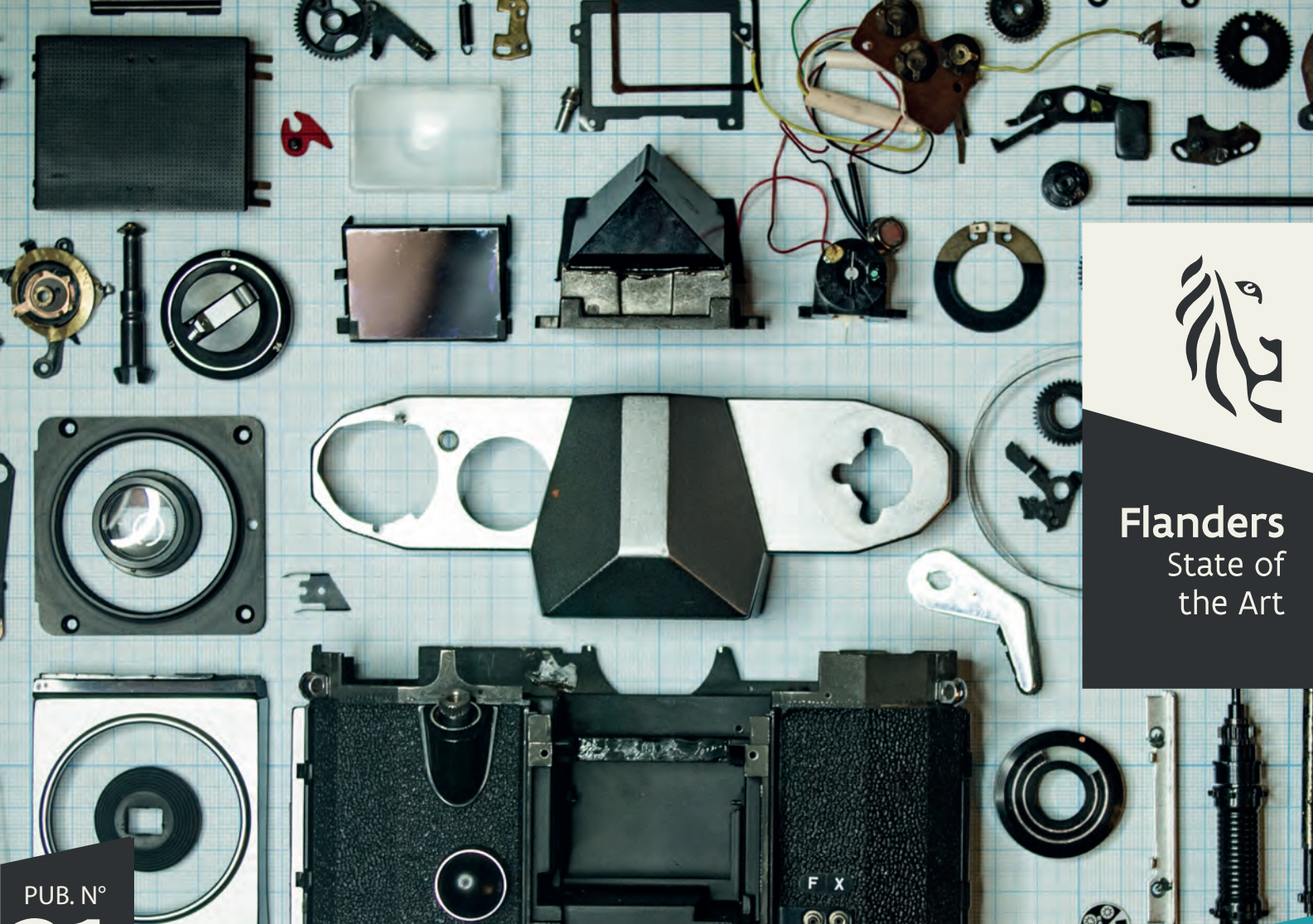

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Lifespan extension of products

European & national initiatives

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Lifespan extension of products
European & national initiatives

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Summary

As part of the European Union's Green Deal, the European Union legislature has worked on legislation meant to transform the European economy into a circular one. One of the focal points of that legislation is the extension of the useful lifespan of products on the market of the European Union. In a circular economy, natural resources are kept in circulation for as long as possible while the generation of 'waste' that cannot be reintroduced in the loop is reduced. Measures to halt the premature obsolescence of products, their components and their materials, ensure their recirculation and lower the need for virgin materials.

This research report analyzes the legislative initiatives of the European Union containing such measures primarily through a private law lens. It has a threefold objective. First, it describes their potential impact for the national Belgian and regional Flemish policy level. In doing so, it pays attention to the initiatives announced in turn by the federal government. Which measures is the Flemish government to take? Second, this document explains their potential impact on businesses active in the Flemish region. How are they to adapt their activities to the economy of tomorrow? Third, the research report describes how Belgian policy makers could help ensure that the European Union legislation reaches the fullest circular potential within its framework (e.g., in the cooperation with other Member States and the European Commission or in the transposition and implementation of European Union legislation). It also highlights potential shortcomings of the European Union legislation, where Belgian policy makers could consider advocating changes to that framework at the European level.

The research reaches policy recommendations as conclusions of that analysis. By way of example three are mentioned here.

- A first example demonstrates how the Belgian policy makers could promote sustainability within the framework of the legislation of the European Union. The Ecodesign for Sustainable Products Regulation (ESPR) creates an Ecodesign Forum which is to be consulted by the European Commission when it wishes to adopt ecodesign requirements for product (groups). The Belgian delegates at this negotiation table should advocate adapting stringent ecodesign requirements. Good ecodesign of products lowers the risk that the products leave the loop at all stages in their life cycle where that threat arises (e.g., when a need to repair them arises or when recycling facilities wish to deconstruct them), by taking away the barriers for the expansion of their useful lifespan (e.g., by requiring a modular design of the product to boost its repairability or by prohibiting the presence of certain harmful substances which hamper the recyclability).
- A second example shows how the Belgian policy makers could consider advocating changes at the European Union level to legislation that is set to be enacted. The Ecodesign for Sustainable Products Regulation (ESPR) introduces a prohibition of the destruction of unsold consumer goods on the side of businesses. However, business policies are inspired by consumer demands. To strengthen the prohibition, Belgian policy makers could push the European Union legislature to consider adapting or even limiting the right of withdrawal of consumers under the Consumer Rights Directive (for example, by allowing price differentiation between purchases with and those without

right of withdrawal, by analogy with hotel reservations with and without cancellation insurance).

- A third example illustrates how the Belgian policy makers could consider advocating changes at the European Union level to legislation whose legislative process has not yet come to end and where adjustments might still be possible. The European Commission has proposed the Green Claims Initiative, which would introduce common rules on the substantiation of voluntary and explicit environmental claims. The Belgian state could support the heightened attention to substances of concern in the draft amendments of the European Parliament. Substances of concern hinder the potential of products to be recuperated in various manners (e.g., the recyclability of the product is diminished) and, thus, impede strategies to reverse and reduce premature obsolescence in the end-of-life stage of a product

Samenvatting

In het kader van de Green Deal van de Europese Unie heeft de Europese wetgever wetgeving uitgewerkt om de Europese economie om te vormen tot een circulair economie. Eén van de speerpunten van die wetgeving is de verlenging van de levensduur van producten. In een circulaire economie worden natuurlijke hulpbronnen zo lang mogelijk in omloop gehouden, terwijl de productie van 'afval' dat niet opnieuw in de kringloop kan worden gebracht zoveel als mogelijk wordt vermeden. Maatregelen om de voortijdige veroudering van producten, hun bestanddelen en materialen tegen te gaan, verzekeren dat zij blijvend kunnen circuleren en verminderen de behoefte aan nieuwe materialen.

Dit onderzoeksrapport analyseert de wetgevende initiatieven van de Europese Unie die dergelijke maatregelen bevatten met een voornamelijk privaatrechtelijke lens. Het heeft een drieledig doel. Ten eerste beschrijft het de mogelijke impact van die wetgeving op het nationale, Belgische en het regionale, Vlaamse beleidsniveau. Daarbij besteedt het aandacht aan de door de federale overheid op haar beurt aangekondigde initiatieven. Welke maatregelen zou de Vlaamse overheid op basis hiervan moeten nemen? Ten tweede legt dit document ook de mogelijke impact op ondernemingen actief in de Vlaamse regio uit. Hoe zouden zij hun activiteiten eventueel moeten aanpassen aan de economie van morgen? Ten derde beschrijft het onderzoeksrapport hoe Belgische beleidsmakers kunnen helpen ervoor te zorgen dat de wetgeving van de Europese Unie haar circulaire potentieel ten volle bereikt (bijvoorbeeld in samenwerking met andere lidstaten en de Europese Commissie of bij de omzetting en implementatie van de wetgeving). Het benadrukt ook mogelijke tekortkomingen van de wetgeving van de Europese Unie, ten aanzien waarvan Belgische beleidsmakers zouden kunnen overwegen om wijzigingen aan het kader op het niveau van de Europese Unie te bepleiten.

Dit onderzoeksrapport komt zo tot enkele beleidsaanbevelingen als conclusie. Als voorbeeld worden er hier drie genoemd.

- Een eerste voorbeeld toont hoe Belgische beleidsmakers ecologische duurzaamheid kunnen bevorderen binnen het kader van de wetgeving van de Europese Unie. De Verordening over Ecologisch Ontwerp voor Duurzame Producten (ESPR) creëert een Ecodesign Forum dat door de Europese Commissie moet worden geraadpleegd wanneer zij ecodesignvereisten voor producten(groepen) wil aannemen. De Belgische afgevaardigden aan deze onderhandelingstafel zouden moeten pleiten voor stringente ecodesignvereisten. Goed ecodesign van producten verlaagt het risico dat producten de kringloop verlaten in alle stadia van de levenscyclus waar dat risico dreigt (bijvoorbeeld wanneer er behoefte is om ze te repareren of wanneer afvalverwerkers ze willen demonteren met het oog op het recycleren ervan), door de barrières voor de verlenging van hun levensduur weg te nemen (bijvoorbeeld door een modulair ontwerp van het product te eisen om de repareerbaarheid te vergroten of door het verbieden van de aanwezigheid van bepaalde schadelijke stoffen die de recycleerbaarheid belemmeren).
- Een tweede voorbeeld laat zien hoe Belgische beleidsmakers wijzigingen aan de wetgeving van de Europese Unie waarvan zeker is dat zij zal worden afgekondigd, zouden kunnen voorstellen. De ESPR introduceert een verbod op de vernietiging van onverkochte consumptiegoederen aan de zijde van ondernemingen. Het beleid van

ondernemingen wordt echter geïnspireerd door de eisen die consumenten stellen. Om het verbod te versterken, zouden Belgische beleidsmakers de Europese wetgever kunnen aansporen om het herroepingsrecht van consumenten onder de Richtlijn Consumentenrechten aan te passen of zelfs te beperken (bijvoorbeeld door prijsdifferentiatie toe te staan tussen aankopen met en zonder herroepingsrecht, analoog aan hotelreserveringen met en zonder annuleringsverzekering).

- Een derde voorbeeld illustreert hoe Belgische beleidsmakers wijzigingen aan de wetgeving van de Europese Unie waarvan het wetgevingsproces nog niet is afgerond en waar nog aanpassingen mogelijk zijn, zouden kunnen voorstellen. De Europese Commissie heeft het *Green Claims Initiative* voorgesteld, dat gemeenschappelijke regels zou invoeren voor de onderbouwing van vrijwillige en expliciete milieuclaims. De Belgische staat zou de verhoogde aandacht voor zorgwekkende stoffen in de ontwerpamendementen van het Europees Parlement kunnen onderschrijven. Zulke stoffen belemmeren het potentieel van producten om op verschillende manieren te worden gerecupereerd (bijvoorbeeld, de recyclebaarheid van het product wordt verminderd) en hinderen zo strategieën om voortijdige veroudering om te keren en te verminderen in de eindfase van de levensduur van een product.

Auteurs: C. Borucki – in samenwerking met D. Gruyaert, B. Keirsbilck en E. Terryn (KU Leuven)

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1 Introduction

The society of the European Union is to be climate neutral and environmentally[1] sustainable, by 2050. To achieve that vision, the European Commission has drawn up a roadmap in the form of the European Green Deal.[2-3] A fundamental goal of the Green Deal is to make the European economy circular.[4] After all, a linear use of natural resources, extracting them repeatedly as they are discarded as waste once they have served their initial purpose, stands in the way of a sustainable (r)evolution.

The European Commission recognizes that closing the cycle requires a necessary but radical change in current production models.[5] In the future, the circular economy will require efforts from all actors in the life cycle of a product, from governments to businesses and end-users. The European Commission wishes to make these efforts concrete with legislative measures.

This research report provides an overview of the European measures specifically envisage to extend the lifespan[6] of products. It explains the implications of these initiatives taken at the European policy level for the national Belgian and regional Flemish level and for the businesses active in the Flemish region. In doing so, it pays attention to the initiatives of the federal government. At the Flemish policy level, these initiatives find fertile ground. The Flemish government strives for a circular economy as well.[7-8]

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[1] There are many definitions of the notion 'sustainable'. This research report focuses on environmental sustainability, understood to relate to the natural environment and the global climate. For simplicity, the adjective 'environmental' is omitted in the remainder of this research report.

[2] Communication from the Commission to the European Parliament, the Council of the European Union, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, 11 December 2019, COM(2019)640 (hereinafter abbreviated as 'European Green Deal').

[3] The sustainability goals of the European Green Deal have been part of European policy for longer than today. In 2015 already, the European Commission adopted a first Circular Economy Action Plan, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Closing the loop — An EU Action Plan for the Circular Economy, 2 December 2015, COM(2015) 614 final.

[4] In this regard, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan - For a cleaner and more competitive Europe, 11 March 2020, COM(2020) 98 final (hereinafter abbreviated as 'Circular Economy Action Plan').

[5] In this regard, see Communication from the Commission to the European Parliament, the Council of the European Union, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Industrial Strategy for Europe, 10 March 2020, COM(2020) 102 final, p. 1 (hereinafter abbreviated as 'New Industrial Strategy').

[6] In certain contexts, a synonym for the 'lifespan' of a product is 'life cycle'. Lifespan can have the more specific sense, in which it is also used in this research report, as 'the useful life of a product'. Used in this sense, the notion of lifespan refers more to the usefulness of a product in its use stage. This research report focuses on the efforts at the different policy levels to extend the period in which the product remains useful to the end-user to reduce the need for new products.

[7] See the Flemish coalition agreement 2019-2024, https://www.vlaanderen.be/publicaties/regeerakkoord-van-de-vlaamse-regering-2019-2024. See also the policy document *Visie 2050. Een langetermijnstrategie voor Vlaanderen* (*Vision 2050. A long-term strategy for Flanders*), version 11 March 2016, https://publicaties.vlaanderen.be/view-file/19586.

[8] One of the major pieces of legislation that contains tools for the circular transition at the Flemish level is the Materials Decree (*Materialendecreet*). Article 4, §2 of the Materials Decree describes its goal as the enactment of measures meant to promote the circular economy, see decree of 23 December 2011 on sustainable management of material cycles and waste (*decreet van 23 december 2011 betreffende het duurzaam beheer van materiaalkringlopen en afvalstoffen*), *Belgian Official Journal* 28 February 2012.

2 European CE Action Plan

2.1 Four pillars

One of the cornerstones of the European Green Deal is the new[9] action plan for a circular economy (hereinafter 'Circular Economy Action Plan').[10] The extraction and processing of natural resources cause a sizable portion[11] of greenhouse gas emissions and lead to large-scale biodiversity loss and intense freshwater scarcity. In addition, global waste generation increases every year. A circular economy in which natural resources are kept in circulation for as long as possible and in which waste generation is reduced[12] is, therefore, a crucial goal in the sustainability ambitions of the European Union.

The Circular Economy Action Plan is based on four pillars. The European Commission wishes to:

- make sustainable products the norm (not only in terms of circularity but also in terms of energy efficiency);[13]
- strengthen the position of consumers;
- focus on the sectors that consume the most resources and where the potential for circularity is high (e.g., construction[14], electronics, batteries, vehicles, packaging...);
- reduce waste.

The European Commission has translated those ambitions into a number of initiatives, which have an impact on the lifespan extension of products. Successively, will be discussed: the 'sustainable products initiative' that resulted in the Ecodesign for Sustainable Products Regulation (hereinafter 'ESPR'): the 'consumer empowerment initiative' that resulted in the Empowering Consumers for the Green Transition Directive (hereinafter 'ECGTD'); the associated 'green claims initiative' (hereinafter 'GCI'), which so far resulted in the adoption of the European Parliament of its first reading position on the relevant proposal by the European

[9] See earlier footnote 3.
[10] See earlier footnote 4.
[11] The European Commission speaks in the Circular Economy Action Plan (p. 2) of 50%.
[12] This definition is based on the European Commission's own definition in the Circular Economy Action Plan. None of the legislative initiatives studied in this research report contain a legal definition of the concept, although the term is used in the recitals of said initiatives. See for a legislative definition elsewhere, article 2, 9) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, *OJ L* 22 June 2020, p. 13-43: "*an economic system whereby the value of products, materials and other resources in the economy is maintained for as long as possible, enhancing their efficient use in production and consumption, thereby reducing the environmental impact of their use, minimising waste and the release of hazardous substances at all stages of their life cycle, including through the application of the waste hierarchy*".
[13] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making sustainable products the norm, 30 March 2022, COM(2022) 140 final (hereinafter abbreviated as 'Communication Sustainable Products').
[14] A lot of the waste from mining and quarrying and from construction and demolition is classified as major mineral waste. Almost two thirds (64 % or 3.1 metric tonnes per inhabitant) of the total waste generated in the European Union in 2020 was major mineral waste, see Eurostat, Waste statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Waste_statistics.

Commission; and the 'right to repair initiative' that resulted in the Right to Repair Directive (hereinafter 'R2RD').[15]

[15] The European Commission is also taking other – by no means less important – initiatives in the context of the Green Deal and the Circular Economy Action Plan. Featuring high on the European Commission's legislative agenda is, for example, the reduction of waste generation through a revision of the Waste Framework Directive and the Packaging Directive, see request for input for an impact assessment (Environmental impact of waste management — revision of the EU Waste Framework Directive), 25 January 2022, Ares(2022)577247; proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, 30 November 2022, COM(2022) 677 final (hereinafter abbreviated as 'Proposal Regulation Packaging'). The Waste Framework Directive (Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, *OJ L* 22 November 2008, vol. 312, p. 3-30 (hereinafter abbreviated as 'Waste Framework Directive')) does not directly affect the lifespan extension of products, but is important for the sustainability impact of a product once the product has reached the end of its lifespan. Later on it will be explained how one of the strategies to deal with premature obsolescence is to reduce that impact. The Waste Framework Directive is therefore important for the entire lifespan of products, viewed within a life cycle analysis.

2.2 Three focal points

In those initiatives and resulting legislative acts, the European Commission zeros in on a number of focal points of the circular economy with regard to the extension of the lifespan of products: a right to repair, a ban on greenwashing and a ban on commercial practices stimulating premature obsolescence (at large, not merely planned obsolescence). Each of these focal points attempts to extend the lifespan of a product, by preventing and postponing the change from 'product' to 'waste'. While some of the initiatives center on a single focal point, they are to be seen as a coherent legislative package. All focal points are transversal so that each initiative flows into the others.[16]

The right to repair, which is intended to increase the repairability of a product, can serve as an illustration of the diffuse boundaries between the initiatives. The R2RD deals specifically with this right. However, the repairability of a product depends to a considerable extent on how it is designed, so that the ESPR, which focuses on ecodesign, is a crucial tool to make the right to repair effective. The ECGTD is also of importance. This directive aims to strengthen the role of consumers in the transition to a circular economy. For this reason, a consumer should receive sufficient information about the options to repair a product prior to purchasing the product.

Before each of the initiatives and resulting legislative acts are explained in detail, a concise, general description of the focal points is given. Each of these concepts is explained in more detail later in this research report, always in the context of the initiative that pays the most explicit attention to a particular focal point.

- Right to repair[17-18]: there are technical and legal obstacles to repairing a product as an end-user and/or to having it repaired by a repair service independent of the manufacturer. As a result, there is a risk that end-users discard products too quickly and replace them with new products. However, a circular economy benefits from the longest possible lifespan of products once they have been manufactured. A 'right to repair' enables the end-user to repair a product or to have it repaired (by independent repairers), giving it a second life.

[16] In this regard, see in an explicit manner the explanatory memorandum to the 'consumer empowerment initiative', p. 5: "The three initiatives are mutually consistent and complementary.". The three initiatives of which the memorandum speaks are the 'sustainable products initiative', the 'consumer empowerment initiative' and the 'green claims initiative'. In the same vein, see the explanatory memorandum to the 'right to repair initiative', p. 2: "The three initiatives are complementary and generate synergies by establishing a comprehensive approach towards the common objective of sustainable consumption. They are designed to have a cumulative effect and together cover the entire life cycle of a product". The three initiatives of which the memorandum speaks are the 'sustainable products initiative', the 'consumer empowerment initiative' and the 'right to repair initiative'. Finally, the 'green claims initiative' notes that it is "part of a set of interrelated initiatives" (recital 7).

[17] See about this phenomenon in detail E. TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *ERPL* 2019, vol. 27, iss. 4, p. 851-873; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 367-369, no. 86; I. LACROIX, "Recht op herstellen: aansprakelijkheids- en verbintenisrechtelijke implicaties van de circulaire economie" in I. SAMOY and S. STIJNS (eds)., *Masterproefreeks*, Bruges, die Keure, 2022, 114p.; A. PERZANOWSKI, *The Right to Repair: Reclaiming the Things We Own*, Cambridge, Cambridge University Press, 2022, 358p.

[18] See about this terminology later footnote 457.

- Greenwashing[19]: because of growing awareness of the environmental impact of their behavior among consumers[20], businesses like to market their products and services as sustainable. Through marketing with 'environmental claims' [21] they create the impression that a product or service has a positive or no influence on the climate or the environment or causes less harm to the climate or the environment than competing products or services. Those claims are not problematic in and of themselves. As attention to 'corporate social responsibility' grows, an increasing number of businesses, aware of their impact, are honestly taking measures to make themselves more sustainable. However, environmental claims that are false or unverifiable are less innocent. A business that relies on such claims is 'greenwashing' and misleading the consumers. A circular economy requires consumers to buy as many sustainable products as possible to the detriment of unsustainable products. For that, they need adequate information. A ban on greenwashing prevents businesses from unduly inducing end-users to make an unsustainable purchase.
- Premature obsolescence: in the case of 'premature obsolescence', a product design feature or subsequent intervention results in the product becoming non-functional or less performant without it being the result of normal wear and tear. As a result, there is a risk that end-users discard products too quickly and replace them with new products. However, a circular economy benefits from the longest possible lifespan of products once they have been manufactured. A ban on commercial practices stimulating premature obsolescence prevents the end-user from having to replace a product earlier than what would reasonably and technically be possible.[22]

[19] See about this phenomenon in detail C. BORUCKI, "Als de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. 31-55; E. VAN GOOL, "'Climate-washing': B2C communicatie in de klimaatcrisis beoordeeld in het licht van de oneerlijke handelspraktijken, soft law en nieuwe wetgeving", *DCCR* 2023, p. 3-60; B. KEIRSBILCK, E. TERRYN, L. VAN ACKER, The legality of "100 % recycled" and "100 % recyclable" claims on water bottled in plastics – legal analysis under EU Directive 2005/29/EC on unfair business-to-consumer commercial practices - Study accompanying the external alert submitted by BEUC to the CPC-Network, October 2023, 28p.

[20] In the 'green claims initiative' the European Commission notes: "Claiming to be "green" and sustainable has become a competitiveness factor, with green products registering greater growth than standard products" (recital 1).

[21] This term was chosen in line with the terminology of the European proposals for legislation. It might make more sense to speak of 'sustainability claims' in a larger sense, as the 'environment'' is a concept that does not encompass all aspects of sustainability in each and every definition of these notions. In some definitions the environment is regarded as the living environment (soil, water, and air). Part of that living environment is the local climate. In the context of sustainability, however, 'climate' is a term that mainly refers to the 'global climate', particularly in view of increasing climate disruption (a term that in turn itself indicates that the current climate *change*, in the sense of global warming, has an anthropogenic cause and that is less loaded than climate *crisis* or *emergency*). With regard to the global climate businesses make sustainability claims such as the one that their products are 'climate neutral'. As highlighted earlier in footnote 1 the adjective 'environmental' in this research report is understood to relate both to the natural environment and the global climate. Thus, a broad definition is used.

[22] On this phenomenon, see in detail A. MICHEL, *Premature obsolescence: in search of an improved legal framework*, Antwerp, Intersentia, 2023, xv + 672 p. For the implementation of this concept by the European Commission, see recital 14 of the ECGTD.

2.3 Four strategies

The three focal points of the initiatives can be integrated into four strategies to ensure an optimal lifespan of products. These strategies were developed in detail by A. MICHEL as part of her doctoral research on premature obsolescence, under the supervision of prof. dr. Bert Keirsbilck (KU Leuven) and prof. dr. Anne-Lise Sibony (UCLouvain). [23] Combating such obsolescence is the fundamental basis of extending the lifespan of products in a circular economy. For the conceptual interpretation of these strategies A. MICHEL bases her research on the horizontal standard developed by CEN-CENELEC[24] on aspects of efficient use of materials for ecodesign[25] and the glossary *(glossaire*) of the United Nations Environment Programme (acronym: UNEP/PNEU).

These four strategies are:

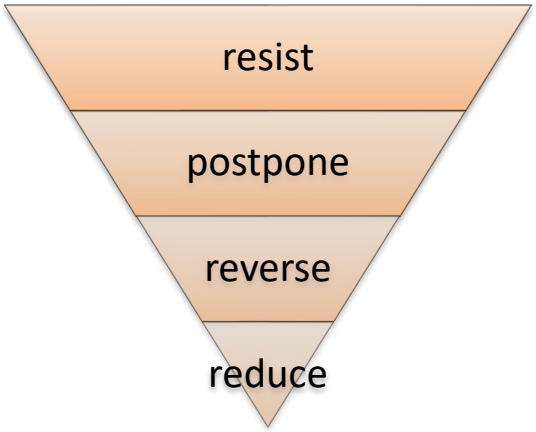
- Resist*:* premature obsolescence can be counteracted by designing and producing products more sustainably and by marketing sustainable products in such a way that they compete with unsustainable equivalents.[26]
- Postpone: premature obsolescence can be delayed by adequately updating products and by performing sufficiently thorough maintenance; at the very least the end-users should be enabled to maintain products themselves or by a service independent of the manufacturer.
- Reverse: premature obsolescence can be reversed by methods of 'recuperation', such as re-use (possibly for other purposes, i.e., repurposing[27]) and the different manners of repair[28].
- Reduce: a final strategy does not extend the lifespan of a product but reduces its environmental impact once the product has reached the end of its life and turns into 'waste'. [29] The methods to reduce that impact attempt to recover the product/waste as much as possible as secondary raw materials (via recycling) or as energy (via energy recovery).

Within these four strategies, the concrete actions that can be taken can be ranked according to R9-framework, which defines several R-strategies and orders them from most to least 'circular'. [30] For example, within the strategy 'reverse' re-use takes precedence over

[23] A. MICHEL, *Premature obsolescence: in search of an improved legal framework*, Antwerp, Intersentia, 2023, xv + 672 p.
[24] These are the following European standardization bodies: the European Committee for Standardisation and the European Committee for Electrotechnical Standardisation.
[25] These standards can be found as the 'CEN/CLC/JTC 10 Published Standards'. For definitions related to efficient material use CEN-CENELEC established the standard CLC/TR 45550:2020.
[26] The latter aspect is mainly achieved in a 'negative' way by ensuring that unsustainable equivalents do not unduly benefit from sustainable consumer behavior. To this end, certain commercial practices concerning those unsustainable equivalents are prohibited (for example, the practice of greenwashing) and efforts are made to provide thorough information to the consumer.
[27] One simple example of repurposing is the use of a wooden stepladder as a piece of furniture/home decor item and no longer as a tool. For example, one can use its steps as shelves for houseplants.
[28] Later, the section on the R2RD explains in more detail how 'repair' has different meanings. First, there is the ordinary 'repair'. Second, there is an intermediate level that is usually called 'refurbishment' or 'reconditioning'. Third, there is 'remanufacturing'.
[29] See also earlier, footnote 15.
[30] J. POTTING, M. HEKKERT, E. WORRELL and A. HANEMAAIJER, *Circular economy: measuring innovation in the product chain. Policy report for PBL Netherlands Environmental Assessment Agency*, PBL Netherlands Environmental Assessment Agency, Den Haag, 2017, p. 5.

repurposing and simple repair is preferable to refurbishment. The four strategies themselves can also be ranked according to this framework.

Moreover, these strategies overlap with the management options in the waste hierarchy of the European Union.[31] The first two strategies (resist & postpone) can be placed under the management option 'prevention', which has the highest priority in the waste hierarchy. The third strategy (reverse) falls under the option 'preparing for re-use'. The fourth strategy (reduce) belongs to the options 'recycling' and 'other recovery (such as energy recovery)'. All strategies seek to avoid the removal of the product/waste from the economy without recovery. In an ideal circular economy, there is no such removal. Like the waste hierarchy, the four strategies can be represented in the form of an inverted pyramid that indicates the priority order.



The four strategies can be applied at various stages in the life cycle of a product. These stages are the design and production stage, the marketing and pre-contractual stage, the use stage, and the end-of-life stage. For example, requirements of ecodesign in the design and production stage and the mandatory use of sustainability labels (such as a repairability score) in the marketing and pre-contractual stage are two examples of the strategy to resist premature obsolescence. Hereinafter, the research report places the new European Union measures within this framework.

[31] The waste hierarchy is used as a priority order when drafting legislation and policy initiatives for the prevention and management of waste. The waste hierarchy is the cornerstone of the European Union waste policy and legislation and is laid down in article 4 Waste Framework Directive. Ranked from most to least attractive, the hierarchy runs as follows: prevention, preparing for re-use, recycling, other recoveries, and disposal.

2.4 Ecodesign for Sustainable Products Regulation

2.4.1 General overview ESPR

On 30 March 2022, the European Commission announced its 'sustainable products initiative' implementing the Circular Economy Action Plan.[32] This proposal for a regulation establishes a framework for setting 'ecodesign [33] requirements' [34] to create sustainable products (the Ecodesign for Sustainable Products Regulation (ESPR)).[35]

On 15 May 2023, the Council of the European Union presented its amendments to the European Commission's proposal (hereinafter referred to as 'Amendments ESPR Council of the EU').[36] The Council viewed the ESPR explicitly as an instrument meant to prevent the premature obsolescence of products.[37] On 12 July 2023, the European Parliament adopted its position that served as the basis for the trilogue negotiations (hereinafter referred to as 'Amendments ESPR Parliament').[38] The European Parliament also made clear that the ESPR is meant as a tool to halt premature obsolescence.[39] On 4 December 2023, the European Parliament and the Council of the European Union reached a provisional agreement on the ESPR (hereinafter referred to as 'Provisional agreement ESPR'), which, again, stressed that ecodesign requirements should address practices associated with premature obsolescence (recital 5a).[40] Typically, such a provisional agreement becomes the final text of European Union legislation. Thus, the description and analysis of the ESPR hereinafter is based on this provisional agreement. Whenever a recital or article of the ESPR is mentioned, the reader may assume that this is a reference to the provisional agreement, unless stated otherwise.

[32] The European Commission considered its proposal for the ESPR to be "the cornerstone of the European Commission's approach to more environmentally sustainable and circular products. " (see Communication Sustainable Products, p. 4). It is also the most all-encompassing initiative. For these reasons, this research report discusses the ESPR first.
[33] Article 2, point 6 ESPR defines 'ecodesign' as the integration of environmental sustainability considerations into the characteristics of a product and the processes taking place throughout the product's value chain.
[34] Article 2, point 7 ESPR defines 'ecodesign requirement' as a performance requirement or an information requirement aimed at making a product, including processes taking place throughout the product's value chain more environmentally sustainable.
[35] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for the establishment of ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, 30 March 2022, COM(2022) 142 final.
[36] Council of the European Union, general approach to 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, (2022/0095(COD), no. 7854/22 + ADD 1-8.
[37] See in the version of the ESPR of the Council of the European Union the amended recital 5 and the addition of 'premature obsolescence' as a yardstick for the durability and reliability of a product in the list of product parameters in Annex I (see Amendments ESPR Council of the EU, p. 10 and 198). The Council of the European Union did not include a definition of its understanding of 'premature obsolescence' in its version of the ESPR.
[38] Amendments adopted by the European Parliament on 12 July 2023 on the 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)0142 – C9-0132/2022 – 2022/0095(COD)) (first reading), P9_TA(2023)0272.
[39] Amendments ESPR Parliament, amendment 54.
[40] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6257.

During the design and production stage, up to 80% of the environmental impact of products is determined.[41] The aim of the ESPR is to address the most harmful of these effects by setting ecodesign requirements on all physical products on the market of the European Union. Those requirements are based on the sustainability and circularity aspects of the Circular Economy Action Plan. Those aspects include the durability, reusability, upgradability and repairability of products, the presence of substances of concern in products, the energy use & energy efficiency and resource use & resource efficiency of products, the content of recycled material in products, the possibility of maintenance and refurbishing of products, the possibility of remanufacturing and recycling of products and the reduction of the carbon and environmental footprints of products (recital 5 and article 5 ESPR). Thus, this regulation goes beyond the current Ecodesign Directive, which only applies to energy-related products and only imposes energy efficiency requirements.

With the ESPR, the European Union legislature wishes to guarantee a sustainable and fully functional internal market (see article 1.1 ESPR). Therefore, the legal basis of the initiative is article 114 TFEU[42] (as additional objectives the protection of the competitiveness of the European Union's industry in article 173 TFEU, the protection of the environment in article 191 TFEU and the promotion of energy efficiency and energy saving in article 194 TFEU could be considered; however, the European Commission does not explicitly mention these other objectives in the explanatory memorandum to the ESPR). The European Union legislature wants to eliminate unequal conditions of competition for businesses trying to be sustainable by introducing uniform rules to ensure that all products placed on the market in the European Union become increasingly sustainable. The European Commission notes that the European Union's market currently runs the risk of fragmentation because of novel national legislation on sustainability requirements of products (e.g., in France and Germany) (see among others recital 4 ESPR). For this reason, a European harmonization measure is required.[43]

Concisely, the ESPR:

- replaces the current Ecodesign Directive with a regulation;[44]
- has a wider scope than the current Ecodesign Directive, both in terms of products, actors and requirements covered;
- constitutes a general legislative framework, on which the European Commission bases sector- and product-specific additions;[45]

[41] Circular Economy Action Plan, p. 3; European Commission, Directorate-General for Energy, Directorate-General for Business and Industry, *Ecodesign your future : how ecodesign can help the environment by making products smarter*, European Commission, 2014, https://data.europa.eu/doi/10.2769/38512, p. 3.
[42] Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 26 October 2012, vol. 326, p. 47-390.
[43] Explanatory memorandum to the ESPR, p. 5.
[44] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, *OJ L* 31 October 2019, vol. 285, p. 10-35.
[45] One of the pillars of the Circular Economy Action Plan is to focus on the sectors that consume the most resources and where the potential for circularity is high. The ESPR is part of a package of initiatives that the European Commission has developed simultaneously. This package includes targeted sectoral initiatives in the field of textiles (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Strategy for Sustainable and Circular Textiles, 30 March 2022, COM(2022) 141 final (hereinafter referred to as 'Sustainable Textiles Communication') and construction products (see proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) No 305/2011, 30 March 2022, COM(2022) 144 final (hereinafter abbreviated as 'Proposal Regulation Construction Products')).

- introduces new obligations for businesses such as:
  - the introduction of a digital product passport,
  - the extension of labeling obligations,
  - a possible ban on the destruction of unsold consumer products;
- prohibits trade in non-compliant products;
- leaves supervision and enforcement to national market surveillance authorities;
- allows national incentives for the best performing products;
- introduces mandatory 'green' public procurement criteria.

2.4.2 Relationship with other legislation

The ESPR greatly broadens the scope of the current Ecodesign Directive. The extent of this reform entails that the current directive cannot be preserved and is repealed. Moreover, it is a conscious decision of the European Union legislature to move from the instrument of a directive to that of a regulation. A regulation is a binding legal act that applies throughout the European Union with direct effect. Unlike a directive, a regulation does not have to be transposed into national law by the Member States. A regulation, therefore, has the effect of applying uniformly throughout the European Union (see articles 288 TFEU and 71 ESPR).

Because the ESPR is a general framework with a broad – mostly horizontal – scope, the European Union legislature is aware that the regulation touches upon areas covered by other legislation. In the explanatory memorandum to the ESPR, the European Commission clarifies the relationship of the ESPR to other legislation.[46]

- The general principle governing this relationship is that specific rules take precedence over more general rules (at the same hierarchical level[47]). This is the rule of *lex specialis derogat generali* (i.e., specific legislation trumps general legislation).[48] In the event of a conflict between the ESPR and other European Union legislation with the same objective of improving the environmental sustainability of products, the specific provision in or derived from the legislation which regulates this objective in a more specific manner should apply.
- When the provisions of the ESPR are applicable in the same context as other legislation governing horizontal aspects, it may not be easily determinable which of the equally horizontally pieces of legislation is to be regarded as more specific than the other. The European Commission has drawn up an overview of the relationship between the ESPR and legislation of this nature in Annex XIV of the impact assessment of the ESPR.[49] An example of such legislation can be found in the REACH rules on chemicals which apply

[46] Explanatory memorandum to the ESPR, p. 2.
[47] In this regard, the European Commission indicates that product-specific requirements included in delegated acts on the basis of the ESPR cannot supersede requirements set through legislative acts such as directives or regulations (even though these product-specific requirements could be more specific), following the principle of the hierarchy of norms (see p. 2 of the explanatory memorandum to the ESPR). Delegated acts rank lower in that hierarchy and, thus, cannot be enforced against higher-ranking legislative acts.
[48] Explanatory memorandum to the ESPR, p. 2. The Council of the European Union had proposed a recital 17a that explicitly reiterated this rule, but this recital has not made the cut in the Provisional agreement ESPR, see Amendments ESPR Council of the EU, p. 19.
[49] See Annex XIV of the impact assessment of the proposal for regulation: impact assessment accompanying the document 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, 30 March 2022, SWD(2022) 82 final, p. 514 and next.

to all products. The ESPR can only restrict the use of a substance in a product if the main reason for this restriction is to improve the durability of the product, not to increase its chemical safety, and this restriction does not significantly affect human health or the environment. This relationship is not only explained in the impact assessment but is also included in the ESPR itself in articles 6.3 and 7.3.

- Finally, the European Commission mentions two specific issues. The ecodesign requirements of construction products would fall under the scope of the ESPR, but because of the strong interlinkages between their environmental and structural performance (and, therefore, their safety), they will continue to be adopted on the basis of the Construction Products Regulation (with the exception of energy-related construction products, which are already covered by the Ecodesign Directive today). [50] The Energy Labeling Regulation will also be retained.[51]

To avoid having to resolve conflicts in the application of different regulatory acts, the European Commission is to take care that ecodesign requirements are consistent with other European Union legislation (article 5.4 ESPR).[52] The European Commission itself stresses that, as a matter of principle, the ESPR applies only to products that are not covered by existing sector-specific product legislation.[53] Products that do fall under such legislation are only covered by the ESPR if their sustainability aspects are addressed to a lesser extent in that legislation. However, for the sake of clarity, it should be noted that no empowerment under other European Union legislation to set requirements with the same or similar effects as ecodesign requirements under the ESPR limits the empowerment included in the ESPR, unless specified otherwise (recital 17 ESPR) (regarding the limits to this empowerment, see the section on the scope of the ESPR).

In addition to legal coherence and clarity, another goal of seeking consistency is to avoid the regulatory burden that would come with duplicating requirements (recital 17 ESPR). The wish to avoid excessively burdening both economic operators and public authorities is a common thread in the ESPR (particularly vis-à-vis SMEs). Thus, 'consistency' is also sought in administrative simplification. For example, recital 27a ESPR states that European Union legislation already establishes various information requirements for products and sets up systems to make this information available to economic operators and customers. Whenever feasible, the European Commission should consider linking information requirements under the ESPR to other existing information requirements.[54]

[50] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, *OJ L* 4 April 2011, vol. 88, p. 5-43. The European Commission has submitted a proposal to amend this regulation, see earlier footnote 4.
[51] Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 establishing a framework for energy labeling and repealing Directive 2010/30/EU, *OJ L* 28 July 2017, vol. 198, p. 1-23.
[52] Amendments ESPR Parliament, amendment 77.
[53] Explanatory memorandum to the ESPR, p. 2.
[54] This recital has the version of the ESPR of the Council of the European Union as its origin, see Amendments ESPR Council of the EU, p. 32.

2.4.3 Scope

2.4.3.1 Overview

2.4.3.1.1 Material scope

The current Ecodesign Directive applies materially to energy-related products[55]. The ESPR significantly expands that scope. It is explicitly a goal to give the regulation the widest possible breadth (recitals 4, 11 and 103 ESPR).[56] This should allow the European Commission to take into account the broadest range of products possible when prioritizing the setting of ecodesign requirements and thereby maximize their effectiveness (recital 11 ESPR). Article 1.2 ESPR stipulates that *all* physical[57] products placed on the market of the European Union or put into service for the first time[58], including components[59] and intermediate products[60], are covered by the regulation. Regarding the adjective 'physical' it is of note that digital content that is an integral part of a physical product is also included in the scope of the ESPR (recital 11 ESPR). One could argue that it would have been wise to include this 'sidenote' found in the recitals in, for example, the definition of 'physical product' in article 2, point 1 ESPR (i.e., the operative provision) to avoid any ambiguity.[61]

The same article 1.2 ESPR excludes only some physical products such as animal feed, medicines, products of human origin and certain vehicles (insofar as product aspects related to these vehicles already fall under product requirements set by other legislative acts of the European Union). [62 - 63] The reasons for the exclusion of these products is that either ecodesign requirements would not be suitable or that other legislative frameworks already provide for the setting of ecodesign requirements (recital 11 ESPR).

This general article does not tell the whole story. In article 5 ESPR, which is the general article on the empowerment to set ecodesign requirements, another limitation can be found, which transcends the list of products excluded from the scope of the ESPR in article 1.2 ESPR. Products

[55] Article 2, point 4 ESPR defines 'energy-related product' as any product that has an impact on energy consumption during use. This is a more concise definition than the one found in article 2, point 1. of the current Ecodesign Directive.

[56] The Council of the European Union agreed with the European Commission that the ESPR should have the broadest scope possible. It did not alter the mentions of that ambition by the European Commission (see, for example., the amended recital 4 ESPR, which retained the words 'applicable to the broadest possible range of products', Amendments ESPR Council of the EU, p. 9). Similarly, the European Parliament endorsed the European Commission's ambitions. An amended recital 4 in its version of the ESPR even stated that the ESPR is meant as an 'ambitious' regulatory framework (see Amendments ESPR Parliament, amendment 4).

[57] The adjective 'physical' in article 1.2 ESPR is pleonastic, as article 2, point 1 ESPR defines 'product' as any *physical* good that is placed on the market or put into service.

[58] 'For the first time' is not found in article 1.2 ESPR, but in the definitions of 'placing on the market' (i.e., the *first* making available of a product on the market of the European Union) (article 2, point 40 ESPR) and 'putting into service' (i.e., the first use, for its intended purpose, in the European Union of a product) (article 2, point 41 ESPR).

[59] Article 2, point 2 ESPR defines 'component' as a product intended to be incorporated into another product.

[60] Article 2, point 3 ESPR defines 'intermediate product' as a product that requires further manufacturing or transformation such as mixing, coating or assembling to make it suitable for customers.

[61] Regarding the interplay between recitals and the operative provisions in European Union legislation, see T. KLIMAS and J. VAICIUKAITE, "The law of recitals in European Community legislation", *ILSA Journal of International & Comparative Law*, 2008, p. 61-93.

[62] The addition of motor vehicles of categories M and N and their trailers of category O, that are intended to be used on public roads can be traced back to the version of the ESPR of the Council of the European Union, see Amendments ESPR Council of the EU, p. 75.

[63] Additional harmonized requirements for vehicles should be limited to aspects that are not currently addressed, for example, environmental requirements for tires (recital 11 ESPR).

whose sole purpose is to serve defense or national security cannot be part of a product group and have to be excluded from delegated acts setting out ecodesign requirements by the European Commission (article 5.1b ESPR).[64] These products have to be able to operate under specific and sometimes harsh conditions and certain information on defense equipment should not be disclosed and should be protected (recital 16 ESPR). Thus, the exclusion is necessary because these products cannot fulfill their use or purpose when complying with ecodesign requirements (i.e., an application of recital 11 ESPR).

Moreover, one major exclusion that is somewhat 'hidden' in the ESPR is that of second-hand products. Considering the need to promote circular and sustainable business models including those based on the sale of second-hand products, ecodesign requirements should not apply to products already placed on the market according to the Council of the European Union and the European Parliament.[65] Thus, recital 14a ESPR excludes second-hand goods originating from within the European Union from the scope of the regulation (note that this means that imported second-hand goods remain subject to the ecodesign requirements of the ESPR[66]).[67] At first glance, this exclusion in the recital is not made clear in article 1.2 ESPR (i.e., the operative provision).[68] However, the definitions of 'placing on the market' and 'putting into service' are important in that regard. Article 2, point 40 ESPR defines 'placing on the market' as the *first* making available of a product on the market of the European Union. Article 2, point 41 ESPR defines 'putting into service' as the *first* use, for its intended purpose, in the European Union of a product. Both definitions are similar to the existing definitions in the current Ecodesign Directive (articles 2.4 and 2.5). Recital 14a ESPR can be read as an explanation of what constitutes a product's 'first encounter' with the market of the European Union. According to the recital, domestic second-hand goods are not 'new' products, in the sense that they are already circulating on the market of the European Union. As a result, they need not comply with ecodesign requirements. This goes in particular for products that undergo refurbishment[69] or repair[70], because the European Union legislature regards these activities as actions that serve to return the product to a state in which it can fulfill its intended use without being substantially altered. However, products that are remanufactured are considered as new products and they are subject to ecodesign requirements if they fall within the scope of a delegated act setting out ecodesign requirements. Article 2, point 16 ESPR defines 'remanufacturing' as a process in which a new product is produced from objects that are waste, products or components and in which at least one change is made that substantially affects the safety, performance, purpose or type of the product. The adverb 'substantially' can be understood to refer to the European

[64] Added by Amendments ESPR Council of the EU, p. 90.
[65] Amendments ESPR Council of the EU, p. 16; Amendments ESPR Parliament, amendment 9.
[66] This distinction between domestic and imported products can be traced back to the amendments of the European Parliament (see Amendments ESPR Parliament, amendment 9). The European Parliament had intended, with an amended article 4 ESPR, for the European Commission to be able to exempt imported second-hand products from ecodesign requirements, for a limited period of time, where certain conditions (mostly concerning sustainability) are met. However, this empowerment has not become part of the Provisional agreement ESPR.
[67] Amendments ESPR Council of the EU, p. 16.
[68] Regarding the interplay between recitals and the operative provisions in European Union legislation, see T. KLIMAS and J. VAICIUKAITE, "The law of recitals in European Community legislation", *ILSA Journal of International & Comparative Law*, 2008, p. 61-93.
[69] Article 2, point 18 ESPR defines 'refurbishment' as actions carried out to prepare, clean, test, service and, where necessary repair an object that is waste or a product in order to restore its performance or functionality within the intended use and range of performance originally conceived at the design stage at the time of its placing on the market.
[70] Article 2, point 20 ESPR defines 'repair' as one or several actions carried out to return a defective product or waste to a condition where it fulfils its intended use.

Commission's Blue Guide on the implementation of European Union product rules 2022 to determine when a product should be considered altered in such a substantial manner that is to be considered new.[71-72]

Finally, the ESPR allows the European Commission to exempt certain products from ecodesign requirements. Thus, even though those products fall under the scope of the ESPR *a priori*, the European Commission can decide that they should be 'excluded'[73] from the scope. This aspect is dealt with in a subsequent section on the functioning of the ESPR.

2.4.3.1.2 Personal scope

The ESPR also has a broad personal scope. Articles 21 and following lay down obligations for all economic operators[74] in the supply chain[75]. Those obligations are more stringent or less stringent depending on the influence of the economic operator on the design and marketing of the product on the market of the European Union. They are based on standard provisions of Decision no. 768/2008/EC.[76] The ESPR imposes obligations not only on manufacturers (article 21)[77] (or their authorized representatives (article 22)[78]) and importers (article 23) [79] but also on distributors (article 24)[80], dealers (article 25)[81], fulfilment service providers (article 27)[82], online

[71] Commission notice The 'Blue Guide' on the implementation of EU product rules 2022 (Text with EEA relevance) 2022/C 247/01, *OJ C* 29 June 2022, vol. 247, p. 1-152.
[72] In its version of the ESPR the Council of the European Union had referred to this guide in an amended recital 14, but this explicit reference is not part of the Provisional agreement ESPR, see Amendments ESPR Council of the EU, p. 16.
[73] The reason for these quotation marks is twofold. First, the European Commission can decide that products should be exempted *on the basis* of the ESPR. Thus, in a technical sense, products can never truly escape the scope of the ESPR as it always the application of the ESPR that determines whether they fall under its requirements or not. Second, nothing in the ESPR suggests that the European Commission cannot revert its decision to exempt products, fully 'reinstating' its applicability.
[74] For a definition, see article 2, point 46 ESPR. This definition simply lists the actors in the supply chain: the manufacturer, the authorized representative, the importer, the distributor, the dealer and the fulfilment service provider. It may be an oversight that this list does not include electronic marketplaces and search engines, although article 29 ESPR, which applies to them, does fall under the heading 'Chapter VII – obligations of economic operators'.
[75] According to article 2, point 10 ESPR, the supply chain consists of all upstream activities and processes of the value chain of the product, up to the point where the product reaches the customer. The value chain in turn consists of all activities and processes that are part of the life cycle of a product, as well as its possible remanufacturing, see article 2, point 11 ESPR.
[76] Explanatory Memorandum to the ESPR, p. 14; decision no. 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products and repealing Council Decision 93/465/EEC, *OJ L* 13 August 2008, vol. 218, p. 82-128.
[77] Article 2, point 42 ESPR defines 'manufacturer' as any natural or legal person who manufactures a product or who has such a product designed or manufactured, and markets that product under its name or trademark or, in the absence of such person or an importer, any natural or legal person who places on the market or puts into service a product
[78] See article 2, point 43 ESPR for a definition.
[79] Article 2, point 44 ESPR defines 'importer' as any natural or legal person established in the Union who places a product from a third country on the Union market.
[80] Article 2, point 45 ESPR defines 'distributor' as any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market.
[81] Article 2, point 56 ESPR defines 'dealer' as a distributor who is offering products for sale, hire or purchase, or who is displaying products, to end users in the course of a commercial activity, including through distance selling. Any natural or legal person putting a product into service shall also be considered as a dealer. This definition is analogous to that of 'trader', used in, for example, the ECGTD.
[82] Article 3.11. Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and conformity of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 (*OJ L* 25 June 2019, vol. 169, p. 1-44) defines this concept as any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services as defined in point 1 of Article 2 of Directive 97/67/EC of the European Parliament and of the Council, parcel delivery services as defined in point 2 of Article 2 of Regulation (EU) 2018/644 of the European Parliament and of the Council, and any other postal services or freight transport services. Article 2 ESPR refers to this definition.

marketplaces and search engines (article 29)[83] and supply chain actors (article 31a)[84]. The scope of the ESPR therefore covers virtually all economic operators who place products on the market or put them into service for the first time.

Regarding the other end of the equation, the ESPR is not limited to consumer contracts. Even though some articles seem to limit the ESPR to the consumer context (e.g., article 2, point 5 ESPR[85]), the ESPR speaks more generally of 'customers' (e.g., article 7.1a. (b), (ii) ESPR[86]). Article 2, point 35a ESPR defines a 'customer' as a natural or legal person who buys, hires or receives a product for own use whether or not acting for purposes which are outside its trade, business, craft or profession.[87] Thus, this category encompasses both consumers and businesses.

For the definition of 'consumer', article 2, point 35b ESPR refers to article 2, point 2 of 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 (hereinafter abbreviated as 'Sale of Goods Directive').[88] According to that directive, a consumer is any natural person who, in relation to contracts covered by the directive (i.e., sales contracts), is acting for purposes which are outside that person's trade, business, craft or profession. The clause 'in relation to contracts covered by the directive' entails that the consumer in the context of the ESPR is one who engages in sales contracts.

2.4.3.1.3 Substantive scope

Finally, the ESPR also considerably broadens the substantive scope of the ecodesign legislation of the European Union. The current Ecodesign Directive aims to make products more energy efficient. The ESPR retains that objective but only as a single parameter in a much more extensive list of 'product aspects' that can be subject to ecodesign requirements (article 5 ESPR). Article 1.1 ESPR states that the regulation establishes a framework for ecodesign requirements "with the aim to improve the environmental sustainability of products in order to make sustainable products the norm and to reduce their overall carbon and environmental footprint over their life cycle[89]". Those improvements to the environmental sustainability may go far beyond mere energy efficiency.

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[83] Article 2, point 55 ESPR defines 'online marketplace' as a provider of an intermediary service using an online interface which allows customers to conclude distance contracts with economic operators for the sale of products covered by delegated acts adopted pursuant to article 4 ESPR actors. The ESPR does not contain a definition of 'search engines'. The Provisional agreement ESPR does not contain actual separate obligations for search engines (unlike the original article 29.2 ESPR, which demonstrated that these actors would only have been relevant insofar as they provide visual advertising for the products concerned). The European Parliament had suggested to remove all mentions of 'search engines', but its suggested change in the title of article 29 ESPR has not been implemented, see Amendments ESPR Parliament, amendments 185 (change in title) and 189 (deletion of obligation of online search engines).

[84] The ESPR does not define 'supply chain actor'.

[85] This article contains a definition of 'product group', which means a set of products that serve similar purposes and are similar in terms of use, or have similar functional properties, and are similar in terms of *consumer* perception. The article does not speak of 'customer's perception'.

[86] This article stipulates that information requirements shall, as appropriate, require products to be accompanied by information for *customers* and other actors on how to install, use, maintain and repair the product.

[87] Sometimes the ESPR uses 'end-user', see, for example, article 59.2, point ba) ESPR.

[88] *OJ L* 22 May 2019, vol. 136, p. 28-50

[89] A definition of 'life cycle' can be found in article 2, point 12 ESPR which states that this means the consecutive and interlinked stages of a product's life, consisting of raw material acquisition or generation from natural resources, pre-processing, manufacturing, storage, distribution, installation, use, maintenance, repair, upgrading, refurbishment and re-use, and end-of-life.

The ESPR greatly focuses on the circularity and lifespan of products, as product aspects such as durability, reusability, upgradability and repairability of products, the content of recycled material in products, the possibility of maintenance and refurbishment of products and the possibility of remanufacturing and recycling of products may be required. These product aspects can be stated both in terms of actual performance and in terms of the presentation of products. Article 6 ESPR deals with the performance requirements. Article 7 ESPR deals with the information requirements.

2.4.3.2 Analysis

2.4.3.2.1 Creation of broader ecodesign framework is beneficial

The scope of the ESPR makes clear that the European Union institutions wish to create an all-encompassing framework for the ecodesign of products on the market of the European Union. For reasons of sustainability, this ambition is to be applauded unreservedly.

Good ecodesign requirements are essential for all the strategies to combat premature obsolescence.[90] An intervention in the design and production stage in the life cycle of a product, creates the greatest potential for combating premature obsolescence as it enables all strategies. Obviously, ecodesign requirements resist premature obsolescence. They also lay the groundwork for being able to postpone (e.g., through ecodesign requirements enhancing the maintainability of products), reverse (e.g., through ecodesign requirements on the possibility of remanufacturing) and reduce (e.g., through ecodesign requirements on the presence of substances of concern, which lower the environmental impact of waste recovery methods) premature obsolescence.

Specifically, the product aspects that focus on the circularity and lifespan of products highlighted earlier (i.e., durability, reusability….) can be regarded as the cornerstone of any policy to extend the lifespan of products.

- For example, good ecodesign addresses the impact of 'consumer behavior' on the lifespan of products. Take as an example, the use of textiles. The disposal of textiles by consumers begins with a consumer's decision to stop using a textile that no longer satisfies the owner.[91] Bad ecodesign is an external barrier that disempowers consumers to prolong that satisfaction. Consumers recognize the convenience of replacing textiles with cheap new ones as a disabling effect. Because of the diminishing necessity for textile repair or re-use skills, consumers have gradually become incapable of effectively engaging in these practices, which leads to less re-use and repair of textile products.[92] Lowering the barrier for repair by demanding greater repairability through ecodesign requirements can mitigate this problem and re-empower consumers (thus, enabling the postponing of premature obsolescence). Of course, ecodesign by itself is no cure-all. Consumers also experience internal barriers (e.g., lack of time, patience and energy) and the availability of cheap, low-quality fast fashion drives many consumer decisions in the

[90] See the previously explained framework of A. MICHEL.
[91] R. PERA and E. FERRULLI, "Consumers' textile disposal practices and their perceived value in the circular economy: A platform focused ethnography approach", *Business Strategy and the Environment*, 2023, p. (1) 12.
[92] R. PERA and E. FERRULLI, "Consumers' textile disposal practices and their perceived value in the circular economy: A platform focused ethnography approach", *Business Strategy and the Environment*, 2023, p. (1) 12.

context of the disposal of textile products by consumers (note that ecodesign requirements could halt the abundance of low-quality products).[93]

- For example, good ecodesign is crucial to enhance the circularity of products once they have reached the utter end of their usefulness to consumers and are discarded as waste (thus, to reduce the impact of premature obsolescence). As things stand, the cost of recycled materials is often higher than virgin materials as a result of processing complexities (e.g., the presence of substances of concern or mixed material content).[94] However, with good ecodesign requirements that diminish those complexities (e.g., banning the use of a substance of concern[95]), the cost of recycled materials can be reduced, making them more competitive in the market and encouraging their adoption by manufacturers. An essential condition for reaching a fully circular European Union industry is that secondary production with recycled materials becomes a true alternative for primary production with virgin materials, with comparable quality and price.[96] Products from secondary production need to be able to compete with their primary alternatives or meaningful substitutions in a significant manner. Otherwise, their environmental benefits are unlikely to occur.[97]

2.4.3.2.2 Extension of material scope to products meant for export?

The basis of the ESPR is solid from the perspective of fostering sustainability in the European Union. However, some remarks can be made from that same perspective.

First, the general article 1.2 ESPR on the material scope of the regulation implies that it does not apply to products that are produced within the European Union and are meant to be exported outside of the market of the European Union.[98] From a sustainability perspective, it can be questioned whether the material scope of the ESPR should not have been broadened even more to include domestically produced products meant for export outside of the market for the European Union.[99]

After all, this exclusion of products meant for export runs counter to the ambition of the European Union to become the front runner in the transition towards a circular economy and

[93] R. PERA and E. FERRULLI, "Consumers' textile disposal practices and their perceived value in the circular economy: A platform focused ethnography approach", *Business Strategy and the Environment*, 2023, p. (1) 12.

