ECOMMERCE EUROPE

Position paper on the Proposal for a Directive on the Substantiation and communication of explicit environmental claims

Ecommerce Europe values the European Commission's work on establishing an EU-wide framework for the substantiation of environmental claims and labels through the Proposal for a Directive on Substantiation and Communication of Explicit Environmental Claims. We believe that the new legislation constitutes a **concrete opportunity for retailers operating online to better communicate on the essential role they play in making sustainable products and services available to consumers across the EU**. The initiative could lay out a more harmonised and balanced set of rules, creating a level-playing field, and ensuring that claims accessible to EU consumers are verifiable, relevant and comparable.

Ecommerce Europe is ready to contribute to the achievement of feasible obligations and cost-efficient procedures underpinning the substantiation of explicit environmental claims, while upholding the overall objective of the Directive. In this context, we would like to raise our concerns with regards to certain aspects of the proposed legislation, which could have an adverse impact on the Directive's contribution to a greener economy and a high level of consumer protection.

A number of diverse legislative proposals, with a direct impact on consumer information are currently being discussed and will enter into force in the coming years (this Directive, the future Regulation on Ecodesign for Sustainable Products, the Directive on Empowering consumers in the green transition, sectoral legislations impacting consumer information and labelling…). These acts all cover and overlap on certain aspects of product information, data collection, or requirements for consumer information and marketing.

On the longer-term, as part of the European Commission's next mandate, we strongly encourage the co-creation (with the industry and civil society) of a clear roadmap and accompanying guidance on the future of consumer information in the EU, encompassing the role of all these new legislations and how they interact with each other.

Key Recommendations

1. Provide unambiguous definitions and a clear scope, while **addressing potential regulatory overlaps**
2. **Specify and harmonise requirements for substantiation** and facilitate the development of **EU-wide recognised** methodologies
3. Ensure that communication requirements draw on **workable information access** across the supply chain and **prevent unnecessary double assessment**
4. Preserve a **level-playing field** by introducing clear safeguards and commit to standardisation efforts for the verification of claims and labels
5. Allow for a **workable implementation period** and define balanced responsibilities to ensure easier **compliance** with the rules
6. Address the Proposal's deficiencies in the treatment of **second-hand products** to make sure that the sector continues its growth

www.ecommerce-europe.eu | info@ecommerce-europe.eu | +32 (0) 496 273 060

Rue du Commerce 31, 1000 Brussels (Belgium)

1. Regulatory instrument and scope of the proposed Directive (Articles 1 and 2)

Ecommerce Europe understands the rationale behind the choice of the Commission to opt for a Directive, instead of a Regulation, to lay out an EU-wide framework for the substantiation of explicit environmental claims. However, without further clarity and efforts for harmonisation and coherence with interlinked pieces of legislations, this Directive will create important challenges for companies. There is a tangible risk that significant divergencies will emerge across Member States once the Directive will be implemented, notably owing to existing or emerging national initiatives to regulate environmental information[1], **hence the need for standardisation and guidance well before the deadline for implementation**. The risk of fragmentation is detailed in greater details in the rest of our position paper.

Regarding the scope of the Directive, Ecommerce Europe invites the co-legislators to clarify that the rules laid down in this instrument shall not apply to trademarks registered under national, Union or international intellectual property laws. For instance, companies whose name suggests an association with the word "green" or "sustainable" should not fall under the scope of this Directive, as long as no commercial claim in connection to the company is made. Such registered trademarks should not be interpreted as corporate claims and should therefore be out of the scope of this Directive. **Therefore, we suggest adding a clear exemption for these trademarks under Article 1.1.**

Concerning the interplay between these Directive and related pieces of legislation, we would like to stress the following:

- For the future **Ecodesign for Sustainable Products Regulation (ESPR)** covering mandatory product information, we see a risk of increasing businesses' compliance costs, as companies will need to abide by different regulatory regimes for obligatory and voluntary product claims. More specifically, those claims referring to environmental aspects of products covered under ESPR, even when exceeding the framework's minimum requirements, should benefit from a presumption of conformity and should not be subjected to the verification process under this Directive. For example, a company developing and/or using a recognised methodology to attest to its compliance with a minimum requirement for recycled content in a product as specified in an ESPR delegated act should be able to use the same methodology to substantiate its claims for recycled content, even if the percentage of recycled content goes beyond the minimum requirement (the same methodology and dataset applies and are valid whether the product contains 10% or 50% recycled content).

