

Fixing the circular economy: a limited right to repair faces core constraints from private law

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1. Introduction. 2. Methodology. 3. The long slow path to the R2R proposal with veto power for the Regulatory Scrutiny Board. 4. How comprehensive is the legal approach to sustainable products and consumption? The scope of the R2R proposal and the full harmonisation approach. 5. Right to repair or information about repairers? 6. Uneven right to repair stemming from the proposal for ecodesign regulation. a) Products potentially covered by reparability requirements. b) Some previous steps towards reparability and durability. 7. Legal intersections with core EU policies. a) The role of corporate-driven voluntary standardization. b) Industrial property constraints. Open-access vs. firm-controlled information and repair services. c) The impact of the Services Directive on proximity and accessibility of repair services. d) Consumer empowerment with slight legal changes. 8. Conclusions.

Abstract. The Right to Repair and Ecodesign EU proposals are two relevant pieces of legislation to promote an ambitious Circular Economy. Analysing those proposals to see limitations arising from time delays, decision-making procedures and intersections with other sectors of the legal system might help to understand if a new sustainable product policy is about to be born. The right to repair is also a good issue to explore if the EU Environmental Law is at a turning point and mandatory instruments of public environmental law are no longer the preferred means of implementing environmental policies because private law approaches and voluntary/information tools are taking the lead.

Keywords. Right to Repair, Ecodesign, Public vs. Private implementing tools, legal intersections, EU core policies, sustainable product's legislation, durability, reparability.

1. Introduction*

The second Circular Economy Action Plan, known as CEAP 2020¹, recognised the right to repair (R2R) as a leading tool for sustainable transition and consumer empowerment. Durability and reparability were also identified as relevant criteria for a sustainable product legislation initiative. However, progress towards the right to repair seems to be facing serious obstacles. The legislative initiative to regulate the right to repair was blocked for a long time and after three years, progress on R2R and eco-design proposals is significantly limited.

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¹ COM(2020) 98 final, A new Circular Economy Action Plan For a cleaner and more competitive Europe, https://eur-lex.europa.eu/resource.html?uri=cellar:8a8ef5e8-99a0-11e5-b3b7-01aa75ed71a1.0012.02/DOC_1&format=PDF

Additionally, legal intersections with other branches of private law and prevailing sectors of the European economic order can hinder the aim of giving longer life to products and providing repair options. Market rules that are immune to sustainability criteria restrict efforts and undermine expectations about any ambitious push for the right to repair².

This paper examines the Proposal for a Directive on common rules to promote the repair of goods along with the Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC. The analyse includes the scope of the provisions and their coherence with legislation on competition, consumer law, intellectual property and commercial law. Is European law working for sustainable, longer-lasting products or are there shortcomings in the proposals and competing private law provisions or interests that can obstruct R2R and product life-extension measures? This work assesses how such legal provisions can limit product durability, reparability as a first option, access to spare parts and product re-use and refurbishment, thereby promoting increasingly unsustainable consumption patterns for products and resources.

The aim is to assess momentum and obstacles to the circular economy by studying limitations arising from time delays, decision-making procedures and intersections with other sectors of the legal system. The right to repair might also be a good issue to explore if the EU is at a turning point and mandatory instruments of public environmental law are no longer the preferred means of implementing environmental policies. Instead private law and voluntary/information tools are taking the lead, revealing a clear shift.

2. Methodology

Within a legal framework, the texts implementing the Circular Economy (CE) were examined in detail to: a) assess the extent of the right to repair, the scope of the regulations and their consistency with more stringent regulations of Member States; b) to determine the presence and type of durability or repair provisions; c) to understand whether the relevant measures ensure a clear, directly applicable right to repair or depend on further legal developments or self-regulation that would delay or dilute its entry into force; d) to discern the mandatory/voluntary nature of the proposed measures; e) to assess how other core economic legislation (competition law, Services Directive, consumer law, intellectual property) obstruct R2R and evaluate the level of ambition for implementing the CE in the European Union.

The grey literature relevant to the proposed measures (monitoring reports, evaluation documents, working papers, official websites...) was also carefully scrutinised to see the scope and the degree of compliance with timelines. Studying measures from draft stages to approval and assessment documents helped identify contentious issues, competing interests, shortcomings and coherence with political claims regarding transformative ambition. Academic literature from economic, political or sociological perspectives has also addressed the shortcomings of the European Union's CE strategy. There are legal studies describing obstacles to the right to repair, but there is no complete review of the various intersections with other areas of law that must be addressed to push for durable and repairable products. Legal research methodology was used to study legal texts, academic literature, jurisprudence and documents produced by the EU, its Member States and stakeholders to determine the

² Nogueira, Alba (2022), "Are Soft Legal Measures in Circular Economy Action Plans Enough to Permeate EU Strong Economic Core Regulations Bringing Systemic Sustainable Change?" *Circular Economy and Sustainability*, <https://doi.org/10.1007/s43615-022-00227-0>

deficiencies and efficacy issues linked to CE instruments and measures. This paper will try to assess scope, shortcomings and ways to fix the right to repair.

3. A long slow path to the R2R proposal with veto power for the Regulatory Scrutiny Board

The right to repair was probably the most publicised measure of CEAP 2020. It specified feasible and affordable repair for all types of products, not just electrical and electronic products, as a key feature. This, combined with new ecodesign regulation would result in longer-lasting, sustainable products and pave the way for circularity. Eco-design plays a central role in the plan, as it would facilitate reparability, dismantling and standardization of components. Information is also crucial component for accessing repair instructions and knowing about the availability of spare parts, repair services or degree of reparability (reparability scores). Another key issue is to determine whether repair should be limited to authorised service technicians or if individual repairers, repair shops and bricoleurs can have access to repair instructions, diagnostic software, spare parts or specific tools. The plan also contemplates establishing appropriate regulatory timeframes for compulsory availability of spare parts, product durability, and repair itself.

On the consumption side, making repair affordable constitutes a relevant policy issue that also affects taxation decisions. Proximity to repair shops is a key feature for making repair easily and quickly available. Finally, the legal scope and conditions of product guarantees and regulation of the choice of remedies for consumers clearly influences repair decisions.

