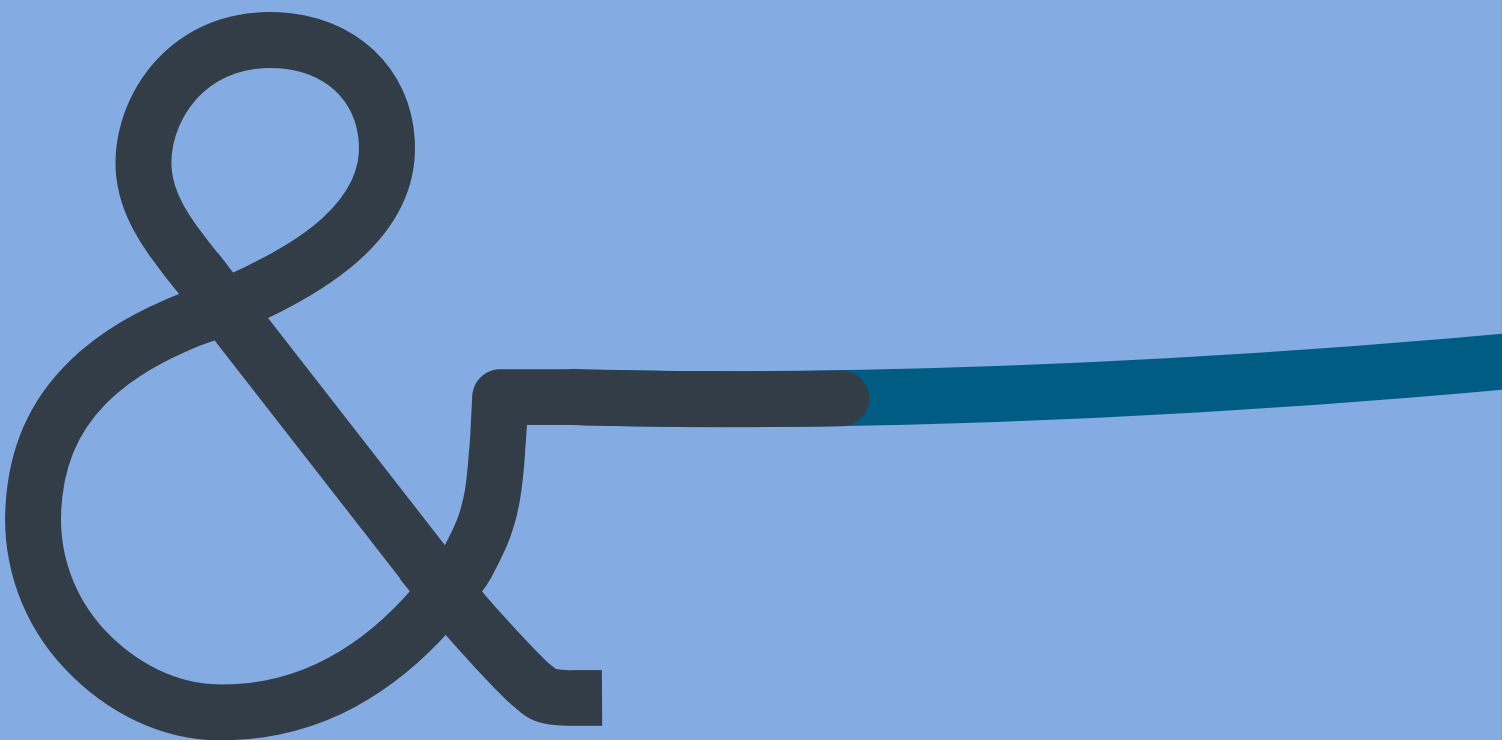


Bird & Bird

Q&A on Efficiency Labelling of New Passenger Cars in Germany

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Introduction

Under certain conditions, advertisers in the automotive sector, who display, offer for sale or lease, or advertise new passenger cars, are required to include information on fuel consumption, CO₂ emissions and electricity consumption of the advertised vehicles in their advertising materials.

The efficiency labelling requirements subject to the German Ordinance on Efficiency Labelling of New Passenger Cars (Pkw-EnVKV), which are unfortunately slightly imprecise in part, have presented car manufacturers, car dealers and legal practitioners with enormous challenges for years. The replacement of the New European Driving Cycle (NEDC) test procedure, which was previously used to determine the fuel consumption and emission values of new passenger cars, by the WLTP test procedure adds further difficulties, since the German legislator has unfortunately been lagging behind with the corresponding legislative process for years. Even at present, it is not yet foreseeable when the German legislator will pass the amendments to the Passenger Car Energy Consumption Labelling Ordinance (Pkw-EnVKV), which is urgently awaited by advertisers.

