EuroCommerce for retail & wholesale

Position paper
27 September 2023

Position paper on the Commission proposal for a Directive on Green Claims

Recommendations

- **Coherence, clarity, and legal certainty** among linked policy and legislative files needs to be ensured; especially referring to the Empowering Consumers for the Green Transition proposal, the Corporate Sustainability Reporting Directive, and Sustainability Reporting Standards.
- **For environmental claims to be excluded from the pre-approval process**. Instead, we suggest their application is based on through self-regulation relying on international standards e.g., ISO Standards and ICC Framework for Responsible Environmental Marketing Communications, where applicable, reasonable, and practical.
- We believe that the **verification (pre-approval) process should be effective and efficient**: setting a **time limit** for verifiers, **simplifying, and standardizing procedures**, and strengthening **harmonization of the requirements**.
- **Mutual recognition of the certificate of conformity** should be strengthened in the legal text. Member States' authorities should not challenge the certificate unless on clearly pre-defined and serious grounds.
- We ask the Commission to include a **grace period** and a **simplified verification process for SMEs traders** (including trainings, templates, guidelines, etc…).
- We support the flexibility in the methodology as provided in Article 3. However, we ask for further clarification **of requirements**, **reference to internationally recognized standards**, where applicable, reasonable, and practical, and the creation of a **'safe harbour'** provision **for the PEF methodology for textiles** and future methodologies established at the EU level.
- The proposal should provide for at **least 24 months transition period** following the 18 months transposition deadline for the Member States.
- Transitional measures that allow the **sell-through of products until the exhaustion of the stocks**, whereby they were placed before the entry into force of the Directive, needs to be included.
- **On traders' responsibility**, the provisions should be clarified and improved to reflect the role and responsibilities of different actors in the supply chain. Distributors can be responsible for verifying the presence of the required justification/certificate of conformity but not its veracity. Division of responsibilities between traders and verifiers should be defined.
- **Fines should be effective, proportionate, and dissuasive. The proposed** maximum amount of fines being at least at 4 % of the trader's annual turnover in the Member State or Member States

concerned is disproportionate and possibly deterring the use of environmental claims and labels.

- The proposal should envisage at least **6 months-time** for the correction of non-compliance.
- We ask the Commission to establish a **consultation forum**, or **expert group** composed of the relevant stakeholders in the private sector (**including retailers and wholesalers**) and civil society partners to contribute to the further development of the delegated acts as foreseen in the proposal.

Introduction

We welcome the Commission's proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive). Consumers should be able to rely on properly verified environmental claims and need legal certainty for traders making a claim or using environmental schemes. We, therefore, support further action on green claims to (1) **protect consumers** and (2) **ensure fair competition** in the Single Market.

Our sector is committed to the transition towards a Circular Economy and is engaging in many sustainability initiatives and actions. Every day, we offer more and more products aligned with the green transition.[1] Products are often created to be marketed in the entirety of the EU and with their information and communication (including labelling) translated for consumers in each given Member State. To correctly engage with the consumer, we need green claims to be transparent, reliable, and accurate. **Harmonization of requirements and mutual recognition of the certificate of conformity** are paramount to enable free movement of goods. Requirements should not go beyond those included in internationally recognized standards which businesses and authorities are already referring to (e.g., ISO Standards and the Framework for Responsible Environmental Marketing Communications by the International Chamber of Commerce ''ICC'').

General remarks

Firstly, the **choice of regulatory instrument**, namely a directive instead of a regulation, may lead to **significant divergences.** The verification of applications in the different EU Member States may vary; and for businesses to follow different procedures in different Member States will increase the complexity and difficulty.

Secondly, **coherence among different policy files** should be ensured, avoiding overlaps of obligations to ensure legal certainty and clarity for operators. This is especially important with respect to the **Empowering Consumers for the Green Transition proposal** (ECGT). We welcome the explicit exclusion of certain claims from this Directive as listed in Article 1(2) of the Commission proposal whereby EU Ecolabel and EMAS can continue to apply. Businesses have invested significantly in complying with these existing voluntary labels based on well-established methodologies. Furthermore, to avoid pre-empting ongoing discussions on sustainability labelling in food products, we welcome the exclusion of the forthcoming measures on **a legislative framework for a Union Sustainable Food System** from the Green Claims rules under Article 1(2)(p), once published (Recital 13). For many other legislative files coherence will be key, such as the **Eco-design for Sustainable Product Regulation** and the revision of **the Textile Labelling Regulation** that once adopted will also be ***lex specialis*** **to the Green Claims rules** (Recital 13). In addition, the **Corporate Sustainability Reporting Directive (CSRD)** and **ESG Reporting Standards** that are already adopted should be explicitly excluded from the scope of the Green Claims proposal to avoid any overlap.

