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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 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

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 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 (hereinafter referred to as the “Proposed Directive”). RAL hereby issues a statement in response thereto, both in its own name and also in its capacity as the umbrella association for the 113 RAL Quality Assurance Associations (*Gütegemeinschaften*) comprising more than 9,000 member companies.

As will be explained in more detail in the following, RAL has some considerable concerns with regard to the proposal as it currently stands and therefore sees an urgent need for a number of amendments to the text.

- **RAL supports the Proposed Directive’s objective** of ensuring that consumers receive reliable information and greater protection against unfair business practices. To this end, it is indeed essential to prevent “greenwashing” and the use of unreliable and non-transparent sustainability labels (*Nachhaltigkeitssiegel*) and information.
- However, the amendments envisaged by the Proposed Directive will considerably restrict the **self-regulation of the economy** in the area of voluntary labelling. They endanger the fulfilment of 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 1 in this regard). There are therefore reasonable grounds for concern that the Proposed Directive will have the effect of destroying important self-regulating elements of, and thus of permanently impairing the drive for innovation in, the German economy. We assume that this will also be the case for comparable systems in other Member States. This would be in conflict with the Directive’s objective of not only protecting and empowering consumers but also of strengthening the green economy, in particular.

- Pursuant to the Proposed Directive, only **sustainability labels in the form of private quality marks (*Gütezeichen*)** which are based on a “certification scheme” within the meaning of the Proposed Directive will be permissible. This will entail, among other things, mandatory monitoring of such labelling on the basis of standards that is not carried out by the scheme owners themselves. These requirements will exclude established systems which are not based on such standards, but which also use objective, non-discriminatory procedures to monitor compliance with product-related requirements. In addition, the Proposed Directive will render any schemes whose providers are engaged in such monitoring (in addition to external auditors or audit bodies) impermissible, even though impartial monitoring would also be ensured in this case.
- The requirements with regard to sustainability labels also **contradict with the provisions of European 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 amendments proposed by the European Commission to be implemented, the use of quality or certification marks would be deemed to be an unfair commercial practice, even though these satisfy the requirements imposed by the provisions (see section 2.c in this regard).
- Furthermore, **generic environmental claims** will be prohibited where recognised excellent environmental performance is not demonstrated by means of specific instruments provided for by European Union law. The provisions here are unclear. Moreover, it is not clear why such evidence may only be furnished by means of specific instruments (see section 3 in this regard).
- **Environmental claims about the entire product** which in fact only relate to a certain aspect of the product will likewise be prohibited. While this provision is justified in principle, it will give rise to inconsistency with regard to sustainability labels, given that many of these also concern the entire product in question (see section 4 in this regard).
- RAL is therefore advocating for **amendments to the Proposed Directive** permitting the continued use of established and reliable private quality marks in line with European Union law as a whole. In addition, some clarifications are called for (see section 5 in this regard).

We are happy to contribute our expertise on this matter and kindly ask that we once again be permitted to participate in the further course of the legislative process.

In detail:

1. Self-regulation by the economy and the role played by RAL

a. Positive impact of self-regulation

The EU has established the positive impact of self-regulation. The “Better regulation toolbox 2021” (Section 3.1) of the European Commission 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.”

Private quality marks provide one example of successful self-regulation. This is also 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 self-regulation by the economy, as companies have an interest in being able to reliably demonstrate the environmental characteristics. Any circumvention by them of the requirements in this regard 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 deploy unreliable means of verifying environmental characteristics. The economy is therefore effectively self-regulating in this regard.



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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 Basic Law of Germany (Grundgesetz – GG), or in an overarching sense in the form of a political party, in the decision-making process”* (cf. German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), judgment of 12/07/2017 – 1 BvR 2222/12 and 1 BvR 1106/13, para. 95).

b. RAL Quality Assurance

The RAL Quality Assurance System has traditionally been an **important element of the self-governance** by the economy. 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. For this purpose, the relevant economic players – under the auspices of RAL – channel their technical expertise into RAL rules and standards (RAL Quality Assurance), which they then voluntarily undertake to apply and observe, with non-compliance potentially resulting in the imposition of sanctions.

There are currently 113 different RAL Quality Assurance Associations with 148 different RAL Quality Marks and approximately 9,000 members. 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 standards 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

auditors or audit bodies to evaluate the products in question on the basis of the applicable requirements. These comprise the following (last updated: 2018/2019 cycle):

–	DAkkS ¹ -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.

c. **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 ultimately more sustainable as a result.

