

Danish non-paper

This paper presents the drafting proposal of the Danish delegation concerning the need to clarify when and how vague and ambiguous broad generic claims such as 'sustainable', 'responsible' and 'conscious' should be used in marketing practices in order not to mislead consumers. Such terms cover numerous aspects which make them fundamentally different from terms like 'ecological' and 'environmentally friendly' that both solely refer to one aspect. In order not to mislead consumers, the use of broad generic claims such as 'sustainable' should therefore be allowed only in situations where all different aspects covered by the claim can be documented, otherwise it risks leading to other kinds of "washing". By drawing inspiration from the Commission's guidance on the interpretation and application of the Unfair Commercial Practices Directive, the paper introduces changes to recital 9 and 10 as well as a new recital 9bis that allow the proposal on Empowering Consumers for the Green Transition (ECGT) to regulate also broader claims without the risk of misleading consumers.

i. Rationale of the proposed amendments to recital 9, 9bis (new) and 10

As stated in recital 1, the ECGT aims at tackling unfair commercial practices such as misleading environmental claims ('greenwashing') preventing consumers from making more sustainable consumption choices.

However, the recent reintroduction of social aspects can lead to a wider use of broad generic claims such as 'conscious', 'responsible' and 'sustainable' when demonstrating recognised excellent environmental performance to one or more social and/or environmental aspects that could be considered relevant to the claim. In accordance with the Commission's guidance on Unfair Commercial Practices Directive (UCPD), such broad generic claims require a high level of documentation, because they refer to several aspects. All of which must be substantiated in order not to be misleading. Using broad generic claims such as 'sustainable', 'responsible' and 'conscious' should therefore require documentation for all the numerous aspects covered by the claim. If the ECGT proposal does not explicitly uphold this approach, the result could very well be that entities could claim that their product, value chain or business is 'sustainable' based on documentation of only environmental aspects despite using for example forced labour, modern slavery or human trafficking in the production process. Thereby misleading the consumers as well as breaching legal standards.

ii. Amendments with track changes against the Presidency's fifth compromise proposal

To address this concern while keeping broad generic claims in scope, Denmark proposes to make minor changes to recital 9 and 10 as well as adding a new recital 9bis.

The changes in recital 9 as well as the new recital 9bis clarifies that the use of broad generic claims such as 'conscious', 'sustainable' and 'responsible' can be considered misleading because they refer to numerous aspects, even if they are qualified. Qualification of such broad claims needs to be sufficiently detailed in accordance with article 6 of the UCPD. This is to avoid the average consumer from being misled to enter into transactions, the consumer would not otherwise have engaged in.

Furthermore, we propose adding an example in recital 10 in order to ensure legal certainty. This is to clarify that broader claims cannot be permitted based on an excellent performance that does not cover all aspects of the claim. Hence, recognised excellent environmental performance, for example the EU Ecolabel, cannot justify the use of these broad statements despite being relevant to the claim as documentation will still be necessary regarding the other aspects, including social and economic aspects.

Proposal for amendments to recital 9, 9bis and 10:

(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.

(9)bis Broader statements such as 'conscious', 'sustainable' or 'responsible' refers to numerous aspects, including environmental, social and economic aspects. Such broad claims, which are vague and ambiguous, are not included in Annex I to Directive 2005/29/EC because they are considered to be misleading even if they are qualified in certain aspects such as recognised excellent environmental performance. The assessment of such broad statements should be made in accordance with the general rules in Article 6(1)(a) and 6(1)(b) of Directive 2005/29/EC.

*(10) ~~Excellent~~ Recognised excellent environmental performance can be based on compliance 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, 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. The excellent environmental performance in question should be relevant to the claim. For example, a generic **environmental** claim 'energy efficient' could be made based on **recognised** excellent environmental performance in accordance with Regulation (EU) 2017/1369. By contrast, a generic **environmental** claim 'biodegradable' could not be made based on **recognised** 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. **Similarly, broad generic claims such as 'conscious', 'sustainable' or 'responsible' could not be made exclusively based on recognised excellent environmental performance because it refers to numerous aspects.***



Luxembourg written comments on the Proposal for a Directive on Empowering consumers for the green transition - 23/02/2023

General comment: Luxembourg supports the overall aim of this proposal to contribute to a more sustainable consumption by enabling consumers to make informed purchasing decisions. We thank the Swedish Presidency for all the hard work and progress realized so far in the text.

1. Directive 2005/29/EC UCP

1.1. Article 2 Definitions

Letter r) sustainability label:

As we indicated in the previous working groups, we believe that the terminology “that is awarded or gives an impression to be awarded” is confusing and ambiguous in a definition as it contains an element of subjectivity. We think that the concept of “giving the impression to be awarded” could already constitute an unfair commercial practice.

Letter w) software update:

We welcome the many efforts made on this definition in the direction of a broader scope. We were in favour of such a broadening.

However, in its current state, the definition does not contain any substantial element and we question the added value of such a definition. We are in favour of its deletion. We are in line with the justifications provided by other delegations, namely that:

- Neither the Sale of Goods directive nor the Digital Content Directive contain such a definition.
- The absence of definition would also ensure greater resistance in time of such a concept.
- It would also avoid the problem of the alignment of the definition with Article 2 point (14e) of the Consumer rights directive (see our comments below) which we believe is important. The alignment of definitions in directives makes the transposition into national law more coherent.

1.2. Annexe

23d

We have some reservations about this point in that it seems to us to have little added value or even undesirable effects:

We wonder whether such information would be truly effective, particularly with regard to its interplay with Article 7(4) of the Sale of Goods Directive. We fear that traders might be tempted to generalise the practice of issuing a generic warning indicating that the update will negatively impact the use of the good, while at the same time the consumer must, for example, agree with the general terms and conditions of the software update. Consumers will have to update their goods if this is an update to maintain the conformity of the good. If they do not update the good, they will not be able to claim their legal guarantee of conformity.

As a matter of fact, if consumers fear the potential slowdown of their good containing digital elements and given the uncertainty of the extent of such a negative impact, they might be tempted not to update the good. This would put them in the position of no longer being able to invoke their legal guarantee of conformity under Article 7(4).

23e

The wording has improved, but from the beginning, we have had doubts about the added value of a simple prohibition of omission of information.

We believe that in any circumstances the consumer should be provided with information on the existence of a feature of a good introduced to limit its durability, even though this practice probably already constitutes a breach of several legal principles in national laws.

Given these limitations, this provision has its place in unfair commercial practices but we would be open to any more ambitious proposal.

We also consider it might be useful to work on the recitals so that there is no *a contrario* reading by preserving other instruments or national laws that could go beyond a simple prohibition on omitting to inform.

2. Directive 2011/83/EU CRD

Commercial guarantee of durability

A lot of work has been done on this definition and we can support it. We find it functional as it is in line with the elements of definitions from Articles 2 and 17 of SGD.

Our reasoning on this concept is as follows: the commercial guarantee of durability is a type of commercial guarantee. It is optional and is provided by the producer (Article 17 SGD) which is not a party to the sales contract and it entails the following remedies: repair or replacement of goods according to Article 14 SGD.

The definitions in article 2, point 12 and article 17 of SGD do not give any indication as to the duration of this guarantee or whether it is free of charge or subject to payment.

It is only stated that:

- these are contractual obligations different to the one legally provided by the seller ("in addition to the seller's legal obligation relating to the guarantee of conformity,") and
- its aim is to repair or replace a good which does not meet the specifications or other "non-conformity" requirements.

The commercial guarantee of durability may therefore have a shorter duration than the legal guarantee of conformity.

