

POLICY BRIEF

Working Paper

Green Claims Directive: what to expect for climate-related claims?

Summary

This policy brief looks at the proposed Directive on substantiation and communication of explicit environmental claims (Green Claims Directive), *vis-à-vis* the European Parliament recently adopted amendments and the Council's general approach, by analysing the specific provisions concerning climate-related claims and potential implications. It also intends to look at the current state of discussions not only through a legal lens, but also through a policy lens, providing takeaways and raising questions.

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1. Introduction

In March 2023, the European Commission proposed a Directive on substantiation and communication of explicit environmental claims (Green Claims Directive). This proposal emerges within a specific scope and legislative context, which is the Directive (EU) 2024/825, empowering consumers for the green transition through better protection against unfair practices and through better information¹ (amending Directive 2011/83/EU on consumer rights and Directive 2005/29/EC on unfair business-to-consumer commercial practices). However, the Directive empowering consumers for the green transition does not specify what companies should do to properly substantiate their environmental claims.

As it is stated in the proposal's explanatory memorandum, the Commission feels that the current consumer protection framework needs further and more specific requirements on unregulated claims when it comes to address the identified problem of “*greenwashing*” and what see as “*unreliable*” environmental labels. Alternatively, some may also see this as another action that could fit under the current tendency of the EU institutions to overregulate all aspects of EU life.

Against this backdrop, the proposal on substantiating and communicating voluntary environmental claims aims to complement as *lex specialis* the existing set of EU rules on consumer protection (*lex generalis*). The key objectives of the Green Claims Directive proposal are to:

- (i) Increase the level of environmental protection and contribute to accelerating the green transition towards a circular, clean and climate neutral economy in the EU;
- (ii) Protect consumers and companies from “greenwashing” and enable consumers to contribute to accelerating the green transition by making informed purchasing decisions based on credible environmental claims and labels; and
- (iii) Improve the legal certainty on environmental claims and ensure a level playing field in the internal market, boost the competitiveness of economic operators that make efforts to increase the environmental sustainability of their products and activities, and create cost saving opportunities for operators that are trading across borders.

One year later, on March 12, 2024, the European Parliament (EP) adopted, at first reading under the ordinary legislative procedure, several amendments to the Commission's proposal. Following this, the Presidency produced a compromise text – which had several interim versions and revisions – based on discussions in the Working Party on the Environment (WPE) and written comments received from delegations. Recently, on June 17, 2024, the Council adopted its position (‘general approach’) on the Green Claims Directive – no. prev. doc. 104351/24 REV 1, from 10 June 2024. The general approach will constitute the Council's mandate for future negotiations with the EP – which are expected to begin in the new legislative cycle – in the context of the Ordinary Legislative Procedure.

¹ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 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.

Hence, the present policy brief intends to look at the texts, which substantially differ from the Commission's initial proposal, analysing the specific provisions concerning climate-related claims and potential implications. It also intends to look at the current state of discussions not only through a legal lens, but also through a policy lens, and provide an opinion on how the various aspects address the tension between some trying to regulate in order to eliminate any risk from society and the consequences that this has for creating an environment where entrepreneurship and risk taking should help innovation and decarbonization.

2. Analysis of the texts

2.1. The European Commission proposal

According to the abovementioned objectives and its specific scope (Article 1)², the proposal sets minimum requirements on the substantiation (Article 3) and communication (Article 5) of explicit voluntary environmental claims and environmental labelling in business-to-consumer practices which are subject to third party verification, to be delivered prior to the claim being used in commercial communications (Article 10).

Firstly, worth mentioning is recital 21) – specifically concerning climate-related claims – which states that: “(...) *In order to adequately contribute to global climate change mitigation targets, traders should prioritise effective reductions emissions across their own operations and value chains instead of relying on offsets. Any resulting residual emissions will vary by sector-specific pathway in line with the global climate targets and will have to be addressed through removals enhancements. When offsets are used nonetheless, it is deemed appropriate to address climate-related claims, in a transparent manner. (...)*”. Therefore, Article 3 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, namely that the underpinning assessment: (i) demonstrates the significance of impacts, aspects and performance from a life-cycle perspective; (ii) takes into account all significant aspects and impacts to assess the performance; (iii) demonstrates whether the claim is accurate for the whole product or only for parts of it; (iv) demonstrates that the claim is not equivalent to requirements imposed by law; (v) provides information on whether the product performs environmentally significantly better than what is common practice; (vi) identifies whether a positive achievement leads to significant worsening of impact; and (vii) includes accurate primary or secondary information.