[94] The costs connected to logistics, especially, pre-sorting and sorting operations, are significant. Combined with textile-specific requirements, such as the need for the separation of fibers, dyes, hardware, and chemicals, the recycled textile materials are expensive compared to the use of virgin textile materials, see I. DUKOVSKA-POPOVSKA, L. KJELLSDOTTER IVERT, H. JONSDOTTIR, H. CARIN DREYER and R. KAIPIA, "The supply and demand balance of recyclable textiles in the Nordic countries", *Waste Management* 2023, Vol. 159, p. (154) 161.

[95] Article 2, point 28 ESPR contains a threefold definition of the concept of substance of concern. Point (c) of the article contains a broad definition which considers to be a substance of concern any substance that negatively affects the re-use and recycling of materials in the product in which it is present.

[96] T. SIDERIUS and K. POLDNER, "Reconsidering the Circular Economy Rebound effect: Propositions from a case study of the Dutch Circular Textile Valley", *Journal of Cleaner Production* 2021, Vol. 293, article 125996, p. 3.

[97] T. SIDERIUS and K. POLDNER, "Reconsidering the Circular Economy Rebound effect: Propositions from a case study of the Dutch Circular Textile Valley", *Journal of Cleaner Production* 2021, Vol. 293, article 125996, p. 3.

[98] Regarding the same scope in the current Ecodesign Directive, see T. KRUGER, "Transnationale regelgeving voor duurzaamheid: kan de EU de wereld repareren?", *DCCR* 2023, p. (7) 16, no. 27.

[99] Regarding the same scope in current pieces of European Union legislation, see T. KRUGER, "Transnationale regelgeving voor duurzaamheid: kan de EU de wereld repareren?", *DCCR* 2023, p. (7) 15-17, nos. 25-30.

secure its competitive advantage in the future.[100] Also, the manufacturing processes in the European Union have local environmental impacts.[101]

2.4.3.2.3 Should the exclusion of second-hand products be maintained?

Second, certain second-hand products are excluded from the scope of the ESPR. This exclusion is meant to promote the circular business models based on the recuperation of products, as they tie in with the intended vision of a more circular European Union economy. Methods to recuperate products through re-use and the different methods of repair are strategies to reverse premature obsolescence in the end-of-life stage of a product.[102] Thus, in general, the exclusion could be seen as commendable.

However, the European Union legislature should take care to ensure that this exclusion cannot be abused by economic operators as a loophole for non-compliance. Market surveillance authorities will have to investigate and check whether manufacturers employ deceptive techniques in an attempt to evade ecodesign requirements (e.g., false/manipulated product history suggesting that new items have been previously used or repaired in some manner even if they have not, artificial aging of products through crafted patina, inauthentic wear and tear, altered packaging meant to mimic sings of previous use…). This might not be an easy endeavor. If the risk of this loophole is great, it might outweigh the benefits envisioned by the European Union legislature. However, the digital product passport (more on this to follow) should diminish this risk as it enhances the traceability of products.

Furthermore, one could argue that the distinction between second-hand products originating from the European Union and imported second-hand products may, to some extent, be influenced by protectionist motives prioritizing the internal market rather than a sole focus on sustainability. Excluding domestic products from scrutiny may inadvertently create a situation where these products are assumed to be more sustainable than their foreign counterparts without proper assessment, potentially leading to consumer misconceptions and overlooking opportunities for improvement of production processes (e.g., repair processes) in the European Union itself. This runs counter to the ambition stated in the ESPR for the industry in the European Union to become the front runner in the transition towards a circular economy and secure its competitive advantage in the future. At the same time, it needs to be acknowledged that it may be challenging to enforce ecodesign requirements on foreign products because of jurisdictional issues and the complexity of monitoring compliance abroad. Making the access to the market of the European Union for third country products conditional on the adherence to ecodesign requirements, regardless of the condition of a product as new or second-hand, ensures that no loophole can exist for imported products.

There is also the larger question whether it is truly commendable to exclude second-hand goods from the scope of the ESPR. Even though it intuitively seems wise to give second-hand products a ‘head start’ in the transition toward the circular economy, it could be seen as counterproductive in the long run. The distinction between virgin and second-hand products in and of itself could be seen as a relict of thinking according to a linear economy model, as is the

[100] Analogous, see T. KRUGER, “Transnationale regelgeving voor duurzaamheid: kan de EU de wereld repareren?”, *DCCR* 2023, p. (7) 17, no. 30.
[101] Analogous, see T. KRUGER, “Transnationale regelgeving voor duurzaamheid: kan de EU de wereld repareren?”, *DCCR* 2023, p. (7) 16, no. 26.
[102] See the previously explained framework of A. MICHEL.

case with an excessive focus on manufacturers. In a truly circular economy, each and every chain in the loop needs to ensure that the product can be 'R'ed' (referring to the R-framework[103]) to the largest extent by the next chain. Good ecodesign ensures that that is the case, making it hard to argue that actions such as the repair of products should fully fall outside of the scope of the ESPR. If one chain is allowed not to adhere to ecodesign requirements, the loop might be broken, reverting the product's life cycle back to a linear one. For example, if a manufacturer was obligated to create an easy to disassemble product through a ban on gluing together components, a repairer can ruin this ease of disassembly by using glue instead of screws during the repair process. Thus, it might have been sensible to include second-hand products in the scope of the ESPR (which would have required changes in the definitions in articles 2.40 and 2.41 ESPR). This is not to say that all second-hand products should fall under the scope of the ESPR or, rather, that all actors in the context of second-hand products should be obligated to adhere to ecodesign requirements. The personal scope of the ESPR would allow to differentiate between such actors. For example, obligations could be restricted to 'professional repairers'.[104]

Two counterarguments against including second-hand products in the ESPR can be considered. First, there is the reality that both the European Union's market for virgin products and for second-hand products will likely continue to include products not adhering to good principles of ecodesign. This situation will persist until the ESPR is in full swing, after it has been enacted and delegated acts have been drawn up. Even then, the actors on the second-hand market will generally only be confronted with virgin products that are manufactured according to ecodesign requirements established on the basis of the ESPR with a delay. For possibly a considerable time they will be confronted with both 'old' products (not falling under delegated acts of the ESPR) and 'new' products (subject to delegated acts of the ESPR). It might be cumbersome for the actors in the market of second-hand products to have to check whether a product in their hands is to adhere to strict ecodesign requirements (even though, for example, the introduction of the digital product passport, should mitigate this problem insofar as the accessibility and durability of the passport is ensured; with an article of clothing, for example, that accessibility might be hindered if the information on the passport is printed on the clothing label and a previous owner has cut away this label). A second argument is that the R-strategies can be ranked hierarchically. Some strategies require less input of resources and energy than others. Maintaining a second-hand product, for example, requires less input than the production of a virgin product (even if the materials are sourced circularly). The circular economy can be seen as a collection of concentric circles rather than as one single large circle, as illustrated nicely by the butterfly diagram of the Ellen MacArthur foundation.[105] Prioritizing the smaller circles that require less input, pushing for products to remain in those loops for as long as possible before diverting to larger circles, can be regarded as advantageous from a sustainability perspective. Thus, there is a case to be made that easing all administrative and technical burdens for actors in the market of second-hand products, who operate in those smaller circles, is preferable. It might make sense to place the main burden of the ecodesign requirements on the economic actors who manufacture virgin products (even if those virgin products contain recycled content

[103] See earlier the section on the strategies to combat premature obsolescence.
[104] Article 2, point 46b ESPR defines 'professional repairer' as a natural or legal person who provides repair or maintenance services for a product, irrespective of whether that person acts within the manufacturer's distribution system or independently.
[105] https://www.ellenmacarthurfoundation.org/circular-economy-diagram.

(i.e., a feedback loop that lies to the outside of the butterfly diagram)), giving a competitive advantage to the market for second-hand products.

Still, the foregoing does not mean that a blanket exclusion of second-hand products is without a doubt the best tool to reach the goal envisioned by the European Union legislature. It might have made greater sense to grant the European Commission the explicit power to exempt second-hand products temporarily from the ecodesign requirements in a delegated act, for the time period needed for the second-hand market of the product or product group to contain a substantial share of products manufactured in line with the ecodesign requirements in the delegated act (as was suggested by the European Parliament in its amendments[106]).[107] Once this point has been reached, those employing circular business models could have been made co-responsible for ensuring the endurance of the ecodesign of those products.

2.4.3.2.4 Should the definition of 'consumer' be changed?

A third remark concerns the definition of 'consumer' in the ESPR. The question arises whether the reference to the Sale of Goods Directive is a conscious choice. As a backdrop it should be noted that the European Union legislature could not fall back on the current Ecodesign Directive, as this directive lacks a definition of consumer in its article 2 containing definitions relevant to the directive. Also, as the goals and the scope of the ESPR are significantly larger than those from the current Ecodesign Directive an existing definition might not have been particularly useful.

When creating a definition, the European Union legislature could have opted for a more general definition of consumer such as, for example, the notion found in the Consumer Rights Directive.[108] Similar to the definition in the Sale of Goods Directive, the definition of the Consumer Rights Directive is self-referential. Article 2, point 1 Consumer Rights Directive regards all natural persons who, *in contracts covered by the directive*, are acting for purposes that are outside their trades, businesses, crafts or professions as 'consumers'. The Consumer Rights Directive is, however, not restricted to sales contracts but also covers services contracts. The Consumer Rights Directive is relevant to the ESPR because of its provisions concerning 'unsold consumer products' (more on this to follow). Another alternative is the definition of consumer found in the Unfair Commercial Practices Directive, which applies to all business-to-consumer commercial practices directly connected with the promotion, sale or supply of a product to consumers, with product meaning any goods or service including immovable property, rights and obligations.[109] Thus, the Unfair Commercial Practices Directive also has a larger scope.

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[106] Amendments ESPR Parliament, amendment 9.

[107] This would require a revision of article 4 ESPR.

[108] Directive (EU) 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* 22 November 2011, vol. 304, p. 64-88 (hereinafter abbreviated as 'Consumer Rights Directive').

[109] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 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 L* 11 July 2005, vol. 149, p. 22-39 (hereinafter abbreviated as 'Unfair Commercial Practices Directive').

Was it a conscious decision to opt not for a larger understanding of the notion of consumer? The definition of consumer in the ESPR has its origin in the amendments of the Council of the European Union.[110] The original version of the ESPR proposed by the European Commission contained no definition of the concept. The ESPR, in general, is meant to enable consumers to engage in sustainable 'consumption' (recital 24a ESPR) and to drive consumers towards sustainable 'choices' (recital 39 ESPR). Even though those are broad goals, going beyond purchasing products, the ESPR – in all its versions, including the original version proposed by the European Commission – is littered with references to 'sales' and 'purchases' by consumers (e.g., the aforementioned recital 39 ESPR). The ESPR even goes so far as substituting 'purchasers' for consumers (see recital 23 ESPR, which mentions 'purchasers and public authorities' in a sentence that also speaks of 'consumers and public authorities'). Thus, it seems that from the outset the implicit understanding of the European Commission was that the consumer of the ESPR is the consumer in a sales contract.

This discussion may seem largely theoretical. After all, the definitions of 'customer'[111] and 'making available on the market'[112] entail that all products on the market of the European Union will have to comply with ecodesign requirements and not solely those meant to be the object of sales contracts (with consumers). Thus, from the perspective that the ESPR should apply as broadly as possible to products, it is not necessary to broaden the definition of consumer in the ESPR to avoid any (unintentional) restriction of the material scope of the ESPR.

However, a practical importance of this discussion lies in the interpretation of article 69a ESPR on consumer redress. This article states that in the event of non-compliance of a product with ecodesign requirements certain economic operators are liable for damage suffered by the consumer. This article can be traced back to the amendments of the European Parliament.[113] In those amendments, article 69a ESPR originally referred to remedies in the Sale of Goods Directive and in the Unfair Commercial Practices Directive. The final version of article 69a ESPR is of a more vaguely worded nature, referring to liability for 'damage suffered as a result of non-compliance' (see also recital 102b ESPR). Even though the text of that version is broad, the definition of consumer in article 2, point 35b ESPR limits the consumer redress to redress for damage suffered in the context of sales contracts. If one regards such consumer redress as a method of 'private enforcement' of European Union legislation – as the European Union legislature itself does (see recital 102b ESPR) – this means that the tools for private enforcement in the ESPR are restricted. If one puts much belief in the efficacy of private enforcement, then one could argue that the ESPR is needlessly restrictive in this regard, especially considering a possible evolution towards business models that shift away from ownership of the customer (e.g., Product-as-a-Service contracts). One can imagine circumstances where non-compliance with ecodesign requirements has impaired the consumer to make an informed decision regarding a product outside the context of a sales contract, with damage as a result. For example, if a consumer leases a refrigerator that does not meet ecodesign requirements

[110] Amendments ESPR Council of the EU, p. 80.

[111] The definition of 'customer' in 2.35a ESPR makes clear that the ESPR is not limited to products that are meant to be the object of sales contracts, as the definition of 'customers' makes clear that they can also hire products.

[112] The definition of 'making available on the market' in article 2, point 39 ESPR refers to any supply of a product for distribution, consumption or use on the European Union market in the course of a commercial activity, whether in return for payment or free of charge. Products may not be made available on the market if they do not comply with ecodesign requirements (article 3.1 ESPR). This definition, in particular its reference to 'use', suggests a scope larger than products meant to be the object of sales contracts.

[113] Amendments ESPR Parliament, amendment 223.

regarding energy efficiency, leading it to consume significantly more energy over its lifetime, the non-compliance results in the consumer unknowingly facing higher electricity bills.

2.4.4 Functioning of the ESPR

2.4.4.1 Ecodesign requirements via delegated acts

2.4.4.1.1 Empowerment to adopt delegated acts

Like the current Ecodesign Directive, the ESPR is a general framework. The European Commission will gradually develop the actual ecodesign requirements for specific product groups. To that end, article 4 of the ESPR empowers the European Commission to adopt delegated acts setting out ecodesign requirements based on article 290 TFEU (recital 13 ESPR) (whereas the European Commission is only empowered to implement measures under the current Ecodesign Directive on the basis of article 291.2. TFEU).[114] The delegated acts of the European Commission are to specify at least the elements listed by article 7a ESPR (e.g., the definition of the product group or groups covered by the delegated act). Thus, the actual obligations imposed on operators in the value chain of a product will, therefore, only really enter into force later on. As the European Commission is obligated to carry out an impact assessment for each delegated act (article 5.4. b) ESPR) and to take into account the views expressed by an expert group (the Ecodesign Forum)[115] (article 5.4. d) ESPR), it may take some time to prepare delegated acts.

The empowerment to adopt delegated acts is no coincidence. Many Member States had questioned the need for the empowerment to adopt delegated acts to the European Commission, fearing insufficient involvement of the Member States, and had suggested limiting the empowerment to an implementing one rather than a delegated one. Delegated acts differ from implementing acts in particular with regard to the procedural aspects of their adoption. Delegated acts are adopted after consulting Member States' experts, but their view is not binding. Implementing acts are adopted in the comitology procedure, where experts designated by the Member States, sitting on specialized committees, can object to a draft implementing act when the 'examination procedure' is followed (which stands in contrast with the 'advisory procedure'[116]).[117] Member States had also asked for a better framing of the empowerment. This led the Swedish presidency of the Council of the European Union to request political

[114] Regarding the framework of this empowerment, see articles 66 (specifically for the power to adopt delegated acts) and 67 ESPR (specifically for the power to adopt implementing acts that already present in the proposal of the European Commission).
[115] Regarding this expert group, see article 17 ESPR, which contains the obligation to establish an 'Ecodesign Forum'. There is to be a balanced and effective participation in that forum of experts designated by the Member States and of all interested parties involved with the product or product group in question. This expert group is a continuation of the current 'Ecodesign and Energy Labeling Consultation Forum' under the current Ecodesign Directive. Article 17a ESPR creates a sub-group within the Ecodesign Forum, called the Member States expert group.
[116] In case of an advisory procedure, the European Commission decides on its own whether to adopt the proposed act, but it must 'take the utmost account' of the committee's opinion before deciding
[117] If a qualified majority (55% of European Union countries representing at least 65% of the total European Union population) votes in favor of the proposed implementing act, the European Commission hast to adopt it. If a qualified majority votes against the proposed act, the Commission may not adopt it. If there is no qualified majority either for or against the proposed act, the Commission can either adopt it or submit a new, amended version.

guidance from the Permanent Representatives Committee regarding a draft version of its position on the ESPR.[118]

This Committee noted that the use of implementing acts for the setting of ecodesign requirements foreseen under articles 5-7 ESPR would require adding significantly more criteria and principles to the Council of the European Union's text to arrive at a legally sound framework. Even if legally possible, using implementing acts for the setting of ecodesign requirements would entail practical consequences and the complete framework needed would inherently limit the possibility for the European Commission to tailor or adapt the environmental sustainability requirements of products to the wide variety of products, and to different situations.[119] Thus, the Committee advised to retain the empowerment to adopt delegated acts where necessary, while adding clearer criteria and principles. It suggested that the ESPR should opt for implementing acts in all other circumstances.[120] The Committee stressed that, ultimately, the choice between conferring a delegated power or an implementing power is a political one.[121]

2.4.4.1.2 Specifics of empowerment

Article 4 ESPR empowers the European Commission to establish ecodesign requirements for products to improve their environmental sustainability. The ecodesign requirements are established for a specific product group (article 5.2 ESPR), which is defined by article 2, point 5 ESPR as a set of products that serve similar purposes and are similar in terms of use, or have similar functional properties, and are similar in terms of consumer (not: customer) [122] perception. However, the European Commission may differentiate the ecodesign requirements for any specific product that belongs to that product group.

Where two or more product groups display one or more similarities allowing a product aspect to be effectively improved based on common ecodesign requirements, such requirements may be established horizontally for those product groups (article 5.2 ESPR). For example, one product group could be 'washing machines', another product group could be 'refrigerators'. The European Commission may establish that the products belonging to those groups are sufficiently alike in the way they use energy. Thus, the European Commission could establish horizontal ecodesign requirements for energy use for the wider range of products 'electronic appliances' to which both product groups belong. These horizontal ecodesign requirements are meant to increase the efficiency of the ESPR (recital 13 ESPR). When establishing horizontal ecodesign requirements, the European Commission is to take into account the positive effects towards reaching the objectives of the ESPR, in particular the ability to cover a wide range of product groups in the same delegated act (article 5.2 ESPR). The European Union legislature

[118] 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 - Guidance for further work, 7854/22 + ADD1, 17 March 2023.
[119] A similar remark can be found in the opinion of the European Economic and Social Committee, see NAT/851-EESC-2022, no. 3.6.
[120] 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 - Guidance for further work, 7854/22 + ADD1, 17 March 2023, p. 3-4, nos. 7-8.
[121] 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 - Guidance for further work, 7854/22 + ADD1, 17 March 2023, p. 3, no. 6.
[122] As noted before in the section on the personal scope of the ESPR, this definition does not refer to the broader notion of 'customer perception'.

indicates that horizontal requirements should be developed in particular on durability and repairability (recital 13 ESPR). Horizontal ecodesign requirements may be supplemented through the establishment of ecodesign requirements for a specific product group (article 5.2 ESPR). This last provision means that the horizontal requirements, as *lex generalis*, do no stand in the way of more specific requirements, as *lex specialis*.

This empowerment includes the power to establish that no performance requirements, no information requirements or neither performance nor information requirements are necessary for certain specified product parameters referred to in Annex I to the ESPR (more on these product parameters to follow) if a requirement related to that specific product parameter would have a negative impact on the ecodesign requirements considered for the product group (article 4 ESPR; see also recital 15 ESPR). The empowerment to adopt delegated acts to establish ecodesign requirements does not include the possibility to adopt a delegated act that establishes that no ecodesign requirements are necessary for a product group (article 4 ESPR). Concretely, this means that specific product parameters can be exempted from ecodesign requirements in relation to a product group if such requirements would conflict with overarching ecodesign goals, but complete exemptions for entire product groups are not permissible.

The fact that no 'product *groups*' may be exempted leads to a subtlety that might be easily overlooked: it seems that 'products' can be exempted. As mentioned earlier, the European Commission may differentiate the ecodesign requirements for any specific product that belongs to a product group for which it sets ecodesign requirements. Recital 11 ESPR suggests that such differentiation may take the form of an exemption. Some of the reasons why products may be exempted explain why the European Union legislature has included some of the provisions of the ESPR (e.g., article 5.1b ESPR for reason of maintaining the functionality of (specifically civil service/military) products) (see the earlier section on the material scope of the ESPR). Additionally, recital 11 ESPR mentions that the European Commission may exempt products produced in very small quantities and products on a market of a very specific type and size (an example thereof is probably a market in which bespoke products are produced). This addition can be traced back to the amendments of the Council of the European Union.[123] The Council of the European Union had suggested in an amended article 5.2 ESPR that a delegated act may exclude subset of products belonging to the regulated product group from the ecodesign requirements or exempt them from some of the requirement. The advantage of the Council's version of the ESPR is that the operative provisions of the ESPR themselves explicitly made clear that specific products can be exempted from the ecodesign requirements for product groups, whereas this has to be inferred through *a contrario* reasoning of article 4 in an interplay with recital 11 in the Provisional agreement ESPR.[124]

2.4.4.2 Prioritization, planning and accountability through transparency & reporting

To enhance the 'accountability' of the European Commission in ensuring a sufficiently swift transition to the circular economy, the ESPR contains some transparency and reporting obligations of the European Commission vis-à-vis the other European Union institutions.

[123] Amendments ESPR Council of the EU, p. 90.

[124] Regarding the interplay between recitals and the operative provisions in European Union legislation, see T. KLIMAS and J. VAICIUKAITE, "The law of recitals in European Community legislation", *ILSA Journal of International & Comparative Law*, 2008, p. 61-93.

Article 16.1 ESPR obligates the European Commission to draft, adopt and make publicly available a 'working plan' in which it lists the product groups that it will prioritize for the establishment of ecodesign requirements and estimates the timelines for the establishment of such requirements. The working plan covers a period of at least three years, and the European Commission is obligated to update it regularly. Article 16.2 ESPR obligates the European Commission to present the draft working plan to the European Parliament before its adoption. Furthermore, the European Commission is to report annually to the European Parliament and the Council of the European Union on the progress made in the implementation of the current working plan.[125]

While the European Commission is normally free (in cooperation with the Ecodesign Forum[126]) to decide which products should be prioritized on the basis of an analysis of their potential contribution to achieving the European Union's climate, environmental and energy efficiency objectives, this freedom is restricted with regard to the first working plan. Article 16.2b ESPR stipulates that the European Commission is obligated to include iron, steel, aluminum, textiles (notably garments and footwear), furniture (including mattresses), tires, detergents, paints, lubricants, chemicals, energy related products[127], ICT products and other electronics in the first working plan. If any of those product groups is not included in the working plan or if any other product group is included, the European Commission is to provide a justification in the working plan. Moreover, the European Commission is required to prioritize cement if the Proposal Regulation Construction Products does not contain adequate ecodesign requirements (article 16.2c ESPR) [128]

As regards the accountability of the European Commission vis-à-vis the other European Union institutions in the use of its empowerment to adopt delegated acts, there are several obligations of transparency and of cooperation as well. Clear examples thereof are the obligations to cooperate with the Ecodesign Forum and the Member States Expert Group within that forum (article 5.4, point d) ESPR), to carry out an impact assessment (article 5.4, point b) ESPR) and to publish the results of that impact assessment (article 5.8 ESPR).

2.4.4.3 Self-regulation measures

The economic operators involved with a product can also act proactively. On the basis of article 18 ESPR two or more economic operators may submit a self-regulation measure establishing ecodesign requirements to the European Commission as an alternative to a delegated act. This is only allowed if the product does not already fall within the scope of an existing delegated act or if the products are not included in the current working plan of the European Commission (article 18.1 ESPR; see also recital 44 ESPR). Together, the economic operators have to represent a market share of at least 80% of the units of the product placed on the market or

[125] The Council of the European Union additionally suggested an obligation for the European Commission in the case of delays in the implementation of working plans, to give an explanation of the main causes of the delays and to explain how it intended to ensure progress in the implementation (see Amendments ESPR Council of the EU, p. 118. This obligation did not make the final cut of the Provisional agreement ESPR.

[126] Article 17 ESPR stipulates that the forum contributes to preparing working plans.

[127] Recital 42 ESPR states that considering their importance for meeting the European Union's energy objectives, the working plans should include an adequate share of actions related to energy-related products.

[128] Recital 42a ESPR states that the cement industry, as one of the most energy-, material- and carbon- intensive sectors, is currently responsible for around 7% of global and 4% of European Union CO_2 emissions, which makes it a key sector for alignment with the Paris climate agreement and the Union's climate objectives as quickly as possible.

put into service for the first time (article 18.3, point b) ESPR). A self-regulation measure is only possible if it contributes to improving the environmental sustainability of products and to ensuring the free movement in the internal market quickly or at a lesser expense than a delegated act (article 18.3, point a) ESPR). Finally, the self-regulation measure has to be in line with European Union law and international trade commitments of the European Union. It is up to the European Commission to verify whether these prerequisites are fulfilled.

According to article 18.2 ESPR, the self-regulation measure contains the following information:

- a list of the economic operators who are signatories to the self-regulation measure;
- the ecodesign requirements applicable to products covered by the self-regulation measure;
- a detailed, transparent, and objective monitoring plan, with clearly identified responsibilities for industry and independent inspectors, including the criteria set out in point 6 of Annex VII;
- rules on information to be reported by signatories and on testing and inspections;
- rules on the consequences of the non-compliance of a signatory that include provisions whereby, if the signatory has not undertaken sufficient corrective actions within three months, it is dismissed from the self-regulation measure; and
- an explanatory note explaining how the self-regulation measure improves the environmental sustainability of products in line with the objectives of the ESPR more quickly or at lesser expense than mandatory requirements than a delegated act. To enable the European Commission to assess the self-regulation measure, this note shall be supported by evidence, consisting of a structured technical, environmental and economic analysis, justifying the ecodesign requirements and objectives of the self-regulation measure, and assessing the impacts of the ecodesign requirements set in that self-regulation measure.

2.4.4.4 Analysis

The possibility for the European Commission to differentiate the ecodesign requirements for any specific product that belongs to a product group can be highlighted. Building in flexibility in the ESPR as regards the establishment of ecodesign requirements, allows for a bespoke approach.

From a sustainability perspective, a tailored approach can be advantageous. In cases where the European Commission would find itself doubting to decide that strict ecodesign requirements should apply to the entirety of a product group, merely because a particular subset of the group makes for a ‘hard case’, the flexibility to ease the requirements for that subset could ultimately mean that more products have to adhere to ambitious ecodesign requirements. The bar need not be lowered for the entirety of a product group because of a single subset.

While flexibility in setting ecodesign requirements offers advantages, there are potential disadvantages to differentiating between products in the same product group. Excluding subsets from stricter ecodesign requirements might cause fragmentation within a product category. This fragmentation could reduce overall market transparency. Consumers might find it difficult to compare the environmental performance of different products within the same

category.[129] This fragmentation also introduces complexity in implementation by economic operators and in enforcement by public authorities. Moreover, exemptions of stricter ecodesign requirements may stifle innovation, as they disincentive – from a purely regulatory point of view – the investment in innovations to enhance the environmental performance of products. Whether such disadvantages might actually become a reality should come to light in the impact assessment.

2.4.5 Ecodesign requirements

2.4.5.1 In general

2.4.5.1.1 Product aspects

The European Commission may require ecodesign to improve the following product aspects, when relevant to the product group concerned, to address environmental impacts in any of the stages of product's life cycle (article 5.1 ESPR):

- durability[130];
- reliability[131];
- reusability;
- upgradability[132];
- repairability;
- possibility of maintenance[133] and refurbishment;
- presence of substances of concern;
- energy use and energy efficiency;
- water use and water efficiency;
- resource use and resource efficiency;
- recycled content;
- possibility of remanufacturing;
- possibility of recycling;
- possibility of recovery of materials;
- environmental impacts, including carbon and environmental footprint[134];
- expected generation of waste.

[129] By the very definition of 'product group', the different products are sufficiently similar in the perception of the consumer, so that it is not without reason to think that consumers might want to compare different products as concerns a specific product parameter.
[130] Article 2, point 21 ESPR defines 'durability' as the ability of a product to maintain over time its function and performance under specified conditions of use, maintenance and repair.
[131] Article 2, point 22 ESPR defines 'reliability' as the probability that a product functions as required under given conditions for a given duration without an occurrence which results in a primary or secondary function of the product no longer being delivered.
[132] Article 2, point 17 ESPR defines 'upgrading', a concept related to upgradability, as actions carried out to enhance the functionality, performance, capacity, safety or aesthetics of a product.
[133] Article 2, point 19 ESPR defines 'maintenance' as one or several actions carried out to keep a product in a condition where it is able to fulfill its intended purpose.
[134] Article 2, point 23 ESPR defines 'environmental footprint' as quantification of product environmental impacts throughout its life cycle, whether in relation to a single environmental impact category or an aggregated set of impact categories based on the Product Environmental Footprint method (established by Recommendation (EU) 2021/2279, see article 2, point 24 ESPR) or other scientific methods developed by international organizations and widely tested in collaboration with different industry sectors and adopted or implemented by the European Commission in other European Union legislation

As concerns the presence of substances of concern, the European Commission is to determine for each product group covered by ecodesign requirements which substances fall into that category, taking into account at least, whether (article 5.8a ESPR):

- based on standard technologies, the substances make the re-use, or recycling process more complicated, costly, environmentally impactful, or energy- or resource-demanding;
- the substances impair the technical properties or functionalities, the usefulness or the value of the recycled material or products manufactured from this recycled material;
- the substances negatively impact aesthetic or olfactory properties of the recycled material.

Where a substance has already been established as being a substance that hinders circularity for another product group, this can be an indication that it also hinders circularity for other product groups. The European Commission, when setting performance requirements (more on performance requirements to follow), should be able to introduce requirements to prevent certain substances from being included in a product. Moreover, the identification, and possible restriction, of a substance should also trigger an information requirement (more on information requirements to follow) (recital 22a ESPR). As concerns information requirements on substances of concern, requirements on the tracking of substances of concern should by default be included where an information requirement is to be set under the ESPR, except when this information requirement is part of horizontal ecodesign requirements or where, based on technical feasibility, the presence of a substance in a product cannot be verified with the current available technologies (recital 25 ESPR).

2.4.5.1.2 Product parameters

The European Commission is obligated to base its ecodesign requirements on the product parameters in Annex I to the ESPR. This Annex I contains a list of parameters that explain which criteria can be used to enhance the general product aspects enumerated in article 5.1 ESPR. The European Commission may use parameters individually or combine them. The introduction of the list of product parameters suggests that this list is non-exhaustive. The parameters are supplemented by others where necessary.

Concretely, this means that the European Commission is to use at minimum the relevant product parameters in Annex I and is to use other product parameters (i.e., not listed in Annex I) where enhancing the sustainability with regard to a product aspect calls for such additional parameters. 'Where necessary' implicates that there is no freedom for the European Commission to use additional parameters (either they are of paramount importance, and cannot be omitted, or they are not essential, and should not be used).

2.4.5.1.3 Types of ecodesign requirements

The European Commission may impose two types of ecodesign requirements: performance requirements [135], which require products to achieve a certain performance level, and information requirements [136], which require products to be accompanied by specified information. An information requirement may be established for a specific product parameter

[135] For a definition, see article 2, point 8 ESPR.
[136] For a definition, see article 2, point 9 ESPR.

irrespective of whether a performance requirement is established for that specific product parameter (article 7.2 ESPR).

2.4.5.1.4 Criteria for and requirements of ecodesign requirements

The ecodesign requirements are to meet the following criteria (article 5.5 ESPR):

- there shall be no significant negative impact on the functionality of the product, from the perspective of the user;
- there shall be no adverse effect on the health and safety of persons;
- there shall be 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;
- there shall be no disproportionate negative impact on the competitiveness of economic operators and other actors in the value chain, including SMEs, in particular micro-enterprises.
- there shall be no proprietary technology imposed on manufacturers or other actors in the value chain; and
- there shall be no disproportionate administrative burden on manufacturers or other actors in the value chain, including SMEs, in particular micro-enterprises.

Moreover, the European Commission is to ensure that ecodesign requirements are verifiable (article 5.7 ESPR). The European Commission is to identify appropriate means of verification for specific ecodesign requirements, including directly on the product or based on the technical documentation. This ties in with the general obligation for the European Commission to select or develop tools or methodologies as necessary for the setting of ecodesign requirements (article 5.1b ESPR). The verifiability of ecodesign requirements in the ESPR overlaps with goals of other initiatives of the European Union, such as the ECGTD and the GCI (which are explained in detail in subsequent sections of this research report).

Also, the European Commission should, when assessing the characteristics of the market and preparing ecodesign requirements, strive to consider national characteristics, such as the different climate conditions in Member States and practices and technologies used in Member States with proven beneficial environmental effects (recital 16 ESPR). This requirement can be traced back to the amendments of the Council of the European Union.[137] The Council of the European Union does not provide much guidance on the meaning of this requirement. Perhaps products such as air conditioning units could be an example of products that have to operate in different climate conditions. Ecodesign requirements for air conditioning will have to take regional differences in average temperature and humidity levels into account. By the same token air conditioning units produced in in hotter regions might employ technology with proven beneficial environmental effects.

2.4.5.2 Performance requirements

Products shall comply with the performance requirements laid down in a delegated act (or self-regulation measure[138]) (article 6 ESPR). Those performance requirements relate to the product

[137] Amendments ESPR Council of the EU, p. 18.

[138] It is to be assumed that a self-regulation measure can also establish performance requirements, as the self-regulation measure is an alternative to the delegated act. In what follows in this research report, this assumption is no longer explicitly clarified.

aspects listed in article 5.1 ESPR. They are based on the product parameters set out in Annex I. The performance requirements based on those product parameters include minimum or maximum levels in relation to a specific product parameter (or a combination thereof), or non-quantitative requirements that aim to improve performance in relation to one or more product parameters, or both.[139] Annex II to the ESPR contains the procedure that is to be followed for defining performance requirements. When the European Commission envisages a combination of requirements, it should assess them as a whole and identify the combination of requirements that delivers the highest environmental sustainability benefits (recital 20 ESPR).

Article 5.1a ESPR is of great importance for the extension of the lifespan of products. This article states that ecodesign requirements shall, where relevant through product parameters, ensure that products do not become prematurely obsolete, for reasons including design choices by manufacturers, use of components which are significantly less robust than other components, impeded disassembly of key components, unavailable repair information or spare parts, when software no longer works once an operating system is updated or when software updates are not provided.[140] Article 2, point 20a ESPR defines 'premature obsolescence' as a product design feature or subsequent intervention resulting in the product becoming non-functional or less performant without it being the result of normal wear and tear. This definition seems neutral enough not to hinge on proving intent of an actor in the value chain of a product.[141] The definition is concerned with the effect rather than the intent behind the product design or intervention, regardless of whether anyone intended for this outcome (especially in comparison with recital 5a ESPR, which uses the more ambiguous term 'practices' associated with premature obsolescence).

The competence of the European Commission to establish a comprehensive list of product performance requirements provides a foundation for many of the strategies to combat premature obsolescence, at various stages in a product's life cycle.[142] Several of the product parameters in Annex I to the ESPR can be used to combat premature obsolescence. For example, there is the parameter b) 'ease of repair and maintenance' as expressed through: characteristics, availability, delivery time and affordability of spare parts, modularity, compatibility with commonly available tools and 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 whether specialized tools are needed, ease of non-destructive disassembly and re-assembly, conditions for access to product data, conditions for access to or use of hardware and software needed.[143] Performance requirements for the repairability and maintainability of a product (e.g., by allowing easy disassembly) focus on reversing premature obsolescence and contribute to the possibility of postponing premature obsolescence with regular maintenance.

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[139] This follows from both article 6 ESPR and the definition of 'performance requirement' in article 2, point 8 ESPR, which states that such a requirement is a quantitative or non-quantitative requirement for or in relation to a product to achieve a certain performance level in relation to a product parameter referred to in Annex I to the ESPR.

[140] See also recital 5a ESPR.

[141] This differs from, for example, the French penal provision prohibiting premature obsolescence in article L.422-2 *Code de la consommation*, which defines premature obsolescence as a deliberate strategy.

[142] See the previously explained framework of A. MICHEL.

[143] These criteria to determine this ease of repair and maintenance can all be considered as components of an end-user's 'right to repair'. This research report explains the right to repair in detail in a subsequent section on the R2RD.

2.4.5.3 Information requirements

The Circular Economy Action Plan pays ample attention to the position of consumers.[144] Strengthening this position is an end in and of itself, but at the same time it also serves sustainability goals. Various studies commissioned by the European Commission show that consumers are interested in receiving more information about the sustainability of products and that they are also more inclined to choose such products when duly informed.[145] An informed end-user is worth two in terms of environmental sustainability.[146] Therefore, it is unsurprising that the ESPR contains extensive information obligations geared towards end-users.[147] Moreover, the European Union legislature wishes to inform all economic operators in the entire value chain of the product. This is an important condition for the extension of the lifespan of products. To ensure that, for example, independent repair services are actually able to repair products, it is necessary that they have access to all relevant[148] product information.[149]

Article 7 is a general article on information requirements. In its first paragraph it provides that products shall comply with the information requirements laid down by delegated act (or self-regulation measure[150]). Those information requirements relate to the product aspects listed in article 5.1 ESPR.

The information requirements shall include as a minimum the requirements related to the digital product passport (see articles 8 and following ESPR; more on the digital product passport to follow) and the information requirements on substances of concern (which can be found in article 7.5 ESPR) (article 7.1a ESPR).

In addition to these general requirements, the European Commission may also require the following where appropriate.

- The European Commission may require that information is provided on the performance of a product in relation to the product parameters listed in Annex I (article 7.2. b), i) ESPR).

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[144] In this regard, see also the new consumer agenda: Communication from the Commission to the European Parliament and the Council - New Consumer Agenda. Strengthening consumer resilience with a view to sustainable recovery, 13 November 2020, COM(2020) 696 final (hereinafter abbreviated as 'Consumer Agenda Sustainable Recovery').

[145] European Commission, Directorate-General for Justice and Consumers, *Consumer market study to support the fitness check of EU consumer and marketing law : final report*, Luxembourg, EU Publications Office, 2017, DOI: 10.2838/8056, p. 50 and following; LE, VVA, Ipsos, Conpolicy and Trinomics, *Behavioural Study on Consumers' Engagement in the Circular Economy*, Luxembourg, EU Publications Office, 2018, DOI: 10.2818/956512, p. 176 and 178-180.

[146] On the usefulness and added value of information obligations, see E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 329 and following, nos. 33 and following; E. TERRYN, "Consumenten correct informeren over ecologische duurzaamheid: een uitdaging en een must?", *TvC* 2021, p. 256-259.

[147] The European Commission expects that the information requirements will enable consumers and other end-users to make more sustainable choices, as they provide a solid basis for comparing products based on their environmental sustainability (recital 23 ESPR).

[148] The Belgian Council of State casts doubts on the efficacy of an overly broad obligation to inform about 'all' information about the spare parts used, see later in more extensive detail footnote 512.

[149] This is also a component of an end user's 'right to repair'. This research report explains this right to repair in detail in a subsequent section on the R2RD.

[150] It is to be assumed that a self-regulation measure can also establish information requirements, as the self-regulation measure is an alternative to the delegated act. In what follows in this research report, this assumption is no longer explicitly clarified.

- In particular, the European Commission may obligate a scoring of repairability or durability, carbon footprint [151] or environmental footprint where its establishment is deemed appropriate, in terms of providing environmental benefits and clearer information for consumers (recital 24a ESPR). In order to allow consumers to assess and compare products effectively, it is important that the format, content and display of such reparability and durability scores include easy-to-understand language and pictograms and that the reparability score be based on a harmonized methodology specified for the product or product group, aggregating parameters such as availability of spare parts, price of spare parts, ease of disassembly and the availability of tools into a single score.
- Moreover, the European Commission may determine classes of performance to provide a benchmark for those performances (article 7.4 ESPR). These classes of performance may be based on single parameters, on aggregated scores, in absolute terms or in any other form that enables potential customers to choose the best performing products. The classes of performance correspond to statistically significant improvements in performance levels. Where classes of performance are based on parameters in relation to which performance requirements are established, they shall use as the minimum level the minimum performance required at the time when the classes of performance start to apply.

- In terms of extending the lifespan of products, it is interesting that it may be required that products are accompanied by information for customers and other actors on how to install, use, maintain and repair the product in order to minimize its impact on the environment and to ensure optimum durability, on how to install third-party operating systems where relevant, as well as on collection for refurbishment or remanufacture, and on how to return or handle the product at the end of its life[152] (article 7.2. b), ii) ESPR).[153] The availability of such information is a component of an end-user's 'right to repair'. This research report explains this right to repair in detail in a subsequent section on the R2RD.
- The European Commission may require information for treatment facilities on disassembly, reuse, refurbishment, recycling, or disposal at end-of-life.
- Finally, all other information that may influence sustainable product choices for customers and the way the product is handled by parties other than the manufacturer in order to facilitate appropriate use, value retaining operations and correct treatment at end-of-life may be required.

The information requirements indicate how the required information is to be made available. There are various manners to do so, such as displaying information on the product itself, on the packaging of a product, on a label or on a website or application that is accessible free of charge (article 7.6 ESPR).

[151] Article 2, point 25 ESPR defines 'carbon footprint' as the sum of greenhouse gas (GHG) emissions and GHG removals in a product system, expressed as CO_2 equivalents and based on a life cycle assessment using the single impact category of climate change.

[152] Article 2, point 13 ESPR defines 'end-of-life' as the life cycle stage that begins when a product is discarded and ends when the waste material of the product is returned to nature or enters another product's life cycle.

[153] Some of the articles providing an overview of all the obligations of economic operators (articles 21 and following ESPR), reiterate this general provision as an information obligation for the economic operator concerned. For example, article 21.7 ESPR stipulates that a manufacturer is to ensure that the product is accompanied by these instructions (compare with article 23.4 and 24.2, b) ESPR).

The required information is provided in a language determined by the Member States in such a way that customers can easily understand the information (article 7.7 ESPR).

Like the performance requirements, the information requirements provide a foundation for many of the strategies to combat premature obsolescence, at different stages of a product's lifespan. [154] These largely support the strategies previously explained in the section on performance requirements. Whereas those performance requirements make these strategies possible, the information requirements ensure that the relevant actors in a product's value chain can actually put them into practice (for example, the possibility of good repair is reinforced if the repairer is provided with sufficient information on how to carry out the repair). The information requirements also play an important role in the marketing and pre-contractual stage. Methods to display information, such as labels, that inform on the sustainability in a general sense and specifically on the repairability of a product ensure that sustainable products are marketed as attractive to the consumer and other end-users and thus compete with unsustainable equivalents. Thus, informing the consumer contributes to resisting premature obsolescence.

2.4.5.4 Analysis

The scrutiny regarding substances of concern can be welcomed from a sustainability perspective. The European Union legislature is correct to assume that the identification of such substances during the European Commission's assessment prior to the setting of ecodesign requirements for a specific product group can better the understanding of the challenges that need to be addressed by ecodesign requirements. Substances of concern hinder the potential of products to be recuperated in various manners (e.g., the recyclability of the product is diminished) and, thus, impede strategies to reverse and reduce premature obsolescence in the end-of-life stage of a product.[155]

Concerning the ban on premature obsolescence in the design phase, the general provision in the ESPR is advantageous from a sustainability perspective, as this initiative is the most general and all-encompassing. Explicitly empowering the European Commission to ban product design features and subsequent interventions leading to premature obsolescence through performance requirements is a strategy to resist premature obsolescence, focused on the design and production stage. [156] The additional information requirements are part of a strategy to reverse premature obsolescence by promoting the possibilities of repair in the end-of-life stage of a product. [157] Anchoring this ban on premature obsolescence in the performance and information requirements of the ESPR makes sense as this as this initiative is the most general and all-encompassing. Additionally, the European Union legislature strengthens the legislative approach to commercial practices stimulating premature obsolescence in the ECGTD.

Concerning the repairability score, this research report goes into more detail on repairability scores in the section on the ECGTD. That initiative introduces obligations to inform consumer through repairability scores. It can already be noted in this section that the concrete method to

[154] See the previously explained framework of A. MICHEL.
[155] See the previously explained framework of A. MICHEL.
[156] See the previously explained framework of A. MICHEL.
[157] See the previously explained framework of A. MICHEL.

establish the European repairability score is left to the discretion of the European Commission. Recital 24a ESPR stipulates that the reparability score is to be based on a harmonized methodology specified for the product or product group, aggregating parameters such as availability of spare parts, price of spare parts, ease of disassembly and the availability of tools into a single score.

Concerning the repairability information, this research report goes into more detail in the section on the ECGTD. That initiative blacklists several commercial practices where information on repair information is withheld. This research report also goes into more detail on requirements for actors in the supply chain to ensure an effective right to repair in the section on the R2RD. That initiative introduces an obligation for the manufacturers of certain products to ensure that independent repairers have reasonable access to spare parts and repair tools. It can already be noted here that including aspects of the right to repair in the ESPR seems sensible, as this initiative is the most general and all-encompassing.

2.4.6 Digital product passport

2.4.6.1 General framework

Article 8 ESPR creates a digital product passport. In essence, the digital product passport is a tool to convey the information that is required by delegated act to accompany a product. Digital product passports hold great potential to aid the strategies to halt premature obsolescence. When interviewed, most of 107 experts in the fields of sustainability, circular economy and product passports of electronics, consider that digital product passports should (and could) foster recycling, repurposing, remanufacturing, refurbishing, repairing, and reusing products (specifically, electronics).[158] Thus, digital product passports are part of the strategies to postpone, reverse and reduce premature obsolescence.[159]

The digital product passport serves different purposes (see recital 26 and article 8.3 ESPR). It should help consumers to make informed choices.[160] It should enable economic operators and other actors in the value chain (such as repair services or recycling centers) to process the product sustainably. It should enable the competent national authorities to check whether the product complies with all European Union legislation. The digital product passport is not a substitute for non-digital ways of transferring information, such as product manuals or labels, but complements such means to convey information (recital 26 ESPR).

Products can only be placed on the market or put into service for the first time if a digital product passport is available, in accordance with a delegated act (or self-regulation measure) (articles 7.1 and 8.1 ESPR). Article 8.2 ESPR lays down the information requirements regarding the digital product passport that may be established by a delegated act (or self-regulation measure). Those information requirements shall cover, among others, the overview of information given by Annex III to the ESPR.). It is up to several of the economic operators to ensure that a digital product passport is available (including a back-up copy of the most updated

[158] R. REICH, J. AYAN, L ALAERTS and K. VAN ACKER, "Defining the goals of Product Passports by circular product strategies", *Procedia CIRP* 2023, p. (257) 259-260.
[159] See the previously explained framework of A. MICHEL.
[160] Thus, the digital product passport contributes to the strategies to combat premature obsolescence, which were explained in more detail earlier in the sections on the performance and information requirements.

version) (manufacturers: article 21.1, point c) ESPR; importers: article 23.1, point c) ESPR).[161] The European Commission may exempt products from the obligation to be accompanied by a digital product passport if technical specifications of the digital product passport are not available in relation to the essential requirements for the technical design and operation of the product passport, in order to avoid delays in the establishment of ecodesign requirements or to ensure that product passports can be effectively implemented (recital 29 and article 8.4, point a) ESPR). Another reason for exemption is the existence of other European Union legislation that already includes a system for the digital provision of product information, in order to prevent unnecessary administrative burden for economic operators (recital 29 and article 8.4, point b) ESPR). These exemptions should be periodically reviewed taking into account further availability of technical specifications.

Articles 9 and 10 define the general requirements for the product passport and its technical design and operation. Three examples of general requirements are the following.

- A first example of a general requirement is that the product passport is connected through a data carrier[162] to a persistent unique product identifier (article 9.1, point a) ESPR). A 'unique product identifier' means a unique string of characters for the identification of products that also enables a web link to the product passport (article 2, point 31 ESPR), which is to comply with the requirements of article 9.1, point b) ESPR. The data carrier shall be physically present on the product, its packaging or on documentation accompanying the product (article 9.1, point b) ESPR).
- A second example is that personal data related to the customer of the product shall not be stored in the product passport without the explicit consent of the customer in compliance with the GDPR (article 9.1, point da) ESPR).[163]
- A third example is that to ensure access to the product passport for the period specified in delegated acts, including after an insolvency, a liquidation, or a cessation of activity in the Union, the economic operator, when placing the product on the market, shall make also available a back-up copy of the product passport through a certified independent third-party digital product passport service provider (article 9.3a ESPR).[164]

An example of an aspect of the technical design and operation of the product passport is that the economic operator who is responsible for the creation of the product passport is obligated to store the data contained therein (article 10, point c) ESPR). This obligation may also be

[161] Other economic operators have more specific obligations regarding the digital product passport. See, for example, article 24.1. a) ESPR regarding distributors and article 25.2 ESPR regarding dealers.
[162] According to article 2, point 30 ESPR, a data carrier is a linear bar code symbol, a two-dimensional symbol or other automatic identification data capture medium that can be read by a device. The European Commission gives as an example a watermark or QR code (recital 31 ESPR).
[163] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *OJ L* 4 May 2016, Vol. 119, p. 1–88.
[164] Article 2, point 32a ESPR defines 'digital product passport service provider' as a natural or legal person who, authorized by the economic operator placing the product on the market or putting it into service, processes the digital product passport data for that product for the purpose of making such data available to economic operators and other relevant actors with a right to access those data under the ESPR or other European Union legislation.

performed by a certified[165] independent third-party digital product passport service provider authorized to act on behalf of the economic operator.

The digital product passport is connected to a unique product identifier to improve the traceability of a product throughout the value chain. In addition, where appropriate, the passport should allow for the tracing of the actors and manufacturing facilities related to that product. This traceability requires all economic operators to create a unique operator identifier[166] or unique facility identifier[167] (article 11 ESPR; see also recital 30).

Manufacturers shall ensure that their products bear a type, batch or serial number or other element allowing their identification (article 21.5 ESPR). If this is not possible because of the nature or size of the product, they shall affix this means of identification to the packaging or to a document accompanying the product. This 'identification' of products at different levels is important, because the European Commission may determine whether the product passport is to correspond to the model[168], batch[169], or item[170] level (article 8.2, point d) ESPR)**.** The digital product passport is required to refer to the product model, batch, or item (article 9.1, point e) ESPR).

Regarding access to the digital information, the European Union legislature holds that it must be 'differentiated'. The delegated act (or self-regulation measure) is to determine, on the one hand, which stakeholders have access to the product information and, on the other hand, to which information that access relates (articles 8.2, point f) and 9.1, point f) ESPR). Moreover, the rights to access and to introduce, modify or update information in the digital product passport is restricted based on the access rights specified in delegated acts (or self-regulation measures) (article 10.1, point f) ESPR). At play is an acknowledgment of the need to protect intellectual property rights (recital 27 ESPR).

Access to the digital product passport is free of charge for persons who have access to it (article 10, point b) ESPR). Access to the digital information about the product should be easily obtained by scanning a data carrier such as a watermark or a QR code. Where possible, the data carrier should be located on the product itself. Exemptions are possible depending on the nature, size, or use of the products (recital 31 ESPR). A data carrier on the product itself is not sufficient, since even in the case of distance selling, the product passport is to be made available to the consumer before the conclusion of the sales contract (see, e.g., article 25.2 ESPR). It is up to the European Commission to determine by delegated act how this prior information requirement is to be carried out (article 8.2, point e) ESPR).

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[165] The European Commission is empowered to adopt delegated acts setting out the rules and requirements to be followed by product passport service providers, including a certification scheme to verify such requirements, if appropriate (article 10 ESPR; see also recital 33a ESPR).

[166] Article 2, point 32 ESPR defines 'unique operator identifier' as a unique string of characters for the identification of actors involved in the value chain of products.

[167] Article 2, point 33 ESPR defines 'unique facility identifier' as a unique string of characters for the identification of locations or buildings involved in the value chain of a product or used by actors involved in the value chain of a product.

[168] A 'model' usually means a version of a product of which all units share the same technical characteristics relevant for the ecodesign requirements and the same model identifier (recital 27 ESPR).

[169] A 'batch' usually means a subset of a specific model composed of all products produced in a specific manufacturing plant at a specific moment in time (recital 27 ESPR).

[170] An 'item' usually means a single unit of a model (recital 27 ESPR).

To improve the enforcement of the ESPR, the European Commission is to set up and maintain a product passport registry in which the digital product passports themselves and the unique identifiers are stored (recital 34 and article 12 ESPR). The national customs authorities have direct access to this registry (recital 36 and articles 12.5 and 13 ESPR). This allows those authorities to verify that the obligations of the ESPR have been met, which is required to place products on the market or put them into service for the first time. Moreover, the European Commission is to set up and manage a publicly accessible web portal allowing stakeholders to search and compare information included in product passports. The web portal shall be designed to guarantee that stakeholders can search and compare for the information in line with their respective access rights (article 12a ESPR).

2.4.6.2 Specific application: the battery passport

The development and production of batteries is crucial for the clean energy transition. Processes that today still depend on fossil energy sources need to be electrified so that they – ideally through climate-neutral energy generation – become emission-free. Batteries play a major role in this transition, especially in the development of electronic vehicles. Transport is responsible for around a quarter of greenhouse gas emissions in the European Union and is the main cause of air pollution in urban environments. [171] For this reason, the European Union legislature has created a regulation on (end-of-life) batteries, meant to stimulate the number of batteries in the European Union.[172] The regulation aims, among other things, to increase the circularity of batteries and their circular processing.

Articles 77 and following of that regulation create a 'digital battery passport', which can be seen as a precursor to the general digital product passport of the ESPR. From 18 February 2027 each LMT battery, each industrial battery with a capacity greater than 2 kWh and each electric vehicle battery placed on the European Union market or put into service shall have an electronic record. The data contained therein must be unique to each battery, which can be identified by a unique identifier.

2.4.7 Labeling requirements

Labeling requirements are a final part of informing customers in the ESPR. The European Union legislature sees labels as a means to encourage consumers to make more sustainable choices.[173] Physical labels on a product can be an additional source of information for consumers, enabling them to compare products effectively and quickly in relation to a specific product parameter or set of product parameters. Thus, a label is one of the ways to make required information available that can be imposed by the European Commission (articles 7.6. d) and 14.1 ESPR). The requirements concerning the content of the label, its layout, the way in which it is presented to the consumer [174] (including in the case of distance selling) and, where appropriate, the electronic means of generating the label shall be laid down by delegated act (or self-regulation

[171] Explanatory memorandum to proposal for a Regulation of the European Parliament and of the Council on batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) 2019/1020, 10 December 2020, COM(2020) 798 final, p. 1.

[172] 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 L* 28 July 2023, vol. 191, p. 1-117.

[173] Thus, labels contribute to the strategies to combat premature obsolescence, which were explained in more detail earlier in the sections on the performance and information requirements.

[174] The European Commission may require the label to be printed on the packaging of the product (recital 39 ESPR).

measure). The European Commission may adopt implementing acts establishing common requirements for the layout of the labels (article 14.4 ESPR).

The delegated act (or self-regulation measure) may, for example, impose as an information requirement that labels bear classes of performance related to one or more of the product aspects in article 5 ESPR (see article 7.4 ESPR on these classes of performance). The label must then have such a layout that it enables consumers to easily compare product performance in relation to the relevant product parameter and to choose better performing products (article 14.2 ESPR). Classes of performance are already well-known in the context of energy efficiency, where the energy label shows, among other things, a colored, pyramid-shaped scale from A to G.[175] Such a scale allows for an intuitive comparison. It would make sense were the European Commission to take the energy label and its practical support[176] as a model for the concrete development of the labels required on the basis of the ESPR, as it itself implicitly points out.[177]

The European Union legislature is vigilant about the possible deception of consumers through labels. Article 15 of the ESPR provides that products shall not be placed on the market or put into service if they bear or are accompanied with labels which are likely to mislead or confuse customers by mimicking the labels provided for in the ESPR or if they are accompanied by any other information which is likely to mislead or confuse customers with respect to the labels provided for in the ESPR.[178] However, the EU Ecolabel or other nationally or regionally officially recognized EN ISO 14024 type I ecolabels may continue to be provided or displayed where the criteria developed under those labels are at least as strict as the ecodesign requirements (recital 41 ESPR).

In other words, article 15 ESPR prohibits 'mimicking labels' that attempt to copy labels that are mandated by the ESPR. Article 26.2 ESPR, a general article on economic operators' obligations related to labels, stipulates that products that *are required* to be labelled shall not provide or display other[179] labels, marks, symbols or inscriptions that are likely to mislead or confuse customers with respect to the information included on the label.[180] This article is reminiscent of the *Dyson* case of the European Court of Justice, in which the question arose whether a product (specifically a vacuum cleaner) on which an energy label (on energy efficiency) has to be affixed may also bear other non-mandatory symbols (on energy efficiency, cleaning

[175] See for legislation on the energy label earlier footnote 51.
[176] An example of this practical support is the automatic development of the required energy label when suppliers register their product in the EPREL database.
[177] The European Commission states in the explanatory memorandum to the ESPR (p. 11): "This information can take the form of 'classes of performance' for instance ranging from A to G, to facilitate comparison between products."
[178] The original article 15 in the European Commission's version of the ESPR applied to products that are not required to bear a label on the basis of a delegated act. The version of the article in the Provisional agreement ESPR is that of the Council of the European Union (Amendments ESPR Council of the EU, p. 116). The Council's version is broader and more open-ended than the original. This revision makes sense. After all, some products are excluded from the scope of the ESPR by the ESPR itself. Therefore, it is simply impossible that these products would have to adhere to its requirements. It is not a delegated act that decides that they do not have to bear a label, meaning that they would fall out of the scope of article 15 in the proposal of the European Commission. The current text version, proposed by the Council of the European Union, entails that these products do fall under that scope. Both from a sustainability perspective (in the light of fair competition with more sustainable products) and consumer protection, the broader wording is preferable.
[179] The ESPR is a general framework. This provision of the ESPR does not exclude labels based on more specific European Union legislation such as energy labels or labels regarding the exact composition of packaging (in this regard, see article 11.7 .Proposal Regulation Packaging).
[180] See also article 25.3. c) that repeats this obligation specifically for dealers. For a similar provision on sustainability requirements for the packaging of products, see article 11.7 Proposal Regulation Packaging.

performance, dust re-emissions and dust pick-up).[181] In that case, a specific directive was in force that contained a similar article as article 26.2 ESPR in the context of energy labels.[182] The ESPR now creates a general article in this sense. On the basis of the case-law of the Court of Justice, this general article should be read in conjunction with the general Unfair Commercial Practices Directive. The Court rules that other labels, even if they merely repeat information, could be misleading. [183] A question that arises when reading articles 15 and 26.2 ESPR together is whether alternative indications – that do not repeat information – may be affixed to products that *do* fall under labeling requirements. On the basis of the text, the answer is positive: the ESPR does not consider this situation. Therefore, this hypothesis falls back on the general framework of the Unfair Commercial Practices Directive, as it will be amended by the ECGTD, to assess whether this commercial practice is misleading. Articles 15 and 26.2 ESPR relate to greenwashing. This research report explains the ban on greenwashing in detail in a subsequent section on the ECGTD.

