



Council of the European Union
General Secretariat

Brussels, 10 February 2023

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

WK 2057/2023 INIT

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NOTE

From:	Delegations
To:	Delegations
Subject:	Proposal for a Directive on Empowering consumers for the green transition - Comments on Presidency forth compromise text 5036/23 REV1

Delegations will find attached comments from DK, FR, IE and IT

Denmark's written comments to the proposal Empowering Consumers in the Green Transition

The comments below should be seen as addition to the Danish comments that was circulated in Delegates Portal 31th January 2023 regarding a proposal for a new recital 9a clarifying the use of generic environmental claims which remains valid. The comments below are targeted to address the need for clarifying the use of vague and ambiguous generic claims.

Danish proposal to clarify the use of vague and ambiguous generic claims

As mentioned at the working party meeting on 3rd February 2023, we propose adding a clarification in recital 9 as a reaction to the reintroduction of 'social aspects' in the text. We acknowledge the need to regulate social aspects but this creates an increasing need to highlight the ambiguous nature of terms like 'sustainable', 'conscious' and 'responsible' and specify when such terms can be used in marketing.

This is also important due to the interplay with the other initiatives set out in the new Consumer Agenda and the Circular Economy Action Plan, including Ecodesign but also the upcoming initiatives on Right to Repair and Green Claims.

Proposal for amendments to recital 9:

"(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', 'sustainable' 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. **Broader statements such as 'conscious', 'sustainable' or 'responsible' refers to numerous aspects, including environmental, social or economic aspects. Such broad claims could be considered misleading even if they are qualified, since they are vague and ambiguous.¹ Qualification of such broad statements need to be sufficiently detailed in accordance with directive 2005/29/EC of 11 May 2005 Article 6(1)(a) and 6(1)(b) to avoid that the average consumers are not deceived to enter into transactions which they would not otherwise have done.***

Justification:

This proposal aims at tackling unfair commercial practices preventing consumers from making more sustainable consumption choices such as misleading environmental claims (“greenwashing”) as stated in recital 1.

We acknowledge the need to regulate social aspects, but with the reintroduction of social aspects, the need to highlight the ambiguous nature of terms like ‘sustainable’ has only become more pronounced.

We are therefore very concerned about the way ‘sustainable’ is added to recital 9, because this concept has its own meaning.

Although there is no clear definition of the concept 'sustainable' in the EU, there is a general agreement that the concept covers numerous aspects, including environmental, social and economic aspects. This follows from the Brundtland Report from the UN and the Taxonomy Regulation.

As mentioned in our previous comments, the proposed point 4a of Annex I to Directive 2005/29/EC may be interpreted to entail that traders will be able to market their products with generic environmental claims, if the trader is able to demonstrate recognised excellent environmental performance e.g. the EU Ecolabel.

Thus, listing 'sustainable' in recital 9 can lead to a risk of creating a wider use of the term, thereby diluting the concept as well as making it possible for traders to use it as a generic environmental claim if they are able to demonstrate recognised excellent environmental performance. It will e.g. be the case, if the performance only refers to requirements regarding environmental and/or social aspects, but not the other aspects that ‘sustainable’ covers, e.g. economic aspects.

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 77, point 4.1.1.3.

In order to accept the reintroduction of social aspects, we therefore call for an amendment to recital 9 clarifying that broader statements such as 'conscious', 'sustainable' or 'responsible' could be considered misleading because they refer to numerous aspects, even if they are qualified, since they are vague and ambiguous. Qualification of such broad statements need to be sufficiently detailed in accordance with UCPD article 6 and thus avoid that the average consumers are not deceived to enter into transactions which they would not otherwise would not have done.

Additional supporting changes to recital 9 amendment

In order to support our proposal in recital 9 and to ensure legal certainty, we propose to add an example in recital 10 clarifying that recognised excellent environmental performance not alone can justify the use of broader statements such as 'sustainable'.

Proposal for amendments to recital 10:

*(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 excellent environmental performance in accordance with Regulation (EU) 2017/1369. By contrast, a generic **environmental** claim 'biodegradable' could not be made based on excellent environmental performance in accordance with Regulation (EC) No 66/2010, insofar as there are no requirements for biodegradability in the specific EU Ecolabel criteria related to the product in question. Similarly, the broad generic claim 'sustainable' could not be made exclusively based on recognised excellent environmental performance because it refers to numerous aspects.***

Justification:

In addition to our proposal in recital 9, we suggest an amendment to recital 10 clarifying that a trader cannot use broad statements such as 'conscious', 'sustainable' or 'responsible' if the trader only can demonstrate recognised excellent environmental performance because these broad statements refer to numerous aspect. Recognised excellent environmental performance, e.g. the EU Ecolabel, cannot exclusively justify the use of these broad statements.

