

Sustainable Consumption and Consumer Protection Legislation

How can sustainable consumption
and longer lifetime of products be
promoted through consumer
protection legislation?



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Abstract

This in-depth analysis investigates the contribution, or lack of contribution of, the current EU consumer protection legislation to a sustainable consumption and a longer lifetime of products. In addition, it gives an overview of the most relevant best practices at national and international level and provides recommendations on the future development and possible reforms of European consumer protection legislation in order to contribute to a more sustainable consumption and a longer lifetime of products.

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CONTENTS

LIST OF ABBREVIATIONS	4
EXECUTIVE SUMMARY	5
1. INTRODUCTION	6
2. DESIGN AND PRODUCTION STAGE	8
2.1. Current EU legislation and best practices	8
2.2. Recommendations	9
3. MARKETING AND PRECONTRACTUAL STAGE	11
3.1. Current EU consumer protection legislation and best practices	11
3.2. Recommendations	14
4. CONTRACTUAL STAGE	17
4.1. Current EU consumer protection legislation and best practices	17
4.2. Recommendations	20
5. WASTE STAGE	23
5.1. Current EU legislation and best practices	23
5.2. Recommendations	24
REFERENCES	25

LIST OF ABBREVIATIONS

10YFP	10-Year Framework of Programmes on Sustainable Consumption and Production Patterns
B2B	Business-to-business
B2C	Business-to-consumer
CE	Circular Economy
CJEU	Court of Justice of the European Union
CRD	Consumer Rights Directive 2011/83/EU
DIY	Do-it-yourself
EC	European Commission
EP	European Parliament
EPR	Extended Producer Responsibility
EU	European Union
IT	Information Technology
LCA	Life-Cycle Assessment
PEF	Product Environmental Footprint
PRO	Producer Responsibility Organisation
PSS	Product Service Systems
OEF	Organisation Environmental Footprint
SDG	Sustainable Development Goal
UCPD	Unfair Commercial Practices Directive 2005/29/EC
UN	United Nations
US	United States
WEEE	Waste Electrical and Electronic Equipment
WFD	Waste Framework Directive 2008/98/EC

EXECUTIVE SUMMARY

In order to provide the Members of the European Parliament with evidence and recommendations for the own-initiative report entitled “Towards a more sustainable single market for businesses and consumers”, the IMCO Committee has requested Policy Department A to prepare an In-Depth Analysis on “Sustainable Consumption and Consumer Protection Legislation”.

The objectives of this in-depth analysis are to provide: (i) an analysis of the contribution, or lack of contribution, of the current EU consumer protection legislation to a sustainable consumption and a longer lifetime of products; (ii) an overview of the most relevant best practices at national and international level; (iii) recommendations on the future development and possible reforms of European consumer protection legislation in order to contribute to a more sustainable consumption and a longer lifetime of products.

As to the **design and production stage**, this in-depth analysis proposes to: (i) develop more ecodesign requirements on material efficiency aspects; (ii) adopt ecodesign requirements for a wider range of energy-related products, and further investigate the possibility to apply ecodesign requirements to other consumer products with an important environmental impact; (iii) review the Ecodesign Directive so as to make sure that it fits neatly within the new EU Circular Economy Action Plan; (iv) step-up market surveillance activities on ecodesign requirements; (v) further develop standards on durability and resource efficiency.

As to the **marketing and precontractual stage**, this in-depth analysis proposes to: (i) review and reinforce the Ecolabel Directive so as to make sure that it fits neatly within the new EU Circular Economy Action Plan and further investigate an extension of the system to services; (ii) blacklist “greenwashing” through the Unfair Commercial Practices Directive (“UCPD”) and require the use of the Product/Organisation Environmental Footprint (“PEF”/“OEF”) methods to substantiate green claims; (iii) blacklist the most blatant cases of premature obsolescence in the UCPD; (iv) update the UCPD Guidance document through the lens of the new EU Circular Economy Action Plan; (v) include durability and reparability information in the list of mandatory precontractual information (Consumer Rights Directive [“CRD”]) or alternatively develop durability and reparability information requirements under the Energy Labelling Regulation (EU) 2017/1369; (vi) introduce an obligation to provide information on the availability of spare parts and/or require the supply of spare parts from producers and importers.

As to the **contractual stage**, this in-depth analysis proposes to: (i) link the guarantee period to the average expected lifetime of goods; (ii) stimulate the offering of a commercial lifespan guarantee; (iii) make the hierarchy of remedies under the Sale of Goods Directive 2019 more sustainable; (iv) ensure access to repair and maintenance information; (v) explore the possibilities of mandatory European legislation on product service systems (“PSS”)/services contracts and explore the possibilities of standardisation and/or the development of standard contracts for PSS; (vi) make e-commerce greener by stimulating sustainable delivery and return options, by investigating the possibilities to limit or even prohibit free returns, etc.; (vii) step-up market surveillance activities to ensure that both European and imported products comply with EU consumer contract law requirements.

As to the **waste stage**, this in-depth analysis proposes to: (i) refine the waste management hierarchy so as to make sure that it is truly in line with the new EU Circular Economy Action Plan; (ii) fine-tune and narrow the definition of “waste” so that waste legislation is more compatible with the objectives of circular economy and sustainable consumption; (iii) broaden and strengthen the extended producer responsibility, and further investigate the effect of modulation of the financial contribution to producer responsibility organisations (“PROs”).

1. INTRODUCTION

Due to increasing concerns on environmental problems and climate change, the European Union (EU) and the EU Member States have taken global commitments such as the **UN 2030 Agenda for Sustainable Development**. Of particular interest is the **Sustainable Development Goal (SDG) 12 – “Ensure Sustainable Consumption and Production Patterns”** which details the targets and related actions to be taken by governments, businesses and consumers (A/RES/70/1). These targets vary from the sustainable management and efficient use of natural resources, to the reduction of food waste and losses, to the promotion of public procurement practices that are sustainable and rationalise inefficient fossil-fuel subsidies. Importantly, the **United Nations Guidelines for Consumer Protection** constitute the basis for the enhancement of consumer protection legislation, enforcement institutions and redress systems, towards a more effective and sustainable consumer protection, reducing pollution and the depletion of resources. Another important document in the field is the **Guidelines for providing product sustainability information: Global guidance on making effective environmental, social and economic claims, to empower and enable consumer choice**, issued by the Consumer Information Programme of the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns (10YFP).

With a view to meeting the agreed targets and particularly in light of SDG-12, **the EU and its Member States** have devoted substantial efforts over the past few years to improve the European consumer protection legislation. In 2015, the European Commission (EC) published an **EU action plan for the circular economy** which underlined the crucial role played by economic actors in shifting towards a circular economy and fostering sustainable consumption¹. The European Parliament (EP), the Council, all levels of government and stakeholders were invited to work together towards this long-term goal. In July 2017, the EP issued a **Resolution on a longer lifetime for products: benefits for consumers and companies** recommending various changes to EU and national laws². In May 2018, the EP also issued an important related **Resolution on the implementation of the Ecodesign Directive**³. In March 2019, the EC published a *Report on the Implementation of the Circular Economy Action Plan*, asserting that most of the foreseen initiatives have been delivered or soon will be⁴.

In December 2019, the EC published its **European Green Deal**⁵. In March 2020, the EC published its **New Circular Economy Action Plan – The European Green Deal (“New CE Action Plan”)**⁶. It announces *inter alia* a legislative proposal for a “sustainable product policy initiative” (2021); a legislative proposal empowering consumers in the green transition (2020); legislative and non-legislative measures establishing a new “right to repair” (2021); and a legislative proposal on substantiating green claims (2020)⁷. The *New CE Action Plan* was published after the submission of the draft final version of this in-depth analysis. Although the recommendations in this in-depth analysis were formulated before the publication of the *New CE Action Plan*, they are to a large extent in line with and complementary to the proposals of the EC. The proposals of the *New CE Action Plan* will be briefly referred to where relevant.

¹ COM(2015) 614 final.

² European Parliament resolution of 4 July 2017 on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)).

³ European Parliament resolution of 31 May 2018 on the implementation of the Ecodesign Directive (2009/125/EC) (2017/2087(INI)).

