Position on the European Commission's proposal for a Directive on Substantiation and Communication of Explicit Environmental Claims ('Green Claims Directive') by the Confederation of Swedish Enterprise

This document represents the Confederation of Swedish Enterprise's ('Swedish Enterprise') position on the Green Claims Directive. Swedish Enterprise is Sweden's largest business federation, representing over 60,000 member companies in all sectors, with almost two million employees. We bring together 49 industry and employer organisations, and this position has been reached in close collaboration with our members.

Introductory Comments

Swedish Enterprise believes there is value in reducing the level of unsubstantiated, inaccurate or even false environmental claims that currently exist. The goal of these efforts is to help consumers make choices that are more sustainable and that prevent 'greenwashing'. The key purpose of any legislation in this area should be to encourage companies to develop products and services that are more environmentally sustainable, which can be communicated and marketed to consumers within clear and harmonised legal frameworks. Properly designed, such legislation could increase the competitiveness of the many Swedish companies and industries that can produce strong and valid evidence for their environmental claims. This would aid the transition towards a more sustainable and circular economy in Europe. However, Swedish Enterprise has identified several significant problems and uncertainties in the current proposal for a Directive. As currently structured, these could instead hinder those companies willing to communicate their sustainability efforts. These shortcomings must be clarified and addressed before the Directive can be implemented.

This proposal versus existing and upcoming legislation

First - and at a more general level - it needs to be considered as to whether the problem this Directive sets out to solve can be addressed by current existing or upcoming legislation and whether the additional requirements proposed are proportionate, clear and precise. There is presently a revision underway to the existing 'Unfair Commercial Practices Directive' (UCPD) and 'Consumer Rights Directive' (CRD), in the form of the Commission's proposal for 'empowering consumers for the green transition'. This is expected to be finalised during the current term of the European Parliament. The UCPD has been implemented in Sweden primarily through the marketing law, which regulates how companies are able to make claims and communicate about their products and services. Therefore, Swedish Enterprise wishes to

stress the importance of carefully examining the legal consequences were the current proposal for a Directive also to be adopted in its current form. It is vital not to introduce regulation that is more burdensome than necessary; nor should there be any legal grey areas where it is unclear which legislation applies, both for companies and supervisory authorities. Overlapping, unharmonised legislation should always be avoided wherever possible, as it creates uncertainties for companies, undermines competitiveness and increases the risk of undesirable legal loopholes.

It should be noted that the Swedish Environmental Protection Agency, in its impact assessment of the current proposal for the Directive, states that the legal prerequisites already exist to counter misleading environmental claims but are not applied in practice effectively, as the supervisory authority only examines a selection of suspected misleading environmental claims on the market. They write that '*a large part of the responsibility for countering greenwashing lies with the supervisory authorities, which must also prioritise these issues for it to have an effect on the market*'. Swedish Enterprise believes, as a matter of principle, that further regulation should not be introduced before existing and upcoming regulations have been evaluated and deemed insufficient. Additionally, there should be a higher priority in EU Member States for supervision, to ensure compliance with existing or upcoming regulatory frameworks.

An increased risk of 'greenhushing'

Swedish Enterprise sees a significant risk that sustainability efforts - including communication around sustainability work - may be withheld or even stagnate if this Directive makes it overly technically challenging or administratively and economically burdensome to obtain approval for an environmental claim or a specific ecolabel. Many Swedish companies are at the forefront of sustainability and wish to make claims based on facts and transparent data. This is central to their ability to compete in both Swedish and European markets. The proposal for the Directive only covers voluntary claims; creating significant risk that companies will simply refrain from making fact-based claims. This so-called 'greenhushing' will make it more difficult for consumers to find sustainability information and make sustainable choices. It would also directly contradict the broader perspective of the goal of the green and circular transition. As a result, legislation in this area needs to balance strong consumer protection, effective environmental protection and the competitiveness of businesses.

