



**ES comments**  
**regarding the Presidency compromise proposal to 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**

ES appreciates the work of the Czech Presidency and welcomes the improvements in the text, although some additional work is still needed.

As a general preliminary comment, we would like to highlight that in the coming months different initiatives will have an impact on the labelling of food and non-food products for consumers: front-of-pack nutritional labelling, reparability score, green claims, among others, which will be added to the existing ones, e.g. on energy performance and EU Ecolabel. Therefore, in order to avoid possible confusion for consumers and to facilitate quick comparison of products when making purchasing decisions, we believe that the greatest possible compatibility between these initiatives should be ensured so that, wherever possible, the labelling logic is similar across all of them (be it number or letter scales, traffic lights, etc.). Consumers should be informed about what the exact promise of a logo or label is. A proliferation of logos, scales and types of labels, in addition to generating over-information, runs the risk of being misleading, which could considerably undermine the objectives pursued. Further standardisation and harmonisation of labelling requirements is not only helpful to consumers, but also to producers and other parties in the value chain, since fewer and more meaningful labels lead to more clarity throughout markets.

**Recital 1**

We consider that the fight against premature obsolescence is a key objective, which should be translated primarily into a ban on certain design and production practices. The regulation on production will be partly embodied in the new Sustainable Products Regulation and in other pieces of legislation.

Since this directive does not regulate practices related to the manufacture of products, but contributes indirectly to fighting early obsolescence through the information that consumers receive, Spain suggests the following change in drafting:



In order to tackle unfair commercial practices which prevent consumers from making sustainable consumption choices, such as practices associated **with information about the durability** ~~the early obsolescence~~ of goods, misleading environmental claims ("greenwashing"), non-transparent and non-credible sustainability labels or sustainability information tools, specific rules should be introduced in Union consumer law.

### **Recital 3**

We are concerned that the current wording could be misinterpreted to mean that all traders are non-compliant. To avoid this, we propose the following alternative wording:

In order to deter **potentially non-compliant** traders from deceiving consumers.

On the other hand, probably due to the concerns raised by the initial impact report, a reference to the social sustainability of products has been introduced. We welcome this, but we think that the present wording should be improved. Thus, the first sentence clearly deals with the amendment of Article 6(1) of Directive 2005/29/EC to add the "environmental or social impact, durability and reparability of the product" to the list of the main characteristics of the product in respect of which the trader's practices can be considered misleading, following a case-by-case assessment.

However, the second sentence refers to avoiding misleading consumers when providing information on social sustainability of products and provides some examples of what could be included under that term (such as working conditions, charity contributions or animal welfare). It is not clear whether social sustainability and social impact are the same thing or whether the former should be understood as included in the latter. We believe that the text would be clearer if explicit reference were made to criteria to be taken into account in the case-by-case analysis of potentially misleading social impact information, while noting that this is not an exhaustive list. A more explanatory recital could also be an alternative.

Finally, with regard to the Spanish translation, we suggest replacing "las contribuciones a la beneficencia" with "contribuciones a fines de interés social".

### **Recital 4**

We find the first sentence somewhat confusing in its current wording. It should be defined in more detail what is meant by "future performance". Sometimes carbon-



neutral and similar claims are being justified by compensation initiatives, but information about them is only rarely available or verified. Therefore having an independent monitoring system in place does not seem to be enough. If this term remains, it should be further explained what is meant by an "independent monitoring system" or, at least, what are its main characteristics and the type of authorisation or supervision that "independent monitoring" entities will be subject to in case they are private operators.

As we have already pointed out in the previous recital, expressions that "stigmatise" all traders as a whole should be avoided. Therefore, in this case we propose "**some** traders".

#### **Recital 5**

The notion of "common practice" is an indeterminate legal concept that may give rise to different interpretations in a case-by-case analysis and should therefore be further elaborated. We welcome the Presidency's attempt to clarify this recital, but we think it still requires further elaboration. It should be made clearer that this is about prohibiting what is in fact an ordinary feature from being made to appear as an extraordinary benefit, not the mere fact that this ordinary feature is mentioned in a purely descriptive, informative way.

#### **Recital 11**

We suggest including additional, less obvious examples in order to facilitate the interpretation of the relevant provisions of the directive.

#### **Recital 14**

As in the case of environmental claims, information provided to consumers about the lifetime of products should be based on verifiable parameters; otherwise, we risk entering into a muddy terrain subject to multiple interpretations that will limit practical enforcement.

Therefore, since this directive does not directly address early obsolescence practices, but only the information to be provided to consumers, we propose to narrow the wording. In addition, we include some other drafting nuances:

In order to improve the welfare of consumers, the amendments to Annex I to Directive 2005/29/EC should also address several **information** practices



associated with early obsolescence, including planned obsolescence practices, understood as a commercial policy involving deliberately planning or designing a product with a limited useful life so that it prematurely becomes obsolete or non-functional after a certain period of time **or after a predetermined intensity of use**. Purchasing products that are expected to last longer than they actually do causes consumer detriment. Furthermore, early obsolescence practices have an overall negative impact on the environment in the form of increased ~~material~~ waste **and use of energy and materials**. Therefore, addressing **information related to early obsolescence** ~~those practices are~~ is also likely to reduce the amount of waste **and the use of natural resources**, contributing to a more sustainable consumption.

#### **Recital 17**

This recital should be revised to differentiate more clearly between the prohibition, which must always be ex ante, and the proof of the facts, which is an afterthought. We believe that the current wording, in which the prohibited practice is made conditional on subsequent verification, creates uncertainty.

#### **Recital 22**

We propose to replace “may” with “shall” so that there is no doubt that this is an obligation and not merely an option.

#### **Recital 23 to 28**

We support option 2. However, the two-year period is problematic for us because the Directive on the Sale of Goods sets two years as the minimum period, but some countries, such as Spain, have extended it. Thus, as of 1 January this year, the guarantee period will be three years for any type of product, and two years for the supply of digital content or services.

Therefore, if this two-year limit is maintained throughout the text of this new directive, the real benefit for those Member States that have a longer warranty period may be reduced. An alternative wording should be considered: "longer than the period laid down for the legal guarantee in the Member State where the product is made available" / "longer than the period laid down for the seller's liability for lack of conformity in the national legislation transposing Directive (EU) 2019/771".



This should also be taken into account in **recital 26 and in all the related articles.**

### **Recital 31**

We propose some changes in wording:

**“In addition, to** ~~To~~ allow consumers to make an informed transactional decision and choose goods that are easier to repair, traders should provide, before the conclusion of the contract, for all types of goods, where applicable, the reparability score of the good as provided by the producer in accordance with Union law **or, insofar as it has not yet been developed, with existing national** law.

### **Recital 33**

We support option 2.

### **Article 1.1.**

The Commission is due to present the new initiative on the substantiation of environmental claims in the following months, so it will be necessary to ensure that this definition and all related definitions are consistent in both legal texts.

**s)** The definition of “certification scheme” should be further developed, especially to ensure its accuracy and impartiality. In any case, we insist in the importance of keeping coherence with the substantiation of environmental claims initiative, that we expect will further develop the requirements for environmental claims to be verifiable and comparable, as well as the enforcement and surveillance mechanisms.

### **Article 1.2.**

**b)** Consistency should be guaranteed with the initiative on the substantiation of environmental claims.

**ea)** We agree with moving this provision to art. 6, but we suggest rewording this paragraph. We propose looking for consistency with the obligations set for economic operator in relation to the safety of products and to food, which include the notion of “professional due care”:

“to be aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question” (Recital 32 of the GPSR Proposal)



“not supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements” (art. 5.2. of GPSD).

“Food business operators which do not affect food information shall not supply food which they know or presume, on the basis of the information in their possession as professionals, to be non-compliant with the applicable food information law and requirements of relevant national provisions” (art. 8.3. of Regulation 1169/2011).

In all those cases, obligations about conformity assessment apply not only to producers but also to traders, within the limits of their respective knowledge, activities and responsibilities as professionals.

#### **Article 2.1.**

**b)** We prefer option 2.

**14.b)** We strongly prefer the term “reparability index” rather than “reparability score” because the score itself is the result of combining the sub-scores of different criteria. In Spanish, the term “índice de reparabilidad” is also more frequently used and more familiar to stakeholders than “puntuación”, which could be misleading.

#### **Article 2.2**

We prefer option 2 because it seems to us that it helps to clarify consumers' doubts about the different guarantees, contributes to greater harmonisation in the internal market and could be used as an opportunity to launch explanatory campaigns when the use of the harmonised graphic format enters into force. In addition, promoting longer product durability, even in this indirect way, provides an incentive for companies to try to improve on their competitors' offerings, even to increase the quality of their products, and brings benefits for consumers and the environment.

Furthermore, if a harmonised graphic format is introduced, it should be the producers who will add it to the product in a visible way, so that the traders would not have to assume any further burden and there would be no problems in relation to what is pointed out in case C-179/21 for the proportionality of traders' obligations.

However, we believe that, for the sake of clarity for consumers and to enhance its benefits, the reference period should not be two years, but the period established for



the legal guarantee in each Member State in the regulations transposing the Directive on the Sale of Goods.

### **Annex**

We consider it appropriate to use “may” instead of “will” to modulate the obligations of traders. However, in order to avoid that this could end up leading to the copy and paste of a generic and worthless formula, we propose to explain in the recitals how this requirement should be fulfilled.

We support deleting 23e).

### **DE proposal regarding a "Withdrawal Button"**

ES supports Germany's proposal of applying the "withdrawal button" horizontally, not only in the field of financial services contracts.

However, we believe that this directive is not the best place to introduce it, as its objective is different and the changes it introduces to the Consumer Rights Directive are few and very specific. Therefore, we believe that the general regulation of this button should be established through the Distance Financial Services Directive, which does make a more far-reaching modification to the CRD and already introduces the button for financial services.

Paris, le 18 octobre 2022

## **NOTE DES AUTORITÉS FRANÇAISES**

**Objet :** Commentaires écrits consécutifs à la réunion du groupe de travail « Information et protection du consommateur » du Conseil du 28 septembre 2022 concernant le renforcement du rôle du consommateur dans la transition écologique

**Réf. :** SGAE/MINUME/2022/314

**PJ. :** Compromis de la Présidence (10937/2/22 REV 2) amendé  
Traduction de courtoisie de la note des autorités françaises

À la suite de la réunion du groupe de travail « Information et protection du consommateur » qui s'est tenue le 28 septembre 2022, les délégations sont invitées à faire part, d'une part, de leurs commentaires écrits sur le premier texte de compromis de la Présidence tchèque et, d'autre part, de leurs propositions d'amendements rédactionnels.

### **I. Remarques préliminaires**

La France soutient, de manière générale, toutes les initiatives en faveur de la transition écologique et, en particulier, le renforcement à l'échelle de l'UE de l'information des consommateurs sur les qualités et caractéristiques environnementales des produits ainsi que de la lutte contre les pratiques commerciales déloyales en ce domaine.