The following Q&A on the labelling requirements for the Pkw-EnVKV is therefore intended to provide advertisers in the automotive industry with a quick and easy-to-understand overview of the relevant requirements pursuant to the Pkw-EnVKV. The individual Q&As will be updated on an ongoing basis and supplemented with further important points, so please check out for updates to these Q&A.

If you are interested in individual support, our team of experts around partner Roman Brtka will be happy to assist you at any time.



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Q&A on consumption and emission labelling according to the Pkw-EnVKV

1. What does the Pkw-EnVKV regulate?

The German Ordinance on Efficiency Labelling of New Passenger Cars (Pkw-EnVKV) implements the provisions of Directive 1999/94/EC of December 13, 1999 on the provision of consumer information on fuel consumption and CO₂ emissions in respect of the marketing of new passenger cars into German law. Since 2004, the Pkw-EnVKV obliges manufacturers and dealers, who display, offer for sale or lease, or advertise new passenger cars, to provide information on fuel consumption, CO₂ emissions and electricity consumption in their advertising materials under certain conditions.

On September 1, 2011, the amended and current version of the Pkw-EnVKV was published in the Federal Law Gazette and became effective on December 1, 2011.

2. When will the Passenger Car EnVKV be amended and adapted to the World Harmonised Light Vehicles Test Procedure (WLTP)?

Pursuant to Commission Regulation (EU) 2017/1151 of June 1, 2017, supplementing Regulation (EC) No. 715/2007 of the European Parliament and of the Council on type approval of motor vehicles with respect to emissions from lightweight passenger cars and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No. 692/2008 and Commission Regulation (EU) No. 1230/2012 and repealing Commission Regulation (EC) No. 692/2008, a new test procedure for assessing fuel consumption, CO₂ emissions and electricity consumption of new vehicle types was introduced throughout Europe, the so-called World Harmonised Light Vehicles Test Procedure (WLTP).

The WLTP test procedure replaces the previous test procedure based on the New European Driving Cycle (NEDC) and is considered to provide more realistic information on consumption and CO₂-emission values of new passenger cars. The member states must take the introduction of the new test procedure into account and make the necessary changes in national law with regard to the fuel consumption labelling of new passenger cars. Unfortunately, German lawmakers have been behind schedule with implementation for years, with the result that advertisers in the automotive sector are currently facing considerable legal uncertainties in connection with the fuel consumption and emissions labelling of models of new passenger cars.

At the moment there is only an initial draft bill for the updated Pkw-EnVKV (see <https://www.bmwk.de/Redaktion/DE/Downloads/P-R/referentenentwurf-pkw-envkv.html>), according to which the planned new passenger car label will no longer show efficiency classes. Instead, engine-specific labels with extensive individual information are to be provided. Five car label formats are planned, depending on the type of power train (gasoline, diesel, natural gas, battery-electric cars, plug-in hybrids and fuel cell vehicles). In addition, regulatory loopholes in the current version of the PKW-EnVKV are to be eliminated.

Unfortunately, it is currently not possible to predict when the German legislator will pass the amendment to the PKW-EnVKV, which is urgently awaited by advertisers, and which requirements will finally be stipulated by the legal text.

