

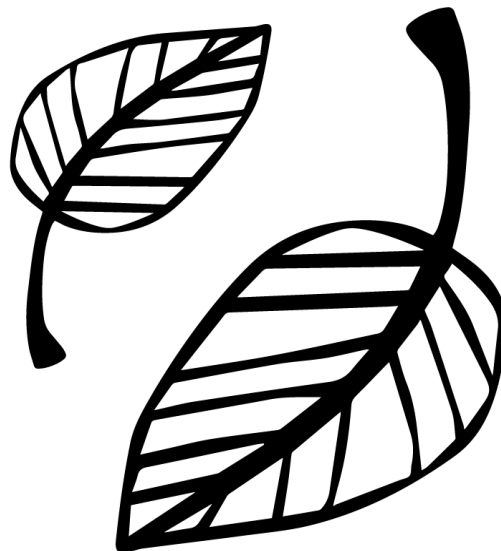
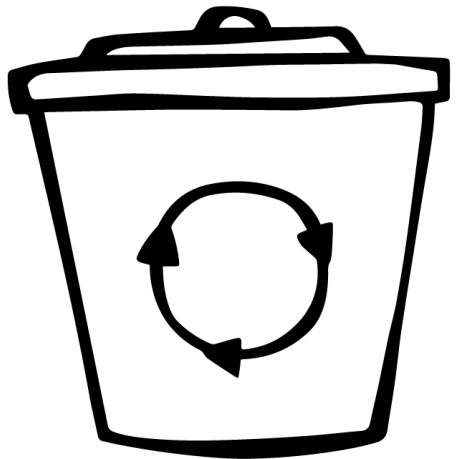
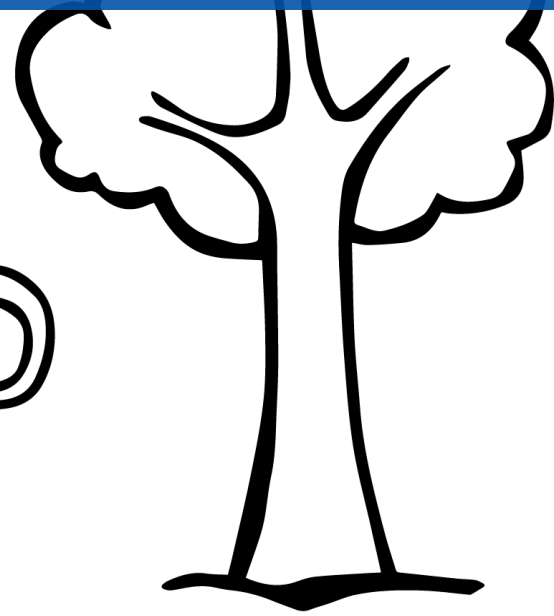
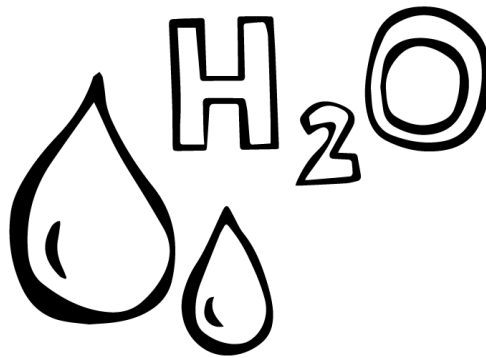
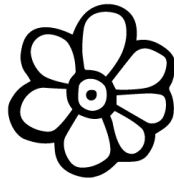
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European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse

Response of the European Law Institute



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**European Commission's Public Consultation
on Sustainable Consumption of Goods –
Promoting Repair and Reuse**

Susanne Augenhofer

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

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I. Introduction (Q2)

When the United Nations General Assembly (UN-GA) passed the 17 interlinked Sustainable Development Goals (SDGs) in 2015, all European Union (EU) Member States agreed, as Members of the UN-GA, to fight for a sustainable future for all. To implement these goals, the EU itself passed an Action Plan for the Circular Economy¹ in 2015.

