

ISFE observations on the EU Commission proposal for a Directive for empowering consumers in the green transition

ISFE Transparency register ID: 20586492362-11

January 2023

1. ISFE shares the European Commission's conviction that addressing climate change is one of the most critical challenges of the 21st century and welcomes the recent publication from the European Commission of a proposal for a Directive for empowering consumers in the green transition. Providing reliable and clear information to consumers is key to facilitate and encourage greener consumption of goods.
2. The video games sector is committed to partake into the EU green transition, and launched in 2019 the UNEP-facilitated [Playing for the Planet Alliance](#) as a forum of discussion to encourage action from video games companies on the environment, for instance by raising awareness to players through in-game content. Our members also developed [guidance](#) to support studios that are starting their environmental journey to reduce their impact.

Executive Summary

Amendment to the Unfair Commercial Practices Directive (Directive 2005/29/EC)

- **On the definition of durability (Article 1(1))**
ISFE welcomes the reference to the [Directive \(EU\) 2019/771](#) to define the notion of "durability". In particular, the reference to "normal use" is key, as it excludes from the scope any voluntary mishandling of the product, such as piracy attempts. ISFE also welcomes the clarification embedded in Recital 23 on the length of such durability, and is pleased to see that the European Commission favoured such approach rather than using broader and undefined concepts such as "lifespan", which would ultimately prove difficult to enforce both from a consumer and producer point of view.
- **On the definition of environmental and social impact (Article 1(2a))**
ISFE regrets that the proposal lacks clear definition of an "environmental or social impact". ISFE suggests for the deletion of "social impact" from the proposal as it is barely even mentioned elsewhere in the proposal, thus impacting the ability of producers to ensure their product will comply with the proposal if adopted as such. On environmental impact, ISFE would like to avoid that environmental performance assessment of a product can be performed only through a specific methodology (e.g. the PEF method) and would encourage regulators to use wording embedded in the recently published UCPD guidance from the European Commission, which provides more flexibility in chosen science-based approaches.
- **On omitting to inform the consumer that a software update will negatively impact the use of goods with digital elements or certain features of those goods (Annex I, Paragraph 4, Point 23d)**
ISFE agrees that consumers must be adequately informed on the impacts a software update will have on their goods with digital elements, and therefore welcomes the wording suggested by the European Commission. However, ISFE would be concerned should the regulators be inclined to ban the mere practice of software update that have a negative impact on the use of the good with digital elements or of certain of its features, as this would prevent producers' ability from terminating the providing of such features after a certain period of time (e.g. online features of a console years after its launch).
- **On omitting to inform that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer (Annex I, Paragraph 4, Point 23i)**
ISFE welcomes the wording from the European Commission and of the inclusion of the word "designed", as it implies that producers should have voluntarily intended to produce their good in a way that it limits its functionalities when used in conjunction with third-party accessories or consumables. Accessories or consumables produced by the original producer may sometimes have more features than those from third-party producers thanks to intense R&D activities, but this does not mean that this is the result of a specific intent from the original producer to limit third-party products. This is why ISFE encourages regulators to preserve the original wording suggested by the European Commission in its proposal.

Amendment to the Consumer Rights Directive (Directive 2011/83/EC)

On disclosing information related to the existence of a commercial guarantee of durability for distance contracts (Article 2(3) and Article 2(4))

ISFE is concerned that providing detailed information about the existence or non-existence of a commercial guarantee of durability in such a prominent manner at the point of sale, compared to other information, could potentially distract consumers from other important information, such as their cancellation rights. ISFE believes it would be more appropriate for this type of information to be provided as a pre-contract disclosure on the product details page rather than right at the point of sale. Therefore, ISFE would suggest the deletion of “and directly before the consumer places his order” from Article 2(4) in the proposal.

