

Empowering consumers for the Green Transition

Key recommendations

<u>1</u>	Ensure balanced roles and responsibilities for retailers and producers. Producers are responsible for providing the information to retailers. Retailers check whether all the required information is present.
<u>2</u>	Discuss all relevant legal initiatives in conjunction to avoid legal uncertainty and conflicting or non-harmonised legal requirements.
<u>3</u>	The scope should be clarified. Product and service specific claims to consumers should be covered, not general information on traders' websites or ancillary services provided by the trader.
<u>4</u>	Extend the transition period for certification schemes. It takes at least 3 to 4 years to develop a certification scheme and to certify products.
<u>5</u>	Traders' exclusive / private certification schemes, which are third-party certified, should be allowed.
<u>6</u>	Traders should be allowed to use relevant international environmental performance standards equivalent to EU standards.
<u>7</u>	Pre-approval of environmental claims is disproportionate and will make it very expensive to promote sustainable products.
<u>8</u>	Ensure effective enforcement of EU rules , supporting a level playing field between EU-based and third country traders selling to EU-based consumers.
<u>9</u>	Ensure clear definitions of important concepts like environmental claims, explicit environmental claims, environmental impact, future environmental performance, social impact, reparability, reparability score and common practice.
<u>10</u>	Clearly clarify banned practices, otherwise assess them on a case-by-case basis.

Introduction

EuroCommerce welcomes the European Commission’s proposal on Empowering Consumers for the Green Transition. **We are fully committed to create a circular economy, where all business operators contribute their fair share according to their role in the supply chain.** Retailers and wholesalers are the bridge between producers and consumers and we recognise that we play a pivotal role in the green transition. The core activity of retail and wholesale is reselling products, and we create added value by for example offering consumers advice, information and after sale services. Retailers are considered ‘traders’ under consumer law, but it is important to understand that a trader can be any economic operator selling directly to consumers e.g. also a producer could act as a trader. When we talk about traders in this paper we mean all traders, including retailers. When we say retailer, we mean retailers only excluding all other types of traders.

Consumer demand is driving change and innovation, and our members compete fiercely every day to provide consumers with the best choice. **Consumers demand affordable choices also for sustainable products.** Our direct link to consumers is instrumental in helping consumers make more sustainable choices. At the same time, retailers are normally dependent on others to be able to offer sustainable products and provide relevant information. However, retailers assume the responsibility of the producer when they import products themselves from third countries, or when they offer own brand products where in most cases a third party produces the product. In a limited number of cases we are also producer of the products they sell themselves. This shows it is important to take this into account to ensure balanced roles and responsibilities depending on how retailers source their products.

Currently, our sector is undergoing a digital transformation and green transition that is fundamentally changing our sector requiring significant investments. This while many retailers and wholesalers have suffered tremendously from the Covid-19 pandemic, especially non-food retail and wholesale more generally. On top of that, many of our members need to mitigate the impact on the supply chain due to the invasion of Ukraine by Russia, high inflation and high energy prices. This all puts heavy burdens on our members, and we call upon EU legislators to **ensure new rules will not overburden businesses and leave room for investments and innovation that will be needed to establish a digital and green EU economy, and respond to consumers’ needs.**

On 25 October 2022 we will publish a retail investment study where **EuroCommerce together with McKinsey has examined what the sector needs to invest in to make the sustainability and digital transformation possible** and ensure that the sector has access to the skills and talent needed for that transformation. The study examines the current situation, what transformation is expected by 2030 and suggests concretely what investments need to be made and quantifies the size of the investment needed. A separate policy paper shall identify what needs to be invested in to become more sustainable and where policymakers can support that investment and transformation.¹

Price remains a key driver of consumers’ behaviour. **Sustainable products must also be affordable.** The proposal currently does not address the affordability of sustainable products. EuroCommerce believes that a true massive switch to more sustainable behaviour requires more than a set of legal obligation imposed on companies and providing consumer with more and more product information. Already in July [EuroCommerce expressively supported the establishment of a culture of repair and reuse](#), in anticipation of the Commission legal initiative expected by the end of this year. In our view, **creating a true circular economy is only possible when the EU institutions and stakeholders work together to make the sustainable choice the most attractive choice for consumers and businesses.** This requires positive and financial incentives. We call upon the EU institutions to make this an integral part of establishing a true circular economy.

