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UNIVERSITY OF AMSTERDAM



AMSTERDAM CENTRE
FOR TRANSFORMATIVE
PRIVATE LAW

REPAIRING CONSUMER SALES LAW

M.B.M. Loos

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Repairing Consumer Sales Law

Prof. Dr. M.B.M. Loos¹

Abstract

Traditionally, European consumer law has primarily focused on consumer protection. Much attention was spent on strengthening consumer rights and later also on enhancing the enforcement of consumer rights. More recently, consumer law has also been given a role to play in stimulating sustainability and a circular economy, in particular by stimulating repair. This paper seeks to answer the question whether European (consumer) law lives up to its proclaimed aim of stimulating repair. In this paper, first the currently applicable legislation regarding consumer sales law, the law regarding service contracts, and rules facilitating continued use and repair by either the consumer or an independent repairer are discussed. On all three points, important shortcomings are identified. The author continues by discussing recent reform initiatives pertaining to eco-design legislation, to amendments to the Unfair Commercial Practices Directive contributing to the green transition, and to the introduction of the right to repair and associated amendments to the Sale of Goods Directive. The author concludes that the legal environment has been improved to facilitate repair, but – from the point of view of sustainability – existing and new European (consumer) law nevertheless does not yet sufficiently live up to its aim of stimulating repair.

Résumé

Traditionnellement, le droit européen de la consommation est principalement axé sur la protection des consommateurs. Une grande attention a été accordée au renforcement des droits des consommateurs et, plus tard, à l'amélioration de l'application des droits des consommateurs. Plus récemment, le droit de la consommation s'est également vu attribuer un rôle à jouer dans la stimulation de la durabilité et de l'économie circulaire, en particulier en stimulant la réparation. Dans cette contribution, l'auteur cherche à répondre à la question de savoir si le droit européen (de la consommation) est à la hauteur de l'objectif qu'il s'est fixé de stimuler la réparation. Il examinera tout d'abord la législation actuellement applicable en matière de vente aux consommateurs, le droit relatif aux contrats de service et les règles facilitant l'utilisation continue et la réparation par le consommateur ou un réparateur indépendant. Sur ces trois points, d'importantes lacunes sont identifiées. L'auteur poursuit en examinant des récentes initiatives de réforme relatives à la législation sur l'éco-conception, aux amendements à la directive sur les pratiques commerciales déloyales contribuant à la transition écologique, et à l'introduction du droit à la réparation et des amendements associés à la directive sur la vente de biens. Il conclut que l'environnement juridique a été amélioré pour faciliter la réparation, mais que, du point de vue de la durabilité, le droit (de la consommation) européen existant et nouveau n'est pas encore suffisamment à la hauteur de son objectif de stimuler la réparation.

Zusammenfassung

Traditionell hat sich das europäische Verbraucherrecht in erster Linie auf den Verbraucherschutz konzentriert. Viel Aufmerksamkeit wurde auf die Stärkung der Verbraucherrechte und später auch auf die Verbesserung der Durchsetzung von Verbraucherrechten verwendet. In jüngster Zeit wurde auch dem Verbraucherrecht eine Rolle bei der Förderung von Nachhaltigkeit und Kreislaufwirtschaft zugewiesen, insbesondere durch

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die Förderung von Reparaturen. In diesem Aufsatz soll die Frage beantwortet werden, ob das europäische (Verbraucher-)Recht seinem erklärten Ziel, die Reparatur zu fördern, gerecht wird. Dazu werden zunächst die derzeit geltenden Rechtsvorschriften zum Verbraucherkaufrecht, das Dienstleistungsvertragsrechts und die Vorschriften zur Erleichterung der Weiternutzung und Reparatur durch den Verbraucher oder eine unabhängige Reparaturwerkstatt erörtert. In allen drei Punkten werden erhebliche Defizite festgestellt. Im weiteren Verlauf des Aufsatzes werden die jüngsten Reforminitiativen in Bezug auf die Ökodesign-Gesetzgebung, die Änderungen der Richtlinie über unlautere Geschäftspraktiken, die zum ökologischen Übergang beitragen, sowie die Einführung des Rechts auf Reparatur und die damit verbundenen Änderungen der Richtlinie über den Warenkauf erörtert. Der Autor kommt zu dem Schluss, dass das rechtliche Umfeld zur Erleichterung von Reparaturen verbessert wurde, dass aber – unter dem Gesichtspunkt der Nachhaltigkeit – das bestehende und neue europäische (Verbraucher-)Recht seinem Ziel, Reparaturen zu fördern, noch nicht ausreichend gerecht wird.

1. Introduction

1. Traditionally, European consumer law has primarily focused on consumer protection. Much attention was spent on strengthening consumer rights and, more recently, on enhancing the enforcement of consumer rights. More recently, consumer law has also been given the aim of stimulating sustainability and a circular economy, in particular by stimulating repair.²

2. Repair is a multi-faceted phenomenon. Until recently, the notion had not been defined in legislation. Art. 2(20) Eco-design Regulation³ currently defines ‘repair’ as meaning ‘one or more actions carried out to return a defective product or waste to a condition where it fulfils its intended purpose’. This is in line with the description in the Oxford English Dictionary.⁴ Repair, therefore, aims at restoring goods in such a way that they can continue or resume to function properly. It may, thus, relate to the purchase of goods that are to be restored before they are delivered to the buyer, for instance a car that needs to be serviced before it is delivered to prevent a lack of conformity. Secondly, repair may also relate to a remedy for a lack of conformity against the seller or against the party providing a commercial guarantee. Thirdly, repair may be the object of an independent contract with a third party, aimed at simple maintenance to remedy ordinary wear and tear, e.g., by mending a punctured tyre or replacing a broken window, or at prolonging the lifespan of a good that no longer functions properly, e.g. by replacing a broken element in electronic equipment. For all three of these facets, European (consumer) law can provide instruments to serve and stimulate repair. Finally, consumers may also execute repair themselves. On this point, legislation can provide a framework for enabling consumers to repair goods themselves.

3. With a view to sustainability, repair of existing goods is in many cases superior to the purchase of new goods. In this respect, in the background information to a press release pertaining to recent European legislation,⁵ the European Parliament invoked a report drafted

² See E. TERRY, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’, *European Review of Private Law* 2019, 853.

³ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, *OJ* 2024, L 1781. The Regulation will be briefly discussed in section 5.2.

⁴ https://www.oed.com/dictionary/repair_n2?tl=true&tab=meaning_and_use (visited 21 May 2024).

⁵ European Parliament, ‘New EU rules encouraging consumers to repair devices over replacing them’, press release 21 November 2023, <https://www.europarl.europa.eu/news/en/press-room/20231117IPR12211/new-eu-rules-encouraging-consumers-to-repair-devices-over-replacing-them> (visited on 21 August 2024).

on behalf of the European Commission suggesting that consumers prefer repair over buying new goods. According to the report, 77% of consumers say that they try to get broken appliances repaired before buying new ones.⁶ In reality, however, that was not the outcome of the inquiry. Consumers were in fact asked: ‘Which of the following actions are you undertaking to reduce the amount of household waste that you generate?’ To this question, 77% of the consumers that were interviewed answered that they make an effort to get broken appliances repaired before buying new ones.⁷ However, this does not give an indication as to how often consumers undertake such action, or with regard to what goods: even if consumers would simply buy new goods 9 out of 10 times, but once in every 10 times would try to have the goods repaired, they could still rightfully claim that they ‘make an effort’ to get broken appliances repaired before buying new once. Moreover, when asked: ‘What are the main reasons why you are not trying to reduce the amount of waste you generate?’, 39% of the consumers that were interviewed answered that they tend to throw things away as it is difficult or too expensive to get them repaired.⁸

4. This shows that even though from the viewpoint of sustainability repair may be superior to the purchase of new goods, there is little evidence for the claim that consumers actually *prefer* repair over other options. Consumer behaviour research, in particular with regard to the endowment effect (or status quo bias) might suggest that at least some consumers may do so as they may have become accustomed to the defective goods and value them higher than replacement goods, even though these would be new.⁹ However, the European Commission’s report also shows that for a significant number of consumers repair is not an option as it is either too difficult or too expensive. This suggests that the possibility of repair is, in fact, underdeveloped, at least in practice. Still, repair may be, at least in theory, be attractive to both the seller and the consumer. The seller retains (most of) the profit from the original contract and is not left with the defective goods, which it needs to repair before it can resell them to another customer as second-hand goods. The consumer may also prefer repair as they may have become accustomed to the defective goods and value them higher than replacement goods, even though these would be new. Bearing this in mind, this paper seeks to answer the question whether European (consumer) law lives up to its own aim of stimulating repair.

5. In order to answer the research question set out above, section 2 will discuss repair under the Sale of Goods Directive. It will focus on repair as an element of the conformity test, repair as a remedy, and repair by the manufacturer (or producer – the terms will be used interchangeably). Section 3 will then focus on repair as a separate contract, and in section 4 I will address the question to what extent sellers or manufacturers are required to facilitate repair being carried out by the consumer themselves or by an independent third party. In section 5 I will focus on three legislative developments in the area of the circular economy. In section 6, the above research question will be answered.

⁶ TNS Political & Social, Attitudes of Europeans towards waste management and resource efficiency, Report on behalf of the European Commission, Flash Eurobarometer 388, 2014, p. 4 and 20.

⁷ See the attached tables, question 5a on p. T11.

⁸ See the attached tables, question 5b on p. T13.