Specific comments

Swedish Enterprise believes there are a number of specific challenges and uncertainties that need to be further addressed and amended before this Directive can be implemented. Of particular priority is clarification of the provisions in *Articles 3 and 4*. The Commission should provide clear guidance on how, in practice, these articles are to be interpreted and complied with. In its current form, it leaves too much room for interpretation in these provisions. Swedish Enterprise also does not support the restrictions and prohibitions on new eco-labelling systems under *Article 8*, as these systems must also be characterised by competition and

innovation. In addition, the procedure for prior approvals under *Article 10* should be removed, as this significantly limits companies' market conditions and competitiveness. Furthermore, the provisions on sanctions in *Article 17* should be revised to adequately reflect the existing rules for violations. The following pages set out Swedish Enterprise's comments on particular elements of the proposal based on specific articles.

Article 2 - Definitions

Swedish Enterprise sees it as problematic that several definitions - such as 'empowering consumers' - stated in this article depend on other proposed Directives that are currently subject to negotiations. It is crucial that terms and definitions are harmonised across different files; this will avoid uncertainties for companies that are required to comply with the numerous pieces of legislation currently being developed within the EU. As noted in the introduction, there may be value in waiting to assess the effects of the 'empowering consumers' proposal before seeking to implement this Directive.

Swedish Enterprise also sees the need for further clarifications on certain definitions at a relatively basic level. These will directly impact how companies are able to communicate sustainability information and conduct their operations. For example, it is not clear what the difference is between an 'environmental claim' and an 'explicit environmental claim'; this is problematic. There is also a need for further clarification over what should be considered an environmental claim or ecolabel in relation to a company name or a registered trademark and how this relates to national trademark legislation. Swedish Enterprise believes that, by definition, company names or registered trademarks should not be seen as environmental claims or ecolabels that need to meet the requirements of this Directive. The starting point should be that a company name or trademark should not automatically be treated as an ecolabel or environmental claim. However, verification may be considered necessary in those cases where the company name or trademark is used as part of communication to consumers.

Article 3 - Substantiation of explicit environmental claims

Swedish Enterprise believes that this article (as well as *Article 4* below) is among the most problematic aspects of the proposed Directive. Significant sections of this need to be clarified and addressed before considering bringing the Directive into force. The fundamental problem is that several paragraphs and subparagraphs leave excessive room for interpretation. This leads to considerable challenges both for those companies covered by the Directive and the national authorities charged with the responsibility for supervision and market control.

To ensure the effective implementation of this Directive, Swedish Enterprise proposes that the Commission initiates the development of comprehensive and clear guidelines for both the business sector and authorities. The Commission can look to the implementation of the Single-Use Plastics Directive (SUP) for lessons and experiences; this legislation was greatly improved when the Commission provided clarifying guidelines.

A similar approach should be prioritised in the national implementation of this Directive. As a result, Swedish Enterprise believes that *Articles 3 and 4* should not come into effect until the Commission has developed clear and accessible guidelines. In the process of developing this guidance, it is essential to ensure that the perspectives of all businesses and companies are represented, particularly those of small and medium-sized enterprises. Ultimately, it is these companies and industries that best understand their products and services and how they are marketed and communicated. This makes their representation essential, and a close dialogue between lawmakers and the business sector will be vital in ensuring the functional implementation of the Directive.

Among the particularly problematic parts of this article that require clarification in the legal text are the following:

Article 3.1.b, on 'widely recognised' scientific evidence. It is not clear where the threshold lies for this and how a company can assess what constitutes 'widely recognised'. There is a risk of the threshold for what is considered scientific evidence being set too low; an actor seeking to circumvent the provision could cite - for example - a consultant report in support of their product. At the same time, there is also a risk of the threshold being set too high, and that what constitutes 'widely recognised' scientific evidence is constantly evolving and changing. A more appropriate approach would be to consider a transparent peer review process and publication in a well-regarded scientific journal as the threshold for scientific evidence. Eliminating these types of ambiguities and delineations through comprehensive guidelines from the Commission is something that would assist both companies and authorities.

Article 3.1.c, addressing 'significant' environmental impact from a lifecycle perspective. The term 'significant' permits excessive room for interpretation, given the potential extent of a lifecycle analysis. Ecolabels must generally comply with the requirements according to *Articles 3-6.* Clarification is needed, particularly on how *Article 3.1.c* should be interpreted for certain type-1 ecolabels that do not have an explicit life-cycle perspective, such as the EU Ecolabel and the Nordic Swan label. Swedish Enterprise welcomes the fact that the proposal allows for the approval of a range of methods, recognising the need to consider that different products face differing conditions. However, the current wording runs a risk of causing practical problems, as the proposal prescribes neither a specific method for conducting a life-cycle analysis nor any indication of the values and parameters to be considered. In addition, the concept of a life cycle requires considering the definition of system boundaries. If different actors choose and establish different system boundaries, it will become all but impossible to compare environmental claims.