The European Parliament (EP) adopted a first plenary resolution on 25 November 2020, with very strong parliamentary support, to push for ‘making repairs more attractive, systematic and cost-effective’ by extending warranties, providing guarantees for replaced parts or improving access to repair and maintenance information. It also insisted on increasing support for second-hand markets and tackling practices that shorten the useful life of a product. This included access to information on product operation and disassembly, software that conditions operability and diagnostic software. Access to spare parts that are available over a long period of time (particularly for consumer goods such as white goods) along with the standardisation of these parts and the tools needed for repairs were also central issues. Additionally, taxation would need to be introduced to encourage repair. The resolution also mentioned removing competition barriers that block independent repairers from accessing information and spare parts. This plenary resolution was followed by two others, one of them concerning only the right to repair, which also had broad support.³

However promising this support might seem, the fact is that the ‘Proposal for a Directive on common rules promoting the repair of goods’ (COM(2023) 155 final) did not see the light until March 2023, long past the 2021 time limit established in the Annex to the CEAP 2020 (COM(2020) 98 final, ANNEX). The two sets of initiatives announced in 2022, to ‘make

³ European Parliament, Resolution of 25 November 2020 Towards a More Sustainable Single Market for Business and Consumers, 2020/2021(INI), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0040_EN.html.
European Parliament, Resolution of 10 February 2021 on the New Circular Economy Action Plan, 2020/2077(INI), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0040_EN.html
European Parliament, Resolution of 7 April 2022 on the Right to Repair, 2022/2515(RSP), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0126_EN.html

sustainable products the norm'⁴ (March) and put 'an end to wasteful packaging, boosting reuse and recycling' (November),⁵ made no mention of the expected R2R regulation.

Though allegedly a milestone for Green Deal measures, the legislation faced lengthy blockage by the Regulatory Scrutiny Board⁶. The Directive proposal explained the key role of the Regulatory Scrutiny Board in the proposal outcomes and the timing delay. 'The Commission's Regulatory Scrutiny Board (RSB) first issued a negative opinion on 30 September 2022. After the initial draft, underwent a significant revision, the RSB provided a positive opinion with further comments on 24 January 2023' (COM (2023) 155 final,⁶). Both RSB opinions addressed the proposal's supposed lack of explanation of different regulatory choices and demanded 'quantitative estimates', 'cost and benefits', 'results of cost benefit analysis' and a clearer 'methodological approach to estimate consumer savings' for many proposed actions. However, the RSB opinions contained no environmentally driven considerations (SWD (2023), 59 final, Annex I, 76-82).

Eller and Kampourakis⁷ describe the RSB as 'a central gatekeeper in the European legislative process' because 'if an impact assessment does not satisfy the RSB twice, this brings the proposal to a halt. In such cases, only a decision by the College of Commissioners can overcome the blockage and take the proposal further'. Considering that about one third of RSB opinions are negative, it is clear that non-elected actors outside EU institutional power distribution play a major role in legislative procedure. The current RSB members come from business/trade-oriented professional backgrounds and there are no non-industry environmental experts among them,⁸ according to a maladministration complaint filed with the European Ombudsman in March 2023 by Corporate Europe Observatory claims.⁹ The complaint also points out the lack of transparency that would violate access rights, as provided by Case C-57/16P, ClientEarth v. EU Commission (ECLI:EU:C:2018:660), and a consistent track record of one-sided meetings with lobbies supportive of a better regulation agenda.

Finally, the proposal that emerged in March 2023 was quite diluted, as we will examine further on, and many of its provisions were delayed through delegated acts, signalling a long road ahead for a strong R2R. The European Environment Bureau (environmental NGOs) observed that for ecodesign regulation, 'the slow pace of decision-making processes without clear deadlines is not really addressed. As all future measures will be set through future legal acts, it may take decades to set rules on products if the decision-making process continues to require more than 3 years per product'¹⁰. Considering that the R2R Directive proposal only refers to products that have or will have ecodesign regulations and that it also provides for several delegated acts that the Commission would have to adopt for R2R, it seems there is still a long way to go to ensure a full-fledged right to repair. Delays in reaching a proposal might also hamper possibilities of the Directive being passed before the next June 2024 European Parliament elections.

⁴ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2013

⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7155

⁶ https://twitter.com/anna_cavazzini/status/1581931568662081537?s=20

⁷ Eller, Klaas Hendrik; Kampourakis, Ioannis: Quantifying 'Better Regulation': The EU Regulatory Scrutiny Board and the Sustainable Corporate Governance Initiative, VerfBlog, 2022/2/21, <https://verfassungsblog.de/quantifying-better-regulation/>, DOI: 10.17176/20220222-001231-0.

⁸ https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board_en

⁹ <https://www.ombudsman.europa.eu/en/opening-summary/en/168093>

¹⁰ EEB (2022), Unpacking the Circular Economy Package, Briefing April 2022, <https://eeb.org/wp-content/uploads/2022/04/CE-Briefing-April-4-2022.pdf>, p.4.

4. How comprehensive is the legal approach to sustainable products and consumption? The scope of the R2R proposal and the full harmonisation approach.

The explanatory memorandum of the Directive proposal (COM (2023) 155 final, 2) refers to ‘three initiatives that are complementary and generate synergies by establishing a comprehensive approach towards the common objective of sustainable consumption’. The R2R initiative would be one of the three pillars of Green Deal sustainable consumption: a) on the *supply side*, Ecodesign for Sustainable Product Regulation (COM (2022) 142 final); b) on the *demand side*, the proposal for a Directive on empowering consumers (COM (2022) 143 final) and; c) to fill the gap focusing on the *use phase of goods*, the proposal deals with the right to repair and amendment to the Sale of Goods Directive (Directive (EU) 2019/771) on the choice of remedies between repair or replacement. These three initiatives pursue ‘the Green Deal objective of sustainable consumption in a comprehensive manner’ (COM (2023) 155 final, 2).

The R2R measures contained in those initiatives must be analysed to assess their comprehensiveness and scope, the type of regulatory approach chosen and potential loopholes. How these issues are addressed in new and current EU regulation proposals on ecodesign, R2R and amendments to the Sale of Goods Directives shows the degree of ambition for longer-lasting goods and sustainable policies. The extent to which related key policies remain untouched must also be considered.