In any case, with a commercial guarantee of durability from the producer, even if its duration is shorter than the legal guarantee of conformity, the consumers already have the advantage of having an additional liable person who they can turn to for the repair or replacement of their goods (which can be very useful if it is difficult to be in touch with the seller because the seller or even the consumer has moved or the seller has gone bankrupt, etc.).

The commercial guarantee of durability can also be free or payable, but the producer should not be able to charge for a commercial guarantee of durability for a duration shorter than the legal guarantee of conformity as it might be considered as an unfair commercial practice.

(ea) and (ma)

Although we support the definition of the commercial guarantee of durability, it seems to us that the information via a harmonised graphic format cannot encompass every type of commercial guarantees of durability. It does not seem realistic to have a harmonised graphic format for a commercial guarantee of durability without distinction as to its duration and without specifying whether it is free or subject to payment. If the purpose of this information is to promote a longer lifespan of goods and to encourage producers to produce such goods, the information with this harmonised graphic format should only be required in case the commercial guarantee of durability is of a longer duration than the legal guarantee of conformity and if it is free of charge.

We would support the reintroduction in the provisions of (ea) and (ma) of the criteria of duration and the proviso that it is free of charge:

(ea) where a commercial guarantee of durability on the entire good is offered, and the producer makes it available, information that the goods benefit from such a guarantee and its duration in units of time using a Union harmonised graphic format set out in the Annex of this Directive, **where that guarantee is free of charge and has a duration of more than [two years/number of years of the legal guaranty of conformity in national law].**

Software update

14e ‘software update’ and Article 5, (ec) and (ed)

As indicated previously for Article 2 letter (w) of UCPD, we are in favour of deleting the definition.

Without prejudice to the choice made concerning the definition, we think that it would be more relevant to incorporate the concepts of “free of charge” and “keeping good in conformity” into the body of the provisions of the article 5 letters (ec) and (ed). This would avoid having these notions in the body of the definitions of “software update” and it would avoid having conflicting definitions between the UCPD and the CRD.

The provisions of letters (ec) and (ed) could thus be read as follows:

(ec) “for goods with digital elements, where the producer makes such information available to the trader, the minimum period in units of time during which the producer provides **free** software updates, **including security updates, that are necessary to keep goods with digital elements in conformity in accordance with Directive 2019/771.**”

(ed) “for digital content and digital services, where the provider makes such information available to the trader the minimum period in units of time during which the provider provides **free** software updates, **including security updates, that are necessary to keep digital contents and digital services in conformity in accordance with Directive (EU) 2019/770.**”



Council of the European Union
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NOTE

From:	Delegations
To:	Delegations
Subject:	Proposal for a Directive on Empowering consumers for the green transition - Comments on Presidency fifth compromise text 5036/23 REV2

Delegations will find attached comments from AT, BE, DK, ES, FR, HR, IE, IT, LU and SI.



ES comments
regarding the Presidency fifth 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

Spain thanks the Swedish Presidency for its work to make progress on this legislative file.

With regard to the last proposal submitted, we would like to point out several issues that we consider particularly relevant, even if this means reiterating some of the comments we have made previously and does not fully cover our position.

1. Amendments to Directive 2005/29/EC (UCPD)

- Definitions

(r) Sustainability label.

In our view, the current text remains unclear with regard to its scope:

On the one hand, the term “predominantly” (also used in recital 7) is too generic and indeterminate. On the other hand, although they might mainly relate to other topics, labels should not be misleading in any case with regard to environmental and social aspects.

The expression “that is awarded or gives an impression to be awarded” is confusing. We understand that, in this case, we must focus on the objective elements of the label and avoid misleading behaviour by traders, but we cannot enter into the subjective consumers’ perceptions when there is no intention to mislead. We therefore support the following drafting suggested by France:

(r) ‘sustainability label’ means any voluntary trust mark, quality mark or equivalent, either public or private, that ~~is awarded or gives an impression to be awarded with the aim~~ **aims** to set apart and promote a product, a process or a business with reference ~~predominantly~~ to its environmental or social aspects or both, **beyond characteristics required by the Union or national law**. This does not cover any mandatory label required in accordance with Union or national law;



(s) Certification scheme

We see the need for greater clarity on this point. We can therefore support the proposal put forward by France, with a slight nuance to make the wording clearer, to emphasize transparency and to underline that not only the competence, but also the independence of the third party must be verified:

‘Certification scheme’ means a verification system that certifies, by a third party independent of both the scheme owner and the trader, that a product, process or company meets certain objectively verifiable and publicly available requirements. It shall be open to all traders willing and able to meet the requirements of the scheme under transparent, fair and non-discriminatory conditions. The certification process shall be objective, based on international, Union or national standards and procedures, include an open and transparent complaint processing system, and be carried out by a third party whose independence and relevant competence have been verified by the Member State in which it is established.

(w) Software updates

It should be taken into account that software updates can have an effect on the connected product, but also on access to digital content and digital services. We consider that this issue is not sufficiently covered by Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. It should therefore be included either in the definition or in the annex itself.

Social claims

We would like to stress the importance of **incorporating a definition of social claims** for reasons of clarity and legal certainty. For the same grounds, we also propose a revision of recitals 1 and 3:

Recital 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 **or social** claims (“greenwashing” **and “socialwashing”**), non-transparent and non-credible sustainability labels, specific rules should be introduced in Union consumer law.

Recital 3

In order for consumers to take better-informed decisions and thus stimulate the demand for, and the supply of, more **durable environmentally and socially sustainable goods**, the consumers should ~~may~~ not be misled about a product’s



environmental or social aspects, durability or reparability, including through the overall presentation of the products **or reference to corporate policies**. Article 6(1) of Directive 2005/29/EC should be therefore amended by adding the environmental or social aspects, 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 aspects **may refer to corporate policies** or to ~~of a product throughout its~~ the value chain **of a product**. It may relate for example to the quality and fairness of working conditions of the involved workforce, such as adequate wages, social protection, work environment safety and social dialogue; to the respect for human rights, **including and to** equal treatment and opportunities for all, such as gender equality, inclusion and diversity; **and to contributions to social welfare purposes**. Another example is animal welfare.

In order to avoid misleading consumers, such claims should relate to matters that are not mandatory under existing national or Union legislation. We therefore consider that it would also be useful to refer in this recital to the new point 10.a of the Annex.

We support the Danish proposal for reformulating recital 9.

▪ Article 6

Even if this Directive should act as a horizontal legislation, we should seek the greatest possible consistency with other initiatives, such as Corporate Sustainability Due Diligence, Green Claims, or Carbon Removal Certification. We therefore propose this wording:

(d) making an environmental claim related to future environmental performance without clear, objective, publicly accessible and verifiable commitments, and targets and a detailed and realistic implementation plan, and without being **periodically** verified by ~~an independent~~ third party **expert which is independent from the company, free from any conflicts of interests, has experience and competence in environmental matters and is accountable for the quality and reliability of the verification.**

Since this provision is very detailed, we would have no objection to its inclusion in the annex.

We agree with Croatia that, in order not to mislead consumers, future claims should not rely solely on offsetting schemes. Companies must be required to report separately their own emission reduction efforts and the financing they provide for climate action outside their value chain. We therefore propose to further explain in recital 4 that it is not



admissible to claim that negative impacts are offset in the sense of a net zero effect, as this is not scientifically sound. However, it would be allowed to report on measures taken to improve environmental performance or to reduce potential negative impacts. A new point should also be added to the Annex:

Claiming that a product or business has a neutral, offset or compensated environmental impact.

- Annex

As a general comment, we share Italy's concern that sellers' obligations should not be narrower in the annex than in the articles of the UCPD. In our view, the notion of "professional diligence" is broader than just "being aware", since it does not only imply a passive attitude related to receiving information from a third party. Furthermore, until information obligations for manufacturers under the Ecodesign Regulation are developed, traders should be encouraged to require more information from them on product characteristics that may affect durability, reparability or recyclability, so that they can properly inform consumers.

