

# **\*\*page 82\*\* Vacuum cleaner energy labels and misleading commercial practices: EU consumers left in the dust?<sup>1</sup>**

A case annotation of C-632/16 *Dyson Ltd v BSH Home Appliances NV*

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## **I. Introduction**

In May 2010, the European Parliament and the Council adopted Directive 2010/30/EU concerning energy labelling requirements for consumer household appliances.<sup>3</sup> Building further on earlier legislation<sup>4</sup>, the now repealed<sup>5</sup> directive essentially set out a framework for the harmonization of energy consumption information by means of a standardized label. This particular label is known as the EU Energy Label.

Over the years, EU legislators have introduced numerous supplementing regulations, thereby gradually extending the scope of the energy labelling requirement to nearly all consumer grade energy-related products.<sup>6</sup> One of these supplementing acts – Delegated Regulation 665/2013 – contains provisions specifically geared towards energy labelling of vacuum cleaners.<sup>7</sup> As a result, since September 2014, vacuum cleaner manufacturers are obligated to submit new appliances to extended testing in order to determine the device’s energy efficiency class. This information subsequently needs to be displayed on the product via an EU Energy Label before it is put on the market.

Even though the content of Delegated Regulation 665/2013 leaves little to the imagination, it gave rise to an interesting **\*\*page 83\*\*** dispute between two vacuum cleaner manufacturers. More specifically, the question arose whether EU consumers can be misled based on information that is *not* mentioned on a vacuum cleaner’s energy label. This particular question eventually prompted

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<sup>3</sup> Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products [2010] OJ L153/1 (hereafter: Directive 2010/30/EU).

<sup>4</sup> Council Directive 79/530/EEC of 14 May 1979 on the indication by labelling of the energy consumption of household appliances [1979] OJ L145/1 (hereafter: Directive 79/530/EEC); Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances [1992] OJ L297/16 (hereafter: Directive 92/75/EEC).

<sup>5</sup> Directive 2010/30/EU has been superseded by Regulation 2017/1369, which is still in force; Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1 (hereafter: Regulation 2017/1369).

<sup>6</sup> An overview of all categories concerned can be found at European Commission, ‘Energy efficient products’ (*European Commission*, 31 July 2014), <<https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficient-products>> accessed 19 October 2018.

<sup>7</sup> Commission Delegated Regulation (EU) No 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners [2013] OJ L192/1 (hereafter: Delegated Regulation 665/2013).

the ECJ to hand down a preliminary ruling in C-632/16 *Dyson*.<sup>8</sup> The core of the dispute revolved around the interpretation of Delegated Regulation 665/2013 and its compatibility with the provisions of Directive 2005/29/EC on unfair commercial practices (hereafter: UCPD). In its judgment, the Court clarified that leaving out information regarding the testing conditions does not necessarily constitute a misleading omission pursuant to article 7 UCPD.

The following case note aims to critically analyze the Court's judgment in *Dyson*. The second and third parts take a closer look at the legal and factual context of the situation at hand. The fourth part provides an in-depth analysis of the ECJ's reasoning. Part five sets out a number of comments on the present case and establishes a link between this case and *Dyson*'s action for annulment<sup>9</sup> against Delegated Regulation 665/2013. The sixth and final part summarizes the main findings of this case annotation.

## II. Legal context

The first steps towards an EU Energy Label were taken in 1979 and 1992, when the European Economic Community (EEC) had adopted Directive 79/530/EEC and Directive 92/75/EEC respectively. A close reading of the recitals illustrates how the EEC aimed to achieve market integration by adopting positive harmonization measures under the current article 114 TFEU.<sup>10</sup> The directives meticulously pointed out how structural problems were arising in the internal market due to various Member States implementing their own energy labelling schemes.<sup>11</sup> According to the Council, differences between these schemes would almost certainly cause confusion for some consumers and, consequently, lead to barriers to intra-Community trade.<sup>12</sup> In response to these issues, the EEC found it necessary to introduce a uniform energy label for household appliances and to impose harmonized energy consumption testing methods.<sup>13</sup> Furthermore, the directives also briefly touched on environmental concerns by highlighting that prudent use of energy would bring about a more rational use of natural resources.<sup>14</sup>

With Directive 2010/30/EU recasting the 1992 energy labelling scheme, a noticeable shift took place in terms of the rationale behind the EU Energy Label. Market integration ideals were ostensibly moved to the background whereas energy policy and environmental goals gained more attention.<sup>15</sup> More concretely, the directive put a very strong emphasis on the Europe 2020 strategy<sup>16</sup> and the associated objective to achieve significant reductions in terms of Europe's energy

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<sup>8</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599.

<sup>9</sup> Case T-544/13 RENV, *Dyson Ltd v European Commission* [2018] EU:T:2018:761; Case C-44/16 P, *Dyson Ltd v European Commission* [2017] EU:C:2017:357; Case T-544/13, *Dyson Ltd v European Commission* [2015] EU:T:2015:836.

<sup>10</sup> Directive 92/75/EEC, recital 1.

<sup>11</sup> Directive 79/530/EEC, recital 7; Directive 92/75/EEC, recital 2.

<sup>12</sup> *Ibid.*, recital 7; *ibid.*, recitals 2 and 8.

<sup>13</sup> *Ibid.*, recital 8; *ibid.*, recital 6.

<sup>14</sup> *Ibid.*, recitals 1-5; *ibid.*, recitals 3-4.

