



**Independent
Retail Europe**

**PROPOSAL ON A DIRECTIVE ON SUBSTANTIATION AND
COMMUNICATION OF EXPLICIT ENVIRONMENTAL CLAIMS
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

JULY 2023



EXECUTIVE SUMMARY

The EU Commission's proposal for a [Directive on the substantiation and communication of explicit environmental claims](#) aims to counter greenwashing practices, by ensuring that environmental claims on products and services are substantiated, reliable, comparable and verifiable across the EU.

We welcome the parts of the Commission's proposal that allow reputable companies who make a tangible effort to reduce their environmental impact stand out and distinguish themselves from their competitors. The proposal should enhance consumer trust in environmental claims. Consumer interest and awareness has steadily grown over the past years. The objective of retailers is to cater to this demand and to contribute to their own and the EU's sustainability objectives.

It is therefore critical that the proposal maintains the business case for developing reliable green claims, as otherwise many businesses will abandon these sustainability efforts. Reputable companies have already put in place sound concepts for their (reliable) environmental claims. They made investments and work closely together with scientific experts, NGO's and their business partners on their claims. Existing (reliable) schemes that have a positive environmental effect and that go beyond the current legal requirements should not be ruled out by the Directive.

We therefore call upon the co-legislators to adopt a legislative text that strikes the right balance to ensure that the new requirements will reward companies that make a real effort to reduce their environmental footprint and maintains a business case that incentivises economic operators' efforts in favour of sustainability. Moreover, the Directive should ensure that it effectively addresses the operators responsible for the claims (i.e. producers) and does not punish operators with no control over the content of these claims (i.e. distributors).

Summary of our position:

- ➔ Without being able to promote their product and monetize their efforts and additional investments in favour of sustainability, economic operators will not source/manufacture more sustainable (i.e. more expensive) products
- ➔ Legal coherence between the proposal on [empowering consumers for the green transition](#) and the proposal on substantiating green claims is essential
- ➔ The obligations of traders need to be clarified. The definition of a trader included in the proposal includes producers as well as retailers. Whereas producers are technically able to assess the claims they make on the products they produce, retailers depend on the information provided by the producer. Retailers cannot be made responsible for wrongful claims made by producers.
- ➔ Certain legal definitions require clarification. The legal text should carefully distinguish between the economic operators who issue the claim, normally the producers, and those who do not.
- ➔ Retailers' revenues from products with wrongful claims should not be confiscated. They are not responsible for the claim (producers are). An adequate compensation mechanism between producers and retailers needs to be put in place in case of loss of sales resulting from producers' misbehaviour.
- ➔ The extensive use of delegated and implementing acts does not provide for sufficient legal certainty and will significantly delay the process. As long as not all implementing acts are adopted business operators will not be want to risk investing in more sustainable products or services. The transition period must start after the adoption of the last implementing act.

COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE PROPOSAL ON A DIRECTIVE ON SUBSTANTIATION AND COMMUNICATION OF EXPLICIT ENVIRONMENTAL CLAIMS

The legal definitions require clarifications

We welcome that the Directive on Green Claims adopts the legal definitions of the Proposal on empowering Consumers in the green transition, of “environmental claim”, “sustainability label” and “certification scheme”. **Definitions must be aligned between different legal texts in order to provide for an overall coherent legal framework.** This is particularly important concerning definitions of environmental claims (article 2(1)) which depend on definitions not yet adopted in the proposal on empowering consumers.

The definition of explicit environmental claims (article 2(2)) is also vague, which raises an issue as to the scope of the proposal. In particular, it is unclear whether broader ‘sustainability’ claims and labels other than environmental ones are excluded or not from this directive (e.g. fair trade, animal welfare...). This should be made clear, and, if they are covered, the proposal should explain how.

The proposal on green claims distinguishes between environmental claims and environmental labels. We welcome that the proposal refers to Article 2 point (o) of Directive 2005/29/EC in order to define environmental claims. However, this definition already includes pictorial elements such as labels. The distinction between labels and claims is therefore not clear. Businesses need to be able to clearly distinguish between their obligations under Article 3 and 8 of the proposal.