Les autorités françaises sont donc favorables à la mise à jour du cadre européen pour permettre aux consommateurs de faire des choix éclairés et respectueux de l'environnement lorsqu'ils achètent des produits afin qu'ils jouent un rôle majeur dans la transition écologique et la construction d'une Europe résiliente.

Il s'agit de l'un des objectifs de la proposition de directive visant à donner aux consommateurs les moyens d'agir en faveur de la transition écologique grâce à une meilleure protection contre les pratiques déloyales et à de meilleures informations.

La France remercie la Présidence tchèque pour sa proposition de compromis et souhaite faire part de ses commentaires sur ce texte. Elle accompagne cette contribution écrite de propositions rédactionnelles et d'une traduction de courtoisie, jointes à la présente note.



En particulier, la France saisit l'opportunité de cette contribution écrite afin de préciser sa position sur un point central de la proposition de directive, à savoir l'obligation d'information sur la garantie commerciale de durabilité. Ses commentaires porteront par ailleurs également sur les pratiques commerciales relatives à l'obsolescence programmée.

## **II. Sur les amendements à la directive 2005/29/CE relative aux pratiques commerciales déloyales**

Les autorités françaises proposent d'amender le compromis de la Présidence tchèque, notamment les articles 2, 6.2, 7.7 et l'annexe 1 de la directive 2005/29, avec le texte placé en annexe. Elles accompagnent ces amendements rédactionnels des commentaires ci-dessous.

### **a) Article 2 – Amendements aux définitions de schéma de certification, de performance environnementale reconnue excellente et de mise à jour logicielle**

#### **- Schéma de certification (point s)**

La France propose de préciser que les tiers auxquels il incombe de certifier qu'un produit respecte les exigences posées par un cahier des charges soient accrédités par une instance nationale d'accréditation comme le prévoit le droit de l'Union (cf. règlement 765/2008 fixant les prescriptions relatives à l'accréditation des organismes d'évaluation de la conformité).

#### **- Performance environnementale reconnue excellente (point u)**

S'agissant des textes européens sur la base desquels la performance environnementale excellente serait reconnue, la France accueille favorablement l'annonce de la Commission de compléter la liste des textes pour apprécier la performance environnementale reconnue excellente et se prononcera sur la version définitive.

#### **- Mise à jour logicielle (point w)**

La France propose de préciser qu'une mise à jour logicielle ne devrait pas seulement concerner les mises à jour de nature à maintenir la conformité des biens comportant des éléments numériques, du contenu numérique et des services numériques mais devrait également concerner les mises à jour qui ont pour objet d'améliorer ou de réduire la durabilité des biens.

Ces précisions seraient à même d'assurer la cohérence avec cette définition de la pratique commerciale prévue au point 23 d de l'annexe qui prohibe, en toutes circonstances, la pratique consistant à « *ne pas informer le consommateur qu'une mise à jour logicielle aura une incidence négative sur l'utilisation de biens comportant des éléments numériques ou sur certaines fonctionnalités de ces biens, contenus numériques ou services numériques, même si cette mise à jour améliore d'autres fonctionnalités* » et qui, de fait, considère qu'une mise à jour peut avoir des effets négatifs et/ou positifs.

### **b) Article 6.2 – Amendements relatifs à certaines pratiques commerciales trompeuses**

#### **- La pratique commerciale consistant à valoriser une caractéristique du bien qui est en réalité commune à tous les biens du même type**

La France propose une reformulation de la proposition de la Présidence tchèque (article 6.2, e).

La France propose également de remplacer l'exemple donné dans le considérant n°5 ou de le compléter par d'autres illustrations mieux adaptées.

- La communication commerciale portant sur un bien dès lors que le professionnel a conscience ou peut raisonnablement avoir conscience qu'il contient une caractéristique qui a été introduite pour limiter sa durabilité.

La France propose de remplacer l'interdiction de la pratique par un nouveau point 23 e dans l'annexe 1 de la directive 2005/29/CE de manière à présumer de l'altération potentielle du comportement économique du consommateur, d'une part, et à responsabiliser tous les professionnels qu'il s'agisse des vendeurs ou des producteurs de produits, d'autre part.

La circonstance selon laquelle serait trompeuse la pratique dont un professionnel pourrait raisonnablement avoir conscience ne paraît pas suffisamment précise pour caractériser une infraction.

La justification de l'ajout proposé au point 23 e figure dans les développements dédiés à l'annexe.

**c) Article 7.7 – Amendements relatifs à certaines informations substantielles dont l'omission constituerait une pratique commerciale trompeuse**

La France propose de revenir à la proposition initiale consistant à préciser que, lorsqu'un professionnel fournit un service de comparaison de produits, y compris au moyen d'un outil d'information sur la durabilité, les informations sur la méthode de comparaison utilisée, sur les produits faisant l'objet de la comparaison et sur les fournisseurs de ces produits, ainsi que sur les mesures mises en place pour tenir ces informations à jour, sont considérées comme substantielles.

En effet, les comparaisons de produits portant généralement sur les prix, il peut être opportun de préciser que les comparaisons de produits peuvent également porter sur la durabilité et que, par conséquent, le consommateur devrait pouvoir disposer, dans cette hypothèse, des informations substantielles prévues.

En conséquence, il est proposé de restaurer la définition des outils d'information sur la durabilité (point t de l'article 1).

**d) Annexe – Amendement à certaines pratiques commerciales réputées déloyales en toutes circonstances listées à l'annexe 1 de la directive 2005/29/CE**

- La pratique consistant à « ne pas informer le consommateur qu'une mise à jour logicielle pourra avoir une incidence négative sur l'utilisation de biens comportant des éléments numériques ou sur certaines fonctionnalités de ces biens, contenus numériques ou services numériques, même si cette mise à jour améliore d'autres fonctionnalités » (23 d).

S'agissant des pratiques commerciales réputées trompeuses en toutes circonstances, la France suggère que la rédaction des infractions repose sur le mode indicatif. De plus, la rédaction proposée dans le compromis pourrait avoir comme conséquence la banalisation d'une information selon laquelle toutes les mises à jour seraient susceptibles d'avoir un effet négatif sur les fonctionnalités du bien, privant ainsi la portée de cette disposition de toute pertinence.

Il est également proposé de modifier le considérant n°15 en conséquence.

- La pratique consistant à « réaliser toute action commerciale sur un bien lorsque le professionnel sait qu'un tel bien contient une caractéristique qui a été introduite pour limiter sa durabilité » (23 e)

La France continue de soutenir qu'au regard de la nécessité de lutter contre les pratiques préjudiciables aux consommateurs et non-conformes aux objectifs d'une économie durable et circulaire, incluant l'obsolescence prématurée, il conviendrait d'interdire la pratique consistant, pour un professionnel, à introduire des caractéristiques propres à limiter la durabilité des biens.

En effet, la proposition initiale qui visait à interdire, en toutes circonstances, la pratique consistant à ne pas informer le consommateur de l'existence d'une caractéristique d'un bien introduite pour en limiter la durabilité, semblait non seulement ne pas lutter contre l'obsolescence programmée des biens mais aussi, pouvait être interprétée comme légitimant cette pratique contre laquelle la directive entend pourtant lutter, dès lors que le consommateur en est informé.

Néanmoins, dans la mesure où la proposition de directive n'entend pas interdire la pratique d'obsolescence programmée en tant que telle, la France propose de remplacer l'interdiction envisagée par la Présidence tchèque, à l'article 6.2 sous le point ea, par un nouveau point 23 d dans l'annexe 1 de la directive 2005/29/CE de manière à présumer de l'altération potentielle du comportement économique du consommateur, d'une part, et à responsabiliser tous les professionnels, au sens de la directive 2005/29/CE, qu'il s'agisse des vendeurs ou des producteurs de produits, d'autre part.

Dès lors, toute communication commerciale, d'un bien comportant une caractéristique qui limite sa durabilité, réalisée en connaissance de cause par un professionnel serait interdite, étant entendu qu'un producteur est présumé toujours savoir que son bien comporte une telle caractéristique.

Il revient aux autorités chargées de la protection des consommateurs de rassembler les éléments de preuve quant à la connaissance que le vendeur a ou n'a pas de l'existence de cette caractéristique et, en conséquence, d'engager ou non sa responsabilité.

Cette interdiction contribuerait à lutter contre des pratiques préjudiciables aux consommateurs et non conformes aux objectifs d'une économie durable et circulaire, incluant l'obsolescence programmée.

La France considère sa proposition comme étant équilibrée tant au regard des objectifs de la proposition de directive, rappelés ci-dessus, qu'au regard des possibilités d'encadrement des pratiques commerciales que la directive 2005/29/CE peut offrir.

Il est ainsi proposé de remplacer les considérants n°14a et 14b du compromis par les considérants 16 et 16.1 (reprise du considérant 14.b).

- La pratique consistant à « Affirmer qu'un bien présente, à conditions d'usage données, une certaine durabilité, sur le plan du temps d'utilisation ou de l'intensité, alors que tel n'est pas le cas » (23 f)

Par souci de clarté, la France propose de préciser que les conditions d'usage sont déterminées par le producteur.

La France propose également de supprimer, dans le considérant n°17, la condition selon laquelle l'interdiction ne vaudrait que dans l'hypothèse où un nombre de cas significatifs auraient été constatés. En effet, il revient au professionnel de justifier ses allégations et notamment la justesse de ses allégations en terme de conditions d'usage. De plus, l'expression « *nombre de cas significatifs* » est floue et difficilement applicable.

- La pratique consistant à « Présenter un bien comme réparable alors qu'il ne l'est pas ou omettre d'informer le consommateur qu'un bien n'est pas réparable, conformément aux exigences légales » (23 g)

La France propose de compléter cette infraction par le fait d'omettre qu'un bien est réparable dès lors qu'il l'est. En effet, cette pratique qui poussera le consommateur à racheter un nouveau bien plutôt que de faire réparer son bien cassé doit également être prohibée.

Le considérant n°18 serait également modifié en conséquence afin de prévoir cette hypothèse.

### **III. Sur les amendements à la directive 2011/83/UE relative aux droits des consommateurs**

Les autorités françaises proposent d'amender le compromis de la Présidence tchèque, notamment les articles 2, 5.1, 6.1 de la directive 2011/83/UE, avec le texte placé en annexe. Elles accompagnent ces amendements rédactionnels des commentaires ci-dessous.

Par ailleurs, la France soutient les modifications proposées par la Présidence dans les options n°2 (articles 2, 5.1 et 6.1) tout en les adaptant.

#### **a) Article 2 – Amendements à la définition de la mise à jour logicielle**

Par cohérence, la France propose d'aligner la définition de la mise à jour logicielle figurant à l'article 2 sous le point 14 e de la directive 2011/83/UE sur celle donnée par l'article 2 sous le point w de la directive 2005/29/CE.

Une mise à jour logicielle ne devrait pas seulement concerner celle de nature à maintenir la conformité des biens comportant des éléments numériques, du contenu numérique et des services numériques mais devrait également concerner les mises à jour qui ont pour objet d'améliorer ou de réduire la durabilité des biens.

