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Environmental Activism on Plastics through Clinical Legal Education

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Amid growing public awareness and concern regarding the true nature and extent of plastic pollution, and growing realization of the urgent need to transition away from petroleum-based plastics, consumers have a vital role to play in addressing the problem. Where they can make informed choices on avoiding products containing the most persistent and harmful plastics, consumers can lead the market away from its current reliance upon such plastics and can promote more sustainable production and consumption of similar or substitute materials. Such behavior change lies at the heart of global commitments under Sustainable Development Goal (SDG) 12 on Responsible Consumption and Production. G.A. Res. 70/1, UN Doc A/RES/70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015). It also underpins current European Union (EU) policy ambitions regarding the transition to a "circular economy." *Closing the Loop—An EU Action Plan for the Circular Economy*, COM (2015) 614 final (Dec. 2, 2015); *Communication on the Implementation of the Circular Economy Package: Options to Address the Interface Between Chemical, Product and Waste Legislation*, COM (2018) 32 final (Jan. 16, 2018). This is particularly so concerning plastics. *A European Strategy for Plastics in a Circular Economy*, COM (2018) 28 final (Jan. 16, 2018).

It is becoming increasingly clear, however, that certain economic sectors and actors routinely make claims regarding the environmental performance of their products that do not hold up to serious scrutiny, thereby manipulating and exploiting the environmentally conscious purchasing decisions of responsible consumers. Such practice inevitably harms both consumer and competition interests. Even more worryingly, perhaps, it appears that the relevant regulatory framework currently being applied in Ireland and the EU may not be ideally equipped to detect or act upon such misleading claims, which risks undermining the growing market for environmentally sustainable products. The global problem of "greenwashing" is particularly prevalent in respect to plastics and plastics waste, where a 2021 study conducted by a Brussels-based nongovernmental organization found that as much as half of the environmental claims routinely made regarding the environmental performance or impact of plastics are potentially misleading. Saabira Chaudhuri, *Plastic Straws That Quickly Biodegrade in the Ocean? Not Quite, Scientists Say*, Wall St. J., Mar. 20, 2021.

It is into this lacuna that clinical education programs run by law schools around the world can step with a view to identifying false or misleading claims and elaborating upon the existing, often underdeveloped, applicable legal frameworks. As restrictive rules on professional audience rights and problems regarding the availability of indemnity insurance generally mean that European law students cannot participate directly in litigation before the courts, clinical legal education programs in Europe are not currently as active or developed as they are in the United States. However, even in Europe they can play a progressive and impactful role by assisting in the policing of product-related environmental claims and in better informing the relevant regulatory authorities of the possibilities for progressive legislative interpretation and of their full range of enforcement options where breaches are detected.

This article outlines a complaint regarding the alleged biodegradability of teabags prepared and submitted to the Irish Competition and Consumer Protection Commission (CCPC) by a small team of postgraduate students engaged in an Environmental Law Clinic run by the School of Law at University College Cork (UCC) in Ireland as an elective module on the LL.M. (Environmental & Natural Resources Law) Program. Kristina Schröder et al., *Report to the CCPC Regarding "Tesco Finest Green Jasmine Pyramid Tea 15S 30G"* (Feb. 13, 2023) (the

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Complaint). The Complaint concerned misleading claims by Tesco, a major multinational food retailer, regarding the "biodegradability" of one of the retailer's own-brand teabags, which were incorrectly labeled as biodegradable. The Complaint relied upon a peer-reviewed scientific study by a postdoctoral researcher working at the School of Biological, Earth and Environmental Sciences at UCC, which demonstrated that the teabags, which are made up of a bioplastic compound (polylactic acid or PLA), remained completely intact after having been buried for 12 months in Irish garden soil at a depth of 20 cm. Alejandra Mateos-Cárdenas, *Fate of Petroleum-Based and Plant-Based Teabags Exposed to Environmental Soil Conditions for One Year*, 10 Frontiers in Bioeng'g & Biotech. 1579 (2022). Therefore, despite the lack of any clear definition of "biodegradability" in either Irish or EU law, the Complaint argued that the teabags in question could not meet any commonsense understanding of the concept or any reasonable expectation that customers might have regarding the product's environmental performance. This contention was supported by a detailed survey and analysis of various standards regarding the biodegradability of plastics employed by international, regional, and national standardization organizations.

