

## Our position

# Response to the consultation on the proposal for a Directive on Green Claims

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2019, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

The European Commission's efforts to ensure adequate substantiation of green claims by creating a minimum level of evidence and harmonising different legislative interpretations in the EU through the proposed Directive on Green Claims are welcome. Legislation in this area would help increase consumers' trust while boosting competitiveness and guaranteeing a level playing field that rewards investments in greener practices.

To increase legal certainty, reduce administrative burden, promote further harmonisation and ensure that making claims does not become too costly, the Commission should amend the proposal to:

- Clarify the definition and scope of environmental claims;
- Clarify aspects of the requirements for the substantiation of explicit environmental claims, access to data and use of environmental labels and scientific evidence;
- Introduce robust and clear definitions of carbon removals and carbon reduction to substantiate any claims based on offsets; the Carbon Removal Certification Framework (CRCF) could provide the base for such clarity.
- Streamline the current requirements on information of environmental claims to make the amount of disclosed information proportionate, easily understandable and relevant to the consumers;
- Recommend specific methodologies, environmental labels and standards that are well accepted to substantiate environmental impacts of a certain product or service;
- Retain the mutual recognition of certificates of conformity and the rest of the requirements regarding the ex-ante verification of environmental claims and labelling schemes;
- Consider allowing traders to sell off those products already placed on the market, as recalling of products that are out in the marketplace can be exceptionally expensive and disruptive to the retail supply chain;
- Ensure a level playing field for stakeholders in case of complaint handling;
- Ensure penalties are tied to actual and quantifiable damages
- Extend the transition time for the new rules, granting traders and verifiers at least an 18-month preparatory period following Member States' national transposition;
- Issue guidance for this Directive that is available one year before the application of the new rules; and
- Introduce a provision indicating that the Directive and implementing measures apply only to communications addressed to EU consumers.

## Introduction

With the goal of accelerating the green transition, the proposed Directive on Green Claims contains positive elements that could further protect consumers and businesses from harmful greenwashing practices and allow them to play an active role in enhancing sustainability. These include:



- Accepting the use of widely recognised methodologies including international standards to substantiate green claims;
- Applying the same requirements to all industry players, with an exception only for microenterprises of fewer than ten employees and less than €2 million turnover;
- Prohibiting aggregated voluntary scoring schemes in Member States;
- Focusing on business-to-consumer communication and commercial practices, and exempting claims that are already regulated; and
- Continuing to allow for existing private environmental labels established in both the EU and third countries.

The proposal builds on the current consumer framework, as *lex specialis* to the Unfair Practices Directive and Empowering Consumers for the Green Transition Directive. To avoid double regulation, any claims specifically regulated by other EU legislation are exempted from the scope of the proposal (for example eco-design, organic labels and EU Ecolabel). The core of the Directive lies in the requirement for companies making explicit environmental voluntary claims to substantiate them by providing scientific evidence, identifying the significant environmental issue they tackle and clarifying the trade-off that may occur.

According to the Commission's proposal, substantiation of claims can be made by relying on both primary and secondary data, ensuring flexibility in the criteria. Verification of traders' claims would be conducted *ex ante* by independent and accredited verifiers, while enforcement would align with consumer protection legislation. To avoid the proliferation of schemes and ensure harmonisation of the Single Market, aggregate scoring as well as public labelling schemes would have to be developed only under EU law, not at the national level. Similarly, new schemes established by private operators from the EU and third countries would have to be approved by the relevant national authorities.

The Directive will only succeed if it addresses regulatory uncertainties and ensures alignment with relevant Union laws. In addition, adapted timeframes for the industry to implement the legislation without encountering adverse economic effects is key in guaranteeing a smooth transition. Lastly, harmonisation throughout the Single Market and clarity of scope will play an important role in the Directive's viability and efficiency.

Below are key recommendations to improve the proposal and ensure it achieves its full potential.

## Scope

Article 1 of the Directive needs further clarification, namely in connection to corporate claims. Including corporate communications in the scope of the Directive would introduce further administrative burdens, not only on industry but also on the independent verifiers, which would be exacerbated by the fact that verification functions on an *ex-ante* basis. It would also cause uncertainty

as to what can and cannot be considered an environmental corporate claim. For example, claims under environmental, social and governance reporting could be interpreted as a business-to-consumer commercial practice but in reality are intended for shareholders and other stakeholders. Additionally, the Green Claims Directive should be harmonised with the Corporate Sustainability Reporting Directive (CSRD).

## Definition of environmental claims

The proposal's definition of environmental claims (as provided in the proposed Directive for Empowering Consumers of the Green Transition) is welcome. However, the Commission should further clarify that it does not include claims on corporate sustainability goals, and product features and attributes (eg product composition, ingredients or packaging). Such claims primarily focus on features other than environmental impact, environmental aspects or environmental performance, even if some consumers may associate them with sustainability.

