

Feedback of the European Law Institute

on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final)

(Final Word version – the final publication will be available on ELI [website](#) in due course)

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I. Introduction

1. Context of the Proposal

To achieve the European Commission's (EC) objective of Europe becoming the first climate-neutral continent as set out in the European Green Deal¹, the EC is currently working on various initiatives to promote sustainability in different areas of the law. As part of the New Circular Economy Action Plan² and the New Consumer Agenda³, the EC announced a proposal on common rules promoting the repair of goods on 22 March 2023 (Repair of Goods-P).⁴ The main objectives of the Proposal are to avoid premature disposal of viable goods purchased by consumers and to promote more sustainable consumption (Recital 3), while maintaining a high level of consumer protection (Recital 1). The Proposal is based on Art. 114 Treaty on the Functioning of the European Union (TFEU). This Proposal aims to contribute to the better functioning of the internal market by setting out a harmonised system of rules to promote repair within and beyond the legal guarantee for the sale of goods purchased by consumers.

2. Structure of the Feedback

The following Feedback will analyse the proposed consumer's right to repair within the scope of the Sale of Goods Directive (SGD) as well as the newly proposed Directive which introduces measures beyond the legal guarantee period of the SGD.⁵ It will evaluate the proposal in order to determine whether the Proposal achieves its goal to introduce *'common rules promoting the repair of goods, with a view to contributing to the proper functioning of the internal market, while providing for a high level of consumer and environmental protection'* (Art. 1(1)). Finally, the Feedback briefly addresses the enforcement of the proposed Directive and its coordination with other recent EC proposals that touch upon complementary aspects of sustainability in consumer law.

3. Scope of Application and Level of Harmonisation

The Proposal applies to the repair of all defective goods that are purchased by consumers and repairable, provided that the defect occurs outside the seller's liability pursuant to Art. 10 SGD (Art. 1(2)), in particular because of the expiration of the two-year guarantee period under the SGD. The Proposal distinguishes between two types of goods. The first type of goods refers to those for which reparability requirements are specified by Union legal acts, as listed in Annex II of the Proposed Directive. These are mainly goods for which the Ecodesign for Sustainable Products Regulation

¹ The European Green Deal, 11.12.2019, COM(2019) 640 final.

² A new Circular Economy Action Plan, 11.3.2020, COM(2020) 98.

³ New Consumer Agenda, 13.11.2020, COM(2020) 696 final.

⁴ Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation 2017/2394/EU, Directives 2019/771/EU and 2020/1828/EU, 22.3.2023, COM(2023) 155 final.

⁵ On the implementation and impact of the SGD (and the DCD) in all EU Member States, see De Franceschi/Schulze (eds.), *Harmonizing Digital Contract Law*, Beck – Hart – Nomos, 2023, forthcoming.

Proposal (ESPR-P)⁶ or the implementing measures adopted pursuant to the Ecodesign Directive⁷ provide rules regarding design and reparability. According to Art. 5(1), producers⁸ of these goods are obligated to provide repair services. However, the effectiveness of this requirement is limited due to the protracted progress of Ecodesign legislation. In contrast, for all other repairable goods, producers are not obligated to offer repair services, but may choose to do so; this includes producers of clothes, furniture, amongst others. In addition to producers, any natural or legal person can provide repair services for all goods, including those covered by ecodesign requirements. The term ‘repairer’ encompasses producers and sellers that provide repair services, as well as other repair service providers, whether independent or affiliated with such producers or sellers (Art. 2(2)).

In line with most consumer law directives enacted since the Unfair Commercial Practices Directive (UCPD)⁹, the EU legislator has chosen a full harmonisation approach for the proposed Directive (Art. 3). By fully harmonising the right to repair and other accompanying measures in the field of legal guarantees at the EU level, it acknowledges the growing proportion of sales occurring across EU borders. Moreover, full harmonisation improves legal certainty for consumers as well as for businesses. While the proposed Directive does not include traditional opening clauses for Member States, the limited scope of its provisions and the fact that some of its provisions read more like recommendations will reduce its impact. It has therefore been put forward that, *‘[i]f enhancing competition between legal orders in the area of sustainability is desired, opening clauses or even regulatory sandboxes could be considered in order to allow Member States to introduce more sustainable measures’*.¹⁰ The SGD should not prevent Member States from maintaining or introducing deviating provisions in their national laws to the extent that these provisions enhance the ‘environmental added value’ (understood as reducing the strain on the environment or preserving the environment in compliance with sustainable development goals, including, but not limited to, removal, prevention, reduction, mitigation of pollutants released into the environment, restoration of damage to the environment or the use of natural resources in a more efficient and sustainable

⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting Ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final, 30.3.2022.

⁷ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of Ecodesign requirements for energy-related products (recast).

⁸ According to Art. 4(2), ‘producer’ means a manufacturer as defined in Art. 2, point (42) of Regulation [on the Ecodesign for Sustainable Products]. Art. 5(2) further explains that where the producer that is obligated to repair is established outside the Union, its authorised representative in the Union shall perform the obligation of the producer. Where the producer has no authorised representative in the Union, the importer of the good concerned shall perform the obligation of the producer. Where there is no importer, the distributor of the good concerned shall perform the obligation of the producer.

⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the European Parliament and of the Council and Regulation 2006/2004/EC of the European Parliament and of the Council, OJ L 149/22.

¹⁰ *Augenhof*, Response of the European Law Institute to the European Commission’s Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse, April 2022, p. 15, available under: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf, last accessed 02/05/2023; *Micklitz/Mehnert/Specht-Riemenschneider/Liedtke/Kenning*, Right to repair, Publications of the Advisory Council for Consumer Affairs, Berlin Sep. 2022, p. 4 regard a sandbox mechanism as a ‘must-have’ to avoid national initiatives to test new ways of regulation from being suffocated.

manner while upholding consumer protections established by the SGD).¹¹ In addition, B2B relationships need to be considered as well: *‘For the goal of sustainability to be reached, it is imperative that the right to repair – as well as other means which foster sustainability – are also strengthened in B2B contracts. Here it is up to national legislators to act. However, a proposal by the EC for B2C relations could serve as a model for national amendments. In order to provide legal certainty for businesses, it would also be preferable if there were no differences between B2B and B2C rules’.*¹²

4. Key Aspects of the Proposal

a. Repair within the Legal Guarantee Period

The Proposal adds a second sentence to Art. 13(2) SGD that will prioritise repair as a remedy for lack of conformity of the goods with the contract where the costs for replacement of the goods are equal to, or greater than, the costs for repair. Under such circumstances, the seller is obligated to repair the goods to bring them into conformity whereas the consumer has no right to choose a replacement, even when based on Art. 13(2) first sentence SGD, when the replacement would cause less convenience to the consumer (lit c). Hence, it is misleading that the EC, in its press releases concerning the Proposal, used the term ‘right to repair’ as the consumer (at least within the legal guarantee period) is not granted an additional right or remedy, but rather loses the right to choose between repair and replacement under certain circumstances.

b. Repair beyond the Legal Guarantee Period

aa. General remarks

The Proposal introduces rules fostering a more competitive aftersales repair market. First, producers of goods that are subject to mandatory reparability requirements are obligated to offer repair services when repair is possible. However, as mentioned earlier, the scope of this obligation is limited to the product categories listed in Annex II. Hence producers of all other goods – and, therefore, the producers of most consumer goods – are free to choose whether or not to offer repair services. Furthermore, independent repair shops are also exempt from any obligation to repair. While the proposed Directive obliges producers of the products falling under Annex II to offer repair, they remain free to set a price for the repair service offered. Consequently, producers may be inclined – if they wish to avoid the obligation to offer repair services in practice – to set unreasonably high prices for repairs, leading consumers to seek assistance from third-party repairers instead or to refrain from repair altogether. In general, greater emphasis should be placed on making repair attractive for independent repair shops in order to foster competition within the repair market. The Proposal does not contain any rules regarding the contract (especially its formation) for the provision of repair

¹¹ Zoll/Watson/Południak-Gierz/Bańczyk/Richter/Estifanos, Academic Proposal for amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, *Transformacje Prawa Prywatnego* 2022, 109, 118.

¹² *Augenhofer*, Response of the European Law Institute to the European Commission’s Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse, April 2022, p. 15, available under: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf, last accessed 02/05/2023.

services. These contracts will continue to be governed by the applicable national law. Without more specific rules regarding the cost of repair, and without more obligations imposed on producers regarding the availability of spare parts, the Proposal offers limited value.

