



19 JULY 2023

Empowering Consumers Directive: What to watch out for during the trilogues



Executive summary

DIGITALEUROPE strongly supports the European Commission's aim to use consumer law to promote more sustainable consumption and protect consumers from unfair commercial practices such as greenwashing, early obsolescence, and unreliable and non-transparent sustainability information.¹

As trilogues progress, it will be key to ensure that competition, innovation and product differentiation are encouraged. Companies should not be disincentivised from setting challenging environmental goals because they perceive it will not be possible to publicise them.

In particular, the final text should:

- ▶ Drive sustainability and accessibility by allowing companies to provide all relevant information to consumers digitally;
- ▶ Continue to allow industry environmental labels that meet high sustainability standards based on third-party verification;
- ▶ Ensure that software update provisions do not discourage security updates, exposing consumers to cybersecurity threats or poor functioning; and
- ▶ Clarify that the proposed ban on 'early obsolescence' relates to intentional practices, and not to unintended effects.

¹ COM/2022/143 final. For our full position on the proposal, see DIGITALEUROPE, *Building on existing best practice to support consumers' green transition*, available at <https://www.digitaleurope.org/resources/building-on-existing-best-practice-to-support-consumers-green-transition/>.



Table of contents

• Executive summary.....	1
• Table of contents.....	2
• Early obsolescence.....	3
Inducing a consumer to replace consumables	3
Goods designed to limit functionality	4
• Software updates	4
• Commercial guarantees of durability	5
• Repairability information	6
• Environmental claims	6
Carbon offsetting	7
• Dark patterns	7



Early obsolescence

DIGITALEUROPE strongly rejects business practices or marketing strategies whereby manufacturers deliberately shorten the lifetime of a product in order to ensure a constant or recurring purchase pattern. Introducing new products reflects our industry's best efforts to keep pace with consumer expectations and preferences. The speed at which this occurs reflects the highly competitive market we operate in, rapidly increasing consumer expectations, and the breakneck speed of technological improvements.

While the wording on this topic suggested by the Council is clear, the language suggested by the European Parliament is not sufficiently precise. 'Engaging in practices that lead to' should be amended to read either 'deliberately engaging in practices that lead to' or 'engaging in practices that intentionally lead to,' to avoid confusion in the interpretation of the law.²

Inducing a consumer to replace consumables

The Commission proposal bans the practice of inducing the consumer into replacing consumables, for example a printer ink cartridge, earlier than is technically necessary. We support the intent of this provision. However, there are several reasons – technical and non-technical – that justify informing consumers about an upcoming need to replace consumables.

For example, informing consumers of the remaining ink level in a printer cartridge can help them plan ahead so they have a replacement cartridge available when the ink runs out or the print quality starts to deteriorate. Warnings that 'require' early replacement should not be permitted, but warnings that provide information and enable users to plan ahead and make informed choices are desirable. It is similar to an electric vehicle letting the driver know when it is time to charge again.

In its amendments, the Parliament suggests prohibiting the 'marketing of goods' that require replacing consumables earlier than would otherwise be necessary for technical reasons. It should be clarified that the ban should not apply to communication to the user that merely informs them of the approximate remaining ink level. The scope of such provision should be limited to cases where the warnings are specifically designed to mislead and induce the consumer into replacing consumables earlier than is technically necessary.

The restriction on the 'marketing of goods' differs from the Commission proposal's intent, which was to give the consumer accurate information, and to avoid information that leads consumers to make decisions contrary to their own interests and those of the environment. For clarity, DIGITALEUROPE therefore recommends amending the Council wording to '~~inducing~~ requiring the consumer into replacing the consumables of a product earlier than would otherwise be

² Recital 14.

necessary for technical reasons [...] For example, the practice of ~~urging~~ *requiring* the consumer, via the settings of the printer, to replace the printer ink cartridges before they are actually empty in order to stimulate the purchase of additional ink cartridges would be prohibited.'

Goods designed to limit functionality

The Commission proposal requires manufacturers to inform consumers when a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer. The Parliament expanded this to ban the marketing of such goods. The intent of the legislation should be maintained by focusing on information to the consumer rather than banning the marketing of a product.

It should also be clarified that the ban relates only to intentional effects, and not to unintended effects caused, for example, because the manufacturer was not able to test its products with all third-party consumables, spare parts or accessories. Similarly, manufacturers cannot ensure compatibility and interoperability with third-party products that did not exist until after the product was placed on the market.

For this reason, the Council suggestions to maintain the following wording in the Annex is preferred: 'omitting 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 *when the trader can be reasonably expected to know about such design limitations*.'³

The Commission proposal also gives the example in the recitals of '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.' We recommend adding to the sentence 'when using ink cartridges not provided by original producer of the printer' the following: '*this does not preclude producers and traders from informing consumers if a good is designed to limit its functionality when using consumables, spare parts or accessories not provided by the original producer*.'⁴



Software updates

Software updates are meant to improve user experience by maintaining and enhancing a safe, stable and seamless environment. They ensure goods can function as they did at the time of delivery, support compatibility with new devices and applications, address unintended functional issues, and protect consumers against threats by mitigating security vulnerabilities.

