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NOTE

From: Presidency
To: Delegations

Subject: Presidency discussion paper on the substance of Empowering Consumers for the Green Transition

With a view to the meeting of the Working Party on Consumer Protection and Information on 3 April 2023, delegations will find a Presidency NOTE in the Annex to this note.

Presidency discussion paper

1. Definitions in the Unfair Commercial Practices Directive

The definition of **generic environmental claim**, which has been unchanged in the last compromise texts, is limited to claims made in written form or orally. We believe that the definition would otherwise be very broad and cover implicit claims, for example a colour with no additional text. With the aim of finding a compromise we have kept the definition as it is but worked on the drafting of recital 9 by providing an example.

Regarding the definition of **sustainability label**, we suggest removing the word predominantly which was not in the original proposal from the Commission, both in Article 2 and in the corresponding recital 6a. This has been requested by several Member States.

In line with comments from several Member States we suggest not including a definition of **software updates** in the Unfair Commercial Practices Directive. Previous discussions on the definition have led to it becoming very broad, and as pointed out by some Member States it does not seem to be needed anymore. Our opinion is that this deletion would not change the meaning of the provisions that concern software updates.

For the definition of **certification scheme**, we have previously introduced a requirement on verification at the end of the definition. This was strongly supported by several Member States. In the latest version of the text, we have made some additional changes, with the ambition of further improving the text. This is also a topic where the interlink with the Green Claims Directive is of interest. We consider that it is not feasible to go into too much detail regarding the requirement on verification in Unfair Commercial Practices Directive. Since we only provide a more general description of what could fulfil the requirement, this leaves more room for different solutions in the Member States, which we have clarified in recital 7.

2. Environmental claims related to future environmental performance

Article 6, paragraph 2, point (d) of the Unfair Commercial Practices Directive concerns future environmental performance. Member States have asked for clarifications regarding the implementation plan, and we propose further clarifications in recital 4 regarding this issue. We also suggest to not mention that the plan needs to be detailed, since it does not seem necessary and could create confusion regarding what is meant by detailed.

We also suggest to further explain in the same recital what is meant with an independent third party expert, taking into account other legislative files where this term is used, for example the proposal for a Directive on Corporate Sustainability Due Diligence.

3. Advertising a special characteristic of a product category as a unique advantage or benefit

Article 6, paragraph 2, point (e) of the Unfair Commercial Practices Directive concerns advertising a special characteristic of a product or product category as a unique advantage or benefit when such a characteristic is considered as a common feature in respect of the particular product or product category.

Some Member States have suggested that the provision should be moved to Annex I. Other Member States have made the argument that the scope of the provision risks being too wide and prohibits relevant information to consumers. In previous compromise texts changes have been made to the provision and the corresponding recital 5. Taking into account the different positions of Member States and that having the provision in Article 6 ensures a case-by-case assessment, we have not proposed any changes to the text.

4. Annex I to the Unfair Commercial Practices Directive

We are putting all our efforts into finding the best possible compromise for Annex I to the Unfair Commercial Practices Directive.

Regarding what points should be included in Annex I, we do not consider that there is enough support among Member States to add new points to Annex I. At the same time, we do not consider that removing points from the annex, which some Member States have suggested, would be the best way forward. Following the work of the European Parliament on this file also indicates that their opinion on Annex I will be going quite a bit further than what we are discussing, which of course will be an issue during the trilogues. This leaves us with trying to find the best drafting for the points of Annex I.

Several Member States have stressed that traders who are mere sellers and who are unaware of, for example, that a good is designed to limit its functionality should not be liable for omitting to inform the consumer that the good has such a limitation. On the other hand, in line with comments from those Member States who see a risk of altering the notion of trader in the Unfair Commercial Practices Directive, we have made changes to recitals 15, 16 and 21. However, the issue of the potential need for a subjective element remains. For the last compromise proposals, the phrasing “while being aware” has been used in the points 23e, 23f and 23i of Annex I.

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

Some Member States have expressed that the phrasing “while being aware” risks leading to the trader (who could be a seller) being able to stay passive. We have tried different wordings in previous compromise texts.

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

We are reflecting on, while keeping the subjective element in Annex I, describing in the recitals that a trader cannot remain passive and in doing so avoid the risk of being liable under the new points of Annex I.

Some Member States oppose to including a software update, which is solely a security update, in point 23d. There could be a risk that consumers would not download important security updates.

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

In the fourth compromise proposal the following wording was used for point 23f in Annex I:

23f. Falsely claiming that a good has a certain durability in terms of usage time or intensity under normal conditions of use.

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

5. Information on commercial guarantees of durability under the Consumer Rights Directive

Following the opinion of several Member States we suggest limiting the obligation to provide information on commercial guarantees of durability to guarantees longer than two years. This coincides with the minimum duration of two years of the legal guarantee of conformity in accordance with Directive (EU) 2019/771. Some Member States have however chosen to have a longer legal guarantee period nationally, which needs to be considered when drafting the provision.

Since the provisions are added to the Consumer Rights Directive the information is to be provided at the point of sale, while the commercial guarantee can be expected to be provided by a producer. Possible issues due to this fact has been pointed out by some Member States. We consider it however to be the opinion of most Member States to include a provision with an obligation to provide information on commercial guarantees of durability in the Consumer Rights Directive. Worth considering is that providing a commercial guarantee of durability is a competitive advantage and something that a producer would want to call attention to and provide information on. Such information can then be passed on by the seller to the consumer, which would limit the burden put on sellers. Regarding the Union Harmonised Graphic Format, in most cases it will be put on the product already by the producer. The limitation to guarantees longer than two years also limits the cases in which the obligation to provide the information applies.

We hope that this reflects a well-balanced approach that strikes the right balance between the different positions held by the Member States when it comes to information on commercial guarantees of durability.

6. The Union Harmonised Graphic Format

The idea of having a Union Harmonised Graphic Format was widely supported by Member States at the meeting in the Working Party on 11 January.

For the meeting on 8 March, we introduced texts concerning the Union Harmonised Graphic Format and submitted you two options. The first option was having a delegated act and the second option was having an implementing act. The Council legal service also described the differences between the two options. Most Member States who have expressed an opinion on this issue prefer an implementing act and we have therefore proceeded with that option.

On 3 April we will further explain the reflections from the Presidency regarding the Union Harmonised Graphic Format, and we will also have a discussion on what information should be provided through the Union Harmonised Graphic Format.

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

7. Other changes to the text

We have also introduced a few other changes to the text: these are mainly to be viewed as clarifications and editorial changes.