In any case, the fact that R2R provisions are scattered among three legal texts and the provisions of the R2R proposal depend on the scope of each set of ecodesign regulations does not seem to favour the development of regulation with predictable and uniform content that would result in a universal, directly applicable obligation to repair.

Although Article 1 of the Directive proposal makes no exclusion concerning the scope of the products, several provisions in the text limit its obligations to goods ‘for which and to the extent that’ reparability requirements are provided for in the EU legal acts listed in Annex II (Art. 5). For now, this includes products subject to ‘but not limited’ to ecodesign regulations, as any other requirement in future developments ‘in any other field of Union law’ would be covered (Recital 6 of the proposal). ‘This limitation of the obligation to repair ensures that only those goods which are repairable by design are subject to that obligation’ (Recital 16 of the proposal). In fact, in the future the Commission could delegate acts that add new product groups to Annex II when new reparability requirements are adopted (Recital 17 of the proposal). Ecodesign regulations and the right to repair are intertwined, but obligations for each type of products will actually be defined (to varying degrees) through future delegated acts of the Commission.

The lack of clarity concerning the scope of the proposal was one of the issues mentioned in the first negative opinion of the Regulatory Scrutiny Board (‘the report is not clear on the preferred option regarding obligations to repair, i.e., all product scope vs ecodesign product scope’, SWD (2023), 59 final, 80, 76). Then in the January opinion, the RSB again asked for clarity regarding the legal enforceability of the right to repair and the scope of goods categories’ (SWD (2023), 59 final, 81). The Commission responded that the obligation ‘is relevant for goods that are subject to reparability requirements under Union law’. That policy option was chosen after a proportionality test and an exclusively economic assessment. The Commission discarded an obligation to repair all goods, alleging that it ‘causes significant adjustment costs for business as well as significant losses in turnover and GVA’. It conferred ‘uncertainty as to when the

obligation applies given that many products would remain unregulated and could be irreparable by design' (SWD (2023), 59 final, 71). To get the whole picture of the implications of that policy choice, the impact assessment reports confirmed that an obligation to repair all goods 'has higher benefits for the environment and the repair sector' and that 'consumers do not need to wait for the obligation to repair to become operational progressively for different product groups' presumably 'over the next decade' (SWD (2023), 59 final, 64). In the end, a delayed, limited, business-friendly right to repair was preferred over a comprehensive, directly applicable R2R.

The current proposal fails to provide a 'universal' or 'mainstream' right to repair because it only affects an 'extremely limited set of products'¹¹. Furthermore, reparability obligations can vary because individual ecodesign regulations can establish different reparability requirements ('for which *and to the extent*', Art.5 of the proposal).

The Directive follows a full harmonisation approach (Art.3), whereby Member States cannot maintain or introduce in their national law provisions that diverge from those laid down in the text. This harms the possibility of more ambitious national policies. The full harmonisation approach is consistent with the legal basis claimed by the proposal – Art.114 of the TFEU on measures to ensure the establishment and functioning of the internal market – but can affect national measures already in force, such as France's repair rules. The Explanatory Memorandum accompanying the proposal argues that 'diverging mandatory national rules' might create obstacles to the internal market, discourage repairers from offering their services in more than one Member State and limit cross-border movement of spare parts and repair equipment (COM (2023) 155 final, 2-3). The provisions subject to full harmonisation are modifications to the legal guarantees of the Sale of Goods Directive and 'the standardised European Repair Information Form and obligation to repair, which have an internal market dimension'. Other provisions fall outside the full harmonisation mandate, so 'where a solution at national level is equally effective, in particular the repair platform, this is the preferred choice' (COM (2023) 155 final, 5). Recital 5 of the proposal states that the Directive 'should not affect the freedom of Member States to regulate aspects of contracts for the provision of repair services other than those harmonised in Union law'.

Views on full harmonisation option differ. The European Law Institute asked the proposal to open 'clauses or even regulatory sandboxes...in order to allow Member States to introduce more sustainable measures'; it was looking for flexibility to enhance 'environmental added value'¹². For its part, the technological industries association Orgalim fully supported the proposed maximum level of harmonisation, but added that 'we are very concerned about different national initiatives adopted by various Member States to promote the repair of goods; for example, related to the repair score of products (e.g. in France, Belgium and Austria), because they fragment the internal market and do not offer credibility to consumers when the same product can have different scoring with different methodologies in the various Member

¹¹ Right to Repair (2023), Not yet Accessible, Affordable nor Mainstream: Campaigners Tighten the Screw on new EU Right to Repair proposal, 22.3.2023, <https://repair.eu/news/not-yet-accessible-affordable-nor-mainstream-campaigners-tighten-the-screw-on-new-eu-right-to-repair-proposal/>

¹² ELI (2023), Feedback of the European Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Feedback_Right_to_Repair.pdf Also available as Augenhofer, Susanne (2023), EC's Public Consultation on Sustainable Consumption of Goods - Promoting Repair and Reuse, Response of the European Law Institute (April 3, 2022) <http://dx.doi.org/10.2139/ssrn.4318524>

States'¹³. The latter position is consistent with industry and business association positions on other recent environmental proposals, where full harmonisation has been used as a regulatory option to stop more stringent national schemes (i.e., corporate sustainability due diligence).¹⁴

5. Right to repair or information about repairers?

The decision to tackle the right to repair through three legal initiatives – the ecodesign proposal and the R2R proposal, which also amends the Sale of Goods Directive (SGD) – means that producer and seller reparability obligations and consumer rights will be located in different legal texts. Also, the obligations arising from Article 5 of the Proposal for a Directive on common rules promoting the repair of goods will depend on the scope of future ecodesign regulations for each category of goods passed down through delegated acts that would not be ready earlier than 2027-2030.¹⁵ In fact, the R2R proposal directly enacts two main issues: it gives slight priority to repair remedies within the legal guarantee (amendment of the SGD) and makes a set of information tools available to consumers about repairer availability, prices and conditions.

