

The use of green claims towards consumers

Aude Mahy – Attorney-at-law, Food Law Partner - DALDEWOLF
ERA, Annual Food Law Conference - 20 May 2021

DALDEWOLF

AGENDA

- I. Notion & legal framework
- II. Existing standards
- III. EU initiatives and legislative options
- IV. Conclusion



I. Notion & legal framework

1. What is a green claim ?

- No legal definition
- Guidance of the Commission for the implementation/application of Directive 2005/29/EC on unfair commercial practices:

“The expressions “environmental claims” or “green claims” refer to the practice of suggesting or otherwise creating the impression (in the context of a commercial communication, marketing or advertising) that a product or a service, is environmentally friendly (i.e. it has a positive impact on the environment) or is less damaging to the environment than competing goods or services”.

2. Legal framework

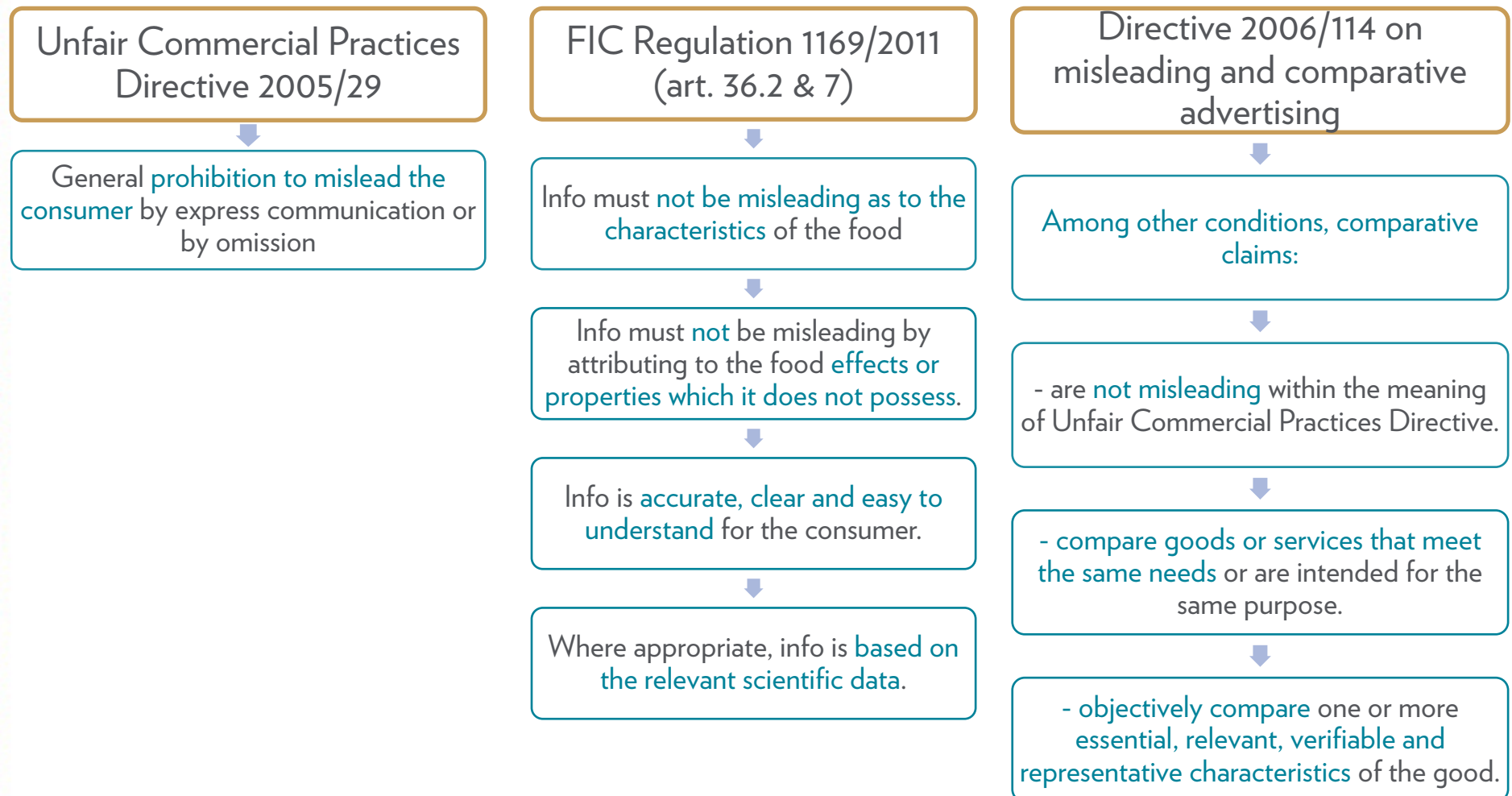
No EU legal framework for food products

(EU Reg. 66/2010 on the EU Ecolabel does not apply to food products)



