

Statement of the German Institute for Quality Assurance and Certification (RAL Deutsches Institut für Gütesicherung und Kennzeichnung e. V. – RAL) on the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), Procedure 2023/0085(COD)

The German Institute for Quality Assurance and Certification (RAL Deutsches Institut für Gütesicherung und Kennzeichnung e. V. – RAL) acknowledges, with great interest, the proposal put forward by the European Commission for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (hereinafter: "Green Claims Directive"). Although RAL supports the underlying objective of preventing greenwashing in principle, RAL has significant concerns about the proposal. In the following, RAL addresses these, both in its own name and also in its capacity as the umbrella association for the 118 RAL Quality Assurance Associations (*Gütegemeinschaften*) comprising more than 9,000 member companies.

In summary, RAL has the following view:

- The Proposed Directive considerably restricts the **self-regulation of the economy** in the area of voluntary labelling. It endangers the fulfilment of the tasks by RAL and other voluntary quality mark systems of private institutions, which for many years have successfully provided reliable means of confirming environmentally relevant aspects of products (see section 3).
- The proposed requirements will **exclude small and medium-sized enterprises (SMEs)** from using and operating environmental labels. They will have to decide not to use environmental labels and environmental claims because they will not be able to bear the costs. This would also remove the incentive for them to contribute to environmental protection that goes beyond the legal minimum standard, as they would no longer be able to advertise with it (see section 4).
- The proposal for a **Directive on empowering consumers for the green transition**¹ already provides for the prohibition of misleading environmental claims and sustainability labels. The Green Claims Directive has the identical objective and also covers environmental claims and environmental labels (as a form of sustainability labels). An extension or **doubling of the provisions**, which ultimately always express the same (namely that inaccurate environmental claims are prohibited or inadmissible), is not necessary and would contribute to overregulation. This is obviously not compatible with the objectives of the EU's "Better Regulation" agenda (see section 5).
- The requirements with regard to environmental labels and environmental labelling schemes also contradict the **provisions of Union law governing certification marks and the use of quality marks as evidence of compliance in the context of public procurement procedures**, which impose less strict monitoring requirements. Were the provisions proposed by the European Commission to be implemented, the use of quality or certification marks would constitute a breach

¹ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, 30.03.2022, COM (2022) 143 final, procedure 2022/0092/COD.

of the Green Claims Directive, even though these marks satisfy the requirements imposed by the existing provisions. Therefore, following the Council's negotiating mandate with regard to the Directive on empowering consumers for the green transition, certification marks should be exempted (see section 6).

- The requirements for **verifying compliance with the conditions** are too high. According to the Proposed Directive, schemes in which the scheme owner (in addition to external auditors or audit bodies) is involved in the monitoring are not permitted, although this also ensures impartial monitoring (see section 7).
- The requirements for environmental labelling schemes need **clarification**. It is unclear which requirements apply to already existing private schemes. In contrast to environmental labelling schemes established by public authorities, the Proposed Directive does not contain any explicit provisions for existing private schemes. It is also unclear how existing schemes are to be distinguished in detail from new schemes (see section 8).

In detail:

1. Role of RAL

a. RAL Quality Assurance

RAL has been active in the field of neutral and independent labelling since 1925. Almost one hundred years ago, there was already awareness of the need to lay down uniform technical and quality requirements for certain products and services for reasons of rationalisation, which always exceed the legal and normative requirements. For this purpose, the relevant economic players – under the auspices of RAL – channel their technical expertise into RAL rules and standards (RAL Quality Assurances), which they then voluntarily undertake to apply. In case of non-compliance, sanctions may be imposed.

There are currently 118 different RAL Quality Assurance Associations with 155 different RAL Quality Marks and approximately 9,000 members worldwide. RAL Quality Marks serve as a guide through the veritable jungle of labels for consumers, companies and public authorities alike. RAL organises and safeguards this process and monitors **compliance with the rules on a purely private law basis**. Continuous updating of the rules and regulations ensures constant innovation.

