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*Edited by Marta Santos Silva, Andrea Nicolussi,
Christiane Wendehorst, Pablo Salvador Coderch,
Marc Clément and Fryderyk Zoll*

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CHAPTER 6

VARIOUS APPROACHES TO ‘GREENING’ CONSUMER SALES LAW

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VARIOUS APPROACHES TO 'GREENING' CONSUMER SALES LAW¹

*Fryderyk Zoll, Katarzyna Południak-Gierz,
Wojciech Bańczyk and Maciej Bujalski*

6.1 Introduction

In recent years, we are finally seeing European Union legislation adopting a new approach. Environmental care, and in particular green transition, is becoming one of the more standard aims of a whole range of measures, especially in areas of public law.² In addition, the impact of ESG³ on matters of corporate governance and capital markets is growing.⁴ The same is true about the environmental aspects of sustainable development.⁵

Consumer law is seen as an important weapon in the fight for greener European markets.⁶ The environmental costs of consumer markets can (at least potentially) be mitigated by an appropriately balanced sales law, especially concerning rules on the seller's liability. Sustainable consumption and circular economy are mentioned in Recitals 32 and 48 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.⁷ Nevertheless, the current provisions of the directive fail to sufficiently correspond to this objective.⁸ As a result, just shortly after the directive was adopted and already before its provisions became applicable a discussion on possible amendments to Directive 2019/771 began.⁹

The aim of this chapter is to present possible regulatory approaches to increasing the ecological efficiency of the revised consumer sales law. For this purpose, two proposals are compared, namely the Academic Draft Amendment of Directive 2019/771¹⁰ and the European Law Institute's Response to the European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse.¹¹ Even though both of these initiatives are built upon the same foundation and have the same objective, the proposed outcome differs substantially, as the regulatory area within which the intervention is claimed to be needed varies, as does the intensity of the discussed amendments.

The conducted analysis focuses on the main differences between the presented proposals. Those appear in the context of the level of harmonisation, the way in which the right to repair is viewed, the role of price reduction, the requirements of conformity – especially the durability of goods, the period of the seller's liability, and the possibility of introducing a direct producer's liability. The analysis also looks at the different ways in which the proposals find a balance between promoting sustainability, protecting consumers, and achieving a proper risk distribution within a sales

contract, as far as the above matters are concerned.¹² On the other hand, some similarities between the approaches may be observed. Consequently, the results of this analysis should facilitate finding regulatory solutions that are relatively uncontroversial and may help to focus further academic and political debate on solving issues, where adjusting legal instruments to meet the challenges of ecological transition is more problematic.

Finally, as the European Commission's position on the matter has been published shortly before submitting the final version of this article,¹³ the approach taken by the EU will also be briefly commented. As expected, the aim of this initiative is 'to increase the repair and reuse of viable defective goods purchased by consumers within and beyond the legal guarantee'.¹⁴

To prevent differentiation of national rules on repair, full harmonisation of some of its aspects (especially those being outside of the seller's liability regime provided for by Directive 2019/771) is proposed. Environmental aims are hoped to be achieved through synergy between several initiatives – the proposed Directive on common rules promoting the repair of goods, the proposed Ecodesign for Sustainable Products Regulation,¹⁵ the expected revision of Directive 2019/771,¹⁶ and the Directive on empowering consumers for the green transition¹⁷ that should, in principle, cover the entire lifecycle of a product and have a cumulative effect on the consumer market. Contrary to what has been proposed by the Academic Proposal and the majority of recommendations formed in the ELI Response, the main focus of the strategy is to promote the repair of defective items, and not to increase the ecological efficiency of consumer sales law.¹⁸

6.2 Level of Harmonisation

Directive 2019/771 is aimed at full harmonisation (Article 4) in order to maintain the same level of consumer protection across the European Union and to minimise the transactional costs for sellers who want to benefit from the free movement of goods, persons, services and capital on the single market.¹⁹ However, choosing full harmonisation may increase the environmental costs of regulatory solutions.

