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**WK 2057/2023 REV 1**

**LIMITE**

**CONSOM**

**MI**

**COMPET**

**ENER**

**ENV**

**SUSTDEV**

**DIGIT**

**CODEC**

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**NOTE**

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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

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

## Fourth position statement of the German Federal Government

concerning the

**European Commission’s 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**

### Preliminary remarks

The German Federal Government wishes to thank the Presidency for its work on the fourth compromise proposal for a directive (the “**Directive proposal**” or “**Proposal**”) and the opportunity to comment on the current version of the text (5036/1/23 REV 1). The following position relates to the amendments to the Unfair Commercial Practices Directive (“**UCP Directive**” or “**UCPD**”) contained in Article 1 of the Proposal. It compiles and updates Germany’s drafting proposals for the current text version. For a more detailed rationale please refer to our prior position statements. It remains the case that Germany’s comments in this fourth position statement are not intended to be exhaustive, and hence the Federal Government explicitly reserves the right to submit further comments and proposals for provisions at any time.

1. Clarification of the definition “*recognised excellent environmental performance*” in Article 1 (1)(u), Annex n° 4a and Recital (10) of the Proposal

We suggest the following amendment to Article 1(1)(u) of the Proposal:

#### **Proposed amendment**

(u) ‘recognised excellent environmental performance’ means environmental performance **compliant** with Regulation (EC) No 1221/2009 or with Regulation (EC) **No** 66/2010 of the European Parliament and of the Council\*, with national or regional

EN ISO 14024 type I ecolabelling schemes officially recognised in the Member States, or top environmental performance in accordance with other applicable Union law;

The requirements in n° 4 of the Annex should be clarified:

**Proposed amendment**

'4a. Making a generic environmental claim for which is not registered or certified as the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.

Recital (10) should be amended accordingly:

**Proposed amendment**

(10) 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 with Regulation (EC) No 66/2010 of the European Parliament and of the Council<sup>3</sup>, or officially recognised ecolabelling schemes in the Member States, or with top environmental performance for a specific environmental aspect in accordance with other applicable Union laws, such as a class A in accordance with Regulation (EU) 2017/1369 of the European Parliament and of the Council<sup>4</sup>. Traders should be allowed to use a generic environmental claim if such a claim is based on recognised excellent environmental performance that the trader has achieved and the trader has registered or certified, in accordance with the applicable certification standard, the item to which the claim refers. ~~The excellent environmental performance in question should be relevant to the claim.~~ For example, a generic claim 'energy efficient' could be made based on excellent environmental performance in accordance with Regulation (EU) 2017/1369. By contrast, a generic claim 'biodegradable' could not be made based on excellent environmental performance in accordance with Regulation (EC) No 66/2010, insofar as there are no requirements for biodegradability in the specific EU Ecolabel criteria related to the product in question.

2. Provision for the verifiability of future environmental claims by independent third parties in Article 1(2)(b) of the Proposal

Advertising based on environmental claims regarding future environmental performance should be more specific and more transparent. The proposed transparency approach demands for a **completed implementation concept** to be provided by the trader, which is open to **assessment by independent third parties**. Such a **transparency approach strengthens the provision**, as it opens up the possibility for enforcement bodies and experts in the relevant field to easily assess whether the trader is adhering to its implementation concept.

#### **Proposed amendment**

(d) making an environmental claim related to future environmental performance without clear, objective, publicly accessible and verifiable commitments, ~~and targets~~ **and a completed implementation concept** and without ~~an independent monitoring system~~ **providing the opportunity for verification by independent expert third parties**;

In addition, Recital (4) should be amended as follows:

#### **Proposed amendment**

(4) Environmental claims, in particular climate-related claims, increasingly relate to future performance in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date. Through such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products. To ensure the fairness and credibility of such claims, Article 6(2) of Directive 2005/29/EC should be amended to prohibit such claims, following a case-by-case assessment, when they are not supported by clear, objective and verifiable commitments and targets given by the trader **and are not based on a completed implementation concept**. Such claims should also be **open to verification by independent expert third parties, who shall be enabled** ~~supported by an independent monitoring system to monitor the progress of the trader with regard to the commitments and targets.~~ **This transparency approach will facilitate enforcement of the rules whilst avoiding additional costs for third-party monitoring systems.** ~~Consumers should be able to~~

~~consult the findings of independent monitoring systems free of charge online and thus be able to take note of the relevant proof indicating the progress of the trader.~~

3. Deletion of the provision regarding advertising benefits considered as a common practice in Article 1(2)(b) sub. (e) of the Proposal

The provision in Article 1(2)(b) sub. (e) of the Proposal should be deleted because it **deems correct indications of customary market practice to be unfair**, even if this **correct indication is of interest to consumers**, such as “vegan” or “free of animal products”.

