


REPORT

To Address “Greenwashing” and Misleading Environmental Claims, the European Commission Publishes a Proposal on “Green Claims” and Their Substantiation

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I. Introduction

On 22 March 2023, the European Commission (hereinafter, Commission) published a Proposal for a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive),¹ which provides minimum requirements for such claims to prevent “greenwashing” and misleading claims. A regulatory framework for environmental claims is one of the actions proposed by the Commission in the context of the European Green Deal,² which recognised that reliable, comparable and verifiable information plays an important part in enabling buyers to make more sustainable decisions and reduces the risk of “greenwashing”. Together with the Proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information,³ also published on 22 March 2023, the proposed Green Claims Directive will establish a framework for environmental claims, including environmental labels. This article focuses on the requirements for the substantiation of environmental claims and labels, discusses how they are verified and looks at enforcement and penalties.

II. Rationale, scope and definitions of the proposed Green Claims Directive

The reasons for regulating the field of environmental claims and labels are indicated in Recital 1 of the proposed Green Claims Directive: “Claiming to be ‘green’ and sustainable has become a competitiveness factor, with green products registering greater growth than standard products. If goods and services offered and purchased on the internal market are not as environmentally friendly as presented, this would mislead the consumers, hamper the green transition and prevent the reduction of negative environmental impacts.”

¹ Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM/2023/166 final, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>> (last accessed 12 April 2023).

² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final, available at <https://commission.europa.eu/document/daef3e5c-a456-4fbb-a067-8f1cbe8d9c78_en> (last accessed 12 April 2023).

³ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0143&from=EN>> (last accessed 12 April 2023).

Recital 1 further notes: “With a proliferation of different labels and calculation methods on the market, it is difficult for consumers, businesses, investors and stakeholders to establish if claims are trustworthy.”

Article 1 of the proposed Green Claims Directive sets the scope, noting that it sets “minimum requirements on the substantiation and communication of voluntary environmental claims and environmental labelling in business-to-consumer commercial practices”. Article 2(1) defines “environmental claim” as “defined in Article 2, point (o), of Directive 2005/29/EC”. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market⁴ does currently not yet provide for such a definition, but the Commission’s Proposal on empowering consumers⁵ defines “environmental claim” as “any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time”. Both proposals define “explicit environmental claim” as an “environmental claim that is in textual form or contained in an environmental label”.

III. Requirements for the substantiation of environmental claims

In order to ensure that consumers are provided with reliable, comparable and verifiable information that enables them to make more environmentally sustainable decisions and to reduce the risk of “greenwashing”, the proposed Green Claims Directive establishes requirements for the substantiation of explicit environmental claims. Article 3 of the proposed Green Claims Directive requires that traders carry out an assessment that must: (1) specify if the claim is related to the whole product, part of a product or certain aspects of a product or to all activities of a trader or a certain part or aspect of these activities; (2) rely on recognised scientific evidence, use accurate information and take into account relevant international standards; (3) demonstrate the significance of impacts, aspects and performance from a life-cycle perspective; (4) take into account all significant aspects and impacts to assess the performance; (5) demonstrate whether the claim is accurate for the whole product or only for parts of it; (6) demonstrate that the claim is not equivalent to requirements imposed by law; (7) provide information on whether the product performs environmentally significantly better than what is common practice; (8) identify whether a positive achievement leads to significant worsening of another impact; (9) require greenhouse gas offsets to be reported in a transparent manner; and (10) include accurate primary or secondary information.

Article 4 of the proposed Green Claims Directive sets out further requirements for comparative claims, which refer to claims that state or imply that a product or trader has fewer or greater environmental impacts or performs better than other products or traders regarding certain environmental aspects. These requirements are essentially: (1) related to the use of information and data for the assessment of environmental impacts, aspects or performance of compared products or traders; (2) an equivalent coverage of stages along the value chain for the products and traders compared; and (3) that the coverage of

⁴ Available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>> (last accessed 12 April 2023).

⁵ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0143&from=EN>> (last accessed 12 April 2023).

environmental impacts, aspects or performances is equivalent for the products and traders compared and ensures that those that are most significant are taken into account for all products and traders compared. Importantly, the proposed Green Claims Directive does not prescribe a single method for such assessment, as different types of claims will require different levels of substantiation. The assessment used to substantiate explicit environmental claims needs to consider the life cycle of the product or of the overall activities of the trader in order to identify the relevant impacts that are subject to the claims.

According to the Explanatory Memorandum to the proposed Green Claims Directive, “for the assessment to be considered robust, it should include primary, company-specific data, for relevant aspects contributing significantly to the environmental performance of the product or trader referred to in the claim”. Additionally, “if the process is not run by the trader making the claim and if primary information is not available, the use of secondary information should be permitted, even for processes contributing significantly to the environmental performance of the product or trader”. Both primary and secondary data should show a high level of quality and accuracy.

