**Comments by the Lithuanian delegation on the seventh compromise proposal (No. 5036/4/23 REV 4) 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 and on the working document (No. 7851/23)**

Lithuanian delegation would like to thank the Presidency for its efforts to make substantial progress on this legislative file. With regard to the last compromise proposal, we would like to raise the following issues:

**Article 6(2)(d) of the Directive 2005/29/EC**

We propose to clarify what added value the insertion of the "realistic implementation plan" brings to the 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.

Also, we consider that the proposed amendments do not improve the wording of this provision: it remains unclear what is to be understood by an "independent third-party expert", as we did not receive a detailed explanation during the last meeting.

**Working document No. 7851/23**

**Question 1: Should there be a subjective element in the points in Annex I to the Unfair Commercial Practices Directive?**

The subjective element in the points 23e, 23f and 23i of the Annex could stay. The traders who are mere sellers and who are unaware of, for example, the fact that a good is designed to limit its functionality should not be liable for omitting to inform the consumer that the good has such a limitation.

However, in such a case, the traders should be responsible when they "knew or should have known", for example, when the trader receives some documents and it is clear from them that the durability of a certain part or mechanism is limited in time.

**Question 2: If you are in favour of having a subjective element, do you agree with using "while being aware", or do you have a suggestion for an alternative phrasing?**

Yes, we could agree with using "while being aware".

**Question 3: Should security updates be included in point 23d?**

We do not have a strict position whether security updates should be included. However, if we make an exception for security updates, then the question about other updates remains unclear.

**Question 4: Do you prefer this version compared to the current wording of point 23f of Annex I?**

We prefer the version provided.

**Question 5: Are there additional aspects that should be provided through the Union Harmonised Graphic Format compared to what is already suggested in Article 6a of the Consumer Rights Directive?**

We do not propose to include additional aspects that should be presented using the Union's harmonized graphic format compared to what is already proposed in Article 6a of the Consumer Rights Directive.

Council of the European Union
General Secretariat



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

**Brussels, 17 April 2023**

**WK 4724/2023 INIT**

**LIMITE**

**CONSOM**
**MI**
**COMPET**
**ENER**
**ENV**
**SUSTDEV**
**DIGIT**
**CODEC**

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**NOTE**

| | |
|---|---|
| From: | Delegations |
| To: | Delegations |
| Subject: | Proposal for a Directive on Empowering consumers for the green transition<br>- Comments on Presidency seventh compromise text 5036/23 REV4 |

Delegations will find attached comments from DK, FR, HR, GR, IT, LT, RO.

MINISTRY OF INDUSTRY, BUSINESS
AND FINANCIAL AFFAIRS



12 April 2023

**Denmark's written comments regarding the seventh compromise proposal (Doc. 5036/4/23 rev 4) for a Directive on empowering consumers for the green transition**

## General remarks

Denmark supports the overall aim of the proposal regarding empowering consumers for the green transition (the Directive Proposal). We thank the Presidency for the hard work and progress so far and for the opportunity to comment on the current version of the text.

It remains the case that the Danish remarks in this position statement are not intended to be exhaustive, and hence the Danish Government explicitly reserves the right to submit further remarks and proposals for this Directive Proposal.

## Amendments to Directive 2005/29/EC

### *Recital 9*

As previously mentioned, Denmark still supports the Commission's proposal to shorten the sentence so that "*such as the same advertising spot, product's packaging or online interface"* is omitted.

This is due to the fact that this reference does not comply with the UCPD guidance. The guidance states that it can be misleading if an environmental claim is stated on the front of a packaging, while the information about the claim is on the back of the packaging, especially if the information can be provided in a more prominent way, e.g. next to the claim. The same is relevant in relation to websites where it is necessary to scroll down or click on from the page before the specification of the claim appears.

A specification of an environmental claim, not stated in the same place as the environmental claim itself, will not cause the environmental claim to be specific and therefore not generic according to the existing rules in the UCPD. Denmark finds this point is important in order to maintain the existing level of consumer protection and to avoid "greenwashing".

The following example is mentioned in the Commission's guidance on UCPD: *"Traders sometimes provide information about environmental claims in a way that requires the consumer to take additional action to access (e.g. a consumer may have to click once more in the context of a social media post or a product list to get the necessary supplementary information), which may be misleading in some cases. Representatives from*

*the CPC network of national consumer authorities considered that, depending on the circumstances of the case and in particular the limitations of the medium, it may be misleading to require the consumer to take such action to obtain the relevant information, especially if it is possible to provide that information in a more prominent way, e.g. next to the claim."* [1]



***Definition (s) – 'certification scheme' and recital 7***

Denmark does not see the necessity for further evaluation of the competence of the third party by a Member State as it is already required that the national accreditation body evaluates the competence of the third party as part of the accreditation process, according to article 5.1 of EF/765/2008.

We therefore suggest the following amendments to definition (s) 'certification scheme' and recital 7:

*(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****, a process or a business*** *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 independent from both the scheme owner and the trader****, and whose relevant competence has been verified*** ~~***in accordance with union law***~~ ***by a national accreditation in accordance with EF/765/2008*** ~~***the Member State in which this party is established, provided that such a verification complies with Union law***~~*;*

Recital 7

*[…]****Its relevant competence should be verified by a national accreditation body in accordance with EF/765/2008*** ~~*the Member State in which the independent third party is established, provided that such a verification complies with union law*~~*.[…]*

***Definition (u) – 'recognised excellent environmental performance'***

As previously mentioned, Denmark is concerned with the reference to EMAS as EMAS only sets up an eco-management and audit scheme but not specific environmental requirements or improvements. Hence, an en-

[1] Commission notice (2021/C 526/01) 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, page 80, point 4.1.1.4.

tity can in other words be EMAS registered without meeting any environmental requirements. Therefore, compliance with EMAS does not guarantee recognised excellent environmental performance and the reference to EMAS *"Regulation (EC) No 1221/2009 (EMAS)"* should be omitted.



**Amendments to Annex I**

***Point 2a and recital 7***

Denmark still believes the insertion in point 2a regarding certification marks could lead to an undesirable interpretation and practice. Denmark therefore still prefers to delete the reference to certification marks. However, after the remarks from the Commission, it is our understanding that a sustainability label, which is either based on a certification scheme or registered as a certification mark in accordance with Regulation (EU) No 2017/10011 or Directive (EU) 2015/2436, or established by public authorities, may still be deemed as being unfair after a case-by-case assessment based on the provisions of Articles 5 to 9 in Directive 2005/29/EC.