⁴ COM(2019) 190 final.

⁵ COM(2019) 640 final.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A New Circular Economy Action Plan For a Cleaner and More Competitive Europe, COM(2020) 98 final.

⁷ EC, A New Circular Economy Action Plan, 26.

Although both the EU and its Member States have deployed a broad range of actions to trigger sustainable consumption and longer lifetime of products, there is still an urgent **need to refine current EU consumer protection legislation**, in order to ensure the smooth functioning of the internal market and to contribute to a more sustainable consumption and a longer lifetime of products.

The objectives of this in-depth analysis are to provide:

- an analysis of the contribution, or lack of contribution, of the current EU consumer protection legislation to a sustainable consumption and a longer lifetime of products;
- an overview of the most relevant best practices at national and international level;
- recommendations on the future development and possible reforms of European consumer protection legislation in order to contribute to a more sustainable consumption and a longer lifetime of products.

2. DESIGN AND PRODUCTION STAGE

KEY RECOMMENDATIONS

As to the design and production stage: (i) develop more ecodesign requirements on material efficiency aspects; (ii) adopt ecodesign requirements for a wider range of energy-related products, and further investigate the possibility to apply ecodesign requirements to other consumer products with an important environmental impact; (iii) review the Ecodesign Directive so as to make sure that it fits neatly within the new EU Circular Economy Action Plan; (iv) step-up market surveillance activities on ecodesign requirements; (v) further develop standards on durability and resource efficiency.

More than 80% of a product's environmental impact is determined at the design stage⁸, which therefore plays a highly important role in promoting the circular economy. When designing a product, decisions are taken on the type and amount of materials to be integrated into the product, its durability, its ease of repair and maintenance, as well as the recyclability of its components⁹. In other words, *"once a product is put on the market, there is relatively little that can be done to improve its environmental characteristics"*¹⁰.

2.1. Current EU legislation and best practices

The **Ecodesign Directive 2009/125/EC** empowers the EC to set mandatory requirements for specific energy-related products. While the main focus has been so far on setting energy efficiency improvements, the future product requirements are expected to contain more material efficiency requirements on durability, repairability and recyclability of products¹¹. For some products, like vacuum cleaners¹² and lamps¹³, minimum durability requirements already apply. As from 1 March 2020, certain material efficiency requirements will apply for computers and computer servers. For example, manufacturers shall ensure that joining, fastening or sealing techniques do not prevent the disassembly for repair or reuse purposes of certain vital components¹⁴. There are also requirements on availability of instructions on the disassembly operations and the tools required to third parties dealing with maintenance, repair, reuse, recycling and upgrading of servers¹⁵. In addition, as from 1 March 2021, requirements in relation to the availability, delivery and easy replacement of spare parts for certain products like dishwashers will apply as well as requirements on access to repair and maintenance information¹⁶.

In addition to the Ecodesign Directive, there are other specific ecodesign rules. **Car legislation**, although aimed at fostering competition rather than repair, provides *inter alia* for access to repair and maintenance information, tools and relevant software to independent operators, as well as for the

⁸ See EP resolution of 31 May 2018 on the implementation of the Ecodesign Directive, recital T; EC, A New Circular Economy Action Plan, 6.

⁹ D. Jepsen et al., *Delivering resource-efficient products – How Ecodesign can drive a circular economy in Europe* (European Environmental Bureau 2015) p. 6.

¹⁰ See Green Paper on Integrated Product Policy, COM(2001) 68 final.

¹¹ See Ecodesign working plan 2016-2019, COM(2016) 773 final.

¹² See Annex I pt 1 b) to the Commission Regulation (EU) No 666/2013 of 8 July 2013 (vacuum cleaners).

¹³ See Annex II (2) to Commission Regulation (EC) No 244/2009 of 18 March 2009 (non-directional household lamps).

¹⁴ Annex II 1.2.1 to the Commission Regulation (EU) 2019/424 of 15 March 2019 (servers and data storage products).

¹⁵ Idem, Annex II 3.3.

¹⁶ See for example Annex II(5) to the Commission Regulation (EU) 2019/2022 of 1 October 2019 (household dishwashers).

almost total reuse and recovery of end-of-life vehicles¹⁷. There are also new product requirements for **plastic products**¹⁸.

In support of those ecodesign rules, new **standards** are being developed on the basis of the Regulation (EU) 1025/2012 on European standardisation. One of the most relevant standardisation requests in terms of sustainable consumption is the one related to ecodesign requirements on material efficiency aspects (M/543).

At national level, Member States can add ecodesign requirements when not (yet) regulated by EU rules, provided that no barriers to cross-border trade are being created.

2.2. Recommendations

First, we recommend to **develop more ecodesign requirements on material efficiency aspects such as durability** (e.g. minimum lifetime of products or critical components), **repairability** (e.g. availability of spare parts, tools and repair manuals, design for repair), **upgradeability**, **design for disassembly** (e.g. easy removal of certain components), **information** (e.g. marking of plastic parts) and **ease of reuse and recycling** (e.g. avoiding incompatible plastics)¹⁹. Although the context in the car sector is particular and the goal different, some ideas from the above-mentioned sector-specific car legislation could be transposed into rules on other products. Some inspiration could be drawn also from self-regulation (e.g. the German Blue Angel initiative²⁰).

Additionally, **access to the EU market of certain 'inherently unsustainable' products could be barred**²¹. This has already been done in the past through ecodesign rules in a progressive way (e.g. halogen lamps) or through specific legislation like the Directive (EU) 2019/904 on plastic products²².

A **second** recommendation is to **adopt ecodesign requirements for a wider range of energy-related products**. For example, extending the requirement for computers on secure deletion of data to **smartphones** could be considered²³. While the scope of the Ecodesign Directive was enlarged in 2009 to cover all energy-related products (excluding means of transport), no non-energy using products have yet been covered by ecodesign requirements. This should change in order to avoid risks of distortions of competition caused by the adoption of such ecodesign rules at national level²⁴.

Additionally, the **possibility to apply ecodesign requirements to other consumer products with an important environmental impact, such as textiles and furniture, should be further investigated**²⁵.

¹⁷ Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information and amending Regulation (EC) No 715/2007 and Directive 2007/46/EC and repealing Directives 80/1269/EEC, 2005/55/EC and 2005/78/EC, OJ L 188, 18.7.2009, pp. 1–13.

¹⁸ Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, pp. 1–19.

¹⁹ See also European Parliament resolution of 4 July 2017, 9.

²⁰ <https://www.blauer-engel.de/en>.

²¹ See E. Maitre-Ekern, C. Dalhammar, 'Towards a hierarchy of consumption behaviour in the circular economy', 26 *Maastricht Journal of European and Comparative Law* (2019) p. 403.

²² See footnote 17, Annex, part B.

²³ Such requirement could encourage consumers to recycle their old smartphones. D. Kreziak, I. Prim-Allaz and E. Robinot, *Des tiroirs pleins de téléphones remplacés: consommateurs et objets à obsolescence perçue* (ADEME 2017).

²⁴ The French Parliamentary European Affairs Committee warned about those risks in its report on the French law against waste. See Rapport d'information fait au nom de la commission des affaires européennes (1) portant observations sur la transposition du droit européen par le projet de loi relatif à la lutte contre le gaspillage et à l'économie circulaire, 18 July 2019, n°682, p. 39 and p. 50.

²⁵ See B. Bauer, D. Watson, A. Gylling, A. Remmen, M. Hauris Lysemose, C. Hohenthal, A. Jönbrink, Potential Ecodesign Requirements for Textiles and Furniture, 2018, p. 57.

The proposal in the *New CE Action Plan* to widen the Ecodesign Directive beyond energy-related products and to make the Ecodesign framework applicable to the broadest possible range of products is therefore to be welcomed²⁶.

Thirdly, and more generally, we would suggest to consider **reviewing the Ecodesign Directive (including its underlying methodology and main criteria) so as to make sure that it fits neatly within the new EU Circular Economy Action Plan**. Moreover, the Ecodesign framework should no longer be developed in isolation of the consumer protection legislation (see also *infra* on information requirements and the legal guarantee for non-conformity). The need to increase coherence is also acknowledged in the *New CE Action Plan*, where it is stated that the “*sustainable product policy legislative and any other complementary regulatory or voluntary approaches will be developed in a way to improve the coherence with existing instruments regulating products along various phases of their lifecycle.*”²⁷

Fourthly, we recommend to **step-up market surveillance activities to ensure that both European and imported products comply with the requirements as regards ecodesign**²⁸.