Since the start of the Fridays for Future movement, at the very latest, awareness of the climate crisis has spread and calls for swift and forceful political action have grown louder ever since. Studies show that consumers want to be part of the Green transition. Therefore, an EU-wide initiative to push for a more circular economy and for the sustainable consumption of goods is highly appreciated, as is the fact that the Green transition is one of the five key areas on the EU's New Consumer Agenda of 2020.²

This Response aims at providing answers to the European Commission's Public Consultation on 'Sustainable Consumption of Goods – Promoting Repair and Reuse'.³

It is understood that the majority of resources employed in the course of the life cycle of a product are used during the production process. However, a distinction must be drawn between the use of resources at production and the impact products have throughout their entire life cycle on the climate,

including their greenhouse gas and other emissions. In the case of electronics, the amount of energy used at different phases of their life cycles – from production to disposal – varies significantly between products.⁴ Hence, to foster environmental sustainability, production should be reduced and products which produce the most emissions during their phases of use should be designed as efficiently as possible. This can be achieved by providing incentives for products to be repaired in the case of defects instead of replaced and by fighting firmly against planned obsolescence.⁵ While this Response will focus solely on the questions posed by the European Commission in its consultation, it has to be noted that the right to repair – on which the consultation focuses – cannot and should not be seen in isolation. There are different means available to foster environmental sustainability and an isolated view of means (eg right to repair) will not produce sufficient or satisfactory outcomes.⁶ Also, if one only examines single areas of law at a time, an incomplete picture will emerge. To give just two examples: an agreement between different businesses to offer a right to repair, which goes beyond the legal requirements set out in the Sales of Goods Directive,⁷ might violate Article 101 Treaty on the Functioning of the European Union (TFEU) if the agreement has an adverse effect on competition in the internal market; a false claim that a good is easily repairable may be considered unfair

¹ Commission, 'Closing the Loop – An EU Action Plan for the Circular Economy' COM (2015) 614 final, 2 December 2015.

² Commission, 'New Consumer Agenda' COM (2020) 696 final, 13 November 2020; see eg Evelyne Terryn, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption?' (2021) *Journal of European Consumer and Market Law (EuCML)* 10 1ff.

³ Available under <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/public-consultation_en> accessed 04 April 2022.

⁴ John Bachér, Yoko Dams, Tom Duhoux, Yang Deng, Tuuli Teittinen, and Lars Fogh Mortensen, 'Electronic Products and Obsolescence in a Circular Economy' (2020), Eionet Report by ETC/WMGE, 19ff. <www.eionet.europa.eu/etcs/etc-wmge/products/etc-wmge-reports/electronics-and-obsolescence-in-a-circular-economy/@@download/file/ETC-WMGE_Electronics%20and%20obsolescence%20in%20CE_final.pdf#page21> accessed 25 March 2022.

⁵ Alberto De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements' (2021) 12 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)* 142, 152ff.

⁶ Hans-W Micklitz and others, 'E-Commerce and the Trade-Off between Consumer Protection and Sustainability' (2020) Publication of the Advisory Council for Consumer Affairs, 35ff <www.svr-verbraucherfragen.de/en/wp-content/uploads/sites/2/201110_SVRV_PB3_Onlinehandel_ENGL_bf.pdf> accessed 22 March 2022; Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' (2021) 10 *EuCML* 89-101; Aaron Perzanowski, 'Consumer Perceptions of the Right to Repair' (2021) 96 *Indiana Law Journal* 361.

⁷ Council Directive 2019/771/EU of 22 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

commercial practice under the Unfair Commercial Practices Directive (UCPD)⁸ and, therefore, this may have an affect both on the right to repair and on competition law. In the first example, it has to be ensured that a balance is reached between Article 101 TFEU and the interest of fostering sustainability,⁹ whereas the second example requires strong enforcement of the UCPD to prevent businesses from misleading consumers. Also, the law ought to create incentives for manufacturers to design and produce goods in a manner which allows for repair in the first place. Therefore, the introduction of an obligation on the manufacturer to repair goods must be considered. One also has to bear in mind that most supply and production chains are global in nature and hence not only EU provisions have to be considered, but rather the EU, when passing new rules, should take account of rules by, for example, the World Trade Organization (WTO).

Finally, it has to be stated in these introductory remarks that while Question 1 of the survey (on whether the life span of most consumer goods has decreased in the last decade) cannot be answered

due to the lack of access to reliable empirical data to support such a claim, this seems true. It also appears that, if the statement is correct, this may well not only be caused by premature obsolescence but also by psychological obsolescence, thus consumer preferences, the wish to consume more, to always possess the latest version of certain 'lifestyle goods', such as mobile phones¹⁰ and clothes, etc. This would, of course, contradict studies¹¹ stating that consumers long for a green transition and want more durable products, less consumption or waste and, therefore, favour the right to repair. However, perhaps, different types of consumers shape different trends of demand; also, it needs to be borne in mind that the desire to act and consume in the interest of the environment is sometimes reflected in answers to surveys but not always on the level of decisions relating to consumption. In other words, consumers, in some cases, may care about sustainability in the abstract but nevertheless consume goods in a manner which is not aligned with those rather general intentions.¹²

⁸ Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22.