We refer to our previous comments on keeping obligations related to the omission of information requiring analysis of contextual factors in the scope of Article 7 rather than in the Annex. The text of this article could be amended for the sake of clarity and legal certainty and to send a message to the market.

23d. Information about software updates.

We believe that, if this point is retained as it stands, its wording should seek to strike a better balance between mere possibility (may) and complete certainty (will). In addition, greater consistency with the relevant definition should be ensured. We therefore propose the following wording:

Omitting to inform the consumer that a software update **is likely to impair** the functioning of goods with digital elements, **or the consumer's access to digital content or digital services.**

23.e. We prefer the text of the fourth compromise proposal with a slight but significant change in its wording. We consider that it is important not to legitimise practices related to planned obsolescence. In this sense, banning certain commercial communications is a powerful tool to send a message to all involved stakeholders.



Any **marketing commercial communication** of a good containing a feature introduced to limit its durability, considering the knowledge that can be expected from a diligent trader.

23.i. Consumer should also be informed when repairs require the use of proprietary software or spare parts, especially when the quality of the repair would be degraded without their use.

23i. Omitting to inform the consumer that a good is designed to limit its functionality **or reparability** when using consumables, spare parts, **software** or accessories **other than those from** the original producer.

2. Amendments to Directive 2011/83/EU on Consumer Rights

A “proper” definition of the commercial guarantee of durability should be included, nor just a reference to article 17 of the Sales of Goods Directive. In order to meet the objective of promoting longer durability of consumer products and indirectly combating planned obsolescence, we believe that this guarantee should offer consumers a clear comparative advantage over the legal guarantee and other possible commercial guarantees. It should therefore be free of charge and its duration should be longer than that of the legal guarantee established in each Member State. Where there are already different durations of the legal guarantee for different types of products, we see no objection to the duration of this durability guarantee also being adapted.

We believe that the trader's obligation to properly inform the consumer about what each of the guarantees entails should be clarified in point e), as it seems that the wording of the directive currently in force is not producing the expected results.

Finally, with regard to the harmonized graphic format, we support empowering the Commission to develop it by means of a delegated act, provided that the scope of the delegation is detailed in the directive and that the graphical format is easy to use and recognisable and allows a quick comparison among products in the same range.

Ireland's written comments on fifth compromise text by Swedish Presidency on the proposal for Directive 'empowering consumers for the green transition through better protection against unfair practices and better information'.

Directive 2005/29/EC

Article 2, recital 7 – Sustainability Label

The additional explanatory text and worked examples are helpful in the context of prohibiting sustainability labels which are not based on a certification scheme or developed by public entities.

Article 6(2)(d), recital 4 – Independent Monitoring System

This text has been updated to allow consumers to consult the findings of an *independent third-party expert* rather than an independent monitoring system. The rationale for this change could be examined as well as the criteria to be deemed a third-party expert.

Directive 2011/83/EC

Annex 1, recital 16 – Limited Durability

The focus again is 'primarily' placed on the producer when there is a feature of a good introduced that could limit its durability. The retailer may not be expected to know this as they have not produced the good but if the producer has supplied information/statement detailing any limit in durability then the retailer will be expected to know, which seems reasonable.

Article 5(1)(ea), recital 23 – Harmonised Graphic Format/Durability

A significant amount of focus is placed in the Directive on the role the Harmonised Graphic will play to inform consumers regarding the durability of products. The Harmonised Graphic is considered as a key driver of consumer purchasing behaviour as it is expected they will favour longer lasting products. However, to date, there has been no mock up or spec in relation to the information this Harmonised Graphic would present, how it would look across a range of products and how the consistency of information presented would be maintained.

No doubt developing, testing and agreeing a Harmonised Graphic is a significant task, but it appears that there is very little, if any, preparation or progress made on this, in terms of developing an outline scope/spec/principles. Given it is such a central plank and consumer facing element of the proposal, it would appear to be an important gap in moving this forward. Is there any estimate of how long creating the Harmonised Graphic within the Directive would take?

It is difficult to provide a position on whether the focus should be on ensuring the Harmonised Graphic is included within progression of the Directive, or through a (future) delegated act. Clarity on the work required, stages and timescales would be important to facilitate making a decision on this i.e., will it be 2 months, 12 months or 2 years. The provision of the Harmonised Graphic is so closely linked to the commercial guarantee of durability that if it is not included it could really undermine the overall aim of this guarantee to support consumers make sustainable choices.

The preference would be to have the Harmonised Graphic included as an Annex to the Directive to ensure the aims are fully met. However, if the timelines indicate developing the Harmonised Graphic will be a drawn out process, then perhaps introducing it through a delegated act at a later stage is a sensible compromise, it's a judgement call depending on timelines.

The key consideration is, if the Harmonised Graphic is included in a delegated act which can be completed within the transposition timeframe of the Directive, so that the provisions on the commercial guarantee of durability can have full and immediate impact because the delegated act is also in place, that would be acceptable. However, if there is a long timespan between the Directive being made law in Member States and the finalisation of the delegated act, the matter would need to be reflected on further. Also, will Member States be consulted on the content of the delegated act or have any say in the Harmonised Graphic if it is done through this format?

CROATIAN COMMENTS ON THE FIFTH PRESIDENCY COMPROMISE PROPOSAL REGARDING EMPOWERING CONSUMERS FOR GREEN TRANSITION PROPOSAL (doc. ST 5036/23 REV2)

1. Recital 4 and Article 1(2)(b)(d) - UCPD

HR proposes clarification of how the insertion of the detailed and realistic implementation plan gives added value to this text. Namely, the current wording only raises additional issues on how this plan should be introduced and what is the nature of this plan in general.

2. Recital 15 and Annex point 23d – UCPD

HR supports the remarks made by BE, EE, SK and NL related to the proposed amendments of this Article, since it is unclear how this provision should work in practice. Namely, since the updates take place after the contract has been concluded, how will the trader fulfil the obligation to provide precontractual information that the security update will negatively impact the functioning of goods with digital elements when it can only provide information that it has at the moment of sale (the information on the update that may negatively impact the functioning...).

Additionally, the proposed text reduces the level of legal certainty and consumer protection because the replacement of word “may” with “will” also disregards the issue of professional diligence that the trader has to have in these contractual relations. Namely, it should not be considered as sufficient just to inform the consumer when the update will actually do harm, but also when the harm might be inflicted, especially because the trader possesses or should possess such insight.

Therefore, **HR considers the earlier version of the text, where “may” is inserted instead of “will”, more appropriate, however, alternatively, we may support DE proposal of the amendment, as follows:**

“23d. Omitting, contrary to the requirements of professional diligence, to inform the consumer that a software update will negatively impact the functioning use of goods with digital elements or digital content or digital services.”.

The Recital to this provision should be amended accordingly.

3. Recitals 16, 17 and 21 and Annex points 23e, 23f and 23i – UCPD

The wording “*after becoming aware of...*” gives the trader the possibility of almost completely bypassing the provisions of these Points. The moment of becoming aware is a very subjective term and it leaves too much space for various interpretations, as well as raises issues when it comes to demonstrating such awareness. E.g. the trader might argue that it has become aware of the issue much later that it actually did and there will be difficulties in arguing

otherwise, which might result with significant consumer detriment. Additionally, traders are professionals, and they should be aware of a certain problem or limitation at a very early stage, however, here the issue of professional negligence is not in any way reflected by this proposal.

Therefore, **HR suggests reintroducing the previous wording in the text of the mentioned Points of the respective Annex.**

The Recitals to these provisions should be amended accordingly.