¹ <https://www.eurocommerce.eu/transforming-retail-wholesale/> (available from 25 October 2022)

Retail essential in providing information to consumers

For consumers (online) stores are essential for finding information. The store where consumers bought a product is usually the first point of call for consumers when they have questions or when there is a defect. Regularly our members offer a commercial guarantee or other benefits, on top of the legal guarantee and the commercial guarantee by the producer e.g. an insurance against theft, loss, extension of the legal guarantee, etc. Such guarantees can be very diverse and may apply to the whole or parts of the product. Often, commercial guarantees offered by retailers are not for free. It offers consumers per product the option to have more security if they think this is worthwhile. Normally, retailers offer a commercial guarantee via a third party and not themselves.

Retailers and wholesalers also may provide remedies and advice where appropriate and possible. Since retail is a consumer-driven industry, this only takes place when consumers ask for it. This is an additional service that adds value to the service we provide but is in most cases not a core activity. However, retailers are normally not the producer of the product and do not have (all) the product specifications related to durability, reparability and availability of spare parts. If such information would be available to the trader this would help offering the most sustainable and suitable solution to consumers. Especially SMEs may benefit from this.

Information exchange should be facilitated throughout the entire process, from the producer to the consumer. The best tool on how to provide the information depends on the moment the consumer needs it e.g. on package, in store, online. Retailers can only provide consumers with information that the producer has provided or that is easily accessible to the trader. It should be taken into account that information on durability, reparability, and availability of spare parts is not relevant for all products nor measured in the same way. These aspect will be addressed in the e.g. the Eco-design for Sustainable Product Regulation and the Digital Product Passport.

In general, we see great potential in providing consumers with more information via digital tools. The space on a product or its packaging is limited and the number of information requirements for consumers at EU and national level is ever expanding. On top of that, traders also need space to provide information to consumers that they believe consumers will find relevant. Digital tools will also help consumers navigate a potential **information overload**.

Introducing additional information requirements for companies should be in line with the **one-in one-out principle**. Upon this principle, companies should be relieved from an equivalent administrative costs at EU level in the same policy area. Following this principle, a proportionate burden in consumer policy should be removed.

Producers are responsible for providing correct information about the safety and sustainability of their products

Producers bear the ultimate responsibility for the products they place on the Union market. They have been in control of the production process, sourced all relevant raw materials and components, and have done all the necessary tests to ensure compliance with EU law and additional claims made by them. **Producers need to provide retailers and wholesalers with the relevant (legally required) information so we can properly inform the consumer.** We check whether the legally required information is there (labels, manuals, etc.), but we are not in the position to check whether all this information is correct. According to EU product law ensuring the information is correct is the responsibility of the producer. Therefore, it should be made clear in this proposal that when the 'trader' is a retailer it cannot be held liable for incomplete, incorrect or misleading information which has been provided by the producer or where the producer has not provided the legally required information. Competent authorities should go to the producer where they have questions about the product information provided or not.

Unclear relationship other legal initiatives

The Commission proposal seems to be closely connected to three other initiatives: (1) the review of the recently published proposal ‘Establishing a framework for setting ecodesign requirements for sustainable products’, (2) the still to be adopted proposal for ‘Environmental performance of products & businesses – substantiating claims’, and (3) the initiative on ‘Sustainable consumption of goods – promoting repair and reuse’. We call upon the EU institutions to discuss these initiatives in conjunction. Discussing the proposals separately will lead to confusion, legal uncertainty and may lead to mismatching legal requirements. Finally, there is already legislation in place that covers software updates: Directives (1) on certain aspects concerning contracts for the supply of digital content and digital services; and (2) on certain aspects concerning contracts for the sale of goods.

To improve the quality of the legislative outcome and avoid unnecessary uncertainty, the Council and the European Parliament should ensure they have the opportunity to amend their positions after the Commission’s presentation of the upcoming initiatives that will complement this proposal.

Scope

Although the Commission proposal to amend the Unfair Commercial Practices Directive (UCPD) is focussing on products offered by traders to consumers, the UCPD applies to products and services. Therefore, the impact of the proposal is much wider.