To ensure that the CCPC might take the matter sufficiently seriously, the Complaint highlighted the extent of tea-drinking in Ireland and the resulting amount of waste produced, as well as the broader adverse implications of greenwashing for the development and operation of the growing market in sustainable products and the wider move towards a circular economy. In addition, it highlighted how the Complaint merited action having regard to the CCPC's own "Prioritisation Principles," designed to ensure that the Commission should exercise its consumer-related powers in a manner likely to bring the greatest benefit to consumers, businesses, and the economy. While the CCPC is still considering which particular course of enforcement action to take in respect to the specific product and retailer with which the Complaint is concerned, at the broader policy-making level it has provided assurances that the information provided will inform the Commission's work in respect to a number of its current workstreams covering "green claims" and greenwashing. In addition, it appears that the retailer in question is currently revising its policies regarding environmental claims and the use of certain bioplastics more generally.

This article is intended to highlight the type of direct impact that environmental law students engaged in clinical programs or projects might be able to achieve, in terms of both raising awareness and encouraging enforcement of regulations that would otherwise only rarely be pursued by governmental authorities for the purpose of environmental protection.

Scientific Assessment

For the purposes of assessing the "biodegradability" claimed in respect of the teabags in question, the LL.M. students involved in preparing the Complaint were fortunate to be able to rely upon the findings of an unrelated postdoctoral research study conducted in UCC by Dr. Mateos-Cárdenas, which tested and compared the degradation of different brands of teabags commonly sold in Ireland. Mateos-Cárdenas, *supra*. A total of 18 brands were carefully selected for the study to test a range of materials, including both petroleum-based and plant-based plastics, which were buried in garden soil at a depth of approximately 20 cm for periods of 3 weeks, 3.5 months, 6 months, and 12 months. Prior to burial, the teabags had all tea contents removed so that only degradation of the containing membrane material was tested, and four samples per teabag brand were used for each time-point. Control materials were also buried individually and exposed to identical environmental soil conditions. The test involved measurement of surface changes, polymeric composition, and dry weight before and after each time-point. The key finding of the study for the purposes of the Complaint to the CCPC was that teabags made entirely of the bioplastic PLA, including the "biodegradable" teabag brand concerned, were found to be completely intact after 12 months buried in soil. These findings were meticulously recorded and photographed, including by means of light microscopy and scanning electron microscopy, and were ultimately published in a reputable, peer-reviewed scientific journal. *Id*. Thus, the complainants were in a position to provide the CCPC with direct and convincing evidence that the relevant claim of "biodegradability" was false, misleading, and unsubstantiated and, as a result, contrary to applicable Irish and EU consumer protection legislation.

This article is intended to highlight the type of direct impact that environmental law students engaged in clinical programs or projects might be able to achieve. . . .

Concept of Biodegradability

Despite the lack of any EU or Irish legislative provision establishing standards for bioplastics, or providing a statutory definition of "biodegradability," the Complaint contended that it must be possible to infer certain core elements of a common understanding of the concept and, thus, that consumers are entitled to maintain a reasonable expectation that short-term single-use products labeled as "biodegradable" should not persist in the environment for any significant period of time. To identify the core elements of a reasonable understanding of biodegradability based upon general practice in the field, the students conducted a detailed comparative survey and an analysis of various existing technical standards regarding the biodegradability and compostability of plastics employed by international, regional, and national standardization organizations. For the benefit of the CCPC, details of the standards examined and the students' findings in respect of each were included in an appendix attached to the Complaint. Their

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analysis concluded that the two principal parameters by means of which a product's biodegradability might be assessed concern the process and time frame for degradation. Therefore, it appears that the concept comprises two principal characteristics: (1) the microbial conversion of all of the product's organic constituents to carbon dioxide (CO_2) (or carbon dioxide and methane in conditions where oxygen is not present), new microbial biomass, and mineral salts, and (2) conversion should occur within a timescale short enough so as not to lead to lasting harm or accumulation in the open environment.

Though there does not as yet exist any dedicated legislative framework expressly covering greenwashing in Irish or EU law, there are a number of measures currently on the Irish statute books that are intended to address false or misleading claims or advertising.

This position is supported by the fact that the EU policy framework on biobased, biodegradable, and compostable plastics advises that, to avoid misleading consumers, it is necessary that any product asserting such a claim should "always specify the receiving open environment for which [plastics labelled as 'biodegradable'] are intended and the required timeframe for their biodegrading, in terms of weeks, months or years." *EU Policy Framework on Biobased, Biodegradable and Compostable Plastics*, COM (2022) 682 final (Nov. 30, 2022). This strongly suggests that it is entirely misleading to market any teabag as biodegradable that shows no sign of disintegration after a year buried in garden soil. Therefore, despite the failure to provide any clear definition of biodegradability in either Irish or EU law, the Complaint argued on the basis of the scientific findings outlined above that the teabags in question could not possibly be considered to meet any reasonable expectation that customers might have regarding the product's environmental performance.