***Point 23 e, f and i***

As mentioned by other Member States such as FI, CZ, EE, BE and AT there is a need for a subjective element in the proposed points 23e, f, and i in Annex I of the UCPD.

Denmark has asked the Council's Legal Service whether the criterion about 'professional diligence' in Article 5 in the UCPD also applies to the Annex I of the UCPD.

The Council's legal Service has replied, that the judgement of the Court in case C-304/08[2] and recital 17 of the UCPD illustrates that the criteria of Articles 5-9 of the UCPD do not apply to the Annex I (the Black List).

Denmark can therefore support the FR proposal to use "expected to know" as this element entails a professional diligence standard and thus is not unreasonable for the traders who are only retailers.

**Amendments to the Consumer Rights Directive**

As previously stated, we are especially focused on preventing information overload.

If there is a majority behind a provision to inform about commercial guarantees of durability, we believe that such an obligation should not result in excessive administrative burdens on traders and that the obligation

[2] JUDGMENT OF THE COURT (First Chamber), 14 January 2010 - Case C-304/08, Plus Warenhandelsgesellschaft, recital 45.

therefore should be limited. Further, it is important that such information is understood correctly by the consumers and that it is not confused with other guarantees.

We therefore believe that such a requirement should only apply in cases where the commercial guarantee of durability extends the minimum legal guarantee. We can therefore support the proposal to limit the obligation to cases where the commercial guarantee of durability covers a period of more than two years

RÉPUBLIQUE
FRANÇAISE
*Liberté*
*Égalité*
*Fraternité*



Paris, le 11 avril 2023

# NOTE DES AUTORITÉS FRANÇAISES

**Objet** : Commentaires écrits consécutifs à la réunion du groupe de travail « Information et protection du consommateur » du Conseil du 3 avril 2023 concernant le renforcement du rôle du consommateur dans la transition écologique

**Réf. :** SGAE/MINUME/2023/203

**PJ. :** Traduction anglaise de courtoisie

À la suite de la réunion du groupe de travail « Information et protection du consommateur » qui s'est tenue le 3 avril 2023, la France souhaite faire part des commentaires écrits suivants sur le septième compromis proposé par la présidence suédoise.

## I. Remarques préliminaires

Les autorités françaises remercient la présidence suédoise pour ce nouveau texte de compromis sur la proposition de directive relative au renforcement du rôle du consommateur dans la transition écologique (st05036-re04.en23).

**Elles considèrent que les modifications apportées dans ce 7ème compromis vont globalement dans le bon sens mais que plusieurs points importants méritent encore d'être ajustés. Elles formulent donc les propositions et commentaires suivants**.

## II. Commentaires sur les définitions dans la directive 2005/29/CE sur les pratiques commerciales déloyales

### a) Définition des allégations environnementales génériques

Les autorités françaises soutiennent la précision apportée par la présidence au considérant 9 s'agissant des allégations implicites mais regrettent que celles-ci ne puissent être considérées comme des allégations génériques toutes seules et en tant que telles, mais uniquement combinées à une allégation écrite ou orale.

Enfin, les autorités françaises soutiennent le changement d'exemple proposé par la présidence au considérant 9 et la suppression de l'exemple sur l'allégation « *biodégradable* ».

### b) Définitions du label de durabilité

S'agissant de la définition au point (r), les autorités françaises expriment leur soutien à la suppression du terme « *predominantly* » mais considèrent que les précisions apportées par la présidence au considérant (6a) devraient

également figurer dans la définition elle-même, s'agissant du fait qu'un label de durabilité ne doit pas correspondre uniquement au respect des règles européennes ou nationales.

c) Suppression de la définition des mises à jour logicielles et pPratique 23d

Les autorités françaises ne sont pas opposées à la suppression de la définition de « *mises à jour logicielles* » au sein de la directive 2005/29/CE, bien qu'il n'existe à ce jour aucun texte européen proposant une telle définition.

S'agissant de la pratique 23d, les autorités françaises ont pris note des préoccupations exprimées lors de précédentes réunions concernant le risque de contournement consistant en la fourniture par le professionnel d'une information générique dans les documents précontractuels ou les conditions générales sur le potentiel impact négatif de toute mise à jour.

**Afin d'éviter un tel effet contreproductif de la disposition et de s'assurer que l'information réponde de manière opérationnelle au besoin du consommateur, les autorités françaises proposent de mieux encadrer cette interdiction en prévoyant que l'information doit être faite durant l'exécution du contrat et sous la forme d'information personnalisée**.

**Elles suggèrent ainsi les amendements suivants (amendements en rouge) :**

- Au considérant 15 :

  *« It should be prohibited **under Annex I to Directive 2005/29/EC** to omit to inform the consumer **individually, without any additionnal cost, in a clear and comprehensible manner,** that a software update~~may~~ **will** negatively impact the use **functioning** of goods with digital elements **or digital content or digital services** ~~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 ~~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**. **This prohibition applies only to the trader that is providing the software update to the consumer, regardless whether it is the producer of the good, software provider or the seller of the good. This provision is without prejudice to Article 19 of Directive 2019/770, which prohibits in principle the modification of digital content and digital services by the trader where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a certain period of time** »*

- Au 23d. de l'Annexe I de la directive 2005/29/CE :

  *« 23d. Omitting to inform the consumer **individually, without any additionnal cost, whether that** ~~a~~ **particular** software update **provided by** ~~**that** **the trader** **provides**~~ will negatively impact the **functioning** ~~use~~ of goods with digital elements ~~or certain features of those goods~~ or digital content or digital services ~~even if the software update improves the functioning of other features~~ »*

**Les autorités françaises peuvent apporter les précisions suivantes à l'appui de leur proposition :**

- cette proposition est inspirée du droit national français qui a introduit des obligations pesant sur les vendeurs et sur les producteurs concernant le téléchargement de mises à jour par le consommateur : ces ajouts permettraient de rendre réellement effective l'information du consommateur et réduiraient les risques de contournement en imposant au producteur ou fournisseur de mise à jour d'informer le consommateur, de manière lisible et compréhensible sur les caractéristiques essentielles de chacune des mises à jour proposées au téléchargement ;

- s'agissant du caractère individualisé de l'information, les autorités françaises rappellent que le fournisseur de service numérique ou le vendeur de bien comportant un élément numérique est d'ores et déjà tenu de fournir au consommateur, en vertu de la règlementation sur la garantie légale de conformité, des mises à jour, pendant une certaine durée (article 7 de la directive 2019/771).