In addition, in the current Presidency Proposal the provision contains **three criteria** that are **vague and cannot be met with certainty in practice**, neither by traders nor by enforcement bodies. It is completely unclear how the relevant “*product or product category*” is to be defined in detail, what is to be understood as “*advertising as a unique advantage*” and how to determine a “*common feature*”. These terms are not further explained in Recital (5) either.

Recital (5) should be deleted accordingly.

4. Addition to n° 2a of the Annex and Recital (7)

The provision in n° 2a of the Annex should be amended as follows:

**Proposed amendment**

‘2a. Displaying a sustainability label which is neither based on a certification scheme **or registered as a certification mark in accordance with Chapter VIII Section 2 of Regulation (EU) No 2017/1001 (European Union Trade Mark Regulation) or Article 28 of Directive (EU) 2015/2436 (Trade Mark Directive)**, nor established by public entities.’;

In addition, Recital (7) should be amended as follows:

**Proposed amendment**

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, **a process or a business**. 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. 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 **an EU- or a national certification mark in accordance with Chapter VIII Section 2 of Regulation (EU) No 2017/1001 (European Union Trade Mark Regulation) or Article 28 of Directive (EU) 2015/2436 (Trade Mark Directive)** 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. **In addition to the instrument of certification marks, the** The certification scheme should fulfil minimum transparency and credibility conditions. The displaying of sustainability labels remains possible without a certification scheme **or certification mark** where such labels are established by a public authority entity. **Such entity can be established by Member States in accordance with specific Union law like the environmental verifier under Regulation (EC) No 1221/2009 (EMAS) or the competent body under Regulation (EC) 66/2010 (EU Ecolabel) or based on national provisions only.** ~~or in~~ **In** case of additional forms of expression and presentation of food in accordance with Article 35 of Regulation (EU) No 1169/2011, **the displaying of sustainability labels remains possible without a certification scheme or certification mark as well.** 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.

If the exception concerning certification marks is included into n° 2a, the addition to Recital (34) of the Proposal should be deleted.

#### **Proposed amendment**

(34) Directives 2005/29/EC and 2011/83/EU should continue to work as a 'safety net' ensuring that a high level of consumer protection can be maintained in all sectors, by

complementing sector and product-specific Union law that prevail in case of conflict. Similarly, the specific Union law providing for transparency and certification as included for example in Regulation (EC) No 1221/2009 (EMAS), Regulation (EC) 66/2010 (EU Ecolabel), or Regulation (EC) 2017/1001 (trade mark) should prevail in case of conflict.

5. Expansion of the Annex to include new provisions on the use of labels (Article 1(4) of the Proposal)

The annex should be expanded to include a provision concerning the use of sustainability labels without indicating the class or categorisation.

**Proposed amendment**

**2b. Displaying a sustainability label which is part of a coherent class or level system without indicating the respective class or level on the product and without allowing the consumer to view all available classes or levels at the point of sale.**

A new Recital should be added accordingly.

**Proposed amendment**

**(8a) If a sustainability label is used by traders in graduated or different classes or levels, consumers should be able to determine the class or level in which a certified product has been categorised. In such cases they should also have access at the point of sale to information on the different classes or levels that are awarded in general for the sustainability label, so that they can ascertain the relative level of ambition. Traders may display the overview of the different classes or levels on the label itself, elsewhere on the product packaging, in the immediate vicinity of the product offered for sale or on the internet. Representation on the internet alone should be permitted only if the website can be accessed by consumers using an internet-enabled end device via a clear indication on the product.**

6. Addition of the provision in n° 4b of the Annex to the Proposal (Article 1(4) of the Proposal)

To avoid legal uncertainty, the provision in n° 4b of the Annex to the Proposal should be expanded to include sustainability labels.