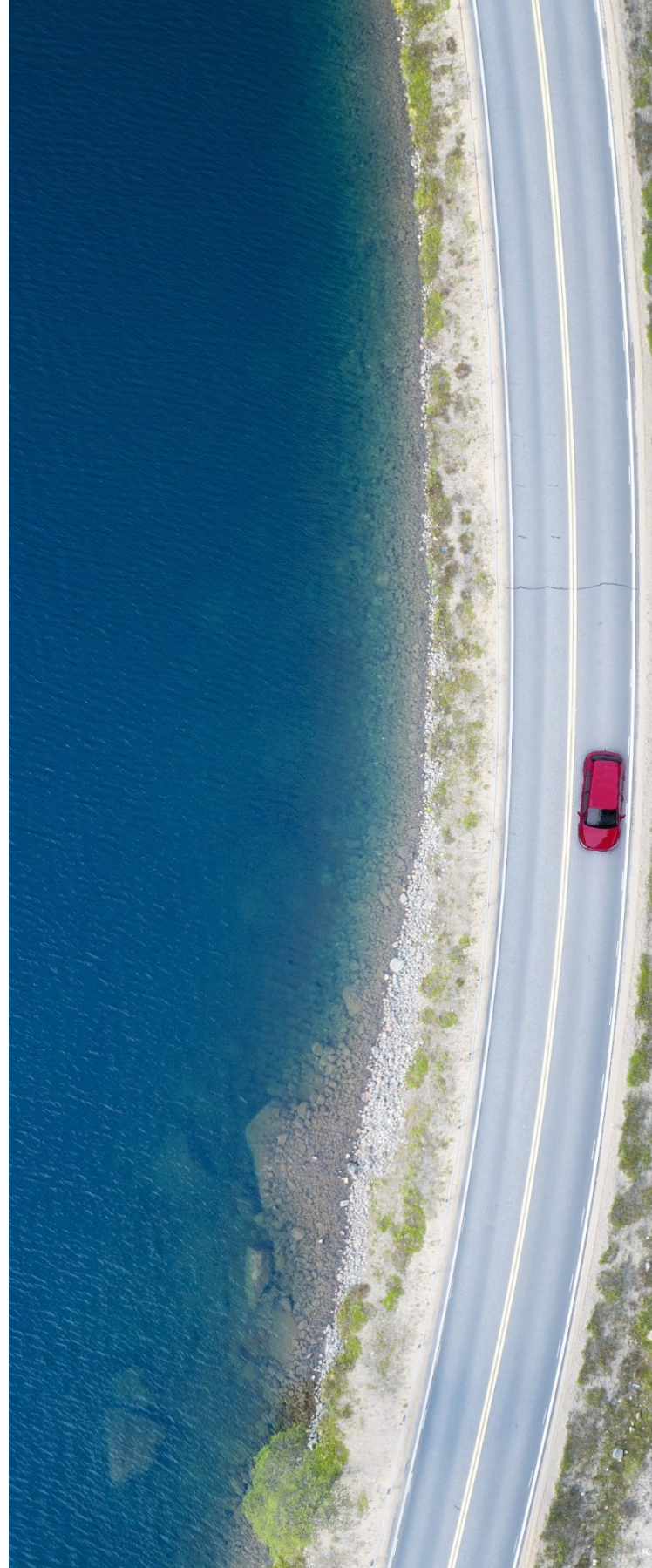
3. What is the purpose of the Pkw-EnVKV?

Pursuant to recital 5 of Directive 1999/94/EC, accurate, relevant, and comparable information on the specific fuel economy and CO₂ emissions of passenger cars should influence consumers' purchasing decisions in favour of more fuel-efficient, CO₂-reduced vehicles. This, in turn, is intended to create an incentive for car manufacturers to reduce the fuel consumption as well as the emissions of the vehicles they produce. Consequently, the Pkw-EnVKV, which implements Directive 1999/94/EC into German law, serves the same purpose.

4. When is the Pkw-EnVKV applicable?

The obligation to indicate consumption and emission values according to the provisions of the Pkw-EnVKV only applies to advertisements which mention specific models of new passenger cars.

In contrast, according to the wording of the respective provision of the Pkw-EnVKV, the obligation to provide the DAT-note online or in electronic media (cf. Q&A 17) is not confined to the advertising of specific models. Hence, it is recommended to provide the DAT-note in any advertisement which refers directly or indirectly to new passenger cars.



5. What is a new passenger car pursuant to the Pkw-EnVKV?

The question of whether a car is to be considered a "new passenger car" is to be based on the subjective motives of the dealer. According to Art. 2 no. 1 of Directive 1999/94/EC a car which has not yet been sold for a purpose other than resale or delivery is a new passenger car.

However, subjective motives often cannot be reliably determined. Therefore, the assessment of the subjective motive has to be based on objective circumstances. The Federal Court of Justice (BGH) has so far named two aspects that regularly can indicate that a car is not a new passenger car:

- The car has a considerable mileage at the time of the offer for sale (in this respect the BGH considered a mileage of 1,000 km to be sufficient).
- At the time of the offer for sale, the vehicle was already continuously registered for road traffic for a longer period of time (in this respect the Federal Court of Justice considered 10 months to suffice).

According to the BGH, if one of these criteria is met, this would indicate that the dealer has also acquired the vehicle for a not entirely insignificant personal use and that the vehicle is no longer new within the meaning of the Pkw-EnVKV at the time of the offer for sale. On the other hand, the fact that a corresponding vehicle has a one-day registration or was used by the dealer only briefly as a demonstration vehicle should not change the classification as a "new passenger car". Since the concept of novelty within the meaning of the Pkw-EnVKV is to be interpreted autonomously under EU law, principles established for example under contract law are irrelevant.