⁹ Cf § 2(1) of the Austrian Antitrust Law (*Kartellgesetz*) which, since an amendment in 2021, especially states that consumers enjoy a fair share of the resulting benefit (in the sense of Art 101(3) TFEU) if such benefit contributes essentially to a sustainable or climate-neutral economy ('wenn der Gewinn, der aus der Verbesserung der Warenerzeugung oder -verteilung oder der Förderung des technischen oder wirtschaftlichen Fortschritts entsteht, zu einer ökologisch nachhaltigen oder klimaneutralen Wirtschaft wesentlich beiträgt').

¹⁰ Harald Wieser and Nina Tröger, 'Exploring the Inner Loops of the Circular Economy: Replacement, Repair, and Reuse of Mobile Phones in Austria' (2018) 172 *Journal of Cleaner Production* (J Clean Prod) 3042.

¹¹ cf eg Study of the Federation of German Consumer Organisations (vzbv), <www.vzbv.de/pressemitteilungen/studie-zu-langlebigkeit-von-produkten-qualitaet-zahlt-sich-aus> accessed 22 March 2022.

¹² Addressing this sustainability paradox, Giorgio Monti, Editorial Comments: 'The European Climate Law: Making the Social Market Economy Fit For 55?' (2021) 58 *Common Market Law Review* (CMLR) 1321.

II. Amendments to the Sale of Goods Directive (Q4)

The potential of the Sale of Goods Directive to serve as a vehicle for achieving sustainability has long been discussed in academia and also among legislators.¹³ Despite efforts, the current version of the Sale of Goods Directive – as well, it seems, as its implementation by Member States – fall short with regard to the potential fostering of sustainability.

The present consultation differentiates between situations within and outside the scope of application of the Sale of Goods Directive. Under the Directive, repair is one of two equal remedies that consumers are generally entitled to choose from (Article 13(2)). As receiving an entirely new product might appear more advantageous to those who wish to maximize the life cycle of their purchases, and repair is often refused by the seller/manufacturer (if it is possible in the first place) as it would impose costs on the seller that would be disproportionate, in practice replacement is the more common remedy sought and offered.

1. Repair as the Primary Remedy

Returning to the need to save resources in the production of new products, introducing repair as the primary remedy would increase the longevity of a product and in most cases lead to less consumption of new products, thereby – in the longer term – to less production, and this could help in saving resources. However, it has to be taken into consideration that sustainability is not a standalone goal. Firstly, it can be questioned whether a – ultimately political – decision to prefer sustainability over the wishes of the individual consumer, who may very well prefer a quick replacement over a lengthy repair, can be considered

just. Not so long ago, the right granted to consumers to choose between repair and replacement was celebrated as one of the advantages of the Consumer Sales Directive of 1999.¹⁴

If there is (political) agreement that sustainability is of a higher value than the choice of individual consumers, it still has to be taken into consideration that, according to Article 14(1) Sale of Goods Directive, repair has to be carried out not only free of charge for the consumer, but also ‘within a reasonable period of time’ and ‘without significant inconvenience’ to the consumer. If this provision of the Sale of Goods Directive is not to be changed, a range of additional considerations are to be considered: firstly, in our view, this provision should not be changed in order to foster acceptance by consumers of the primacy of repair. Secondly, there should be guidance as to what ‘reasonable time’ and ‘without significant inconvenience’ means for different categories of products. It seems difficult to establish general rules, as the answer to these questions will depend on the kind of product at stake, but it is suggested that consumers should be afforded a right of a loaner (eg a computer given on loan) if repair takes longer than an average of two weeks.¹⁵

2. Repair as the Optimal Remedy when Repair Costs are Less than or Equal to Replacement Cost

The Commission’s consultation also wishes to establish the effect the cost of repair and the cost of replacement has on the remedies which should be offered to consumers. For many product categories,

¹³ See eg Elias Van Gool and Anaïs Michel, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis’ (2021) 10 EuCML 136.