That will be the case if we consider that maximum harmonisation may impede national legislators from introducing norms that exceed the standard set by Directive 2019/771, concerning both consumer protection and seller's guarantees. However, some Member States may still be inclined to opt for an eco-friendlier transposition of Directive 2019/771, following the principle of common but differentiated responsibilities.²⁰ On the one hand, as ecology is a transnational issue and the degradation of the environment is an irreversible process, initiatives aimed at granting sustainability should not be suppressed in order to achieve full harmonisation. On the other hand, the maximum harmonisation method may, in some contexts, be better positioned to greening consumer sales law than the minimum harmonisation. The hierarchy of remedies can serve as an example here. If repair (assuming that it is the most eco-friendly remedy) is prioritised over other remedies in a minimum harmonisation directive, then national legislators could nevertheless place all remedies for non-conformity at the same level. In that manner, they would grant consumers better protection than the directive itself at the expense of the environment, which would not be the case if maximum harmonisation was introduced.²¹

This problem has been highlighted in both commented approaches. The Academic Proposal strongly recommends a mixed harmonisation approach. It states that, while consumer protection should remain a subject of maximum harmonisation, the directive: 'shall not prevent the Member States from maintaining or introducing deviating provisions of national law that increase the environmental added value without lowering the protection provided for the consumer in this Directive'.²²

In the meantime, the ELI's Response simply indicates that there are two possibilities (namely, maintaining full harmonisation or returning to the minimum harmonisation approach in order to allow Member States to increase the ecological effectiveness of consumer sales law) without opting definitively for either of them.²³ As mentioned, this problem should be regarded from a wider perspective. The duality of the level of harmonisation may be an effective measure to promote sustainable legislation. The provisions guaranteeing the same level of consumer protection should remain fully harmonised. In contrast, in the context of provisions that may strongly influence the sustainable development and circular economy, the minimum harmonisation method should be applied to allow Member States to find measures that are best suited from an environmental perspective, while taking into consideration such things as the regional particularities and variety of possibilities to contribute to better environmental protection. This kind of competitiveness between Member States is hoped to achieve a higher level of environmental protection in general.

Although both proposals recognise that it is too early for the maximum harmonisation regarding issues that have a direct impact on the environmental costs of consumer sales law, the EU, once again, opts for maximum harmonisation when addressing the right to repair. The reasons behind this choice are of economic nature: legal fragmentation dissuades consumers from using repair services, and full harmonisation is hoped to encourage cross border movement of goods (including spare parts) and the development of repair services, as it reduces transaction costs for business.²⁴

6.3 Right to Repair as a Central Point of the New Approaches

The European Commission has been focusing on one of the remedies that has been present in the European consumers' sales law since Directive 1999/44,²⁵ namely the right to repair. This is no longer viewed solely as a remedy for non-conformity within the framework of Directive 2019/771, but has become a general, standalone right.²⁶ The idea is quite simple: the environmental costs are lower when the same good is circulating on the market, as opposed to when a new one is produced, with the first good delivered usually going to waste.²⁷ In addition, in principle, the environmental costs of repairing an already existing good are low compared to the costs of producing a new one. This is why the right to repair is regarded as an eco-friendly solution if viewed as a self-standing right²⁸ or if compared with other remedies available in case of non-conformity of the good during the period of the seller's liability under Directive 2019/771.²⁹

The question now is how to promote this remedy.³⁰ The most intuitive and already broadly discussed solution is to design the hierarchy of the remedies of Directive 2019/771 accordingly. That is why the Academic Proposal indicates that right to repair should become the primary and main remedy, which would then no longer be at the same level as the right to a replacement.³¹ In addition, the ELI's Response focuses on the right to repair by arguing that its introduction as a primary remedy 'would increase the longevity of a product and in most cases lead to less consumption of new products, thereby – in the longer term – to less production, and this could help in saving resources'.³²

It is worth mentioning that the ELI's Response also poses an important condition: the primary nature of the right to repair should respect the principle of proportionality, which means that, from the seller's side, the costs (both environmental and economic) related to the repair cannot prevail over those associated with a replacement.³³

For sure, the enforcement of the right to repair would become the main measure of greening the consumer sales law. However, it is not as simple as that. One must be aware of all consequences of such an approach, which in certain circumstances may be even more damaging from a sustainability point of view. This is the case when the repair of a good is more harmful for the environment

than its replacement (e.g., because of the transportation or utilisation of replaced parts).³⁴ In addition, if the replacement is a new generation model of a good, replacing a defective good might be more ecologically efficient than repairing it.