Finally, article 26 sets out the obligations of economic operators in relation to labels. For example, the economic operator placing the product on the market or putting it into service for the first time is to ensure that each individual unit of the product is accompanied by printed labels free of charge. Dealers may request that said economic operator provides them with printed labels or digital copies free of charge.

2.4.8 Micro, small and medium-sized businesses

The European Green Deal demonstrates a strong belief that the circular economy is the economy of the future.[184] World regions that are not currently committed to the sustainable transition are in danger of missing the boat. Those who shift quickly, on the other hand, put themselves in pole position to maintain or acquire a competitive position.[185]

However, in addition to the benefits of the transition to a circular economy, there may also be increased costs. The European Union legislature is aware of the need to support European

[181] CJEU 25 July 2018, C-632/16, ECLI:EU:C:2018:599. For an annotation of this case, see C. KOOLEN, "Vacuum Cleaner Energy Labels and Misleading Commercial Practices: EU Consumers Left in the Dust? (annotation of CJEU 25 July 2018)", *EuCML* 2019, vol. 8, iss. 2, p. 82-88.

[182] Article 3.1. b) Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products, *OJ L* 18 June 2010, vol. 153, p. 1-12.

[183] CJEU 25 July 2018, C-632/16, ECLI:EU:C:2018:599. In §57, the Court held that other labels, even if they simply repeat the information from the mandatory label, could be misleading: "In that regard, the mere fact that the labels or the symbols displayed by BSH refer to information already present on the energy label cannot suffice to rule out the existence of such a risk. It should be pointed out, first, that the symbols used by BSH are not graphically identical to those used on the energy label and, second, that some of the labels or symbols used by BSH repeat the same information while using a distinct graphic for each label, which could give the impression that they convey different information each time."

[184] See, for example, European Green Deal, p. 7: "There is significant potential in global markets for low-emission technologies, sustainable products and services. Likewise, the circular economy offers great potential for new activities and jobs." See, for example, also New Industrial Strategy, p. 1: "The twin ecological and digital transitions will affect every part of our economy, society and industry. They will require new technologies, with investment and innovation to match. They will create new products, services, markets and business models. They will shape new types of jobs that do not yet exist which need skills that we do not yet have. And they will entail a shift from linear production to a circular economy. These transitions will take place in a time of moving geopolitical plates which affect the nature of competition. The need for Europe to affirm its voice, uphold its values and fight for a level playing field is more important than ever."

[185] New Industrial Strategy, p. 3: "In the entrepreneurial spirit of this strategy, EU institutions, Member States, regions, industry and all other relevant players should work together to create lead markets in clean technologies and ensure our industry is a global frontrunner."

companies and to strike a balance between benefits and burdens at all times. For this reason, article 5.5 of the ESPR stipulates, as mentioned earlier, in diverse ways that the ecodesign requirements must not affect the competitiveness of the European Union's industry.

In this context, the European Union legislature pays particular attention to microenterprises, small and medium-sized businesses (for the remainder of this research report all deemed covered by the notion of 'SMEs').[186] The European Union legislature indicates that while these businesses potentially stand to benefit enormously from an increasing demand for sustainable products, they might also face costs and difficulties with some of the requirements of the ESPR (recital 45 ESPR). Thus, several provisions state that the European Commission is to take care not to overburden SMEs. For example, article 5.5, point f) ESPR states that ecodesign requirements shall create no disproportionate administrative burden on manufacturers or other actors in the value chain, *including SMEs*, *in particular micro-enterprises* (see also recital 45 ESPR). Another important example can be found in articles 19a and following on the ban on the destruction of unsold consumer products (more on this to follow). Obligations in that context, such as the obligation to disclose information, do not apply to micro and small enterprises (article 20.2 ESPR), unless a delegated act provides that that is the case (article 20.6 ESPR).

Additionally, article 19 ESPR contains several obligations for the European Union institutions and the national Member States to support SMEs. Article 19.2 ESPR stipulates that, when adopting delegated acts, the European Commission shall, where appropriate, accompany those acts with guidelines covering specificities of SMEs active in the product or product group sector affected for facilitating the application of the ESPR by SMEs. Those guidelines should make it easier for these businesses to apply the ESPR. Article 19.3 ESPR obligates Member States to take appropriate measures to support these businesses. Those measures shall at least include ensuring the availability of one-stop shops or similar mechanisms to raise awareness and create networking opportunities for SMEs to adapt to requirements. In addition, without prejudice to applicable state aid rules, such measures may include:

- financial support, including by giving fiscal advantages and providing physical and digital infrastructure investments;
- access to finance;
- specialized management and staff training; and
- organizational and technical assistance.

Finally, as regards representation, SMEs should have a seat at the table of the Ecodesign Forum. Article 17 ESPR stipulates that representatives of industry should include representatives for SMEs and craft industry. Moreover, when developing guidelines for SMEs, the European Commission is to consult organizations that are representative for SMEs (article 19.2 ESPR). Similarly, when Member States take appropriate measures, they have to consult such organizations on the kind of measures SMEs consider useful (article 19.3 ESPR).

[186] The definition of SMEs can be found in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized businesses, *OJ L* 20 May 2003, vol. 124, p. 36-41 (see article 2 ESPR).
Micro: fewer than ten employees and with an annual turnover not exceeding EUR two million.
Small: fewer than fifty employees and with an annual turnover not exceeding EUR ten million.
Medium: fewer than two hundred and fifty employees and with an annual turnover not exceeding EUR fifty million.

2.4.9 Prohibition of the destruction of unsold consumer products

2.4.9.1 Prohibition of the side of economic operators

2.4.9.1.1 Legal framework in the ESPR

2.4.9.1.1.1 Introduction

The European Union legislature regards the destruction of unsold consumer products by economic operators as a widespread environmental problem in the European Union, particularly as regards textiles and footwear (recital 46 ESPR). According to the European Union legislature, an important cause for this phenomenon is the rapid growth in online sales (recital 46 ESPR). This destruction of unsold consumer products leads to a loss of valuable resources. To discourage overproduction and reduce the generation of waste, the European Union legislature intends to identify and, where necessary, limit this destruction. Some Member States have already taken this step, so that harmonized rules are required.[187-188] An example of a national measure can be found in France, where the Loi Anti-Gaspillage bans the destruction of new unsold non-food[189] products (article L. 541-15-8 Code de l'environnement). All goods are to be 'reutilized' (meaning sold off or donated) [190], re-used or recycled, taking into account the waste hierarchy of the Waste Framework Directive, unless their material valorization is prohibited, their discarding is mandatory or their reutilization, re-use or recycling entails serious risks to health or safety. It is mandatory to reutilize 'essential goods', such as hygienic or childcare products [191], for example by donation to charitable organizations, unless their expiration date is less than three months away or reutilization turns out to be impossible after having reached out to charitable organizations.

The harmonized rules of the European Union legislature can be found in articles 19a and following ESPR. Three definitions are of great importance for those articles.

- Article 2, point 37 ESPR defines 'unsold consumer product' as any consumer product that has not been sold including surplus, excessive inventory, overstock and deadstock, including products returned by a consumer in view of their right of withdrawal in accordance with article 9 Consumer Rights Directive, or, where applicable, during any longer withdrawal period provided by the trader.
- Article 2, point 36 ESPR defines 'consumer product' as any product, excluding components and intermediate products, primarily intended for consumers. Thus, for example, cell phones could be regarded as a consumer product. Even though many cell

[187] In France, from 1 January 2022, the 'Loi Anti-Gaspillage' prohibits the destruction of non-food-related products covered by an extended manufacturer responsibility policy, see article 35 loi n° 2020-105 du 10 février 2020 relative à la lutte contre le Gaspillage et à l'économie circulaire, *JORF* 11 February 2020, n°0035 (hereinafter abbreviated as 'Loi Anti-Gaspillage').
[188] On this necessity, see explanatory memorandum to the ESPR, p. 5. and recital 46 ESPR.
[189] For food products an earlier ban is in place, see loi n° 2016-138 du 11 février 2016 relative à la lutte contre le Gaspillage alimentaire, *French Official Journal (Journal officiel de la République française)* 12 February 2016.
[190] Regarding the notion of 'reutilization', see C. LEPLA, "L'obligation de gestion des invendus non alimentaires", *Revue juridique de l'environnement* 2022, Vol. 47, p. (81) 86-87.
[191] For a list of these products, see article D. 541-320 Code de l'environnment (introduced by article 3 décret n° 2020-1724 du 28 décembre 2020 relatif à l'interdiction d'élimination des invendus non alimentaires et à diverses dispositions de lutte contre le Gaspillage, *French Official Journal (Journal officiel de la République française)* 30 December 2020.

phones are sold to customers at large, as cell phones are also used for trade-related purposes, they are primarily intended for consumers (as they offer many functionalities for personal communication and entertainment). Examples of products that are probably not consumer products are industrial machinery (i.e., equipment used in manufacturing processes or industrial applications) and laboratory equipment (i.e., instruments and tools used in scientific research). It goes without saying that the inclusion of the adverb 'primarily' leaves some room for ambiguity regarding products where it might not be so clear whether they are mostly intended for consumers or for businesses. Are, for example, construction tools (e.g., power tools such as drills) consumer products or not? Obviously, these products are used in abundance in the construction trades, but many hardware stores also cater to the DIY enthusiast. This somewhat opaque definition in the ESPR stands in contrast to, for example, the Sale of Goods Directive that defines goods broadly as any tangible movable item (article 2, point 5. a)).

- Article 2, point 37 ESPR defines 'destruction' as the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering the discarded product for preparing for re-use, refurbishing or remanufacturing operations. Recycling is not included in those exceptions. Thus, unlike re-use, refurbishing and remanufacturing, recycling is always seen as a form of 'destruction'. The reasoning behind the inclusion of recycling in the concept of destruction can be found clearly in the version of the ESPR proposed by the Council of the European Union. Recital 46 in this version explains that while recycling is an important waste treatment activity for a circular economy, it is unreasonable that products are manufactured only to be recycled immediately. The products would have served no purpose.

2.4.9.1.1.2 General duty of care

Articles 19a and following ESPR contain the following obligations. First, article 19a ESPR introduces a 'general principle to prevent discarding'. Economic operators are to take necessary measures which can reasonably be expected to prevent the need to discard unsold consumer products that are fit for use (see also recital 46a ESPR).[192]

This provision is similar to the German duty of care (*Obhutspflicht*) that can be found in article 23(2)(11) of the German Circular Economy Act (*Kreislaufwirtschaftsgesetz*) (see also article 24(10)). A pivotal obligation in that German Act is to ensure product durability and usability and to prevent products from becoming waste. The explanatory memorandum to the German Act explains that obligation as follows: "In accordance with the directive to use resources as efficiently as possible, the responsible party is therefore obligated to maintain the functionality of the product within its original intended purpose when organizing and designing its distribution. If this is not feasible, alternative uses may be considered. If the original intended purpose cannot be preserved and no other reasonable alternative purpose is achievable, disposal of the product as waste may be contemplated. The same applies if objective reasons, such as health or environmental risks, necessitate the disposal of the product. The act grants the product steward the discretion to determine how to maintain the product's functionality.

[192] The origin of article 19a can be found in the amendments of the Council of the European Union, see Amendments ESPR Council of the EU, p. 126.

(translated)"[193] German literature has noted that there is a need to enact a general duty of care in a harmonized manner at the level of the European Union to ensure its effectiveness (more on this to follow in the section explaining the extent of harmonization of articles 19a and following ESPR).[194]

As is the case in Germany, this general duty of care in the ESPR supplements more specific obligations. It makes clear to all economic operators that, at all times, they are to use all reasonable efforts to maintain the usability of a product. It also burdens them with the obligation to justify why a product should be destroyed (more on this to follow in the section on the transparency obligation).

2.4.9.1.1.3 Transparency obligation

Second, article 20 ESPR contains a 'transparency obligation' (recital 47 ESPR), that can be imposed by the European Commission on product types or categories by implementing act (article 20.3 ESPR). Article 20.1 ESPR obligates any economic operator who discards unsold consumer products directly or has unsold consumer products discarded on their behalf, to disclose annually the following information via an easily accessible page of their website or through mandatory sustainability reporting (if applicable):

- the number and weight of unsold consumer products discarded per year, differentiated per type or category of products;
- the reasons for the discarding of products, and where applicable the relevant exemption to the prohibition of destruction (found in article 20a.6 ESPR);
- the proportion of the delivery of discarded products, whether directly or through a third party, to each of the following activities: preparing for re-use, remanufacturing, recycling, other recovery including energy recovery and disposal operations in accordance with the waste hierarchy as defined by article 4 Waste Framework Directive[195];
- measures taken and measures aimed at preventing the destruction of unsold consumer products.

Notably, the obligation to disclose all measures taken to prevent the destruction of unsold consumer products, entails that indirectly economic operators will have to justify why they are left with unsold consumer products.

This transparency obligation typically does not apply to micro and small enterprises (but there is a nuance that will be explained later on). However, six years after entry into force of the ESPR, it will apply to medium-sized enterprises.

2.4.9.1.1.4 Actual prohibition of destruction

2.4.9.1.1.4.1 Products that fall under the ban

Third, article 20a contains the actual ban on the destruction of unsold consumer products in a two-tiered manner. The prohibition applies to the destruction of all product groups listed in

[193] Explanatory memorandum to 'Entwurf eines Gesetzes zur Umsetzung der Abfallrahmenrichtlinie der Europäischen Union' of 20 May 2020, *Drucksache* 19/19373, P. 59.
[194] F. PETERSEN, "Die Produktverantwortung im Kreislaufwirtschaftsrecht", *NVwZ* 2022, p. (921) 928.
[195] For this directive, see earlier footnote 15.

Annex VIIa to the ESPR. That Annex VIIa is not a blank slate. The European Union legislature has already added some groups to the annex, namely categories of textiles and footwear. The reason therefor is the large environmental impact of the fashion industry because of the unnecessarily high production volumes and short use phases of textiles as explained by the European Commission in great detail in its Sustainable Textiles Communication (see also recital 47a ESPR) [196].[197] The destruction of those products will be prohibited twenty-four months after the entry into force of the ESPR. This is a first tier.

The second tier consists of all products added to Annex VIIa by the European Commission via delegated act (article 20a.4 ESPR).[198] When preparing to add product groups to the annex, the European Commission shall:

- assess the prevalence and environmental impact of the destruction of specific consumer products;
- take into account the information disclosed by economic operators pursuant to the transparency obligation; and
- carry out an impact assessment based on best available evidence and analyses, and on additional studies as necessary.

It is up to the European Commission to decide the date of application and, where appropriate, any transitional measures or periods for the newly added product groups. The European Union legislature has given the European Commission twelve months after the entry into force of the ESPR to draft the first delegated act amending Annex VIIa to the ESPR (article 20a.6 ESPR).

Article 20b ESPR obligates the European Commission to publish information on the destruction of unsold consumer products every thirty-six months on one of its websites. This information includes the prevalence of the destruction of specific groups of unsold consumer products per year, based on the information disclosed by economic operators pursuant to the transparency obligation, and the comparative environmental impact resulting from such destruction per product group. On the basis of this information and any other available evidence, the European Commission is to identify in its working plans the groups of unsold consumer products for which it will consider prohibiting their destruction by economic operators. Recital 48a ESPR states that the first working plan should consider at least electrical and electronic equipment.

The original version of the ESPR proposed by the European Commission held that the European Commission needed reason to believe that the destruction is ‘widespread’, resulting in ‘significant environmental impact’ for it to be able to prohibit destruction. This version of the ESPR did not elaborate when exactly environmental impact could be regarded as ‘significant’. The European Parliament suggested scrapping the adjective ‘significant’ in the provision, in

[196] This recital can be traced back to the amendments of the Council of the European Union, see Amendments ESPR Council of the EU, p. 46. Like the Council of the European Union, the European Parliament wished to enact a mandatory prohibition of the destruction of unsold textiles and footwear. It proposes an article 20a.1 ESPR stipulating that one year after the date of entry into force of the ESPR, the destruction of unsold consumer products by economic operators shall be prohibited for these product categories, see Amendments ESPR Parliament, amendment 168.

[197] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Strategy for Sustainable and Circular Textiles, 30 March 2022, COM(2022) 141 final (hereinafter abbreviated as 'Sustainable Textiles Communication').

[198] The Council of the European Union had wished to amend this empowerment into an implementing see Amendments ESPR Council of the EU, p. 130.

favor of the adjective 'non-negligible'.[199] This adjective suggested a lower threshold but remained somewhat unclear. It seems that the Provisional agreement ESPR has opted for the approach of the Council of the European Union. The Council of the European Union suggested a more open-ended wording, requiring that the destruction of the type of unsold consumer products simply has a negative environmental impact.[200] The final version of the ESPR even drops the adjective 'negative'. This approach seems sensible as it avoids discussions on the extent of the competence of the European Commission to impose prohibitions. At the same time the obligation for the European Commission to carry out an impact assessment based on best available evidence and analyses keeps this competence in check by ensuring that any prohibition is not unfounded.

2.4.9.1.1.4.2 Exemptions

To ensure that prohibitions remain proportionate, the European Commission may lay down specific exemptions, where this would be appropriate in view of:

- health, hygiene and safety reasons;
- damage to products as a result of their handling or detected after a product has been returned, that cannot be repaired in a cost-effective manner;
- fitness of the product for the purpose for which it is intended, taking into account, where applicable, European Union and national law and technical standards;
- refusal of products for donation, preparing for re-use or remanufacturing;
- products rendered unsellable due to infringement of intellectual property rights, including counterfeit products; and
- products for which destruction is the option with the least negative environmental impact.

2.4.9.1.1.4.3 Extent of harmonization regarding prohibitions

As mentioned, the European Union legislature saw it fit to enact articles 19a and following ESPR given the risk of fragmentation of the internal market because of national legislation containing similar prohibitions to destroy unsold consumer products (e.g., France's Loi Anti-Gaspillage).

Recital 48aa ESPR states that Member States should not be precluded from introducing or maintaining national measures as regards destruction of unsold consumer products for products that are not subject to the prohibition under the ESPR, provided that such measures are in line with European Union law.[201] In essence, this recital states that the ESPR does not harmonize to the extent that the competence of national authorities to set out prohibitions is fully subdued by the ESPR. The ESPR only precludes national measures once the European Commission has decided on the desirability of a prohibition.[202]

This recital might come across as peculiar, given the acknowledgment by the European Union legislature that the existing national legislation on the destruction of unsold consumer products

[199] Amendments ESPR Parliament, amendment 160.
[200] Amendments ESPR Council of the EU, p. 130.
[201] This recital can be traced back to the amendments of the Council of the European Union, see Amendments ESPR Council of the EU, p. 44.
[202] Given the empowerment to the European Commission and the goals of the ESPR it is to be assumed that a decision not to impose a prohibition (i.e., a general exemption) precludes any national prohibitions.

creates market distortions, necessitating harmonized rules to ensure that economic operators are subject to the same rules and incentives across Member States.[203]

However, from a sustainability perspective, leaving the competence to take national measures to Member States could be beneficial. Granting autonomy to Member States encourages experimentation and innovation in sustainability policies, with the development of targeted measures in line with local needs and priorities. Different regions may adopt diverse approaches, allowing for the identification of best practices and the dissemination of successful initiatives across the European Union.[204] Moreover, by retaining the flexibility to enact national measures, Member States can respond to emerging sustainability issues in their own jurisdictions, thus keeping pace with environmental concerns.

There is an important caveat though. National measures are beneficial if a sufficiently large portion of the Member States enact them. Evidence suggests that stand-alone national measures might miss their mark, rendering them ineffective to an extent. Businesses active in Germany, such as Amazon and Nike are reportedly carrying out the destruction of products in other European Union countries. Literature notes that this possible because of diverging environmental standards and highlights the need to introduce the German concept of the duty of care at the European Union level (cfr. article 19a ESPR).[205]

From an internal market perspective, disparities in the treatment of unsold consumer products across member countries, could potentially impede the free flow of products within the single market. This fragmentation may complicate compliance for businesses operating across borders and undermine the overarching objective of a harmonized and integrated European Union market.

2.4.9.1.1.5 Waste status of products

2.4.9.1.1.5.1 General definition of waste

The ESPR has an impact on the 'waste status' of products. The definition of 'waste' can be found in article 3.1. Waste Framework Directive. According to that definition 'waste' means any substance of object which the holder discards or intends or is required to discard. The Court of Justice of the European Union states that, to ensure the highest level of environmental protection, it is required to interpret the concept of 'waste' widely.[206] The Court rules that the classification of a substance or object as 'waste' is to be inferred primarily from the holder's actions and the meaning of the term 'discard'.[207] The concept of 'waste' does not exclude substances or objects which are capable of economic reuse (as many unsold consumer products are). The Waste Framework Directive covers all substances and objects discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation, or reuse.[208] Particular attention must be paid to the fact that the object

[203] Amendments ESPR Council of the EU, p. 43.
[204] Regarding the possibility of 'experimentation' in the context of sustainability, see E. TERRYN and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear.
[205] F. PETERSEN, "Die Produktverantwortung im Kreislaufwirtschaftsrecht", *NVwZ* 2022, p. (921) 928.
[206] See for recent examples of this vested case law, CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §18; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §41.
[207] See for a recent example of this vested case law, CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §33.
[208] See for recent examples of this vested case law, CJEU 14 October 2020, , C-629/19, ECLI:EU:C:2020:824, §48; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §37.

or substance in question is not or is no longer of any use to its holder, such that that object or substance constitutes a burden which the holder will seek to discard. If that is indeed the case, there is a risk that the holder will dispose of the object or substance in its possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner.[209]

A substance or object that has become waste can lose this status of waste if (1) it has undergone a recovery operation (e.g., preparing for reuse or recycling) and (2) it meets specific end-of-waste criteria set at the level of the European Union or by the national Member States (article 6.1. Waste Framework Directive). Article 3.15. Waste Framework Directive defines 'recovery operation' as any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. If no specific end-of-waste criteria are set at the level of the European Union or by the Flemish region, the waste is to meet the general criteria in article 6.1. Waste Framework Directive, which the specific criteria are meant to elucidate (see also articles 2.6.1. and 2.6.2. of the order of the Government of Flanders adopting the Flemish regulation on the sustainable management of material cycles and waste, referring to articles 36 and 37 of the Materials Decree). One of those general criteria is, for example, that a market or demand exists for the substance or object that has gone through a recovery operation.

2.4.9.1.1.5.2 How does the prohibition of the destruction of unsold products relate to existing legislation?

It is of note that there is case law of the Court of Justice of the European Union that is highly relevant to 'unsold (consumer) products', which is the anchoring point for the ban on the destruction of products in the ESPR, in the context of European Union waste legislation.

In the *Tronex* case, an enterprise's export consignment was stopped by Dutch customs authorities. The consignment consisted of electronic appliances that were, first, no longer saleable because of a change in the range of products and, second, returned by consumers under the statutory warranty of the (then applicable) 1999 Consumer Sales Directive.[210] Some of the products were defective. The shipment was to take place without notification or consent in the meaning of the Waste Shipment Regulation. The question at hand was whether the batch of products had to be viewed as 'waste' and, thus, subject to that regulation.

A first aspect of this case law relates to 'obsolete products' (i.e., the 'deadstock' mentioned in the definition of 'unsold consumer product' in the ESPR). In the *Tronex* case the Court of Justice of the European Union held that these products that are 'new' yet have become no longer fit for the originally intended purpose can be considered to be market products amenable to normal trade. In principle, they do not represent a burden for their holder which entails that

[209] See for recent examples of this vested case law, CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §22; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §38.

[210] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L* 7 July 1999, Vol. 171, p. 12-16 (hereinafter abbreviated as '1999 Consumer Sales Directive).

they are not waste.[211] It is nevertheless for the referring national court to verify that there is nothing that raises doubts as to the good working condition of this type of products.[212]

A second aspect of this case law concerns 'reverse logistics', where products that have been distributed are returned to the manufacturer or trader, for example, because they are off-specification or following reliance by a consumer on the statutory warranty of conformity in sales contracts.[213] These are 'mismade' and 'damaged' products. In the *Tronex* case the Court of Justice of the European Union ruled out that products returned under the statutory warranty could be seen has having been discarded, as the consumer cannot be regarded as having wished to carry out a disposal or recovery operation of the products.[214] Thus, at this stage they cannot be considered waste. However, such a return operation under the guarantee does not provide certainty that the returned product will be reused. It is, therefore, necessary to verify, for the purposes of determining the risk of the holder discarding them in a way likely to harm the environment, whether products returned, where they show defects, can still be sold without being repaired to be used for their original purpose and whether it is certain that they will be reused. If, however, the products suffer defects that require repair, such that they cannot be used for their original purpose, they constitute a burden for their holder and must thus be regarded as waste, insofar as there is no certainty that the holder will actually have them repaired. If there is no certainty that the holder will actually have the products repaired, they have to be considered a waste. To prove that malfunctioning products do not constitute waste, it is for the holder of the products in question to demonstrate not only that they can be reused but also that their reuse is certain, and to ensure that the prior inspections or repairs necessary to that end have been done.[215]

It should be noted that the Court's considerations on the statutory warranty of conformity are formulated broadly. Its *obiter dictum* states that products that have undergone a return transaction carried out in accordance with a contractual term and in return for the reimbursement of the purchase price cannot be regarded as having been discarded. A consumer return on the basis of the right of withdrawal granted by the Consumer Rights Directive (i.e., a contractual term implied by any and all EU consumer contracts concluded at a distance or off-premises) can be regarded as a return transaction in the sense of that consideration. Thus, this second aspect of the *Tronex* case law also relates by analogy to 'consumer returns'.

To conclude, it follows from the *Tronex* case law that products that would fall under the prohibition to destroy them in the ESPR do not constitute waste and, thus, are not subject to the Waste Framework Directive. One sidenote is that there is a duty for the holder of returned products to inspect them. If they do not need repair, they are not waste. If they do need repair, there has to be certainty that the holder will repair them. Otherwise, they will be considered to be waste.

The previous might seem obvious. After all, the prohibition to destroy in article 20a ESPR is only relevant insofar the products that fall under it are not yet waste. Article 2, point 35 ESPR defines

[211] CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §32.
[212] CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §33.
[213] Regarding this topic see extensively, G. VAN CALSTER, *EU waste law*, Oxford, Oxford University Press, 2015, p. 35, nos. 1.149 and following.
[214] CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §34.
[215] CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §35-40.

'destruction' as the *intentional damaging or discarding of a product as waste* with the exception of discarding for the only purpose of delivering the discarded product for preparing for re-use, refurbishing or remanufacturing operations. Thus, the prohibition is meant to prevent their status as waste. Still, it is important to understand how the ESPR would relate to existing legislation. An assessment of how neatly it fits with that legislation, helps to uncover whether there might be a risk of loopholes.

The waste status of a product that is unsold to consumers can be determined as follows.

- The starting point from a legal point of view is that unsold products (both products that have never been distributed to consumers (obsolete products/deadstock) and returned products (consumer returns)) are not waste. This legal point of view corresponds to the actual practice of unsold consumer products, in particular textiles. As manufacturers and traders wish to maximalize the economic value of clothing and footwear, they strive to sell their textile items through as many different methods before considering donation and physical destruction. Their intention is, thus, opposite to the intention to discard. A study from the Netherlands found that 6% of all clothing items placed on the Dutch market remained unsold (after methods such as selling at reduced prices). From that percentage of unsold clothing items, 18% remains in-store stock (with the intention of re-attempting to sell these items at a later time), 35% is sold in other countries and 6% is sold to bulk purchasers (e.g., outlet stores).[216] Thus, these items of clothing remain part of 'normal trade'.
- Products that are returned in too poor of a state by the consumer can be seen as waste. Article 20a.6 ESPR explicitly clarifies that products that have been returned damaged and that are not suitable for cost-effective repair, should not constitute an unsold consumer product within the meaning of the ESPR and can be exempted from the prohibition of destruction (see also recital 46 ESPR). This means that these items do not necessarily fall under the prohibition to destroy unsold consumer products in the ESPR. They can become waste once an economic operator intends to discard them. This is in line with the case law of the Court of Justice of the European Union, which holds that if returned products need repair, there has to be certainty that the holder will repair them for the waste status not to apply.
- Once economic operators have explored all options to sell their products, the products become a burden. They will wish to discard them. The Dutch study found that of the amount of unsold clothing items (i.e., 6% of all clothing items placed on the Dutch market) 36% is donated to charities and 5.8% is physically destroyed, with 3% being shredded to fibers (i.e., prepared for recycling) and 2.8% being burned.[217] The prohibition to destroy unsold consumer products in the ESPR prevents the remainder of these items from being destroyed. This entails that the remaining products cannot become waste if their holder intends to do anything other with them than delivering them for preparing for reuse, refurbishing or remanufacturing operations.
    - If the holder of the unsold consumer products intends to donate them, they become waste. They will lose their status as waste once they have gone through

[216] M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 18.
[217] M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 18.

preparation for reuse (e.g., sorting of clothing in a thrift store). As in the past, manufacturers and traders will be able to donate unsold consumer products.

- If the holder of the unsold consumer products intends to have them remanufactured, they become waste. They will lose their status as waste once they have gone through the remanufacturing process (e.g., by cutting up T-shirts and recoupling them in a different design).[218]
- If the holder of the unsold consumer products intends to do anything else with them, such as recycling, the ESPR prohibits a change in their status to waste (e.g., unlike in the past, the manufacturers and traders of textile items will not be able to have unsold consumer products shredded into fibers).

2.4.9.1.1.6 Exemption of SMEs from transparency obligation and prohibition of destruction

To avoid unnecessary administrative burdens for SMEs, they are exempted from the transparency obligation and the prohibition of destruction. Micro and small enterprises are exempted indefinitely. The exemption of medium-sized enterprises is limited in time and will remain in effect for six years after the entry into force of the ESPR.[219]

However, the European Commission may declare both provisions of the ESPR applicable to SMEs by delegated act where there is sufficient evidence that they may be used to circumvent the prohibition to destroy unsold consumer products or the disclosure obligation (article 20a.6 ESPR).[220] This prevents economic operators from abusing a corporate structure to circumvent the obligations in the ESPR. This empowerment of the European Commission is mirrored by an obligation for all economic operators that are not subject to the prohibition of destruction (i.e., not merely SMEs) not to destroy unsold consumer products supplied to them with the purpose to circumvent that prohibition (article 20a.3 ESPR).

2.4.9.1.2 Analysis

2.4.9.1.2.1 In general

A prohibition of the destruction of unsold consumer products is a strategy to reverse premature obsolescence in the end-of-life stage of a product. [221] As this ban is meant to serve as an incentive to better tailor one's own supply to the needs of the market, the ban resists premature obsolescence in a general sense. Thus, from a sustainability perspective, this aspect of the ESPR is to be welcomed.

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[218] See for an example thereof, A. ZETHRAEUS, A.VELLESALU, *Remanufacturing of deadstock and customer claims apparel. Perspectives on business strategy adoption, consumer perceived value, and economic feasibility*, ISBN 978-91-88838-94-0, p. 37.

[219] In the original version of the ESPR the European Commission empowered to apply the transparency obligation and the prohibition of destruction to ESPR to medium-sized enterprises (micro and small enterprises are not mentioned) where there is sufficient evidence that they account for a substantial proportion of unsold consumer products being destroyed (article 26.6. 2), a) in the version of the ESPR of the European Commission). This facultative competence has been turned into an automatic application. This change is the result of the amendments of the Council of the European Union, see Amendments ESPR Council of the EU, p. 130.

[220] Even though the text of article 20a.6 ESPR reads that the provisions may be declared applicable "to micro and small enterprises", it is to be assumed that the European Commission may declare them applicable to all types of SMEs, including medium-sized enterprises, lest there be an inexplicable hiatus. Presumably, this wording was chosen because medium-sized enterprises will automatically be required to adhere to existing prohibitions six years after the entry into force of the ESPR.

[221] See the previously explained framework of A. MICHEL.

From a more strictly legal point of view, the prohibition of the destruction of unsold consumer products can also be justified. In (Belgian) property law, an inherent component of the right to ownership – part of the right to property – is the right to consume and transform a product, to the extent that owners may even destroy their products (*ius abutendi*), albeit within the limits of public policy that legislation may impose (e.g., restrictions because of heritage value).[222] Thus, the ESPR would limit this right to property as it is protected by human rights treaties.

The Council of the European Union, as a strong proponent of the possibility to ban the wanton destruction of unsold consumer products, had articulated a robust and well-founded legal underpinning for such a ban in a suggested recital 47a ESPR. Originally, in its amendments to the ESPR, the Council of the European Union felt that the ESPR should introduce the logic of prohibiting the destruction of unsold consumer products in the European Union, considering, pursuant to article 52.1 of the Charter of Fundamental Rights[223], the right to property and to conduct a business are not absolute rights and, according to the case law of the Court of Justice of the European Union, protection of the environment is an objective of general interest capable of justifying a restriction on the use of those rights, provided that such restriction does not constitute a disproportionate and intolerable interference, impairing the very substance of such rights.[224] However, this explicit basis for the restriction of the right of property is not part of the Provisional agreement ESPR.

2.4.9.1.2.2 Definition of 'unsold consumer product'

The definition of 'unsold consumer product' is dependent on the notion 'consumer product'. The definition of the latter in the ESPR is not as broad as, for example, the definition of 'good' in the Sale of Goods Directive.

From a sustainability perspective, one could argue that definition chosen in the ESPR is needlessly restrictive. It may overlook the environmental impact of destroying products primarily used in non-consumer settings. Considering the European Union's overarching ambition to establish itself as a global frontrunner in industry and transition towards a fully circular economy, it seems peculiar that the prohibition against destroying products excludes non-consumer products in such a broad manner. While the likelihood of a large stock of unsold products is probably small when it comes to very specialized tools, such as industrial machines, which are often highly specific and costly, there are numerous non-consumer products that are produced in large quantities and bear similarities to consumer products in terms of production scale and distribution (e.g., laboratory equipment such as test tubes). Rather than implementing a blanket, *a priori* exclusion, it might have been more sensible to include all products within the scope of the prohibition against the destruction of unsold goods, while accounting for 'industrial needs' through a tailored approach in enacting prohibitions for product groups and in setting exemptions to those prohibitions. A broader approach would lead to more comprehensive regulation and incentivize all economic operators (and not only those active on the consumer product market) to be more mindful of destroying valuable resources.

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[222] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civile belge, tome V, Principaux contrats - Les biens*, Brussels, Bruylant, 1975, p. 800, no. 898; V. SAGAERT, *Goederenrecht, deel V, Goederenrecht, Beginselen van Belgisch privaatrecht,* Mechelen, Kluwer, 2014, p. 191, no. 218; I. DURANT, Droit des biens, Brussels, Larcier, 2017, p. 162, no. 182; N. BERNARD, *Précis de droit des biens*, Limal, Anthemis, 2017, p. 120, no. 253.

[223] Charter of Fundamental Rights of the European Union, *OJ C* 26 October 2012, vol. 326, p. 391–407.

[224] Amendments ESPR Council of the EU, p. 46.

Furthermore, the inherent ambiguity of the definition, stemming from the adverb 'primarily', could result in uncertainties regarding certain products (e.g., construction tools, which are utilized both by professionals and for DIY purposes). These uncertainties may contribute to inconsistencies in regulation and oversight. However, this does not imply that the ESPR would be unsuitable for its intended purpose. Many products are likely to be readily classified as consumer products without extensive debate. Additionally, the European Commission has the authority to issue guidance documents to aid in interpreting the ESPR. Nonetheless, for the sake of legal clarity and predictability, unambiguous statutory provisions are preferable.

2.4.9.1.2.3 Transparency obligation and the magnitude of unsold consumer products

The transparency obligation mandates economic operators to disclose both the number and the weight of unsold consumer products destroyed. The original version of the ESPR proposed by the European Commission held only that the 'number' had to be disclosed (article 20.1, point a) of this version of the ESPR). The addition of 'weight' can be traced back to the amendments of the Council of the European Union.[225] This addition is sensible. It helps to assess the magnitude of destruction of a particular product type. Relying solely on the 'number' of products destroyed is insufficient to gauge the environmental impact fully. Considering weight alongside the number of products destroyed allows for better comparisons between different types of products. For example, destroying a few 'heavy' products may have a greater environmental impact than disposing of numerous 'lightweight' items.

The European Parliament had suggested adding 'percentage' as a data point to the transparency obligation, but this requirement is not part of the Provisional agreement ESPR.[226] This seems to be a missed opportunity. Incorporating the percentage of destruction into the transparency obligation would have provided even greater insight into the magnitude of product destruction but with a different focus. Whereas data on number and weight could be seen as information that allows to assess the 'absolute' magnitude of destruction, focused on the physical volume and actual mass of destroyed products and the meaning thereof for resource depletion, waste generation et cetera, the data on number and percentage is more of a 'relative' yardstick. Including the percentage of destroyed products in transparency reporting would provide a more nuanced understanding of the scale of destruction relative to the total production volume of the product itself. The relative numbers can expose problematic business practices that lead to the destruction of a disproportionally large share of produced products, even if the product type in question by itself does not represent a huge market share of products and/or the manufacturing of the product type does not require large amounts of resources when compared to other product types. For example, the destruction of one hundred units of a product may not sound significant. However, if this number represents 25% of the total volume of produced products, it becomes clear that a substantial portion of the products has been wasted. Thus, insight into the relative magnitude of product destruction could have revealed excesses in certain sectors, enabling the European Commission to prioritize analyzing the reasons for product destruction in these sectors and if necessary regulating them.

[225] Amendments ESPR Council of the EU, p. 123.
[226] Amendments ESPR Parliament, amendment 166.

2.4.9.1.2.4 Applicability to SMEs: what is sufficient evidence?

The Council of the European Union had wished to omit the possibility to impose prohibitions on SMEs when there is sufficient evidence that they may be used to circumvent the obligations of the ESPR.[227]

From a sustainability perspective, it seems unwise to remove this possibility and, thus, the choices made in the Provisional agreement ESPR should be welcomed. It should be noted that the power of the European Commission is restricted to those cases where there is *sufficient evidence* that corporate structures are abused. Removal of the power to act against such abuse would have undermined the overall objectives of the ESPR and weakened its effectiveness in promoting environmental sustainability. The absence of regulatory measures for SMEs with potentially abusive corporate structures may inadvertently incentivize unethical behavior. Businesses might exploit this exemption to engage in practices that are detrimental to the environment.

However, one could agree with the Council of the European Union that the power of the European Commission is worded vaguely. As an example of this vagueness: can the discovery of a single case of abuse count as sufficient evidence? Intrinsically, a single case demonstrates that SMEs *may* be used to circumvent the obligations of the ESPR. The Provisional agreement does not elucidate this vagueness.

2.4.9.1.2.5 Remarks regarding exemptions

2.4.9.1.2.5.1 Exemption 'damaged products'

One reason for exempting products from the prohibition to destroy them is damage as a result of their handling or their use and/or return by the consumer (article 20a.6, point b) ESPR). the Council of the European Union had suggested modifying this exemption to clarify that it relates to damage that has occurred "despite the measures taken in accordance with [the general principle] in article 20aa [i.e., the general duty of care]."[228] Concretely, according to this amendment, the exemption could only be granted where the economic operator had taken all reasonable measures to prevent the product from becoming waste in accordance with the current 19a ESPR. However, this amendment did not survive into the Provisional agreement ESPR.

Regarding damage during the handling of products, this amendment might have been useful to enhance the effectiveness of the ESPR, as it would have encouraged responsible product management. It makes sense to impose obligations on economic operators to ensure that handling procedures do not damage products. While economic operators may lack full control over every aspect of product handling (e.g., during transit), this need not be a cause for great concern. The general duty of care mandates economic operators to exert all reasonable efforts and does not demand achieving a result at all costs. This standard of conduct acknowledges that economic operators may encounter challenges that would ask for unreasonable efforts, but still requires them to take reasonable steps to prevent damage. Practically, the amendment would have shifted the burden of proof onto economic operators, requiring them to provide evidence that they have implemented appropriate measures to safeguard products during

[227] Amendments ESPR Council of the EU, p. 47 and 129.
[228] Amendments ESPR Council of the EU, p. 132.

handling (e.g., using appropriate packaging materials to minimize the risk of damage during shipping) before they could rely on an exemption.

2.4.9.1.2.5.2 Exemption 'refusal of donations, preparing for re-use or remanufacturing'

Regarding the exemption for reason of 'refusal of donations, preparing for re-use or remanufacturing', the Council of the European Union had suggested that the European Commission should set a minimum effort threshold for companies to adhere to before destruction is allowed, for instance requiring that several recipients should have been contacted (see the amended recital 48 in the version of the ESPR of the Council of the European Union).[229] This explicit requirement has not found its way into the Provisional agreement ESPR. There is no indication in the Provisional agreement ESPR that it would be impossible for the European Commission to regulate prohibitions by implementing a minimum effort threshold. At the same time, it is not crystal clear whether the empowerment of the European Commission extends so far.

In any case, a minimum effort threshold seems a sensible requirement, meant to ensure that this exemption cannot be abused. Raising the bar ensures that economic operators are not too easily absolved of their general duty to avoid the discarding of products. Economic operators cannot use donation as an easy escape route but will have to take the actual demands of the 'donation market' – reflected by the (un)willingness from several donatees to engage with the economic operators – into account. It should be noted that there need not be a societal need for large surplus volume of products, particularly for charitable organizations that work with vulnerable people.[230] In a study conducted by Roberts, Milios, Mont and Dalhammar the interviewees express skepticism regarding the efficacy of a ban on destroying unsold products (in particular in the textiles and electronics sector). There is not always a suitable disposal route or reuse case for the volumes of unsold or returned products, particularly low-value products. The interviewees fear that a ban could lead to the dumping of undesirable products on reuse organizations or charities.[231]

It could be sensible allow the European Commission to set the following 'flanking measures' to deter attempts to misuse charitable donations.

- Volume limits: establishing maximum thresholds for the number of products that any one economic operator can donate to charitable organizations within a specific time period could help prevent excessive dumping.
- Quality standards[232]: establishing quality criteria for donated goods could ensure that only suitable products are donated, preventing the disposal of unsellable or low-quality items. Both expert input and feedback from recipients of donated goods can provide insights into the quality and relevance of donated goods. Some of the key elements that

[229] Amendments ESPR Council of the EU, p. 47.
[230] H. ROBERTS, L. MILIOS, O. MONT and C. DALHAMMAR, "Product destruction: Exploring unstainable production-consumption systems and appropriate policy responses", *Sustainable Production and Consumption* 2023, p. (300) 308.
[231] H. ROBERTS, L. MILIOS, O. MONT and C. DALHAMMAR, "Product destruction: Exploring unstainable production-consumption systems and appropriate policy responses", *Sustainable Production and Consumption* 2023, Vol. 35, p. 307 (hereinafter abbreviated to 'Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35').
[232] Compare with the existing framework for the quality assessment of food products put up for donation, Commission Regulation (EU) 2021/382 of 3 March 2021 amending the Annexes to Regulation (EC) No 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs as regards food allergen management, redistribution of food and food safety culture, *OJ L* 4 March 2021, Vol. 74, p. 3-6.

could be considered are (1) the physical condition of the donated goods, including factors such as cleanliness, structural integrity, and absence of damage; (2) safety (i.e., absence of potential health risks); (3) durability (i.e., evaluation of the expected lifespan of the donated goods to ensure they can be used for a reasonable period without significant wear and tear); (4) functionality (i.e., fitness to serve intended purpose and suitability to be repurposed for other applications).

- Clear eligibility criteria: defining eligibility criteria for charitable organizations, ensuring that only legitimate non-profit entities receive the donated goods could help to ensure that no organizations are set up with the goal of circumventing obligations.[233]
- Mandatory reporting: requiring economic operators to submit regular reports on the quantity and nature of goods donated to charities, could enhance transparency and ease the monitoring for potential abuses.
- Incentives for responsible practices: offering tax benefits or other incentives to manufacturers and retailers that responsibly manage their surplus goods could encourage compliance.[234]
- Fines: implementing strict penalties for non-compliance with the ban on destruction of unsold goods and the misuse of donation routes could act as a deterrent (see also article 68 ESPR on penalties for infringements of the ESPR).

2.4.9.1.2.5.3 Exemption 'destruction has the least negative environmental impact'

The addition of the possible exemption where destruction is the option with the least negative environmental impact suggested by the Council of the European Union offers a safety valve that allows for flexibility in the – presumably rare – cases where destruction is the most sustainable option.[235] From a sustainability perspective, this possibility is welcome to cover all hypotheses and to ensure that it is always possible to opt for the most sustainable choice.

2.4.9.2 No adjustment to consumer side

The prohibition of the destruction of unsold consumer products in the ESPR is aimed at the side of businesses. The ESPR does not pay great attention to consumers, even though their behavior is one of the causes of the quantity of unsold consumer products.[236] By checking the results of a literature study against the experiences of experts from the textiles and electronics sectors Roberts *et al.* have identified several reasons why the destruction of excess products is favored over strategies to extend their lifespan.[237] The factors influencing this choice are divided into upstream and downstream factors. Upstream factors are those which determine the overall volumes of excess stock and customer returns, which are the root causes of product

[233] Currently, article 12, §1(1)(2)(c) of the Belgian VAT Act allows for an exemption of VAT for the donation (fully free of charge) to recognized charity organizations of certain products that meet vital needs and whose resale value significantly diminishes after their first use. Clothing is an example of such products (see Circulaire 2020/C/116 betreffende het verstrekken voor liefdadigheidsdoeleinden van voedingsmiddelen en levensnoodzakelijke niet-voedingsmiddelen). According to current Belgian legislation, the organization must commit to the fight against poverty.

[234] Currently, article 12, §1(1)(2)(c) of the Belgian VAT Act allows for an exemption of VAT for the donation (fully free of charge) to recognized charity organizations of certain products that meet vital needs and whose resale value significantly diminishes after their first use. Clothing is an example of such products (see Circulaire 2020/C/116 betreffende het verstrekken voor liefdadigheidsdoeleinden van voedingsmiddelen en levensnoodzakelijke niet-voedingsmiddelen).

[235] Amendments ESPR Council of the EU, p. 132.

[236] As a reminder, one of the four pillars of the Circular Economy Action Plan is the strengthening of the position of consumers.

[237] These reasons for product destruction correspond with the 'general barriers' for an evolution towards a circular economy in the textile industry. For a detailed review of those barriers, see F. JIA *et al.*, "The circular economy in the textile and apparel industry: A systematic literature review", *Journal of Cleaner Production* 2020, 120728.

destruction.[238] Downstream factors refer to the factors that influence the businesses' decisions to dispose of products rather than choosing more sustainable alternatives.[239] The most important upstream factor is consumer behavior (as it underlies the other upstream factors, namely choices in business models and in product characteristics).[240] Those operating in the textile industry respond to consumer expectations. A fear of losing customers disincentives changes to the status quo.[241] Roberts *et al.* have confirmed the rise of a 'returns culture' in which consumers purchase beyond their needs, knowing that unnecessary products can be returned.[242] In parallel, consumer expectations regarding on-demand access to a wide product range contribute to the volumes of unsaleable stock.[243] Thus, actors such as retailers are forced to offer choice between many different products, with the risk of excess.

The Consumer Rights Directive gives consumers great freedom to exercise their right to withdraw from an online purchase and return the purchased products. For example, they do not have to justify why they exercise this right. Often, consumers can exercise this right without additional costs (based on 'free return policies', which in any case do not *visibly* affect the pricing of products). The Consumer Rights Directive offers consumers strong protection, but does not encourage them to reduce the environmental impact of their purchases and reduce impulsive purchases.[244] It could, therefore, be advisable to adapt or even limit the right of withdrawal of consumers under the Consumer Rights Directive (for example, by allowing price differentiation between purchases with and those without right of withdrawal, by analogy with hotel reservations with and without cancellation insurance).[245] The same holds true as regards the possibility for national Member States under article 3.7. of the Sale of Goods Directive to allow specific remedies for conformity defects thirty days after purchase (for example, the right to reject known in Ireland), which can also encourage impulsiveness.[246]

However, this view is not shared by all.[247] M. Santos Silva and T. Gabriel García-Micó wish to leave the right to withdrawal intact to ensure its protective function, in particular towards consumers acting in good faith. Instead, they propose to target those abusing the right to

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[238] Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35, p. 307.
[239] Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35, p. 308.
[240] For a detailed analysis of the role of consumer behavior, see M. KOSZEWSKA, "Circular economy in textiles and fashion—the role of a consumer" in S.S. MUTHU (ed.) *Circular Economy in Textiles and Apparel*, Elsevier, Kidlington, 2019, p. 183-206.
[241] Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35, p. 305.
[242] Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307.
[243] Roberts *et al*., *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307.
[244] B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 20.
[245] See about this recommendation and see for an overview of methods how to possibly adjust this right, B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO*), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 22; E. TERRYN and E. VAN GOOL, "Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?", *TvC* 2021, vol. 1, p. (15) 21-27; E. TERRYN, "Overeenkomsten op afstand en buiten de verkoopruimten na de omzetting van de Omnibusrichtlijn", *DCCR* 2022, vol. 2-3, p. (133) 149-150, no. 30. Some of these suggested methods have already been adopted in a resolution of the federal Chamber of Representatives, see voorstel van resolutie van 23 november 2021 betreffende de evolutie naar een duurzaam en evenwichtig herroepingsrecht in het kader van e-commerce (proposal for a resolution of 23 November 2021 on the evolution towards a sustainable and balanced right of withdrawal in the context of e-commerce), *Parliamentary Documents* Chamber of Representatives 2021-2022, no. 2335/1.
[246] E. VAN GOOL, A. MICHEL, B. KEIRSBILCK and E. TERRYN, *Public consultation as regards the Sustainable consumption of goods – promoting repair and re-use initiative*, 2022, https://lirias.kuleuven.be/retrieve/674960, p. 6.
[247] M. SANTOS SILVA and T. GABRIEL GARCÍA-MICÓ, "Cooling-off hot deals. a plea for green sludge in distance sales contracts" in M. SANTOS SILVA *et al.* (eds.), *Routledge Handbook of Private Law and Sustainability*, Abingdon, Routledge, 2024 (forthcoming).

withdrawal: the chronic returners. They advocate legislatively mandating 'green sludges', which are alterations to the behavioral architecture of decisions meant to introduce friction so that decision processes become more cumbersome. The authors only suggestion in this regard is to mandate a 'pre-cooling off period' which would obligate chronic returners to confirm their intention of purchasing a product after a certain time for reflection upon the purchase has elapsed. However, the framework of mandatory green sludges could be expanded to other types of private initiatives. For example, many traders ask consumers to state the reason of return, which can be seen as a form of green sludges. That requirement and other types of green sludges could be mandated as well. Note that such a requirement does not equate to an abolishment of the right to withdrawal of the consumer without justification, as giving any reason or refusing to state any reason suffices to jump this hurdle.

The European Union legislature does not truly consider restricting consumer rights.[248] This course might need to be adjusted. Even though the European Union legislature wishes to 'empower' consumers and gives great weight to the protection of consumer interests (see in particular the ECGTD), the time may be ripe to restrict the aforementioned rights. Even if consumers are effectively 'empowered' and express positive attitudes towards sustainable practices, they may still fail to engage in behaviors that support the circular economy.[249] It is not always easy to break free from ingrained habits.[250] Thus, the European Union legislature might need to help by limiting consumer choice. The initiatives taken by the European Union legislature to enact the Green Deal are meant to protect the environment. The protection of the environment is an objective of general interest capable of justifying a restriction of the current consumer rights. An element of inter-generational solidarity can be noted as well. Ensuring a healthy living environment in the European Union, is necessary to ensure the well-being of future European Union citizens (the 'consumers of the future'). It is essential to acknowledge the potential fallacy of an overly binary perspective on consumer rights and considerations of sustainability. While the European Union's commitment to consumer empowerment and protection is important, it is equally crucial to recognize that sustainability measures are not in opposition to consumer rights. Rather, they are complementary to them. Eventually, putting an end to the throw-away culture, as it is exacerbated by the right of withdrawal, is beneficial to consumers because of an increase in quality and longevity of consumer products.

[248] In recital 46 ESPR, the European Commission explicitly mentions textiles and footwear as examples of unsold consumer products. In its policy paper on sustainable textiles, it addresses the need to ban the destruction of unsold or returned textiles (p. 4) and the need to reduce overproduction and overconsumption of clothing (p. 8-9). In this document on textiles, one of the main reasons for the ban, the European Commission does not discuss ways of reducing overconsumption on the consumer side through a change in consumers' legal rights, see Communication Sustainable Textiles.

[249] This discrepancy between what individuals say they will do (their attitudes) and what they actually do (their behaviors) is called the attitude-behavior gap.

[250] There are several reasons why habits become ingrained, both from a physiological (e.g., the forming and strengthening of neural pathways) and psychological perspective (e.g., reinforcement). 'Unlearning' requires effort because it involves the deliberate and conscious process of overcoming habits and replacing them with new behaviors or ways of thinking. This process requires cognitive resources, self-awareness, and motivation to challenge existing beliefs, attitudes, and behavioral patterns. People are generally unwilling to undertake that process as is clear from the 'status quo bias'. There is a behavioral tendency to prefer the current state of affairs over potential alternatives, even if those alternatives offer potential benefits or improvements (for reasons such as loss aversion). Reluctance to deviate from the status quo reinforces inertia in unlearning.

2.4.10 Ban of non-compliant products & national requirements for market access

2.4.10.1 Meaning of ban

Article 3.1 ESPR stipulates that products shall only be placed on the market or put into service if they comply with the ecodesign requirements set out in the delegated acts (or self-regulation measures).[251]

Once a product complies with those requirements, national Member States can no longer prohibit, restrict, or impede access to the European Union market for reasons of non-compliance with national ecodesign requirements (recital 15 and article 3.2 ESPR). This applies to the extent that those national requirements relate to product parameters set out in Annex I, which are covered by a delegated act (or self-regulation measure). Even where that delegated act (or self-regulation measure) provides that no performance nor/or information requirements are necessary, there is no room for national requirements relating to the same product parameters (article 3.4 ESPR). Therefore, article 3 ESPR is a matter of exhaustive [252] harmonization designed to safeguard the European Union's internal market.[253] Nevertheless, the ESPR contains a safeguard procedure in articles 63 and 64. Through this procedure, a ban for non-compliance imposed by national market surveillance authorities can be considered justified by the European Commission. Such a national measure may lead the European Commission to revise European standards.[254] There is only one exception to the foregoing: as regards the energy performance of buildings, national Member States may set their own minimum requirements and system requirements (article 3.3 ESPR).[255]

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[251] Some of the articles providing an overview of all the obligations of economic operators (articles 21 and following ESPR), repeat this ban on non-compliant products as an obligation for the economic operator in question. Article 21.1, a) ESPR, for example, obligates manufacturers to ensure that the products that they wish to place on the market or put into service for the first time are designed and manufactured in accordance with the requirements of a delegated act (or self-regulation measure) and that the products are accompanied by the information required by the delegated act (compare with articles 23.1 and 24.3 ESPR).

[252] Synonyms for this concept are 'maximum' and 'full' harmonization (see on the similarity between the terms, S. WEATHERILL, "Is maximum harmonization a myth? The story of Directive 2019/771 on contracts for the sale of goods", *REDC* 2021, vol. 2, p. (217) 220). The notions 'maximum' and 'minimum harmonization' are mainly used within the context of European directives, which need to be transposed into national law by the Member States. These notions indicate how much margin member states have in this transposition to impose more stringent national requirements. Regulations, on the other hand, are directly applicable and automatically lead to a unified European framework. Nonetheless, even a regulation may involve minimum harmonization or exhaustive harmonization. First, a specific article of a regulation, which, in general, harmonizes exhaustively, can explicitly state that it grants a margin to Member States in the context of the article. Second, in certain circumstances Member States can go further than a regulation in their national legal systems going beyond a regulation, as long as they do not go against the objectives of the regulation or reduce its effectiveness. At the same time, a regulation can clearly state that it regulates a matter exhaustively (as is the case here in the ESPR), so that it reduces the circumstances in which the foregoing is possible (see, for example, regarding the important policy reasons set out in article 36 TFEU, which normally allow leeway for more far-reaching national measures, *Ibid.*, p. 221-222).

[253] Regarding this form of harmonization and the European Union's sustainability ambitions, see E. TERRYN and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear.

[254] Regarding how this safeguard procedure generally works in European law, see the 'Blue Guide'. That guide provides guidance on EU product rules, see The 'Blue Guide' on the implementation of EU product rules 2022 (2022/C 247/01), *OJ C* 29 June 2022, vol. 247, p. 1-152, see specifically for the safeguard procedure p. 117 and following (hereinafter abbreviated as 'Blue Guide 2022').

[255] Based on articles 4.1 and 8 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, *OJ L* 18 June 2010, vol. 153, p. 124-146. Regarding the Flemish legislation, see articles 11.1.1. and following Energy Decree (*Energiedecreet*). Regarding minimum requirements see article 11.2/2.1 Energy Decree.

The wording of the relevant provisions in the ESPR suggests that the ESPR does not preclude Member States from introducing or maintaining national ecodesign requirements regarding product groups for which such requirements have not yet been set under the ESPR. For example, recital 15 ESPR states that only *once* a delegated act setting ecodesign requirements is adopted, Member States are *no longer* allowed to set national ecodesign requirements. [256] Thus, up until a delegated act has been adopted Member States are allowed to set national ecodesign requirements. Concretely, the national legislation which serves as a justification for the adoption of harmonizing rules at the European Union level (e.g., the French legislation which contains a repairability score), can stay in force for all product groups that have not yet been scrutinized by the European Commission. It should be noted that for some decades already, there has existed the obligation to notify draft technical regulations to the European Commission via the TRIS procedure ("Technical Regulation Information System") and under the current Ecodesign Directive to prevent new national legislation from conflicting with the internal market and European Union law (e.g., harmonization measures).[257] The French and Belgian repairability scores serve as a good example of such technical requirements, as they can significantly influence the composition or nature of the product or its marketing. Currently, a Member State wishing to impose new technical requirements for non-harmonized product characteristics is to follow the notification procedure established by Directive 2015/1535.[258] This research report goes into further detail on this procedure in the section on the ECGTD.

In addition to the ban on placing non-compliant products on the market or putting them into service for the first time, there is also a ban on keeping non-compliant products on the market. Some of the articles providing an overview of all the obligations of economic operators (articles 21 and following ESPR) contain an obligation to bring non-compliant products into conformity, to withdraw them or to recall them when the economic operator in question finds or has reason to believe that the product is non-compliant.[259] The economic operator shall immediately inform the market surveillance authorities of the Member States in which the product has been placed on the market of the alleged non-compliance and of any corrective measures taken.

2.4.10.2 Conformity assessment

Articles 32 and following ESPR lay down the rules on how to determine the conformity of products. These rules follow the already existing legal framework of product regulations.[260]

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[256] It is interesting that the recital does not make explicit that Member States are not precluded from introducing or maintaining national ecodesign requirements regarding product groups for which such requirements have not yet been set under the ESPR. The recitals of the ESPR are more straightforward in that regard as regards, for example, national prohibitions on the destruction of unsold consumer goods (recital 48aa ESPR) and national public procurement measures (recital 87a ESPR)

[257] See about this procedure in general and specifically about the notification of the French and Belgian repairability scores based on this procedure, E. TERRYN and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear.