Background information

Amendment to the Unfair Commercial Practices Directive (2005/29/EC)

On the definition of durability (Article 1(1))

3. ISFE welcomes the reference to the [Directive \(EU\) 2019/771](#) to define the notion of “durability”, understood as “the ability of the goods to maintain their required functions and performance through normal use”¹. If adopted as such, this definition would provide clarity for companies and consistency with the rest of the EU framework, as well as avoid potential conflicts of interpretation, and therefore fragmentation, when implementing the Directive at national level.
4. More importantly, the reference to “normal use” is key as it excludes from the scope of the proposal any voluntary mishandling of the product. In particular, this protects video game companies from malicious attempts to circumvent the measures they have put in place to protect their intellectual property, either through software protection within the game, or components embedded within video game devices to prevent piracy (so-called Technological Protection Measures). This reference is an essential safeguard which should be kept in the final version of the proposal.
5. In addition, ISFE welcomes the clarification embedded in Recital 23 of the proposal, which states that “a good indicator of a good’s durability is the producer’s commercial guarantee of durability within the meaning of Article 17 of Directive (EU) 2019/771”. This provides for a fair compromise between the interests of the consumers, which will in any case be ensured that the good’s durability will at least be equal to two years², and of the producers, which will be able to establish a finite and longer period of durability should they wish to as part of the good’s commercial guarantee. This allows for the period of durability to be best suited for the goods, and would constitute a competitive advantage for producers who know they will be able to ensure longer period of durability.
6. ISFE favour this approach from the European Commission, instead of using broader terms such as “lifespan”, which are defined neither in EU law nor in additional guidance. Should regulators favour such terms, ISFE is concerned that their application would be difficult, due to the fact that producers may not be able to accurately assess the average lifespan of their product as this in part depends on a number of factors outside of their control such as actual storage conditions, use and handling in addition to the fact that producers might not necessarily be able to assess the average lifespan of their product prior to its commercialisation³. Considering the difficulty for manufacturers to accurately assess the average lifespan of their own products, ISFE believes it will be equally, if not more, difficult to consumers to make such an assessment. It would therefore be almost impossible to set up “an average lifespan” for the product, in particular for highly complex products, making its enforcement highly uncertain.

¹ Article 2(13), [Directive \(EU\) 2019/771](#) on certain aspects concerning contracts for the sale of goods

² As required by Directive (EU) 2019/771, Article 10

³ Even with accelerated Life Cycle testing techniques

7. **Considering the above, ISFE encourage regulators to follow the proposal from the European Commission to define durability, including its length, in accordance with the Directive (EU) 2019/771, thus facilitating implementation and enforcement for both consumers and producers.**

On the definition of environmental or social impact (Article 1(2a))

8. The European Commission proposes in its Article 1(2a) to add the notion of “environmental or social impact” as part of the characteristics of a product on which a trader cannot provide false information or deceive or be likely to deceive consumers on. ISFE regrets however that the proposal lacks clear definition of an “environmental or social impact”, as this could encompass a broad range of issues, including those not unforeseen by companies⁴. Whilst the future proposal for a Directive to substantiating green claims may give further clarifications on what an environmental impact is, the proposal has not been adopted yet, and might lead to different appreciations of the definition across all the various texts.
9. In particular, social impacts are barely mentioned in the proposal. This could translate into legal uncertainty and higher difficulties for video game studios and their compliance teams⁵ to assess prior commercialisation of their good and whether its social impact would be compliant with the Directive, if adopted as such.
10. On environmental impacts, ISFE agrees with the European Commission that the assessment of the environmental performance of a good should be measured through sound and reliable scientific evidence, which could rely on existing industry driven standards that are already meeting high sustainability requirements. However, ISFE would like to avoid that such an exercise can be performed only through a specific methodology (e.g. the PEF or OEF method, as implied by Recital 12 of the proposal) as these may not necessarily best suit a sector’s specificities. In this regard, the recent European Commission guidance on the application of the Unfair Commercial Practices Directive provides for more flexibility by stating that studies measuring the “environmental performance of products [...] should be made according to recognised or generally accepted methods applicable to the relevant product type”⁶. Such wording ensures that adequate safeguards are put in place, and provides flexibility for producers to make an assessment based on the most suitable methodology for their product⁷.
11. In addition, Annex 1, paragraph (2)-4a of the proposal states that generic environmental claims can only be made where there is “*recognised excellent environmental performance*” (REEP) relevant to the claim. ISFE is concerned however that the notion of REEP is narrowly defined against EU laws, thus leading to a situation where any environmental claim would be prohibited in the EU, unless backed by EU certification schemes, therefore discarding the benefits of using other science-based and recognised methodologies to back up such claims.
12. Any ecolabel requirements should be implemented in a flexible manner to accommodate different products and different manufacturer requirements for label placement, including the use of electronic

⁴ e.g. A consumer

⁵ Which not all video game companies are necessarily staffed with

⁶ See section 4.1.1.4 of the [EU Commission Guidance on the interpretation and application of Directive 2005/29/EC](#). “This could also be the case if the life cycle assessment studies of the product have proven its environmental performance. These studies should be made according to recognised or generally accepted methods applicable to the relevant product type and should be third-party verified. Such environmental performance evaluations may involve comparisons (see also section 4.1.1.7 on comparative environmental claims). If such methods have not yet been developed in the relevant field, traders should refrain from using general benefit claims.”