We are also concerned whether retailers’ sustainability reports will qualify as a claim about their businesses. They usually employ an independent consultancy to report about their sustainability activities. The consultancies who offer these reports as a service do not qualify as an independent verifier according to Article 11 of the proposed regulation. The reports however are mandatory according to the Directive on Corporate Sustainability Reporting (EU) 2022/2464. If there are not sufficient independent verifiers, businesses will not be able to publish the reports that they are required to publish. It is also unclear whether other corporate claims of companies which are unrelated to a product or service fall into the scope of the proposal, and in particular concerning article 5(4). Should this be the case, it would create major difficulties for companies requiring full alignment with the CSRD. Similarly, it is unclear if and how article 5(4) also applies to B2B claims.

Our position in summary:

- ➔ Legal definitions between the Directive to Empower Consumers in the Green Transition and the Green Claims Directive must be aligned.
- ➔ The definition of explicit environmental claims should be clarified, in particular as to whether it covers or not sustainability claims broader than ‘environmental’ aspects (e.g. animal welfare, fair trade, etc.).
- ➔ The definition of an environmental label requires clarification – especially concerning the difference with claims with pictorial elements.
- ➔ (Mandatory) Sustainability Reports by an external consultant should not qualify as an environmental claim.

➔ Generic company claims unrelated to a product or service should not be covered by the proposal, given the impact this may have on the CSRD and the need for full alignment in such a case. Specifications should also be brought as to the possible application of article 5(4) to B2B claims.

Legal Coherence is paramount

The proposal aims to complement the general consumer law directives and specifically the proposal on empowering consumers for the green transition as *lex generalis*, being part of and amending the Unfair Commercial Practices Directive. The Green Claims Directive should be identified as *lex specialis* to the general consumer law.

The Unfair Commercial Practices Directive applies to business-to-consumer commercial practices and thereby to the sale or supply of a product by a trader to a consumer. As such, this is not the right place to regulate a harmonised methodology to sustain environmental claims in the internal market.

The Green Claims Directive refers to the Directive Empowering Consumers for the Green Transition throughout the text. The two legislative proposals were supposed to be published at the same time, be negotiated in parallel and transposed jointly. Unfortunately, the Directive on Green Claims was significantly delayed and only published when the proposal on empowering consumers for the green transition was already voted in the IMCO committee. The European Parliament took account of the significant delay and introduced more specific provisions on the methodology, definitions, verification, required certification and approval processes in the proposal on consumer law to fill the legal gap that resulted from the separation of the two legal texts.

We are firstly convinced that those aspects would be better addressed in the *lex specialis*, that is the proposed Directive on Green Claims. Secondly, we call upon legislators to provide for a legally coherent framework. It is paramount for economic operators to have clarity regarding the requirements with which they need to comply. Having two legal texts that refer to different approval procedures or different requirements for verification and certification will not provide businesses with the guidance they need.

An incoherent legal framework on requirements for environmental claims will disincentivise businesses from reducing the environmental footprint of their services or products. Businesses require an economically attractive business case to go beyond the legal requirements. More sustainable products and services entail higher production costs. The success of the business case depends on the possibility to market and promote the additional efforts the company has made in order to offer a more sustainable product or service. An incoherent and complex legal framework will increase the risk of unintended infringements that are linked to considerable penalties. If those risks are taken into account by the company when it builds its business case, only very few businesses will be able to maintain their business case and will therefore stop all efforts to reduce their environmental footprint.

Our position in summary:

➔ Address specific requirements of environmental claims in the Green Claims Directive

- ➔ Ensure the highest level of legal coherence between the Proposal Empowering Consumers for the Green Transition and the proposal on Substantiating Green Claims
- ➔ Negotiate and transpose both proposals in parallel to guarantee the highest level of legal coherence
- ➔ Ensure that businesses have clear guidance on how to comply with the legal requirements

The role and obligation of traders need to be clarified based on the respective responsibilities of the different economic operators in the supply chain

The definition of traders in Article 2.3 of the proposal refers to Article 2, point b of the UCPD (2005/29/EC), and “*means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession*”. This definition also includes retailers and is therefore very problematic with regard to several provisions of the proposal, due to the fact that retailers play no role in the formulation/development of product claims producers make on their product. ¹

Retailers sell products that bear claims that have been made by the producers of those products. Retailers do not have any control over these claims. Retailers can have up to 40 000 different products in their product range. They have neither the expertise nor the resources to assess the substantiation of all environmental claims on the products they sell. In addition, they do not have access to the necessary documentation to verify whether the claim complies with the legal requirements. Retailers should therefore not be liable for any wrongful claim on any product they sell. **Only producers know what is behind their environmental claims on their products and therefore they should be the sole responsible entities.**