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

- RAL-GZ 276, Carbon-offset energy products
- RAL-GZ 435, Climate-neutral furniture manufacture

¹ 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.

- RAL-GZ 425, CO₂ emission-reducing wooden structures

In other cases, compliance with ecological requirements is one of many aspects and as such not the central focus. This is the case for the following Quality Marks, by way of example:

- Quality Marks in the RAL-GZ 430, Furniture series: The award of Quality Marks under this collective mark is contingent upon a comprehensive examination of the items of furniture in question. These must comply with requirements with regard to not only environmental aspects but also quality and material composition.
- RAL-GZ 388, Mineral wool products: This Quality Mark requires the satisfaction of, among other things, requirements with regard to the low level of harmful substances which go beyond those by law.
- RAL-GZ 041, Candles: This Quality Mark requires the satisfaction of, among other things, requirements with regard to the low level of harmful substances which go beyond those imposed by law.
- RAL-GZ 720, % of Recycled Plastics: The Quality Criteria stipulate the seamless traceability of origin of the plastics at each stage along the process chain. This encompasses all process stages from sorting at LWP sorting facilities to processing to the use of the recycled materials in the end product.

2. Prohibition of sustainability labels

a. Restrictive requirements for certification schemes regarding sustainability labels

The Proposed Directive as put forward by the European Commission limits systems of self-regulation such as that of RAL. In particular, pursuant to Section 2a of Annex I of Directive 2005/29/EC, a **sustainability label in the form of a private quality mark** will in the future be permissible only where it is based on a certification scheme.

According to the proposed amendment to Art. 2(s) of Directive 2005/29/EC, a **certification scheme** 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”.

Pursuant hereto, monitoring should be undertaken (i.) in an objective manner, (ii.) on the basis of international, European Union or national standards or procedures, and (iii.) by an independent third party. It is undisputed that compliance with the applicable requirements should be monitored in an objective and impartial manner. This is indeed a central prerequisite for ensuring the compliance with the requirements and thus justifying the trust placed in quality marks and sustainability labels.

However, the criteria contained in the foregoing definition with regard to this monitoring will have the effect of excluding private quality marks where the monitoring is not carried out **on the basis of international, European Union or national standards or procedures**. This may be taken to refer to standards within the meaning of Art. 2(1) of Regulation (EU) No 1025/2012², i.e. standards established by international, European or national standard-setting organisations. However, it is not clear why the monitoring should be carried out on the basis of standards, with other appropriate procedures not coming under consideration even though they would also ensure an objective and impartial result. Moreover, it is questionable whether this reference to standards should be seen as legally binding, given that, according to the more recent case law of the Court of Justice of the European Union (CJEU), individuals may be required to observe only those standards which are available to them free of charge.³ However, gratuitous access to standards is more often than not the exception rather than the rule.

Furthermore, pursuant to the foregoing definition, the monitoring must be undertaken by a “*party independent from both the scheme owner and the trader*”. It is therefore clear that self-monitoring by the trader (the user of the mark) will be deemed to be insufficient. However, it remains unclear whether monitoring systems will satisfy these requirements where – as is the case for the RAL Quality Assurance Associations – the scheme owners are involved in the monitoring process in that they commission the external auditors or audit bodies and draw conclusions on the basis of the latter’s findings. RAL is of the opinion that an independent and

² Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ 2012 L 316/12.

³ CJEU, judgment of 22 February 2022, C-160/20, ECLI:EU:C:2022:101, para. 52, 73 – Stichting Rookpreventie Jeugd et al. (see in this regard *Wagner*, EuZW 2022, 289 et seq.).

impartial verification can be ensured even in the case of the **involvement of internal departments of the scheme owner**. To this end, the traders in question, in particular, should be excluded from any decisions made with regard to their products.

The strict requirements for private sustainability labels furthermore contradict with other provisions which relate to the requirements applicable to quality marks (see section 2.c in this regard). These do not stipulate that monitoring must be undertaken on the basis of standards or entirely by individuals outside of the scheme owner's organisation.