¹⁴ Council Directive 1999/44/EC of 7 July 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L17/12.

¹⁵ Mediamarkt, a large German and Austrian market for electronic goods, advertises a one-two hour return duration for voluntary repair services for mobile phones (‘where technically possible and when spare parts are in stock’) and a one week return for the (again voluntary) repair of coffee machines. Patagonia, the clothing company, states on the internet that consumers should expect a(n) (again voluntary) repair within 20 days.

it seems, replacement is currently often the less expensive remedy for businesses and, as already mentioned, due to the longer life expectancy of a replaced good and the speed of replacement compared to repair, replacement is most likely also the preferred choice of consumers. If a consumer prefers replacement, but a seller repair, under the current legal framework, the latter can refuse replacement only if the remedy chosen by the consumer would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including the value the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be provided without significant inconvenience to the consumer.

Should the Sale of Goods Directive be amended in future, there should indeed be a rule making repair the prevailing remedy – without choosing repair as the default remedy – if the economic and environmental costs associated with it are less than or equal to replacement costs.

3. Re-Starting the Legal Guarantee Period After Repair

Re-starting the legal guarantee period after repair might be a strong incentive for consumers to choose repair over replacement (under the current legal framework, where consumers have a right to choose between repair and replacement). If repair is introduced as a default option, a re-start of the legal guarantee period might incentivise consumers to opt for it. However, re-starting the legal guarantee period imposes costs on businesses, which eventually will result in higher prices. It is an ethical question whether it is more appropriate to include these costs in the retail price paid by all consumers buying the same kind of product or to impose these costs on the individual consumer who bought a good which turned out to be defective.

A further point to be addressed is that an increase in prices due to legal changes which aim at an increase

of durability of goods might have the negative side effect that some goods are no longer available for the poorest consumers. This would further increase inequality among consumers and would clearly not be a desirable outcome. Therefore, we must consider consumer and environmental protection from 'a holistic perspective'¹⁶ and strike a delicate balance between the interests involved.

A market solution might be that businesses offer consumers a re-start of the legal guarantee period after repair at a premium. Alternatively, tax cuts or other financial benefits by the government might serve as incentives for businesses to offer a re-start of the legal guarantee period for free.

4. Longer Legal Guarantee Periods

A longer legal guarantee period could promote sustainability regardless of whether consumers have a right to choose between repair or replacement or if repair is the primary remedy. The most appropriate solution seems to be to determine the length of the legal guarantee according to categories of products which depends on their expected durability, and hence should be longer for most products than the current two-year period as the expected life cycle for eg cars, computers, washing machines or even an electronic toothbrush is longer than two years. This could be regulated in an amended Ecodesign Directive¹⁷ and its subsequent regulations.¹⁸

However, the enforcement of consumer rights during the legal guarantee period greatly depends on the burden of proof imposed on the consumer. As consumers do not have any insights into the production process, it is crucial to reverse the burden of proof with regard to the defect (under Article 11(1) of the Sales of Goods Directive, consumers benefit from a burden of proof for one year after delivery). Therefore, if the period in which a reversal of the burden of proof is granted to the consumer is not extended in accordance with a longer legal guarantee period, introducing longer legal guarantee periods might not prove entirely useful.

¹⁶ Hans-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) 6 EuCML 229, 230.

¹⁷ Council Directive 2009/125/EC of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products [2009] OJ L285/10, which is currently under revision. Cf Commission, 'Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC' COM(2022) 142 final.

¹⁸ Cf Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) 10 Verbraucher und Recht (VuR) 363, 370.

An alternative to extending the legal guarantee period could be to subsidise repair services even after the end of the legal guarantee period (by eg governments paying a lump sum or providing tax cuts to businesses which offer such services), with the cost of repair to be paid by the consumer. This might even create competition between repair service providers – considering the fact that environmentally focused consumers will rather buy goods where they know that repair is available – and, at the same time, incentivise the creation of more durable products if manufacturers want to avoid excessive repairs within the legal guarantee period.

5. Same Legal Guarantee Period for New and Second-Hand Goods and/or Refurbished Goods

Incentivising the increased use of second-hand and refurbished goods could also save resources. It is, however, important to differentiate between second-hand and refurbished goods, the latter having undergone some sort of assessment and improvement by the seller before being sold, while second-hand goods are sold in the condition, they were handed over by the first or subsequent owner. With regard to second-hand goods, it is also worth mentioning that the period of use which turns a good into a second-hand good might differ from Member State to Member State (eg in Austria, a car can be considered used – and the legal guarantee can be shortened – one year after it was first registered, regardless of how many kilometres it was driven; in other Member States, such rules do not seem to exist).