⁹ See, for instance, D. KAHNEMAN, J.L. KNETSCH & R.H. THALER, ‘Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias’, *Journal of Economic Perspectives*, 1991, 193-206; see also briefly Y. ATAMER, ‘Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics’, *Modern Law Review* 2017, 632.

2. Repair under the Sale of Goods Directive

2.1 Repair as an Element of the Conformity Test

6. The Sale of Goods Directive¹⁰ suggests that repair is one of the key instruments to ensure the conformity of goods. Repair may be an element of conformity itself. Under Articles 6 and 7 Sale of Goods Directive, the consumer may expect that the goods delivered will be fit for any purpose made known by the consumer before the conclusion of the contract, and for the purposes for which goods of the same type would normally be used. In addition, the consumer may expect the goods to be delivered with the necessary maintenance and repair instructions, with spare parts and accessories if delivery thereof has been agreed upon, and with updates being delivered in case of goods with digital elements.¹¹ If the goods that are sold do not meet these expectations at the moment of conclusion of the contract, the seller may prevent a lack of conformity by repairing the goods before delivery. The availability of spare parts, however, is not expressly mentioned as an element of objective conformity, leaving it open whether the consumer may expect such spare parts to be available in case the parties have not made expressly agreed upon such obligation.¹²

7. Article 7(5) Sale of Goods Directive, however, provides that there is no lack of conformity if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective conformity requirements and the consumer expressly and separately accepted that deviation when concluding the sales contract. This ‘double explicitness’ requirement basically requires the seller to be explicit when an existing defect will *not* be remedied before delivery, and the consumer to accept the defect expressly and separately before the conclusion of the contract. If these requirements are not met, the defect must have been remedied before delivery. Here, repair functions as a means to *prevent* a lack of conformity. The quasi-mandatory nature of the conformity rules that follows from Article 7(5) Sale of Goods Directive can thus be seen as stimulating ‘preventive repair’.

2.2 Repair as a Remedy for a Lack of Conformity

8. If there is a lack of conformity, the consumer is entitled to a remedy. As a starting point, it is the consumer that chooses the remedy.¹³ In this respect, repair is but one of several remedies.

9. Under the former Consumer Sales Directive,¹⁴ repair and replacement were the primary remedies, and price reduction and termination merely secondary remedies. Recital (50) of the current Sale of Goods Directive suggests that the situation is the same under the Sale of Goods Directive, as it states that

‘the consumer should not, in principle, be immediately entitled to a price reduction or termination of the contract but should give the seller reasonable time to repair or replace the non-conforming good.’

¹⁰ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, *OJ* 2019, L 136/28.

¹¹ Cf. Art. 6(1)(a), 7(1)(a) and (d) Sale of Goods Directive.

¹² Cf. I. JOKANOVIĆ, ‘Lack of conformity of goods with the contract and sustainability issue – Directive (EU) 2019/771’, *Central European Academy Law Review* 2023, 88.

¹³ See Art. 13(1) Sale of Goods Directive.

¹⁴ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999, L 171/12.

10. However, Article 13(4) Sale of Goods Directive currently allows the consumer to immediately terminate or claim price reduction in a series of cases, including the case where the lack of conformity is particularly serious, and the case where a lack of conformity appears after an earlier attempt to remedy a lack of conformity. This means that, in essence, the consumer's right to termination is no longer of a secondary nature. On this point, the Sale of Goods Directive has strengthened the position of the consumer vis-à-vis the seller. However, this also means that consumers are no longer geared into the direction of repair (or replacement). From the point of view of sustainability, this is unfortunate.

11. As under the former Consumer Sales Directive, Article 13(2) Sale of Goods Directive allows the consumer to choose, in principle freely, between repair and replacement. Articles 13 and 14 Sale of Goods Directive treat both remedies in exactly the same manner, not distinguishing one from the other. The absence of specific legislative advantages that could stimulate a choice for repair over replacement effectively nudges consumers towards replacement for at least two separate reasons. First, this remedy can typically be executed faster as the seller can simply take new goods off the shelves and hand them over, whereas repair costs more time and effort. Second, replacement results in consumers receiving brand-new goods instead of receiving back the original goods, that may by that time have deteriorated because of ordinary wear and tear.¹⁵ The nudge towards replacement is even stronger in a Member State where the legislator did not prolong the conformity period beyond the two year minimum:¹⁶ whichever choice the consumer makes, their conformity rights end when the conformity period has elapsed, and the chance that a lack of conformity manifests shortly after that period is likely to be higher with regard to the original (repaired) goods than with regard to new goods.

12. The consumer is therefore likely to prefer replacement over the more sustainable remedy of repair. Only if the chosen remedy of replacement is impossible or causes disproportionate costs to the seller when compared to the costs of repair can the seller block the consumer's choice for replacement instead of repair.¹⁷ As consumer goods typically are mass-produced, replacement will normally be available; this is different only where the purchased goods were one-of-a-kind, *e.g.*, in the case of second-hand goods. This implies that in most cases, only the proportionality test may stand in the way of the consumer's (less sustainable) choice for replacement. Since the seller's right to object to the choice made by the consumer is a defence against its obligation to bring the goods into conformity in the manner the consumer has requested, the seller bears the burden of proof that the requirements for the objection are met. The mere fact that repair is cheaper as such is not sufficient for the seller to

¹⁵ Cf. TERRYN 2019, 854-856; K. KRYLA-CUDNA, 'Sales Contracts and the Circular Economy', *European Review of Private Law* 2020, 1211-1212; JOKANOVIĆ 2023, 89; M. ARTIGOT GOLOBARDES, 'Revisiting European consumer protection through the lens of sustainable markets', in M. SANTOS SILVA, A. NICOLUSSI, C. WENDEHORST, P. SALVADOR CODERCH, M. CLÉMENT, F. ZOLI (eds.), *Routledge Handbook of Private Law and Sustainability*, Abingdon: Routledge, 2024, 164.

¹⁶ According to the Explanatory Memorandum to the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final, p. 6, the two-year period mentioned in the former Consumer Sales Directive was taken over in 23 Member States: only Finland, Great Britain, Ireland, Sweden and The Netherlands would allow for a longer period. However, this is not the whole truth. First, it is overlooked that in Belgium after the end of the period of two years the consumer could make use of the scheme for hidden defects. Moreover, in Belgium, the Czech Republic, Hungary, Malta, Slovakia and Spain, the two-year period is suspended during the period that the goods are being repaired and the consumer as a result cannot make use of the goods, or when negotiations take place between the parties regarding a remedy for performance. For all these countries, this means that the period of two years under circumstances can be extended.

¹⁷ Cf. Art. 13(3) Sale of Goods Directive.

be able to oppose the consumer's claim for replacement.¹⁸ The *social* costs of replacement (*i.e.*, the costs for society as a whole, including the impact of the chosen remedy on the environment and other aspects of sustainability) are left out of consideration altogether.¹⁹ If repair causes significant inconvenience to the consumer and replacement does not, the chances of the seller proving that the consumer's choice for replacement is disproportionate are slim as in such case the consumer cannot reasonably be expected to accept that alternative remedy. The latter may, for instance, be the case if the consumer cannot use the goods during a long repair period or if repair would have to be carried out in the consumer's house, as this could significantly affect the consumer's daily life.²⁰

13. Moreover, if the consumer chooses repair instead of replacement, the seller is also faced with Article 14(1)(a) Sale of Goods Directive's requirement that the repair must be carried out 'without any significant inconvenience to the consumer', taking into account the nature of the goods and the purpose for which the consumer required the goods.²¹ *Looschelders* even considers the requirement to conduct repair (or replacement) without causing significant inconvenience to the consumer as 'a guiding principle of the Sale of Goods Directive'.²² In my view, the provision brings about an active obligation for the seller to avoid significant inconvenience to the consumer by responding appropriately. Since the remedy of repair (and that of replacement) must be executed free of charge, this implies, first of all, that the seller must also cover the consumer's costs for transporting the goods to them and for delivering them back to the consumer.²³ Second, Article 14(1)(a) Sale of Goods Directive may also require the seller to offer temporary replacement goods for the period during which repair takes place if without such temporary replacement good repair *would* cause significant inconvenience. (The national provision transposing) Article 14(1)(c) Sale of Goods Directive may, then, serve as a legal basis for such obligation. This is relevant, in particular, with goods consumers need for everyday life and of which they do not have a spare. One may think of a car which the consumer uses to go to work, or a (private) smartphone, which nowadays often is not only necessary for work (if only for 2-factor authentication purposes), but also for electronic payments, reading the newspaper, and accessing social media and satellite navigation services. Everyday life is much more complicated if the car or the smartphone are being repaired, especially if repair takes longer than a day or two. Although some inconvenience must be accepted, in case of such goods the threshold to *significant* (and therefore unacceptable) inconvenience is met soon. If in such cases the seller does not offer temporary replacement goods and the consumer needs to arrange a proper solution themselves, the costs thereof constitute damage, which may be

¹⁸ D. LOOSCHELDERS, Comments 46 and 48 to Article 13 Sale of Goods Directive, in: R. SCHULZE & D. STAUDENMAYER (eds.), *EU Digital Law, Article-by-article commentary, Nomos, Baden-Baden, 2nd edition 2024*, 463-464.

¹⁹ Cf. JOKANOVIĆ 2023, p. 90; ARTIGOT GOLOBARDES 2024, p. 164.

²⁰ LOOSCHELDERS, Comment 46 to Article 13 Sale of Goods Directive, in: SCHULZE & STAUDENMAYER 2024, 463-464.

²¹ Cf. Art. 14(1)(a) Sale of Goods Directive.

