

The European Commission

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Case nr: 22/4643-1
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Date:
25.05.2022

Norwegian Consumer Authority feedback on the proposal for a directive on empowering consumers in the green transition

1 INTRODUCTION

We refer to the Commission's proposal for a Directive on empowering consumers for the green transition and annex (the **Directive**).¹

The Norwegian Consumer Authority (**NCA**) is supportive of the proposed changes to the Unfair Commercial Practices Directive (**UCPD**) and Consumer Rights Directive (**CRD**). We especially welcome the proposed changes to the UCPD, as we believe this will significantly improve and expedite our enforcement capabilities.

The NCA has over several years gained experience with enforcement of the UCPD related to sustainability claims. We have written this document with the purpose of sharing our understanding of the Directive based on our experiences with enforcing consumer law related to sustainability claims.

Although the proposal for the Directive is solid, we believe there are areas where small changes or further explanations could be highly beneficial to avoid future misunderstandings and conflicts. We therefore hope our views this can be of interest when drafting the final version of the Directive.

2 GENERAL REMARKS

¹ https://ec.europa.eu/info/publications/proposal-empowering-consumer-green-transition-and-annex_en.

Our only general remark to the proposed changes to the CRD is that there is a risk of 'information overload' for the consumer, and that there could at times be difficult for traders to present all the information in a practical way. However, we know that these issues are not new, and we will therefore not comment further on this issue.

Our general understanding of the proposed changes to the UCPD is that it is, in large, codifying already established case law and interpretations across Member States, while also introducing some new requirements for communicating environmental and social performance. The placement of many of the 'new' requirements in Annex 1 (the **blacklist**) will significantly strengthen enforcement authorities' ability to efficiently enforce the law. The increased legal clarity will also be beneficial for traders, especially those that make real and significant environmental strides forward.

We recognize that the Directive mainly targets *environmental* sustainability. However, the introduction of *social* sustainability in only select places, but not all places where it is relevant, is likely to cause confusion and difficulties in enforcement. If social sustainability elements are to be included in the provisions, such inclusion should be more coherently and consequently dealt with in the Directive than it is in the proposal. With stricter rules on making environmental claims, we suspect that social/ethical claims will become more common among traders than it already is. The proposed Directive offers enforcement authorities a great toolkit for enforcing environmental claims, but the same kit is only sporadically available when assessing claims of social sustainability. Thus, such claims must still, in large, be assessed on a case-by-case basis through the general provisions of the UCPD. We urge the Commission to consider whether social sustainability can be more consistently integrated with the new provisions in the Directive.

3 PROPOSED CHANGES TO THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

3.1 Terminology

Throughout the preamble and the proposed amendments to the Directive, the terms "social sustainability", "social impact" and "social aspects" are used. It is unclear whether the terms are used interchangeably and carry the same meaning, or whether they refer to distinct concepts. The way the terms are used in the proposed amendment might lead to confusion as to whether the terms refer to different concepts or not.

We therefore suggest that one term is used throughout the Directive and the preamble, or that the link between "social impact", "social sustainability" and "social aspect" is explicitly stated in the preamble of the Directive. This will lead to a clearer text and avoid discussions of whether the different terminology is intended to limit the scope of certain provisions.

3.2 Article 2 – Definitions

3.2.1 Environmental claim

The Directive defines an “environmental claim”. However, no definition of claims made on the “social impact” of a product is offered in the Directive or in the preamble. We believe that the inclusion of a definition in the Directive or preamble will clarify for traders, consumers and authorities what “social impact” entails.

The preamble mentions "social sustainability" of products "such as" working conditions, charity contributions or animal welfare.² It is unclear whether this reference to “social sustainability” is to be understood as an explanation of the term “social impact”. This should preferably be clarified in the preamble.

Social sustainability is a well-established notion, and an integral part of the UN Sustainable Development Goals³, where the core focus is on human rights, equity, empowerment and working conditions. We therefore believe that a reference to what the notion of social sustainability entails would help clarify the aim of the inclusion of “social impact” in the Directive.