<sup>15</sup> Note, for instance, that Directive 2010/30/EU was adopted on the basis of article 194(2) TFEU instead of article 114 TFEU. In this regard, see Marjan Peeters, 'Governing towards Renewable Energy in the EU: Competences, Instruments, and Procedures' (2014) 21 MJ 46.

<sup>16</sup> European Commission, 'Europe 2020 strategy' (*European Commission*, 1 August 2018), <[https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en)> accessed 18 November 2018.

consumption levels.<sup>17</sup> To that end, the role of consumers could not be overlooked. By providing “*accurate, relevant and comparable information*”<sup>18</sup> on devices’ energy consumption, the directive incited end users to favor less energy hungry household appliances.<sup>19</sup> Furthermore, purchasing more energy efficient appliances would also indirectly bring about cost savings for the consumer.<sup>20</sup> A similar line of reasoning can be found in Regulation 2017/1396, which not only supersedes Directive 2010/30/EU but also provides a number of updates<sup>21</sup> to the 2010 energy labelling scheme.<sup>22</sup>

The EU saw great potential to achieve energy savings by subjecting household vacuum cleaners to the compulsory energy labelling scheme.<sup>23</sup> After all, “*energy used by vacuum cleaners accounts for a significant part of total energy demand in the Union*”.<sup>24</sup> Eventually, the European Commission took action by adopting Delegated Regulation 665/2013. As a result, from September 2014 onwards, vacuum cleaner suppliers have to ensure that their products come with an EU Energy Label.

Both Directive 2010/30/EU and Delegated Regulation 665/2013 contain provisions regarding the design and content of the EU Energy Label.<sup>25</sup> The former outlines the overall layout and the classification system of the energy label.<sup>26</sup> It establishes, among others, an energy efficiency ranking by using letters A to G (with A being the most efficient energy class).<sup>27</sup> Moreover, the directive also provides that each letter should be associated with a color, ranging from green to red (with green representing the most efficient energy class).<sup>28</sup> Delegated Regulation 665/2013 goes into detail about the testing methods and the particular information to be mentioned on vacuum cleaner energy labels. When looking at Annex I, one can observe three separate performance ratings being ascribed to each vacuum cleaner: (i) the overall energy efficiency of the vacuum cleaner, expressed in annual energy consumption per year, (ii) the cleaning performance of the device, based on the mass of artificial dust particles removed from different types of surfaces, and (iii) the dust re-emission class, determined by **\*\*page 84\*\*** the amount of fine dust particles re-

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<sup>17</sup> Directive 2010/30/EU, recitals 3-5; Gianni Lo Schiavo, ‘The New EU Directive on Energy Efficiency: A Critical View’ (2013) 20 MJ 323.

<sup>18</sup> Directive 2010/30/EU, recital 5.

<sup>19</sup> Anna Russoa, Marta Rossia, Michele Germania and Claudio Favib, ‘Energy Label Directive: current limitations and guidelines for the improvement’ (2018) 69 Procedia CIRP 676.

<sup>20</sup> Directive 2010/30/EU, recital 8 and article 10(4)(d); Gianni Lo Schiavo, ‘The New EU Directive on Energy Efficiency: A Critical View’ (2013) 20 MJ 324.

<sup>21</sup> A full-fledged review of Regulation 2017/1396 lies beyond the scope of this case annotation. However, the most important changes can be summarized as follows: (i) a rescaling procedure for the energy classes in order to easily accommodate to technological changes, (ii) an abandonment of the A+, A++ and A+++ energy classes since these were rather confusing to end users, and (iii) the creation of a product database by January 2019 to allow for better enforcement of the labelling requirements by market surveillance authorities.

<sup>22</sup> Regulation 2017/1396, recitals 8 and 10 and article 16(3)(b).

<sup>23</sup> Delegated Regulation 665/2013, recital 1.

<sup>24</sup> Delegated Regulation 665/2013, recital 2.

<sup>25</sup> For a take on the design aspects of the EU Energy Label from a behavioral science point of view, see Fabiana Di Porto and Nicoletta Rangone, ‘Behavioural Sciences in Practice: Lessons for EU Rulemakers’ in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015) 44-46.

<sup>26</sup> Directive 2010/30/EU, article 4 and article 10(4)(d).

<sup>27</sup> Directive 2010/30/EU, article 10(4)(d).

<sup>28</sup> Ibid.

emitted while the vacuum cleaner is being used.<sup>29</sup> Annex VI of the delegated regulation specifies the measurement and calculation methods to be used by reference to multiple mathematical formulas.<sup>30</sup>

In view of adopting harmonized energy measurement standards, the European Commission issued standardization mandates to the CEN<sup>31</sup> and the CENELEC<sup>32</sup>, two official standardization organizations within the EU.<sup>33</sup> This eventually resulted in European standard EN 60312-1:2013 and later in EN 60312-1:2017.<sup>34</sup> Strikingly, measurement of energy consumption had to be tested with an empty dust receptacle. At the time being, it was deemed unfeasible to achieve reproducible test results while using a partly filled dust reservoir.<sup>35</sup>