**Proposed amendment**

4b. Making an environmental claim **or using a sustainability label for the** ~~about the~~ entire product when ~~it~~ **the claim or label** actually concerns only a certain aspect of the product.

7. Defining an appropriate scope for provisions fighting early obsolescence in n° 23d., 23e., 23i. of the Annex to the Proposal (Article 1(4) of the Proposal)

The provisions fighting early obsolescence in n° 23d., 23e., 23i. of the Annex should be designed equally. As the provisions are also addressed at traders who are not producers, the provisions have to be designed in such a way as to meet two criteria: (i) traders need to be protected from over-enforcement of the provisions, (ii) for the sake of consumer protection and protection of the fair market, the provisions must not lack effectiveness.

In order to meet both criteria, we suggest the following amendments, which incorporate the term “*professional diligence*”. This term is already defined in Article 2(h) UCPD.

**Proposed amendment**

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

23e. ~~Any marketing of a good containing~~ **Omitting, contrary to the requirements of professional diligence, to inform the consumer about the existence of** a feature **of a good** introduced to limit its durability.

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



The Recitals to these provisions should be amended accordingly, and the introduction of a new Recital regarding n° 23e of the Annex should be considered. The amendments use the definition of the term “*professional diligence*” set out in Article 2(h) UCPD.

#### **Proposed amendment**

(15) It should be prohibited under Annex I to Directive 2005/29/EC to omit to inform the consumer that a software update, including a security update, will ~~hinder~~ **negatively impact** the functioning ~~use~~ of goods with digital elements **or digital content or digital services**. For example, when inviting consumers to update the operating system on their smartphone, the trader should inform the consumer if such an update 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.~~ **However, the trader should be responsible for omitting to provide such information only if it is available within the trader’s field of activity, e.g. if the trader has received a statement from the original producer or has access to another reliable source of information or if a competent national authority has published a warning regarding the software update. The trader should not be required to start an investigation into the effects of software updates without any reason.**

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

that are not provided by the original producer without disclosing this information to the consumer would be prohibited as well. **Again, the trader should be responsible for omitting to provide such information only if it is available within the trader's field of activity.** The primary target group of this prohibition is the original producer of the good in question. Original producers of the goods fall within the scope of this Directive whenever they are engaged in business-to-consumer commercial practices, such as advertising. In contrast mere retailers do not have influence on such design limitations and may not know from the producer about them. However, mere retailers can be held liable when they can be reasonably expected to know about such design limitations, for example via a statement from the original producer or a competent national authority. In such a situation, mere retailers should provide consumers with additional information at the point of sale, thus ensuring that consumers are made aware that the good concerned has design limitations.

8. Definition in more concrete terms of the provision in n° 23f. of the Annex to the Proposal as well as Recital (17) (Article 1(4) of the Proposal)

The provision of n° 23f should be amended. This is necessary because, under the current draft, the trader is deemed to have committed an unfair commercial practice in cases in which, for example, a consumer makes use of a commercial guarantee.

In order to achieve a more precise provision, the following proposal should be considered:

**Proposed amendment**

23f. ~~Falsely claiming~~ **Claiming** that a good has a certain durability in terms of usage time or intensity under normal conditions of use **when it does not have such durability as a result of a systematic underperformance within the production process or supply chain of the relevant good.**

In addition, Recital (17) should be amended as follows:

**Proposed amendment**

(17) Another practice which should be prohibited under Annex I to Directive 2005/29/EC is the practice of ~~falsely~~ claiming that a good has a certain durability in terms of usage

time or intensity under normal conditions of use **when it does not**. That would be the case, for instance, when a trader informs consumers that a washing machine is expected to last a certain number of washing cycles if used in accordance with ~~specific~~ **the ordinary conditions of use** provided in the instructions, while the actual use of the washing machine under the prescribed conditions shows this is not the case. **However, such practice should be prohibited only in case a trader's claim regarding the usage time or intensity turns out to be incorrect in a significant number of cases, i.e. in a situation of a systematic underperformance within the production process or supply chain of the relevant good. The background of the systematic underperformance may differ with respect to the relevant product or product category and should be assessed on a case by case basis. In the event that the trader has issued a recall before any enforcement action is launched, the commercial practice shall be deemed not to be unfair.**

9. No reference to PEF and OEF in Recital (12)

The Proposal should not contain any reference to Product and Organisation Environmental Footprint methods, since those methods are of a technical nature and are not a subject of the discussions within the Working Party.