For instance, the definition of ‘environmental claim’ is very broad: ‘any message or representation, which is not mandatory under Union law or national law’ ... ‘which implies that a product or trader has a positive or impact on the environment’. Could this also apply to information provided by traders on their website not related to products, but about a trader’s more general sustainability ambitions? How could this be certified? Does this also apply to ancillary services provided by the retailer e.g. repairation services or take-back schemes for smartphones?

We call upon EU legislators to clarify what is in and what is out of scope. We should be mindful of **not imposing strict third-party certification obligations on every service or ambition expressed**, with limited added value or interest to consumers buying from that trader. It will only overcomplicate the situation for traders, leading to high costs or even to minimising providing such information at all to avoid compliance breaches.

As such, we would suggest that forward-looking sustainability goals (aspirational claims) mentioned as part of companies’ wider corporate strategies, and on which they already report on a regular basis, to be exempted. Similarly, we would recommend a revision of the definition of ‘sustainability labels’ to specify that they are product-related voluntary trust marks, quality marks or equivalent.

Setting up a certification scheme takes time

Existing sustainability or social certification schemes have taken years to set up, and after that it may take quite some time before the first products and services are certified and claims are ready to be communicated to consumers. The proposed implementation period of the directive of 24 months is not realistic. Even today, not all sectors have certification schemes yet. **The minimum time required for setting up a scheme and issuing certifications is at least 3 to 4 years.** New certification schemes will not be ready or may not be up to standards because of the lack of capacity in the market, the lack of time for setting it up properly and issuing certificates. This may lead to a situation where there will be sustainable products that are no longer certified and cannot be marketed as such anymore. This will only lead to confusion among consumers and would unnecessarily limit their choice. Therefore, we recommend extending the transition period for developing certification schemes, including issuing certificates to 48 months.

Far-reaching prohibition of traders' own certification schemes

The Commission proposed an absolute ban on *“Displaying a sustainability label which is not based on a certification scheme or not established by public authorities”* in Annex I of the UCPD. Although, we support protecting consumers against misleading sustainability labels, **banning any such voluntary private label seems to go quite far**. It is unclear why all existing sustainability labels not meeting the conditions set in the proposed definition of a certification scheme mislead consumers. This also seems to be closely linked to the forthcoming ‘Substantiating Green Claims’ proposal.

For a ban, the definition of **certification scheme should be clearly defined to ensure legal certainty for traders and ensure a harmonised application throughout the EU**. If this is not possible, it may make more sense to continue to assess such practices on a case-by-case basis. Elements that require further clarification are: third-party verification scheme; transparent, fair and non-discriminatory terms; scheme requirements; objective monitoring of compliance; independent party from both the scheme owner and the trader. We also suggest to make clear in the Annex 2 under point 2a that *“The displaying of sustainability labels remains possible without a certification scheme where such labels are established by a public authority, or in case of additional forms of expression and presentation of food in accordance with Article 35 of Regulation (EU) No 1169/2011”* (recital 7) is not banned.

We believe that a **more flexible approach would encourage retailers to take further steps towards sustainable consumption**. As “certification schemes”, as defined in the proposal, do not yet exist for all aspects of environmental or social sustainability, restricting only to labels that are “open to all traders” would significantly reduce the scope of relevant sustainability information that can be shared with consumers. It would also reduce innovation in that space, making it more complex to develop new labels to cover new progress in sustainability of products or services. Allowing operators to innovate and establish robust and credible labels to account for sustainability aspects is therefore essential. Elaborate certification and monitoring systems are costly and not affordable for many micro and small enterprises. SMEs needs to be supported. Therefore, we call upon EU legislators to allow sustainability labels, developed and managed by retailers themselves and remove the requirement that certification scheme must be “open to all traders”.

In addition, we believe a **new definition should be added to the legislative proposal creating an additional category for exclusive/private sustainability labels, but which still should be subject to third-party verification** and thus independently verified. It would allow and stimulate traders to continue to innovate and increase choice, but have their own private sustainability labels of which methodology, IP and trade secrets would be protected. Such a label would still be trustworthy, based on international standards and provide added value to consumers. And because such a label would be closely connected to the reputation of the retailer there is a strong incentive for the retailer to ensure all information provided is correct.