General rules on voluntary claims apply

2. Legal framework (2)



2. Legal framework (3)

- Wide interpretation of “comparative claim”
 - De Landtsheer case (ECJ, 19 April 2007, De Landtsheer, Case C-381/05).
- ❖ Concept of implicit identification
- ❖ Beer marketed under the designation “champagne beer” to describe its beer with fine bubbles reminiscent of champagne.
- ❖ No identification of a particular champagne brand
- ❖ The Court’s ruling:
 - a reference to a type of product, in an advertisement, and not to a specific undertaking or product, may be considered comparative advertising if it is possible to identify that undertaking or the products it offers to which that advertisement specifically refers.
 - The fact that several competitors of the advertiser or goods or services offered by them can be identified to which the advertisement specifically refers is irrelevant for the assessment of whether there is comparative advertising (§ 24).



3. Green washing issue

- **COM:** « When such claims are not true or cannot be verified this practice can be described as "green washing"»
- **Challenge:** Green claims must convey a clear unambiguous and easy to understand message while providing sufficiently detailed information to the consumer in order not to be misleading
- **COM* & ICC**:**
 1. All business operators must present their "green" claims in a *specific, precise and unambiguous manner*.
 2. Business operators should have *scientific evidence to support their claims* and should be prepared to provide this in an understandable way in the event that the claim is challenged

>< Increasing consumers' demand for 'Green products'

*Guidance of the Commission for the implementation/application of Directive 2005/29/EC on unfair commercial practices (2011) & EU Commission « Compliance Criteria on Environmental Claims » (Multi-stakeholder Dialogue on Environmental Claims (2016)). ** ICC Framework for Responsible Environmental Marketing Communications (2019)

3. Green washing issue (2)



'Green' – 'Sustainable' & other vague claims

- Green products = “products that use resources more efficiently and cause less environmental damages along their life cycle, from the extraction of raw materials, to their production, distribution, use, up to the end of life (including reuse, recycling and recovery) compared to other similar products of the same category”*.
- Today: difficult, if not impossible, to substantiate.
- may not be accurate
- In case traders choose to use general broad claims, they should be accompanied by clear and prominent qualifying language that limits the claim to a specific benefit or benefits.





II. Existing standards

1. ISO identifies 3 types of environmental labelling schemes

- General principles applicable to all environmental claims

ISO 14020:

- Guiding principles for the development and use of environmental labels and declarations
- Not intended for use as a specification for certification and registration purposes
- To be used in conjunction with the other International Standards: 3 types of environmental claims identified by ISO



1. ISO identifies 3 types of environmental labelling schemes (2)

- Type I: based on criteria set by a third-party (ISO 14024:2018)

→ Multi-issue, being based on the product's life cycle impact.

→ Awarding body is a governmental organisation or a private non-commercial entity.

→ The Standard establishes:

- the principles and procedures for developing such claims
- the principles and procedures for assessing and demonstrating compliance
- the certification procedures for awarding the label



1. ISO identifies 3 types of environmental labelling schemes (3)

■ Type II: Self-declared environmental claims (ISO 14021:2016)

→ Claims are based on self-declarations by manufacturers or retailers.

‘made from x% recycled material’

→ The Standard describes:

- selected terms commonly used in environmental claims and gives qualifications for their use

e.g. “CO neutral”



- a **general evaluation** and verification methodology for self-declared environmental claims
- a **specific evaluation** and verification methods for the selected claims in the standard (+ relation with other ISO Standards - e.g. GHG).