² Article 1 explicitly excludes from its scope of application the environmental labelling schemes/explicit environmental claims regulated by or substantiated by rules established in the regulations identified therein, namely the “*Regulation (EU) ... /... of the European Parliament and of the Council establishing a Union certification framework for carbon removals (OJ L ...)*”.

Particularly concerning climate-related claims, the assessment shall “*separate any GHG emissions offsets used from GHG emissions as additional environmental information, specify whether those offsets relate to emission reductions or removals, and describe how the offsets relied upon are of high integrity and accounted for correctly to reflect the claimed impact on climate*” (cf. article 3(1)(h)).

The Commission’s proposal does not require any specific assessment method for the substantiation of any environmental claims, and relies upon general requirements that generate reliable information for consumers, while providing competent national bodies with uniform criteria.

While there is no specificity on what additional environmental information comprises of, the Commission may adopt delegated acts (Article 3(4)) to complement the requirements on substantiation for certain types of claims. These delegated acts should in principle follow the results of monitoring (referred in Article 20) of evolution of environmental claims on the market to allow prioritising and addressing identified situations where the absence of requirements for specific claims leads to widespread misleading of consumers. However, for some types of claims it may be necessary for the Commission to act prior to that.

When communicated, all environmental claims (Article 5) shall at least: (i) cover environmental impacts, aspects or performance that are assessed in accordance with the substantiation requirements and are identified as significant for the respective product or trader; (ii) where relevant for the claim made, shall include information on how consumers may appropriately use the product to decrease environmental impacts; and (iii) shall be accompanied by information on the substantiation (including information on product or activities of trader; aspects, impacts or performance covered by the claim; other recognised international standards, where relevant; underlying studies and calculations; how improvements that are subject to the claim are achieved; the certificate of conformity and coordinates of the verifier). In addition, for climate-related explicit environmental claims that rely on GHG offsets, the communication shall include “*information to which extent they rely on offsets and whether these relate to emissions reductions or removals*” (cf. article 5(6)(f)).

Finally, an officially accredited body by the Member States (the ‘verifier’ according to the requirements of Article 11) will carry out the ex-ante verification of the claims (i.e., before the claim is used in a commercial communication) submitted by the company wishing to use it (Article 10).

Member States shall set up procedures for verifying the substantiation and communication of explicit environmental claims against the requirements set out in the abovementioned articles. The measure will ensure that every claim that the consumer will be exposed to had been verified to be reliable and trustworthy. Once the ‘verifier’ has carried out the verification of the submitted claim, it will decide to issue (or not) a certificate of conformity. This certificate will be recognised across the EU, shared between Member States via the Internal Market Information System, and will allow companies to use the claim in a commercial communication to consumers across the internal

market.³ The Commission will be empowered to adopt an implementing act specifying the format of certificate of conformity of claims.

2.2. The European Parliament amendments

The European Parliament (EP) adopted several amendments that substantially change the proposal's text regarding climate-related claims, albeit not providing clear definitions of the new terminology used, namely on the distinction between “*contribution*” and “*compensation*” claims. A first amendment worth mentioning is the replacement of the expression used in the proposal's recital 31): “claims based on/about *offsets*” by “claims based on *carbon credits on residual emissions of a trader*”.⁴

Despite mentioning on Article 3(h) that the assessment shall separate any *carbon credits* used from GHG emissions as additional environmental information, specifying whether those *credits* relate to *emission reductions* or *removals*, the EP introduces a new provision foreseeing that: “*Compensation claims based on the use of carbon credits may only be made in respect of the residual emissions of a trader.*” And that “*the carbon credits used must be certified units issued in accordance with [Regulation of the European Parliament and of the Council establishing a Union certification framework for permanent carbon removals, carbon farming and carbon storage in products (CFCR)]*”, or other units in duly justified cases⁵ (new article 3b)⁶. Moreover, “*where the use of units is for compensation of fossil emissions, the claim shall be substantiated by permanent removals as defined in [the CRCF]*” (new Article 3b).