#### **b) Article 5.1 – Amendements relatifs aux obligations d'information précontractuelle relatives à la garantie commerciale de durabilité et aux mises à jour logicielles**

##### **- La garantie commerciale de durabilité**

L'obligation d'information relative à la garantie commerciale de durabilité, introduite par la proposition de directive de la Commission, a pour objectif, au regard des éléments de l'analyse d'impact (cf. page 13), de combler un déficit d'information fiable sur la durée de vie des produits.

La France s'est opposée à l'introduction d'une obligation d'information précontractuelle relative à l'existence d'une garantie commerciale de durabilité, présentée comme un bon indicateur de l'information sur la durabilité des biens, au profit d'une information sur la durabilité du bien elle-même.

Les autorités françaises soulignent en effet que, telle qu'elle était présentée, cette obligation d'information était comprise dans l'obligation d'information relative aux garanties commerciales, incluant les garanties commerciales de durabilité, et donc sans grande valeur ajoutée.

Par ailleurs, elles considèrent qu'une telle obligation d'information, qui pèserait sur le vendeur, dépendrait en réalité de la mise à disposition du vendeur par le producteur des informations relatives à la garantie commerciale de durabilité de telle manière que cette obligation ne recouvre pas véritablement de caractère contraignant pour le vendeur.

Enfin, comme le considérant n°28 le précise, les autorités françaises constatent que les principales difficultés rencontrées par les autorités de contrôles tiennent davantage à la manière de présenter les informations et à la confusion entretenue par les professionnels entre les garanties légales et commerciales. Ces difficultés

relèvent dès lors davantage de l'application de la directive 2005/29/CE que de celle de la directive 2011/83/UE.

L'obligation d'information sur la garantie commerciale de durabilité constituant toutefois un point central de la proposition de directive, la France pourrait soutenir cette disposition sous réserve que son application conduise, de manière effective, à une meilleure information des consommateurs et qu'elle responsabilise davantage les producteurs en contraignant ces derniers à informer les vendeurs de l'existence d'une garantie de durabilité, afin de permettre que cette information soit effectivement répercutée aux consommateurs.

Ainsi, la France propose que, pour tous les biens, les vendeurs devraient informer les consommateurs, avant la conclusion d'un contrat, de l'absence ou de l'existence de la garantie commerciale de durabilité offerte par le producteur et, dans ce dernier cas, de sa durée et de ses modalités de mise en œuvre.

Pour rendre cette obligation effective, la France propose que les vendeurs, en l'absence d'information fournie par le producteur sur une garantie commerciale de durabilité qu'il offrirait, informe les consommateurs que le producteur n'offre pas une telle garantie.

L'information relative à l'existence d'une garantie commerciale de durabilité ne devant être fournie que si la durée de celle-ci est supérieure à la durée de la garantie légale de conformité, la France suggère de remplacer l'expression « *lorsqu'elle a une durée supérieure à deux ans* » par « *lorsqu'elle a une durée supérieure à la garantie légale de conformité* » conformément à la directive (UE) 2019/771 qui prévoit que la garantie légale de conformité peut avoir une durée supérieure ou égale à deux ans.

Par ailleurs, cette obligation devant être généralisée à tous les biens, la France propose de supprimer le point eb prévoyant une adaptation de cette disposition à la seule catégorie des biens consommateurs d'énergie.

Enfin, les considérants n°22 à 28 (option 2) et le considérant n°33 (option 2) devraient également être modifiés pour tenir compte de ces propositions.

#### - Les mises à jour logicielles

Dans l'objectif de mieux informer et de manière effective les consommateurs sur la période pendant laquelle les mises à jour logicielles sont disponibles, la France propose de responsabiliser les vendeurs dans la fourniture de cette information précontractuelle en prévoyant que ces derniers devraient prendre toutes mesures raisonnables et proportionnées pour l'obtenir et, à tout le moins, de la demander au producteur.

Cette formulation a été inspirée de celle utilisée par la directive 2019/2161/UE pour introduire, dans l'annexe 1 de la directive 2005/29/CE, la pratique commerciale réputée déloyale en toutes circonstances consistant à « *Affirmer que des avis sur un produit sont envoyés par des consommateurs qui ont effectivement utilisé ou acheté le produit, sans prendre de mesures raisonnables et proportionnées pour vérifier qu'ils émanent de tels consommateurs.* » qui, même si elle a été employée dans la directive 2005/29/CE pourrait trouver à s'appliquer dans la directive 2011/83/UE aux fins de préciser les obligations du vendeur.

Les considérants n°29, 30 et 32 seraient également modifiés pour tenir compte de ces propositions.

#### **c) Article 6.1 – Amendements relatifs aux obligations d'information précontractuelle relatives à la garantie commerciale de durabilité et aux mises à jour logicielles**

La France propose les mêmes amendements que ceux évoqués dans l'article 5.1 ci-dessus.

#### **IV. Observations complémentaires**

La France propose également de modifier la rédaction de plusieurs considérants qui n'ont pas pu être rattachés aux amendements des articles modifiés.

S'agissant du considérant n°4, la France propose ainsi de supprimer la dernière phrase qui prévoit que les consommateurs devraient avoir accès aux résultats du système de suivi indépendant pour se faire une opinion des progrès réalisés par les professionnels qui utilisent des allégations environnementales « *qui font référence à des performances futures en évoquant une transition vers la neutralité carbone, la neutralité climatique ou un objectif similaire, à un certain horizon* ».

Outre le fait que cela crée un surplus d'informations pour les consommateurs, il n'incombe pas à ces derniers de vérifier que les professionnels respectent leurs engagements et ne mettent pas en œuvre des pratiques commerciales trompeuses.

S'agissant du considérant n°34, la France considère qu'il n'est pas nécessaire de préciser que la *lex specialis* prévaut sur la *lex generalis* lorsqu'un acte de l'Union encadre, en particulier, une pratique commerciale d'un professionnel. S'agissant du règlement 2017/1001 sur les marques, les autorités françaises souhaiteraient être éclairées par l'expertise du service juridique du Conseil. Dans l'attente des résultats de cette analyse, la France propose de supprimer toute référence aux textes spécifiques, à savoir les règlements n° 1221/2009, n° 66/2010 et n° 2017/1001.

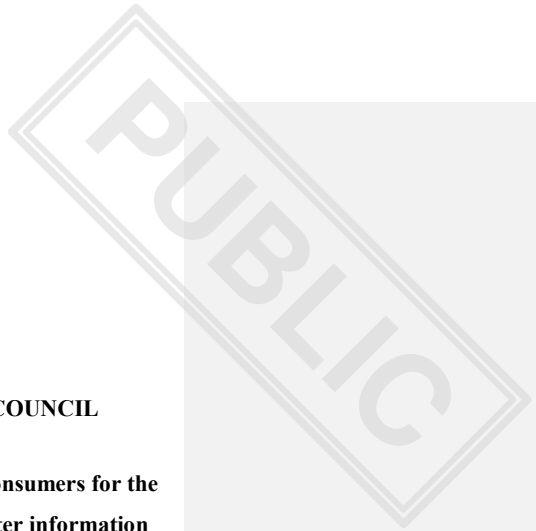
Enfin, les autorités françaises estiment qu'il n'est pas indispensable d'ajouter, par renvoi, des définitions prévues dans d'autres directives (cf. notions de bien, durabilité, fonctionnalité).

**Annexe 1 de la note SGAE/MINUME/2022/314**

**Compromis de la Présidence (10937/2/22 REV 2) amendé**

With a view to the meeting of the Working Party on Consumer Protection and Information on 28 September 2022, delegations will find a **revised** Presidency text in the Annex to this note.

Changes compared to the Commission proposal are indicated in **bold underlined** for new text and ~~strike through~~ for deleted text. For some recitals and provisions, the Presidency submits to delegations' views two options, highlighted in dark grey and light grey.



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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,<sup>1</sup>

Acting in accordance with the ordinary legislative procedure,

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<sup>1</sup> OJ C , , p. .



Whereas:

- (1) In order to tackle unfair commercial practices which prevent consumers from making sustainable consumption choices, such as practices associated with the early obsolescence of goods, misleading environmental claims (“greenwashing”), non-transparent and non-credible sustainability labels or sustainability information tools, specific rules should be introduced in Union consumer law. This would enable national competent bodies to address those practices effectively. By ensuring that environmental claims are fair, consumers will be able to choose products that are genuinely better for the environment than competing products. This will encourage competition towards more environmentally sustainable products, thus reducing negative impact on the environment.
- (2) Those new rules should be introduced both through amending Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council<sup>2</sup> relating to those commercial practices which are to be considered misleading, and therefore prohibited, on the basis of a case-by-case assessment, and through amending Annex I to Directive 2005/29/EC with the addition of specific misleading practices which are in all circumstances considered unfair, hence prohibited.

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<sup>2</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ L 149, 11.6.2005, p. 22).

- (3) **In order for consumers to take better-informed decisions and thus stimulate the demand for, and the supply of, more durable goods, the consumers may not be misled about a product's durability and reparability.** In order to deter traders from deceiving consumers as regards the environmental or social impact, durability or reparability of their products, including through the overall presentation of the products, Article 6(1) of Directive 2005/29/EC should be amended by adding the environmental or social impact, durability and reparability of the product to the list of the main characteristics of the product in respect of which the trader's practices can be considered misleading, following a case-by-case assessment. Information provided by traders on the social sustainability of products, such as working conditions, charity contributions or animal welfare, should not mislead consumers either.
- (4) Environmental claims, in particular climate-related claims, increasingly relate to future performance in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date. Through such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products. To ensure the fairness and credibility of such claims, Article 6(2) of Directive 2005/29/EC should be amended to prohibit such claims, following a case-by-case assessment, when they are not supported by clear, objective and verifiable commitments and targets given by the trader. Such claims should also be supported by an independent monitoring system to monitor the progress of the trader with regard to the commitments and targets. **Consumers should be able to consult the findings of independent monitoring systems and thus be able to take note of the relevant proof indicating the progress of the producer.**

- (5) Another potentially misleading commercial practice which should be added to the specific practices targeted by Article 6(2) of Directive 2005/29/EC is advertising benefits for consumers that are actually a ~~common practice~~ regular common feature in the relevant market regarding the relevant type of product whenever the average consumer is not aware that this is a ~~common-regular practice~~ feature. For example, if the absence of a chemical substance in a product is a common practice if the substance has never been associated with the particular product in a specific product market, Therefore, its promotion of the absence of a chemical substance as a distinctive feature of the product could constitute an unfair commercial practice. For example, dishwashing liquid might be advertised as containing “no CFCs” or being “CFC-free.” However, if dishwashing liquid products have never contained CFCs, the implication that the product has been improved through the removal of CFCs should be considered misleading. A “free” claim may also be misleading if it implies to the average consumer that the compared product is unsafe, toxic or harmful when it is not.
- (6) Comparing products based on their environmental or social aspects, including through the use of sustainability information tools, is an increasingly common marketing technique. In order to ensure that such comparisons do not mislead consumers, Article 7 of Directive 2005/29/EC should be amended to require that the consumer is provided with information about the method of the comparison, the products which are the object of comparison and the suppliers of those products, and the measures to keep information up to date. This should ensure that consumers make better informed transactional decisions when using such services. The comparison should be objective by, in particular, comparing products which serve the same function, using a common method and common assumptions, and comparing material and verifiable features of the products being compared.