RAL Quality Marks are awarded by the individual RAL Quality Assurance Associations, which are also responsible for organising the **external monitoring** of the quality assurance system. To this end, the Quality Committees of the Quality Assurance Associations commission external independent auditors or audit bodies to evaluate the products or services in question on the basis of the applicable requirements. These comprise the following (last updated: 2018/2019 cycle):

– DAKKS ² -accredited audit institutions	43.94 %
– Experts (in some cases, sworn-in)	29.55 %
– Notified/recognised bodies	10.61 %
– Others	9.09 %
– Independent auditors	6.82 %

The Quality Committee decides, on the basis of the evaluation carried out by the auditors, whether the conditions for the use of the Quality Mark in question have been met. Where the companies concerned have representatives on the Quality Committee, those representatives are not involved in the evaluation of their own products.

b. Ecological aspects of quality assurance

Given that the RAL Quality Assurance Associations take the interests of the economy and of consumers into account in establishing and further developing RAL Quality Marks, a continuously growing number of RAL Quality Marks relate to sustainability aspects. In these cases, the Quality Assurance Specifications comprise requirements with regard to carbon neutrality, the use of renewable raw materials, recycled raw materials, recyclability, low level of harmful substances, etc. Furthermore, quality assured products are of higher value and are longer lasting and ultimately more sustainable as a result.

Some of these Quality Marks **focus mainly on environmental aspects**. This is the case for the following Quality Marky, by way of example:

- RAL-GZ 276, Carbon-offset energy products
- RAL-GZ 435, Climate-neutral furniture manufacture
- RAL-GZ 425, CO₂ emission-reducing wooden structures

2. Proposal for the Environmental Claims Directive at a glance

The proposal put forward by the European Commission includes numerous requirements for environmental labels and so-called explicit environmental claims contained therein as well as environmental labelling schemes. Member States are to ensure that traders themselves comply with certain requirements for the substantiation and communication of **explicit environmental claims**.³ Undertakings must evaluate the claims according to various criteria and substantiate them on the basis of scientific evidence. When communicating environmental claims several criteria must be met as well.

² The German Accreditation Body (Deutsche Akkreditierungsstelle GmbH – DAKKS) is the national accreditation body of the Federal Republic of Germany within the meaning of Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ 2008 L 218/30.

³ Cf. Art. 3 to 6 Green Claims Directive.

In principle, the proposal provides that only those explicit environmental claims may be communicated that have been duly substantiated and that have been identified as significant.⁴

Environmental labels that explicitly include environmental claims should also meet the requirements for substantiation and communication.⁵

Moreover, the European Commission proposes a set of requirements for certification schemes which certify that a product, a process or a trader complies with the requirements for an environmental label (**environmental labelling schemes**).⁶

Compliance with the requirements for environmental claims, environmental labels as well as environmental labelling schemes shall be verified by an **independent conformity assessment body accredited** in accordance with Regulation (EC) No 765/2008.⁷

New private environmental labelling schemes established after the date of transposition of the Directive must be **approved**. Approval is only possible if these schemes provide added value in terms of their environmental impacts as compared to the existing national, regional or Union schemes and meet the requirements of the Green Claims Directive.⁸

3. Restriction of self-regulation by the economy

The Proposed Directive considerably **restricts the self-regulation of the economy** in the area of voluntary labelling.

In Germany, the principle of the self-governing economy is one of **the foundations of the economic system**. The German government has frequently reinforced this principle. The state should only intervene where economic players are not themselves willing or able to act.

A self-governing economy is one which – to the extent legally permissible – makes decisions, takes action and finances its activities in an autonomous manner. Economic self-governance entails the direct involvement of the parties concerned. The German Federal Constitutional Court has recently reaffirmed this liberty-safeguarding, legitimate function of a self-governing economy: *"The organisation of certain economic subjects within a self-governing body is aimed at and capable of bundling expert knowledge and interests in a legitimate manner from a constitutional law standpoint and enables its integration as a whole rather than in the form of an interest group or a coalition within the meaning of Art. 9(3) of the*

⁴ Cf. Art. 5(2) Green Claims Directive.

⁵ Cf. Art. 7(1) Green Claims Directive.

⁶ Cf. Art. 8 Green Claims Directive.

⁷ Cf. Art. 10(1) and (2) and Art. 11(1) Green Claims Directive.

⁸ Cf. Art. 8(5) Green Claims Directive.