‘Reduced resource use’



→ Not subject to third party verification

1. ISO identifies 3 types of environmental labelling schemes (4)

- Type III 'Eco-Profile' / Environmental Product Declaration (ISO 14025:2006)

→ Claims consist of quantified product information based on life cycle impacts: “cradle to grave approach”

→ Enable comparisons between products fulfilling the same function

E.g.  a bottle of wine compared to another bottle of wine
 wine compared to cheese

→ Mandatory third-party verification if B-to-C declarations according to the Standard.

1. ISO identifies 3 types of environmental labelling schemes (5)

■ Type III 'Eco-Profile' / Environmental Product Declaration (2) (ISO 14025:2006)



→ Declarations are:

- provided by one or more organizations
- developed using **predetermined parameters** → impact categories
- **based on independently verified life cycle assessment (LCA) data**, life cycle inventory analysis (LCI) data or information modules in accordance with the **ISO 14040** series of standards and, where relevant, additional environmental information
- **subject to the administration of a programme operator**
 - E.g. - company or a group of companies,
 - trade association
 - public authorities
 - independent scientific body or other organization

1. ISO identifies 3 types of environmental labelling schemes (6)

■ Remark concerning the French Eco-score

- Database is collected in accordance with ISO 14040 : life cycle assessment, based on multi-criteria
- Not based on ISO 14015:2006 (Type III) → does not allow comparison between products of a same category
- Enable comparisons between categories of products but no distinction between several products fulfilling the **same function**

E.g.  wine compared to cheese
 a bottle of wine compared to another bottle of wine