In the same vein, we would recommend that private aggregator programmes, **which collate and highlight to consumers (by way of a label, badge, icon or name) products which have received a sustainability label (based on a certification scheme or third-party verification or which is established by public authorities)**, should not be considered “generic sustainability claims”. Many of our members take due care in incentivising consumers to purchase more sustainable products via dedicated websites and should therefore not be penalised for communications that facilitate consumers’ access to verified and substantiated sustainability labels, and which may assist the consumer in identifying and understanding a claim.

Pre-approval of environmental claims excessive

Although not part of the Commission proposal, different stakeholders have suggested that environmental claims should be pre-approved by a third party or authority before being used. EuroCommerce strongly rejects this idea. There are currently many environmental claims and many are being developed, and this will only increase alongside the green transition. A pre-approval system would most likely lead to long and unnecessary delays of being able to use environmental claims. It will also be very costly, the Commission proposal will create a huge market for third party certifiers that would need to be paid for by traders and the third party verification scheme, and on top this pre-approval would even lead to more costs and delays for traders. In the end, this may only make sustainable products more expensive than less sustainable versions and with little added value for consumers. It could discourage new initiatives to help consumers make sustainable choices.

Commercial guarantee of durability made available by the producer

Firstly, we believe it is important to streamline amendments to Art. 5(1)(ea) and Art. 6(1)(ma) of the UCPD with recent **CJEU caselaw**. It may even make both amendments obsolete:

“for all [...] goods, where the producer makes it available, information that the goods benefit from a commercial guarantee of durability and its duration in units of time, where that guarantee covers the entire good and has a duration of more than two years;”

On 17 June 2022, the Court of Justice of the European Union ruled in case [C-179/21 Victorinox](#) that *“as regards the manufacturer’s commercial guarantee, the information requirement imposed on the trader by [Art. 6(1) CRD] provision does not arise from the mere fact that that guarantee exists, but only where the consumer has a legitimate interest in obtaining information concerning that guarantee in order to decide whether to enter into a contractual relationship with the trader. Such a legitimate interest is established, inter alia, **where the trader makes the manufacturer’s commercial guarantee a central or decisive element of its offer.** (...)”*

We suggest bringing the proposed amendment in line with the above case law.

A second issue is about the amendments to Art 5(1)(eb) and Art 6(1)(mb):

“[...] for energy-using goods, where the producer does not make available information referred to in point [...], information that the producer has not provided information on the existence of a commercial guarantee of durability of more than two years. This information shall be at least as prominent as any other information about the existence and the conditions of after-sales services and commercial guarantees provided in accordance with point [...];”

The amendment above seems to add a new dimension to mandatory labelling requirements. **Consumers are already suffering from an information overload** due to all the mandatory labels providing information about the product. This is confusing consumers that do not understand anymore which information is relevant and which not, and it does not help consumers to make the right choice. **Now traders would also be obliged to inform consumers about information that is not there.** We strongly suggest not to confuse the consumer any further and abolish such provisions.

Especially for small and low value products such new obligations are becoming disproportionate. All in all, the new rules should help consumers make more sustainable choices and not confuse consumers with additional information that is not helpful or already obvious.

Enforcement & creating a level playing field

Enforcement of consumer protection rules is lacking in the EU, especially in the case of third country traders. This leads to unfair competition and traders across the EU suffer from this. In certain non-food product categories in certain Member States third country traders have a larger market share online than domestic traders. Media regularly report on surveys, tests, and checks that products offered online by third country traders are non-compliant and even unsafe.²

An additional problem is that in recent years many new EU rules applying to products and businesses have been introduced. This has increased compliance costs for EU-based businesses and has led to higher prices for consumers. However, rogue traders ignore the rules by default, they only want to sell as much as possible to EU consumers and do not care about the consequences. This increases the price gap between compliant and non-compliant products. For consumers, it is difficult to withstand the temptation of lower prices, and research shows that consumers increasingly buy from outside the EU. One study from 2020 suggests that almost 70% of EU consumers that buy cross-border have purchased products offered from China, a figure that was at about 15% in 2014³.

² A recent [report of the Swedish Chemicals Agency](#) found that more than half of the products purchased via online marketplaces established in third countries contained prohibited and dangerous substances.