[258] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. The procedure was established in 1983 by Council Directive 83/189/EEC, later codified by Directive 98/34/EC of 22 June 1998 and amended by Directive 98/48/EC of 20 July 1998, (mainly to extend its application to information society services).

[259] For example, article 21.7a ESPR obligates manufacturers who consider or have reason to believe that a product covered by a delegated act (or self-regulation measure) that they have been placed on the market or put into service is not in conformity with the requirements set out in those delegated acts (or self-regulation measure) to immediately take the necessary corrective measures to bring that product into conformity, to withdraw it or recall it, if appropriate (compare with articles 23.6. and 24.4 ESPR).

[260] For this reason, it may be useful for a person who is responsible for the implementation of the ESPR to consult the 'Blue Guide'. This guide provides guidance on EU product rules and devotes attention, among others, to conformity assessment, see Blue Guide 2022, specifically for conformity assessment p. 70 and following.

Article 32 contains the general rules on test, measurement, and calculation methods. This article stipulates in rather broad terms that “reliable, accurate and reproducible methods that take into account the generally recognized state-of-the art methods” are to be used. The more in-depth criteria for these methods will be determined by delegated act (or self-regulation measure) (recital 65 ESPR).

With article 33 ESPR the European Union legislature shows vigilance for ways to circumvent the conformity assessment, undoubtedly with the 'Diesel gate scandal' in the automotive sector at the back of its mind.[261] Article 33.-1 ESPR holds that economic operators shall not engage in any behavior that undermines the compliance with the ESPR regardless of whether that behavior is of a contractual, commercial, technical or any other nature.[262] Article 33.1 ESPR stipulates that products designed to alter their behavior or properties when they are tested in order to reach a more favorable result for any of the tested product parameters are banned. Products designed to be able to detect they are being tested and automatically alter their performance in response and products pre-set to alter their performance at the time of testing are automatically viewed as products of this type. Furthermore, economic operators are prohibited from prescribing instructions to obtain a more favorable result in testing (article 33.2 ESPR). Recital 66 ESPR states that “any practice leading to an unjustified alteration of the product’s performance during compliance testing or within a short period after putting the product into service, leading to a declared performance that misrepresents the product’s actual performance while in use” is prohibited. The consideration that a ‘declared performance’ has to correspond to an ‘actual performance while in use’ is interesting. This suggests that the ESPR obligates manufacturers to design their products for the actual use and prevents them from ‘designing to the test’[263] in any way. Therefore, this consideration gives reason to believe that a case such as that of the Dutch *sjoemelsigaretten* ('cheating cigarettes') is caught by the prohibitions of the ESPR.[264]

Articles 33.3 and 33.4 ESPR are particularly interesting for the extension of the lifespan of products. Both articles prevent planned premature obsolescence (i.e., a deliberate business policy to drive premature obsolescence). Products should not be designed in such a way that they adjust their behavior or properties shortly after first commissioning, with the result that their performance deteriorates. Nor should software[265] or firmware updates result in a deterioration in the performance of a product beyond acceptable margins, except with the explicit consent of the customer prior to the update.

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[261] The car manufacturer Volkswagen installed software on the on-board computer of its diesel cars. The on-board computer was able to recognize when it was subjected to an official regulatory test, in order to improve the test results of the diesel engine. During testing, the on-board computer temporarily increased the injection of urea into the exhaust gases, thus keeping the emissions of nitrogen oxides below the maximum standard.

[262] This article 33.-1. was added by Amendments ESPR Council of the EU, p. 154.

[263] After the expression ‘teaching to the test’, a colloquial term for any method of education whose curriculum is heavily focused on preparing students for a standardized test.

[264] Those 'cheating cigarettes' are filter cigarettes whose filters are perforated with small ventilation holes. When smokers inhale, they suck clean air through these holes. That air dilutes the smoke and thus the concentration of nicotine and other harmful substances. European cigarettes are only allowed a contain a certain concentration of such substances and are tested for this. During the test method, based on an ISO standard known to manufacturers, the ventilation holes are unobstructed and work as intended. In practice, however, smoker block the ventilation holes in part or in whole with their fingers. As a result, the quantity of harmful substances in a test environment does not correspond to the actual amount inhaled. Regarding these cigarettes, see CJEU (Grand Chamber) 22 February 2022, C-160/20, ECLI:EU:C:2022:101.

[265] On this phenomenon, see in detail A. MICHEL, *Premature obsolescence: in search of an improved legal framework*, Antwerp, Intersentia, 2023, xv + 672 p. For the implementation of this concept by the European Commission, see recital 14 of the ECGTD.

There is a presumption of conformity on the basis of article 34.2 ESPR for products that are in conformity with harmonized standards[266] or parts thereof, to the extent that the requirements of a delegated act (or self-regulation measure) are covered by those standards or parts thereof.[267] The same applies on the basis of article 34.3 ESPR. for products awarded the EU Ecolabel. [268] Moreover, whenever the European Commission develops delegated acts containing product-specific requirements, it will always review the legislation on the EU Ecolabel in parallel.[269-270]

Before manufacturers can place a product on the market or put it into service for the first time, they are to carry out a conformity assessment. The procedure is determined by delegated act (articles 4.2 and 36 ESPR). When that assessment shows that the product complies with the applicable requirements, manufacturers are to draw up an EU declaration of conformity in accordance with article 37 ESPR and affix the CE marking to the product in accordance with article 39 ESPR (article 21.2 ESPR). The European Commission may adopt alternative rules, for example, to minimize the administrative burden on economic operators or to ensure coherence and avoid confusion when other conformity markings apply to the product (articles 4.3, point f) and 40 ESPR).[271]

General European Union legislation always holds the manufacturer responsible for the conformity assessment. Specific legislation may require the involvement of a third party, as is the case with the ESPR. The European Commission may determine by delegated act that the intervention of an external conformity assessment body is necessary. Articles 41 and following ESPR contain the rules on the role of such bodies in the context of the ESPR.[272]

[266] Harmonized standards are European standards which, at the request of the European Commission, be adopted with a view to the
application of Union harmonization legislation (see article 2, point 1, c) Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, *OJ L* 14 November 2022, vol. 316, p. 12-33).

[267] This is a general principle in the European Union legislative framework of product regulation, see Blue Guide 2022, p. 8 and p. 49 and following.

[268] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, *OJ L* 30 January 2010, vol. 27, p. 1-19.

[269] Communication Sustainable Products, p. 6 ("In parallel to and in synergy with developing product-specific rules under the ESPR, the European Commission will work on reviewing or setting new product-specific criteria under the EU Ecolabel").

[270] The European Commission announced that it will revise the EU Ecolabel for textiles and footwear, see Communication Sustainable Textiles, p. 6.

[271] Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, *OJ L* 13 August 2008, vol. 218, p. 30-47.

[272] For a general description of the role of these bodies in European Union legislation, see Blue Guide 2022, p. 71-73 and 81 and following

2.4.11 Market surveillance and enforcement

As regards market surveillance and enforcement, the ESPR builds on the general framework of Regulation (EU) 2019/1020 on market surveillance.[273 - 274] In a targeted manner, the ESPR establishes more specific obligations where relevant to its objectives.[275]

Article 59.1 ESPR requires each Member State provide a section in the national market surveillance strategy referred to in article 13 of Regulation (EU) 2019/1020 that outlines the market surveillance activities planned to ensure that appropriate checks in relation to the ESPR are performed on an adequate scale. This section shall include at least a description of the products and requirements identified as priorities and also a description of the planned market surveillance activities on those priorities. Article 59.2 ESPR obligates Member States to identify priorities based on objective criteria, such as:

- the levels of non-compliance observed in the market;
- the environmental impacts of non-compliance;
- where available, the number of complaints received from end-users, consumer organizations or other information received from economic operators or the media;
- the number of relevant products made available on national markets; and
- the number of relevant economic operators active on those markets.

Article 59.3 ESPR stipulates that for product categories identified as representing a high risk of non-compliance, the checks shall include, where appropriate, physical and laboratory checks based on adequate samples. Market surveillance authorities shall have the right to recover from the responsible economic operator the costs of document inspection and physical product testing in case of non-compliance with ecodesign requirements.

Where a product poses a risk related to ecodesign requirements and market surveillance authorities determine that the product does not comply with those requirements, those authorities shall require the economic operator to take appropriate and proportionate corrective action within a reasonable period of time (article 63.1 ESPR). If the economic operator fails to implement those measures, the market surveillance authorities shall take all appropriate provisional measures to prohibit or restrict the making available of the product concerned on their national market, to withdraw the product from that market or to recall it (article 63.4 ESPR). They shall inform the European Commission and the other Member States, without delay, of those measures. In any case, they must also inform the European Commission and the other Member States of a non-conformity and the measures they intend to take if they consider that the non-conformity is not restricted to their national territory (article 63.2 ESPR). Other Member States may raise objections to the national measures (article 63.6 ESPR). The European Commission may also object (article 64 ESPR).

[273] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, *OJ L* 25 June 2019, vol. 169, p. 1-44.
[274] For this reason, it may be useful for a person who is responsible for the implementation of the ESPR to consult the 'Blue Guide'. This guide provides guidance on EU product rules, see Blue Guide 2022.
[275] Explanatory Memorandum to the ESPR, p. 14.

Member States shall determine, on the basis of article 68 ESPR, the penalties applicable to infringements of the ESPR. Those penalties should be effective, proportionate and dissuasive, taking into account the extent of non-compliance and the number of units of non-complying products placed on the Union market.

2.4.12 National incentives

The European Union legislature considers that to incentivize consumers to make sustainable choices, in particular when the more sustainable products are not affordable enough, mechanisms such as 'eco-vouchers' and 'green taxation' should be provided for (recital 86 ESPR). For this reason, article 57 of the ESPR allows Member States to reward products with the best performance in sustainability through incentives. The reference to environmental taxes in recital 86 of the ESPR suggests that such a reward may consist in a reduction or exemption from an environmental tax.[276]

When Member States decide to make use of incentives to reward the best-performing products, they should do so by targeting those incentives at the highest two populated classes of performance that were set by the delegated acts (or self-regulation measures), not necessarily taken cumulatively, in case classes of performance would be set in relation to more than one parameter. However, Member States are not able to prohibit the placing on the market of a product based on its class of performance (recital 86 ESPR).

The introduction of incentives from Member States should be without prejudice to the application of European Union State aid rules.

2.4.13 Public procurement

Public procurement accounts for 14% of the European Union's GDP (recital 87 ESPR).[277] Thus, this procurement holds significant leverage in the transition to a circular economy.[278] The European Union legislature wants to use public spending to boost the demand for more sustainable products. For this reason, the ESPR empowers the European Commission to require contracting public authorities and contracting entities[279] to align their public spending with specific criteria or objectives for green public procurement (see article and 58 ESPR).[280]

[276] For a similar provision, see article 83 Proposal Regulation Construction Products.

[277] See also recital 128 Proposal Regulation Packaging; recital 91 Proposal Regulation Construction Products.

[278] In this regard, see F. DE LEONARDIS, "Green Public Procurement: From Recommendation to Obligation", *International Journal of Public Administration* 2011, p. 110-113; A. WIESBROCK and B. SJÅFJELL, "Public procurement's potential for sustainability" in B. SJÅFJELL and A. WIESBROCK (eds.), *Sustainable Public Procurement Under EU Law: New perspectives on the State as Stakeholder*, Cambridge, CUP, 2015, p. 230-242; K. DE HORNOIS, "Van lineair naar circulair: overheidsaankopen als hefboom voor de circulaire economie en de uitdagingen voor de overheidsinkoper. Een aantal inleidende beschouwingen.", *MER* 2019, vol. 1, p. 53-65. Regarding how sustainability plays a role in European procurement law, see B. DESCAMPS, "Duurzame overheidsopdrachten in de EU: de blijvende zoektocht naar een evenwicht tussen de primaire en secundaire aanbestedingsdoelstellingen in de rechtspraak van het Hof van Justitie", *MER* 2022, vol. 1, p. 3-15

[279] Article 2, 1) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ L* 28 March 2014, vol. 94, p. 65-242; Article 3, 1) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *OJ L* 28 March 2014, vol. 94, p. 243-374.

[280] See for similar empowerments, article 85 Battery Regulation; article 57 Proposal Regulation Packaging; article 84 Proposal Regulation Construction Products.

Although such criteria already exist today[281], their impact is limited, according to the European Commission, as their use is currently voluntary.[282]

Article 58.1 ESPR stipulates generally that contracting authorities and contracting entities are required to award public contracts that comply with the minimum requirements set by the European Commission for the purchase of products covered by a delegated act (or self-regulation measure), or for works or services where those products are used for activities constituting the subject matter of those public contracts. However, the requirements are without prejudice to the possibility for contracting authorities and contracting entities to rely on derogations or exemptions regarding public contracts set out in European Union legislation, in particular Directive 2014/24/EU and Directive 2014/50/EU (recital 87 ESPR). Moreover, recital 87 ESPR stresses that the green public procurement requirements are merely minimum requirements which do not preclude the ability of contracting authorities and entities to set out additional and more demanding requirements.

Article 58.3 ESPR contains the empowerment of the European Commission to adopt implementing acts setting out the minimum requirements for public contracts. These minimum requirements take the form of technical specifications, award criteria, contract performance conditions or targets. In compliance with the public procurement framework, minimum mandatory technical specifications should avoid artificially narrowing down competition in favor of a specific economic operator (recital 87 ESPR). Award criteria should be preferred to technical specifications when there are uncertainties about the availability or cost of the most performant products in the European Union market (recital 87 ESPR). The European Commission may set minimum criteria and assign specific weighting, between 15% and 30%, to those criteria for the purpose of ensuring that they can significantly influence the choice of products in favor of those that are most environmentally sustainable (recital 87 ESPR). Furthermore, the minimum requirements shall be based on the two highest performance classes, the highest scores or, when not available, on the best possible performance levels as set out in the delegated act (or self-regulation measure) applicable to the products in question. Recital 87 ESPR lists some examples of possible minimum requirements.

- As an example of 'technical specifications', it can be made mandatory for contracting authorities and contracting entities to require that the tenderers' products meet specific carbon footprint requirements.
- As an example of 'award criteria', it can be made mandatory for contracting authorities and contracting entities to give the recycled content of the products in question a weight between 20% and 30% of the award criteria. As a consequence, contracting authorities and contracting entities, in the specific award procedure, would have the possibility to assign a weight higher than 30% but not lower than 20% to recycled content.
- As an example of 'contract performance conditions or targets', it can be mandatory for contracting authorities and contracting entities to award at least 50% of their annual procurement of certain products to those with more than 70% of recyclable material.

[281] On these current criteria, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public procurement for a better environment, 16 July 2008, COM(2008) 400 final; European Commission, Directorate-General for the Environment, *Buy green! A handbook on green public procurement,* Luxembourg, Publications Office, 2016, https://data.europa.eu/doi/10.2779/837689.

[282] Recital 9 ESPR; Communication Sustainable Products, p. 6; recital 128 Proposal Regulation Packaging.

As a result, Member States could still set higher targets for the procurement of those products.

When setting the requirements for public procurement, the European Commission shall take into account the following criteria, in accordance with article 58.2 ESPR:

- the value and volume of public contracts awarded for that given product group or for the services or works using the given product group;
- the economic feasibility for contracting authorities or contracting entities to buy more environmentally sustainable products, without entailing disproportionate costs.

Recital 87a ESPR states that Member States should not be precluded from introducing or maintaining national measures on green public procurement regarding product groups for which public procurement requirements under the ESPR have not yet been set and from introducing stricter national requirements regarding products which fall within the scope of implementing acts setting out green public procurement requirements, provided they are in line with European Union legislation.[283] In essence, this recital states that (1) the ESPR does not harmonize to the extent that the competence of national authorities to set out ecodesign criteria for public procurement is fully subdued and (2) the extent of harmonization allows 'greenplating'.[284]

From a sustainability perspective, national measures in the absence of European Union criteria and greenplating criteria are welcome. Concerns regarding the unity and functioning of the internal market can be regarded as less pressing when compared, for example, with product requirements. At the European Union level, the Public Procurement Directive contains minimally harmonized procedural rules for public tenders.[285] Contracting authorities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner (article 18.1 Public Procurement Directive). In contrast with product requirements, national public procurement criteria do not exclude products from the entirety of the market of a Member State. They solely restrict the 'access'[286] to public contracts. Public procurement involves a significant degree of local decision-making. Thus, public procurement criteria are inevitably tailored to the specific needs and circumstances of individual public authorities, which may have diverse public policy goals and social objectives.

[283] Amendments ESPR Council of the EU, p. 65.
[284] Greenplating refers to the practice of Member States adopting or implementing environmental regulations or standards that contain additional or stricter requirements, when compared to the baseline standard set by harmonizing European Union legislation.
[285] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L* 28 March 2014, vol. 94, p. 65–242 (hereinafter abbreviated as 'Public Procurement Directive').
[286] One could regard green public procurement criteria as 'eligibility criteria' but more accurately they influence the success rate of being awarded a public tender.

2.5 Empowering Consumers for the Green Transition Directive

2.5.1 General overview ECGTD

On 30 March 2022, the European Commission proposed the 'consumer empowerment initiative', implementing among others the Circular Economy Action Plan.[287] On 6 March 2024 the end-result of the interinstitutional negotiations[288] was published in the Official Journal of the European Union as the Empowering Consumers for the Green Transition Directive (ECGTD).[289] This directive amends the Unfair Commercial Practices Directive and the Consumer Rights Directive.[290] Its objectives are to strengthen the position of consumers in the circular economy and to enable those consumers to contribute to more sustainable consumption.

The European Union legislature wants to achieve the goals of the ECGTD primarily by better informing consumers about the sustainability and repairability of products before they enter into contracts. Second, the ECGTD creates better protection of consumers against unfair commercial practices that hinder sustainable purchases such as greenwashing, the use of unreliable and unclear sustainability labels and other misleading ways of conveying information on sustainability as well as premature obsolescence. Previously, these practices could already be caught by the general provisions of the Unfair Commercial Practices Directive, but the European Union legislature saw a need for specific provisions that explicitly ban them.

With the ECGTD, the European Union legislature aims to achieve a high level of consumer protection and further complete the internal market. The environmental benefits of the ECGTD are complementary to these primary objectives. Therefore, the basis for the ECGTD is article 114 TFEU (with the objective of consumer protection provided for in article 169 TFEU).[291]

Concisely, the ECGTD:

[287] This proposal is also in line with the Consumer Agenda Sustainable Recovery.
[288] On 11 May 2023 the European Parliament adopted its position that served as the basis for the trilogue negotiations, see Amendments adopted by the European Parliament on 11 May 2023 on the proposal for a directive of the European Parliament and of the Council on 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)0143 – C9-0128/2022 – 2022/0092(COD)) (first reading), TA/2023/0201 (hereinafter referred to as 'Amendments ECGTD Parliament'). On 25 October 2023 the Council of the European Union proposed its amendments to the European Commission's proposal, see Council of the European Union, Letter to the Chair of the IMCO Committee of the European Parliament regarding the 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, 2022/0092(COD), no. 14685/23 (hereinafter referred to as 'Amendments ECGTD Council of the EU').
[289] 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* 6 March 2024, vol. 8
[290] 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, 30 March 2022, COM(2022) 143 final.
[291] Explanatory memorandum to the ECGTD, p. 5.

- extends the list of mandatory pre-contractual information from the Consumer Rights Directive to include information on commercial guarantees of durability, information on software updates and a product repairability score;
- labels practices of greenwashing through misleading environmental claims as unfair commercial practices and prohibits them;
- labels practices stimulating premature obsolescence as unfair commercial practices and prohibits them.

2.5.2 Pre-contractual information obligations

2.5.2.1 General overview of changes

Articles 5.1 (ordinary sales) and 6.1 (off-premises and distance selling) Consumer Rights Directive contain a list of information that traders[292] are to provide to consumers in a clear and comprehensible manner. The ECGTD supplements this list with the following items.[293]

- Information on the existence and length, of a manufacturer's commercial guarantee of durability, when this commercial guarantee is valid for more than two years and covers the entire good, insofar this information is made available by the manufacturer.
- The existence and length of the period during which the manufacturer commits to providing software updates for products with digital elements or for digital content and digital services.
- The repairability score of the product as applicable under European Union law.
- Other repair information, should no repairability score be available at European Union level, such as information on the availability of spare parts and a repair manual.

Thus, these additional items target information on commercial guarantees of durability, software updates and repairability, which are all discussed in detail hereinafter.

The European Union legislature intends for consumers to be better able to compare products before purchasing them, as regards their expected useful lifespan (including the possibility to extend this lifespan through repair). It hopes that informed consumers will opt for products with a longer lifespan, which will outcompete less sustainable products.[294] This informing of the consumer thus fits in with the strategy to resist premature obsolescence, especially in the marketing and pre-contractual life stage.[295]

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[292] Article 2, point 2 Consumer Rights Directive defines 'trader' as any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by the Consumer Rights Directive.

[293] See for a commentary on these pre-contractual information obligations and the risk of 'information overload', C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 291 and following.

[294] In the Consumer Agenda Sustainable Recovery, the European Commission indicates that it wants to empower consumers "to play a more active role in the circular economy". Consumers should receive trustworthy and relevant information to choose reusable, durable, and repairable product. Regarding misleading environmental claims, the European Union legislature considers in the ECGTD that fair claims "encourage competition towards more environmentally sustainable products, thereby reducing the negative impact on the environment" (recital 1 ECGTD). Regarding information on software updates, the European Commission considers in the ECGTD that such information "promote[s] competition between producers as regards the durability of goods with digital elements" (recital 29 ECGTD). In sum, enhanced competition with unsustainable products is the foundation for the entire ECGTD.

[295] See the previously explained framework of A. MICHEL.

2.5.2.2 Commercial guarantee of durability

2.5.2.2.1 General background of the commercial guarantee of durability

In contracts with consumers, the Sale of Goods Directive imposes a minimum[296] statutory warranty period of two years on sellers (i.e., traders)[297], during which they are liable for any lack of conformity of a product that exists at the time of delivery of the product (article 10.1 Sale of Goods Directive).[298] Within that period, the consumer is entitled to the remedies provided for in article 13 Sale of Goods Directive. This is the statutory[299] warranty of conformity.

On top of what they are statutorily obligated to do, producers (i.e., manufacturers) and traders are permitted to provide additional 'commercial guarantees'[300] for characteristics of the product that are not related to its conformity.[301] Such a guarantee can relate to the durability of the product. Article 17 Sale of Goods Directive contains specific rules for commercial guarantees of durability offered by manufacturers. Where a manufacturer offers to the consumer a commercial guarantee of durability, the producer is directly liable to the consumer, during the entire period of the commercial guarantee of durability, for repair or replacement of the product.

The Sale of Goods Directive defines 'durability' in article 2, point 13 as "the ability of the goods to maintain their required functions and performance through normal use".[302] This narrow definition concerns the lifespan of the product, not other environmental aspects of the product.[303] Thus, Pavillon notes that the connection between the ECGTD (whose goals go

[296] Although the Sale of Goods Directive generally harmonizes exhaustively (article 4 Sale of Goods Directive), it contains an exception regarding this period. Member States may implement a longer warranty period and/or a limitation period that cannot expire before the consumer has been able to invoke the statutory warranty (article 10.3 Sale of Goods Directive). Countries such as the Netherlands and Finland have introduced a flexible warranty period whose duration depends on the average economic lifespan of a product. A flexible term is beneficial for the extension of the lifespan of products. However, the Belgian legislature has maintained the two-year warranty period in the legislation transposing the Sale of Goods Directive, see wet van 20 maart 2022 tot wijziging van de bepalingen van het oud Burgerlijk Wetboek met betrekking tot de verkopen aan consumenten, tot invoeging van een nieuwe titel VIbis in boek III van het oud Burgerlijk Wetboek en tot wijziging van het Wetboek van economisch recht, *Belgian Official Journal* 31 March 2022.

[297] Article 2, point 3 Sale of Goods Directive defines 'seller' as any natural person or any legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession, in relation to contracts covered by the Directive. Thus, this is the same notion as 'trader' in, for example, the Consumer Rights Directive.

[298] A nuance to this minimum duration of two years is that the directive allows for a reduction of the statutory warranty period to one year with respect to second-hand products and products sold at public auctions.

[299] The ECGTD speaks of the 'legal guarantee' (see, for example, recital 26 ECGTD). This research report opts for the term 'statutory warranty' over 'legal guarantee'. The adjective 'statutory' highlights that this warranty has statutory law as its origin. A commercial guarantee has a different origin, namely contractual agreements. A commercial guarantee is governed by legal principles (under the umbrella of contract law), making it inherently a 'legal' guarantee as well. Both the commercial guarantee and the statutory warranty are legally enforceable. Thus, they do not differ in their 'legality', but in their origin. Additionally, the terms 'guarantee' and 'warranty' are often used interchangeably. However, 'warranty' is a term that is more closely associated with a person's obligation to ensure that products meet both specifications and expectations that is inherent to contracts. On the other hand, 'guarantees' generally refer to promises made and are often seen as additional assurances beyond the inherent obligations.

[300] For a definition, see article 2, point 14 Consumer Rights Directive and article 2, point 12 Sale of Goods Directive.

[301] Both the trader (seller) and manufacturer (producer) can be guarantor of a commercial guarantee to the consumer, see, for example, article 2, point 12 Sale of Goods Directive.

[302] New article 2, point 14b Consumer Rights Directive repeats this definition by referring to the definition in the Sale of Goods Directive.

[303] Regarding this narrow interpretation of the concept and a critical estimation of it in the light of the European Union's circular economy objectives, see E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 336-337, nos. 43-46

beyond mere lifespan extension) and this existing legislation has not been sufficiently well-considered.[304]

2.5.2.2.2 The commercial guarantee of durability in the ECGTD

The ECGTD retains the freedom of the manufacturer and the trader to provide commercial guarantees (recital 28 ECGTD). However, the information provided to the consumer should not confuse the consumer with regard to the existence and duration of the manufacturer's commercial guarantee of durability (recital 28 ECGTD). Research by the European Union has shown that information on commercial guarantees is often unclear, inaccurate, or incomplete, making it difficult for consumers to compare products and to distinguish the commercial guarantee from the statutory warranty of conformity (see also recital 23a ECGTD).[305]

Therefore, the ECGTD obligates traders to inform consumers of the existence and duration of the manufacturer's commercial guarantee of durability using a harmonized label (new articles 5.1, point ea) and 6.1, point la) Consumer Rights Directive). This obligation has some prerequisites.

- First, the obligation only applies to commercial guarantees of durability that (1) are offered for a period longer than two years, (2) cover the entire product (and not merely specific components of the product) and (3) are offered to the consumer without additional costs (in addition to new articles 5.1, point ea) and 6.1, point la) Consumer Rights Directive, see in particular recitals 26 (emphasis on duration and costs) and 27 (emphasis on entirety of product) ECGTD and additionally recitals 23, 23b and 28, always using the same wording containing these prerequisites).
- Second, the obligation applies only to any information made available by the manufacturer. Traders are not expected to actively look for this information themselves, for example, on the product-specific websites (recital 23 ECGTD).[306]

In addition, the harmonized label should also remind consumers of the existence of the statutory warranty of conformity. Moreover, traders are to remind consumers of that existence by using a harmonized notice (new articles 5.1, point e) and 6.1, point l) Consumer Rights Directive). That harmonized notice is a general means to inform consumers (e.g., a poster on a wall in the shop, next to the checkout counter or, in cases of online sale, a general reminder on the website) (recital 23b ECGTD). These obligations reinforce the current requirement in article 17.2 Sale of Goods Directive that a commercial guarantee statement is to be provided to the consumer on a durable medium at the latest at the time of the delivery of the product that includes a clear statement that the consumer is entitled by law to the statutory warranty of conformity.

Recital 23a ECGTD offers some guidance on how traders are to use the harmonized label. The harmonized label should be displayed in a prominent manner and used in a way that allows the consumers to identify easily which particular products benefit from a commercial guarantee of

[304] C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 293.
[305] Explanatory memorandum to the ECGTD, p. 3 and 4.
[306] The reasoning behind this limitation can be found in an amended recital 33 ECGTD in the version of the European Parliament. Where traders are not the manufacturers of products, their influence on the design of the products and their input regarding any information accompanying the products might be limited, see Amendments ECGTD Parliament, amendment 25. However, this reasoning is not present in the Provisional agreement ECGTD.

durability, for example by placing the label directly on the packaging of a particular product or by displaying the label in a prominent manner on the shelf where the products covered by such a guarantee are placed, or by placing it directly next to the picture of the product when the product is offered for sale online. Manufacturers offering commercial guarantees of durability can themselves place the harmonized label directly on the particular product or on its packaging. In that case, traders should ensure that this harmonized label is clearly visible.

A new article 22a Consumer Rights Directive stipulates that the European Commission has eighteen months after the entry into force of the ECGTD to specify the design and the content of the harmonized label and the harmonized notice necessary to fulfill these obligations to inform with implementing acts (in accordance with the committee procedure in article 27a ECGTD).

2.5.2.2.3 Analysis

2.5.2.2.3.1 Absence of obligations to inform of non-disclosure and to relay relevant information

Several remarks can be made about the ECGTD. First, the European Commission hopes that the obligation for the trader to provide information on commercial guarantees of durability will encourage manufacturers to offer such guarantees.[307] It is unclear how the final version of the ECGTD (note: also the version of the ECGTD originally proposed by the European Commission) will realize that hope. The obligation of the trader to inform the consumer of a commercial guarantee of durability only applies if manufacturers have made that information available. At the same time, there is no obligation for the trader to inform the consumer explicitly that no information on commercial guarantees has been given by the manufacturer. Thus, manufacturers who do not offer a commercial guarantee of durability are not disadvantaged by a taciturn attitude.[308] Manufacturers who offer no commercial guarantees of durability and, inevitably, give no information about such commercial guarantees to traders are lumped with manufacturers who do offer commercial guarantees of durability but who have neglected to inform the trader.[309] The European Union legislature merely notes that it is in the interest of the manufacturers to provide such information proactively to benefit from a commercial advantage (see recital 23b ECGTD; see also recital 33 ECGTD (on update and repair information)).

It might have been sensible to include an obligation for the trader to inform the consumer of non-disclosure of information on non-commercial guarantees, and/or an obligation for the manufacturer to relay all relevant information to traders in the ECGTD.

- Regarding an obligation for the trader to inform the consumer of non-disclosure, the original version of the ECGTD proposed by the European Commission contained such an obligation. Originally, the European Commission distinguished energy-using products[310]

[307] Explanatory memorandum to the ECGTD, p. 2 and 4.
[308] Except, perhaps, with regard to consumers who are well aware of the content of the ECGTD and, in general, consumer rights and who might suspect that manufacturers wish to hide behind the absence of an obligation of the trader to inform about the non-disclosure of information. Cautiously, this type of consumer can be assumed not to to be the average consumer.
[309] See for a similar critical analysis, C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 293-294.
[310] An energy-using product is a product that depends on energy input to function as intended, see article 2, point 3b Consumer Rights Directive proposed in the version of the ECGTD of the European Commission. A point of attention is that products

from other products. Traders of energy-using products would also have had to inform the consumer if the manufacturer did *not* provide information on a commercial guarantee of durability (article 5.1, eb) Consumer Rights Directive in the version of the ECGTD proposed by the European Commission).[311] The European Commission justified this limitation to energy-using products by arguing that the issue of limited durability contrary to consumer expectations is most relevant for energy-using products. Allegedly, consumers are also most interested in receiving information about the expected durability of this category of products. Consequently, only for this category of goods should consumers have been made aware if information about the existence of a manufacturer's commercial guarantee of durability exceeding two years had not been provided by the manufacturer (recital 24 ECGTD (version proposed by the European Commission)). This limitation was unconvincing and begged the question whether it would have sufficiently justified a difference in treatment of product types. Even if that information is *most* relevant for energy-using products, this fact alone does not exclude *any* relevance to other products. Regardless, the final version of the ECGTD contains no obligation in the context of non-disclosure, not for energy-using products, nor for other products. While it is commendable that the European Parliament[312] and the Council of the European Union[313] have eliminated the distinction between energy-using products and other products, one is left to wonder whether the obligation itself should have been retained and extended to cover all products.

- Regarding an obligation for the manufacturer to inform the trader of all relevant information, the version of the ECGTD proposed by the European Parliament obligated the manufacturer to make all relevant information (including information on commercial guarantees of durability and repairability information) available to traders.[314] This requirement aimed to ensure that traders could fulfill their information obligations effectively. The rationale behind this obligation can be found in an amended recital 33 in this version of the ECGTD: where traders are not the manufacturers of products, their influence on the design of the products and their input regarding any information accompanying the products might be limited.[315] Similar to the original proposal by the European Commission, traders are assigned a passive role, not expected to seek out this information actively.[316] Manufacturers are compelled to take on a proactive role. Manufacturer not offering a commercial guarantee of durability cannot benefit from the forgetfulness of manufacturers who do offer a commercial guarantee of durability and who might have forgotten to disclose information in the absence of this obligation. Construed this way, the information obligations of the ECGTD could in fact have had a positive effect on the voluntary uptake of commercial guarantees of durability as envisioned by the European Commission.

containing energy-using components, where those components are mere accessories and do not contribute to the main function of those goods, such as decorative lighting for clothing or footwear or electric light for a bicycle, should not be classified as energy-using products (recital 25 ECGTD (version of the European Commission)).

[311] According to the explanatory memorandum to the ECGTD, dealers are subject to this requirement only in relation to energy-using goods for which durability can be reliably estimated and about which consumers are mostly interested to receive this information (see p. 6). However, this limitation of the obligation to inform is not included in the articles of the ECGTD (version of the European Commission) and is not reflected in its recitals.

[312] Amendments ECGTD Parliament, amendments 16,17, 43, 45 and 58.

[313] Amendments ECGTD Council of the EU, p. 21.

[314] Amendments ECGTD Parliament, amendments 25 (recital 36) 54, (new article 5.1b Consumer Rights Directive) and 63 (new article 6.1a Consumer Rights Directive).

[315] Amendments ECGTD Parliament, amendment 25.

[316] This is repeated in recital 26, see Amendments ECGTD Parliament, amendment 25.

2.5.2.2.3.2 Restrictive prerequisites of the obligation to disclose commercial guarantees of durability

The obligation of the trader to inform the consumer only applies to commercial guarantees of durability that (1) are offered for a period longer than two years, (2) cover the entire product (and not merely specific components of the product) and (3) are offered to the consumer without additional costs.

Thus, the obligation is restricted to a subset of commercial guarantees of durability. European Union legislation allows commercial guarantees in all sizes and shapes. Both the Consumer Rights Directive and Sale of Goods Directive define commercial guarantees simply as *any* undertaking going beyond the statutory warranty. Article 17 Sale of Goods Directive states that the commercial guarantee of durability of the manufacturer can apply to "certain goods for a certain period of time", which is certainly not a restrictive wording.

The general rationale of the obligation is to avoid confusion of consumers regarding their statutory rights. The European Union legislature justifies the restrictions to this obligation by referring to 'the established minimum duration of two years of the statutory warranty of conformity' and 'the fact that many product failures occur after this duration' (recital 26 ESPR). Thus, it seems that the European Union legislature stresses the fact that when the commercial guarantee of durability typically comes into play, the statutory warranty is no longer applicable and there is no longer a risk of confusion when consumers want to invoke their (contractual) rights (note: the obligation of the European Union legislature is concerned with confusion at the time of the purchasing decision).[317] Furthermore, if a commercial guarantee is offered against payment, the risk of confusion is far less because consumers can be assumed to understand that they pay for a service in addition to their statutory rights.

One is left to wonder whether a blanket exclusion of other types of commercial guarantees of durability is the best avenue for avoiding consumer confusion. Commercial guarantees of durability can be relevant during the statutory warranty period as well, given that nothing precludes a manufacturer (or, for that matter, trader) to offer more advantageous rights during that period (e.g., regarding temporary replacement products while repairs are taking place). Article 2, point 13 Sale of Goods Directive defines 'durability' as the ability of products to maintain their required functions and performance through normal use. Even though durability and the verb 'maintain' suggest an element of longevity (beyond the minimum period of the statutory warranty of conformity) and even though commercial guarantees of durability are offered in practice mostly to 'extend' the statutory warranty period, this broad definition does not exclude the applicability of commercial guarantees of durability during the statutory warranty period. One of the cases where consumers have a right of redress during that period is exactly when the product does not function and perform through normal use as the consumer may reasonably expect during the minimum period set by the legislature. It seems that legislation should also target commercial guarantees of durability that coincide with the statutory warranty. The result of the restrictive prerequisites is that a manufacturer who offers a commercial guarantee of durability for less than two years is not obligated to use the harmonized label to advertise that guarantee. The creation of three 'categories' might

[317] An important sidenote is that the statutory warranty period harmonized at the level of the European Union is a minimum period, which means that national legislation can extend it.

inadvertently lead to confusion. A consumer will be confronted with the harmonized label for the statutory warranty of conformity and commercial guarantees of durability exceeding two years and with a non-harmonized advertisement for other commercial guarantees of durability. Lumping the first two together, in contrast with the third, might suggest to the consumer exactly the kind of similarity between both that the European Union legislature is trying to avoid. An alternative path to the choices made in the ECGTD could have been to extend the obligation to disclose to all commercial guarantees of durability under the watchful eye of the European Commission. The European Commission, with its implementing powers to design the harmonized label, can ensure that the distinction between the statutory warranty and the commercial guarantee of durability is clear in practice. For example, design elements such as borders, patterns, or backgrounds could be utilized to distinguish between the two types visually. For instance, a solid border could surround the information on the statutory warranty, while a dotted border could surround the information on the commercial guarantee. Or a variation in size and font where the information on the statutory warranty is larger and bolder than the information on the commercial guarantee could catch the consumer's attention and signal the prominence of the statutory warranty.

2.5.2.2.3.3 Restriction to commercial guarantees 'of durability' and 'of manufacturers'

Article 17 Sale of Goods Directive specifies that if the manufacturer is guarantor of a commercial guarantee of durability, the manufacturer is directly liable to the consumer. This article deals with a specific legal topic (i.e., the 'jump action' or *action directe* in chains of contracts). However, the Sales of Goods Directive does not preclude the trader from offering commercial guarantees of durability.[318]

Therefore, it seems a missed opportunity for the ECGTD not to include a general provision applicable to all commercial guarantees of durability, regardless of whether they are given by the manufacturer or the trader. After all, the same confusion regarding the consumer's statutory rights cited by the European Union legislature is possible when the trader is the guarantor.

The case could even be made that a general article should be applicable to all commercial guarantees and not be limited to guarantees of durability. However, in light of the need to avoid an overload of information on the consumer, it makes sense to focus on guarantees of durability, as the aspect of time associated with this product characteristic is likely to cause the most confusion with one of the core elements of the statutory warranty in the Sale of Goods Directive (i.e., the period during which this statutory warranty is available to the consumer and its voluntary 'extension' by the commercial guarantee of durability).

2.5.2.3 Repairability score and repairability information

2.5.2.3.1 General background

Today, traders are already obligated to inform consumers about the existence and conditions of after-sales repair services whenever such services are provided (articles 5.1, point e) and 6.1, point m) Consumer Rights Directive). The ECGTD extends this obligation by requiring traders to communicate the repairability score of a product to the consumer (new articles 5.1, point i) and

[318] Both the trader (seller) and manufacturer (producer) can be guarantor of a commercial guarantee to the consumer, see, for example, article 2, point 12 Sale of Goods Directive.

6.1, point u) Consumer Rights Directive). That repairability score is a score expressing the capacity of a product to be repaired, based on harmonized requirements established at the European Union level (new article 2, point 14d Consumer Rights Directive).

If no repairability score exists, the trader is to communicate to the consumer other relevant repair information made available by the manufacturer (new articles 5.1, point j) and 6.1, point u) Consumer Rights Directive). This obligation applies only to the information made available by the manufacturer.[319] Traders are not required to actively search for repair information themselves (recital 33 ECGTD). The relevant repair information relates to:

- the availability, estimated cost and ordering procedure of spare parts necessary to keep the good in conformity;
- the availability of repair and maintenance instructions; and
- repair restrictions.

The concrete method to establish the European Union repairability score is not elaborated upon in ECGTD. Within the framework of the ESPR, a repairability scoring system is one of the matters that the European Commission is to establish for the product aspect of repairability (recital 19 ESPR). The repairability score will be established by delegated act as one of the information requirements of a product. The reparability score is to be based on a harmonized methodology specified for the product or product group[320], aggregating parameters such as availability of spare parts, price of spare parts, ease of disassembly and the availability of tools into a single score (recital 24a ESPR). As regards those parameters, inspiration is likely to be drawn from Annex I to the ESPR. Product parameter b) in that Annex, which is 'ease of repair and maintenance', contains all the criteria that are also the basis of the French repairability score. The European Commission's Joint Research Center has already developed a scoring system (Repair Scoring System (RSS)). [321] Other assessment methods have been developed in technical literature (e.g., the Assessment Matrix for ease of Repair (AsMeR) developed by KU Leuven[322]) or by stakeholders (e.g., iFixit. Smartphone Repairability Scores[323]). Finally, a European standard has been created for general methods for the assessment of the ability to repair, reuse and upgrade energy-related products (EN45554).[324] The first repairability score established at the level of the European Union will relate to smartphones and tablets put on the European Union market from 20 June 2025 onwards.[325]

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[319] This is information that the manufacturer has provided to the trader or has otherwise intended to make readily available to the consumer before the conclusion of the contract, by indicating it on the product itself, its packaging or tags and labels that the consumer would normally consult before concluding the contract (recital 33 ECGTD).

[320] It is natural that the repairability score is differentiated by product group. Establishing a universal scoring system that applies across diverse product groups would be challenging. Different products may have unique repairability requirements and considerations. Developing standardized criteria that adequately capture these differences while remaining applicable and meaningful across various products is a complex task.

[321] see Communication from the Commission - Ecodesign and Energy Labeling Work Plan 2022-2024, (2022/C 182/01), p. 7.

[322] P. VANEGAS *et al.*, *Study for a Method to Assess the Ease of Disassembly of Electrical and Electronic Equipment: Method Development and Application to a Flat Panel Display Case Study (EUR 27921- JRC101479)*, Luxembourg, Publications Office of the European Union.

[323] https://www.ifixit.com/smartphone-repairability.

[324] European Committee for Electrotechnical Standardization, Brussels, Belgium, 2021

[325] Commission Regulation (EU) 2023/1670 of 16 June 2023 laying down ecodesign 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 L* 31 August 2023, vol. 214, p. 47-93.

2.5.2.3.2 French and Belgian repairability scores and the TRIS-procedure

With the repairability score, the European Commission aims to establish a unified legislative framework for the European Union market.[326] Several Member States, including Belgium, are considering the idea of introducing such a repairability score.[327] In France, this score already exists in the form of the *indice de réparabilité*, introduced by the Loi Anti-Gaspillage.[328] The persons who place certain electrical or electronic products on the French market must affix the repairability score to these products. From 1 January 2021, the obligation applies to mobile phones, laptops, lawn mowers and washing machines with front loader.[329] From 4 November 2022 onwards, the obligation is extended to top-loading washing machines, dishwashers, vacuum cleaners, and high-pressure cleaners. From 2024 onwards, the repairability score is to transform into a more general *indice de durabilité* (sustainability score), which also measures the durability of the product (*la fiabilité et la robustesse*). The French repairability score is calculated based on five parameters: availability of repair information, simplicity of disassembly, availability of spare parts, price of spare parts and product-specific characteristics. Each parameter is scored on twenty points. The total score is then divided by ten to obtain a score on a ten-point grading scale. This score is applied to products as a colored label (with the colors indicating varying degrees of repairability). Regarding products with digital elements[330], French public authorities are obligated to consider the repairability score in their public procurement policy.[331]

For some decades already, there has existed the obligation to notify draft technical regulations to the European Commission via the TRIS procedure ('Technical Regulation Information System') to prevent new national legislation from conflicting with the internal market and European Union law (e.g., harmonization measures).[332] The French and Belgian repairability scores serve as a good example of such technical requirements, as they can significantly influence the composition or nature of the product or its marketing. Currently, a Member State

[326] The European Commission notes in the explanatory memorandum to the ECGTD (p. 5-6) that the Consumer Rights Directive fully harmonizes the rules on pre-contractual information obligations in the case of distance or off-premises contracts, so that "Any new national legislation within the scope of these Directives would go against the fully harmonised legal framework." The French repairability score is an example of such novel legislation. The French legislation has a wider scope than merely the distance or off-premises contracts.

[327] This is measure 2 in the Federal Circular economy Action Plan (more on this to follow). Through the TRIS procedure mentioned later, Belgium has informed the European Commission of a draft law on the introduction of a repairability and durability score and the dissemination of information on the duration of software compatibility of products and executive Royal Decrees (*wetsontwerp betreffende de invoering van een repareerbaarheids- en levensduurscore en de verspreiding van informatie over de duur van de softwarecompatibiliteit van producten en uitvoerende koninklijke besluiten*), see notification numbers 2022/0634/B, 2022/0635/B, 2022/0636/B, 2022/0637/B

[328] Article 16 Loi Anti-Gaspillage. For the ministerial implementing decree on how the score is to be calculated and displayed in general, see arrêté du 29 décembre 2020 relatif aux modalités d'affichage, à la signalétique et aux paramètres généraux de calcul de l'indice de réparabilité, *JORF* 31 December 2020, n° 0316.

[329] See as an example of a ministerial decree on how the score is to be calculated and displayed for a specif category, arrêté du 29 décembre 2020 relatif aux critères, aux sous-critères et au système de notation pour le calcul et l'affichage de l'indice de réparabilité des lave-linges ménagers à chargement frontal, *JORF* 31 December 2020, n° 0316.

[330] These are the 'classic' electronic products, such as laptops and smartphones, but also products that can connect to the internet, such as robot vacuum cleaners, smart household appliances, et cetera

[331] Article 15 loi n° 2021-1485 du 15 novembre 2021 visant à réduire l'empreinte environnementale du numérique en France, *JORF* 16 November 2021, n° 0266. For a guide for public authorities on how to put this obligation into practice, see Ministère de la Transition écologique et de la Cohésion des territoires, La prise en compte de l'indice de réparabilité dans les achats publics, December 2022, https://www.ecologie.gouv.fr/sites/default/files/Guide%20IR%20Achat%20durable%202022.pdf.

[332] See about this procedure in general and specifically about the notification of the French and Belgian repairability scores based on this procedure, E. TERRYN and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear. This section of the research report is the work of these authors.

wishing to impose new technical requirements for non-harmonized product characteristics is to follow the notification procedure established by Directive 2015/1535. [333] Before Member States can adopt such draft legislation, they are to notify it to the European Commission (article 5.1). The notification is followed by a three-month [334] standstill period during which the implementation of the draft is postponed so that the European Commission and the other Member States can examine the draft legislation and make comments (article 6.1). In the absence of comments by the European Commission and the other Member States, the draft legislation may be implemented at the end of the three months. If there is reason to believe that the draft legislation could hinder free movement, the European Commission and the other Member States deliver a reasoned opinion to the Member State concerned, which extends the initial standstill period by several months (article 6.2). Subsequently, the Member State concerned informs the European Commission of the actions it proposes to take on such detailed opinions (article 6.2). Even if there is no suspicion of an infringement, the European Commission and the other Member States may make comments, which the Member State concerned is to take into account as far as possible (article 5.2). The definitive text is to be communicated by the Member State to the European Commission (article 5.3).

Both the French and Belgian repairability scores have gone through the TRIS procedure, with different results. Both national scores were mainly examined in the light of the harmonizing Ecodesign Directive (and not, for example, the Consumer Rights Directive). The European Commission has not voiced a detailed opinion on the French repairability score, nor was the standstill period extended. As a result, the French legislation entered into force on 1 January 2021.

However, following examination of the Belgian draft legislation, the European Commission did express a detailed opinion, as it considers that the minimum requirements for repairability and durability infringe the existing harmonizing legislation.[335-336] In addition, the draft act provides for the introduction of several specific criteria relating to the repairability score[337], some of which, according to the European Commission, would overlap with the requirements imposed by three specific regulations. [338] For example, for television sets, the availability of spare

[333] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. The procedure was established in 1983 by Council Directive 83/189/EEC, later codified by Directive 98/34/EC of 22 June 1998 and amended by Directive 98/48/EC of 20 July 1998, (mainly to extend its application to information society services).

[334] The time limit may be extended if it appears that the subject matter of the technical rules relates to a proposal for a harmonization measure. See Article 6.3 and 6.4 Directive 2015/1535.

[335] Among other things, the European Commission raises objections to the minimum requirements set out in the draft Royal Decree for household washing machines, household dishwashers and television sets, as these products are already subject to the following Ecodesign implementing regulations: (EU)2019/2023 as regards household washing machines, (EU)2019/2022 as regards household dishwashers and (EU)2019/2021 as regards electronic displays. See Communication from the Commission - TRIS/(2022) 04493, p.2.

[336] The Belgian draft legislation notified through the TRIS procedure also includes an obligation for the manufacturer and the trader to inform the consumer about the maintenance of software compatibility. Regarding this obligation, the European Commission points out in its detailed opinion that for smartphones and tablets this obligation is already contained in the relevant implementing regulations of the Ecodesign Directive. Thus, this obligation stands in the way of an already harmonized matter, see Communication from the Commission - TRIS/(2022) 04493, p. 4.

[337] Namely: (1) The availability of technical information and maintenance and repair manuals. (2) The ease with which the product concerned can be disassembled. (3) The availability on the market of spare parts and their delivery time. (4) The price of spare parts. (5) Other criteria specifically related to the product (see article 4.1) of the draft law).

[338] In particular, the first three criteria, see Communication from the Commission - TRIS/(2022) 04493, p.2.

parts[339], the delivery times for spare parts[340], the availability of repair information[341] and the ease of dismantling of products[342] are regulated in Regulation (EU)2019/2021.

The European Commission also considers the introduction of longevity score with a minimum requirement to place a product on the market to be contrary to existing ecodesign requirements[343]. According to the European Commission, the existing ecodesign requirements for vacuum cleaners already contain longevity-related requirements on the operational motor lifetime and the durability of vacuum cleaner hoses.[344] As a result, the European Commission considers that a minimum requirement covering these two aspects would come into conflict with existing ecodesign requirements.[345] Furthermore, the European Commission notes that even though some products listed in the draft legislation do not yet fall under the scope of European requirements concerning repairability, these products are mentioned in the new Ecodesign and Energy Labeling Work Plan 2022-2024.[346] Part of this work plan is to investigate the possibility of introducing a repairability score for products such as smartphones and tablets. Thus, the European Commission considers that the requirements for these products will likely be covered by future harmonization measures. It also points out (without clearly taking position) that the obligation to calculate and display the repairability score of certain electrical and electronic products in order to be able to place them on the Belgian market may restrict access to the Belgian market in a way that is contrary to article 34 TFEU (on quantitative restrictions on market access in a Member State).[347]

Although the European Commission does not elaborate on this in the detailed opinion, questions could also have been raised about the compatibility of the Belgian draft law with the Consumer Rights Directive. The Consumer Rights Directive exhaustively harmonizes pre-contractual information obligations in the case of distance or off-premises contracts (articles 4 and 6 Consumer Rights Directive). Only for other contracts are Member States allowed to create additional obligations (article 5.4 Consumer Rights Directive). The introduction of a repairability score in a general way, for all types of sales, following the French example, could therefore possibly be considered not to be in line with European Union legislation (although the European Commission has not expressed any reservations it might have about the French legislation). At the least, this legislation should be interpreted in such a way that it does not apply to distance or off-premises contracts. If the Belgian repairability score as presented in the TRIS-procedure

[339] Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down ecodesign 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, Annex II(D)(5)(a)

[340]Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down ecodesign 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, Annex II(D)(5)(c)

[341] Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down ecodesign 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, Annex II(D)(5)(b)

[342] Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down ecodesign 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, Annex II(D)(1)

[343] Communication from the Commission - TRIS/(2022) 04493, p.3.

[344] *Ibid.*, p. 3.

[345] *Ibid.*, p. 2-3.

[346] Communication from the Commission - Ecodesign and Energy Labeling Work Plan 2022-2024, (2022/C 182/01). In particular, "household vacuum cleaners, wired, cordless and robots", "smartphones" and "laptops including digital tablets", see Communication from the Commission - TRIS/(2022) 04493, p 2-3.

[347] *Ibid.*, p. 4.

were implemented as a mandatory label on the products themselves or their packaging, it can be assumed that even if Belgian legislation were not to apply to this type of sale in theory, there would be a Spillover effect in practice. A manufacturer or trader is likely to apply this label to all products to avoid the administrative burden of two separate product lines.

The federal Minister of Climate, the Environment, Sustainable Development and Green Deal Zakia Khattabi has adjusted the draft legislation to meet the criticism of the European Commission. In the final draft version of this legislation, agreed upon by the Council of Ministers on 2 June 2023, the minimum requirements to place a product on the market have been omitted. Instead, the legislation focusses solely on the repairability index. The explanatory memorandum to this new draft explains how the Belgian legislation aligns with the European initiatives and the initiatives of other national Member States. It mentions how (1) it is "self-evident" that if a repairability score becomes available at the level of the European Union, it will supersede the Belgian index and (2) how the legislation will be implemented in close consultation with neighboring countries such as the Netherlands, Luxemburg and in particular France. Article 11 of the draft legislation creates a Belgian 'consultation and knowledge' platform whose task is to exchange and stimulate knowledge on *inter alia* methods to gauge repairability. Even though this is not clear from the text of this article itself, the explanatory memorandum mentions that foreign governments (such as the French) will be invited to join this platform. This consultation of and cooperation with other countries should be understood as a means to ensure *de facto* European harmonization to the largest extent. Two concrete examples of this aspiration to harmonization are that, first, the Belgian repairability index is calculated in exactly the same way as the French one (five product aspects scored on a scale of twenty points, added up and divided by ten to reach a single score) and, second, that if the royal decrees that implement the legislation impose the use of pictograms, these pictograms are to be as uniform as possible with the French pictograms, including their color scheme.

2.5.2.3.3 Analysis

Pre-contractual information obligations about the repairability of a product are important in the marketing and pre-contractual stage to resist and postpone premature obsolescence.[348] With information on the repairability of a product in hand, an end-user can estimate before purchasing a product how easy it will be to repair the product or to have it repaired and thus get an idea of its expected lifespan.

As mentioned before, the European Parliament had suggested a general obligation of manufacturers to provide traders with all relevant information needed to fulfill their obligations to disclose information. Repair information would have fallen under that general obligation. This general obligation is not part of the Provisional agreement ECGTD. However, for the reasons outlined earlier, the introduction of this general obligation would have been commendable. Mandating this disclosure serves the goal of consumer protection and, in turn, allows more informed transactional decisions and promotes competition for sustainable products (i.e., products whose lifespan will be longer than that of similar products).

When devising a scoring system for repairability, the European Commission will have to reconcile two conflicting demands.

[348] See the previously explained framework of A. MICHEL.

- On one hand, the repairability score is meant to inform consumers and help them compare the repairability of different products within the same product group. To avoid overloading consumers with information, especially considering all the other information provided to them, such as on energy efficiency, a simple numerical score that aggregates different product parameters is the easiest tool to achieve these goals.
- On the other hand, the repairability score is also intended to enhance transparency and incentivize manufacturers to prioritize repairability in product design and manufacturing. Knowing that repairability is a factor considered by consumers during the purchasing process, manufacturers may pay more attention to eco-design that allows for easy maintenance and repair. However, a single score aggregating different product parameters presents challenges in terms of transparency and accuracy regarding a product's repairability.
    - First, the simplicity of a single numerical score may obscure the underlying factors that contribute to a product's repairability. Consumers may not fully understand how the score is calculated or which specific aspects of repairability are being assessed.
    - Moreover, there is the risk common to all 'aggregating' scores: manufacturers may attempt to manipulate scoring systems to inflate their products' repairability scores. They could prioritize optimizing certain parameters that contribute to the overall score, such as ease of disassembly, while neglecting other equally important aspects of repairability, such as the availability of spare parts or repair information while hiding behind the single score. A product scoring well across all product parameters, without excelling in any single one, may be perceived as more genuinely repairable compared to products where a few parameters are emphasized at the expense of others. For example, consider two products: product A and product B. Product A performs moderately well across various repairability parameters, such as ease of disassembly, availability of spare parts, availability of repair information, and repairability over time. While it may not excel in any single parameter, its overall performance indicates a balanced approach to repairability, and no single product parameter acts as a bottleneck for actual repair. On the other hand, product B focuses heavily on optimizing two specific parameters, such as ease of disassembly and availability of repair information. As a result, it may receive a higher overall score than product A. However, the price of its spare parts is excessively high, which means that in practice there is a significant hurdle for actual repair.

Thus, the European Commission will have to walk a fine line between overloading the consumer with information and letting manufacturers of the hook as regards strict information requirements.

2.5.2.4 Software updates

2.5.2.4.1 General background

Today, many products contain digital elements. The installation of the digital content or the digital service is then usually necessary for consumers to use the product for the purpose for which they are intended (recital 34 and article 2.5, point b) Sale of Goods Directive). Furthermore, software updates of that digital element are a necessary tool in order to ensure that the products are able to function in the same way that they did at the time of delivery

(recital 31 Sale of Goods Directive).[349] Traders are, therefore, obligated to provide such necessary updates (recital 30 and article 7.3 Sale of Goods Directive; recital 47 and article 8.2 Digital Content Directive[350]). Where the sales contract provides for a single act of supply of the digital content or digital service, they are obligated to do so for the period of time that the consumer may reasonably expect given the type and purpose of the products and the digital elements and taking into account the circumstances and nature of the contract. Where the contract provides for a continuous supply over a period of time, they are obligated to do so for at least two years (the period during which traders are liable for any lack of conformity) or the period of time during which the digital content or digital service is to be supplied under the contract if the contract provides for a continuous supply for more than two years.

Software updates are an important aspect of the lifespan of a product with digital elements. Even if the hardware is in perfect condition, its usability decreases if it is not sufficiently updated. The availability of software updates is vital for the extension of the lifespan of products. At present, the comparability of products in terms of the availability of updates is not regulated.[351] The ECGTD fills that gap.

Traders are obligated to inform consumers of the minimum period during which the manufacturer of a product with digital elements or (provider of digital services) undertakes to provide software updates for the products (or the digital service) (new articles 5.1, point ec) and 6.1, point lc) Consumer Rights Directive). This obligation only applies to the information made available by the manufacturer (or the provider). Traders are not expected to actively look for this information themselves (recital 29 ECGTD). There is no obligation to inform the consumer that the manufacturer has not provided that information.

2.5.2.4.2 Analysis

Pre-contractual information obligations about software updates are important in the marketing and pre-contractual stage to resist and postpone premature obsolescence.[352] With information on the period during which software updates will be provided, an end-user can estimate before purchasing a product with digital elements how long the operability of the product is guaranteed and get an idea of its expected lifespan.