- (7) The displaying of sustainability labels which are not based on a certification scheme or not established by public authorities should be prohibited by including such practices in the list in Annex I to Directive 2005/29/EC. The certification scheme should fulfil minimum transparency and credibility conditions. The displaying of sustainability labels remains possible without a certification scheme where such labels are established by a public authority, or in case of additional forms of expression and presentation of food in accordance with Article 35 of Regulation (EU) No 1169/2011. This rule complements point 4 of Annex I to Directive 2005/29/EC which prohibits claiming that a trader, the commercial practices of a trader, or a product has been approved, endorsed or authorised by a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- (8) In cases where the displaying of a sustainability label involves a commercial communication that suggests or creates the impression that a product has a positive or no impact on the environment, or is less damaging to the environment than competing products, that sustainability label also should be considered as constituting an environmental claim.

- (9) Annex I to Directive 2005/29/EC should also be amended to prohibit making generic environmental claims without recognised excellent environmental performance which is relevant to the claim. Examples of such generic environmental claims are ‘environmentally friendly’, ‘eco-friendly’, ‘eco’, ‘green’, ‘nature’s friend’, ‘ecological’, ‘environmentally correct’, ‘climate friendly’, ‘gentle on the environment’, ‘carbon friendly’, ‘carbon neutral’, ‘carbon positive’, ‘climate neutral’, ‘energy efficient’, ‘biodegradable’, ‘biobased’ or similar statements, as well as broader statements such as ‘conscious’ or ‘responsible’ that suggest or create the impression of **recognised** excellent environmental performance. Such generic environmental claims should be prohibited whenever there is no excellent environmental performance demonstrated or whenever the specification of the claim is not provided in clear and prominent terms on the same medium, such as the same advertising spot, product’s packaging or online selling interface. For example, the claim ‘biodegradable’, referring to a product, would be a generic claim, whilst claiming that ‘the packaging is biodegradable through home composting in one month’ would be a specific claim, which does not fall under this prohibition.

- (10) Excellent **Recognised excellent** environmental performance can be **based on registration in accordance with Regulation (EC) No. 1221/2009 of the European Parliament and the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) or** demonstrated by compliance with Regulation (EC) No 66/2010 of the European Parliament and of the Council<sup>3</sup>, or officially recognised ecolabelling schemes in the Member States, or compliance with top environmental performance for a specific environmental aspect in accordance with other applicable Union laws, such as a class A in accordance with Regulation (EU) 2017/1369 of the European Parliament and of the Council<sup>4</sup>. The excellent environmental performance in question should be relevant to the claim. For example, a generic claim ‘energy efficient’ could be made based on excellent environmental performance in accordance with Regulation (EU) 2017/1369. By contrast, a generic claim ‘biodegradable’ could not be made based on excellent environmental performance in accordance with Regulation (EC) No 66/2010, insofar as there are no requirements for biodegradability in the specific EU Ecolabel criteria related to the product in question.
- (11) Another misleading commercial practice which should be prohibited in all circumstances and thus added to the list in Annex I to Directive 2005/29/EC is making an environmental claim about the entire product when it actually concerns only a certain aspect of the product. This would be the case for example when a product is marketed as ‘made with recycled material’ giving the impression that the entire product is made of recycled material, when in fact it is only the packaging that is made of recycled material.

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<sup>3</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (Text with EEA relevance) (OJ L 27, 30.1.2010, p. 1).

<sup>4</sup> Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ L 198, 28.7.2017).

- (12) The Circular Economy Action Plan<sup>5</sup> provides for the need to set the rules on environmental claims using Product and Organisation Environmental Footprint methods. Additional requirements on environmental claims will have to be set in specific Union legislation. Those new requirements will contribute to the Green Deal<sup>6</sup> objective of enabling buyers to make more sustainable decisions and reduce the risk of greenwashing through reliable, comparable and verifiable information.
- (13) Presenting requirements imposed by law on all products within the relevant product category on the Union market, including imported products, as a distinctive feature of the trader's offer, should also be prohibited in all circumstances and added to the list in Annex I to Directive 2005/29/EC. This prohibition could apply, for example, when a trader is advertising that a given product does not include a specific chemical substance while that substance is already forbidden by law for all products within that product category in the Union. Conversely, the prohibition should not cover commercial practices promoting traders' or products' compliance with legal requirements that only apply to some products but not to other competing products of the same category on the Union market, such as products of non-EU origin. **It could be the case that certain products on the market are required to comply with certain legal requirements while other products are not. For example, fish products produced while using EU-mandated sustainable fishing methods should still be allowed to advertise compliance with EU legal requirements because not all fish offered on the EU market must have been caught while complying with them.**

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<sup>5</sup> COM(2020)98 final, 11 March 2020.

<sup>6</sup> COM(2019)640 final, 11 December 2019.

- (14) In order to improve the welfare of consumers, the amendments to ~~Annex I to~~ Directive 2005/29/EC should also address several practices associated with early obsolescence, including planned **early** obsolescence practices, understood as a commercial policy involving deliberately planning or designing a product with a limited useful life so that it prematurely becomes obsolete or non-functional after a certain period of time. Purchasing products that are expected to last longer than they actually do causes consumer detriment. Furthermore, **planned** early obsolescence practices have an overall negative impact on the environment in the form of increased material waste. Therefore, addressing those practices are also likely to reduce the amount of waste, contributing to a more sustainable consumption.

~~(14a) — Marketing of a good although the trader is aware or may reasonably be aware of the fact that such good contain a feature that was introduced to limit its durability should be prohibited on a case-by-case assessment by competent authorities. Therefore, traders should make reasonable efforts to verify that goods they are selling do not contain such features. For example, such a feature could be software which stops or downgrades the functionality of the good after a particular period of time, or it could be a piece of hardware which is designed to fail after a particular period of time.~~

~~(14b) — The prohibition of such features of the goods complements and does not affect the remedies available to consumers when they constitute a lack of conformity under Directive (EU) 2019/771 of the European Parliament and of the Council<sup>7</sup> on certain aspects concerning contracts for the sale of goods. The use of features limiting the durability of goods should be distinguished from manufacturing practices using materials or processes of general low quality resulting in limited durability of the goods. Lack of conformity of a good resulting from the use of low quality materials or processes should continue to be governed by the rules on the conformity of goods set out in Directive (EU) 2019/771.~~

<sup>7</sup> — ~~Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).~~



(15) It should be prohibited under Annex I to Directive 2005/29/EC to omit to inform the consumer that a software update, including a security update, will ~~may-will~~ negatively impact the use of goods with digital elements or certain features of those goods, even if the update improves the functioning of other features. For example, when inviting consumers to update the operating system on their smartphone, the trader ~~will have to~~ should inform the consumer if such an update will ~~may-will~~ negatively impact the functioning of any of the features of the smartphone, **for example the battery, certain applications performances or a complete smartphone slowdown.**

(16) Marketing of a good when the trader knows -that such good contains a feature that has beenwas introduced to limit its durability should be prohibited , in any circumstances, by competent authorities. Given the definition of the trader under point b article 2 of the directive 2005/29/CE, the responsibility of the seller as well as the responsibility of the producer could be engaged if it appears that they market a good when they know that this good contains a feature that limits its durability. The responsibility of the seller could not be engaged if he markets a good without knowing that it contains such a feature. For example, such a feature could be a software which stops or downgrades the functionality of the good after a particular period of time, or it could be a piece of hardware which is designed to fail after a particular period of time.

(16.1) The prohibition of such features of the goods complements and does not affect the remedies available to consumers when they constitute a lack of conformity under Directive (EU) 2019/771 of the European Parliament and of the Council<sup>8</sup> on certain aspects concerning contracts for the sale of goods. The use of features limiting the durability of goods should be distinguished from manufacturing practices using materials or processes of general low quality resulting in limited durability of the goods. Lack of conformity of a good resulting from the use of low quality materials or processes should continue to be governed by the rules on the conformity of goods set out in Directive (EU) 2019/771. It should also be prohibited to omit to inform the consumer about the existence of a feature of the good introduced to limit its durability. For

<sup>8</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

example, such a feature could be software which stops or downgrades the functionality of the good after a particular period of time, or it could be a piece of hardware which is designed to fail after a particular period of time. The prohibition of omitting to inform consumers of such features of the goods complements and does not affect the remedies available to consumers when they constitute a lack of conformity under Directive (EU) 2019/771 of the European Parliament and of the Council<sup>9</sup>. For such a commercial practice to be considered unfair, it should not be necessary to demonstrate that the purpose of the feature is to stimulate the replacement of the respective good. The use of features limiting the durability of the goods should be distinguished from manufacturing practices using materials or processes of general low quality resulting in limited durability of the goods. Lack of conformity of a good resulting from the use of low quality materials or processes should continue to be governed by the rules on the conformity of goods set out in Directive (EU) 2019/771.

<sup>9</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

- (17) Another practice which should be prohibited under Annex I to Directive 2005/29/EC is the practice of claiming that a good has a certain durability when it does not. That would be the case, for instance, when a trader informs consumers that a washing machine is expected to last a certain number of washing cycles if used in accordance with the instructions, while the actual use of washing machine under the prescribed conditions shows this is not the case. However, such practice should be prohibited only in case a trader's claim regarding the usage time or intensity turns to be incorrect in a significant number of cases.
- (18) Similarly, Annex I to Directive 2005/29/EC should also be amended to prohibit presenting products as allowing repair when such repair is not possible, as well as omitting to inform consumers that it is not possible to repair goods in accordance with legal requirements in accordance with legal requirements, or omitting to inform consumers that goods could be repaired.
- (19) The prohibition of those practices in relation to durability and reparability in Directive 2005/29/EC would provide the consumer protection authorities of Member States with an additional enforcement tool for better protection of consumers' interests in the cases where traders fail to comply with requirements on the durability and reparability of goods under Union product legislation.
- (20) Another practice associated with planned early obsolescence which should be prohibited and added to the list in Annex I to Directive 2005/29/EC is inducing the consumer into replacing the consumables of a product earlier than would otherwise be necessary for technical reasons. Such practices mislead the consumer into believing that the goods will no longer function unless their consumables are replaced, thus leading them to purchase more consumables than necessary. For example, the practice of urging the consumer, via the settings of the printer, to replace the printer ink cartridges before they are actually empty in order to stimulate the purchase of additional ink cartridges would be prohibited.

- (21) Annex I to Directive 2005/29/EC should also be amended to prohibit omitting to inform the consumer that the good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer. For example, the marketing of printers that are designed to limit their functionality when using ink cartridges not provided by the original producer of the printer without disclosing this information to the consumer would be prohibited. This practice could mislead consumers into purchasing an alternative ink cartridge which cannot be used for that printer, thus leading to unnecessary repair costs, waste streams or additional costs for the consumer due to the obligation to use the original producer's consumables which the consumer could not foresee at the time of purchase. Similarly, marketing smart devices designed to limit their functionality when using chargers or spare parts that are not provided by the original producer without disclosing this information to the consumer would be prohibited as well.