It seems appropriate to introduce a legal guarantee period of the same duration for refurbished goods as for new goods, thereby setting an incentive (in addition to the most likely discounted price) for consumers to buy refurbished goods. By carrying out an assessment before selling the good, the seller has the opportunity to detect potential defects and resolve any problems before the sale, an opportunity they do not have with regard to second-hand products.

6. Voluntary Business Commitments to Repair Goods

Voluntary commitments by businesses to repair goods would be an ideal solution as they would spare the European Commission (EC) (and consequently national legislators) from having to amend the Sale of Goods Directive (or national laws) and save stakeholders transaction costs. However, in practice, voluntary commitments often seem to fall short of what is expected of them: they are not always honoured by the businesses signing the commitment and can be used as a form of ‘green-washing’.¹⁹ While the UCPD refers to such codes of conduct and enables the enforcement of breaches of voluntary commitments, codes of conduct alone should not be the preferred or the only choice for the EC as the way forward.

¹⁹ Cf actions brought about by the European Consumer Organization BEUC, <www.beuc.eu/search?keys=greenwashing> accessed 28 March 2022; cf also Commission, ‘Proposal for a Directive 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, which addresses the danger of green-washing.

III. Effectiveness of Measures Amending the Sale of Goods Directive (Q4)

The different measures suggested by the EC in this consultation appear to enjoy different levels of effectiveness. Introducing repair as the primary remedy appears to be a very effective proposal.

Considering repair as the optimal remedy when it costs less than or equal to the cost of replacement seems a good idea per se. However, this approach might create unnecessary compliance costs. The question remains: how can these costs be easily determined without creating extra costs and how can businesses be prevented from manipulating estimated repair costs to push for replacements?

If a repair is done within the legal guarantee period, it might be appropriate to re-start the legal guarantee period afterwards to incentivise consumers to repair goods. One might even consider re-starting the legal guarantee period after a replacement is issued to provide an incentive for the production of

durable goods. However, an extension of the legal guarantee period might be preferable to a complete re-start to avoid excessive costs for sellers, which would be added to the price of new items. Finally, it is a political debate whether it is advantageous to create 'eternal' products by re-starting the legal guarantee every time goods are repaired as this does not allow for products to keep up with technological developments. One solution might be that consumers who wish for their products to last 'forever' should be asked to pay a premium for such a permanent repair service. Longer legal guarantee periods in general, as well as equating the legal guarantee period for new and refurbished goods, might be effective in some cases. By contrast, the same legal guarantee for new and second-hand goods and merely encouraging businesses to voluntarily commit to repairing may seem to be rather ineffective measures.

IV. Right to Repair Without Legal Guarantee (Q6)

Repair is equally important in order to prevent the premature end of the life cycle of a product when it comes to defects that are not covered by the legal guarantee under the Sale of Goods Directive. This concerns defects established only after delivery (eg a consumer accidentally drops his tablet and the screen breaks) or defects that become apparent after the end of the legal guarantee period. In practice, it is difficult for consumers to have defective goods repaired outside of the legal guarantee, either at all, as repair services are simply not offered for various products after the good has reached a certain age, or because repair is extremely expensive, also compared to the expense of purchasing a new good. In addition, it can be the case that manufacturers technically prevent the repair or replacement of components by third parties or consumers.²⁰ It seems to be a good approach to give businesses an incentive to offer repair services for goods even after the end of the legal guarantee period and to produce repairable products in the first place, also enabling repair by third parties.

This being said, it seems adequate to have consumers pay for the repair in such cases as long as it is ensured

that repairs are not priced inappropriately high. If people buy new items less often, manufacturers might be inclined to offer repair services to compete for their market share. The total costs of repair should include a reasonable margin of profit. This might encourage competition among services and make it more attractive to offer repair services. It also has to be ensured that consumers receive adequate information about the reparability of products. At least from anecdotal evidence, it can be reported that sometimes sellers wrongly inform consumers that a repair is not possible. Such misleading information by an employee of the business would constitute an unfair commercial practice, enabling a customer – under Article 11a UCPD, as amended by the Omnibus Directive²¹ – to seek compensation for damage (losses could, eg, result from buying a new product which would have not been necessary given the fact that the original product could have been repaired in the first place).