The announcement in the *New CE Action Plan* that the EC will “*step up efforts, in cooperation with national authorities, on enforcement of applicable sustainability requirements for products placed on the EU market, in particular through concerted inspections and market surveillance actions*” is therefore also to be welcomed²⁹.

Fifthly, **standards (measurement standards, test standards and verification methods) on durability and resource efficiency should also be further developed**. Some current standards limit the possibilities to use secondary materials³⁰. New legislative initiatives such as on ‘Common chargers for mobile phones and similar devices’ are to be welcomed³¹.

²⁶ EC, A New Circular Economy Action Plan, 6.

²⁷ EC, A New Circular Economy Action Plan, 7.

²⁸ See also European Parliament resolution of 4 July 2017, 25.

²⁹ EC, A New Circular Economy Action Plan, 7.

³⁰ K. Van Acker et al., Circular Economy – Position paper working group Metaforum (KU Leuven Metaforum 2016) p. 26.

³¹ See also, EC, A New Circular Economy Action Plan, 10: where it is confirmed that, as part of its “Circular Electronics Initiative”, the EC will present “*regulatory measures on chargers for mobile phones and similar devices, including the introduction of a common charger, improving the durability of charging cables, and incentives to decouple the purchase of chargers from the purchase of new devices*”.

3. MARKETING AND PRECONTRACTUAL STAGE

KEY RECOMMENDATIONS

As to the **marketing and precontractual stage**: (i) review and reinforce the Ecolabel Directive so as to make sure that it fits neatly within the new EU Circular Economy Action Plan and further investigate an extension of the system to services; (ii) blacklist “greenwashing” through the UCPD and require the use of the Product/Organisation Environmental Footprint (“PEF”/“OEF”) methods to substantiate green claims; (iii) blacklist the most blatant cases of premature obsolescence in the UCPD; (iv) update the UCPD Guidance document through the lens of the new EU Circular Economy Action Plan; (v) include durability and reparability information in the list of mandatory precontractual information (under the Consumer Rights Directive 2011/83/EU) or alternatively develop durability and reparability information requirements under the Energy Labelling Regulation (EU) 2017/1369; (vi) introduce an obligation to provide information on the availability of spare parts and/or require the supply of spare parts from producers and importers.

At the marketing and precontractual stage, measures fostering sustainable consumption include prohibitions of misleading commercial practices and requirements imposed on businesses to provide product sustainability information.

3.1. Current EU consumer protection legislation and best practices

Regulation (EC) No 66/2010 on the **EU Ecolabel** establishes a scheme of voluntary ecolabels of excellence awarded to sustainable products. For example, to get the EU Ecolabel, computers should meet certain requirements in relation to lifetime extension (durability testing, rechargeable battery quality and lifetime, upgradeability and reparability) and design and end-of-life management (material selection and compatibility with recycling, design for disassembly and recycling). A 2017 Fitness Check confirmed the useful – even if limited – role of the scheme as a voluntary instrument for businesses that facilitates the transition to a circular economy and provides information on the environmental performance of products in B2C and B2B transactions. The Fitness Check also indicated that, in order to fully exploit the potential of the scheme, efforts need to be made to enhance its uptake³². Recently, the EC launched a study for the identification of **elements for a strategic approach to EU Ecolabel**³³.

“**Green claims**” (or “environmental claims”) are on the rise. These include any practices of “suggesting or otherwise creating the impression that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services” (due to its production process, composition and design, energy consumption or pollution during use, durability, reparability, recyclability, etc.)³⁴. Whenever a green claim is not true or cannot be verified, it constitutes “**greenwashing**” that **can be combated on the basis of the Unfair Commercial Practices Directive 2005/29/EC (‘UCPD’)**, in particular Articles 6-7 and 12. “Greenwashing” could be defined as the practice of marketing a product as environment-friendly, when in fact it does not meet basic

³² Commission Staff Working Document, Executive Summary of the Fitness Check, 30.6.2017, SWD(2017) 252 final.

³³ Commission Staff Working Document, Sustainable Products in a Circular Economy - Towards an EU Product Policy Framework contributing to the Circular Economy, 4.3.2019, SWD(2019) 91 final, 12.

³⁴ Commission Staff Working Document, Guidance on the implementation/application of the UCPD, SWD(2016) 163 final, 95.

environmental standards³⁵. However, **in the absence of a uniform methodology for the assessment of green claims, enforcement is seriously jeopardised**. The 2014 *Consumer Market Study* showed that there is certainly room for improvement on enforcement of environmental claims. Proactive surveillance or inspections are rather limited and in some cases inspectors have a limited knowledge about how to correctly interpret the UCPD with reference to environmental claims³⁶. Likewise, the **proliferation of ecolabels** of all kinds at national level is problematic.

The UCPD **can also be used to combat premature obsolescence**. Some practices accelerating product obsolescence are already mentioned in the UCPD blacklist³⁷. Other well-known cases include the Italian and French *Apple* and *Samsung* cases³⁸. Funded by Horizon 2020, an **independent testing programme on premature obsolescence of products** was started in May 2019³⁹. In **France**, a prohibition of planned obsolescence was introduced in 2015⁴⁰. In addition, specific commercial practices **contributing to premature obsolescence** are now being banned⁴¹. In **Belgium**, similar general prohibitions are being proposed⁴².

As regards **mandatory provision of information at the marketing stage**, it should be noted that Article 7 UCPD prohibits so-called misleading omissions, including failures to inform consumers on durability, reparability, etc. – to the extent that this is qualified as ‘material information’ (SWD(2016) 163 final). Of particular relevance, Article 7(4) UCPD requires to provide information in relation to “the main characteristics of the product”, which again can cover many types of product sustainability information (environmental impact, durability, reparability, etc.)⁴³. Article 7(5) UCPD provides that a breach of information requirements established by EU law in relation to commercial communication (see list of sector-specific EU legislation in Annex II of the UCPD including the Ecodesign Directive and Energy Labelling Regulation 2017/1369), constitutes an omission of material information.

As regards **mandatory precontractual information requirements**, the Consumer Rights Directive 2011/83/EU (“CRD”) imposes the obligation to provide all main product characteristics (Articles 5(1)(a) and 6(a)(1)). As Article 5 of the CRD is based on minimum harmonisation, Member States are allowed to maintain or adopt additional national information requirements (where allowed under EU law).

³⁵ Cf. Recital 9 of the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, COM(2018) 353 final. The procedure for this file is currently under trilogue.

³⁶ Consumer market study on environmental claims for non-food products, available at: https://ec.europa.eu/info/sites/info/files/study_on_environmental_claims_for_non_food_products_2014_en.pdf.

³⁷ See Annex I pt 20 and 26 to the UCPD.

³⁸ See recent decisions of the Italian authority against Apple and Samsung: Autorita Garante della Concorrenza e del Mercato, 25 september 2018, Apple, online, https://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf; Autorita Garante della Concorrenza e del Mercato, 25 september 2018, Samsung, online, available at: https://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf.

See also the similar decision in France on Apple:

https://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communiqu/2020/CP-Ralentissement-fonctionnement-iPhone200207.pdf.

³⁹ <https://prompt-project.eu/>

⁴⁰ Article 441-2 French Consumer Code.

⁴¹ Thus, e.g., Article 50 French Act of 10 February 2020 relating to the fight against waste and the circular economy (“French Act”) prohibits any advertising or commercial communication encouraging the degradation of products in normal operating conditions and preventing their reuse.

⁴² Article 2 and 23 Proposal, *Doc. Parl. Chambre*, 2019, 0914/001; Article 2 and 3 Proposal, *Doc. Parl. Chambre*, 2019, 0193/001; Article 3 and 10 Proposal, *Doc. Parl. Chambre*, 2019, 0771/001.