### III. Facts of the case

In 2016, the Belgian *rechtbank van koophandel te Antwerpen* (Commercial Court, Antwerp) submitted a request for a preliminary ruling to the ECJ regarding the interpretation of Delegated Regulation 665/2013 and article 7 UCPD. The reference was made in the context of a legal dispute between Dyson and BSH Home Appliances. Both companies produce and market vacuum cleaners within the EU and are subjected to the labelling requirement contained in Delegated Regulation 665/2013. Notably, Dyson manufactures vacuum cleaners that operate without a dust bag, whereas BSH markets devices that function in a conventional way, i.e. with a dust bag.<sup>36</sup>

Two separate issues were at stake in the present case, both relating to BSH's labelling practices. The first matter of contention revolved around allegations of misleading consumers by omission.<sup>37</sup> In support of that view, Dyson explicated that the information contained on the energy label corresponded with tests which were carried out with an empty dust receptacle.<sup>38</sup> Dyson subsequently argued that, in normal conditions of use, BSH's appliances required more energy than shown on the label since the pores of the dust bag became clogged once it started filling up with dust, thereby requiring the motor to generate more power to maintain the same suction.<sup>39</sup> Furthermore, Dyson presented evidence indicating that, due to the different nature of bagless

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<sup>29</sup> Delegated Regulation 665/2013, Annex I.

<sup>30</sup> Delegated Regulation 665/2013, Annex VI. These formulas illustrate that, on average, end users perform 50 cleaning tasks per year. Whilst doing so, they vacuum a floor surface area of about 87 m<sup>2</sup> whereby each floor point is vacuumed 4 times (two double strokes).

<sup>31</sup> *Comité Européen de Normalisation* (European Committee for Standardization), <<https://www.cen.eu>> accessed 18 November 2018.

<sup>32</sup> *Comité Européen de Normalisation Électrotechnique* (European Committee for Electrotechnical Standardization), <<https://www.cenelec.eu>> accessed 18 November 2018.

<sup>33</sup> European Commission, 'Mandate to CEN and CENELEC for the elaboration and adoption of measurement standards for household appliances: vacuum cleaners' (*European Commission*, 25 June 2004), <[http://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=select\\_attachments.download&doc\\_id=197](http://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=select_attachments.download&doc_id=197)> accessed 18 November 2018.

<sup>34</sup> European Commission, 'Ecodesign and energy labelling - Vacuum cleaners' (*European Commission*, 31 May 2018), <[https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/ecodesign/vacuumcleaners\\_en](https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/ecodesign/vacuumcleaners_en)> accessed 18 November 2018.

<sup>35</sup> Case T-544/13 RENV, *Dyson Ltd v European Commission* [2018] EU:T:2018:761, para 59; Case T-544/13, *Dyson Ltd v European Commission* [2015] EU:T:2015:836, para 49.

<sup>36</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 22.

<sup>37</sup> *Ibid.*, para 27.

<sup>38</sup> *Ibid.*, para 20.

<sup>39</sup> *Ibid.*, para 22.

vacuum cleaners, its own devices were not affected by increased energy consumption levels once dust started building up in the receptacle.<sup>40</sup> In light of the foregoing, BSH's vacuum cleaner energy labels were said to be inaccurate. Furthermore, the company itself was accused of actively misleading consumers by omission by not specifying on the energy label that the energy efficiency tests were conducted with empty dust receptacles.

The second issue related to BSH's marketing practices of attaching different labels and symbols to its products in addition to the EU Energy Label.<sup>41</sup> Moreover, the information contained on these supplementary labels was somewhat similar to the information provided by the EU Energy Label.<sup>42</sup> For one particular type of vacuum cleaner, the referring court noted that the device displayed a green label stating "Energy A", an orange label with the phrase "AAAA Best rated: A in all classes" and a black label indicating "Class A Performance".<sup>43</sup> In light of the wording of Delegated Regulation 665/2013, the referring judge was uncertain whether the applicable rules permitted the use of additional labels and symbols.<sup>44</sup>

## IV. Judgment of the Court

### A. Omitting information regarding the energy efficiency testing conditions

The ECJ answered the first question in the negative: withholding information regarding the testing conditions, used for determining the vacuum cleaner's energy classification, does not entail a misleading omission under article 7 UCPD.<sup>45</sup> The reasoning behind the Court's decision closely followed the views put forward by Advocate General Saugmandsgaard Øe in his Opinion.<sup>46</sup>

The Court commenced its argument by reiterating some of the findings from *Canal Digital Danmark*<sup>47</sup> and emphasized in para 28 that the UCPD calls for a high level of consumer protection.<sup>48</sup> It subsequently upheld the view that displaying information via labels, even those provided for by Delegated Regulation 665/2013, qualifies as a "commercial practice" in the sense of article 2(d) UCPD.<sup>49</sup> Recalling *RLvS*<sup>50</sup>, the Court made it clear that the concept of "commercial practice" should be understood in a broad sense.<sup>51</sup> This implies that non-communication of

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<sup>40</sup> Ibid., para 22.

<sup>41</sup> Ibid., para 50.

<sup>42</sup> Ibid., para 25.

<sup>43</sup> Ibid., paras 24 and 49.

<sup>44</sup> Ibid., para 25.

<sup>45</sup> Ibid., paras 45-46.

<sup>46</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:95, Opinion of AG Saugmandsgaard Øe, paras 78, 93 and 96.