For claims on future environmental performance based on the use of carbon credits, the trader shall comply with the relevant rules set out in Delegated Regulation (EU) 2023/2772 supplementing

³ The certificate of conformity of claims will provide businesses with certainty that their certified claim will not be challenged by the competent authorities in another Member State.

⁴ Residual emissions appear to be covered in item ESRS E1 point 60: “*residual GHG emissions (after approximately 90-95% of GHG emission reduction with the possibility for justified sectoral variations in line with a recognised sectoral decarbonisation pathway)*”. The International Organization for Standardization (ISO) is also working on a proper definition of “residual emissions” and seems to have a gap with the ESRS aforementioned one. Cf. ISO 14068-1:2023(en), Climate change management — Transition to net zero — Part 1: Carbon neutrality.

⁵ New article 3c.: Certified units other than those issued in accordance with CFCR may be used in duly justified cases where those schemes are recognised by the Commission as part of the list of compliant schemes corresponding to at least equivalent requirements to those provided by CFCR, in particular with regard to monitoring, reporting, verification and liability requirements, and ensuring no double counting. The Commission is empowered to adopt delegated acts to list recognised carbon credit schemes that are considered to comply with such equivalent requirements.

⁶ In these cases, the assessment shall indicate the share of residual emissions expressed as a share of base-year emissions, the share of biogenic and fossil emissions within these residual emissions and the quantity and type of activity (permanent carbon removal, carbon storage in products, carbon farming sequestration, or soil emission reductions, as defined in CFCR underlying the credits used, providing evidence that the credits have been appropriately retired from the registry of the certification scheme, in order to avoid double counting (new article 3(ha)).

Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards (ESRS).

In addition, a new provision is introduced stating that: *“To supplement the provisions on the use of certified units for residual emissions of a trader, the Commission shall adopt [12 months from the date of entry into force of this Directive] a delegated act to establish a method for defining residual emissions, based on an emission reduction pathway compatible with limiting global warming to 1.5°C, taking into account technological feasibility and in consultation with the European Scientific Advisory Board on Climate Change.”* (cf. Article 3(4a)).

Furthermore, the EP adds another novel Article 3(ja) foreseeing that for the use of carbon credits for *contribution claims*, the assessment shall *“(...) ensure that no financial contribution is used to claim an improved climate or environmental impact of the product, or trader and shall separate any financial contributions from the climate or environmental impact of the product or trader as additional environmental information”*.

Finally, in Article 21 – which foresees an evaluation report to be performed by the Commission assessing whether the Green Claims Directive has achieved its objective –, the EP adds a new objective: *“ensuring that traders effectively prioritise emission reductions in their own operations and value chains, by assessing the adequacy of the provisions related to the use of carbon credits.”* (new article 21(2)(da)). Essentially, one could say the objective is not only to ensure emission levels needed, but also how these are to be achieved.

2.3. The Council’s general approach

Between the months of April and June, several interim revised versions of the compromise text (e.g., from April 4 and 23, May 7 and 22) prepared by the Presidency were circulated. While the very initial texts followed the path opened by the EP – being more restrictive and having explicit mentions to “residual emissions” and alluding to “corresponding adjustments” in the core text – the Council’s adopted position (‘general approach’) drops that intention, at least explicitly. As it is stated, the compromise text seeks to uphold the ambition of the Commission’s proposal and aims to strike a balance between protecting consumers from “*greenwashing*”, promoting environmentally sustainable innovation, and ensuring that the burden on economic operators and national authorities remains manageable.

The general approach introduces the definitions of ‘*contribution claims*’, ‘*offset claim*’ and ‘*total greenhouse gas emissions*’ (Article 2):

“(19d) ‘contribution claim’ means an explicit environmental claim related to climate, where the trader claims to have contributed to climate action by purchasing carbon credits, but without using those carbon credits for balancing out a share of its emissions;

(19e) ‘offset claim’ means an explicit environmental claim related to climate, where the trader claims to have balanced out a share of its emissions by purchasing carbon credits;

(19f) ‘total greenhouse gas emissions’ means a trader’s scope 1, 2, and 3 emissions in tCO₂eq calculated pursuant to Disclosure Requirements on Gross Scopes 1, 2, 3 and Total GHG Emissions, and related Application Requirements in accordance with Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards;”