Using a broad statement such as ‘sustainable’ will require further documentation regarding all the aspects, that ‘sustainable’ covers. For example, a lifecycle analysis (LCA) could document the environmental aspects of a product, but similar documentation will still be necessary regarding the other aspects, including social and economic aspects.

Additional supporting changes

As a result of the proposed amendments to recital 9, we suggest consequential amendments to the proposal regarding ‘sustainability’.

Proposal for amendments to definition (q) and (r):

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

*(r) **‘environmental labels’ and ‘social labels’ ‘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;*

Justification:

In addition to our proposed amendments to recital 9, we propose amendments to definitions (q) and (r) in order not to create any risk of confusion by using the term ‘sustainable’.

The term ‘sustainable’ should be used with caution in this directive just as the term should be used with caution by entities, traders and others. In order to avoid a misleading wording, we suggest avoiding the term when it can be misleading. For example regarding the definition (q) and (r), we suggest to use the term ‘environmental labels’ regarding labels predominantly covering environmental aspects, and ‘social labels’ regarding labels predominantly covering social aspects.

An alternative solution could be to elaborate definition (r) by adding a wording, which highlights that ‘sustainability labels’ is a collective term which covers environmental and social aspects but does not set requirements and thus cannot be used to promote a product, a process or a business. Having a sustainability label do therefore not justify using the ‘sustainable’.

Proposal for amendments to recital 7:

(7) ~~Sustainability~~ *Labels can set standards for different areas and thus address different aspects. This Directive should apply only to ~~sustainability~~ labels that refer predominantly to the environmental or social aspects of a product. Consequently, a label can refer to the environmental or social aspects in this way even though it to some extent also refers to other both aspects. A sustainability label means any voluntary trust mark, quality mark or equivalent, which is awarded or from the consumers' perspective seems to be awarded by a public or private entity to set apart and promote a product, process, or business about environmental or social aspects. The displaying of ~~sustainability~~ labels which are not based on a certification scheme or not established by public ~~authorities~~ entities should be prohibited by including such practices in the list in Annex I to Directive 2005/29/EC. The certification scheme should fulfil minimum transparency and credibility conditions. The displaying of ~~sustainability~~ labels remains possible without a certification scheme where such labels are established by a public ~~authority~~ entity, or in case of additional forms of expression and presentation of food in accordance with Article 35 of Regulation (EU) No 1169/2011. This rule complements point 4 of Annex I to Directive 2005/29/EC which prohibits claiming that a trader, the commercial practices of a trader, or a product has been approved, endorsed or authorised by a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation.*

Justification:

As a consequence of our proposed amendments to definition (r), we propose to amend recital 7 by both deleting 'sustainable' in relation to 'labels' and changing it to 'environmental labels' or 'social labels' where appropriate.

Furthermore, we are in doubt as to how the sentence “*Consequently, a label can refer to the environmental or social aspects in this way even though it to some extent also refers to other aspects.*” should be interpreted. Can a label refer to environmental aspects and to some extent also refer to other aspects, e.g. social aspects? Or can a label refer to environmental and social aspects and to some extent also refer to other aspects, e.g. economic, ethic or similar. If the intention is the former, we suggest to change 'other' to 'both' in line with the used wording in definition (r) where a 'sustainability label' refers predominantly to its environmental or social aspects or both.

To ensure further alignment, we suggest using the same wording in recital 1, 12 and 14 regarding 'more sustainable' throughout the entire proposal. This will for example be relevant in recital 35.



**RÉPUBLIQUE
FRANÇAISE**

*Liberté
Égalité
Fraternité*

Paris, le 7 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 3 février 2023 concernant le renforcement du rôle du consommateur dans la transition écologique

Réf. : SGAE/MINUME/2023/065

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 février 2023, les délégations sont invitées à faire part de leurs commentaires écrits sur le quatrième 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 compromis de la Présidence suédoise, notamment les articles 2, 6.2 et l'annexe 1 de la directive 2005/29.

- a) Article 2 - Amendements aux définitions de schéma de certification, de label de durabilité, d'allégation environnementale générique et de mise à jour logicielle**

- Allégation environnementale générique (point q)

Les autorités françaises estiment 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. Elles relèvent que la différence entre les définitions o et q tiennent, pour ces dernières à l'absence de spécification en des termes clairs et précis. En réaction à la volonté de la Présidence d'écarter les allégations implicites de la définition des allégations génériques, elles considèrent 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.

Elles proposent donc de retenir la précédente formulation (« *in any form* ») qui permet d'assurer la cohérence avec la définition de l'allégation environnementale proposée au point (o) à savoir « *including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication* ».