That being said, an obligation for the producer to offer repairs will not have an impact on the individual preference of consumers who often desire the latest version of certain electronics or other consumer goods (such as the latest fashion).¹³ The discussion on the actual utilisation of consumers' right to repair falls outside the scope of this Feedback. Consumers who intend to make more sustainable consumer choices will, at any rate, benefit from the inclusion of a right to repair.¹⁴

Since consumers bear the cost of repairs beyond the legal guarantee period, the EC aims to create a framework with competitive repair prices. Therefore, several initiatives have been set up: first, the recent EU Commission Regulations, which are based on the Ecodesign Directive, stipulate that manufacturers or importers must ensure professional, appliance-specific repair and provide for maintenance information and spare parts within a specified period of time. However, the regulations have a rather limited scope – mainly focusing on larger electronic devices¹⁵ – and the issue of reparability by third parties will continue to exist for the time being.¹⁶ Second, the Proposal for a Directive on the Legal Protection of Designs (Recast) (DD-P)¹⁷ was published with the primary aim of introducing a harmonised 'repair clause' in the EU, thereby achieving a certain liberalisation of the market for 'must-match' spare parts across the EU. These initiatives seek to increase transparency on the repair market and to promote cross-border repair. Consequently, the conditions under which consumers can ask for repair might be improved. Nevertheless, doubts remain as to whether these goals will actually be achieved in practice. The Proposal does not seem to fully consider the significance attributed to prices. In addition to establishing fixed rules on prices, the provision of stronger financial support could potentially produce effective incentives to actively pursue repair. Over the last couple of years, some Member States have introduced a repair bonus to ensure

¹³ *Augenhofer*, Response of the European Law Institute to the European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse, April 2022, p. 8, available under: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf, last accessed 02/05/2023.

¹⁴ Cf. *Micklitz/Mehnert/Specht-Riemenschneider/Liedtke/Kenning*, Right to repair, Publications of the Advisory Council for Consumer Affairs, Berlin Sep. 2022 who evaluate not only the functional, but also the social and emotional value of goods to consumers.

¹⁵ Household washing machines and household washer-dryers according to Commission Regulation (EU) 2019/2023; household dishwashers according to Commission Regulation (EU) 2019/2022; refrigerating appliances with a direct sales function according to Commission Regulation (EU) 2019/2024; refrigerating appliances according to Commission Regulation (EU) 2019/2019; electronic displays according to Commission Regulation (EU) 2019/2021; welding equipment according to Commission Regulation (EU) 2019/1784; vacuum cleaners according to Commission Regulation (EU) 666/2013; servers and data storage products according to Commission Regulation (EU) 2019/424; mobile phones, cordless phones and tablets according to Commission Regulation (EU) forthcoming. The sustainable products initiative aims to make more product groups sustainable: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en, last accessed 9/5/22.

¹⁶ This is also an issue of competition law as well as IP law, cf. Aaron Perzanowski, *The Right to Repair*, Cambridge 2021; cf. also the Memorandum of Understanding between Johan Deere and the American Farm Bureau Federation according to which farmers have access to John Deere's diagnostic repair codes, manuals, diagnostic tools, available under https://www.fb.org/files/AFBF_John_Deere_MOU.pdf, last accessed 02/05/2022.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on the legal protection of designs (recast), COM(2022) 667 final, 28.11.2022.

affordability of repair. These initiatives have been significantly effective, making comparable approaches at the EU level highly advisable.¹⁸ However, the aforementioned changes do not address the challenges faced when the producer is located outside the EU.

bb. In-depth analysis of the proposed provisions

During the EC Consultation on ‘Sustainable Consumption of Goods – Promoting the Right to Repair and Reuse’ in spring 2022 (‘EU-Consultation’), the EC emphasised the important role of the SGD in the EU’s wish to create a circular economy.¹⁹ Therefore, it is quite astonishing that the Proposal contains only one single amendment to the SGD, namely prioritising the right to repair over replacement as the primary remedy in the case of non-conformity of goods (Art. 12). All other policy options regarding the SGD (Cluster I), which were discussed in the EU-Consultation, were either discarded before or after the Impact Assessment process. Instead, policy options focusing on repair and reuse beyond the legal guarantee period (Cluster II) were preferred.²⁰ This choice was made *‘based on an analysis of effectiveness, efficiency and coherence [...], a weighing of options based on the cost-benefit analysis (CBA) and their ranking in the multi-criteria analysis (MCA) comparison, as well as based on considerations of subsidiarity and proportionality and in view of the synergies they produce’*.²¹ This analysis is hardly convincing and based on a conspicuous flaw: all policy options concerning the SGD were weighed against each other,²² while failing to consider a combination of the options regarding the SGD (as was the case in Cluster II options). A more sustainable sales law could have been attained by, eg, prioritising repair and granting consumers an additional guarantee period of one year after such repair and giving sellers a right to replace defective goods with refurbished goods. A set of well-coordinated options could have the potential of developing a more effective, efficient, and coherent proposal.

On the other hand, the specific design of the provision that prioritises repair over replacement is also questionable. As mentioned above, as long as repair is not more expensive than replacement, the consumer does not have a right to object to the repair, even if it creates significant inconvenience. This gives the seller an advantage compared to the status quo. Given that the consumer will not be able to challenge the seller’s claim that repair is more expensive than replacement, the approach of the Proposal seems to be more about introducing a ‘duty to accept’ repair rather than a ‘right’ to repair.

Finally, the Proposal aims at promoting repair services and establishing a common market for such services. However, in doing so, it disregards the actual environmental costs of repair. The promotion of cross-border repair can be ecologically unfriendly as it boosts environmental costs related to

¹⁸ <https://repair.eu/news/there-is-life-on-mars-financial-incentives-to-make-repair-affordable/> last accessed on 9/5/23.

¹⁹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en.

²⁰ Commission Staff Working Document Impact Assessment Report, SWD(2023) 59 final (‘IA-Report’), p. 171 et seq and p. 66 et seq.

²¹ IA-Report, p. 66.

²² Besides, the IA focuses on economic efficiencies and lacks the societal dimension of the EU rules. The importance of considering the impact beyond the market is outlined in *Micklitz/Mehnert/Specht-Riemenschneider/Liedtke/Kenning*, Right to repair, Publications of the Advisory Council for Consumer Affairs, Berlin Sep. 2022.

transport. Moreover, fostering cross-border repair means that those repairers that are established in countries with lower environmental standards have a competitive advantage.

- **The limited factual and personal scope of provisions proposed reduces the impact of the Proposal. To promote sustainability, Member States should consider implementing a more environmentally friendly contract law also regarding B2B contracts. In addition, the limited scope of the Proposal could be overcome by allowing Member States to introduce regulatory sandboxes.**
- **Instead of amending the SGD to achieve a more sustainable framework for sales law, the Proposal focuses on policy options beyond the legal guarantee.**
- **The scope of application of the essential obligation of the producer to offer repair beyond the legal guarantee period (Art. 5) is exceedingly limited.**

II. Right to Repair within the Legal Guarantee Period of the Sale of Goods Directive

The Proposal contains only one amendment to the SGD, namely the prioritisation of repair over replacement as a remedy according to Art. 13 SGD, in case repair is less or equally expensive as replacement (Art. 12).²³ Below, this policy option and its potential for conflict will be discussed first. This is followed by a brief analysis of ‘missed’ opportunities, which could have supported a more sustainable sales law.

1. Prioritising Repair over Replacement

a. Problems regarding drafting

According to the proposed wording of Art. 12, a new sentence will be added to Art. 13(2) SGD, reading as follows: *‘In derogation from the first sentence of this paragraph, where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods in order to bring those goods in conformity.’* In the explanatory memorandum, it is stated that Art. 13(2) lit. a-c SGD remain untouched, but that *‘the seller should always repair the goods where the costs for replacement are equal to or greater than the costs for repair. As a result, the consumer may only choose replacement as a remedy when it is cheaper than repair’*²⁴. This amendment creates disadvantages for the consumer without exactly achieving the goals set out by the Proposal.

First, the interrelation of the two sentences of Art. 13(2) SGD is prone to cause problems whenever the **consumer prefers replacement over repair**. Art. 13(2) lit. a-c SGD states that the consumer can prefer replacement, as long as this does not impose costs on the seller that are *disproportionate* compared to repair. The disproportionality is ascertained by weighing the interests of the parties. The consumer, for example, currently has a right to insist on replacement if the non-conformity is significant and/or reduces the value of the goods significantly and the defect cannot be fully repaired, or rather repairing the goods causes significant inconvenience to the consumer. However, if the proposed sentence is added, the first sentence of this paragraph loses its meaning. Even if repair causes significant inconvenience to the consumer, the seller can choose to repair – because repair costs the same as replacement or is cheaper. Consequently, neither the inconvenience experienced by the consumer, nor any disproportionality is considered relevant. While this can be a policy choice of the EU lawmaker, from a methodological point of view, it is a case of poor law-making, as one rule is eroded by adding a new one without clarifying the consequences.

Secondly, if the **consumer prefers repair over replacement**, the proposed new sentence in Art. 13(2) SGD may lead to interpretation issues. The new rule suggests that the choice of the consumer should be respected by the seller if repair costs are either cheaper or equal to the costs of replacement. If the costs of repair are higher than the costs of replacement, the proposed second sentence allows the seller to reject repair. However, this is not what is stated in Art. 13(2) first sentence SGD,

²³ Objecting to the change in the hierarchy of remedies, BEUC, Response to the EC Public Consultation on sustainable consumption of goods – promoting the right to repair and reuse, 2022, p. 4, accessible under: https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-034_public_consultation_on_right_to_repair.pdf, last accessed 9/5/23.

²⁴ Repair of Goods-P, Explanatory Memorandum p.13 and Recital No 28.

according to which, the seller can reject the consumer's choice of repair *only* if it imposes costs on the seller that are disproportionate, considering all the circumstances.

