

Advice

Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)

Brussels, 30 November 2023

1. Background

Under the European Green Deal, the Commission committed to ensure that consumers are empowered to make better informed choices and play an active role in the ecological transition. The European Green Deal specifically commits to tackle false environmental claims by ensuring that buyers receive reliable, comparable and verifiable information to enable to make more sustainable decisions and to reduce the risk of “green washing”.

On 10 December 2020, following a public consultation launched by the Commission services, the Market Advisory Council (MAC) adopted advice on the potential legislative proposal¹. On 24 May 2023, the MAC adopted on Product Environmental Footprint Category Rules for Marine Fish for Human Consumption², which is an initiative linked to the preparation of the legislative proposal. On 22 March 2023, the actual legislative proposal was published³.

The proposed directive will be a *lex specialis* to the Unfair Commercial Practices Directive. The proposal covers business-to-consumer commercial communication and applies only to voluntary explicit environmental claims. Claims will need credible and proportionate substantiation backed by scientific evidence, while taking into account relevant international standards. The proposal also foresees a regime for environmental labelling, which aims to avoid the proliferation of schemes and reinforce the trust in existing ones.

¹ <https://marketac.eu/substantiating-green-claims/>

² <https://marketac.eu/recommendation-of-mac-concerning-product-environmental-category-rules-pefcr-for-marine-fish-for-human-consumption/>

³ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12511-Environmental-performance-of-products-businesses-substantiating-claims_en

2. Requirements on substantiation of environmental claims (Article 3)

The legislative proposal requires that the substantiation of explicit environmental claims shall be based on an assessment that meets the selected minimum criteria to prevent claims from being misleading. The underpinning assessment is required to account for the following:

- Recognised scientific evidence and state of the art technical knowledge;
- From a life-cycle perspective, demonstration of significance of impacts, aspects and performance;
- All significant aspects and impacts to assess the performance;
- Demonstration of whether the claim is accurate for the whole product or parts of it;
- Demonstration that the claim is not equivalent to legally imposed requirements;
- Provision of information on whether the product performs environmentally significantly better than what is the common practice;
- Identification of whether a positive achievement leads to significant worsening of another impact;
- Transparent reporting of greenhouse gas offsets;
- Accurate primary or secondary information.

The MAC agrees that there should be a framework for requirements to substantiate explicit environmental claims, as a way to prevent the proliferation of “greenwashing”. The flexibility foreseen in the proposal, which allows different methodologies for the substantiation, is welcomed, as certain product groups might require different methodologies.

At the same time, to avoid problems of harmonisation and to ensure legal certainty for the economic operators, especially those active in different national markets in the EU, the mutual recognition principle of the certificate of conformity needs to be reinforced within the Single Market.

The additivity of the criteria, the costs to meet them, and the undetermined nature of some of the requirements can create obstacles to the possibility of making environmental claims, particularly for microenterprises. Ensuring that the explicit environmental claim for a product

or service is based on solid information and robust assessment is necessary. Overall, the proposed criteria seem fair, but, to reduce administrative burden, the scope of the assessment must be in line with the claim.

The legislation and future guidance should make it easy to differentiate between the information that should be provided to verifiers and public authorities and the information that is relevant to provide to consumers.

In the view of the EU retail & wholesale sector, the Spanish retail sector for fish and frozen products, and of the EU fish producer organisations, the creation of a presumption of conformity / “safe harbour” provision⁴ for existing or future methodologies established at the EU-level whose rules are developed in a Commission delegated act under Article 3.4.c. would be welcomed. These provisions would entail a presumption of conformity for the substantiation of the claim/label. Hence, the claims/labels would be exempted from the ex-ante verification, if relying on the Commission’s delegated act rules. Furthermore, a shared secondary information database should be created to facilitate the implementation and substantiation of green claims for especially SMEs without increasing the administrative burden.

2.1 Recognised scientific evidence and state of the art technical knowledge

It should be clear that this requirement refers to the use of relevant methodologies on substantiation of claims for certain product groups or sectors. Guidance on the term “widely recognised scientific evidence” is needed.

2.2 Demonstration of significance of impacts, aspects and performance

The proposed requirement to “demonstrate the significance of impacts, aspects and performance from a life-cycle perspective” can be complicated for some products, as harmonised assessments methods are still not available. Access to the data needed to conduct these analyses must be made easier for companies. If a requirement to undertake

⁴ A “safe harbour” provision is a legal provision that reduces or eliminates legal or regulatory liability in certain situations and as long as certain conditions are fulfilled.

life cycle assessments is established, there should be an assessment of the costs and burdens associated with this proposed requirement, as there is a risk of additional companies costs for companies without any added value for their products. In some cases, other methodologies could be relevant, as alternative, to demonstrate the significant of impacts, aspects and performance.