<sup>47</sup> Case C-611/14, *Criminal proceedings against Canal Digital Danmark A/S* [2016] EU:C:2016:800. The case concerned advertisements for TV subscription services. Certain elements of the product price were omitted or presented in a "less conspicuous manner", giving consumers the wrong impression as to the actual price to be paid. See also Pauline Verbiest, 'Arrest Canal Digital: naar een bescherming van de real life-consument bij oneerlijke handelspraktijken?' (2017) 114 DCCR 54.

<sup>48</sup> See also Directive 2005/29/EC, recital 1.

<sup>49</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 29.

<sup>50</sup> Case C-391/12, *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] EU:C:2013:669. The facts of the case revolved around sponsored newspaper articles and whether it was necessary to clearly identify this type of content by mentioning the word "advertisement".

<sup>51</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 30.

information as well as communication of information that is unfavorable to the trader can fall within the ambit of a commercial practice.<sup>52</sup> **\*\*page 85\*\***

Having established the existence of a commercial practice, the Court then considered the interplay between the UCPD and Delegated Regulation 665/2013.<sup>53</sup> Whereas the former necessitates consumers being sufficiently informed to make transactional decisions, the latter mandates the absence of information regarding the energy efficiency testing conditions. Interestingly, both objectives are justified on grounds of consumer protection, which the Court identified in para 33 of its judgment.<sup>54</sup> In application of the precedence rule in article 3(4) UCPD, the Court explained that, in case of a conflict, the general consumer protection rules from the UCPD need to give way to the more specific energy label uniformity requirements stipulated by Delegated Regulation 665/2013.<sup>55</sup> As a result, traders are not allowed to add any additional information to the EU Energy Label.<sup>56</sup>

The Court then ventured forth by stating that traders are not precluded from adding information regarding the testing conditions elsewhere on their products.<sup>57</sup> Nevertheless, leaving out these details – i.e. mentioning them neither on the EU Energy Label nor on a different tag – does not constitute a misleading omission in the sense of article 7 UCPD for the reason that it does not qualify as “material information” in the eyes of the average consumer.<sup>58</sup> Stated otherwise: the Court took the view in paras 43-45 that information regarding the testing conditions is incapable of influencing the transactional behavior of a consumer and, therefore, it does not have to be mentioned anywhere on the product.

## **B. Using supplementary (energy) labels**

As concerns the second question, the ECJ answered that adding additional tags and symbols to a vacuum cleaner is prohibited by Delegated Regulation 665/2013 if this would cause confusion for the end user.<sup>59</sup> Whether or not this were the case, depended on a factual assessment to be made by the referring judge.<sup>60</sup>

In arriving at the above conclusion, the Court analyzed whether Delegated Regulation 665/2013 (read in conjunction with the UCPD) allows for additional energy labels to be displayed on household appliances.<sup>61</sup> To that end, the Court identified a twofold test: (i) is the label incompatible with the requirements from Delegated Regulation 665/2013 and (ii) is the label likely to mislead consumers?<sup>62</sup> As regards the first criterion, no apparent incompatibility arose since the labels added by BSH were not covered by Delegated Regulation 665/2013.<sup>63</sup>

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<sup>52</sup> Ibid., para 31.

<sup>53</sup> Ibid., para 32.

<sup>54</sup> Ibid., para 33.

<sup>55</sup> Ibid., para 34.

<sup>56</sup> Ibid., para 35.

<sup>57</sup> Ibid., para 42.

<sup>58</sup> Ibid., paras 43 and 45.

<sup>59</sup> Ibid., para 58.

<sup>60</sup> Ibid., para 58.

<sup>61</sup> Ibid., para 50.

<sup>62</sup> Ibid., para 51.

<sup>63</sup> Ibid., para 52.

Then, as for the potentially misleading nature of the supplementary labels, the ECJ motioned the referring court to examine and determine by itself – in view of all the relevant factors – whether consumers are being deceived.<sup>64</sup> However, the ECJ did not shy away from providing detailed guidance to the referring judge. Not only should the two aforementioned criteria be interpreted in a strict sense<sup>65</sup>, the referring judge should be mindful of the fact that “*some of the labels used by BSH repeat the same information [present on the EU Energy Label] while using a distinct graphic for each label, which could give the impression that they convey different information each time*”.<sup>66</sup> These findings go hand in hand with the AG’s Opinion, who anticipated not only a “*game of one-upmanship*”<sup>67</sup> but also potential harmful effects in terms of uniformity and transparency of the EU Energy Label in case the use of additional energy labels were to be accepted altogether.<sup>68</sup> Yet, AG Saugmandsgaard Øe did not preclude the use of labels which provide information on non-energy aspects (such as the selling price, warranty period, and place of manufacture) of the vacuum cleaner.<sup>69</sup>

## V. Comment

One of the key objectives of the Europe 2020 strategy revolves around increasing energy efficiency levels within the EU by 20%.<sup>70</sup> To that end, the EU has dedicated a significant amount of attention to the creation of a harmonized energy labelling scheme.<sup>71</sup> Even though the groundwork for the current EU Energy Label has already been laid in 1979, legal doctrine<sup>72</sup> and ECJ case law<sup>73</sup> on the

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<sup>64</sup> Ibid., para 53.

<sup>65</sup> Ibid., para 55.

<sup>66</sup> Ibid., para 57.

<sup>67</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:95, Opinion of AG Saugmandsgaard Øe, para 60.

<sup>68</sup> Ibid., para 59.

<sup>69</sup> Ibid., para 65.