Enfin, concernant la modification de la fin de ce considérant 15 par l'introduction d'une référence à l'article 19 de la directive (UE) 2019/771 proposée par la présidence, les autorités françaises considèrent que cette référence n'est pas utile dans la mesure où les dispositions ne sont pas contradictoires. Si elle devait toutefois être maintenue, il serait préférable qu'un renvoi plus bref soit fait à cette disposition. Le considérant pourrait être ainsi raccourci :

*« **This provision is without prejudice to Article 19 of Directive 2019/770, ~~which prohibits in principle the modification of digital content and digital services by the trader where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a certain period of time.~~** »*

d) Définition du schéma de certification

**Les autorités françaises soutiennent la modification rédactionnelle proposée par la présidence au point s et considérant 7 s'agissant de la vérification de la compétence du tiers certificateur par l'État membre. Il s'agit de préciser que cette vérification doit être conforme au droit de l'Union.**

Les autorités françaises ont pris note des questions exprimées par certaines délégations concernant l'introduction de contraintes administratives et financières liées aux procédures de vérification. À toutes fins utiles, elles peuvent apporter l'éclairage suivant :
- ce mécanisme existe déjà en droit européen ;
- le règlement (CE) n°2008/765 fixant les prescriptions relatives à l'accréditation et à la surveillance du marché pour la commercialisation des produits prévoit l'accréditation comme voie privilégiée pour s'assurer de la qualité de l'organisme d'évaluation de la conformité : *« Lorsqu'un État membre décide de ne pas recourir à l'accréditation, il fournit à la Commission et aux autres États membres toutes les preuves documentaires nécessaires à la vérification de la compétence des organismes d'évaluation* »[1].
- le règlement (CE) n°1221/2009 dit EMAS retient la même organisation avec les organismes d'accréditation ou d'agrément pour évaluer les compétences des vérificateurs environnementaux.

Par ailleurs, les autorités françaises partagent l'analyse du SJC selon laquelle la vérification de la compétence du tiers qui certifie le respect des critères des labels doit obligatoirement assurée par l'État membre où le tiers est installé. Cette disposition permet de s'assurer de la qualité de la certification, et ce faisant de participer pleinement à la lutte contre les labels peu fiables. Elle s'inscrit par ailleurs dans le cadre du droit européen existant, comme rappelé *supra.*

## III. Commentaires sur les allégations environnementales liées à une performance environnementale future

Les autorités françaises apportent leur soutien aux précisions apportées par la présidence au considérant 4. Elles maintiennent toutefois leurs interrogations précédemment exprimées concernant le tiers expert indépendant : *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 ?*

## IV. Commentaires sur l'annexe I de la directive relative aux pratiques commerciales déloyales

a) Sur l'inclusion d'un élément subjectif dans la définition des pratiques commerciales déloyales

**Les autorités françaises sont défavorables à tout élément subjectif dans l'annexe I et continuent de proposer la suppression de « *while being aware* ». Elles considèrent en effet que cette formule est contraire à la philosophie générale de la directive 2005/29, où les interdictions ne s'appliquent pas uniquement lorsque le professionnel est effectivement conscient de la présence d'une telle caractéristique : il ne peut donc pas adopter uniquement un comportement passif qui le conduirait à attendre d'en être informé.**

A l'appui de cette position, les autorités françaises soulignent les points suivants :
- au contraire d'un comportement passif de la part du professionnel que la rédaction « *while being aware* » permettrait, le respect des exigences de la diligence professionnelle impliquerait que le professionnel se comporte conformément aux pratiques de marché honnêtes et conformément aux attentes légitimes des consommateurs. Il doit donc chercher à s'informer ;

[1] Art 5§2 du règlement (CE) n°765/2008

- les pratiques commerciales définies par l'article 2 de la directive 2005/29/CE peuvent être déloyales ou trompeuses, respectivement au sens des articles 5, 6 et 7, indépendamment de tout caractère intentionnel. En effet, la licéité des pratiques commerciales trompeuses ne doit être appréciée qu'au regard de leurs conséquences sur l'altération substantielle, même potentielle, du comportement économique du consommateur et le comportement économique du consommateur peut être altéré, y compris de manière non intentionnelle ;
- les dispositions de la directive 2005/29/CE constituent un « *filet de sécurité* » en matière de protection des consommateurs contre les pratiques commerciales déloyales, elles doivent donc rester générales ;
- il appartient à l'autorité de surveillance du marché d'apporter la preuve de la connaissance du professionnel de la pratique interdite pour pouvoir engager sa responsabilité et qu'il n'est pas nécessaire de le traduire dans le texte (de nombreux considérants explicitent cet aspect).

b) Sur l'inclusion des mises à jour de sécurité dans la pratique 23d

**Les autorités françaises considèrent que les mises à jour de sécurité devraient être intégrées à la pratique 23d, sous réserve de la prise en compte des amendements proposés au II.c et visant à mieux encadrer cette interdiction en prévoyant que l'information doit être faite durant l'exécution du contrat et sous la forme d'information personnalisée**.

c) Sur la formulation de la pratique 23f

**Les autorités françaises soutiennent de façon préférentielle la rédaction proposée par la présidence dans son papier de discussion (st07851.en23), soit la version suivante : *23f. Falsely claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use.***

En effet, bien que les rédactions soient très proches, celle-ci ne retient pas la formule « *while being aware* ». Il reviendra aux autorités de contrôle de démontrer que l'allégation est fausse.

d) Sur le périmètre de la pratique 2a

S'agissant de la pratique 2a consistant à « *afficher un label de durabilité qui n'est ni basé sur un système de certification, ni enregistré comme marque de certification conformément au règlement 2017/1001 ou à la directive 2015/2436 ni établi par des entités publiques* », les autorités françaises demeurent preneuses d'une analyse plus poussée sur l'exclusion ou non des marques de certification du champ d'application de cette interdiction dans la mesure où la règlementation européenne sur les marques de certification poursuit un objectif différent de celui du projet de directive transition écologique. Elles soulignent en effet que le projet de directive est un texte consumériste dont l'objectif est de définir des critères stricts pour assurer la protection la plus élevée des consommateurs.