In addition, it is also important to clarify how rules established under the remit of this Directive may be addressed to both products and traders. This opens the question of how claims on a trader's overall activities (eg a producer) can impact the claims that the same producer may sell on the market in a business-to-consumer commercial transaction.

## Substantiation of environmental claims

The proposal's science-based approach to substantiating green claims is appreciated. To reinforce legal certainty and protect innovation, such an approach should not only be based on international standards – such as the International Organization for Standardization 14020 series on environmental labels and declarations – but also on a scientifically valid reasoning which has either been subject to peer review and publication or has received widespread acceptance within a relevant scientific community. The requirements for the substantiation of explicit environmental claims should be proportionate to the nature of the claim and consider the difference between environmental aspects, environmental impacts and environmental performance. This would ensure companies have clarity on how to substantiate different types of explicit environmental claims. Thus, the Directive should only require environmental claims related to an environmental aspect, environmental impact or environmental performance to be supported by scientific evidence.

The Commission's proposal requires that environmental claims be substantiated via information confirming that 'the product or trader which is subject to the claim performs significantly better regarding environmental impacts, environmental aspects or environmental performance which is subject to the claim than what is common practice for products in the relevant product group or traders in the relevant sector' (Art. 3).

The general advertising law rule rightly requires that claims not refer to attributes that are common to all products, services or traders in the relevant sector. However, the current provision in Art. 3 is disproportionate as it would require traders to have access to very detailed data about competing traders, products and services to assess their life-cycle environmental impact, which is not feasible and would ultimately preclude the substantiation of most environmental claims. For example, if a trader places an innovation on the market which is subsequently adopted by further economic operators, it would be difficult to monitor and determine precisely when that innovation becomes common on the market. Furthermore, the broader voluntary uptake of a sustainability innovation to the point that it becomes a common standard is a success and should be allowed to be communicated. As written, this rule would disincentivise investments in green innovation, as traders would no longer be able to communicate with consumers about their environmental improvements. These effects would be contrary to the fundamental objectives of the proposal.

### Consistent environmental labels

Restricting environmental labels to those awarded under environmental labelling schemes established under Union law would limit the products awarded environmental labels due to the relatively few products currently covered. There are many well accepted and respected environmental labels established outside the EU's law that should be allowed to continue guiding consumers. Existing and emerging standards should also serve as a base for the substantiation of environmental labels such as 'recyclability', 'recycled' and 'recyclable'. Furthermore, to provide clarity to consumers, traders and verifiers, the proposal should specify what would happen to all other well-recognised schemes and labels (eg Nordic Swan).

## Communication of environmental claims

The proposal sets forth that information about the product, service or trader that is the subject of an environmental claim and linked to the substantiation of the claim shall be made available together with the claim in a physical form or in the form of a weblink, QR code or equivalent. This provision contributes to fostering transparency and consumer trust.

However, the extensive list of technical information required to be disclosed is too burdensome for traders. The substantiation requirements and authorities' oversight already ensure a robust level of compliance and consumer information. Therefore, the Commission should streamline the current requirements on environmental claims information so that the amount of information disclosed is proportionate, easily understandable and relevant to the consumer. For example, the Commission should stipulate that all the information mentioned in the provision, including how the consumer should use the product to achieve the expected environmental performance (for those environmental claims where the in-use phase is among the most relevant life-cycle stages) can be conveyed through digital means.

## Methodology

It is positive that the Directive gives traders more flexibility to choose the right methodology to substantiate environmental claims. To ease the proposal's administrative burden while keeping its flexibility and ensuring further coherence on the EU market, the Commission could recommend establishing specific methodologies, environmental labels and standards, as in the processes set out in EU Product Safety Law:

- Where a specific standard, environmental label, or methodology is well accepted to substantiate environmental impacts of a certain product or regarding a certain impact, the Commission may include a reference to this standard/methodology in an Annex to the proposal. Economic operators are still free to use other methodologies but can self-certify and rely on presumed conformity in case the specific methodology is used.

By doing so, the proposed Directive would:

- Ease administrative burden for authorities and economic operators;
- Distinguish between non-complex claims and those that need a more thorough review/assessment;
- Give flexibility to economic operators, while taking steps towards harmonisation and coherence of claims assessment in the EU;
- Allow the EU to take product-specific approaches where needed; and
- Maintain full oversight for the Commission on which standards/methodologies are mature enough to allow for self-certification.

An initial list of suitable methodologies and criteria should be provided to economic operators at least 12 months before the Directive becomes effective.