³ [E-commerce in Europe 2020](#), Postnord

Both issues, undermine a level playing field in the EU, and are not addressed in the Commission proposal. It is unclear how the new rules will be enforced on traders not established in the EU and how non-EU producers will ensure their products and sustainability labels will comply with the new rules. This may persuade consumers based in the EU to buy – often cheaper – products offered by third country traders with misleading sustainability claims while EU-based traders are making high costs.

Therefore, we call upon EU legislators, to **enhance cross-border cooperation, coordination and knowledge among consumer protection authorities to ensure effective and efficient enforcement.**

Software updates

We believe that the amendments regarding software updates are redundant and possibly confusing. This is already regulated in the *directive on certain aspects concerning contracts for the supply of digital content and digital services*; and the *directive on certain aspects concerning contracts for the sale of goods*. There are already clear transparency obligations. The proposed information obligations on software updates also seem to clash where the proposal refers to ‘*minimum period in units of time*’ and the existing legislation which says ‘*that the consumer may reasonably expect given the type and purpose of the goods*’.

International standards for environmental performance should be included

Recital 10 of the Commission proposal states that “excellent environmental performance” may be demonstrated in accordance with officially recognised eco-labelling schemes in Member States, or by taking into account optimal environmental performance for a given environmental aspect in accordance with other applicable Union legislation. However, equivalent international standards are not considered under the present definition. It would be disproportionate to ban globally recognised international standards, which are already often used by traders. The use of international standards will only improve the global competitiveness of EU-based traders. Therefore, we ask EU decision-makers to include all relevant international standards. This would also align this proposal with legal initiatives lead by DG Environment.

In addition, in the recital it is stated that the ‘excellent environmental performance in question should be relevant to the claim.’ But it is not clear how such an assessment should be done.

Ensure clear definitions of key concepts

Not all key concepts in the Commission proposal are well-defined or defined at all. To ensure legal clarity towards consumers, businesses and competent authorities we suggest providing further clarification for the following concepts.

Environmental claim

As said earlier, the scope of what is an environmental claim is too broad. This should be limited to claims related **to the concrete product or service**. It should not apply to general information provided by the trader on its website e.g. annual reports, governance documents, etc. Now it seems that even having a green company logo or slogan would be in scope. A green logo could be considered a ‘representation’ and therefore an illegal environmental claim, as it comes without ‘clear, objective and verifiable commitments and targets’. It is important to ensure legal certainty for traders and that it is clear what is in scope or not, and to make sure the new rules will not deter traders from using environmental claims at all.

Generic environmental claim

The definition of "generic environmental claim" does not fully match the examples given in the recitals. The definition focuses on the medium where the information/specification is given and not on the nature of the claim.

This definition of "generic claim" seems to refer to the fact that claims should be specified in the own space (we agree) but this requirement should be in another part of the text. Generic Claims should be defined for their nature of being generic and not specific.

Explicit environmental claim

It is difficult to understand what the difference is with a "generic environmental claim" we suggest to delete this.

Characteristics: environmental impact, social impact:

The terms environmental and social impact that are added to Art 6(1)(b) of the UCPD in the proposal are not defined. As those two concepts now become two characteristics that need to be assessed by competent authorities to determine whether consumers have been misled, we suggest providing more clarity to ensure compliance and legal certainty. We believe that the examples mentioned in recital 3 "working conditions, charity contributions or animal welfare" are not sufficient.

Liability concerning omission, damages and administrative penalties should be limited to the extent that the trader was or should have been aware of the facts. Accordingly, those who have or ought to have knowledge, according to the draft Corporate Sustainability Due Diligence and/or Corporate Sustainability Reporting Directive, would be liable.

Reparability score

This concept is added to the Consumer Rights Directive and refers to Union law that does not (yet) exist. We suggest to remove it or to discuss this issue in conjunction of the initiative on repair and reuse and the review of the Ecodesign Directive.

Repairability, Sustainability, and Independent Monitoring System

These concepts are not even defined in the proposal. If applicable, a linkage to other existing pieces of legislation such as the Ecodesign proposal is necessary.