## V. Commentaires sur l'information sur les garanties commerciales de durabilité dans la directive Droits des consommateurs 2011/83/UE

Les autorités françaises soutiennent les modifications apportées par la présidence au (ea) du §1 de l'article 5 et au (ma) du §1 de l'article 6 de la directive 2011/83/UE concernant la rédaction des hypothèses pour lesquelles un logo harmonisé sera présenté avec le produit pour informer sur la garantie commerciale de durabilité.

**En revanche, elles considèrent que la rédaction de certains des considérants se rapportant à la garantie commerciale de durabilité peut apporter de la confusion sur cette garantie commerciale spécifique.**

En effet, à la lecture du considérant 26, il pourrait être compris que l'information précontractuelle due pour toute garantie commerciale au titre de 2011/83/UE ne concernerait pas la garantie commerciale de durabilité, ce qui est erroné.

Toute garantie commerciale de durabilité devra faire l'objet d'une information précontractuelle répondant aux exigences des articles 5 et 6 de 2011/83/UE comme toute garantie commerciale. Toutefois, outre ces informations, la garantie commerciale de durabilité se verra rappelée au consommateur par le moyen d'un logo harmonisé lorsque cette dernière sera proposée gratuitement et pour plus de deux ans.

**Pour que cela soit plus clairement distingué, les autorités françaises proposent une reformulation au considérant 26, qui pourrait alors être ainsi rédigé (amendements en rouge) :**

*(26) « In view of the established minimum duration of two years of the* ***legal guarantee*** ~~*seller's liability for lack*~~ *of conformity in accordance with Directive (EU) 2019/771 for new goods and the fact that many product failures occur after* ***this duration*** ~~*two years,*~~ *the trader's obligation to inform consumers about the existence and duration of the producer's commercial guarantee of durability* ***via the Harmonised Graphic Format*** *should* ***only*** *apply to guarantees that are* ***beyond the minimum duration*** *of* ~~*more than*~~ *two years* ***of the legal guarantee of conformity set out in directive (EU) 2019/771****. »*

Dans cette perspective, elles soulignent que l'articulation entre les considérants (23), (26) et (28) ne permet pas d'éclaircir parfaitement la distinction ci-dessus évoquée entre d'une part, l'information précontractuelle due pour toute garantie commerciale dont la garantie commerciale de durabilité, d'autre part, l'information spécifique à la garantie commerciale de durabilité au moyen d'un logo harmonisé.

**Elles proposent donc également une évolution du considérant 28, qui pourrait être ainsi allégé (amendements en rouge) :**

*(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*~~***, has a duration of more than two years, and is offered without additional costs.*** ~~*and has a duration of more than two years.*~~***as defined in Directive 2019/771.*** *»*

**Par ailleurs, les autorités françaises souhaitent élargir le débat sur ces articles 5 et 6 pour regretter que l'information sur les pièces détachées (disponibilité, processus de commande) soit limitée aux contrats pour lesquels l'indice de réparabilité ne serait pas requis. Elles soulignent les points suivants :**

- l'indice de réparabilité et l'information relative aux pièces de rechange constituent deux aspects d'un contrat qui ne sont pas corrélés : un professionnel qui commercialise la vente d'un bien peut être soumis à l'apposition d'un indice de réparabilité tout en étant par ailleurs soumis à l'indication de disponibilité de pièces de rechange ;

- il est bien bénéfique au consommateur de disposer tant d'une information sur la réparabilité que d'une information sur le cas échéant, la disponibilité des pièces détachées.

**C'est pourquoi les autorités françaises proposent une modification du (j) de l'article 5 et du (v) du (b) de l'article 6 comme suit (amendements en rouge) :**

- le (j) de l'article 5 comme suit : « *(j) when* ~~*point (i) is not applicable*~~ ***and the producer makes such information available to the trader****, 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. »*

- le (v) du (b) de l'article 6 : « *(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.' »*

Enfin, si la présidence souhaitait maintenir la définition des mises à jour logicielles dans la directive 2011/83/UE, les autorités françaises auraient une préférence pour la rédaction du point w de l'article 1 du compromis précédent qui visait toutes les mises à jour (« any update ») et pas uniquement les mises à jour gratuites.

**Traduction de courtoisie des commentaires écrits des autorités françaises sur le compromis relatif à la proposition de directive sur le renforcement du rôle du consommateur dans la transition écologique st07851.en23**

(SGAE/MINUME/2023/203)



## I. Preliminary remarks

The French authorities thank the Swedish Presidency for this new compromise text on the proposal for a directive on strengthening the role of consumers in the ecological transition (st05036-re04.en23) which goes in the right direction.

**However they consider that some important points still need to be ajusted and would like to share the following comments and proposals.**

## II. Comments on the definitions in the Unfair Commercial Practices Directive 2005/29/EC

a) Definition of generic environmental claims

The French authorities support the clarification made by the Presidency in recital 9 concerning implicit claims, but regret that these cannot be considered as generic claims on their own and as such, but only in combination with a written or oral claim.

Finally, the French authorities support the change of example proposed by the Presidency in recital 9 and the deletion of the example on the claim "biodegradable".

b) Definitions of the sustainability label

With regard to the definition in point (r), the French authorities express their support for the deletion of the term "predominantly". However, they consider that the clarification brought in recital (6a) concerning the scope of the sustainability label (that should not correspond solely to compliance with European and national rules) should also appear in the definition itself.

c) Deletion of the definition of software updates and practice 23d

The French authorities are not opposed to the deletion of the definition of "software updates" from Directive 2005/29/EC, although there is no European text proposing such a definition to date.

With respect to practice 23d in the annex, the French authorities have taken note of the concerns expressed at previous meetings regarding the risk of circumvention consisting of the provision by the trader of generic information in pre-contractual documents or general terms and conditions on the potential negative impact of any update.