Both scenarios show that the problem is too multifaceted to be solved by simply adding one sentence to a system that has been developed over years. The better option seems to be to redraft Art. 13(2) SGD entirely.

- **Simply adding a new paragraph to Art. 13 SGD without considering the consequences for the existing provision suggests that not enough attention was paid to consistent law-making.**
- **The proposed amendment of Art. 13 SGD might necessitate an adjustment in the interpretation of Art. 13(2) sentence one SGD. Currently this provision enables the seller to reject the consumer's choice between repair and replacement if the selected remedy is impossible to implement or places disproportionate costs on the seller.**

b. Problems regarding enforceability

With the proposed new sentence, the cost factor will become the main justification for the seller to either impose or reject repair. First, calculating these costs rests within the purview of the seller. Although the seller carries the burden of proof regarding the costs, the consumer will not have the necessary knowledge to object to the cost calculation. Moreover, since the seller is most often not the producer, he/she is not the party that carries the final costs of repair or replacement. The seller's incentive to repair might be limited if the producer does not offer a repair service that the seller has access to. The seller will often have the means and motivation to manipulate the desired outcome by cost-calculation. A consumer may also be inclined to accept a replacement offered by the seller instead of repair, even if there is no valid justification, such as high costs. Due to the inherent inclination of consumers to place a higher level of trust in replaced items as opposed to repaired ones, the likelihood of them insisting on repair is considerably low.

c. Problems regarding the protection of consumer interests

As mentioned above, the consumer's right to choose replacement no longer exists if repair is cheaper or as equally burdensome as replacement. Unfortunately, this disadvantage of the consumer has not been compensated by granting the consumer alternative rights. To raise the trust of consumers in such an extended application of repair, it is advisable to introduce an additional liability period after repair. If repair is prioritised over replacement, it is essential to ensure that the quality of repair services reaches an adequate standard. In recital 27 of the Proposal, the EC mentions the idea of developing a voluntary European quality standard for repair services to boost consumers' trust in repair.

Regrettably, the EC did not incorporate such standards in the Proposal. It would have been an important step towards a functioning repair culture to obligate the seller to provide the consumer with a substitute good if the repair takes a certain amount of time and to establish an absolute time limit for repairs. Prioritising repair over replacement certainly creates a tension between consumer protection and empowerment, on the one hand, and environmental protection, on the other. To

promote the circular economy which the EC is envisaging, this policy might be an effective tool. The EC should consider different options that could balance legitimate consumer interests with sustainability initiatives.

In principle, according to the current version of Art. 13(2) of the SGD, the seller is granted the right to reject replacement based on the argument of disproportionality only when it is possible to fully restore the conformity of the good through repair. Given that the new sentence to be added does not consider the interests of the consumer, possible side-effects of repair, such as stains, marks etc., will no longer be considered as a legitimate cause to reject repair. Particularly, goods such as cars can have a diminished market value as soon as they undergo repair, even if no recognisable evidence of such repair remains. Whether or not the consumer will have a remedy under these circumstances is left unresolved in the Proposal. In the above-mentioned cases, it seems justified to give consumers a right to reduce the price of the consumer good if repair does not offer a complete remedy. Art. 13(4)(b) SGD can serve as a basis for such price reduction.

If repair is emphasised as the primary remedy for the purpose of upholding the contractual agreement, it is not recommended to provide the consumer with the alternative option of terminating the contract instead of seeking a price reduction. This is possible under the current version of Art. 13(4) SGD. Repair combined with a price reduction ensures that consumer interests are adequately protected (see also below para 2/f regarding the need to promote the right to reduce the price as a sustainable remedy). An additional right to terminate could undermine the right of the seller to repair.

- **Simply limiting the consumer's choice of remedy without granting any rights to compensation (eg extending the liability period in the case of repair, the option to ask for replacement with a refurbished good instead of granting the consumer the right to ask for a loaner during the repair) decreases the consumer's trust in repair.**
- **The EC should introduce mandatory quality standards for repair services.**

2. Missed opportunities

As mentioned, the Proposal only chose one of the suggestions in the EU Consultation (prioritising repair). Some of the promising policy options presented initially, as well as some other proposals in the literature, will be discussed briefly below. Instead of an either/or approach, it would have been advisable to combine some of the policy options, as their joint application would enhance sustainable consumption.

a. Revision of the objective requirements for conformity

In the current version of the SGD, the only conformity requirement relating to sustainability is the requirement of 'durability' as stated in Art. 7(1) lit. d SGD. Other than that, the Directive emphasises twice in its recitals 32 and 48 that sustainable consumption should be encouraged. It would have been an important statement by the EU to further expand the objective requirements of conformity, considering different aspects of sustainability. The question of whether reparability is part of

durability is subject to widespread discussion in the literature.²⁵ Therefore, it is recommended to clarify in Art. 7(1) lit. d SGD that consumers can expect reparability for durable goods.²⁶ Also, under the SGD, to meet the objective requirements for conformity, goods must adhere to legal standards: a failure to meet legal standards renders the good objectively defective. This would be in line with Art. 2(29) and Art. 8 ESPR-P, which introduce a product passport for some product groups in order to inform consumers about reparability, as well as the Proposal for a Directive on empowering consumers for the green transition (ECGT)²⁷, which provides for better information on the durability and reparability of goods by way of a reparability score (Art. 2 ECGT-P). Emphasising the need for goods to comply with ethical production processes and environmental standards would further emphasise the importance of such product claims made in the chain of transactions and that consumers can anticipate conforming goods.²⁸

- **A clarification of the seller's obligation to provide updates for goods with digital elements should be made with regard to the period during which the consumer may 'reasonably expect' such updates.**

b. Clarification regarding the duration of update obligations

No special durability requirements for goods with digital elements exist under the SGD. The obligation of the seller to ensure that the consumer has all necessary information and is supplied with updates, including security updates (Art. 7(3) SGD), serves the sole purpose of maintaining the usability of durable goods with digital elements. The update obligation of the seller is of utmost importance, especially for all durable electronic goods, with an ever-expanding significance as more and more goods have a digital component. Although Art. 7(3) and Art. 10(2) SGD give a timeframe regarding these obligations, many questions remain unresolved due to a lack of legal certainty of the wording (i.e. '[...] for the period of time that the consumer may reasonably expect [...]').²⁹ The EU legislator would be well advised to revise these provisions in order to ensure a uniform application as well as a longer use of goods with digital elements.³⁰

²⁵ See eg for Germany, *Croon-Gestefeld*, Die nachhaltige Beschaffenheit der Kaufsache, NJW 2022, 497, 501; *Bach/Kieninger*, Ökologische Analyse des Zivilrechts, JZ 2021, 1088, 1093; cf. also *Micklitz/Mehnert/Specht-Riemenschneider/Liedtke/Kenning*, Right to repair, Publications of the Advisory Council for Consumer Affairs, Berlin Sep. 2022. *Van Gool/Michel*, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) *EuCML* 2021, 145 f; *Terryn/Keirsbilck*, Belgium, in A. De Franceschi and R. Schulze (eds.), *Harmonizing Digital Contract Law*, Beck – Hart – Nomos, 2023, forthcoming.

²⁶ See *De Franceschi*, Consumer's Remedies for Defective Goods with Digital Elements, (2021) *JIPITEC* 141 et sequ.

²⁷ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final, 30.3.2022.

²⁸ Cf. the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive 2019/1937/EU, 23.2.2022, COM(2022) 71 final.

²⁹ See eg *Wendehorst*, The Update Obligation – how to make it work in the relationship between seller, producer, digital content or service provider and consumer, in Lohsse, Schulze, Staudenmayer (eds), *Smart Products*, Nomos, Baden-Baden 2022, pp. 77 et seq.; *Janssen*, The Update Obligation for Smart Products: Time Period for the Update Obligation and Failure to Install the Update, same Volume, pp. 95 et seq.

³⁰ Cf. also Art. 2 ECGT-P, which proposes a change to the Consumer Rights Directive and introduces information obligations for goods with digital elements regarding 'the minimum period in units of time during which the producer provides software updates, unless the contract provides for a continuous supply of the digital content

- **The Proposal fails to seize the opportunity to enhance the list of objective requirements of conformity in terms of sustainability by including reparability of durable goods and compliance with ethical production processes and environmental standards.**

c. Introduction of a continuous obligation to maintain the conformity of durable goods

By introducing a continuous obligation of the seller to supply updates after delivering the goods, the traditional one-off sales law obligation of the seller to ‘just’ transfer ownership has been fundamentally altered. The seller’s obligations are now extended to also include the period after ownership has lapsed. Therefore, the decisive moment for the non-conformity of the goods is no longer the moment of passing of risk, i.e. delivery. Acts and omissions of the seller after delivery can also lead to the goods being non-conforming.

Once this paradigm shift is accepted, it may also be discussed whether it makes sense to introduce a maintenance obligation of the seller (or the producer as cheapest cost avoider) for certain specific durable goods. These maintenance obligations would target later non-conformities. Regarding goods with IoT elements, remote software-driven fault diagnostic techniques would easily facilitate preventive checks. A timely exchange of filters and wearable parts, as well as professional maintenance, could be conducted at certain intervals. These could even be incentivised in addition to updates: by informing the consumer that failure to perform such maintenance checks could result in, for example, a limited liability of the seller (Art. 7(4) SGD). However, this dynamic might strengthen the position of manufacturers and consequently decrease their incentives to produce durable goods in the first place if they benefit from an ongoing service relationship.