⁴³ For example, the Maltese Consumer Tribunal ruled on 6 December 2010 (*Kenneth Ciangura v AR Tech Limited*) that not providing information on the expected lifetime of a product, constitutes a misleading omission. The plaintiff had purchased a solar water heater system. After a period of time, some parts of the water tank began to rust and leaks were established. According to the plaintiff, the defendant had not informed the plaintiff on the relatively quick worsening of the water tank’s state. It was held by the Tribunal that the information on the expected lifetime of a product is essential information. Next, the defendant could not prove such information was communicated to the plaintiff. As a result, the plaintiff had not been provided with all relevant information in order to make an informed transactional decision. Hence, the defendant had breached the prohibition of misleading omissions (Article 7 UCPD).

For example, in **France**, as from 1 January 2022, **producers and importers of waste-generating products must inform consumers, by marking, labelling, displaying or by any other appropriate process, their environmental qualities and characteristics**⁴⁴. In addition, since 2014, manufacturers and importers of movable goods must **inform professional sellers about the period of availability of essential spare parts**. The professional seller must provide this information to the consumer prior to the conclusion of the contract and this information must be confirmed upon conclusion of the contract. Upon request from the seller or any repairer, those spare parts must be made available within a period of 2 months⁴⁵. As from 1 January 2022, in case spare parts are not available, manufacturers and importers will have to **inform professional sellers of this non-availability**. For electrical and electronic equipment and furniture, when this information is not provided to the professional seller, the spare parts essential to the use of the goods will be deemed not available⁴⁶. In addition, as from 1 January 2021, producers, importers, distributors or other marketers of electrical and electronic equipment must **communicate without charge to the sellers of their products and to any person who requests it the index of reparability** of this equipment. Sellers of electrical and electronic equipment as well as those using a website, platform or any other online distribution channel in the context of their commercial activity in France must inform the consumer of this reparability index⁴⁷. Finally, the manufacturer of goods containing digital elements must **inform the seller of the period during which updates to the software supplied during the purchase of the goods remain compatible with normal use of the device**. The seller makes this information available to the consumer⁴⁸.

In **Belgium**, an amendment to the provision implementing Article 5 CRD is being proposed so as to include durability and reparability information⁴⁹. Alternatively, the idea of a digital “product passport” is being proposed⁵⁰.

Currently, **EU consumer protection legislation** does not set any requirements in relation to **availability of and access to spare parts** (as mentioned, some ecodesign requirements and standards do).

In **France**, as from 1 January 2022, for producers of household appliances, small IT and telecommunications equipment, screens and monitors, **spare parts will have to be available for a period fixed by decree of the Council of State and which cannot be less than five years** from the date of placing the last unit of the model on the market. This decree will establish the list of categories of electrical and electronic equipment and parts concerned⁵¹. Already today, French law provides that producers or importers (who did provide information on the availability of spare parts essential to the use of movable goods) must supply these spare parts, upon request from the seller or any repairer, **within a period of 2 months**⁵². As from 1 January 2022, this maximum period will be **reduced to 15 working days**⁵³.

⁴⁴ Article 13 French Act.

⁴⁵ Article L 111-4 Consumer Code.

⁴⁶ Article 19 I French Act.

⁴⁷ Article 16 French Act.

⁴⁸ Article 27 French Act.

⁴⁹ Article 3 Proposal, *Doc. Parl. Chambre*, 2019, 0914/001; Article 4 Proposal, *Doc. Parl. Chambre*, 2019, 0771/001.

⁵⁰ Article 4 Proposal, *Doc. Parl. Chambre*, 2019, 0193/001.

⁵¹ Article L 111-4 Consumer Code

⁵² Article L 111-4 Consumer Code.

⁵³ Article 19 i French Act.

In **Belgium**, it is being proposed to include a minimum period of availability of spare parts that equals the expected lifespan⁵⁴. Alternatively, it is being proposed to require producers and importers to provide spare parts, repair information and the like within a reasonable period⁵⁵. Already in 1993, the EC rightly observed that *“any national legislation which imposes stringent obligations on providers to provide after-sales service for their products, including the **obligation to stock the spare parts necessary for the maintenance and repair of the products**, risks being ineffective or indeed **provoking distortions of competition or barriers to trade**.”*⁵⁶

3.2. Recommendations

First, we would recommend to **reinforce the EU Ecolabel** in order to increase uptake and improve awareness. The **Ecolabel system** currently focuses on products and an extension of the system to services merits further investigation in light of the emerging servitization of the economy. More fundamentally, we recommend to **review the Ecolabel Directive (including its methodology and main criteria) so as to make sure that it fits neatly within the new EU Circular Economy Action Plan**. This is in line with the *New CE Action Plan*, in which the EC announced that it will *“test the integration of [the Product/Organisation Environmental Footprint (“PEF”/“OEF”)] methods in the EU Ecolabel and include more systematically durability, recyclability and recycled content in the EU Ecolabel criteria.”*⁵⁷

Second, we recommend to **blacklist “greenwashing” through the UCPD** and to **require the use of the PEF/OEF methods to substantiate green claims in relation to products, services and organisations**⁵⁸. Life-Cycle Assessment (LCA) methods of excellence guarantee a common and correct way of measuring “environmental performance” and thereby enable companies to make environmental claims that are reliable, reproducible and comparable. This **will facilitate the green transition of consumers** as well as **help in stepping up enforcement**. It would also help **ensuring efficient communication on the sustainability of emerging Product Service Systems (“PSS”)**. Consumers/businesses wishing to engage in PSS for environmental reasons lack an efficient tool to be informed of or communicate about the sustainable character of the PSS.

Third, we recommend to **blacklist the most blatant cases of premature obsolescence in the UCPD** (such as the omission of information on the negative effect of updates on the performance of the device)⁵⁹. The blacklist could include practices of premature obsolescence that are regulated by other EU rules⁶⁰ or regularly sanctioned in practice⁶¹. In its UCPD Guidance document, the EC could further elaborate on an EU-level definition of premature obsolescence for tangible goods and software. The results of the independent testing and detecting system should feed into EU policy making⁶².

Fourth, we recommend to **update the UCPD Guidance document through the lens of the new EU Circular Economy Action Plan**. For example, the Guidance document could be amended so as to

⁵⁴ Article 23 Proposal, *Doc. Parl. Chambre*, 2019, 0914/001.

⁵⁵ Article 6 Proposal, *Doc. Parl. Chambre*, 2019, 0193/001; Article 11 Proposal, *Doc. Parl. Chambre*, 2019, 0771/001.

⁵⁶ Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93) 509 final, 80.

⁵⁷ EC, A New Circular Economy Action Plan, 8.

⁵⁸ This is in line with the *new Circular Economy Action Plan*, in which the EC announces that it will *“propose that companies substantiate their environmental claims using Product and Organisation Environmental Footprint methods.”*, EC, A New Circular Economy Action Plan, 8.

⁵⁹ A. Michel, ‘Est-il pertinent de définir légalement et de pénaliser les pratiques d’obsolescence prématurée ? Analyse de la loi française au regard des récentes décisions italiennes contre Apple et Samsung’, CRIDES Working Paper Series no. 5/2019; Colloque sur le Droit en Transition (Presses de l’Université Saint-Louis Bruxelles 2019) (*to be published*).

⁶⁰ E.g. ecodesign rules related to product durability and repairability.

⁶¹ See the Italian and French Apple and Samsung cases.

⁶² See also European Parliament resolution of 4 July 2017, 30 and 37-38.

clarify that “material information” within the meaning of Article 7 includes various types of product sustainability information (environmental impact, durability, repairability, availability and cost of spare parts, etc.).

A **fifth** recommendation is to **amend the minimum harmonisation Article 5 CRD so as to include durability and repairability information in the list of mandatory precontractual information**. As an alternative to including durability and repairability information in EU consumer protection legislation, **durability and repairability information requirements could be developed under the Energy Labelling Regulation**. This Regulation lays down a framework for the labelling of energy-related products and the provision of standard product information regarding energy efficiency, the consumption of energy and of other resources. Access to the EU market could be made conditional upon the full availability of the requested information⁶³. The proposal in the *New CE Action Plan*, to revise “EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan”, is therefore to be welcomed⁶⁴.