Applicable Legal Framework

Though there does not as yet exist any dedicated legislative framework expressly covering greenwashing in Irish or EU law, there are a number of measures currently on the Irish statute books that are intended to address false or misleading claims or advertising.

Most significantly, section 42 of the 2007 Consumer Protection Act (CPA) prohibits "misleading commercial practices," which can include "any conduct (whether an act or omission), course of conduct or representation by the trader in relation to a consumer transaction, including any such conduct or representation made or engaged in before, during or after the consumer transaction." CPA, sec. 2(1). As regards the misleading character of a product-related environmental claim, section 43 of the CPA provides that

> a commercial practice is misleading if it includes the provision of false information in relation to any matter set out in subsection (3) and that information would be likely to cause the average consumer to make a transactional decision that the average person would not otherwise make.

The matters listed under section 43(3) include false information relating to the principal characteristics of a product, such as the results to be expected from the product; "its composition, ingredients, components or accessories"; and/or "the results and material features of tests or checks carried out on the product." *Id.* sec. 43(v), (viii), (xiii).

Thus, the Complaint contends that the retailer in question had engaged in a misleading commercial practice by falsely describing its own-brand teabags as biodegradable. It argues that, by falsely burnishing the product's environmental credentials, the retailer's conduct amounts to a practice that "would be likely to cause the average consumer to make a transactional decision that the average person would not otherwise make." It further contends that this false description relates to one of the main characteristics of the product, including the results expected from it (i.e., biodegradability), and the composition or components of the product (i.e., that it is composed of a material that is biodegradable in nature). Section 47 of the CPA provides that a trader who engages in any misleading commercial practice under section 43 commits a criminal offense.

In addition to the CPA, section 3 of the current code of rules adopted by the Advertising Standards Authority for Ireland (ASAI) requires that advertisements and promotions must be "legal, decent, honest and truthful." ASAI, *Code of Standards for Advertising and Marketing Communications in Ireland* (7th ed. Mar. 2016). Section 15 of the code distinguishes between two different types of environmental claims made by advertisers—absolute and qualified claims—and requires that an absolute claim, such as that regarding the biodegradability of the teabags concerned, must be "supported by a high level of substantiation" and should not be "used without qualification unless advertisers can provide substantiation that their product causes no environmental damage." The Complaint points out that the claim in question cannot possibly be supported by a high level of substantiation and, regardless, no details are provided, either on the product's packaging or on the retailer's website, about how any conclusions regarding the product's biodegradability

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were reached. It therefore appears that the claim was, at best, carelessly included on the product's packaging, in flagrant breach of the ASAI Code.

Of course, in almost every country there would exist corresponding statutory and/or industry-administered normative frameworks for the regulation of false or misleading claims or advertising, generally demanding similar standards of conduct and due diligence. In the vast majority of cases, these rules would extend to cover claims regarding the environmental performance or risks associated with products. In the United States, for example, there have been several challenges to companies describing plastic packaging as "recyclable" when, in practice, local infrastructure capable of effectively recycling such plastics is limited or absent. First Amended Complaint, *Smith v. Keurig Green Mountain, Inc.*, No. 18-cv-06690 (N.D. Cal. Dec. 21, 2018), ECF No. 20; Complaint, *Swartz et al. v. Coca-Cola Co. et al.*, No. 21-cv-04643 (N.D. Cal. June 16, 2021), ECF No. 1.

Justifying Enforcement

Keenly aware that the waste generated from teabags might be regarded as a marginal environmental problem at best, the Complaint made every effort to highlight the fact that the food industry is a major plastics polluter, citing research showing, for example, that around 40% of plastic packaging, the largest single application of plastics, is used by the food industry. ING, *Plastic Packaging in the Food Sector* (2019). More directly related to the product in question, it also stressed the sheer extent of tea consumption in Ireland—with each tea drinker (comprising a very considerable majority of the Irish population) apparently consuming up to five cups per day—to demonstrate that the volume of teabag waste to be disposed is significant. Sharon McGown, *Seven Facts You Didn't Know About Ireland's Favourite Drink—Tea*, Irish Mirror, Feb. 20, 2019. Therefore, the use of any plastic material in such a single-use, short-term product is highly questionable. The Complaint further produced convincing evidence of the level of awareness and concern regarding plastics and related waste among European citizens, companies, and consumers, including recent data on the willingness of Irish consumers to pay a premium for sustainable products. PwC, *Irish Retail and Consumer Report: Investing in Experience* (2019).