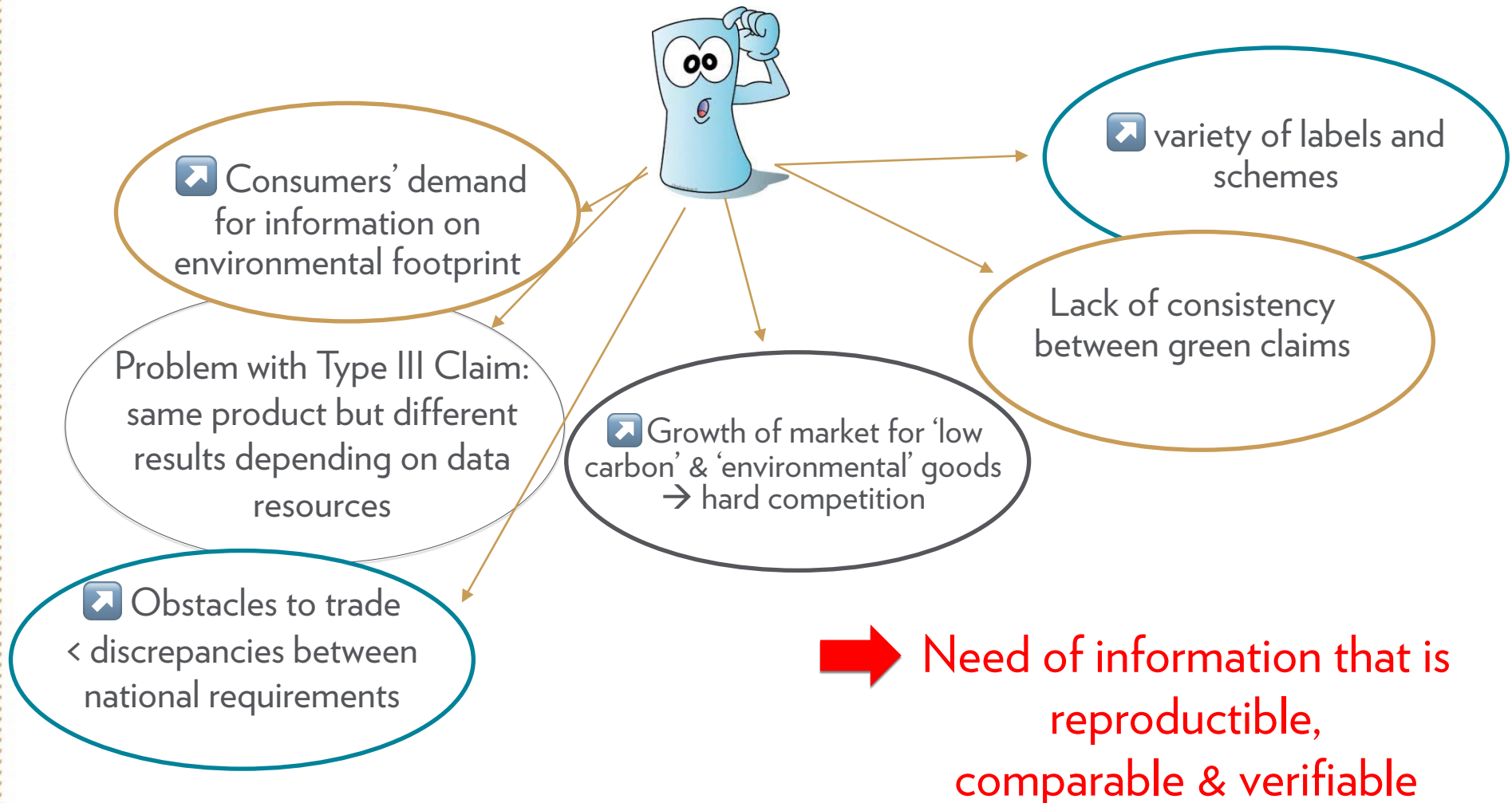


2. ISO standards are not the absolute answer

These International Standards:

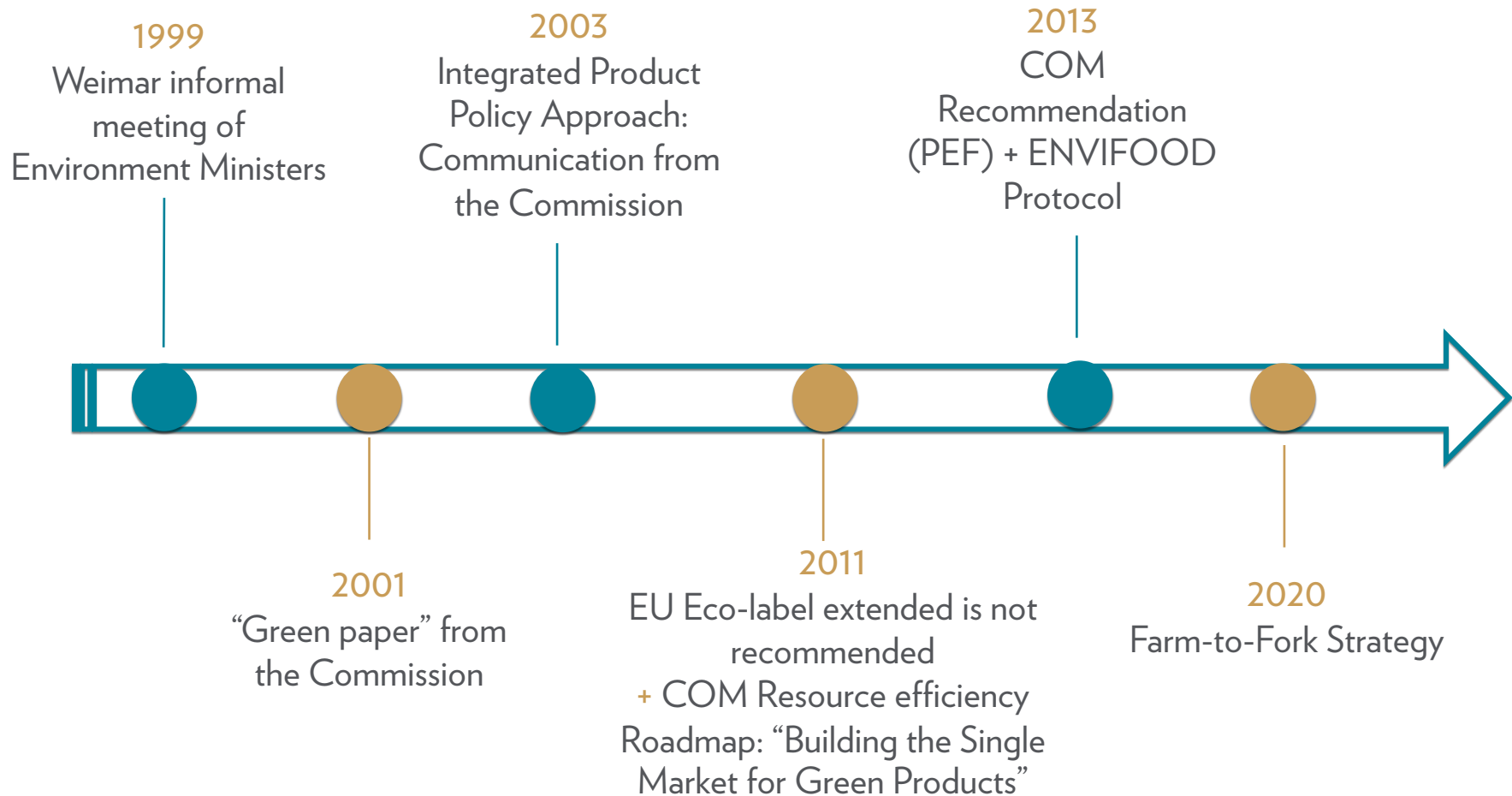
- are not mandatory under EU legislation
- do not override legally required environmental information, claims or labelling
- Do not constitute a guarantee that the claim is compliant with applicable legal principle (but helps!)
- do not ensure comparable results since do not establish a unique methodology but principles to be followed when developing the scheme:
→ different results for the same product.
- Most of the time, approaches for measuring environmental performance do not look at all direct and indirect impacts of the product