In the case of fishery and aquaculture products, life-cycle perspective should take place where relevant. To communicate on the sustainability of these products at the production stage, it is not necessary to carry out a full Life Cycle Assessment – especially if the Product Environmental Footprint methodology is used – as it focuses on a number of impact categories that are not relevant.

Additionally, clarity is needed on how the substantiation should identify trade-offs. The MAC would welcome Commission technical guidance on the LCA and references to well-established international standards, e.g., ISO Standard 14001 defining “life-cycle perspective”.

2.3 All significant aspects and impacts to assess the performance

The proposal should make it clearer whether the assessment of the performance refers to the trade, the production, or to another activity.

2.4 Demonstration of whether the claim is accurate for the whole product or parts of it

Clarity is needed on what is specifically required from the trader of “demonstrating” and by “scientifically substantiating a claim” in practical sense. In this sense, it would be useful to clarify the type of scientific support that would be required to support the claims (e.g., report, life cycle analysis, mass balance tests).

2.5 Provision of information on whether the product performs environmentally significantly better than what is the common practice

The term “common practice” should be better defined. It is particularly important to determine whether the term is to be understood as the common practice by the producers

of a certain region or the common practice on a certain market. In the case that it refers to a certain market, it is important to clarify the size of the market (e.g., EU, national, regional).

2.6 Accurate primary or secondary information

The concept of “available primary information” needs to be clarified, as it can be open to varying interpretations. It is important to ensure that the concept is not interpreted in a way that is disproportionate to businesses.

In the case of the fisheries and aquaculture sector, the use of secondary information carries the risk of additional “green washing”, for example if secondary data for the same species but different stock with a different status is used. There must be incentives to use primary data in communications and minimum thresholds of primary data, in order to decrease the chance of inaccuracies.

3. Requirements on substantiation of environmental claims (Article 4)

The proposal sets out further requirements for comparative claims, which are required to account for the following:

- Use of equivalent information for the assessment of environmental impacts, aspects or performance of compared products;
- Use of data generated or sourced in an equivalent manner;
- The coverage of stages along the value chain is equivalent, while ensuring that the most significant stages are taken into account;
- The coverage of environmental impacts, aspects or performances is equivalent, while ensuring that those most significant are taken into account;
- Consistency in the assumptions used for the comparison;
- For comparative claims on improvements of impacts, include explanation of the impact on other aspects and impacts, while stating the baseline year.

The MAC generally agrees with the additional requirements proposed for comparative claims, which allows for more consistency between the products and services concerned. The

implementation of these requirements should imply a transparent access to data and full respect for the requirements set out in Article 3.

At the same time, it is worth highlighting that the use of undetermined terms (e.g., “more significant, “are consistent”, “are equivalent”) can be interpreted in different manners, making the justification of the claims by companies more legally uncertain. Therefore, the provisions of Article 4 should be improved and clarified in language.

The provisions do not determine on which data companies should rely when making a comparative environmental claim. In the absence of a shared data set, there is a significant risk of inconsistencies.

4. Requirements on communication of environmental claims (Article 5)

The provisions of Article 5 aim to respond to the problem of lack of reliable information on product’s environmental characteristics for those traders who make an environmental claim. The requirements also aim to ensure that environmental claims are made on products or traders that offer environmental benefits as compared to common products. The proposal sets out that, when communicated, all claims shall:

- Only cover environmental impacts, aspects or performance that are assessed and are identified as significant for the respective product or trade;
- When relevant, include information on how consumers may appropriately use the product or decrease environmental impacts;
- Be accompanied by information on the substantiation (information on product or activities of the trader; aspects, impacts or performance covered; studies and calculations; how improvements are achieved; certificate of conformity and coordinates of the verifier).

The MAC generally agrees with the proposed requirements on communication of environmental claims, which should be in full alignment with the requirements of Article 3. The possibility for claims to be made, at the discretion of the business, in a physical or digital form is welcomed.

In the case of claims relating to future performances, the proposal mandates a timebound commitment for improvements inside own operations and value chain. Here, it remains unclear whether and when a trader would be liable if the time commitment is not met. Therefore, a threshold for liability should be established. The threshold should be proportional to the efforts carried out in bona fide by the company.