**Proposed amendment**

~~(12) The Circular Economy Action Plan<sup>5</sup> provides for the need to set the rules on environmental claims using Product and Organisation Environmental Footprint methods. Additional **Specific** requirements on environmental claims will have to be set in specific Union legislation. Those new requirements will contribute to the Green Deal<sup>6</sup> objective of enabling buyers to make more sustainable decisions and reduce the risk of greenwashing through reliable, comparable and verifiable information.~~

10. Updating of Annex II to the UCP Directive

The Presidency is asked to update Annex II to the UCP Directive, which is outdated.

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## **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 31<sup>th</sup> 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 3<sup>rd</sup> 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.<sup>1</sup> 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.

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<sup>1</sup> 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.





**ES comments**  
**regarding the Presidency fourth compromise proposal to the**  
**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE**  
**COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards**  
**empowering consumers for the green transition through better protection**  
**against unfair practices and better information**

Spain would like to thank the Swedish Presidency for its work to make progress on this legislative file, the objectives of which we share.

We believe it is essential that consumers receive accurate, clear and complete information to help them make more environmentally and socially responsible decisions, within the framework of the circular economy and the objectives of the Green Deal. This should be accompanied by the respective obligations of the different economic operators involved in the value chain.

Furthermore, we consider that making commercial guarantees of durability more visible and increasing their comparative value can indirectly contribute to the fight against planned obsolescence, which should also be addressed in the specific rules on product design and manufacturing.

The last meeting of the working group showed that we are on the right track. We would however like to raise the following points that are of particular importance to us:

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

▪ Definitions

(q) Generic environmental claim.

Given that the objective is to combat greenwashing, we believe that the definition of "generic environmental claim" should maintain consistency with the definition of environmental claim, limiting itself to making explicit the elements that make it generic, but without reducing its scope. If some explanation is needed in relation to implicit claims, it could be included in the recitals. We therefore propose the following wording:

‘generic environmental claim’ means any environmental claim not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium’



(r) Sustainability label.

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

Although they may refer predominantly to other aspects, labels should not be misleading in any case with regard to environmental and social issues.

The expression "that is awarded or gives an impression to be awarded" is confusing. We understand that, in this case, we must focus on the objective elements of the label and avoid misleading behaviour by traders, but we cannot enter into the subjective consumers' perceptions when there is no intention to mislead.

We therefore support the drafting proposal put forward by France.

(s) Certification scheme

We support the need for greater clarity on this point. We can therefore support the proposal put forward by France at the last meeting, with a slight nuance:

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

(w) Software updates

Currently, two different definitions are used in different articles, for which we do not fully understand the reason. We believe that the two definitions should be consistent and that it should be taken into account that software updates can have an effect on the connected product, on digital content and on access to digital services.

Social claims

We would like to stress the importance of **incorporating a definition of social claims** for reasons of clarity and legal certainty. For the same grounds, we also propose a revision of recitals 1 and 3, along the lines of our written comments on the third compromise proposal.



- Article 6

It should be further clarified how to guarantee the independence of the monitoring system in the case of environmental claims related to future environmental performance. We suggest the following wording:

(d) making an environmental claim related to future environmental performance without clear, objective, publicly accessible and verifiable commitments, and targets and without an independent monitoring system to account for its progress. The methodology used for monitoring shall be publicly accessible and the monitoring shall be carried out by a third party independent of the trader.

While we see a number of improvements, we remain uncertain as to how a feature will be considered to be "common". Against this, we believe that the prohibition of the use of "product-defining features" as beneficial elements would be useful. Let us give an example to better explain what we mean: it would be forbidden to advertise "additive-free honey" because any honey, by its very definition, does not contain additives.

- Annex

23d. Information about software updates.

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

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

23.e. We can support the compromise proposal provided that the term "marketing" is replaced by one that makes it clearer that we are only referring to commercial communications, not sales.



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

We believe that the introduction of guarantors other than the manufacturer may confuse consumers, so we prefer to revert to the original wording.