²² LOOSCHELDERS, Comment 46 to Article 14 Sale of Goods Directive, in: SCHULZE & STAUDENMAYER 2024, 463.

²³ Cf. Art. 14(2) Sale of Goods Directive. It should be noted that this provision does not explicitly state that the seller is required to return the goods to the consumer's home or to cover the costs thereof. However, since Article 14(1)(a) Sale of Goods Directive requires the seller to provide repair free of charge, this can only be understood as including a compensation of the costs of transportation after repair; cf. also C.M.D.S. PAVILLON, 'Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?', in: C.M.D.S. PAVILLON & W.H. VAN BOOM, *Privaatrechtelijke bescherming herijkt*, Preadviezen Nederlandse Vereniging voor Burgerlijk Recht 2021, Zutphen: Uitgeverij Paris, 2021, 97.

recovered under national general contract law.²⁴ Moreover, the consumer may then also resort to price reduction or termination of the contract.²⁵ In other words: by not offering a temporary replacement good in case of goods necessary for everyday life, either voluntarily or (as is argued here) because the law requires the seller to do so, effectively prevents the seller from invoking disproportionality of the consumer's choice for replacement instead of repair, and exposes the seller to the possibility of the consumer opting for price reduction or termination of the contract (and damages under national contract law) instead of repair. In both cases, the result is sub-optimal from the viewpoint of sustainability – and in most cases also from the viewpoint of both the seller and the consumer.

14. It should be recognised, however, that a right to a temporary replacement good in case of repair of goods necessary for everyday life has not yet been firmly embedded in legislation. This implies that current legislation is not yet up to the standard needed with a view to sustainability.

2.3 Producer's Liability

15. As there is no direct contractual link between the consumer and the producer, the producer is normally not liable towards the consumer. This may be different where the goods are defective and have led to death or physical injury, or if the defective goods have caused damage to, or the destruction of *other* goods, as in such case the producer may be liable under product liability law. However, neither the existing Product Liability Directive²⁶ nor the currently pending proposal for a new directive²⁷ provide for a right to claim repair of the defective goods themselves.

16. A direct link (whether or not contractual) between the consumer and the producer does exist if the producer²⁸ has offered a commercial guarantee. Such a commercial guarantee is binding on the producer under the conditions laid down in the commercial guarantee statement and associated advertising available at the time, or before the conclusion, of the consumer sales contract. More stringent rules apply if the producer has offered a commercial guarantee of durability. The notion of 'commercial guarantee of durability' is as such not defined, but its constituent components are. Article 2(12) Sale of Goods Directive defines a 'commercial guarantee' as 'any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to the seller's legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract'. Art. 2(13) Sale of Goods Directive defines 'durability' as 'the ability of the goods to maintain their required functions and performance through normal use'. A commercial guarantee of durability can, thus, be described as the undertaking by the producer that it will either reimburse the price paid, or replace, repair or service goods if the goods are no longer fit for normal use during the guarantee period.

²⁴ See in this respect also the last sentence of recital (61) Sale of Goods Directive, which explicitly mentions that Member States remain free to regulate a consumer's entitlement to compensation in such cases.

²⁵ See Art. 13(4)(d) Sale of Goods Directive.

²⁶ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* 1985, L 210/29.

²⁷ Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final.

²⁸ As mentioned earlier, I use the terms 'producer' and 'manufacturer' interchangeably in this paper.

17. With regard to such commercial guarantees of durability, the second sentence of Article 17(1) Sale of Goods Directive provides that ‘where a producer offers to the consumer a commercial guarantee of durability for certain goods for a certain period of time, the producer shall be liable directly to the consumer, during the entire period of the commercial guarantee of durability for repair or replacement of the goods in accordance with Article 14’. This means that if a producer offers a commercial guarantee of durability, it is liable for repair throughout the guarantee period, under the conditions set out for repair by the seller under Article 14 Sale of Goods Directive. Moreover, whereas the provision of the commercial guarantee may be in exchange for a price, the remedies under Article 14 Sale of Goods Directive must be performed free of charge, which implies that the producer may not demand additional payment for the repair (or replacement) itself. Since the seller’s liability for lack of conformity is restricted to two years from delivery unless the Member State of the country whose law applies to the contract has opted for a longer conformity period,²⁹ this means that the producer may be required to repair, free of charge, for a longer period than the seller is required to do, i.e. also when the conformity period has already elapsed. Moreover, the producer could be liable to repair the goods also in case it would be able to carry out repair itself whereas it could be disproportionate to the seller if the seller would need to invoke the help of a third party. Article 17(1) Sale of Goods Directive, therefore, clearly strengthens the consumer’s right to repair. However, the fact that repair does not take priority over replacement in the relationship between consumer and seller, also translates to the relationship between consumer and producer: the producer can hardly block the consumer’s request for replacement even if repair would be a more sustainable remedy, and the producer may have a similar preference for replacement instead of repair as the seller. Here, too, a nudge towards repair is missing.³⁰

3. Repair as Independent Contract

18. If neither the seller nor the producer is liable or available, or simply because it may be more convenient to the consumer, the consumer may also turn to a third party to have the goods repaired. At EU level, however, private law rules pertaining to repair are missing entirely. An attempt to provide for uniform rules on liability for service providers was considered in the beginning of the 1990s,³¹ but encountered so much resistance that the Commission was forced to withdraw the proposal. In 2006, the Services Directive³² was enacted, but this Directive hardly affects the contractual relations between the service provider and their client (whether that is a consumer or a trader).³³ The 2011 Consumer Rights Directive³⁴ provides for (pre-contractual) information obligations for service contracts and a right of withdrawal for such service contracts that are concluded at a distance or off-premises, but does not contain substantive rules for service contracts. The Principles of European Law on Service Contracts (PELSC), published in 2007,³⁵ do contain such rules. Chapter 1 PELSC contains general provisions applicable to all service contracts, and includes, among other things, provisions on

²⁹ Cf. Art. 10(1) and (3) Sale of Goods Directive.

³⁰ Cf. also JOKANOVIĆ 2023, 95.

³¹ Proposal for a Council Directive in liability for services, *OJ* 1991, C 12/8.

³² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* 2006, L 376/36.

³³ Cf. recital (90) Services Directive.

³⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ* L 304/64.

³⁵ M. BARENDRECHT, C. JANSEN, M. LOOS, A. PINNA, R. CASCÃO & S. VAN GULIJK (eds), *Principles of European Law: Services Contracts (PEL SC)*, Munich: Sellier European Law Publishers 2007. As will be clear from this footnote, I participated in drafting these Principles.

price, precontractual and contractual duties to warn, the general standard of care for services and the result stated or envisaged by the client, remedies for defective performance, as well as provisions on the right for the client to give directions as to the performance of the contract and the possibility to change or terminate the contract. Next to these general provisions applicable to all service contracts, Chapter 3 PELSC contains specific provisions applicable to ‘processing contracts’. Article 3:101 PELSC defines a processing contract as a contract ‘whereby one party, the processor, is to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client’. Paragraph (2) adds that the rules on processing apply, in particular, to contracts whereby the processor is to repair, maintain or clean an existing movable or incorporeal thing or immovable structure. The Chapter further contains rules on, among other things, conformity, inspection and supervision, the return of the goods to the client, and more specific rules on remedies. Together, Chapters 1 and 3 PELSC offer a coherent framework for repair and maintenance contracts. However, the PELSC are not binding law, but merely the result of academic research.³⁶ The PELSC were taken over, with some amendments,³⁷ in Book IV.C of the Draft Common Frame of Reference (DCFR),³⁸ but also the DCFR is the fruit of academic work and does not contain binding rules. Both the PELSC and the DCFR were developed as a basis for European legislation that could regulate, among other things, repair, and other services contracts. Unfortunately, so far, no such legislation has been enacted.

19. This means that the contractual regulation of the relationship between parties offering repair services and their clients is left to national law. At national level, however, the law pertaining to service contracts is underdeveloped and often unsystematic.³⁹ Moreover, and quite different from consumer sales law, there is little to no mandatory law, and generally applicable legal standards are missing as well at the level of the individual Member States. As a result, national general contract law offers service providers much leeway in shaping their contracts themselves by means of standard contract terms. In the absence of clear legal standards, unfair terms legislation intervenes only in the case of more extreme terms. Apart from that, service providers are free to do as they please. This is as much true for repair and maintenance contracts as it is for other service contracts.

20. That means, however, that it is difficult to indicate what the rights and obligations of the parties under an independent repair contract are, and almost impossible to compare the legal positions of consumers in the different Member States on this point.

³⁶ See for the development thereof M.B.M. LOOS, ‘Chapter 33, Service contracts’, in: A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. du Perron (eds.), *Towards a European Civil Code, fourth revised and expanded edition*, The Hague/London/New York/Nijmegen: Kluwer Law International/Ars Aequi Libri 2011, 757-785; see for the earlier stages of this development also M.B.M. LOOS, ‘Chapter 32, Service Contracts’, in: A. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. du Perron (eds.), *Towards a European Civil Code, Third fully revised and expanded edition*, Ars Aequi Libri/Kluwer Law International, 2004, 571-582.

³⁷ For the purposes of the DCFR, Chapter 1 of the PEL SC has been split into two separate general chapters, which means that the numbering of the Articles and Chapters differ with their counterpart in the PEL SC. Moreover, some articles were thought to be redundant given the extensive regulation of remedies elsewhere in the DCFR. Finally, some articles were rewritten to fit the drafting style of the DCFR. The definition of a processing contract, and the mentioning that the Chapter on Processing applies in particular to contracts for the repair, maintenance, and cleaning of goods, is taken over in Art. IV.C.-4:101 DCFR.