4. Recital 22 - CRD

The corresponding Recital 22 states that pre-contractual information on durability, repairability and availability of updates should be provided in a clear and comprehensible manner in accordance with the accessibility requirements regulated by Directive 2019/882 - Accessibility Act. **As the provisions of that directive are limited to the obligations of the manufacturer/importer/distributor, we kindly ask for clarification in which way the trader's obligation should be applied in relation to the provisions of Directive 2019/882 and which exact provisions of the same were meant. In this sense, we would propose the addition of some examples in the respective Recital.**

5. Recital 23 and Article 2 (b)(14a) - CRD

We propose reintroducing the previous text “*or another guarantor’s commercial guarantee of durability, under which the guarantor offers the same or more favourable conditions to the consumer as the producer*” in the Article as well as in the corresponding Recital. Namely, reintroduction would result in much more comprehensive consumer protection, since it will cover a much wider range of guarantors than in the current version.

6. Recital 23 and Articles 2 (2)(a)(ea) and (3)(a)(ma) - CRD

Regarding the Union harmonised graphic format, HR would like to **invoke scrutiny reservation**. Namely, despite the fact that HR generally supports the efforts of SE PRES in finding potentially better solution, before deciding whether to support the initiative of introducing Delegated Act for the harmonised graphic format, it is necessary to receive more detailed explanations. The Recital as well as the mentioned provisions mention the wording “*using a Union harmonised graphic format set out in the Annex of this Directive*” in the context of commercial guarantee of durability. HR asks for explanation on the particularities of this format, since the Directive still does not contain any graphic format. HR believes that following elements should be clarified in relation to this graphical format: validity period of guarantee and geographical validity of guarantee.

7. Recital 27 – CRD

Regarding this Recital, HR would like to ask for the clarification of what constitutes the term “*specific components*”? Does it include accessories of the goods, such as connecting cables accompanying the goods?

8. Article 1(1)(g) - UCPD

HR prefers the previous wording, without the wording “*made in written form or orally*”, since it limits the way in which the generic environmental claim may be given (e.g. it does not include conclusive actions).

9. Article 1(2)(b)(e) - UCPD

HR considers that the introduced changes in the Article did not result with the 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 suggests 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 Member State.**

10. Article 2(3)(mb) – CRD

HR considers that this provision should be reintroduced in the text of the proposal, since this is an opportunity to indisputably state that clear and prominent manner does not include standard terms and conditions.

Additionally, HR proposes the insertion of the appropriate recital, where the examples of what constitutes “clear and prominent manner”, as well as clearly indicating the exclusion of clicking on the general conditions of traders as an appropriate place of notification, considering that this is important information for consumers that should be highlighted in a noticeable way. In other words, due to the exceptional comprehensiveness of the general conditions of the traders, the information placed in them cannot be “clear and comprehensive” in our view, since the consumer in that case can hardly perceive them.

Given the common business practice in certain Member States, HR proposes the addition of a new subparagraph to regulate explicitly that the trader that has not fulfilled its obligation to inform the consumer of the obligations under Art. 6. (1) points a), e), o) and p) if the information was provided 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.”

11. Annex - UCPD

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”.

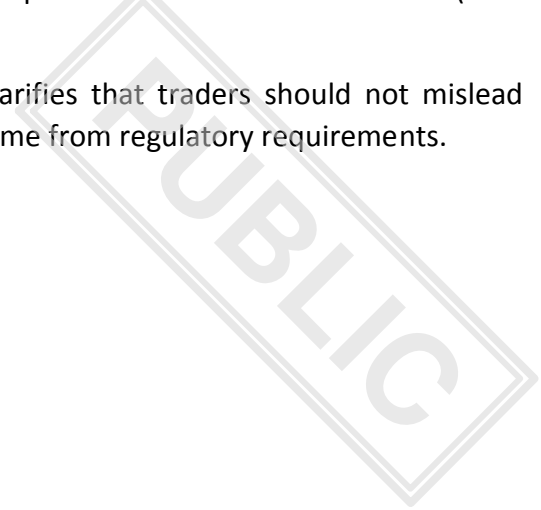
12. Annex Point 10a - UCPD

HR suggests reconsidering the need for special regulation of Point 10 a of Annex I of the Unfair Commercial Practices Directive, given that this 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 emphasizing attributes that come from regulatory requirements.



Paris, le 22 février 2023

NOTE DES AUTORITÉS FRANÇAISES

Objet : Commentaires écrits consécutifs à la réunion du groupe de travail « Information et protection du consommateur » du Conseil du 20 février 2023 concernant le renforcement du rôle du consommateur dans la transition écologique

Réf. : SGAE/MINUME/2023/107

À la suite de la réunion du groupe de travail « Information et protection du consommateur » qui s'est tenue le 20 février 2023, les délégations sont invitées à faire part de leurs commentaires écrits sur le cinquième compromis partiel proposé par la Présidence suédoise.

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.

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

Les autorités françaises proposent d'amender le cinquième compromis de la Présidence suédoise, notamment les articles 2, 6.2 et l'annexe 1 de la directive 2005/29.

En préambule, elles souhaitent réaffirmer que les dispositions de la directive 2005/29/CE, « filet de sécurité » en matière de protection des consommateurs contre les pratiques commerciales déloyales, doivent rester générales et ne faire référence qu'aux professionnels sans distinguer par exemple entre producteurs et

vendeurs, sous peine de restreindre la portée et l'efficacité de cette législation. À cet égard, elles apportent leur soutien à l'Italie en ce qu'elle estime que les vendeurs devraient également voir leur responsabilité engagée pour les pratiques commerciales liées à l'obsolescence précoce ou programmée (considérant 16).

Les autorités françaises rappellent qu'il revient aux autorités de contrôles de rassembler les éléments nécessaires aux fins d'engager la responsabilité des professionnels au titre de la pratique commerciale mise en œuvre. Elles considèrent donc qu'il n'est pas opportun de préciser, y compris dans les considérants, les conditions dans lesquelles les professionnels (producteurs, vendeurs ou autres) doivent voir leur responsabilité engagée par les autorités de contrôles qui s'attachent naturellement à déterminer la responsabilité des professionnels dans la commission des infractions aux dispositions du droit de l'Union, en général, et à celles de la directive 2005/29/CE, en particulier.

a) Article 2 – Amendements aux définitions d'allégations environnementales génériques, de label de durabilité, schéma de certification, et de mise à jour logicielle

- Allégations environnementales génériques (point q)

Les autorités françaises se prononcent en faveur de la rédaction précédente (*in any form* ») et rappellent que l'allégation environnementale générique est une forme d'allégation environnementale caractérisée par son contenu (en ce qu'elle n'est pas suffisamment précise ou justifiée par le professionnel) et non sa forme). À cet égard, elles apportent leur soutien à l'Espagne, à la Croatie, au Danemark et à la Finlande en ce qu'elles estiment que les allégations génériques devraient prendre toutes formes.

À titre d'illustration, les autorités françaises soulignent que les allégations implicites (couleur verte par exemple) sont tout aussi susceptibles d'induire en erreur le consommateur et devraient à ce titre être incluses dans la définition. Ainsi, dès lors que la spécification sur laquelle elle repose n'est pas précisée de manière claire et évidente sur le même support, l'allégation environnementale générique devrait pouvoir prendre toutes les formes mentionnées au point (o). En tout état de cause, le fait qu'une allégation environnementale générique puisse prendre toutes les formes évoquées au point (o) ne peut être interprété comme interdisant l'usage des allégations implicites, y compris la couleur verte, dans la mesure où le professionnel pourrait justifier de la performance environnementale excellente comme le point 4a de l'annexe le prévoit. Les autorités françaises rappellent d'ailleurs que l'usage d'une couleur, si elle est susceptible de conduire le consommateur à prendre une décision commerciale qu'il n'aurait pas prise autrement, peut en l'état actuel de la réglementation constituer une pratique commerciale trompeuse.