On the basis of a multi-criteria and cost-benefit analysis as well as a qualitative assessment of the proportionality of the various options considered, a combination of six preferred policy options was proposed to address the problems:

- prioritising repair whenever it is cheaper than replacement within the legal guarantee framework.
- an online platform at national level, matchmaking consumers with repairers and promoting refurbished goods.
- an obligation on repairers to issue upon request a quote on price and conditions for repair in a standardised form (European Repair Information Form).
- an obligation on producers of goods to which reparability requirements under Union law apply to repair outside the legal guarantee against a price.
- an obligation on producers to inform on their applicable obligation to repair.
- a voluntary EU easy repair standard (European Standard for repair services).

The preferred options package increases the repair of goods purchased by consumers both within and outside the legal guarantee by tackling several of the identified drivers of premature disposal of these goods (COM (2023)155 final, 7).

Those provisions must be transposed and applied and infringements punished by Member States 24 months after the Directive enters into force (Art.17, Art. 11). They are expected to reach their full potential after the first two years of application of the measures (SWD (2023, 59 final, 71). So, if the proposal actually sees the light in late 2024, consumers might be able to take full advantage of the online platform and the European Repair Information Form (ERIF) by approximately 2030.

¹³ Orgalim (2023), Green Transition: Orgalim Position and Recommendations on the Proposal for a Directive Laying down Common Rules Promoting the Repair of Goods, <https://orgalim.eu/position-papers/green-transition-orgalim-position-and-recommendations-proposal-directive-laying>, 25.5.2023, p.2.

¹⁴ <https://ert.eu/documents/joint-statement-ensuring-harmonisation-consistency-across-due-diligence-frameworks/>
<https://clepa.eu/mediaroom/joint-statement-due-diligence-proposal/>

¹⁵ The proposal on Ecodesign set the following schedule: “review, between 2022 and 2026, 33 Commission regulations and adopt 5 new measures under the current Ecodesign Directive, which cannot be carried out by staff currently working on implementation of the Directive;

- prepare and adopt up to 18 new delegated acts between 2024 and 2027; 12 new delegated acts would also be adopted between 2028 and 2030, with staff and budget implications in 2025-2027;
- prepare implementing acts (on average one per year as from 2024) when this is needed to ensure uniform conditions for the implementation of this Regulation”. (COM(2022) 142 final, 11).

If we leave aside amendment to the choice of remedies within the legal guarantee (repair if cheaper than replacement), the main new features are the national online platform to find repairers and the European Repair Information Form that would strengthen the R2R beyond the guarantee period. In line with the CEAP 2020 motto of ‘empowering consumers’, the European Repair Information Form ‘facilitates consumer choice of repair services’ by allowing comparison of ‘repair opportunities in order to choose the most suitable’ (Recital 18 of the proposal). The online national platform ‘enables consumers to search’ and ‘directly request that form’ (Recital 21 and 25 of the proposal). The option for an EU platform was discarded because ‘a national platform is closer to the consumer’s needs’ and the key requirements are granted at the EU level, allowing the same results across the EU (SWD (2023, 59 final, 71).

However, both are merely information tools that are consistent with the latest trends in EU environmental law¹⁶, where mandatory tools are losing ground and information measures take the lead, placing the responsibility for change to advance towards sustainability on consumers. A primary focus on ‘consumer choice’ is a key feature of neoliberalism in law¹⁷. It is also consistent with the three trends in EU environmental policy identified by Bowma et al.¹⁸: ‘a movement from compulsory settings towards [a] ‘due diligence system’ (DDS), a movement from regulatory to information and agreement-based instruments and an increasing reliance on self-governance’. The Commission put it in black and white, stating that ‘the majority of Member States did not support imposing obligations to repair on economic operators’ and that even those supportive of the obligation wanted it to be limited to the producer, not the seller (COM (2023)155 final, 6). Business stakeholders also supported a preference for voluntary commitments, something that half of the consumer organisations have found ineffective (COM (2023)155 final, 5).

The proposed regulation for the European Repair Information Form (ERIF) and the national online platform contains several shortcomings that should be addressed. For a start, the ERIF is not directly accessible but supplied to the consumer ‘upon request’ and can only be provided by ‘producers’ (or their authorised representative or importer in the European Union) with an obligation to repair, as established in Article 5 of the proposal (Art.4.2 of the proposal). The form has clear limitations in scope with regard to the subjects under obligation and accessibility. Moreover, a fee might be charged before facilitating the form if the repairer needs to assess the product to provide the information included in the ERIF (Art.4.3). In any case, the information included in the form (Art.4.4.: data on the repairer, price, estimated time of repair, type of repair suggested etc.) is not binding for the repairer and not considered a contractual offer¹⁹. Repairers ‘remain free to decide not to conclude such a contract’ (Recital 10 of the proposal) and they could even alter the repair conditions of the form by simply waiting to conclude the contract until after the 30-day period within which those conditions cannot be modified (Art.4.5 of the proposal).

6. Uneven right to repair stemming from the ecodesign regulation proposal.

¹⁶ Nogueira, supra, note 2 at p.1.

¹⁷ Grewal DS, Purdy J (2015), “Law and Neoliberalism”, 77 *Law and Contemporary Problems* 1–23, p.13. <https://scholarship.law.duke.edu/lcp/vol77/iss4/1>

¹⁸ Bouwma IM, Gerritsen AL, Kamphorst D, Kistenkas FH (2015) *Policy Instruments and Modes of Governance in Environmental Policies of the European Union; Past, Present and Future*. Statutory Research Tasks Unit for Nature & the Environment (WOT Natuur & Milieu), WOt-technical report 60, p.27.

