

Vienna, February 19th 2025

Strongly critical statement from ÖV as an Austrian expert committee on the proposal for a directive on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 and 2023/0085(COD), which will also be published in the Austrian scientific journal ÖBI 3/2025

Dear Sir or Madam,

the 1958 founded “*Österreichische Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (ÖV)*” as the independent and non-profit Austrian association for industrial legal protection and copyright is a recognized scientific organization in the field of intellectual property, competition and copyright law. Its members are experts in the field such as lawyers and patent attorneys, judges, officials, university professors and representatives of associations and companies.

This proposal for a directive on substantiation and communication of explicit environmental claims is part of the ‘*Green Deal*’ program and aims to enable consumers to make more sustainable decisions and reduce the risk of ‘*Greenwashing*’ by providing reliable, comparable and verifiable information.

The ÖV is committed to fair competition and, thus, welcomes in general the concern to protect consumers from misleading environmental claims. **However, the chosen approach of this proposal for a green claims directive is misguided and problematic in several respects.** In order to keep the comments concise, they are limited to just a few fundamental points:

Misguided approach

The proposal is intended to strengthen the role of consumers in accelerating the ecological transition and is based on the assumption, that consumers are not or only insufficiently protected from ‘*Greenwashing*’ by advertising claims under current law.

This fails to recognize that the ‘*Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (...) (‘Unfair Commercial Practices Directive’)*’ already provides flexible and proven protection against misleading information. Numerous successful court cases in Austria and many other member states prove that it is entirely possible to successfully combat *Greenwashing* on this basis. This legal situation was expanded by the ‘*Directive (EU) 2024/825 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information*’ to include specific offences, in particular numerous relevant prohibitions in the area of the environment and sustainability.

Accordingly, the necessary legal standards are in place to prosecute *Greenwashing*. If this is not done sufficiently partially in practice, this is a problem of inadequate enforcement, not of legislation. Thus, such a problem or deficit in the execution (nothing known to us either) cannot be successfully

combated by imposing more regulations. Therefore, from this perspective, the proposal's approach is fundamentally misguided.

'Better Regulation' and 'Competitiveness compass'

For the remaining specific environmental claims, the present proposal creates a lengthy, extremely bureaucratic and complex certification procedure for environmental advertising. This is a prime example of over-bureaucratization and contradicts the principles of 'Better Regulation' as well as the 'Compass for Competitiveness' - proclaimed at the beginning of the year.

Fundamental rights concerns

The obligation of an ex-ante certification massively interferes with economic processes and the external communication of European enterprises:

The above-mentioned Directive (EU) 2024/825 has already banned general environmental claims - with a few highly regulated exceptions. Therefore, as a rule, only specific environmental claims remain permissible, for which the present draft sets out a rigid set of rules. This applies without exception, even to specific environmental claims that do not require even explanation, as they can be understood by the average consumer with common knowledge (e.g. that a bicycle delivery service is generally an environmentally friendly form of transport). It should be noted that advertising is the most important form of communication between enterprises and consumers.

And communication between enterprises and consumers is fast-moving. This would be prevented by the scope of the directive because the required procedures would take many months. In addition, micro, small and medium-sized enterprises (MSMEs) generally do not have the financial and/or human resources to fulfil this ex-ante certification. The Commission itself has estimated the costs at up to € 54,000 (COM [223] 166, 17). MSMEs account for 99.8% of the Austrian market. Although the proposal provides for an exemption for micro-enterprises, this exemption is also under discussion in the legislative process and would furthermore not cover many small and medium-sized businesses.

This not only hinders advertising measures, but also environmentally relevant projects or new and innovative products or slows them down in a way that threatens their existence. The high costs and bureaucracy of the certification process will be unbearable for many MSMEs.

The proposal would therefore lead to a massive and disproportionate curtailment of the fundamental right to freedom of expression within the meaning of the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

There are also concerns regarding property rights protected by fundamental rights, including intellectual property. This proposal will have to be applied to all relevant business identifiers (e.g. trademarks and the names of companies). As the proposal does not provide for an exception for existing trademarks and other relevant business identifiers would have to undergo and pass an ex-ante certification in order to be used lawfully in the future.

Due to a lack of financial and/or human resources, in many cases these procedures will not be carried out and entrepreneurs will no longer be able to use these business identifiers.

Creation of legal uncertainty

As a further crucial technical issue, the planned certification process for companies would bring with it considerable legal uncertainty. Even if a company were to properly complete all the steps of such a certification, it would not be protected from being prosecuted for an unfair commercial practice, as Art 10 (8) of the draft Green Claims Directive provides that the certificate of conformity issued by the testing body should not prejudice the assessment of the environmental claim by national authorities or courts in accordance with Directive 2005/29/EC. This means that such a certificate of conformity, which was obtained with great effort, would not prevent an independent official or judicial proceeding or control of the environmental statement or the use of the eco-label and therefore would entail a great deal of legal uncertainty. In addition, this lack of legal certainty would raise liability issues if the certification was inadequately checked.

Expected impacts

Expected impacts are usually assessed in advance of a proposal (so-called 'impact assessments'); in this case, this was not deemed necessary. This is incomprehensible especially with such far-reaching measures and should be criticized.

From our point of view, the following picture emerges: Due to this over-bureaucratization of environmental claims, if the directive comes into force, a strong decline in the topic of the environment in advertising is generally to be expected (so-called 'Greenhushing') to avoid corresponding procedures. Advertising is a creative industry and would, thus, quickly turn to other topics. Such a development would ultimately even counteract the intention of the 'Green Deal', specifically the '*empowerment of consumers for ecological change through better information*'.

Conclusion

Therefore, in our view, it would be appropriate for the Commission to withdraw this directive or at least the ex-ante certification should be cancelled in the trilogue.

Please do not hesitate to contact us if you have any questions.

Best regards

Dr. Michael Meyenburg eh
President

Mag. Hannes Seidelberger eh
Secretary General