Another important aspect is that if the Sales of Goods Directive is not amended, that is to incentivise consumers to choose repair over replacement. Even though consumers tend to express a mostly positive attitude towards the protection of the environment,³⁵ in order not to discourage them from choosing an eco-friendly remedy, the legislative measures must meet consumers' expectations related to protecting their interests. In particular, the period needed to perform repairs, according to Article 14(1)(b) of Directive 2019/771, should be reasonable. One issue is that no fixed time frame can be introduced in this regard. This is because, depending on the nature of the good, the severity of its defect and other circumstances of the case, the time reasonably needed to perform repair may vary, making it challenging to shape the legal framework in a way that performing the right to repair does not adversely affect the consumer. One suggestion is to introduce the consumer's right to obtain 'a loaner' (a substitute for the good that is being repaired) if the repair is likely to last for longer than, e.g., two weeks.³⁶ Here, however, the need to promote competitiveness in the market cannot be forgotten. Granting the consumer a right to a loaner would oblige the sellers to have a substantial amount of spare items at their disposal, to fulfil the consumer's demands. This, on the one hand, increases consumption (including the production of loaners), and on the other may place small enterprises in a weaker position.³⁷ That is why some further options ought to be considered.

Alternatively, the same result may be achieved through claims for damages that already exist in national legal systems. In practice, it may be more convenient for a buyer to demand compensation for rental costs incurred. From an ecological point of view, it represents an advantage, as this measure does not require the sellers to maintain a given amount of replacement goods. For example, in French³⁸ and German³⁹ case law it is assumed that requesting payment of the rental costs, even if no rental has been contracted, is admissible.⁴⁰ In these cases, there is a fixed rate for damages, such as rental costs. By this, incentives for obtaining more expensive (or more ecologically inefficient) rentals are minimised.

Another issue under discussion is the admissibility of self-repair under the sellers' liability regime. *Prima facie*, a repair performed by consumers themselves may seem more efficient from an ecological point of view. First and foremost, a good can then be repaired in the consumers' vicinity, which will limit environmental costs related to transportation.⁴¹ However, it has been noted that the legislator does not have the measures to guarantee that self-repair will comply with environmental standards.⁴² As a matter of fact, a 'homemade repair' may generate more detrimental effects on the environment than a well-designed process on the seller's or producer's side. That is why the amendments of Directive 2019/771 should promote a repair performed directly by the liable entity. Thus, the seller may often pass the goods demanding repair directly to the producer, but also often direct producers' liability against consumers is considered (see part 7).

The growing importance of repair increases the number of goods that are repaired or rebuilt on the market, which forces legislators to regulate their status. Firstly, as the current text of Directive 2019/771 allows its application to second-hand goods to be excluded, it is necessary to determine whether a good, once repaired, becomes a second-hand good. In principle, the response should be negative. This is why both commented papers propose to introduce provisions on 'refurbished goods'.⁴³ The notion will cover goods whose key elements were rebuilt or repaired⁴⁴ by the seller or producer and reintroduced on the market.⁴⁵ Refurbishing is an important aspect of an ecologically effective circular economy. Still, for this strategy to be effective, consumers cannot be afraid of buying refurbished products. The solution could be to grant them the same position as if they

bought a new product.⁴⁶ In addition, consumers that buy refurbished goods often view them as new ones.⁴⁷ A desirable spill-over effect would be that, if the new and refurbished goods start to be seen as equal from the perspective of seller's liability, then sellers should be allowed to offer the buyer a refurbished good as a replacement for a new good.⁴⁸

For the time being, one of the most significant obstacles when it comes to promoting repair is that some goods cannot be repaired in the event of their non-conformity, e.g., because of their design or the technology used for their production. A solution for this matter is introducing a criterion of repairability as a requirement for conformity.⁴⁹ The ELI's Proposal postulates that incoming legislation should motivate businesses to produce repairable goods as much as possible.⁵⁰ The Proposal of Ecodesign for Sustainable Products Regulation,⁵¹ where *inter alia* requirements regarding product design and availability of spare parts are set, may play a significant part in this process. However, neither the Academic Proposal nor the ELI's Proposal tackle the interplay between the right to repair (either as a standalone right or as one of the rights of the consumer under the seller's liability for non-conformity regime) and intellectual property rights. This matter deserves attention, especially if the right to self-repair or the right to repair outside the seller's liability regime was introduced as envisaged by the Proposal on the Directive on repair. The scope and intensity of protection of intellectual property rights may need to be rethought, as extensive protection of IP rights may limit the availability of repair services and increase its costs due to the need of obtaining adequate licences by repairers (being either sellers or third parties).⁵²