[1] E.g., energy efficient products, low carbon impacts producers, recyclable products and so on.

Thirdly, **the methodology for substantiating green claims should be simplified, sciened-based, and consider the specificity of the sector to which the product belongs**. Possible additional requirements should consider the ease of access to information for the assessment. Accordingly, the **administrative burden** on the traders and Member States' authorities for the substantiation of claims and authorities' recognition should be **reduced to a minimum**. Time-consuming, costly, and potentially fragmented processes at national level are counterproductive.[2]

Lastly, we believe **mutual recognition of the certificate of conformity** [as mentioned in Article 11(1)]. should be reinforced. Member States authorities must accept the certificate verified in other Member States, failing this the purpose of going through a costly and time-consuming verification process would be invalidated.

Specific remarks

Clarification of the scope and definitions (Articles 1 and 2)

To **avoid overlaps and unclarity among complementary policy files**, the provisions regarding the scope of application need to be clarified. The definitions under Article 2 do not ensure legal certainty as referring to the ECGT proposal, which is not yet in force.

The Commission proposal should clarify the scope of the proposal in respect to the following points:

- The difference between '*business to consumers*' (B2C) claims and '*explicit environmental claims*' as opposed to '*environmental claims*';
- The difference between '*environmental labels*' and '*environmental claims',* and their respective requirements.
- The fact that only **'*explicit environmental claims*' are in scope**, and the proposal does not cover '*environmental claims*' that are already regulated under the ECGT (Article 6 refers to '*environmental claims*'). Only claims in text format should be included, while images and symbols should be assessed under the Unfair Commercial Practice Directive (UCPD) as there is a higher risk for accredited bodies to make different evaluations about the environmental benefit they communicate.
- The Directive should set out that a trademark registered under national, Union, or international intellectual property laws should not be considered an environmental label/explicit environmental claim.
- The proposal must exclude '*corporate environmental claims*' already regulated under the CSRD[3] and the Sustainability Reporting Standards[4] under Article 1(2). Furthermore, clear differentiation between commercial marketing communication, non-commercial communication, and corporate communication is needed. Companies must be able to inform their shareholders and other stakeholders about news, objectives, and climate/sustainability measures without prior approval before they are communicated. **It is therefore paramount that factual company communication is considered outside the scope of the Directive.**

Flexibility is necessary: different product groups require different methodologies (Article 3).

We welcome the **flexibility** provided by the proposal to allow different methodologies for the substantiation of claims under Article 3. We believe that **certain product groups might require**

[2] E.g., at the moment there are no agreed verification standards for recycled content.
[3] Corporate Sustainability Reporting Directive - EUR-Lex - 32022L2464 - EN - EUR-Lex (europa.eu)
[4] Commission Delegated Regulation supplementing Directive 2013/34/EU as regards sustainability reporting standards - csrd-delegated-act-2023-5303_en.pdf (europa.eu) (not yet in force as not yet published in the Official Journal).

different methodologies. This will allow actors of different sizes and different product specialisations to apply the most appropriate methodology.

However, to ensure legal certainty for the traders, especially those active in different national markets in the EU, the mutual recognition principle needs to be reinforced. A good practice found in the proposal is having the Commission publish and **keeping-up-to date a list of officially recognised environmental labels** that are allowed to be used on the Union market.

Within the wording of Article 3, the following elements need to be clarified:

- ''*widely recognized scientific evidence*'' - we ask for guidance on the term 'widely recognized', and ask for this not to be too restrictive, limiting companies' range of options. Leaving the definition of this criterion to the respective Member State or third-party verifier will inevitably lead to problems of coordination and legal fragmentation.
- ''*significant from a life-cycle perspective*'' – we welcome clarity on how the substantiation should identify trade-offs. We welcome the Commission's specification that under Article 3(1)(c) a full-life cycle assessment is not needed, but a ''bird's-eye view'' is sufficient.[5] This approach needs further clarifications, especially in situations where there is no recognized methodology: e.g., non-LCA indicators as biodiversity. To this extent, we would welcome Commission technical guidance on the LCA and an explicit reference to the ISO Standard 14001 defining ''life-cycle perspective''. [6]
- *''significantly better* compared to common practice''. We propose to redefine a "*significant*" environmental claim with concrete criteria/requirements and in a way that it can cover all products and services. The definition should not be too restrictive and limit companies' range of options.
- ''*sufficient evidence''* of the environmental impacts;
- What is specifically required of the trader to "*demonstrate*'' and by ''*scientifically substantiating a claim*'' in practical terms. We propose to clarify the type of scientific support needed to support the claims (e.g., report, life cycle analysis, mass balance tests - for claims related to the recycled material of products).
- For the substantiation of environmental claims, the trader must include ''*primary information''* when available for environmental impacts, environmental aspects, or environmental performance, which are subject to the claim. If not available, ''*secondary information''* can be used. Clarification is needed in the term 'available' as it may be open to different interpretations. For example, what would be expected of a trader if primary data can only be accessed via substantial investments? How would be decided whether primary or secondary data should be used? What if primary data is only available for some products and some producers? How should the data be collected and stored?