In case of infringement, recital 64 suggests temporary exclusion or prohibition from placing products or making services available on the market. Since retailers qualify as traders under EU legislation, recital 64 implies that in case of an infringement, retailers must cease their activity. We are therefore extremely concerned about this recital. Retailers willingly fulfil their obligations before making a product available on the market, but their responsibility is limited to checking whether a producer has provided the information and documents which enables retailers to ensure the product is compliant with EU law and can be made available on the market by them. **In case of an environmental claim made by a producer on the product, retailers have by no means the necessary expertise to adequately assess the substantiation of that claim.**

Retailers should be able to sell out their stock in case a producer has made a wrongful claim. The destruction of unsold goods contradicts the objective of the legal text. In case retailers are not allowed to do sell their stocks, **the proposal should foresee a mandatory compensation to the retailer by the producer for the financial loss occurred, as the retailer has been misled by the producer.** In any case, it should be at the discretion of the retailer to decide, whether a product with a wrongful claim is returned to the producer or relabelled to mitigate the wrongful information.

¹ To clarify, where retailers sell their private label products, they are according to existing EU law the producers of these products and hence, as the producers, responsible for any claims that are made on the packaging of these products. They can however not be made responsible for labels or claims made about products by others.

Article 17 on penalties enables Member States to confiscate any revenue gained by the trader from a transaction with the product that is concerned by an infringement (Art. 17. 3.b). The definition of trader refers to Article 2, point b of the UCPD (2005/29/EC) i.e. trader *“means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession”*. As said above, this definition also includes retailers who, as explained, should not be held responsible for any wrongful claim made by a producer. **Article 17 shall therefore be amended to clearly address the “economic operator who issued the environmental claim”**.

Article 15.3 on compliance enables Member States’ authorities to notify the trader and require the trader to take any corrective action and cease the use of and references to the non-compliant explicit environmental claim. While in principle we agree that there should be no products with non-compliant claims on the market, we have doubts about the practical implementation. The provision address traders at large and therefore includes retailers (see above). Explicit claims are displayed on the packaging by the producer. Retailers would therefore need to immediately delist products with environmental claims that have been found non-compliant or relabel them manually. Both options will come with significant costs. When retailers are not the issuers of the claim, which is normally the case, they should not be made responsible for the corrective action. **The producer should recall the product and compensate the retailer accordingly.**

The definition of trader is also problematic with regard to Article 3 on the substantiation of explicit environmental claims. The proposal makes traders responsible to carry out an assessment to substantiate the claim. This is in principle not problematic if the trader is the issuer of the claim. This generic wording raises questions on whether retailers will have to assess claims of all products that they sell. Retailers sell many products they do not produce and they cannot control or verify claims that producers may make. Retailers will not have the necessary documentation to assess the product as required by Article 3. This should be the task of the claim issuer only.

We welcome the EU Commission’s effort also addressing labels that have been issued by private operators established outside the EU (Article 8.4). This means that without the public authority of the third country submitting the labelling scheme to the Commission for approval, no operator in a third country will be able to make a claim. While we support this principle in general, we see a high risk of non-compliance. These measures are very hard to be enforced, especially in the case of online marketplaces. Products with an unsustained green claim will be sold and shipped from a trader established in a third country directly to the EU consumer. Due to the growing environmental conscience within the EU, environmental claims have become a powerful marketing tool. Operators in third countries against whom the new rules cannot be enforced and to whom the penalties cannot be applied will face a significant advantage in comparison to operators established within the EU. A legislative framework that does not sufficiently address traders in third countries leads to a competitive disadvantage for EU operators and to an unlevel playing field.

Our position in summary:

- Retailers sell products. Retailers do not produce products. They shall therefore not be responsible for any wrongful claim made by producers, as retailers are not able to control or verify these claims.
- The legal text should carefully distinguish between distributors and producers. The legal text should refer to the economic operators who issues the claim.
- Temporary exclusion or prohibitions from placing products or making services available on the market is exaggerated if they apply to retailers with no control over the claims made by producers.
- Retailers' revenues from products with wrongful claims should not be confiscated. They are not responsible for the claim. Any such confiscation should exclusively apply to the operator who made the claim on the product (i.e. the producer)
- Retailers should be able to decide at their own discretion whether they relabel and sell out the stocks of products with wrongful claims or whether they delist those products and claim compensation from manufacturers. In the latter case, the proposal should acknowledge distributors' right to obtain a compensation from the author of the claim (i.e the producer).