6. What is a "model" according to the Pkw-EnVKV?

Pursuant to Sec. 2 no. 15 Pkw-EnVKV, a "model" is the trade name of a vehicle, consisting of the make, type and, if applicable, variant and version of a passenger car. According to the wording, the labelling provisions of the Pkw-EnVKV only apply if a fully detailed model is advertised, while the advertisement of a type regularly does not trigger labelling requirements.

However, one needs to be cautious in this regard since there exist cases where type and model of new passenger cars might be basically the same. In such case the consumption and emission values must also be provided. Consequently, before advertising a car the respective EU type approval should be evaluated thoroughly.

7. Does the Pkw-EnVKV also apply to electric and hybrid vehicles?

Yes. The Pkw-EnVKV also applies to electric vehicles and externally chargeable hybrid electric vehicles. For electric vehicles electricity consumption must be provided instead of fuel economy; for hybrid vehicles electricity consumption must be provided in addition to fuel consumption.

8. In which advertising materials must consumption and emission values be included?

Car manufacturers and dealers who display, offer for sale or lease, or advertise models of new passenger cars must provide information on the fuel consumption, CO₂ emissions, and, where applicable, electricity consumption of the models advertised in the following advertising materials:

- so-called "passenger car label" at the point of sale,
- promotional literature (e.g. print catalogues and advertisements),
- advertising material distributed in electronic form (e.g. websites), and
- advertisements by means of electronic, magnetic, or optical storage media.

The term promotional literature includes all printed matter used for marketing and advertising of new passenger cars to the public, such as technical manuals, brochures, advertisements in newspapers, magazines, and trade journals, as well as posters.

9. What is the label at the point of sale (so-called "car label")?

If a car dealer exhibits a model of a new passenger car or offers such a model for sale or lease, he must affix a notice (so-called "car label") to the vehicle or in its immediate proximity, which provides information about the official fuel consumption, the official specific CO₂ emissions and, if applicable, the official electricity consumption as well as the efficiency class (including the graphic representation) of the model in question. The car label must comply with the formal requirements of § 3 I iVm Appendix 1 (to § 3 I No. 1) Pkw-EnVKV, it must be clearly visible and clearly identifiable. As a general rule, exhibitors fulfil this obligation by, for example, displaying appropriate information boards next to the vehicles.

10. Which information must be included in promotional literature?

For a model of a new passenger car advertised in promotional literature information must be provided on the official fuel consumption according to the "urban", "extra-urban" and "combined" test cycles and on the official specific CO₂ emissions according to the "combined" test cycle.

If several models are advertised in the same advertisement, the advertiser has the choice of either stating the corresponding values for each model individually (i.e. fuel consumption according to the "urban", "extra-urban" and "combined" test cycles and the official specific CO₂ emissions according to the "combined" test cycle) or the ranges of the combined consumption and emissions values of all advertised vehicles, whereas the ranges must start with the highest values.

11. How must consumption and emission values be displayed in promotional literature?

The consumption and emission values must be "easily understandable, legible and no less prominent than the main part of the advertising message, even on cursory reading." In view of the wide variety of ways in which advertising can be designed, it is not possible to lay down a general rule when this requirement is met. In principle, however, it can be said that the requirements for presentation are likely to be met as long as it is not left to chance whether the consumer takes note of the information on fuel consumption and CO₂ emissions. However, a precise examination should be carried out in each individual case.

12. What are the special features of catalogues and purchasing or leasing offers in printed form?

When advertising models of new passenger cars in catalogues or in printed purchasing or leasing offers, the efficiency class of the advertised models must be provided in addition to the consumption and emission values.

13. Which information must be provided in online and in electronic media?

For the model mentioned in an advertising brochure, information must be provided on the official fuel consumption or electricity consumption in the "combined" test cycle and on the official specific CO₂ emissions in the "combined" test cycle. Unlike in promotional literature, it is not necessary to also provide the official fuel consumption in the "urban" and "extra-urban" test cycle.

14. How must consumption and emission values be displayed in online and electronic media?

The consumption and emission values must be "easily understandable, legible and no less prominent than the main part of the advertising message, even on cursory reading." In view of the wide variety of ways in which advertising can be designed, it is not possible to lay down a general rule here regarding the requirement for the claims to be dominant compared to the rest of the advertising. In principle, however, it can be said that the requirements for presentation are likely to be met as long as it is not left to chance whether the consumer takes note of the information on fuel consumption and CO₂ emissions. However, a precise examination should be carried out in each individual case.

However, if engine specifications are mentioned stricter obligations for the presentation of consumption and emission values apply (see Q&A 15).

15. Which additional requirements with regard to the display of consumption and emission values need to be taken into account in online or electronic media when engine specifications are stated?