Basic Law of Germany (Grundgesetz – GG), or in an overarching sense in the form of a political party, in the decision-making process”.⁹

The EU has also established the positive impact of self-regulation. The *Better regulation toolbox* states:

“Self-regulation is where business or industry sectors formulate codes of conduct or operating constraints on their own initiative for which they are responsible for enforcing. However, pure self-regulation is uncommon and at the EU level it generally involves the Commission in instigating or facilitating the drawing up of the voluntary agreement.

Self-regulation by the relevant industry can in suitable cases deliver the policy objectives faster or in a more cost-effective manner compared to mandatory requirements. They also allow greater flexibility to adapt to technological change (e.g. in the ICT-related areas of activity) and market sensitivities. Voluntary agreements work when the interests of society and the industry grouping coincide; otherwise it is unlikely that industry will voluntarily take the necessary steps without external influence such as the Commission, or other parts of civil society such as NGOs. Voluntary agreements may also appear when industry fears upcoming regulation and voluntarily restrict their room for manoeuvre. A challenge of such approaches is to ensure that the desired policy outcome is delivered in practice as the conventional enforcement mechanisms associated with regulation are not available.”¹⁰

Private quality marks are an example of successful self-regulation. This is particularly the case as regards the confirmation of environmentally relevant product characteristics. As touched upon by the European Commission in the foregoing citation, the convergence of the interests of society and those of corporate entities in this case facilitates industry self-regulation by the economy, as companies have an interest in being able to reliably demonstrate the environmental characteristics. If they circumvent the requirements, this would undermine consumer confidence in the mark in question and thus the positive marketing impact of the label and the Quality Assurance System as a whole. In other words, companies and private quality marks cannot in any way afford to use unreliable means of verifying environmental characteristics. The economy is therefore essentially self-regulating in this respect.

However, the proposal put forward by the European Commission jeopardises the fulfilment of the tasks of RAL and other voluntary quality mark systems of private institutions, which for many years have successfully ensured that environmental aspects of products are confirmed in a reliable manner. This is because it includes numerous requirements and thus additional effort and costs that are not viable for smaller organisations and companies (see section 4). However, since RAL quality marks are in many cases established and used by SMEs and the committee work of the Quality Assurance Associations, which are organised as associations under private law without relevant personnel structures, is mainly

⁹ Cf. German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), judgement of 12/07/2017 – 1 BvR 2222/12 and 1 BvR 1106/13, para. 95.

¹⁰ Cf. European Commission, *Better Regulation Toolbox*, November 2021, p. 123
<https://commission.europa.eu/system/files/2023-02/br_toolbox-nov_2021_en.pdf>.

carried out on a voluntary basis, the system of quality assurance under the Proposed Directive would no longer be feasible.

Furthermore, according to Art. 8(5) of the Green Claims Directive, private labelling schemes should only be approved if they provide **added value compared to existing national, regional or Union schemes**. Private schemes must therefore first demonstrate that they are "better" (in terms of their environmental ambition, in particular the extent to which environmental impacts, aspects or performance or a certain product group or sector are covered, and their ability to support the green transition of SMEs). This burden of justification is presumably intended to limit the number of environmental labelling schemes. In any case, private schemes can be assumed to only succeed if they provide added value. In general, competition between schemes is likely to be helpful in enabling innovation. Art. 8(5) of the Proposed Directive is an expression of over-regulation and a lack of trust in the self-regulation of the economy.

There is therefore good reason to be concerned that the Proposed Directive will destroy important parts of the self-regulation of the economy and thus permanently damage the innovation engine of the economy. It can be assumed that this also applies to comparable systems in other Member States. This would be contrary to the purpose of the Proposed Directive, which is not only to protect and empower consumers, but also to strengthen the green economy in particular.

4. Driving SMEs out of the private label sector

The proposal put forward by the Commission does provide for exemptions for microenterprises. SMEs, on the other hand, are not exempt from the requirements. However, the scope of the proposed obligations will also generally not be manageable for SMEs, i.e. for companies with more than ten employees, that want to make use of an explicit environmental claim. This is true both for the requirements for the companies using the labels and for the operators of the labelling systems.