- With regards to the scope of the Directive, we welcome the clear wording in Art. 1(1) on the applicability of the proposed Directive to 'explicit' environmental claims. However, we would like to underline that the wording is not consistent throughout the text, which could create confusion as to whether the concerned provision (e.g., Art. 10.4, 10.8, 11.3(a)), among many others) applies to 'environmental claims' under Art. 2(o) of the Unfair Commercial Practices Directive (UCPD). **We therefore strongly suggest ensuring alignment with the final text of the UCPD as amended by recent legislation**.

- Additionally, we suggest policymakers to consider possible overlaps with the Corporate Sustainability Reporting Directive (CSRD) when it comes to the substantiation and communication of corporate environmental claims. **The proposal should clarify that information on environmental claims submitted as part of legal reporting requirements (e.g., CSRD or European Sustainability Reporting Standards) will not be subject to additional requirements under the Green Claims Directive**. For instance, it shall be ensured that the information included by large companies in their sustainability report pursuant to the European Sustainability Reporting Standards (ESRS), developed by the EFRAG and adopted by the European Commission, can be used in general marketing without

[1] E.g., France wants to introduce its own Environmental Footprint methodology from 2024.

any need for further assessment or verification, even when the content would count as an 'explicit environmental claim' under the Green Claims Directive.

2. Requirements for the substantiation and comparison of explicit environmental claims (Articles 3 and 4)

Given the type of regulatory instrument and the lack of a common EU methodology for the substantiation of green claims, **it is of paramount importance that the requirements underpinning traders' assessment listed in Article 3 are both clear and workable**. We would specifically welcome clarification on concepts such as "widely recognised scientific evidence" (Art. 3(b)), "significant from a life-cycle perspective" (point (c)), or "significantly better than common practice" (point (f)). For instance, it might be worth considering introducing a cut-off for what is considered "significant" from a life-cycle perspective when proving that the claim is relevant for the product/trader in question. We would like to caution that proof of significance should not be equivalent to conducting a full LCA study for all claims. **In general, we would suggest the European Commission to draft guidance on this point, including concrete examples to better delimitate the criteria for the assessment of an explicit environmental claim included in Article 3**.

With regards to the type of data underlying the assessment process, as per Recital 20 and Article 3.1(i) and (j), we have doubts on the type of claims which would need to draw on primary information. We are also unsure about the conditions under which a trader is expected to extract primary data to substantiate their claims, currently depending on the latter's "influence" on the substantiation process. Further clarity on this point would be welcome, especially in light of the fact that "*[c]onsumer protection authorities in some countries are starting to question product specific environmental claims if no primary data has been used in the substantiation*", as explained in the explanatory memorandum. A diverging regulatory landscape for this requirement would further complicate the collection of such data, which is already costly to obtain. **We believe that leaving this provision to the discretion of Member States would significantly endanger the level-playing field among EU companies.**

The Proposal refrains from touching upon the issue of a common methodology for the substantiation of such claims. As an association representing a wide range of actors, selling a diverse pool of products and services to which different environmental claims are attached, we understand the complexity of establishing (a) common European methodology(ies). On the one hand, the approach chosen by the European Commission would offer some flexibility, potentially also at product categories level or types of claims where methodologies still need to be strengthened. However, there is a risk that the co-existence of different methods would greatly complexify the assessment of explicit green claims, the comparability of these claims and the equivalence of data underpinning the claims. This situation makes it challenging for companies to evaluate and communicate to consumers in an efficient way. We encourage the European Commission and policymakers to explore, through this legislation or through the future delegated acts, how to collectively work towards the development of recognised, reproductible, common EU methodology(ies), in cooperation with all relevant stakeholders. This approach would also allow for further discussions on possible way forwards for this Proposal and its implementation (e.g., common "voluntary" methodology per sector such a PEF, streamlined and transparent verification process, presumption of conformity for substantiated claims that follow sector specific PEF methods). **A suggestion for moving forward, at least for products already covered by PEF, would be for the European Commission to adopt delegated acts pursuant to Article 3.4(c).**

