Independent Retail Europe

THE NEW CONSUMER AGENDA:
OPEN PUBLIC CONSULTATION
- COMMENTS OF INDEPENDENT RETAIL EUROPE
AS ADDENDUM TO ONLINE CONSULTATION-

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GENERAL REMARKS

This document is to be seen as an addendum to our contribution to the online public consultation on the New Consumer Agenda. Considering the character limit in the online form, we herewith provide clarification and additional information. Please note that we additionally responded in detail to the surveys by ICF on consumer empowerment and by Civic Consulting on the General Product Safety Directive as well as to the Public Consultation on the Digital Services Act (Deadline 8 September).

SUMMARY

Overview of the main points we would like to raise on each specific part of the public consultation. Since the Consumer Credit Directive is not of immediate priority to our members, no details are given.

I. THE NEW CONSUMER AGENDA

II. EMPOWERING CONSUMERS IN THE GREEN TRANSITION

1. **Product warranties, commercial guarantees, durability requirements and remedies**
2. **Green claims and logos**
3. **PEF and OEF methods**

III. GENERAL PRODUCT SAFETY DIRECTIVE

1. **Obligations of distributors**
2. **Exemption from certain obligations of manufacturers, importers and distributors: 'Isolated cases'**
3. **The role platforms in relation to the GPSD**

COMMENTS BY INDEPENDENT RETAIL EUROPE IN DETAIL

I. THE NEW CONSUMER AGENDA

Independent Retail Europe stresses the importance of EU consumer policy being consistent. It is imperative that new and newly revised EU legislation is first transposed into national law, enforced properly and applied for a number of years, before introducing additional legislation. Whilst consumer rights are and should continue to be a priority for the EU, they should not hinder the Internal Market. Divergences in Member States in consumer protection make it difficult for businesses, especially SMEs, to operate cross border.

II. EMPOWERING CONSUMERS IN THE GREEN TRANSITION

It should be emphasised that products are inherently very different which makes a one-size-fits all approach impossible. The different types of failures require more or less complex repairs. Certain repairs can and should only be undertaken by experts for reasons of complexity, product safety et al. It should also be noted that notwithstanding the crucial importance of the Green Transition, ecological considerations can only play a partial role in the context of consumer protection.

1. Product warranties, commercial guarantees, durability requirements and remedies

The discussion on guarantees is very relevant to our members which is why our organisation has been actively working on this issue in the context of the Proposal on Contract Rules for Goods. The concepts of warranties, guarantees and durability have to be clearly distinguished.

Commercial guarantees are and should remain optional and should not be harmonised as the length of a guarantee is a part of a company's commercial offer and a valid means for differentiating itself from the competition.

Legal guarantees or warranties and the burden of proof thereof should in our view be fully harmonized at a reasonable level across the EU to provide legal certainty for consumers and companies alike. The period and the burden of proof have now been only partially harmonised in the above mentioned contract rules proposal.

As regards **durability**, our organisation continues to have reservations about the introduction of a durability obligation for manufacturers. We consider that product durability should not be promoted in this manner, but should remain a voluntary choice by the manufacturer. There are also major practical issues with such an obligation. For example, who would verify a products' durability? Furthermore, a product's durability will change depending on usage.

The manufacturer, who alone masters the design choices of the product, must remain free to determine the durability of his product and to choose whether or not to communicate on this. The obligation of the retailer is then limited to communicating that piece of information to the consumer, so that the consumer understands that any price premium is justified by a supplier's contractual commitment on durability. Durability cannot be the responsibility or liability of the retailer, as retailers cannot be held liable for activities that are not under their direct control.

Indeed, different pieces of EU legislation refer to this principle, namely the General Product Safety Directive (Directive 2001/95/EU, GPSD) as well as the General Food Law (Regulation 178/2002/EC). Product durability is under the manufacturer's, not under a retailer's control, the retailer should therefore not be made to guarantee this by an obligatory extension of his responsibility or his burden of proof.

We therefore support that any indications on the durability of a product should be voluntary and up to the manufacturer.