According to Recital 21 of the proposed Green Claims Directive, climate-related claims have been shown “to be particularly prone to being unclear and ambiguous and to mislead consumers”. This relates notably to environmental claims that products or entities are “climate neutral”, “carbon neutral”, “100% CO₂ compensated” or will be “net-zero” by a given year, or similar. Such statements are often based on the “offsetting” of greenhouse gas emissions through “carbon credits” generated outside the company’s value chain (eg from forestry or renewable energy projects). The methodologies underpinning offsets vary widely and are not always transparent, accurate or consistent. Therefore, the proposed Green Claims Directive would require climate-related claims to report in a transparent manner, separately from greenhouse gas emissions, any greenhouse gas emissions offsets used.

The proposed Green Claims Directive would empower the Commission to adopt delegated acts to complement the requirements on the substantiation for certain types of claims, following the results of monitoring of the evolution of environmental claims on the market to allow for the prioritisation of claims that are prone to misleading consumers. However, the Explanatory Memorandum to the proposed Green Claims Directive notes that “for some types of claims it may be necessary for the Commission to act prior to that”.

IV. Requirements regarding environmental claims and labels

Article 5 of the proposed Green Claims Directive “responds to the problem of lack of reliable information on product’s environmental characteristics for those traders who make an environmental claim”. Notably, the Proposal sets out requirements for all claims when communicated, for example, that they be accompanied by information on the substantiation. Additionally, Article 6 states that “comparative claims on the improvement of an environmental impact of a product as compared to another product of the same trader, or that the trader no longer sells to consumers, are to be based on evidence that improvement is significant and achieved in the last five years”.

The proposed Green Claims Directive would also regulate the use of environmental labels. For instance, claims or labels that use “aggregate scoring of the product’s overall environmental impact” would not be permitted unless provided under future European Union (EU) rules. This could apply to schemes like the Eco-Score.⁶ The Commission underlines that, to date, there are at least 230 different labels, a situation that leads to “consumer

⁶ “Similar to the nutritional label Nutri-Score, the environmental or ‘green’ label Eco-Score appears on front-of-packs in the EU – Mere marketing tools?”, *Trade Perspectives*, Issue No. 8 of 23 April 2021, available at <http://www.fratinivergano.eu/en/trade-perspectives/23-april-2021/#_Similar_to_the> (last accessed 12 April 2023).

confusion and distrust”. In particular, new public labelling schemes would be prohibited unless developed at the EU level, and any new private schemes would need to show “higher environmental ambition than existing ones and get a pre-approval to be allowed”. Further to the requirements on the substantiation and communication applicable to all types of claims, the proposed Green Claims Directive would build on the requirements of the Proposal on empowering consumers, which would add to the list of commercial practices that are considered unfair, as provided in Annex I to Directive 2005/29/EC, the display of a “sustainability label which is not based on a certification scheme or not established by public authorities”. This means that labels based on self-certification would be prohibited.

V. *Ex ante* verification of environmental claims and labelling schemes

In accordance with Articles 10 and 11 of the proposed Green Claims Directive, the substantiation and communication of environmental claims and labelling schemes would have to be verified by an officially accredited independent body, with no conflicts of interest to ensure independence of judgment and holding the highest degree of professional integrity. The so-called “verifier” must be a third-party conformity assessment body accredited in accordance with Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products,⁷ “having the required expertise, equipment, and infrastructure to carry out the verifications as well as enough suitable personnel that observe professional secrecy”. The substantiation and communication of environmental claims would have to be reviewed and updated by the trader every five years.

VI. Infringements, enforcement and penalties and the way forward

According to Article 17 of the proposed Green Claims Directive, infringements could result in a fine, confiscation of revenue gained from related products, exclusion from access to public funding and up to twelve-month exclusion from public procurement procedures. EU Member States would have to ensure that, when penalties are to be imposed, the maximum amount of such fines be at least 4% of the trader’s annual turnover in the EU Member State or EU Member States concerned.

If the rules were already in application, there would presumably be many infringements. An impact assessment,⁸ published by the Commission in 2022, highlighted that 53.3% of the examined environmental claims in the EU were found to be “vague, misleading or unfounded”, that 40% were found to be “unsubstantiated” and that half of all “green labels” offer “weak or non-existent verification”. In this context, it is of great importance that the Green Claims Directive, once adopted, be properly enforced by EU Member States’ authorities monitoring the market.

Article 25 of the proposed Green Claims Directive provides that EU Member States are to adopt and publish, eighteen months after the date of entry into force of the Directive,

⁷ Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218, 13.8.2008, pp 30-47, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008R0765>> (last accessed 12 January 2023).

⁸ Commission Staff Working Document, Impact Assessment Report, accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0085>> (last accessed 12 April 2023).

the laws, regulations and administrative provisions necessary to comply with this Directive, and that those rules are to apply from twenty-four months after the date of entry into force of the Directive.

Following the EU's ordinary legislative procedure, the European Commission's Proposal for the Green Claims Directive will now have to be discussed by the European Parliament and the Council of the EU for a common text to be agreed among EU institutions.

Disclaimer. The topic addressed in this report was already discussed in FratiniVergano's *Trade Perspectives*[®], Issue No. 7 of 10 April 2023 (available at <www.fratinivergano.eu/en/trade-perspectives/> (last accessed 11 April 2022)).