³⁸ Chr. VON BAR et al. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Outline edition)*, Munich: Sellier European law publishers, 2009.

³⁹ In Comment B to Art. IV.C.-1:101 DCFR, the editors of the DCFR remark: ‘A significant feature of the present Part, compared to many national laws, is its generality.’ See VON BAR et al. 2009, 1622.

4. Facilitating Continued Use and Repair by Third Party or through Self-Help

4.1 Redress of Costs for Repair by Third Party and/or Compensation of Effort

21. As far as the goods are defective and the seller is liable but unwilling or unable to repair the goods themselves, the consumer may attempt to repair the goods themselves or to engage a third party to carry out the repair. The question then arises whether the consumer is entitled to compensation of the costs thereof and to compensation of their time and effort in case it carries out repair itself. The Sale of Goods Directive does not provide any rules pertaining to this situation. If there is a lack of conformity the consumer may claim the costs for such repair under national general contract law, for instance based on damages. Article 3(6) Sale of Goods Directive explicitly leaves the matter of damages to national general contract law. Nevertheless, recital (61) to the Sale of Goods Directive provides some clarification. The recital states, as far as relevant here, the following:

‘(61) The principle of the seller’s liability for damages is an essential element of sales contracts. Consumers should, therefore, be entitled to claim compensation for any detriment caused by an infringement by the seller of this Directive, including for damage suffered as a consequence of a lack of conformity. Such compensation should put the consumer as much as possible into the position in which the consumer would have been had the goods been in conformity. (...)’

22. Recital (61) Sale of Goods Directive, therefore, suggests that as far as the consumer repairs the goods themselves, at least the actual costs of replacing the defective parts with spare parts should be covered. If the consumer has had a third party repairing the goods, the costs thereof may also be claimed from the seller. However, in accordance with Article 12 Sale of Goods Directive, national general contract law may require the consumer to first notify the lack of conformity to the seller and to allow them to bring the goods into conformity before the consumer may resort to self-help or to invoke the help of a third party. Moreover, whether the seller is also required to compensate the consumer for the loss of time or for the effort needed to repair the goods or have them repaired by a third party is also left to national law, without an indication whether such compensation is due.⁴⁰

4.2 Repair Instructions

23. In order for self-help and third-party repair to be possible, consumers and repairers may need repair or maintenance instructions.⁴¹ If the consumer may reasonably expect such instructions to be provided, their availability is part of the conformity test itself.⁴² As a result, the seller may be liable if these instructions are not provided. In practice, a consumer is likely to ask for such instructions only when the goods break down; before that moment, the consumer has little incentive to ask for them. However, if by that time the conformity period has ended, the consumer can no longer enforce that the instructions are provided, even though repair could still be possible and sensible. Moreover, the unavailability of repair or maintenance instructions

⁴⁰ It should be noted that on several occasions, European law does recognize such right to compensation. One may think of the compensation under the Denied Boarding Regulation (Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *OJ* 2004, L 46/1) in case of long delays of flights, and under the Package Travel Directive (Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, *OJ* 2015, L 326/1) in case of a lack of conformity of a package travel contract.

⁴¹ Cf. PAVILLON 2021, 34, 96.

⁴² Cf. Art. 7(1)(c) Sale of Goods Directive.

is also problematic in case the seller is willing (under a separate repair contract) or required (as a remedy for a lack of conformity) to repair the goods but is not able to obtain these instructions from their supplier. In the absence of such instructions, repair may not be feasible. In case of a lack of conformity, consumers may then effectively be driven towards replacement, price reduction or termination, whereas repair itself would have been a valid option otherwise. In this respect, eco-design legislation may provide relief.⁴³

4.3 Consumables and Spare Parts

24. It seems unlikely that the consumer or the third party may expect that spare parts are readily available. A spare part may be defined as a separate part of a good that can replace a part of that good and that may restore or even upgrade the functionality of that good when it has replaced the original part.⁴⁴ One may think of the battery of a laptop computer or a smartphone, which slow down by ordinary wear and tear over a longer period of time, and of the hose of a vacuum cleaner. As spare parts may extend the lifetime of a good and allow reuse or refurbishment, the availability thereof is important regarding sustainability. European legislation does recognise this,⁴⁵ but this has not (yet) led to the EU imposing the availability of spare parts as a general requirement for sellers or manufacturers.⁴⁶ Moreover, unless the parties have made a specific arrangement to the contrary, and given the fact that the availability of spare parts is not expressly mentioned as a matter of objective conformity, the unavailability of spare parts is not likely to constitute a lack of conformity either.

25. Regarding consumables, this may be different. Whereas the notion of ‘consumable’ is relatively new,⁴⁷ the type of goods it relates to is age-old: it refers to a component of a good that is used up recurrently and that needs to be replaced or replenished for the good to function as intended.⁴⁸ Examples included vacuum cleaner bags for a vacuum cleaner, and brush heads for electric toothbrushes. The borderline between spare parts and consumables is difficult to draw.⁴⁹ For instance, tyres for a bicycle are probably to be seen as spare parts as they need to be replaced only once or twice during the economic lifespan of a bike, whereas shoelaces for which pretty much the same applies, are likely to be seen as consumables. But if either the tyres or the shoelaces are unavailable on the market, the practical consequences are the same: consumers are not able to continue using the goods they purchased. Moreover, if manufacturers do not make spare parts or consumables available to sellers, this may make it impossible for a seller to execute repair in case of a lack of conformity, or for the consumer themselves or a third party to do so.

⁴³ See below, section 5.2.

⁴⁴ See Art. 3(27) of Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast), *OJ* 2011, L 174/88. That definition pertains specifically to electrical and electronic equipment. This Directive, however, aims at restricting the use of certain hazardous substances in such equipment, including in spare parts pertaining to such equipment, but does not deal with the availability thereof.

⁴⁵ See recital (20) Directive 2011/65/EU.

⁴⁶ An exception applies for a limited number of household electronic equipment on the basis of eco-design legislation, see in more detail below in section 5.2.

⁴⁷ As far as I know, the notion has only recently been introduced by the Directive Empowering Consumers for the Green Transition through Better Protection against Unfair Practices and through Better Information, *OJ* L 2024/825 as amendment to the Unfair Commercial Practices Directive. This Greenwashing Directive will be discussed in section 5.3.

⁴⁸ See the definition added to Art. 2(v) Unfair Commercial Practices Directive by Art. 1(b) Greenwashing Directive.

⁴⁹ In fact, one could argue that consumables are a sub-category of spare parts. Since there currently are no legal consequences attached to the qualification, it does not seem necessary to invest much time in determining the exact borderline between the two definitions.

26. In each of these cases, goods that as such can easily be repaired will have to be replaced by the consumer, either by turning to replacement or termination as a remedy for lack of conformity, or by simply purchasing replacement goods themselves. Similar as with repair instructions, relief is not to be expected from consumer sales law, but rather from eco-design legislation. In this respect, it should be noted that within consumer sales law – *i.e.*, with a view to the liability of the seller –, the question whether reparability is an element of durability of the goods, or an independent feature that falls under objective conformity, is difficult to answer. In their comment to Article 7 Sale of Goods Directive, *Staudenmayer* and *Bertelmann* argue that while reparability may, indeed, fall within the scope of the objective conformity requirements, this is only the case if reparability is ‘a feature normal for goods of the same type and which the consumer may reasonably expect. In the absence of either a regulatory requirement or a binding public statement to that effect, this cannot be assumed as such’.⁵⁰ According to them, what is a ‘normal’ feature is a factual criterion, which does not describe how market practices should be, but how they are. As a consequence, whereas for many goods the ability to be repaired may be normal, that may not be the case for other, and the availability of spare parts or consumables or of convenient and cost-efficient repair services may be normal for some goods, but not for other.⁵¹ On the basis of this factual criterion, it would seem that consumers may expect to be able to purchase new vacuum cleaner bags for their vacuum cleaner, new shoelaces for their shoes, and new brush heads for their electric toothbrush, and probably also new tyres for their bicycle, but perhaps not that they will also find a new vacuum hose, let alone that they may expect that an electric toothbrush could be repaired if it breaks down. Moreover, it is even less likely that consumers may expect small components used on the *inside* of electronic equipment to be available on the market – or that they know what type of components they may and may not expect. In this respect, unless eco-design legislation offers a way out, reparability may be the exception instead of the rule.

5. Repair and the Relation to a Circular Economy

5.1 Policymaking

27. On 9 November 2019, the European Commission announced the European Green Deal.⁵² With its communication, the European Commission indicated how it would tackle climate and environmental-related challenges.⁵³ Under the heading ‘Mobilising industry for a clean and circular economy’, the European Commission announced that it would launch a new circular economy action plan to help modernise the EU’s economy.⁵⁴ In the 2020 Circular economy action plan⁵⁵ the European Commission noted that many products ‘break down too quickly, cannot be easily reused, repaired or recycled, and many are made for single use only’.⁵⁶ It announced a proposal to review EU consumer law ‘to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan

⁵⁰ D. STAUDENMAYER & B. BERTELMANN, Comment 59 to Article 7 Sale of Goods Directive, in: SCHULZE & STAUDENMAYER 2024,381.

⁵¹ *Ibidem*.

⁵² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal, COM(2019) 640 final (hereinafter: Green Deal 2019).

⁵³ Green Deal 2019, p. 2.