We therefore suggest that the definition of the term "certification scheme" be broadened and clarified (see section 5 in this regard). RAL considers this to be a decisive element in preventing a de facto prohibition of private sustainability labels.

b. Unclear definition of "sustainability label"

In addition, the definition of "sustainability label" is unclear. According to the Proposed Directive, it is to be defined in Art. 2(r) of Directive 2005/29/EU as *"any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business with reference to its environmental or social aspects or both"*. According to this definition, the placing of emphasis on or **promotion of ecological and/or social aspects** is therefore essential for classification as a sustainability label. It is not however clear whether the label/quality mark must have the promotion of ecological or social aspects as its primary objective, or whether it is sufficient for this to be one of several objectives.

This issue is of considerable significance in practical terms, given that sustainability constitutes (merely) one of many criteria in the case of numerous quality marks and labels. Should the term "sustainability label" and thus the scope of application of Section 2a of Annex I to Directive 2005/29/EC remain unclear, this will give rise to **considerable legal uncertainty** on the part of the scheme owner and the user of the mark in question **as to whether the use of a label will be deemed to be an unfair commercial practice**. We therefore advocate for the clarification of the term "sustainability label" (see section 5 in this regard).

c. Contradiction with other provisions of European Union law with regard to quality marks and certification marks

Provisions of European Union law, which are already in force, impose requirements with regard to quality marks and certification marks which diverge from those with regard to sustainability labels.

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

Pursuant to Directive 2014/24/EU on public procurement⁴, public contracting authorities are in principle entitled to stipulate technical specifications for desired services.⁵ Furthermore, public contracting authorities are also entitled to demand the furnishing of appropriate evidence of the 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*”.⁶ 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;*

⁴ 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.

⁵ Art. 42(1) and (3) of Directive 2014/24/EU; an identical provision is contained 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.

⁶ Art. 2(1)(23) of Directive 2014/24/EU.

- 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 with regard to sustainability labels contained in the Proposed Directive go beyond those applicable to quality marks pursuant to 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**.

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

Regulation (EU) 2017/1001⁷ enables the registration of 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 the use of the mark.⁸ The regulations must also specify the conditions of use of the mark, including any sanctions.⁹

Fifteen RAL Quality Marks had already been registered as EU certification marks as of 31 December 2021 and thus satisfy the requirements imposed by Regulation (EU) 2017/1001.

Regulation (EU) 2017/1001 does not – in contrast to the Proposed Directive – 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

⁷ 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.

⁸ Clause 1 of Art. 84(2) of Regulation (EU) 2017/1001.

⁹ Clause 2 of Art. 84(2) of Regulation (EU) 2017/1001.

carry on a business involving the supply of goods or services of the kind certified. The reason for this as stated in Section 4 of the Trade mark and Design Guidelines¹⁰ 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 Section 2, 8.3.3.1 of the Trademark and Design Guidelines¹¹ that **third-party verification is optional**:

“The regulations of use must include the testing methods of the characteristics being certified and the supervision system of the use of the mark by the owner of the certification mark. The testing methods and supervision, which must be clearly set out in the regulations of use, must be real and effective and are the responsibility of the owner of the certification mark

The applicant/owner does not necessarily need to carry out the tests or supervise the conditions of use itself. In some cases, it might be necessary to cooperate with more specialised external testers and/or supervisors. However, the testing methods and supervision can never be transferred to the authorised user of the mark through a self-monitoring programme as this would not guarantee the correct functioning of the certification mark system.

¹⁰ European Union Intellectual Property Office – EUIPO, Trade mark and Design Guidelines, Part B, Examination, Absolute Grounds for Refusal – European Union Certification Marks, edition 2022, Section 4.

¹¹ European Union Intellectual Property Office – EUIPO, Trade mark and Design Guidelines, Part B, Examination, Formalities – Kind of Mark, edition 2022, Section 8.3.3.1.

The measures can relate to the methods, sampling and frequency of the testing and supervision, the qualification of the persons carrying out the tests and the supervision, and the 'triggers' for additional or enhanced tests or supervision measures."

Thus, pursuant to Regulation (EU) 2017/1001 – in contrast to the situation pursuant to the Proposed Directive – 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 imposed by the Proposed Directive mentioned in the foregoing (in section 2.a.) therefore exceed those contained in Regulation (EU) 2017/1001 without any objective grounds for this divergence being apparent.

cc. Implications for the requirements with regard to sustainability labels

The EU legislature was of the opinion with regard to these 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.”¹²

The Consumer Policy Report of the German Federal Government also emphasises (on p. 23) the **function of certification marks as a 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 Directive, namely **to ensure the provision of reliable information on product characteristics to 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

¹² 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 subject of the quality standard as stated in the regulations governing use.¹³ It is therefore unclear why stricter requirements should apply in the case of sustainability labels as a means of guarding against unfair commercial practices.