Par ailleurs, au considérant 9, les autorités françaises suggèrent un changement relatif à l'exemple d'allégation environnementale utilisé, à la fin du considérant, pour illustrer la différence entre une allégation générique et une allégation spécifique. Elles soulignent que l'allégation concernant la biodégradabilité d'un produit ou d'un déchet reste controversée : en effet, étant donné que, d'une part, la biodégradabilité dépend des conditions dans lesquelles le déchet est placé, et que, d'autre part, rien n'est véritablement biodégradable à 100%, cette allégation est toujours fautive et induit, donc, toujours les consommateurs en erreur. Ainsi, cette allégation a été retirée des critères de l'Ecolabel européen. Dans ce contexte, les autorités françaises expriment le souhait qu'un autre exemple d'allégation environnementale soit utilisé à cet endroit.

- Label de durabilité (point r) et considérant 7

Le dernier compromis partiel restreint le champ d'application de la directive seulement aux labels qui se réfèrent **principalement** aux aspects environnementaux et sociaux. **Les autorités françaises insistent sur la nécessité que tous les labels faisant référence à ces aspects devraient pouvoir être analysés sous l'angle d'une éventuelle pratique commerciale déloyale.**

Par ailleurs, il serait utile de préciser que le label matérialise l'engagement du professionnel 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 peut se traduire par la mise en avant d'un label volontaire).

Enfin, elles considèrent que la définition devrait être la plus objective que possible, or l'ajout de la mention « *or gives an impression to be awarded* » introduit une dimension subjective qui relève davantage la pratique potentiellement trompeuse que la définition.

Elles proposent donc la rédaction suivante :

(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;

- Schéma de certification (point s)

Les autorités françaises souhaiteraient que la définition du schéma de certification évolue afin qu'elle précise que le tiers auquel il incombe de certifier qu'un produit respecte les exigences posées par un cahier des charges doit être compétent pour assurer une telle vérification.

Cette condition de compétence est indispensable pour s'assurer d'un système de certification robuste et atteindre l'une des ambitions de la proposition de directive de lutter contre les labels de durabilité non fiables et non transparents (considérant n°1). Cet ajout contribuerait à renforcer les effets recherchés de l'interdiction de la pratique commerciale consistant à « *afficher un label de durabilité qui ne soit pas fondé sur un système de certification ou qui n'a pas été établi par les entités publiques.* » (annexe - 2 bis).

Les autorités françaises sont favorables à l'introduction d'une obligation de résultat et non de moyen en la matière : ainsi, le texte prévoirait une condition de compétence de l'organisme certificateur qui devra être vérifiée par chaque Etat membre, auquel il appartient de mettre en place le processus qu'il juge pertinent, adapté, proportionné. Le recours à l'accréditation serait donc facultatif.

Elles proposent la rédaction suivante :

(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 traders, **and whose relevant competence has been verified by the Member State in which this party is established.**

- Mise à jour logicielle (point w)

Les autorités françaises remercient la Présidence pour la nouvelle proposition de définition des mises à jour logicielles qui couvre désormais un champ plus large que les seules mises à jour de conformité. La France était favorable à un tel élargissement. Toutefois, les autorités françaises suggèrent le maintien des contenus et services numériques dans le champ d'application de l'article 1er du projet de directive et proposent de rétablir les considérants 15 et 29 afin que la pratique visée au point 23d de l'annexe 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.

Enfin, les autorités françaises signalent la nécessité d'aligner les définitions de mise à jour logicielle dans l'article 1 (w) et l'article 2 (14e), une fois celle-ci stabilisée.

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

Les autorités françaises accueillent favorablement les modifications proposées par la Présidence.

c) Article 6.2 – Amendements relatifs à certaines pratiques commerciales trompeuses

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

Les autorités françaises accueillent favorablement les précisions rédactionnelles proposées par la Présidence et soulignent que ces précisions que la France suggérait également sont de nature à rendre la disposition plus effective. Les autorités soutiennent en outre la proposition de l'Italie de déplacer la pratique décrite à l'article 6(2) (e) vers l'annexe pour en faire une pratique commerciale réputée trompeuse en toutes circonstances.

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

De manière générale, les autorités françaises considèrent 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. Par ailleurs, il revient aux autorités de contrôles de rassembler les éléments nécessaires aux fins d'engager la responsabilité des professionnels au titre de la pratique mise en œuvre.

Dès lors, les autorités françaises considèrent qu'il n'est pas nécessaire, sous peine de restreindre la portée et l'efficacité des dispositions de la directive 2005/29/CE, 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.