Although RAL is a long-established issuer of quality marks, it does not have the necessary structures and capacities to meet the proposed requirements. This is especially true for the large number of RAL Quality Associations that administer and award the marks. They generally have no or hardly any personnel of their own, but mostly voluntary personnel, and do not have the structures to meet the additional requirements of the Proposed Directive and to continuously monitor compliance. After all, according to the proposal, they must not only verify and prove compliance with the environmental requirements of the label, but also prove the compliance of the environmental labelling scheme with the Green Claims Directive, comply with the communication requirements and go through the verification of the assessment bodies. The same applies to the companies that belong to the RAL Quality Assurance Associations. In addition, the multitude of rules and their relationship to each other will not be easily manageable, so that external advice will be needed (see section 5).

In its impact assessment on the Proposed Directive, the European Commission also recognised that the impact of the proposed requirements on smaller companies is likely to be higher than the impact on larger companies. The cost of substantiating an environmental claim for example could amount to

EUR 500 or EUR 54,000, depending on the complexity.¹¹ Therefore, according to the European Commission, microenterprises should be excluded from the scope of application. The impact on SMEs is proposed to be mitigated by requiring Member States to take appropriate measures to help SMEs in applying the requirements.¹² According to this, the measures shall at least include guidelines or similar mechanisms to raise awareness of ways to comply with the requirements on explicit environmental claims. In addition, they **may** include financial support, access to finance, specialised training and organisational and technical assistance.

In doing so, the European Commission has **not sufficiently addressed the threatening effects for SMEs**. The Member States have discretion in the implementation of assistance measures. Merely publishing guidelines or similar mechanisms is a minimum requirement for Member States. Thus, there is no guarantee that SMEs will receive sufficient support. Discretion will also lead to inconsistent implementation across Member States, which is contrary to the objective of harmonisation. In addition, SMEs in Member States that provide support will be given an advantage over SMEs in those Member States that have not implemented such support. This will further increase the already existing economic imbalance between Member States. Finally, the use of support also means additional effort, since, for example, requests have to be submitted and trainings have to be attended. In any case, the implementation will ultimately be up to the companies.

It is therefore to be expected that SMEs will decide not to use environmental labels and environmental claims because they cannot bear the costs. Then, however, there is no longer any incentive for them to comply with the criteria of these labels and to contribute to environmental protection that goes beyond the legal minimum. Instead of advancing the goals of climate neutrality and green transition, the Directive would ultimately counteract them.

5. No significant added value compared to the proposal for a Directive on empowering consumers for the green transition

a. Essential provisions of the proposed Directive on empowering consumers for the green transition

On 30 March 2022, the European Commission published the proposal for a Directive on empowering consumers for the green transition. This proposal already contains **requirements for environmental claims** and even a "blacklist" of **prohibitions in** this regard. Among other things, generic environmental claims are to constitute unfair commercial practices if the trader cannot provide evidence of the "recognised excellent environmental performance" to which the claim

¹¹ Cf. European Commission, Explanatory Memorandum to the Proposal for a Directive on substantiation and communication of explicit environmental claims, point 3.2.2
<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>>.

¹² Cf. Art. 12 Green Claims Directive.

refers. In addition, environmental claims about the entire product are prohibited if they actually concern only a certain aspect of the product.¹³

In addition, the proposed Directive on empowering consumers for the green transition also seeks to prohibit the use of a **sustainability label** that is not based on a **certification scheme** or established by public authorities.¹⁴ Sustainability labels include among other things environment-related claims. A certification scheme, as defined in the proposal, is a third-party verification scheme that is open under transparent, fair and non-discriminatory terms to all traders willing and able to comply with the scheme's requirements, which certifies that a product complies with certain requirements, and for which the monitoring of compliance is objective, based on international, Union or national standards and procedures and carried out by a party independent from both the scheme owner and the trader.¹⁵

b. Dispensability of additional provisions by the proposal of the Green Claims Directive

The **proposal of the Green Claims Directive** is intended to **complement** last year's proposal for a Directive on empowering consumers for the green transition. According to the European Commission, in particular provisions on explicit environmental claims in relation to substantiation, communication and verification are to be added. In case of conflict, these would prevail.¹⁶

However, RAL believes that these **additions are not necessary**. The aim of the Green Claims Directive is to counteract greenwashing and misleading environmental claims. However, misleading commercial practices are already prohibited under Directive 2005/29/EC concerning unfair commercial practices.¹⁷ The proposed Directive on empowering consumers for the green transition clarifies that consumers must also not be misled with regard to the environmental impact of a product.¹⁸

There is also no need for further requirements on the substantiation and communication of environmental labels or on environmental labelling schemes. Already under the proposed Directive on empowering consumers for the green transition, making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system is to be prohibited.¹⁹ The same applies in the case of a comparison of products to the withholding of information on the method of comparison, the

¹³ Cf. para. 2 of the Annex to the Directive on empowering consumers for the green transition and Art. 5(1) and (5) Directive 2005/29/EC concerning unfair commercial practices.