**In order to avoid such a counterproductive effect of the provision and to ensure that the information meets the consumer's needs in an operational manner, the French authorities propose to better frame this prohibition by providing that the information must be provided during the performance of the contract and in the form of personalized information.**

**They therefore suggest the following amendments (amendments in red):**

- In recital 15 :

> *« It should be prohibited **under Annex I to Directive 2005/29/EC** to omit to inform the consumer **individually, without any additionnal cost, in a clear and comprehensible manner,** that a software update ~~may~~ **will** negatively impact the use **functioning** of goods with digital elements **or digital content or digital services** ~~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 ~~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**. **This prohibition applies only to the trader that is providing the software update to the consumer, ~~regardless whether it is the producer of the good, software provider or the seller of the good. This provision is without prejudice to Article 19 of Directive 2019/770, which prohibits in principle the modification of digital content and digital services by the trader where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a certain period of time~~** »*

- Au 23d. de l'Annexe I de la directive 2005/29/CE :

  *« 23d. Omitting to inform the consumer **individually, without any additionnal cost, whether that** ~~a~~ **particular** software update **provided by** ~~**that the trader provides**~~ will negatively impact the **functioning** ~~use~~ of goods with digital elements ~~or certain features of those goods~~ or digital content or digital services ~~even if the software update improves the functioning of other features~~ »*

**The French authorities can provide the following clarifications in support of their proposal:**

- this proposal is inspired by French national law, which has introduced obligations on sellers and producers concerning the downloading of updates by the consumer : these additions would make it possible to make consumer information really effective and would reduce the risks of circumvention by requiring the producer or supplier of the update to inform the consumer, in a legible and comprehensible manner, of the essential characteristics of each of the updates offered for downloading;

- With regard to the individualized nature of the information, the French authorities point out that the digital service provider or the seller of goods with a digital component is already required to provide the consumer with updates for a certain period of time under the regulations on the legal guarantee of conformity (Article 7 of Directive 2019/771).

Finally, concerning the amendment to the end of this recital 15 by introducing a reference to Article 19 of Directive (EU) 2019/771 proposed by the Presidency, the French authorities consider that this reference is not useful insofar as the provisions are not contradictory. If it were to be retained, however, it would be preferable for a shorter reference to be made to this provision. The recital could be shortened as follows:

*« **This provision is without prejudice to Article 19 of Directive 2019/770, ~~which prohibits in principle the modification of digital content and digital services by the trader where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a certain period of time.~~** »*

d) Definition of the certification scheme

**The French authorities can support the drafting change proposed by the Presidency in point s and recital 7 concerning the verification of the competence of the third-party certifier by the Member State. It should be specified that this verification must be in accordance with Union law.**

The French authorities have taken note of the questions expressed by certain delegations concerning the introduction of administrative and financial constraints linked to the verification procedures. For all intents and purposes, they can provide the following clarification :

- this mechanism already exists in European law;
- Regulation (EC) No 2008/765 setting out the requirements for accreditation and market surveillance relating to the marketing of products provides for accreditation as the preferred means of ensuring the quality of the conformity assessment body : "Where a member state decides not to use accreditation, it shall provide the Commission and the other member states with all the documentary evidence necessary for the verification of the competence of the assessment bodies".
- Regulation (EC) No. 1221/2009, known as EMAS, retains the same organization with accreditation or licensing bodies to assess the competence of environmental verifiers.

Furthermore, the French authorities share the Council legal service's analysis according to which all Member States must verify the competence of the third party certifying compliance with the label criteria, as they already have this obligation in the current EU law. This measure fully contributes to the fight against unreliable labels.



## III. Comments on environmental claims linked to future environmental performance

The French authorities support the clarifications made by the Presidency in recital 4. However, they maintain their questions regarding the third party expert: Who is eligible to be an expert? Would the control authorities be bound by the conclusions of this expert on the environmental claim concerned?

## IV. Comments on Annex I of the Directive on unfair commercial practices

a) About the inclusion of a subjective element in the definition of unfair commercial practices

**The French authorities are against any subjective element in Annex I and continue to propose the deletion of "while being aware". They consider that this element goes against the general philosophy of directive 2005/29, according to which the prohibitions do not apply only when the trader is actually aware of the presence of such a characteristic and that he should not adopt a passive behavior that would lead him to wait to be informed.**

In support of this position, the French authorities stress the following points :

- contrary to a passive behavior on the part of the trader that the wording "while being aware" would allow, compliance with the requirements of professional diligence would imply that the trader behaves in accordance with honest market practices and in accordance with the legitimate expectations of consumers. He must therefore seek to inform himself of ;
- the commercial practices defined by Article 2 of Directive 2005/29/EC may be unfair or misleading, within the meaning of Articles 5, 6 and 7 respectively, regardless of any intentional character. Indeed, the legality of misleading commercial practices must be assessed only in terms of their consequences on the substantial alteration, even potential, of the consumer's economic behavior, and the consumer's economic behavior may be altered, even unintentionally;
- the provisions of Directive 2005/29/EC constitute a "safety net" for the protection of consumers against unfair commercial practices and must therefore remain general;
- it is up to the market surveillance authority to provide proof of the trader's knowledge of the prohibited practice in order to be able to engage his liability and that it is not necessary to translate this into the text (many recitals make this aspect explicit).

b) About the inclusion of security updates in practice 23d

**The French authorities consider that security updates should be included in practice 23d provided that the amendments proposed in point II.c are taken into account in order to better address this disposal through an information provided during the performance of the contract and in a personalized form.**

c) About the formulation of practice 23f

**The French authorities prefer the wording proposed by the Presidency in its discussion paper (st07851.en23), namely the following version : 23f. Falsely claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use.**

In fact, although the wording is very close, this one does not use the phrase "while being aware". It will be up to the control authorities to demonstrate that the claim is false.

d) About the scope of practice 2a

With respect to practice 2a, which consists of "displaying a sustainability label that is neither based on a certification system, nor registered as a certification mark in accordance with Regulation 2017/1001 or Directive 2015/2436 , nor established by public entities", the French authorities would welcome further analysis on whether or not certification marks should be excluded from the scope of this prohibition, as the European regulation on certification

marks pursues a different objective than that of the draft Ecological Transition Directive. Indeed, they stress that the draft directive is a consumer text whose objective is to define strict criteria to ensure the highest level of consumer protection.