It further specifies the substantiation requirements for climate-related claims, including those involving carbon credits (Article 3.1a.). Therefore, in addition to the general requirements set out in paragraph 1 of Article 3 (Substantiation of explicit environmental and environmental labels), “*when an explicit environmental claim regarding the trader is related to climate, including claims based on the use of carbon credits, the assessment shall (...) take into the account the specific nature and aspects of that claim, to ensure that consumers are well informed about the use of the carbon credits and their effects. This assessment shall, as applicable, include but not be limited to:*

(a) identification of the trader’s total greenhouse gas emissions, as well as their reductions, future performance regarding the emissions, and any carbon credits used, including the quantity of credits acquired in tCO₂eq, each presented separately, indication the relevant time period;

(b) specification of whether carbon credits used relate to emission reductions or carbon removals, whether or not the associated emission reductions or removals represent a contribution to the reduction of greenhouse gas emissions in the host country, whether removals are permanent or temporary, under which scheme the credits were verified and certified and by which registry they were issued;”

Article 3.1a.(e) then foresees that in case the explicit environmental claim is an offset claim, claiming that a trader has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emission, the assessment shall as well:

“(i) demonstrate that the trader has set a net zero target as set out in Directive 2013/34/EU as regards sustainability reporting standards, and is on a decarbonisation pathway to meet the target;

(ii) disclose the percentage of total greenhouse gas emissions balanced out using carbon credits, for a specific time period.”

Furthermore, to ensure uniform conditions for the implementation of Article 3.1a., “*the Commission shall adopt implementing acts by 31 December 2027 laying down more detailed rules on the assessment to be carried out by the trader when generating an explicit environmental claim that is related to climate, including claims based on the use of carbon credits, to substantiate that*

claim, including on how to demonstrate the quality and integrity of the credits used. The Commission shall, where relevant, consider: a. The different types of environmental claims related to climate made by traders, including contribution claims and offset claims, while recognising that different requirements are appropriate for different types of claims related to climate; b. Sectoral decarbonisation pathways in line with Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards; c. Ease of access to information and data for the assessment and use of this information and data by SMEs.” In addition, the Commission shall take into account scientific or other available technical information, including relevant international standards, and where relevant, ensure consistency with relevant Union law, when adopting the implementing act.

For the communication (Article 5(6a)) of explicit environmental claims based on the use of carbon credits, traders shall provide a summary of the substantiation assessment (according to paragraph 6d.) indicating that the claim is based on the use of carbon credits and explaining whether the explicit environmental claim concerns emission reductions and/or carbon removals, as well as whether it concerns a contribution or an offset claim. If an environmental label is based on the use of carbon credits, it shall provide this information in the summary of the assessment mentioned in 6f..

Finally, the general approach introduces new text in whereas 21 and 22, which shall be read in conjunction with the abovementioned provisions. Worth mentioning are whereas:

- (21aa), which mentions the prohibition under all circumstances of claiming that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions, based on the offsetting of greenhouse gas emissions, as lined out in Directive 2005/29/EC, as amended by Directive (EU) 2024/825 of the European Parliament and of the Council Annex I. Nevertheless, climate-related claims, based on offsetting of greenhouse gas emissions, claiming that a trader has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions are allowed, provided that the requirements of this Directive are met.
- (21b), which states the importance to ensure uniform conditions for the application of the requirements of Green Claims Directive on climate-related claims, including claims based on the use of carbon credits, with the objective of ensuring their high quality and integrity, such as through recognised quality standards as defined in the Directive 2013/34/EU as regards sustainability reporting standards and the accompanying European Sustainability Reporting Standards (ESRS). These recognised quality standards are standards for carbon credits that are verifiable by independent third parties, make requirements and project reports publicly available and at a minimum ensure additionality, permanence, avoidance of double counting and provide rules for calculation, monitoring, and verification of the project’s greenhouse gas emissions and removals. Additionally, also considering, where necessary, authorisations and corresponding adjustments related to the implementation of the Paris Agreement Article 6 framework under development, the operationalisation of which is pending in the Union, the Commission should be empowered to further specify the requirements for the assessment. When adopting the implementing acts, the Commission should comprehensively consider and, where relevant, ensure consistency with all relevant Union law that is necessary to pursue the

objectives of this Directive, in particular, the provisions, including their timing, set out in Article 18 of the CRCF Regulation, ESRS E1 climate reporting standard under CSRD, Article 45 of Governance Regulation, Article 17 of LULUCF Regulation, Article 15 of Effort Sharing Regulation, Article 30 of ETS Directive, and European Climate Law.