- **An obligation of the seller to maintain the conformity of a product for a certain period of time after the delivery of a good could be introduced.**

d. Introduction of a new category of goods: refurbished goods

The Proposal does not take up the policy option to introduce special provisions for refurbished goods, although the Explanatory Memorandum states that *‘[t]he vast majority of all stakeholders also agreed that providing incentives to buy and use refurbished goods is an important objective for promoting sustainable consumption. A clear majority of all respondents considered the EU the appropriate level for action.’*³¹ In fact, two policy options seem to have a good chance of supporting sustainable consumption *in addition to* prioritising repair over replacement:

Given that some businesses already today offer refurbished goods as an addition category (besides new and second-hand goods),³² or online platforms focus on refurbished goods,³³ it can be assumed

or digital service over a period of time.’ However, this information has to be included only if the producer makes such information available.

³¹ Repair of Goods-P, Explanatory Memorandum p. 5, see also IA-Report p. 44.

³² See, eg, <https://www.renaultgroup.com/en/news-on-air/news/circular-economy-recycle-renault/>; <https://www.apple.com/at/shop/refurbished>.

³³ <https://www.amazon.de/Zertifiziert-Generalueberholt/b?ie=UTF8&node=10676131031>

that refurbished goods will become more important than ‘just’ second-hand goods.³⁴ The approach of the proposed Directive is also to promote the sale of refurbished goods via an online platform (see below III/5), which would include a search function by product category, enabling consumers to find sellers of refurbished goods (Art. 7(2)). ‘Refurbishment’ in the sense of Art. 2(18) ESPR-P means ‘preparing or modifying an object that is waste or a product to restore its performance or functionality within the intended use, range of performance and maintenance originally conceived at the design stage, or to meet applicable technical standards or regulatory requirements, with the result of making a fully functional product’. To allow sellers to reduce the liability period for refurbished goods to one year – as for second-hand goods which have not been remodelled – is not convincing. The trust of consumers in refurbished goods would certainly increase if the seller were liable for a two-year period. Given that, even for second-hand goods, 14 Member States have not allowed a contractual shortening of the liability period,³⁵ it would make sense, also in terms of a level playing field in Europe, to at least introduce a fixed two-year liability period for all refurbished goods. Refurbished goods will not be as budget-friendly as second-hand goods, as they undergo a thorough check before being sold, which is factored into the price. Therefore, they do not deserve the protection of a shorter liability period. Although the IA-Report suggests that the environmental impact of extending the liability period for refurbished goods will be limited,³⁶ the aggravated effect of implementing several policy options together is certainly higher.

In addition, refurbished goods could also play an important role with regard to the primacy of repair as a remedy. The seller could be granted the option of offering the consumer a replacement with a refurbished good instead of repairing the non-conforming good. This would not counteract the sustainability objective as refurbished goods are also renewed goods. This could even be a better option for the consumer, as the waiting period for repair would not be an issue. Naturally, refurbished goods must adhere to specific quality standards to ensure consumers are not placed at a disadvantage. The quality of refurbished goods should align with the original standards to achieve conformity. The Proposal is different from Sub-option 3A and 3B,³⁷ as it gives the consumer the right to reject such offers and choose the option of repair of his or her own non-conforming product. The seller should be granted a right to offer replacement with refurbished goods instead of repair.

- **In order to increase the consumer’s trust in refurbished goods, the liability period for this category of products should not be shortened.**
- **The seller could be granted the option to offer the consumer a replacement with refurbished goods instead of repairing the non-conforming goods as long as the refurbished goods meet the standard of conformity.**

³⁴ *Augenhofer*, Response of the European Law Institute to the European Commission’s Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse, April 2022, p. 11, available under: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf, last accessed 02/05/2023.

³⁵ IA-Report p. 46.

³⁶ IA-Report pp. 45-46.

³⁷ IA-Report p. 43.

e. Liability periods

aa. In general

The proposed Directive discards the policy option of prolonging the liability period in Art. 10 SGD for goods in general, or more specifically for durable goods.³⁸ The Impact Assessment Report states that: *'The option extending the current minimum liability period of two years to three years has been discarded. Extending the liability period for both repair and replacement has a detrimental effect because, given the choice, consumers would prefer replacement. This would not serve the purpose of promoting repair but rather have a negative impact on sustainability, contributing to increased waste and use of resources.'*³⁹

This argument is not convincing for several reasons:

First, the prioritisation of repair during the first two years of the liability period would obviously be applicable in a possible third year. Therefore, consumers would not have an unlimited right to ask for a replacement. The problem seems to be, again, the either/or approach of the EC and the 'missing' combination of different policy options.

On the other hand, it would have been a viable policy option to grant consumers a right to repair only, for eg, a third and fourth year, thereby protecting the interests of sellers (by not granting rights such as price reduction or termination of the contract) as well as promoting sustainable usage of goods. Although the survey-data of the EU suggests that most of the non-conformities of goods already appear during the first two years after delivery,⁴⁰ this result might be related to an average usage of goods for only such period. In case consumers are successfully incentivised to use their durable goods for longer periods, the likelihood that non-conformities are recognised after two years will increase. A 'repair liability' of three to four years, starting from delivery of the goods, would have been an incentive in the right direction.

In the current proposed scenario, consumers will have a repair option after the two years have lapsed only in exchange for payment (except for rare gratuitous repair offers). This appears contradictory. On the one hand, the EU is trying to extend the life expectancy of durable goods by promoting Ecodesign legislation with detailed rules regarding the lifetime of various product groups. These require, eg, producers to provide spare parts for goods such as washing machines for ten years. Thereby, the requirements at least imply that these goods will work for ten years. On the other hand, the EU is limiting liability to just two years, a mere fifth of the implied ten-year lifetime. Granting consumers an additional one- to two-year period of repair free of charge would not align the liability period with the product's estimated total durability/lifespan. Of course, this is likely to result in higher prices for

³⁸ Legal guarantee periods might be expanded on the product basis (to be defined in the Ecodesign legislation), cf. BEUC, Response to the EC Public Consultation on sustainable consumption of goods- promoting the right to repair and reuse, 2022, p. 2 f, accessible under: https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-034_public_consultation_on_right_to_repair.pdf, last accessed 9/5/23.

³⁹ IA-Report, p. 171.

⁴⁰ European Commission, Consumer Market Study to support the Fitness Check of EU consumer and marketing law, Final Report, May 2017, Section 1.3.3.2, Table 34 p. 148, available at <https://op.europa.eu/en/publication-detail/-/publication/a8d7ca32-772c-11e7-b2f2-01aa75ed71a1/language-en/format-PDF>.

consumers as businesses will pass on their additional costs to consumers via the original retail price. In this way, the costs are spread out to all consumers.

The reasoning of business stakeholders *'that granting repair for free beyond the legal guarantee and for cases of wear and tear and/or mishandling of products does not incentivise good care and maintenance practices by consumers'*⁴¹ seems to be at least not supported by scientific data. On the contrary, there are many Member States which, by granting longer liability periods,⁴² show that this is not the case. Otherwise, one could assume that the Member States' lawmakers would intervene and shorten the liability period to two years. Article 10(3) SGD, therefore, rightly grants Member States the freedom to introduce longer liability periods.

It is true that consumers must be incentivised to use their goods carefully and for longer periods if sustainability is to be taken seriously. However, the same incentivisation is needed on the producer side. A regime in which sellers (and thereby producers) must assume liability only for two years of the expected ten years of a good's lifespan, and can afterwards charge for each repair, does not appear to set the right incentives. (Cf. also below II/2/g regarding a lack of rules on fraudulent behaviour of producers).

bb. Liability periods after repair or replacement with refurbished goods

Prolonging or restarting the liability period after repair is discussed in the IA-Report in depth as policy option 2 A and B. The Report concludes that such prolonged periods seldom incentivise consumers to choose repair over replacement.⁴³ However, the EU lawmaker has chosen to prioritise repair over replacement; that is, the consumer no longer has a choice in most cases. By preferring to eliminate consumers' choice between repair and replacement, the Proposal, to a great extent, places the burden of sustainability on the consumer. The consumer's interest in replacement is no longer protected as long as repair is cheaper.

If this is the policy choice of the EU lawmaker, then the consumer should at least be granted a longer liability period. The same is true for the policy option to give the seller the right to replace the goods with refurbished ones (II/2/d). In both scenarios, an extended liability of, eg, an additional year after repair or replacement with refurbished goods, would protect consumers if new problems arise with the goods, and, moreover, would better distribute the burden of proof between the parties. Given that research conducted by the EU shows that *'on the EU28-level, 71% of all respondents said that the defect appeared within the first six months after purchase (less than 1 month / between 1-6 months)'*, such additional period would seldom burden sellers, as it would not even prolong the liability period. Nonetheless, such additional liability period would send a message to consumers that, in the future, they have to accept repair but also have additional protection for their 'sacrifice'. Again, the approach of discussing the policy options separately and not combining some of them seems to have led to this negative outcome for the consumer.