Enfin, les autorités françaises proposent un changement relatif à l'exemple d'allégation environnementale utilisé, à la fin du considérant 9, pour illustrer la différence entre une allégation générique et une allégation spécifique dans la mesure où l'allégation concernant la biodégradabilité d'un produit ou d'un déchet reste controversée et qu'elle a d'ailleurs été retirée des critères de l'Ecolabel européen.

- Label de durabilité (point r) et considérant 7

Sur le point r

Les autorités françaises considèrent que tous les labels faisant référence aux aspects sociaux et environnementaux doivent pouvoir être analysés sous l'angle d'une éventuelle pratique commerciale déloyale. Elles estiment également que la définition devrait préciser que le label matérialise l'engagement que les caractéristiques d'un produit vont au-delà du respect des exigences des règles européennes ou nationales, le simple respect de la réglementation ne pouvant se traduire par la mise en avant d'un label volontaire.

Comme l'Espagne, l'Italie, le Luxembourg et le Portugal, les autorités françaises estiment que la formule « *or gives an impression to be awarded* » introduit une dimension subjective relevant davantage de la pratique potentiellement trompeuse que de la définition et proposent donc sa suppression.

Les autorités françaises proposent donc l'amendement rédactionnel suivant :

*(r) 'sustainability label' means any voluntary trust mark, quality mark or equivalent, either public or private, that ~~is awarded or gives an impression to be awarded with the aim~~ aims to set apart and promote a product, a process or a business with reference **predominantly** to its environmental or social aspects or both, **beyond characteristics required by the Union or national law**. This does not cover any mandatory label required in accordance with Union or national law;*

Sur le considérant 7

Les autorités françaises accueillent favorablement les nouveaux développements destinés à expliciter les liens entre les labels de durabilité, le règlement 1221/2009 (EMAS), le règlement 66/2010 (Ecolabel) et le règlement 2017/1001 (marque de l'Union européenne).

- Schéma de certification (point s)

Les autorités françaises remercient la Présidence d'avoir inclus, dans la définition de schéma de certification, la nécessité que la compétence de la tierce partie en charge de la certification soit vérifiée par l'État membre dans lequel cette dernière est établie.

- Mise à jour logicielle (point w)

Les autorités françaises regrettent la suppression de la référence aux contenus et services numériques. À cet égard, elles apportent leur soutien à l'Allemagne, à la Belgique et à l'Espagne en ce qu'elles sont favorables à l'inclusion des mises à jour des contenus et services numériques dans cette définition, et à l'Espagne qui estime que les définitions doivent être les mêmes dans les directives 2005/29/CE et 2011/83/UE.

Les autorités françaises proposent par ailleurs de rétablir les considérants 15 et 29 et de modifier la pratique visée au point 23d de l'annexe afin qu'elle puisse également être applicable aux fournisseurs de mises à jour pour de contenus et services numériques, et ce faisant, assurer une protection complète des consommateurs.

b) Article 6.1 - Amendements relatifs à certaines pratiques commerciales trompeuses

Les autorités françaises ne s'opposent pas aux modifications proposées par la Présidence.

c) Article 6.2 d – La pratique commerciale consistant à faire des allégations sur une performance environnementale future

Les autorités françaises sont défavorables aux ajouts proposés par la Présidence car ils ne sont pas nécessaires pour définir la pratique commerciale trompeuse. Compte tenu du niveau de détail de cette proposition rédactionnelle, elle devrait figurer dans l'annexe I de la directive n°2005/29.

Toutefois, les autorités françaises s'interrogent, comme l'Italie, l'Espagne, le Portugal, la Croatie, la Lituanie, la Slovaquie, l'Allemagne, l'Irlande et le Danemark, sur le rôle et la qualité de l'expert tiers supposé vérifier les fondements de l'allégation.

Cet expert donnerait-il une autorisation préalable à l'utilisation de l'allégation ? Vérifierait-il son fondement a posteriori ? Qui peut prétendre à la qualité d'expert ? Les autorités de contrôles seraient-elles tenues aux conclusions de cet expert sur l'allégation environnementale concernée ?

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 « afficher un label de durabilité qui n'est ni basé sur un système de certification ni établi par des entités publiques » (2a)

Les autorités françaises soutiennent la proposition de l'Allemagne consistant à réputer trompeuse en toutes circonstances la pratique consistant à afficher un label de durabilité à paliers sans préciser le niveau pertinent ainsi que l'échelle de niveau applicable (2b).

- La pratique consistant à « omettre d'informer le consommateur qu'une mise à jour logicielle fournie par le professionnel aura des conséquences négatives sur le fonctionnement des biens comportant des éléments numériques » (23d)

Les autorités françaises regrettent la suppression de la référence aux contenus et services numériques, qui ne font l'objet d'aucune disposition particulière dans d'autres textes de l'Union (y compris, la directive 2019/770/UE) en matière de pratique commerciale déloyale. Elles soulignent que les pratiques commerciales relatives aux mises à jour logicielles devraient s'appliquer aussi bien aux biens comportant des éléments numériques qu'aux contenus ou services numériques dans la mesure où ils sont tous concernés par l'hypothèse qu'une mise à jour les dégrade. A cet égard, elles ne sont donc pas favorables aux ajouts proposés au considérant 15.

Les autorités françaises rappellent que, si la directive 2019/770 prévoit effectivement la possibilité de résoudre le contrat si une mise à jour impacte négativement le contenu ou le service numérique, elle ne prévoit aucune pratique commerciale, applicable aux contenus et services numériques, telle que celle proposée au point 23d.

Enfin, les autorités françaises proposent la suppression de la précision selon laquelle la mise à jour est fournie par le professionnel.

- La pratique consistant à « omettre d'informer, en toute connaissance de cause, le consommateur de l'existence d'une caractéristique d'un bien introduite pour limiter sa durabilité » (23 e)

Les autorités françaises sont défavorables à la nouvelle proposition qui semble non seulement insuffisante au regard de l'objectif de lutte contre l'obsolescence programmée des biens mais aussi ambiguë dans la mesure où elle peut être interprétée comme légitimant cette pratique dès lors que le consommateur en est informé.

Elles proposent donc de revenir à la rédaction du précédent compromis consistant à interdire toute communication commerciale, d'un bien comportant une caractéristique qui limite sa durabilité, réalisée en connaissance de cause par un professionnel. Elles soulignent que cette proposition était plus ambitieuse pour lutter contre l'obsolescence programmée des biens équilibrée tant au regard des objectifs de la proposition de directive qu'au regard des possibilités d'encadrement des pratiques commerciales offertes par la directive 2005/29/CE

A cet égard, les autorités françaises soutiennent l'Espagne, la Pologne et la Croatie en ce qu'elles sont favorables à l'interdiction de communications commerciales sur des produits qui comportent une caractéristique qui limite leur durée de vie, et le Portugal, en ce qu'il est favorable à une interdiction en amont de la pratique consistant à introduire dans un produit une caractéristique qui limiterait sa durée de vie.

Elles proposent donc la reformulation suivante :

« 23e. *Any commercial communication of a good containing a feature introduced to limit its durability.* »

A toutes fins utiles, les autorités françaises rappellent :

- que la disposition doit conduire à responsabiliser tous les professionnels, au sens de la directive 2005/29/CE, qu'il s'agisse des vendeurs ou des producteurs de produits ;
- qu'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.

Enfin, 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, les autorités françaises continuent de soutenir, de manière générale, et au-delà de cette proposition de directive, qu'il conviendrait d'interdire la pratique consistant, pour un professionnel, à introduire - volontairement - des caractéristiques propres à limiter la durabilité des biens.