²⁰ European Commission, Directorate-General for Environment, Véronique Monier, Benoît Tinetti, Alvaro De Prado Trigo, et al, 'Study on Socioeconomic Impacts of Increased Reparability' (2016), <<https://op.europa.eu/en/publication-detail/-/publication/c6865b39-2628-11e6-86d0-01aa75ed71a1/language-en>> accessed 25 March 2022.

²¹ Council Directive 2019/2161/EU of 12 December 2019 for the better enforcement and modernization of Union consumer protection rules [2019] OJ L328/7.

V. Who Should Be Obligated to Repair Products? (Q8, Q9)

The primary addressee of an obligation to repair products should be the manufacturer. 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 also the cheapest cost avoider as they can design and produce more durable and easily reparable products.

In order to shorten the turn-around time of repairs, it seems to be important that consumers have a direct claim against the manufacturer and that they do not have to go through the seller (unless they want or need to do so, because, eg, they do not know the manufacturer or how to reach them in the case of a 'no name product'). If the consumer chooses to contact the seller for a repair, the seller should be given the choice between carrying out the repair (if they are technically equipped to do so) and being reimbursed by the manufacturer or sending the product to the manufacturer for repair (which also means the right to redress under the Directive should be amended in order to contain more specific provisions). The latter option, however, might lead to a longer repair time compared to a direct repair by the seller or when the consumer approaches the manufacturer directly. Another possibility, which is already recognised by Recital 54 of the Sale of Goods Directive, is that the repair is performed by the consumer or a third party at the seller's expense.

In order to avoid placing a greater burden on the seller, it might be worth considering enabling

reimbursement from the manufacturer directly instead. If sellers face too many risks they cannot control, small and medium-sized enterprises (SMEs) might be pushed out of the market, which could have detrimental effects on competition. Of course, reimbursement must be limited to a reasonable amount. Member States should use the option under Recital 54 of the Sale of Goods Directive as it offers the opportunity to have the good repaired by a third party of choice and have the good repaired by the consumer themselves, which might foster the interest of some consumers in repair over replacement and consumer empowerment.

To further promote competition in the repair market, there should also be an obligation to produce and provide spare parts to third parties or consumers,²² providing consumers with more choices as to the way in which they want their goods to be repaired. This obligation should, however, not be endless, but could correspond with the legal guarantee period and be complemented by a right to be reimbursed by the manufacturer if consumers choose to carry out repairs themselves or through a third party of choice. It also must be ensured that businesses do not trick consumers into believing that they would lose their rights under the Sales of Goods Directive if they choose to repair the defective goods themselves.

If the manufacturer is not seated in the EU, one could oblige the seller and/or importer of the good to bear the costs that would normally be borne by the producer, a proposal that is comparable to the rule under the Product Liability Directive.²³

²² For example, IKEA is voluntarily starting to make spare parts available to consumers; cf <<https://www.ft.com/content/a4e22d74-28b8-443b-91ab-c42438d3e259>> accessed 28 March 2022.

²³ Cf 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 [1985] OJ L210/29, Art 3(2).

VI. Level of Harmonisation (Q2, Q3)

As an increasing percentage of sales take place across EU borders, in order to create legal certainty for consumers as well as businesses, it seems important to fully harmonise the right to repair and accompanying measures at EU level. If 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. 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. Besides, sustainability must be pursued throughout the entire life cycle of a product. Therefore, a more holistic approach is needed, covering legislation at all steps of a product's life span.²⁴

²⁴ Hans-W Micklitz and others, (n 6), 10ff; Evelyne Terryn and Elias van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' 10 (2021) EuCML 136-148.

VII. Product Categories to be Covered by an Amended Right to Repair (Q5)

Within the last decades, the EU has already passed sustainability measures, especially for electronics, such as the Ecodesign Directive.²⁵ A mandatory right to repair should only be applied to products which can be repaired easily and effectively (and hence requiring less resources than a replacement). However, what can be repaired easily and effectively – which in this context means at less costs (including externalities) than replacement – will vary not only from one category of products to another, but also within each category, depending on the costs of production, resale price, cost of repair and life expectancy. It seems right that any amendment of the Sale of Goods Directive aiming at more sustainability should cover electronics and large household appliances (especially those falling under the scope of the Ecodesign Directive 2009), vehicles and furniture. When it comes to textiles, it has to be

considered that many defects arise as a result of wear and tear instead of being already present at the time of the sale (and hence do not fall within the scope of the Directive). In addition, the repair of textiles is only possible when the material itself is relatively intact. Therefore, textiles should perhaps not be subject to a mandatory right to repair. It has to be acknowledged, however, that some companies already offer a voluntary repair system for clothes (eg the clothes companies, Patagonia and Levis) and that shoes especially might be subject to repair. New Ecodesign rules introduced in 2019 provide minimal durability and repairability standards for certain consumer goods²⁶ and it is to be expected that circular product design requirements will be extended as an outcome of the current Commission's Sustainable Products Initiative.