⁴¹ IA-Report p. 97.

⁴² Cf. De Franceschi/Schulze (eds.), *Harmonizing Digital Contract Law*, Beck – Hart – Nomos, 2023, forthcoming).

⁴³ IA-Report p. 41.

- **The liability period of durable products should be extended.**
- **After the first two years of liability, the consumer's remedy may be limited to repair.**
- **In case of repair or replacement with refurbished goods, the consumer should be granted an additional liability period.**

f. Remedies

As outlined above, the remedy of price reduction could play an important role in attaining a more sustainable sales law. For example, in cases where production methods do not meet the ethical standards set by the Corporate Sustainability Due Diligence Directive Proposal, the possibility of price reduction can be vital, as the non-conforming goods cannot be repaired or replaced in order to restore their conformity.⁴⁴ Given that efficient private law enforcement in such cases is of utmost importance to increase compliance with the Corporate Sustainability Due Diligence Directive Proposal, consumers should have a right to have the price reduced accordingly.

Price reduction is a remedy which avoids a termination of the contract and can also support the remedy of repair. It may not be used to bring about effects of the termination of the contract de facto already at the first level and thus to circumvent the two-level system of remedies. Particularly from an environmental perspective, price reduction should not lead to additional consumption by consumers. In comparison, replacement and avoidance seem to be the more unsustainable remedies. Despite the potential of price reduction as a remedy, the EU lawmaker's decision to retain it among the second tier of remedies is not convincing. Given that a claim for replacement under the new regime of Art. 13(2) SGD will seldom exist, it would be more convincing to design replacement and avoidance as the second-tier remedies. This is, in fact, the choice of the Convention on International Sale of Goods (CISG), which allows for replacement or avoidance only in cases where the breach of contract is a fundamental breach (see Art. 46(2) and 49(1) lit. a CISG). Such a comprehensive revision of Art. 13 SGD could also consider the above-mentioned inconsistency between Art. 13(2) first sentence SGD and the proposed second sentence.

- **Price reduction as a remedy should be promoted in cases where repair or replacement is not an effective option given the costs (also for the environment).**

g. Special provisions for the case of fraudulent behaviour of the producer and/or seller

The Consumer Sales Directive of 1999⁴⁵ as well as the SGD lack provisions regarding fraudulent behaviour of the seller and/or producer. This fraudulent behaviour can include planned obsolescence, i.e., targeted incorporation of vulnerabilities into products, or their subsequent manipulation through software changes, so that, shortly after the expiry of the liability period, the goods are no longer functional and must be exchanged. Examples from the smartphone industry have already led national competition authorities to impose fines on producers.⁴⁶ Moreover, countries like France have

⁴⁴ See also below V.2 regarding ECGT-P, which makes additions to Annex 1 of the UCPD defining new commercial practices relating to sustainability issues which are always considered to be unfair.

⁴⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12.

⁴⁶ <https://www.politico.eu/article/italy-hits-apple-samsung-with-fines-over-planned-obsolescence/>

introduced specific rules in their Consumer Code penalising such behaviour.⁴⁷ Another type of defrauding conduct is misleading information regarding compliance with, eg, environmental standards. The infamous “Volkswagen emissions scandal” is a good example for such behaviour.⁴⁸

The problem is that this type of behaviour can often only be uncovered after the two-year liability period has elapsed. Many national laws have provisions which bar the seller from relying on the expiration of limitation or warranty periods if they knew of the non-conformity of the goods⁴⁹, thereby giving the buyer a chance to make use of his or her remedies even after the two-year period. However, in the above-mentioned cases, these rules have no effect as the sellers were not, and could not have been, aware of the fraudulent behaviour of the producers. In countries where the buyer does not have a direct claim against the producer based on the sales contract, the only chance that the buyer has to hold the producer liable are tort law rules. In such liability claims, it is often difficult to prove fault on the side of the producer. Liability rules (contractual as well as tortious) aim at encouraging economic actors to internalise the negative effect of their illegal behaviour. If businesses can enjoy the economic benefits of such behaviour due to the under-enforcement of liability rules, sustainable production targets will not be reached. Besides, according to Art 1(4) ECGT-P, new practices are added to the list of commercial practices which are to be considered as unfair under all circumstances according to the list contained in Annex I of the UCPD. These new prohibitions could be enforced by consumers via the remedies introduced recently in the Omnibus Directive⁵⁰ (price reduction, compensation for damage, contract termination). Yet, relying on the enforcement of the UCPD presupposes that private law enforcement is effective, which, in fact, it is not due to ineffective collective enforcement. Therefore, a special provision to extend the liability period in such cases is needed.⁵¹

- **The liability period needs to be extended in cases of fraudulent behaviour of the producer.**

h. Direct claim against the producer to repair

Another missed opportunity concerns a direct claim of the consumer against the manufacturer during the legal guarantee period under the SGD. Such a claim was discussed as early as the preparation of the Consumer Sales Directive 1999 and again before the passing of the SGD.⁵² While

⁴⁷ Art. L441–2 CCons and Art. L454–6 CCons.

⁴⁸ ECJ 17.12.2020 – C-693/18 *CLCV*, ECLI:EU:C:2020:1040; *Riehm*, “Dieselgate” und das Deliktsrecht, DAR 2016, 12; *Janssen*, The Dieselgate Saga: the Next Round, EuCML 2022, 169;

⁴⁹ Art. 40 CISG even applies if the seller ‘could not have been unaware’ of the lack of conformity.

⁵⁰ Directive 2019/2161/EU of the European Parliament and of the council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, OJ L 328/7.

⁵¹ See for a critical analysis with a comparative approach, cf. *Fuglinszky*, ‘The Conceivable Ways and Means of the Further Harmonization of European Product Liability Law – Mandatory Direct Claim against the Producer for Repair or Replacement?’ ZEuP 2018, 590; *Fuglinszky*, Hungary, De Franceschi/Schulze (eds.), *Harmonizing Digital Contract Law*, Beck – Hart – Nomos, 2023, forthcoming.

⁵² Consumer Sales Directive, Rec. 23; SGD Rec. 18; *Wendehorst*, *Direkthaftung des Herstellers (Teil I)*, VbR 2020, 94; *Wendehorst*, *Direkthaftung des Herstellers (Teil II)*, VbR 2020, 81; BEUC, Response to the EC Public Consultation on sustainable consumption of goods- promoting the right to repair and reuse, 2022, p. 4, accessible under: https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-034_public_consultation_on_right_to_repair.pdf, last accessed 9/5/23; so far (according to rec. 63 SGD) it is left

there have always been good arguments for such direct claims in light of the green transition and the modern world of supply chains, such a right seems to be even more timely: *'The manufacturer is usually best placed to have the knowledge required to repair their products, to know when replacement is preferable to repair, to have access to spare parts and they also have the possibility of influencing production in a way that facilitates repair at a later stage. Hence, the manufacturer is the cheapest cost avoider as they can design and produce more durable and easily repairable products'*.⁵³

The current model, focussing on claims along the supply chain, imposes additional costs on the seller instead of charging the producer.⁵⁴ A direct claim against the manufacturer would also shorten the turn-around time of repairs, which would help to foster consumers' acceptance of the proposed 'duty' to repair. A direct claim against the manufacturer would also provide for more sustainability, as it would avoid the 'journey' a defective good would have to travel, first from the consumer back to the seller – who most likely will not be able to offer repair on his premises – and from the seller to the producer and all the way back to the consumer. While a direct claim against the manufacturer seems to be an important step towards the green transition, the consumer should always have the choice between asking the seller or the manufacturer for repair or replacement (especially when the consumer does not know the manufacturer or how to reach him or her in the case of a 'no name product'). If the manufacturer is not located in the EU, one could oblige the seller, distributor or importer of the good to bear the costs that would normally be borne by the producer, as is suggested in Art. 5(2) for the manufacturer's obligation to repair outside the legal guarantee for certain products and which is the approach taken in the current Product Liability Directive (1985)⁵⁵ as well as in the Proposal for a Revised Product Liability Directive (2022) (PLD-P)⁵⁶.

to the Member States to introduce a direct claim against the producer which Portugal made use of: *Carvalho*, The Implementation of the EU Directives 2019/770 and 2019/771 I Portugal, *EuCML* 2022, 31, 34.

⁵³ *Augenhofer*, Response of the European Law Institute to the European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse, April 2022, p. 14, available under: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf, last accessed 02/05/2023.

⁵⁴ *Wendehorst*, *Direkthaftung des Herstellers*, Teil I, *VbR* 2020, 94 (96); *Faber*, *Neues Gewährleistungsrecht und Nachhaltigkeit* (Teil II), *VbR* 2020, 57 (63).

⁵⁵ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29.

⁵⁶ Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final, 28.9.2022.

III. Right to Repair Beyond the Legal Guarantee Period of the Sale of Goods Directive

1. Overview

The explanatory memorandum to the Proposal claims that, beyond the right to repair during the legal guarantee, further measures *'will make repair easier and more attractive for consumers, increasing repairs and the lifetime of consumer goods.'*⁵⁷ This goal could be achieved by introducing a European Repair Information Form (ERIF) for everyone offering repair services (Art. 4), an obligation to repair for producers after the legal guarantee period has lapsed in case they produce goods for which reparability requirements are provided for by Union legal acts (Art. 5), and finally an online platform which provides information on repair services and refurbishment options (Art. 7).