We applaud the Commission's intention to make use of the budget allocated under this Directive to acquire secondary Environmental Footprint (EF) datasets providing key average data on resource consumption and emissions for key processes that can be used by companies to substantiate their claims. Nevertheless, we point to the **need to earmark budget for the approval and promotion of recognised methodologies, which could contribute even more strongly to lessening the costs of compliance with the rules**.

The absence of harmonised methodologies (e.g., for product-specific life cycle assessment) also creates challenges for the comparison of claims and labels, which could for example increase consumer awareness regarding the levels of ambition of each label on the market. We would thus welcome clarification on the possibility for retailers to continue comparing environmental labels, for instance by adopting a 'gold, silver, bronze' approach to indicate the general ambition of a label in a clear, simplified, and transparent way.

3. Communication of explicit claims and requirements for environmental labelling schemes (Articles 5, 7 and 8)

Ecommerce Europe appreciates the discretion that the text leaves with regards to the format (including digital) to communicate explicit environmental claims on a product or a trader (Art. 5.6), as well as the clear list of information spelled out in that subparagraph.

Still, we urge co-legislators to clarify the responsibility of operators in relation to the initial substantiation and subsequent use of the claim. Specifically, **retailers should be able to communicate claims made by manufacturers (or other responsible economic operators) in their own marketing without being required to carry out any further assessment**, based on the assumption that this process has already taken place, and the voluntary claim is compliant.

Overall, the definition of "environmental labels" and "environmental labelling schemes" could benefit from further clarity and a better alignment with "explicit environmental claims". Notably, **it should be made possible for businesses having been granted the right to use a label compliant with the requirements of the Directive to communicate claims that are inseparably linked to the requirements of the environmental label without further substantiation**.

While we support the stance of the Commission against the proliferation of labels, we would invite policymakers to make sure that the new restrictions on private schemes incorporate future-proof considerations, allowing innovative solutions to flourish. In this regard, **we would like to underline that, in absence of a clear definition of "added value" (Art. 8.4) of new labels, the requirements for the development of new private labelling schemes should not be too strict**. Seemingly, the text should allow existing voluntary company self-commitments to deliver on environmental communication beyond the legal compliance level.

We would like to flag that the wording in Article 5.5 could endanger a practice consisting in listing and/or aggregating certified environmental labels under an umbrella programme or a dedicated page on their website. Such initiatives aim to assist consumers in making sustainable purchasing choices by informing them on the products having been awarded with third-party certifications on said page. Therefore, **we suggest aligning this provision with flexible language allowing retailers' initiatives on consumer information under Article 7, for instance by adding a derogation for "aggregator indicators" where no new product evaluation is carried out**. We would also advocate for a definition of this concept to be included in Article 2 on Definitions.

4. Verification process and verifiers (Articles 10, 11)

Ecommerce Europe is concerned about the proposed introduction of an ex-ante verification process for explicit environmental claims (as per Art. 10.4). **We are worried that serious fragmentation could arise in terms of approved verification procedures and enforcement, creating an extremely burdensome approval landscape, and an unlevel-playing field that will have a disproportionate impact on smaller companies.**

Under the current proposal, each Member States would have to set-up procedures for verifying the substantiation of claims, undertaken by verifiers. There is currently no guarantee, in this Directive, for

harmonisation efforts on the procedures for verifying the substantiation, communication and compliance, which could lead to very different regimes from one Member States to another. A direct consequence of a lack of harmonisation could be the impact on availability of verifiers (and therefore guarantee on the competitiveness of such market and the costs of verification) or the difficulty to get a claim verified (e.g., procedures requirements could vary, as well as requirements on data as mentioned under point 2).