**Option 1:**

(22) — In order for consumers to take better informed decisions and thus stimulate the demand for, and the supply of, more durable goods, specific information about a product's durability and reparability should be provided for all types of goods as regards goods with digital elements, digital content and digital services, consumers should be informed about the period of time during which free software updates are available. Therefore, Directive 2011/83/EU of the European Parliament and of the Council<sup>10</sup> should be amended to provide consumers with pre-contractual information about durability, reparability and the availability of updates. Information should be provided to consumers in a clear and comprehensible manner and in line with the accessibility requirements of Directive 2019/882<sup>11</sup>. The obligation to provide this information to consumers complements and does not affect the rights of consumers provided in Directives (EU) 2019/770<sup>12</sup> and (EU) 2019/771<sup>13</sup> of the European Parliament and of the Council.

(23) — A good indicator of a good's durability is the producer's commercial guarantee of durability within the meaning of Article 17 of Directive (EU) 2019/771. Therefore, Directive 2011/83/EU should be amended to specifically require traders selling goods to inform consumers about the existence of the producer's commercial guarantee of durability for all types of goods, where the producer makes this information available.

<sup>10</sup> — Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

<sup>11</sup> — Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (OJ L 151, 7.6.2019, p. 70).

<sup>12</sup> — Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

<sup>13</sup> — Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

(24) — The problem of limited durability contrary to consumer expectations is most relevant for energy-using goods, which are goods that function from an external energy source. Consumers are also most interested in receiving information about the expected durability of this category of goods. For these reasons, only for this category of goods, consumers should be made aware that the information about the existence of a producer's commercial guarantee of durability of more than two years has not been provided by the producer.

(25) — Goods containing energy using components, where those components are mere accessories and do not contribute to the main function of those goods, such as decorative lighting for clothing or footwear or electric light for a bicycle, should not be classified as energy using goods.

(26) — In view of the established minimum duration of two years of the seller's liability for lack of conformity in accordance with Directive (EU) 2019/771 and the fact that many product failures occur after two years, the trader's obligation to inform consumers about the existence and duration of the producer's commercial guarantee of durability should apply to guarantees that are of more than two years.

(27) — In order to make it easier for consumers to take an informed transactional decision when comparing goods before concluding a contract, traders should inform consumers about the existence and duration, of the producer's commercial guarantee of durability for the entire good and not for specific components of the good.

(28) — The producer and the seller should remain free to offer other types of commercial guarantees and after-sales services of any duration. However, the information provided to the consumer about such other commercial guarantees or services should not confuse the consumer with regard to the existence and duration of the producer's commercial guarantee of durability that covers the entire good and has a duration of more than two years.

Option 2:

Commenté [JF1]: Choix France : option 2

(22) In order for consumers to take better informed decisions and thus stimulate the demand for, and the supply of, more durable goods, specific information about a product's durability and reparability should be provided for all types of goods as regards goods with digital elements, digital content and digital services, consumers should be informed about the period of time during which free software updates are available. Therefore, Directive 2011/83/EU of the European Parliament and of the Council should be amended to provide consumers with pre-contractual information about durability, reparability and the availability of updates. Information should be provided to consumers in a clear and comprehensible manner and in line with the accessibility requirements of Directive 2019/882. The obligation to provide this information to consumers complements and does not affect the rights of consumers provided in Directives (EU) 2019/770 and (EU) 2019/771 of the European Parliament and of the Council.

(23) A good indicator of a good's durability is the producer's commercial guarantee of durability within the meaning of Article 17 of Directive (EU) 2019/771. **The producer's commercial guarantee of durability is not a new type of guarantee.** Therefore, Directive 2011/83/EU should be amended to specifically require traders **provide for a specification of the producer's commercial guarantee of durability. Such guarantee is a commitment from a producer to the consumer on the durability of the good, more specifically it is a commitment that the good will maintain its required functions and performance through normal use. If the good will not keep its durability, the producer is directly liable to the consumer to offer free replacement or repair of the good. Consumers will benefit from clarity and better information on the durability of goods. In addition, it will also address existing consumer confusion about the currently offered commercial guarantees information, which is often unclear, imprecise or incomplete. The producer's commercial guarantee of durability should be beneficial to consumers and the environment since it promotes longer durability of goods. Traders selling goods should be specifically required to inform consumers about the existence of the producer's commercial guarantee of durability for all types of goods, where the producer makes this information available.** *In order to make the consumer well informed on the commercial guarantee of durability, the seller should mention that the producer does not offer any commercial guarantee of durability when the seller has received no information from the producer. Therefore, the consumer is informed of the*

existence or of the absence of such a guarantee according to the declaration of the producer.





(24) — The problem of limited durability contrary to consumer expectations is most relevant for energy-using goods, which are goods that function from an external energy source. Consumers are also most interested in receiving information about the expected durability of this category of goods. For these reasons, only for this category of goods, consumers should be made aware that the information about the existence of a producer's commercial guarantee of durability of more than two years has not been provided by the producer.

(25) — Goods containing energy using components, where those components are mere accessories and do not contribute to the main function of those goods, such as decorative lighting for clothing or footwear or electric light for a bicycle, should not be classified as energy-using goods.

(26) In view of the established minimum duration of two years of the seller's liability for lack of conformity in accordance with Directive (EU) 2019/771 and the fact that many product failures occur after two years, the trader's obligation to inform consumers about the existence and duration of the producer's commercial guarantee of durability should apply to guarantees that are of more than ~~two years~~ the duration of the legal guarantee of conformity.

(27) In order to make it easier for consumers to take an informed transactional decision when comparing goods before concluding a contract, traders should inform consumers about the existence and duration, of the producer's commercial guarantee of durability for the entire good and not for specific components of the good.

(28) The producer and the seller should remain free to offer other types of commercial guarantees and after-sales services of any duration. However, the information provided to the consumer about such other commercial guarantees or services should not confuse the consumer with regard to the existence and duration of the producer's commercial guarantee of durability that covers the entire good and has a duration of more ~~than two years~~ than the duration of the legal guarantee of conformity.

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- (29) To promote competition between producers as regards the durability of goods with digital elements the traders selling those goods should inform consumers about the minimum period of time during which the producer provider-producer commits to provide software updates for such goods. However, to avoid overloading consumers with information, such information should only be provided when this period is longer than the period of the producer's commercial guarantee of durability, as that guarantee entails the provision of updates, including security updates, that are necessary to maintain the required functions and performance of goods with digital elements. Furthermore, information about the producer's commitment to provide software updates is relevant only where the sales contract regarding goods with digital elements provides for a single act of supply of the digital content or digital service in respect of which Article 7(3), point (a), of Directive (EU) 2019/771 applies. In contrast, there should be no new obligation to provide that information where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, since for those contracts Article 7(3), point (b), of Directive (EU) 2019/771 specifies, by reference to Article 10 (2) or (5), the period of time during which the seller is to ensure that the consumer is informed of and supplied with updates. In order to ensure that consumers are well informed about the availability of the software update, the trader should take reasonable and proportionate steps to be able to provide the consumer for this information and, at least, ask the provider or any other "intermediate" for such an information.
- (30) Likewise, traders offering digital content and digital services should also inform consumers about the minimum period during which the provider of the digital content or digital service, where the provider is different from the trader, commits to provide software updates, including security updates, necessary to keep the digital content and digital services in conformity. Information about the provider's commitment to provide software updates is relevant only where the contract provides for a single act of supply or a series of individual acts of supply in respect of which Article 8(2), point (b), of Directive 2019/770 applies. In contrast, there should be no new obligation to provide that information where the contract provides for a continuous supply over a period of time, since for these contracts Article 8(2), point (a) of Directive (EU) 2019/770 specifies the period of time during which the trader is to ensure that the consumer is informed of and supplied with updates. In order to ensure that consumers are well informed about the availability of the software update, the trader should take reasonable and proportionate steps to be able to

provide the consumer for this information and, at least, ask the provider or any other “intermediate” for such an information.



- (31) Pursuant to Article 5(1), point (e), and Article 6(1), point (m), of Directive 2011/83/EU traders are obliged to provide the consumer before the consumer is bound by the contract with information on the existence and the conditions of after-sales services, including repair services, where such services are provided. In addition, to To allow consumers to make an informed transactional decision and choose goods that are easier to repair, traders should provide, before the conclusion of the contract, for all types of goods, where applicable, the reparability score of the good as provided by the producer in accordance with Union or national law. *[New first sentence moved from recital 32]*
- (32) Pursuant to Article 5(1), point (e), and Article 6(1), point (m), of Directive 2011/83/EU traders are obliged to provide the consumer before the consumer is bound by the contract with information on the existence and the conditions of after-sales services, including repair services, where such services are provided. In addition, in In order to ensure that consumers are well informed about the reparability of the goods they purchase, where a reparability score is not established in accordance with Union or national law, traders should provide, for all types of goods, other relevant repair information that is made available by the producer, such as information about the availability of spare parts, and a user and repair manual. The trader should not be required to actively search for such information from the producer, for example, on the product-specific websites. *[New last sentence moved from recital 33]*

**Option 1:**

- (33) Traders should provide consumers with information about the existence and duration of the producer's commercial guarantee of durability, the minimum period for updates and the repair information other than the reparability score, where the producer or provider of the digital content or digital service, when different from the trader, makes the relevant information available. In particular, as regards goods, the trader should convey to consumers the information that the producer has provided to the trader or has otherwise intended to make readily available to the consumer before the conclusion of the contract, by indicating it on the product itself, its packaging or tags and labels that the consumer would normally consult before concluding the contract. The trader should not be required to actively search for such information from the producer, for example, on the product-specific websites.

## Option 2:

Commenté [JF2]: Choix France : option 2

- (33) Traders should provide consumers with information about the existence and duration of the producer's commercial guarantee of durability, the minimum period for updates and the repair information other than the reparability score, where the producer or provider of the digital content or digital service, when different from the trader, makes the relevant information available. In particular, as regards goods, the trader should convey to consumers the information that the producer has provided to the trader or has otherwise intended to make readily available to the consumer before the conclusion of the contract, by indicating it on the product itself, its packaging or tags and labels that the consumer would normally consult before concluding the contract. ~~The trader should not be required to actively search for such information from the producer, for example, on the product-specific websites.~~

\*\*\*\*\*

- (34) Directives 2005/29/EC and 2011/83/EU should continue to work as a 'safety net' ensuring that a high level of consumer protection can be maintained in all sectors, by complementing sector and product-specific Union law that prevail in case of conflict. Similarly, the specific Union law providing for transparency and certification as included for example in Regulation (EC) No 1221/2009 (EMAS), Regulation (EC) 66/2010 (EU Ecolabel), or Regulation (EC) 2017/1001 (trade mark) should prevail in case of conflict.