Common to all repair service providers are the provisions in Arts. 4 and 7. According to Art. 4(1): before a consumer is bound by a contract for the provision of repair services, the repairer shall provide the consumer, upon request, with the ERIF. Whereas producers which are obligated to repair according to Art. 5 have to offer such an information form, all other repair service providers are free to decide first whether they wish to provide the repair service. If not, they may abstain from providing an ERIF (Art. 4(2)).

- **A direct claim against the producer to repair the defective good should be introduced to avoid additional costs along the supply chain and offers consumers an easy and accessible remedy.**

2. Obligation to repair

a. In general

Article 5 introduces an obligation of the producer⁵⁸ to repair – upon request of the consumer – for certain products, namely those which are stated in Annex II of the Proposal. In addition to this limitation of the factual scope of obligation to certain product categories, the obligation only exists if the good is technically repairable and only outside the legal guarantee period. A direct claim of the consumer against the producer to repair non-conforming goods is desirable because of the arguments stated above and should hence have been introduced also during the legal guarantee period (see. II/2/h). However, the concrete design of the obligation in Art. 5 is subject to too many constraints to have a major impact on sustainability or to help achieve a higher level of consumer protection.

Regarding the wording, it has to be noted that the articles addressing the time frame beyond the legal guarantee period use a different term than that in the suggested amendment of Art. 13 SGD: they refer – in line with the terminology of the Product Liability Directive – to defective goods (versus non-conformity under the SGD). It should be clarified in the Proposal that cases of non-conformity are still treated as defects under Art. 5 et sequ. if the non-conformity becomes apparent after the end of the two-year legal guarantee period.

⁵⁷ COM(2023) 155 final, p. 7.

⁵⁸ See above fn. 7 for the definition.

b. Product groups mentioned in Annex II

As mentioned, the obligation of the producer to repair requires that the defective good is regulated by the EU legal acts mentioned in Annex II. These regulations relate to various types of electronic devices, such as washing machines, but also products like welding machines. While the average consumer will buy several washing machines during his or her life span, it seems to be a safe assumption that welding machines are not necessarily typical consumer products. The impact of Art. 5 might increase, however, when the proposed regulation of the reparability of smartphones is added to Annex II. Although consumers often show consumerism and disregard the fact that a product is repairable (or maybe not even defective at all), it would have been preferable if the suggested obligation to repair encompasses all consumer goods, not only those addressed in EU legislation stated in Annex II. The fact that producers already regularly advertise the reparability of products shows that repair is possible – beyond the two-year legal guarantee. This is especially the case regarding clothing and shoes,⁵⁹ but also electronic goods not mentioned in Annex II, such as microwaves, coffee machines, etc. Therefore, the product groups for which repair is mandatory should be expanded.

c. Reparability and price

According to Art. 5(1) sentence 1, the producer is only obligated to repair if repair is not impossible. While this sentence seems to first state the obvious – nobody can be legally obligated to fulfil an impossible obligation – this provision becomes more understandable when one reads the introduction to the Proposal, which names as an example for impossibility ‘*where goods are damaged in a manner, which makes repair technically unfeasible* (Art. 5(1) sentence 2)’.⁶⁰ The EC should clarify in the directive itself that the requirement that repair is possible does not mean it is financially possible (contrary to the suggested Art. 13 SGD), but technically possible. It must also be stressed that, under the current Proposal, it seems to be almost impossible for the consumer to prove that repair is possible if the producer claims the contrary.

Article 5 does not regulate any details of the repair obligation but leaves it to the market to set the conditions for the repairs offered. The Proposal states that it is up to the producer to offer the repair either for free or at a certain price (Art. 5(1)). While it seems the right decision to leave the price of the repair to the market, the hope expressed in the explanatory memorandum to the Proposal that Art. 5 will foster competition among producers and hence some producers will offer the repair free of charge seems to be overly optimistic: producers who are willing to offer repair beyond the legal guarantee period already do so either in the form of a commercial guarantee (which will be priced into the sales price or is offered for an extra fee at the time of the purchase) or as a form of commercial practice, which might not fulfil the criteria of a commercial guarantee under the SGD but is offered as one element of an advertising campaign. All other repair services offered by producers

⁵⁹ The following shops offer repairs to their customers beyond the legal guarantee: Patagonia for clothes <https://www.patagonia.com/returns.html>; Sandqvist for backpacks <https://www.sandqvist.com/en/repair-shop>; Schöffel offers repair and other services for outdoor gear https://www.schoeffel.com/de/de/dynamic/service_factory?gad=1&gclid=Cj0KCOjwr82iBhCuARIsAO0EAZw5B_rSM1sMPnklmmpHfTJeR7QVm7zz_Rf86305RQiVj_QnmNld_ogaAuNgEALw_wcB; Zalando recently introduced a care, repair, refresh service in Berlin <https://zalandocareandrepair.saveyourwardrobe.com/>.

⁶⁰ Repair of Goods-P, Explanatory Memorandum p. 11.

are currently offered for a fee. Article 5 does not set out any provisions which would give producers an incentive to do otherwise.

d. Upon request of the consumer

While Art. 5 of the Proposal introduces the producer's obligation to offer repair, it is upon the consumer to request it. The producer, however, must inform the consumer about his or her obligation under Art. 5, according to Art. 7 of the Proposal. The details of this information duty of the producer remain rather vague, as it is upon the Member States '*to ensure that producers inform consumers of their obligation to repair pursuant to Art. 5 and provide information on the repair services*'. Article 7 only states that the information must be given '*in an easily accessible, clear and comprehensible manner*', for example, through the online platform referred to in Art. 7. This reference is known from other directives, such as the Consumer Rights Directive⁶¹. The form in which the information is provided will also have to pass the unfairness test under the UCPD. One way to meet this information duty is to publish all necessary information on an online platform for repair, which has to be established by the Member States (Art. 7(1)). As will be discussed (see III/5), this online platform will be attractive neither for consumers nor producers and hence it seems unlikely that producers will choose the online platform introduced under Art. 7. As has been noted elsewhere, it would be more effective if the information were provided at the time of conclusion of the contract⁶², eg, by the seller or on the package of the good, or if the information were constantly available after the contract conclusion. The more awareness about a right to repair is raised among consumers, the more consumers will actually consider using this option.

e. Repair by third parties

Article 5(1) last sentence of the Proposal gives producers the right to engage sub-contractors to fulfil their repair obligation. However, this sentence should not be interpreted in such a way that the repair contract is concluded between the sub-contractor and the consumer. The obligation to repair is legally on the producer. Even if sub-contractors are used, it is the producer who must be held liable for any breach of the repair contract. The possible negative effects of an 'outsourcing' of producers' obligations, especially the risk of insolvency, should not be borne by the consumer. It seems advisable to include the necessary clarifications in Recital 13.

f. Transnational settings

In today's globalized world, consumers often purchase goods from producers who are based outside the EU. In this case, the obligation to repair rests with other economic operators along the supply chain. After the producer, the next entity responsible for repair is the producer's authorised representative in the EU (Art. 5(2)). In case the producer does not have such a representative in the EU, the importer or subsidiary of the distributor shall perform the producer's obligation. By obliging these parties to fulfil the obligation of the producer, the Proposal seeks to ensure that the obligation

⁶¹Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64.

⁶²<http://recent-ecl.blogspot.com/2023/03/new-green-deal-proposals-published.html>.

is effective in transnational settings and aims to help producers located outside the EU to organise the performance of repair.⁶³ This provision is remodelled on Art. 3 of the Product Liability Directive. It appears unlikely that a distributor or importer is a better fit to perform repairs than the seller (while, under the Product Liability Directive, the producer/importer/distributor must pay damages and hence this problem does not arise). Therefore, it remains uncertain if this provision can increase the effectiveness of the producer's obligation to repair goods. Instead, consumers shall be granted the right to claim damages against an importer/distributor if the producer is not available for repair services so they can carry out the repair themselves or assign third parties to do so.

- **The producer's obligation to offer repair of goods beyond the legal period is crucial to promote sustainable consumption. However, the proposed provision in Art. 5 is subject to too many constraints to have a major impact on sustainability or to help achieve a higher level of consumer protection.**
- **The product groups for which repair is possible according to Annex II should be expanded. It should be clarified that the obligation to repair should only depend on whether repair is technically possible and not whether it is financially possible.**
- **It should be clarified that the producer can use a sub-contractor to fulfil its obligation to repair according to Art. 5 but cannot assign the obligation to a third party.**
- **It remains uncertain if the effectiveness of the producer's obligation to repair is increased by requiring the importer/distributor to repair the goods as they most likely are unfit to carry out repair. Instead, they should be subject to damages claims by consumers so that these can carry out the repair themselves and be reimbursed by the importer/distributor.**

3. Repair services outside the scope of Art. 5

Given that an obligation to conclude a contract is introduced only for producers of goods listed in Annex II, producers of all other type of goods (eg clothes, furniture) and all repair service providers that are not producers enjoy freedom of contract. Article 4(2) underlines this by giving such producers the right not to fill in the ERIF whenever they do not intend to provide the repair service. However, if the repairer decides to fill in the form, they are bound by it for 30 calendar days. In case a contract for repair is concluded in the following 30 days, the conditions defined in the information form shall constitute an integral part of the contract.