¹⁹ Marín López, Manuel Jesús (2023), “Hacia una regulación europea sobre la reparación de bienes de consumo: la propuesta de Directiva de 22 de marzo de 2023”, Centro de Estudios de Consumo, https://manueljesusmarin.es/wp-content/uploads/2023/05/cesco_78.pdf

As we have seen, the core legal decisions on extending the right to repair are contingent upon on the scope of ecodesign regulation now under discussion, since Art.5 of the R2R proposal essentially limits repair obligations to products subject to reparability requirements under ecodesign regulations. Analysing the provisions of the proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022) 142 final) gives a more complete picture of what the EU is going to push for with regard to the right to repair: what type of obligations, for what products, for how long, and with what limitations.

a) Products potentially covered by reparability requirements

The ecodesign regulation proposal says it ‘shall apply to any physical good that is placed on the market or put into service, including components and intermediate products’ (Art.1.2) but excludes food, medicine, veterinary products, living plants, animals or products of human origin. The long-awaited decision to extend ecodesign requirements to all capital goods – not only energy-related goods or those with a long lifespan but also non-energy goods and fast-use goods that generate a lot of waste²⁰– is a step in the right direction.

However, enlarging the scope of ecodesign regulation has two major constraints. Firstly, the proposed regulation does not establish any directly applicable, specific obligation for issues relevant to ensuring reparability and durability in the ecodesign phase. The ‘ease of repair and maintenance as expressed through: characteristics, availability and delivery time of spare parts, modularity, compatibility with commonly available spare parts, availability of repair and maintenance instructions, number of materials and components used, use of standard components, use of component and material coding standards for the identification of components and materials, number and complexity of processes and tools needed, ease of non-destructive disassembly and re-assembly, conditions for access’ (Annex I, COM(2022) 142 final,1) will be defined through delegated acts that develop ecodesign requirements for each goods category. There is no general mandate on availability of spare parts, accessibility to tools and instructions or who (i.e., independent or authorised repairers) will have access to those parts, instructions and tools. The Commission is empowered to adopt those delegated acts (Art. 4 of the proposal) or to decide that no performance and/or information requirements are needed. If they are needed, Member States can’t restrict or impede placing those products on the market for reasons of non-compliance with national rules (Art.3 of the proposal). More stringent national rules would not limit the free movement of goods that comply with EU requirements.

Moreover, questions about product categories, the extent to which requirements for reparability and information about repair apply, whether spare parts are available and for how long, if access to spare parts is limited to authorised repairers, the type of information about repair deemed necessary and where it is made available will all be decided in delegated acts. This could lead to an uneven right to repair with varying reparability obligations for each type of goods.

Secondly, the proposed regulation establishes both procedural provisions and criteria that might *de facto* limit ecodesign regulations and reparability requirements to the categories of

²⁰ Calisto Friant M, Vermeulen WJV, Salomone R (2021) ‘Analysing European Union Circular Economy Policies: Words versus Actions’, *Sustain Prod Consum* 27(2021), p.347.

products that already have ecodesign regulations. Expanding the scope to new goods depends on the approval of delegated acts, which the Commission says will take until at least 2030 (COM (2022) 142 final, 11). Also, the direct involvement of those representing corporate interests in defining the requirements through the Regulatory Scrutiny Board, as explained earlier, and the Ecodesign Forum (Art.17 of the proposal) might further dilute the proposals. The ecodesign proposal also establishes criteria for prioritising which products should have ecodesign requirements (Art.16). Significantly, these criteria identify as the first issue to be assessed the potential for improvement without ‘entailing disproportionate costs’, taking into account ‘the absence or insufficiency of Union law or failure of market forces or self-regulation measures...to address the objective properly’. The representativity of the product in Union trade (sales) is the second criteria and only the third assesses ‘the distribution of the environmental impacts, energy use and waste generation across the value chain, in particular whether they take place within the Union. Finally, even if a decision is taken to promote ecodesign requirements, they must fulfil certain criteria related mainly to assessment of economic efficiency (Art.5.5):

no significant negative impact on the functionality of the product, no adverse effect on the health and safety of persons; no significant negative impact on consumers in terms of the affordability of relevant products, also taking into account access to second-hand products, durability and the life cycle cost of products; no disproportionate negative impact on the competitiveness of economic actors, at least of SMEs; no proprietary technology imposed on manufacturers or other economic actors; no disproportionate administrative burden on manufacturers or other economic actors.

The combination of postponed enforceability, uneven requirements and corporate-oriented criteria and procedures pushes back the horizon of a fully deployed, comprehensive right to repair.

b) Some previous steps towards reparability and durability

The 2018-19 revision of ecodesign rules for energy-related products (e.g. refrigerators, washing machines, light sources) took a first step towards reparability by providing for the existence of spare parts, information about them, replacement with simple tools... but also revealed the drawbacks of the initial proposals on corporate-sensitive issues such as accessibility to spare parts and repair information for non-professional and non-registered users (professional installers can even be charged to access this information). Similarly, proposals to facilitate dismantling operations limited to the time of recycling and not for repair purposes had been toned down. However, in almost all the revised rules the period of existence of spare parts was generally extended from the seven years proposed in the initial drafts to 10 years in the approved regulations.

As regards planned obsolescence and durability, although the latter was included in the European Commission’s proposal for the revision of Directive 2010/30/EU on product energy labelling, it did not appear in the final version – Regulation (EU) 2017/1369 of 4 July 2017 establishing a framework for energy labelling and repealing Directive 2010/30/EU – or in the ecodesign regulations that were updated in 2018-19. This seems to be a real Achilles’ heel on the road to circularity. Providing consumers with information about durability and planned obsolescence was postponed for eventual study in a ‘long-term roadmap’ to be presented by the Commission, (Recital 36, EU Regulation 2017/1369). However, the EU Omnibus Regulation 2021/341 of 23 February 2021 represents a step in the right direction. It contains

multiple amendments to all the eco-design regulations revised just two years earlier²¹ and introduces a provision to penalize obsolescence through software that distorts testing by market surveillance authorities. It also requires that the performance and energy consumption parameters listed in the declaration of conformity not worsen after a software or firmware update. Though it only affects these product categories, this is probably the first time that European legislation has established binding rules to limit some form of obsolescence. The ecodesign regulation proposal also prohibits products placed on the market with applicable delegated acts concerning ecodesign from being designed to have software or firmware updates that alter their performance when tests are being carried out (Art.33).