Repairability is a core issue in the Ecodesign proposal. Producers should understand how products should be designed to improve their reparability. Even if the Commission provides more details in the Annex 1 of the Ecodesign proposal on the 'reparability', there is not a definition 'as such' in the text. To improve legal certainty and ensure the circularity of the product at first place, the Ecodesign proposal needs a clear definition of 'reparability', to which the Empowering Consumers for the Green Transition proposal should be clearly linked.

Common practice

The Commission proposed to regard a practice as misleading when it involves "advertising benefits for consumers that are considered as a common practice in the relevant market. We understand what the Commission tried to achieve here, but we suggest defining better what a common practice means.

- When and why is a common practice misleading?
- Does this apply to all common practices or only common practices related to sustainability?
- Does it allow traders to continue to use national initiatives (e.g. French durability index)?
- Clarify when marketing a common practice is misleading to consumers and does no longer provide benefits to consumers.
- Assess whether there are cases where it may be in the interest of a consumer to understand what a common practice is
- Assess the compatibility with right of freedom of expression and information (Art 11 CFREU) and freedom to conduct a business (Art 16 CFREU).

Continuously, new products and services are being developed. What is a common practice today, could be completely different in a few months time or years. Traders may market new innovative products to distinguish themselves from their competitors, but new characteristics may be copied fast by competitors. Especially in the case of popular innovations. At a certain stage, advertising an innovative product may become illegal. Also, what is a common practice may also differ per Member State linked to local preferences.

Banned practices (annex)

EuroCommerce fully supports banning practices that are by default misleading to consumers and are preferably clearly defined in case law. This clarity is needed, because the practice as such is no longer assessed on a case-by-case basis but when detected a trader is violating EU law by default. It ensures legal certainty to businesses and consumers.

However, in the current proposal this link to case law seems to be missing, and this has immediately led to many questions from our members of what is exactly meant. Because the way the bans are written down, it seems very likely that they would also ban commercial practices that are not misleading to consumers. If the practices below cannot be clearly defined we suggest to assess them on a case-by-case basis and remove them from Annex I. Below a more detailed description of where we need further clarification.

23d. Omitting to inform the consumer that a software update will negatively impact the use of goods with digital elements or certain features of those goods even if the software update improves the functioning of other features.

We suggest clarifying “negatively impact” and exempt security updates. Certain updates, e.g. for security reasons, should be performed without undue delay. In this case, it may not be possible to inform consumers upfront but it is clearly in the interest of consumers to be able to continue the safe use of their product. Therefore, we suggest that software updates that are essential for the safe continuous use of a good with digital elements are exempt from this ban.

23e Omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability

A retailer offering a product of a producer should not be held liable for omitting such information. The retailer depends on the producer to provide the correct information. Retailers cannot know whether the information provided by the producer is incomplete, misleading or incorrect. Market Surveillance Authorities are responsible for ensuring producers comply with EU law.

Also, it would be helpful to define what durability means in this context. For example, would it mean that a producer / trader intentionally introduced a feature that would cause a consumer being unable to use the product as long as an average consumer would expect under normal circumstances? And is this still relevant in a circular economy i.e. if the product can be recycled, repurposed, refurbished, etc.?

23f. Claiming that a good has a certain durability in terms of usage time or intensity when it does not.

It is very difficult to determine the exact durability of a specific product, this also depends on storage, weather, maintenance, use, product care, etc. Product tests indicate an average durability or could provide a minimum durability, which makes sense as a product will be sold many times over the course of years. We suggest referring to the ‘average’ durability of a product.

23g. Presenting goods as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair in accordance with legal requirements.

The above are actually two different practices, that may or may not contradict each other. The presentation of a good is likely something that needs a case by case assessment.

23h. Inducing the consumer into replacing the consumables of a good earlier than for technical reasons is necessary.

We suggest clarifying ‘inducing’ and ‘technical reasons’. Would an automatic warning light of a products suggestion to change oil, decalcify, etc be included? The warning light may be too early at a specific moment in time, but in general this would improve usage and durability of the product.

23i. Omitting to inform that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer.’

A retailer may not be able to assess this properly. This logically would require extensive testing of a product that would lead to high costs for retailers. It should be the producer that informs the consumer whether the use of generic parts effects the functionality of their product in a negative way. The retailer can provide this information to consumers when the producer has provided it.