Article 3.1.d, on taking into account 'all significant environmental aspects or impacts'. The term 'all' permits excessive room for interpretation. In the introductory explanatory text of the proposal, the Product Environmental Footprint (PEF) method is deemed insufficient, on the grounds that it does not take into account all possible relevant aspects (even though PEF includes 16 different environmental aspects). However, it is also indicated that PEF – as with the EU Ecolabel - can serve as an indication of which environmental aspects a company should consider when conducting a lifecycle analysis. This approach is too vague and uncertain.

Article 4 - Substantiation of comparative explicit environmental claims

Swedish Enterprise believes that this article also requires clarifications and clear guidelines from the Commission on how companies and authorities should interpret these provisions. Similar to *Article 3* above, this article should not come into effect until such guidance has been developed and made available. Please refer to the additional justification and reasoning above.

Article 5 - Communication of explicit environmental claims

Swedish Enterprise sees significant advantages in more clearly defining the requirements for how environmental claims are communicated to consumers. The provisions in this article can provide a tool to prevent dishonest and unsubstantiated claims and reduce the risk of 'greenwashing'. At the same time, there remains a need to clarify and improve certain parts of this article.

A fundamental problem, one which is further developed in *Article 10* below, is that companies need to obtain pre-approval and a certificate of conformity from a suitably approved body before communicating an explicit environmental claim to the consumer. This risks becoming a considerable administrative burden, creating significant delays and increased costs, as well as substantial uncertainty for companies. In many industries, the ability of companies to rapidly communicate on and market their products or services is essential, for example, as part of specific campaigns or for seasonal products. Having to wait for pre-approval in each individual case risks severely hindering companies' ability to compete and to develop their business models.

Swedish Enterprise also sees a problem for voluntary claims made in companies' sustainability reports. This type of reporting and external sustainability communication has become increasingly common, and is heavily regulated through the Corporate Sustainability Reporting Directive (CSRD). The proposal for the Directive can be interpreted as not covering such reporting, as it rarely targets consumers directly. However, there is ambiguity over which legislation would apply if a company wants to highlight sections of its sustainability report for marketing purposes, such as on its website. When it becomes more accessible to consumers, it may be interpreted as an environmental claim falling under this Directive. This creates uncertainty and additional administration; it is therefore essential to clarify this ambiguity in the proposal for the Directive.

Furthermore, *Article 5.6* states that environmental claims related to a physical product should be accompanied by information to the consumer in the form of a web link, QR code or equivalent, containing a considerable amount of information and data (listed in *Article 5.6 a-g*). Swedish Enterprise sees value in making this information accessible in a simple and understandable way, so that consumers are able to make more-sustainable and better-informed decisions. One feasible way to achieve this is to harmonise the proposal for the Directive with the provisions of the new Ecodesign Regulation (ESPR) and the Digital Product Passport (DPP), or equivalent systems for digital information transfer. However, harmonising this with the DPP requires that such a system be designed and implemented efficiently. It is particularly important that it is based on a decentralised structure that relies on open and competition-

neutral standards, that company-sensitive information and corporate confidentiality are protected, and that the guiding principle is ‘need to know’ rather than ‘nice to know’. It is also essential to avoid overwhelming consumers with information, so it needs to be considered as to whether all types of information should be made directly available in a digital carrier, or if only the most critical aspects should be initially offered.

Article 7 and 8 - Environmental Labels, requirements for environmental labelling schemes

Swedish Enterprise is generally positive about imposing requirements on how environmental labels are awarded and the proposal for a stricter system for this procedure. Raising the threshold for what is required for an approved label is a viable way of achieving the core purpose of this proposal for a Directive and to counteract continued 'greenwashing’. It should be noted, however, that *Article 7* depends on the design of *Articles 3-6* and *Article 10*; please refer to the relevant sections of this paper.