7. Legal intersections with core EU policies

A more complete picture of the legal approach to reparability involves a closer look at other areas of corporate law and standards. Reparability and longer-lasting products are not only an environmental issue but could imply major changes in business models, consumer behaviour and the economic system. The fact that the ecodesign regulation and R2R proposals have Article 114 of the Treaty on the Functioning of the European Union aiming at the establishment and functioning of the internal market as their legal basis gives a hint as to the importance – and probably predominance – of the constraints arising from other EU corporate/private legislation.

a) The role of corporate-driven voluntary standardization

The first Circular Economy Action Plan (2015) mentioned the need to promote technical standardization in relation to materials efficiency. Standardization regarding life expectancy or reparability could be better implemented at the EU level²². In fact, the European Commission mandated the European standardization organizations to develop generic standards on durability and the possibility of reusing and recycling certain products. Of the more than 20 standards this work aims to create, only eight have been drawn up. These are limited to energy-related products and some of them deal with reparability and durability.²³ The key features of the regulatory agenda are developed by voluntary, corporate-driven standards. Once the impossibility of avoiding such standards was clear, the initial reluctance of companies gave way to active involvement in developing them²⁴.

²¹ Regulations (EU) 2019/424, (EU) 2019/1781, (EU) 2019/1782, (EU) 2019/2019, (EU) 2019/2020, (EU) 2019/2021, (EU) 2019/2022, (EU) 2019/2023 and (EU) 2019/2024 are amended as regards ecodesign requirements for enterprise servers and data storage products, electric motors and variable speed drives, refrigeration appliances, light sources and stand-alone control gear, external power supplies, electronic displays, household dishwashers, domestic washing machines and domestic washer-dryers and refrigeration appliances with a direct vending function

²² Dalhammar, C. (Ed.), Richter, J. L. (Ed.), Almén, J., Anehagen, M., Enström, E., Hartman, C., Jonsson, C., Lindbladh, F., & Ohlsson, J. (2020). Promoting the Repair Sector in Sweden, p.54.

²³ EN 45552:2020 “General method for the assessment of the durability of energy-related products”, EN 45553:2020 “General method for the assessment of the ability to remanufacture energy-related products”, EN 45554:2020 “General methods for the assessment of the ability to repair, reuse and upgrade energy-related products”; EN 45555:2019 “General methods for assessing the recyclability and recoverability of energy-related products”; EN 45556:2019 “General method for assessing the proportion of reused components in energy-related products”; EN 45557:2020 “General method for assessing the proportion of recycled material content in energy-related products”; EN 45558:2019 “General method to declare the use of critical raw materials in energy-related products”; EN 45559:2019 “Methods for providing information relating to material efficiency aspects of energy-related products”.

²⁴ Mathieux F, Ardente F, Boba S (2020), “Ten Years of Scientific Support for Integrating Circular Economy Requirements in The EU Ecodesign Directive: Overview and Lessons Learnt”, *Procedia CIRP* 90,p.141.

The central role of privately based self-regulation can also be seen in the recent Ecodesign Regulation proposal for sustainable products (COM (2022) 142 final), which enables operators to develop alternative ecodesign requirements to those developed by the European Commission (Article 18 Self-regulation measures. 1. Two or more economic operators may submit a self-regulation measure establishing ecodesign requirements for products to the Commission as an alternative to a delegated act adopted pursuant to Article 4.). The criteria for assessing if it is ‘a valid alternative to a delegated act’ consists of having a ‘market share in terms of volume of the signatories to the self-regulation measure in relation to the products covered by that measure [that] is at least 80 % of units placed on the market or put into service’. Allowing companies that enjoy a predominant market share to decide the scope of reparability and ecodesign requirements might harm a comprehensive right to repair.

Some authors argue that for the circular economy to advance at the pace and ambition expected by its proponents, it needs to confront orthodox neoliberal environmental governance and rethink instruments, such as standardization, to challenge existing market relationships²⁵. This concern is consistent with a recent European Commission statement on the weight of corporate interest in decision-making for standardization. ‘Today’s decision-making processes within the European standardisation organisations, in particular in ETSI, allow an uneven voting power to certain corporate interests: some multinationals have acquired more votes than the bodies that represent the entire stakeholder community. This is why the Commission believes that administrative and good governance principles need to be put in place when the European standardisation organisations act upon European standardisation requests and develop standards used to show compliance with rules imposed in the interest of EU citizens’ (COM (2022) 31 final: 4-5). A balance must be struck between the technical needs of standardization for reparability and a transparent, public-driven definition of the goals to be pursued by the standardization process.

b) Industrial property constraints. Open-access vs. firm-controlled information and repair services

Industrial property also hinders the fight against planned obsolescence and an ambitious push for repair, which is a flagship measure of CEAP 2020. Companies have lobbied intensively against R2R and seek to protect their interests under industrial property law in various ways. Branding all components of their devices, including the tiny ones, makes it difficult to replace them with parts from other providers. The tech giant Apple uses this strategy to ensure control over its products and prevent repair by unauthorized technicians. It has denounced non-brand components as counterfeits in the highest courts; including a case that was decided by the Norwegian Supreme Court in June 2020.²⁶ Companies also seek to block the import of reconditioned parts,²⁷ which limits product durability and complicates repairs. There is strong corporate activism against the attempts of several US states²⁸ and the European Commission (COM, 2015, 614 final) to regulate the right to repair.

²⁵ Flynn A, Hacking N (2019), “Setting Standards for a Circular Economy: A Challenge too far for Neoliberal Environmental Governance?”, *J Clean Prod* 212, p.1266, <https://doi.org/10.1016/j.jclepro.2018.11.257> .

²⁶ <https://repair.eu/news/apple-crushes-one-man-repair-shop/>

²⁷ <https://repair.eu/news/apple-uses-trademark-law-to-strengthen-its-monopoly-on-repair/>

²⁸ Leah Chan Grinvald and Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 *Fordham L. Rev.* 63 (2019).

Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss1/3>

Companies also obstruct repair work by preventing ‘odd-jobber’ consumers or independent repair technicians from accessing disassembly information, product instructions or the tools needed for disassembly or repair. Here again, intellectual property issues and allegations of safety risks from product mishandling make repair more difficult. The many recent EU eco-design regulation reforms show how this has prevailed in limiting access to information for a wider range of repair workers. Such restrictions undermine the objectives of repairing, remanufacturing, refurbishing or recycling products. In a globalized market, it is difficult (and costly) for manufacturers to provide repair services for all their products worldwide. Using intellectual property barriers to prevent independent repair can turn products with a potentially longer life span into unusable waste.