In addition, we believe that the obligation to provide information on the existence of this guarantee should lie with the producer, who is in the best position to influence the durability of the products. We therefore suggest ensuring consistency with Article 7 of the proposed Ecodesign Regulation.

In order to meet the objective of promoting longer durability of consumer products and indirectly combating planned obsolescence, we believe that this guarantee should offer consumers a clear comparative advantage over the legal guarantee and other possible commercial guarantees. It should therefore be free of charge and its duration should be longer than that of the legal guarantee established in each Member State. Where there are already different durations of the legal guarantee for different types of products, we see no objection to the duration of this durability guarantee also being adapted.

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

Finally, with regard to the pictogram, we draw attention to the need to provide for flexibility if it is decided to include it in an annex, so that it can be amended in a timely manner in the future if necessary.

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**

**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 – Presidency fourth compromise proposal**

**PT written comments – February 2023**

**I. Recital 10**

In order to balance the visibility given to the two regulations mentioned in this recital, PT proposes to insert the following amendment:

*“...with Regulation (EC) No 66/2010 of the European Parliament and of the Council on the EU Ecolabel...”*

**II. Article 1 – “Amendments to Directive 2005/29/EC”**

– **Paragraph 1 – Article 2 (r) “sustainability label”**

As previously noted PT maintains reservations on the use of the term “gives an impression” as it gives a vague and ambiguous character to the definition. **Therefore, we suggest to delete this reference.**

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

– **Paragraph 1 – Article 2 (s) “certification scheme”**

PT maintains its reservations, as the definition, as presented, points to the possibility of considering certification schemes controlled by entities, which are not public authorities, which may imply increased difficulties for enforcement authorities in the application and enforcement of the new rules.

In addition, and as suggested by FR, it should at least be ensured that the third party carrying out the certification is accredited by a national accreditation authority, thus guaranteeing the independence of the third party. Indeed, this definition needs to be more precise in order to

ensure greater accuracy and guarantee the impartiality of these third parties. In this regard, and as a solution, PT could support FR proposal to add the following wording to the final part of the definition:

*"(...) 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**"*.

– **Paragraph 1 – Article 2 (u) “recognized excellent environmental performance”**

PT would like to reiterate its suggestion to introduce the word "or" before "with national or regional EN ISO 14024 type I", as the 3 standards are an indication of recognized excellent environmental performance.

– **Paragraph 2 – Article 6, para. 2, point (d)**

PT considers necessary to define/densify what should be understood by "*independent monitoring systems*". In fact, it should at least be clarified what the main characteristics of these systems should be to ensure their independence/impartiality.

### **III. Annex**

– **4a**

As previously mentioned by PT, and since the provision has not been amended by PRES, it should be noted that **this provision seems to cover only generic environmental claims for which the seller is not able to demonstrate a "recognizably excellent environmental performance" relevant to the claim, and does not include other generic environmental claims**. Which could lead one to question whether, with the proposed wording, the COM aimed to exclude environmental claims for which the trader is not able to demonstrate or specify the sustainable characteristics attributed to a given product.

However, according to recital (9) 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**"*.

When asked about the provision, in the last WP, the COM clarified that the prohibition of generic claims results from the practice foreseen in point 4a, however PT struggles to identify such prohibition in this provision, that as we read it, only refers to the act of making a generic

environmental claim “for which the trader is not able to demonstrate recognized excellent environmental performance relevant to the claim”.

– 23 e.

PT considers it of utmost importance to combat practices related to the planned obsolescence of products, thus following the intentions of the COM with this legislative initiative. **However, it seems to us that point 23e of the Annex may fall short of the objectives outlined by COM.**

Indeed, **PT considers it vital to ensure, at the beginning of the chain (i.e. with producers), that these practices are effectively combated by directly prohibiting them, which is not achieved in the present provision.**

Notwithstanding the clarification in recital 16 as to the subjects targeted by the provision (producers), we are not faced with a ban on the introduction of these durability limits, but rather with a ban on the marketing of these products, **which, in any case, raises questions as to know what should be understood by marketing.**

In the last WP meeting, COM explained the articulation between the *Ecodesign* Regulation and this initiative, and clarified that article 33 para 3 and 4 addresses certain planned obsolescence practices when identified via testing result of market surveillance authorities. Such provision, according to the COM, prohibits planned obsolescence practices thus complementing the provisions of the empowering consumer’s initiative.