The above recommendations only marginally influenced the Proposal for a Directive on common rules promoting the repair of goods. The sole explicit change when it comes to the right to repair under the seller's liability regime was that consumer choice between repair and replacement was limited to situations where replacement is cheaper than repair (Rec. 28, Article 12 of Proposal of Directive on common rules promoting the repair of goods). Adding the derogation from Article 13(2) Directive 2019/771 is supposed to prioritise the remedy of repair without increasing strain on small and medium enterprises with limited resources to maintain repair services infrastructure. However, this approach does not necessarily translate into lower environmental costs, because the EU fails to specify whether environmental costs should also be taken into consideration when comparing costs of repair and replacement. Also, the EU overlooks the fact that sometimes it is more ecologically efficient to withdraw a certain product (group of products) from the market than to allow its further use – that is especially the case if the functioning of the good poses a threat or is disproportionately burdensome from the environmental perspective.

6.4 Price Reduction

The remedy of price reduction, despite being present in Directive 2019/771, is not a subject of the European Commission initiative and is not considered in the ELI's Response.⁵³ Nevertheless, it is significant when considering the ecological effectiveness of the European consumer sales law. The Academic Proposal pays greater attention to this remedy and its position in the hierarchy, which should result from the amendments of the Sales of Goods Directive.

Price reduction may play a significant role when enforcing the sustainability of private law. Firstly, it is a remedy that presents the greatest neutrality from an ecological point of view.⁵⁴ It differs from all the other remedies under Directive 2019/771 as it does not lead to any direct environmental costs being generated: packing or transporting the good is not required, the defective good is not disposed of and no replacement needs to be produced. Instead, money is transferred (most often through the digitised banking system). From this perspective, its preponderance over termination seems to be obvious, and if the analysis ended here, it could be concluded that promoting

price reduction over other remedies is a highly effective manner of greening the consumer sales law. However, this general assumption as to the ecological friendliness of price reduction may be misleading.

The Academic Proposal suggests offering a price reduction of up to 5% of price as one of the primary remedies (the other being the right to repair). However, its application should be limited. The consumer may choose between the mentioned remedies on the condition that the continued use of the non-complying good does not present a risk of environmental damage.⁵⁵ By contrast, reducing the price by more than 5% may in many cases lead to similar effects as termination, raising the likelihood of the buyer purchasing alternative goods. Consequently, a price reduction exceeding 5% is placed among second-tier remedies together with termination.

However, even though price reduction as a remedy itself achieves ecological neutrality, its consequences for the environment may sometimes be detrimental.⁵⁶ This is the case where the lack of conformity of goods is related to their influence on the environment. The price reduction may indirectly trigger unnecessary environmental costs: the goods that should be repaired or removed from the market because of increased environmental costs of their use remain on the market. The facts of the ‘Dieselgate’ case⁵⁷ may serve to illustrate this issue. In such circumstances, a price reduction could be regarded as a remedy that is – paradoxically – the worst one from the perspective of the environment.⁵⁸ This is reflected in the Academic Proposal, which proposes amending Article 15 of Directive 2019/771 in a way that excludes price reduction if the continued use of good is harmful for the environment.⁵⁹

If a consumer decides to exercise price reduction, it does not necessarily mean that they will then not repair the good to meet expectations. Sometimes, repair is impossible (e.g., if the defect is purely aesthetic). However, in many cases the item will still be repaired, e.g., by the self-repair mentioned earlier. In cases where repair is quite simple,⁶⁰ it should be regarded as a desirable solution as far as self-repair generates relatively low environmental costs. In this manner, the consumer can bring the good to conformity without incurring any associated costs (from an economic perspective, the costs of repair are borne by the seller, as the repair is paid for from the money returned to the consumer following the price reduction).⁶¹

6.5 Ecological Lack of Conformity

The Academic Proposal represents a holistic approach to making European consumer law greener through amending Directive 2019/771. It aims at promoting sustainability and circular economy in different manners and not only by reforming the hierarchy and shape of the remedies for non-conformity.⁶² The need to redefine a lack of conformity is raised so that it corresponds with the new environmentally friendly approach. It can be argued that the existing framework of consumer sales law already accommodates non-economic interests, such as expectations about the environmental features of a good, both directly, by setting durability requirement, and indirectly – by the reference to existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct,⁶³ and to consumer legitimate expectations. Consumers’ expectations as to eco-related features of the good may be based on circumstances of that particular contract but can also be shaped by the market or legal standards.⁶⁴ Nevertheless, under the Academic Proposal a more explicit reference to environmental standards is recommended. It is argued that given that a lack of conformity triggers the seller’s liability, the conformity requirements need to be precise, and that is why some further specifications of eco-related requirements must be provided. Those issues are not yet the subject of the European Commission’s initiative or the ELI’s Response.⁶⁵