If in online or electronic media engine specifications are provided, it is not sufficient if this information is "easily understandable even on cursory reading, easily legible and no less prominent than the main part of the advertising message". Furthermore, it must be ensured that they are automatically brought to the reader's attention at the very latest at the moment when the engine specifications, e.g. engine power, engine capacity or acceleration, is mentioned for the first time.

16. What are so-called “virtual salesrooms” and which specific requirements apply here?

Virtual salesrooms are configuration models and virtual showrooms. These can be online vehicle configurators, for example, such as those made available to potential customers by many car manufacturers on their websites. A characteristic feature of virtual salesrooms is that consumers can already make individual comparisons and selection decisions and, by means of interactive elements, have the opportunity to see a passenger car model configured according to their wishes.

Online brochures or general information on manufacturers' websites, on the other hand, which precede a concrete selection decision by the consumer, do not constitute virtual salesrooms.

Any car manufacturer or dealer displaying vehicle models in such virtual salesrooms must, in addition to the combined consumption and emission values, also indicate the efficiency class of the vehicle models, including the graphical representation. The information must be made available to the user at the latest at the moment when he selects a vehicle model or completes a configuration. Regularly the information is presented at the end of the configuration as part of a summary description of the configured vehicle.

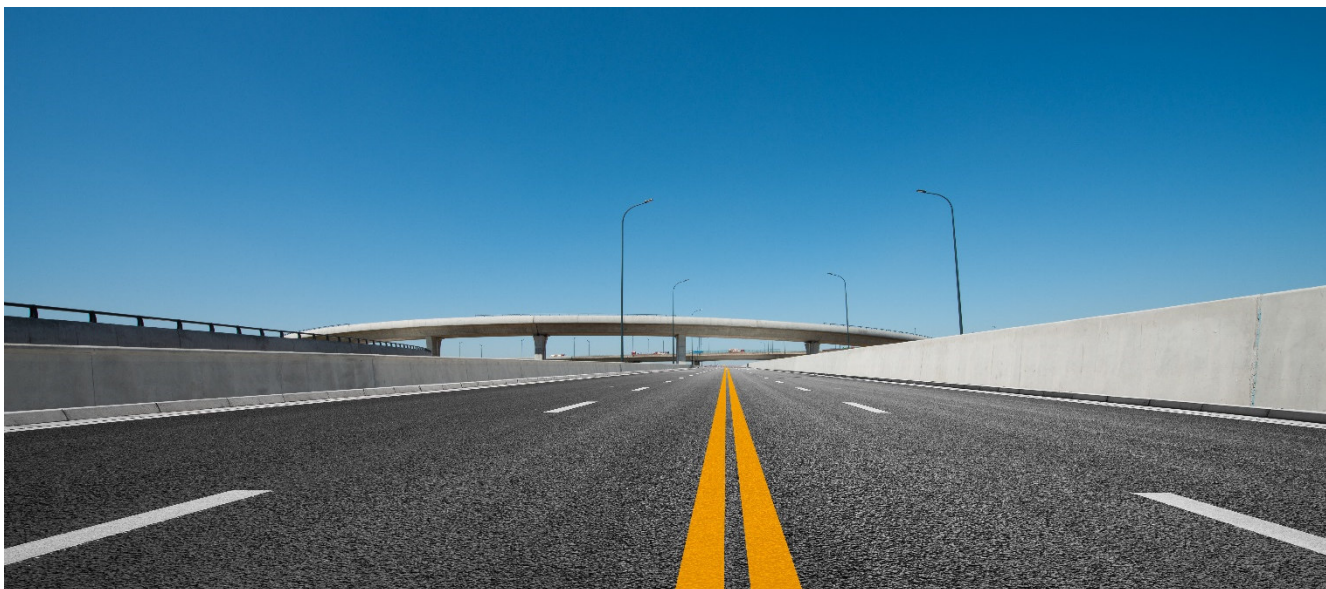
17. What is the so-called DAT guideline?

In online and electronic media, a reference to the "Guidelines on Fuel Consumption, CO₂ Emissions and Electricity Consumption of New Passenger Cars" (so-called "DAT Guidelines") issued by the Deutsche Automobil Treuhand (DAT) must be provided.

The DAT Guidelines contain a list of all models of new passenger cars offered or exhibited in Germany, together with information on the respective consumption and emission values.

18. Are there exceptions to the labelling requirements under the Pkw-EnVKV?

Yes. Advertisements in TV and radio broadcastings and in audio-visual media are exempted from the labelling requirements pursuant to Pkw-EnVKV.





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