Now, PT struggles to fully grasp the complementary relationship of these initiatives. Furthermore, **we struggle to understand the added value of point 23e when article 33 of the Ecodesign Regulation already establishes the prohibition of these practices.** Indeed, as previously noted, point 23e establishes a ban on the marketing of products with durability limits; however, such products are already prohibited and should not be placed on the market.

On the other hand, we question what should be understood by marketing, since in our interpretation such practice can be understood as advertising or publicity for a certain product, and this being the case, **we have a marketing ban that does not prohibit the placing of the product on the market, but only its advertising. Therefore, and once again, we fail to understand the added value of a provision that does not tackle the placing on the market of products with durability limits, but only its marketing.**



Additionally, recital 16 clarifies that retailers can be held liable only “when they can be reasonably expected to know about such features, for example via a statement from a producer or a competent national authority”.

Now, PT supports the idea that retailers should only be held liable if they are aware of the introduction of such features, since as we know only producers know what is in a product and how such product is designed. **However, PT finds it difficult to visualize a circumstance in which the producer freely informs a seller that he has introduced durability limits into a good.** On the other hand, assuming that such information would be transmitted, **PT questions how such information would be transmitted to the seller.** Indeed, we know that the *Ecodesign* Regulation establishes a set of design criteria and parameters whose information will appear in the product passport, **but, as we see it, there is a significant difference between informing about the durability of a product and informing about the introduction of durability limits, a practice that will, in principle, be prohibited.**

Finally, we must note that, as clarified by the COM, the *Ecodesign* Regulation does not have the full spectrum of enforcement mechanisms and consumer redress available, for example, in the UCPD. In these sense we fear that consumers will not have mechanisms to tackle planned obsolescence practices, especially if we consider that the UCPD will only have (if approved) a ban on the marketing of products with durability limits.

As a side note, PT must stress that the COM approach to point 23e regarding the act of not informing the consumer about the existence of a feature of a good introduced to limit its durability does not, in our view, combat planned obsolescence practices. Moreover, we believe that it may be interpreted as legitimizing this practice.

#### **IV. Article 2 – Amendments to Directive 2011/83/EC**

##### **– Paragraph 1 – Article 2 (14a) “commercial guarantee of durability”**

**PT maintains its reservations regarding the proposed definition as well as regarding the amendments now introduced by the PRES.**

In fact, and in the first place, it should be noted, once again, that the proposed definition refers to a reference in Article 17 of the SGD, which, strictly speaking, does not define “*commercial guarantee of durability*”, but only refers to this type of guarantee when provided by the producer.

Regarding the amendments introduced by PRES, PT questions the rationale behind the introduction of the figure of an "*another guarantor*" who seems to differ from the producer, as well as its added value. On the other hand, the new wording refers to the situation where this "*other guarantor*" offers the same or more favorable conditions than those provided for in Article 17. However, Article 17 does not establish the conditions of the commercial guarantee of durability provided by the producer, as these are established by the producer, given that this is a voluntary guarantee.

In this sense, **the wording is considered confusing and unclear as to what should be understood by "*commercial guarantee of durability*" as well as to whom the "other guarantors" might be.**

In addition, we note that the need to clarify, possibly in recitals, the relationship between the commercial guarantee of durability and the guarantee of conformity remains.

– ***Paragraph 2 – Article 5, para. 1, point (ea)***

The new wording specifically states that the consumer must be informed of the existence and duration of the durability guarantee, **where such guarantee is available for the whole product.**

When questioned about the rationale, the PRES explained that the aim is to restrict this provision to cases where the guarantee relates to the whole good. In such case, we are faced with a provision that will not apply whenever a durability guarantee is provided only for parts of the product, making it required to inform the consumer only in cases where the guarantee relates to the entire good.

Now, **PT has reservations about this approach, which leaves aside practices that already exist in the market.** In fact, we deem important to clarify that this guarantee may relate to the good as a whole or only to "*parts*" of the good, whether physical or digital. In this perspective, several commercial guarantees of durability for the same product (example: car) would be admissible.