More clarity is needed on whether all substantiation data (e.g., Life Cycle Assessments, studies) should be provided in the language of the Member State where the product is placed on the market.

There should be a differentiation between information directed to consumers or to Member States's authorities. Information shared with consumers should be simple and straightforward, while guaranteeing full transparency and giving them a complete picture of the assessments made.

5. Provisions on environmental labels and labelling schemes

The requirements in the proposal are complementary to the requirements set out in the proposal on empowering consumers for the green transition⁵. Article 7 ensures that labels fulfil the requirements set out in previous articles and subjects labels to verification. Article 8 details requirements for environmental labelling schemes, including a prohibition of the establishment of new national or regional publicly owned schemes, and a validation procedure for new schemes established by private operators dependent on the demonstration of added value.

The MAC generally agrees with the proposed provisions on environmental labels and labelling schemes, as these will improve the credibility of environmental labels used across the domestic market, even though further clarity on how and by who the verification will be carried out would be welcomed. The proposition from the European Commission to apply the same rules to labels from third countries and for EU labels is particularly welcomed.

⁵ <https://marketac.eu/empowering-consumer-in-green-transition/>

Consumers use an increasingly number of sustainability and environmental criteria when making their choices, plus the market increasingly demands labels for differentiation between similar products. These labels can differentiate in rigor, leading to their misuse.

5.1 Environmental labels

The fisheries and aquaculture sector must be able to communicate effectively with its consumers to direct them towards more environmentally conscious consumption. According to a recent study by the European Commission's Joint Research Centre⁶, rating or scoring is particularly useful in communicating with consumers in an easy and understandable way. Consumers tend to understand simpler, evaluative, colour-coded labels more easily than more complex, reductive, monochrome labels. Hence, already existing voluntary robust private labels using a rating and a score must be allowed to remain on the market following their positive verification according to the Commission's proposal.

In the case of certification schemes, to avoid duplication of effort, when a label and associated claims are approved by the verifier via a certificate of conformity, during the period of validity of the certificate, traders that are willing and entitled (through licensing agreements) to make these claims should be able to do so without applying for a second verification.

5.2 Environmental labelling schemes

The criteria set out in Article 8.2 are a strong and useful foundation to ensure that schemes operate in a credible way, but these could be further strengthened. In this context, the rigorous definition of a transparent and effective labelling provided by the ISEAL Credibility Principles and the ISEAL Codes of Good Practices could be considered. For example, Article 8.2 (b) requires that information on procedures to monitor compliance are transparent and accessible. The criteria could be strengthened by including requirements on the consistent and impartial implementation of the compliance process. Similarly, in Article 8.2 (d), the requirements are to be submitted for consultation to a heterogeneous group of stakeholders.

⁶ <https://publications.jrc.ec.europa.eu/repository/handle/JRC130125>

While this is important, it is equally important that a cross-section of stakeholders have a role in the decision-making, to ensure the societal relevance that is aspired to.

Article 8.2 (f) should be strengthened by ensuring that non-compliance cases are made public and held to account for their non-compliance. Overall, Article 8 should be further strengthened by including requirements for continuous improvements, meaning requiring that the environmental labelling scheme is regularly reviewing its objectives and requirements in monitoring, and assessing the environmental performances and impacts.

Further clarity is needed on how “added value” would be proven and what exactly is meant by it. The ex-post verification and approval process for existing labels on the market will likely prove burdensome. Therefore, the timely transposition and implementation of the new rules by Member States should be encouraged. The publication by the European Commission of the officially recognised environmental labels that are allowed to be used on the Union market would be useful.

The MAC disagrees with the prohibition of the establishment of new national or regional publicly owned schemes, as these could be relevant from an environmental point-of-view and allow consumers to be better informed. It is difficult to understand the motivation of the European Commission to allow private operators the possibility of setting-up new display systems, while prohibiting Member States from doing so. Nevertheless, the addition of a validation step on the relevance of setting-up a new display or label system is desirable.

Ultimately, the MAC wants to emphasise the significance of promoting diversity within environmental schemes. Insufficient schemes might fail to encompass a wide range of practices, while an excessive number could risk alienating consumers, a good balance should be found.

6. Ex-ante verification of environmental claims and labelling schemes

Article 10 details how the substantiation and communication of environmental claims and labels will have to be third-party verified and certified to comply with the requirements of the Directive before the claim is used in a commercial communication. Article 11 sets out the requirements for the “verifier”.