- La pratique consistant à « Affirmer, en toute connaissance de cause, qu'un bien présente, dans des conditions normales d'utilisation, une certaine durabilité sur le plan du temps d'utilisation ou de l'intensité » (23 f)

Les autorités françaises apportent leur soutien à la proposition de rédaction de la Présidence.

Elles proposent par ailleurs de préciser que les conditions normales d'utilisation devraient être déterminées par le producteur comme le suggère le considérant 17 en évoquant l'expression « *prescribed conditions* ». En effet, sans autre précision, l'expression « *conditions normales d'utilisation* » est trop ambiguë pour déterminer les conditions de référence dans lesquelles un bien devrait être utilisé.

- La pratique consistant à « omettre d'informer, en toute connaissance de cause, le consommateur qu'un bien a été conçu pour fonctionner de manière limitée si l'on utilise des consommables, des pièces de rechange ou des accessoires qui ne sont pas fournis par le producteur d'origine » (23 i)

Les autorités françaises apportent leur soutien à la proposition de rédaction de la Présidence.

III. S'agissant des amendements à la directive 2011/83/UE relative aux droits des consommateurs

Sur la garantie commerciale de durabilité

Les autorités françaises, à l'instar de l'Espagne et de la Pologne, soutiennent la suppression de la possibilité introduite dans le compromis précédent que la garantie commerciale de durabilité puisse être offerte par une autre personne que le fabricant ce qui permet d'assurer la cohérence avec la directive (UE) 2019/771.

En revanche, elles regrettent que la nouvelle proposition de rédaction subordonne l'obligation d'information du professionnel à la mise à disposition, par le producteur, des informations relatives à la garantie de durabilité. La disposition perd alors tout caractère contraignant à l'égard du vendeur, seul professionnel auquel les dispositions de la directive 2011/83 s'appliquent (sauf hypothèse de vente par le fabricant).

Elles expriment également un regret concernant la suppression de la seconde référence à l'article 17 de la directive 2019/771 (au profit de celle de l'article 14) et proposent une définition plus concise de la garantie commerciale de durabilité, qui pourrait être ainsi rédigée :

“(14a) ‘commercial guarantee of durability’ means a the producer’s commercial guarantee of durability referred to in Article 17 of Directive (EU) 2019/771.”

Les autorités françaises rappellent enfin l'importance d'exiger que la durée minimale d'une telle garantie excède celle de la garantie légale afin que le consommateur puisse plus aisément engager sans ambiguïté la responsabilité de son vendeur sur son bien durant la période de garantie légale, puis s'adresser, en cas de défaut ultérieur, au producteur dont la garantie prendrait le relais à l'expiration de la garantie légale

En effet, sur le principe, s'il paraît pertinent que pour un même bien, un consommateur puisse bénéficier d'une protection double en ce qui concerne la durabilité de son bien à la fois par la responsabilité du vendeur au titre de la conformité (critère objectif de conformité au sens de 2019/771) et par celle du producteur au titre de la garantie commerciale, le risque de renvoi des professionnels l'un vers l'autre pour la remise en conformité du bien pourrait être d'autant plus important que les mêmes aspects sont couverts : le caractère durable du bien.

Sur un format harmonisé pour informer le consommateur de l'existence de la garantie

Les autorités françaises considèrent que le format harmonisé ne devrait s'imposer qu'au vendeur, cocontractant du consommateur et seul professionnel auquel les dispositions de la directive 2011/83 s'appliquent.

A l'instar du Luxembourg, elles soulignent par ailleurs que le format harmonisé ne devrait informer le consommateur que de l'existence d'une garantie commerciale de durabilité offerte à titre gratuit par le producteur.

En effet, si le format harmonisé devait informer le consommateur uniquement de l'existence d'une garantie, y compris payante, cela pourrait l'induire en erreur sur le fait qu'il en bénéficierait dans tous les cas alors qu'il lui faudrait la payer.

Les autorités françaises considèrent également que ce pictogramme devrait informer le consommateur sur la durée totale de garantie commerciale de durabilité du fabricant.

Enfin, elles estiment qu'il est préférable de ne pas reporter la discussion sur ce logo dans le cadre de la négociation d'un acte délégué au risque de reporter la mise en œuvre effective de cette obligation.

Sur l'obligation d'information précontractuelle sur les biens comportant des éléments numériques (ec/mc) et sur les contenus et services numériques (ed/md)

Les autorités françaises considèrent que, à l'instar de l'obligation d'information définie au ea/ma sur la garantie commerciale de durabilité, les dispositions telles qu'elles sont rédigées ne recouvrent pas de véritable caractère contraignant en ce qu'elles imposent au vendeur d'informer le consommateur tout en faisant dépendre cette information du producteur qui n'est lui-même soumis à aucune obligation d'information.

Elles proposent donc les modifications rédactionnelles suivantes en rouge :

(ec) for goods with digital elements, ~~where the producer makes such information available to the trader~~, the minimum period in units of time during which the ~~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 the provider makes such information available to the trader** 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, **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;~~

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.

Enfin, les autorités françaises soulignent que les considérants n°29, 30 et 32 devraient également être modifiés pour tenir compte de ces propositions.

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 2021/0170 (COD)

Written comments from Italy
ON PRESIDENCY FIFTH COMPROMISE PROPOSAL
(Brussels, 13 February 2023 (OR. en) 5036/2/23-REV. 2

GENERAL REMARKS

We claim for the restoration of the concept of trader in the whole text of this legislative proposal as defined in the Directive 2005/29/EC and Directive 2011/83/EU as a fundamental element to empower consumers for the green transition. The concept of trader is crucial to determine the scope in the Consumer Rights Directive (CRD) and the Unfair Commercial Practices Directive (UCPD) that are founded on the behavioural sciences approach and the bounded rationality paradigm. The concept of trader is deliberately wide because it provides incentives to obtain from all market players (producers, providers, sellers, consumers) behaviours that are consistent with the objectives of both the Directives that this legislative proposal intends to amend. Therefore, we cannot support amendments that distinguish specific subcategories in the general concept of trader and make them as such the relevant subjects of the new provisions. It is a radical change that disrupts the logical framework and the scope of Directive 2005/29/EC and Directive 2011/83/EU and make the value of this legislative proposal null or negative.

COMMENTS

RECITALS

Recital 2

As in our previous written comments, we state that last sentence of the recital specifies a known fact, which seems unnecessary to highlight.

Recital 3

We oppose the deletion of the reference to “forced and child labour” as an example of fairness of working conditions of the involved workforce. This reference is part of the corporate social responsibility that the European Union supports.

Recital 4

We deem that the new amendments reduce the clarity of the recital and make more difficult the assessment of the claims credibility by consumers. Furthermore, we reiterate that the environmental claims relative to future performance in the absence of the indication of precise objectives and a monitoring system are provided in re ipsa of a deceptive suitability which justifies its tracing back to the category of practices that must certainly be considered unfair - and therefore its inclusion in Annex I of the directive instead of article 6(2) that regards practices that must be considered lawful if they are not likely to induce the consumer to take a decision of a commercial nature other than that which he would otherwise have taken.

Recital 5

As for the attribution to the product in terms of advantage for consumers of characteristics that are instead common to the entire market, our main concerns regards how to pose this unfair practice in the Directive. It should be included in Annex I

Recital 7

We reiterate our previous written comments: the words "or from the consumers' perspective seems to be awarded" should be deleted to clarify the text and avoid interpretative problems. Therefore, we propose the following rewording:

"A sustainability label means any voluntary trust mark, quality mark or equivalent, either public or private, that which is awarded or from the consumers' perspective seems to be awarded by a public or private entity to aims to set apart and promote a product, process, or business about environmental or social aspects".