What remains open is whether the ERIF can be categorised as an offer which is binding for 30 days, or whether repairers not covered by Art. 5 shall have a right to reject the conclusion of the contract even during these 30 days (*invitatio ad offerandum*). Recital 10⁶⁴ suggests that repairers have the freedom not to conclude the contract even after providing an ERIF. This regulatory decision seems not convincing. It is incongruous to legally bind repairers to the information provided in the form for 30 days if they can declare their non-conclusion of the contract before the completion of the 30-day period. This would undermine the idea that consumers compare all offers on the market and to make an informed choice is frustrated, given that their best choice can declare that they will not conclude the contract. Repairers who are not obligated to offer repair under Art. 5 are already sufficiently protected, as Art. 4(2) gives them the right to reject the request for repair, and therefore also the

⁶³ Repair of Goods-P Rec. 15.

⁶⁴ Cf.. Repair of Goods-P, Explanatory Memorandum p. 10.

request to provide the ERIF. However, if they choose to provide such a form, they should be bound by it. This form also does not oblige the repairer to fix a price. If the price cannot reasonably be calculated in advance, the repairer only has to state the manner in which the price is to be calculated and the maximum price for the repair (Art. 4(4) lit. e).

- **The ERIF shall be considered a binding offer so that they are bound to the conditions as set out in the ERIF for 30 calendar days.**

4. Freedom to request the ERIF?

Repairers must provide consumers with the ERIF before the latter bound by a contract for the provision of repair services – but only if the consumer requests such a form (Art. 4(1)). It is surprising that, on the one hand, the EC considers the information contained in the ERIF as essential for the conclusion of a repair contract, while, on the other hand, such a form must only be provided upon request. This would mean that producers obligated to provide repair under Art. 5, as well as repairers who wish to conclude a repair service contract with the consumer, do not have to provide the form if the consumer does not request it. In addition, the repairer may charge the consumer costs which the repairer incurs for providing the information due the production of the ERIF (Art. 7(3)). This appears appropriate if repairers incur significant expenses to estimate the time needed to complete the repair, the price and other information required by the ERIF (Art. 4(4)). This fact makes it unlikely that consumers will request the form before most repairs, even if they are aware of their right to do so.

The information that is required to be included in the form can be accessed by the consumer on the repairer's website, rendering the form potentially redundant. The greatest advantage of the ERIF is that the repairer remains bound by the content of the ERIF (such as the estimated costs for the repair) for 30 days, which should help the consumer to gather different ERIFs and therefore compare different offers. If it were mandatory to also include the environmental costs of a repair service into the ERIF, consumers would be given the possibility to choose a repair service that is designed in the most environmentally-friendly manner. As the ERIF forms an integral part of the repair contract, a repair which led to greater environmental costs than those specified in the ERIF would constitute a breach of contract.

- **The impact of the ERIF appears minor as consumers have to pay to obtain an ERIF, which has a deterrent effect.**

5. Online Repair Platform

Article 7 introduces a new platform for repair services and refurbished goods to stimulate supply and demand and also to offer a marketplace to find the best match. Such online platforms have to include search functions, requests for the ERIF and contact information (Art. 7(1)). Considering that most repairers already have an online presence which can be found via regular search engines, it remains unclear if the benefits of such a repair platform outweigh the enormous administrative costs that Member States would have to bear. Moreover, at least one repair platform should be introduced by each Member State, so that their use in the case of transnational repair requests is limited. Although Member States should support cross-border registration by repairers, it remains in the Members

States' discretion '*how to populate the online platform*'.⁶⁵ One advantage of the provision is that the online platform would consider the accessibility for vulnerable consumers, such as persons with disabilities (Art. 7(1) lit. f). Taking these considerations into account, such platforms are better left to private businesses and regulated by competition law.

- **The envisaged online repair platform creates unnecessary administrative costs for the Member States, which could be avoided by leaving such platforms to private businesses. The latter solution would also better consider the fact that consumers often buy cross-border. Instead of introducing a new online platform providing all relevant information on repair, that information should be provided when the contract between the seller and the consumer is concluded.**

⁶⁵ Repair of Goods-P Rec. 22.

IV. Enforcement

Substantive law can only be as strong as its enforcement. The Proposal delegates its enforcement to the Member States that are obligated to ensure the effectiveness of the provisions (Art. 8(1)). In comparison to Art. 4 Representative Actions Directive⁶⁶, the proposed Directive allows Member States to extend the list of bodies allowed to take legal action to professional organisations having a legitimate interest in acting (Art. 8(2) lit. c). While the Representative Actions Directive requires qualified entities to have a non-profit-making character and to be independent, especially traders who have an economic interest in the representative action, professional organisations might include traders or other organisations which are profit-based. However, anybody aiming to bring a representative action still must comply with Art. 4 Representative Actions Directive so that the extension of the scope of the Proposal only applies to enforcement outside of the latter Directive.

Moreover, the Proposal does not oblige Member States to extend the scope of admissible bodies: the Member States only need to allow *'one or more of the following bodies'* to be able to take legal action. Therefore, the Member States might also limit the admissible bodies to public bodies, consumer or environmental organisations (Art. 8(2)). Consequently, the effectiveness of the Proposal's enforcement relies on the Member States.

- **Extending the list of bodies allowed to take legal action to professional organisations is very important.**
- **This extension should be mandatory for the Member States.**

⁶⁶ Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L409/1.

V. Coordination with other EU legal acts and proposals

Within the last year, the EC has published several different legislation proposals directly related to the objectives of reducing the negative life cycle and environmental impact of products as well as empowering consumers to take an active role in the green transformation of the EU. While such a challenge calls for complex legislation, their effectiveness depends on them being well coordinated. Therefore, the coordination of the EU? Repair Directive Proposal with other proposals must be analysed in more depth.

1. Proposal for establishing a framework for setting Ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022), 142 final

On the supply side, the ESPR-P sets the framework for design requirements regarding the production phase and introduces a delegation norm for acts of the Commission (Art. 5). The Proposal broadens the scope of application of the current Ecodesign Directive⁶⁷ both in terms of products ('any physical good that is placed on the market') and in terms of so-called performance as well as information requirements (Art. 6-7).

According to Art. 5(1) ESPR-P, products should be designed, among others, in a durable, reusable, and repairable manner. The design and production of goods allowing for repair is particularly important in the context of the proposed Directive. The ESPR-P further introduces in Art. 2(29) a 'Product Passport', which has several purposes. On the one hand, it should help consumers to make informed choices. In addition to the information on product labels and manuals, the consumers will be provided with information, among others, on the repair, disposal, disassembly, and recycling of goods. Moreover, the Product Passport enables third-party repairers to gain access to repair-relevant information. The ESPR-P supports repair as laid down in the Repair Directive Proposal by opening up the repair market so that consumers can benefit from better repairs, performed in shorter periods as well as at an affordable price.

In addition, it would seem advisable to adjust the conformity requirements of Art. 7 SGD to also reflect the information provided in such Product Passports (see above II/2/a).

- **The Product Passport, introduced by the ESPR-P, sets the conditions under which repair (as required by the Proposal) can be carried out.**
- **The conformity requirements of Art. 7 SGD should be adapted to the Product Passport.**

⁶⁷ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of Ecodesign requirements for energy-related products (recast) (Text with EEA relevance)

2. Proposal for a Directive as regards empowering consumers for the green transition, COM(2022) 143 final

On the demand side, the ECGT-P shall provide for better and reliable information on the durability and reparability of goods at the point of sale. This will enable consumers to make sustainable purchasing decisions so that they can take on a more active role in the green transition.⁶⁸

First, the ECGT-P makes additions to Annex 1 UCPD, defining new commercial practices relating to sustainability issues which are always considered unfair. Among others, displaying a sustainability label which is not based on a certification scheme⁶⁹; or making generic environmental claims for which the trader is not able to demonstrate recognised excellent environmental performance; omitting to inform the consumer that a software update will negatively impact the use of goods with digital elements; or omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability are new types of unfair behaviour. By defining such practice as unfair under the UCPD, the means to enforce consumer rights are enhanced, as the UCPD enables legal action to be taken by authorities against such practices (Art. 12 UCPD) or to be taken by harmed consumers claiming damages (Art. 11a UCPD).⁷⁰

Although it is an important step to qualify omitted information on early obsolescence as an unfair commercial practice (Annex (4)(23e) ECGT-P), solely informing consumers about such harmful behaviour does not represent a sufficient measure. The better policy option is, without a doubt, to prohibit the manufacture of products with premature obsolescence. This could be regulated in the ESPR-P.

In a second part, the ECGT-P addresses information requirements in the Consumer Rights Directive. Consumer information for contracts other than distance or off-premises contracts (Art. 5 Consumer Rights Directive) as well as those for distance and off-premises contracts (Art. 6 Consumer Rights Directive) are adjusted to also include sustainability-related information which includes information on the existence and length of a producer's commercial guarantee of durability for all types of goods, or the absence of such guarantee in the case of energy-using goods, and the reparability score, where available. In case such a reparability score is not applicable, consumers have the right to receive information made available by the producer about the availability of spare parts as well as to be provided with a user and repair manual (Art. 2 (2)(b), (3)(b) ECGT-P). The goal of this pre-contractual information requirement is to enable consumers to make informed decisions (Recital 31 ECGT-P).