The MAC generally agrees that there should be provisions on ex-ante verification, as these will improve credibility and transparency. Nevertheless, the verification process should be streamlined. A pilot project should take place first, setting time limits for verifiers, simplifying and standardising procedures, and strengthening the harmonisation of requirements. There should be guidance from the European Commission on the scientific methods and standards that can be accepted to verify and certify, particularly on greenhouse gas emissions.

There are specifically concerns regarding the following:

- The capabilities of existing certifying bodies and their capacity to handle a large number of requests for approval expected to come in following the application of the new rules of the proposed directive;
- Vigilance about the potential lack of availability of verifiers and the need for appropriate measures when this causes difficulties to business operators;
- Potential diverging approaches due to Member States' competences, including the risk of forum shopping and of a piecemeal implementation – a fixed period of time for the verification process to be completed would be useful, plus the establishment of minimum common criteria;
- Respect for confidentiality rules before the commercialisation of the product, especially respect for sensible information that should not be transmitted to consumers;
- Concerning the wording of Recital 52 and of Article 10(7), it is important to ensure that a Member State authority is required to recognise the validity of conformity granted in another Member State - even though the Member State can continue to enforce the requirements of the Unfair Commercial Practices Directive, which are additional to the Green Claims Directive, against the trader regarding its communication to consumers. Otherwise, there will be an unnecessary burden and liability risk on traders operating in multiple Member States;

In the view of EuroCommerce, explicit environmental claims should be excluded from the ex-ante verification process. Their exclusion will avoid administrative bottlenecks and subsequent delays in the approval process and will allow businesses to communicate to their

consumers in a timely manner, in line with the expectations and need to drive sustainable consumption. These members support the principle of pre-approving environmental labels (schemes), however for environmental claims, they consider that these can be applied through self-regulation relying on international standards e.g., ISO Standards and ICC Framework for Responsible Environmental Marketing Communications, where applicable, reasonable, and practical. Such claims are still subject to controls as part of the Unfair Commercial Practices directive where those businesses can be held accountable.

On the other hand, ClientEarth, Oceana, MSC, and Good Fish do not support removing explicit environmental claims from the scope of the Green Claims Directive so it only covers labels. In their view, keeping environmental claims outside the verification process will unhelpfully leave traders to navigate increasing legal risk, regulatory enforcement and unfair competition without clear substantiation rules, and may discourage the use of labels. They consider that ex ante verification will provide much-needed clarity, a level playing field, will reduce legal and advisory costs and will align green claims practice with new sustainability-related demands on traders in the areas of reporting, financing, commercial contracts/due diligence and public procurement.

7. Small and medium sized enterprises

Microenterprises are exempt from the requirements on substantiation of environmental claims as well as on the provision of information on substantiation, unless they wish to receive a certificate of conformity. Additionally, Article 12 foresees that Member States shall take appropriate measures to help small and medium enterprises apply the requirements set out in the directive.

In the view of the members representing the fisheries and aquaculture value chain, the exemption for microenterprises is appropriate, as it would be excessively burdensome for them to comply with the requirements proposed in the directive. The requirements on substantiation of environmental claims should not create a barrier to the entrance of companies in the market.

On the other hand, in the view of the members representing other interest groups, microenterprises should be held to the same standards as larger companies. Given the high number of microenterprises, the consumption landscape would remain extremely confusing to consumers and uninformative, if they were excluded. Should microenterprises want to make explicit environmental claims (i.e., labels, front of pack, back of pack, or websites) they should be able to provide verification. A simplified verification should be created, and sufficient budget should be available to help businesses comply.

The MAC agrees with the support measures to help small and medium enterprises to be provided by Member States, including financial support, finance, specialised management and staff training, and organisational and technical assistance. The development of guidelines should take place at EU-level, not just at the level of each Member State.

8. Enforcement of provisions

Articles 13 to 17 establish the framework for the enforcement of the provisions of the directive, including the designation of competent authorities, the powers of the competent authorities to investigate and enforce the requirements, responsibility to monitor the compliance and risks of infringement, the complaint handling mechanisms and requirements for access to justice, and the definition of penalty regimes.

The MAC believes that the European Commission should ensure that the legislative action is undertaken through a clear and harmonised regulatory framework at the EU-level, creating a level-playing-field across the EU.

On compliance, a deadline should be foreseen to achieve compliance. The deadline should be, at least, 18 months after the publication of guidelines by the European Commission. The deadline should allow for the use/sell through of stocks of non-compliant packaging.

On non-compliance, the proposed period for compliance of 30 days does not take into account the specific nature of non-compliance, as the required changes, e.g., if related to the collection of data, would need significantly more time. Therefore, the legislative text should allow for, at least, three months for the correction of non-compliance.