Therefore, we suggest amending recital 3 of the preamble so that it reads “*information provided by traders on the social sustainability of products, such as the impact on universal human rights, labour and cultural rights.*” The already mentioned examples of charity contributions etc. should also preferably be mentioned as examples that would fall within the scope of the Directive.

3.2.2 Explicit and generic environmental claims

An “explicit environmental claim” is defined as an environmental claim that is in “*textual form or contained in a sustainability label*”, cf. art. 2 (p). The term does not reoccur in the Directive on its own but is used in the subsequent definition of “generic environmental claim”, cf. art. 2 (q). A “generic environmental claim” is defined as “*any explicit environmental claim, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium*”.

We read the wording as regarding *textual* statements only, excluding impressions based on more graphical communication such as imagery, music etc. The consequence of this interpretation is that unsupported, generic textual claims are blacklisted, but impressions of misleading generic environmental claims through imagery and such must still be handled by a case-by-case assessment under articles 6 and 7 UCPD.

Separating textual and impression-based claims makes sense, as applying the blacklist on textual claims is easier than on claims based on impressions from graphical methods. The

² Recital 3.

³ <https://sdgs.un.org/goals>.

latter will often involve some level of subjectivity and is perhaps better handled through case-by-case assessments.

However, we do not understand why the definition of “explicit environmental claim” includes containment in a sustainability label if the definition’s only purpose is to be used as a bridge into the definition of “generic environmental claim”, when the latter definition specifically excludes claims contained in a sustainability label.

We would therefore suggest, if an “explicit environmental claim” is to be understood as a textual claim only, to clarify why the definition includes containment in a sustainability label only for such claims to immediately be excluded from generic claims, the only place where the former definition is used in the Directive’s text.

Additionally, some clarification in recital 9 of the preamble could help avoid confusion in this regard. The recital first gives several examples of statements constituting generic claims, then contrasts this with claims where a specification is available. The sentence “[s]uch generic environmental claims should be prohibited [...] whenever the specification of the claim is not provided” could give rise to confusion as to whether generic claims also can encompass specified claims, even if the definition’s wording appears to exclude specified claims. In our view, confusion can be avoided by splitting up the recital, or by not interchanging specified and unspecified claims in the examples given.

3.2.3 *Generic environmental claims – placement of specification*

Recital 9 states that generic environmental claims not based on excellent environmental performance or without a specification should be prohibited. The specification should be “provided in clear and prominent terms on the same medium, such as the same advertising spot, product’s packaging or online selling interface”.

There is a possibility of this being interpreted as an unintentional step back from the current strict line in UCPD Guidance. A product’s packaging or online selling interface can be physically and digitally large areas, with multiple sections of graphical and textual elements. Product packaging is usually multi-sided, and online selling interfaces can include scrolling features and expandable menus. The way we read recital 9, placing for example a specification on the back of a product’s packaging will be sufficient, even if the generic claim is on the front, provided that the specification is clear and prominent.

The UCPD Guidance makes, among others, reference to a decision from the Swedish Patent and Market Court (*Midsona*), which stated that the specification must be placed in immediate proximity to the vague claim.⁴ This interpretation is also used in a currently ongoing – and unpublished – case within the CPC Network.

⁴ UCPD Guidance, p. 80.

If no change from the current acquis is intended, we would urge the Commission to include words such as “immediate proximity” or similar in the recital to make it clear that specifications of vague claims cannot be placed in a way that is removed from the vague claim even though it is on the same medium.

3.2.4 Certification schemes and sustainability labels

The introduction of several criteria for being regarded as a ‘certification scheme’, together with the prohibition in the proposed blacklist item 2a, is a good step towards combating the jungle of sustainability labels with limited substance. These labels often imitate trusted labels, and are often confusing or misleading for consumers, and can ultimately impact consumers’ trust in labels such as the EU Ecolabel or the Nordic Swan.

Recital 7 states that the scheme “*should fulfil minimum transparency and credibility conditions*”. It is however not immediately clear whether these minimum conditions are merely referencing the technical requirements of such schemes in the definition in art. 2(s), or if the minimum conditions indicate that qualitative assessments are to be carried out by enforcement authorities and courts in addition so that a legal standard can be developed in practice.