We support the idea of a **hierarchy of remedies** as provided in Article 13 of Directive (EU) 2019/771. This approach allows a graduated and appropriate response to a particular claim. For example, a repair may be more appropriate than a replacement product for certain products. We however believe that the seller should be able to choose the appropriate remedy for the claim at hand as the seller is best able to assess the feasibility or appropriateness of each remedy. For example, a replacement product is not feasible if the product line has ended and no equivalent alternative product exists. Equally, a product repair may not be appropriate e.g. for reasons of product safety or because repair would require more resources than a replacement.

➔ The provisions as set in the **Directives on contract rules for sales of physical goods (Directive (EU) 2019/771) and digital content (Directive (EU) 2019/770)** as well as the **Implementing Regulations to Directive 2009/125/EC on Eco-design are sufficient** and should first be transposed into national law and applied for a few years, before the introduction of additional legislation makes sense.

2. Green claims and logos

Independent Retail Europe was actively involved in the multi-stakeholder group representing the whole supply chain that had been set up by the Commission on environmental claims and that had developed a set of '**Compliance Criteria on Environmental Claims**'. These criteria reflect a common cross-sector understanding of the correct application of the Unfair Commercial Practices Directive (UCPD) in this area and has fed into the revision of the updated UCPD Guidance as published in May 2016. **These criteria continue to be valid and we still fully support them.** We also advise policy makers to consult this original document as cautiously developed by the multi-stakeholder dialogue rather than spending time and resources to re-engage the multi-stakeholder dialogue in doing exactly the same thing as a few years previously thereby duplicating this original work.

In the course of the discussions, stakeholders already then considered that the introduction of new EU labels, logos and corresponding legislation was not advisable, given the multitude of already existing well-known national (e.g. Nordic Swan, Green dot) and EU wide (Ecolabel, Energy Label) logos, labels and claims. **We continue to support this position that there is no need for new EU labels, logos or corresponding EU legislation with an environmental objective.**

3. PEF and OEF methods

We see more disadvantages than advantages of the Product Environmental Footprint (PEF) and the organisational environmental footprint (OEF) methods. Experience has shown that these methodologies are overall problematic.

a) Advantages

- The Product Environmental Footprint Category Rules (PEFCRs) enable ecological analyses of the entire supply and value chain of products.
- A common methodology for a product life cycle assessment is useful as it enables a fair comparison.

b) Disadvantages

- **Little clarity on what needs to be measured and how it should be measured** (data collection). It seems that there would be little comparability of results from company to company depending on the which data would be collected and results even within the same product categories.
- Not clear how this should work for products that are not basic textiles or footwear. **Measuring the impact of complex goods, for instance pieces of sports equipment (tents/ treadmills, ski's etc.) is extremely difficult,** likewise for other technical goods and food products.
- There are likely to be **conflicts with social or ethical requirements/goals**. However, taking more criteria into consideration would make it impossible to calculate the impact. Experience on former labelling obligations in France have shown that already the three indicators (carbon, air and water) proved too complicated to calculate.
- The **high costs of product-specific PEFCRs analyses (seasonality, recipe changes) and the lack of independent evaluation (competition, greenwashing) and verification**. Not clear who would be

verifying that the information that the companies put on the labels and who checks that it is actually correct and accurate.

- **High complexity complicates customer-oriented communication with a clear steering effect**. (extensive dependencies linked to product use, origin of raw materials, type of storage and duration, etc.)

Concluding remarks PEF/OEF

The PEF is very complex, which makes it difficult to carry out correctly and therefore comparison may not be correct. In addition, there is no control over how it is carried out. As it only focuses on environmental/ecological aspects, the PEF does not give a comprehensive view of sustainability, as sustainability is wider than environment. Environmental sustainability can conflict with ethical and social requirements, which can be equally important to consumers.

Summary

➔ There should be **no more EU labels or legislation, the current ones are sufficient.**

➔ The **concepts of warranties, guarantees and durability** have to be **clearly distinguished**.

➔ There should be **no durability obligation for manufacturers**.

➔ **Retailers cannot not be held responsible or liable for durability.**

➔ **PEF/OEF are too complex**, leading to unreliable results that are difficult to compare. PEF/OEF should therefore remain voluntary and be up to industry.

