

Our position

Empowering Consumers Directive - priorities for trilogues

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

Informal interinstitutional (trilogue) negotiations are underway between the co-legislators with a view to reach a first reading agreement on the Empowering Consumers Directive proposal. The priority for EU decision-makers should be to drive sustainability by allowing companies to provide digitally relevant information; allow industry environmental labels meeting high sustainability standards; ensure software update provisions do not discourage security updates or expose consumers to cybersecurity threats; and clarify that the proposed ban on early obsolescence is based on intentional practices rather than unintended effects.

Introduction

The Empowering Consumers for the Green Directive proposal, published in March 2022, aims to help consumers make more sustainable choices when buying products. The initiative would require businesses to provide more information about the environmental impact of their products, such as their lifespan and reparability. It would also ban misleading environmental claims and the sale of products with a covertly shortened lifespan.

The European Parliament and Council have both adopted positions in May 2023 regarding environmental claims and product sustainability. Currently, EU policymakers are working to reach an agreement on the final text of the Empowering Consumers Directive. As trilogues progress in the upcoming months, co-legislators should consider adopting the below concrete recommendations in the areas of early obsolescence, software updates, durability, reparability, environmental claims and dark patterns to protect consumers while also enabling businesses to advance their green and digital transitions.

Early obsolescence

Context

AmCham EU members are firmly against early planned obsolescence which is a practice that disadvantages and misleads consumers. The institutions must avoid confusion in the interpretation of the law by clearly separating intentionality and unexpected consequences. To do this, co-legislators should amend the language '*Engaging in practices that lead to ...*' to '*deliberately engaging in practices that lead to ...*'¹

Recommendations

Inducing a consumer to replace consumables: the European Commission's proposal to ban the practice of inducing the consumer to replace consumables earlier than is technically necessary is a positive one. Co-legislators should not permit warnings that 'require' early replacement, although warnings that provide information and enable users to plan ahead and make informed choices are desirable. There are several technical and non-technical justifications for informing consumers about an upcoming need to replace consumables. For example, informing the consumer of the remaining ink level in a printer cartridge can help them plan ahead so they have a replacement cartridge available

¹ Recital 14.

when the ink runs out – thereby ensuring business continuity in certain cases – or the print quality starts to deteriorate.

Co-legislators should avoid the European Parliament’s wording around ‘marketing of goods’ that requires replacing the consumables earlier than necessary for technical reasons. This restriction goes beyond the intent of the Commission proposal by bringing in product design aspects, whereas the intent of the proposal is to give the consumer accurate information to make choices in their best interest and in the interest of the environment.

Goods designed to limit functionality: according to the Commission’s proposal, manufacturers should inform consumers if a good is designed to limit functionality when using consumables, spare parts or accessories not provided by the original producer. The Parliament extended such ban, suggesting the legislation should cover the marketing of such goods, which is essentially a product design requirement. While the Ecodesign rules address the development of product design requirements, the Empowering Consumers Directive should focus on providing information to consumers rather than banning the marketing of products. The ban should only apply to intentional effects, not unintended effects caused by manufacturers’ inability to test their products with all third-party consumables, spare parts or accessories, especially after a product has been placed on the market.

As such, co-legislators should adopt the Council’s suggestions to maintain the following wording in the Annex: *‘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’*.²

The Commission proposal also mentions prohibiting the marketing of printers designed to limit functionality when using ink cartridges not provided by the original producer. The relevant provision would benefit from extending the sentence: *‘when using ink cartridges not provided by the original producer of the printer’* by the following wording: *‘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’*.

Software updates

Context

Thanks to software updates, the user experience is improved 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. Software updates are not just critical for individual end users but the ecosystem at large, given how cyberattacks proliferate across the connected information and communications technology supply chain. Therefore, while it is important for consumers to receive notification of the impact of software updates, this must not discourage them from updating their software. Lack of updates risk exposing the product or service to cybersecurity threats and poor functionality. With increased connectivity and remote work, as well as the expansion of the attack surface, ensuring software update adoption is a critical societal priority.

² Annex, point (4), amending provision, sixth paragraph.