Les autorités françaises se félicitent que la Présidence ait supprimé la condition qui subordonnait le caractère trompeur des pratiques commerciales visées aux points 23f et 23i à la connaissance, par le professionnel, de la pratique reprochée et soutiennent cette position.

- La pratique consistant à « omettre d'informer le consommateur qu'une mise à jour logicielle entravera le fonctionnement des biens comportant des éléments numériques » (23d)

Les autorités françaises apportent leur soutien à la reformulation proposée. Toutefois, elles regrettent que la pratique commerciale réputée trompeuse en toutes circonstances prévue au 23d ne couvre pas les mises à jour portant sur les 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. Les autorités soutiennent donc la reformulation suivante, de façon à intégrer les effets négatifs de la mise à jour sur l'accès ou l'usage du contenu ou service numérique :

“Omitting to inform the consumer that a software update will hinder the functioning of goods with digital elements, **or the consumer's access to or use of the digital content or digital service.**”

Il conviendrait également de modifier en conséquence le considérant n°15 lié à la pratique définie au 23d pour y inclure les effets des mises à jour logicielles sur les contenus et services numérique.

- La pratique consistant à « toute activité de commercialisation d'un bien contenant une caractéristique introduite pour limiter sa durabilité » (23 e)

Les autorités françaises accueillent favorablement le compromis et cette nouvelle proposition qui est plus ambitieuse au regard de l'objectif de lutte contre l'obsolescence programmée des biens et qui responsabilise tous les professionnels, au sens de la directive 2005/29/CE, qu'il s'agisse des vendeurs ou des producteurs de produits.

Elles souhaitent également rappeler, comme elles l'ont toujours fait depuis le début, que la directive 2005/29/CE n'est pas l'outil le plus adapté pour lutter contre l'obsolescence programmée des biens, l'interdiction de la mise sur le marché des biens ne relevant pas du champ d'application de la directive. Elles continuent de soutenir qu'au regard de la nécessité de lutter contre les pratiques préjudiciables aux consommateurs et non-conformes aux objectifs d'une économie durable et circulaire, incluant l'obsolescence prématurée, il conviendrait d'interdire la pratique consistant, pour un professionnel, à introduire des caractéristiques propres à limiter la durabilité des biens.

Néanmoins, les autorités françaises estiment que la directive sur l'information du consommateur pour la transition écologique peut contribuer de façon indirecte à cet objectif. Elles proposent d'amender l'interdiction envisagée par la Présidence suédoise de manière à lever toute ambiguïté sur le terme « marketing », qui n'est pas défini explicitement et suscite des interrogations quant à sa signification chez certains États membres.

Par conséquent, les autorités françaises proposent de remplacer le terme « marketing » de la proposition de la Présidence par celui de communication commerciale au sens du point d de l'article 2 de la directive 2005/29/CE.

Par ailleurs, les autorités françaises proposent, par souci de clarté, de préciser dans le texte que la pratique ne pourrait être considérée comme trompeuse que dès lors que le professionnel aurait connaissance que le bien comporte une caractéristique à même de limiter sa durabilité.

A cet égard, les autorités françaises rappellent qu'il appartient à l'autorité de surveillance du marché d'apporter la preuve de la connaissance que le professionnel aurait de l'existence d'une telle caractéristique. Dans l'hypothèse où les autorités chargées de la consommation constataient une communication commerciale émanant d'un producteur (emballage, par exemple), d'un bien comportant une telle caractéristique, elles devraient pouvoir engager sa responsabilité dans tous les cas, étant entendu que le producteur devrait être réputé connaître l'existence d'une telle caractéristique. Dans l'hypothèse où les autorités chargées de la consommation constataient une communication commerciale, émanant d'un vendeur, portant sur un tel bien, elles ne devraient pouvoir engager sa responsabilité que si elles constataient que ce dernier en avait connaissance, comme précisé dans le considérant 16 et, au point 23 e de l'annexe 1.

Enfin, les autorités françaises continuent de considérer que le fait de ne pas informer le consommateur de l'existence d'une caractéristique d'un bien introduite pour en limiter la durabilité, semble non seulement ne pas lutter contre l'obsolescence programmée des biens mais aussi, peut être interprétée comme légitimant cette pratique contre laquelle la directive entend pourtant lutter, dès lors que le consommateur en est informé.

Elles proposent la rédaction suivante : « *toute communication commerciale sur un bien qui comporte une caractéristique qui limite sa durabilité lorsque le professionnel en a connaissance* »

- La pratique consistant à « Affirmer faussement 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 accueillent favorablement la suppression de la condition d'une sous performance systématique.

Elles proposent également, par souci de clarté, 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 ».