As mentioned before, the European Parliament had suggested a general obligation of manufacturers to provide traders with all relevant information needed to fulfill their obligations to disclose information. Information on software updates would have fallen under that general obligation. This general obligation is not part of the Provisional agreement ECGTD. However, for the reasons outlined earlier, the introduction of this general obligation is commendable. Mandating this disclosure serves the goal of consumer protection and, in turn, allows more informed transactional decisions and promotes competition for sustainable products (i.e., products whose lifespan will be longer than that of similar products).

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[349] The new article 2, point 14e Consumer Rights Directive defines 'software update' as a free update, including a security update, that is necessary to keep goods with digital elements, digital content and digital services in conformity in accordance with the Sale of Goods Directive and the Digital Content Directive.

[350] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ L* 22 May 2019, vol. 136, p. 1-27 (hereinafter abbreviated as 'Digital Content Directive').

[351] Explanatory memorandum to the ECGTD, p. 4.

[352] See the previously explained framework of A. MICHEL.

2.5.2.5 Sustainable delivery options

2.5.2.5.1 General background

The ECGTD alters the obligation to inform the consumer about the arrangements for delivery for distance and off-premises contracts (found in article 6.1, point g) Consumer Rights Directive), which can be seen as a minor attempt to greening e-commerce. The trader is to inform consumers of the arrangements for delivery including where available environmentally friendly delivery options. Recital 33a ECGTD offers some examples of such options: the delivery of products by cargo bikes or electric delivery vehicles or the possibility of bundled shipping options.

2.5.2.5.2 Analysis

The obligation to inform the consumer about the existence of 'environmentally friendly delivery options' can be traced back to the amendments of the Council of the European Union.[353] Alternatively, the European Parliament had proposed to obligate the trader to inform the consumer about the existence of 'delivery options that emit less CO_2'.[354] The final version of the ECGTD has opted for the approach of the Council of the European Union.

That approach of the Council of the European Union is more flexible and allows for considering environmental impacts other than greenhouse gas emissions (specifically CO_2). For instance, delivering products using cargo bikes not only reduces emissions of CO_2, a greenhouse gas contributing to climate change, but also decreases emissions like NO_x that contribute to fine dust particles affecting local air quality. Cargo bikes, being lighter, also release fewer microplastics from tire wear, contributing less to air pollution and local environmental harm. In some aspects, this obligation will be easily to fulfill.

However, the term 'environmentally friendly' is complex. It is polycentric, involving various criteria, making it not always easily operable (hence, why the 'environmentally friendly' is given as an example of a generic environmental claim in the ECGTD (more on this to follow)). To rank activities an aggregate score is needed involving choices in the weighing of different criteria. For example, electric delivery vehicles generally emit less greenhouse gasses than equivalent vehicles with combustion engines because of their increased energy efficiency. However, as electric vehicles generally weigh more and are able to accelerate faster their tires and braking pads wear down more quickly meaning that they pollute more microplastics.[355] Thus, the determination of whether delivery by electric vehicles is more 'environmentally friendly' than delivery by other vehicles requires a determination of the relative weight of the criterion 'microplastics pollution' when compared to 'emission of greenhouse gasses'. Proper guidance on how to implement this requirement will be necessary, with sufficient detail on the method that is to be used (e.g., this method could entail that criteria are ranked as is according to policy priorities (for example, the avoidance of microplastics pollution could be regarded as more important than the prevention of greenhouse gas emissions) or this method could take the relative improvements/deteriorations into account (for example, a drop in greenhouse gas emissions by 50% could outweigh an increase in microplastics pollution by 15%) or any

[353] Amendments ECGTD Council of the EU, p. 23.
[354] Amendments ECGTD Parliament, amendment 55.
[355] Y. ANDERSSON-SKÖLD *et al.*, *Microplastics from tyre and road wear. A literature review*, Swedish National Road and Transport Research Institute, Linköping, 2020 p. 63 and 65.

combination of methods).[356] At the same time, some delivery options are very clearly more environmentally friendly without much need for additional guidance. The example of bundled shipping options given by the European Union legislature is a great example thereof, as bundling shipping is without a doubt more environmentally friendly. It cuts back on the environmental costs of the 'last mile' of delivery (i.e., the final stretch of a parcel's journey from a distribution center to the customer).

The approach of the European Parliament had the advantage that it focused on one single criterion that is relatively easy to measure, making it more easily verifiable, when compared to the broader 'environmentally friendly' (which is not the same as saying that this criterion is easy to measure). Care will have to be taken to avoid possible confusion of consumers and the possibility of greenwashing.

2.5.3 Unfair commercial practices

2.5.3.1 General overview changes

Substantively, the ECGTD amends article 6 Unfair Commercial Practices Directive.[357-358] This article contains the general criteria to determine whether an action is misleading.[359] The ECGTD also amends article 7 Unfair Commercial Practices Directive. This is the general article used to determine whether an omission is misleading.[360]

In addition to these amendments to the general articles, the ECGTD also amends the so-called blacklist of unfair commercial practices in Annex I to the Unfair Commercial Practices Directives. These are commercial practices that are considered unfair in all circumstances, without the need for a case-by-case assessment pursuant to general articles. The ECGTD adds twelve commercial practices to this blacklist (see Annex I to the ECGTD).

2.5.3.2 Greenwashing[361]

2.5.3.2.1 General background

Because of growing awareness of the environmental impact of their behavior among consumers, businesses like to market their products and services as sustainable. A circular

[356] Both the European Parliament and the Council of the European Union stress in general that to facilitate the proper application of the ECGTD, it is important that the European Commission keeps the guidance documents for the Sale Unfair Commercial practices Directive and the Consumer Rights Directive updated to take into account the content of the ECGTD, see Amendments ECGTD Parliament, amendment 26 (new recital 36a) and Amendments ECGTD Council of the EU, p. 18 (new recital 36a).

[357] The ECGTD also adds some definitions to article 2 of the Unfair Commercial Practices Directive.

[358] See for a commentary on the amendments by the ECGTD, P. VERBRUGGEN and J. VAN VLIET, "Duurzaamheid in het buitencontractueel aansprakelijkheidsrecht. De belofte van drie Europese wetgevingsvoorstellen", *WPNR* 2023, p. (276) 276 and following.

[359] The text of the article reads as follows: "A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise".

[360] The text of the article reads as follows: "A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.."

[361] See earlier the heading 'Three focal points'. See about this phenomenon in detail C. BORUCKI, "Als de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. 31-55; E. VAN GOOL, "'Climate-washing': B2C

economy requires consumers to buy as many sustainable products as possible to the detriment of unsustainable products (recital 1 ECGTD). A ban on greenwashing prevents businesses from unduly inducing consumers to make an unsustainable purchase. Fair, understandable and reliable environmental claims should reduce the risk of greenwashing (recital 1 ECGTD).

The phenomenon of greenwashing has not gone unnoticed within the European Union.[362-363] Already in 2000 the European Commission's Directorate-General for Health and Consumer Protection drew up guidelines for the formulation and evaluation of environmental claims.[364] Today, the Unfair Commercial Practices Directive already prohibits greenwashing.[365] This follows clearly, among other things, from the guidelines for the interpretation and implementation of that directive, in which the European Commission devotes a chapter to environmental claims.[366] A recent application of the Unfair Commercial Practices Directive and its guidelines can be found in the judgement of the court of Amsterdam of 20 March 2024 in which the court assesses nineteen claims of the Dutch aviation company KLM that flying can take place in a sustainable fashion and that greenhouse gas emissions offsetting can diminish part of the environmental impacts of flying. The court finds that most of those claims are misleading.[367]

Currently, greenwashing is only prohibited by the general articles of the Unfair Commercial Practices Directive, which in turn are worded vaguely when it comes to sustainability. Thus, a

communicatie in de klimaatcrisis beoordeeld in het licht van de oneerlijke handelspraktijken, soft law en nieuwe wetgeving", *DCCR* 2023, p. 3-60; B. KEIRSBILCK, E. TERRYN, L. VAN ACKER, The legality of "100 % recycled" and "100 % recyclable" claims on water bottled in plastics – legal analysis under EU Directive 2005/29/EC on unfair business-to-consumer commercial practices - Study accompanying the external alert submitted by BEUC to the CPC-Network, October 2023, 28p.

[362] At the level of the national Member States, France, for example, has already implemented legislation to curb greenwashing. Businesses that make claims about the climate neutrality of their products or organization are obligated to draw up a general report with three annexes on that claimed neutrality and to communicate it to the consumer, see decree n° 2022-539 du 13 avril 2022 relatif à la compensation carbone et aux allégations de neutralité carbone dans la publicité, *JORF* 14 April 2022, n° 0088.

[363] Greenwashing is not only the subject matter of European Union *legislation.* The advertising industry is characterized by self-regulation, with varying degrees of importance in national legal systems. Both at the international and at the national level, the industry itself draws up codes of conduct and/or enforces these codes of conduct and the applicable legislative framework. The different codes draw inspiration from the ICC Code for Advertising and Marketing Communication of the International Chamber of Commerce. Chapter E of that code focuses on environmental claims in marketing communications. In Belgium, the Jury for Ethical Practices in Advertising (*Jury voor Ethische Praktijken inzake reclame*), as an independent self-regulation body, ensures that advertising complies with, among other things, the Belgian Environmental Advertising Code (*Belgische Milieureclamecode*) drawn up by the European Commission for Environmental Labeling and Advertising (*Commissie voor Milieuetikettering en Milieureclame*), which was established by Royal Decree.

[364] J.R. PALERM, *Guidelines for the formulation and evaluation of environmental claims*, Brussels, European Commission, 2000, Report No 67/94/22/1/00281, http://ec.europa.eu/consumers/archive/cons_safe/news/green/ guidelinesnl.pdf.

[365] Explanatory Memorandum to the ECGTD, p. 3: "The general rules in the Unfair Commercial Practices Directive on misleading practices can be applied to greenwashing practices when they negatively affect consumers, using a case-by-case assessment."; B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies*, European Parliament, Luxembourg, 2020, p. 11.

[366] Commission Notice Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 2021/C 526/01, *OJ C* 29 December 2021, vol. 526, p. 72 and following (hereinafter abbreviated as 'Guidelines Unfair Commercial Practices Directive') (in the previous version of 25 May 2016, SWD(2016) 163 final, environmental claims were also mentioned on p. 105-120). Important to note is that these guidelines are not legally binding. Only the European Court of Justice can give a binding interpretation of European Union legislation, see the previous version of the guidelines (SWD(2016) 163 final), p. 5; C. PAVILLON, *Open normen in het Europees consumentenrecht. De oneerlijkheidsnorm in vergelijkend perspectief*, Deventer, Wolters Kluwer, 2011, 337, no. 479.

[367] Rechtbank Amsterdam 20 March 2024, ECLI:NL:RBAMS:2024:1512.

case-by-case assessment is always required. [368] With the ECGTD, the European Union legislature wishes to sharpen the Unfair Commercial Practices Directive's teeth. In the first place, it adds more precise guidelines regarding sustainability to the general articles of the directive (i.e., aiding in the case-by-case assessment)). In the second place, it supplements the blacklist of the directive with several practices of greenwashing (i.e., making clear which practices of greenwashing are unfair in all circumstances without the need for a case-by-case assessment). [369]

First, the ECGTD amends article 6 Unfair Commercial Practices Directive. This article contains the general criteria to determine whether an action is misleading. The ECGTD adds two new product characteristics to article 6.1, point b). Henceforth, 'environmental or social characteristics' and 'circularity aspects such as durability, repairability and recyclability' are *explicit* elements in relation to which a commercial practice may not lead the average consumer to take a decision on a transaction that he would not otherwise have taken. Als the list of product characteristics in this general article is non-exhaustive, these novel product characteristics were previously only *implicitly* included in the list. 'Environmental and social characteristics' of a product should be considered to have a broad meaning, including environmental and social aspects, impacts and performance (recital 3 ECGTD). [370] In addition, the ECGTD extends article 6.2 Unfair Commercial Practices Directive as follows.

- Is potentially misleading, making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound and targets and targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings shall be made available to consumers. New article 2 o) Unfair Commercial Practices Directive defines 'environmental claim' as any message or representation that is not mandatory under European Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, and which states or implies that a product, product category, brand or trader has a positive or no impact on the environment or is less damaging to the environment than other products, brands or traders, respectively, or has improved their impact over time. The third-party expert to whom the implementation plan is to be submitted should be independent from the trader, free from any conflicts of interest, with experience and competence in environmental issues and should be enabled to monitor regularly the progress of the trader with regard to the commitments and targets, including the milestones for achieving them (recital 4 ECGTD).

[368] If a commercial practice is not included in the blacklist, it is prohibited only after a case-by-case assessment showing that it is unfair, see CJEU 9 November 2010, C-540/08, ECLI:EU:C:2010:660, §35; CJEU 30 June 2011, C-288/10, ECLI:EU:C:2011:443, §38; CJEU 2 September 2021, C-371/20, ECLI:EU:C:2021:674, §34.

[369] In this regard, see explanatory memorandum to the ECGTD, p. 3 "[...] confirmed there is a need to strengthen the rules to facilitate enforcement in this area."

[370] The social characteristics do not fall within the focus of this research report. The social characteristics of a product throughout its value chain can relate for example to the quality and fairness of working conditions of the involved workforce, such as adequate wages, social protection, work environment safety and social dialogue; to the respect for human rights; to equal treatment and opportunities for all, such as gender equality, inclusion and diversity; to contributions to social initiatives; or to ethical commitments, such as animal welfare (recital 3 ECGTD).

- Is potentially misleading, advertising benefits to consumers that are irrelevant and do not result from any feature of the product or business as this may mislead consumers into believing that these benefits are more beneficial to consumers, the environment or society than other products or traders' businesses of the same type. As an example, a trader may not advertise a particular brand of bottled water as gluten-free or claim that the own paper sheets do not contain plastic. With the introduction of this commercial practice, the European Union legislature explicitly makes it clear that there is no room in the general Unfair Commercial Practices Directive for the unjustified suggestion of uniqueness of a product.[371] This principle already exists explicitly in other legislation, such as the Food Information Regulation.[372-373]

Second, the ECGTD amends article 7 Unfair Commercial Practices Directive. This is the general article used to determine whether an omission is misleading. The article provides an overview of information that is considered material in the case of specific commercial practices and the omission of which may lead to the commercial practice being considered misleading. The ECGTD adds the following specific commercial practice and related key information to the overview. Where a trader provides a service which compares products and provides the consumer with information on environmental or social characteristics or on circularity aspects, such as durability, reparability or recyclability, of the products or suppliers of those product, information about the method of comparison, the products which are the object of comparison and the suppliers of those products, as well as the measures in place to keep that information up to date, shall be regarded as material information. The European Union legislature clarifies that the comparison must be objective. Traders should compare products which serve the same function, using a common method and common assumptions, and comparing material and verifiable features of the products being compared (recital 6 ECGTD).

Third, in addition to these amendments to the general articles, the ECGTD adds new commercial practices to the blacklist of Unfair Commercial Practices Directive. Today, environmental claims can already fall under the generally worded points 1, 2, 3, 4 and 10.[374] The ECGTD adds five points that explicitly relate to greenwashing (2a, 4a, 4b, 4ba and 10a). Two other points meant to combat commercial practices stimulating premature obsolescence are tangential to greenwashing (23f and 23g).

- A first prohibited commercial practice is displaying a sustainability label that is not based on a certification scheme or has not been established by public authorities (2a), with a

[371] It can be argued that this is already an implicit principle in the Unfair Commercial Practices Directive, see C. BORUCKI, "Wanneer de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. (31) 46-47, nos. 17-18.
[372] Art. 7, 1, c) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, *OJ L* 22 November 2011, vol. 304, p. 18-63.
[373] In the self-regulation codes on environmental claims of the advertising industry, this is already an explicit principle. Article D4 of the Code of the International Chamber of Commerce stipulates that generic features or ingredients, which are common to all or most products in the category concerned, should not be presented as if they were a unique or remarkable characteristic of the product being promoted. Article 12 of the Belgian Environmental Advertising Code stipulates that advertising may not claim false superiority over products or services with similar environmental effects.
[374] See C. BORUCKI, "Als de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. 31-5, p. (31) 38-39, no. 8.

'sustainability label' being any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process, or a business with reference to its environmental or social aspects or both, not including mandatory labels required in accordance with European Union or national law (new article 2 r) Unfair Commercial Practices). In other words, it is not permissible to attach just any label to a product. The certification scheme must meet minimum transparency and credibility requirements (recital 7 ECGTD). These minimum requirements are found in the definition of 'certification scheme' in the new article 2, point s) Unfair Commercial Practices Directive:

- the scheme is open under transparent, fair, and non-discriminatory terms to all traders willing and able to comply with the scheme's requirements;
- the scheme's requirements are developed by the scheme owner in consultation with relevant experts and stakeholders;
- the scheme sets out procedures for dealing with non-compliance and foresees the withdrawal or suspension of the use of the sustainability label by the trader in case of non-compliance with the scheme's requirements; and
- the monitoring of compliance by the trader with the scheme's requirements is subject to an objective procedure and carried out by a third party whose competence and independence from both the scheme owner and the trader is based on international, European Union or national standards and procedures

The displaying of sustainability labels remains possible without a certification scheme when labels are established by a public authority or in case of additional forms of expression and presentation of food in accordance with article 35 Food Information Regulation (recital 7 ECGTD and proposed article 2, point r) Unfair Commercial Practices Directive). These two exceptions complement point 4 of the blacklist of the Unfair Commercial Practices Directive, which prohibits claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorized by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorization. A final piece of information about sustainability labels is that in cases where the displaying of a sustainability label involves a commercial communication that suggests or creates the impression that a product has a positive or no impact on the environment or is less damaging to the environment than competing products, that sustainability label also should be considered as constituting an environmental claim (recital 8 ECGTD).

- A second prohibited commercial practice is making a generic environmental claim for which the trader is not able to demonstrate recognized excellent environmental performance relevant to the claim (4a).[375] A generic environmental claim is any environmental claim made in written form or orally, including through audiovisual media, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium such as the same advertising spot, product's packaging or online selling interface (new article 2, point q) Unfair Commercial Practices Directive; see also recital 9 ECGTD). Examples of such generic environmental claims are 'environmentally friendly', 'eco-friendly', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly', 'gentle on the environment', 'carbon friendly', 'energy efficient', 'biodegradable', 'biobased' or similar

[375] For more background on generic environmental claims, see C. BORUCKI, "Als de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. 31-5, p. (31) 41 and following, nos. 13 and following.

statements that suggest or create the impression of excellent environmental performance (recital 9 ECGTD). Moreover, a trader should not make a generic claim such as 'conscious', 'sustainable' or 'responsible' exclusively based on recognized excellent environmental performance because such claims relate to other aspects in addition to the environmental aspect, such as social characteristics (recital 9 ECGTD). Generic environmental claims are only permitted if excellent environmental performance can be demonstrated. Traders can demonstrate outstanding environmental performance by compliance either with the EU Ecolabel or with national officially recognized eco-labeling schemes, or by compliance with the top environmental performance for a specific environmental characteristic in accordance with other applicable European Union legislation, such as a class A from the Energy Labeling Regulation (recital 10 ECGTD). Concretely, a trader would be allowed to promote a product falling under that class A as 'energy-efficient'. A point of attention is that a sufficiently specific claim does not fall under this prohibition of generic environmental claims. For example, the claim 'biodegradable', referring to a product, would be a generic claim, whilst claiming that 'the packaging is biodegradable through home composting in one month' would be a specific claim, which does not fall under this prohibition. Similarly, 'climate-friendly packaging' is generic, while '100% of energy used to produce this packaging comes from renewable sources' is not (recital 9 ECGTD). In recital 9 ECGTD the European union legislature also pays attention to 'indirect' or 'implicit' greenwashing. Indirect greenwashing refers to the use of green colors and/or environmental imagery such as pictures of nature on product packaging or advertising to suggest that a product is eco-friendly or sustainable, without providing any meaningful information about the product's actual environmental impacts. The European Union legislature notes that a claim combined with implicit claims such as colors or images could constitute a generic environmental claim altogether (recital 10 ECGTD).

- A third prohibited commercial practice is claiming that an environmental claim applies to the entire product or the entire trader's business when in fact the claim relates only to a certain aspect of the product or a specific, unrepresentative activity of the trader's business (4b). This would be the case for example when a product is marketed as 'made with recycled material' giving the impression that the entire product is made of recycled material, when in fact it is only the packaging that is made of recycled material (recital 11 ECGTD). For the sake of clarity: traders are allowed to make environmental claims about a certain aspect of a product, if they make it clear to the consumer that the claim relates to only that aspect and not to the whole product.[376] An example concerning a trader's business, is the case where traders gives the impression that they are only using renewable energy sources when several of their business facilities still use fossil fuels. The European Union legislature stresses this limitation should not prevent traders to make environmental claims at the global level of their business if these claims are accurate and verifiable and do not overstate the environmental benefit, such as reporting a decrease of the use of fossil fuels at the global level of their business in the earlier example (recital 11 ECGTD). Encouraging businesses to engage in sustainable practices and allowing them to promote these efforts helps to incentivize and reward environmentally responsible behavior. If all types of self-promotion on the level of sustainability were banned, it could have adverse effects on sustainable endeavors. Banning such promotion might discourage businesses from investing in sustainability

[376] Explanatory memorandum to the ECGTD, p. 8.

initiatives altogether, as they would have no way to differentiate themselves from competitors or communicate their efforts to consumers. This is the opposite of the vision of the European Union legislature: sustainable products and services should be able to differentiate themselves in the market. The ECGTD (as well as the GCI) are meant to prevent that actors could unduly ride the coattails of those who genuinely make efforts to be more sustainable.

- A fourth prohibited commercial practice relates to greenhouse gas emissions offsetting. It is prohibited to claim based on greenhouse gas emissions offsetting[377], that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions (4ba) (to avoid 'climate washing'). The European Union legislature bans this practice because such claims mislead consumers by making them believe that such claims relate to the product itself, or the supply and production of that product, or as they give the false impression to consumers that the consumption of that product has no environmental impact, while this is not the case (recital 11a ECGTD). Such claims can only be allowed when they are based on the actual life cycle impacts of the product in question, and not based on greenhouse gas emissions offsetting outside the product's value chain, as the former and the latter are not equivalent. Examples of claims based on greenhouse gas emissions offsetting are 'climate neutral', 'CO_2 neutral certified', 'carbon positive', 'climate net zero', 'climate compensated', 'reduced climate impact', 'limited CO_2 footprint' among others. The European Union legislature stresses that this ban should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects, as long as they provide such information in a way that is not misleading (recital 11a ECGTD). The remark on desirable promotion of sustainable practices made before is relevant here too.
- A fifth prohibited commercial practice is presenting requirements imposed by law on all products within the relevant product category on the Union market as a distinctive feature of the trader's offer (10a). This prohibition could apply, for example, when a trader is advertising that a given product does not include a specific chemical substance while that substance is already forbidden by law for all products within that product category in the Union. A concrete example of this is farmers who grow maize and explicitly sells their products as 'fipronil-free', although the use of this pesticide has been restricted by the European Commission because of its harmful effects on the population of bees in the European Union.[378]

In addition to these five prohibited commercial practices, two practices that the European Union legislature views as halting premature obsolescence also fit somewhat into the category of greenwashing. Points 23f and 23g (more on this to follow) stipulate that products should not be presented as having a certain durability in terms of usage time or intensity or as allowing repair, if neither is true.

[377] This is not defined in the ECGTD. The European Parliament had suggested adding a definition of 'carbon offsetting' to the Unfair Commercial Practices Directive, stating it to mean the purchase of carbon credits or the provision of financial support for environmental projects, that aim to neutralize, reduce, compensate or inset the purchasers' own environmental impact, or that of their goods or services, see Amendments ECGTD Parliament, amendment 37.

[378] Commission Implementing Regulation (EU) No 781/2013 of 14 August 2013 amending Implementing Regulation (EU) No 540/2011, as regards the conditions of approval of the active substance fipronil, and prohibiting the use and sale of seeds treated with plant protection products containing this active substance, *OJ L* 15 August 2013, vol. 219, p. 22.

The GCI complements the ECGTD (more on this to follow).[379] It contains more specific requirements on the substantiation and communication of explicit environmental claims.

2.5.3.2.2 Analysis

The prohibitions of commercial practices outlined in this section fit within the strategy to resist premature obsolescence, especially in the marketing and pre-contractual life stage.[380] The pre-contractual information obligations of the ECGTD are intended to give consumers an idea of the sustainability of products and to ensure that they are not misled in this regard. This, in turn, ensures fair competition for sustainable products. Combating greenwashing through the Unfair Commercial Practices Directive entails a retrospective approach. This directive is meant to deter unfair commercial practices by allowing several actors to challenge them once they are being committed. Consumers, individually or collectively (via class actions or via consumer organizations), other economic operators (who are disadvantaged by those unfair commercial practices) and market authorities could all enforce the proposed rules on greenwashing. Thus, this retrospective approach is part of the holistic approach to combat premature obsolescence (with, for example, the ESPR as a prospective regulatory framework).

Some remarks can be made. First, regarding the new article 6.2, point e) Unfair Commercial Practices Directive on advertising benefits for consumers that are irrelevant and do not result from any feature of the product or trader's business, the use of the adjective 'irrelevant' warrants attention. Originally, the European Commission had proposed to ban advertising benefits for consumer that are considered as a common practice in the relevant market. The version of this ban in the end-version of the ECGTD can be traced back to the amendments of the Council of the European Union.[381] In the example given in the recitals that traders cannot claim that a particular brand of bottled pure water is 'gluten-free' (recital 5 ECGTD), it is clear that this claim is entirely irrelevant. There is not a single bottle of pure water for which it is necessary to advertise that it is gluten-free, because the chemical composition of pure water (H_2O) contains no gluten (usually the combination of prolamin and glutelin). The presence or absence of gluten is entirely irrelevant and will never be relevant (as the chemical composition of pure water is eternal). The reference to gluten could be substituted for any other concept (an equivalent claim is advertising the bottled water as the absurd 'wasp-free'[382]). In contrast, it is 'relevant' to bottled water to claim that its packaging is made out of '100% recyclable polyethylene terephthalate (PET)', as the packaging of a substantial amount of bottled drinks is made out of this plastic. The British Plastics Federation speaks of 70% of all soft drinks including bottled water, with the remaining percentage packaged mostly in glass bottles, metal cans and cartons.[383] The chemical composition of a common method of packaging a product (i.e., a common practice in the relevant market) is not without relevance. However, in theory *all* PET packaging is recyclable (recognized by, for instance, the British Plastics Federation itself).[384] This is a direct result of the chemical composition of PET. Importantly, it does not follow from a feature of the product or the trader's business. On the contrary! In practice, the actual recycling of PET bottles is far lower than 100% as a result of consumer behavior (e.g., insufficient sorting),

[379] Explanatory memorandum to the ECGTD, p. 5.
[380] See the previously explained framework of A. MICHEL.
[381] Amendments ECGTD Council of the EU, p. 21.
[382] Albeit that advertising something as free of gluten responds to actual consumer concerns and that gluten, like water but unlike the presence of wasps, relates to foodstuff.
[383] https://www.bpf.co.uk/Sustainability/pet_plastic_bottles_facts_not_myths.aspx.
[384] https://www.bpf.co.uk/Sustainability/pet_plastic_bottles_facts_not_myths.aspx.: "All PET plastic bottles can be recycled."

the waste management system (e.g., inefficient collection infrastructure) and – this should be duly stressed – industry practices (e.g., low demand for post-consumer PET (RPET)).[385] One should take care to read the requirement of the irrelevance of the benefit in conjunction with the requirement that the benefit does not result from any feature of the product or trader's business. It seems that the ECGTD implicitly stipulates that the benefit is irrelevant precisely because it is not distinctive when compared to other products and other traders' businesses. Thus, a 'relevant' *plausible* characteristic (which differs from an entirely irrelevant *absurd* characteristic) becomes irrelevant if does not result from any feature of the product or trader's business. This means that an environmental claim boasting that a bottle is made out of 100% recyclable PET plastic would not be allowed under the ECGTD for this reason alone (in addition to other reasons related to unfair commercial practices[386]).

Second, regarding the blacklisted practice of environmental claims on greenhouse gas emissions offsetting, it should be noted that the European Economic and Social Committee was a proponent of introducing a clear ban on all claims based on compensation via the use of offsetting credits (not merely greenhouse gas emissions offsetting). For example, the Committee was also concerned about claims such as 'plastic-compensated'. [387] The general rationale behind the prohibition of this commercial practice is that the European Union legislature wishes to avoid that consumers would regard actual changes in life cycle impacts and mere greenhouse gas emissions offsetting (outside the value chain) as equivalent. It is understandable that the European Union legislature regards greenhouse gas emissions offsetting as particularly important (recital 11a). However, while reducing greenhouse gas emissions with sufficient swiftness is crucial it is unclear why the general rationale was not extended to all types of offsetting. The dynamic of offsetting is always the same, where an external compensation is sought instead of changes in the value chain of the product itself.

Third, many of the new blacklisted practices are phrased quite broadly. Without clear guidance this holds the risk that they will be difficult to interpret, apply and enforce in practice.[388]

[385] Several self-regulating advertisement codes stipulate for this reason that a claim regarding recyclability is only possible if there are actual collection methods that ultimately lead to recycling and some even stipulate that a claim is only allowed if a sufficient amount of recycling is actually achieved, see C. BORUCKI, "Als de vos de passie preekt… Corporate greenwashing als misleidende handelspraktijk", *DCCR* 2018, p. (31) 48-50, nos. 48-49.

[386] For other reasons, such as the fact that such an absolute claim gives a false impression of of a closed loop and a 100% recyclability rate, see B. KEIRSBILCK, E. TERRYN, L. VAN ACKER, The legality of "100 % recycled" and "100 % recyclable" claims on water bottled in plastics – legal analysis under EU Directive 2005/29/EC on unfair business-to-consumer commercial practices - Study accompanying the external alert submitted by BEUC to the CPC-Network, October 2023, 28p.

[387] Opinion of the European Economic and Social Committee, 14 June 2023, INT/969, nos. 1.4 and 3.7. This opinion is on the GCI.

[388] C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 293.

2.5.3.3 Commercial practices stimulating premature obsolescence[389]

2.5.3.3.1 General background

With the ECGTD the European Union legislature expressly[390] counters commercial practices stimulating premature obsolescence. [391] This legislative goal includes halting 'planned premature obsolescence', which is defined in recital 14 ECGTD as a commercial policy involving deliberately planning or designing a product with a limited useful life so that it prematurely becomes obsolete or non-functional after a certain period of time or after a predetermined intensity of use.

The ECGTD adds several commercial practices stimulating (planned) premature obsolescence to the blacklist of the Unfair Commercial Practices Directive, so that they are automatically labelled as unfair. Seven novel points on the blacklist are targeted at specific and well-defined existing commercial practices.[392]

Five of the new points in Annex I to the Unfair Commercial Practices Directive are formulated sternly as bans.

- A first prohibited commercial practice is presenting a software update as necessary where it only enhances functionality features (23da). Software updates that are security updates are necessary for the secure use of the product while updates related to enhancing functionality features are not (recital 15a ECGTD). Thus, traders may not present a software update as necessary to keep the product in conformity where the update only enhances functionality features.
- A second prohibited commercial practice is communicating commercially in any way in relation to a product that contains a feature introduced to limit its durability despite information on the feature and its effects on the durability of the good being available to the trader (23e). For example, such a feature could be software which stops or downgrades the functionality of the product after a particular period of time, or a piece of hardware which is designed to fail after a particular period of time (recital 16 ECGTD). Commercial communications include communications designed to promote products, directly or indirectly, but the manufacturing of products and making them available on the market do not constitute a commercial communication. This prohibition warrants some remarks.
    - First, the European Union legislature indicates that this prohibition is aimed mainly at the traders who are also the manufacturers of the products, as they are the ones determining the durability of the products. Therefore, in general, when a product is identified as containing a feature to limit the durability, the

[389] See earlier the heading 'Three focal points'. On this phenomenon, see in detail A. MICHEL, *Premature obsolescence: in search of an improved legal framework*, Antwerp, Intersentia, 2023, xv + 672 p.

[390] The European Commission indicates that commercial practices of premature obsolescence are already covered by the general provisions of the Unfair Commercial Practices Directive (see also Guidelines Unfair Commercial Practices Directive, p. 84 and following). However, there is a need for specific rules to curb such practices and enhance enforcement of the directive, see explanatory memorandum to the ECGTD, p. 3.

[391] In addition to the ECGTD, specific legislation can also pay attention to premature obsolescence. For example, Article 22.2, d) Proposal Regulation Construction obligates manufacturers to prevent premature obsolescence of products, use reliable parts and design products in such a way that their durability does not fall beyond the average durability of products of the respective category.

[392] Explanatory memorandum to the ECGTD, p. 7

manufacturer of that product is expected to be aware of that feature and its effect on the durability of that product.[393] Nevertheless, traders who are not the manufacturers of the products, such as the sellers, can be targeted by the prohibition where reliable information is available to them about the feature and its effects on durability, such as a statement from a competent national authority or information provided by the manufacturer. Therefore, as soon as such information is available to the trader, the prohibition applies irrespective of whether the trader is actually aware or unaware of that information, for example by neglecting it (recital 16 ECGTD). In other words, the trader need not be actually knowledgeable of the feature. It suffices that the trader could reasonably have been expected to know of the feature.

- Second, the person claiming premature obsolescence does not need to demonstrate that the purpose of the feature is to stimulate the replacement of the respective product (recital 16 ECGTD), which is in line with the legislative goal of the ECGTD to facilitate enforcement as enforcement authorities will not be required to prove that a product has been designed for premature obsolescence with the intention of stimulating the purchase of a new model of the product.[394] Thus, this recital suggests that it is not required to demonstrate a specific intent on the side of the manufacturer, which is recommendable for the efficacy of this blacklisted commercial practice. After all, particularly as regards consumers, there is great information asymmetry. The consumer has no insight in the design and production of a product. Perhaps this efficacy could have been enhanced even more were the recital to reflect explicitly that the term 'introduced' in point 23e suggests no obligation on the side of the claimant to demonstrate any conscious behavior on the side of the manufacturer. In part, recital 16 ECGTD might make this clear by stating that the manufacturer can be 'expected' to know of a feature limiting the durability of a product (which might suggest a presumption). Now recital 16 ECGTD merely states that for the commercial practice to be considered unfair it is 'sufficient' to prove that the feature has been introduced to limit the durability of the good.
- Third, the use of features limiting the durability of products should be distinguished from manufacturing practices using materials or processes of general low quality resulting in limited durability of products. A lack of conformity of a product because of the use of low-quality materials or processes is covered by the product conformity requirements of the Sale of Goods Directive.

- A third prohibited commercial practice is falsely claiming that a product has a certain durability in terms of usage time or intensity under normal conditions of use (23f). The European union legislature gives as an example the claim of a trader to consumers that a washing machine is expected to last a certain number of washing cycles, in accordance with normal expected use indicated in the instructions, while the actual use of the washing machine under the prescribed conditions shows this is not the case (recital 17 ECGTD). Again, the European Union legislature indicates that this prohibition is aimed

[393] This clarification in the recitals is to be welcomed. Literature had raised the question whether the trader is the correct actor to target with the ECGTD. Some information that is to be divulged to the consumer is best known by the manufacturer, see C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 294.
[394] Explanatory memorandum to the ECGTD, p. 7.

mainly at the traders who are also the manufacturers of the products, as they are the ones determining the durability of the products.[395] Therefore, in general, traders who are the manufacturers of those products are expected to be aware of false claims on the durability of the good, whereas other traders such as mere sellers should rely on reliable information available to them, for instance based on a statement from a competent national authority or information provided by the producer (recital 17 ECGTD). This prohibition provides the consumer protection authorities of Member States with an additional enforcement tool for better protection of consumers' interests in the cases where traders fail to comply with requirements on the durability and repairability of products under European Union product legislation (such as the ESPR) (recital 19 ECGTD).

- A fourth prohibited commercial practice is presenting products as allowing repair when they do not (23g). Similarly, this prohibition is an additional enforcement tool with regard to the requirements for the repairability of products under European product legislation (such as the ESPR) (recital 19 ECGTD).
- A fifth prohibited commercial practice is inducing the consumer into replacing or replenishing the consumables of a product earlier than necessary for technical reasons (23h). As an example, the European Commission gives the practice of urging the consumer, via the settings of the printer, to replace the printer ink caR2RDdges before they are actually empty in order to stimulate the purchase of additional ink caR2RDdges would be prohibited (recital 20 ECGTD).

Rather than outright banning the two final new commercial practices on the blacklist, the European Union legislature has expressed these as pre-contractual duties to inform the consumer. Thus, the ECGTD addresses information related to premature obsolescence practices (recital 14 ECGTD).

- A sixth prohibited commercial practice is withholding information from the consumer about the fact that a software update will negatively impact the functioning of products with digital elements or the use of digital content or digital services (23d).[396] New article 2, point w) Unfair Commercial Practices Directive defines 'software update' as an update, including a security update, that is necessary to keep goods with digital elements, digital content and digital services in conformity in accordance with the Sale of Goods Directive and the Digital Content Directive or a functionality update. For example, when inviting consumers to update the operating system on their smartphone, the trader should not withhold the information towards the consumer that such an update will negatively impact the functioning of any of the features of the smartphone, such as the battery, certain application performances or a complete smartphone slowdown (recital 15 ECGTD). The European Union legislature assumes that traders responsible for the development of software updates have that information, while in other cases traders can rely on reliable information provided by, for example, software developers, suppliers or by competent national authorities (recital 15 ECGTD).

[395] See earlier footnote 393.

[396] Regarding the reduction of the functionality of products through updates, see T. VAN ZUIJLEN en J. BRUINEWOUD, "Kan de consument een remedie uitoefenen indien een fabrikant via een software-update de prestaties van zijn zaak vermindert ter bescherming van de hardware? Een verkenning aan de hand van de 'update-gates' van Apple en Tesla" in B. AKKERMANS *et al.* (eds.), *Privaatrecht 2050. De weg naar ecologische duurzaamheid*, Bruges, die Keure, 2022, p. 159-176

- A seventh and final prohibited commercial practice is withholding information from the consumer about the impairment of the functionality of product when consumables, spare parts or accessories not supplied by the original manufacturer are used or falsely claiming that such impairment will happen (23i). For example, the marketing of printers that are designed to limit their functionality when using ink caR2RDdges not provided by the original manufacturer of the printer without disclosing this information to the consumer would be prohibited (recital 21 ECGTD). Another example is marketing smart devices designed to limit their functionality when using chargers or spare parts that are not provided by the original manufacturer without disclosing this information to the consumer would be prohibited as well (recital 21 ECGTD). This last example relates to so-called safety lock-outs (by means of software locks and firmware updates), where a product with digital elements checks whether a spare part has been certified by the manufacturer and reduces the functionality of the product if this is not the case.[397] Again, the European Union legislature indicates that this prohibition is aimed mainly at the traders who are also the manufacturers of the products.[398] In general, traders who are the manufacturers of those products are expected to have this information, whereas other traders such as mere sellers should rely on reliable information available to them, for instance based on a statement from a competent national authority or information provided by the producer.

2.5.3.3.2 Analysis

The prohibitions of the commercial practices outlined in this section fit within the strategy to resist premature obsolescence, especially in the marketing and pre-contractual life stage.[399] The pre-contractual information obligations of the ECGTD are intended to give consumers an idea of the sustainability of products and to ensure that they are not misled in this regard. This, in turn, ensures fair competition for sustainable products. Pre-contractual information obligations are part of a more 'retrospective' approach to halting premature obsolescence. The Unfair Commercial Practices Directive is meant to deter unfair commercial practices by allowing several actors to challenge them once they are being committed. Consumers, individually or collectively (via class actions or via consumer organizations), other economic operators (who are disadvantaged by those unfair commercial practices) and market authorities could all enforce the pre-contractual information obligations. This retrospective approach is part of the holistic approach to combat premature obsolescence (with, for example, the ESPR as a prospective regulatory framework; article 5.1a ESPR is of great importance in that regard as it states that ecodesign requirements shall, where relevant through product parameters, ensure that products do not become prematurely obsolete).

Some remarks can be made. First, as highlighted before, the efficacy of the ECGTD could have been enhanced even more were it to reflect explicitly that the term 'introduced' in point 23e suggests no obligation on the side of the claimant to demonstrate any conscious behavior on the side of the manufacturer.

Second, the blacklisted commercial practices stimulating premature obsolescence all target 'absolute' premature obsolescence. This type of obsolescence occurs when a product loses its

[397] One well-known example of this verification process is the one used by Apple with the Apple T2 security chip.
[398] See earlier footnote 393.
[399] See the previously explained framework of A. MICHEL.

functionality for objective reasons, such as when a part of the product physically breaks down (qualitative obsolescence), a product no longer functions because of a safety lock-out (technological obsolescence), the function of components are no longer used (functional obsolescence) or products or components are no longer available to procure (logistical obsolescence).[400] With 'relative' premature obsolescence, a product has not lost its functionality, but the end-user considers it outdated because of a desire for a new product (aesthetic, societal, and psychological obsolescence), a better quality, functionality, or effectiveness of a new product (technological and environmental obsolescence) or too high a cost to upgrade or repair the product (economic aging).[401] It is understandable why the European Union legislature limits itself to absolute obsolescence and does not add this relative obsolescence to the blacklist. Although the relative obsolescence can be fueled by the manufacturer/trader (for example, by advertising a product with a new design, placing micro collections of products on the market in rapid succession so that products feel outdated more quickly[402] or only offering spare parts of a high quality and therefore with a high price), ultimately the end-users themselves decided that a product has run its course.[403] End-users may differ in how quickly they feel the need for replacement. The European Union legislature is trying to combat relative obsolescence elsewhere in the ECGTD and in the ESPR.[404] The many pre-contractual information obligations are meant to enable consumers to estimate how long a product will last and whether they will be able to repair it easily (and/or cheaply) before purchasing the product. The European Union legislature wants to strengthen the possibility of repairing products with the R2RD. Still, the commercial practice 23h raises an interesting question. Can this prohibition be used to combat forms of psychological obsolescence? For example, do targeted e-mails 'urging' the consumer to buy a new version of a product fall under this prohibition? Unlike the settings of the printer, the consumer is not hindered in using the old product, but merely enticed to buy a new product.

Third, between the original version of the ECGTD proposed by the European Commission and the final version, there has been a change in tone regarding some the prohibited commercial practices. Original prohibitions on omissions to inform (i.e., the introduction of obligations to inform) were turned into more direct prohibitions. For example, instead of prohibiting the omission to inform the consumer about the existence of a feature of a product introduced to limit its durability (see the original ECGTD), the final version of the ECGTD prohibits all commercial communications in relation to a product containing such feature. The European Parliament wanted to go even further and prohibit the introduction of a feature to limit the durability of a product in and of itself (23e in the version of the ECGTD proposed by the European Parliament).[405] Even though these changes may seem subtle at first glance, they alter

[400] See for this categorization A. ZEEUW VAN DER LAAN and M. AURISICCHIO, "Archetypical consumer roles in closing the loops of resource flows for Fast-Moving Consumer Goods", *Journal of Cleaner Production* 2019, vol. 236, 1174752: J. BACHÉR, Y. DAMS, T. DUHOUX, Y. DENG, T. TEITTINEN and L.F. MORTENSEN, *Eionet Report - ETC/WMGE 2020/3- Electronics and obsolescence in a circular economy*, European Topic Center on Waste and Materials in a Green Economy, Mol, 2020, p. 14-15.
[401] *Ibid.*, p. 15.
[402] See about this Communication Sustainable Textiles, p. 8 ("Those who have built their business models over the last two decades by capitalising on bringing increasing numbers of fashion lines and micro collections to the market at an ever increasing pace, are strongly encouraged to internalise circularity principles and business models, reduce the number of collections per year, take responsibility and act to minimise their carbon and environmental footprints.").
[403] J. BACHÉR, Y. DAMS, T. DUHOUX, Y. DENG, T. TEITTINEN en L.F. MORTENSEN, *Eionet Report - ETC/WMGE 2020/3- Electronics and obsolescence in a circular economy*, European Topic Centre on Waste and Materials in a Green Economy, Mol, 2020, p. 15.
[404] See also the attention paid by the European Commission to the psychological aspect of *fast fashion* in the Communication Sustainable Textiles, p. 8.
[405] Amendments ECGTD Parliament, amendment 76.

the meaning of the blacklisted commercial practices. They turn indirect prohibitions through informing the consumer into direct 'true' prohibitions on commercial practices that lead to premature obsolescence. Regarding the aspect of evidence, direct prohibitions alleviate the burden of proof resting on the person claiming the existence of one of the blacklisted commercial practices. In Belgium, when it comes to proving a failure to disclose information, the person claiming the failure to inform has to prove (1) that the other person had a duty to inform (i.e., in this context this would mean that, for example, consumers are to prove that a feature to limit the durability of a product has been introduced and, that it would be an unfair commercial practice not to inform them thereof) and (2) the actual failure to disclose information (i.e., the absence of information).[406] A more direct prohibition entails that the person claiming the existence of an unfair commercial practice 'only' has to prove, for example, the feature introduced to limit the durability of a product without having to concern themselves with the question whether the trader could reasonably have known of the feature and should have informed. Direct prohibitions can be assumed to serve the legislative goal of easing enforcement of the Unfair Commercial Practices Directive, and thus, indirectly, fostering the uptake of sustainable products. This begs the question whether the European Union legislature should not have gone further and should have adopted the same approach with regard to the remaining obligations to inform. For example, the European Parliament suggested to replace the prohibition of omission to inform that a product is designed to limit its functionality when non-proprietary replacement parts or consumables are used (see the original ECGTD and the final version of the ECGTD) by a prohibition to market a product that is designed in this way (23i in the version of the ECGTD proposed by the European Parliament).[407]

Fourth, many of the new blacklisted practices are phrased quite broadly. Without clear guidance this holds the risk that they will be difficult to interpret, apply and enforce in practice.[408]

[406] Cass. 18 June 2020, C.19.0343.N, ECLI:BE:CASS:2020:ARR.20200618.1N.79.
[407] Amendments ECGTD Parliament, amendment 82.
[408] C. PAVILLON, "Consumentenrechtelijke stukjes in de circulariteitspuzzel", *WPNR* 2023, p. (289) 293.

2.6 Green claims initiative

2.6.1 General overview GCI

On 22 March 2023, the European Commission proposed the 'green claims initiative' (GCI), implementing among others the Circular Economy Action Plan. [409] This a proposal for a directive that would not amend existing legislation, yet instead function as a standalone legal instrument. Its objective is to set a framework for the substantiation of voluntary environmental claims made by traders about products or traders in business-to-consumer commercial practices.[410] It is meant to function as a safety net for all sectors where environmental claims are unregulated at the European Union level.

On 12 March 2024, the European Parliament adopted its position that will as the basis for the trilogue negotiations.[411] The research report focusses mainly on the proposal of the European Commission and only selectively refers to these amendments.

The European Commission wants to achieve the goals of the GCI primarily by introducing minimum requirements regarding the substantiation and communication of environmental claims. These claims are to be verified by independent accredited bodies prior to their commercial use. Moreover, the GCI would also contain minimum criteria for all environmental labels to increase their transparency and credibility and limit the amount of environmental labeling schemes. Thus, the GCI complements and supports the ESPR (labels) and ECGTD (labels and greenwashing).

With the GCI, the European Union legislature aims to ensure the functioning of the internal market, while taking as a base a high level of environmental protection. However, the internal market dimension of reaching the environmental objective is predominant. Therefore, article 114 TFEU is the legal basis for the GCI.[412]

Concisely, the version of the GCI proposed by the European Commission would[413]:

- obligate traders to carry out an assessment to substantiate explicit voluntary environmental claims;
- impose additional requirements for comparative claims;
- impose requirements for communicating comparative claims;
- impose requirements for environmental labeling schemes;
- set up and *ex ante* verification system by independent accredited bodies.

[409] This proposal is also in line with the Consumer Agenda Sustainable Recovery.
[410] Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims, 22 March 2023, COM(2023) 166 final.
[411] Amendments adopted by the European Parliament on 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) (COM(2023)0166 – C9-0116/2023 – 2023/0085(COD)) (first reading), P9_TA(2024)0131.
[412] Explanatory memorandum to the GCI, p. 8.
[413] In what follows in this research report, this conditional tense is omitted. Note, however, that the proposal from the European Commission is only the start of the ordinary legislative procedure (as the legal basis of the GCI is article 114 TFEU). The Council of the European Union and the European Parliament will reject this legislative proposal or adopt it at first reading or second reading, possibly after amendments. Therefore, it is uncertain whether the proposal will become law in its current form.

2.6.2 Scope

The GCI applies to explicit[414] environmental claims made by traders[415] about products or traders in business-to-consumer commercial practices. The GCI covers *voluntary* environmental claims.[416]

The GCI is meant to function as a *lex specialis* (i.e., specific legislation) regarding the Unfair Commercial Practice Directive, which as a *lex generalis* (i.e., general framework) covers all voluntary B2C commercial practices before, during and after a commercial transaction in relation to a product[417]. It also acts as a *lex specialis* as regards the ECGTD (recital 14 GCI). It contains more specific requirements regarding the substantiation and communication of environmental claims than those contained in the ECGTD, which applies to all sustainability claims (both environmental and social aspects).[418] The provisions of the GCI on environmental labels and labeling schemes should also be seen as complementary to the requirements on displaying labels set out in the ECGTD.[419] At the same time the GCI is a *lex generalis* as concerns specific rules on environmental claims and labels. It does not aim to change existing or future sectoral rules. On the contrary, it is meant to function as a safety net where no such rules are in force.[420] Thus, article 1.2 GCI excludes its application to environmental claims and labeling schemes governed by (currently sixteen) existing regulations and directives as well as by future European Union rules.

2.6.3 Substantiation of explicit environmental claims

2.6.3.1 General rules on the assessment of claims

Article 3.1 GCI obligates traders to conduct an assessment to substantiate explicit environmental claims. This assessment shall:

- specify if the claim is related to the whole product, part of a product or certain aspects of a product, or to all activities of a trader or a certain part or aspect of these activities, as relevant to the claim (cfr. point 4b added by the ECGTD to the blacklist of the Unfair Commercial Practices Directive, which prohibits claiming that an environmental claim applies to the entire product when in fact the claim relates only to a certain aspect of the product);
- rely on widely recognized scientific evidence, use accurate information and take into account relevant international standards;

[414] Article 2, point 2 GCI defines 'explicit environmental claim' as an environmental claim that is in textual form or contained in an environmental label. Thus, the GCI does not concern itself with 'indirect' green claims or 'indirect' greenwashing. Indirect greenwashing refers to the use of green colors and/or environmental imagery such as pictures of nature on product packaging or advertising to suggest that a product is eco-friendly or sustainable, without providing any meaningful information about the product's actual environmental impacts

[415] Article 2, point 3 GCI refers to the definition of 'trader' in the Unfair Commercial Practices Directive (article 2, point b)). Thus, a trader is any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.

[416] Explanatory memorandum to the GCI, p. 7.

[417] Explanatory memorandum to the GCI, p. 7.

[418] Explanatory memorandum to the GCI, p. 6-7.

[419] Explanatory memorandum to the GCI, p. 21.

[420] Explanatory memorandum to the GCI, p. 7 and recital 8.

- demonstrate that environmental impacts, environmental aspects or environmental performance that are subject to the claim are significant from a life cycle perspective;
- where a claim is made on environmental performance, take into account all environmental aspects or environmental impacts which are significant to assessing the environmental performance;
- demonstrate that the claim is not equivalent to requirements imposed by law on products within the product group, or traders within the sector (i.e., there may be no unjustified suggestion of uniqueness of a product; cfr. the amendment to article 6.2. Unfair Commercial Practices Directive by the ECGTD);
- provide information whether the product or trader which is subject to the claim performs significantly better regarding environmental impacts, environmental aspects or environmental performance which is subject to the claim than what is common practice for products in the relevant product group or traders in the relevant sector (*ibidem*; 'common practice' could be equivalent to the requirements imposed by law, but if a majority of products within the product group or a majority of traders within the sector perform better than those legal requirements, the minimum legal requirements should not be considered as common practice (recital 18 GCI));
- identify whether improving environmental impacts, environmental aspects or environmental performance subject to the claim leads to significant[421] harm in relation to environmental impacts on climate change, resource consumption and circularity, sustainable use and protection of water and marine resources, pollution, biodiversity, animal welfare and ecosystems;
- separate any greenhouse gas emissions offsets used from greenhouse gas emissions as additional environmental information, specify whether those offsets relate to emission reductions or removals, and describe how the offsets relied upon are of high integrity and accounted for correctly to reflect the claimed impact on climate;
- include primary information[422] available to the trader for environmental impacts, environmental aspects or environmental performance, which are subject to the claim; and
- include relevant secondary information[423] for environmental impacts, environmental aspects, or environmental performance which is representative of the specific value chain of the product or the trader on which a claim is made, in cases where no primary information is available.

These obligations to substantiate the explicit claims made on a product are important in the marketing and pre-contractual stage to resist and postpone premature obsolescence.[424]

2.6.3.2 Science-based approach

The assessment needs to take into account internationally recognized scientific approaches to identifying and measuring environmental impacts and performance (recital 15 GCI). The

[421] The European Commission does not elaborate on the meaning of 'significant'.
[422] Article 2, point 14 GCI defines 'primary information' as information that is directly measured or collected by the trader from one or more facilities that are representative for the activities of the trader.
[423] Article 2, point 15 GCI defines 'secondary information' as information that is based on other sources than primary information including literature studies, engineering studies and patents. In recital 20 GCI secondary information is called 'average data'.
[424] See the previously explained framework of A. MICHEL.

information used to substantiate explicit environmental claims should be science-based (recital 23 GCI).

However, for some sectors or for certain products or traders, significant environmental impacts could be suspected but there might not yet be a recognized scientific method to assess them fully. For such cases traders should be able to promote their sustainability efforts through publication of company sustainability reporting (factual reporting on the company's performance metrics and work to reduce energy consumptions) including on their websites (recital 29 GCI). Still, efforts to develop methods and gather evidence to enable the assessment of the respective environmental impact for those sectors should be made. Moreover, as will be explained later, traders have certain obligations to take into account the existing available information where the environmental impact is not merely suspected but instead demonstrated.

The information used to substantiate explicit environmental claims needs to include primary, company-specific data for relevant aspects contributing significantly to the environmental performance of the product or trader referred to in the claim.[425] The requirement to use primary information needs to be considered in the light of the influence the trader making the claim has over the respective process and of the availability of primary information. If the process is not run by the trader making the claim and primary information is not available, accurate secondary information can be used even for processes that contribute significantly to the environmental performance of the product or trader.[426] Both primary data and secondary data are required to show a high level of quality and accuracy (recital 20 GCI).

2.6.3.3 Relevant environmental impacts & aspects and standard assessment methods

The assessment substantiating the explicit environmental claim should make it possible to identify the environmental impacts and environmental aspects for the product or trader that jointly contribute *significantly* to the overall environmental performance of the product or trader (recital 17 GCI).

In this regard, traders have to demonstrate that environmental impacts, environmental aspects or environmental performance that are subject to the claim are significant from a life cycle[427] perspective. Indications for the relevance of the environmental impacts and environmental aspects can stem from assessments taking into account the life cycle, including from the studies based on the European Environmental Footprint (EF) methods (recital 17 GCI). The European Commission has already updated its recommendation on the use of the European Product Environmental Footprint (PEF) and Organization Environmental Footprint (OEF) assessment

[425] The European Commission gives the following two examples of situations in which primary data are required (recital 20 GCI). Claims on recycled or bio-based content, the composition of the product should be covered by primary data. For claims on being environmentally less polluting in a certain life cycle stage, information on emissions and environmental impacts related to that life cycle stage should include primary data as well.

[426] The European Commission underlines that this is especially relevant to not disadvantage small and medium sized enterprises and to keep the efforts needed to acquire primary data at a proportionate level (recital 20 GCI).

[427] Article 2, point 13 GCI defines 'life cycle' as the consecutive and interlinked stages of a product's life, consisting of raw material acquisition or generation from natural resources, pre-processing, manufacturing, storage, distribution, installation, use, maintenance, repair, upgrading, refurbishment as well as re-use, and end-of-life.

methods to measure and disclose the environmental performance of products and organizations throughout their life cycle. [428]

The Environmental Coalition on Standards (ECOS), an international NGO, warns of two shortcomings of the PEF.[429- 430] First, the PEF is limited to sixteen product parameters, so that certain environmental claims, such as those on parameters like 'microplastics' and 'recyclability', cannot be calculated. Second, the PEF gives one aggregate score based on all relevant product parameters. Thus, there can be a perverse incentive for business to calculate a score based on all sixteen product parameters, to compensate weaker parameters with stronger ones. The first shortcoming identified by the ECOS is part of the substantiation of environmental claims and is dealt with immediately hereinafter. The European Commission deals with the second shortcoming in the rules on the communication of environmental claims (more on this to follow).

The European Commission is mindful of the shortcomings of standard assessment methods. This is exactly the reason why it has opted not to pursue a single (obligatory[431-432]) standard methodology. Addressing the very wide and fast changing area of environmental claims by means of a single method has its limitations.[433] First, even though the European EF methods are helpful, they do not yet cover all relevant impact categories for all product types. Second, many environmental claims are also made regarding environmental aspects (e.g., durability, reusability, repairability, recyclability, recycled content, use of natural content) for which the environmental footprint methods are not suited to serve as the only method for substantiation.

Instead, the European Commission has opted for a more flexible approach. It lays down the following ground rules for all assessment methods. The European Commission highlights that assessment methods may only be used if they are *complete* on the impacts relevant to the product category or trader. They may not omit any important environmental impacts (recitals 17 and 24 GCI). For example, when using the PEF, the most relevant impact categories identified should together contribute to at least 80% of the single overall score. Moreover, the fact that a significant environmental impact of a product is not covered by any of the sixteen impact

[428] Commission Recommendation (EU) 2021/2279 of 15 December 2021 on the use of environmental footprint methodologies to measure and publicise the life cycle environmental performance of products and organizations, *OJ L* 30 December 2021, vol. 471, p. 1-396.

[429] ECOS, "To PEF or not to PEF? Make all green claims robust", 29 November 2022, https://ecostandard.org/news_events/to-pef-or-not-to-pef-make-all-green-claims-robust/.

[430] For another, cautiously critical analysis of the PEF, see BEUC, *Getting rid of green washing Restoring consumer confidence in green claims*, 2 December 2020, https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf, p. 11.

[431] An obligation could be seen as preferable to accelerate the transition to a circular economy and to simplify the enforcement of the prohibition of greenwashing, see B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies*, European Parliament, Luxembourg, 2020, p. 14.

[432] Other legislation can contain specific obligations regarding claims and assessment methods. Article 21.2, a) of the Proposal Regulation Construction Products stipulates that where an assessment method based on harmonized standards exists, the manufacturer is to refrain from any claim about the characteristics of a product (e.g., on the environmental performance of the product) that is not based on said method. Moreover, the GCI contains the power for the European Commission to lay down supplementary rules by delegated act. The European Commission considers that that it should be empowered to adopt delegated acts to establish product group or sector specific rules where Product Environmental Footprint Category Rules (PEFCR) may have added value. However, in case the PEF method does not yet cover an impact category, which is relevant for a product group, the adoption of PEFCR may take place only once these new relevant environmental impact categories have been added (recital 32 GCI).