**V. Comments on the information on commercial guarantees of durability in the Consumer Rights Directive 2011/83/EU**

The French authorities support the changes made by the Presidency to Article 5(1)(ea) and Article 6(1)(ma) of Directive 2011/83/EU concerning the wording of the cases in which a harmonized logo will be presented with the product to provide information on the commercial guarantee of durability.

**However, they consider that the wording of some of the recitals relating to the commercial guarantee of durability may cause confusion about this specific commercial guarantee.**

Indeed, reading recital 26, it could be understood that the pre-contractual information due for any commercial guarantee under 2011/83/EU would not concern the commercial guarantee of durability, which is wrong.

Any commercial guarantee of durability will have to be subject to pre-contractual information meeting the requirements of articles 5 and 6 of 2011/83/EU like any commercial guarantee. However, in addition to this information, the commercial guarantee of durability will be reminded to the consumer by means of a harmonized logo when it is offered free of charge and for more than two years.

**In order to make this more clearly distinguishable, the French authorities propose a rewording of recital 26, which could then read as follows (amendments in red):**

*(26) « In view of the established minimum duration of two years of the* ***legal guarantee*** ~~*seller's liability for lack*~~ *of conformity in accordance with Directive (EU) 2019/771 for new goods and the fact that many product failures occur after* ***this duration*** ~~*two years,*~~ *the trader's obligation to inform consumers about the existence and duration of the producer's commercial guarantee of durability* ***via the Harmonised Graphic Format*** *should* ***only*** *apply to guarantees that are* ***beyond the minimum duration*** *of* ~~*more than*~~ *two years* ***of the legal guarantee of conformity set out in directive (EU) 2019/771****. »*

In this perspective, they stress that the articulation between recitals (23), (26) and (28) does not make it possible to clarify perfectly the distinction mentioned above between, on the one hand, the pre-contractual information due for any commercial guarantee, including the commercial guarantee of durability, and on the other hand, the information specific to the commercial guarantee of durability by means of a harmonized logo.

**They therefore also propose a change to recital 28, which could be lightened in this way (amendments in red):**

*(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*~~***, has a duration of more than two years, and is offered without additional costs.*** ~~*and has a duration of more than two years.*~~***as defined in Directive 2019/771.*** *»*

**In addition, the French authorities wish to broaden the debate on Articles 5 and 6 to regret that information on spare parts (availability, ordering process) is limited to contracts for which the reparability index is not required. They emphasize the following points:**

- the reparability index and the information on spare parts are two aspects of a contract which are not correlated: a trader who markets the sale of a good can be subject to the affixing of a reparability index while also being subject to the indication of the availability of spare parts;
- it is beneficial to the consumer to have both information on reparability and information on the availability of spare parts, where applicable.

**This is why the French authorities are proposing an amendment to Article 5(j) and Article 6(b)(v) as follows (amendments in red):**

- le (j) de l'article 5 comme suit : « *(j) when ~~point (i) is not applicable~~ **~~and~~ the producer makes such information available to the trader**, 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. »*

- le (v) du (b) de l'article 6 : « *(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.' »*

Finally, if the Presidency wished to maintain the definition of software updates in Directive 2011/83/EU, the French authorities would have a preference for the wording of point w of Article 1 of the previous compromise, which referred to all updates ("any update") and not only to free updates.

**HR comments on EMPOWERING CONSUMERS FOR GREEN TRANSITION Proposal - 5036/4/23 REV 4**



We would like to thank the Swedish Presidency for the 7th compromise Proposal which is in accordance with some of earlier written suggestions raised by HR.

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

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

- **Point q)**

**HR prefers** previous wording. *"Any explicit claim made in any form"* ensures comprehensive approach to the various forms of trader's claims, and changes in wording don't seem necessary. Also current wording limits the way in which the generic environmental claim may be given (e.g. it does not include conclusive actions).

- **Point r)**

Regarding FR proposal for the definition to emphasize that the label reflects the commitment that the characteristics of a product go beyond compliance with requirements of European or national rules, since simple compliance with regulations should not be promoted in a voluntary label to be prescribe – we prefer this obligation to be prescribed by the definition in the normative part instead in recital amendments.

- **Point s)**

We would like for the change of wording *"a MS"* **to be explained in detail in accompanying recital** so that there aren't any differences in translation and understanding of this change. Should this be interpreted that existing certification systems **in any MS** could fall under this provision and MS that doesn't have special certifications system in her territory are not obliged to establish certification system upon entry into force this provision?

**Article 1 Paragraph 2 to Art 6 Paragraph 2 of the Directive 2005/29/EC**

- **Point d)**

**HR again proposes clarification of how the insertion of the 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.

Also, again we can support ES proposal prescribing that verification should be carried out periodically.

*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*
*given that existing provision poses unproportioned burden to the traders. Rather than prescribing an obligation to establish an independent monitoring system for all claims, it would be sufficient to prescribe a possibility for conducting such verification by independent experts in the case of a dispute.*

- **Point e)**

SE PRES accented in its note that MS argued that this provision prohibits relevant information to consumers, and that you (SE PRES) haven't made any changes in this provision given that infringements of this provision shall be assed on case-by-case basis. However, we are arguing that exactly there will be problems for the enforcement bodies who don't have any criteria to determine what is common feature of a product. We are prescribing very general provision and leaving everything on the enforcement bodies who, without any criteria won't be able to ensure harmonized approach resulting with different treatment marketing of the same product.

Thus, HR retains its position that provision should explicitly limits its scope to advertising benefits that are considered as common practice "*in the market of that particular Member State*".

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

- **Point 14e** – this definition is still not aligned with the UCPD amendments (deletion in UCPD), can you explain the reasons for that?

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

**HR proposes reintroducing the previous text "*or another provider of guarantee 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**. 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.

**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?

- **Article 5 paragraph 1 Point ea) and Art 6 par 1 Point ea**

HR doesn't support this proposal. We are returning to the option 1 – this articles to be deleted.