2. ISO standards are not the absolute answer (2)



III. EU initiatives & legislative options

1. Some key dates:



Policy to be developed in co-operation with stakeholders.

2. Integrated Product Policy (IPP) Strategy (2003)

- Communication from the Commission to the Council and the European Parliament - Integrated Product Policy - Building on Environmental Life-Cycle Thinking*

→ Enforcing misleading Green claims

→ COM will study whether Environmental product declarations - Type III Claims - need to be developed within a EU framework.

“Life-Cycle thinking”

- Considers a product's life-cycle and aims for a reduction of its cumulative environmental impacts - from the “cradle to the grave”.
- Aims to prevent individual parts of the life-cycle from being addressed in a way that just results in the environmental burden being shifted to another part. By looking at the whole of a product's life-cycle in an integrated way, IPP also promotes policy coherence.

* COM/2003/0302 final

3. No Eco-label for food products (2011)

- EU Ecolabel for food and feed products – feasibility study*
 - EU Eco-label extended to food **not recommended**
 - **Complexity** of developing criteria and then verifying compliance
 - Would require a **level of expertise not currently present** in the national competent bodies charged with the administration of the EU Ecolabel scheme.
 - Process of multi-criteria assessment and verification is likely to be resource intensive. The **costs involved could not be met from the current licence fees** as these are limited by the EU Ecolabel Regulation.
 - The **use of the word “eco” is legally protected** in the EU and therefore there may be some difficulty in using it within the logo ‘EU Ecolabel’ when it is placed on food products which are not organically produced.

* ENV.C.1/ETU/2010/0025, Report of Oakdene Hollins for DG Envi, European Commission Oct. 2011

4. The PEF Method Recommendation (2013)

■ Product Environmental Footprint Initiative

- Recognised **importance** of addressing environmental impacts throughout the **life cycle** of a product in an **integrated way**
- **Commission Recommendation 2013/179/EU** on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations
- Guidance Product Environmental Footprint (**PEF**)
- Guidance Organisation Environmental Footprint (**OEF**)

■ ENVIFOOD Protocol

- Food and drink-specific guidance document
- created by the European Food Sustainable Consumption and Production Roundtable, a **multi stakeholder initiative co-chaired by the European Commission** and business associations from the food and beverage supply chains
- used as a **complementary guidance to PEF and OEF guides** in the PEF/OEF pilot testing launched by the European Commission.