[433] See in detail explanatory memorandum to the GCI, p. 12-13.

categories of the PEF does not justify the lack of consideration of such impacts. A trader making an explicit environmental claim on such an impact has an obligation of diligence to find evidence substantiating such claim (recital 25 GCI).

As a concrete example of the shortcomings of the European EF methods, the European Commission refers to the release of microplastics (recital 26 GCI). There is not yet a reliable methodology to assess the environmental impacts thereof. However, in the event that the release of microplastics contributes to significant environmental impacts that are not part of an environmental claim, the trader making the claim regarding another environmental impact is not allowed to ignore it. Instead, the trader is to take into account all available information and to update the assessment based on this information once widely recognized scientific evidence becomes available. This is a general rule that can be found in article 3.2 GCI, which applies where it is demonstrated that significant environmental impacts that are not subject to the claim exist but there is no widely recognized scientific evidence to perform the life cycle assessment.

In sum, traders have the following obligations when making an explicitly environmental claim.

- The trader is to identify the environmental impacts and environmental aspects of the product or trader that jointly contribute significantly to the overall environmental performance of the product or trader.
- The trader is to demonstrate that environmental impacts, environmental aspects, or environmental performance that are subject to the claim are significant from a life cycle perspective.
- To this end, the trader can use a standard assessment method (e.g., the PEF and OEF), granted that:
    - this method is complete on the environmental impacts; and
    - this method does not omit any important environmental impacts.
- If there exists no standard life cycle assessment method regarding a significant environmental impact of which the existence is demonstrated,
    - the trader has an obligation of diligence to find evidence substantiating a claim regarding this environmental impact;
    - the trader has an obligation to take into account all available information and to update the assessment based on this information once widely recognized scientific evidence becomes available when making a claim regarding a different environmental aspect.

2.6.3.4 Inclusion of trade-offs

It would be misleading to consumers if an explicit environmental claim pointed to the benefits in terms of environmental impacts or environmental aspects while omitting that the achievement of those benefits leads to negative trade-offs. To this end, traders need to substantiate their claims both ‘internally’ (i.e., as regards the different stages in the life cycle of the product or the different aspects of the overall activities of the trader) and ‘externally’ (i.e., as regards the impact of the improvement of one environmental aspect (e.g., water consumption) versus other environmental aspects (e.g., greenhouse gas emissions)). Recall that one of the general rules on the substantiation of explicit environmental claims is that traders are to identify whether improving environmental impacts, environmental aspects or

environmental performance subject to the claim leads to significant harm in relation to environmental impacts on climate change, resource consumption and circularity, sustainable use and protection of water and marine resources, pollution, biodiversity, animal welfare and ecosystems (article 3.1. g) GCI).

First, internally, the assessment is to consider the life cycle of the product or of the overall activities of the trader and should not omit any relevant environmental aspects or environmental impacts.[434] The benefits claimed should not result in an unjustified transfer of negative impacts to other stages of the life cycle of a product or trader, or to the creation or increase of other negative environmental impacts (recital 16 GCI) or an increase in the same environmental impacts in a different stage of the life cycle of the product or during a different activity of all activities of the trader (recital 19 GCI)[435]. The wording of these recitals, particularly of recital 16, seems to suggest that a benefit can never truly be claimed as a 'benefit' if it has a negative impact at the same time. This begs the question whether it should be possible for a trader to claim a benefit regarding one stage of the life cycle or regarding one activity despite a negative impact elsewhere as long as this negative impact is not omitted but instead communicated transparently to consumers. There are many possible environmental aspects and impacts (cfr. as an illustration the sixteen parameters of the PEF). Which of these are to be regarded as more important or deserving of more urgent attention lies in the eye of the beholder. Thus, the informed consumer might accept certain trade-offs as inevitable for the time being and might regard these trade-offs as desirable because of personal preferences. Recital 20, which also contains the external dimension of trade-offs, seems to suggest a more open approach.

Second, externally, the information used to substantiate explicit environmental claims should ensure that the interlinkages between the relevant environmental impacts and between environmental aspects and environmental impacts can be identified along with potential trade-offs. The assessment used to substantiate explicit environmental claims should identify if improvements on environmental impacts or environmental aspects lead to the kind of trade-offs that significantly worsen the performance as regards other environmental impacts or environmental aspects (for example, if savings in water consumption lead to a notable increase in greenhouse gas emissions) (recital 20 GCI). The European Commission gives the following two examples.

- An environmental claim on positive impacts from efficient use of resources in intensive agricultural practices may mislead consumers because of trade-offs linked to impacts on biodiversity, ecosystems or animal welfare.
- An environmental claim on textiles containing plastic polymer from recycled PET bottles may also mislead consumers as to the environmental benefit of that aspect if the use of this recycled polymer competes with the closed-loop recycling system for food contact materials which is considered more beneficial from the perspective of circularity.

[434] The European Commission notes that different types of claims require different levels of substantiation. The GCI does not prescribe a single method. Neither does the GCI require conducting a full life-cycle analysis for each type of claim, see explanatory memorandum to the GCI, p. 19.
[435] The European Commission gives as an example: CO_2 savings in the stage of manufacturing leading to a notable increase of CO_2 emissions in the use phase.

2.6.3.5 Climate claims[436]

According to the European Commission, climate-related claims have been shown to be particularly prone to being unclear and ambiguous and to mislead consumers. This relates notably to environmental claims that products or entities are 'climate neutral', 'carbon neutral, '100% CO_2 compensated', or will be 'net-zero' by a given year, or similar. Such statements are often based on 'offsetting' of greenhouse gas emissions through 'carbon credits' generated outside the company's value chain, for example from forestry or renewable energy projects. The methodologies underpinning offsets vary widely and are not always transparent, accurate, or consistent (recital 21 GCI).

Moreover, the European Commission looks with suspicion at the practice of 'offsetting'. It considers that offsetting can deter traders from emissions reductions in their own operations and value chains. However, to contribute adequately to global climate change mitigation targets, traders should prioritize effective reductions of emissions across their own operations and value chains instead of relying on offsets (recital 21 GCI). When the claim relates to future environmental performance, it should as a priority be based on improvements inside the trader's own operations and value chains rather than relying on offsetting of greenhouse gas emissions (recital 35 GCI).

When offsets are used nonetheless, the European Commission deems it appropriate to increase their transparency. Article 2, point 1, h) GCI obligates traders to report separately from greenhouse gas emissions any greenhouse gas emissions offsets used by the traders, as additional environmental information. In addition, this information should also specify whether these offsets relate to emission reductions or removals and describe how that the offsets relied upon are of high integrity and accounted for correctly.

Whenever the claim relates to the future (e.g., 'net-zero by a given year'), this claim is to be substantiated in line with the rules outlined in the ECGTD (recital 22 GCI).

2.6.3.5.1 Choices made in the ECGTD

The GCI will have to be adjusted considering the choices made in the ECGTD. That directive prohibits claims based on greenhouse gas emissions offsetting through the blacklist of commercial practices of the Unfair Commercial Practices Directive. A new point 4ba on that blacklist states that it is prohibited to claim based on greenhouse gas emissions offsetting, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions.

The amendments of the European Parliament take this legislative evolution into account (see amendments 159 and 169).

2.6.3.6 Substantiation of comparative claims

Consumers can also be misled by 'comparative environmental claims'. These are claims that state or imply that a product or trader has less or more environmental impacts or a better or worse environmental performance than other products or traders (article 4; recital 27 GCI). In addition to the general requirements for all claims outlined in article 3, comparative claims are

[436] Regarding climate claims, see E. VAN GOOL, "'Climate-washing': B2C communicatie in de klimaatcrisis beoordeeld in het licht van de oneerlijke handelspraktijken, soft law en nieuwe wetgeving", *DCCR* 2023, p. 3-60.

to comply with the requirements set out in article 4.1 GCI. In essence, this article requires equivalence in several ways (e.g., regarding information and data, regarding coverage of the stages along the value chains, et cetera).

The equivalence ensures that comparative environmental claims can be compared in an adequate manner. The European Commission gives three illustrations of situations in which a comparison cannot be adequately be made:

- choosing indicators on the same environmental aspects but using a different formula for quantification of such indicators makes comparisons impossible;
- in case two traders make an environmental claim on climate change, where one considered only direct environmental impacts, whilst the other considered both direct and indirect environmental impacts, these results are not comparable;
- a decision to make the comparison only at certain stages of a products life cycle can lead to misleading claims, if not made transparent.

If the comparative environmental claim relates to products with different raw materials, uses and process chains (e.g., bio-based plastics and fossil-based plastics), the most relevant stages of the life cycle are to be taken into account. For example, agriculture or forestry is relevant for bio-based plastics while raw oil extraction is relevant for fossil-based plastics and the question whether a relevant share of the product ends up in landfill is highly relevant to plastics that biodegrade well under landfill conditions but maybe less relevant for plastics that do not biodegrade under such conditions (recital 27 GCI).

The definition of 'comparative environmental claim' in article 4.1 GCI mentions that a claim can state that a product has a better environmental impact "than other products". The category of 'other products' includes previous versions of the same product. If the comparative environmental claim concerns an improvement in terms of environmental impacts, aspects, or performance, when compared to earlier versions of a product, the claim is to include an explanation on the impact of the improvement on other aspects, impacts and performance of the product subject to the claim and to clearly state the baseline year for the comparison (article 4.2 GCI). This obligation also applies to claims that compare a product with a product from a competing trader who is no longer active on the market or from a trader who no longer sells to consumers.

2.6.3.7 Review of the substantiation

The science-based approach of the GCI is also reflected in the obligation of traders to review the substantiation of a claim in article 9 GCI. Explicit environmental claims are to reflect the environmental performance and environmental impacts covered by the claim correctly and are to consider the latest scientific evidence.[437] Thus, Member States are to ensure that the trader making the claim reviews and updates the substantiation and communication of the claim when there are circumstances that may affect its accuracy and at least every five years (from the date of communication to the consumer) to ensure compliance with the requirements of the GCI.

[437] The European Commission regards these characteristics as essential (recital 49 GCI).

2.6.3.8 Monitoring & delegated powers

Article 20 GCI obligates the Member States to monitor the application of the GCI and to follow up on the evolution of environmental claims. When this regular monitoring reveals differences in the application of the requirements regarding the substantiation of claims and such differences create obstacles for the functioning of the internal market, or where the European Commission identifies that the absence of requirements for specific claims leads to widespread misleading of consumers, the European Commission may adopt delegated acts to supplement the requirements for substantiation of explicit environmental claims.[438] As an example, the European Commission hints at supplementary rules to operationalize the provisions on the substantiation of claims based on offsets, even before any monitoring has taken place (recital 31 GCI).

2.6.3.9 Exemption of microenterprises

To avoid disproportionate impacts on the smallest traders, the GCI contains provisions excluding microenterprises from its obligations. Microenterprises are exempted from the requirements on the substantiation of (comparative) environmental claims (articles 3.3 and 4.3 GCI). These businesses only have to comply with these requirements if they wish to receive a certificate of conformity of the environmental claim (in accordance with article 10 GCI).

There is no exemption for small and medium sized businesses. However, article 12 GCI obligates Member States to take appropriate measures to help these businesses apply the requirements of the GCI. Those measures hose measures shall at least include guidelines or similar mechanisms to raise awareness of ways to comply with the requirements on explicit environmental claims. In addition, without prejudice to applicable State aid rules, such measures may include:

- financial support;
- access to finance;
- specialized management and staff training;
- organizational and technical assistance.

2.6.4 Communication of explicit environmental claims

2.6.4.1 General rules

Article 5 GCI contains an overview of obligations and requirements regarding the communication of explicit environmental claims.

As the first and most general rule, claims may only cover environmental impacts, aspects or performance that are assessed in accordance with the substantiation requirements and are identified as significant for the respective product or trader (article 5.2 GCI). The trader is to make the information on which the assessment is based available to the consumer in a physical form or in the form of a weblink, a QR code or an equivalent means (article 5.6 GCI). Other pieces of information that are to be made available in the same manner are, among others, an explanation on how the improvements that are subject to the claim are achieved, the certificate of conformity and, for climate claims, information to which extent they rely on offsets and

[438] Regarding the framework of this empowerment, see article 18 GCI.

whether these relate to emissions reductions or removals. As noted earlier, the ECGTD prohibits claims based on greenhouse gas emissions offsetting, so that article 5.6. f) GCI will have to be removed from the GCI.

Second, if the claim is related to a final product and the use stage of this product is among the most relevant life cycle stages of that product, the claim is to include information on how consumers may appropriately use the product to decrease its environmental impact (article 5.3 GCI). An example of appropriate behavior is correct waste sorting (recital 34 GCI).

Third, when the claim communicated relates to future environmental performance, it should as a priority be based on improvements inside trader's own operations and value chains rather than relying on offsetting the environmental impacts (recital 35 GCI). Thus, the claim is to include a time-bound commitment for improvements inside own operations and value chains (article 5.3 GCI).

A fourth rule relates to the second shortcoming of assessment methods identified by ECOS (see earlier the section on the substantiation of claims for these shortcomings) (i.e., the risk that aggregated scores hide information). The European Commission acknowledges this risk.[439] For this reason, article 5.5 GCI stipulates that explicit environmental claims on the cumulative environmental impacts of a product or trader based on an aggregated indicator of environmental impacts can be made only on the basis of rules to calculate such aggregated indicator that are established in the law of the European Union. By itself, this rule is insufficient to mitigate the risk of 'dilution' by the aggregated score. Thus, the European Commission indicates that in case that it enacts specific rules by delegated act, it may be necessary to add supplementary rules on presentation of environmental impacts assessed based on these rules by requiring that three main environmental impacts are presented next to the aggregated indicator of overall environmental performance (recital 38 GCI). To this end, the European Commission is empowered to adopt delegated acts to supplement the provisions on communication of explicit environmental claims in delegated acts (article 5.8 GCI).[440]

2.6.4.2 Communication of comparative claims

Article 6 GCI contains some explicit requirements on the communication of comparative environmental claims. Comparative claims may only be used if the claimed improvement is based on evidence proving that it is significant and has been achieved in the last five years.

2.6.4.3 Exemption of microenterprises

Microenterprises are exempted from the requirements on the communication of environmental claims (article 5.7 GCI). These businesses only have to comply with this requirement if they wish to receive a certificate of conformity of the environmental claim (in accordance with article 10 GCI). Unlike the article on the substantiation of comparative environmental claims, the article on comparative environmental claims (article 6 GCI) contains no explicit exemption for microenterprises.

[439] See recital 41 on environmental labels ("Such aggregated scoring however presents risks of misleading consumers as the aggregated indicator may dilute negative environmental impacts of certain aspects of the product with more positive environmental impacts of other aspects of the product.")
[440] Regarding the framework of this empowerment, see article 18 GCI.

2.6.4.4 Substances of concern in the amendments of the European Parliament

The European Parliament empowers the European the Commission to restrict or prohibit the use of explicit environmental claims regarding substances of concern (amendment 161 and 171). This empowerment relates to products containing substances or preparations/mixtures meeting the criteria for classification as toxic, hazardous to the environment, carcinogenic, mutagenic or toxic for reproduction (CMR), causing endocrine disruption to human health or the environment, persistent, bioaccumulative and toxic (PBT), very persistent, very bioaccumulative (vPvB), persistent, mobile and toxic (PMT), or very persistent, very mobile (vPvM) properties in accordance with Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures and in relation to products containing substances referred to in article 57 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency.

2.6.5 Labels & labeling schemes

The European Commission identifies a proliferation of environmental labels and ensuing confusion of consumers.[441] Thus, it builds on the ECGTD to limit environmental labels and to increase their transparency and credibility (see recital 43 GCI). The ECGTD bans displaying a sustainability label that is not based on a certification scheme or not established by public authorities as a backlisted unfair commercial practice. The GCI provides additional safeguards to improve the quality of labeling schemes by requiring the following requirements.

Article 7 GCI imposes minimum criteria for all environmental labels. First, labels have to fulfill all substantiation and communication requirements and have to be verified. Second, only labels awarded under environmental labeling schemes established under the law of the European Union may present a rating or score of a product or trader based on an aggregated indicator of environmental impacts of a product or trader (cfr. article 5.5 GCI. on the communication of claims).

Article 8 GCI contains requirements for environmental label schemes. These requirements are modeled by the European Commission to the governance criteria of a number of well-known and reputable public and private sustainability labeling schemes (e.g., requirements on transparency and accessibility of information on ownership, decision-making body and objectives).[442]

Article 8 GCI also holds the tools to combat the proliferation of environmental labels, both of a private and public nature. First, it prohibits the establishment of new national or regional publicly owned schemes once the GCI has been transposed (article 8.3 GCI).[443] Second, it introduces a validation procedure for new schemes established by private operators from the European Union and third countries. National authorities are to assess new schemes and may validate them only if they demonstrate added value in terms of their environmental ambition,

[441] See e.g. explanatory memorandum to the GCI, p. 4 and 21-22.
[442] Explanatory memorandum to the GCI, p. 22.
[443] National or regional environmental labeling schemes established prior to that date may continue to award the environmental labels on the market of the European Union, provided they meet the requirements of the GCI (article 8.3 GCI).

their coverage of environmental impacts, of product category group or sector and their ability to support the green transition of SMEs as compared to the existing European Union, national or regional schemes (article 8.5 GCI). The goal is to avoid too many labels overlapping in terms of their scope (recital 46 GCI). New public schemes from third countries wishing to operate on the Union market have to meet the requirements of this proposal and shall be subject to prior notification and approval by the European Commission with the aim of ensuring that these schemes provide added value in terms of environmental ambition, coverage of environmental impacts, product groups or sectors (article 8.4 GCI).[444] The European Commission publishes a list of officially recognized environmental labels that are allowed to be used on the market of the European Union (article 8.7 GCI).

2.6.6 *Ex ante* verification of explicit environmental claims

In 2020, BEUC, the umbrella group for European consumer organizations, launched a call to the European Union legislature to allow only environmental claims that have been verified and approved in advance by a regulatory body of the European Union (e.g., the European Environment Agency). [445] Inspiration for such a pre-approval procedure can be found in the Regulation on Nutrition and Health Claims.[446] Such claims are only permitted if they have been substantiated by a food business operator on the basis of generally accepted scientific data.[447] Currently, the enforcement of the Unfair Commercial Practices Directive works retrospectively, *ex post*. [448]

With the GCI, the European Commission introduces a prospective, *ex ante* verification in the context of environmental claims. Article 10 GCI details how the substantiation and communication of environmental claims and labels will have to be third party verified and certified to comply with the requirements of GCI before the claim is used in a commercial communication. Business have to submit the claims that they whish to use to an officially accredited body, called the 'verifier', prior to using the claim as a commercial practice (article 10 GCI ("before the claim is made public or the environmental label is displayed by a trader"). The accreditation of verifiers by the Member States depends on compliance with the requirements of article 11.3 GCI (e.g., independency and absence of conflicts of interest, professional secrecy, et cetera). If the verifier can verify the submitted claim, it may issue a certificate of conformity (article 10.6 GCI). This certificate is recognized across the European Union. The verifier can, if appropriate, indicate several ways of communicating the explicit environmental claim that comply with the requirements of the GCI to avoid the need for continuous re-certification in case the way of communication is slightly modified without affecting compliance with the GCI (recital 51 GCI).

[444] The European Commission has included this provision to avoid creating unnecessary barriers to international trade and to ensure equal treatment with the public schemes established in the European Union (recital 45 GCI).

[445] BEUC, *Getting rid of green washing Restoring consumer confidence in green claims*, 2 December 2020, https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf.

[446] Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, vol. 404, p. 9-25.

[447] On the standard of proof of 'generally accepted scientific data' and the burden of proof of the food business operator, see CJEU 10 September 2020, C-363/19, ECLI:EU:C:2020:693, §43 and following

[448] It is only when a claim is brought against an unfair, misleading, or aggressive commercial practice that the business in question bears the burden of proving the material accuracy and completeness of the information it has provided.

The obligation to gain verification extends to updated environmental claims as well, i.e., claims that have been subject to review in accordance with article 9 GCI.

2.6.7 Member States' obligations (enforcement & surveillance)

The obligations for the Member States of the European Union of the GCI relate mostly to the enforcement of the GCI and market surveillance. The Member States are to set up a procedure for verifying that the substantiation and communication of explicit environmental claims, including environmental labels, or the environmental labeling schemes, comply with the requirements set out in the GCI (recital 50) and remain compliant (article 9; recital 49 GCI).

Member States are to designate one or more competent authorities as responsible for the application and enforcement of the GCI. They may opt to designate the competent authorities already responsible for the enforcement of the Unfair Commercial Practices Directive, in which case the enforcement rules of that Directive apply (article 13.2 GCI). The competent authorities are empowered with the powers laid down by article 14. As explained earlier, the (competent authorities) of the Member States are to undertake regular checks of the explicit environmental claims made and the environmental labeling schemes applied on the market of the European Union and to report their findings.[449]

To ensure that traders are effectively dissuaded from non-compliance with the requirements of the GCI, Member States are to lay down rules on penalties and ensure that those rules are implemented. Those penalties should be effective, proportionate, and dissuasive. Article 17 GCI contains common non-exhaustive criteria for determining the types and levels of penalties that are to be imposed in case of infringements, to facilitate a more consistent application of penalties across the European Union.

The competent authorities are not the only watchmen designated by the GCI. Natural or legal persons or organizations regarded under European Union or national law as having a legitimate interest are entitled to submit substantiated complaints to competent authorities when they deem, on the basis of objective circumstances, that a trader is failing to comply with the provisions of the GCI (article 16.1 GCI). Non-governmental entities or organizations promoting human health, environmental or consumer protection and meeting any requirements under national law shall be deemed to have sufficient interest (article 16.2 GCI). Member States are to ensure that those wishing to submit a substantiated complaint have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under the GCI, without prejudice to any provisions of national law which require that administrative review procedures be exhausted prior to recourse to judicial proceedings. Those judicial review procedures shall be fair, equitable, timely and free of charge or not prohibitively expensive, and shall provide adequate and effective remedies, including injunctive relief where necessary (article 16.5 GCI).

[449] Based on these findings, the European Commission may adopt delegated acts with supplementary rules (see earlier).

2.7 Right to Repair Directive

2.7.1 Background of the right to repair

Ecodesign of products is a *condicio sine qua non* for the circular economy.[450] In terms of extending the lifespan of products, ecodesign allows to increase the repairability of the product, which is one of the objectives of the ESPR.[451] Ecodesign removes technical barriers to repair that are ingrained[452] in the product itself. [453]

Ecodesign is a necessary but not a sufficient condition for the circular economy. Technical barriers are not the only obstacles to the repair of products. Examples of other barriers include[454]:

- unavailability of repair information, spare parts and repair tools (which in the context of the European Union legislation is viewed as part of ecodesign, namely information (ecodesign) requirements);
- commercial guarantees that can no longer be invoked after own or independent repair;[455]
- restrictions based on intellectual property rights;
- security lockouts through software and hardware checks (which could also be grouped under technical design);
- restrictive end-user license agreements.

These technical and other barriers impede easy repair of products. Technical difficulties, an excessive cost of repair or a cumbersome procedure may all lead to the premature replacement of a product. Worldwide[456], a societal and legal awareness is growing that a circular economy

[450] See in the field of recovery of raw materials and of recycling the report by DENUO, the Belgian federation of the waste and recycling sector, commissioned by the Federal Public Service Public Health (*FOD Volksgezondheid*), DENUO, *Eindrapport voor rekening van de FOD gerealiseerde studie over de technische, technologische en economische belemmeringen voor de terugwinning van componenten en het recycleren van producten in België, bestek DG5/PP/NDS/17012*, 61 p.

[451] Regarding the benefits of lifespan extension in a circular economy, see European Environmental Agency, *Briefing no. 02/2020 – Europe's consumption in a circular economy: the benefits of longer-lasting electronics*, doi: 10.2800/445301.

[452] On the end-user's side there are barriers to repair as well, which are not inherent to the product or to the way in which a manufacturer offers it to the end user. For example, there may exist a negative stigma that only people who have fewer resources repair their products themselves or have them repaired, resulting in a psychological barrier, see N. TERZIOGLU, "Repair motivation and barriers model: Investigating user perspectives related to product repair towards a circular economy", *Journal of Cleaner Production* 2021, vol. 289, p. 8.

[453] An example of technical barriers can be found in the world of mobile phones. It has become a common practice to connect mobile phone components with proprietary screws, which can only be loosened with tools that are unavailable to the general market, or to even omit the screws altogether in favor of glue, making it difficult to disassemble components. These practices create a technical obstacle for end-users of the phone to repair it themselves or have it repaired by a repair service that is independent of the manufacturer.

[454] Regarding most of these barriers, see Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021, p. 6.

[455] For this purpose, manufacturers apply labels to components that warn that the warranty no longer applies when they are removed.

[456] In the United States there are several states that have implemented legislation on the right to repair, see for example Georgia (House Bill 286 [2019], LC 39 2094ER, Right to Repair Act), West Virginia (House Bill 2115 [2019], Right to Repair Act), New York (Senate Bill S710 [2019], Mobile Device And Computer Fair Repair Act) and Washington (House Bill 1342 and Senate Bill 5799 [2019], Concerning the fair servicing and repair of digital electronic products). In Australia and New Zealand, consumers enjoy a contractual right to access independent repair services and spare parts, §74F Trade Practices Act 1974; §12 Consumer

needs a 'right to repair'[457] that removes such barriers and strengthens the position of end-users.[458]

For a correct understanding of the 'right to repair', it should be noted that the *right* to repair is somewhat of a misnomer. From a property law perspective, it is without question that the owner of a product has the right to repair it. After all an inherent component of the right to ownership is the right to consume and transform a product, to the extent that owners may even destroy their products (*ius abutendi*), albeit within the limits of public policy that legislation may impose (e.g., restrictions because of heritage value).[459] If the owners of products may take such drastic measures, they certainly have the right to repair their products, that is to transform them, as they see fit. However, the right to repair gives the consumer the *actual ability* to repair, thus making the legal possibility a factual reality. It does so by obligating manufacturers to make diagnostic and repair information and tools freely available to consumers and independent repair services, to make spare parts available, to adhere to repairability requirements when designing products, et cetera Ideally, the legislative framework of a right to repair also clarifies the impact of an own or independent repair on a manufacturer's legal obligations regarding the statutory warranty of conformity, product safety, product liability, et cetera

The right to repair has been on the European Union's legislative agenda for a while. The right already exists in specific legislation. In the automotive sector, manufacturers are obligated to provide independent repair services with access to repair information and to make spare parts and repair tools available.[460] Implementation standards of the current Ecodesign Directive dating from 2019, also obligate the manufacturers of certain energy-related products, such as

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Guarantees Act 1993. In the European Union, the right to repair can be found in legislation that applies to specific contexts (more on this to follow).

[457] This right to repair is not to be mistaken with the consumer's right to redress found in the Sale of Goods Directive, which can happen in the form of repair, when bought products turn out to be faulty or do not look or work as advertised. The difference between both rights can be illustrated semantically. In Dutch the right to redress translates to '*recht op herstel*', whereas the right to repair central to this contribution could translate to '*recht op herstellen*'. The use of a verb in the latter translation, in contrast to the noun derived from this verb used in the former, shows how the right is to be understood as an active right to be able to carry out repair. The same holds true in French with the contrast between '*droit à réparation*' and '*droit de réparer*'. This distinction in concepts and the precise content of the right to restore will be further clarified later. However, an immediate side note to this conceptual distinction is the nuance is that an extension/amendment to the 'right to redress' within the meaning of the Sale of Goods Directive is also sometimes seen a specific component of the more broad 'right to repair'.

[458] See earlier the heading 'Three focal points'. Regarding the right to repair, see in detail E. TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *ERPL* 2019, vol. 27, iss. 4, p. 851-873; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 367-369, no. 86; I. LACROIX, "Recht op herstellen: aansprakelijkheids- en verbintenisrechtelijke implicaties van de circulaire economie" in I. SAMOY and S. STIJNS (eds)., *Masterproefreeks*, Bruges, die Keure, 2022, 114p.; A. PERZANOWSKI, *The Right to Repair: Reclaiming the Things We Own*, Cambridge, Cambridge University Press, 358p.

[459] H. DE PAGE and R. DEKKERS, Traité élémentaire de droit civile belge, tome V, Principaux contrats - Les biens, Brussels, Bruylant, 1975, p. 800, no. 898; V. SAGAERT, Goederenrecht, deel V, Goederenrecht, Beginselen van Belgisch privaatrecht, Mechelen, Kluwer, 2014, p. 191, no. 218; I. DURANT, Droit des biens, Brussels, Larcier, 2017, p. 162, no. 182; N. BERNARD, Précis de droit des biens, Limal, Anthemis, 2017, p. 120, no. 253.

[460] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, *OJ L* 29 June 2007, vol. 171, p. 1-16; Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy-duty vehicles (Euro VI) and on access to vehicle repair and maintenance information, amending Regulation (EC) No 715/2007 and Directive 2007/46/EC and repealing Directives 80/1269/EEC, 2005/55/EC and 2005/78/EC, *OJ L* 18 July 2009, vol. 188, p. 1-13.

washing machines, to make spare parts available.[461] The European Union legislature wish to give a more general scope to the right to repair found in this specific legislation with the R2RD.[462]

2.7.2 General overview R2RD

On 22 March 2023, the European Commission announced the 'right to repair initiative', implementing the Circular Economy Action Plan. This proposal for a directive establishes common rules promoting the repair of products (the Right to Repair Directive (R2RD)).[463]

On 17 November 2023 the Council of the European Union adopted its position that served as the basis for the trilogue negotiations (hereinafter referred to as 'Amendments R2RD Council of the EU').[464] On 21 November 2023 the European Parliament proposed its amendments to the European Commission's proposal (hereinafter referred to as 'Amendments R2RD Parliament').[465] On 15 February 2024 the Committee on the Internal Market and Consumer Protection of the European Parliament approved the provisional agreement reached by the Council of the European Union and the European Parliament (hereinafter referred to as 'Provisional agreement R2RD').[466] Typically, such a provisional agreement becomes the final text of European Union legislation. Thus, the description and analysis of the R2RD hereinafter is based on this provisional agreement. Whenever a recital or article of the R2RD is mentioned, the reader may assume that this is a reference to the provisional agreement, unless stated otherwise.

With the R2RD, the European Union legislature wishes to ensure the establishment and functioning of the internal market. Therefore, the legal basis of the initiative is article 114 TFEU.[467] Referring to article 114.3 TFEU, the European Union legislature takes as a basis for the R2RD a high level of environmental and consumer protection.[468] It explicitly highlights the promotion of sustainable consumption, a circular economy and the green transition as objectives of the R2RD.[469] The European Union legislature notes that differing national rules and resulting differences in market practices result in low transparency in repair options and

[461] See, for example, for household washing machines and household washer-dryers, Regulation (EU) 2019/2023 of 1 October 2019 laying down ecodesign requirements for household washing machines and household washer-dryers in accordance with 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 L* 5 December 2019, p. 285-312. For an overview of the package of implementation standards, see European Commission - Questions and answers - The new ecodesign measures explained (QANDA/19/5889), 1 October 2019; L. VAN ACKER, "The new Ecodesign Package: an important step towards a circular economy", *Ars Aequi* 2020, vol. 9, p. 793-801.

[462] On 7 April 2022, the European Parliament adopted a resolution on the right to repair, see European Parliament resolution of 7 April 2022 on the right to repair (2022/2515(RSP)).

[463] 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.

[464] Council of the European Union, 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 - Mandate for negotiations with the European Parliament, no. 15408/23.

[465] Amendments adopted by the European Parliament on 21 November 2023 on the 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)0155 – C9-0117/2023 – 2023/0083(COD))1 (first reading), P9_TA(2023)0400.

[466] Provisional agreement resulting from interinstitutional negotiations, AG\1296871EN, PE 759.045.

[467] Explanatory memorandum to the R2RD, p. 2. See also article 1.1 R2RD.

[468] Explanatory memorandum to the R2RD, p. 3. See also article 1.1 R2RD.

[469] Explanatory memorandum to the R2RD, p. 3.

conditions. To avoid the dissuasion of consumers to access repair services and the resulting hindrance of the development of repair services, European harmonization is required.

The R2RD has two main components, which pivot around the 'legal guarantee' provided for by the Sale of Goods Directive (i.e., the statutory warranty of conformity).[470] If, in the context of a consumer purchase, a product shows a lack of conformity (which was already present at the time of delivery[471]) during the statutory warranty period, the consumer is entitled to the remedies in article 13 of the Sale of Goods Directive.[472] The R2RD contains a direct amendment to this article. The bulk of the R2RD applies as a 'stand-alone' directive to defective products after the statutory warranty period has expired, creating new consumer rights to repair.

The harmonization of the R2RD is exhaustive (article 3 R2RD). The Member States shall not maintain or introduce national law provisions that diverge from those laid down in the R2RD. At the same time, the harmonization is limited to those elements that have an internal market dimension (i.e., the standardized European Repair Information Form and the obligation to repair of manufacturers of products that fall under statutory repairability requirements (more on this to follow)) [473] and the amendments to the Sale of Goods Directive by the R2RD are mostly restricted to rules that are already subject to exhaustive harmonization[474]. Recitals 5 and 5a R2RD explain that Member States remain free to regulate aspects of general contract law (such as rules on the formation of contracts) and to maintain or introduce provisions on other aspects of promoting the repair of goods that complement the R2RD (such as rules regarding commercial guarantees, the existence of repair service centers or fiscal incentives to repair).

Concisely, the R2RD will:

- within the contours of the statutory warranty of conformity:
  - promote repair as a remedy by extending the statutory warranty period by twelve months if the consumer makes the informed choice to have the product repaired; and
  - stimulate refurbishment by allowing replacement with a refurbished product in cases where repair is impossible;
- outside those contours, promote repair with the following tools:
  - a European Repair Information Form as a means of conveying precontractual information regarding contracts for the provision of repair services;
  - an obligation for the manufacturers of products that fall under statutory repairability requirements to repair their products for free or against consideration;
  - an obligation for those manufacturers to inform the consumers of the obligation to repair;

[470] See earlier footnote 299.
[471] The Belgian legislation transposing the Sale of Goods Directive stipulates that a lack of conformity is rebuttably presumed to have been present at the time of delivery for a period two years (presumption of anteriority), while the Sale of Goods Directive imposes a minimum period of one year for this presumption.
[472] This is a 'right to redress', see earlier footnote 457 (in particular, the nuance regarding the conceptual distinction with the 'right to repair').
[473] Explanatory memorandum to the R2RD, p. 4.
[474] Explanatory memorandum to the R2RD, p. 4.

- an obligation for those manufacturers to ensure access to spare parts and repair tools at a reasonable price; and
- a European online platform for repair and refurbishment that collects information on repair services.

2.7.3 Scope

2.7.3.1 General background

Article 12 R2RD contains targeted amendments to the Sale of Goods Directive. The bulk of the R2RD contains, as a 'stand-alone' directive, common rules on the repair of products purchased by consumers in the event of a defect of the products that occurs or becomes apparent outside of the statutory warranty of the Sale of Goods Directive (article 1.2 R2RD). Thus, the general material scope of the R2RD as a stand-alone directive is defects outside of the statutory warranty, for *all* products (recital 5b R2RD). However, the material scope of the R2RD is limited as regards the obligations of manufacturers to repair and to inform of the obligation to repair found in articles 5 and 6 R2RD (article 1.2a R2RD). As will be explained in more detail, these obligations are limited to products that fall under a specific list of European Union legislation that lays down repairability requirements. This list can be found in Annex II to the R2RD. Article 5.4 R2RD empowers the European Commission to adopt delegated acts to update the list in the light of regulatory developments.

The harmonized personal scope of the R2RD is limited to consumer contracts, specifically sales contracts. Article 2, point 1 R2RD defines 'consumer' as the consumer of the Sale of Goods Directive (i.e., consumers engaging in sales contracts for purposes which are outside their trade, business, craft or profession).

Another aspect of the personal scope is the definition of 'repairer'. Pursuant to the definition in article 2, point 2 R2RD repairers provide a repair service *related to their trade, business, craft or profession*. The explanatory memorandum to the R2RD underlines that this means that the repair service should serve *commercial* purposes (p. 10). In the growing repair industry, 'new'[475] players have entered the circular economy. In addition to businesses offering repair services, there is also a rise in peer-to-peer repair services and collaborative partnerships. The union legislature pays attention to 'community-led repair initiatives' (e.g., repair cafés). Such initiatives are not equated with 'repairers'. For example, regarding the online platform for repair (more on this to follow), the Member States are free to decide whether to extend the scope of their national section on the platform to include such initiatives even though the platform is meant to facilitate the search for repair services in business-to-consumer relationships (recital 21a R2RD). This suggests that the European Union legislature does not view initiatives such as repair cafés as repairers who repair for commercial purposes. It is true that repair cafés typically operate on a non-commercial basis. Often, they focus on fostering a sense of community (which is why the Belgian city of Leuven for example, strongly promotes these initiatives[476]) and educating people on repair and honing their repair skills. Mostly volunteers help those who gather. Commercial repairers, on the other hand, are profit-oriented businesses that offer repair services as a commercial transaction, where employed staff helps

[475] It is good to keep in mind that the repair of products was a customary practice in the past (and has always remained so in some sectors such as the automotive industry).
[476] https://leuven.be/repair.

clients. However, the line between both can sometimes blur, as repair cafés may charge nominal fees for their services or accept donations to cover costs. One can expect the European Commission to in time give guidance on the notion of 'repairing for commercial purposes'.

2.7.3.2 Analysis

The obligations to repair and to inform of the repair obligation in the R2RD are limited in their scope (more on the substantive content of these obligations to follow). One limit is that the obligations are restricted to the legislation containing repairability requirements in Annex II to the R2RD. A second limit is that the extent of the obligations is limited to the requirements laid down by that legislation (e.g., regarding components, duration, repair actors, et cetera) (this is explained in more detail later on). In essence, the R2RD acts as a 'conduit' for specific legislation, which entails that rather than a truly 'horizontal' piece of legislation, the R2RD is mostly a framework for the enactment of targeted 'vertical' legislation.

The reasons for limiting the scope of the obligation to repair to the products covered by the legislation covered in Annex II to the R2RD are to avoid overburdening manufacturers and to ensure that the obligation can effectively be performed. Accordingly, the European Union legislature limits the obligation to repair to those products that are 'repairable by design' (recital 16 R2RD).

This reasoning needs nuance regarding one aspect. The category of products that are 'repairable by design' is necessarily broader than those products that fall under existing statutory ecodesign requirements. Those products are the *minimum minorum* of products that fall in the category of repairable by design because they are statutorily mandated to be so. However, possibly many more products can be repairable by design because the manufacturer has designed them as such without being statutorily obligated thereto (e.g., following an industry standard). Thus, the 'legal' category of repairable products in the R2RD overlooks products that fall in the 'technical' category of repairable products. In sum, the R2RD limits the obligation to repair to those products that are 'repairable by design *because they are statutorily required to be so*'.

The European Parliament had suggested changing the scope of Annex II to the R2RD, by opening up this restrictive list to also include 'repairable products' (i.e., products that are simply technically repairable even though they are not mandated to be so by legislation). Thus, an amended article 5.4. in the version of the R2RD proposed by the European Parliament empowered the European Commission to add new repairable products to the list in the light of not only regulatory but also market developments.[477] When adding new product groups to Annex II the European Commission would have needed to conduct an impact assessment, in particular when the addition would be undertaken independent of other acts under European Union law (i.e., in absence of European Union legislation mandating repairability requirements for the product group) (amended recital 17 in the version of the R2RD proposed by the European Parliament).[478] The European Parliament itself introduced one example of technically repairable products in Annex II: bicycles.[479]

[477] Amendments R2RD Parliament, amendment 46.
[478] Amendments R2RD Parliament, amendment 15.
[479] Amendments R2RD Parliament, amendment 82.

From a sustainability perspective, it could have been beneficial for the European Union legislature to follow this approach of the European Parliament. The amendments could have ensured that the inclusion of product groups in the scope of the R2RD would not have been solely dependent on the pace of regulatory developments (although the required impact assessment would also have taken up time). At the same time, it is to be acknowledged that the final version of the R2RD is not without merit from a governance perspective. The European Commission can still add products such as bicycles to Annex II of the R2RD by first creating and imposing repairability requirements on these products through the ESPR. Thus, technically repairable products may still end up in the range of the R2RD, albeit possibly with a slight delay. As a trade-off for that possible delay the procedure to enact ecodesign requirements, including impact assessments and stakeholder consultations within the Ecodesign Forum, ensures that regulatory decisions of the European Commission are well-informed, balanced, and reflective of the diverse interests and perspectives involved. This scrutiny helps uphold the credibility of these regulatory decisions and could help ensure that stakeholders feel willing to co-operate in fulfilling the repairability requirements that they themselves have helped to create as stakeholders.

2.7.4 Ecodesign

The repairability of a product strongly depends on its design. This repairability, in turn, is fundamental to the extension of the lifespan of products, as it plays an important role in the design and production stage to resist premature obsolescence.[480] For this reason, the ESPR is strongly committed to this product aspect. The ESPR is the general framework for ecodesign, which allows for specific requirements for products to be determined in co-operation with stakeholders.

Consequently, the R2RD – a general framework in its own right, establishing common rules – does not go into detail on ecodesign requirements to stimulate repairability. It limits itself to referring to a specific list of European Union legislation that lays down repairability requirements on the basis of the existing ecodesign framework. This list can be found in Annex II to the R2RD.

2.7.5 Information obligations

2.7.5.1 Pre-contractual information on repairability before the sale of a product

Another aspect of the larger right to repair movement relates to pre-contractual information on the repairability of the product. Pre-contractual information obligations about the repairability of a product are important in the marketing and pre-contractual stage to resist and postpone premature obsolescence.[481] With information on the repairability of a product in hand before purchasing it, a consumer can estimate how easy it will be to repair the product or to have it repaired and thus get an idea of its expected lifespan.

To this end, the ESPR introduces the repairability score as a possible information requirement, while the European Union legislature expands on the mandatory nature of the repairability score in the ECGTD (see earlier the sections on the ESPR and the ECGTD). The R2RD is not part

[480] See the previously explained framework of A. MICHEL.
[481] See the previously explained framework of A. MICHEL.

of the legislative framework of the pre-contractual repairability score, as it is focused more on the after-sale stages in the life cycle of a product.

2.7.5.2 Information on obligation to repair of manufacturer

The R2RD obligates the manufacturers of products that fall under statutory repairability requirements to repair products upon the consumer's request (more on this obligation to follow). These manufacturers, or where applicable, their authorized representatives, importers or distributors, are obligated to inform consumers of their obligation to repair. At least for the entire duration of the obligation to repair[482], they are to provide information on their repair services free of charge in an easily accessible, clear and comprehensible manner (article 6 R2RD) without the need for the consumer to request this information (recital 20 R2RD). The information should mention the relevant products covered by the obligation to repair, together with an explanation that and to what extent repair is provided for those products, for instance through sub-contractors (recital 20 R2RD).

Manufacturers are free to determine the means through which they inform the consumer, such as such as on a website in a visible and prominent way, in the digital product passport mandated by the ESPR or at the point of sale (where the manufacturer is also the trader) (recital 20 R2RD).

It is to be assumed that this obligation to repair could fall under the information requirements required by delegated act on the basis of the ESPR. Thus, other – and mandatory – methods to inform could be to display the obligation on the product itself, on the packaging of a product, on a label or on a website or application that is accessible free of charge (see article 7.6 ESPR).

2.7.5.3 Information on conditions of repair for all repairers (European Repair Information Form)

The R2RD creates a new information tool relevant for the use stage of all products, not only those subject to statutory repairability requirements (i.e., article 4 R2RD has a truly horizontal scope)). Article 4 R2RD stipulates that before a consumer is bound by a contract for the provision of repair services, the repairer may voluntarily[483] provide the consumer, upon the consumer's request[484], with the European Repair Information Form set out in Annex I to the R2RD within a reasonable period of time from the request[485] (article 4.1 R2RD). Thus, the form is a means to convey important information to consumers before they decide to enter into a contract for the provision of repair services. The form specifies certain key conditions of repair in a clear and comprehensible manner (e.g., the identity of the repairer, the nature of the defect and the type of repair suggested, the price or, if the price cannot reasonably be calculated in advance, the way the price is to be calculated and the maximum price for repair[486]) (article 4.4

[482] This could be understood as starting from the moment of placing the product on the market until the expiry of the reparability requirements (recital 20 R2RD).
[483] Repairers are free to offer the European Repair Information Form voluntarily without there being an obligation to do so (recital 8 R2RD).
[484] The consumer remains free not to request this form and to conclude a contract with a repairer pursuant to pre-contractual information provided by other means in accordance with the Consumer Rights Directive (recital 8 R2RD).
[485] This should correspond to the shortest possible time necessary (recital 8 R2RD).
[486] In this regard the case law of the Court of Justice of the European Union should be kept in mind. A clause concerning the total price a consumer contract that merely states that the fees to be received by the business amounts to a lump sum for each hour of services provided does not enable an average consumer, who is reasonably well informed and reasonably observant and circumspect, to estimate the financial consequences of that clause, that is to say, the total amount to be paid for those services. The business is to provide more particular information. Such particular information might be an estimate of the

R2RD). This standardized presentation of the repair conditions is meant to allow consumers to assess and easily compare repair services (recital 7 R2RD). Also, repairers gain more legal certainty since by using and filling in correctly the European Information Repair Form they will be deemed to fulfil their statutory obligations, in particular with respect to the provision of pre-contractual information pursuant to different pieces of European Union legislation (article 4.6 R2RD; see also recital 7 R2RD).

The form is to be provided free of charge (article 4.2a R2RD). However, there are situations where a repairer incurs costs necessary for providing the information on repair and price included in the European Repair Information Form. The repairer might need to carry out a diagnostic service to inspect the products to be able to determine the defect or type of repair that is necessary, including the need for spare parts, and to estimate the repair price. If a diagnostic service is necessary, a repairer may request a consumer to pay the costs that are necessary for that diagnostic service (including labor or transportation costs) (article 4.3 R2RD). In line with the pre-contractual information obligations and other requirements set out in the Consumer Rights Directive, the repairer should inform the consumer about such costs before the consumer requests the diagnostic service and before the provision of the European Repair Information Form. Consumers may refrain from requesting the diagnostic service where they consider its costs are too high. If the consumer chooses to have the product repaired, the repairer should be able to deduct the necessary costs of the diagnostic service from the price of the repair. This is without prejudice to Member States' rules on mandatory deduction of such costs. The deduction could be communicated through the European Repair Information Form (recital 9 R2RD).

The R2RD fixes the content of the European Repair Information Form for a period of thirty calendar days from the date on which the form was provided to the consumer. During this time, the repairer cannot alter the conditions of repair. If a contract is concluded within the thirty-day period, the conditions of repair specified in the form are an integral part of that contract (article 4.5 R2RD). The provisions of the R2RD are of a mandatory nature, which means that contracting parties cannot derogate from them to the detriment of the consumer (article 10.1 R2RD). This means, for example, that the contract for the provision of repair services may not contain an entire agreement clause that excludes the European Repair Information Form from being an integral part of the contract. Conversely, the repairer and the consumer may agree on a longer period of validity of the form (as this contractual agreement is not to the detriment of the consumer) (article 4.5 R2RD).[487] The period of validity is mandatorily mentioned in the European Repair Information Form (article 4.4. ia) R2RD).

The European Repair Information Form is seen as an offer to contract that cannot be withdrawn once the consumer has accepted the repair conditions set out in the form. If the repairers decide to offer the European Repair Information Form and the consumers accept the conditions provided therein, the repairers are obligated to repair (article 4.5 R2RD). This binding nature of

expected number or minimum number of hours needed to provide a certain service, see CJEU 12 January 2023, C-395/21, ECLI:EU:C:2023:14, §40 and §43-44.

[487] The R2RD does not prevent the repairer from offering to the consumer contractual arrangements that go beyond its protection. Even though article 10.2 R2RD speaks of 'contractual' arrangements and even though the European Repair Information Form is pre-contractual to the contract for the provision of repair services, one can assume that the voluntary extension of the period of validity of the form is caught by the article. As there is an exchange of consents between repairer and consumer, they have entered into a contract about the form itself.

the form acts as a counterweight to the voluntary nature of the European Repair Information Form. Member States should provide for proportionate and effective remedies for consumers where the repairer does not perform the repair service after the consumer has accepted the European Repair Information Form provided by the repairer. Such remedies can include a reimbursement of the cost paid for the diagnostic service (recital 10a R2RD). This obligation for the Member States in the recitals is not found in the articles of the R2RD themselves (i.e., the operative provisions).[488]In Belgium the remedies for contractual non-performance can be found in article 5.83. Civil Code.

2.7.6 Obligation to repair

2.7.6.1 General background

Article 5.1 R2RD obligates the manufacturers of products that fall under statutory repairability requirements to repair products upon the consumer's request outside the statutory warranty of conformity of the Sale of Goods Directive. Thus, the obligation covers defects that are not a result of a non-conformity of the product within the statutory warranty period (see also article 1.2 R2RD). This obligation to repair contributes to reversing premature obsolescence through the various methods of repair in the use and end-of-life stages of the product.[489] The European Union legislature hopes that the obligation stimulates consumers to have defective but otherwise viable products repaired instead of prematurely discarding them (recital 11 R2RD).

The reason why the R2RD grants the consumer the right to claim directly against the manufacturer is that the manufacturers are the addressees of sustainability requirements (recital 12 R2RD). Thus, the direct claim on the side of the side of the consumer supplements the supply-side related repairability requirements (recital 16 R2RD).

The obligation to repair is limited in its scope in two ways. As touched upon before in the section on the scope of the R2RD, the R2RD acts as a 'conduit' for specific legislation.

- First, the obligation to repair only exists regarding those products for which 'repairability requirements'[490] are provided for by the European Union legislation listed in Annex II to the R2RD (in particular the ecodesign framework, so that products such as household washing machines, household dishwashers, refrigerating appliances and vacuum cleaners can be found on the list in Annex II). The European Commission wishes to avoid overburdening manufacturers by limiting the obligation to products that are repairable by design (recital 16 R2RD). The statutory repairability requirements ensure that the products are technically repairable.[491] The European Commission is granted the power to update the list in Annex II by delegated acts to ensure that it is kept up to date with regulatory developments.[492] By limiting the obligation to repair to existing ecodesign

[488] Regarding the interplay between recitals and the operative provisions in European Union legislation, see T. KLIMAS and J. VAICIUKAITE, "The law of recitals in European Community legislation", *ILSA Journal of International & Comparative Law*, 2008, p. 61-93.
[489] See the previously explained framework of A. MICHEL.
[490] Article 2, point 10 R2RD defines 'repairability requirements' as requirements under the Union legal acts listed in Annex II which enable a product to be repaired including requirements to improve its ease of disassembly, access to spare parts, and repair-related information and tools applicable to products or specific components of products.
[491] Explanatory memorandum to the R2RD, p. 11.
[492] Regarding the framework of this empowerment, see article 15 R2RD.

requirements, the European Commission ensures that the R2RD does not undercut the ESPR. Were the R2RD to contain a general, horizontal right to repair, applicable to all products and all repair actors, for a standard duration of time and for certain standard components, manufacturers might *de facto* have to design their products as repairable even though they are not (yet) statutorily obligated to do so by the ESPR. This 'risk' is mitigated, however, by the exemption to the obligation to repair where it is factually or legally impossible to repair the product (meaning that a product that is designed poorly regarding its repairability might not give rise to the obligation to repair; more on this exemption to the obligation to repair in case of impossibility to follow). In fact, a horizontal right to repair might have been an incentive for manufacturers to limit the repairability of the product as long as they are not statutorily obligated to do so to fall under that exemption. Without the pressure of the obligation to repair there might be more room for spontaneous improvements to the design of products.

- Furthermore, the obligation to repair corresponds to the scope of the repairability requirements in the listed legislation (recital 16 R2RD). Thus, the obligation to repair of the R2RD is modeled to the requirements of the more specific legislation, regarding, for example, the components covered and the period during which the respective repairability requirements apply. The European Union legislature gives the following example. [493] Commission Regulation (EU) 2019/2023 requires that manufacturers, importers or authorized representatives of household washing machines and household washer-dryers make available to professional repairers a specified list of spare parts, for a minimum period of ten years after placing the last unit of the model on the market. Therefore, the obligation to repair will apply to the respective products, defects that necessitate a replacement with such spare parts and the time period of ten years.

As explained before, the reasons for limiting the scope of the obligation to repair to the products covered by the legislation covered in Annex II to the R2RD are to avoid overburdening manufacturers and to ensure that the obligation can effectively be performed. Accordingly, the European Union legislature limits the obligation to repair to those products that are 'repairable by design' (recital 16 R2RD).

Manufacturers are only exempted from the obligation to repair if the product is factually or legally impossible to repair (article 5.1 R2RD). 'Factual impossibility' means an impossibility of a technical nature (e.g., because the product is damaged beyond repair).[494] There are no other exemptions. Thus, the manufacturer may not, for instance, refuse repair for purely economic reasons such as the costs of spare parts (recital 19 R2RD). Also, manufacturers may not refuse repair for the sole reason that a previous repair has been performed by other repairers or by the consumer (article 5.3c R2RD). In other words, own or independent repair can never void the right of the consumer to request repair from the person obligated to repair pursuant to article 5 R2RD (more on independent repair to follow).[495] From a sustainability perspective and

[493] Explanatory memorandum to the R2RD, p. 11.
[494] See explanatory memorandum to the R2RD, p. 11.
[495] As a sidenote: in its version of the ECGTD the European Parliament suggested adding the omission to inform the consumer that the trader will refuse to repair a product that has previously been repaired by an independent professional, a non-professional or a user several to the blacklist in Annex I to the Unfair Commercial Practices Directive (see Amendments ECGTD Parliament, amendment 80). This unfair commercial practice is not part of the final version of the ECGTD. This explicit provision in the R2RD diminishes the need for the addition of that practice to the blacklist. Also, the new point 23i. in Annex I is related to this matter. It is regarded as an unfair commercial practice to withold information concerning the impairment of the

in consideration of the goals of the right of repair, this is sensible. Repair of products should be fully stimulated to resist premature obsolescence.[496] It should be noted that on the end of the person obligated to repair, shoddy repair work by the consumer or an independent repairer that leads to additional labor or material costs can be reflected in the reasonable price that can be asked for repair (more on this to follow in the part explaining article 5.1a R2RD). Also, the repairability requirements in the legislation in Annex II often stipulate that repair information, spare parts and repair tools are made available to independent repairers and, to a lesser extent, end-users (such as consumers). Article 5.3 R2RD reiterates that manufacturers are to do so (if required by the repairability requirements). From a sustainability perspective, it is beneficial that the European Union legislature does not allow manufacturers to refuse repair in cases of independent repair. Allowing such refusals would undermine the efficacy of the repairability requirements, given the risk of a 'chilling effect'. Knowing that manufacturers can refuse repairs due to previous independent repairs, consumers may be discouraged from seeking repair services from independent repairers or attempting repairs themselves.

Manufacturers may fulfill the obligation to repair by sub-contracting repair (article 5.1 R2RD), for instance, if the producer does not have the repair infrastructure or if repair can be carried out by a repairer located closer to the consumer (recital 13 R2RD). The European Union legislature notes that it is beneficial that the repair can be carried out as close as possible to the consumer to prevent unnecessary shipping costs and emissions (combining both the care for consumer protection and for environmental protection). Importantly, the manufacturer remains liable for the obligation to repair (recital 13 R2RD). It is a general principle in the Belgian law of obligations that if the debtor relies on other persons for the performance of an obligation, the wrongs committed by these auxiliaries are imputable to the debtor (article 5.229. Civil Code). A practical implication of the obligation to repair is that manufacturers will have to keep spare parts in their own stock or in the stock of the sub-contractor to be able to perform this obligation.

The repair shall be carried out subject to the following conditions (article 5.1a R2RD).

- It shall be carried out either for free or against a reasonable price.[497] The manufacturer may have an interest to perform the obligation for free as part of a commercial guarantee on durability of its products (see explanatory memorandum to the R2RD, p. 11 and recital 12 R2RD). The price may take into account, for example, labor costs, costs for spare parts, costs for operating the repair facility and a customary margin. Repair services may become an additional source of revenue for manufacturers (desirable to stimulate a repair industry) but the price must remain reasonable. [498] The 'reasonableness' of the price means that it should be set in such a way that consumers are not intentionally deterred from benefitting from the manufacturers' obligation to

functionality of a product when consumables, spare parts or accessories not supplied by the original producer are used or to falsely claim that such impairment will happen.

[496] See the previously explained framework of A. MICHEL.

[497] The European Union legislature has opted for a combination of two policy options A 'high intervention' would have been to obligate repair free of charge (this is sub-option 3(A) in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084). A 'moderate intervention' would have been to allow a reasonable price for the repair (sub-option 2(B)). As the obligation to repair relates to defects outside of the statutory warranty, the European Union legislature saw it fit to allow manufacturers to fulfill the obligation against consideration (see also recital 12 R2RD).

[498] Explanatory memorandum to the R2RD, p. 11.

repair (recital 12 R2RD). The European Union legislature believes that the competitive pressure from other repair actors is likely to keep the price acceptable for the consumer (see explanatory memorandum to the R2RD, p. 11 and recital 12 R2RD).

- It shall be carried out within a reasonable period of time from the moment the manufacturer has physical possession of the product, has received the product or has been given access to the product by the consumer.
- The manufacturer may provide the consumer with the loan of a replacement product free of charge or against a reasonable fee for the duration of the repair (article 5.1a, point c) R2RD). This optional loan can give manufacturers a competitive edge over alternative repair services. Even though the European Union legislature does not go into detail here, it seems plausible that several of the principles regarding replacement products enumerated in the context of the statutory warranty period are applicable by analogy (see new article 14.1 Sale of Goods Directive and recital 28b R2RD for these principles).[499]
    - The manufacturer could loan a replacement a good if the repair will not be completed within a reasonable period of time or without significant inconvenience.
    - The replacement product can be a refurbished product.
    - The manufacturer should still undertake the repair within a reasonable period of time. Providing a product on loan for the duration of the repair can avoid significant inconvenience to the consumer but it cannot justify an unreasonably long time period for repair. As the obligation to repair can be seen as a 'bonus' to the statutory warranty of conformity one should generally take care not to apply the principles of new article 14.1 Sale of Goods Directive and recital 28b R2RD overly strict here. However, as article 5.1a., point b) R2RD mandates that the repair obligation is to be carried out within a reasonable period of time, this principle seems applicable without reservation.
- In cases where the repair is impossible, the manufacturer may offer the consumer a refurbished product (article 5.1a, point d R2RD).

Where the manufacturer obligated to repair is established outside the European Union, its authorized representative[500] in the European Union shall perform the obligation of the producer. Where the producer has no authorized representative in the Union, the importer[501] of the product concerned shall perform the obligation of the manufacturer. Where there is no importer, the distributor[502] of the product concerned shall perform the obligation of the manufacturer (article 4.2 R2RD). This cascading system of anchor points for the obligation to repair ensures its effectiveness and empowers the consumers (recital 15 R2RD).

