Green Claims Directive

Independent Retail Europe position for the trilogue

Independent Retail Europe fully supports the objective of the **proposal for a Directive on Green Claims** to step up the fight against greenwashing and ensure that green claims are reliable and transparent. This is a necessity to ensure that consumers take informed decisions as regards the impact of their purchases and to reward companies that invest in more sustainable products.

It is crucial that the final text negotiated in the trilogue equally considers both aspects and does not indirectly weaken companies' interest in investing in sustainable production. We recognise that the Council and the European Parliament's positions significantly improved the original proposal in this regard. Nevertheless, some specific aspects need to be worked on further to ensure that this Directive does not constitute a barrier to investment in sustainable production.

Therefore, this paper makes some suggestions based on the Council and European Parliament positions, with the view to offer solutions that could lead to a consensus between the co-legislators whilst preserving companies' incentives to invest in sustainability and ensuring that only reliable claims are made on the market.

1) Sector-specific EU laws should prevail over the more generalist Green Claims rules: Article 1(2) of the Commission's proposal should be re-established.

According to the well-established legal principle *lex specialis derogate legi generali*, sector-specific legislations should always prevail over more generalist legislation, as they are conceived to provide a tailored and effective legal framework for specific sectors, products and purposes.

Unfortunately, by broadening the scope of the Green Claims Directive to include claims on *all* products, the Parliament failed to recognise the prevalence of EU sectorial legislation such as the Packaging and Packaging Waste Directive (and future Regulation) as *lex specialis* over the general Green Claims Directive. This will raise legal uncertainty and create practical issues in concrete cases that were not considered in the debate over Green Claims.

The prevalence of the PPWD (and soon PPWR) and any other existing or future Union rules covering explicit environmental claims in a specific product category (e.g. the future Packaging and Packaging Waste Regulation, which will require a whole array of environmental labelling requirements for packaging for both B2B and B2C purposes, for each of which specific standards and implementing rules will be developed) over the Green Claims Directive should be re-established, as proposed by the Commission's proposal and supported by the Council.

We therefore urge the Parliament to support the Commission and Council's texts which maintain the Packaging and Packaging Waste Directive (and any other existing or future Union rules) as *lex specialis* over the general Green Claims Directive.

We call on the co-legislators to support the Commission and Council's proposals to maintain in Article 1(2) the following references (and to refer to the future PPWR):

- (k) Directive 94/62/EC of the European Parliament and of the Council (packaging and packaging waste) ***and Regulation (EU) [No to be published] of the European Parliament and of the Council (future updated Packaging and Packaging Waste Regulation)***;
- (p) other existing or future Union rules setting out the conditions under which certain explicit environmental claims about certain products or traders may be or are to be made or Union rules laying down requirements on the assessment or communication of environmental impacts, environmental aspects or environmental performance of certain products or traders or conditions for environmental labelling schemes.

2) The Council's proposed distinction between traders generating the claims and other traders must be supported to provide legal certainty (Council's text for Article 2, first paragraph, point (6a) and Recital 15).

Retailers sell products made by manufacturers. In case the product made by the manufacturer bears a green claim, the retailer has no control whatsoever over neither the content/substantiation/verification of the claim made by the manufacturer, nor the production methods of the manufacturer. Only the manufacturers/producers of the products are fully aware of the basis for their environmental claims on their products, so they alone should bear the responsibility for those claims. As the Commission's proposal considers both manufactures/producers and retailers as "traders", it creates legal uncertainty about what is under whose control and their respective responsibilities.

To ensure legal certainty, it is therefore indispensable to clarify in the Directive that only the trader which *created* the green claims (i.e. usually the producer/manufacturer) is bound by the rules on substantiation/verification (and liability) of the claim.

The Council's proposal to introduce a distinction between traders generating the claim and other traders (i.e. those not generating the claim) is indispensable to ensure legal certainty. We invite the co-legislators to support the Council's text in this regards.

We therefore call on co-legislators to:

➔ Keep the Council's text regarding Recital 15 and Article 2, first paragraph, point (6a) which introduces an indispensable distinction between traders generating the claim and other traders.

3) A simplified procedure for substantiation is needed to preserve companies' incentives to invest in sustainability. We therefore support the Council's position on the simplification of substantiation procedures.

Companies will avoid introducing new, reliable, green claims if the substantiation/verification process entails costs, burdens, and legal uncertainty that outweigh the business case for investing in sustainability and marketing these investments towards consumers.