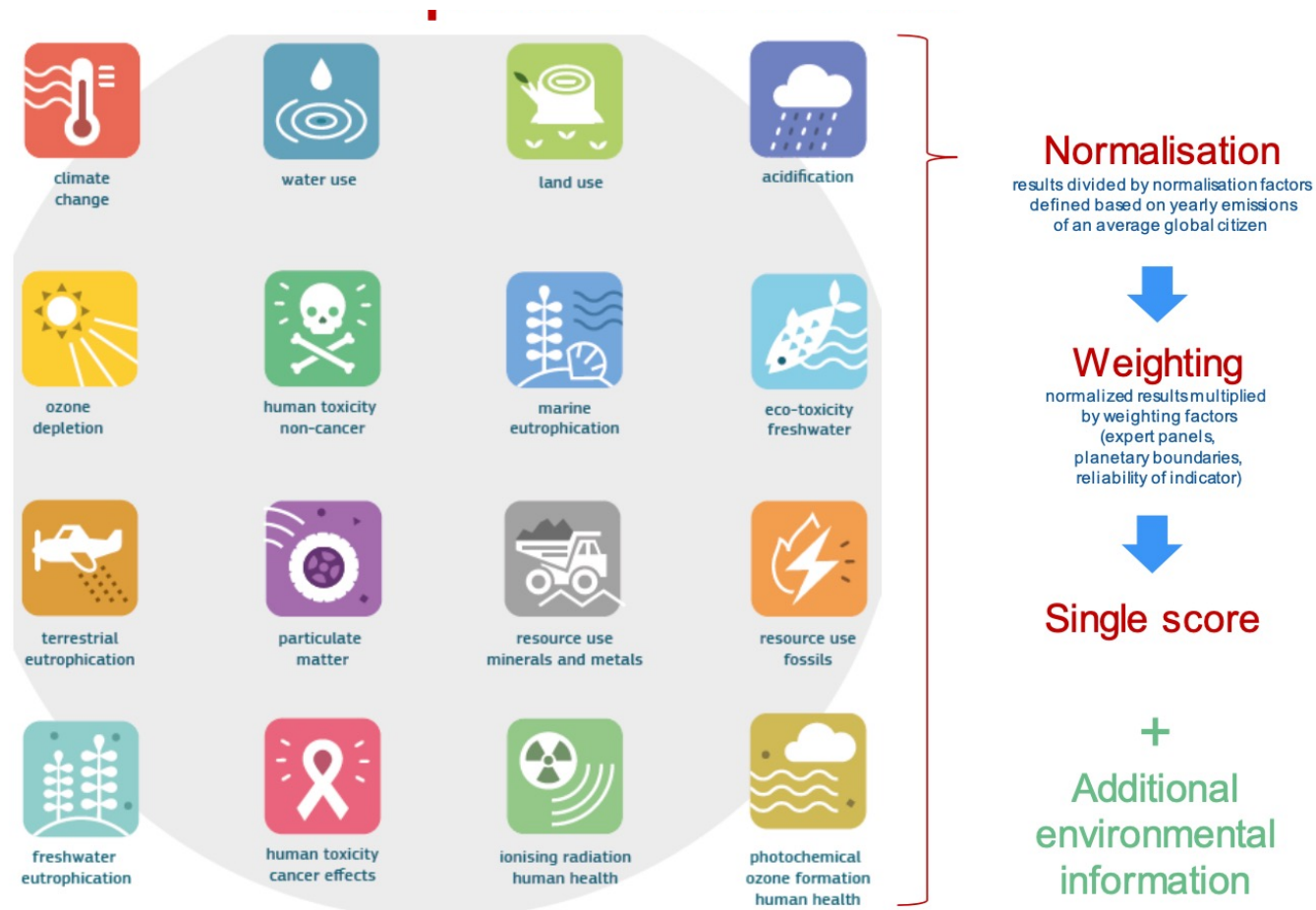
4. The PEF Method Recommendation (2013) (2)

■ Commission Recommendation 2013/179

- Encourages M.S. & private sector to use the PEF & OEF methods when communicating on environmental footprint
- **Objective:** improving measurement + communication on environmental performance of products and organisations (food & non-food)
- **Method of measurement :**
 - Detailed guidance on how to model specific life cycle stages, processes & other aspects
 - Life-cycle assessment-based method to **quantify the environmental impacts of products** (goods or services).
 - **Builds on existing approaches** and international standards.
- **Testing phase** < pilot projects, developed by stakeholders
e.g. dairy, beer, wine

4. The PEF Method Recommendation (2013) (3)

- 16 impact categories related to the life-cycle of a product



4. The PEF Method Recommendation (2013) (4)

PEF

Calculation based on this method generate results on 16 environmental impact categories, reflecting the PEF profile of a product.

→ A “score” defines the PEF profile of the product.

PEFCR

Product category-specific, life-cycle-based rules that complement general methodological guidance for PEF studies by providing further specification at the level of a specific product category.



Verification by a third party (certification scheme)

- checks whether the study has been carried out in compliance with the most updated version of EF method
- confirms that the information and data are reliable, credible and correct.