Recital 15

With reference to recital 15, we do not agree with the introduction of the new last sentence. Directive 2019/770 does not cover all cases of software modification which negatively impact the consumer's access to or use of the digital content or digital service. Actually, the Directive 2019/770 does "not concern situations where the parties conclude a new contract for the supply of the digital content or digital service, for instance as a consequence of distributing a new version of the digital content or digital service".

Recital 16

As already stated, we deem it fundamental that the recital does not distinguish subcategories of trader concept such as producers and mere retailers. Therefore, the recital wording should be reconsidered. We could accept to go back to the European Commission proposal.

Recital 17

As already stated, we deem it fundamental that the recital does not distinguish subcategories of trader concept. Therefore, we propose to modify the relevant recital as follows:

Another practice which should be prohibited under Annex I to Directive 2005/29/EC is the practice of ~~falsely~~ claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use ~~after becoming aware that~~ 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 specific conditions provided in the instructions, while the actual use of the washing machine under the prescribed conditions shows this is not the case. ~~Such claims are largely done by the producers and they are the primary target group of this provision whenever they are engaged in a business-to-consumer commercial practice.~~

Recital 21

We reiterate previous comments on recital 16. We deem it fundamental that the recital does not distinguish subcategories of trader concept such as producers and mere retailers. Therefore, the recital wording should be reconsidered. We could accept to go back to the EC proposal.

Recital 23

We are analyzing the impact of the text rewording. At this stage, this recital is under scrutiny reserve.

Recital from 24 to 26

We oppose the deletion of these recitals. If one of the objectives of this proposal is to bring out durability as a competitive parameter by discouraging the use of unfair practices, then information obligations on the absence of a producer's commercial guarantee of durability of more than two years have to be kept among the proposal provisions. Furthermore, these obligations should be provide not only for energy-using goods but also for other products.

Recital 30

We notice that the recital 30 does not appear anymore and its content is now included in recital 29.

Article 1 (1)-amendments to art. 2 UCPD:

- point r)

As already stated, for the sake of clarity we ask for delating the following words “or gives an impression to be awarded”. Please, see also our comments on recital 7. Besides, we deem that the adverb “predominantly” makes the provision too loose. We propose the following rewording:

(r) ‘sustainability label’ means any voluntary trust mark, quality mark or equivalent, either public or private, that **is awarded** ~~or gives an impression to be awarded with the aim~~ ~~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;”

- point s)

We support amendments

Article 1 (2)-amendments to art. 6 (2) UCPD:

Paragraph 2 (b) points (d) and (e)

We reiterate what already stated:

- From a technical point of view, the choice of extend the scope of article 6, paragraph 2, of directive 2005/29 / EU, seems not viable. The list of practices contained in article 6, paragraph 2, of the aforementioned directive, in fact, is just an example, as the assessment of misleading actions is subject to the so-called test of settlement. Consequently, such practices must be considered lawful if they are not likely to induce the consumer to take a decision of a commercial nature other than that which he would otherwise have taken.

However, the environmental boasting relative to future performance in the absence of the indication of precise objectives and a monitoring system and the attribution to the product in terms of advantage for consumers of characteristics that are instead common to the entire market are provided *in re ipsa* of a deceptive suitability which, on the other hand, justifies its tracing back to the category of practices that must certainly be considered unfair - and therefore its inclusion in Annex I of the directive.

We claim that both the prohibitions should be included in Annex I and not in Art. 6 (2) Directive 2005/29/EC.

As for this issue, please see our comments on recitals 4 and 5, as well.

Annex I – UCPD

(4)

As for point 23d, we welcome the restoration of the concept of trader

As for point 23e, we oppose the rewording. We prefer to go back to the European Commission proposal

As for point 23f, we partially support the amendments. We could not accept the part referring to “after becoming aware that it” and we ask for its deletion.

As for point 23i, we do not support the amendments and we ask for their deletion.

Article 2 (1)/amendments to art. 2 CRD:

- point b, 14a)

We are analyzing the impact of the text rewording. At this stage, this recital is under scrutiny reserve.

Article 2 (2)/amendments to art. 5 CRD:

- point a, eb)

We share concerns expressed by France about the deletion of information obligations on the absence of a producer's commercial guarantee of durability. On this issue please see our comments on recitals 24 to 26.

Rome, 20.2.23



**Ministry of Enterprises
and Made in Italy**

**DIRECTORATE GENERAL FOR MARKET, COMPETITION, CONSUMER PROTECTION AND
TECHNICAL PROVISIONS-UNIT IX**

Austrian comments on the fifth compromise proposal (Doc. 5036/2/23 REV 2) for a Directive 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 (2022/0092(COD))

Article 1 - Amendment to Directive 2005/29/EC

General Remarks

We would like to ask that the timetable for this proposal be reconsidered. We must not decide anything prematurely until all proposals, which are related to the Empowering Consumers proposal, such as the Green Claims Initiative or the Right to Repair, are on the table and compatibility with all related proposals (including Ecodesign) has been established. In the case of Ecodesign, for example, we have received a - very brief - presentation from the EC on the durability issues, but the interaction with the labels (e.g. Art. 25 para 3 Ecodesign proposal) is still completely open. Many questions raised in the meetings of the Working party were not answered yet. It is difficult to explain to businesses concerned that the stipulations will be "complementary" - we need clear rules how the different legal approaches will interact.

Definitions

We call for caution regarding the definition in Art. 2 lit. q UCPD; we see a valid point of the Commission's explanation in the Working party and want to further discuss on this provision.

Regarding the new addition in Art. 2 lit. s UCPD: As we understand, one form of verification would be accreditation. However, this could trigger high costs for scheme owners, which were not examined in the Impact Assessment and therefore this examination still has to be done. We also have questions about the wording:

- Who needs to be verified - the scheme owner or the independent party, as "this party" could refer to both?
- We also ask for an explanation of how the verification - other than through accreditation - can be done.
- It has to be clear that "relevant competence" only refers to the requirements of the provision (e.g. independence, publicly accessible terms, ...) and not to any further substantive requirements.

- It should also be ensured that a verification of a Member State is recognised in all Member States (even though the verification is not done by accreditation).

Article 6 UCPD:

With regard to the comments made on Art. 6 (1) lit. e, it is also not clear for us, what is the added value of the provision is, as advertising with common features as an unique benefit or advantage is also covered by the general clause of misleading practises as well as prohibitions in No. 10 and No. 10a of the Annex.

Annex:

Regarding recital 7, we have another question: We were wondering why the reference to Art. 35 of Regulation (EU) No 1169/2011 is mentioned here but not in No. 2a of the Annex itself and also what this reference states about whether forms of expression and presentation of food qualify as a sustainability label (or not).

With regard to No. 23e, we want to draw your attention on the aims of the UCPD, which is to avoid commercial practices, that are misleading or aggressive. Recital 7 of the UCPD states that this Directive only addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. Therefore, an extension of the provision in No. 23e would also lead to a contradiction with the scope of the UCPD.

In view of No. 23f we also support the German comments that we should include more than one individual case in this provision.

Finally, as there is no Impact Assessment for additional obligations in the Annex, it is not appropriate to discuss additional obligations.

Proposal for a Directive on empowering consumers for the green transition and annex

COMMENTS BELGIUM

The Belgian delegation wishes to thank the Presidency for its work on the proposal and the opportunity to comment on the current version of the text. It remains the case that Belgium's comments on this fifth compromise text are not intended to be exhaustive, and hence the delegation explicitly reserves the right to submit further comments and proposals for provisions at any time.