<sup>70</sup> European Commission, ‘Communication from the Commission. Europe 2020. A strategy for smart, sustainable and inclusive growth’ (*EUR-Lex*, 3 March 2010), <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020>> accessed 28 November 2018; Marjan Peeters, ‘Governing towards Renewable Energy in the EU: Competences, Instruments, and Procedures’ (2014) 21 MJ 54; Gianni Lo Schiavo, ‘The New EU Directive on Energy Efficiency: A Critical View’ (2013) 20 MJ 322; Dörte Fouquet and Jana Nysten, ‘Changing Energy Policy’ (2012) 2 EEJ 38.

<sup>71</sup> European Commission, ‘Energy label and ecodesign’ (*European Commission*, 8 November 2018) <[https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/energy-label-and-ecodesign\\_en](https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/energy-label-and-ecodesign_en)> accessed 28 November 2018.

<sup>72</sup> Marjan Peeters, ‘Governing towards Renewable Energy in the EU: Competences, Instruments, and Procedures’ (2014) 21 MJ 39; Gianni Lo Schiavo, ‘The New EU Directive on Energy Efficiency: A Critical View’ (2013) 20 MJ 321.

<sup>73</sup> At present, the ECJ has dealt with energy labelling on 7 occasions: Case C-139/97, *Commission v Italy* [1998] EU:C:1998:58 regarding Italy’s failure to transpose labelling legislation on electric refrigerators and freezers; Case C-281/01, *Commission v Council* [2002] EU:C:2002:761 with regard to the correct legal basis for energy labelling programs; Case C-79/04, *Commission v Luxembourg* [2004] EU:C:2004:736 concerning Luxembourg’s failure to transpose labelling legislation on electric ovens in a timely manner; Case C-319/13, *Udo Rätzke v S+K Handels GmbH* [2014] EU:C:2014:210 in relation to the temporal scope of application of TV energy labelling requirements; Case T-544/13, *Dyson Ltd v European Commission* [2015] EU:T:2015:836 involving an application for annulment of Delegated Regulation 665/2013; Case C-44/16 P, *Dyson Ltd v European Commission* [2017] EU:C:2017:357 dealing with the appeal against T-544-13; Case T-544/13 RENV, *Dyson Ltd v European Commission* [2018] EU:T:2018:761 providing for the annulment of Delegated Regulation 665/2013.

topic of energy labels is surprisingly scarce.<sup>74</sup> The present case, however, reveals that the EU energy labelling scheme is not without issues. Hence, the decision in *Dyson* is particularly welcomed since it sheds light on the interaction between the different purposes of the EU Energy Label: energy and environmental policy, on the one hand, and consumer protection, on the other.

### A. Energy labelling as a commercial practice

Interestingly, BSH attempted to derail the case at the outset by arguing that energy labelling practices do not qualify as a commercial practice.<sup>75</sup> More specifically, the company purported that its behavior was not caught under article 2(d) UCPD since it did not have any leeway in drawing-up the **\*\*page 86\*\*** energy label.<sup>76</sup> In other words, BSH was “merely complying” with Delegated Regulation 665/2013 by not mentioning the energy efficiency testing conditions on the energy label.<sup>77</sup> Neither the AG nor the Court entertained BSH’s argument, citing excessive formalism as the main reason for rejection.<sup>78</sup>

Thus, according to both the Court and the AG, making use of energy labels amounts to a commercial practice.<sup>79</sup> Following this qualification, the Court drew attention anew to the broadly construed interpretation of the notion “commercial practice”. Such a finding is fully consistent with article 2(d) UCPD, where the concept of commercial practice is defined as “*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*”.<sup>80</sup> Furthermore, established ECJ case law – *VTB-VAB*<sup>81</sup>, *Mediaprint*<sup>82</sup> and *UPC Magyarország*<sup>83</sup> in particular – also corroborates this view. Concurrently, the ECJ’s reasoning also contributes to the UCPD’s overarching objective of attaining a high level of consumer protection within the EU.<sup>84</sup>

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<sup>74</sup> AG Saugmandsgaard Øe also makes note of this point in para 43 of his Opinion.

<sup>75</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:95, Opinion of AG Saugmandsgaard Øe, para 72.

<sup>76</sup> Ibid.

<sup>77</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 23.

<sup>78</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:95, Opinion of AG Saugmandsgaard Øe, para 76.

<sup>79</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 29; Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:95, Opinion of AG Saugmandsgaard Øe, para 78.

<sup>80</sup> Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer International Publishing 2015) 14; Mateja Djurovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016) 15-16.

<sup>81</sup> Case C-261/07, *VTB-VAB NV v Total Belgium NV* [2009] EU:C:2009:244.

<sup>82</sup> Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v “Österreich”-Zeitungsverlag GmbH* [2010] EU:C:2010:660.

<sup>83</sup> Case C-388/13, *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* [2015] EU:C:2015:225.

<sup>84</sup> Jules Stuyck, ‘The Court of Justice and the Unfair Commercial Practices Directive’ (2015) 52 CML Rev. 724; Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer International Publishing 2015) 16.



Even though the concept of a commercial practice is construed in a broad sense, minor limitations as to its scope have arisen over the years, notably in *Pelckmans Turnhout*<sup>85</sup> and in *RLvS*<sup>86, 87</sup>. These two cases underscore the need for a direct link between a commercial practice and a sale or supply of goods or services to consumers.<sup>88</sup> Stated otherwise, a trader's commercial behavior can only be caught under the provisions of the UCPD if consumers' economic interests are at stake. In the case at hand, there is a strong argument to be made that the information contained on the energy label is able to directly influence the average consumer's purchasing behavior.