This is particularly important as it will have a clear impact on the level-playing for SMEs in the EU. While large companies operating in more than one market will be able to choose verifiers that are able to deliver ex-ante verification on time, smaller players will be more dependent on the verifiers established in the national market they operate in, with less choice and fewer guarantees on time and costs. This means they could for example have to go through ex-ante verification in a market with less competition where verifiers cannot cope with the demand.

An additional layer of complexity also lies in the guarantee that a claim approved in one Member State shall be recognised across the EU.

Considering the uncertainty created by the lack of guarantees on the delays and costs of such procedures, as well as the legal uncertainty over the validity of an approved claims throughout the EU, companies are very likely to give up on having claims verified ex-ante, even if they already comply with Article 3, preventing consumers for having access to relevant information.

Considering the concerns listed above, **we believe that the verification and pre-approval process should be limited to new environmental labels, in order to assess and streamline the setting-up of new potential labels.**

Nevertheless, if ex-ante verification remains in the Directive, we urge policymakers to consider at least the following:

- Once a claim and a methodology to substantiate that claim have been verified, **the approved method and the underlying data should be made publicly available,** in order to allow companies to use the claim and methodology across the EU for comparable products or traders, creating opportunities for SMEs and avoid the duplication of assessment for identical claims.

- **We also strongly encourage strengthening the provisions covering the mutual recognition of claims across the EU**, beyond the meaning of Recital 52 and Article 10.7. These reflections also apply to the requirements set for verifiers (Art. 11.3), as we find that the text is too vague when it comes to defining verifiers' obligations, notably in respect of the methodology used for the verification. Additionally, we encourage **the European Commission to at least consider standardising verification processes and define a time limit as well as ensure a proportionate and reasonable cost for the approval of the claim**.

Finally, we would welcome further guidance on whether, once approved in one Member State, the translated version of an approved claim would have to seek renewed approval. Similarly, it would be helpful to specify whether a translation of the certificate of conformity would be required.

5. Compliance and implementation (Articles 15 and 25)

We strongly recommend extending the transition period for the entry into force of the rules to give all relevant stakeholders sufficient time to prepare for compliance with the new obligations. The transition period (between the publication at national level and application as foreseen by Article 25.1) is set at six months, which is unworkable for businesses (or third-party data solutions) and data pathways to adjust adequately. A more extended transition period would notably allow a timelier alignment with the expected Commission's publication of a "list of officially recognised environmental labels that are allowed

to be used on the Union market", pursuant to Article 8.7, facilitating smaller players' compliance with the rules on environmental labels. **We also call on the European Commission to provide guidance to Member States, including an assessment of existing or emerging national initiatives tackling environmental communication against the Green Claims Directive ahead of the transposition deadline, for these EU-wide rules to integrate national legislations.**

To support economic operators' compliance with the new rules and ensure balanced obligations, **Article 15.3 should further clarify that economic operators making the claims are responsible for ensuring compliance with the requirements set out in Articles 3 to 6**. Retailers should not be responsible for verifying that the use of a claim or label under the meaning of this Directive is compliant, nor for taking action to bring non-compliant claims into alignment. In the same vein, retailers should not have to request new certificates of conformity for environmental claims taken from vendors and displayed on the product detail page or in any other format to consumers, nor be held accountable when these are inaccurate.

We also note that the draft Directive does not provide any information on which instances a verifier will be held liable when wrongly issuing a certificate of conformity.

6. Additional remarks

The proposal does not contain any reference to second-hand or refurbished products, despite these being more and more integrated in the purchasing patterns of EU consumers. Claims on environmental performance of pre-owned or refurbished goods are not only hard to substantiate but also difficult for competent authorities to verify. Indeed, a trader of second-hand goods will not have the same level of knowledge and control over the environmental performance of a second-hand product compared to a new one. **We would welcome more flexibility and additional clarification on how requirements mandated by this Directive could apply to those specific categories of products**. For instance, the Proposal could explicitly acknowledge the higher environmental value of second-hand products. To conclude, we invite the Commission to consider the specific needs of the second-hand sector ahead of the acquisition of secondary Environmental Footprint (EF) datasets.