Conformity requirements under Directive 2019/771 include both subjective and objective requirements. This division should be maintained after the directive is amended, but the eco-related requirements of conformity should not appear in the context of just one of those categories. Consumers' expectations as to eco-related features of the good may be based on circumstances of that particular contract, but can also be shaped by the market or legal standards.⁶⁶ Sometimes eco-related features might be expected as a result of a statement made by the seller to a buyer, though sometimes such a quality is generally expected by the public from certain goods, especially considering the raising of environmental awareness among consumers.⁶⁷ Such an assertion was accepted by the Academic Proposal, which introduces the environmental criteria in both categories.⁶⁸

As already said, the European sales law act may contribute to achieving sustainability in consumer commerce by promoting a more circular economy. The main role in this transformation should be played by the goods themselves (i.e., by their producers). The goods must represent the quality that will be least detrimental to the environment. A certain durability of the good was already required under Directive 1999/44 (it was considered one of the goods' characteristics, even though not explicitly so).⁶⁹ Directive 2019/771 expressly recognised the durability requirement in its Article 2(13), making it one of the objective requirements of conformity in Article 7.1.d. The lifespan of a good is, therefore, a significant aspect that needs to be addressed in order to contribute to increasing the sustainability of the consumer market, especially given the necessity to combat planned obsolescence practices.⁷⁰ At the same time, however, it needs to be underlined that there are instances where increasing the durability of goods may be detrimental to the environment, in particular, if the next 'generation' of such goods is more ecological, and the environmental cost of disposal is not significant.⁷¹

Furthermore, other qualities may also influence environmental costs produced by consumer goods throughout their lifecycle. Those include reusability, recyclability or the already mentioned reparability.⁷² These should also be taken into consideration. According to the Academic Proposal, it is also necessary to introduce notions into the Sales of Goods Directive that will describe these other eco-related qualities and will thereby shape the scope of the seller's liability for any lack of conformity. The Academic Proposal suggests incorporating into the directive the terms of 'adaptability', 'reparability', 'reusability', 'recyclability' and the general term of 'environmental added value'.⁷³ Under the Academic Proposal, if the good does not have these qualities, either subjective or objective requirements are not met and thus it shall be viewed as not in conformity with the contract.⁷⁴

One of the key concepts under the Academic Proposal is environmental added value, understood as a reduction in the strain on the environment, and/or to preserve the environment in compliance with sustainable development, including but not limited to the removal, prevention, reduction and mitigation of pollutants released into the environment, the restoration of damage to the environment or the use of natural resources in a more efficient and sustainable manner. According to the authors, achieving environmental added value should be considered as a goal of public interests, regardless of consumer knowledge or expectations.⁷⁵ Hence the seller's exoneration resulting from Article 7(2) of Directive 2019/771 would not apply in cases where the lack of conformity appears because the good does not correspond with statements regarding its environmental added value. What is more, the parties to a contract would be prohibited from deviating from the intended environmental added value.⁷⁶

Another crucial aspect that concerns the ecological lack of conformity of a good is whether it meets the technical standards for environmental protection.⁷⁷ This problem, appearing also in the context of other, ecology unrelated standards, has been widely discussed under German law since the 'Dieselgate' case, where it was admitted that the failure to achieve those standards can

be regarded as non-conformity, as a consumer can reasonably expect that these standards will be met.⁷⁸ This approach seems accurate. On the one hand, it guarantees a proper level of consumer protection, while on the other, the risk of liability motivates producers to offer goods that conform to the established standards.⁷⁹ This approach also appears in the Academic Proposal for amending the Sales of Goods Directive.⁸⁰