⁷ Which could well be the PEF method (e.g. in the case of video game devices and accessories), but could be replaced by more adequate Life Cycle Assessments methods for specific product categories, and in particular digital content such as video games.

labels. Electronic labeling allows for relevant information to be provided in a timely manner without the need to discard or rework existing product packaging or documentation. **Consequently, the Directive should allow producers and sellers to comply with the information requirements by making information available online and accessible via QR code or other digital format.**

13. Considering the above, ISFE invites the regulators to:

- a. **Further define the notion of “environmental and social impact of a good”, including by providing clear examples of elements which could be understood as part of the “social impact” of a good.**
- b. **To allow for flexibility in the assessment of the environmental performance of a good by allowing producers to assess their products based on “recognised or generally accepted methods applicable to the relevant product type”, as stated in the EU Commission guidance on the application of the UCPD.**
- c. **To rephrase Annex I, paragraph (2)4a as follows: “Making a generic environmental claim for which the trader is not able to demonstrate its accuracy using recognised or generally accepted methods applicable to the product type for which the claim was made”.**

On omitting to inform the consumer that a software update will negatively impact the use of goods with digital elements or certain features of those goods (Annex I, paragraph 4, Point 23d)

14. ISFE agrees with the European Commission that consumers must be adequately informed on the impacts a software update will have on their goods with digital elements (such as consoles). Our members already provide information to consumers each time an update is available for their products, including when these relate to product enhancement but also when these relate to the termination of a feature of the good⁸. This is why ISFE welcomes the wording proposed by the European Commission within the Annex, Paragraph 4 (Point 23d)

15. Software updates are essential for promoting security, innovation and consumer welfare, including safe use. Failure to install updates, including important security updates, is widely recognized as a major contributor to the insecurity of many consumer devices. Updates are not just critical for individual end-users, but the ecosystem at large given how attacks proliferate across the connected ICT supply chain. While we recognise the importance to provide information to consumers on the software updates affecting the device, this should not discourage consumers from updating their software.

16. Therefore, ISFE believes the proposal from the European Commission is balanced as it would embed into law practices which already are common within the sector. However, ISFE would be highly concerned should the regulators decide to include as part of the commercial practices which are in all circumstance considered unfair any software update which would have a negative impact on the use of the goods with digital elements or certain of its features.

- a. Ensuring a continued service for the online features of a good with digital elements is a costly exercise, as it requires producers to invest in infrastructure and personnel to maintain the level of quality consumers can safely expect from their product. As new generation of consoles are released, it becomes less relevant for producers to maintain such online features especially when most players switched to the new generation of consoles⁹. Therefore, preventing the termination of such features would impose a disproportionate burden on producers, but also by extension to

⁸ For instance, Nintendo informed its consumers that it will shut down on 27 March 2023 the online store features of its Wii U and 3DS devices, disabling the ability for their owners to purchase games in the digital storefront included within the console. Both consoles were commercially released in 2012 and 2011 respectively.

⁹ A new generation of console is released around every 7-8 years, and online services of the former generation of console are maintained for several years even after the launch of the new generation.

video game studios who would need to continue supporting such online features within their games, whilst being beneficial only to a very slim proportion of consumers.

In addition, ISFE believes this could lead to harmful unintended consequences in which keeping servers online despite minimal consumer usage (which is when servers are typically closed), would lead to increased energy use, and by extension carbon emissions, therefore hampering the proposal's overall objective of promoting sustainable consumption.

- b. Also, such change could unduly impact producers when the update unexpectedly causes a negative impact on the use of the goods or of certain of its features (e.g. due to a bug resulting from the update). In such rare cases, producers would be held liable under the Directive 2005/29/EC if the proposal is adopted as such, and thus even if they could not reasonably have foreseen such negative impacts, or even if they fixed these very shortly after their discovery.