¹⁴ Cf. para. 1 of the Annex to the Directive on empowering consumers for the green transition.

¹⁵ Cf. Art. 1(1)(s) Directive on empowering consumers for the green transition.

¹⁶ Cf. recital 14 Green Claims Directive.

¹⁷ Cf. Art. 5(4)(a), Art. 6 Directive 2005/29/EC concerning unfair commercial practices.

¹⁸ Cf. Art. 1(2)(a) Directive on empowering consumers for the green transition.

¹⁹ Cf. Art. 1(2)(b) Directive on empowering consumers for the green transition.

products concerned and the suppliers of these products, as well as the measures in place to keep the information up to date.²⁰

Moreover, the definition of "certification scheme" in the proposed Directive on empowering consumers for the green transition already includes several requirements, including on transparency and third-party verification. It is not clear why further requirements on environmental labelling schemes and verification should be necessary when the proposal of the Green Claims Directive also refers to the definition of certification scheme in the Directive on empowering consumers for the green transition.

Consequently, further provisions, which ultimately always express the same (namely that misleading environmental claims are prohibited or inadmissible), are not necessary and would only make the already barely comprehensible jungle of regulations even more complex. It is not without reason that overregulation in the EU is currently being criticised. The doubling of provisions also obviously contradicts the goals of the EU's Better Regulation agenda ("*Making EU laws simpler and better, and avoiding unnecessary burdens*").

6. Contradiction with certification marks and the use of quality marks as evidence of compliance in public procurement procedures

In case the European Commission should nevertheless hold on to the proposal of the Green Claims Directive and the additional requirements for explicit environmental claims and environmental labelling schemes, at least a contradiction with already existing provisions of Union law would have to be avoided. This is also true for the provisions of Union law on certification marks and the use of quality marks as evidence in public procurement procedures, which contain less stringent requirements on monitoring than both the proposed Directive on empowering consumers for the green transition and the Green Claims Directive. If the European Commission's proposed amendments were to be implemented, the use of certification marks or quality marks would be classified as unfair and/or in breach of the Green Claims Directive, even though they comply with the requirements of the existing provisions.

Requirements for certification marks and quality marks differ from the requirements for sustainability and environmental labels.

a. Requirements with regard to labels pursuant to Directive 2014/24/EU on Public Procurement

Pursuant to Directive 2014/24/EU on public procurement²¹, public contracting authorities are in principle entitled to stipulate technical specifications for desired services.²² Furthermore, public contracting authorities are also entitled to demand the furnishing of appropriate evidence of the

²⁰ Cf. Art. 1(3) Directive on empowering consumers for the green transition in conjunction with Art. 7(1) Directive 2005/29/EC concerning unfair commercial practices.

²¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

²² Art. 42(1) and (3) of Directive 2014/24/EU; an identical provision is contained in Art. 60 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (the "Utilities Directive"), OJ 2014 L 94/243.

satisfaction of the applicable criteria for the award of the contract in question or the conditions for its execution. A contracting authority may require quality marks, conformity assessments or ecolabels by way of such evidence.

A "label" within the meaning of Directive 2014/24/EU is "any [...] attestation confirming that the works, products, services, processes or procedures in question meet certain requirements".²³ The first subparagraph of Art. 43(1) of Directive 2014/24/EU defines the requirements which must be met by a label in order to enable a contracting authority to require it by way of evidence of compliance:

- "a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;*
- b) the label requirements are based on objectively verifiable and non-discriminatory criteria;*
- c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;*
- d) the labels are accessible to all interested parties;*
- e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence."*