The extensive use of delegated and implementing acts does not provide for sufficient legal certainty and will significantly delay the process

We are concerned about the high number of delegated and implementing acts. Important details of the substantiation of green claims will be determined only in delegated or implementing acts. These elements, however, are crucial for economic operators. Businesses can only adapt their processes when they have full knowledge about what exact requirements they need to fulfil and how they may or may not communicate on them. Without sufficient legal certainty, businesses will not adapt or invest in new environmental labels since readapting a process that has just been put in place is very costly. Businesses will not be willing to take this entrepreneurial risk.

Hence, businesses will be able to implement the new requirements on substantiating green claims only if the implementing acts in Article 10.9 and 8.8 are already adopted. Article 8 will lay down the national approval procedures for environmental labelling schemes of private operators. Businesses who wish to make an environmental claim on one of their products need to justify the added value of their claim and provide certain documentation. The detailed requirement of environmental labelling schemes and the content of the supporting documents, however, will only be determined by implementing acts. **Without prior knowledge of these aspects, most reputable businesses make will likely stop to promote the sustainability of their products.** Without knowing how a claim needs to be supported and according to which criteria national authorities will check the claim, no new claim can reasonably be conceived without a major legal and economic risk.

Article 10 lays down the verification and certification procedure for substantiating a green claim. **It is crucial for businesses that all authorities in all Member States recognize all certification and verification procedures.** Article 10.9 requires the implementing acts to set out the details of the certificates of conformity necessary to support different claims. It is very likely, that no verification body will start their activity as long as these details have not been sufficiently clarified. Adding to the legal uncertainty for business operators is that the requirements listed in Article 3 can be

supplemented any time by delegated acts (Article 3.4). The Commission may change the requirements for the Communication of claims in a similar way (Article 5.8.).

Businesses who wish to make their products more sustainable and wish to communicate about their efforts must be certain about the legal requirements. Any environmental labelling scheme - from the conception to the implementation and the labelling of the final product - is a long-term investment. **Operators who wish to make a serious effort towards more sustainable products will be induced by the Commission proposal to wait until the legal framework is set out clearly.** The way the EU Commission has drafted its proposal will lead to significant delays in the implementation since businesses will wait for the implementing acts to be adopted.

The Commission has proposed an application deadline of 24 months after the entry into force. Given that businesses will have to wait for implementing acts before they adjust their procedure or conceive new claims, this deadline does not seem realistic. **An application deadline of 36 months should apply from the moment all implementing acts have been adopted.**

Our position in summary:

- ➔ Important details of the **substantiation** of green claims will be determined only in delegated or implementing acts. Economic operators will not continue to invest without these crucial elements.
- ➔ Without clarity on the **national approval procedures** for environmental labelling schemes, economic operators are likely to refrain from investing in any labelling scheme.
- ➔ Without clarity on **the requirements of the verification procedure and the necessary supporting documents**, economic operators will not take the risk of investing in an environmental label.
- ➔ Without being able to promote their product and monetise their efforts and additional investments, economic operators will not source more sustainable and more expensive products.
- ➔ As a result, the Directive needs to foresee a much longer period before it starts to apply, to ensure that all important elements to be set by the implementing/delegated acts will be known before full application of the legislation.

The Regulation as proposed will rule out certain schemes that have a real environmental benefit

Groups of independent retailers recognise the importance of mitigating climate change. They are committed to adapt their businesses with a view to reduce their overall energy consumption, to source more sustainable products or to take responsibility for their communities. These investments are certainly very costly. However, independent retailers acknowledge that society is changing in that sustainability becomes more and more important for consumers and businesses alike. Providing more sustainable services and products in a highly competitive market is hence a competitive advantage that allows our members to distinguish themselves from their competitors. Providing more sustainable products and services does have certain advantages for economic operators.

Due to the lack of legal guidance on sustainable business practices until now, reputable economic operators have filled that void by developing their own schemes and contribute their fair share to climate change mitigation and other environmental goals. They made investments in different

schemes, processes and labels because they are convinced that they can make a real positive contribution. The current Commission proposal rules out several of our members' initiatives. We recognise that banning green washing is necessary. Many claims are illicit and lack any scientific basis. However, we invite legislators to carefully assess the following initiatives and whether ruling these out would be in line with the initial objective of the proposal, namely banning practices that do not bring any benefit to the environment.