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[499] A principle where reasoning by analogy falls short is the requirement in the context of the statutory warranty that the trader should provide the replacement product without cost. In the context of the obligation to repair of article 5 R2RD, the European Union legislature allows mercantile considerations as the manufacturer may set a price on the repair as an additional source of revenue (see explanatory memorandum to the R2RD, p. 11). Thus, it comes as no surprise that article 5.1a. c) R2RD stipulates that the replacement product may be provided against a reasonable fee.

[500] Article 2, point 5 R2RD refers to the definition of 'authorized representative' in article 2, point 43 ESPR. Thus, an 'authorized representative' is any natural or legal person established in the Union who has received a written mandate from the manufacturer to act on its behalf in relation to specified tasks with regard to the manufacturer's obligations under the ESPR.

[501] Article 2, point 6 R2RD refers to the definition of 'importer' in article 2, point 44 ESPR. Thus, an 'importer' is any natural or legal person established in the Union who places a product from a third country on the Union market.

[502] Article 2, point 7 R2RD refers to the definition of 'distributor' in article 2, point 45 ESPR. Thus, a 'distributor' is any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market.

The consumer is not bound to make use of the obligation of the manufacturer (article 5.3d R2RD). The consumer can instead solicit the services of other repairers. This can be explained by the contractual freedom of the consumer (see recital 8 R2RD). As consumers would need to pay for the repair, they are likely to compare repair opportunities to choose the most suitable repair services for their needs relying on the European Repair Information Form. Thus, it is likely that they approach independent repairers in their proximity or the seller (i.e., trader who is not manufacturer) before reaching out to manufacturers who may for instance be located at a greater distance and for which the price could be higher due to transportation costs (recital 18 R2RD).

2.7.6.2 Analysis

In general, the creation of this obligation to repair is to be applauded unreservedly for reasons of sustainability. Repair of products should be fully stimulated to resist premature obsolescence.[503] Still, some remarks can be made.

First, the European Union legislature states that a reasonable price for repair means that it should be set in such a way that consumers are not *intentionally* deterred from benefitting from the manufacturer's obligation to repair (albeit that this requirement of intentionality is only found in the recitals and not in the operative provisions of the R2RD[504]).[505] Requiring proof of intentionality can be a difficult burden to meet, as intentions are subjective and often challenging to determine. Any ambiguity in this regard can undermine the effective enforcement of the R2RD. This raises the question whether the European Union legislature should not have opted for a more objective standard of reasonableness. For example, the standard of reasonableness could rely on a more objective benchmark such as a reference to the reasonable and prudent person. This standard of conduct is used in Belgian law among others[506] in the context of the benevolent intervention in another's affairs to determine whether the expenses of the intervener have been useful and necessary (i.e., 'reasonable')) (article 5.132. Civil Code). It is based on the assessment of what a hypothetical, 'average' person would do in a similar situation and does not take into account the individual characteristics or motivations of the actual person involved. Thus, in the context of the obligation of repair it would allow for the assessment whether a reasonable and prudent manufacturer, when placed in the same circumstances, would ask an equally high price. If not, the asking price could be ruled unreasonable.

A second remark concerns the loan of a replacement product during repair and the provision of a replacement product where repair is impossible. One should take care to note that both article 5.1a, point c) and article 5.1a, point d) R2RD are merely informative. They do not contain actual consumer rights but merely suggestions for manufacturers to increase their competitiveness in the repair market (with article 10.2 R2RD allowing contractual arrangements that go beyond the protection offered by the R2RD). Article 5.1a, point d) R2RD stipulates that

[503] See the previously explained framework of A. MICHEL.

[504] Regarding the interplay between recitals and the operative provisions in European Union legislation, see T. KLIMAS and J. VAICIUKAITE, "The law of recitals in European Community legislation", *ILSA Journal of International & Comparative Law*, 2008, p. 61-93.

[505] This stipulation can be traced back to the version of the R2RD proposed by the Council of the European Union, see Amendments R2RD Council of the EU, p. 14.

[506] It is also used to determine abuse of rights or a wrong based on the general duty of care.

in cases where the repair is impossible, the manufacturer may provide the consumer with a refurbished product. It is clear that this is merely a suggestion to create a competitive edge from the European Union legislature. After all, in cases where the repair is factually or legally impossible there simply exists no obligation for the manufacturer to repair (see article 5.1 R2RD). Thus, offering a refurbished product is not necessary for the manufacturer to be discharged from the (in this case non-existing) obligation to repair. Even though this is only a suggestion, from a sustainability perspective it seems unnecessarily restrictive of the European Union legislature to have only mentioned refurbished products. 'Re-use' and 'repair' rank higher in the hierarchy of R-strategies than 'refurbish' and, thus, are preferable if feasible. As there is no obligation to repair where the repair of the product is impossible and given that the obligation to repair in and of itself contextually belongs to rights outside the statutory warranty, one would be hard-pressed to conceive a reason why the consumer's interests would not be served equally well with replacement by, for example, a repaired product. In any case, the consumer is given a 'bonus'. It can be pointed out that the European Union legislature itself mentions that the R2RD is meant to promote not only refurbishment but also re-use and repair (recital 3 R2RD).[507]

2.7.7 Facilitating own or independent repair

2.7.7.1 No voidance of obligation to repair in case of own or independent repair

As mentioned before, article 5.3c R2RD stipulates that manufacturers may not refuse repair for the sole reason that a previous repair has been performed by other repairers or by the consumer (article 5.3c R2RD). In other words, own or independent repair can never void the right of the consumer to request repair from the person obligated to repair pursuant to article 5 R2RD (more on independent repair to follow).

Additionally, recital 14a R2RD recalls that commercial practices that induce consumers to think that their product cannot be repaired because of previous repair or inspections by an independent repairer, non-professional repairer or end-users, or false claims that such repair or inspection generates risks related to safety, thereby misleading consumers, can, where applicable, constitute an unfair commercial practice under the Unfair Commercial Practices Directive. This is a reference to the general articles of the directive. None of the European Union initiatives blacklists such commercial practices.

2.7.7.2 Availability of repair information, spare parts and repair tools

2.7.7.2.1 General background

In addition to technical obstacles, the unavailability of repair information, spare parts and repair tools is also a barrier to own or independent repairs.

The unavailability of repair information poses challenges. Even when a product is easy to disassemble, its composition is not necessarily easy to understand. As an example of this, the US Federal Trade Commission gives the uncertainty about lithium-ion batteries.[508] This is a type of rechargeable batteries that can often be found in consumer electronics because of their high energy density and long service life. A common form of this type of batteries is the '18650

[507] Amendments R2RD Parliament, amendment 3.
[508] Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021, p. 19-21 and 30.

cylindrical cell'. The number 18650 refers to the dimensions of the cylinder (18mm x 65mm). Rechargeable alkaline batteries for domestic use (known as AA, AAA, C and D batteries) have different sizes to meet different energy needs. However, the 18650 cells are all the same size, even though they as well serve different energy needs depending on their chemical composition. In other words, these cylindrical cells are not all interchangeable with one another. If an 18650 cylindrical cell is used incorrectly, there exists a risk that the battery combusts. Despite this risk, the cells in many products are not labeled, which makes own or independent repair dangerous and discourages this repair. [509] Even when there is no immediate danger, a product that is not transparent in its composition increases the threshold for repair. This can increase the total duration of the repair and thus its burdens.

The ESPR holds potential to increase the 'transparency of products' in several ways. The ecodesign requirements in the ESPR seek first and foremost to decrease the need for the availability of repair information. Product parameters such as 'use of component and material coding standards for the identification of components and materials' *directly* increase the transparency of a product itself. Additionally, the European Commission is empowered to impose information requirements. A possible information requirement is that products are accompanied by information for customers (i.e., including consumers) and other actors on how the product should be maintained and repaired (article 7.22, point b), ii) ESPR).[510] Moreover, the ESPR introduces the digital product passport as a means of informing.[511] With that passport, repair services should have access to all information relevant[512] to the repair of a product. It should be noted that the ESPR assumes differentiated access to the information in the digital product passport, depending on the type of information and the typology of stakeholders (recital 27 ESPR). Thus, it is possible to modulate the availability of repair information. At play is an acknowledgment of the need to protect intellectual property rights (recital 27 ESPR). This need for protection is raised by manufacturers as a reason why they cannot simply make own or independent repair possible.[513] Finally, the European Union legislature hopes to increase the availability of repair information indirectly through the repairability score (which should encourage competition in the repair market and greater transparency) (see also the ECGTD).

The unavailability of spare parts and repair tools leads to similar problems. First, this unavailability increases the burden of repair. Second, it may increase the risk of repair, for example where inadequate spare parts or lower quality spare parts have to be used.[514] Again, the ESPR holds potential to mitigate these problems. Via the performance requirements in the

[509] Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021, p. 20-21.

[510] Some of the articles providing an overview of all the obligations of economic operators (articles 21 and following ESPR), repeat this general provision as an information obligation for the economic operator in question. For example, article 21.7 obligates the manufacturer to ensure that the product is accompanied by these instructions (compare with articles 23.4, 24.2, b) ESPR).

[511]

[512] When fleshing out the meaning of the notion 'relevant' in the ESPR, a comment by the Belgian Council of State about a Belgian legislative proposal to stimulate the circular economy is thought-provoking. The Belgian proposal would obligate businesses to inform consumers of the production price of spare parts, their delivery time, persons from whom they can be purchased, as well as the country or countries where they are available. The Council of State notes: "Moreover, if it is to be assumed that the information must cover all spare parts used (for example, also small parts, such as a screw or a sealing ring), questions may arise about the workability of the proposed provisions, taking into account that the number of potential suppliers of spare parts may be large", see opinion Council of State of 21 February 2020, no. 66.910/1, *Parliamentary Documents Chamber of Representatives* 2019-2020, no. 914/2.

[513] Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions, May 2021, p. 24-26.

[514] *Ibid.*, p. 30.

ESPR, the need for the availability of specialized repair tools can be reduced. Product parameters such as ‘use of standard components’ and 'number and complexity of processes and tools needed’ directly reduce the need for such tools. The availability of spare parts can also be boosted, via product parameters such as availability and delivery time of spare parts' and ‘compatibility with commonly available spare parts’. Moreover, the European Union legislature hopes to increase the availability of repair tools and spare parts indirectly through the repairability score (see also the ECGTD).

How does the R2RD enhance the availability of repair information, spare parts and repair tools? There is only one obligation in this regard. Article 5.3 R2RD stipulates that where manufacturers make spare parts and tools available for products listed in Annex II to the R2RD, they shall offer these spare parts and tools at a reasonable price that does not deter repair. Thus, the R2RD itself contains no actual obligation to make repair information, spare parts and repair tools available. It contains no independent obligation that goes beyond the scope of existing legislation.

2.7.7.2.2 Analysis

As explained earlier in the part on its scope, the R2RD acts as a ‘conduit’ for the specific legislation found in Annex II to the R2RD. Here too, the R2RD contains no autonomous obligation to make repair information, spare parts and repair tools available that is independent of existing legislation.

This approach has as its advantage that the European Union legislature was able to avoid having to take a general, horizontal stance on a right to repair (e.g., as regards the minimum duration for the availability of spare parts). This allows for a bespoke approach to product groups (e.g., a duration of x years for product group y and a different duration for product group z).

Nonetheless, it can be questioned whether the R2RD, should not have contained certain minimum requirements regarding the repairability requirements as a horizontal piece of legislation. It could have contained minimum guidance for the requirements that can be set by the European Commission through the ecodesign framework. Thus, the product groups that would, subsequently, have been added to Annex II to the R2RD would have need to meet at the very least the threshold of these horizontal requirements of the R2RD.

A first possible horizontal aspect of the right to repair concerns the scope of persons for whom spare parts and repair tools should be made available. The existing ecodesign legislation does not always include an obligation to make all repair information, spare parts and repair tools available to the end-users of products themselves. Instead, this obligation is differentiated. For example, the implementation ecodesign standard on household washing machines and household washer-dryers obligates the availability of ‘simple’ parts such as door hinges and seals to all users but mandates the availability of ‘complex’ parts such as motor parts only to professional repairers. [515] However, advocates for the right to repair, recommend a general

[515] See, for example, for household washing machines and household washer-dryers, Regulation (EU) 2019/2023 of 1 October 2019 laying down ecodesign requirements for household washing machines and household washer-dryers in accordance with 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 L* 5 December 2019, p. 285-312. For an overview of the package of implementation standards, see European Commission - Questions and answers - The new ecodesign measures explained

scope of the right, which also includes own repair. At the least, it might be counterproductive to limit the obligation of availability only to 'professional repairers' who, pursuant to the definition in article 2, point 2 R2RD repairers provide a repair service *related to their trade, business, craft or profession*. The explanatory memorandum to the R2RD underlines that this means that the repair service should serve *commercial* purposes (p. 10). In the growing repair industry, 'new'[516] players have entered the circular economy. In addition to businesses offering repair services, there is also a rise in peer-to-peer repair services and collaborative partnerships. The European Union legislature pays attention to 'community-led repair initiatives' (e.g., repair cafés). Such initiatives are not equated with 'repairers'. The R2RD could have contained an obligation to make spare parts available to all persons, in a general manner. The reasons why the obligations in the current implementation standards are differentiated is a fear that non-professional repairers lack the technical competence to repair and associated worries of safety and liability. For example, per the implementation standard for household washing machines and household washer-dryers the manufacturer may require the professional repairer to demonstrate technical competence and to be covered by insurance for liabilities resulting from its activity before accepting a request to make repair and maintenance information available (point 8.1.3 Annex II). In a circular economy where products become more easily repairable such fears could become a thing of a linear past.

Other horizontal aspects that could have been addressed by the R2RD are, for example:

- rules determining the minimum duration for the availability of spare parts (for example, a Belgian federal legislative proposal contains the general proposition that spare parts are to be offered for the entire lifespan of a product; for products whose purchase price is higher than 30% of the 'living wage' (a social benefit that ensures a basic income), the lifespan may not be shorter than ten years[517]).
- rules limiting the price that manufacturers can put on spare parts (other than the broad obligation in the R2RD that this price be 'reasonable') (for example, a Belgian federal legislative proposal contains the general proposition that spare parts are to be offered at a reasonable price; this reasonable price can never be higher than 25% of the original price of the product[518]);
- rules limiting the price of repair tools (other than the broad obligation in the R2RD that this price be 'reasonable').

Enacting a general, horizontal foundation in the R2RD would not have excluded the flexibility that can be sought after with more specific legislation. This is nothing more than the relation between a *lex generalis* and a *lex specialis*. For specific product groups the European Union legislature could have enacted tailored rules that would have build on the horizontal requirements in a *lex generalis.* If the European Union legislature were to create new legislation

(QANDA/19/5889), 1 October 2019; L. VAN ACKER, "The new Ecodesign Package: an important step towards a circular economy", *Ars Aequi* 2020, vol. 9, p. 793-801.

[516] It is good to keep in mind that the repair of products was a customary practice in the past (and has always remained so in some sectors such as the automotive industry).

[517] Legislative proposal of 7 January 2020 to combat organized obsolescence and to support the circular economy (*wetsvoorstel om georganiseerde veroudering tegen te gaan en de circulaire economie te steunen*), *Parliamentary Documents* Chamber of Representatives 2019-2020, no. 914/1, p. 34.

[518] Legislative proposal of 7 January 2020 to combat organized obsolescence and to support the circular economy (*wetsvoorstel om georganiseerde veroudering tegen te gaan en de circulaire economie te steunen*), *Parliamentary Documents* Chamber of Representatives 2019-2020, no. 914/1, p. 34.

after the entry into force of the ESPR and the R2RD whose requirements would have differed from the horizontal requirements of the R2RD, it could have been assumed that it wanted to deviate from those horizontal requirements. The general principles regarding conflicts between hierarchically equal rules would have applied. As regards the legislation that is already part of Annex II it would have been sensible for the European Union legislature to 'grandfather' them into the R2RD in an explicit manner (meaning that their requirements would have been allowed to differ from the R2RD) to avoid discussions on conflicts between hierarchically equal rules.[519]

2.7.7.3 Prohibition of contractual, software and hardware 'lockouts'

2.7.7.3.1 General background

Manufacturers can adopt several techniques to dissuade end-users from repairing products, in particular products with digital elements. For example, licensing agreements for embedded software may forbid own or independent repair (the John Deere tractor case in the United States has become a focal point of the right to repair movement in that regard).[520] To enforce that prohibition manufacturers may implement software checks that prevent access to certain diagnostic features or system settings as well as prevent unauthorized modifications, limiting repairers' abilities to diagnose and troubleshoot issues and to repair them. Manufacturers may even remotely disable or restrict functionality in products that have undergone unauthorized repairs or modifications.

Article 5.3b R2RD combats such techniques. It stipulates that manufacturers shall not use any contractual clauses, hardware or software techniques that impede the repair of goods listed in Annex II unless justified by legitimate and objective factors including the protection of intellectual property rights under Union and national legal acts. Manufacturers shall, in particular, not impede the use of original or second-hand spare parts, compatible spare parts and spare parts issued from 3D-printing, by independent repairers when those spare parts are in conformity with requirements under national or European Union law such as requirements on product safety or in compliance with intellectual property. This means that manufacturers may not create software and hardware locks or force the consumer into overly restrictive end-user license agreements.

Article 5.3b R2RD operates in tandem with the new point 23i introduced by the ECGTD to Annex I to the Unfair Commercial Practices Directive. It is regarded as an unfair commercial practice to withhold information concerning the impairment of the functionality of a product when consumables, spare parts or accessories not supplied by the original producer are used or to falsely claim that such impairment will happen.

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[519] Within the tier of binding secondary legislative acts of the European Union (i.e., regulations and directives), there is no clear precedence between the various types (note that the R2RD is a directive, while the legislation mentioned in its Annex II consists of regulations). Instead, the general principles of conflicts between hierarchically equal rules apply (the main principles being *lex specialis derogat lex generalis* and *lex posterior derogat lex prior*) (see K. LENAERTS and M. DESOMER, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures", *European Law Journal* 2005, p. (744) 745, footnote 1). These general principles are the easiest to apply if a general act is followed by a specific act, as the latter trumps the first both for substantive and for time-related reasons. If things are the other way around, the application of these general principles can become difficult whenever it is not clear-cut whether the legislative intent was to solidify specific rules and replace them by a general framework or to supplement the specific rules and fill in lacunae.

[520] See In re: Deere & Company Repair Services Antitrust Litigation, No. 3:22-cv-50188. MDL No. 3030.

2.7.7.3.2 Commercial guarantees as contractual 'lockouts'?

2.7.7.3.2.1 Introduction

As mentioned earlier, on top of what they are statutorily obligated to do, manufacturers and traders are permitted to provide additional commercial guarantees. For example, they may guarantee that a product will be repaired within a period that is longer than the statutory warranty period. They can also guarantee repair in circumstances where consumers have no right to redress within the statutory warranty period (for example, because they caused the 'lack of conformity' themselves). Such commercial guarantees can have a positive effect on the lifespan extension of products.

However, there is a danger that these commercial guarantees are used to discourage own or independent repair. This is the case if commercial guarantees stipulate that they apply only to the extent that the consumer has not tried to repair the product or to have it repaired by an independent repairer. For example, in the United States manufacturers and sellers (i.e., trader who is not manufacturer) commonly applied[521] labels warning 'warranty void if seal broken' to components of their products.[522] The question arises whether such commercial guarantees can be seen as a 'contractual clause that impedes the repair of products'.

2.7.7.3.2.2 Relationship with the statutory warranty of conformity

To answer that question, it is important to first elucidate the relationship between the commercial guarantees and the statutory warranty of conformity on which consumers may rely to have products repaired.

In principle, commercial guarantees of the type 'warranty void if seal broken' are permitted based on the freedom of contract. After all, a contractual ground for nullity of the guarantee, such as own or independent repair, can be understood to relate only to the commercial guarantee and to be without effect on the statutory rights of the consumer. As the guarantor is not allowed to restrict the mandatory rights of the consumer, a clause excluding these rights would be null and void (article 21.1 Sale of Goods Directive). In this sense a commercial guarantee cannot impede statutory repair.

However, the distinction between the statutory warranty of conformity and commercial guarantees is not necessarily always clear to the average consumer. A commercial guarantee that stipulates in broad terms that own or independent repair nullifies the obligations of the manufacturer or trader (such as the general 'warranty void'), could lead the consumer to believe that the statutory right to redress is also lost.[523] In this case, there may be an unfair commercial practice or unfair contract term.[524] Under European Union law, the assessment of whether

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[521] This past tense is deliberate, following the opinion of the *Federal Trade Commission* from 2018 about these stickers (more on this to follow).

[522] See for examples of provisions that tie warranty coverage to the use of particular products or services, https://www.ftc.gov/news-events/news/press-releases/2018/04/ftc-staff-warns-companies-it-illegal-condition-warranty-coverage-use-specified-parts-or-services.

[523] In any case, these labels create a fear among the end-users and can make them feel that they are not allowed to open up the product, see N. TERZIOGLU, "Repair motivation and barriers model: Investigating user perspectives related to product repair towards a circular economy"*, Journal of Cleaner Production* 2021, vol. 289, p. 8.

[524] TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *ERPL* 2019, vol. 27, iss. 4, p. (851) 862-863; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 355, no. 67.

there is such an unfair commercial practice or unfair contract term is currently based on the general articles of the relevant directives.[525] In addition, the Sale of Goods Directive tries to reduce the possible confusion of the consumer. It mandates that, to increase transparency, the commercial guarantee statement should include the terms of the commercial guarantee and state that the statutory warranty of conformity is unaffected by the commercial guarantee, making it clear that the commercial guarantee constitutes an undertaking that is additional to the statutory warranty of conformity.[526]

2.7.7.3.2.3 Would voidance of the commercial guarantee itself 'impede repair'?

A remaining question is whether voidance of the commercial guarantee itself 'impedes repair'. From a strictly contractual point of view and in the light of the freedom of contract it would not seem a problem that the manufacturer is able to void the commercial guarantee. The only effect is that the manufacturer itself will not undertake the repair promised in the commercial guarantee. Repair by other repair actors remains possible. In this sense commercial guarantees do not impede repair. However, the questions that arise are whether this threat of voidance can induce a 'chilling effect' by scaring the consumer into straying from own or independent repair (in particular where consumers might have the feeling the feeling that they have paid a premium for the commercial guarantee that they do not want to lose) and whether such an effect would be seen as an impediment in the eyes of the European Union legislature.

In this regard the American point of view is of interest. The US Federal Trade Commission has issued an opinion on the practice of labels warning 'warranty void if seal broken'.[527] Unless warrantors provide the parts or services needed for repair for free or receive a waiver[528] from the US Federal Trade Commission (which is possible if it is proven that a particular part or reliance on a specific service provider is absolutely necessary for the product to function properly and the waiver is in the public interest[529]) such statements generally are prohibited by the anti-tying provisions of the Magnuson-Moss Warranty Act.[530] That law, which governs consumer product warranties, prohibits making a warranty conditional on the use, in connection with a purchased product, by a consumer of any article or service that is identified by brand, trade, or corporate name. Also, according to the US Federal Trade Commission, such

[525] Regarding unfair commercial practices, articles 6.1, e) and g) Unfair Commercial Practices Directive are of interest. The consumer should not be misled as regards the need for a service, part, replacement or repair, nor about the consumer's rights, including the right to replacement or reimbursement, as provided for in the Sale of Goods Directive. Regarding unfair terms, see article 3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 24 April 1993, vol. 95, p. 29-34 (hereinafter abbreviated as 'Unfair Contract Terms Directive').

[526] The European Parliament had suggested introducing a new article 17.1a Sale of Goods Directive that would hold that any terms of the commercial guarantee that discourage consumers from making use of their right to have a product that is not in conformity repaired pursuant to article 13.3a Sale of Goods Directive would be deemed to be void (see Amendments R2RD Parliament, amendment 72). That article 13.3a. would have been a new article introducing a direct manufacturer liability. It stipulated that if the consumer chooses repair, the consumer may directly request the manufacturer to bring the product into conformity (see Amendments R2RD Parliament, amendment 67). However, these new articles are not part of the Provisional agreement R2RD. This is not something one should be overly concerned about (as regards the explicit exclusion of commercial gaurantees limiting rights). The directive already holds generally that the contractual limitation of consumer rights is not permitted.

[527] See Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021.

[528] Under 15 U.S.C. § 2302(c).

[529] Since 1975, only three waiver requests have been made to the Federal Trade Commission, all of which were denied, see Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021, p. 7.

[530] 15 U.S.C. § 2301 and following.

practices may be a stand-alone deceptive practice under the Federal Trade Commission Act of 1914.[531]

Even though the rationale behind the anti-tying provisions Magnuson-Moss Warranty Act (i.e., protection of fair prices for consumers and protection of businesses offering competing services) is different from the R2RD (i.e., stimulating repair of products) and even though the R2RD mandates the availability of spare parts against a reasonable price so that one of the American concerns should not be an issue, the report of the American Federal Trade Commission makes clear that this type of commercial guarantees can in fact dissuade consumers from seeking out own or independent repair. Thus, it seems that this type of commercial guarantees would fall under the prohibition in article 5.3b R2RD.

If the European Union legislature had wished to make the answer to this question clearer, it might have been advisable to expand upon the meaning of 'contractual clauses impeding repair' in the R2RD itself (at minimum in the recitals). In the future, European Commission guidance might be necessary. Also, other legislative avenues would have been available if the European Union legislature had wished to prohibit commercial guarantees tying their coverage to repair by the guarantor. For example, the R2RD could have amended the Unfair Commercial Practices Directive, which already regulates commercial guarantees, by stipulating that a commercial guarantee cannot require repair through repair services authorized by the manufacturer or trader. The R2RD could have added this commercial practice to the blacklist of the directive. In doing so, the directive would stipulate that this commercial practice is unfair in all circumstances. The R2RD could also have amended the Unfair Contract Terms Directive by adding to the indicative list (annexed to the directive) that a non-negotiated commercial guarantee made conditional on the use of in-house or certified repair services, is to be regarded as an unfair term because it significantly distorts the balance between the rights and obligations of the parties arising from the contract to the detriment of the consumer.[532] It can be argued that in a circular economy an unhindered right to repair by consumers themselves or by independent repair services is an integral part of the contractual relationships between businesses and consumers, so that its modulation can distort the contractual balance. Given that the harmonization level of the Unfair Contract Terms Directive is minimal, the Member States remain free to add such a contract term to national blacklists. It should be noted, however, that the approach through these pieces of European Union legislation would have significantly expanded the scope of the R2RD. The prohibition of impeding repair found in article 5.3b R2RD only applies to the product groups found in Annex II to the R2RD, whereas the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive both have a more expansive scope and apply to all consumer contracts.

There is one potential downside to this point of view. The European Union legislature wishes to promote commercial guarantees offering repair (see, for example, article 14a.1a R2RD). If manufacturers cannot exclude own or independent repair and still be held liable to the fulfillment of the commercial guarantee if the product fails after the repair, they might be dissuaded from offering such commercial guarantees. Importantly, it has to be made clear that a commercial guarantee does not impose a legal obligation to comply with it no matter what,

[531] 15 U.S.C. §§ 41-5.

[532] There is also the possibility of adding a blacklist (and therefore not a purely indicative) article to the Unfair Contract Terms Directive. However, this would require a fundamental revision of this directive.

no matter how much of a distorted mess a consumer or an independent repairer made of a product while trying to fix it. A manufacturer only has to replace or repair products that fail in a manner clearly described by the commercial guarantee statement. The R2RD does not intervene with that principle. From a contractual point of view, manufacturer cannot be held to compensate for any shoddy repair work. Manufacturers are only held to the risks that are contractually (or statutorily) brought into their 'sphere of risk'. From a practical point of view the importance of the availability of repair information, spare parts and spare tools is clear here. If products have been repaired in accordance with the information and with the tools provided for by the manufacturer they can be expected to have been brought into conformity with what manufacturers wish their product to be so that the commercial guarantee continues to apply after the repair. The availability of repair information, spare parts and repair tools eases the burden of the consumer to proof that the commercial guarantee still applies (because the failure of the product is not the result of earlier repair work) as all repair instructions have been followed obediently.

2.7.8 Online platform for repair (& refurbishment)

A final part of the R2RD as a stand-alone directive is the creation of a European online platform for repair (article 7 R2RD), that is accessible free of charge by consumers. The European Commission is responsible for its creation and IT maintenance (recital 21 R2RD). The European online platform consists of national sections based on a common online interface. It is the responsibility of the Member States to create national sections (article 7.-1b R2RD)[533] and the responsibility of the European Commission to create the common interface (article 7.-1a R2RD) (in cooperation with an expert group, see article 7a R2RD). If Member States already have their own national online platform(s) for repair, whether public or private, they are not obligated to establish a national section but can instead use hyperlinks to their national platform(s).[534] In this case national platforms have to fulfil the requirements listed in article 7.1 R2RD (e.g., several search functions, accessibility for persons with disabilities…).

When Member States use the European online platform, it is left to their discretion how to populate the national sections (e.g., by self-registration, importing bulk data from existing databases with the consent[535] of the repairers or by making registration subject to prior approval). Where Member States consider it necessary, they can set out conditions for repairers for accessing the national sections, such as meeting criteria on professional qualifications or showing adherence to applicable voluntary European Union or national repair quality standards. Such conditions must be non-discriminatory and in accordance with European Union law (recital 21 R2RD). The European Union legislature notes that to build consumer confidence in the repair services available on the European online platform, repairers should be able to demonstrate their adherence to certain repair standards (recital 24 R2RD).

While the online platform aims at facilitating the search for repair services in business-to-consumer relationships, Member States are free to extend the scope of their national sections to include sellers of refurbished goods, purchasers of defective goods for refurbishment or community-led repair initiatives, such as repair cafes (recital 21a R2RD)).

[533] Member States are required to designate national contact points responsible for tasks in relation to the management of their national section (article 7b R2RD).
[534] To avoid creating excessive administrative burden and to allow for appropriate flexibility (recital 21 R2RD).
[535] Registration on the online platform on the supply-side is voluntary. Thus, repairers are not obligated to register.

The European online platform should allow consumers to find suitable repair services for their defective products and, where applicable, sellers of refurbished goods, purchasers of defective goods for refurbishment or community-led repair initiatives such as repair cafes. Consumers should be able to use search functions to filter by different features like product categories, availability of temporary replacement goods, quality indicators and any repair condition, including location of the repairer and the possibility of cross border provision of services (recital 23 R2RD). The search function based on products may refer to the product type or brand. Since repairers cannot know the specific defect before a request to repair has been made, it is sufficient that they provide on the European online platform generic information on key elements of their repair services to enable consumers to decide whether to repair the good in question, in particular the average time to complete repair, the availability of temporary replacement goods, the place where the consumer hands over the goods for repair and the availability of ancillary services (recital 24 R2RD).

2.7.9 Member States' measures promoting repair

Article 9a.1 R2RD obligates the Member States to take at least one measure promoting repair.[536] The measures promoting repair can be of financial or of non-financial nature (recital 26a R2RD). Measures of non-financial nature can include information campaigns, support to community-led repair initiatives through direct means like providing space for repair laboratories or meeting places, for instance in community or cultural centers. Measures of financial nature may, for example, take the form of repair vouchers, repair funds, supporting or creating local or regional repair platforms, organizing or financing training programs to acquire special skills in repair, taxation measures. These measures should lower barriers to repair accessibility for consumers and encourage an environment wherein consumers can more effectively have products repaired.

The usual disclaimers regarding subsidizing markets apply. Subsidies could distort market dynamics and unintended consequences may emerge. For example, economic public choice theory suggests that when subsidies are involved, economic actors may engage in rent-seeking behavior to capture or protect the benefits of subsidies, which could lead to a higher baseline level of prices than would have been the case in the absence of subsidies.[537] At the same time subsidies can stimulate economic activity in the repair sector, create jobs, and boost the transition to a more circular economy. The actual relationship between subsidies and prices strongly depends on the specific characteristics of the market, the elasticity of demand in that market, the behavior of its economic actors, and other contextual factors.

2.7.10 Adjusting statutory warranty and 'hierarchy of remedies'

2.7.10.1 General background

Article 13 of the Sale of Goods Directive contains a hierarchy between remedies in case of a defective consumer good. The consumer can choose between two primary remedies: repair

[536] Article 9a.3 R2RD obligates the Member States to report these measures to the European Commission.
[537] In this regard it should be noted that the European Union legislature believes that the competitive pressure from other repairers would lead to acceptable prices of repair (recital 12 R2RD).

and replacement. Only when these remedies are impossible or would entail disproportionate costs for the trader compared to other remedies, the trader may refuse repair and replacement and the consumer is to settle for one of the two secondary remedies: a proportionate price reduction and termination of the contract (article 13.3 Sale of Goods Directive). Under some circumstances, the consumer may immediately rely on the secondary remedies, for example if the lack of conformity is of such a serious nature that it justifies an immediate price reduction or termination of the sales contract (article 13.4 of the Sale of Goods Directive).[538]

Although recital 48 of the Sale of Goods Directive indicates that the choice between repair and replacement should contribute to sustainable consumption, criticism has been voiced regarding the preservation of the absolute freedom of choice of consumers regarding the primary remedies.[539] For some time now, authors have advocated to adjust the hierarchy and prioritize restoration as the sole primary remedy.[540] In the request for an impact assessment regarding the R2RD, the European Commission describes the policy option to prioritize repair fully as a 'high intervention'.[541] The policy option to make repair the preferred remedy when repair is less expensive than or as expensive as replacement is seen as a 'moderate intervention'.[542]

Where the European Commission originally opted for the moderate intervention, the final version of the R2RD is even more modest.[543] Most Member States in the Council of the European Union considered the proposal of the European Commission to mandate repair where the costs of replacement are equal to or higher than the costs for repair an unacceptable limitation of consumer's options (whereas the European Parliament had wished to expand on the European Commission's proposal).[544] The vision of the Council of the European Union has prevailed. To promote repair by other means instead, the European Union legislature extends the original[545] statutory warranty period once by twelve months where repair takes place as the remedy to bring the defective product into conformity (new article 10.2a Sale of Goods

[538] See in detail B. TILLEMAN and F. VAN DEN ABEELE, "Remedies in het nieuwe consumenten(koop)recht: een (her)nieuw(d) getrapt systeem", *DCCR* 2022, iss. 2-3, p. 59-102.

[539] V. MAK and E. TERRYN, "Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law", *Journal of Consumer Policy* 2020, vol. 43, p. (227) 237; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 360 and following, nos. 80 and following.

[540] A. MICHEL, "La directive 1994/44/CE sur la garantie des biens de consommation: un remède efficace contre l'obsolescence programmée?", *REDC* 2016, p. (207) 228; E. TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *ERPL* 2019, vol. 27, iss. 4, p. (851) 858; B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation*, *In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies*, European Parliament, Luxembourg, 2020, p. 21; V. MAK and E. TERRYN, "Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law", *Journal of Consumer Policy* 2020, vol. 43, p. (227) 229 and 237; . VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 363-364, no. 84.

[541] This are sub-option 3(A) under the heading 'high intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.

[542] This is sub-option 2(B) under the heading 'moderate intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.

[543] The orginal article 12 R2RD limited the freedom to choose replacement over repair where costs for replacement would have been equal or greater than the costs for repair. As a result, the consumer would only have been able to choose replacement as a remedy where it would have been cheaper than repair (recital 28 in the orginal version of the R2RD).

[544] Explanatory memorandum to the amendments R2RD Council of the EU, p. 4.

[545] Thus, the extension of the liability period means that the trader is liable for any lack of conformity which exists at the time when the product was delivered and which becomes apparent within the remaining liability period of the product, which includes the extension (recital 28a R2RD).

Directive).[546] Thus, the statutory warranty period becomes at least three years in the case of repair. Member States may maintain or introduce longer time limits (new article 10.3 Sale of Goods Directive) (compare with the current freedom of Member States to extend the harmonized statutory warranty period). Recital 28a R2RD also mentions that Member States may further incentivize repair by providing additional extensions of the liability of the trader if repair takes place again. Importantly, the amendment to the Sale of Goods Directive by the R2RD does not prevent Member States from introducing or maintaining provisions that provide for a longer extension of the liability period only for repaired parts (i.e., the creation of a statutory warranty of conformity that applies specifically to the repaired parts) (recital 28a R2RD). From a sustainability perspective, an extension of the statutory warranty period is commendable.[547] It can be assumed that it stimulates repair, thus aiding in reversing premature obsolescence.[548]

In addition to this extension of the liability period, the European Union legislature introduces an obligation for the trader to inform consumers before the remedy to bring the product into conformity about their right to choose between repair and replacement as well as the possible extension of the liability period (if repair is chosen) (new article 13.2a Sale of Goods Directive).[549]

Furthermore, a new article 14.1 Sale of Goods Directive explains how repairs or replacements pursuant to the right to redress from the consumer are to be carried out, listing the following requirements (regarding these requirements see also earlier the section on the obligation to repair, where these requirements were applied by analogy to the repair outside of the statutory warranty period).

- The repair or replacement is free of charge.
- The repair or replacement is to be carried out within a reasonable period of time from the moment the trader has been informed by the consumer about the lack of conformity.
- The repair or replacement is to be carried out without any significant inconvenience to the consumer, taking into account the nature of the products and the purpose for which the consumer required the products.
- During repair, depending on the specificities of the relevant category of products, in particular of the need of the consumer to have such products permanently available, the trader may provide the consumer free of charge with a replacement product, including a refurbished product, on loan.
- The trader may provide, upon the explicit request by the consumer, a refurbished good to fulfil his obligation to replace the good.

[546] The Council of the European Union had suggested six months (see Amendments R2RD Council of the EU, p. 42), while the European Parliament favored twelve months (see Amendments R2RD Parliament, amendment 68).
[547] See also E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN en I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 350, no. 60.
[548] See the previously explained framework of A. MICHEL.
[549] Amendments R2RD Council of the EU, p. 42.

2.7.10.2 Analysis

2.7.10.2.1 Adjusting the hierarchy of remedies: non-prioritization of repair

The European Union legislature has chosen not to alter the hierarchy of remedies fundamentally. From a sustainability perspective, it could be seen as regrettable that repair has not become the default option and has remained on par with the replacement of products. Prioritizing the remedy of repair would have strengthened strategies to reverse premature obsolescence.[550]As noted earlier, criticism has been voiced regarding the top of the hierarchy. Several authors have advocated making repair the sole primary remedy (i.e., a 'high policy intervention').[551] As the European Commission notes in the explanatory memorandum to the R2RD the majority of consumer and environmental organizations already in the open public consultation labeled the option to prioritize repair only when it is cheaper than replacement an ineffective measure, whereas the final version of the R2RD has even dropped this change to the hierarchy.[552]

The conservative approach to the hierarchy of remedies gives more weight to the protection of consumer's interests than considerations of sustainability. As explained before in the section on the ban on the destruction of unsold consumer products and the possible need to restrict the consumer's right of withdrawal, one should take care to transcend the false dichotomy between consumer rights and sustainability considerations. They are not necessarily conflicting priorities. Sustainability measures are not in opposition to consumer rights. Rather they are complementary to them. Here too, the pressure of repair as the sole primary remedy could have stimulated traders to offer only products that are easily repairable to lower their burdens when consumers claim redress against them, thereby fostering competition in the market to produce more durable and repair-friendly products compared to non-repairable alternatives. In the long run, consumers could have stood to benefit from increased product longevity and improved quality by encouraging repair as the default option.

The changes to the hierarchy suggested by the European Parliament reflect a more balanced approach to strengthening both consumer protection and the protection of the environment. Like the European Commission, the European Parliament confirmed that repair should be prioritized over replacement where the costs for replacement are equal to or greater than the costs for repair (amended article 13.2 Sale of Goods Directive). However, its amendments nuanced this priority. Replacement regained its position as a primary remedy where the repair is factually or legally impossible or where the repair would create significant inconvenience to the consumer.[553] According to the European Parliament, situations where the repair would create significant inconvenience to the consumer should have been considered on a case-by-case basis while taking into account the nature of the products and the purpose for which the consumer required the products (amended recital 28 R2RD).[554] The European Parliament referred to the case-law of the Court of Justice of the European Union establishing that a significant inconvenience to the consumer could be understood as a burden that is likely to

[550] See the previously explained framework of A. MICHEL.
[551] This is sub-option 3(A) under the heading 'high intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.
[552] Explanatory memorandum to the R2RD, p. 5.
[553] Amendments R2RD Parliament, amendment 66.
[554] Amendments R2RD Parliament, amendment 23.

deter the average consumer from asserting consumer rights. The European Parliament gave two examples of cases in which a significant inconvenience can be assumed.

- This is the case where the consumer has a valid interest for non-interrupted use of the product, and a temporary replacement cannot be provided or cannot be provided in good time or would not be adequate to the consumer's needs, thereby dissuading the consumer from repairing the product.
- Significant inconvenience can also be assumed where products have already undergone repair measures to meet the conformity standards and the products subsequently require repair after a short period of time due to a lack of conformity, thereby damaging confidence in the reparability of the goods and dissuading consumers from exercising their right to repair.

2.7.10.2.2 Requirements of repair & replacement: circular replacement

It has been advocated to modulate the remedy of replacement as well so that the right of redress in the Sale of Goods Directive prioritizes 'circular' replacements, meaning that products may be replaced with refurbished[555] or remanufactured[556] equivalents (instead of allowing a replacement with a completely new product).[557] The R2RD has opted for this 'high policy intervention'.[558] The trader may provide a refurbished product upon the explicit request by the consumer. Of note it that there is no obligation to provide the consumer with a refurbished product if available, as the provision of a circular replacement is only mandatory upon request by the consumer. Such an obligation would have been an 'even higher policy intervention'. From a sustainability perspective such an obligation would, of course, stimulate the circularity of products to an even greater extent. However, the facultative nature of the replacement in the R2RD could be seen as an approach that seeks to balance consumer's interests with sustainability considerations. Still, a middle way could have been to create the obligation for traders to inform consumers of their right to request a remanufactured product in article 12 Sale of Goods Directive (perhaps with a mandatory explanation of the term 'remanufactured' so that consumers would understand that such a product is restored to a 'like-new' condition (more on this to follow immediately hereinafter)).

Earlier, in the section on the obligation to repair outside of the statutory warranty, it was mentioned that, from a sustainability perspective it seems unnecessary to restrict this method of replacement to refurbished products. 'Re-use' and 'repair' rank higher in the hierarchy of R-strategies than 'refurbish' and, thus, are preferable if feasible. The same discussion can be mentioned here, although one should be careful to consider the difference in contexts. In the earlier discussion, the replacement of a product outside of the statutory warranty period could be seen as a 'bonus' to the consumer. Here, within the statutory warranty period, consumers are entitled to a replacement product that meets their legitimate expectations regarding its conformity at the conclusion of the sale. Therefore, one should keep the definition of

[555] See earlier footnote 559.
[556] See earlier footnote 577
[557] B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 21; E. VAN GOOL en A. MICHEL, "The New Sale of Goods Directive 2019/771 and Sustainable Consumption: a Critical Analysis.", EuCML 2021, p. (136) 145 and following.
[558] This is sub-option 3(C) under the heading 'high intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.

refurbishment in mind (see, for example, article 2, point 18 ESPR). Refurbishment means restoring a product's performance or functionality within the intended use, range of performance and maintenance originally conceived at the design stage, or to meet applicable technical standards or regulatory requirements, with the result of making a fully functional product. In other words, refurbishment involves restoring a product to a 'like-new' (and, as a result of the passing of time and technical advancements, in some cases even improved) condition.[559] Consequently, a refurbished product might be more likely to meet the legitimate consumer's expectations regarding its conformity at the time of the sale than a repaired or re-used product. Thus, it can be argued from a consumer's rights perspective that it is sensible to restrict the remedy of replacement within the statutory warranty to refurbished products.

However, in this discussion one could also point to the fact that the consumer is to *request explicitly* a refurbished product. If the consumer consciously opts for an alternative 'circular' replacement, one could argue that the consumer should also be given the option to choose explicitly a repaired or even re-used product. From a sustainability perspective, this would be beneficial. From a consumer protection point of view, one could fear that leaving too many options on the table might lead to consumer confusion, which could be abused by those held to the statutory warranty. Perhaps counterbalance would need to be sought in obligations to inform consumers of the meaning of these different types of 'repair' (in a large sense), possible in a fixed order descending from 'remanufactured' to 're-used'), taking into account the risk of overloading consumers with information.

2.7.10.2.3 Requirements of repair & replacement: temporary loan of replacement product

It has been advocated to modulate the remedy of repair to stipulate that if a repair lasts longer than a certain period (e.g., one business day), sellers are obligated to offer consumers a temporary replacement product – which itself, in turn, may be a 'circular product (i.e., a re-used, repaired or refurbished product).[560] This replacement product incentives consumers to choose repair in those cases where the consumer considers a product to be indispensable.

The European Union legislature has not obligated the temporary loan of a replacement product. Instead, new article 14.1, point cb) Sale of Goods Directive stipulates that the trader *may* provide the consumer free of charge with a replacement product, including a refurbished product, in particular where the permanent availability of the product is important to the consumer.

It bears repeating here that it seems unwise from a sustainability perspective and unnecessary from a consumer's rights perspective to restrict the replacement product to a refurbished

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[559] Refurbishing is a process of returning a product to good working condition by replacing or repairing major components that are faulty or close to failure and making 'cosmetic' changes to update the appearance of a product, such as cleaning, changing fabric, painting, or refinishing. Any subsequent warranty is generally less than issued for a new or a remanufactured product, but the warranty is likely to cover the whole product (unlike repair). Accordingly, the performance may be less than as-new, see ELLEN MACARTHUR FOUNDATION, "Towards the Circular Economy Vol. 1: Economic and business rationale for an accelerated transition", 2015, https://www.ellenmacarthurfoundation.org/assets/downloads/publications/Ellen-MacArthur-Foundation-Towards-the-Circular-Economy-vol.1.pdf, p. 25; M.C. HOLLANDER *et al*., "Product Design in a Circular Economy: Development of a Typology of Key Concepts and Terms", *Journal of Industrial Ecology* 2017, vol. 21, iss. 3, p. (517) 522; W. IJOMAH, *A model-based definition of the generic remanufacturing business process*, unpublished PhD thesis University of Plymouth, 2002, http://hdl.handle.net/10026.1/601, p. 186.

[560] E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN en I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 367.

product, given the hierarchy between the R-strategies, all the more where a temporary loan is concerned. Where one could argue regarding a definitive replacement that consumer right considerations should trump sustainability considerations to a certain extent (even though here too one could argue that the consumer who consciously opts for a circular replacement should be given the free choice), the per definition temporary nature a loan entails that the consumer's interests are served equally well with a re-used or repaired product if it is fit for purpose.

2.7.10.2.4 Mandatory minimum duration of statutory warranty period

The 1999 Consumer Sales Directive was renewed in 2019 by the previous European Commission, leading to the Sale of Goods Directive. The current Commission was pondering several policy options to give a stronger impetus to the repair of products with the R2RD by extending the statutory warranty period: (i) for new products that consumers choose to repair instead of replacing them; and/or (ii) for second-hand and/or refurbished products.[561] Another considered policy option was to extend the statutory warranty period beyond the current minimum period of two years (leaving no choice in the matter to Member States).[562]

The first policy option is reflected in the R2RD. Conversely, the R2RD does not amend the Sale of Goods Directive as regards the minimum duration of the statutory warranty period.[563] This is a missed opportunity. It is recommended that the statutory warranty period be extended at the level of the European Union, ideally to a flexible warranty period depending on the average economic lifespan (possibly in addition to extending the presumption of anteriority of the lack of conformity [564]). [565] However, the European Union legislature wished to put forward a balanced approach with the R2RD that respects the principle of proportionality.[566] Therefore, the amendments to the Sale of Goods Directive by the R2RD are mostly restricted to rules that are already subject to exhaustive harmonization. Member States remain free to extend the minimum duration of the statutory warranty period or not according to their own discretion.

2.7.10.2.5 Repair by third parties as a remedy

Article 4 of the Sale of Goods Directive stipulates that the Directive imposes an exhaustive level of harmonization, unless otherwise provided for in the Directive. Recital 47 explains that the directive exhaustively harmonizes the remedies. As a result, the hierarchy is to be strictly followed. An interesting question for the right to repair is whether and how the possibility of

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[561] This is sub-option 2(A) under the heading 'moderate intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.

[562] This is sub-option 3(B) under the heading 'high intervention' in the request for input for an impact assessment (Sustainable consumption of goods – stimulating repair and re-use), 22 January 2022, Ares(2022)175084.

[563]

[564] The Belgian legislation transposing the Sale of Goods Directive, stipulates that a lack of conformity is rebuttably presumed to have been present at the time of delivery for a period two years, while the Directive imposes a minimum period of one year for this presumption. This way, the duration of the presumption corresponds to the entire statutory warranty period. Should the statutory warranty period be extended, it may also be useful to extend the presumption of anteriority with it. Regarding this recommendation, see B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies*, European Parliament, Luxembourg, 2020, p. 20-21; E. VAN GOOL, A. MICHEL, B. KEIRSBILCK and E. TERRYN, *Public consultation as regards the Sustainable consumption of goods – promoting repair and re-use initiative*, 2022, https://lirias.kuleuven.be/retrieve/674960, p. 3.

[565] B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 20-21; E. VAN GOOL, A. MICHEL, B. KEIRSBILCK and E. TERRYN, Public consultation as regards the Sustainable consumption of goods – promoting repair and re-use initiative, 2022, https://lirias.kuleuven.be/retrieve/674960, p. 3.

[566] Explanatory memorandum to the R2RD, p. 4.

repair by consumers themselves or by independent repair services, at the expense of the seller, fits into the hierarchy as a remedy. [567]

In the past, Belgian case law on the previous version of the 1999 Consumer Sales Directive has ruled that such a repair by a third party is not possible as a remedy.[568] The strict hierarchy is partly based on a 'right to cure' of the seller.[569] This right grants a 'second chance' to properly perform the obligations of the contract of sales. The new 2019 Sale of Goods Directive opens the door for repair by consumers themselves or by a third party. Recital 54 allows Member States to determine the circumstances in which the seller's obligations may be carried out by a third party (at the consumer's request) or by consumer themselves. However, the Belgian legislature has not made use of this option in the legislation transposing the Directive.[570]

The R2RD could have inserted this currently optional choice of the Member States in the mandatory framework of the hierarchy of remedies. However, the European Union legislature wished to put forward a balanced approach with the R2RD that respects the principle of proportionality.[571] Therefore, the amendments to the Sale of Goods Directive by the R2RD are mostly restricted to rules that are already subject to exhaustive harmonization. Member States remain free to include repair by third parties as a remedy or not according to their own discretion.

Had the European Union legislature chosen differently, the European consumer law would have become more closely aligned with the general law of obligations in, for example, Belgium (but also the law found in harmonization projects), on the basis of which defaulting debtors can be forcibly replaced by creditors at the expense of those debtors.[572] In the context of consumer

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[567] Regarding this repair by a third party in the context of a consumer sales, see S. JANSEN and S. STIJNS, "La directive nouvelle est arrivée : conformiteitsbegrip, overmacht, kennisgeving, termijnen en remedies in de richtlijn consumentenkoop 2019/771", *DCCR* 2020, vol. 3, p. (3) 42-43, nos. 67-68 and p. 49, no. 76; S. JANSEN, "Over de harde hiërarchie der remedies in de consumentenkoop: kosteloos herstel en vervanging gaan voor op schadevergoeding, ook bij huisdieren (noot onder Cass. 18 juni 2020)", *TBH* 2021, vol. 4, p. (404) 412 and following, no. 22 and following; H. SLACHMUYLDERS, "Herstelling door een derde en de hiërarchie van de remedies in de consumentenkoop (noot onder orb. Gent (afdeling KoR2RDjk) 24 oktober 2019)", *DCCR* 2020, vol. 2, p. 135-148; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 365-366; H. VYNCKE, "Het herstel door een derde bij de consumentenkoop (noot onder orb. Henegouwen (afdeling Charleroi) 10 mei 2019)", *TBBR* 2021, vol. 5, p. 261-271.

[568] For example, see Court of Cassation 18 June 2020, C.19.0332.N, ECLI:BE:CASS:2020:ARR.20200618.1N.30 in which the Court of Cassation annuls a judgment in which compensation for the medical costs of the treatment of a pet dog by a veterinarian was awarded, while the dealer of the dog was not offered the opportunity to offer repair or replacement free of charge. For other examples, see, Ghent 20 October 2010, *DCCR* 2012, p. 124, annotation by S. JANSEN; rb. Tongeren 14 June 2010, *T. Vred.* 2012, p. 298, annotation by C. DELFORGE. See for examples of judgments in which compensation was awarded vred. Antwerp 11 December 2014, *RW* 2015-16, p. 1429; orb. Hainaut (Charleroi) 10 May 2019, *TBBR* 2021, vol. 5, p. 257, annotation by H. VYNCKE.

[569] V. MAK, *Performance-Oriented Remedies in European Sale of Goods Law*, Oxford, Hart Publishing, 2009, p. 150; S. JANSEN, *Consumer Sales Remedies in US and EU Comparative Perspective*, Antwerp, Intersentia, 2018, p. 15, §10; S. JANSEN and S. STIJNS, "La directive nouvelle est arrivée : conformiteitsbegrip, overmacht, kennisgeving, termijnen en remedies in de richtlijn consumentenkoop 2019/771", *DCCR* 2020, vol. 3, p. (3) 47, no. 75; H. SLACHMUYLDERS, "Herstelling door een derde en de hiërarchie van de remedies in de consumentenkoop (noot onder orb. Gent (afdeling KoR2RDjk) 24 oktober 2019)", *DCCR* 2020, vol. 2, p. (135) 143, no. 16; E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 365-366.

[570] See earlier footnote 559.

[571] Explanatory memorandum to the R2RD, p. 4.

[572] This remedy for non-performance can be found in articles 1143-1144 Old Civil Code and article 5.85. Civil Code. See also article 9:102, 2), d) Principles of European Contract Law, which stipulates that the creditor may reasonably be expected to obtain performance from other sources, even if the cost is higher than the contract price, but only if the defaulting debtor is in a position to pay the damages for the difference.

sales and in the light of the circular economy, this new remedy may be particularly interesting in some of the circumstances where consumers can now only ask for price reduction or dissolution. For example, if a lack of conformity appears despite the trader having attempted to bring the products into conformity (see article 10.4, point b) Sale of Goods Directive), the new remedy allows a consumer to have a third party attempt a repair at the trader's expense. The same applies if the trader has declared, or it is clear from the circumstances, that the trader will not bring the products into conformity within a reasonable time, or without significant inconvenience for the consumer (see article 10.4, point d) Sale of Goods Directive). Restrictions on this new remedy to protect the trader would simply be the general principles underlying the (Belgian) law of obligations that consumers may not abuse the right to this remedy[573] and that, in the event of the forced replacement of a debtor, only the necessary and reasonably incurred costs are eligible for reimbursement (in other words, the repair costs need to be in line with market prices). The European Union legislature could explicitly clarify these restrictions if it ever chose to mandate this new remedy at the level of the European Union.[574]

2.7.11 Remaining questions

2.7.11.1 Intellectual property rights

Intellectual property rights can be an obstacle to the circular economy. The exceptions to these rights accepted in the European context are too narrow according to doctrinal literature.[575] Therefore, it would have been advisable for the R2RD to pay attention to the impact of the right to repair to intellectual property rights. A suggestion to ensure that these rights also serve sustainability goals, would be to explicitly exclude activities of repair aimed at extending the lifespan of a product as infringing acts.[576] One question to be answered is whether more radical forms of repairs such as remanufacturing[577] could also fall under this exclusion. Another issue is how the sale of spare parts by persons other than the original manufacturer or the use of self-produced parts by an independent repair service should relate to the intellectual property rights of the original manufacturer in a circular economy. However, the R2RD does not address this issue head-on. It only tangentially touches upon copyright concerns (e.g., in article 5.3b R2RD).

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[573] For a general definition of abuse of rights, see article 1.10. Civil Code. No one may abuse one's right. One who uses one's right in a manner that manifestly exceeds the limits of the normal exercise of that right by a prudent and reasonable person in the same circumstances abuses the right.

[574] For a call to include an explicit abstract criterion for the restriction of costs in legislation, see E. VAN GOOL, "De nieuwe Richtlijn Consumentenkoop en duurzame consumptie" in E. TERRYN and I. CLAEYS (eds.), *Nieuw recht inzake koop & digitale inhoud en diensten*, Antwerp, Intersentia, 2020, p. (303) 366, footnote 290.

[575] T. PIHLAJARINNE, "Repairing and Re-Using From an Exclusive Rights Perspective – Towards Sustainable Lifespan as Part of a New Normal?" in O.-A. ROGNSTAD and I. BERG ØRSTAVIK (eds.), *IP and Sustainable Markets*, London, Edward Elgar Publishing, 2021, p. 13 (draft version).

[576] T. PIHLAJARINNE, "Repairing and Re-Using From an Exclusive Rights Perspective – Towards Sustainable Lifespan as Part of a New Normal?" in O.-A. ROGNSTAD and I. BERG ØRSTAVIK (eds.), *IP and Sustainable Markets*, London, Edward Elgar Publishing, 2021, p. 13-14 (draft version).

[577] Remanufacturing is the process of returning a used product to like-new condition. The process includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly, and parts which cannot be brought back to original quality are replaced, meaning the final remanufactured product will be a combination of new and re-used parts, see G.D. HATCHER, W.L. IJOMAH and J.F.C. WINDMILL, "Design for remanufacture: a literature review and future research needs", *Journal of Cleaner Production* 2011, vol. 19, vol. 17, p. (2004) 2004; W. IJOMAH, *A model-based definition of the generic remanufacturing business process*, unpublished. doctoral thesis University of Plymouth, 2002, http://hdl.handle.net/10026.1/601, p. 186; H.J. PARKINSON and G. THOMPSON, "Analysis and taxonomy of remanufacturing industry practice", *Proceedings of the Institution of Mechanical Engineers* 2003, vol. 217, ep. 3, p. (243) 243 and 247; E. SUNDIN, *Product and Process Design for Successful Remanufacturing*, unpublished. doctoral thesis Liköpings Universitet, 2004, http://liu.diva-portal.org/smash/get/diva2:20932/FULLTEXT01.pdf, 2.

2.7.11.2 Product safety and liability

A circular economy in which products are repaired puts traditional linear frameworks to the test. Whereas a product necessarily leaves the market after a while in a linear economy, it continues to circulate in that market for as long as possible in a circular economy. This raises questions about the safety of those products as well as the liability of the economic operators involved in circulating the product. In the growing repair industry, 'new'[578] players have entered the circular economy. In addition to businesses offering repair services, there is also a rise in peer-to-peer repair services and collaborative partnerships. Also, the right to repair could make it possible for consumers themselves to repair their products. New techniques, such as 3D printing of specific spare parts, have the potential to involve more people than ever before in the repair of products.[579] These evolutions lead to the questions whether and how these persons fall under the personal scope of product safety and product liability legislation and how the liability of the original manufacturer can/should be enforced.