³ Annex, point (4), amending provision, sixth paragraph (emphasis added).

⁴ Recital 21.

Software updates are not just critical for individual end-users, but the ecosystem at large, given how cyber-attacks proliferate across the connected ICT supply chain. With increased connectivity and remote work, as well as the expansion of the attack surface, ensuring software update adoption is a critical societal priority.

It is important for consumers to receive notification of the impact of software updates. However, this must not discourage consumers from updating their software, thus exposing the product or service to cybersecurity threats or poor functioning. Failure to install updates is widely recognised as a major contributor to the insecurity of many consumer devices. Further, some software updates – such as battery management software, designed to prevent overheating and possible fire risk – protect users from harm.

The Parliament text suggests prohibiting the introduction of a feature of the good that limits its durability, e.g. software updates or a piece of hardware designed to fail after a particular period of time, whereas the Council only prohibits traders from not informing consumers when a good may have a limited lifespan.

DIGITALEUROPE does not support intentionally limiting the products' lifespan, but unintended consequences could occur. Consumers must receive notification of the impact of a given software update if it may negatively impact 'the product's durability' and not simply 'the use of a product or particular features.' Furthermore, since consumers must receive notification of the impact of whether a given software update will negatively impact 'the product's durability,' it would be more appropriate to use the wording 'omitting to inform' as suggested by the Commission, which does not preclude the updates themselves, rather than the Parliament's position to ban the introduction of the feature.⁵



Commercial guarantees of durability

The Commission proposal requires traders to inform consumers about the existence of the producer's commercial guarantee of durability for all types of goods, where the producer makes this information available.

The Parliament suggests expanding this provision to also include information on the good's legal guarantee of conformity and introducing a label.⁶ However, it should be considered that the duration of the legal guarantee varies by country, and therefore including it in the packaging as a label would lead to fragmentation of the Single Market and undermine the free movement of goods across Europe. Additionally, for sustainability reasons, many manufacturers are trying to reduce packaging – not make it bigger to fit more labels.

⁵ Recital 16.

⁶ Recital 23 and Art. 2(1)(2)(a), amending provision, first paragraph.

The Parliament also prevents a producer or trader from offering different terms for commercial guarantees in different Member States.⁷ This provision should be removed. The difference in terms provided by in the commercial guarantee often arises from the differences in legal guarantee in national laws, but is also used competitively to differentiate between traders, manufacturers and third parties, to extend the period of coverage or the scope.



Repairability information

DIGITALEUROPE believes consumers should have clear and accurate information on repair.

We support the Parliament's position which states that information such as user and repair manuals, should be made readily and easily available. However, the Council wording excludes electronically versions such as product websites.

For sustainability reasons, many manufacturers are trying to reduce packaging – not make it bigger to fit more information. Producers and traders should be able to comply with the information requirements by making compulsory information available online, provided that, in the case of offline shopping, that information is easily available for consumers also at the point of purchase. For instance, by providing a QR code on the packaging or other materials displayed in shops, where consumers can find the required information.

We support the Council's proposed new obligation for traders to provide consumers with information on after-sales services, including repair services, before they are bound by the contract.⁸ However, the European Parliament's reference to 'traders interacting with consumers' should be clarified so that authorised traders are liable for informing consumers, as it is difficult for producers to connect with traders without established relationships.⁹



Environmental claims

DIGITALEUROPE supports the requirement that environmental claims made by manufacturers should be based on robust, commonly recognised criteria and, where applicable, recognised international standards such as ISO standards.

The European Parliament proposes that sustainability labels should be accessible to all businesses at reasonable costs, regardless of size or financial system.¹⁰ Reasonable costs for sustainability labels should not be limited only

⁷ Annex, point (4), amending provision, sixth paragraph.

⁸ Recital 31.

⁹ Recital 33.

¹⁰ Recital 7.

to those labels established by public authorities, but also be extended to other labels.

We remain concerned by the blanket ban on non-third-party labels. In addition to the use of sustainability labels developed by public bodies, it is important that industry initiatives can be used as an indication of the sustainability of a product or service. Industry initiatives that meet high sustainability standards based on third-party certifications should be supported. The final Directive should continue to allow private labels, which are third-party verified through robust and credible auditing, to be used to encourage more companies to provide consumers with reliable sustainability information.

As ‘certification schemes,’ as defined in the proposal, do not yet exist for all aspects of environmental or social sustainability, restricting only to labels that are ‘open to all traders’ would significantly reduce the scope of relevant sustainability information that can be shared with consumers. It would also make it more complex to develop new labels to cover new progress in the sustainability of products or services. Allowing operators to innovate and establish robust and credible labels to account for sustainability aspects is therefore essential.