III. Sur les amendements à la directive 2011/83/UE relative aux droits des consommateurs – garantie commerciale de durabilité

Les autorités françaises se félicitent que la Présidence ait introduit le principe selon lequel, dès lors que la garantie commerciale de durabilité existe, le consommateur doit en être informé par le vendeur. Toutefois, elles regretteront l'introduction, au considérant 23 et à la définition prévue au (14bis) d'une garantie commerciale de durabilité pouvant être offerte par une autre personne que le fabricant car cette possibilité est susceptible d'entraîner de la confusion avec les autres catégories de garanties et ne serait pas cohérente avec les dispositions de la directive (UE) 2019/771 relative à la vente de biens, qui précise que la durabilité fait partie des critères objectifs de la conformité des biens que le vendeur est tenu d'assurer durant toute la période de la garantie légale de conformité.

Les autorités françaises rappellent que pour que la proposition de garantie commerciale de durabilité présente un quelconque avantage au regard de la législation actuelle, il convient de bien la différencier de la garantie légale de conformité, de façon également à éviter tout contournement des obligations dues par le vendeur au titre de la garantie légale. **Dans ce contexte, il est indispensable de maintenir une exigence de durée pour la garantie commerciale de durabilité** (sauf à la priver de toute plus-value par rapport à une garantie commerciale « classique » (qui peut elle aussi être proposée pour un certain temps). Une garantie commerciale de durabilité dont la durée n'excéderait pas la durée de la garantie légale et qui présenterait des conditions équivalentes ne se distinguerait donc ni de la garantie légale ni d'une autre garantie commerciale.

Enfin, les autorités françaises notent que la Présidence ne propose pas de définir une obligation d'information sur l'absence d'une garantie commerciale de durabilité.

Comments on 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

I. Preliminary remarks

France supports, in general, all initiatives in favor of the ecological transition and, in particular, the strengthening at the EU level of consumer information on the environmental qualities and characteristics of products as well as the fight against unfair commercial practices in this area.

The French authorities are therefore in favor of updating the European framework to enable consumers to make informed and environmentally friendly choices when purchasing products so that they can play a major role in the ecological transition and the construction of a resilient Europe.

This is one of the objectives of the proposed directive to empower consumers to act in favor of the ecological transition through better protection against unfair practices and better information.

II. Comments on the amendments of directive 2005/29/EC

The French authorities propose to amend the Swedish Presidency's compromise, particularly Articles 2, 6.2 and Annex 1 of Directive 2005/29.

a) Article 2 - Amendments to the definitions of Certification Scheme, Recognized Excellent Environmental Performance, Generic Environmental Performance and Software Upgrade

- Generic environmental claim (point q)

The French authorities consider that the generic environmental claim is a form of environmental claim characterized by its content (in that it is not sufficiently precise or justified by the professional) and not its form. They note that the difference between the « o » and « q » definitions is, for these last one, the lack of specification in clear and precise terms. In reaction to the Presidency's desire to exclude implicit claims from the definition of generic claims, they consider that implicit claims (e.g. green color) are just as likely to mislead the consumer and should therefore be included in the definition.

They therefore propose to retain the previous wording ("in any form"), which ensures consistency with the definition of environmental claim proposed in point (o), namely "including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication".

Furthermore, in recital 9, the French authorities suggest a change in the example of an environmental claim used at the end of the recital to illustrate the difference between a generic claim and a specific claim. They point out that the claim concerning the biodegradability of a product or waste remains controversial: indeed, given that, on the one hand, biodegradability depends on the conditions in which the waste is placed, and that, on the other hand, nothing is truly 100% biodegradable, this claim is always false and therefore always misleads consumers. Thus, this claim has been removed from the criteria of the European Ecolabel. In this context, the French authorities express the wish that another example of environmental claim be used in this place.

- Sustainability label (point r) and recital 7

The last partial compromise restricts the scope of the directive only to labels that refer mainly to environmental and social aspects. The French authorities insist that all labels referring to these aspects should be analysed from the point of view of a possible unfair commercial practice.

In addition, it would be useful to specify that the label materializes the trader's commitment that the characteristics of a product go beyond compliance with the requirements of European or national rules (simple compliance with the regulations cannot be reflected in the promotion of a voluntary label).

Finally, they consider that the definition should be as objective as possible, but the addition of the words "or gives an impression to be awarded" introduces a subjective dimension that is more of a potentially deceptive practice than a definition.

They propose the following wording :

(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;

- Certification scheme (point s)

The French authorities would like the definition of the certification scheme to be amended to specify that the third party responsible for certifying that a product complies with the requirements laid down in the specifications must be competent to carry out such verification.