17. Alternatively, ISFE suggests the term “negative impact” could be better defined to avoid any misinterpretation and provisions should only apply to intentional early obsolescence effect that would intentionally harm the performance of the device.

18. Considering the above, ISFE encourages the regulators to adopt the European Commission proposal wording on software update that will negatively impact the use of goods with digital elements or certain of its features. Provisions such as banning “software updates with negative impact” should only apply to intentional early obsolescence effect that would intentionally harm the performance of the device.

On omitting to inform that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer (Annex I, Paragraph 4, Point 23i)

19. ISFE welcomes the wording used by the European Commission in its proposal on the need to inform consumers should a good be designed to limit its functionalities when using third-party accessories. In particular, the use of the word “designed” is key as it implies that producers should have intended to produce their good in such a way. ISFE believes intent is key as not all third-party accessories, spare parts, or consumables are able to deliver the same features and level of quality as those of the original producer due to design limitations and other factors such as intellectual property rights covering certain features. ISFE also welcomes the additional examples provides in Recital 21 as it provides clarification of what would be considered falling under the scope of this proposal.

20. Our members' goods, such as consoles, all allow for the use of third-party accessories, which provide consumers with a wider choice to improve their gameplay experience. However, some features of our members' accessories that are used in conjunction with the consoles (e.g. the “HD vibration” of the Nintendo Switch JoyCons, or the haptic triggers of the PS5 controllers) are often not available on goods produced by third-party producers. Such features usually are the result of intense (and costly) Research and Investment activities by our members, which could be protected by intellectual property rights as a result of that innovation rightly granting a competitive advantage to our members' products. Nothing in consoles prevents third party products from using such features and the fact that third parties may not be able to reproduce these features is not the result of a specific intent from our members, but rather of the inability from third-party producers to achieve the same level of quality and innovation in their products as those of our members.

21. Considering the above, ISFE urges regulators to stick to the original wording proposed by the European Commission in the proposal to include as part of the commercial practices that are in all circumstances

considered unfair the omission to inform that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer

Amendment to the Consumer Rights Directive (Directive 2011/83/EU)

On disclosing information related to the existence of a commercial guarantee of durability for distance contracts (Article 2(3) and Article 2(4))

22. Article 2(3), point (mb), of the proposal outlines that any producer of energy-using goods must provide information to the consumer on the existence or non-existence of a commercial guarantee of durability longer than two years for their product. Article 2(4) of the proposal suggests that this information must be provided in a clear and prominent manner “directly before the consumer places his order” when purchasing online. This could, on some occasions, mean that this information must be available on the preview page of the product on a website, rather than being available in the product’s details page, where other important information is also disclosed, such as cancellation rights, repair opportunities when applicable, etc.
23. ISFE is concerned that this disclosure requirement at point of sale would be disproportionate and would have harmful unintended consequences as providing detailed information about the existence or non-existence of a commercial guarantee of durability in such a prominent manner compared to other information could potentially distract consumers from other important information, such as their cancellation rights. ISFE believes it would be more appropriate for this type of information to be provided as a pre-contract disclosure on the product details page rather than right at the point of sale.
- 24. Considering the above, ISFE would suggest the deletion of “and directly before the consumer places his order” from Article 2(4) in the proposal**

About ISFE

ISFE represents the video games industry in Europe and is based in Brussels, Belgium. Our membership comprises of national trade associations in 15 countries across Europe which represent in turn thousands of developers and publishers in the member states. ISFE also has direct members, the leading console manufacturers and European and international video game companies, many of which have studios with a strong European footprint. They produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, mobile phones and tablets.

ISFE’s purpose is to serve Europe’s video games ecosystem by ensuring that the value of games is widely understood and to promote growth, skills, and innovation policies that are vital to strengthen the video games sector’s contribution to Europe’s digital future. The video games sector represents one of Europe’s most compelling economic success stories, which enjoyed a growth in European revenues in 2020 of 22%, reaching a total market size of €23.3bn and employing some 90,000 people. Today 51% of Europe’s population plays videogames, which is approximately 250 million people, and 54 % of the players regularly play on consoles.

Contacts:

Ann Becker
Head of Policy & Public Affairs | ISFE
ann.becker@isfe.eu

Benjamin Seignovert
Policy & Public Affairs Manager | ISFE
benjamin.seignovert@isfe.eu

ISFE secretariat, January 2023