⁵⁴ Green Deal 2019, p. 7.

⁵⁵ Communication from the Commission to the European Parliament, the European Council, 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 (hereinafter: Circular economy action plan).

⁵⁶ Circular economy action plan, p. 2.

and on the availability of repair services, spare parts and repair manuals.’⁵⁷ Moreover, the Commission also announced that it would work towards establishing a new ‘right to repair’ and that it would ‘consider new horizontal material rights for consumers for instance as regards availability of spare parts or access to repair and, in the case of ICT and electronics, to upgrading services.’⁵⁸ According to the Commission, electronics and IT would be ‘a priority sector for implementing the ‘right to repair’, including a right to update obsolete software’.⁵⁹

28. In order to execute the European Green Deal, the European Commission indeed submitted several proposals for legislation to the European Parliament and the Council. Of these, three are relevant to the research in this paper: the new Eco-design Regulation (section 5.2), the Greenwashing Directive (also known as the Directive Empowering Consumers for the Green Transition) (section 5.3), and the proposal for a Right to Repair Directive (section 5.4).

5.2 Eco-design legislation

29. The Eco-design Directive 2009⁶⁰ applies next to the directives in the area of consumer law. It sets requirements for energy-related products that are to be placed on the market and/or put into service. The Directive aims at increasing energy efficiency of products and at increasing the security of the energy supply.⁶¹ It requires Member States to ensure that goods that have an impact on energy consumption during use⁶² may be placed on the market and/or put into service only if they comply with measures implementing the Directive by the European Commission and if they bear the CE marking.⁶³ Among the many aspects that need to be taken into account by the European Commission when evaluating the potential for improving the environmental aspects are the extension of lifetime as expressed through the minimum guaranteed lifetime for the product, the minimum time for availability of spare parts, and the modularity, upgradeability, and reparability of the product.⁶⁴

30. In addition, an Energy Labelling Regulation was adopted in 2017.⁶⁵ Together, the Directive and the Regulation form the legal basis for a series of implementing directives pertaining to several types of household electronic equipment for which such requirements have been set. These types include televisions and other electronic displays,⁶⁶ refrigerators,⁶⁷ washing

⁵⁷ Circular economy action plan, p. 4.

⁵⁸ Circular economy action plan, p. 5.

⁵⁹ Circular economy action plan, p. 7.

⁶⁰ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy-related products (recast), *OJ* 2009, L 285/10.

⁶¹ Cf. Art. 1 Eco-design Directive 2009.

⁶² So-called energy-related products, see Art. 2(1) Eco-design Directive.

⁶³ Cf. Art. 3(1) Eco-design Directive 2009.

⁶⁴ Cf. Annex I to the Eco-design Directive 2009 under 1.3(i).

⁶⁵ Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, *OJ* 2017, L 198/1.

⁶⁶ Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down eco-design requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) No 642/2009, *OJ* 2019, L 315/241.

⁶⁷ Commission Regulation (EU) 2019/2019 of 1 October 2019 laying down eco-design requirements for refrigerating appliances pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulation (EC) No 643/2009, *OJ* 2019, L 315/187.

machines and washer-dryers,⁶⁸ tumble dryers,⁶⁹ dishwashers,⁷⁰ welding equipment,⁷¹ vacuum cleaners,⁷² servers and data storage products,⁷³ mobile phones, cordless phones and slate tablets,⁷⁴ and goods incorporating light means of transport batteries.⁷⁵ For these products, spare parts (including consumables) must be available to consumers or to professional repairers for a period of 7 to 10 years after they have been purchased by a consumer. These spare parts (and consumables) which must be supplied within 15 working days after the consumer or a professional repairer has requested their delivery.⁷⁶ Moreover, manufacturers are also required to make repair and maintenance information pertaining to such products available to independent repairers.⁷⁷ In addition, eco-design legislation is in place regarding household ovens,⁷⁸ air conditioners and comfort fans,⁷⁹ water heaters,⁸⁰ space heaters,⁸¹ and light

⁶⁸ Commission Regulation (EU) 2019/2023 of 1 October 2019 laying down eco-design requirements for household washing machines and household washer-dryers pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EU) No 1015/2010, *OJ* 2019, L 315/285.

⁶⁹ Commission Regulation (EU) 2023/2533 of 17 November 2023 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to eco-design requirements for household tumble dryers, amending Commission Regulation (EU) 2023/826, and repealing Commission Regulation (EU) No 932/2012, *OJ L* 2023/2533.

⁷⁰ Commission Regulation (EU) 2019/2022 of 1 October 2019 laying down eco-design requirements for household dishwashers pursuant to Directive 2009/125/EC of the European Parliament and of the Council amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EU) No 1016/2010, *OJ L* 315/267.

⁷¹ Commission Regulation (EU) 2019/1784 of 1 October 2019 laying down eco-design requirements for welding equipment pursuant to Directive 2009/125/EC of the European Parliament and of the Council, *OJ* 2019, L 272/121.

⁷² Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to eco-design requirements for vacuum cleaners, *OJ* 2013, L 192/24.

⁷³ Commission Regulation (EU) 2019/424 of 15 March 2019 laying down eco-design requirements for servers and data storage products pursuant to Directive 2009/125/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No 617/2013, *OJ* 2019, L 74/46.

⁷⁴ Commission Regulation (EU) 2023/1670 of 16 June 2023 laying down eco-design requirements for smartphones, mobile phones other than smartphones, cordless phones and slate tablets pursuant to Directive 2009/125/EC of the European Parliament and of the Council and amending Commission Regulation (EU) 2023/826, *OJ* 2023, L 214/47.

⁷⁵ Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, *OJ* 2023, L 191/1.

⁷⁶ See https://ec.europa.eu/commission/presscorner/detail/en/qanda_19_5889 (visited on 9 July 2024). For instance, in the case of electronic displays, such as televisions, the period is seven years after the last unit of a model was put on the market within the EU, cf. point D(5)(a) of Annex II of Commission Regulation (EU) 2019/2021. Point D5(c) of Annex II of the Regulation contains the time period within which the spare parts must be supplied.

⁷⁷ For instance, see for electronic displays, such as televisions, point D(5)(b) of Annex II of Commission Regulation (EU) 2019/2021.

⁷⁸ Commission Delegated Regulation (EU) No 65/2014 of 1 October 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to the energy labelling of domestic ovens and range hoods, *OJ* 2014, L 29/1.

⁷⁹ Commission Regulation (EU) No 206/2012 of 6 March 2012 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to eco-design requirements for air conditioners and comfort fans, *OJ* 2012, L 72/7.

⁸⁰ Commission Regulation (EU) No 814/2013 of 2 August 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to eco-design requirements for water heaters and hot water storage tanks, *OJ* 2013, L 239/162.

⁸¹ Commission Regulation (EU) No 813/2013 of 2 August 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to eco-design requirements for space heaters and combination heaters, *OJ* 2013, L 239/136.

sources.^{82,83} For these products, the Commission's Regulations may also contain requirements as to the extent in which parts can easily be replaced.⁸⁴ In sum, eco-design legislation and the implementing measures thereof may not only influence conformity standards, but may also contain information obligations as to repair and reparability of goods and obligations to provide spare parts for a period far exceeding the conformity period. This clearly contributes to European law's aim of stimulating repair'. However, as eco-design legislation does not award remedies to consumers, consumers will have to enforce their right to receive spare parts in accordance with national general contract law or tort law.

31. A proposal for a new Eco-design Regulation was submitted to the European Parliament and the Council on 30 March 2022.⁸⁵ The final text of the Regulation was published on 13 June 2024.⁸⁶ Its provisions are, with some exceptions, applicable as of 18 July 2024. The Eco-design Regulation is to apply to a large number of products – much larger than the previously applicable eco-design legislation –, provided that no product-specific legislation or legislation addressing horizontal aspects apply, and will set requirements where EU consumer law does not address, or insufficiently addresses, environmental sustainability aspects.⁸⁷ The new Regulation will certainly have an effect on reparability of goods for which implementing measures have been or will be set. For instance, Art. 27(1) and 7(2) Eco-design Regulation provide that manufacturers of products covered by implementation measures must ensure that the product is accompanied by digital instructions that enable consumers and other end-users to install, use, maintain and repair the product as well as information regarding a reparability score, a durability score, and a carbon or environmental footprint, and information regarding refurbishment, remanufacture or disposal of the product in a language that can be easily understood by consumers and other end-users.⁸⁸ This does not only contribute to consumers repairing goods themselves, but may also assure consumers that repair by a third party is a feasible solution as well.

5.3 The Greenwashing Directive (Directive Empowering Consumers for the Green Transition)

32. The proposal for a Directive Empowering Consumers for the Green Transition (hereinafter Greenwashing Directive) was submitted to the European Parliament and the Council on 30 March 2022.⁸⁹ It aimed at enhancing consumer rights by amending the Unfair Commercial

⁸² Commission Regulation (EU) 2019/2020 of 1 October 2019 laying down eco-design requirements for light sources and separate control gears pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulations (EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012, *OJ* 2019, L 315/209.

⁸³ An (outdated) list is published at https://single-market-economy.ec.europa.eu/single-market/european-standards/harmonised-standards/eco-design_en (visited 25 July 2024).

⁸⁴ See for instance Art. 4(1) Commission Regulation (EU) 2019/2020 regarding the possibility to replace light sources and separate control gears with the use of common available tools and without permanent damage to the containing product.

⁸⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final.

⁸⁶ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of eco-design requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, *OJ* 2024, L 1781.