- (35) Since the objectives of this Directive, namely, enabling better informed transactional decisions by consumers to promote sustainable consumption, eliminating practices that cause damage to the sustainable economy and mislead consumers away from sustainable consumption choices, and ensuring a better and consistent application of the Union consumer legal framework, cannot be sufficiently achieved by the Member States individually but can rather, by reason of the Union-wide character of the problem, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.
- (36) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>14</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

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<sup>14</sup> OJ C 369, 17.12.2011, p. 14.

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Amendments to Directive 2005/29/EC**

Directive 2005/29/EC is amended as follows:

- (1) in Article 2, the following points **(ca) and** (o) to (y) are added:

**‘(ca) ‘goods’ means goods as defined in point (5) of Article 2 of Directive (EU) 2019/771 of the European Parliament and of the Council;**

**‘(o) ‘environmental claim’ means any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time;**

~~‘(p) ‘explicit environmental claim’ means an environmental claim that is in textual form or contained in a sustainability label;~~

(q) ‘generic environmental claim’ means any ~~explicit~~ environmental claim, **in any written or spoken form**, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium;

(r) ‘sustainability label’ means 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 **predominantly** to its environmental or social aspects or both. This does not cover any mandatory label required in accordance with Union or national law;

(s) ‘certification scheme’ means a third-party ~~verification~~ scheme that is open under **publicly accessible**, 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 **objectively verifiable and publicly accessible** 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 accredited by a national accreditation authority, independent from both the scheme owner and the trader;

(t) ‘sustainability information tool’ means software, including a website, part of a website or an application, operated by or on behalf of a trader, which provides information to consumers about environmental or social aspects of products, or which compares products on those aspects;

(u) ‘recognised excellent environmental performance’ means environmental performance ~~based on a registration in accordance with Regulation (EC) No. 1221/2009 or~~ 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;

(v) ‘durability’ means durability as defined in Article 2, point (13), of Directive (EU) 2019/771 of the European Parliament and of the Council\*\*;

(w) ‘software update’ means a free update, including a security update, that is necessary to keep goods with digital elements, digital content and digital services in conformity in accordance with Directives (EU) 2019/770 and (EU) 2019/771 or that upgrades or downgrades their durability;

(x) ‘consumable’ means any component of a good that is used up recurrently and needs to be replaced **or replenished** for the good to function as intended;



(y) 'functionality' means functionality as defined in point (9) of Article 2 of Directive (EU) 2019/771.

\_\_\_\_\_  
\* Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ L 27, 30.1.2010, p. 1).

\*\* Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (*OJ L 136, 22.5.2019, p. 28*).';

(2) Article 6 is amended as follows:

(a) in paragraph 1, point (b) is replaced by the following:

'(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, environmental or social impact, accessories, durability, reparability, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product.';

(b) in paragraph 2, the following points (d) and (e) to (e) are added:

'(d) making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system;

(e) advertising benefits ~~for consumers that are considered as a common practice in the relevant market~~ respect of the particular product of a product's feature which is a regular feature considering the relevant type of product ;

(ca) any marketing of a good when the trader is aware or may reasonably be aware that such good contains a feature that was incorporated to limit its durability.'

- (3) in Article 7, the following paragraph (7) is added:

'7. Where a trader provides a service which compares products, ~~including through a sustainability information tool,~~ including through a sustainability information tool, information about the method of comparison, the products which are the object of comparison and the suppliers of those products, as well as the measures in place to keep that information up to date, shall be regarded as material.';

- (4) Annex I is amended in accordance with the Annex to this Directive.

#### *Article 2*

#### **Amendments to Directive 2011/83/EU**

Directive 2011/83/EU is amended as follows:

- (1) Article 2 is amended as follows:

- (a) ~~the following point (3a) is inserted:~~

~~'(3a) 'energy using good' means any good that depends on energy input (electricity, fossil fuels and renewable energy sources) to work as intended;';~~

**Option 1:**

(b) the following points (14a) to (14e) are inserted:

~~“(14a) ‘commercial guarantee of durability’ means a producer’s commercial guarantee of durability referred to in Article 17 of Directive (EU) 2019/771, under which the producer is directly liable to the consumer during the entire period of that guarantee for repair or replacement of the goods;~~

~~“(14b) ‘durability’ means durability as defined in Article 2, point (13), of Directive (EU) 2019/771;~~

**Option 2:**

Commenté [JF3]: Choix France option 2

(b) the following points (14a) to (14e) are inserted:

“(14a) ‘commercial guarantee of durability’ means a producer’s commercial guarantee of durability referred to in Article 17 of Directive (EU) 2019/771, under which the producer is directly liable to the consumer during the entire period of ~~that the~~ guarantee of durability for repair or replacement of the goods, under the conditions laid down in Article 14 of Directive (EU) 2019/771, whenever the goods do not maintain their durability;

“(14b) ‘durability’ means durability as defined in Article 2, point (13), of Directive (EU) 2019/771;

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(14c) ‘producer’ means producer as defined in Article 2, point (4), of Directive (EU) 2019/771;

(14d) ‘reparability score’ means a score expressing the capacity of a good to be repaired, based on a method established in accordance with Union law or national law, where applicable;

(14e) ‘software update’ means a free update, including a security update, that is necessary to keep goods with digital elements, digital content and digital services in conformity in accordance with Articles 7 and 8 of Directives **Directives** (EU) 2019/770 and Articles 6 and 7 of Directive (EU) 2019/771 or that upgrades or downgrades their durability;’;

(2) in Article 5, paragraph 1 is amended as follows:

**Option 1:**

(a) the following points (eac) ~~to~~ **and** (ed) are inserted:

~~(ea) for all goods, where the producer makes it available, information that the goods benefit from a commercial guarantee of durability and its duration in units of time, where that guarantee covers the entire good and has a duration of more than two years;~~

~~(eb) for energy-using goods, where the producer does not make available the information referred to in point (ea), information that the producer has not provided information on the existence of a commercial guarantee of durability of more than two years. This information shall be at least as prominent as any other information about the existence and the conditions of after-sales services and commercial guarantees provided in accordance with point (e);~~

Option 2:

Commenté [JF4]: Choix option 2

(a) the following points (ea) to (ed) are inserted:

(ea) for all goods, ~~where the producer makes it available~~, information that the goods benefit from a commercial guarantee of durability, ~~and its duration in units of time and its conditions~~, where that guarantee covers the entire good, ~~and has a duration of more than the duration of legal guarantee of conformity two years and is not offered against additional payment to the good. This information shall be made available in a Union harmonised graphic format in accordance with [Annex of this proposal]. When the seller has received no information from the producer on the existence of the commercial guarantee of durability, the seller informs the consumer about the absence of such a guarantee.~~

(eb) ~~for energy-using goods, where the producer does not make available the information referred to in point (ea), information that the producer has not provided information on the existence of a commercial guarantee of durability of more than two years. This information shall be at least as prominent as any other information about the existence and the conditions of after-sales services and commercial guarantees provided in accordance with point (e) made available in a Union harmonised graphic format in accordance with [Annex of this proposal];~~

\*\*\*\*\*

(ec) for goods with digital elements, ~~where the producer makes such information available~~, the minimum period in units of time during which the ~~producer~~ ~~provider~~ ~~producer~~ provides software updates, ~~given the information that the trader could collect in a reasonable and proportionate manner, unless the contract provides for a continuous supply of the digital content or digital service over a period of time. Where information about the existence of a commercial guarantee of durability is provided in accordance with point (ea), the information on the updates shall be provided if those updates are supplied for a longer period than the commercial guarantee of durability;~~

(ed) for digital content and digital services, ~~where their provider is different from the trader and makes such information available, the minimum period in units of time during which the provider provides software updates, unless the contract provides for a continuous supply of the digital content or digital service over a period of time.~~ **Where the provider of digital content and digital services is different from the trader, the trader shall provide the information about the minimum period in units of time during which the provider provides software updates only if the provider makes such information available, given the information that the trader could collect in a reasonable and proportionate manner;**

(b) the following points (i) and (j) are added:

‘(i) where applicable, the reparability score for the goods;

(j) when point (i) is not applicable, information made available by the producer about the availability of spare parts, including the procedure of ordering them, and about the availability of a user and repair manual.’;

(3) in Article 6, paragraph 1 is amended as follows:

**Option 1:**

(a) the following points (ma) to **and** (md) are inserted:

~~‘(ma) for all types of goods, where the producer makes it available, information that the goods benefit from a commercial guarantee of durability and its duration in units of time, where that guarantee covers the entire good and has a duration of more than two years;~~

~~(mb) for energy using goods, where the producer does not make available information referred to in point (ma), information that the producer has not provided information on the existence of a commercial guarantee of durability of more than two years. This information shall be at least as prominent as any other information about the existence and the conditions of after-sales services and commercial guarantees provided in accordance with point (m);~~

**Option 2:**

Commenté [JF5]: Choix option 2

(a) the following points (ma) to (md) are inserted:

(ma) for all types of goods, ~~where the producer makes it available~~, information that the goods benefit from a commercial guarantee of durability ~~and~~, its duration in units of time ~~and its conditions~~, where that guarantee covers the entire good, ~~and has a duration of more than two years~~ the duration of the legal guarantee of conformity ~~and is not offered for additional payment to the good. This information shall be made available in a Union harmonised graphic format in accordance with [Annex to this proposal] When the seller has no information from the producer on the existence of the commercial guarantee of durability, the seller informs the consumer about the absence of such a guarantee;~~

(mb) for energy-using goods, ~~where the producer does not make available information referred to in point (ma)~~, information that the producer has not provided information on the existence of a commercial guarantee of durability of more than two years. This information shall be at least as prominent as any other information about the existence and the conditions of after-sales services and commercial guarantees provided in accordance with point (m) ~~made available in a Union harmonised graphic format in accordance with [Annex to this proposal]~~;

\*\*\*\*\*

(mc) for goods with digital elements, ~~where the producer makes such information available~~, the minimum period in units of time during which the ~~producer~~ **provider** provides software updates, given the information that the trader could collect in a reasonable and proportionate manner, ~~unless the contract provides for a continuous supply of the digital content or digital service over a period of time. Where information about the existence of a commercial guarantee of durability is provided in accordance with point (ma), the information on the updates shall be provided if those updates are supplied for a longer period than the commercial guarantee of durability;~~

(md) for digital content and digital services, ~~where their provider is different from the trader and makes such information available~~, the minimum period in units of time during which the provider provides software updates, ~~unless the contract provides for a continuous supply of the digital content or digital service over a period of time.~~ **Where the provider of digital content and digital services is different from the trader, the trader shall provide the information about the minimum period in units of time during which the provider provides software updates , given the information that the trader could collect in a reasonable and proportionate manner only if the provider makes such information available;**

(b) the following points (u) and (v) are added:

‘(u) where applicable, the reparability score for the goods;

(v) when point (u) is not applicable, information made available by the producer about the availability of spare parts, including the procedure of ordering them, and about the availability of a user and repair manual.’;

(4) ~~in Article 8(2), the first subparagraph is replaced by the following:~~

~~‘If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in Article 6(1), points (a), (e), (ma), (mb), (o) and (p).’.~~

### Article 3

#### Reporting by the Commission and review

By [5 years from adoption], the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council.