A 'safe harbour'/ presumption of conformity for PEF methodology for textiles and future methodologies established by Union law

We would be supportive of the creation of a **'safe harbour' provision for the PEF methodology for textiles** and for its legal basis to be included in the Commission proposal. The provision would entail that those green claims relying on the PEF methodology for textiles would not need the *ex-ante* verification, but they would be granted a **presumption of conformity**, if relying on PEFCRs [product environmental footprint categories rules that will be developed in Delegated Acts – Article 3(4)(c)].

[5] Commission power point presentation on the Green Claims Directive - Green Claims Directive (europa.eu)

[6] ISO Standard 14001: environmental management - definition of ''life-cycle perspective'' - ISO - ISO 14001 and related standards — Environmental management. The definition is: *Consecutive and interlinked stages of a product (or service) system, from raw material acquisition or generation from natural resources to final disposal. Life cycle stages include acquisition of raw materials, design, production, transportation/delivery, use, end-of-life treatment and final disposal.*

This would not exclude such claims– to be subjected to an *ex-post* assessment under the UCPD if deemed necessary. It would ensure a smooth confirmation of current business practices in the textile sector and a reduced administrative burden on traders and competent authorities in their activities. The same should be considered in the future for other methodologies established at the European level whose rules might be developed in Commission delegated acts.

Delegated acts

We welcome Article 3(5) specifying that the Commission shall consider scientific or other available technical information, including relevant international standards, specificity of the sector and products, and other elements when establishing further the requirements for substantiation of explicit environmental claims. These further requirements will be adopted under delegated acts. We ask that the process of developing these delegated acts is **transparent and participatory**. The Commission should establish a **consultation forum**, or **expert group** composed of Member State representatives, the relevant stakeholders of the private sector (including retailers and wholesalers) as well as civil society partners similar to the Eco-Design Consultation Forum.

Clarity in mandatory communication of green claims claims (Article 5).

We appreciate that green claims can be made, at the discretion of the business, in a **digital form**. The proposed Directive allows traders the possibility to choose different communication methods to steer sustainable consumption and at the same time it does not mandate one digital solution hence avoiding stifling innovation.

However, we need more clarity on the following points:

- For **claims relating to future performance**, the proposal mandates a time-bound commitment for improvements inside own operations and value chain. Here, it remains unclear whether and when a trader would be legally responsible if the time commitment is not met. A threshold for responsibility should be established. The threshold should be proportional to the efforts carried out in *bona fide* by the company.
- Regarding substantiation data (including LCAs, studies, etc), we ask for the language provided to be either in **language of the Member State** where the product is placed on the market **and/or in English.** Likewise, for other documents required.
- We ask for the **simplification of communication requirements under Article 5** of the Commission proposal and the **differentiation between information directed to consumers and information directed to Member States' authorities (to be provided on request)**. The consumer should not be overwhelmed with information that might be technical and difficult to understand, as it will only add to its confusion regarding the claim made. By contrast, the Member States' authorities have the expertise to understand and evaluate technical information.
- ***''Aggregated indicator''* must be defined in the proposal**. The term should not be understood as the practice of retailers and wholesalers (online/offline) to list and/or aggregate certified environmental labels under an umbrella programme or a dedicated page on their website. The existence of such a page should not amount as a new certification scheme or label since no new product evaluation is carried out. Instead, its aim is to make it easier for consumers to make a sustainable purchasing decision by listing products with third-party certifications on said page.

Environmental labels and labelling schemes (Articles 7 and 8)

We ask for further clarification on the difference between environmental labels and environmental labelling schemes at a practical level. A reference to ISO Standards 14020 on environmental labels and

declarations[7] would be beneficial in this respect.