This condition of competence is essential to ensure a robust certification system and to achieve one of the ambitions of the proposed directive to fight against unreliable and non-transparent sustainability labels (recital 1). This addition would help to reinforce the intended effects of prohibiting the commercial practice of "displaying a sustainability label that is not based on a certification scheme or that has not been established by public entities." (Annex - 2 bis).

The French authorities are in favor of introducing an obligation of result and not of means in this matter: thus, the text would provide for a condition of competence of the certifying body which will have to be verified by each Member State, which is responsible for setting up the process it deems relevant, appropriate and proportionate. Recourse to accreditation would therefore be optional.

They propose the following wording :

(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 that is independent from both the scheme owner and the traders, **and whose relevant competence has been verified by the Member State in which this party is established.**

- Software updates (item w)

The French authorities thank the Presidency for the new proposed definition of software updates, which now covers a broader field than just compliance updates. France was in favour of such a broadening. However, the French authorities suggest that digital content and services remain within the scope of Article 1 of the draft directive and propose that recitals 15 and 29 be reinstated so that the practice referred to in point 23d of the annex can also be applicable to providers of updates for digital content and services, thereby ensuring full consumer protection.

Finally, the French authorities point out the need to align the definitions of software updates in Article 1 (w) and Article 2 (14e), once this has been stabilized.

b) Article 6.1 - Amendments relating to certain unfair commercial practices

The French authorities welcome the changes proposed by the Presidency.

c) Article 6.2 - Amendments relating to certain unfair commercial practices

- The commercial practice of enhancing a characteristic of the good that is in fact common to all goods of the same type

The French authorities welcome the drafting clarifications proposed by the Presidency and stress that these clarifications, which France also suggested, are likely to make the provision more effective. They also support Italy's proposal to move the practice described in 6.2.e to the Annex to make it a commercial practice that is deemed misleading in all circumstances.

d) Annex - Amendment to certain commercial practices deemed unfair in all circumstances listed in Annex 1 of Directive 2005/29/EC

In general, the French authorities consider that, the provisions of Directive 2005/29/EC, a "safety net" for the protection of consumers against unfair commercial practices, must remain general and refer only to traders without distinguishing, for example, between producers and sellers, and, moreover, that it is up to the supervisory authorities to gather the elements necessary to hold traders liable for the practice in question.

Consequently, the French authorities consider that it is not necessary, on pain of restricting the scope and effectiveness of the provisions of Directive 2005/29/EC, to specify, including in the recitals, the conditions under which traders (producers, sellers or others) must be held liable by the supervisory authorities, which are naturally concerned with determining the responsibility of traders in the commission of infringements of the provisions of Union law, in general, and of Directive 2005/29/EC, in particular.

The French authorities welcome the fact that the Presidency has removed the condition that made the misleading nature of the commercial practices referred to in points 23f and 23i conditional on the trader's knowledge of the practice complained of and support this position.

- The practice of "omitting to inform the consumer that a software update will hinder the functioning of goods with digital elements" (23d)

The French authorities support the proposed reformulation. However, they regret that the commercial practice deemed misleading in all circumstances provided for in 23d does not cover updates to digital content and services that are not subject to any specific provision in other EU texts (including Directive 2019/770/EU) on unfair commercial practices. The authorities therefore support the following rewording to incorporate the negative effects of updating on access to or use of the digital content or service

« Omitting to inform the consumer that a software update will hinder the functioning of goods with digital elements, or the consumer's access to or use of the digital content or digital service ».

It would also be appropriate to amend accordingly recital 15 related to the practice defined in 23d to include the effects of software updates on digital content and services.

- The practice of "any marketing of a good containing a feature introduced to limit its durability" (23 e).

The French authorities welcome the compromise and this new proposal, which is more ambitious with regard to the objective of combating the programmed obsolescence of goods and which makes all traders responsible, within the meaning of Directive 2005/29/EC, whether they are sellers or producers of products.

They also wish to recall, as they have done since the beginning, that Directive 2005/29/EC is not the most appropriate tool to fight against the programmed obsolescence of goods, the prohibition of the placing on the market of goods that do not fall within the scope of the directive.

They continue to maintain that, in view of the need to combat practices that are detrimental to consumers and not in line with the objectives of a sustainable and circular economy, including premature obsolescence, it would be appropriate to prohibit the practice of a trader introducing features that limit the durability of goods.

Nevertheless, the French authorities believe that the directive on consumer information for the ecological transition can contribute indirectly to this objective. They propose amending the ban envisaged by the Swedish Presidency to remove any ambiguity regarding the term "marketing", which is not explicitly defined and raises questions about its meaning in some Member States.

