commitments.

## Scenario 3.4

A company advertising their signature of the New York Declaration on Forests or its membership of the Consumer Goods Forum (CGF) on a television commercial and on print advertising, but doing nothing to change its practices to adhere to the commitments it made, is likely not breaching the UCPD

### 1. Is it a commercial practice?

The company has made the advertisement in the context of a commercial practice, featuring the claim on broadcast or non-broadcast advertising and using its membership as a means to sell its products. These activities are intended to promote products of the company to consumers.

### 2. Is it blacklisted?

If the claim were untrue, and the company had not signed the New York Declaration on Forests or was not a member of the Consumer Goods Forum (CGF),<sup>31</sup> then it might be a blacklisted practice. However, this is only the case if the two declarations constitute a code of conduct, which is doubtful.

The CGF Board of Directors passed a deforestation resolution in November 2010, which includes a pledge to “mobilise resources to help achieve zero net deforestation by 2020” and “develop specific, time bound and cost-effective action plans” to address challenges in sourcing palm oil sustainably. These commitments cannot be described as firm and verifiable in and of themselves. While the CGF expects members to comply with these commitments, it is unclear how members' compliance is monitored and there do not appear to be any repercussions for non-compliance. Therefore, the CGF resolution does not adhere to the definition of a code of conduct.

The New York Declaration is similarly broadly and aspirationally worded, and there is no indication that a company will face any consequences for a failure to meet its commitments. There is also no evidence in the text of the declaration which suggests that the United Nations or any other body has oversight over companies' progress in implementing their commitments.

### 3. Is there non-compliance with commitments contained in a code of conduct?

Even if found to be a code of conduct, non-compliance with the commitments passed by these groups in the context of a commercial practice is unlikely to breach the UCPD. The imprecise and aspirational nature of these commitments would make it very difficult to prove that the company failed to comply with the terms of its (voluntary) membership or commitment. This may change after 2020 or 2030, the dates by which the broad commitments should have been achieved. However, the broad nature of the claims may remain problematic to demonstrating how a company did or did not achieve their 'firm' and 'verifiable' pledges.

### 4. Would the information influence the purchasing decision of an average consumer?

Referring explicitly to a public commitment, such as the New York Declaration on Forests or the CGF declaration, particularly if the details of the 'deforestation free' commitments are referenced

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<sup>31</sup> The GCF is a network of retailers, manufacturers, service providers and other stakeholders active in the consumer goods industry.

on packaging which is clearly visible at the point of browsing and purchase, would likely influence the decision of an average environmentally-conscious consumer as to whether to purchase or otherwise consider engaging with the product.

In conclusion, it is very unlikely that a voluntary commitment made in the context of an announcement such as the New York Declaration on Forests, or membership of the CGF, would be held to be sufficiently firm or verifiable to fit the definition of a code of conduct. Therefore, non-compliance with such a voluntary commitment would be *outside* the scope of the UCPD.

## 4 Key messages and recommendations

1. To fall within the scope of the UCPD, voluntary 'deforestation free' commitments must be made in the context of a commercial practice that is directed at consumers. A publicly-made commitment unconnected to the sale of a good or service is unlikely to be caught by the UCPD. Reference to a 'deforestation free' commitment made on product packaging or during an advertisement for a product is much more likely to fall within the UCPD.
2. How environmental claims, such as 'zero deforestation' commitments, are worded is very important and should be specific, accurate and unambiguous to abide by the requirements of the UCPD. A company that details the policies it has implemented to achieve its 'deforestation free' goals, and that regularly and transparently monitors progress in the form of intermediary milestones, is unlikely to breach the UCPD. On the other hand, a vague or general commitment is more likely to be misleading.
3. Companies must be able to provide scientific evidence to support factual claims they make and be ready to provide it in an understandable way, if challenged by competent national bodies. Where no interim milestones or clear processes have been put in place to implement voluntary commitments, then evidence may not be sufficient to substantiate the claim.
4. Enforcement of the UCPD is often mainly carried out by administrative authorities of the Member States, such as consumer protection bodies, and may for example lead to fines or the withdrawal of a claim.
5. The UCPD could be used to highlight non-compliance with voluntary 'deforestation free' commitments and to require accuracy in voluntary commitments through requiring the withdrawal of a false statement. It is therefore a legal tool which could be used to make companies aware of the risk of not implementing their voluntary commitments or of making false or misleading claims.
6. Most importantly, and although it will not apply to all company communications concerning zero-deforestation-related pledges, the legal standards the UCPD contains should guide how such corporate pledges are made. Reliance on these principles can strengthen consumer and general public confidence in environmental claims and avoid front-runner companies being undercut by competitors who falsely claim to act on their pledges.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.



This publication has been funded with UK aid from the UK government. The information contained in this document is the sole responsibility of its authors and does not necessarily reflect the UK government's official policies.

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ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, with a registered branch in Belgium, N° d'entreprise 0894.251.512, and with a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208