Regarding environmental labels [Article 7(2)], while we can support the objective of reducing the proliferation of new labels, we disagree with the prohibition of using aggregating scoring for labels unless established at the EU level. Instead, we ask for **already existing voluntary robust private labels using a rating and a score, to be allowed to remain on the market following their positive verification.** These labels - if transparent, reliable, accurate, verifiable, relevant, and not misleading[8] - have the potential stimulate market-driven continuous environmental improvement. Evidence suggests that colours stimulate attention paid to labels and that less complex labels require less attention to be processed. Consumers tend to understand simpler, evaluative, colour-coded labels more easily than more complex, reductive, monochrome labels.[9]

Concerning environmental labelling schemes, the proposal prohibits new private schemes if they do not have *''added value in terms of their environmental ambition''* [Article 8(5)]. We need more clarity on how would ***''added value''*** be proven to avoid stifling innovation if not further specified. *''Added value''* should be considered proven if there is no equivalent on the market. Moreover, we encourage **publication by the Commission of officially recognised environmental labels** that are allowed to be used on the Union market.

Support for SMEs (Article 12)

We encourage the Commission to be the first in providing support and financial support in a harmonized way at the EU level for SMEs. Member States should complement this help via Article 12 by taking appropriate measures to help SMEs applying the requirements set out in the proposed Directive such as: **financial support, finance, specialized management** and **staff training**, and **organizational and technical assistance.**

The verification process needs to be effective and efficient (Articles 10 and 11)

We see the process of *ex-ante* verification as particularly **burdensome**. Our sector is specifically concerned about the following:

- The **capabilities of existing certifying bodies** to handle a large number of requests for approval in a timely manner following the application of the new rules of this Directive.
- **Member States' competences leading to diverging approaches in terms of timing and methodologies**.
- The **increase in costs of these types of green marketing for companies**.
- **Long and costly procedures prevent efficient communication to consumers**. Products have a specific time to be developed and sold. Marketing and commercial claims have to be used at the right moment;
- The **practicalities of verifying *ex-post* well-established certifications/labelling schemes** present already placed on the market.

[7] ISO Standard 14020: - ISO 14020:2022 - Environmental statements and programmes for products — Principles and general requirements.
[8] ISO standard 14020 - ISO 14020:2022 - Environmental statements and programmes for products — Principles and general requirements.
[9] JRC Publications Repository: Front-of-pack nutrition labelling schemes – an update of the evidence (2022) - JRC Publications Repository - Front-of-pack nutrition labelling schemes: an update of the evidence (europa.eu)

The procedure

It is paramount that the verification process is effective and efficient. The Commission should consider establishing a standardized form to accelerate the process with harmonized procedures, as well as setting a clear timeline for the assessment by verifiers and ensuring their scientific expertise.

Green claims should not be pre-approved.

To help streamline the process and reduce the burden for businesses, we recommend that **green claims to be excluded from the scope of the mandatory verification process**. While we welcome harmonized requirements for their substantiation, we believe that **only environmental labels should be subject to the pre-approval verification process.** The trader using the environmental label is obliged to exercise due care, hence a verification procedure by an independent third party is needed. By contrast, the verification is **not to be expected** for claims.

A **self-regulation approach should be preferred** for the substantiation of explicit environmental claims based on existing guidance and standards such as ISO Standards and the Framework for Responsible Environmental Marketing Communications by the ICC, where applicable, reasonable, and practical. The ICC's rules supplement EU and national regulations and often form the basis for assessment in some countries' court practice e.g., in Sweden.[10] Self-regulation has the advance of being quicker, more flexible, and cost-effective. Many cases are being tried efficiently, compared to number of cases where the national competent authority has to intervene. Furthermore, the rules can be quickly adapted to new scientific knowledge, and it is free of cost to society as financed entirely by businesses.

SMEs should be granted special status.

SMEs are particularly vulnerable traders on the market due to lack of resources, adequate skills such as technical and legal expertise, and lack of personnel. We ask the Commission to include a **grace period for the verification of environmental labels from SMEs traders**. They should be allowed additional time for verifying their environmental labels *ex post* instead of being required to do so before marketing a product. It will avoid deterrence towards using these types of communication for SMEs who still need to be able to compete with other products on the market. In the event of pre-approval of green claims is included in the final text, we also ask for a grace period to be included for the verification of claims of SMEs traders in addition to labels. Furthermore, the Commission should consider introducing a **simplified verification process** to support them (e.g., templates, factsheets, guidance, etc...).

Mutual recognition must be reinforced.

