

Reaction of ACM to the consultation of the European Commission's legislative initiative 'Empowering consumers for the Green Transition'

ACM welcomes the initiative of the European Commission to reconsider EU consumer law to enhance preconditions for consumers to play an active role in the green transition. In its role as a national authority charged with the enforcement of consumer-protection legislation, ACM has identified a number of issues that are relevant for inclusion in the reconsideration. This paper reflects upon these issues.

ACM realizes that consumer protection legislation and a possible 'refit' are part of a broader Circular Economy Action Plan.¹ The observations and reflections in this paper focus specifically on the initiative regarding the refit of consumer-protection legislation.

Problem: lack of information & misleading practices

Consumers are increasingly focused on sustainability as a factor in their purchasing behavior.² Almost 60% of consumers prefer to buy a product with an environmental label.³ However, consumers often do not have any confidence in sustainability claims, and it is difficult for them to verify what products are truly environmentally friendly.⁴ 61% of consumers state that they find it difficult to understand what products are truly environmentally friendly, and 44% of consumers say that they do not trust environmental information displayed on products and in advertisements.⁵ Consumers are also increasingly overwhelmed by the proliferation of sustainability logos alluding to environmental virtues, which are difficult to interpret or to verify.⁶

ACM recognizes⁷ the issues and practices obstructing the enhancement of consumer participation in the circular economy, as identified by the European Commission in its Inception Impact Assessment and the Circular Economy Action plan:

- a. Consumers often lack reliable and relevant information at the point of sale on: products' sustainability, the expected or guaranteed lifespan of a product; the availability of repair services, spare parts, and repair manuals; and software updates/upgrades.
- b. Consumers are confronted with vague, misleading or unfounded information on products' environmental characteristics ('greenwashing').

¹ The new EU Circular Economy Action Plan: <https://ec.europa.eu/environment/circular-economy/>

² For example: out of 58,757 consumers interviewed for the Sustainable Brand Index, 79% indicated that sustainability is a factor in making a purchasing decision. See: https://www.sndex.com/#sb_index_NL_download_official_report_2020.

³ [Consumer market study on environmental claims for non-food products](#) (2014), p. 21

⁴ [Consumer market study on environmental claims for non-food products](#) (2014).

⁵ [Consumer market study on environmental claims for non-food products](#) (2014), p 19 and 20.

⁶ See: <https://www.acm.nl/sites/default/files/documents/2020-07/acm-insight-2020.pdf>, last visited on 20 August 2020.

And ACM (2016), *Proliferation of certification labels hurts their credibility*, 7 January 2016.

⁷ Based on desk research, and on stakeholder and consumer information.

c. Consumers appear to be confronted with cases of early failure (goods are purposefully designed not to last as long as the average consumer may expect).

Possible solutions

Preliminary remarks

ACM sees a number of possible solutions for the identified issues. Enforcement experience regarding these issues is relatively scarce. Some of these solutions will have to be discussed and explored. ACM is looking forward to further discussing these topics ahead of the Commission's proposals.

The Commission initiative focuses on "green" information requirements and the prevention of "greenwashing". Transparency and information requirements (hereinafter 'transparency requirements') are an important building block of EU consumer law. They have their merits but it is important to acknowledge that they are not a panacea. What should be avoided is information overload,⁸ because this leads to a reduced quality of consumer decisions.⁹ It is therefore crucial that information requirements are meaningful, consistent and presented in such a way that they actually empower consumers.¹⁰ In its contributions to the DSA and Consumer agenda consultations, ACM has made three recommendations on transparency and information requirements. These recommendations are also relevant for the way forward with transparency requirements regarding sustainability aspects of products.

- **Incorporate insights from the behavioural sciences.** Insights about actual consumer behaviour, such as cognitive weaknesses and biases should be incorporated when transparency requirements are implemented in actual user interfaces. We recommend investing in research in this field.
- **A reverse onus clause for effective transparency.** The information position that providers of data-intensive information society services have and their technical capabilities could be used to increase the effectiveness of transparency requirements. One way of achieving this could be by shifting the burden of proof on the provider to show that requisite information disclosures are understood by consumers and taken into account when making decisions about transactions. Such a shift could make the effectiveness of transparency requirements towards consumers an integral part of providers' design process of their online interfaces.
- **Acknowledge limitations.** Insights from the behavioural sciences can expose the limitations of transparency requirements. If trade practices harm the economic interests of consumers

⁸ Malhotra, N. K. (1984). Reflections on the information overload paradigm in consumer decision making. *Journal of consumer research*, 10(4), 436-440.

⁹ Jacoby J (1977) Information load and decision quality: Some contested issues. *J. Marketing Res.* 14:569–573.