⁸⁷ Explanatory Memorandum to the Proposal for an Eco-design Regulation, p. 2.

⁸⁸ A similar obligation will be put on importers that import a good from outside the European Union, cf. Art. 23(4) of the proposal for an Eco-design Regulation.

⁸⁹ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final.

Practices Directive⁹⁰ and the Consumer Rights Directive. The underlying idea was that consumers would be enabled to take informed purchasing decisions and therefore contribute to more sustainable consumption.⁹¹ The Greenwashing Directive was eventually adopted on 28 February 2024.⁹² The Directive will have to be transposed by the Member States by 27 March 2026, and the Member States will have to apply these national measures as of 27 September 2026.⁹³ With regard to the Unfair Commercial Practices Directive, among other things, Art. 1 Greenwashing Directive introduces rules pertaining to environmental claims and provides that information pertaining to environmental or social characteristics, accessories, circularity aspects, such as durability, reparability or recyclability, and after-sale customer assistance belong to the main characteristics of the goods or services of which the consumer must be informed. If such information is incorrect or missing, it may constitute a misleading commercial practice or a misleading omission under Art. 6 and 7 Unfair Commercial Practices Directive. In addition, several commercial practices regarding durability and reparability claims are blacklisted. Regarding each of these unfair commercial practices, in accordance with Art. 11a Unfair Commercial Practices Directive, consumers must be able to claim compensation for damage suffered by them, as well as price reduction or termination of the contract. However, Member States are not required to offer individual consumers any private law remedy by which they may demand that traders comply with environmental characteristics or circularity aspects regarding the contracts they have concluded with consumers. This is left entirely to the operation of conformity rules under the Sale of Goods Directive.

33. The changes to the Consumer Rights Directive introduced by Art. 2 Greenwashing Directive may appear more relevant for the purposes of this paper. Art. 2(1) Greenwashing Directive first adds a series of definitions to Art. 2 Consumer Rights Directive. Paragraphs(3) and (2) add information obligations to Art. 6 (for off-premises and distance contracts) and 5 Consumer Rights Directive (for other contracts), respectively. These information obligations pertain to the existence and the content of the legal guarantee, and either the reparability score for the goods or information about the availability, procedure for ordering, and estimated cost of spare parts that are necessary to keep the goods in conformity, as well as to the availability of repair and maintenance instructions and as to repair restrictions.⁹⁴ In addition, Art. 2(5) introduces a new Art. 22a Consumer Rights Directive pertaining to a harmonized notice and a harmonized label. The notice serves to inform consumers in a uniform way as to the main elements of the legal guarantee, *i.e.*, about their conformity rights. In addition, and only when applicable, the harmonized label serves to inform consumers about the extra rights a commercial guarantee of durability offers them. By providing the notice and the label traders comply with their information obligations under the new provisions incorporated in Art. 6 and 5 Consumer Rights Directive. The precise content and design of the harmonized notice and label are yet to be developed by the European Commission. However, as the consequences of breaches of the information obligations of the Consumer Rights Directive are largely left to national law, the influence of these changes to the Consumer Rights Directive on actual consumer rights is limited. The most relevant exception to that is the provision of Art. 6(5)

⁹⁰ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 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, *OJ* 2005, L 149/22.

⁹¹ Explanatory Memorandum to the Proposal for the Greenwashing Directive, p. 1.

⁹² Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, *OJ L* 2024/825.

⁹³ Art. 4(1) Greenwashing Directive.

⁹⁴ As already advocated by TERRYN 2019, 858.

Consumer Rights Directive, which provides that for off-premises contracts and distance contracts, the information that *is* provided, is an integral part of the contract, and thus directly affects the features that the consumer may expect of the goods under Art. 5(a) and 6(1)(d) Sale of Goods Directive. A corresponding provision is missing in Article 5 Consumer Rights Directive regarding other contracts, but a similar outcome is likely under the operation of national doctrines such as *culpa in contrahendo*, general contract law or interpretation of the contract.

5.4 *The Right to Repair Directive*

5.4.1 *Background*

34. On 22 March 2023, the European Commission finally published its proposal for a Right to Repair Directive.⁹⁵ In the impact assessment preceding the proposal the European Commission concluded that both measures pertaining to the legal guarantee, i.e. the conformity scheme, and measures addressing repair beyond the legal guarantee should be taken, with an emphasis on the latter as most defects appear after the legal guarantee has elapsed, and therefore the potential to increase repair is the highest with regard to the period beyond the legal guarantee.⁹⁶

35. The European legislator – bearing in mind the end of the term of the European Commission and of the European Parliament – rushed to the adoption of the Directive. A political agreement was reached within a year after the moment when the proposal was submitted by the European Commission.⁹⁷ The Right-to-Repair Directive was formally adopted on 13 June 2024.⁹⁸ It must be transposed by the Member States by 31 July 2026, and is to be applied as of that date.⁹⁹

5.4.2 *European Repair Information Form (Art. 4 Right to Repair Directive)*

36. Originally, Article 4 of the proposal introduced an obligation for repairers (including sellers, manufacturers, and independent repair service providers) to provide, upon request, standardised key information on their repair services via a European Repair Information Form (ERIF). Sellers and independent repair service providers that do not intend to provide the repair service would not be required to provide the form, and consumers could be required to compensate the repairer for the costs the repairer incurs in order to provide the information, provided that the consumer is informed thereof before it asks the repairer to provide the form to it. If the ERIF is provided, the repairer would be bound by the conditions specified in it if the consumer would accept these conditions within thirty calendar days from the date on which that form was provided to the consumer, unless the parties have agreed otherwise.

37. Under the final text of this Article, repairers are no longer required to provide the ERIF when it is requested, but *if* they do, they must do so for free, unless a diagnostic service is needed to identify the nature of the defect and the type of repair and to estimate the price of repair. In such cases, the repairer may request the consumer to pay the necessary costs of the diagnostic service, provided that they indicate that such costs will have to be paid before the

⁹⁵ Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM(2023) 155 final.

⁹⁶ Explanatory memorandum to the proposal, p. 7.

⁹⁷ See the European Commission's press release of 2 February 2024, 'Commission welcomes political agreement on new consumer rights for easy and attractive repairs'.

⁹⁸ Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, OJL 2024/1799.

⁹⁹ Cf. Art. 22 Right to Repair Directive.

consumer requests such diagnostic service and before the ERIF is provided.¹⁰⁰ More importantly, and different from the proposal, a contractual derogation of the conditions specified in the ERIF that was provided is not valid if the consumer has accepted these conditions within 30 calendar days from the date on which the ERIF was provided to the consumer.

5.4.3 *Manufacturer's Obligation to Repair and/or to Inform as to Repair (Art. 5-7 Right to Repair Directive)*

38. Article 5 Right to Repair Directive contains the heart of the Directive. Article 5(1) contains an obligation for the manufacturer of goods to repair goods upon request by the consumer, provided of course that repair is possible.¹⁰¹ Paragraph (7) provides that the manufacturer may not refuse to repair the goods for the sole reason that a previous repair has been performed by other repairers or by other persons. In addition, consumers may seek repair from any repairer of their choice and do not lose the right to request repair by the manufacturer as a result thereof (Art. 5(8)).

39. However, the obligation to repair under Article 5 Right to Repair Directive – and all other obligations stemming from this Article – only exist regarding goods that feature on Annex II to the Directive and for which reparability requirements have been provided by Union legal acts. Currently, Annex II features ten types of household electronic equipment for which, in accordance with eco-design legislation, such requirements have been set. These types include televisions and other electronic displays, refrigerators, washing machines and washer-dryers, tumble dryers, dishwashers, welding equipment, vacuum cleaners, servers and data storage products, mobile phones, cordless phones and slate tablets, and goods incorporating light means of transport batteries.¹⁰² The other Commission eco-design regulations mentioned in section 5.2 do not feature on this Annex as they do not contain reparability requirements. However, the European Commission is required to update Annex II – and therefore the scope of the manufacturer's obligation to repair – if reparability requirements have been provided by Union legal acts for additional types of goods.¹⁰³

40. In accordance with Article 5(2), the manufacturer need not offer their repair services for free and may demand payment of a reasonable price instead. This is different from the seller's obligation to repair in case of a lack of conformity under Article 14(1)(a) Sale of Goods Directive, and for good reason. First, except for the case of a commercial guarantee offered by the manufacturer, the latter does not have a contractual relationship with the consumer, and therefore there is less reason to award the consumer a *right* to free repair. Second, the right to repair under Article 5(2) is not limited to 2 years after delivery, as is typically the case with the seller's obligation to repair in case of a lack of conformity,¹⁰⁴ but may apply throughout the technical lifespan of the goods. Third, the right to repair under this Directive applies irrespective whether repair is needed because of a lack of conformity or because of ordinary tear and wear.¹⁰⁵ Moreover, in case of a commercial guarantee of durability, under Article 17(1)

¹⁰⁰ Cf. recital (12) Right to Repair Directive.

¹⁰¹ The manufacturer is allowed to sub-contract their repair obligation and is therefore not required to execute repair itself. If the manufacturer is not established within the European Union, paragraph (3) puts the obligation on the manufacturer's authorised representative, or in the absence therefore the importer or, if there also is no importer, on the distributor of the goods. Each of them, of course, may also sub-contract repair.

¹⁰² See for the relevant sources *supra*, section 5.2.

¹⁰³ Cf. Art. 5(9) Right to Repair Directive.

¹⁰⁴ Cf. Art. 10(1) Sale of Goods Directive; however, national law may provide for a longer conformity period, see Art. 10(3) Sale of Goods Directive.