- **Labels and schemes that are not based on a certification scheme but based on guidelines developed by an independent scientific council:** External service providers, like the [science based targets initiative](#), offer to develop climate impact reduction targets in close cooperation with the business operator. They also assist with implementation and reporting. The initiative is led by independent experts and researchers and already encouraged several businesses to implement important changes in their climate change mitigation strategies. As long as similar initiatives are presided by independent scientific experts, a certification according to [\(EC\) No 765/2008](#) is not necessary. Certification is costly, time intensive and administratively burdensome. Recognising the urgency of climate change mitigation means to act rapidly and allow for flexibility. These initiatives demonstrate that businesses can successfully reach important results without accredited verifiers.
- **Labels and schemes that are developed in close cooperation with NGOs:** Some groups of independent retailers develop their private label products in close cooperation with NGOs. Together, they develop guidelines on requirements the products have to fulfil in order to qualify for co-branding and be awarded the common label or product recommendation. The co-branding and the creation of an own label is interesting from a marketing point of view. Consumers are more familiar with the NGO than with the individual certification scheme: co-branded products are more appealing to the consumer. Businesses will not voluntarily invest in more sustainable products if they cannot financially benefit. The common guidelines lay down which certification (if available) or other criteria the products need to respect to qualify for the common branding, for example the Forest Stewardship Council (FSC®), Roundtable on Sustainable Palm Oil (RSPO), MSC, blue angel, NATURE, the EU organic regulation, or national schemes like Naturland or Bioland. Products can only qualify for the common branding if sourced according to the developed guidelines. The private label and co-branding scheme, even though not based on a certification scheme, sources certified products. Legislation should provide a framework on how to develop own labels but should not stifle initiatives that have a proven positive impact on businesses, the environment and society.
- **Private labels that cumulate different labels that are independently based on certification schemes:** From a marketing point of view it can be interesting to develop an own environmental labelling scheme. Retailers' private label products have better profit margins than products of multinational companies. Retailers have a high interest in strongly promoting these products, for example through a private environmental label. **The private label is in most cases based on guidelines developed by an independent scientific council who advises the retailer on how to source certain products.** If the product qualifies for one or more particular certification schemes, it is awarded the private environmental label. If the product

sourced is certified and the certification is also displayed on the label, the private label should continue to exist because it helps retailers in promoting more sustainable products.

- **Need for more flexible and entry-level certification schemes:** Certification is costly. Even though some retailers would like to go the extra mile, they do not have the financial means or the existing certification schemes are not adapted to their business processes. One of the most important certification schemes for textiles, Global Recycled Standard (GRS), certifies the entire supply chain from the raw material to the final product. However, for groups of independent retailers, due to their very specific (cooperative) organisational structure, the audit would be difficult to implement. Whilst, the international group entity will source the product, the national wholesale entities and the local member retailers will be in charge of the sale, the transport and maybe even the production process. It is the very nature of groups of independent retailers that the different organisational levels act independently from each other. Certain certification with comprehensive auditing is thus difficult to obtain. However, our members are committed to the fight against climate change. They source for example certified textiles from recycled materials. Since they cannot promote their final product with the independent certification scheme (as they are not able to implement the audit), they promote the final product with their own environmental label, claiming that the product is made from recycled material. For legal reasons they may not use the official certificate in their consumer facing communication, but they can provide all documentation with regard to their own claim to authorities upon request. **If the Directive as proposed eliminates the possibility to make a claim on part of a product, and thereby promoting the private label product, or if the Directive as proposed adds additional administrative steps, business operators will simply stop sourcing more sustainable materials because they cannot monetise the additional effort.**

Moreover, the proposal should ensure that recognised existing labels, such as the ‘rainforest alliance’ or ‘fair trade’ will continue to exist without hurdles, as they have proved their sustainability benefit, and are widely recognised and valued positively by consumers.

Our position in summary:

- ➔ Labels and schemes that are not based on a certification scheme but based on guidelines developed by an independent scientific council should not be ruled out by the legislation.
- ➔ Labels and schemes that are developed in close cooperation with NGOs should not be ruled out by the legislation.
- ➔ Private labels that are based on different labels that are independently based on certification schemes should not be ruled out by the legislation.
- ➔ Need for more flexible and entry-level certification schemes that takes account of all efforts that are made in favor of more sustainable products and that is easy to implement for all business models.
- ➔ Ensure that widely accepted green schemes that have proved their value (e.g. rainforest alliance, fair trade) can continue to operate without difficulties.

Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their over 417.800 independent retailers, who manage more than 753.500 sales outlets, with a combined retail turnover of more than 1,320 billion euros and generating a combined wholesale turnover of 513 billion euros. This represents a total employment of more than 6.500.000 persons.

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