The requirements in the proposed Directive on empowering consumers for the green transition and the Green Claims Directive go beyond those for quality marks under Directive 2014/24/EU. While the first part of the **definition of the certification scheme** (pursuant to the proposed amendment to Art. 2(s) of Directive 2005/29/EC) is largely in line with the requirements with regard to quality marks pursuant to the first subparagraph of Art. 43(1) of Directive 2014/24/EU, the second part of the definition comprises **more extensive requirements with regard to monitoring**. The Green Claims Directive not only refers to the definition of the certification scheme, but even sets additional requirements in the form of verification by accredited independent conformity assessment bodies.

b. Requirements with regard to the EU certification mark pursuant to Regulation (EU) 2017/1001

Regulation (EU) 2017/1001²⁴ created the possibility of applying for a certification mark for goods or services which the owner of the mark **certifies as possessing certain characteristics** – in particular, as regards their material composition, manner of manufacture, quality or specificity. The regulations governing use must specify the persons authorised to use the mark, the characteristics to be certified by the mark, how the certifying body is to test those characteristics and to supervise

²³ Art. 2(1)(23) of Directive 2014/24/EU.

²⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ 2017 L 154/1.

the use of the mark.²⁵ The regulations shall also specify the conditions of use of the mark, including any sanctions.²⁶

Fourteen RAL Quality Marks had already been registered as EU certification marks as of 30 April 2023 and thus satisfy the requirements imposed by Regulation (EU) 2017/1001.

Regulation (EU) 2017/1001 does not – in contrast to the Proposed Directives – require that the compliance with the certified characteristics be verified by independent third parties. Art. 83(2) of Regulation (EU) 2017/1001 merely stipulates that an owner of a certification mark may not carry on a business involving the supply of goods or services of the kind certified. The reason for this as stated in Part B, Section 4 of the Trade mark and Design Guidelines²⁷ is that the owner of the certification mark must be independent:

"The reasons are that it would not make much sense that the proprietor certifies its own goods and services; a certifier should be neutral with respect to the business interests of the producers of the goods and the suppliers of the services it certifies. That "duty of neutrality" has to be understood broadly: the proprietor must not have any economic (business) interest on the relevant market. This is, in particular, not fulfilled where the producer of the goods or the supplier of the services to be certified, although formally distinct from the owner of the certification mark, is economically linked to the latter [...]."

However, it is not required that the compliance with the certified characteristics be monitored by a third party who is distinct from the owner of the certification mark. It is clear from Part B, Section 2, 8.3.3.1 of the Trademark and Design Guidelines that **third-party verification is optional**:

"The articles of association shall describe the examination procedures and the system of supervision which the applicant/proprietor of the certification mark applies in order to ensure that the goods or services actually possess the warranted characteristics.

The applicant/holder does not necessarily have to carry out the tests or the checks of the conditions of use himself. In some cases, cooperation with more specialised external examiners and/or monitors may be necessary. Similarly, the examination of the goods and services bearing the trade mark and the monitoring of the conditions of use may be limited to random or sporadic checks and need not extend to the totality of the goods covered by the warranty or to all users.

However, the applicant shall describe both measures (examination and monitoring) with sufficient clarity to convince the Office, as well as market participants, that these measures are appropriate to ensure that the certification mark actually covers goods and services for which there is an effective warranty. The measures may take into account the methods and frequency

²⁵ Clause 1 of Art. 84(2) Regulation (EU) 2017/1001.

²⁶ Clause 2 of Art. 84(2) Regulation (EU) 2017/1001.

²⁷ European Union Intellectual Property Office - EUIPO, Guidelines for Examination in the Office, version 1.0 31/03/202, Part B Examination, Section 4 Absolute grounds for refusal.

of examination and surveillance, the qualifications of the persons carrying out the examinations and controls, and the factors triggering additional or increased examination or surveillance measures."

Thus, pursuant to Regulation (EU) 2017/1001 – in contrast to the situation pursuant to the Proposed Directives – a characteristic will be deemed to have been certified even where its compliance is monitored by the owner of the mark. There is no requirement that such monitoring be undertaken on the basis of any standards. The monitoring requirements of the Proposed Directives therefore exceed those contained in Regulation (EU) 2017/1001 without any objective grounds for this divergence being apparent.

c. **Implications for the requirements with regard to environmental labels**

The EU legislator was of the opinion, with regard to these existing provisions, that the requirements in question were sufficient to ensure the trustworthiness of quality marks and certification marks. In the context of the incorporation of certification marks into German law, emphasis was placed on the fact that a certification mark constitutes an **indication from an independent party (the owner of the mark) of the existence of certified product characteristics:**