As not only the content but also the method and timing of the information provision are key, various recent studies show that there is a huge untapped potential to enhance more sustainable consumer choices by **improving the manner (method and timing) in which durability and repairability information is provided**⁶⁵. As regards for example the option of targeted mandatory lifespan labelling⁶⁶, two interesting studies can be mentioned. A *2016 study on the Influence of Lifespan Labelling on Consumers* showed that lifespan labelling has an influence on purchasing decisions in favour of products with longer lifespans⁶⁷. The *2018 Behavioural Study on Consumers’ Engagement in the Circular Economy* showed that the provision of information on durability and repairability can shift purchasing decisions towards more sustainable choices. Yet, the study uncovered that information on durability and repairability of products was in fact difficult to find and consumers wanted to receive better information. Evidence from the literature review, stakeholder interviews, focus groups, and experiments showed that improved information provision at the point of purchase (e.g. on EU labels, or provided by manufacturers) was effective at promoting CE behaviours amongst consumers. The study contains several policy recommendations, which the EC will further examine (e.g. “Recommendation 4 - Making durability and repairability information available at the point of sale”)⁶⁸.

In order to improve product durability information, one could also consider the **development of a uniform methodology and standardised criteria for the measurement of a product’s expected**

⁶³ E. Maitre-Ekern, C. Dalhammar, ‘Towards a hierarchy of consumption behaviour in the circular economy’, *26 Maastricht Journal of European and Comparative Law* (2019) pp. 415-16.

⁶⁴ EC, A New Circular Economy Action Plan, 8.

⁶⁵ See also B. Keirsbilck and S. Rousseau, “The marketing stage: fostering sustainable consumption choices in a “circular” and “functional” economy”, in: B. Keirsbilck and E. Terryn (Eds.), *Consumer Protection in a Circular Economy*, Antwerp, Intersentia, 2019, 93-126.

⁶⁶ BEUC advocates the introduction of an explicit legal obligation, for energy-related products only, to inform consumers about the expected lifetime of a product on the EU Energy Label. See BEUC, Durable goods: More sustainable products, better consumer rights, BEUC-X-205-069, 2015, 11.

⁶⁷ European Economic and Social Committee study on the influence of lifespan labelling on consumers. Final report, 2016, available at https://www.eesc.europa.eu/resources/docs/16_123_duree-dutilisation-des-produits_complet_en.pdf.

⁶⁸ Behavioural Study on Consumers’ Engagement in the Circular Economy, Final Report, October 2018, available at https://ec.europa.eu/info/sites/info/files/ec_circular_economy_final_report_0.pdf. In particular, when, respectively, durability or repairability information was provided in the experiment, consumers were almost three times more likely to choose products with the highest durability on offer, and more than two times more likely to choose products with the highest repairability ratings. General CE preferences were strongest when durability and repairability information was presented together. These findings are corroborated by consumers’ significant willingness-to-pay for better durability/repairability for all product categories. ‘Nudges’ informing consumers of the benefits and social norms of buying durable/repairable products increased the saliency of CE characteristics and triggered shifts in preferences towards more durable/repairable products. See also European Commission, Report on the implementation of the Circular Economy Action Plan, 4.3.2019, COM(2019) 190 final, 4. See also European Parliament Resolution of 4 July 2017, 27: “Calls on the Commission to improve product durability information via...”

useful life⁶⁹. Likewise, there is a need to **develop a potential scoring system to rate the ability to repair products**⁷⁰.

Sixth, it could be envisaged in EU consumer protection law to **require to provide information on whether spare parts for goods are available or not, on what terms and for how long**⁷¹ and/or to **require producers and importers to ensure that essential spare parts are available during the expected lifespan of the goods**⁷². Already in 1993, the EC believed that three solutions merited consideration at EU level. *"The most stringent solution would be to impose a standard obligation on manufacturers to stock the necessary spare parts during a certain period from the date they quit selling the products. This product-specific period should correspond to the normal lifespan of the merchandise in question and could be "fleshed out" through codes of conduct or through recourse to standardisation."* Apart from a voluntary solution, *"a final solution, focussing purely on the information aspects, would be to require stating, on the product label, the period during which the manufacturer commits himself to stocking spare parts. The advantage here would be to ensure market transparency and giving free rein to competition without requiring manufacturers to respect specific time limits."*⁷³

⁶⁹ See also European Parliament resolution of 4 July 2017, 27.

⁷⁰ <https://susproc.jrc.ec.europa.eu/ScoringSystemOnReparability/index.html>.

⁷¹ See also European Parliament resolution of 4 July 2017, 10. See in the same sense the *New CE Action Plan*, where the EC announces that it will *"propose a revision of EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including [...] on the availability of repair services, spare parts and repair manuals"*, EC, A New Circular Economy Action Plan, 8.

⁷² European Parliament resolution of 4 July 2017, 10.

⁷³ Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93) 509 final, 100.

4. CONTRACTUAL STAGE

KEY RECOMMENDATIONS

As to the **contractual stage**: (i) link the guarantee period to the average expected lifetime of goods; (ii) stimulate the offering of a commercial lifespan guarantee; (iii) make the hierarchy of remedies under the Sale of Goods Directive 2019 more sustainable; (iv) ensure access to repair and maintenance information; (v) explore the possibilities of mandatory European legislation on PSS/services contracts and explore the possibilities of standardisation and/or the development of standard contracts for PSS; (vi) make e-commerce greener by stimulating sustainable delivery and return options, by investigating the possibilities to limit or even prohibit free returns, etc.; (vii) step-up market surveillance activities to ensure that both European and imported products comply with EU consumer contract law requirements.

At the contractual stage, several instruments of EU consumer protection legislation have an impact on the sustainability of consumption and on the lifetime of products. These instruments include the new Directive (EU) 2019/771 on the sale of goods ('Sale of Goods Directive 2019') and the CRD, as recently amended. It is suggested that these instruments do not currently sufficiently stimulate sustainable consumption in general (in particular sustainable e-commerce) and the '*hierarchy of consumption behaviour in the circular economy*'⁷⁴. For services, a comprehensive EU legal framework determining the rights of the consumer is currently missing.

4.1. Current EU consumer protection legislation and best practices

Under the Sale of Goods Directive 2019, the **period for the legal guarantee** is set at **two years**, with the possibility of reducing this period for 'second-hand goods' to one year and to exclude the application of the directive for second-hand goods sold at auctions. The two-year legal guarantee is a minimum harmonisation provision. Longer guarantee periods provide an incentive for sellers (and indirectly producers) to offer goods with a longer lifetime; they further increase the chance that such goods are repaired under the legal guarantee and it may take longer for consumers to buy a replacement good⁷⁵. Several Member States have established longer guarantee periods, ranging from 3 to 6 years⁷⁶, and two Member States (the Netherlands and Finland) take into account the expected lifetime of a product⁷⁷. In **France**, as from 1 January 2022, the two-year guarantee period is complemented by the new French law against waste that provides for a six-month extension in case of repair and a renewed guarantee in case of replacement⁷⁸. In **Belgium**, several legislative proposals are pending to extend the legal guarantee, including a proposal to extend the legal guarantee to the average expected lifetime⁷⁹ and to extend the legal guarantee in function of the type of product⁸⁰. The

⁷⁴ E. Maitre-Ekern and C. Dalhammar, "Towards a hierarchy of consumption behaviour in the circular economy", *Maastricht Journal of European and Comparative Law*, 2019, vol. 26(3), (394), 403: from most to least preferred: 'avoid, maintain and repair, share, lease, buy second-hand, buy quality, recirculate'.

⁷⁵ M. Loos, "Not good but certainly not content: the proposals for European harmonisation of online and distance selling of goods and the supply of digital content" in E. Terryn, I. Claeys (eds.), *Digital content & distance sales*, Antwerpen, Intersentia, 2017 (3), 21.

⁷⁶ Thus e.g. 3 years Sweden, 5 years in Iceland and Norway (for products with a longer expected lifespan), 6 years in Ireland, E. Maitre-Ekern and C. Dalhammar, "Towards a hierarchy of consumption behaviour in the circular economy", *MJ* 2019, vol. 26(3), 418.