We find that this change in wording leads to inconsistency **with the Art 5 Par 1 Point e and Art 6 par 1 Point e of the Dir 2011/83.** These Articles already require **that traders inform consumers on the guarantee 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. And SE PRES addition is contrary to this obligation by reducing this obligation only for the cases when guarantee is given for the period longer than 2 years with which we don't agree. Thus, we prefer deleting this provision as whole.**

**Article 2 Paragraph 4 – 8 para 2 CRD**

**HR prefers 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. 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, HR suggests 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 I of the Proposal – Annex I of the UCPD**

- **Addition of a new point in Annex I**

HR is addressing previous proposal to amend the annex with carbon neutral claims. We've revised a wording of our previous proposal accenting that information on the carbon offsetting projects needs to be explained to the consumer on the same medium as message on carbon neutrality, otherwise it should be considered as blacklisted practice:

i. *"Making a generic environmental claim on carbon neutrality without clarifying that carbon neutrality is a result of company's involvement in carbon offsetting or compensation projects in clear and prominent manner on the same medium".*

**In that sense, we also support EP definition of offsetting projects**: *(yb) 'carbon offsetting' means the purchase of carbon credits or provision of financial support for environmental projects, with the aim to neutralise, reduce, compensate or inset for the purchaser's own environmental impact, or of their goods or services.*

- **point 10a**

HR suggests reconsidering the need for special regulation of Point 10 a of Annex I of the UCPD, given that its matter is already covered by point 10 of Annex I of the same 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*****."**

**2. Recital 15 and Annex point 23d – UCPD**

Wording in the Point d limits trader's obligation to inform consumer on software update in cases when such update ***"will"*** impact the use of goods**.** We prefer wording – ***"may".*** Although *"may impact"* could be too burdensome for the trader, given its extensive range, and that it could actually cover all contracts, proposed wording ***"will"*** requires certainty which in practice will be very difficult to prove and failure to comply with this provision shall be difficult to identify and penalise in most cases.

**The Recital to this provision should be amended accordingly.**

- **Point 23e and accompanying Recital 16**

**Very important!** We request deletion of the sentence: *"The manufacturing and the selling of the good do not constitute a commercial communication."* because selling of good definitely constitute for commercial communication.

- **Point 23i**

HR supports ES comment and amendment regarding the question on consumer information in cases where 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."*

- ***Points d, e, f, i***

We are of the opinion that matter of professional diligence shouldn't be addressed specifically in blacklist provisions. However, if we decide to regulate level of due diligence, we should prescribe responsibility for both the case when trader is aware and **when he should be aware**.

**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 SEVENTH COMPROMISE PROPOSAL**

**(Brussels, 28 March 2023 - 5036/4/23 rev. 4)**

Please find here after the comments on the latest amendments submitted with the Presidency Compromise Proposal issued on 28 March 2023 (5036/4/23). As required in the Presidency Discussion Paper of the same date (7851/23) the comments also contain our answers to the five questions of the Presidency.

We consider that this compromise proposal marks a progress as for the concept of trader.
However, we reiterate the importance of the inclusion in Annex I of the directive instead of article 6(2) of the unfair practice of environmental claims relative to future performance and advertising a special characteristic of a product category as a unique advantage or benefit when such a characteristic is considered as a common practice feature respect of the particular product or product category.

## RECITALS

**Recitals 1-3**

We support the latest amendments.

**Recital 4**

We could support the proposed amendments if the relevant unfair practice would be included in the Annex I. The rational is always the same (absence of precise objectives and a monitoring system) even if illustrated with different words (when environmental claims relative to future performance "not supported by clear, objective, publicly accessible and verifiable commitments and targets given by the trader and are not based on a realistic implementation plan that shows how these commitments and targets will be achieved […] verified by a third party, who shall be independent from the trader, free from any conflict of interests, with experience and competence in environmental aspects and who shall be enabled to monitor the progress of the trader with regard to the commitments and targets [..].)
We deem that this instance, as such, must be considered unfair.

**Recital 5**

Even if this recital has not been amended if the relevant unfair practice would be included in the Annex I. Actually, we reiterate that the attribution to the product in terms of advantage for consumers of characteristics

that are instead common to the entire market represents a category of practices that must certainly be considered unfair.

**Recital 6a**

We welcome the required deletion of the word “predominantly”. We support the rewording.

**Recital 7**

We support the latest amendments. However, we could be flexible with further amendments that specify that certification marks concerning environmental and social aspects should be compliance with the present directive proposal.

**Recitals 9**

We agree with the amendments.

**Recital 10**

We welcome and support the latest amendments.

**Recital 15**

We welcome and support the latest amendments.

**Recitals 16 - 17- 21**

We consider the current rewording a good point of compromise and we can support recital 16, 17 and 21.

**Recital 23**

We share the modifications. Considering the discussion results, we share the option 2 on implementing act, reiterating our preference to the examination procedure. Regarding the Union Harmonised Graphic Format see or comments at artt. 6a and 6b (Article 2 (4)/ CRD).

**Recitals 24-25**

Even if recitals 24 and 25 are not currently subject to any amendment, we reiterate we opposite to their deletion 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 26**

We welcome the required restoration of the recital and support amendments.

**Recital 28**

We support the rewording.

**Recital 29**

Even if the recital is not subject to new amendments, we have realised that we did not send our position on the last sentence with our previous written comments for a mere material error. We ask for the deletion of "The trader should be obliged to provide this information only where the provider has made such information available". This sentence introduces legal uncertainty and reduces the consumers' protection in an unacceptable way.



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

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

- **point r)**

We welcome the required deletion of the word "predominantly". We support the rewording.

- **point s)**

We share the modifications.

- **point w)**

We share the Presidency proposal and we can support the deletion of this definition if point 23 d of Annex I of UCPD is strengthened with the inclusion of the concept of security updates.

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

**The following comments regards the Paragraph 2 (b) points (d) and (e)**

We reiterate what already stated in our previou:

- From a technical point of view, we consider the choice of extend the scope of article 6, paragraph 2, of directive 2005/29 / EU, 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.

**Annex I – UCPD**

Even if the Annex is not subject to new amendments we deem important reiterate our comments.

- As for point 23e, we opposite the rewording. We reiterate we prefer to go back to the European Commission proposal.
- As for point 23f, we reiterate we partially support the amendments. We could not accept the part referring to “while being aware that it” and we ask for its deletion.
- As for point 23i, we reiterate we do not support the amendments “after becoming/while being aware of such design limitations” and we ask for their deletion.