➔ **Environmental sustainability does not rhyme with overall sustainability.**

III. GENERAL PRODUCT SAFETY DIRECTIVE

Independent Retail Europe welcomes the Commission's effort in looking into the application of on the DIRECTIVE 2001/95/EC on general product safety (GPSD). We wish to share some general comments on two issues of particular concern to our membership:

1. Obligations of distributors

Legal certainty is **not guaranteed** with the current wording of Article 5 (2) GPSD which is too vague and does not clarify the necessary steps like it is the case in other pieces of guidance and legislation in the EU product safety regime. A clearer wording of obligations of distributors is necessary for legal certainty. Our proposal for a possible adaptation of distributor's obligations in Article 5 (2) is therefore as follows:

> *Distributors shall be required to act with due care to help* ***to*** *ensure* ~~*compliance*~~ ***that the products they make available on the market are compliant*** *with the applicable safety requirements*~~*, in particular*~~ *by not* ***distributing*** *products which they know or should have presumed, on the basis of the information in their possession and as professionals,* ***not to be compliant*** *with those*

> *requirements* ***because these are evidently not accompanied – be it on the pack or in the accompanying documents – by the necessary markings or information as specified in Decision 768/2008.***

Distributors should only need to check for the presence of the required information. This would enable all distributors, particularly SMEs, to apply the regulation more efficiently and in a legally certain way.

2. Exemption from certain obligations of manufacturers, importers and distributors: 'Isolated cases'

An isolated case is the situation where a problem is noticed with only one sample of a product. In such a situation, a distributor may be unable to determine with certainty whether the source of this isolated case comes from the product itself, from an inappropriate usage of this product by a consumer or if the entirety of the production line of products is faulty.

The provision addresses what had previously been an issue for distributors (notably SMEs) as they risked being sued by manufacturers if they unnecessarily reported a product to the competent authorities.

Because legislators have recognised this problem it is covered *inter alia* in the Blue Guide accompanying the GPSD. The European Commission and the European Parliament took it a step further in the context of the Draft Consumer Product Safety Regulation (published in 2013), in which a provision on 'isolated cases' was even included in the main text.

We welcome this acknowledgment of the situation and believe the issue should be taken into consideration when reviewing the GPSD. There should be a provision on isolated cases along the lines of **Article 13 of the *Proposal for a Regulation of the European Parliament and of the Council on consumer product safety*** *and repealing Council Directive 87/357/EEC and Directive 2001/95/EC* (published in 2013) and more specifically Amendments 79-80 of the European Parliament Plenary Report of 25.10.2013.

As a general principle of the product safety regime, the provision on isolated cases should be generally applicable, i.e. applicable for all products, harmonised and non-harmonised.

3. The role of platforms in relation to the GPSD

With a rise in online sales, we believe that the role of platforms, particularly those allowing non-EU sellers to sell imported products to EU consumers, deserves additional attention. It goes without saying that product safety should also be a top priority here.

Our groups of independent retailers are in a unique position in the EU market to fully apprehend the diversity of the online ecosystem, as well as the benefits and challenges that it may raise, notably in terms of product safety and competitiveness, as they operate platforms for their members, whilst their members are also users of third party platforms.

Some of our members, particularly non-food operators, report that they are regularly confronted with – often cheap – illegal goods made available on online platforms by competitors, especially, but not exclusively, from non-EU countries. This leads to unfair competition, consumer harm and a lack of trust in online sales. Some of them have contacted their public authorities in this regard.

However, identifying and reporting illegal goods and non-compliant traders on online platforms is complex for both retailers and platforms. Strict regulation will therefore make it much harder for new smaller third-party platforms to enter the market and only have the effect of strengthening the oligopoly of existing platforms.

In this context, there are different types of platforms and business models, whereby certain types of platforms are more exposed to a risk of illegal activities (e.g. dangerous products) by their users than others. It is crucial to make a distinction between platforms to assess the creation of any possible new obligation, in order to ensure a proportionality between the obligation and the risks. **We believe that the discussion on possible new responsibilities/obligations for online platforms in relation to illegal offers should take into account the diversity of the types of platforms and the consequential differences in risk of exposure to dangerous goods. This is a necessary condition for taking a balance approach that would not hinder market access and innovation**.