Recommendations

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’. Moreover, since consumers must be notified if the impact of 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.³

Commercial guarantees of durability

Context

The Commission proposal mandates that traders inform consumers about the producer's commercial guarantee of durability for all goods, provided the producer makes this information available. The Parliament text suggests extending the scope of this provision to include information on the good's legal guarantee of conformity and introducing a label.^{4,5}

Recommendations

Because the duration of the legal guarantee varies by country, including it as a label in the packaging risks fragmenting the Single Market and undermine free movement of goods across the EU. This requirement would conflict with manufacturers’ efforts to reduce packaging for sustainability. The Parliament also prevents producers or traders from offering different terms for commercial guarantees in different Member States. Co-legislators should remove such a requirement, as it could represent a competitive advantage for traders, manufacturers and third parties.⁶

Repairability information

Context

Consumers should have clear and accurate information on repair, as this is crucial to achieve some of this Directive’s objectives.

Recommendations

The Parliament's position that information on repair should be easily accessible, including user and repair manuals is welcome. However, the Council's wording excludes electronic versions, such as product-specific websites. Producers and traders should comply with information requirements by making compulsory information available online, provided it is easily accessible for consumers shopping offline.

³ Recital 16.

⁴ Recital 23.

⁵ Article 2, first paragraph, point (2)(a), amending provision, first paragraph.

⁶ Annex, point (4), amending provision, sixth paragraph.

The obligation suggested by the Council, mandating traders provide consumers with information on after-sales services,⁷ including repair services, is positive. However, co-legislators should clarify the Parliament's reference to *'traders interacting with consumers'*⁸ to ensure authorised traders are responsible for informing consumers. This is crucial for producers to connect with traders without established relationships, which can be difficult.

Environmental claims

Recommendations

The blanket ban on non-third-party labels is concerning. The legislation should allow not only sustainability labels developed by public bodies, but also industry initiatives that indicate a product or service's sustainability. Co-legislators should support industry initiatives that meet high sustainability standards based on third-party certifications. The final Directive should continue to allow private labels that are third-party verified through robust and credible auditing.

Moreover, the Directive should allow and encourage operators to innovate and establish robust and credible labels to account for sustainability. In fact, 'certification schemes,' as defined in the Commission's proposal, do not yet exist for all aspects of environmental and social sustainability. As written, the legislation is restricted to only labels that are 'open to all traders,' which would significantly reduce the scope of relevant sustainability information that can be shared with consumers. It would also make it more difficult to develop new labels to communicate future progress in products or services' sustainability.

As a final point, the Directive must provide more clarity on environmental claims that are based on carbon offsets. Co-legislators should reject the Parliament's proposed ban on claims based on carbon offsetting,⁹ as reducing emissions remains a top priority to incentivise through policy. As part of this goal, it is important to clearly define and distinguish between carbon reductions, avoided emissions offsets and carbon removals.

Removals are not consistently distinguished from credits that cover avoided or reduced emissions, particularly in the most widely used standards. The Carbon Removal Certification Framework can provide the base to distinguish between removals and reductions, and it can help build an approach that provides greater clarity, consistency and transparency in carbon accounting principles and standards.

To incentivise emissions reductions, the definition of 'offset' must clearly exempt direct reductions (eg energy efficiency, onsite fuel switching etc) and indirect sectoral reductions that go beyond the direct operations of a company and its value chain partners (eg reductions obtained via power purchase agreements and sustainable aviation fuel certificate purchases).

⁷ Recital 31.

⁸ Recital 33.

⁹ Recitals 4 & 9.

Dark patterns

Recommendations

The European Commission's goal to ensure EU consumer law remains fit for purpose in the digital transition through the ongoing 'digital fairness' fitness check is welcome. However, the Parliament's 'dark patterns' provision¹⁰ is unrelated to this objective and seems to ignore existing protections under the Unfair Commercial Practices Directive, General Data Protection Regulation and Digital Services Act.¹¹ The ongoing fitness check should take this into account.

Conclusion

The Empowering Consumers Directive's overall objective to promote sustainable consumption and protect consumers from unfair commercial practices is commendable. Eliminating greenwashing, early obsolescence and unreliable sustainability information is crucial for creating a level playing field for businesses and empowering consumers. However, the new rules should also encourage competition, innovation and product differentiation, without disincentivising companies from setting – and achieving – challenging environmental goals.

¹⁰ Article 1, first paragraph, point (2)(b), amending provision, second paragraph.

¹¹ Directive 2005/29/EC as amended by Directive (EU) 2019/2161, Regulation (EU) 2016/679 and Regulation (EU) 2022/2065 respectively.