The proposed substantiation/verification rules are often disproportionately complex/burdensome for many simple claims. **Disproportionate burdens to market to consumers green claims that reflect sustainability investments would strongly weaken the business case to invest in sustainability in the first place**. We therefore very much welcome the fact that both co-legislators proposed a simplification of the substantiation procedures.

Taking into account both co-legislators' texts, we stress that the Council's text under Article 3a(3) provides more legal certainty and is more exhaustive as to the type of claims that may be subject to a simplified procedure. As a result, businesses will have more certainty as to the possibility of marketing the result of their green investments towards their consumers. This is essential for the EU to succeed its transition towards more sustainable production and consumption.

Additionally, the Council's text includes a list of claims eligible for this simplified procedure (Recital 26a): '*reusability, […] […] reduced energy consumption, reduced water consumption, reduced resource use, waste reduction, waste prevention or circular business models*'. This means that the Commission will establish a simplified procedure for these specific claims in an implementing act. We strongly support this position. We believe that such a list under Recital 26(a) should actually be extended to cover the following simple types of claims: "X% use of recycled material", "reduced use of pesticides", "optimised irrigation", "X% recycled content".

We therefore call on co-legislators to:

➔ Keep the Council's text regarding Recital 26(a) and Article 3a (4) on the simplification procedure, as it provides legal certainty and helps to preserve the business case to invest in sustainability;

➔ Add to the list of claims eligible for the simplified procedure under Recital 26(a) (of the Council) other types of claims such as 'X% use of recycled material', 'reduced use of pesticides', 'optimised irrigation', 'X% recycled content'.

4) **Private schemes should not be discriminated against public schemes nor be forbidden *per se*, as this will otherwise hinder innovation and discourage investments in sustainability (Articles 8(3) and 8(5)).**

Firstly, both the Council (Articles 8(3) and 8(5)) and the European Parliament's text (Article 8(4) and 8(5)) introduce an arbitrary difference in treatment between public and private labelling schemes, due to the use of different wording, which seems to indicate that future private schemes are to be subject to more stringent approval conditions. **There is no rational ground to treat future public schemes more favourably than future private schemes if they both fulfil the conditions of the Directive. Therefore, any difference in wording as to the future approval of such schemes is purely discriminatory and would create a major break in private investment in sustainability.**

A level playing field should be achieved through the use of the same conditions, and consequently the same wording for the approval of future private and public schemes.

Secondly, the *ex-ante* "*added value*" conditionality for the admissibility of future labelling schemes is theoretical, legally vague, and unpredictable. Stakeholders are likely to reconsider their sustainability efforts if the "*added value*" requirement questions their ability to develop (substantiated / verified) schemes to market their sustainability investments towards consumers.

We acknowledge and welcome the Council's attempt in Article 8(8) to clarify what "*added value*" means. However, it remains inherently vague and legally uncertain. The "*added value*" criterion does not allow to assess potential consumer acceptance, which is the ultimate test of the usefulness of any scheme. There are many examples of theoretically ideal schemes that failed to have an impact as they did not correspond to market reality and were not considered attractive by consumers.

Instead, competition and consumer choice should determine which labelling schemes are the most appropriate: **future schemes that are substantiated and verified as per the Directive should always be allowed to enter the market**. Should the co-legislators decide to keep the "added value" criterion, then the Council's proposal to further define the concept of added value should be favoured, whereby the definition of added value should also include the potential market appeal of a scheme towards consumers and its innovativeness.

We therefore call on co-legislators to:

- ➔ Treat equally future private and public labelling schemes in regard of their approval through an identical wording under Article 8(3) and 8(5) – see suggestion below**.**
- ➔ Remove the 'added value' condition in both Article 8(3) and 8(5) <u>OR</u> support the Council's proposal of Article 8(8), also inviting to consider the potential market appeal and the innovativeness of future schemes as a proof of added value – see suggestion below.