In addition to misleading consumers and undermining the market for sustainable products, the Complaint highlights that the misleading claim may itself exacerbate the negative environmental impacts of the product concerned by encouraging responsible consumers to dispose of the teabags in the natural environment in a manner that leads to waste problems, in the mistaken belief that they are fully biodegradable and may be safely composted. The Complaint also points out that the retailer concerned had been, or certainly ought to have been, fully aware of the problematic nature of its biodegradability claims in respect of this product. In support of this contention, the Complaint references a 2021 customer complaint posted on the retailer's own website that clearly highlighted one consumer's discovery that this range of teabags was entirely unsuitable for disposal by composting.

> Particularly where clinical law students are prevented from engaging directly in environmental litigation before the courts, they might usefully assist in promoting greater enforcement of, and ultimately ensuring compliance with, a broad range of environmental regulatory regimes.

More pointedly, the Complaint took pains to point out how active pursuit of the issue would clearly align with the four "Prioritisation Principles" set out under the CCPC's own enforcement strategy. In relation to Principle 1, regarding the "level of economic and/or physical harm," it highlighted that the retailer in question is a leading player in the Irish food retail market, which is gaining a competitive advantage by misleading consumers as to the true nature of their products and the effects of these products on the natural environment. It pointed out that these particular misleading claims, and any other similar claims regarding the biodegradability of products containing plastic made by a retailer of this size and importance in the market, whether made wilfully or negligently, must lead to significant and long-lasting harm to nature and undermine the transition to a circular economy. This is particularly true in light of recent scientific findings regarding the toxicity of plant-based bioplastics such as PLA. Ewa Liwarska-Bizukojc, *Effect of (Bio) Plastics on Soil Environment: A Review*, 795 Sci. of Total Env't 148889 (2021); Esperanza Huerta-Lwanga et al., *Is the Polylactic Acid Fiber in Green Compost a Risk for* Lumbricus terrestris *and* Triticum aestivum*?*, 13 Polymers 703 (2021). For the purposes of Principle 2, regarding "likely impact of the CCPC's action," the Complaint laid emphasis on the importance of the Commission being seen to address misleading claims of this sort, as its actions would send a clear message to all retailers operating in Ireland that the veracity of product-related environmental claims must be ascertained and that enforcement for noncompliance will be robust. As regards Principle 3, regarding "strategic significance," the Complaint pointed to the growing importance attributed to tackling so-called greenwashing at EU policy level. *Proposal for a Directive Amending Directives 2005/29/EC [EU Unfair Commercial Practices Directive]*

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and 2011/83/EU [EU Consumer Rights Directive] as Regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information, COM (2022) 143 final (Mar. 30, 2022); Doig McMahon, *Greenwashing—Which Adverts Get Hosed Down?*, Irish Legal News, Nov. 1, 2022. It also reiterated that the CCPC's central mission is to make markets work better for consumers and businesses, something that is impossible when large retailers can benefit from competitive advantage by making unsubstantiated environmental claims. Finally, in relation to Principle 4, regarding "risks, resources and costs," the Complaint suggested that the scientific research and legal analysis compiled and presented therein should alleviate the CCPC of much of the burden of conducting a full investigation *ab initio*. Altogether, therefore, the Complaint made a very strong argument for enforcement action to be initiated on the part of the CCPC.

Potential for Clinical Law Students

This clinical project illustrates a potentially significant contribution that environmental law students engaged in clinical courses or programs might make towards the continuing development and evolution of a comprehensive governance framework for environmental protection and improvement. Particularly where clinical law students are prevented from engaging directly in environmental litigation before the courts, they might usefully assist in promoting greater enforcement of, and ultimately ensuring compliance with, a broad range of environmental regulatory regimes. For one thing, such clinical courses are intended and designed to furnish law students with the time and resources to invest in research-informed, discursive elaboration of (often neglected and/or underdeveloped) regulatory frameworks. In addition, such complaints or submissions can promote the more active involvement of (often under-resourced and overstretched) regulatory agencies by highlighting the broader policy context for, and long-term environmental benefits of, effective enforcement action. Of course, the myriad benefits for law students themselves stemming from their direct, proactive, and hands-on engagement in the development and implementation of emerging legal frameworks are entirely self-evident.

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