Position Paper

Proposal for a directive on substantiation and communication of explicit environmental claims (Green Claims Directive)
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Summary

Bitkom welcomes the efforts of the EU Commission to create more transparency in competition when it comes to environmental claims and to avoid "greenwashing".

Environmental statements play an increasingly important role in consumers' opinions and purchasing decisions. The sustainability of products and services has become an important competitive factor. Products declared as "green" or sustainable are now growing faster than other products in the EU single market. However, the quality of environmental statements and declarations made by individual manufacturers about their products and services can vary greatly. This can be misleading for consumers who are looking for reliable information for their consumer decisions.

However, in our view, the present draft directive does not appear to be suitable for achieving the objectives pursued by the Commission. Rather, the draft would create significant additional bureaucracy and increased burdens for both administrations and businesses. **Bitkom therefore rejects the draft directive in its present version.**

In particular, the proposal contained in Art. 10 for a reservation of authorisation for environmental claims and the accompanying conformity assessment and certification procedure is, in our view, neither suitable nor necessary to achieve the objectives stated in the draft. Rather, it represents a disproportionate encroachment on the protected legal positions of the companies. Mandatory ex ante scrutiny should therefore either be abolished altogether or be designed to minimise the red tape and costs incurred by businesses.

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The reservation of authorisation for environmental claims is disproportionate and impractical

Art. 10 of the draft directive stipulates that any statement indicating that a product or company has a positive or no environmental impact ("environmental statement") must be verified by an independent auditor for compliance with the requirements of the directive before being placed on the market and, in case of conformity, must be certified accordingly. Such a conformity assessment and certification procedure is reminiscent of the strict requirements of product safety legislation, in particular medical device law, but has not been known to competition law so far.

Such a regulation would, in our view, constitute a significant burden and, ultimately, a disproportionate interference with the freedom of entrepreneurship of the companies concerned, but at the same time, it does not seem appropriate to achieve the objectives set out in the draft: (a) The procedure under consideration neither strengthens the conditions of competition in the European single market, (b) nor significantly facilitates the implementation and enforcement of European competition law, nor (c) provides greater legal certainty for companies. At the same time, a directive as envisaged will impose significant additional burdens on businesses and administrations.

Product information requirements based on standards do not require a prior approval procedure, as standards are presumed to be in conformity in the context of market surveillance. If companies already follow harmonised standards for affixing information to their products, a pre-authorisation system would only increase the administrative burden for companies. In addition, in a pre-approval process, it takes a very long time for a claim on a product to be approved. If our goal is to enable consumers to opt for more sustainable products, such a pre-approval process would be counterproductive, as companies need to be able to inform consumers of any environmental improvements to a product in a timely manner.

Mandatory ex ante scrutiny should therefore either be abolished altogether or be designed to minimise the red tape and costs incurred by businesses.

Failure to facilitate the implementation and enforcement of European competition law

In our view, the introduction of the described conformity assessment and certification procedure only yields very limited results – if any – towards the objective of facilitated enforcement identified by the Commission.

The planned innovation is only intended to relieve the institutions entitled to claim under competition law, i.e., in particular the relevant consumer protection organisations, and not, for example, the equally entitled competitors of an anti-competitive company.

It is even more significant that although the certificates of conformity are intended to facilitate the assessment of environmental claims by the aforementioned institutions, they have no binding effect on the authorities and the courts and, in particular, have no influence on the assessment of possible infringements of the prohibition of misleading statements prescribed by the UCP Directive. Art. 10 para. 8 of the draft states:

"The certificate of conformity shall not prejudge the assessment of the environmental claim by national authorities or courts in accordance with Directive 2005/29/EC."

Accordingly, the issuance of such a certificate of conformity, similar to, for example, a TÜV certification, does not protect the company concerned from being held liable for a violation of the prohibition of misleading statements and also from being subjected to legal measures, despite the considerable investments.

And even if, contrary to the requirements of the draft directive, a certificate of conformity is not available or has been applied for but not issued, and a consumer protection organisation benefiting from the new regulation then claims against the advertising company, in particular for injunctive relief, a court dealing with the matter would be at liberty to find that there has nevertheless been no breach of the prohibition of misleading statements.

No further strengthening of a level playing field

It is also not clear whether, and to what extent, the proposed authorisation reservation and the accompanying conformity assessment and certification procedure can contribute to strengthening the competitive conditions in the European single market.

Since the implementation of Directive 2005/29/EC on unfair commercial practices ("UCP Directive"), uniform rules on unfair commercial practices have been in place across the EU in the business-to-consumer sector (principle of full harmonisation Art. 4 UCP Directive). In particular, the prohibition of misleading commercial practices (Art. 6, 7 UCP Directive) applies throughout the EU and also covers all cases of "greenwashing". This means that identical conditions of competition already prevail in the European single market.