6.6 Periods of Liability and Burden of Proof

Another key aspect that is inextricably bound with promoting durability and a long lifespan of goods is the length of the consumer protection period. The link between these two has been noted in both the Academic Proposal and the ELI's Response. Possible amendments to the Sales of Goods Directive aimed, among other things, at combating the phenomenon of planned obsolescence.⁸¹ A longer period of the sellers' liability should discourage businesses from artificially limiting a product's lifetime. The Academic Proposal points out that the protection of consumers resulting from Directive 2019/771 is currently insufficient and underlines the need to tie the period of seller's liability with a previously announced or even impliedly assured durability of the good subject to a contract.⁸² As a result, the duration of the seller's liability will differ depending on the type of the product. A similar approach is presented in the ELI's Response, with an even further-reaching solution being proposed. Namely, it is argued that the EU legislator should directly provide for different periods of the seller's liability for various categories of goods.⁸³ The proposal indicates the Ecodesign Directive⁸⁴ as a place where such divisions could be made.⁸⁵

Furthermore, the right to repair could play an important part in greening European consumer sales law, provided it becomes a primary remedy under Directive 2019/771. However, for this measure to be as effective as intended, exercising repair should not have a – direct or indirect – negative impact on the consumer's situation. If it does, individuals would be discouraged from exercising their rights through this remedy. One of the main issues that reduces the attractiveness of repair is the risk that the repair will fail or that the good brought into conformity will remain functional only for a short while. That is why both commented approaches underline that the period of the legal guarantee (seller's liability) should be renewed after a repair has been performed.⁸⁶

Last but not least, it must be noted that measures allowing consumers to actually exercise their rights are required. One of these is a presumption that the non-conformity already existed at the time of delivery in the event that the defect manifested shortly after the contract was concluded (e.g., under the minimum harmonisation Directive 1999/44, six months; under the maximum harmonisation Directive 2019/771, one year, which may be extended to two years), resulting in a reversed burden of proof.⁸⁷ However, the importance of that mechanism is also related to sustainability. It should be pointed out that the period of the reversed burden of proof and the difficulties for the business resulting from it will motivate producers to ensure the conformity of a good for that period, which may be described as the actual durability of a product.⁸⁸ For those reasons, both the Academic Proposal and the ELI's Response find it crucial to link the extension of the periods of sellers' liability with the appropriate extension of the period in which a consumer will benefit from the reversed burden of proof,⁸⁹ regardless of the fact that the function of the burden of proof is broader than just ensuring durability.⁹⁰

6.7 Direct Producer's Liability

As long as the right to repair remains the central point of the European Commission's approach to making consumer sales law greener, the following question arises: should the seller be the only

one held liable for repairing the good? Both the Academic Proposal and the ELI's Response opt to introduce the direct liability of producers,⁹¹ but only in the form of a duty to repair.⁹² Under the Academic Proposal, the seller's and the producer's liability are at the same level – the consumer may freely choose between seeking a repair from the seller or from the producer, as long as the good fails to meet objective conformity criteria (Article 17a of the Academic Proposal). In addition, if the seller refuses or cannot repair the good, the consumer still has a claim against the producer.⁹³ The ELI's Response goes even further, stating that: '[the] primary addressee of an obligation to repair products should be the manufacturer'.⁹⁴

The idea is well founded. It is evident that the producer is better prepared from the technological point of view to perform repair and has the easiest and direct access to spare parts. In addition, the producer's direct liability will frequently limit the duration of repair,⁹⁵ as in practice the sellers often send a defective good to the producer to get it repaired anyway (probably exercising the right of redress under Article 18 of the Sales of Goods Directive). Furthermore, such a solution may indirectly increase the environmental effectiveness (lower transportation costs, etc.) of the right to repair.

The risks to competitiveness in the market, touching mostly the SMEs, resulting from the primacy of right to repair were already mentioned. The producer's direct liability may balance out these consequences.⁹⁶ If consumers were able to claim repairs directly from the producer, the burden of maintaining infrastructure and spare parts would be limited on the sellers' side. Another possibility to protect competition is to oblige producers to produce spare parts and provide them to other market participants.⁹⁷

Furthermore, the introduction of producer's liability in the Sales of Goods Directive may have other positive effects, not directly connected with the environmental costs of exercising remedies for non-conformity in consumer transactions. Since Directive 1999/44, European consumer sales law has been trying to shift the costs and burdens resulting from non-conformity onto the producer (the least cost avoider).⁹⁸ The same aim might be achieved if the producer's direct liability is introduced. This solution might be even more efficient, as, for example, in Poland, specific provisions transposing the right to redress resulting from Directive 1999/44 were not used in practice.⁹⁹ The suggested solution may also minimise the number of litigations between sellers and producers.