Similarly, patents are being used to prevent access to software that enables product repair and refurbishment or to directly protect programming that shortens the life of products and accelerates planned obsolescence. In a ground-breaking decision concerning *Impression Products Inc. v. Lexmark International Inc.* (30 May 2017),²⁹ in which Lexmark sought to prevent reuse and refilling of its cartridges by other companies, the US Supreme Court ruled in favour of patent exhaustion once the product is sold. However, with no hint of criticism or reflection on these issues in the CEAP 2020, the European Commission is promoting ‘an intellectual and industrial property strategy that will ensure that intellectual property is defended as a key factor in boosting the circular economy and the development of new business models’ (COM (2020) 98 final, 20).

In the USA, the Covid-19-induced shortage of parts and repair services in rural areas, particularly for agricultural activity, has revitalised the pro-repair movement that is pushing for ‘right to repair’ state legislation. The US Congress and Senate commissioned the Federal Trade Commission (FTC) to conduct a report on ‘how manufacturers – particularly mobile and auto manufacturers – can limit consumer repairs and repair services and how those limitations can increase costs, limit choice, and impact consumers’³⁰. In a documented report detailing the practices that hinder repair and the conflicting positions of industry and the pro-repair movement, the Federal Trade Commission has proposed measures to update to the new repair challenges competition and consumer rights. These would overturn the Magnuson-Moss Warranty Act, passed 44 years ago, which is insufficient in today’s consumer scenarios. The proposed measures seek to facilitate repair by consumers themselves or by independent repairers in the face of increasingly common practices involving product designs that complicate or impede repair; unavailability of parts and repair information; designs that make independent repairs less safe; policies or statements that direct consumers to the manufacturer’s repair networks; enforcement of patent rights and trademarks; disregard for non-genuine parts and independent repair; software lockouts and firmware upgrades or end-user licensing agreements³¹. The report calls for reinvigorated regulation and enforcement, expressing scepticism regarding the effectiveness of self-regulation for such a wide range of companies in light of so few successful precedents. Finally, it points out the contrast between the new European eco-design standards for certain electrical and electronic products and those of the

²⁹ <https://supreme.justia.com/cases/federal/us/581/15-1189/>

³⁰ Federal Trade Commission (2021), “Nixing the Fix: An FTC Report to Congress on Repair Restrictions”, https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf, p.3.

³¹ *Id.* p.6.

United States, particularly the European restriction of access to certain parts and repairs to authorised repairers only³².

c) The impact of the Services Directive on proximity and accessibility to repair services

Competition rules do not favour the CEAP 2020 proposal³³ of exploring complementary legislation to ‘incentivize “products as services” or other similar models where producers retain ownership of the product or responsibility for its performance throughout its life cycle’. Cases before state and European competition authorities and the CJEU have shown inconsistencies.

Limitations on access of independent repair shops to repair activities and spare parts might be seen as territorial restrictions, leading to fines for anticompetitive practices (Vaillant Group, repair of gas boilers CNMC 2019).³⁴ In some cases, however, the CJEU did not find anticompetitive practices when independent repairers were prevented from accessing spare parts (Case T-712/14 Confédération européenne des associations d’horlogers-réparateurs (CEAHR) vs. European Commission, CJEU 23 October 2017).³⁵ In fact, any regulations requiring companies to offer repair services for their products or have repair shops with a certain proximity to consumers would be subject to evaluation under the Services Directive, Art.15 a) and h), EU Directive 123/2006) and could be considered territorial restrictions or discriminatory requirements.

In short, European competition authorities have been resistant to including sustainability issues in their assessments³⁶. However, aspects linked to collaborative agreements, the right to repair and new models of consumption and ownership should lead to a circularity-attuned redefinition of competition law. Accordingly, circularity would be considered an overriding public interest that could justify imposing conditions on the free establishment and movement of services.

d) Consumer empowerment with slight legal changes

In the European Union the star measures of consumer empowerment and ensuring R2R in the second Circular Economy Action Plan still have little impact on the parallel processing of European Union consumer legislation. The EU seems to prefer to nudge consumers to change their lifestyles through information measures but not force them to reduce consumption through mandatory rules that discourage unsustainable or misleading practices. Keirsbilck and Rousseau³⁷ point out that ‘access to information is necessary, but not sufficient to foster sustainable consumption choices. Importantly, recent studies show that consumers are often overwhelmed with information’. In fact, consumer rights are conceived mainly as a question of price and increasing the possibilities of choice but not as a matter of having access to more sustainable products and sales practices. Making consumption easy rather than limiting unsustainable consumer habits aligns consumer law and consumer rights with an economic model based on permanent growth and consumerism.

³² Id. p.6-7, 49.

³³ Id. CEAP supra, note 1 p.4.

³⁴ <https://www.cnmc.es/prensa/multa-reparacion-calderas-cnmc-20191126>

³⁵ <https://curia.europa.eu/juris/document/document.jsf?jsessionid=07CA73772BD75E85F63BC7ADADAD766AE1?text=&docid=195810&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=219510>

³⁶ Gerbrandy A (2017), “Solving a sustainability-deficit in European competition law” *World Compet* 40(4):539–562.

³⁷ Keirsbilck, B., Rousseau, S. (2019). “The Marketing Stage: Fostering Sustainable Consumption Choices in a Circular and Functional Economy”, in B. Keirsbilck & E. Terry (Eds.) *Consumer Protection in a Circular Economy*, Cambridge: Intersentia, 93, p.103.