Pursuant to the prevailing interpretation of the UCPD, this particular aspect of the ECJ's judgment did not come as a surprise. Firstly, the EU Energy Label is built on the premise that it can steer consumers' purchasing behavior by providing information regarding a product's energy usage. Furthermore, objectives such as achieving a high energy efficiency rating or a low noise pollution level could legitimately guide a trader's commercial strategy which, in turn, can be linked back to the trader's marketing potential. On that account, the connection between energy labelling practices, on the one hand, and the promotion and sale of vacuum cleaners, on the other, seems irrefutable. These findings are also in line with the reasoning set out by legal scholarship, highlighting that "*a purpose of attracting consumers*" in view of concluding sales is oftentimes a more tangible criterion in determining whether a trader's behavior can be characterized as a commercial practice.<sup>89</sup>

The counterfactual scenario cannot be overlooked either. Bringing labelling practices outside the scope of a commercial practice could arguably have a detrimental and undesired effect of undermining the overall effectiveness of the UCPD. For that matter, the ECJ made the right call by not narrowing down the scope of application of what exactly constitutes a commercial practice.

## **B. Resolving conflicts between Directive 2005/29/EC and other pieces of European consumer protection legislation**

When a conflict arises between the UCPD and other European legislative acts which have as their purpose the protection of consumers, recourse should be made to the precedence rule in article 3(4) UCPD. This provision stipulates that Community rules governing specific aspects of unfair commercial practices shall prevail over the general requirements set forth by the UCPD.<sup>90</sup>

At first sight, Delegated Regulation 665/2013 has relatively little to do with consumer protection inasmuch as the statutory provisions and the recitals primarily point towards energy policy. Yet, the Court identified some provisions as clearly having a consumer protection element. Especially the requirement to provide the end user with "*accurate, relevant and comparable information*" via

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<sup>85</sup> Case C-483/12, *Pelckmans Turnhout NV v Walter Van Gestel Balen NV and Others* [2014] EU:C:2014:304.

<sup>86</sup> Case C-391/12, *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] EU:C:2013:669.

<sup>87</sup> Jules Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 CML Rev. 732; Mateja Djurovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016) 11.

<sup>88</sup> Safia Cazet, 'Étiquetage énergétique et pratiques commerciales déloyales' (2018) 10 L'actualité du droit de l'Union européenne 395; Bert Keirsbilck, 'The UCPD's notion of "commercial practice": UPC Magyarország' (2016) 53 CML Rev. 539.

<sup>89</sup> Bert Keirsbilck, 'The UCPD's notion of "commercial practice": UPC Magyarország' (2016) 53 CML Rev. 539. See also Jules Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 CML Rev. 733 who phrases it as carrying out a "gainful activity".

<sup>90</sup> Directive 2005/29/EC, article 3(4).

the energy label adds to the consumer protection acquis.<sup>91</sup> Hence, a small aspect of Delegated Regulation 665/2013 overlaps with the UCPD and, moreover, both rulesets point towards different outcomes. This conflict is subsequently resolved pursuant to article 3(4) UCPD, which essentially encompasses a rephrasing of the Latin maxim *lex specialis derogat legi generali*: when two legislative acts cover the same substance, priority should be given to the more specific rules over the general applicable ones insofar as these rules are overlapping.<sup>92</sup>

In the case at hand, the energy labelling rules qualify as the more specific provisions and, therefore, take precedence over the UCPD. As a result, by allowing Delegated Regulation 665/2013 to prevail, the Court confirmed that there is no question of misleading consumers by omission under article 7 UCPD.<sup>93</sup> Furthermore, this also reinforces the view that Delegated Regulation 665/2013 offers no leeway to traders to add any other details to the EU Energy Label. Interestingly, **\*\*page 87\*\*** these findings thus extend to situations where additional information could, in fact, more accurately inform consumers regarding the actual energy consumption of their household appliances. From a legal point of view, this is arguably the more sensible outcome since any other interpretation of Delegated Regulation 665/2013 would fundamentally hamper the uniformization goal of the EU Energy Label.

With the Court having clarified that no additional information can be added to the EU Energy Label, the following question arises: is it mandatory to add information regarding the energy efficiency testing conditions elsewhere on the product? In doing so, one essentially avoids creating a legislative conflict between the UCPD and Delegated Regulation 665/2013, implying that the former will find application again. The Court confirmed the possibility of adding information on other places than the energy label and, logically, interjected that in those circumstances reference should be made to article 7 UCPD.<sup>94</sup>

### **C. What constitutes material information in the eyes of the average consumer?**

In light of the foregoing, it is necessary to determine whether leaving out information regarding the testing conditions elsewhere on the product entails a misleading omission. Accordingly, this calls for an assessment whether details surrounding the energy efficiency tests qualify as *material information*<sup>95</sup>, which is required by the average consumer to take an informed transactional decision.<sup>96</sup> For this assessment to succeed, it first needs to be established which information is regarded as material and which details are deemed trivial. According to the definition contained in article 7 UCPD, information is characterized as material if it is “*likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*”.<sup>97</sup> For that matter, the UCPD itself contains a concise (albeit purely illustrative) overview of information

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<sup>91</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 33.