Open vs. Closed Platforms

For instance, groups of independent retailers have or are in the process of creating online platforms to allow their members (who are independent retailers with physical shops in the EU) to digitalise and sell online in order for them to remain competitive in the modern retail market. As retailers established in the EU, they are already bound by a high number of legal obligations in relation to product safety and consumer protection. Moreover, the 'know your customer' principle is automatically applied by such platforms, as they are made only for members of the group and/or for trusted third parties. This type of closed platform does not raise the risk for consumers of exposure to non-compliant goods.

Sellers with EU establishment vs sellers without

The risk for consumers of exposure to non-compliant goods by business users is much higher on third-party platforms acting as marketplaces, especially when there is a high number of non-EU operators without an established subsidiary in the internal market. In such cases, it is not uncommon to see dangerous/non-compliant products sold by business users on such platforms, which not only harms consumers but also constitutes unfair competition to compliant traders.

Any update of the regulatory regime should reflect the risk of exposure to dangerous goods

We are therefore of the opinion that online platforms should only have a very restricted set of responsibilities in addition to the responsibilities of the sellers on these platforms (implementing the 'know your customers' principle, cooperation with enforcement authorities and fast removal of any good notified to the platform by public authorities as non-compliant). **Additional responsibilities in relation to product safety should only be considered for platforms with a higher risk of exposure to such goods** (e.g. notice and take-down system with counter-notice possibilities, etc.).

Moreover, where products are sold by non-EU sellers through online marketplaces, such marketplaces have a crucial role to play to ensure that their business users established outside the EU comply with the requirements set by the recently adopted Regulation on market surveillance and compliance of products for harmonised goods (Regulation 2019/1020). Such marketplaces should further play a role

to ensure that the responsibility of an importer (which is the non-EU seller on the platform) placing illegal/dangerous/counterfeit goods on the EU market can effectively and easily be enforced **through an EU-based entity**. This could follow the logic of the "**authorized representative"** concept known from the EU waste legislation. In the context of general minimum requirements for extended producer responsibility (EPR) schemes, "Member States may lay down requirements, such as registration, information and reporting requirements, to be met by a legal or natural person to be appointed as an **authorised representative** on their territory" (Art. 1 (9) 5. para 3 & 4, Directive 2018/851). In analogy with Directive (EU) 2018/851 on Waste as well as in Directive 2012/19/EU on Waste Electrical and Electronic Equipment, a potential obligation for third-country sellers/importers to designate an authorized representative in the EU (as long as this authorized representative can be identified and addressed) should therefore also be considered in the context of product safety.

Also, further reflection is necessary with regard to a possible responsibility for online marketplaces with a significant risk of non-compliant products to inform consumers in case of a confirmed non-compliant purchase. Such an obligation raises practical difficulties if it were made applicable to all operators. While compliance may not raise major difficulties for large third-party online marketplaces (as they hold comprehensive consumer data), this is not the case for offline retailers which do not hold such data as consumers are reticent to provide detailed data at a physical retail shop.

Therefore, any such requirement – if introduced at all – should strictly be limited to large online platforms with a significant risk of exposure to non-compliant products. This distinction would be justified by the specificity of the online environment (higher risk of illegal activities, consumers' detachment from the seller), a lack of an EU establishment, the absence of the same level of liability for online platforms by opposition to offline retailers and by the fact that platforms operated by groups of independent retailers (and reserved to retailers members of the groups or to trusted parties) do not raise any particular risk of exposure to illegal activities, – hence restoring a similar level of responsibilities/protection online/offline taking into account objective differences.

Summary

- **Clearer wording of distributors' obligations**.
- **Explicit provision on so-called 'isolated cases'**.
- Clear **delineation of different types of platforms and of their respective obligations**, with a limited set of new responsibilities proportionate to the risk of exposure to non-compliant goods.

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.
Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 24 groups and their 380.980 independent retailers, who manage more than 757.000 sales outlets, with a combined retail turnover of more than 971 billion euros and generating a combined wholesale turnover of 291 billion euros. This represents a total employment of more than 6.486.000 persons.

More information about Independent Retail Europe under www.IndependentRetailEurope.eu