Finally, one may ask if the Sales of Goods Directive would be the right place to introduce such a provision since this is a directive constituting the core of European sales law, traditionally founded on a civil contract of sale that binds only its parties. It could be argued that the introduction of producer's direct liability will disturb this balance. However, this argument is not very convincing, as contract law under, e.g., Directive 1999/44 already knew instruments with similar effects to the proposed amendments (e.g., *action directe*).¹⁰⁰ Furthermore, introducing the producer's direct liability in the Sales of Goods Directive can be seen as an imminent consequence of prioritising the right to repair. It would result in a unified regime for this consumer-friendly remedy, so that the consumers would not have to face too many legal complexities and could truly benefit from the remedies provided. On the other hand, in cases where the producer is an entity from outside the European Union, the ELI's Response suggests that rules similar to those in the Product Liability Directive,¹⁰¹ e.g., importer's liability, should be introduced.¹⁰²

In any event, the proposal for a Directive on common rules promoting the repair of goods which imposes on the producers the duty to repair the good may be seen as proof that the need to involve the producers in the fight for a greener consumer market is also recognised at the EU level. However, the role that this group of market actors may play within the liability for a non-conformity regime still remains neglected.

6.8 Conclusions

The proposal for a Directive on common rules promoting the repair of goods does not necessarily green consumer sales law, as the EU remains reluctant to comprehensively revise¹⁰³ Directive 2019/771 so that it actually corresponds to the principles of sustainability and circular economy. Certainly, it does not yet consider the possibility of introducing new green consumer law.¹⁰⁴ Instead, it only promotes repair services and gives rise to producers' repair obligations beyond and outside the scope of Directive 2019/771. Even though granting the consumer the possibility to repair the good is, in principle, positive from the environmental perspective, it is just a small step towards increasing the ecological efficiency of the consumer market.

Big changes in European consumer law, aimed at greening consumer market, are yet to come. From the perspective of the private law framework, these would not only mean redrafting numerous provisions but also forcing a revolution within private law goals. Private law would no longer be just an instrument of balancing and executing the private interests of formally equal parties. Quite the opposite, public interests, such as environmental protection, would also be taken into consideration. This would then influence functions of this branch of law as well as affect the position of parties to a contract.¹⁰⁵ Thus, an axiological overturn may be observed.¹⁰⁶

With that in mind, it might be reasonable to think also about revising the Sales of Goods Directive accordingly. For instance, as suggested in the Academic Proposal, sustainability and circular economy could be expressly mentioned in the black letter text of the directive as a goal of the European sales law.¹⁰⁷ Such a change would not only be an axiological manifestation but would also have direct legal effects. Currently, given that recitals have no binding power,¹⁰⁸ sustainability only indirectly affects the interpretation of the provisions of Directive 2019/771.¹⁰⁹ From the environmental perspective, the seller's liability regime under Directive 2019/771 does not differ too much from previous one, governed by Directive 1999/44. The proposed amendments would change the situation and make sustainability an important criterion in applying particular provisions of the Sales of Goods Directive.

This chapter commented on proposed possible ways of amending the Sales of Goods Directive. The Academic Proposal and the ELI's Response present important similarities that may become the core of a forthcoming revision of Directive 2019/771. A pivotal role will be played by the right to repair which should become the primary remedy. Furthermore, periods of legal guarantees and of the reversed burden of proof should be lengthened. Finally, the producer's direct liability for the objective non-conformity of a good should be introduced.

On the other hand, there are some differences between the presented approaches. For example, the ELI's proposal argues that the consumer should be granted a right to obtain a replacement good for the time of repair ('a loaner') and advocates for the direct categorisation of goods for the purposes of determining the liability period, while the Academic Proposal touches upon the issue of self-repair. Furthermore, following the Academic Proposal, a more holistic approach, that is not limited to the right to repair and its modalities, should be applied. Especially, the ecological effectiveness of price reduction should be reviewed. Also, an explicit regulation on an ecological lack of conformity is crucial for granting sustainability, as it may truly motivate businesses to produce goods that conform to established standards and present a less detrimental influence on the environment. For sure, these ideas should be examined further by the EU, along with reconsidering the level of harmonisation of the Sales of Goods Directive at least in respect to certain matters.