On penalties, the mitigating factors applicable when competent authorities are taking a decision are welcomed. Nevertheless, subparagraph 2(g) of Article 17 could result in double penalties and in an apparent violation of the well-established principle of law *ne bis in idem* (double jeopardy). In line with EU Acquis, it would be more appropriate to use the same wording as established under Article 41 “penalties” of Regulation 2010/2019 on market surveillance and product regulation.

On liability, in the legislative proposal, a clear reference to the role and responsibilities of traders in terms of liabilities following a non-compliant explicit environmental claim is missing. Liability should be clearly set at the level of the trader of the product who made the environmental claim and/or the environmental label. Other traders distributing the product can be responsible for verifying the presence of the required justification/certificate of conformity, but not its veracity. Moreover, the legal text does not refer to the share of liability between businesses and verifiers. If a product holding the certificate of conformity is found in breach of the requirements as not sufficiently substantiated, the verifier should be held accountable if an investigation finds that it has been negligent.

On the entrance in force of the directive, a sufficient transition period, no less than 36 months, should be foreseen, so that the verification processes are established, and operators can guarantee that their claims meet the provisions of the directive.

9. Recommendations

In the context of the legislative proposal for a directive on substantiation and communication of explicit environmental claims, the MAC believes that the European Commission and the Member States, in the interinstitutional negotiations should:

- a) Recognise the importance of the initiative for the EU market of fisheries and aquaculture products, including through the close involvement of the services responsible for fisheries and aquaculture products;
- b) Ensure coherence with other policy initiatives affecting communication to consumers, such as the revision of the marketing standards framework for fishery and aquaculture

products⁷, the revision of rules on food information to consumers⁸, the revision of animal welfare rules⁹, the proposal on empowering the consumer for the green transition¹⁰, the upcoming sustainable food system framework¹¹, the EU taxonomy and technical screening criteria¹², and the sustainable corporate governance framework;

- c) Proceed with the development of a framework for substantiation and communication of explicit environmental claims, while integrating the amendments and suggestions described in sections 2 to 8 of the present advice;
- d) To avoid problems of harmonisation and to ensure legal certainty, reinforce the principle of mutual recognition within the Single Market;
- e) Provide clarifications on the terms used in Articles 3 to 5 of the proposed directive, as described in sections 2 to 4 of the present advice;
- f) Concerning the provisions on environmental schemes, ensure that, in the case of certification schemes, to avoid duplication of effort, when a label and associated claims are approved by the verifier via the certificate of conformity, during the period of validity of the certificate, , traders that are willing and entitled (through licensing agreements) to make these claims can do so without applying for a second verification;
- g) Further strengthen the provisions on environmental schemes, particularly on compliance procedures, continuous review, and added value;
- h) Allow the establishment of new national or regional publicly owned schemes that meet verification requirements and when these are relevant from an environmental point-of-view and provide consumers the opportunity to be better informed;
- i) In case the proposed exemption for microenterprises is maintained in the legislation, take measures to ensure that EU consumers are familiar with the rules of the directive,

⁷ <https://marketac.eu/marketing-standards-sustainability/>

⁸ <https://marketac.eu/revision-of-food-information-to-consumers-regulation/>

⁹ <https://marketac.eu/revision-of-eu-legislation-on-animal-welfare/>

¹⁰ <https://marketac.eu/empowering-consumer-in-green-transition/>

¹¹ <https://marketac.eu/sustainable-food-system-setting-up-an-eu-framework/>

¹² <https://marketac.eu/eu-taxonomy/>

particularly on the certificates of conformity, to limit any potential abuse by operators not subject to the directive;

- j) Streamline the ex-ante verification process of environmental claims and labelling schemes, including through a pilot project and EU-level guidance, while also taking into account the concerns described in section 6 of the present advice, namely on capabilities of certifying bodies, availability of verifiers, potential divergence in approaches, and respect of confidentiality rules;
- k) Implement support measures to help small and medium enterprises, including financial support, finance, specialised management and staff training, and organisational and technical assistance;
- l) Improve the provisions on enforcement, particularly on deadlines for compliance, potential violation of the legal principle of *ne bis in idem*, liability of businesses and verifiers, , and transition period;
- m) Ensure a level-playing-field via the equal implementation of the directive across the EU as well as between the EU and imported products – specifically making sure that the claims on imported products meet, at least, the EU standards, irrespective of the eventual standards met in the originating countries.