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 the 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 as certification marks in line with Regulation (EU) 2017/1001 would constitute an “unfair commercial practice” pursuant to the Proposed Directive. Certification marks would be rendered useless, or would have to be adjusted in line with the more stringent requirements of the Proposed Directive, as a result. It is therefore quite apparent that the Proposed Directive is not consistent with other provisions of EU law; it would effectively invalidate provisions of EU law only introduced a few years ago.

RAL is therefore of the opinion that the requirements with regard to sustainability labels contained in the Proposed Directive should be aligned with the criteria applicable to quality marks and certification marks contained in Directive 2014/24/EU and Regulation (EU) 2017/1001, as the case may be, in order to ensure that they provide for permissible sustainability labels. To this end, reference could be made to the requirements contained in the legal provisions in question (see section 5 in this regard).

d. Unequal treatment of public and private sustainability labels

Pursuant to the Proposed Directive, sustainability labels which are not based on a certification scheme or have not been established by public authorities will be deemed to be unfair in accordance with Section 2a of Annex I to Directive 2005/29/EC. Thus, only private sustainability labels will need to satisfy the aforementioned strict requirements with regard to certification schemes. In contrast, sustainability labels issued by public authorities will not be subject to any requirements with regard to monitoring pursuant to the Proposed Directive.

There are no discernible objective grounds for this unequal treatment of public and private sustainability labels. In particular, there can be no justification for such unequal treatment in the case of verifying labels – such as the RAL Quality Marks – which are awarded on the basis of generally recognised and long-standing systems of economic self-regulation. These systems of

¹³ European Union Intellectual Property Office – EUIPO, Trade mark and Design Guidelines, Part B, Examination, Absolute Grounds for Refusal – European Union Certification Marks, edition 2022), Section 5.1.

self-regulation will ultimately be forced to adapt themselves entirely in line with the requirements resulting from the definition of the term “certification scheme” or cease awarding quality marks. Public marks, on the other hand, may continue in effect without amendment, even though they do not offer any more extensive guarantee of compliance with the certified characteristics or of the absence of any misrepresentation vis-à-vis the consumer.

3. Prohibition of generic environmental claims

According to the Proposed Directive, Annex I to Directive 2005/29/EC is to be amended so as to prohibit the making of generic environmental claims in the absence of evidence of the recognised excellent environmental performance relevant to the claim. Such generic environmental claims will be prohibited where no evidence of recognised excellent environmental performance is furnished or the specification of the claim is not provided in clear and prominent terms on the same medium.

The requirements with regard to environmental claims are generally a welcome development; however, the wording as it currently stands is unclear and therefore in need of clarification:

a. Criteria for the application of the prohibition of generic environmental claims

Pursuant to the proposed amendment to Section 4a of Annex I to Directive 2005/29/EC, the making of a generic environmental claim “*for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim*” will be deemed to be an unfair commercial practice. The term “recognised excellent environmental performance” will in the future be defined in Art. 2(u) of Directive 2005/29/EC and will relate to environmental performance which is recognised on the basis of EU law. This may be understood as indicating that Section 4a of Annex I to Directive 2005/29/EC will preclude a trader from claiming such environmental performance where said trader is unable to furnish corresponding evidence within the meaning of the identified EU law. In contrast, the making of other generic environmental claims would be permissible.

However, Recital 9 of the Proposed Directive implies that all generic environmental claims will be prohibited, even those which do not relate to any “recognised excellent environmental performance” within the meaning of Art. 2(u) of Directive 2005/29/EC. If this is indeed the case, the definition of “recognised excellent environmental performance” should be broadened to encompass performance which can be demonstrated by other means (e.g. by way of quality marks or EU certification marks). This would in any case be called for were the exception for

sustainability labels to be provided for in the future wording of Art. 2(q) of Directive 2005/29/EC to relate solely to the claims comprised in the sustainability label itself and not to the characteristics the existence of which is likewise certified by the sustainability label (see sub-section b. in this regard).

b. Exception for sustainability labels

According to the Proposed Directive, the term “generic environmental claim” is in the future to be defined in Art. 2(q) of Directive 2005/29/EC 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*”. It is RAL’s understanding that this would in any case exclude environmental claims which are expressly contained in the sustainability label.