When answering these questions, it is important to keep in mind that there are different methods of repair, which change products in varying degrees of intensity. This affects the material scope of the Product Liability Directive.[580] In specialized literature, a threefold distinction is made. First, there is the ordinary repair, which consists of specifically correcting defects in a product or product component that have already surfaced, possibly by replacing some relevant parts, with the aim of merely making the product suitable for use again.[581] Second, there is the intermediate level of refurbishment or reconditioning. Refurbishing is a process of returning a product to working condition by replacing or repairing major components that are faulty or close to failure and making 'cosmetic' changes to update the appearance of a product, such as cleaning, changing fabric, painting, or refinishing. Any subsequent warranty is generally less than issued for a new or a remanufactured product, but the warranty is likely to cover the whole product (unlike repair). Accordingly, the performance may be less than as-new.[582] Third, there is remanufacturing, which is the process of returning a used product to like-new condition. The process includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly, and parts which cannot be brought back to original quality are replaced, meaning the final remanufactured product will be a combination of new and re-used parts.[583]

[578] It is good to keep in mind that the repair of products was a customary practice in the past (and has always remained so in some sectors such as the automotive industry).

[579] A feature of the (online) 3D printing community is that many of the sources of information are open sources or shared via a GNU general public license or a Creative Commons License. Databases like Thingiverse offer millions of files that are free to download, including instructions on how to print spare parts. As a result, those who share these files and those that make online suggestions for improving the files, are persons who may be 'involved' in a repair.

[580] Besides repair there are other circular strategies such as re-use (for the same purpose (re-use) or for any other purpose (repurpose)) that extend the lifespan of products. The rules about product safety and product liability in the case of the sale of second-hand products useful could be useful for such circular strategies. However, as the R2RD is strongly focused on repair, it will probably pay no attention to these other circular strategies.

[581] M.C. HOLLANDER, C.A. BAKKER and E.J. HULTINK, "Product Design in a Circular Economy: Development of a Typology of Key Concepts and Terms", *Journal of Industrial Ecology* 2017, vol. 21, iss. 3, p. (517) 522; W. IJOMAH, *A model-based definition of the generic remanufacturing business process*, unpublished PhD thesis University of Plymouth, 2002, http://hdl.handle.net/10026.1/601, p. 186. See also ISO 9000:2015, no. 3.12.9.

[582] See earlier footnote 559.

[583] See earlier footnote 556.

The European Commission is already addressing the challenges facing the current legislative framework in its proposal to amend the Product Liability Directive.[584-585] In the explanatory memorandum, the European Commission states that the proposal should ensure that liability rules reflect the nature and risks of products in the circular economy. [586] The proposal is to reinforce efforts like the sustainable products initiative by ensuring consumers have rights to compensation for harm caused by defective modified products that are just as clear as those for entirely new products and by creating the legal clarity that industry needs in order to embrace circular business models [587] Recital 29 of the proposal sets out the main lines of liability in the event of repair:

> "*In the transition from a linear to a circular economy, products are designed to be more durable, reusable, repairable and upgradable. The Union is also promoting innovative and sustainable ways of production and consumption that prolong the functionality of products and components, such as remanufacturing, refurbishment and repair. In addition, products allow for modifications through changes to software, including upgrades. When a product is modified substantially outside the control of the original manufacturer, it is considered to be a new product and it should be possible to hold the person that made the substantial modification liable as a manufacturer of the modified product, since under relevant Union legislation they are responsible for the product's compliance with safety requirements. Whether a modification is substantial is determined according to criteria set out in relevant Union and national safety legislation, such as modifications that change the original intended functions or affect the product's compliance with applicable safety requirements. In the interests of a fair apportionment of risks in the circular economy, an economic operator that makes a substantial modification should be exempted from liability if it can prove that the damage is related to a part of the product not affected by the modification. Economic operators that carry out repairs or other operations that do not involve substantial modifications should not be subject to liability under this Directive.*"

This recital ties in with the interpretation of the notion of 'manufacturer' in the Blue Guide.[588] Examples of questions of liability law could be put up for consideration in the context of a revision of product liability and product safety legislation are the question on the effect of a repair on the manufacturer's defenses [589] , the question on the direct accountability of

[584] Proposal for a Directive of the European Parliament and of the Council on liability for defective products, 28 September 2022, COM(2022) 495 final.

[585] For the sake of completeness, in its proposal to amend the Product Safety Regulation the European Commission pays attention to the circular economy as well (see explanatory memorandum to the proposal for a Regulation of the European Parliament and of the Council on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council, 30 June 2021, COM(2021) 346 final, p. 6). The European Commission refers to the CE Action Plan and its goal to reduce waste re-use, repair, remanufacturing and high-quality recycling. It also notes that the safety of products has to be taken into account as a primary objective. Recital 40 of this proposal contains this consideration: "Where economic operators or market surveillance authorities face a choice of various corrective measures under the regulation, the most sustainable action resulting in the lowest environmental impact, such as the repair of the product, should be preferred, provided that it does not result in a lesser level of safety".

[586] Explanatory memorandum to the proposal to amend the Product Liability Directive, p. 2.

[587] Explanatory memorandum to the proposal to amend the Product Liability Directive, p. 5.

[588] Blue Guide, p. 28.

[589] See, for example, on the impact of a repair on the manufacturer's defense that the defect arose only after it was placed on the market Liège 18 October 2004, *JLMB* 2005, vol. 5, p. 212 (professional repair without effect on original manufacturer's

potentially liable persons in a chain of contracts, questions on causality, questions on evidentiary matters (such as burden of proof and presumptions), et cetera A challenge in answering such questions are the differences in the national liability laws of the different Member States.

It should be noted that one of the concerns of manufacturers regarding the right to repair is precisely this fear about the safety of their products and about the liability for damage caused by their products during a repair attempt or after a repair.[590] As for the fear of damage during a repair attempt, a rather simple solution is obvious. Manufacturers who design their products as repair-friendly as possible, with standard parts, with parts that are easy to disassemble, with clear labels, et cetera, reduce the chance that their product can be considered defective within the meaning of the Product Liability Directive.[591] In a circular economy, repairs are part of the normally foreseeable use of a product.[592]

At the same time, there may be products that cannot be safely repaired because of an inherently dangerous nature. It is possible that the European Commission, when developing ecodesign requirements for a specific product under the ESPR, may find that a design that allows repairs poses risks to human (or environmental) safety. The ESPR allows for an exception to repair-friendly design of products. Article 5.5. b) states that ecodesign requirements may not have a negative impact on the health and safety of persons (of note is that the environment is not mentioned). Article 22.2, e) of the Proposal Regulation Construction Products, an instrument that is separate from the ESPR for safety reasons (see earlier), similarly includes such an exception regarding the safety for people and the environment. It also contains a warning obligation (article 22.2, f)). This means, concretely, that the European Commission is empowered to require of manufacturers that they design product(s) tamperproof, meaning hard to disassemble, as a performance requirement and that they warn about the dangers of disassembly as an information requirement (for example, in the user manual or with a warning label applied directly to the product component).

liability); Antwerp 28 October 2009, *TBBR* 2011, p. 381 (improper repair makes it sufficiently plausible that the defect arose later),

[590] Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions, May 2021, p. 27-30.

[591] See under the law of the United States, *ibid.*, p. 29-30. As an example, the Federal Trade Commission cites the labeling of the previously mentioned 18650 cells: such labels increase the safety of products during repairs.

[592] For authors who hold the view that this is already the case in today's more linear economy, see E. GEDDES, *Product and Service Liability in the EEC. The New Strict Liability Regime*, London, Sweet & Maxwell, 1992, p. 22; D. FAIRGRIEVE *et al.*, "Product Liability Directive" in P. MACHNIKOWSKI (ed.), *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, Antwerp Intersentia, 2016, p. 58; D. VERHOEVEN, *Productaansprakelijkheid en productveiligheid*, Antwerp, Intersentia, 2018, p. 141, no. 137.

3 Federal CE Action Plan

3.1 Policy documents

At the federal policy level, the circular economy is clearly set to be the economy of the future. The federal government recently drew up two policy documents: the Federal Sustainable Development Plan (2020-2025) (*Federaal Plan Duurzame Ontwikkeling*)[593] and the Federal Circular Economy Action Plan (2021-2024) (*Federaal Actieplan Circulaire Economie*)[594]. In these documents, it describes the steps it intends to take within the federal competences. Both documents refer to the European Green Deal and the European Circular Economy Action Plan.

Besides these policy documents of the executive branch, three proposals for legislation ('bills') are being discussed in the federal Chamber of Representatives, which would promote the circular economy and halt premature obsolescence.[595] Like the European initiatives, these proposals contain information obligations, measures to combat premature obsolescence and extend the lifespan of products and provisions on obligations to repair. The Council of State has given an advisory opinion on these proposals, but this advice has not yet been incorporated.[596] Thus, these proposals are not explicitly dealt with in the remainder of this research report. In general, it can be noted that many of their objectives overlap significantly with the objectives of the European initiatives. Consequently, the federal government should be wary of the harmonization envisioned by the initiatives.

3.2 Consultation, cooperation and implementation

The Federal Circular Economy Action Plan provides an overview of the various forms of consultation and cooperation between all actors involved in the transition to a circular

[593] Federale regering, Federaal Plan Duurzame Ontwikkeling, versie 1 oktober 2021, https://www.sdgs.be/sites/default/files/content/20211001_fpdo_nl.pdf.

[594] FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilieu en FOD Economie, Federaal actieplan circulaire economie (2021-2024), versie 9 december 2021, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/paf_16_dec_2021_nl_clean.pdf.

[595] Legislative proposal of 19 July 2019 (*wetsvoorstel om geprogrammeerde veroudering tegen te gaan en de repaireconomie te steunen*), *Parliamentary Documents* Chamber of Representatives 2019 (special session), no. 193/1; legislative proposal of 19 November 2019 proposing amendments to the Civil Code and the Economic Code, in order to combat programmed and premature aging and to provide more repair options (*wetsvoorstel tot wijziging van het Burgerlijk Wetboek en het Wetboek van economisch recht, teneinde geprogrammeerde en voortijdige veroudering tegen te gaan en in meer herstellingsmogelijkheden te voorzien*), *Parliamentary Documents* Chamber of Representatives 2019-2020, no. 777/1; legislative proposal of 7 January 2020 to combat organized obsolesence and to support the circular economy (*wetsvoorstel om georganiseerde veroudering tegen te gaan en de circulaire economie te steunen*), *Parliamentary Documents* Chamber of Representatives 2019-2020, no. 914/1 (which is a revamped version of a legislative proposal with the same name of 11 April 2016, *Parliamentary Documents* Chamber of Representatives 2015-2016, no. 1749/1) See also proposition for a resolution to regulate Black Friday and to support local businesses and the circular economy (*voorstel voor een resolutie om Black Friday te reguleren en de lokale handel en de circulaire economie te ondersteunen*), *Parliamentary Documents* Chamber of Representatives 2021-2022, no. 2428/1.

[596] Opinion Council of State of 21 February 2020, no. 66.910/1, *Parliamentary Documents Chamber of Representatives* 2019-2020, no. 914/2.

economy. In this overview, the federal government explains how it aims to cooperate with the other national governmental entities and the other European Member States.

At the European Union level, the federal government coordinates the Belgian position during negotiations on matters related to the circular economy. This position is determined in the *ad hoc* working groups of the Coordination Committee for International Environmental Policy (CCIM) and other bodies such as the Directorate-General for Coordination and European Affairs (DGE).[597] In this context, the federal government, as the leader of CCIM, ensures "*that Belgium defends ambitious positions. In particular, it will ensure that the product policy, which is developed at European level, is a truly integrated product policy. This means that legislative instruments, although developed within a circular economy framework, will have to take into account all environmental impacts throughout the life cycle of products. To this end, an adequate methodology (which could be based on the PEF method, which is currently still in transition) will have to be developed and approved according to a form of governance that guarantees neutrality. Belgium will also ensure that the coherence and complementarity of the different product policy instruments (e.g., label standards, EPR, public procurement, et cetera) are ensured, as well as the coherence between the different announced legislations. Particular attention will be paid to the removal of chemicals of concern from products.*"[598]

At the national level, the federal government wants more strategic cooperation between the governmental entities. To this end, it developed the Intra-Belgian Circular Economy Platform (*Intra-Belgisch Platform Circulaire Economie*) to stimulate consultation and cooperation. One purpose of this platform is, for example, to take due account of the actions already taken at the regional level when implementing federal actions, to avoid duplication of effort and to ensure a complementary workload.[599]

In particular, the governmental entities will have to consult one another on product standards. The regional policy level is always to be involved whenever the federal government intends to enact product standards with an impact on the environment. This involvement requires a genuine exchange of views, for example, in the framework of a consultative committee or an interministerial conference. Informal consultation is insufficient.[600] If the requirements do not relate to the products themselves, but to the people who place them on the market, they fall under the competences of the regions. Moreover, the federal government is only authorized to impose product standards as a requirement for placing products on the market. Rules that regulate how the product is to subsequently be kept on the market fall within the regional competence. Applied to the ESPR, this means that the federal government is competent in general to transpose the product standards of the European Union legislation, while the Flemish policy level is competent for specific matters. For example, the federal government is, in principle, competent to transpose the rules on ecodesign requirements, the digital product passport, the labeling requirements and the market surveillance of product standards. The European Commission elaborates the specific product requirements by delegated act after consultation with the Ecodesign Forum (article 17 ESPR). Representatives of the Member States

[597] Federal Circular Economy Action Plan, p. 8-9.
[598] Federal Circular Economy Action Plan, p. 11.
[599] Federal Circular Economy Action Plan, p. 8-9.
[600] L. LAVRYSEN, "Het leefmilieu en het waterbeleid" in B. SEUTIN and G. VAN HAEGENDOREN (eds.), *De bevoegdheden van de gewesten*, Bruges, die Keure, 2016, p. (29) 60, no. 72.
p. (29) 60, no. 72.

are part of this expert group. Again, to determine the Belgian position in this European forum, consultation and cooperation at the national level between the governmental entities is necessary.

Concerning consumer protection, it is mainly the federal government that is competent to implement the European initiatives. For example, it will have to transpose the amendments to the Consumer Rights Directive and the Unfair Commercial Practices Directive made by the ECGTD into national law. The same applies to the amendment to the Sale of Goods Directive by the R2RD. It is possible for the regions to go beyond general consumer protection rules introduced by the federal government, but the degree of harmonization of European Union legislation may limit this possibility. The principles outlined in the section on the federal measures, concerning the relationship between these measures and current and potentially future European Union legislation are relevant here (see later the discussion on federal measures 2 and 3, as well as 9 and 13).

Similar principles apply in the field of public procurement.

Regarding incentives for sustainable products, interpreted as a reduction or exemption from environmental taxes on products that do not belong to the two highest classes of performance, the Flemish policy level is in principle competent on the basis of the Belgian Constitution and BWHI. However, because such taxes can disrupt the Belgian economic union and monetary unity, the federal government can act on the basis of its own fiscal competence in the Constitution. The principle of federal loyalty obligates the federal government to ensure that the exercise of its own power does not make the exercise of their respective powers by the regions impossible or excessively onerous. The case law of the Constitutional Court shows that it is advisable for the federal government to consult the regional authorities and to conclude a cooperation agreement with them. This makes federal action proportionate.

Potentially, the Flemish policy level could play a major role in implementing the obligations of article 19.3 ESPR. That article requires Member States to take appropriate measures to support SMEs. Those measures shall at least include ensuring the availability of one-stop shops or similar mechanisms to raise awareness and create networking opportunities for SMEs to adapt to requirements. Flanders already has 'MVO Vlaanderen', the knowledge center for sustainable entrepreneurship, which can be responsible for this awareness raising and networking opportunities. In addition, without prejudice to applicable State aid rules, such measures may include:

- financial support, including by giving fiscal advantages and providing physical and digital infrastructure investments;
- access to finance;
- specialized management and staff training;
- organizational and technical assistance.

The Flemish policy level could develop these measures.

In the same vein, the Flemish policy level could play a major role in implementing the obligations of article 12 of the GCI. That article also requires Member States to take appropriate measures

to support SMEs. It contains the additional obligations outlined above as well but a different general obligation. The Member States are to enact guidelines or similar mechanisms to raise awareness of ways to comply with the requirements on explicit environmental claims. The Flemish policy level could develop these measures.

3.3 Concrete measures

3.3.1 General overview

The Federal Circular Economy Action Plan proposes twenty-five concrete measures. These measures are part of six objectives:

- stimulating the market for circular products and services (measures 1-10);
- promoting greater circularity in production methods (measures 10-11);
- supporting the role of consumers and contracting public authorities (measures 12-15);
- provide the necessary incentives and instruments (measures 16-17);
- supporting the role of employees in the transition (measures 18-21);
- evaluating progress (measures 22-25).

The federal government indicates that it will have due regard for the specificities of SMEs while implementing measures to avoid additional administrative burdens for these businesses as much as possible. If necessary, it will take appropriate accompanying measures by way of support.[601]

Not every measure directly concerns the extension of the lifespan of products. Hereinafter, only the relevant measures are highlighted.[602]

3.3.2 Stimulating circular products & services

"Measure 1: Changing the product standards to facilitate re-use and/or recycling."

The federal government wants to investigate whether, in the context of the Law of 21 December 1998 on product standards meant to promote sustainable production and consumption patterns and to protect the environment and public health[603], it should adopt new product standards in order to stimulate the re-use and recycling of, for example, packaging, electronic appliances, building materials and textiles through better product design. The federal government also wants to establish a dialogue between manufacturers and the recycling sector (possibly under the supervision of the government).

As the federal government itself indicates, this measure overlaps with the ESPR at the European level. The ESPR aims at exhaustive harmonization regarding the performance and information requirements imposed by the European Commission (or by self-regulation measures) through

[601] Federal Circular Economy Action Plan, p. 15.
[602] Measures 6-7, 9, 16-18 and 21-22 are excluded.
[603] Wet van 21 december 1998 betreffende de productnormen ter bevordering van duurzame productie- en consumptiepatronen en ter bescherming van het leefmilieu en de volksgezondheid *Belgian Official Journal* 11 February 1999, p. 3986.

article 114 TFEU (article 3.4 ESPR), taking into account the safeguard procedure for national market surveillance authorities (articles 63 and 64 ESPR). After the entry into force of the ESPR, the federal government could – after consultation with the regions – only impose ecodesign requirements[604] for product parameters not (yet) covered by a delegated act of the European Commission (or to which no self-regulation measure applies) (article 3.4 ESPR).[605] If the federal government deems it necessary to go further than the ESPR, it will have to rely on article 114.5 TFEU, which allows new national measures to be taken for the important policy reasons in article 36 TFEU[606] or the protection of the environment or human health (but not: consumer protection[607]), where a problem specific to the Member State arises after the entry into force of the European harmonization measure. The Member State must base the measures on new scientific data. Moreover, the measures may not constitute a means of arbitrary discrimination, disguised restrictions on trade between Member States or obstacles to the functioning of the internal market (article 114.6 TFEU). If the federal product standards were to be established before the entry into force of the ESPR, the federal government could only maintain them under the same requirements (except for the requirement of new scientific data and the requirement of a specific problem in that Member State) (articles 114.4 and 114.6 TFEU).

Under the current legislation, the federal government is to ensure that the product standards it sets do not fall within the scope of European Union legislation that already harmonizes exhaustively today. Otherwise, as explained earlier, it will have to justify the product standards on the basis of article 114.5 TFEU, arguing that there is reason to deviate from a European harmonization measure. National product standards may not distort the free movement of products in the internal market. In Belgium, the law of 21 December 1998 (on environmental product standards) allows for the enactment of additional product standards relating to the packaging of products in order to promote their sustainability. For example, on the basis of this law, the federal government previously adopted a decree regulating the use of compostable and biodegradable materials.[608]

"Measure 2: Promoting repairability by means of a mandatory index to be mentioned on the product when purchasing products (including online). This index is to provide consumers with correct information about the repairability of the products they intend to buy. It will initially be affixed to certain electrical and electronic devices. Various criteria will be included in this index, such as the availability of spare parts necessary for the proper functioning of the product, its price, the availability of repair manuals, the ease of repair (disassembly, access to parts), et cetera If relevant, the product is to also provide a consumption meter (similar to an odometer). The index will be displayed on a label or a poster or in another appropriate form. This index will later evolve into a sustainability index that will provide information about the robustness and reliability of products."

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[604] Regarding information requirements, see earlier the section on product standards. If some of the information requirements in the ESPR are to be interpreted as an obligation for an economic operator, rather than a product standard, which, for example, regulates the labeling of a product, the federal government has no competence.

[605] Excluding minimum energy performance requirements and system requirements of buildings (Article 3.3 ESPR).

[606] However, see earlier footnote 252.

[607] In the case of European measures that are not based on article 114 TFEU, is it possible to adopt or maintain national measures where a Member State considers that a higher level of consumer protection is necessary, see article 169.4 TFEU.

[608] Koninklijk besluit van 25 maart 1999 van houdende bepaling van productnormen voor verpakkingen, *Belgian Official Journal* 1 April 1999, p. 10942; Koninklijk besluit van 9 september 2008 houdende vaststelling van productnormen voor composteerbare en biologisch afbreekbare materialen, *Belgian Official Journal* 24 October 2008, p. 56651.

This measure would introduce a repairability and durability (lifespan) score, following the French example. This score would initially apply to the same product categories as in France. Later, other categories can be added, which are specific to the Belgian market (for example, bicycles). As in France, the Belgian score is to eventually evolve into a sustainability score, meant to inform the consumer about the useful lifespan of the product. To prevent greenwashing manufacturers may only communicate the repairability of a product on the basis of the repairability score. Via the TRIS procedure Belgium informed the European Commission of a draft law on the introduction of a repairability and durability score and the dissemination of information on the duration of software compatibility of products and executive Royal Decrees (see earlier).[609]

At the European Union level, the repairability score is part of the ESPR and the ECGTD. The repairability score is therefore also subject to exhaustive harmonization by the ESPR on the basis of article 114 TFEU, taking into account the safeguard procedure for national market surveillance authorities (articles 63 and 64 ESPR). After the entry into force of the ESPR, the federal government – after consultation with the regions – could only obligate its own repairability index as a requirement for placing a product on the market[610] if a delegated act (or self-regulation measure) does not yet impose (nor exclude) the use of the European Union repairability score as an information requirement with regard to the product parameter (article 3.4 ESPR).[611] If the federal government deems it necessary to go further than the ESPR, it will have to rely on article 114.5 TFEU, which allows new national measures to be taken for the important policy reasons in article 36 TFEU[612] or the protection of the environment or human health (but not: consumer protection[613]), where a problem specific to the Member State arises after the entry into force of the European harmonization measure. The Member State must base the measures on new scientific data. Moreover, the measures may not constitute a means of arbitrary discrimination, disguised restrictions on trade between Member States or obstacles to the functioning of the internal market (article 114.6 TFEU). If the repair index were to be established before the entry into force of the ESPR, the federal government could only maintain it under the same requirements (except for the requirement of new scientific data) (articles 114.4 and 114.5 TFEU). Insofar as the repair index mainly or even exclusively serves the protection of the interests of the consumer, it is not self-evident that a deviation would be possible. In this context, it is important that the ECGTD considers the environmental benefits as secondary objectives and regards consumer protection as its primary legal basis.[614]

Measure 3: Providing information on maintaining software compatibility. Consumers need to know the lifespan of the software updates of their devices. This information will be provided by the manufacturer and the seller.

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[609] See notification numbers 2022/0634/B, 2022/0635/B, 2022/0636/B, 2022/0637/B/

[610] In this regard, see also Opinion no. 70.266/1 of the Council of State of 4 November 2021 on 'een ontwerp van koninklijk besluit betreffende producten voor eenmalig gebruik en ter bevordering van herbruikbare producten', §3: an article that relates to the affixation of labels and other markings on glass bottles with a deposit should be sufficiently clearly formulated as a condition to be met in order for the bottles in question to be placed on the market.

[611] Regarding information requirements, see earlier the section on product standards. If some of the information requirements in the ESPR are to be interpreted as an obligation for an economic operator, rather than a product standard, which, for example, regulates the labeling of a product, the federal government has no competence.

[612] However, see earlier footnote 252.

[613] In the case of European measures that are not based on article 114 TFEU, is it possible to adopt or maintain national measures where a Member State considers that a higher level of consumer protection is necessary, see article 169.4 TFEU.

[614] Explanatory memorandum to the ECGTD, p. 5.

This measure, which again draws inspiration from the French Loi Anti-Gaspillage, is intended to combat the premature obsolescence of products. The ECGTD contains the obligation to provide information envisioned by the federal government. The principles outlined on the degree of harmonization of European Union legislation with respect to measure 2 are relevant here as well.

Measure 4: Developing a reliable certification for recycled content. The aim is to develop a certification system to demonstrate that a product contains recycled materials. Such a certificate will be issued by an accredited institution, which will carry out the necessary tests. The requirements for the certificate and the necessary tests will be determined in cooperation with the government. In addition, a Royal Decree will impose minimum requirements for any manufacturer who wishes to affix the indication "contains recycled material" or a similar indication to its product (see also measure 13).

This twofold measure is intended to combat greenwashing. The desire to develop a certification system can be linked to two of the new prohibited commercial practices in the ECGTD. In point 2a of the blacklist, the ECGTD prohibits the display of a sustainability label that is not based on a certification scheme or has not been established by public authorities. Furthermore, point 4a prohibits generic environmental claims for which the trader cannot demonstrate recognized excellent environmental performance relevant to the claim. Such excellent environmental performance is to be demonstrated by an EU Ecolabel or a national label scheme (i.e., a national certification). The GCI introduces minimum criteria for all environmental labels. It also limits the possibility of creating new labeling schemes and introduces an embargo on new labeling schemes established by public authorities. Environmental labeling schemes may only be established under the law of the European Union.

Within the framework of the ECGTD, the federal government could therefore easily develop a sustainability label and certification system concerning the use of recycled material. However, the GCI makes the creation thereof impossible (article 8.3 GCI), with one side note: the creation of new labeling schemes will become impossible only from the date of transposition of the GCI. Thus, until that date the federal government could create a new labeling scheme, which would remain in force as long as it meets the substantive requirements of the GCI. It is worth bearing in mind that the European Union institutions are working on calculation methods to calculate the percentage of recycled material in the context of the Single Use Plastics Directive (as beverage bottles are to contain a minimum amount of recycled material according to this Directive).[615] As part of the reform of the Packaging Directive, the European Union legislature is also working on mandatory minimum quantities of recycled material for all packaging and a uniform calculation method.[616]

Furthermore, it is not entirely clear which 'minimum requirements' for the indication 'contains recycled material' the federal government would like to elaborate by Royal Decree. In the light of the ECGTD, those minimum requirements could relate to two issues. First, the federal government can develop an eco-label scheme that allows recognized excellent environmental

[615] Article 6.5. Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, *OJ L* 12 June 2019, vol. 155, p. 1-19.
[616] Article 7.7. Proposal Regulation Packaging.

performance concerning the generic environmental claim 'contains recycled material' (point 4a added to the blacklist of the Unfair Commercial Practices Directive by the ECGTD prohibits generic environmental claims that lack demonstrated excellent environmental performance). Second, by analogy with the European Commission's general guidelines on environmental claims, the federal government could also develop its own guidelines on the general articles of the Unfair Commercial Practices Directive explaining how to avoid misleading consumers (which is an obligation regarding small and medium sized enterprises concerning the requirements of the GCI; article 12 GCI). The federal government can certainly elaborate such guidelines by Royal Decree but their value is to be understood correctly. Only the European Court of Justice can interpret European Union legislation in a binding manner. Today, the FPS Economy, SMEs, and Energy has already issued some guidelines on environmental claims.[617]

Under current legislation, the Unfair Commercial Practices Directive intends exhaustive harmonization (articles 3.5 and 4 of the Unfair Commercial Practices Directive).[618] Thus, there is little room for national rules that are stricter than the directive, even if they aim to achieve a higher level of consumer protection. Stricter rules are only permitted if the directive indicates so itself. However, this exhaustive harmonization is limited to the scope of the directive which aims at consumer protection. National rules that are stricter than the directive *exclusively*[619] for other reasons than the protection of the interests of consumers are possible. The directive does not affect the ability of Member States to lay down rules on commercial practices for the purposes of health, safety, or environmental protection.[620] However, the fact that the federal measures are intended to combat greenwashing makes it difficult to exclude the angle of consumer protection, even though these measures certainly intend environmental protection as well.

Measure 5: Defining, together with the Belgian REACH partners, a strategic public policy for the replacement of chemicals of concern in order to strengthen the circularity of products. This strategy will include the following elements: 1. a combination of information, regulatory and economic instruments; 2. a combination of transversal and vertical actions addressing priority themes which are specific to Belgium.

Substances of concern can hinder the circularity of a product.[621] Both at the European Union level and at the federal level, the aim is to replace these substances in a sustainable way.[622]

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[617] https://economie.fgov.be/sites/default/files/Files/Entreprises/Praktische-gids-Goede-praktijken-inzake-milieuclaims.pdf.

[618] CJEU 14 January 2010, C-304/08, EU:C:2010:12, §41; CJEU 19 October 2017, C-295/16, ECLI:EU:C:2017:782, §39; CJEU 2 September 2021, C-371/20, ECLI:EU:C:2021:674, §34.

[619] As soon as the other objectives are related to consumer protection, national legislation falls within the scope of the Unfair Commercial Practices Directive, see Guidelines Unfair Commercial Practices Directive, p. 7; CJEU 9 November 2010, C-540/08, ECLI:EU:C:2010:660, §41.

[620] Guidelines Unfair Commercial Practices Directive, p. 6-7.

[621] Article 2, point 28 ESPR contains a threefold definition of the concept of substance of concern. Point c) of the article contains a broad definition which considers to be a substance of concern any substance that negatively affects the re-use and recycling of materials in the product in which it is present.

[622] RDC environment, *Development of a strategic roadmap for the substitution of SVHC as part of a sustainable economy*, study commissioned by FPS Economy, April 2019, https://economie.fgov.be/sites/default/files/Files/Entreprises/Development-of-a-strategic-roadmap-for-the-substitution-of-SVHC-as-part-of-a-sustainable-economy.pdf; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable chemicals strategy – Towards a toxic-free environment, 14 October 2020, COM(2020) 667 final.

The presence of substances of concern is one of the product parameters in the ESPR for which performance and information requirements may be imposed. As noted earlier in the sections on measures 1-3, federal *legislative* or *regulatory* measures may conflict with the harmonizing nature of the ESPR at the European Union level. A 'strategic public policy' that is not of that nature, remains possible.

In the Circular Economy Action Plan and the initiatives taken on the basis thereof, the European Union legislature strongly emphasizes the need to provide sufficient support for companies in the evolution towards a circular economy, more so when it comes to SMEs. A strategic public policy with non-legislative and non-regulatory measures, such as economic ones, would be compatible with that view. Of course, the federal government should always consider the rules on state aid.

Measure 8: Developing and disseminating (through training, information sessions, et cetera) a methodology for companies wishing to set up a "PaaS" (Product/Performance as a Service) business model.

Product as a Service (PaaS) has potential as a circular business model.[623] The service provider retains ownership of products (in contrast with the transfer of ownership in a sales contract). As a result, there is an incentive for the service provider to extend the lifespan of these products as long as possible (through good ecodesign that allows repairs, regular maintenance, et cetera) or at the very least to re-use, repurpose and/or recycle them as to the largest extent possible within the own organization.

In 2018, the FPS Public Health assisted a Belgian business in the transition of some of its activities to a PaaS model. Based on this experience, the federal government wants to develop a general guide. The objectives of this measure are:

- simplifying the existing methodology and making it known to other businesses;
- developing a specific section on 'chemical leasing';
- developing a digital platform on which a roadmap to PaaS can be followed.

3.3.3 Promoting circular production methods

Measure 10: Reliably supporting and stimulating the development of circular economic models by creating a framework for evaluating and granting sustainability and circularity certification for the services offered to businesses, in particular SMEs, in the context of their transition to a circular economy. This certification framework should coordinate sustainability and circularity expertise and ensure the granting of official certificates with recognized sustainability and circularity requirements, by ensuring close consultation with BELAC [Belgian accreditation body], which provides methodological support in the form of information for the development of certification procedures and of specific accreditation for that certification, provided that this is feasible.

[623] Regarding this potential, see in detail B. KEIRSBILCK, E. TERRYN en E. VAN GOOL, "Consumentenbescherming bij servitisation en product-dienst-systemen (PDS)", *TPR* 2020, vol. 3/4, iss. 56, p. 817-899; H. SLACHMUYLDERS, "Économie de la fonctionnalité – Le contrat de service : défis juridiques et solutions contractuelles", *Revue juridique de l'environnement* 2022, vol. 1., iss. 47, p. 111-120.

Measure 10, on services, is the equivalent of measure 4, on products. The principles outlined in the section on measure 4, concerning the relationship between this measure and European Union legislation on consumer information are also relevant here.

Measure 11: Supporting the development of an efficient digital system to trace material flows at European level, to increase the transparency of product components and ensure high-quality, safe recycling. A first study with an analysis of the technical needs and possibilities at Belgian level was funded by the FPS Public Health in 2021. The results of this study will be used at European level (in particular in the context of the 'sustainable products initiative') and will complement the upcoming analysis at European level.

With this measure, the federal government refers to the digital product passport of the ESPR. In the action plan, the federal government indicates that it will analyze what the Belgian position on that product passport should be, taking into account the possible problems that Belgian SMEs might encounter regarding the feasibility of the digital product passport.

3.3.4 Supporting consumers and contracting public authorities

Measure 12: Regarding the legal guarantee on consumer products, extending the period of reversal of the burden of proof to two years to cover the entire warranty period and examine what role the statutory warranty period can play in the transition to a circular economy.

The federal government wants to investigate what role the statutory warranty period can play in the transition to a circular economy. Article 10.3 Sale of Goods Directive allows national Member States to extend the statutory minimum period of two years. The Belgian legislature has not made use of this possibility.

Regarding the research desired by the federal government, the following recommendations can be made:

- extend the statutory warranty period, ideally to a flexible warranty period depending on the average economic lifespan (possibly in addition to extending the presumption of anteriority of the lack of conformity);
- obligate traders to offer consumers a temporary replacement – which itself may be a circular replacement (i.e., it may be repaired, refurbished or remanufactured) – if the repair exceeds a certain duration (for example, one business day).[624]

Measure 13: Regulating specific claims on products with product standards. These include claims about the percentage of recycled materials (see measure 4), the repairability of the product (see measure 2), the reusability of the product or claims about the biomass content.

[624] B. KEIRSBILCK, E. TERRYN, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation*, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 20-21; E. VAN GOOL, A. MICHEL, B. KEIRSBILCK and E. TERRYN, *Public consultation as regards the Sustainable consumption of goods – promoting repair and re-use initiative*, 2022, https://lirias.kuleuven.be/retrieve/674960, p. 3.

With this measure, the federal government wants to combat greenwashing. The federal government indicates that while the Unfair Commercial Practices Directive harmonizes exhaustively, it can impose the use of precise and objective criteria to substantiate specific claims. Such a regulatory framework already exists, for example, for compostable and biodegradable materials. Every manufacturer that uses such materials and wants to advertise them must comply with the requirements of the Royal Decree of 9 September 2008.[625] The aim of this measure is to extend this approach to other product aspects.

This measure will have to take into account the provisions of the ESPR, the ECGTD and the GCI. On the basis of the ESPR, information requirements can be established with regard to product aspects such as the percentage of recycled materials, the repairability of the product and its reusability. The ECGTD regulates the use of environmental claims, which are to be substantiated according to the guidelines proclaimed by the GCI. The principles outlined earlier in the sections on measures 1 to 4 concerning the relationship of these measures with European Union legislation are also relevant here.

Measure 14: Improving contracting authorities' knowledge of circular public procurement and launching pilot public procurement in the field of the circular economy. This measure is being developed in conjunction with the federal plan for sustainable procurement.

According to the federal government, public procurement accounts for more than 13% of GDP in Belgium. Thus, it could play an important role in the transition to a sustainable economy. Already, there exists federal legislation on public procurement that takes sustainability into account as a criterion.[626] The ESPR includes the possibility of requiring sustainable criteria at European level.

Measure 15: Setting up a communication campaign to make Belgian consumers aware of sustainable consumption and circular economy.

The federal government wants to analyze which obstacles stand in the way of a good knowledge of sustainable consumption today. Following this analysis, it wants to develop key messages to inform and raise awareness among consumers. The dual purpose of this campaign is:

- to make consumers more aware of sustainable consumption and, for example, of the potential financial benefits;
- to inform consumers about changes in consumer rights under the plan (e.g., longer warranty period, introduction of a product passport, repairability score, et cetera

When implementing this measure, the federal government will strive for coherence and complementarity with the actions of the regions, which are already developing strategies in this area, to ensure that there is coherent communication on these topics in Belgium.

[625] See earlier footnote 608.
[626] Article 82 wet van 17 juni 2016 inzake overheidsopdrachten, *Belgian Official Journal* 14 July 2016, p. 44219.

3.3.5 Evaluating progress

Measure 22: Analyzing Belgian data from the EU circular economy monitoring framework based on the circular economy monitoring framework set up by Eurostat.

Measure 23: Developing a long-term strategy to monitor the transition to a circular economy using appropriate indicators such as Belgium's materials footprint.

Measure 24: Researching the contribution of the circular economy in the fight against climate change and the promotion of biodiversity and economic prosperity.

Measure 25: Monitoring the implementation of the federal circular economy action plan.

Measures 22-25 all relate to the follow-up and further elaboration of the federal policy plans. Where necessary, the federal competent authorities will consult with the Federal Planning Bureau and the Intra-Belgian Platform for the Circular Economy. Together, they should develop a strategy for monitoring the transition to a circular economy on the basis of concrete indicators in consultation and coordination with the regions.

4 Impact on Flemish businesses

This section provides a general summary overview of the impact of the European Union initiatives on the businesses active in the Flemish region, in the form of a table. There are four preliminary comments to this table.

First, the overview is based on the current state of the initiatives. As the European Union institutions have not yet finished all trilogue negotiations some European initiatives have not yet resulted in definitive pieces of legislation (ESPR, R2RD) and some not even in provisional agreements (GCI). Although unlikely, there is a chance that some of the provisional agreements are not finalized. Thus, this overview could become outdated. Nevertheless, a general summary overview remains useful to show the general direction in which the European Union institutions wish to head with the economy of the European Union. As regards the GCI, the table is based mainly on the original proposal by the European Commission.

Second, the obligations arising from the European Union initiatives are differentiated. Not every obligation applies automatically to SMEs. For example, the obligations regarding the prohibition of the destruction of unsold consumer products in the ESPR only apply to these businesses where the European Commission considers it appropriate.

Third, some of the obligations of the European initiatives also differ according to the capacity of an economic operator. For example, the ESPR imposes different obligations on the manufacturer than on the importer, distributor, dealers, fulfillment service providers, electronic marketplaces and search engines (see articles 21 and following ESPR). The table hereinafter provides a general overview of the obligations. It does not always go into detail how they are modulated and adjusted to the different economic operators. This general overview is applicable, without much deviation, to the manufacturer. This economic operator has the most and the most extensive obligations. As the influence of economic operators on the design and marketing of the product on the European Union market decreases, so do their obligations. For example, the trader, who has little or no influence on the design of the product, is mainly obligated to ensure a good transfer of all required information to consumers and not to engage in unfair commercial practices.

Finally, this table gives an overview of the *general* obligations in the European initiatives. In the case of the ESPR in particular, the specific, more extensive ecodesign obligations are elaborated by delegated act. Furthermore, the table focuses on the more fundamental obligations.[627] An excess of detail would reduce its readability.

[627] For example, the table does not contain the technical requirements for the operation of the digital product passport in article 10 ESPR.

Sustainable product design	
General – operation	The ESPR is a general framework for mandating more sustainable product design. The European Commission will gradually develop the actual requirements that specific products must meet by means of delegated acts (4 ESPR). Those requirements may relate to a specific product group or to multiple product groups that show technical similarities. The European Commission shall consult with an expert group of stakeholders before drawing up a delegated act. Economic operators may also respond to calls for input for an impact assessment of the delegated act. Economic operators can propose a self-regulation measure to the European Commission themselves (18 ESPR).
Performance/information requirements	Ecodesign requirements are established as follows. A product aspect is selected from the list in Article 5 ESPR (e.g., repairability). From the list of product parameters in Annex I, a parameter relevant to that product aspect is chosen (e.g., b) 'ease of repair and maintenance' as expressed through, among others, the modularity of the product). Based on this product parameter, performance and information requirements are determined (for example, from now on, the USB-C port may not be soldered to the circuit board of a mobile phone; this prohibition contributes to the modularity of a product, thereby increasing the ease of repair and maintenance and thus strengthening the repairability of a product).
Premature obsolescence	The ecodesign requirements set by delegated acts should ensure in particular that products do not become prematurely obsolete for reasons including design choices by manufacturers and use of components which

	are significantly less robust than other components. Consequently, economic operators will have to design more robust products.
Planned premature obsolescence	Economic operators shall not design products to alter their behavior or properties within a short period after putting the product into service leading to a worsening of their performance (33.3 ESPR). Nor shall software or firmware updates worsen the performance of a product, except with the express consent of the end-user prior to the update (33.4 ESPR).
Ban of non-compliant products and conformity assessment	Where a delegated act (or self-regulation measure) imposes ecodesign requirements for a particular product, it may be placed on the market or put into service only if it complies with those requirements (3.1 ESPR). There is also a ban on keeping non-compliant products on the market. Manufacturers, importers and distributors who consider or have reason to believe that a product that they have placed on the market or put into service is not in conformity with the requirements set out in delegated acts, shall immediately take the necessary corrective measures to bring that product into conformity, to withdraw it or recall it, if appropriate (21 and following ESPR). The economic operator concerned shall immediately inform the market surveillance authorities of the Member States in which the product has been placed on the market of the suspected non-compliance and of any corrective measures taken. The ESPR ties in with the general European product legislation to assess whether a product complies with ecodesign requirements (32 and following ESPR). As a business, it can be useful to consult the Blue Guide, which explains how this conformity assessment works.

	Methods of circumventing conformity assessment tests are prohibited (33 ESPR).
Pre-contractual information obligations	
General	When designing and placing a product on the market, economic operators comply with all information requirements in a delegated act (or self-regulation measure) (7 ESPR). These requirements shall cover at least: ▪ the digital product passport (7.2, point a) and 8 ESPR); ▪ substances of concern in the product (7.5 ESPR).
Maintenance, repair and end-of-life information	The delegated act (or self-regulation measure) may require business to inform consumers and other end-users on how to install, use, maintain and repair the product in order to minimize its impact on the environment and to ensure optimum durability, as well as on collection for refurbishment or remanufacture and on how to return or handle of the product at end-of-life (7.1a, point b), ii) ESPR). The ESPR stipulates that the European Commission can require that a product is accompanied by a 'repairability score'. The ECGTD requires traders to communicate this score to the consumer. If no repairability score exists, the trader is to communicate to the consumer other relevant repair information made available by the manufacturer. This may be, for example, information about the availability and ordering procedure of spare parts. This obligation only applies to the information made available by the manufacturer. Traders are not expected to actively search for this information themselves. The R2RD works as a conduit for more specific legislation (cfr. Annex II to the R2RD). Thus, regarding the information towards consumers and others, the specific legislation is to be followed.
Classes of performance	Classes of performance may be an information requirement (compare with the

	performance classes of the energy label) (article 7.1a. b), i) ESPR).
Method of presentation	The information requirements indicate how the information should be made available. This is done in at least one of the following ways: ▪ on the product itself; ▪ on the product's packaging; ▪ in the digital product passport; ▪ on a label; ▪ in a user manual; ▪ on a free access website or application.
Language	Information shall be provided in an easy-to-understand language (7.7 ESPR).
Digital product passport	Products may only be placed on the market or put into service for the first time if a digital product passport is available. Each product and each economic operator receives a unique identification code, that can be linked to the product passport. The delegated act (or self-regulation measure) determines how the digital passport should be available to the end-user (article 8.2, point e) ESPR). Access shall be easily obtained by scanning a data carrier such as a watermark or a QR code, which is located on the product itself whenever possible. Exemptions from this affixation on the product itself are possible depending on the nature, size or use of the products. The economic operator who creates, modifies, or supplements the product passport is responsible for storing the created, modified or supplemented data.
Labels	A label can be one of the ways in which companies are to inform about the characteristics of the product. It may be mandatory to communicate the class of performance regarding a certain product parameter via a label. In this case, the label shall have such an appearance that

	it is easy for the consumer to compare product performance and to choose products with better performance (14.2 ESPR). Where a label is not mandatory, an economic operator may not affix an own label that is likely to mislead or confuse customers by mimicking the labels provided for by the ESPR (15 ESPR). Where a label *is* mandatory, an economic operator shall not provide or display other labels, marks, symbols or inscriptions that are likely to mislead or confuse customers with respect to the information included on the label (26.2 ESPR). The economic operator placing the product on the market or putting it into service for the first time shall ensure that all individual units of products are accompanied by printed labels, free of charge (26.1 ESPR).
(Planned) premature obsolescence	The ECGTD prohibits premature obsolescence in seven ways through the blacklist of the Unfair Commercial Practices Directive. Two of these are expressed as a pre-contractual obligation to provide information. Traders should inform consumers: ▪ that a software update has a negative impact on the use of products with digital elements or on the operation of certain characteristics of those products, even if the software update improves the functioning of other characteristics; and ▪ that a product is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original manufacturer. Moreover, traders may not:

	▪ present a software update as necessary where it only enhances functionality features; ▪ communicate commercially in relation to a product that contains a feature that has been introduced to limit its durability, while information on that feature is available to them; ▪ falsely claim that a product has a certain durability in terms of usage time or intensity under normal conditions of use, if that is not the case; ▪ present a product as repairable if that is not the case; nor ▪ induce the consumer into replacing or replenishing the consumables of a product earlier than necessary for technical reasons.
Advertising and marketing	
Greenwashing – general rules	Traders should not mislead consumers. The ECGTD amends the general articles of Unfair Commercial Practices Directive to determine whether such misleading commercial practice exists. In particular, the ECGTD takes action against incorrect or difficult-to-verify sustainability claims. First, traders shall not give a false impression of services or products in terms of their (1) societal and environmental impacts, (2) sustainability and (3) repairability. In addition, traders shall not make environmental claims about future environmental performance (e.g., a commitment to climate neutrality) without clear, objective and verifiable commitments and targets set out in a detailed and realistic implementation plan. There shall be a monitoring system, independent of the trader, enabling the consumer to verify that traders are actually delivering on their promises.

	Furthermore, traders should not advertise consumer benefits that are irrelevant and do not result from any feature of the product or business. In other words, traders should not present their products as beneficial, if they have had no hand in creating that benefit. Finally, when traders offer a service which compares products, including through a sustainability information tool, information about the method of comparison, the products which are the object of comparison and the suppliers of those products, should be shared and traders should take the measures in place to keep that information up to date.
Greenwashing – assessment of claims	The GCI is complementary to the ECGTD. It contains specific requirements for voluntary explicit *environmental* claims. The trader (who is not a microenterprise) is to conduct an assessment of the claim. This assessment should make it possible to identify the environmental impacts and environmental aspects for the product or trader that jointly contribute significantly to the overall environmental performance of the product or trader. The trader is to demonstrate that environmental impacts, environmental aspects, or environmental performance that are subject to the claim are significant from a life cycle perspective. A standard assessment method (e.g., the European PF methods) may only be used if it is complete on the impacts relevant to the product category or trader. They may not omit any important environmental impacts. The assessment is to be kept up to date, whenever there are circumstances that may affect the accuracy of the claim and no later than five years from the date of communication to the consumer.

Greenwashing – climate claims	Claims based on greenhouse gas emissions offsetting are banned.
Greenwashing – *ex ante* verification of claims	Prior to using an explicit environmental claim as a commercial practice, business have to submit the claims that they whish to use to an officially accredited body to have them verified (article 10 GCI).
Greenwashing – blacklist	The ECGTD prohibits *greenwashing* in five ways through the blacklist of the Unfair Commercial Practices Directive. Traders may: ▪ not display a sustainability label that is not based on a certification scheme or has not been established by public authorities; ▪ not claim that a generic environmental claim such as 'environmentally friendly', 'eco(logical)' or 'climate neutral' applies, if the trader cannot demonstrate recognized excellent environmental performance that is relevant to the claim. ▪ not claim that an environmental claim applies to the entire product when in fact the claim relates only to a certain aspect of the product; ▪ may not present legally imposed requirements on all products as a distinguishing feature of the trader's offer. In addition, climate claims are not allowed (see earlier).
Greenwashing – premature obsolescence	The ECGTD prohibits premature obsolescence in several ways through the blacklist of the Unfair Commercial Practices Directive. Two of these are (partly) worded as a ban on incorrect environmental claims. Traders may not: ▪ claim that a product has a certain durability in terms of usage time or intensity when it does not;

	▪ present products as repairable when they are not.
Prohibition of destruction of unsold consumer products	
General duty of care	Each economic operator is to take necessary measures to which can reasonably be expected to prevent the need to destroy unsold consumer products (19a ESPR). The term 'unsold' also includes products returned by the consumer on the basis of the right of withdrawal of article 9 of the Consumer Rights Directive.
Transparency obligation	Any economic operator who discards unsold consumer products directly or indirectly is to disclose the following information (20 ESPR): ▪ the number and weight of unsold consumer products discarded per year, differentiated per type or category of products; ▪ the reasons for the discarding of products; ▪ the proportion of the delivery of discarded products to preparing for re-use, remanufacturing, recycling, other recovery including energy recovery and disposal operations in accordance with the waste hierarchy as defined by article 4 Waste Framework Directive; and ▪ the measures taken to prevent the destruction of products.
Prohibition of destruction	Based on among others the information provided by the economic operator, the destruction of a particular product may be prohibited (20a ESPR).
Exemption for SMEs	The transparency obligation and the prohibition do not apply to medium-sized enterprises for six years. They do not apply to other SME's indefinitely. However, a delegated act may make both applicable to these SME's where there exists sufficient evidence that SMEs can be used to circumvent those obligations (article 20a.6 ESPR).

Facilitate own or independent repair	
Repair-friendly design	See earlier: if ecodesign requirements can be imposed, it can be required that products shall be repair- friendly. In particular, economic operators shall not impede repair through software or hardware locks.
Pre-contractual information obligations	See earlier: economic operators can be obligated to provide information on repair.
Making spare parts and repair tools available	The R2RD works as a conduit for more specific legislation (cfr. Annex II to the R2RD). Thus, regarding rules on the availability of spare parts and repair tools, this specific legislation is to be followed.
Commercial guarantees	Commercial guarantees can confuse consumers about the impact of an own or independent repair on their legal rights. Traders should take care that the commercial guarantee is not seen as unfair on the basis of the general articles on unfair commercial practices. A likely interpretation of the R2RD entails that commercial guarantees cannot state that they are void if the consumer undertakes own or independent repair, as this could be seen as a contractual method to impede the repair of products.
Repair and replacement of defective products in consumer sales	
Extension of statutory warranty period	If a trader repairs a product, the statutory warranty period is extended once by twelve months.
Circular replacement	Upon explicit request by the consumer, the trader may offer a refurbished product as a replacement.

Obligation to repair outside of statutory warranty	
Statutory repairability requirements lead to obligation to repair	Manufacturers who offer products that fall under statutory repairability requirements (e.g., household washing machines) are obligated to repair the product upon request by the consumer, outside of the statutory. They may ask a reasonable repair price.
European Repair Information Form for repair services	Enterprises who offer repair services may voluntarily provide consumers with the European Information Repair Form. If they choose to do so, the conditions listed in the form become contract terms upon acceptance by the consumer. The form remains valid for a period of a least thirty days.

5 Policy recommendations

On the basis of this research report some policy recommendations can be formulated. Some of these policy recommendations can be implemented short-term because they relate to freedoms within the existing legislative framework of the European Union initiatives. Other recommendations challenge the choices made in the initiatives. They would require long-term diplomatic efforts with other Member States to seek consensus to adjust the legislative framework. Given that the federal government wants to develop a shared and ambitious Belgian plan to evolve towards a circular economy, the Belgian state could consider the following.

A first set of recommendations relates to the implementation of the European initiatives and their functioning. These recommendations can be seen as 'internal' recommendations, meaning that they relate to responsibilities and freedoms of the Belgian governments. It is solely up to the Belgian governments to determine whether they wish for them to become a reality. For example, where the European Union legislature gives leeway to the national Member States to develop more ambitious rules in the implementation of the initiatives that are directives, the Belgian governments are free to decide by themselves whether they wish to do so. They do not have to lobby for changes at the level of the European Union.

- Advocate stringent ecodesign requirements in the Ecodesign Forum. In particular, as concerns repairability scores, aid the European Commission in mitigating the risks associated with aggregated scores (ESPR).
- Incentivize Belgian customers to make sustainable choices through measures such as green taxation (e.g., reduction or exemption from an environmental tax) (ESPR).
- Introduce national measures on green public procurement regarding product groups for which public procurement requirements under the ESPR have not yet been set. If necessary, introduce stricter national requirements when such requirements have been set (ESPR).
- When implementing the amendments to the Sale of Goods Directive by the R2RD, the Belgian governments (i.e., the federal government as given advice by the other governments) could consider reviewing the choices made previously in the implementation of the directive.
    - The Belgian governments could consider introducing a flexible statutory warranty period depending on the average economic lifespan.
    - Moreover, the Belgian governments could explicitly allow for repair by third parties as a remedy during the statutory warranty period.
- When implementing the amendments to the Sale of Goods Directive by the R2RD, the Belgian governments could consider stipulating multiple extensions of the statutory period of conformity in case of repair.
- Request guidance on the following notions from the European Commission:
    - 'consumer product' (given the adverb 'primarily') (ESPR);
    - 'sufficient evidence (regarding the use of SMEs to circumvent the obligations of the ESPR) (ESPR);
    - the broad formulation of some of the new blacklisted practices in Annex I to the Unfair Commercial Practices Directive (for example, the notion 'introduced'

(regarding a feature that limits the durability of a product) and 'irrelevant' (regarding benefits that do not result from any feature of the product or business)) (ECGTD);
    - 'environmentally friendly delivery options' (ECGTD);
    - 'repairing for commercial purposes' (R2RD);
    - 'contractual clauses impeding repair' (in particular with regard to commercial guarantees) (R2RD).
- Given that the harmonization level of the Unfair Contract Terms Directive (and its indicative list) is minimal, the Member States remain free to add contracts term to national blacklists. Thus, the Belgian governments could add to the national blacklist regarding consumer contracts (and perhaps even to the lists B2B) that a non-negotiated commercial guarantee cannot require repair through in-house repair services or repair services authorized by the manufacturer/trader Unfair Contract Terms Directive It can be argued that in a circular economy an unhindered right to repair by consumers themselves or by independent repair services is an integral part of the contractual relationships between businesses and consumers, so that its modulation can distort the contractual balance (R2RD/ECGTD).

A second group of recommendations pertains to adjustments to the legislative framework at the level of the European Union. These recommendations can be seen as 'external' recommendations, as they necessitate lobbying efforts and collaboration with other national Member States and European Union institutions. Unlike the first set of recommendations, which involves primarily the Belgian state as the sole actor, these 'external' recommendations entail a broader scope of engagement across multiple stakeholders within the European Union framework. This might prove not to be an easy endeavor. The European Union legislature has weighed different interests and has determined a balance between them in the final versions of the initiatives. These recommendations challenge the choices made therein, while the different stakeholders might be hesitant to question the initiatives immediately. Often, choices can be explained by the concern that consumer rights should prevail. This research report has attempted to argue that one should take care to transcend the false dichotomy between consumer rights and sustainability considerations. They are not necessarily conflicting priorities. Sustainability measures are not in opposition to consumer rights. Rather, they are complementary to them. Eventually, putting an end to the throw-away culture, as it is exacerbated by some of the consumer rights, is beneficial to consumers because of an increase in quality and longevity of consumer products.

- Adapt or even limit the right of withdrawal of consumers under the Consumer Rights Directive to strengthen the prohibition of the destruction of unsold consumer products on the side of the businesses (for example, by allowing price differentiation between purchases with and those without right of withdrawal, by analogy with hotel reservations with and without cancellation insurance, so that sustainable choices are rewarded) (ESPR).
- Question whether the material scope of the ESPR should not have be broadened to include domestically produced products meant for export outside of the market for the European Union (ESPR).
- Question whether is absolutely necessary to exclude second-hand products from the scope of the ESPR. Perhaps it might make greater sense to grant the European

Commission the explicit power to exempt second-hand products temporarily from the requirements in a delegated act (i.e., a revision of article 4 ESPR), for the time needed for the second-hand market of the product or product group to contain a substantial share of products produced subject to the ecodesign requirements in the delegated act. Once this point has been reached, those employing circular business models should be co-responsible for ensuring the endurance of the ecodesign of those products (ESPR).

- Introduce an obligation for the trader to inform the consumer of non-disclosure of commercial guarantees of durability by the manufacturer (ECGTD).
- Introduce a general obligation for manufacturers to provide traders with the information that the latter have to relay to consumers in the context of the ECGTD, as proposed in the amendments of the European Parliament (ECGTD).
- Question whether the obligations to disclose commercial guarantees in the ECGTD (1) need to be so restrictive and (2) need to be limited to the guarantees of the manufacturer (ECGTD).
- Question whether the ban on claims based on greenhouse gas emissions offsetting should not be extended to all types of offsetting (as noted by the European Economic and Social Committee) (ECGTD).
- Amend the remedies in the Sale of Goods Directive (R2RD):
    - make repair the sole primary remedy (either unconditionally or whenever repair is cheaper than replacement);
    - mandate circular replacement over replacement with virgin products in all circumstances (rather than mandating this upon request by the consumer);
    - extend the statutory warranty period in a harmonized manner, ideally to a flexible warranty period depending on the average economic lifespan (possibly in addition to extending the presumption of anteriority of the lack of conformity);
    - let a repair interrupt the limitation period in a harmonized manner;
    - obligate (rather than suggest to) traders to offer consumers a temporary replacement – which itself may be a circular replacement – if the repair exceeds a certain duration (for example, one business day);
    - allow for repair by third parties during the statutory warranty period in a harmonized manner.
- Amend the Unfair Contract Terms Directive by stipulating in its Annex I that a commercial guarantee cannot require repair through in-house repair services or repair services authorized by the manufacturer/trader (R2RD/ECGTD).
- Amend the Unfair Commercial Practices Directive by supplementing the blacklist to ensure that a commercial guarantee cannot require repair through in-house repair services or repair services authorized by the manufacturer/trader (R2RD/ECGTD).
- Add general, horizontal repairability requirements to the R2RD. The European Union legislature can set the lowest bar, for example, with regard to the minimum duration of availability of spare parts.

A final policy recommendation concerns the GCI (taking into account how the European Parliament suggests amending it). A provisional agreement on this initiative has not yet been reached, so that there might be room for the Belgian state to weigh in on the interinstitutional negotiations. The Belgian state should support the heightened attention to substances of concern in the amendments of the European Parliament. Substances of concern hinder the

potential of products to be recuperated in various manners (e.g., the recyclability of the product is diminished) and, thus, impede strategies to reverse and reduce premature obsolescence in the end-of-life stage of a product

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