<u>Proposal 1</u> based on the Commission's text (Article 8(5))	**<u>Proposal 2</u> based on the Council's text (Article 8 (5) and Article 8(8)**
5. Member States shall ensure that environmental labelling schemes established by private operators after [OP: Please insert the date = the date of transposition of this Directive] **shall be subject to approval with the aim of ensuring that they fulfil the conditions set in this Directive** ~~are only approved if those schemes provide added value in terms of their environmental ambition, including notably their extent of coverage of environmental impacts, environmental aspects or environmental performance, or of a certain product group or sector and their ability to support the green transition of SMEs, as compared to the existing Union, national or regional schemes referred to in paragraph 3, and meet the requirements of this Directive.~~	*5.* Member States shall ensure that environmental labelling schemes established by private operators after [OP: Please insert the date = the date of transposition of this Directive] ~~are only approved if~~ **shall be subject to approval with the aim of ensuring that** those environmental labelling schemes provide added value as defined in ~~terms of their environmental ambition, including notably their extent of coverage of environmental impacts, environmental aspects or environmental performance, or of a certain product group or sector and their ability to support the green transition of SMEs~~ the implementing acts specified in paragraph 8 of this Article, as compared to the existing Union, national or regional environmental labelling schemes referred to in paragraph 3, and meet the requirements of this Directive. 8. In order to ensure a uniform application across the Union, the Commission shall by … [18 months after the date of entry into force of this Directive] adopt implementing acts to: (a) provide detailed requirements for approval of environmental labelling schemes pursuant to the criteria referred to in paragraphs 3, 4 and 5; especially on how added value should be evaluated. The assessment of added value shall take into account the following criteria: 1. The environmental ambition of the environmental labelling scheme; 2. The coverage of environmental characteristics […] of the environmental label […]; 3. The product group(s) or sector(s) covered by the labelling scheme;

	4. **The potential attractiveness of the scheme for consumers in the relevant market;** **5. The innovative feature of the scheme;** ~~4~~. **6**. The ability to support the green transition for SMEs; or ~~5~~. **7**. […] The geographic market in which the environmental labelling scheme operates.

5) Article 10(6) - Certificate of conformity only valid for up to 5 years appears unreasonable if there is no material change in its accuracy.

As per Article 9, any circumstances affecting the accuracy of a claim shall lead to a revision of the claim itself. Therefore, a substantiated and verified explicit environmental claim or labelling scheme that did not experience a substantial change of circumstances that impacted its accuracy should not expire. Thus, we do not support the Council's position regarding the validity of 5 years for the certificate of conformity. Alternatively, at the very least, its validity should be extended to at least 10 years.

We therefore call on the co-legislators to:

➔ Delete the Council's amendment under Article 10(6) limiting the validity of the certificate of conformity to 5 years or, alternatively, extend it to 10 years.

6) Environmental claims based on a certified environmental label should not undergo additional verification processes. Article 10(3b) proposed by the Parliament should be supported.

When a trader uses a certified environmental label (fulfilling the conditions set in the Directive) to make an environmental claim, it should not be required to undergo additional verification. This would be redundant, as the label has already been verified according to the Directive's requirements, and forcing traders to repeat the process adds unnecessary costs and burdens.

Eliminating the need for extra verification of a claim based on a certified label allows traders to more easily display their environment-friendly practices. This will encourage more businesses to adopt sustainable practices, as the regulatory burden is reduced.

We therefore call on the co-legislators to:

➔ Support the Parliament's text for Article 10(3b).

7) Article 5(6d), points a) and b) of the Council's text is unclear.

Article 5 (6d), points a) and b) must indicate that the trader *generating* an explicit environmental claim is the trader that must comply with the display obligations mentioned in article 5(6d) of the Council's text, given that the trader generating the green claim is the only trader in the position to provide the necessary documentation to support it. It also reinforces the accountability and market integrity of such traders.

Traders who did not generate the claim should not be responsible since, in the case of retailers, they can have thousands of products that are made by other manufacturers on their shelves and do not have any control over claims made by those product manufacturers. The trader that is the scheme owner/generated the claim should be the sole entity responsible to provide a summary of the substantiation assessment carried out in a paper format.

We therefore call on the co-legislators to:

➔ Clarify that the trader within Article 5 (6d), points a) and b) of the Council's text is the 'trader generating the claim'.

8) Article 17 of the Council's text should be maintained: Penalties should remain proportionate and mirror the EU Product Safety Acquis.

The Council's position should be adopted given that rules on penalties and measures for infringements should remain proportionate and strictly mirror the Market Surveillance Regulation and the EU Product Safety Acquis.

We therefore call on the co-legislators to:

➔ Keep the Council's text for Article 17 (penalties).

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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 24 groups and their over 501.000 independent retailers, who manage more than 764.000 sales outlets, with a combined retail turnover of more than 1.411 billion euros and generating a combined wholesale turnover of 604 billion euros. This represents a total employment of more than 6.400.000 persons.

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