The ECGT-P is certainly in line with the ideas put forward in the Repair Right Directive. However, in order to give the pre-contractual information additional impact, it would be advisable to include a reference to such information in Art. 7 SGD (see above II/2/a). Moreover, the effect of the reparability

⁶⁸ Yet, the paradigm that more information improves the consumer's awareness of their rights must be borne in mind, cf.. Ben-Shahar/Schneider, *The Failure of Mandated Disclosure*, *University of Pennsylvania Law Review* 2011, 647.

⁶⁹ A certification scheme for sustainability labels requires transparent, fair and non-discriminatory terms to all traders willing and able to comply as well as an objective monitoring which certifies that a product complies with certain requirements, and for which the monitoring of compliance is objective, based on international, Union or national standards and procedures and carried out by a party independent from both the scheme owner and the trader (Art. 1(1) lit. s ECGT-P).

⁷⁰ ECGT-P, Recital 19.

score appears to remain limited, as the Proposal does not establish a new unified score, but instead refers to already existing scores under EU law regarding some products.⁷¹

- **To further promote repair as laid out by the Proposal, the reparability score which is addressed by the ECGT-P should be extended so that consumers who wish to buy easily repairable products are informed about their reparability.**

3. Proposal for a Green Claims Directive, COM(2023) 166 final

The Green Claims Directive Proposal (GCD-P)⁷² is, in its own words, a *lex specialis*, ‘meant to act as a safety net for all sectors where environmental claims or labels are unregulated at EU level’⁷³. It does not aim to change existing or future sectoral rules (Art. 1(2) GCD-P). It is also not concerned with what constitutes an unfair commercial practice (i.e. generic environmental claims), but with how explicit green claims (Art. 3 GCD-P) and comparative green claims (Art. 4 GCD-P) have to be substantiated in order to be acceptable. They need to be communicated in a physical form or in the form of a URL, QR code or equivalent (Art. 5(6) GCD-P). Member States shall set up procedures for verifying the substantiation and communication of explicit environmental claims against these requirements.

Moreover, the Proposal includes provisions to regulate solely environmental labels. Member States must ensure that environmental labels fulfil the requirements set out in the Proposal and are subject to verification. Only environmental labels awarded under environmental labelling schemes established under EU law may present a rating or score of a product or trader based on an aggregated indicator of the environmental impact of a product or trader (Art. 7 GCD-P). A list of officially recognised environmental labels that are allowed to be used in the EU market will be published by the Commission (Art. 8(7) GCD-P). To review the substantiation of explicit environmental claims, Member States have to provide competent authorities with the power to monitor and verify the substantiation and communication of explicit environmental claims.

Whereas this Proposal also aims to convey accurate messages to consumers, it remains an open question whether, in this label/index/passport ‘jungle, the consumer will really be able to receive the important messages. Given that behavioural sciences show that only limited information can be absorbed by consumers while concluding a transaction, the better approach would probably be to limit the content of the information and to unify the way it is conveyed, eg via simple labels.

- **Instead of introducing multiple labels, passports and scores, important information should be conveyed eg via simple labels to enable consumers to absorb the information.**

⁷¹ ECGT-P, Explanatory Memorandum, p. 6.

⁷² Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims, COM(2023) 166 final, 22.3.2023.

⁷³ GCD-P, Explanatory Memorandum, p. 7.

4. Proposal for a new Product Liability Directive, COM (2022) 495 final

One of the major issues relating to the refurbishment and repair of goods is that they might later not provide the safety which the public at large is entitled to expect from them (see Art. 6 PLD-P). Under these circumstances, the liability of the manufacturer, the refurbisher and/or the repairer has to be clarified. This was discussed at length in the ELI Feedback on the PLD-P and will not be further elaborated on here.

5. Proposal for a Directive on the Legal Protection of Designs, COM (2022) 667 final

The DD-P was published with the major aim of introducing a harmonised ‘repair clause’ in the EU. According to Art. 19(1) DD-P, the protection of registered designs shall not be granted to a registered design constituting a component part of a complex product and which is only used to repair that complex product to restore its original appearance. Such a repair clause will give producers that do not hold the design right to a complex product the right to produce spare parts for these complex products. Increasing competition on the market for ‘must-match’ spare part production aims at giving third-party repairers easy access to these parts and reducing costs for consumers. However, according to the proposed solution, an instant full liberalisation will only occur for new designs. Designs already granted before the entry into force of the proposed Directive will continue to be protected for a transitional period of ten years.

A repair right is strongly restricted by other intellectual property rights of producers. It should therefore be clarified to what extent end-user licence agreements (EULAs) can dictate that the consumer loses all rights against the seller if eg the seal on the goods is broken. Furthermore, it must be determined to what extent repairs can be offered commercially by third parties without infringing patent or trademark rights.

- **By denying design protection to ‘must-match’ spare parts, the competition on the spare parts market will be increased in order to grant third-party repairers easy access to these parts so that ultimately repair costs decrease.**

6. Proposal for a Regulation on harmonised rules on fair access to and use of data, COM(2022) 68 final

Repairers that are not the producer usually have no access to the data generated using a product or digital element. As the Repair Directive Proposal covers goods with digital elements, third-party repairers might depend on the access to data produced by these goods to be able to successfully repair them. In this context, the Data Act Proposal (DA-P)⁷⁴ suggests that products be designed in a way that *‘data generated by their use are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user’* (Art. 3(1) DA-P). In addition, the data holder shall grant access to the data generated using a product or related service to third parties if the user requests this data (Art. 5(1) DA-P). This gives third parties the means to comprehend processes causing a

⁷⁴ Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data, COM(2022) 68 final, 23.2.2022.

defect. Consequently, the rights conferred on users and third parties in the Data Act Proposal facilitate repair of data-based goods.

- **The rights conferred on users and third parties in the Data Act Proposal facilitate repair of data-based goods.**

VI. Key findings of this Feedback

General remarks

1. The Proposal focuses on policy options beyond the legal guarantee instead of adjusting the SGD to attain a more sustainable sales law. It thus misses the opportunity to combine stronger consumer protection with the promotion of sustainability.
2. The limited factual and personal scope of the provisions proposed reduces the impact of the Proposal. To promote sustainability, provisions should consider implementing more environmentally-friendly contract law, also regarding B2B contracts. In addition, the limited scope of the Proposal could be overcome by allowing Member States to introduce regulatory sandboxes.
3. The Proposal lacks a holistic approach, not dealing with legal requirements in IP and competition law, although these requirements are crucial for fostering repair by third parties.

Right to repair within the legal guarantee

4. The proposed amendment to Art. 13 SGD puts consumers at a disadvantage compared to the status quo, as it results in the loss of a remedy rather than granting consumers a new 'right'.
5. Sellers are given an advantage under the Proposal, as they can reject repair or replacement based on cost considerations. Consumers will not be able to reject sellers' cost argument due to the lack of access to the cost calculation. The Proposal also fails to consider the environmental costs associated with repair.
6. Simply limiting the consumer's choice of remedy without granting any compensation rights (eg extending the liability period in the case of a repair, the option to ask for a replacement with a refurbished good instead of repair or granting the consumer the right to ask for a loaner during the repair) decreases the consumer's trust in repair.
7. The Proposal misses the opportunity to expand the list of objective requirements of conformity in terms of sustainability by not adding reparability of durable goods and compliance with ethical production processes and environmental standards. While the current version of the SGD allows this interpretation a clarification would be welcomed.
8. A clarification of the seller's obligation to provide updates for goods with digital elements should be given regarding the period during which the consumer may 'reasonably expect' such updates.
9. In the case of repair or replacement with refurbished goods, the consumer should be granted an additional liability period. In addition, price reduction as a remedy should be promoted in cases where repair or replacement is not an effective option given the costs (also for the environment).

10. A direct claim against the producer to repair the defective good should be introduced to avoid additional costs along the supply chain and to offer consumers an easy and accessible remedy.

Measures beyond the legal guarantee

11. The producer's obligation to offer repair of goods beyond the legal period is crucial to promote sustainable consumption. However, the proposed provision in Art. 5 is subject to too many constraints to have a major impact on sustainability or to help achieve a higher level of consumer protection.
12. The product groups for which repair is possible according to Annex II should be expanded. It should be clarified that the obligation to repair should only depend on whether repair is technically possible and not whether it is financially possible.
13. The envisaged online repair platform creates unnecessary administrative costs for the Member States, which could be avoided by leaving such platforms to private businesses. The latter solution would also better consider the fact that consumers often buy cross-border. Instead of introducing a new online platform providing all relevant information on repair, that information should be provided when the contract between the seller and the consumer is concluded.
14. The ERIF should be considered as a binding offer so that businesses using them are bound to the conditions as set out in the ERIF for 30 calendar days. Also, the impact of the ERIF as proposed will have little impact as consumers have to pay for an ERIF, which will have a deterrent effect.