*"The main attributes of certification marks are transparency, neutrality and monitoring by the owner. The first attribute means that the conditions of use for the certification mark are to be disclosed in the regulations governing its use, which must be available to the public. There must be the greatest possible degree of transparency for users and third parties as to the ifs and the hows of the certification mark in order to ensure that the conditions for the award of the mark and the product and quality characteristics it certifies are evident. The principle of neutrality means that the owner of the mark may not conduct any business which comprises the provision of certified products. [...] The public views certification marks as an indication from an independent party of the existence of certified product characteristics. A substantive separation of the owner and the user of the mark is therefore necessary. Unlike in the case of collective marks, the owner of a certification mark does not itself/himself have any interest in the economic success of the certified product; rather, his/its interest lies in securing the compliance of the licensee with the conditions stipulated by him/it in the regulations of use. The final attribute comprises monitoring obligations: The owner of the mark is obligated to verify the certified characteristics as laid down in the certification regulations upon the granting of the license and to monitor the use of the mark by the user. Should the owner of the mark fail to discharge these monitoring obligations as laid down in the regulations, the mark may ultimately be declared to have been forfeited."*²⁸

²⁸ Draft Bill of the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz), Draft Act Implementing Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks – German Trademark Law Modernisation Act (Markenrechtsmodernisierungsgesetz – MaMoG), p. 93.

The Consumer Policy Report 2020 of the German Federal Government also emphasises (on p. 32) the **function of certification marks as form of guarantee**:

"Consumers need greater transparency as regards the impact of their consumption on mankind and the environment. In light of this development, they increasingly rely on credible quality labels as guides in their decision-making. The certification mark newly introduced in Germany upon the coming into force on 14 January 2019 of the German Trademark Law Modernisation Act (Markenrechtsmodernisierungsgesetz) acknowledges this need. In contrast to conventional individual and collective marks, the certification mark does not place the spotlight on the attribution of a product to a particular company (indication-of-origin function). It is rather the case that the owner of a certification mark guarantees the possession by certain goods and services for which the mark has been registered of one or more characteristics (guarantee-giving function), e.g. a particular material composition, the sustainable and resource-saving manufacture of goods or fair production conditions in line with particular safety standards. The certification mark as a whole embodies the principles of neutrality, transparency and supervision, and as such constitutes a suitable means of assisting consumers in their commercial transactions and providing them with reliable information on the characteristics of goods and services. At the European level, resort may be had to the EU certification mark, which enables the conferral of corresponding protection within the European Union as a whole."

The underlying objective of the Commission's Proposed Directives, namely **to ensure the provision of reliable information on product characteristics for consumers**, is therefore already attained by means of certification marks, a prerequisite for the registration of which is verification of whether the mark in question is misleading in terms of what it signifies. A material question in this context is whether the actual mark indicates a quality that contradicts the quality standard that is to be associated with the mark.²⁹ It is therefore unclear why stricter requirements should apply in the case of sustainability and environmental labels.

Should the Proposed Directive be adopted without any amendments, this would give rise to evident **evaluative contradictions**: The use of quality marks which – as in the case of RAL Quality Marks – are deemed to constitute suitable evidence of compliance in accordance with the requirements imposed by Directive 2014/24/EU or are registered certification marks in line with Regulation (EU) 2017/1001 would constitute an "unfair commercial practice" and be in breach of the Green Claims Directive. Certification marks would be rendered useless or would have to be adjusted in line with the stricter requirements of the Proposed Directives. It is therefore quite apparent that both the proposal of the Directive on empowering consumers for the green transition and the proposal of the Green Claims Directive are inconsistent with other provisions of EU law. It would effectively invalidate provisions of EU law only introduced a few years ago.

²⁹ European Union Intellectual Property Office - EUIPO, Guidelines for Examination in the Office, version 1.0 31/03/202, Part B Examination, Section 4 Absolute grounds for refusal, 5.1.

RAL is therefore of the opinion that the requirements in the Proposed Directives for sustainability and environmental labels should be aligned with the criteria applicable to quality marks and certification marks contained in Directive 2014/24/EU and Regulation (EU) 2017/1001, in order to ensure that they provide for permissible sustainability and environmental labels.