Lack of more legal certainty for businesses

Although the conformity assessment and certification procedure is intended to make it easier for institutions entitled to claim under competition law to verify environmental claims, the authorities and courts of the member states are not bound by it. In the future, only the courts will ultimately decide whether environmental claims are misleading in the sense of competition law, and this irrespective of whether or not the beneficiary company can provide a certificate of conformity.

The introduction and implementation of the described reservation of authorisation thus also does not create any additional legal certainty for the companies concerned.

Significant additional burden on businesses

The envisaged conformity assessment and certification procedure will lead to considerable additional burdens for companies, especially in financial and administrative terms.

Considerable additional effort already results for the companies from the fact that they are restricted in their public communication. There is a concern that companies will no longer be able to cope with the speed of business in individual cases if they have to go through a time-consuming and costly conformity assessment and certification procedure before publication.

Above all, however, it is completely unclear what immediate economic and concrete financial burdens will be imposed on the companies concerned. The draft directive refers to “administrative costs”, which depend on the size of each application and the expected volume of applications, and therefore could not yet be estimated in concrete terms. If the directive enters into force with its current regulatory content, however, a significant number of applications per company – and associated costs – are expected. These costs are disproportionately high in relation to small and medium-sized enterprises (SMEs) compared to large corporations, and constitute a competitive disadvantage. As a result, fewer companies could be able to communicate the environmental aspects of their products, not least to the detriment of consumers. Investments in environmentally friendly but voluntary measures that are not (or cannot be) communicated may be missed in the future. However, this would run counter to the objectives of the European Green Deal.

Recommendations on further provisions

Consistency in the scope of application (Art. 1)

The definitions in this proposal are based on those currently established in the discussions on the Commission’s proposal to empower consumers, and will eventually result in an amendment to the UCP Directive. The scope of the proposal should therefore also be fully in line with the scope of the Directive on Unfair Commercial Practices, which only applies to “business practices… before, during and after the conclusion of a trade transaction relating to a *product* (Article 3 para. 1). Thus, general statements, such as the climate neutrality of a company as a whole or of certain activities, are not covered by this provision.

Review and update of environmental information (Art. 9)

According to Art. 9, the correctness of environmental claims in advertising statements must be verified and reviewed no later than five years after the date on which the underlying investigations or calculations were carried out. It is important to point out the costs and administrative burdens that are associated with such a review and update. It is not clear for what reasons, for example, updates have to be made. In some cases, minor material changes may already make this necessary. This should be ruled out. Accordingly, clear statements must be formulated in this regard. Also, in the subsequent procedure, care must be taken not to shorten the five-year period in order to avoid further burdens.

Corrective measures (Art. 15)

According to Art. 15 para. 1, the competent authorities of the member states must regularly review the environmental claims used on the EU market and make the results available to the public. In the event that environmental claims or labels are in breach of the directive, the companies are liable under Art. 15 para. 3 to take appropriate corrective measures within 30 days of notification by the authorities. Here, what is meant by appropriate corrective measures remains completely open. The deadline for implementing the corrective measures is also far too short. Recalls, re-labelling or the development of new packaging takes time. The 30-day deadline must therefore be extended as a matter of urgency. Similarly, it should be clarified what appropriate measures are.

Sanctions (Art. 17)

Art. 17 stipulates that the member states should determine the sanction regulations. This jeopardises the equal treatment of companies in the member states. A “level playing field” requires the establishment of the same sanction provisions within the EU member states, otherwise the member states will create different levels of fines. Sanctions must be proportionate and sufficiently dissuasive to ensure compliance. A distinction should be made between intentional and negligent infringements. The measures specifically mentioned in Article 17 para. 3 are too strict.

Transitional period and applicability (Art. 25)

Since legal certainty will only be achieved once member states have fully transposed the EU requirements into national law, companies de facto have only six months to justify and review existing and planned environmental claims and to adapt the corresponding communication. The timeframe can be shortened even further if implementation in the member states is delayed.

In particular, the establishment of relevant auditors and the certification procedures are likely to take a long time – especially if the accreditation of such auditors is only possible after full implementation by the member states.

This is likely to result in most environmental claims and labels no longer being allowed to be used within 24 months of the directive coming into force – including many claims that are very soundly based and could meet the requirements of the directive.

This would run counter to the objectives of this initiative, as consumer information on the environmental properties of products and services would be severely limited, and efforts to innovate in an environmentally friendly way would be severely hampered. There is also a risk that products and their packaging, as well as marketing materials, will have to be recalled, which would lead to an unnecessary impact on the environment.

To avoid the unintended negative consequences mentioned above, we propose that the effective date of national legislation implementing the directive's requirement that environmental claims and labelling systems be subject to prior verification and certification be at least 30 months from the date of its publication.

Products that are already on the market and indications that are already in use should be exempted from the new provisions. In order to facilitate the uniform application of the provisions, we propose that the Commission issue guidelines for economic operators, which must be available at least 12 months before the provisions enter into force.