As for the recital 29, we consider that expressions referring to the concept of awareness introduces legal uncertainty and reduces the consumers’ protection in an unacceptable way.

**Amendments to Directive 2011/83/EU - CRD**



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

- **point a, ea)**

We support the rewording.

- **point a, eb)**

In coherence with our comments on recital 24 and 25 we state we opposite the deletion of the article. 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.

**Article 2 (3)/amendments to art. 6 CRD:**

- **point a, ma)**

We support the rewording.

**Article 2 (4a)/ proposed revision of new artt. 6a and 6b to art. 6 CRD:**

Considering the discussion results, we can support the option 2 on implementing act, reiterating our preference to the examination procedure. Answering to the question n. 5 of the Presidency Discussion paper, we reiterate it is important to keep clear the format parameters and we add that a consistency with EU legislation (i.e. Directive 2019/771) has to be kept in the format.

**Presidency Discussion Paper of 28.3.23 (7851/23)**

**Italian answers to the five questions of the Presidency**



| Question 1: Should there be a subjective element in the points in Annex I to the Unfair Commercial Practices Directive? |
|---|

No. We consider that expressions referring to the concept of awareness introduces legal uncertainty and reduces the consumers' protection in an unacceptable way.

| Question 2: If you are in favour of having a subjective element, do you agree with using "while being aware", or do you have a suggestion for an alternative phrasing? |
|---|

NA

| Question 3: Should security updates be included in point 23d? |
|---|

We consider important to include security updates in point 23 d of Annex I of UCPD. On this basis we can support the deletion of software updates definition

| Question 4: Do you prefer this version compared to the current wording of point 23f of Annex I? |
|---|

We do. We prefer the proposed version (Falsely claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use) instead of the current wording of point 23 f of Annex 1.

| Question 5: Are there additional aspects that should be provided through the Union Harmonised Graphic Format compared to what is already suggested in Article 6a of the Consumer Rights Directive? |
|---|

There are. Please, see our comments at article 2 (4a)/proposed new artt. 6a and 6b to art. 6 CRD.

*Rome, 3.4.23*

Ministry of Enterprises and Made in Italy

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

RO comments doc. 5036/23 REV4.

**Recital (10)**

RO can support the changes in the new compromise text from the recital (10), which refer to Regulation (EC) No. 1221/2009 (EMAS) and Regulation (EC) no. 66/2010 (EU Ecological Label) for the recognition of excellent environmental performance.

~~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[3], 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**4**. The excellent environmental performance in question ~~should~~ **must** be relevant to the **entire** 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, a trader should not make a generic claim such as 'conscious', 'sustainable' or 'responsible'** ~~**could not be made**~~ **exclusively based on recognised excellent environmental performance because such claim** ~~**it**~~ **relates to several other aspects, in addition to the environmental aspect.**

**Art.1 - Directive 2005/29/EC**

**The definition from para. (1) letter (u)**

RO can support the changes in the new compromise text from para. (1) lit. (u) regarding the definition of "recognized excellent environmental performance", but for consistency and correlation with the provisions of point (10) of the recital, RO proposes some additions, marked in red.

(u) 'recognised excellent environmental performance' means environmental performance **compliant with Regulation (EC) No 1221/2009 or** ~~compliant~~ with Regulation (EC) **No** 66/2010 of the European Parliament and of the Council~~*~~, **or** with national or regional EN ISO 14024 type I **ecolabeling schemes officially recognised in the Member States,** ~~ecolabelling schemes officially recognised in accordance with Article 11 of Regulation (EC) 66/2010~~, or **with** top environmental performance in accordance with other applicable Union law;

**WK 7851/2023 INIT - Presidency discussion paper Written comments from Greece**

**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**

Greece supports the overall aim of the proposal regarding empowering consumers for the green transition. We thank the Presidency for the hard work and progress so far and for the opportunity to comment on the current version of the text.

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**Question 1: Should there be a subjective element in the points in Annex I to the Unfair Commercial Practices Directive?**

*We understand the logic behind introducing a subjective element in some of the points in the Annex, as some of the points made are applicable to both producers and sellers. When it comes to producers, it is expected that they have the knowledge for example that their product will have limited functionality if a spare part from another supplier (not the original producer) is used. However, a seller and especially a small retailer, under normal circumstances, may not be expected to necessarily have this insight information, unless for example it is explicitly provided by a statement of the producer or it comes as a result of a large number of consumer complaints. Hence, we see the reasons for justifying a subjective element.*

*However, introducing a subjective element in some of the points in the Annex risks that traders (sellers/retailers) do not have the slightest incentive to obtain information from the producer about the characteristics of the products that they are selling such as normal durability, limited functionality when non-original spare parts are used etc. Instead, the subjective element would push traders into acquiring a rather passive behavior. Moreover, it will be very difficult for national authorities to prove the awareness or not of the trader (seller) of such features. Hence, we are not in favor of having a subjective element in the points in Annex I.*

**Question 2: If you are in favour of having a subjective element, do you agree with using "while being aware", or do you have a suggestion for an alternative phrasing?**

*We are not in favor of having a subjective element in the Annex for the reasons explained above.*

**Question 3: Should security updates be included in point 23d?**

*In point (w) of Art. 1 of the present Proposal, software update was defined in a way that included security updates. We now see that this point has been deleted. In any case, we feel that the consumer deserves to know if an update (irrespective if it's a security update that might be necessary anyway as it could result in protection from possible cybersecurity threats) might jeopardize the functioning of digital products. Hence, we don't feel that it needs to be explicitly mentioned in point 23d (however, it could well have been mentioned in the respective recital, #15).*

**<u>Question 4:</u> Do you prefer this version compared to the current wording of point 23f of Annex I?**

*We agree, as we are not in favor of the current formulation.*

*As some MS might have been against the use of the word 'falsely', we could always support the below formulation:*

*Claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use when it does not.*

**<u>Question 5:</u> Are there additional aspects that should be provided through the Union Harmonized Graphic Format compared to what is already suggested in Article 6a of the Consumer Rights Directive?**

*We support that the Union Harmonised Graphic Format is established by an implementing act. We don't have any additional aspects to add to what is already proposed in Art 6a of the CRD.*