Consequently, the French authorities propose to replace the term "marketing" in the Presidency's proposal with that of commercial communication within the meaning of Article 2(d) of Directive 2005/29/EC.

In addition, the French authorities propose, for the sake of clarity, to specify in the text that the practice could only be considered misleading if the trader is aware that the good has a characteristic that limits its durability.

In this respect, the French authorities recall that it is up to the market surveillance authority to provide proof of the trader's knowledge of the existence of such a characteristic. In the event that the authorities responsible for consumer affairs observe a commercial communication from a producer (e.g., packaging) of a good containing such a characteristic, they should be able to hold the producer liable in all cases, it being understood that the producer should be deemed to know of the existence of such a characteristic. In the event that the authorities responsible for consumer affairs find that a seller has made a commercial communication concerning such a product, they should be able to engage their liability only if they find that the seller had knowledge of the product, as specified in recital 16 and in point 23(e) of Annex 1.

Finally, the French authorities continue to consider that the fact of not informing the consumer of the existence of a characteristic of a good introduced to limit its durability not only does not seem to combat the programmed obsolescence of goods, but may also be interpreted as legitimizing this practice, against which the Directive is intended to combat, once the consumer is informed.

They propose the following wording: "any commercial communication on a good that includes a characteristic that limits its durability when the trader is aware of it".

- The practice of "falsely claiming that a good has, under normal conditions of use, a certain durability in terms of time of use or intensity" (23 f)

The French authorities welcome the removal of the condition of systematic underperformance.

They also propose, for the sake of clarity, that it should be specified that the normal conditions of use should be determined by the producer, as suggested in recital 17, by referring to the expression "prescribed conditions" (23f)

III. Comments on the amendments of directive 2011/83/UE – commercial guarantee of durability

The French authorities welcome the fact that the Presidency has introduced the principle that, where a commercial guarantee of durability exists, the consumer must be informed of it by the seller. However, they regret the introduction, in recital 23 and in the definition provided for in (14a), of a commercial guarantee of durability that may be offered by a person other than the manufacturer, as this possibility is likely to lead to confusion with other categories of guarantees and would not be consistent with the provisions of Directive (EU) 2019/771 on the sale of goods which specifies that durability is one of the objective criteria of the conformity of goods that the seller is required to ensure.

The French authorities point out that for the offer of a commercial guarantee of durability to have any advantage under the current legislation, it must be clearly distinguished from the legal guarantee of conformity, also in order to avoid any circumvention of the obligations owed by the seller under the legal guarantee. In this context, it is essential to maintain a duration requirement for the commercial guarantee of durability (unless it deprives it of any added value compared to a "classic" commercial guarantee (which may be offered for a certain period of time). A commercial guarantee of durability whose duration would not exceed the duration of the legal guarantee and which would present equivalent conditions would therefore be distinguished neither from the legal guarantee nor from another commercial guarantee.

Finally, the French authorities note that the Presidency does not propose to define an obligation to provide information on the absence of a commercial guarantee of durability.

Ireland's written comments on fourth 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

Recital (3) – social aspects

The recitals refer to “social aspects” while Article 6(1)(b) refers to “social impact”. Perhaps this should also read “aspects”, similar to Article 7(7).

We welcome the clarification of social aspects in recital (3), which include a broad range of issues such as working conditions, respect for human rights, equal treatment and opportunities for all and also animal rights. However, it will be challenging for national authorities to fully and accurately assess *social aspects* within a wider assessment of Greenwashing.

Article 6(2)(d)

We agree that future claims should be backed up by an independent monitoring system to monitor the progress of the trader with regard to the commitments and targets. Clarity on the information presented, ease of access, and consistency of information would be required in this regard.

Directive 2011/83/EC

Article 2

Points (14) and (14a), Recital 3

Is "upgradability" covered under points (14) and (14a), which deal with early obsolescence and features that limit durability e.g. software.

Point (14e) – software update

Should this definition be consistent with the definition in Directive 2005/29/EC, Article 1?

Article 5(1)(ea)

We welcome the proposal of a harmonised graphic but it would be helpful to see a mock up or spec provided in relation to the information this graphic would present, how it would look across a range of products and how the consistency of information presented would be maintained.

We note reference to the 'the minimum legal guarantee of conformity' has been removed from the text and it would be helpful to be given clarification on why this change has been introduced, to fully assess the implication for consumers.

**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 FOURTH COMPROMISE PROPOSAL
(Brussels, 27 January 2023 (OR. en) 5036/1/23-REV. 1**

Preliminary comments-scrutiny reserve

RECITALS

Recital 2

Last sentence of the recital specifies a known fact, which seems unnecessary to specify. We reiterate that in principle we do not agree on the extension of the scope of article 6, paragraph 2, of directive 2005/29 / EU. We prefer to include eventual new prohibitions in Annex I.