## Verification and certification of environmental claims

It is essential that the ex-ante verification and certification process balances the need for sufficient scrutiny and compliance against an unduly excessive burden for traders. The latter could discourage green innovation by severely limiting the use of environmental claims and labels and could ultimately result in businesses refraining from communicating about sustainable aspects of their goods and services (so-called green-hushing).

The final version of the Directive must retain the mutual recognition by the competent authorities in the Member States of certificates of conformity and the rest of the requirements regarding the ex-ante verification of environmental claims and labelling schemes. Additionally, it should prescribe that:

- Traders can leverage environmental labels that comply with the present proposal or single out elements from the environmental labels that have been verified by a third-party. This would avoid duplicating the assessment of claims. Similarly, self-declarations that have undergone verification should also be admitted.
- Traders should be free to choose the accredited verifiers to which they submit claims.
- Verifiers should issue their assessments within a maximum period of 30 days from the date when the verification or certification request is submitted.
- A list of selected third-party verifiers should be published at least 12 months before the Directive is applicable to economic operators.
- The price and time a verifier can charge and spend per claim should be defined.
- Verifiers should favour desk audits over on-site audits, especially for simple claims.
- Third-party verification should be based on and performed at a product family level instead of an individual stock-keeping unit level.
- Member States' decisions on specific claims are recognised and accepted in all other EU countries ie the principle of mutual recognition;
- Member States' verifiers should establish an independent panel that reviews their decision if they decline to provide certification of a claim or labelling scheme. They must respond to questions and observations from the trader that submits the verification and certification request.
- Traders should have the right to legally challenge a verifier's refusal to certify a claim or labelling scheme.
- The Directive should consider the inclusion of non-EU verification bodies in the scope of the legislation, especially for non-EU environmental labels recognised by the proposal and in light of a limited number – and potential initial shortage – of verifiers to support the execution of the directive's requirements.
- To ensure alignment with existing regulations, and given the thorough assessment that will be required by third-party auditors for CSRD compliance, the third-party validation of the information provided for the CSRD reporting should be recognised as a valuable substantiation of any corporate claims made on that base.

As an alternative proposal to an obligatory third-party verification system, a selected audit agency or agencies would on a regular and random basis check on companies' claims in accordance with methodology/criteria established by this Directive and apply fines when companies are in breach. There are existing self-regulatory measures by industry, such as the International Chamber of Commerce (ICC) Advertising and Marketing Communications Code and the ICC Framework for Responsible Environmental Marketing Communications, which would also encourage alignment at the international level.

## Directive transposition and entry into force

Requirements to substantiate green claims need to be implemented and harmonised in all 27 EU Member States. National variations may create regulatory uncertainty for companies doing business across the EU Single Market. National interpretations and variations may create significant manufacturing and supply chain challenges, as well as prevent products from being sold in the European market, which may undermine the directive's credibility. Harmonisation throughout the Single Market will be critical to the directive's viability and efficiency.

The proposal sets forth that Member States shall adopt and publish within 18 months after the directive's date of entry into force the laws, regulations and administrative provisions necessary to comply with it, and apply those measures 24 months after the directive's date of entry into force.

This means that within only six months of national transposition, Member States would have to accredit a sufficient number of verifiers capable of reviewing a potentially very high number of claims and labelling schemes for certification and verification, in a very short period of time. This timeframe is not realistic and risks the discontinuation of the majority of environmental claims and labels within 24 months from the directive's entry into force, including claims that are substantiated with robust data.

In order to prevent these unintended negative consequences, the proposal should guarantee:

- The possibility for traders to sell off those products already placed on the market, since recalling products that are out in the marketplace can be exceptionally expensive and disruptive to the retail supply chain;
- An extension of the transition time for application of the new rules, granting traders at least an 18-month transition period following Member States' national transposition;  
**OR**
- A phased-in transition period, requiring new claims to comply within the original six months transposition time, while allowing existing claims an additional 12 months to be brought into compliance with the new verification rules.

Finally, in order to facilitate uniform application across the EU and improve legal certainty, the Commission should draft a guidance for this directive that is available one year before application of the new rules.

Additionally, the Directive should require the Commission to adopt the implementing acts within 12 months from its adoption. This would ensure that the implementing acts are not adopted after the deadline for the Member States to transpose the rules into their national legislation, which could risk of divergent rules being adopted.



## Conclusion

The Green Claims Directive is an opportunity for the EU to better inform consumers, help establish a level playing field when it comes to communicating the environmental performance of products and businesses and could spur other markets to approve stronger regulatory enforcement mechanisms to tackle greenwashing.

The policy interventions should be proportionate and well-informed by robust science and applicable across Member States. During the ordinary legislative process, EU regulators should engage with industry stakeholders and provide appropriate guidance to avoid negative outcomes for European competitiveness and consumer choice for sustainable products and services.