The adoption of Directives 2019/770, 2019/771 and 2019/2161 confirms the ‘light touch’ approach to the relationship between consumer law and sustainability³⁸. Consumer law could play a decisive role in encouraging more circular behaviour, given that Directive 2011/83/EU of 25 October on consumer rights is a directive of maximum harmonisation that does not allow Member States to introduce different provisions. However, its provisions do not sufficiently accompany sustainability objectives. In relation to the supply of goods, for example (Art. 18), it does not prevent aggressive e-commerce competition practices such as express deliveries, deliveries to wherever the consumer chooses (last-mile delivery) or deliveries of several goods separately (basket splitting), which impact the environment considerably by increasing emissions³⁹. Terryn and Van Gool⁴⁰ are critical about the regulation for passing on risk (Art. 20) and the right of withdrawal (Art. 9–16). While it is very favourable to consumers (in terms of deadlines, possibility of handling the goods, etc.), it means that consumers do not bear the environmental costs of failed deliveries and can too easily return goods purchased long distance. They suggest solutions for a sustainable approach that include extending the exceptions to the right of withdrawal, limiting the withdrawal of goods already used, making it compulsory to provide information on the impact of the different delivery options, prohibiting free returns or removing the mandatory nature of this right.

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 contains some steps forward that are more coherent with the commitment to circularity, although still insufficient. The provisions regarding remedies, the burden of proof – with respect to second-hand goods as well as goods sold at public auctions – and the producer’s commercial guarantee of durability have been postponed to be reviewed five years after entry into force (Recital 71). Indeed, Recital 33 of the Directive notes that ‘while this Directive should not impose an obligation on sellers to ensure the availability of spare parts for a period as an objective requirement of conformity, this should not affect other provisions of national law which oblige the seller, producer or other person constituting a stage in the chain of transactions to ensure the availability of spare parts or to inform the consumer of such availability’. The Directive introduces ‘a promising conformity criterion not covered by the previous Directive 1999/44/EC’. Although Article 2(13) has a rather narrow definition (‘the ability of goods to maintain their required functions and performance under normal conditions of use’) that does not refer to a period the consumer may reasonably expect a product to last⁴¹. However, here also the regulation has been criticised because the objective conformity criteria (Art. 7) requires product compliance with the principle of average quality (‘which goods of the same type normally present and which the consumer can reasonably expect’). If planned obsolescence is common to all suppliers in a range of products, durability would not act as an objective conformity criterion. Also, legal liability in case of non-conformity still has a two-year time limit that may hinder anti-obsolescence policies, particularly for goods that should reasonably last longer (refrigerators, washing machines...). This issue is no longer subject to maximum harmonisation, so some Member States are extending liability periods.

³⁸ Mak V, Terryn E (2020), “Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law”, *J Consum Policy* 43(1), p.230.

³⁹ García Goldar M (2021) The Inadequate Approach of Directive (EU) 2019/771 towards the Circular Economy. Maastricht *J Eur Comp Law* 1-16. <https://doi.org/10.1177/1023263X21105127>

⁴⁰ Terryn, E (2021) Van Gool E (2021), “The Role of European Consumer Regulation in Shaping the Environmental Impact of E-commerce” (November 18, 2020). *EuCML* 2021(3):89–100. <https://doi.org/10.2139/ssrn.3732911>

⁴¹ Id. García Goldar supra, note 39 p.6.

Finally, the proposal for a Directive on the right to repair makes a slight amendment to the Sales of Goods Directive (EU) 2019/771. In case of non-conformity ‘where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods in order to bring those goods in conformity’ (Art.12). This amendment would put an end to the equivalence of available remedies in case of non-conformity, which has been criticized in terms of sustainability and circularity⁴². So, the proposed amendment is a positive step for promoting reparability and prolonging product life, even if it is subject to a cost evaluation.

In short, small steps have been taken to encourage product life extension and repair, but there is still room for recent consumer legislation reforms to align with the paradigm shift that is needed to fulfil the Circular Economy Action Plan 2020 sustainable consumption goals.

8. Conclusions

The right to repair is a flagship measure of the second Circular Economy Action Plan (2020). Closing the loop – or being circular – has a lot to do with changes in consumption patterns and product durability and reparability. It also has a clear impact on our economic system and business models. The tardiness and shortcomings of the Proposal for a Directive that was finally presented in March 2023 reveals that we are in troubled waters. Still, most of the measures and funding under the Circular Economy umbrella are about waste rather than on the circular design of products and durability⁴³. No single right to repair arises from the proposal, as specific obligations on reparability (accessibility to spare parts, tools or information on repair, time lapses...) will depend on the future ecodesign regulations for each product category to be approved in delegated acts. The Commission legislative agenda delays the drafting of those delegated acts until 2030, so there is still a long way to go before a robust right to repair might emerge. Also, the fragmented approval procedure of those delegated acts, with no uniform legal reparability requirements arising from the proposal for ecodesign regulation (2022) makes it likely that the right to repair will vary for different goods categories.

If the proposals ever see the light, the fact that the directly applicable tools mainly provide information (online national repairers platform, European Repair Information Form) and that mandatory rules on reparability have been postponed is consistent with the neoliberalist drift of EU environmental law⁴⁴. The increasing role of corporate interests in proposal design (Regulatory Scrutiny Board, Ecodesign forum, standards) and the criteria for deciding the scope of future legislation is not counterbalanced by environmentally oriented assessment and criteria.

Additionally, intersections with other areas of corporate law that function according to a narrow and mainly market-oriented interpretation of the European project make the push for sustainable consumption more difficult. The provisions of competition law, the Services

⁴² Terryn, E., “A Right to Repair? Towards Sustainable Remedies in Consumer Law”, at Keirsbilck, B., Terryn, E. (eds.), *Consumer Protection in a Circular Economy*, p.127-147 Intersentia, Cambridge, 2019, p. 133-135.

⁴³ Id. Nogueira, supra, note 2 p.1.

European Court of Auditors (2023), Circular Economy. Slow Transition by Member States despite EU Action, https://www.eca.europa.eu/ECAPublications/SR-2023-17/SR-2023-17_EN.pdf, p.5.

⁴⁴ Krämer., L. (2011) *EU Environmental Law*, Sweet&Maxwell, p. 425.

De Sadeleer, N. (2014) *EU Environmental Law and the Internal Market*, Oxford University Press, p.216-217.

Id. Bowma, supra, note 38 p.27.

Id. Nogueira, supra, note 2 p.1.

Directive, industrial property and consumer law, along with the relevance given to private standards should be aligned in pursuit of sustainability.