Further clarification is needed on how this proposal for a Directive relates to those environmental labels and certifications that are communicating a part of a product's manufacturing process or value chain. As this proposal currently stands, it is not entirely clear how to interpret labelling systems, certifications or standards that attest to a part of a company's manufacturing process or chain-of-custody (for example, wood or timber) or certifications that verify the environmentally sustainable production of raw materials (for example, recycled polyester). It is important for companies to have a degree of flexibility and to be able to continue using relevant labels and certifications for their industry that support particularly crucial aspects of a product's value chain, provided that they also meet (the revised) requirements in *Articles 3-6*.

Article 8.3 proposes a prohibition on new national or regional labelling systems, while *Article 8.5* suggests a ban, at a national level, on new private labels that do not add value. Swedish Enterprise understands the motivation behind these proposals. However, it is essential to take into account that environmental labelling and methods for calculating ecological footprints are also driven by innovation and competition. In addition, it should be kept in mind that a new environmental label can meet the same high standards and scientific basis as an established label but may be developed in a faster, more cost-effective, or efficient manner. Thus, Swedish Enterprise does not support any restrictions on new private labels that meet the requirements of applicable legislation and competition.

Furthermore, those companies that have already used and invested in an established certification and standard should not be required to go through the basic requirements in this proposal for the Directive. In such cases, there should be a simplified procedure to maintain and potentially supplement the existing method used. This will help avoid double regulation, administration and additional costs.

Therefore, Swedish Enterprise opposes the proposals to prohibit national labels (*Article 8.3*) and to restrict new private labels (*Article 8.5*). The (revised) requirements in *Articles 3-6* should form the basis for which labels should be allowed to exist in the market. If the

ambiguities identified in these articles are clarified, and if the Commission develops clear guidelines, the threshold for environmental labelling will be raised without hindering competition and innovation in developing new methods and labels.

Article 10 and 11 - Verification and certification and Verifier

Article 10 states that a company that wants to make an explicit environmental claim for commercial purposes must first obtain pre-approval from a suitably approved verifier; *Article 11* specifies that this a should be a third-party accredited body. The body should have the ability to issue a certificate of conformity, which is proposed to be a requirement before making the environmental claim.

Swedish Enterprise is critical of the proposals in these articles and believes that there should be no requirement for all types of explicit environmental claims to be verified and pre-approved. For companies, such a procedure can lead to several problems. First, it risks causing delays in the product development and marketing process and reduces both the ability and willingness to make an environmental claim, even when good and strong grounds exist to do so. It can be particularly burdensome for those companies selling products or services tailored to a specific season or a limited-time campaign. If verification takes a disproportionately long time, it creates a significant risk that the products or services may become outdated before the process is completed and a certificate of conformity is issued. This, in turn, can result in the loss of investment, jobs and products.

In addition, there is a considerable risk that the requirement for pre-approval and a certificate of conformity will make sustainability efforts more challenging and costly, ultimately leading to higher prices that negatively impact consumers. It may also create so much uncertainty for a company that they choose not to make an explicit environmental claim, even where strong grounds exist to do so, undermining their competitiveness and the opportunity to drive environmental issues forward.

Swedish Enterprise, therefore, proposes that the requirement for pre-approval from a third party be removed from this Directive. The responsibility for what is communicated by a company on environmental and sustainability efforts should lie with the company itself. At the same time, there is a need to strengthen control and supervision over how explicit environmental claims are made compared to the current situation. This can be improved and facilitated in part through formalised assessment requirements to substantiate explicit environmental claims according to *Article 3*. There should also be guidelines from the Commission that clarify the rules and regulations that a company must adhere to.

Furthermore, supervision by national authorities needs to be expanded and made more efficient, as stressed by the Swedish Environmental Protection Agency in its impact assessment. Were this Directive to be introduced, it is reasonable that a company should be able to demonstrate - during inspection by the supervisory authority - compliance with (the revised) requirements in *Articles 3-6* and thus provide evidence for any environmental claim. This is a form of self-regulation that already exists in several sectors, and guidelines have already been developed by the International Chamber of Commerce (ICC). However, this

procedure requires that supervision and market control by the authorities increase, alongside deterrent penalties for violations. Here, it is important to clarify how responsibility for an explicit environmental claim is distributed where multiple actors are part of the same value chain (see more under *Article 15* below).