¹⁰⁵ See as to this third argument also recital (16).

Sale of Goods Directive, the manufacturer is already required to provide repair for free during the period for which the commercial guarantee of durability applies, under the same conditions as the seller is under Article 14 Sale of Goods Directive. The same applies, of course, in case the manufacturer is also the seller of the goods.

41. The manufacturer¹⁰⁶ may therefore be entitled to a price for the repair, unless repair is to be carried out free of charge in accordance with the terms of the commercial guarantee or in accordance with Article 14 Sale of Goods Directive. Moreover, in so far as no contractual relation existed before the consumer accepted the manufacturer's offer to repair the goods, the information obligations of Article 6 (for off-premises and distance contracts) or 5 (for other contracts) Consumer Rights Directive must be complied with.¹⁰⁷ As a result, the manufacturer that wishes to charge a price for their repair services must be clear about that, preferably even before the consumer has contacted them. To this end, Article 5(5) Right to Repair Directive requires the manufacturer to ensure that consumers can access an online website with information on the indicative prices for the typical repair of the goods. Whereas this obligation pertains only to the manufacturers of the goods that feature on Annex II of the Directive, this is not the case for the more or less corresponding obligation under Article 6 Right to Repair Directive. That provision requires manufacturers to provide information on their repair services in an easily accessible, clear, and comprehensible manner. In view of Articles 5 and 6 Consumer Rights Directive, one may expect that such information must also include an indication of the price for their repair services. However, as there is no obligation to repair for manufacturers of other goods than those that feature on Annex II to the Directive, the information pertaining to such goods may simply be that no repair services are offered.

42. Importantly, Article 5(2) Right to Repair Directive also requires the manufacturer to carry out the repair 'within a reasonable period of time from the moment the manufacturer has physical possession of the good, has received the good, or has been given access to the good by the consumer'. This implies that regarding the period for repair the same rules apply as with regard to the seller's obligation to repair in case of a lack of conformity under Article 14(1)(b) Sale of Goods Directive, but Article 5(2) Right to Repair Directive is more precise by indicating when the 'reasonable period' starts to run. One may expect that this provision will inspire courts when interpreting the corresponding provision of Article 14(1)(b) Sale of Goods Directive.

43. Paragraph (2) also provides that the manufacturer *may* provide the consumer with the loan of a replacement good free of charge or for a reasonable fee for the duration of the repair. The manufacturer, therefore, is not *required* to offer such replacement good. Finally, in case repair turns out not to be possible, the manufacturer may (but again is not required to) offer the consumer a refurbished good.

44. Whereas paragraphs (1-3), (5) and (7) of Article 5 Right to Repair Directive are aimed at the manufacturer of the goods or the party that is liable instead of the manufacturer (the authorized representative, the importer, or the distributor), Article 5(4) aims at the manufacturers that make spare parts and tools available for such goods. This of course may include the manufacturer of the goods, but it also includes other manufacturers that specifically

¹⁰⁶ Or the party on whom the obligation is put in accordance with paragraph (3).

¹⁰⁷ If the manufacturer fails to inform the consumer of the price the consumer will have to pay for their repair services, this may have the consequence that under national contract law no contract has been concluded or that repair is to be carried out for free after all. Moreover, such consequences may also follow from Art. 23 Consumer Rights Directive, which requires Member States to ensure that adequate and effective means exist to ensure compliance with the Directive.

produce (generic, often brandless) repair parts and tools. Each of these parties is required to offer the spare parts and tools ‘at a reasonable price that does not deter repair’. This provision thus stimulates competition among manufacturers of spare parts and tools. Similarly, paragraph (6) forbids manufacturers of the original goods to make use of contractual clauses or to introduce or maintain hardware or software techniques that impede the repair of these goods, e.g., by preventing or limiting independent repairers from using original spare parts obtained via parallel importing, second-hand spare parts, compatible (generic) spare parts, or spare parts produced by way of 3D-printing, provided that the spare parts comply with product safety requirements and with intellectual property law. However, contractual clauses and hardware and software techniques impeding the use of such spare parts are allowed if these are justified by legitimate and objective factors, including the protection of intellectual property rights under Union and national law.

45. Article 7 Right to Repair Directive requires the European Commission to make available a European online platform for repair and goods subject to refurbishment. The platform should allow consumers to find repairers and, where applicable, sellers of refurbished goods, purchasers of defective goods for refurbishment or community-led repair initiatives. Access to the platform or to the national platform to which it may link instead, is free of charge for consumers. Repairers, sellers of refurbished goods, purchasers of defective goods for refurbishment, and community-led repair initiatives may, but are not required to register with the European or national platform. As the Directive does not provide otherwise, the operator of the relevant platform is allowed to charge traders for their registration. However, the absence of an obligation to register and the likelihood of national chargers for registration shed severe doubts as to the effectiveness of the platform.¹⁰⁸ In this respect, it seems that the unsuccessfulness of a similar online platform operated by the European Commission – that for online dispute resolution¹⁰⁹ – may serve as a ‘profit warning’.

5.4.4 Amendments to Sale of Goods Directive (Art. 16 Right to Repair Directive)

46. The Right to Repair Directive does not only lead to additional possibilities for consumers to have goods repaired by (or on behalf of) the manufacturer or by independent repairers, but also includes amendments to the Sale of Goods Directive, thus affecting the rights and obligations of the parties to the original consumer sales contract. First, Article 16(1) Right to Repair Directive adds ‘reparability’ to the objective conformity criteria under Article 7(1)(d) Sale of Goods Directive. This implies that the question¹¹⁰ whether reparability is an element of durability of the goods, or an independent feature that falls under objective conformity, is answered: it is an independent feature. Whether or not the consumer may expect that the goods can be repaired, will depend of course on the nature of the goods. However, the mere fact that reparability as a feature will be listed among the objective conformity criteria already indicates that this is a matter which is gaining importance.

¹⁰⁸ This is also one of the reasons why Estonia and Latvia voted against the adoption of the Right to Repair Directive; other reasons are the perceived additional administrative burden for businesses and Member States, and information overload for consumers. See the joint statement by the Estonian and Latvian delegations regarding the Analysis of the final compromise text with a view to agreement, 6153/24 ADD 2. The Council documents mentioned in this paper are available at <https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/>, interinstitutional file: 2023/0083(COD) (visited on 24 July 2024).

¹⁰⁹ Established by Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), *OJ* 2013, L 165/1.

¹¹⁰ Mentioned *supra*, section 4.3.

47. Article 16(2) Right to Repair Directive's amendments to Article 10 Sale of Goods Directive are further reaching. The new paragraph (2a) provides that if during the conformity period the goods are repaired in order to bring the goods into conformity, the conformity period is extended by twelve months – i.e. the conformity period is then three instead of two years. Member States may allow for a longer extension (para. 3), but the new paragraph (5a) makes clear that for Member States that allow conformity claims during the economic lifespan of the goods must ensure that in case of such repair, the conformity period is at least equivalent to three years. These amendments therefore imply that in case of repair, the liability period is extended to (at least) three years after delivery. Since a corresponding extension does not apply in case of replacement, this constitutes a nudge in the direction of repair instead of replacement.¹¹¹ In this respect, it is relevant that the (equally new) provision of Article 13(2a) Sale of Goods Directive¹¹² requires sellers, before they repair or replace the goods – i.e. when the consumer claims a remedy – to inform the consumer not only of the consumer's right to choose between repair and replacement, but also about the possible extension of the liability period resulting from a choice in favor of repair.¹¹³ It is a pity, though, that the extension of the conformity period applies only if repair is executed by or on behalf of the seller: Article 10(2a) Sale of Goods Directive remains silent on the possible extension of the conformity period in case repair is executed by the producer, even if the producer is required to repair in accordance with Article 5 Right to Repair Directive or under the producer's commercial guarantee of durability. Moreover, the producer is not even required to inform the consumer of the extension of the conformity period if repair is carried out by the seller instead of the producer.

48. The last amendment¹¹⁴ pertains to the modalities under which repair, or replacement must take place. Article 14(1) Sale of Goods Directive currently provides that repair or replacement must be free of charge, within a reasonable period from the moment that the seller is informed of the lack of conformity, and without causing significant inconvenience to the consumer. Two sentences are added to this paragraph. First, in case of repair, the seller may provide the consumer free of charge with a replacement good 'on loan'. This need not be a new good but can also be a refurbished good. The new text of Article 14(1) Sale of Goods Directive indicates that such possibility to offer a replacement good will depend 'on the specificities of the relevant category of goods, in particular of the need of the consumer to have such goods permanently available'. Recital (42) Right to Repair Directive directly links the existence of such an offer to the situation where repair is (otherwise) not completed within a reasonable period of time or without significant inconvenience. The provision is, in my view, a bit odd: it applies only if the goods are indispensable for the consumer, e.g. in the case of a smartphone or a car for the consumer's daily commute to work. In such cases, one would expect that the seller would be *required* to offer a replacement good. Instead, Article 14(1) Sale of Goods Directive only speaks of the *possibility* to offer a replacement good. With regard to other goods, the provision does not apply, but of course there is nothing to stand in the way of the seller offering a replacement good during the period of repair. The only practical difference seems to be that if the seller offers such a replacement good, with regard to indispensable goods this must be free of charge, whereas the seller could possibly charge a small fee in other cases. Yet, recital (42) Right to Repair Directive – as well as the text of Article 14(1) Sale of Goods Directive itself – rather suggests that a replacement good should always be offered free of charge. In my view, this new sentence is a step in the wrong direction: whereas under the old text of Article 14(1) Sale of Goods Directive it could be argued – and is argued *supra*, section 2.2 – that under these

¹¹¹ Cf. also recital (40) Right to Repair Directive.