<sup>92</sup> Directive 2005/29/EC, recital 10; Jules Stuyck, Evelyne Terryn and Tom Van Dyck, ‘Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’ (2006) 43 CML Rev. 141.

<sup>93</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 41.

<sup>94</sup> *Ibid.*, para 42.

<sup>95</sup> Emphasis added.

<sup>96</sup> Cécile Delforge, ‘Les pratiques commerciales déloyales des entreprises à l’égard des consommateurs’ in Nicolas Thirion (ed), *Actualités en matière de pratiques du marché et protection du consommateur* (Anthemis 2011) 32; Hans Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 123.

<sup>97</sup> Directive 2005/29/EC, article 7(1).

which is considered to be material. A five-part enumeration is taken up in article 7(4), indicating that the essential attributes of the product, the commercial details of the trader and the pricing and delivery information constitute material information in any case.<sup>98</sup> Furthermore, article 7(5) makes reference to Annex II of the UCPD, which contains a non-exhaustive list of other information aspects which are considered to be material.<sup>99</sup>

Legal scholarship puts a particularly strong emphasis on price transparency and on conveying correct pricing information to the consumer.<sup>100</sup> Building further on this, it seems that economic security is of utmost importance for the consumer and he/she should not be confronted with any additional and unexpected costs when purchasing goods or services on the market.<sup>101</sup> This view is also confirmed by case law of the ECJ such as *Canal Digital Danmark*<sup>102</sup>, *Citroën Commerce*<sup>103</sup>, and *Ving Sverige*<sup>104</sup>. These judgments highlight that information bearing economic consequences on the consumer's decision-making process is in all likelihood material information. It should be recalled that the yardstick by which to assess the importance of information is the average consumer who is reasonably well-informed and reasonably observant and circumspect.<sup>105</sup> This, in turn, leads to the following conclusion: if the average consumer's decision to purchase a vacuum cleaner depends on whether he has information regarding the energy efficiency testing conditions, then that information qualifies as material.

As mentioned above, the Court held that this was not the case.<sup>106</sup> By making use of an *a contrario* argument, it clarified that information concerning the testing conditions is not regarded as material information since, in the opposite scenario, these details would have been included in Delegated Regulation 665/2013.<sup>107</sup> Furthermore, as indicated by the referring judge in his reference<sup>108</sup>, it would be quite paradoxical if BSH were to be held liable for committing a misleading omission by merely complying with the requirements set out by Delegated Regulation 665/2013.

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<sup>98</sup> Pauline Verbiest, 'Arrest Canal Digital: naar een bescherming van de real life-consument bij oneerlijke handelspraktijken?' (2017) 114 DCCR 58; Cécile Delforge, 'Les pratiques commerciales déloyales des entreprises à l'égard des consommateurs' in Nicolas Thirion (ed), *Actualités en matière de pratiques du marché et protection du consommateur* (Anthemis 2011) 32-33.

<sup>99</sup> Directive 2005/29/EC, recital 15; Jules Stuyck, Evelyne Terryn and Tom Van Dyck, 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 CML Rev. 129.

<sup>100</sup> Pauline Verbiest, 'Arrest Canal Digital: naar een bescherming van de real life-consument bij oneerlijke handelspraktijken?' (2017) 114 DCCR 60; Hans Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 123.

<sup>101</sup> Hans Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 124.

<sup>102</sup> Case C-611/14, *Criminal proceedings against Canal Digital Danmark A/S* [2016] EU:C:2016:800.

<sup>103</sup> Case C-476/14, *Citroën Commerce GmbH v Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauterer Wettbewerbs eV* [2016] EU:C:2016:527.

<sup>104</sup> Case C-122/10, *Konsumentombudsmannen v Ving Sverige AB* [2011] EU:C:2011:299.

<sup>105</sup> Pauline Verbiest, 'Arrest Canal Digital: naar een bescherming van de real life-consument bij oneerlijke handelspraktijken?' (2017) 114 DCCR 58-59; Cécile Delforge, 'Les pratiques commerciales déloyales des entreprises à l'égard des consommateurs' in Nicolas Thirion (ed), *Actualités en matière de pratiques du marché et protection du consommateur* (Anthemis 2011) 36-38; Hans Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 123.

<sup>106</sup> Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV* [2018] EU:C:2018:599, para 43.

<sup>107</sup> *Ibid.*, paras 44-45.

<sup>108</sup> *Ibid.*, para 23.

In the author's view, the Court made the right decision. By way of illustration, reference can be made to a fictional numerical example. Consider a vacuum cleaner with an advertised yearly energy usage of 25 kWh. Based on the (rounded) average energy price<sup>109</sup> of €0.20/kWh in Europe, this would lead to a total yearly energy cost of €5. Suppose this same vacuum cleaner suddenly consumes 20% more energy, i.e. 31.25 kWh instead of 25 kWh. This would bring about a yearly energy cost of €6.25. In this scenario, the economic difference for the consumer would be €1.25 per year. When compared with the average purchasing price of a vacuum cleaner, this constitutes a negligible amount of money per year and, therefore, does not have a significant detrimental effect on the economic position of the consumer. Contrarily, the end user will arguably give more weight to other characteristics of the vacuum cleaner such as noise levels, weight of the device, length of the power cord, additional attachments, cashback offers and so on.