¹⁰ The OECD describes in a 2018 policy note how behavioural insights can be used to improve online disclosures. Measures like improving the visual presentation and timing of information can help increase the effectiveness of information that is provided to consumers to stimulate their participation in the circular economy. <https://www.oecd.org/sti/consumer/policy-note-improving-online-disclosures-behavioural-insights.pdf>.

irrespective of the information provided, setting boundaries with regard to such practices should be considered.

Apart from these general recommendations, ACM shares four reflections on how to make transparency requirements regarding sustainability meaningful and effective.

Develop standardized methodologies for the assessment and disclosure of environmental characteristics. Learn from good practices and allow for fine-tuning over time.

Environmental claims of traders must be verifiable by consumers and by enforcement authorities.

Standardized information about environmental, climate and social impact may help consumers make comparisons, and can help regulators monitor compliance. One option would be to require all traders to provide information about the environmental and social impact of their products and services in accordance with a standardized methodology like the Product Environmental Footprint.¹¹ Standardized criteria to measure and disclose expected lifespan and reparability of products would also be helpful. The French reparability index¹² provides a good example.

Methods for standardizing information requirements can be fine-tuned over time. For example, in the energy sector, a system of Guarantees of Origin is in place that provides information about the source of the electricity and direct CO₂ emissions. This is a good starting point, but more information could be provided to consumers about the CO₂ emissions throughout the production process. This is especially relevant for energy made from fossil fuels, where energy suppliers are technically able to give information about installation-specific CO₂ emissions. After all, a recently built natural-gas power plant has a far better performance than a plant that was built in the 1980s. The Netherlands therefore recently implemented a system of Full Disclosure. As a result, even the Certificates of Origin of energy produced from fossil sources are required to provide plant-specific information.

Providing standardized information about the climate/environmental impact of the production phase is also important for consumers in order to be able to make a critical assessment of “green products and services”. For example, biomass is currently labeled as renewable energy with no CO₂ emissions, while the CO₂ emissions of the shipment from Canada to the Netherlands are not considered in the label. By requiring companies to provide detailed information about the geographical and technological origin of the supplied electricity, consumers will be able to compare and choose the product that they want. For example, some consumers are willing to buy *Dutch* biomass but not *imported* biomass. Other consumers might have a preference for domestically-produced wind energy.

Prevent the proliferation of meaningless certification labels

Certification labels and logos can help consumers in their decision-making processes. They offer accessible insight into product characteristics that consumers cannot test themselves (for example about

¹¹ See: <https://ec.europa.eu/environment/eussd/smgp/> last visited on 20 August 2020

¹² See: <https://www.ecologie.gouv.fr/loi-anti-gaspillage#e13> last visited on 20 August 2020

sustainability), and they make it possible to compare different products. One prerequisite however is that the meaning that consumers attribute to such logos and labels is justified. Consumers should be informed about what the exact 'promise' of a logo or label is. ACM has therefore recently argued that setting stricter criteria for existing certifications labels would be helpful, and that the promotion of the creation of a standard sustainability label should be considered.¹³ However, this is not meant as yet another label next to the many labels already in place. Ideally, fewer logos and labels are used, the criteria for logos and labels are stricter, and consumers are able to recognise logos and labels, and rely on them. To that end, it could be useful to scale up the use of the EU Ecolabel.

Scaling down the proliferation of certification labels and further standardisation and (European) harmonisation of certification requirements is not only helpful to the consumer, but to producers and other parties in the value chain as well. Fewer and more meaningful labels lead to more clarity throughout markets.

Prohibit vague claims and shift the burden of proof for misleading environmental claims to businesses

ACM has announced that over the next 12 months, it will take a closer look at sustainability claims made by market participants as well as at certification labels in order to prevent consumers from being misled. Under national UCP legislation, ACM can and will take action against misleading offers. At the same time, from an enforcement perspective, it would be helpful if sustainability claims like “environmentally friendly”, “sustainable” or “green”, which are without any substance and which are not verifiable, were expressly prohibited.

One specific observation from an enforcement perspective relates to the burden of proof. Regulators must prove that a green claim is misleading. One problem here is that if a company uses a sustainability claim, the information about the substance of this claim may only be available to the company. Specific technical and environmental expertise might be required to be able to verify the misleading component of a claim. And when companies provide authorities with evidence to prove the veracity of claims, it is time-consuming for regulators to assess such evidence. ACM would find it helpful if the burden of proof was shifted (fully or partially) to the trader making the green claims.

Be mindful of the kind of proof required to build premature obsolescence cases

Another general but important observation is related to the burden of proof of actual premature obsolescence. Proving such unfair practices *might* require testing the design of products by an independent and qualified institution. In order to build strong cases on premature obsolescence, it can be recommended to establish a European certified testing facility that is able to assess whether products are designed to fail prematurely. Otherwise, authorities must rely on current investigation powers such as

¹³ See: <https://www.acm.nl/sites/default/files/documents/2020-07/acm-insight-2020.pdf>, last visited on 20 August 2020

information requests, dawn raids, and formal hearings. This could prove to be insufficient to build a solid case.