⁷⁷ See E. Maitre-Ekern and C. Dalhammar, "Towards a hierarchy of consumption behaviour in the circular economy", *MJ* 2019, vol. 26(3), 418.

⁷⁸ Article 22 French Act.

⁷⁹ Article 7 Proposal, *Doc. Parl. Chambre*, 2019-2020, 0914/001.

⁸⁰ Article 5 Proposal, *Doc. Parl. Chambre*, 2019, 0193/001.

reversal of the burden of proof furthermore makes it easier for consumers to invoke the legal guarantee and can motivate producers to make sure their products will not fail in a short period of time. It is now set at one year in the Sale of Goods Directive 2019. Several Member States provide for a longer reversal of the burden of proof (e.g., in **France**, 2 years).

The hierarchy of remedies as established by the Sale of Goods Directive 2019 **does not stimulate, let alone require, consumers to choose the most sustainable remedy**. The primary remedies are **repair or replacement**. The choice between these primary remedies lies with the consumer in first instance. In terms of sustainability and promotion of a longer lifetime of goods, **repair** will however most often be the more sustainable choice⁸¹. Several Member States have taken or are considering initiatives to stimulate the choice for repair as a remedy. In **France**, as from 1 January 2022, an obligation will be introduced for professionals who maintain and repair certain goods (such as electrical and electronic appliances), to offer consumers the possibility to opt for spare parts that come from the circular economy instead of new parts⁸². In **Belgium**, there is a legislative proposal that would oblige sellers to repair a good within a period of 7 days, with a possibility to prolong the repair period to two months provided a replacement good is foreseen⁸³. This proposal aims to limit the potential hindrance of repair for the consumer.

Repair can furthermore be stimulated by **flanking measures** (partly discussed above), such as information requirements on reparability and availability of spare parts; obligations to make spare parts available (also to independent repairers/Do-it-yourself [DIY] repairers); access to repair and maintenance information. In addition, **Sweden** has introduced tax reductions for repair and remanufacturing activities⁸⁴. In **France**, a prohibition was recently introduced for producers to make repair by independent/DIY repairers impossible; as well as a prohibition on agreements or practices limiting access of professionals to information, spare parts or any other instruments allowing repair⁸⁵. At the **EU level**, Regulations 715/2007 and 595/2009 regulate access by independent operators to vehicle repair and maintenance information⁸⁶. In the **US**, several legislative proposals were introduced with a broader scope of application to stimulate repair of digital products⁸⁷, requiring manufacturers of digital electronic products to make available to independent repair facilities and owners the same diagnostic and repair information that they make available to their authorised repair providers and this free of charge.

The other primary remedy under the Sale of Goods Directive 2019 is **replacement**. Some national courts have decided that consumers are entitled to replacement by a new good instead of a refurbished or remanufactured good⁸⁸. From a sustainability perspective, this is regrettable.

⁸¹ E. Maitre-Ekern and C. Dalhammar, "Towards a hierarchy of consumption behaviour in the circular economy", MJ 2019, vol. 26(3), 419; E. Terry, "A Right to Repair: Towards Sustainable Remedies in Consumer Law" *European Review of Private Law* 2019, 858; Ellen Mc Arthur Foundation, "Empowering repair", 2016, 5-6, <https://www.ellenmacarthurfoundation.org/assets/downloads/ce100/Empowering-Repair-Final-Public1.pdf>.

⁸² Article 19 II French Act.

⁸³ Article 8 Proposal, *Doc. Parl. Chambre*, 2019, 0193/001.

⁸⁴ E. Maitre-Ekern and C. Dalhammar, "A Scandinavian perspective on the role of consumers in the circular economy", in B. Keirsbilck and E. Terry (eds.), *Consumer Protection in a Circular Economy*, Antwerp, Intersentia, 2019, p. 180.

⁸⁵ Article 25 French Act.

⁸⁶ Regulation (EC) No 715/2007 of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; Regulation (EC) No 595/2009 of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information.

⁸⁷ <https://repair.org/legislation/>

⁸⁸ NL:RBAMS:2016:4197; NL:RBAMS:2017:2519.

Although some problems have been reported with the quality of certain refurbished goods, some authors have suggested – as a compromise solution that balances consumer protection interests and sustainability – to oblige sellers to give a new guarantee period in case of replacement with a refurbished or remanufactured good⁸⁹.

The Sale of Goods Directive 2019 introduces limited additional obligations for producers who offer a **commercial guarantee of durability** to consumers⁹⁰. It has already been suggested to go further and to introduce a duty for manufacturers to inform consumer of the expected lifetime as well as a duty to issue a guarantee statement, with a possibility to make a ‘zero statement’. Such duty to inform consumers about not providing a guarantee can nudge manufacturers to provide a guarantee⁹¹.

‘**Servitization**’ as a business model may also help to achieve the circular economy⁹². Servitization implies a shift from buying a product to using products and various product-service combinations or systems (‘PSS’) are possible⁹³. PSS is increasingly used in a B2C context, ranging from ‘*pay-per-use*’ household appliances, to renting bikes and even clothes. These models *can* provide incentives to producers and users to use resources in a more sustainable way⁹⁴. There are however also **risks involved**. Servitization is **not necessarily sustainable**⁹⁵. The lack of ownership does not provide an incentive for consumers to take good care of products. Consumer protection in these models is furthermore not guaranteed. Consumer protection rules, both at EU and national level, have traditionally focused on sales contracts, service contracts are regulated to a far lesser extent and there is less mandatory protection. Subscription based access models involve regular payment obligations for consumers and pose constraints on their budget although the protection that consumer credit law provides may not apply. Rental or leasing contracts only qualify as consumer credit contracts under the **Consumer Credit Directive** 2008/48/EC if they contain an obligation to purchase the object. The replacement of ownership by access involves its own risks, *inter alia* in terms of creditworthiness of consumers and protection against bankruptcy of the service provider.

E-commerce has an important potential for the achievement of the internal market and has grown rapidly over the last decades. Yet, it **comes with an environmental price**. An analysis of the world’s leading e-retailers shows that the majority provide some information on their commitment to environmental sustainability, but that such commitment is undermined by marketing messages designed to encourage consumption rather than to promote more environmentally sustainable

⁸⁹ E. Terryn, “A Right to Repair: Towards Sustainable Remedies in Consumer Law” *ERPL* 2019, 858.

⁹⁰ Article 17(1).

⁹¹ K. Tonner and R. Malcolm, “How an EU Lifespan Guarantee Model Could Be Implemented Across the European Union”, 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU\(2017\)583121_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU(2017)583121_EN.pdf), 32-34 & 55; I. Oehme, A., Jacob, “Strategies against obsolescence Ensuring a minimum product lifetime and improving product service life as well as consumer information” (Umwelt Bundesamt 2017) p. 12; S. Vandemaele, *Commerciële garanties*, PhD, KU Leuven, 2019.

⁹² M. J. Goedkoop et al. (1999). Product Service Systems. Available at: https://www.pre-sustainability.com/download/Product_Service_Systems_main_report.pdf.

⁹³ A. Tukker, (2004). Eight types of product-service system: eight ways to sustainability. *Business Strategy and the Environment*, 13, (246) 248-249.

⁹⁴ J. Hojnik (2018). Ecological modernization through servitization: EU regulatory support for sustainable product-service systems. *RECIEL*, 27, (162) 164. Producers may take responsibility for the full lifecycle costs which may create an incentive to optimize use of energy, to recycle materials where possible, to increase the durability and to prolong the service life of goods to ensure that they are used as intensively as possible (Tukker 2004, pp. 248-255; European Parliament resolution of 4 July 2017, 4). Renting products, such as e.g. phones, can furthermore ensure that products are sent back at the end of the rental period, allowing redistribution to new users, <https://www.bitkom.org/Presse/Presseinformation/124-Millionen-Alt-Handys-liegen-ungenutzt-herum.html>. Consumers who pay per use may be stimulated to use goods in a more efficient way (Hojnik 2018, p. 164).