At least with regard to the Directive on empowering consumers for the green transition, the Council agrees with this view. The Council's negotiating mandate for the Proposed Directive provides for an exception for certification marks with regard to unfair commercial practices:

*"Displaying a sustainability label which is ~~not~~ neither based on a certification scheme nor registered as a certification mark in accordance with Regulation (EU) No 2017/1001 or Directive (EU) 2015/2436, ~~or not~~ nor established by public authorities."*³⁰

RAL welcomes the Council's proposed amendment. The Union legislator should follow it not only with regard to the Directive on empowering consumers for the green transition, but also with regard to the Green Claims Directive. This would avoid contradictions between the two new Directives and Regulation (EU) 2017/1001.

7. Third-party verification

The proposed Green Claims Directive requires third-party verification of compliance with the requirements multiple times. *First*, the proposal refers to the definition of **certification scheme** as proposed by the European Commission in the Directive on empowering consumers for the green transition.³¹ According to this, verification of compliance with the scheme's criteria must be carried out by a party that is **independent of the scheme owner and the trader**.³²

Second, the proposed Green Claims Directive requires verification of compliance with the requirements for environmental claims, environmental labels and environmentally labelling schemes by an **independent conformity assessment body accredited** in accordance with Regulation (EC) No 765/2008.³³ Consequently, the proposal for the Green Claims Directive is even stricter than the proposal for the Directive on empowering consumers for the green transition.

It is thus clear that self-monitoring by the trader (label user) is not sufficient. However, RAL is of the opinion that an independent and impartial monitoring can also be ensured if **internal bodies of the system owner** (label issuer) are involved. To this end, in particular the traders concerned should be excluded from decisions relating to their products.

³⁰ Council of the European Union, Brussels 3 May 2023 - 9008/23, Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information - Mandate for negotiations with the European Parliament <<https://data.consilium.europa.eu/doc/document/ST-9008-2023-INIT/en/pdf>>.

³¹ Cf. Art. 2(10) Green Claims Directive.

³² Cf. Art. 1(1)(s) Directive on empowering consumers for the green transition.

³³ Cf. Art. 10(1) to (2) and Art. 11(1) Green Claims Directive.

Furthermore, as already explained in detail in an earlier statement on the Directive on empowering consumers for the green transition, RAL also opposes the other requirements for a certification system (see [here](#), point 2.a).

8. Clarification needed

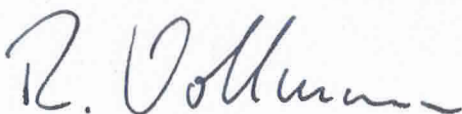
In addition to the already outlined shortcomings of the Proposed Directive, RAL believes that several aspects in the proposed Green Claims Directive need **clarification**.

This applies in particular to **existing private environmental labelling schemes**. New private environmental labelling schemes require approval after the transposition of the Directive. It is unclear whether the requirements for environmental labelling schemes proposed in Art. 8(2) of the Green Claims Directive also apply to private environmental labelling schemes already existing before the date of transposition of the Directive. In contrast to schemes established by public authorities (see Art. 8(3)), the Directive contains no explicit provision with regard to already existing private schemes. The approval requirement under Art. 8(5) of the proposal only applies to new environmental labelling schemes. It is unclear whether existing schemes are only not subject to approval, but still have to comply with the requirements under Art. 8(2), or are exempt from these requirements altogether.

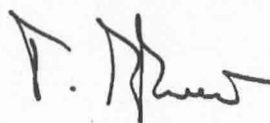
Furthermore, it is unclear how an **existing environmental labelling scheme** is to be **distinguished from a new one**. The proposal of the Green Claims Directive does not define when an environmental label qualifies as "new". This could mean that the system as such must not have existed before. However, it is also conceivable that already new criteria for awarding an existing environmental label (e.g. in relation to other products or new technologies/materials) are sufficient to classify a scheme as "new". This interpretation would lead to label owners refraining from modernising existing schemes by setting new award criteria in order to avoid losing their protection of the status quo (*legacy*).

The answers to these questions directly determine the scope of the requirements that environmental labelling schemes must comply with. Consequently, in order to create legal certainty for the owners and users of the schemes, clarification is needed.

Bonn, 12th of July



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