We welcome the reference in Article 11 of the Commission proposal to Regulation 765/2008 on setting out the requirements for accreditation and market surveillance relating to the marketing of products[11] that alongside Regulation 2019/515 on Mutual Recognition[12] aims to ensure **mutual recognition** of test reports or certificates issued by a conformity assessment body. However, the wording of **Recital 52 and Article 10(8) weaken its objective** by establishing that the certificate should however not prejudge the assessment of the environmental claim by the public authorities or courts which enforce Directive 2005/29/EC. Without any other prescriptive requirement on what grounds a Member State authority would be able to challenge the certificate of conformity verified in another Member State, the provision represents a **liability risk for the businesses**. We ask the Commission **to clarify specific**

[10] The Swedish Consumer Agency writes on its website that the ICC rules form an important basis for an assessment of what constitutes good marketing practice. Link for more information: https://www.konsumentverket.se/for-foretag/marknadsforing/miljopastaenden-i-reklam/

[11] Regulation 765/2008 - EUR-Lex - 32008R0765 - EN - EUR-Lex (europa.eu)

[12] Regulation 2019/515 - EUR-Lex - 32019R0515 - EN - EUR-Lex (europa.eu)

grounds on which the certificate can be challenged. Moreover, we seek confirmation that for the same document English language would be acceptable in all the Member States.

Role and Responsibilities and consequential liability provisions

The proposal should clarify that the **owner of the claim should be fully liable for the accuracy of such information** (excluding microenterprises). Furthermore, the trader should not be held liable for an unsubstantiated claim made by a microenterprise – which is excluded from the scope of the Directive - if it is not actively promoted by the trader in its own marketing. It is essential to **clearly define the role and responsibilities of traders according to the principle of proportionality**. Liability should be clearly set at the level of the trader of the product who made the environmental claim and/or used the environmental label. Distributors can be responsible for **verifying the presence** of the required justification/certificate of conformity but not its veracity. It is a tried and tested practice in retail and wholesale that producers are contractually obliged to adhere to and continuously monitor all compliance regulations. It is for the owner of the claim to request the certificate of conformity and pass it along the supply chain actors who might resell the product.

Moreover, the legal text does not refer to the **share of responsibility between traders and verifiers**. If a product holding the certificate of conformity is found in breach of the requirements of the proposed Directive as not enough substantiated, the verifier should be held accountable if an investigation finds that it has been negligent. These provisions should be clearly stated in the legal text to avoid deviation from the norm at national level.

Non-compliance (Article 15)

On **non-compliance**, the Commission proposal provides under Article 15(3) that the competent authorities shall notify the trader making the claim about the non-compliance and require that trader to take all appropriate corrective action within 30 days. We believe this does not take into account the specific nature of non-compliance. The required changes might be related to the collection of data, which would need far more time than 30 days to be carried out. The legislative text should allow for at **least 6 months' time for correction of non-compliance**.

Penalties (Article 17)

On **penalties**, we welcome the mitigating factors applicable when competent authorities are taking a decision. Nonetheless, we are concerned of Article 17(2)(g) that might result in **double penalties** and in apparent violation of the well-established principle of law *ne bis in idem (double jeopardy)*: none should be allowed to be fined/persecuted twice for the same behaviour. Additionally, we **do not support the maximum amount of such fines being at least at 4 % of the trader's annual turnover** in the Member State or Member States concerned. We believe the amount to be disproportionate and possibly deterring the much-needed use of such voluntary claims. In line with EU Acquis, we would propose the same wording as established under Article 41 of Regulation 2010/2019 on market surveillance and product regulation or under Article 44 of Regulation 2023/988 on general product safety regulation: penalties provided for shall be effective, proportionate, and dissuasive. To that extent, Article 17(3) should be deleted.

Transition period and transitional measures

For the application of the new rules, traders need **at least 24 months transition period following the 18 months transposition deadline** for the Member States (total of 42 months after the entry into force). They need time to understand which claims would need verification and time to go through the verification process itself. There is no indication of how long the verification process would be, as it still needs to be put in place.

Furthermore, we ask for the **inclusion of transitional measures that allow the sell-through of products until the exhaustion of the stocks whereby they were placed before the entry into force of the Directive**. The transitional measures in the Commission proposal should follow those stipulated in Article 54 of Regulation 1169/2011 and in the Blue Guide[13]. This should be included in the legal text to avoid divergences at national level.

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[13] Point 2.10: transitional periods in case of new or revised EU rules, Blue Guide - The Blue Guide on the implementation of the product rules 2022 is published (europa.eu)