Recital 3

We appreciate the return to previous version with the two concepts of environmental and social aspects.

Recital 4

Whilst prefacing that, as already expressed, the prohibition referring to this recital should be included in annex I and not in Art. 6 (2) Directive 2005/29/EC, we still have some concern on the meaning of "an independent monitoring system". As already stated, we reiterate the need to clarify the characterizing elements of such a system.

Recital 6

We consider a step ahead the insertion of "durability" and "reparability" and "social" in the provision.

Recital 7

With reference to the definition of “sustainability label” we ask consistency with the definition (article 1 (1)-amendments to art. 2 UCPD point r). We appreciate the return to previous version with the two concepts of environmental and social aspects. It seems to us that the words "or from the consumers' perspective seems to be awarded" can be deleted to clarify the text and avoid interpretative problems that can cause disputes in the national application phase. Moreover, the sentence immediately after (“The displaying of sustainability labels which are not based on a certification scheme or not established by public entities should be prohibited by including such practices in the list in Annex I to Directive 2005/29/EC.”) clarifies the concept in an appropriate and sufficient form.

Recital 15

We share the modification of the text.

Recital 16

The central issue of the recital lies in having excessively reduced the responsibility of the seller. Directive 2005/29/EC is based on the behavioural sciences approach and the bounded rationality paradigm. If the intention is to provide incentives to obtain from all market players (producers, providers, sellers, consumers) behaviours consistent with the objective of strengthening durability as a means of competitiveness in the Single Market we cannot support amendments that make the incentives to bring sellers to align with this objective disappear. The value of the regulatory proposal should be lost. We deem that sellers shall be within the chain of responsibility.

Recital 17

We share the modification of the text.

Recital 21

See our comments at recital 16.

Recital 23

We share the modification of the text.

Recitals from 24 to 27

We oppose the deletion of these recitals. As already expressed, we deem that seller shall be in the chain of responsibility. A revision of the text that does not expressly contemplate its presence does not appear sustainable. This figure, in fact, while not having to be subject to disproportionate or excessive obligations with respect to the role, often represents in the Single Market the only contact point of the traceable supply chain for the sale of goods and/or services to the EU consumer.

Recital 28

See our comments at recitals from 24 to 27.

Recital 29 (and 30?)

We share the added text on the coherence (and without prejudice to the legal obligations in Directives (EU) 2019/770 and (EU) 2019/771) of the provision. We noticed that the sentence starting from the words "Likewise, merchants offering digital content and digital services..." was in the previous compromise text relating to recital n. 30, which now no longer appears in the fourth draft proposal. We ask to delete the following sentence "This will provide a simple and clear way for consumers to receive information about such minimum periods."

Recital 31

We have no comments on the provision.

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

- **point q)**

We have no remarks on the provision.

- **point r)**

See our comments at recitals 3. About the phrase “is awarded or gives an impression to be awarded” see our comments at recital 7.

- **Points u and w)**

We share the modification of the text.

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

- **point a) sub (a).**

See our comments at recitals 3.

- **point b) sub (e).**

We thank for accepting Italian previous comments in which we asked for uniformity reasons to use the same term both in the recital 5 and in this provision (“feature” or “characteristic”). We claim, as previously represented, that the present prohibition should be included in annex I and not in Art. 6 (2) Directive 2005/29/EC.

Article 1 (3)/amendments to art. 7 UCPD:

See our comments at recitals 3

Annex I – UCPD

- **(1) point 2a**

We share the modification we suppose due to wording reasons.

- **(4) point 23d**

See our comments on recital 15.

- **point 23e**

See our comments on recitals 16, from 24 to 27 and 28.

- **point 23f**

See our comments on recital 17.

- **point 23h**

We have no remarks on the new text of the provision

- **point 23i**

See our comments on recitals 16, from 24 to 27 and 28.

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

- **point b, 14a)**

See our comments on recital 23

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

- **point a, ea)**

We consider appropriate a Union harmonised graphic format to be used by the trader to inform the consumer. See as well our comments on recitals 16, from 24 to 27 and 28.

- **point a, ed) and point b, j)**

We share the modification we suppose due to wording reasons.

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

- **point ma)**

We consider appropriate a Union harmonised graphic format to be used by the trader to inform the consumer. See as well our comments on recitals 16, from 24 to 27 and 28.

- **points mc) and md)**

We share the modification that we consider a step ahead.

Rome, 3.2.23/rev. 1



**Ministry of Enterprises
and Made in Italy**

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