²⁵ Other laws to be considered are Council Directive 2010/30/EU of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products [2010] OJ L153/1; Council Regulation 1907/2006/EC of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1; Council Regulation 305/2011/EU of 9 March 2011 laying down harmonized conditions for the marketing of construction products and repealing Council Directive 89/106/EEC [2011] OJ L88/5.

²⁶ See European Commission, 'The New Ecodesign Measures Explained' (2019) <ec.europa.eu/commission/presscorner/detail/en/qanda_19_5889> accessed 4 April 2022.

VIII. Additional Suggestions to Extend the Useful Life Span of Goods (Q11)

As mentioned in the introductory remarks, in order to achieve the goal of an extension of the useful life span of goods, it is crucial that consumer (contract) law is not viewed in isolation from other areas of law (eg antitrust law or the law of unfair commercial practices). In addition to a change of the hierarchy of remedies for defects, a prolongation of the duration of the period of the legal guarantee and the incentivising of repair outside the scope of application of the Sale of Goods Directive, it seems important to raise the level of awareness among consumers of the impact that their choices can have. Currently, a lack of knowledge about their exact rights represents a huge barrier to many consumers.²⁷

One way of achieving this might be to oblige businesses to publish so-called repair codes, which provide easily accessible information for consumers on how easily, where and at what costs a good can be repaired, including information as to whether or not the good could also be repaired by an average consumer (eg a manual on how to do so could be published on the business' website) or an independent repair shop. This information should be published in a standardised way, which would make it easy for consumers to compare information. It would also be recommendable to include more product categories into the scope of the Ecodesign Directive, thereby providing consumers with knowledge about

the availability of spare parts in a broader range of products.²⁸ In order to prevent consumers from being exposed to unnecessary repairs, it is crucial to give manufacturers incentives to produce more durable goods so that the need for repair declines.

It could also be considered to inform consumers about the amount of energy used in the production of any given good, or at least more complex electronic goods (like the warning packages that tobacco goods have or like nutri-scores) beyond the compulsory labelling system implemented by the EU that uses a colour code and a letter code to classify the energy efficiency of household appliances.²⁹ In this context, it is important to stress that – as was discussed by President Biden for the US³⁰ – manufacturers should be legally required to make repairs by third parties or consumers technically possible. This could be addressed by the Ecodesign Directive, which is currently under revision by the EC.

Another important angle is the requirement for businesses to provide software updates beyond very limited period of time after the sale of a product. The requirement for updates under the Sales of Goods Directive and Digital Content Directive³¹ are an important step in the right direction. However, here also, the manufacturer and not only the seller should be responsible for the update.

²⁷ Sahra Svensson-Hoglund, Jessika Luth Richter, Eleonore Maitre-Ekern et al, 'Barriers, Enablers and Market Governance: A Review of the Policy Landscape for Repair of Consumer Electronics in the EU and the US' (2021) 288 J Clean Prod 125488.

²⁸ See in the regard, eg Chris Backes, *Law for a Circular Economy*, (Eleven International Publishing 2017), 37ff.

²⁹ See in the regard the French Eco-score, <<https://docs.score-environnemental.com/>> accessed 28 March 2022.

³⁰ <www.bloomberg.com/news/articles/2021-07-06/biden-wants-farmers-to-have-right-to-repair-own-equipment-kqs66nov> accessed 28 March 2022.

³¹ Council Directive 2019/770/EU of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

Finally, as with other areas of consumer law, substantive law is only as good as enforcement. It seems crucial that the Ecodesign Directive is included into Annex I of the Representative Actions Directive³² and hence enables qualified entities to bring action if the information requirements under that Directive are violated. In particular, premature digital obsolescence can be tackled by effective enforcement of the Sales of Goods Directive and the UCPD.

³² Council Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.

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