¹¹² Introduced by Art. 16(3) Right to Repair Directive.

¹¹³ In this sense also recital (41) Right to Repair Directive.

¹¹⁴ Introduced by Art. 16(4) Right to Repair Directive.

circumstances the seller *must* offer a temporary replacement good on loan, this seems much less defensible under the new text of the provision.

49. The new last sentence of Article 14(1) Sale of Goods Directive introduces the possibility for the seller to offer the consumer a refurbished good in case the consumer chooses replacement instead of repair. However, this possibility exists *only* if the consumer explicitly requests a refurbished good instead of a new good. This provision not only confirms that a refurbished good does not qualify as a new good,¹¹⁵ but also that replacement of a defective good by a refurbished good is not even to be seen as equivalent to repair of that defective good – even though in both cases the consumer receives a good that functions properly and that may show the results of ordinary wear and tear. Instead, in the case of replacement of the defective good by a new good, the consumer receives a good that is in a *better* state than the consumer could reasonably expect given the ordinary tear and wear the good should normally show by the time it broke down. Moreover, since providing a refurbished good is only an option for the seller if the consumer specifically asks for such good, the new last sentence of Article 14(1) Sale of Goods Directive effectively stands in the way of refurbishment becoming an effective instrument to ensure sustainability: since the conformity period is not renewed¹¹⁶ or even extended in the same manner as in the case of repair, the consumer has little reason to ask for a refurbished good instead of a new good. With a view to sustainability, one would rather have expected that in so far as replacement would be available as a remedy, the consumer would receive a refurbished good, and that the consumer could expect a new good only when the seller cannot offer a refurbished good.

50. In the proposal submitted by the European Commission, another far-reaching amendment to the Sale of Goods Directive featured. Article 12 of the proposal for the Right to Repair Directive consisted of an amendment to Article 13(2) Sale of Goods Directive and provided that if ‘the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods in order to bring those goods in conformity.’ This amendment would, therefore, introduce a priority rule for repair over replacement in case the costs for repair would not exceed the costs for replacement, taking away the consumer’s right to choose between these remedies, and the seller’s right to offer replacement where this would be cheaper. The amendment was expressly justified as a means to promote repair ‘and thereby more sustainable consumption’¹¹⁷ – the same justification that is used in recitals (40-41) Right to Repair Directive, which pertain to the amendment of Articles 10, 13 and 14 Sale of Goods Directive, as discussed above. However, a large majority of Member States considered the mandatory choice for repair instead of replacement to be ‘an unacceptable limitation of consumers’ options’,¹¹⁸ which led the Council to propose deleting the amendment to Article 13(2) Sale of Goods Directive.¹¹⁹ Most Member States were not willing to deviate from this position, even though the European Parliament had accepted the European Commission’s proposal on this point. For this reason, the Council refused to give in on this point during the trilogue

¹¹⁵ See also TERRYN 2019, 860-861; KRYLA-CUDNA 2020, 1222-1224; JOKANOVIĆ 2023, 91; PAVILLON 2021, 28.

¹¹⁶ As advocated by TERRYN 2010, 861; KRYLA-CUDNA 2020, 1224.

¹¹⁷ Explanatory memorandum to the proposal, p. 2.

¹¹⁸ Cf. the mandate the Council gave Permanent Representatives Committee for negotiations with the European Parliament of 17 November 2023, 15408/23, p. 4.

¹¹⁹ See the second compromise proposal by the Presidency of the Council of 11 October 2023, ST-13109-2023-REV 1 NOTE.

negotiations.¹²⁰ Instead, the amendments to Articles 10 and 14 Sale of Goods Directive were adopted.

6. Conclusions and the Way Forward

51. This paper seeks to answer the question European (consumer) law lives up to its own aim of stimulating 'repair'. The answer to this question is nuanced. In sections 2-4, several shortcomings were identified in the European legislation that applied as of 2019. In section 3 it was remarked that a coherent legal framework for contractual relations between consumers and traders is missing at both European and national law. This effectively means that service providers are given much leeway in shaping their contracts themselves by means of standard contract terms, and that unfair terms legislation intervenes only in the case of more extreme terms as clear legal standards against which terms may be evaluated are largely missing. Section 4 reported shortcomings regarding the right for consumers and independent repairers to demand manufacturers to provide them with repair and maintenance instructions, and indicated that EU consumer law does not *require* manufacturers to make spare parts available to consumers, and that is uncertain whether this is different for 'consumables', which notion refers to a component of a good that is used up recurrently and that needs to be replaced or replenished for the good to function as intended.

52. Most shortcomings, however, were identified in section 2, and pertain to the until recently existing EU legal framework for consumer sales law. With the adoption of the Sale of Goods Directive, the pre-existing hierarchy of remedies was abolished. Moreover, it was noted that the consumer's free choice between repair and replacement effectively nudges consumers to choose replacement over repair, as replacement typically can be executed faster as the seller can simply take new goods off the shelves and hand them over, and as replacement results in consumers receiving brand-new goods. The seller can normally only block a consumer's choice for replacement if the consumer's choice is disproportionate. The seller will have difficulty to pass the disproportionality test as repair typically costs more time and, therefore, may cause significant inconvenience to the consumer. The European Commission's proposal to prioritise repair over replacement if the costs of repair are equal to the costs of replacement was rejected during the deliberations regarding the adoption of the Right to Repair Directive. The original text of the Sale of Goods Directive does not speak of the consumer having a right to a temporary replacement good during the repair period in case the goods are needed for everyday life and cannot be missed, as may be the case for a smartphone and a car. However, the text at least offers the possibility to argue that it requires the seller to offer such temporary replacement good during repair, as repair otherwise would cause significant inconvenience to the consumer. One would expect that the adoption of the Right to Repair Directive would give rise to the outright introduction of an obligation to offer such temporary replacement good, at least for goods that the consumer needs for everyday life and that cannot be missed. Instead, the amendment to the Sale of Goods Directive introduced by the Right to Repair Directive only states that in such cases, the seller *may* provide the consumer free of charge with a replacement good 'on loan'. This, in my view, is not just a missed opportunity, but in fact a step back, as it will be much more difficult to argue that a *right* to a temporary replacement good exists.

54. On other points, the Right to Repair Directive does contribute to the stimulation of repair'. This is true, in particular, with the introduction of a repair obligation for manufacturers of goods for which reparability requirements have been set in accordance with eco-design legislation.

¹²⁰ Cf. the Council's General Secretariat's Note to the Permanent Representatives Committee in preparation for the trilogue, 5683/24, p. 7.

This confirms that the interplay of different rules pertaining to repair and reparability, may strengthen the legal framework and enhance a consumer's demand for repair. Moreover, the Right to Repair Directive introduces another important change to the Sale of Goods, which certainly will help European (consumer) law to live up to its aim of stimulating repair. This change will result from the extension of the conformity period to three years for goods that are repaired during the original 2 years conformity period. If repair takes place near the end of the conformity period, this may contribute to consumers choosing repair instead of replacement, since the extension of the conformity period may make replacement slightly less attractive even if by way of replacement the consumer would obtain brand-new goods. If repair takes place near the start of the conformity period, the extension may even be more attractive. In this respect, Article 13(2a) Sale of Goods Directive's new information obligation pertaining to the consequences of the choice between repair and replacement, which applies when the seller is informed of the lack of conformity, may actually help the consumer in making the more sustainable choice. Unfortunately, neither Article 10(2a) nor Article 13(2a) Sale of Goods Directive apply if repair is executed by the producer.

54. In addition, outside consumer law, the current legal framework regarding repair has to some extent improved. Eco-design legislation as such does not award substantive remedies to consumers but is directed towards the production of consumer goods and sets requirements regarding the environmental sustainability of such products. However, it may contain an obligation for manufacturers to supply spare parts, within 15 days after having received a request to that extent, to consumers or to independent repairers during a number of years after the goods have been put on the market. Moreover, manufacturers are also required to make repair information available to independent repairers and, in future, to consumers themselves. This implies that eco-design legislation indeed lives up to the aim of stimulating repair'. Yet, regarding enforcement consumers will need to rely on national general contract law or tort law.

55. Although the amendments made to the Unfair Commercial Practices Directive and the Consumer Rights Directive as such may be evaluated positively, the Greenwashing Directive is much less likely to contribute to the aim of stimulating repair as it does not lead to a right or remedy for the consumer to enforce repair itself – if anything, it may lead to a claim for damages, price reduction or termination of the contract. Indirectly, through the conformity standard, of course it may offer some help in determining whether the goods provided are in line with what the consumer could reasonably expect of the goods.

56. Unfortunately, this leads me to the conclusion that from the point of view of sustainability, European (consumer) law (together) do not yet sufficiently live up to its aim of stimulating repair'. It is true that the legal environment has been improved to facilitate repair. This is true, in particular, regarding eco-design requirements for household appliances. Moreover, the recent extension of the conformity period in case repair has taken place to cure a lack of conformity is certainly an improvement. However, the reaffirmation of the consumer's free choice between repair and replacement during the deliberation of the Right to Repair Directive, and the abolishment of the hierarchy of remedies that took place when adopting the Sale of Goods Directive are rather a step back. That is certainly true for the soft approach regarding temporary replacement goods: the amendment to the Sale of Goods Directive is likely to do more harm than good when it comes to strengthening repair possibilities.