Either way, we presume that this regulation will remove the possibility for traders to utilize self-made schemes and labels when making environmental claims. Instead having to rely on third-party solutions that fulfil certain basic requirements regarding open availability and monitoring of compliance. However, it is likely that certification schemes will emerge that, while fulfilling the requirements in the definition, are easily obtainable.

The definition of “certification scheme” is general and does not relate only to environmental certification schemes. For the prohibition of non-scheme-based sustainability labels to have a significant effect, low-effort certification schemes should not make it easier to utilize sustainability labels that contribute to misleading consumers as to the product’s actual environmental impact. For example, if independent industry organizations establish certification schemes that are relatively easy for their members to achieve, there will be a significant risk of greenwashing unless the quality of the scheme can be assessed by enforcement authorities.

Recital 8 states that a sustainability label can also constitute an environmental claim. For this reason, the relation between the definition of a “certification scheme” and the prohibition in the blacklist item 2a, and the general provisions of the UCPD, specifically articles 6 and 7, should preferably be clarified in the preamble.

When assessing a claim made using a sustainability label under the general provisions of the UCPD, enforcement authorities will have to consider not just the label itself, but also the extent and accuracy of the certification scheme behind it. Situations may arise where a label based on a certification scheme meets the technical requirements in the definition but does not meet the requirements of articles 6 or 7 of the UCPD.

We therefore suggest clarifying in the preamble whether the “minimum [...] conditions”⁵ indicate that qualitative assessments of the scheme should be carried out, e.g., when applying blacklist item 2a, or if it is merely a reference to the technical requirements in the definition of ‘certification scheme’.

3.3 Article 6 – Misleading actions

To verify the measures and goal(s) the company has committed to, an independent body must monitor the progress of the relevant trader with regard to these. However, there are no rules indicating *when* such an initial inspection must be carried out. Thus, there is a risk that consumers will be misled from the time of marketing until an inspection is carried out.

To ensure that the claim is as correct as possible from the outset, it is pertinent to consider a requirement where the relevant environmental target must be approved by an independent third party *before* the claim is used in marketing, to ensure that the plan is qualitatively good and likely to materialise before it is used in marketing. Follow-up inspections must still be carried out in line with the proposal but introducing a duty to get pre-approval from the independent monitoring system can avoid misleading consumers due to plans that only years later turn out to be unachievable.

3.4 Article 7 – Misleading omissions

There is uncertainty regarding the extent of the added paragraph in article 7 regarding comparative services. We presume that websites and applications made for the purpose of comparing specific products are at the core of this provision. Many webstores also offer excerpts from comparison services underneath specific products, such as the HIGG Index for textiles or repairability scores for electronics. It is not clear to us whether the provision will extend to this type of communication, or if it will be more limited in scope.

The word “service” could indicate that index schemes and similar fall outside the scope of the provision. Indexes are, however, comparative in nature, and will often compare products to an established baseline. The wording does not in itself seem to exclude displaying comparison results from indexes and similar, even if the user does not take an active role in choosing comparison criteria.

The word “provides” indicate, to us, a broad scope. More than just the developers of such services, traders who utilize its results in marketing or integrate the service into their own web and app interfaces would, based on wording alone, fall within the scope of this provision. This would be in line with the broad application of the same word in paragraph 2 of article 7.

Due to the above, we believe the provision as is can extend beyond its core function and encompass various information displayed on product pages, such as sustainability indexes and scores. If this interpretation is correct, it would directly impact the ability to display

⁵ The Directive, recital 7.

information/results based on comparison tools that are not sufficiently transparent. Contrary, if such a broad application is *not intended*, further guidance in the preamble could help avoid inconsistent application of the provision between Member States.

3.5 Annex 1 – The blacklist

3.5.1 Relation to the general provisions of the UCPD

Central to the proposed Directive is the placement of many of the new rules in the UCPD in the blacklist. While this should ease and strengthen the enforcement capabilities of competent authorities, it can also create uncertainty regarding the application of the general provisions of the UCPD when claims are not in violation of the blacklist but can still be considered misleading.