That report shall be accompanied, where appropriate, by relevant legislative proposals.



#### *Article 4*

##### **Transposition**

1. Member States shall adopt and publish by [~~18~~ **24** *months from adoption*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [~~24~~ **30** *months from adoption*].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions in national law which they adopt in the field covered by this Directive.

#### *Article 5*

##### **Entry into force**

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.



*Article 6*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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**Annex to the ANNEX**

Annex I to Directive 2005/29/EC is amended as follows:

(1) the following point 2a is inserted:

‘2a. Displaying a sustainability label which is not based on a certification scheme or not established by public authorities.’;

(2) the following points 4a and 4b are inserted:

‘4a. Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.

4b. Making an environmental claim about the entire product when it actually concerns only a certain aspect of the product.’;

(3) the following point 10a is inserted:

‘10a. Presenting requirements imposed by law on all products within the relevant product category on the Union market as a distinctive feature of the trader’s offer.’;

(4) the following points 23d to 23i are inserted:

‘23d. Omitting to inform the consumer that a software update ~~will~~ **may will** negatively impact the use of goods with digital elements or certain features of those goods **or digital content or digital service** even if the software update improves the functioning of other features.

~~23e. Omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability.~~ **Any marketing of a good when the trader knows that such good contains a feature that was incorporated to limit its durability.**

23f. Claiming that, given specific use conditions determined by the trader, a good has a certain durability in terms of usage time or intensity when it does not ~~as a~~ result of a systematic underperformance of the relevant good.

23g. Presenting goods as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair in accordance with legal requirements ~~in accordance with legal requirements~~ or omitting to inform consumers that goods could be repaired.

23h. Inducing the consumer into replacing the consumables of a good earlier than necessary for technical reasons ~~is necessary.~~

23i. Omitting to inform the consumer that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer.’.



Council of the European Union  
General Secretariat

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**Interinstitutional files:  
2022/0092 (COD)**

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**Brussels, 20 October 2022**

**WK 13974/2022 ADD 1**

**LIMITE**

**CONSOM**

**MI**

**COMPET**

**ENER**

**ENV**

**SUSTDEV**

**DIGIT**

**CODEC**

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#### **NOTE**

From:	Delegations
To:	Working Party on Consumer Protection and Information (Attachés) Working Party on Consumer Protection and Information
Subject:	Proposal for a Directive on Empowering consumers for the green transition - Comments on Presidency compromise text 10937/22 REV 2 from delegations of EE, ES, FR, HR

**HR comments on 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 REV 2**

We would like to thank the Czech Presidency for the compromise Proposal which is in accordance with some of earlier written suggestions raised by HR.

**Furthermore, the following text contains additional comments that should be further discussed in the WP.**

**Article 1 Paragraph 1 Amendments to Art 2 of the Directive 2005/29/EC**

- **Point w) "*software update*"**

Definition regulates free updates. In order to ensure legal certainty in a way that free updates refer only to contracts where trader provides for updates without any counter-performance on consumer's side - neither monetary obligation **nor the obligation to provide personal data**, HR repeats earlier suggested amendment of the accompanying recital to explicitly clarify the latter.

**Article 1 Paragraph 2 Point b) Amendments to Art 6 Paragraph 2 of the Directive 2005/29/EC**

- **Point e)**

HR is of the opinion that change in wording:

*"Common practice in ~~the relevant market~~ respect of the particular product"*

didn't result with clearer provision. Similarly to the previously inserted wording "*relevant market*", the term "*common practice in respect of the particular product*" can be the subject to different interpretation. This could result in different enforcement practice on the Union level. In order to avoid disputes over the scope of this term, since the term may be interpreted differently, e.g. as practice established on international level, Union level, on the market of one or more MS, HR suggest that provision explicitly limits its scope to advertising benefits that are considered as common practice "*in the market of that particular Member State*" given that average consumers' decision to purchase is still oriented on business practices limited to their MS and that for the courts/administrative authorities it is easier to determine relevant practice when the practice is limited to the MS.

Proposed change:

*"(e) advertising benefits for consumers that are considered as a common practice in the respect of the particular ~~product~~ market of that particular Member State."*

- **Point (ea)**

It seems that there are still differences **to whom provisions on misleading green claims are addressed to**. For example, at the last WG meeting it has been said that point ea is primarily addressed to the trader/seller. We have a different interpretation of that provision and consider necessary to accentuate that such obligation is directed to the manufacturer as well. General definition of a trader enables extensive interpretation and without doubt includes manufacturers/producers. This broad definition ensures that every person who is in any kind of relationship with the consumer is covered and obligated to respect consumer protection acquis. However, in order to prevent possible differences in interpretation, we propose the amendment of the provision of Art 5 (3) of the Directive 2005/29/EZ in a way to explicitly prescribe that manufacturer is considered as trader. Thereby, all traders' obligations (including dual quality provision) regulated by UCPD would apply both to the manufacturer and the trader:

*"Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader, **including manufacturer**, could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."*

It has been suggested that this issue will be clarified in the EC guidelines. However, given that there are cases when Court of Justice of the European Union has had a different interpretation of the same provision from that specified in the guidelines, HR is of the opinion that it is necessary that the matter is directly addressed in the text of the UCPD.

## **Article 2 Paragraph 1 - Amendments to Article 2 of the Directive 2011/83/EU**

- **Point 14d) "reparability score"**

According to the definition, "reparability score" is based on the method established in accordance with Union law. Considering that the scoring system for repair of products on Union level is still **a matter of analysis and development**, HR expresses concerns with regards to defining "reparability score" at this early stage.

In that regard, HR would like clarification whether JRC methodology is expected to be fully developed before the transposition period is over?

Also, **we prefer Commission's proposal of this provision over the proposal of CZ PRES**. There should be a uniform reparability score on the Union level. Aim of the reparability score is to compare products before the purchase. In order to ensure comparability of the products on the

Union level, reparability score needs to be harmonized. Therefore, we suggest **deleting the wording**: “*or national law, where applicable*”.

#### **Article 2 Paragraph 2 and 3 - Amendments to Art 5 and 6 of the Directive 2011/83/EU**

- **Point ea) and eb) to Art 5 and point ma) and mb) to Art 6**

HR welcomes the efforts to further regulate consumer information on the guarantee of goods. However, as explained before, HR suggest reconsidering the **necessity of the added provision**. HR is of the opinion that this matter is already fully covered by Article 5 Paragraph 1 Point e) that regulates obligation to inform consumer on the existence and **the conditions** of commercial guarantees. Conditions of commercial guarantee undisputable include durability and its duration in units of time, and according to our knowledge, this hasn't been disputed in practice. Thus, we prefer deleting this provision, however if the majority of MS opts for this addition to remain in the text, **we can agree to that**.

- **Point ec), ed), mc) and md)**

Although it seems that it is evident who the “*provider*” is, we suggest adding the definition of the “*provider*” to prevent any misinterpretations in practice, especially taking into consideration different opinions of the scope of the term “*trader*” (whether if it includes manufacturer or not).

#### **Article 2 Paragraph 4**

**We prefer this provision to remain in the text in order to clarify the appropriate manner of providing necessary consumer information.**

Given the common business practice in certain MS, HR proposes addition of the subparagraph to regulate explicitly that the trader has not fulfilled his obligation to inform the consumer of the obligations under Art. 6. (1) points a), e), o) and p) if he discloses this information only in the standard terms and conditions or similar contractual documents. Providing pre-contractual information exclusively in such documents would be contrary to the obligation of providing information in a clear and comprehensible manner. Thus, we suggest the following addition:

*“If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in Article 6(1), points (a), (e), (o) and (p). The information should be provided in a clear and comprehensible manner and not merely in the standard terms and conditions or similar contractual documents.*

**The accompanying Recital 22** states that pre-contractual information on the durability, reparability and availability of updates and should be provided to consumers in a clear and comprehensible manner and in line with the accessibility requirements of Directive 2019/882. As the provisions of this directive are limited to the obligations of manufacturers/ importers/



distributors, HR suggests that the recital clearly states which exact provisions are relevant for the obligation to provide pre-contractual information to the consumer or to clarify that this obligation is limited to accessibility requirements as it was explained during the WG meetings.

## **Annex**

- **Point 10a**

HR suggests reconsidering the need for special regulation of Point 10 a of Annex I of the Unfair Commercial Practices Directive, given that its matter is already covered by point 10 of Annex I of the Unfair Commercial Practices Directive. In this regard, HR is of the opinion that the Point 4.1.1.6 of the Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ C 526) indicates the same by stating the following:

*“This provision (Point 10 of the Annex I UCPD) clarifies that traders should not mislead consumers by **unduly emphasising attributes that come from regulatory requirements.**”*

- **New Point 23e**

HR fully supports BEUC’s proposal on carbon neutral claims. As indicated in the mentioned proposal, *carbon neutral claims are highly misleading to consumers as they imply neutrality and no impact of products (or services) on the environment which is impossible to achieve from the scientific point of view. They are often being justified by the company’s involvement in carbon offsetting/compensation projects, which consumers are not sufficiently informed about and have no means to verify whether they are really robust and reliable.*

Thus, HR suggest adding the explicit prohibition of generic claims on carbon neutrality. These claims became increasingly common in public transport services and they are usually justified by the company’s involvement in carbon offsetting/compensation projects, as BEUC highlighted. However, average consumer doesn’t understand the meaning of such projects nor such projects are explained or even mentioned to the consumer in traders’ communication messages (marketing, pre-contractual information, etc.). Although such claims are prohibited by amendments of Article 6 (2) point ea of the UCPD in this Proposal that prohibits misleading claims in general, every specific and identified infringement of consumer rights needs to be explicitly prohibited by this Proposal.

Thus, we suggest adding the following provision as blacklisted unfair misleading commercial practice:

*“Making a generic environmental claim on carbon neutrality without clarifying that carbon neutrality is a result of company’s involvement in carbon offsetting/compensation projects”.*

- Point 23f

Claiming that ~~given specific use conditions~~, a good has a certain durability in terms of usage time or intensity when it does not ~~as a result of a systematic underperformance of the relevant good~~.

We prefer EC's proposal. Meaning of "as a result of a systematic underperformance of the relevant good" is unclear and it seems to limit the scope of this provision.

**EE written submission on**

*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  
(doc no 10937/2/22 REV 2)*

**1. Amendments to Directive 2005/29/EC**

**1.1. Art 6(2)e – advertising something that is „common practice“.**

Wording suggestion in yellow:

(5) Another potentially misleading commercial practice which should be added to the specific practices targeted by Article 6(2) of Directive 2005/29/EC is advertising benefits for consumers that are actually a common practice in the relevant market regarding the relevant product whenever the average consumer is not aware that this is a common practice. For example, if the absence of a chemical substance particular raw material in a product can be regarded as is a common practice if the that substance has never been associated with that the particular product in a specific product market, Therefore, its promotion of the absence of such a raw material chemical substance as a distinctive feature of the product could constitute an unfair commercial practice. However, advertising that, for example, a particular cheese is lactose free should not be regarded as misleading because although most cheeses do not include lactose some still do. For example, dishwashing liquid might be advertised as containing “no CFCs” or being “CFC-free.” However, if dishwashing liquid products have never contained CFCs, the implication that the product has been improved through the removal of CFCs should be considered misleading. A “free” claim may also be misleading if it implies to the average consumer that the compared product is unsafe, toxic or harmful when it is not.