However, it is unclear whether this exception will also apply to claims which are linked to but are not expressly part of the sustainability label. Many sustainability labels themselves contain only very brief designations of an essential characteristic in the form of keywords on practical grounds (in particular, due to space constraints). They do, however, certify the existence of other environmentally relevant characteristics. RAL is of the opinion that it should also be permissible to make such environmental claims, which are certified by the corresponding sustainability label. Otherwise, the different rules governing the reliability of sustainability labels would to some extent lose relevance.

The definition contained in the future wording of Art. 2(q) of Directive 2005/29/EC should be amended with a view to clarifying the exception made for sustainability labels (see section 5 in this regard).

4. Prohibition of environmental claims about the entire product

Pursuant to the Proposed Directive, the list of misleading business practices in Annex I to Directive 2005/29/EC is to be amended to include environmental claims about an entire product where they actually only relate to one specific aspects of that product. This provision diverges from the definition of “generic environmental claims” in Art. 2(q) of Directive 2005/29/EC in that it does not comprise an exception for sustainability labels. However, given that sustainability labels are, on practical grounds, only able to contain an abbreviated description of the certified characteristics, they do not in many cases – at least not at first glance – distinguish individual aspects or parts of the product in question. A more detailed differentiation can be found in the requirements for the sustainability label.

The proposed wording for Section 4b of Annex I of Directive 2005/29/EC should therefore be amended to allow for an exception for sustainability labels (see section 5 in this regard). An amendment of the prohibition is necessary in the interests of consistency. Otherwise, sustainability labels would under certain conditions be permitted but the information on the sustainability labels would be prohibited.

5. Amendments proposed by RAL

For the aforementioned reasons, we hereby put forward the following proposals for amendment.

a. Definition of unfair commercial practices with reference to sustainability labels – proposed wording for Section 2a of Annex I to Directive 2005/29/EC

The prohibition of unfair commercial practices with reference to sustainability labels should be supplemented as follows:

“2a. Displaying a sustainability label which is not based on a label in accordance with the first subparagraph of Article 43(1)(b) to (e) of Directive 2014/24/EU, a certification mark in accordance with Article 84 of Regulation (EU) No 2017/1001 or some other certification scheme or not established by public authorities.”

c. Definition of the term “sustainability label” – proposed wording for Art. 2(r) of Directive 2005/29/EC

The definition of the term “sustainability label” should be supplemented as follows:

“r) “sustainability label” means any voluntary trust mark, quality mark or equivalent, either public or private, that is predominantly implemented with the aims to set apart and promote a product, a process or a business with reference to its environmental or social aspects or both. This does not cover any mandatory label required in accordance with Union or national law;”

c. Definition of the term “certification scheme” – proposed wording for Art. 2(s) of Directive 2005/29/EC

The definition of the term “certification scheme” should be supplemented as follows:

“s) “certification scheme” means 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 objective, transparent and non-discriminatory procedures, for example on international, Union or national standards, ~~and procedures~~ and *impartially* carried out by a party independent from ~~both the scheme owner and~~ the trader;"*

d. Definition of the term "recognised excellent environmental performance" – proposed wording for Art. 2(u) of Directive 2005/29/EC

The definition of the term "recognised excellent environmental performance" should be supplemented as follows:

"u) "recognised excellent environmental performance" means environmental performance compliant with Regulation (EC) 66/2010 of the European Parliament and of the Council, with national or regional EN ISO 14024 type I ecolabelling schemes officially recognised in accordance with Article 11 of Regulation (EC) 66/2010, or top environmental performance in accordance with other applicable Union law, a label in accordance with Article 43(1)(b) to (e) of Directive 2014/24/EU or a certification mark in accordance with Article 84 of Regulation (EU) No2017/1001;"*

e. Definition of the term "generic environmental claim" – proposed wording for Art. 2(q) of Directive 2005/29/EC

The definition of the term "generic environmental claim" should be supplemented as follows:

"q) "generic environmental claim" means any explicit environmental claim, not contained in or certified by a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium;"

f. Definition of unfair commercial practices with reference to environmental claims about the entire product – proposed wording for Section 4b of Annex I to Directive 2005/29/EC

The prohibition of unfair commercial practices with reference to environmental claims about the entire product should be supplemented as follows:

"4b. Making an environmental claim about the entire product that is not contained in a sustainability label when it actually concerns only a certain aspect of the product."