3. Takeaways

- There are clear differences between the three current versions, but they all go in the direction of additional legislation and regulation and the tendency of overprotection and overregulation.
- The Commission's proposal is less prescriptive concerning climate-related claims. This is closer to the proposed objectives while striking some balance by not being overly prescriptive. It finds a better balance between some degree of flexibility for companies – not totally eliminating the inherent risk – while giving guidance on substantiation, communication, verification and monitoring of climate-related claims. It must be reminded that the Green Claims directive was not designed to regulate (voluntary) carbon markets but to tackle misleading information in green claims by ensuring transparency and accuracy.
- The amendments adopted by the EP concerning climate-related claims lack clarity. While making a distinction between compensation and contribution claims, the EP does not provide for any definition. It foresees that: (i) compensation claims based on the use of carbon credits as an offset are only admissible in relation to residual emissions; and (ii) the units need to be certified under CFCR (i.e., essentially removal), this leads to a segment of carbon credits based on emissions reductions not to be included.
- The Council's adopted position ('general approach') consciously departs from the EP's amendments by dropping any explicit mentions or references to "residual emissions", "certified units under CFCR" or "corresponding adjustments" in the core text. Thus, entailing a positive evolution in the wording.
- ERCST supports the approach that removals/reductions can be counted by one country only, either through its inventory (of the country where the removal/reduction takes place) or through legal ownership of the certificate. It can also be counted for any voluntary (corporate) commitment, provided that the claimant has proven legal ownership of the certificate.
- Furthermore, since trilogues will follow in Autumn 2024, one still needs to question the term "residual" as it may be subjective. It introduces unnecessary and arbitrary regulation and will also limit the uptake of solutions and removal credits. From society it is yet another government intervention and makes a new "*how to protect the citizens*" – where does this need for protection end? Moreover, legislators should bear in mind that this type of information still is extremely complex for a regular consumer.

- It can be concluded that the constraints introduced by the EP delay the use of carbon offsets to that time when companies reduce as much as possible. This begs the questions: until then, are voluntary-offset claims prohibited in practice? Are restrictions of offsetting a way to ensure mitigation hierarchy? Are contribution claims interesting for companies? Is there an incentive/economic benefit to act on a voluntary basis?
- Between claiming that a commercial business is carbon neutral – relying only on the use of carbon credits – and using them for residual emissions only, there is a spectrum of possibilities that could play a role in the companies’ decarbonization strategy. This use should be allowed when and if clearly substantiated and communicated with transparency, credibility, and integrity. These are policy and political decisions and not necessarily technical ones. Legislation should prescribe the goal but not the “how” – otherwise, the government essentially substitutes itself for the commercial business’s management.
- Offset claims ought to encompass both counterbalancing companies’ emissions on the pathway to achieving net zero and residual emissions. Restricting claims solely to residual emissions could severely stifle investment in carbon markets for the next ten to twenty years. All categories of carbon credits (reduction, avoidance, and removals) should be eligible for offset claims. Reduction credits are essential now to curb further emissions, while removal credits must be substantially increased if we are to reach net zero. Both reduction and removal credits are indispensable and warrant support through compensation claims.
- Will a more restrictive approach, if it prevails, paralyse companies in the efforts to mitigate? After all, we are talking about voluntary explicit climate-related claims. Hence, there is a potential outcome: commercial businesses will simply choose not to make the claims in their voluntary commercial communications. Is that the final purpose? If that is the case, it would seem counterproductive and contrary to objectives of the Directive, the European Climate Law and the Paris Agreement.
- The whole effort to legislate green claims can be seen beneficial from the point of view of those that provide credits, and those that may want to use them. In a broader societal view, the result is that it regulates yet another aspect of life and commercial activity. One needs to ask if legislation is necessary and whether it leads to a reduction of individual responsibilities and innovation spirit in society.