Justification: proposal to add further clarity about the meaning of „common practice“ according to the explanations given by the Commission in the working party.

**1.1. Art 6(2)ea and annex I point 23e – marketing a good knowing its durability has been limited.**

Wording suggestion in yellow:

Art 6(2)ea

**(ea) – any marketing of a good when the trader is aware or may reasonably be aware that such good contains a feature that was incorporated to limit its durability.<sup>2</sup>**

Annex I

**23e. Omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability.**

Justification: proposal to revert to original Commission proposal which in our opinion is clearer.

**1.2. Annex I, point 23g – information about repair.**

Wording suggestion in yellow:

23g. Presenting goods as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair **in accordance with legal requirements.**

Justification: proposal to revert to original Commission proposal as otherwise there would be a requirement to always inform consumers about no-repair possibility.

**2. Amendments to Directive 2011/83/EU**

**2.1. Art 5(1)ea and eb – information on commercial guarantee of durability.**

As a first option Estonia prefers Option 1 proposed by the Presidency, i. e. deleting point (ea). We believe that the current rules already guarantee necessary information obligations regarding

both the legal guarantee and commercial guarantee. For us it is crucial that we do not confuse consumers in regards to these essential rights and do not put unnecessary burden on the traders.

Alternatively, the Presidency has proposed in Option 2 that the information on the commercial guarantee of durability should be made available in a Union harmonized graphic format. We believe that this is an alternative that could be further weighed. However, we see it most appropriate as an obligation to producers since they are at the best position to know and publish such information. In this case this matter should be addressed in product regulation. The details of the format should also be carefully weighed to make sure that the consumers do not interpret this as their only right but understand that in any case they can still exercise their rights granted by law.

## **2.2.Art 5(1)(ec) and (ed) – information about software updates.**

Estonia supports the deletion of points (ec) and (ed) as this could result in the reduction of consumer protection granted by the consumer sales directive (2019/771) and digital content directive (770/2019).

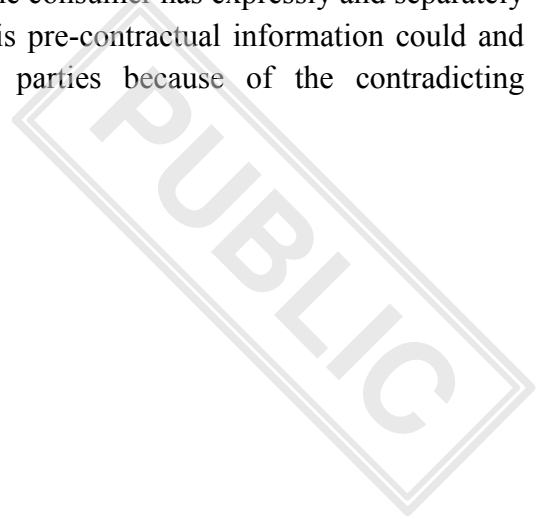
We stress that according to these directives the obligation to grant the consumers updates are put on the seller/provider or the digital content or service. The consumer does not have any right against the producer nor the provider of updates. The obligation stipulated by the directives is to provide consumers in case of single act of supply updates as long as the consumer can reasonably expect them given the nature of the goods or digital content/service.

Providing the information on how long the producer or the provider have promised to grant updates might mislead the consumer about their rights granted by the contract. The legislator has made a decision to protect consumer by stipulating that updates must be provided during a reasonable time. Although this condition must be weighed in each situation, it gives the necessary flexibility taking into account different types of products.

The parties to a contract have the right to specify the update period in the contract, but only if this is expressly and separately accepted by the consumer when concluding the contract. If this is not done, the consumer is granted protection that the reasonableness of the time-limit can in case of disputes be subjected to the assessment of the court, taking all circumstances into account.

We also note that according to CRD art 6(5) the precontractual information forms an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise. However, as stated before, diverging from the rights

guaranteed by the DCD and SGD is only allowed if the consumer has expressly and separately accepted this. Therefore, the question arises how this pre-contractual information could and would affect the contractual terms between the parties because of the contradicting presumptions posed.



**Annexe 2 de la note SGAE/MINUME/2022/314**

**Traduction de courtoisie des commentaires des autorités françaises**

Comments on the Proposal for a directive of the european parlement 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

**Recitals**

Recital 4 : France suggests to delete “consumers should be able to consult the findings of independent monitoring systems and thus be able to take note of the relevant proof indicating the progress of the producer”. This is likely to create an information overload that the consumer may not be able to process and, moreover, the consumer is not meant to check whether the commercial practice is fair.

Recital 5 : France proposes drafting change and ask for another example more accurate to the recital

Recital 14a and 14b : France proposes to transfer the provisions on marketing good with features to limit its durability from article 2 to the annexe. Therefore those recital have been deleted to respect the order of the text and appears now on recital 16 and 16.1 taking into account the new drafting change of point 23.e of the annex.

Recital 15 : France proposes to return to the version of the Commission with the use of « will » and not « may » because the commercial practices forbidden in the annex should be as objective and certain as possible.

Recital 16 : the proposed recital recalls the definition of the trader within the meaning of directive (EU) 2005/29 and states that the marketing of a good when the trader knows that such good contains a feature that has been introduced to limit its durability should be prohibited, in any circumstances.

Recital 16.1 is taken from presidency recital 14b

Recital 17 : France proposes to delete the last sentence which will lead to difficulty in assessing a “significant number of cases”. Moreover it would be more up to the professional to be careful in formulating his claim on the durability of a good.

Recital 18 : France proposes a third forbidden commercial practice related to repair : omitting to inform consumers that goods could be repaired in addition to presenting products as allowing repair when such repair is not possible, as well as omitting to inform consumers that it is not possible to repair goods in accordance with legal requirements.

Recital 22 : France supports option 2 subject to amendments (see recital 23 and article 2)

Recital 23 : France proposes to add that when the information about the commercial guarantee of durability is not given to the seller by the producer, the seller should inform the consumer that such guarantee doesn't exist. It may tend to create more pressure on the producer in order to make the consumer better informed. The obligation to inform on absence or existence of guarantee should be general. Therefore recital 24 on energy using good specifically is not needed.

Recital 26 and 28 : drafting changes to align with directive (EU) 2019/771. The duration of legal guarantee of conformity is at least of two years. This is the case in France but not in all the member states (for example in Netherlands).

Recital 29 : it's better to target the producer for goods with digital elements. Moreover, France proposes to strengthen the obligation of the trader to inform the consumer. He should take reasonable and proportionate steps to be able to provide the consumer for this information and, at least, ask the provider or any other "intermediary" for such an information. Same in recital 30 for digital content or digital service. This provision is likely to put a bit more pressure on the trader to make the consumer better informed on the availability of software updates. To the extent that the seller is responsible for the obligation of information, he should have a more active role (reasonable and proportionate) in obtaining the information that the producer has. Wording inspired by 23b of the annex 1 of directive 2005/29

Recital 32 : "traders should provide, for all types of goods, other relevant repair information that is made available by the producer, such as information about the availability of spare parts, and a user and repair manual" in the recital should be sufficient.

Recital 33 : see recital 23. If the seller has no information about commercial guarantee of durability from the producer, then he makes the consumer informed about the absence of such a guarantee. No need to specify whether he has to search for the information or not.

Recital 34 : France considers that it is not needed to specify that the specific law prevail on general law. More over, lex specialis would prevail over UCPD only if provisions on commercial practices are dealt with in these specific texts. That point is not sure.

## Article 1

### (1) Article 2

s. the third party which carries out the certification must be accredited by a national accreditation authority for the third party to be granted as independent.

u. this point should be amended by the European Commission in order to be more specific on the conditions for a recognised excellent environmental performance to be based on.

w. France suggests to be more precise on the definition of software updates by including the updates that upgrade or downgrade the durability of the good. Not only the updates of conformity should be dealt with. For coherence with point 23 d of the annex that states that an upgrade could have a negative impact or improve the functioning of the feature. That means that an update is not only meant for keeping the good in conformity and it should be a part of the definition of software update.

### (2) Article 6, paragraph 2

e. drafting change to be more specific on the practice that should be forbidden

ea. This point is replaced by a new point 23e in the annex.

### (3) Article 7, paragraph 7

France suggests that the precision on "including through a sustainability information tool" could be set in paragraph 7 of the article 7 in order to make clear that this situation is also covered by the provision.

## Article 2

### (1) Article 2 : Option 2.



14e. drafting change for coherence with the definition of software update in point 1.w of article 1.

(2) Article 5, paragraph 1: Option 2.

ea. France suggests that the provision on commercial guarantee of durability could be set in the directive 2011/83 if a bit of pressure can be put on the producer to give the seller an information whether he offers a commercial guarantee of durability or not. If the producer did not give the seller such an information then the seller should provide the consumer for an information about the absence of a commercial guarantee of durability. Moreover, this information on absence or existence of the guarantee of durability should be general and cover all the goods whether there are energy using goods or not. Finally the consumer should be provided with the information on existence and duration of the commercial guarantee of durability as well as for an information on the conditions related to how the consumer could implement this guarantee.

eb. France suggests to delete the definition of energy using good as regard to the point ea.

ec. France suggests that there should be a bit of pressure on the trader in order to make the consumer well informed about the minimum period of time during which the producer provides software update. Then the trader should make a try to collect this information from the producer in a reasonable and proportionate manner and, at least, ask him for it. Otherwise, if the trader could only inform the consumer if the producer makes the information available, the consumer would not be more informed. To be a real obligation, the obligation of the trader should not depend on the role of the producer.

ed. See point ec.

(3) Article 6, paragraph 1: Option 2

See Option 2, article 5, ea, eb and ec.

Annex
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23d. France suggests drafting changes to replace “may” by “will” to make the practice more objective

23e. France suggests that the practice of “any marketing of a good when the trader knows that such a good contains a feature that was incorporated to limit its durability” could be forbidden. This provision could apply to both the seller and the producer, that are traders due to the definition of the trader in article 2 of the directive 2005/29.

In the case they know that the good contains a feature that limits its durability, their responsibility could be engaged without any doubt.

In case the seller did not know it, then the responsibility of the seller could not be engaged.

The responsibility of each of the traders shall be evaluated by the authority in charge of consumer protection.

Since any planned early obsolescence could not be prohibited by the directive 2009/29, the provision that prohibits any marketing of a good that contains a feature that limits its durability, if the trader knows this characteristic, is likely to be most protective provision that could be suggested in directive 2005/29.

- 23f. drafting precision on the specific use condition that would be determined by the trader.
- 23g. France suggests that should be prohibited not only presenting good as reparable when they are not or omitting to inform the consumer that goods could not be reparable in accordance with legal requirements but also omitting to inform consumers that goods could be repaired when they are.