⁹⁵ Tukker points out that the majority of the eight reviewed PSS types only results in marginal environmental improvements; some PSS types could even lead to increased environmental impacts *inter alia* due to less responsible user behaviour. See also European Parliament resolution of 4 July 2017, 16.

shopping behaviour⁹⁶. E-commerce delivery of B2C goods accounts for 61% of total e-commerce shipments⁹⁷. Whether the environmental impact of an individual online purchase is higher than in a brick and mortar shop depends on many variables and is subject to debate. However, it is certain that there are possibilities to reduce the environmental impact of online purchases and the current legislative framework can be adapted to stimulate such changes. Transport (especially the last mile) and packaging (more individual packaging and plastic air pillows) have an important impact. Also, the use (and abuse) of (free) return policies adds to the environmental impact. Returns cause additional transport and waste. Not only in terms of packaging, but also of (new) goods that may end up as waste.

At EU level, the **Consumer Rights Directive** grants consumers a 14 days **right of withdrawal**. For distance contracts, this right aims to compensate the information asymmetry created by the fact that the consumer could not see the goods before concluding the contract⁹⁸. Exercise of the right of withdrawal **does not need to be motivated**. The costs of returning the goods may be charged on the consumer, but many companies operate a free return policy. The current legislation, in combination with the **commercial free return policies**, ensures strong consumer protection but provides no incentive for consumers to limit returns or to limit the environmental impact of their purchases. This is regrettable, as several technological measures exist to help consumers avoid buying unwanted items (such as sizing technology and try-on technology) and there are more sustainable options to organise delivery logistics (such as the use of pick-up points, collective delivery, smart delivery points) and return logistics (such as buy online - return in store)⁹⁹.

At national level, several initiatives are being taken to make e-commerce more environmentally friendly, both by the industry and by governments. In **Belgium**, the *Conseil Central de l'Economie* has formulated several recommendations to make e-commerce, and especially the last mile, more sustainable. These recommendations include the use of price differentiation between sustainable (e.g. pick-up point) and less sustainable last mile delivery options and additional information to increase transparency on the environmental impact of home delivery¹⁰⁰. In **France**, as from 1 January 2022 at the latest, the destruction of new non-food products will be prohibited. Producers, importers and distributors of new non-food products intended for sale are required to reuse (including by donation to charity organisations) or recycle their unsold goods¹⁰¹.

4.2. Recommendations

Further amendments and additional measures are possible in order for EU consumer protection legislation to promote sustainable choices, even if this may curtail the free choice of the consumer.

First of all, we recommend to **link the guarantee period to the average expected lifetime of goods**.

At least an assessment of the impact of aligning durability information and lifespan labelling with the duration of the legal guarantee could be considered¹⁰². Furthermore, the EP already recommended to

⁹⁶ P. Jones et al. (2015) The World's Leading E-Retailers and Environmental Sustainability. In: European Retail Research. European Retail Research. Springer Gabler, Wiesbaden.

⁹⁷ Olah, J. Kitukutha, N., Haddad, H., Pakurar, M., Maté, D., Popp, J., "Achieving sustainable e-commerce in environmental, social and economic dimensions by taking possible trade-offs", *Sustainability* 2019, 2.

⁹⁸ Recital 37 Consumer Rights Directive.

⁹⁹ VIL (Flemish institute for logistics', E-green, https://vil.be/wp-content/uploads/2018/06/180516-MVO-Vlaanderen_Koploper-E-commerce_afhaalpunten-als-oplossing-voor-de-hoge-CO2-voetafdruk.pdf; CRB 2019-2298.

¹⁰⁰ https://www.ccecrb.fgov.be/dpics/fichiers/2020-02-10-05-18-30_doc192298nl.pdf.

¹⁰¹ Article 35 French Act.

¹⁰² See also European Parliament resolution of 4 July 2017, 27.

“take into account the effects of both ecodesign legislation and contract law on energy-related products in order to develop a holistic approach to product regulation.”¹⁰³

Thus, for example, **ecodesign requirements as to durability could be linked to the guarantee period¹⁰⁴**. In addition, we suggest to provide a definition of second-hand goods to avoid an overly wide application of the one-year guarantee exception¹⁰⁵. Furthermore, a system of direct producer’s liability for non-conformity might stimulate producers to bring more durable products to the market¹⁰⁶.

In addition, we recommend to **stimulate the offering of a commercial lifespan guarantee**. This would mean to impose an obligation on manufacturers to provide information on the expected lifespan of the product and to give a guarantee statement informing consumers of whether the expected lifespan is covered by a commercial guarantee.

Secondly, we recommend to **make the hierarchy of remedies under the Sale of Goods Directive 2019 more sustainable¹⁰⁷**. That means, **in the first place, promoting repair**. Repair should be made the primary remedy. The proportionality test should be amended in order to reduce cases where replacement is favoured by traders as repair is deemed disproportionate. In addition, we recommend to stimulate the choice for repair by the consumer by **prolonging the guarantee period after repair¹⁰⁸**. We would also suggest to regulate the entitlement to a (potentially used) replacement good during the period for repair.

As mentioned above, it could be envisaged to **require producers and importers to ensure that essential spare parts are available during the expected lifespan of the goods**.

In addition, this means **promoting sustainable replacement**. We recommend to **allow replacement by refurbished/remanufactured goods of the same quality**. On top of this, we propose to **grant the consumer a new guarantee period after replacement with refurbished or remanufactured goods**.

Thirdly, we recommend to also stimulate repair by broadening the existing legislation that ensures **access to repair and maintenance information to independent repairers and DIY repair**.

Fourthly, we strongly recommend to **explore the possibilities of mandatory European legislation on PSS/services contracts**. Consumer protection in relation to the quality and safety of services is underdeveloped in EU law and national private laws, as consumer protection law has traditionally been focused on sales. The Unfair Contract Terms Directive 1993/93/EEC allows to filter out terms that create a significant imbalance, but it does not guarantee a minimum set of rights for consumers engaging in PSS. The Services Directive 2006/123 provides little substantive rules. A first step towards a general set of consumer rights for services contracts has been taken with the Digital Content Directive. A general set of remedies for services contracts will make it easier for consumers to make informed decisions and can provide a minimum level of protection. The proposal of the EC in its *new Circular Economy Action*

¹⁰³ See also European Parliament resolution of 4 July 2017, 34.

¹⁰⁴ See also C. Montalvo, D. Peck and E. Rietveld, *A Longer Lifetime for Products: Benefits for Consumers and Companies*, June 2016, Study commissioned by the IMCO Committee, 55.

¹⁰⁵ See E. Van Gool, “De nieuwe richtlijn consumentenkoop en duurzame consumptie”, in *De Nieuwe Richtlijnen Consumentenkoop, Digitale Inhoud en Diensten en Modernisering – Implicaties voor het Belgische Recht*, Antwerpen, Intersentia, 2020, forthcoming.

¹⁰⁶ See C. Willet, “Direct producer liability”, in G. Howells and R. Schulze, *Modernising and Harmonising Consumer Contract Law*, München, Sellier, 2009, 203.

¹⁰⁷ See E. Terry, “A Right to Repair: Towards Sustainable Remedies in Consumer Law”, *European Review of Private Law* 2019, p. 858; E. Maitre Ekern and C. Dalhammar, ‘Towards a hierarchy of consumption behaviour in the circular economy’, 26 *MJ* 2019, p. 419; A. Michel, “La directive 1999/44/CE sur la garantie des biens de consommation: un remède efficace contre l’obsolescence programmée?”, *REDC* 2018, p. 228.

¹⁰⁸ See also European Parliament resolution of 4 July 2017, 9.

Plan to also “consider the introduction of mandatory requirements to increase the sustainability not only of goods, but also of services” is therefore to be welcomed¹⁰⁹.

Furthermore, we recommend to **explore the possibilities to further extend the extended producer responsibility**. Although PSS systems and rental contracts imply that producers retain ownership and recuperate the goods, there is no guarantee that these products are recycled, reused or disposed of in an environmentally friendly way. In addition, we propose to **investigate the need to extend consumer credit protection** to certain rental contracts. Additionally, **there is a need to investigate the need for social support measures** for people who become fully dependent on PSS contracts. This could include a minimum protection in case of a sudden recovery of essential goods upon termination of a contract, a period of grace in case of recovery of specific goods; and more in general protection against sudden termination¹¹⁰.