However, the ruling of the Court leaves the underlying issue untouched: it simply did not engage with Dyson's findings suggesting that the existing testing conditions do not allow **\*\*page 88\*\*** for comparisons to be made between vacuum cleaners which make use of a dust bag and ones that do not. Instead, the Court limited itself to applying the relevant legal provisions. Thus, as a matter of principle, it is factually correct to state that the information conveyed by the EU Energy Label is inaccurate. In light of this, it comes as no surprise that Dyson had launched an action for annulment against Delegated Regulation 665/2013 in 2015 as well.<sup>110</sup> Following proceedings before the EGC and the ECJ, Delegated Regulation 665/2013 was eventually declared null and void on 8 November 2018.<sup>111</sup> Not only did the judgment state that the current energy measuring tests do not reflect realistic conditions of use<sup>112</sup>, it also rejected concerns about partly filled dust bag tests not being reproducible.<sup>113</sup>

At the moment, it remains to be seen what course of action the European Commission will adopt following the annulment of Delegated Regulation 665/2013. On the one hand, it seems most plausible that the Commission will only make slight amendments to the previous labelling regime, resolving only those issues which relate to the energy efficiency tests. On the other hand, the Commission could also make use of the opportunity to tackle some of the criticism addressed towards the EU Energy Label.<sup>114</sup> In doing so, the Commission can reassure consumers that the EU Energy Label is still fit for purpose to attain its overall objective, namely reducing energy consumption in the EU.

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<sup>109</sup> Eurostat, 'Electricity price statistics' (*Eurostat*, 27 November 2018), <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Electricity\\_price\\_statistics#Electricity\\_prices\\_for\\_household\\_consumers](https://ec.europa.eu/eurostat/statistics-explained/index.php/Electricity_price_statistics#Electricity_prices_for_household_consumers)> accessed 30 November 2018.

<sup>110</sup> Case T-544/13, *Dyson Ltd v European Commission* [2015] EU:T:2015:836.

<sup>111</sup> Case T-544/13 RENV, *Dyson Ltd v European Commission* [2018] EU:T:2018:761.

<sup>112</sup> *Ibid.*, paras 69-73.

<sup>113</sup> *Ibid.*, paras 55-56 *juncto* 68.

<sup>114</sup> For instance, the absence of a clear relationship between the purchase price and the energy efficiency and the fact that the lower energy categories remain (mostly) unpopulated. As to the former, see Fabiana Di Porto and Nicoletta Rangone, 'Behavioural Sciences in Practice: Lessons for EU Rulemakers' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing, 2015), 44-46. See also European Commission, 'Review of Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication of labelling and standard product information of the consumption of energy and other resources by energy-related products' (EUR-Lex, 15 July 2015), <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0345>> accessed 30 November 2018.

In any case, *Dyson* makes it clear that it is not possible to rely on information requirements contained in the UCPD in view of outmaneuvering more specific requirements posed by other consumer protection acts. Yet, even though *Dyson* did not involve a misleading omission, vacuum cleaner manufacturers should be mindful of the consequences stemming from the annulment of Delegated Regulation 665/2013. Firstly, pending the adoption of new rules by the European Commission, the UCPD comes into play again. Secondly, the overarching energy labelling scheme – currently governed by Regulation 2017/1396 – remains unaffected. On that note, it has been suggested elsewhere that, for the time being, vacuum cleaner manufacturers should probably stick to using the existing energy label whilst adding a clarifying note on their devices regarding the energy efficiency testing conditions.<sup>115</sup> Although it is not entirely clear whether adding such a clarifying note is absolutely necessary in the interim period, in the author’s view, this approach certainly appears to be consistent with a combined reading of both judgments in *Dyson*.

## VI. Conclusion

The EU Energy Label aims to promote energy-related household appliances with a reduced environmental impact. Based on the assumption that energy labels can affect consumers’ purchasing behavior, the underlying idea of the label is to steer consumers towards more energy efficient devices.

Even though the history of the EU Energy Label has been rather uneventful, the present case illustrates how established legislation is oftentimes still capable of stirring up controversy. Admittedly, *Dyson* predominantly had competitive motives in mind rather than having consumers’ interests at heart. Nevertheless, the judgment in *Dyson* unveils some interesting general points of law. Firstly, the case confirms that labelling forms a commercial practice in the sense of article 2(d) UCPD. Secondly, the case sheds light on how to resolve legislative conflicts between the UCPD and other consumer protection acts by applying the *lex specialis* principle contained in article 3(4) UCPD. Lastly, the ECJ’s ruling also provides additional clarifications as to what exactly constitutes material information in the eyes of the average consumer.

The recent annulment of Delegated Regulation 665/2013 did not come as a surprise. As aptly put by the Court, tests conducted with an empty dust receptacle simply do not reflect normal conditions of use. Consequently, consumers were provided with incorrect information regarding the actual energy consumption of their vacuum cleaners which, in turn, led to the annulment of the regulation.

For the time being, it remains to be seen how the European Commission will decide on the fate of the annulled Delegated Regulation 665/2013. Nevertheless, following judgments in both C-632/16 *Dyson v BSH* and T-544/13 RENV *Dyson v Commission*, it seems that most of the dust has settled.

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<sup>115</sup> Mina Kianfar, ‘General Court annuls Delegated Regulation 665/2013 on energy labelling of vacuum cleaners’ (*The IPKat*, 25 November 2018), <<http://ipkitten.blogspot.com/2018/11/general-court-annuls-delegated.html>> accessed 30 November 2018.