Examples can be sustainability labels based on a low-effort certification scheme, or marketing of products that demonstrate recognized excellent environmental performance but nonetheless mislead consumers as to the product's environmental impact (e.g. a product receives the Nordic Swan ecolabel, and markets itself as "100 % sustainable", "no environmental impact" or similar exaggerations).

We would therefore encourage the Commission to include a section in the preamble detailing the relationship between the new blacklisted items and the general provisions of the UCPD. This will make it easier for both enforcers and traders to understand to what extent marketing in compliance with the provisions in the blacklist is still limited by the general provisions of the UCPD. Notably, we believe there is a need to make clear that compliance with certain items in the blacklist does not grant the trader rights to exaggerate or otherwise mislead consumers as to their products' environmental, or social, impact.

Without such a clarification, it is likely that enforcement authorities will be met with resistance from traders that are in compliance with the detailed provisions in the blacklist. Particularly, it will be difficult to argue that marketing of environmental benefits is misleading when the product is categorized as demonstrating 'recognised excellent environmental performance', unless this possibility is clarified sufficiently in the Directive's preamble.

3.5.2 Claims relating to the social impact of products

The proposed amendments to the Directive strengthen enforcement by placing suggested changes in the blacklist. However, making claims regarding the "social impact" of a product is not "blacklisted" but might be considered misleading under art 6 (1) (b). Authorities therefore must assess whether claims made about the social impact of a product are misleading on a case-by-case basis.

Social and environmental sustainability is gaining significance through both the EU and national legislation.⁶ The proposed legislation both at a national level and at an EU level

⁶ See [The Norwegian Transparency Act](#) and the EU Corporate Due Diligence Act.

force companies to focus on and prevent their adverse environmental, social and human rights impacts. It is in the interest of companies to focus on their environmental, social and human rights impacts, especially as these issues are of rising concern for consumers and investors. Due to the increased focus on sustainability, we foresee an increase in advertisement based on the social and environmental impact of products, services and businesses.

The proposed amendments to the Directive will strengthen the enforcement, and subsequently make it harder to make claims based on the environmental impact of a product. We therefore fear a move towards claims based on the social impact of products.

If social sustainability elements are to be included in the provisions, such inclusion could be more coherently and consequently dealt with in the Directive than it is in the proposal. Aspects of social sustainability could be integrated in the provisions of the Directive, where applicable. For example, item 4a in the blacklist could be amended to also ban generic claims of social performance not backed up by some sort of established and recognized standard for ethical consideration.

3.6 Untruthful and deceptive practices' relation to the elements listed in article 6(1)

The NCA has previously contacted the Commission regarding the understanding of article 6(1). In short, Norwegian preparatory works on implementing the UCPD and national legal theory consider "untruthful" to be self-standing, and unrelated to the elements in letters (a) to (g), with those elements only to be applied to deceptive practices.

The provision can be read like this:

A commercial practice shall be regarded as misleading if it contains (1) false information and is therefore untruthful or (2) in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise

The UCPD Guidance, however, indicate that the elements in letters (a) to (g) should also apply to false information.⁷ A similar interpretation may have been applied in Case C-453/10 *Pereničová*, although the Court does not explicitly state whether the information concerned is regarded as false or deceptive.⁸

⁷ Under section 4.1.1.3 the Guidance states "An environmental claim can be misleading if it 'contains false information and is therefore untruthful' in relation to one of the elements listed in Article 6(1)(a) to (g)".

⁸ The Court did make a reference to the elements in letters (a) to (g) for information that could be considered false, but did not specify if a distinction was made, cf. paragraph 40.

The Commission could not confirm or deny either interpretation, as that would be a matter for the Court of Justice and expressed doubt as to whether a distinction is practically or legally necessary, primarily due to the comprehensive and non-exhaustive nature of the elements mentioned, and the fact that false information can also be considered a deceptive practice.

We understand that this has not yet created any problems, and that it may not do so in the future either. However, due to the potential differences between the Directive and our national transposition, we would like to urge the Commission to use this opportunity with a new Directive to clarify if “false information” is a self-standing criterion or not to avoid different applications of the law between Member States.

Regards,

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