Alternatively, we recommend to **explore the possibilities of standardisation and/or the development of standard contracts for PSS**. The further development of standards for PSS may help to facilitate informed consumer behaviour and to combat unsubstantiated green claims, and also to protect consumers by imposing minimum requirements and by managing complex supply chains and related risks¹¹¹. Although the diversity in services also poses challenges for standardisation bodies, their voluntary character and shorter development times make it somewhat easier to overcome the diversity. A sufficient involvement of consumer representatives in the development of standards should be guaranteed.

Fifthly, we recommend to amend EU consumer protection legislation so as to **make e-commerce greener**. This would include investigating the possibilities to **stimulate sustainable delivery options**; such as **obligatory price differentiation between sustainable and non-sustainable delivery options or a modulation of the right of withdrawal**. This would also include investigating the possibilities to **limit or even prohibit free returns** in e-commerce, thus encouraging or obliging consumers to consider their purchases more carefully and stimulating the use of technology that ensures correct purchases. Finally, we also recommend investigating the possibilities to stimulate consumers and businesses to choose **sustainable return options**.

Sixthly, we recommend to **step-up market surveillance activities to ensure that both European and imported products comply with EU consumer contract law requirements**.

¹⁰⁹ EC, A New Circular Economy Action Plan, 7.

¹¹⁰ See B. Keirsbilck, E. Terry and E. Van Gool, “Consumentenbescherming bij servitisation en product-dienst-systemen (PDS)”, *Tijdschrift voor Privaatrecht* 2019, forthcoming.

¹¹¹ CEN, *Strategic plan on services standardisation to implement the ambitions 2020*, 2017, p. 12.

5. WASTE STAGE

KEY RECOMMENDATIONS

As to the **waste stage**: (i) refine the waste management hierarchy so as to make sure that it is truly in line with the new EU Circular Economy Action Plan; (ii) fine-tune and narrow the definition of “waste” so that waste legislation is more compatible with the objectives of a circular economy and sustainable consumption; (iii) broaden and strengthen the extended producer responsibility, and further investigate the effect of modulation of the financial contribution to PROs.

Longer lifetime and repairability may decrease the volume of discarded products, but the production and consumption of products do create waste. EU waste rules aim at framing the end-of-life of products, promoting waste recovery. Beyond waste management, waste legislation also contributes to preventing waste generation and indirectly impacts on the earlier stages of the product lifecycle and on product durability. Regulating the waste stage is therefore of utmost importance towards sustainable consumption.

5.1. Current EU legislation and best practices

Current EU waste law include general rules and guidelines like the **Waste Framework Directive 2008/98/EC (“WFD”)**, but also sector-oriented rules such as Directive 94/62/EC (packaging), Directive 2006/66/EC (batteries), Waste Electrical and Electronic Equipment Directive 2012/19/EU (“WEEE”), as well as Directive 2005/64/EC and Directive 2000/53/EC on cars¹¹². They set *inter alia* targets on collection and recycling activities and promote repair, reuse and recycling. They set minimum requirements for extended producer responsibility schemes and differentiate the contribution paid by producers based on the costs necessary to treat their end-of-life products.

Article 4 WFD establishes a waste management hierarchy which ranks the different waste management options based on assumed environmental impacts, prioritising prevention (non-waste) over preparing for reuse, recycling, recovery and disposal (waste). So far, products become “waste” when the holder discards or intends to discard or is required to discard¹¹³. The concept of “waste” is also being broadly interpreted by the CJEU. On top of this, “end-of-waste” criteria are quite strict¹¹⁴.

In order to integrate environmental and economic objectives, the “**polluter-pays**” principle has become a guiding principle at European and international level. The concept of “**Extended Producer Responsibility**” (“EPR”) is “*a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organisational responsibility for the management of the waste stage of a product’s lifecycle.*”¹¹⁵ Article 8 WFD states that “*any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product) has extended producer responsibility*”. There are **two ways for producers to meet their obligations related to EPR**:

¹¹² Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008, p. 3–30; Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365, 31 December 1994, p. 10, and later amendments; Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators, OJ L 266, 26 September 2006, p. 1; Directive 2012/19/EU of 4 July 2012 on waste electrical and electronic equipment (WEEE), OJ L 197, 24 July 2012, p. 38; Directive 2005/64/EC of 26 October 2005 on the type-approval of motor vehicles with regard to their reusability, recyclability and recoverability and amending, OJ L 310, 25 November 2005, p. 10; Directive 2000/53/EC of 18 September 2000 on end-of-life vehicles, OJ L 269, 21 October 2000, p. 34. See in relation to batteries and vehicles, packaging and plastics the new actions proposed in EC, A New Circular Economy Action Plan, 11–13.

¹¹³ Article 3(1) WFD.

¹¹⁴ Article 6. See also K. Van Acker et al., Circular Economy – Position paper working group Metaforum (KU Leuven Metaforum 2016) p. 26.

¹¹⁵ Article 3(21) WFD.

individually or collectively. The first way is possible when the product market is concentrated and it is possible for producers to take back their products. The second one operates through Producer Responsibility Organisations (“PROs”), created for collecting and managing post-consumer products¹¹⁶. The WFD as amended in 2018 requires Member States to take the necessary measures to **ensure that the financial contributions paid by the producer are modulated, where possible, notably by taking into account product durability, repairability, re-usability and recyclability**¹¹⁷. In France, a bonus/penalty system for producers is being established depending on the compliance of the products with environmental performance criteria like durability and repairability¹¹⁸. In addition, so-called “eco-organisations” (PROs) participate in funds financing repair and reuse costs¹¹⁹.

5.2. Recommendations

A **first** recommendation is to **refine the waste management hierarchy so as to make sure that it is truly in line with the new EU Circular Economy Action Plan** focusing on sustainable consumption, repair, reuse, recycling etc.¹²⁰

Second, the **definition of “waste” could be fine-tuned and narrowed so that waste legislation is more compatible with the objectives of a circular economy and sustainable consumption**. Bottom-line would be that products at the end of their lifecycle that are now being considered as waste, would more often be considered as resource¹²¹.

A **third** recommendation is to **broaden and strengthen the extended producer responsibility**. Further research is needed to assess whether the modulation of the financial contribution to PROs provides enough incentives to producers to re-design their products¹²².

¹¹⁶ In France, Article L. 541-10-9 of the Environmental Code states that the extended producer responsibility also applies to person who facilitate distance selling by the use of platforms. The new French Act is extending the EPR also to new sources of waste: toys, cigarettes, sanitary textiles (household wipes, disposable diapers, cottons ...), building construction products and materials or even private cars, vans and motorized vehicles with 2 or 3 wheels (motorcycles, scooters ...), etc. (Article L. 541-10-1 Environmental Code).

¹¹⁷ Article 8a WFD (inserted in 2018).

¹¹⁸ Article 62 French Act.

¹¹⁹ Article 62 French Act.

¹²⁰ See also M. Gharfalkar et al., “Analysis of waste hierarchy in the European waste directive 2008/98/EC”, 39 *Waste Management* (2015) 305-313; A. Pires and G. Martinho, “Waste hierarchy index for circular economy in waste management”, *Waste Management*, Volume 95, 15 July 2019, pp. 298-305.

¹²¹ See E. Maitre-Ekern, ‘Taking producer responsibility out of waste law: A new legal framework for the Circular Economy’, in Nils F. Nissen & Melanie Jaeger-Erben (eds.), *3rd international Product Lifetimes and the Environnement (PLATE) conference* (Berlin 2019) (to be published).

¹²² See E. Maitre-Ekern, ‘Taking producer responsibility out of waste law: A new legal framework for the Circular Economy’, in Nils F. Nissen & Melanie Jaeger-Erben (eds.), *3rd international Product Lifetimes and the Environnement (PLATE) conference* (Berlin 2019) (to be published).

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This in-depth analysis analyses the contribution, or lack of contribution of, the current EU consumer protection legislation to a sustainable consumption and a longer lifetime of products. In addition, it gives an overview of the most relevant best practices at national and international level and provides recommendations on the future development and possible reforms of European consumer protection legislation in order to contribute to a more sustainable consumption and a longer lifetime of products.

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