We want to repeat our position:

If a producer becomes directly liable for free repair/replacement when it turns out that the good does not have the durability indicated in the commercial durability guarantee voluntarily offered by him, why would a producer still grant a so-called commercial durability guarantee to the consumer?

Whereas the notion 'commercial durability guarantee' is listed in the provision on definitions, this notion has not yet been defined in the text. There is simply a reference to Directive 2019/771 that mentions the notion of a commercial guarantee of durability, without definition. It is supposed to be a subcategory of "commercial guarantee", but it remains very unclear as a notion for traders, consumers and member states alike.

Recital 29:

The text needs to be formulated with a more general approach.

Reformulating e.g.: “traders selling those goods should inform consumers about the minimum period of time during which ~~the provider-producer commits to provide~~ software updates for such goods **are provided.**”

Article 1, (1), (w):

We cannot agree with the definition of “*software update*” as stipulated in this fifth compromise text, we would like to see it replaced by the previous version, including “*digital content and digital services*”. See recital 29 that explicitly cites “digital content or digital service” that also falls under the information obligation concerning updates.

Artikel 2, (1), (b), (14a) :

Here the term “*commercial guarantee of durability*” is mentioned , without offering any real definition. There is simply a reference to Directive 2019/771 that mentions the notion of a commercial guarantee of durability, without defining this notion. It is supposed to be a subcategory of “commercial guarantee”, but it remains very unclear as a notion for traders, consumer and member states alike.

Artikel 2, (2), (a), (ea):

The text talks about “*the entire good*,” does this mean that there is no disclosure requirement for a commercial durability guarantee on parts of a good? Does this mean that such a durability guarantee can only be given on the entire good?

Further, what is meant by “*union harmonized graphic format*”? Does this apply only to commercial durability guarantees and thus not all commercial guarantees? How is the distinction to be determined and why is such a distinction made?

Artikel 2, (2), (a), (ec) :

In this article the text speaks of the “producer” instead of the “provider”. In our opinion it is better to formulate this provision in general terms. Under the warranty directive, all obligations regarding conformity fall on the seller of the good, regarding information about it. This should also be the case, regardless of what happens B2B.

The same goes for (ed), where the text does refer to the “provider”. Uniformity is key, it does not matter who does or should do these updates, how the seller gets or should get this information, the consumer should simply be informed by the seller.

This corresponds to the obligation of conformity under the warranty directive, for which the seller must vouch. He has to convey everything properly to consumer and that is his responsibility as the ultimate seller to consumer.

There is a choice in the warranty directive as far as liability is concerned, if one wants to attach a specific information obligation to this, then it should parallel and fall on the seller in the same way. Any information obligation introduced in this proposition should be aligned with the information obligations on the seller as imposed by the warranty directive.

Artikel 2, (3), (mc) en (md):

Same comments as above.

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

Written comments and suggestions

(Republic of Slovenia)

Slovenia welcomes the fifth Presidency's compromise proposal for a Directive on empowering consumers for the green transition through better protection against unfair practices and better information.

As we have already emphasised, it is very important for us that the provisions of the directive do not confuse consumers, but provide them with adequate information, that they actually have added value and that they present a clear distinction between different guarantees. Otherwise, the provisions may bring unwanted consequences and may not be in line with the objectives of the directive.

Regarding the proposed text in **point (ea) in Article 5** and in **point (ma) in Article 6** of the CRD Directive, SI supports the obligation to inform the consumer only in case of the existence of **commercial guarantee of durability**, however, we still believe that it should only be given where it outlasts the mandatory legal guarantee for non-conformity provided by traders. Only in this way the commercial guarantee of durability will have an added value.

Therefore we propose the following compromise text :

- where a commercial guarantee of durability on the entire good is issued, information that the goods benefit from such a guarantee and its duration in units of time, **where that guarantee has a longer duration than or commences after the date of expiry of the minimum legal guarantee of conformity provided by Union law.**

As we have already explained, SI has finally made the provisions regarding non-conformity of goods and guarantees more clear in the new Consumer Protection Act, and we are afraid that we will take a step back and that consumers will be again or even further confused when exercising their rights in this regard. In addition, as we already explained, we have a specific situation in Slovenia, since in addition to the two-year legal guarantee of conformity provided by traders, we also have a one-year free of charge mandatory guarantee (of durability) for certain technical goods provided by producers.

SI believes that by providing more guarantees on paper, we do not ensure higher consumer protection in practice, because all these numerous options and information mostly do not reach consumers at all or the consumers are overloaded with information, forgetting their legal rights in the process. Our data from counselling consumers show that they are not aware of all the rights regarding beforementioned two-year legal guarantee of conformity, one-year mandatory guarantee for certain technical goods and other commercial guarantees and do not use all of their rights. In addition, traders are at the point of sale not subjected to inform consumers about all consumer rights or the best options available to them in this regard, but they inform or offer them the guarantee that is more favorable for traders. In the end the consumers often do not use the legal or mandatory guarantees, because they think they do not exist. Still many consumers believe that Apple offers one-year worldwide guarantee, which excludes all other guarantees. Consumers should have at a single point of time only one guarantee or right for sustainability or different rights which do not contest each other.

If point (ea) is accepted as it is written now (only duration in units of time), then SI proposes to oblige traders to give more comprehensive information about guarantees to consumers at the point of sale or at the point of filing a complaint, so that consumers would actually be aware of all their rights and all the options. It would also be appropriate for consumers to be informed on the one hand about their legal options and additionally what the trader offers beyond that.

SI would also like to ask the Commission and the Presidency for the opinion, how will consumers get all the important information about the different types of guarantees at the point of sale. According to the proposal of the directive, traders would only have the obligation to inform consumers in case of commercial guarantee of durability, but not, for example, in the case of two-year legal guarantee of conformity. From our experience on counseling consumers, we found that traders often avoid claims in the context of legal guarantee of conformity, which will certainly not be improved by informing consumers only about the commercial guarantee of durability. Do you think that this would adequately follow a high level of consumer protection if consumers are only informed about the commercial guarantee of durability, although they will not be aware of their basic legal rights in the case of non-conformity of the goods?

SI believes that consumers should not have different options for exercising their same or similar rights. If such rights do exist, informing consumers must be done in such a way that they would be aware of all the options and that this information would not be misunderstood. This would make it easier for consumers to make informed decisions that are most suitable. We do not understand how informing consumers of only one type of commercial guarantee, which will not even cover all types of goods, is better for the environment in contrast to informing them about a legal guarantee of conformity that applies to all goods with the same or almost the same guarantees.

SI believes the consumer should be informed at the point of sale of all the rights, legal or commercial, regarding the non-conformity or guarantees, not just one specific.

Regarding the **harmonized graphic format SI is of the opinion that it should be presented in an annex to the directive and not in delegated acts**. We believe that further discussion about the harmonized graphic format is very important and we don't even imagine how it will be prepared, so we have additional questions in this regard. It is necessary to ensure the clarity of the provisions not to cause confusion among consumers as well as companies. SI is interested in whether the harmonized graphic format will encompass, just commercial guarantee of durability or also legal guarantee of conformity and how we could present the additional one-year mandatory guarantee for certain technical goods that we have in Slovenia? We think the idea of such a harmonized graphic format is very good, but we do not yet have a clear picture of how it will work in practice.

Although SI would like a more ambitious approach to this directive and that the provisions would also address the **unfair business practices** of producers in a broader sense, we nevertheless think that the Presidency has again improved the text within the limits of possibilities.

Regarding the changes in **Annex 1, especially in points (23d), (23e) and (23i)**, SI considers that the current text is improved. However, we still believe that these provisions do not bring enough added value than they could have and do not make it easier for supervisory authorities

to more effectively sanction unfair business practices by companies, especially when they are carried out by producers.