4. The PEF Method Recommendation (2013) (5)

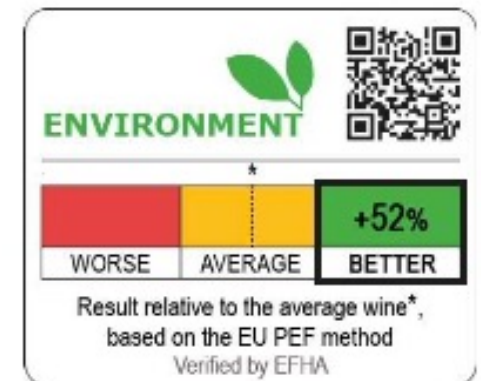
■ Product Environmental Footprint Category Rules (PEFCR)

- Category of products fulfilling the same function
E.g. wine, beer, milk, yoghurt
- PEFCRs provide detailed guidance on how to conduct a PEF study for a product within that specific product category.
- The rules enable comparisons of the PEF results (= individual product) to a benchmark

↓

‘Model product’ seen as representative for the category in the EU market. The PEFCR calculates the life cycle environmental performance of this model product.
→ its performance becomes the benchmark

- Allows comparison between products of a same category
 - against the benchmark
 - one product compared to another



4. The PEF Method Recommendation (2013) (6)

- When no PEFCR exists :

→ Results of a PEF study employing the PEF method can be used to substantiate environment-related product claims

BUT

→ Due to different methodological choices the users may take, PEF results are not comparable across products:

- comparative claims are not allowed

- Are allowed:

- ✓ Score expressed in absolute results

→ number of point

- ✓ Percentage change over time

→ e.g. ‘we have reduced our environmental footprint by 20% over the last 5 years’

5. Farm to Fork Strategy (2020)

20 May 2020:

“A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system”
(COM(2020) 381 final)

4 main objectives



Source:

https://ec.europa.eu/food/farm2fork_en

5. Farm to Fork Strategy (2020) (2)

- Various legislative and non-legislative proposals having a direct impact on food labels and claims



3. Policy options

Baseline	Updating the 2013 EC Recommendation	Voluntary Environmental Footprint scheme	Legislation on Green Claims
<ul style="list-style-type: none">• No modification to the Recommendation 2013/179 & no further action	<ul style="list-style-type: none">• According to the results from 2013-18 pilot phase	<ul style="list-style-type: none">▪ Legislation establishing a voluntary framework based on the PEF and OEF methods▪ Existing methods are not affected	<ul style="list-style-type: none">▪ Requiring companies making green claims to substantiate them based on the PEF/OEF methods.▪ Substantiation via PEF category rules /OEF sector rules (if existing) or the PEF/OEF method (if no product- or sector-specific rules



IV. Conclusion

Conclusion

- Green claims topic = complex issue :
 - Importance of Life-cycle thinking but correlative higher risk to mislead the consumer
 - same product but different results, depending on the methodology
→ PEF method is not mandatory when making a LCA claim
e.g. “eco-score” in France
 - PEFCR’s do not exist for all food categories so far
→ PEF may not be relevant for all FBOs
 - PEF method = guarantee that the claim is not misleading and accurately comparative?

Conclusion (2)

- How to reduce the risk of misleading communication?
 - Consistent choice of dataset, based on scientific evidence
 - Importance of qualifying language in the communication
 - e.g. - Identification of the methodology used
 - Possibility to access the rules of the methodology
 - Identification of the impact criteria taken into account
 - Comparison with other products remains a challenge - same category or not
 - Issue of the use of the term 'eco' on the packaging of non-organic products (cf. reserved term)



Aude MAHY

*Avocat-Advocaat, Partner
Food law*

t: +32 2 627 10 35
m: +32 476 94 09 52
ama@daldewolf.com

DALDEWOLF srl

avenue Louise 81 — 1050 Brussels — Belgium

Thank you for your attention!

Questions?

www.daldewolf.com | www.startitup.legal

Disclaimer - Copyright

- This publication is made available by DALDEWOLF for educational purposes only and should not be construed as being a legal advice. DALDEWOLF cannot be held liable for the consequences of making use of this publication without its further cooperation.
- All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or in an automated database or disclosed in any form or by any means without the prior written permission of DALDEWOLF.