Article 12 - Small and medium-sized enterprises

Swedish Enterprise believes, in principle, that any regulations introduced should be as clear, precise and proportionate as possible, so that SMEs do not require any dedicated support. In reality, however, this is rarely the case, given the large levels of legislation that have been introduced in recent years. The explicit statement that Member States should provide guidelines and assistance to SMEs is a positive approach. At the same time, there is a risk that the responsible national authority may not risk providing clear guidance unless the Commission has first developed its own guidance on how SMEs should be advised and supported. Therefore, it is of great importance that the Commission, in its upcoming guidance, focuses extensively on this issue.

It should be noted that support options for microenterprises are not explicitly set out in the proposal for a Directive. Should microenterprises choose to be covered by the Directive by, for example, applying for a certificate of conformity, Swedish Enterprise believes that it is entirely reasonable for them to seek support and funding from national authorities. This should be clarified in the proposal for a Directive.

Article 15 - Compliance monitoring measures

In the event that this Directive were implemented, Swedish Enterprise believes that an explicit environmental claim, one which meets the criteria and requirements in accordance with (the revised) *Articles 3-6*, should be suitable for communication anywhere within the EU inner market. A fundamental prerequisite for both companies' competitiveness and the green transition is that regulations are harmonised within the EU. Therefore, it is essential to not allow room for different interpretations in different Member States, or for national authorities to exercise supervision in widely varying ways. For the individual consumer, it is also important to know that an environmental claim or environmental labelling maintains the same high standard and is scientifically substantiated, regardless of the Member State in which it occurs.

Were the provisions in *Articles 10-11* on verification and certificates of conformity to be adopted in this Directive, Swedish Enterprise believes that further clarification is needed. This should address whether a certificate or certification related to an environmental claim follows a product throughout its value chain, regardless of where in the chain the application has been made and approved. In the current proposal for a Directive, it is open to interpretation whether it should be the manufacturer, importer, supplier or the final retailer.

Likewise, there needs to be clarification on how the issue of responsibility is distributed among different actors in the same value chain. It is common for an environmental claim or

environmental labelling to be associated with a product by the manufacturer or importer, but the final retailer is the one selling the product to the end consumer. In many cases, retailers are often small businesses with limited resources. Despite the fact that requirements can be imposed on SMEs to control the products they sell, a degree of judgement needs to be applied, with responsibility also being assigned to actors earlier in the value chain. This in turn requires clarification on the information, data and facts that actors at earlier stages of the value chain will be obliged to pass on. If the provisions in *Article 11* on approving bodies are adopted as part of this Directive, it is also relevant to similarly clarify the responsibility of the approving body in those cases where a company later in the value chain is found to be at fault.

Furthermore, it also needs to be clarified what responsibility lies with retailers of second-hand products, such as clothes, electronics, furniture and interior decorations. These retailers are often operated on a not-for-profit or charitable basis. It is common for them to sell products that have environmental labels that were placed on them before this Directive, with its more-restrictive rules, comes into force. Given the ongoing circular transition within the EU, it would be counterproductive if second-hand and used products were prevented from being placed on the market, or if charitable actors were penalised for violations of this planned Directive.

Article 17 - Penalties

Swedish Enterprise believes that, in principle, violations of regulations should be subject to effective, proportionate and deterrent penalties and sanctions. In this proposal for a Directive, *Article 17.3* states that penalties such as fines, seizure of income, exclusion from public procurement for up to twelve months and suspension of the possibility to seek public funding may be imposed for violations. These are far-reaching proposals, ones which risk causing companies to refrain from making any environmental claims or seeking any certifications at all, particularly when combined with the fact that essential elements of this Directive are not clearly formulated (mainly *Articles 3-8*). Such developments would be counterproductive for the broader circular and sustainable transition. At the same time, *Article 13.2* of this proposed Directive states that a Member State may choose to make exceptions from *Articles 14-17* and instead choose to follow the rules on compliance in the Unfair Commercial Practices Directive (UCPD), 2005/29/EG. Given that this possibility exists, *Article 17.3* should be removed from this proposal in its entirety. Instead, *Article 17* should clarify that "Member States shall establish penalties for violations of national provisions adopted in the application of this Directive, and shall take all necessary measures to ensure that these penalties are enforced. These penalties must be effective, proportionate and deterrent", in accordance with 2005/29/EG.

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