Carbon offsetting

DIGITALEUROPE supports the need for clarity regarding environmental claims that are based on carbon offsets. However, emission reduction should remain a top priority to be incentivised via policy. Therefore, the Parliament’s proposed ban on claims based on carbon offsetting should be rejected.¹¹



Dark patterns

DIGITALEUROPE supports the European Commission’s long-term goal to ensure that EU consumer law remains fit for purpose in the context of the digital transition via the ongoing ‘digital fairness’ fitness check. However, the Parliament’s introduction of a ‘dark patterns’ provision¹² is unrelated to the objective of this proposal and appears to ignore the protection already afforded under the Unfair Commercial Practices Directive, the General Data Protection Regulation (GDPR) and the Digital Services Act (DSA).¹³ Discussions on this topic should be handled in the ongoing fitness check.

¹¹ Recitals 4 & 9.

¹² Article 1, first paragraph, point (2)(b), amending provision, second paragraph.

¹³ Directive 2005/29/EC as amended by Directive (EU) 2019/2161, Regulation (EU) 2016/679 and Regulation (EU) 2022/2065, respectively.

FOR MORE INFORMATION, PLEASE CONTACT:



Hugh Kirk

Senior Manager for Digital Commerce Policy

hugh.kirk@digitaleurope.org / +32 490 11 69 46



Alberto Di Felice

Director for Infrastructure, Privacy and Security Policy

alberto.difelice@digitaleurope.org / +32 471 99 34 25

About DIGITALEUROPE

DIGITALEUROPE is the leading trade association representing digitally transforming industries in Europe. We stand for a regulatory environment that enables European businesses and citizens to prosper from digital technologies. We wish Europe to grow, attract, and sustain the world's best digital talents and technology companies. Together with our members, we shape the industry policy positions on all relevant legislative matters and contribute to the development and implementation of relevant EU policies, as well as international policies that have an impact on Europe's digital economy. Our membership represents over 45,000 businesses who operate and invest in Europe. It includes 102 corporations which are global leaders in their field of activity, as well as 41 national trade associations from across Europe.

DIGITALEUROPE

Membership

Corporate Members

Accenture, Airbus, Applied Materials, Amazon, AMD, Apple, Arçelik, Arm, Assent, Autodesk, Avery Dennison, Banco Santander, Bayer, Bosch, Bose, Bristol-Myers Squibb, Brother, Canon, CaixaBank, Cisco, CyberArk, Danfoss, Dassault Systèmes, DATEV, Dell, Eaton, Epson, Ericsson, ESET, EY, Fujitsu, GlaxoSmithKline, Google, Graphcore, Hewlett Packard Enterprise, Hitachi, Honeywell, HP Inc., Huawei, ING, Intel, Johnson & Johnson, Johnson Controls International, Konica Minolta, Kry, Kyocera, Lenovo, Lexmark, LG Electronics, Mastercard, Meta, Microsoft, Mitsubishi Electric Europe, Motorola Solutions, MSD Europe, NEC, Nemetschek, NetApp, Nintendo, Nokia, Nvidia Ltd., Oki, OPPO, Oracle, Palo Alto Networks, Panasonic Europe, Pearson, Philips, Pioneer, Qualcomm, Red Hat, RELX, ResMed, Ricoh, Roche, Rockwell Automation, Samsung, SAP, SAS, Schneider Electric, Sharp Electronics, Siemens, Siemens Healthineers, Skillsoft, Sky CP, Sony, Sopra Steria, Swatch Group, Technicolor, Texas Instruments, TikTok, Toshiba, TP Vision, UnitedHealth Group, Visa, Vivo, VMware, Waymo, Workday, Xerox, Xiaomi, Zoom.

National Trade Associations

Austria: IOÖ	Germany: bitkom, ZVEI	Romania: ANIS
Belgium: AGORIA	Greece: SEPE	Slovakia: ITAS
Croatia: Croatian Chamber of Economy	Hungary: IVSZ	Slovenia: ICT Association of Slovenia at CCIS
Cyprus: CITEA	Ireland: Technology Ireland	Spain: Adigital, AMETIC
Czech Republic: AAVIT	Italy: Anitec-Assinform	Sweden: TechSverige, Teknikföretagen
Denmark: DI Digital, IT BRANCHEN, Dansk Erhverv	Lithuania: Infobalt	Switzerland: SWICO
Estonia: ITL	Luxembourg: APSI	Turkey: Digital Turkey Platform, ECID
Finland: TIF	Moldova: ATIC	Ukraine: IT Ukraine
France: AFNUM, SECIMAVI, numeum	Netherlands: NLdigital, FIAR	United Kingdom: techUK
	Norway: Abelia	
	Poland: KIGEIT, PIIT, ZIPSEE	
	Portugal: AGEFE	