To conclude, the variety, number and nature of possible environmentally driven changes are bound to trigger further debate within legal scholarship and at the regulatory level. However, it

needs to be remembered that the aforementioned possibilities were construed and proposed by lawyers, and the future shape of the Sales of Goods Directive should only be determined after taking into consideration the needs and risks raised by environmental specialists, producers and sellers, as well as consumers themselves. The specific nature of particular goods, examples of their lack of conformity as well as the technically feasible ways to address such deficiencies should be considered. Once all these aspects are examined and all groups of interests are considered, the law is bound to react and provide a system based on deeper granularity, at least when it comes to remedies for non-conformity and the expected durability of goods. Only then can the European consumer sales law actually become greener.

Notes

- 1 This chapter is part of the research carried out under the project '*Homo consumens, Homo ecologicus*—ecological efficiency test of the new directive on certain aspects concerning contracts for the sale of goods' financed by the Narodowe Centrum Nauki (NCN) [National Science Centre] in Krakow, Poland—number 2019/34/A/H55/00124.
- 2 Fryderyk Zoll, 'Ekologiczne prawo sprzedaży—bardzo wstępne uwagi' in Katarzyna Bilewska and Dorota Krekora-Zajac (eds) *Księga jubileuszowa prof. dr. hab. Adama Brzozowskiego* (C.H. Beck Poland 2021) 641. Cf., e.g., Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure [2014] OJ L 307 1–20; Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L 328, 82–209.
- 3 Environmental, social, and corporate governance, which is a way of managing companies while considering certain social and environmental issues. For more, see Anne-Marie Weber, Zofia Mazur, Aleksandra Szczęśna, 'Zrównoważony ład korporacyjny (sustainable corporate governance)—kierunek ewolucji' (2022) 6 *Przegląd Prawa Handlowego* 20, 22–23 and literature cited therein.
- 4 Cf., e.g., 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 [2020] OJ L 198 13–43; European Commission's Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022) 71 final) <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 18 January 2023.
- 5 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 528–529.
- 6 Evelyne Terryn, Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of e-Commerce' (2021) 3 *Journal of European Consumer and Market Law* 89.
- 7 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 [2019] OJ L 136 28–50 (hereinafter: Sales of Goods Directive, Directive 2019/771).
- 8 Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Transpozycja dyrektywy Parlamentu Europejskiego i Rady UE 2019/771 z dnia 20 maja 2019 r. w sprawie niektórych aspektów umów sprzedaży towarów' (2021) 4 *Kwartalnik Prawa Prywatnego* 915, 931–932; Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 529–530; Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services—Overview of Directives 2019/770 and 2019/771' (2019) 5 *Journal of European Consumer and Market Law* 194, 198; Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136.
- 9 Jorge Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 3 *Journal of European Consumer and Market Law* 87.
- 10 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament

- and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109 (hereinafter: Academic Proposal).
- 11 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf> accessed 17 January 2023 (hereinafter: ELI's Response).
 - 12 On whether balancing the sustainability principle with other values encompassed by the private law, especially consumer sales law, is a feasible task, see Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Towards an Environment-Friendly Law of Obligations' in André Janssen, Matthias Lehmann and Reiner Schulze (eds) *The Future of European Private Law* (Nomos/Beck/Hart 2023) 195–224; Katarzyna Południak-Gierz, 'Eco-Reasonableness. Possibility of Incorporating Green Principles into General Private Law Clauses' in Maren Heidemann and Mads Andenas (eds) *Quo Vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice of Global Commerce* (Springer 2023) 110–125.
 - 13 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). See the progress of the European Commission's initiative at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 24 March 2023. Some changes to the Proposal were suggested by Council of the European Union, see: Outcome of proceedings on the European Commission's 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, Brussels, 14.02.2024, 2023/0083(COD), <<https://data.consilium.europa.eu/doc/document/ST-6461-2024-INIT/en/pdf>> (accessed: 12.04.2024).
 - 14 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), Explanatory Memorandum, 1.
 - 15 Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC English, COM(2022) 142 final.
 - 16 The scope of amendments is very limited: Art. 12 of 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.
 - 17 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 [2024] OJ L 825).
 - 18 Critically: Susanne Augenhofer, Yeşim Atamer, Katarzyna Południak-Gierz, 'Feedback of the European Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final)' (2023) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Feedback_Right_to_Repair.pdf> accessed 6 September 2023.
 - 19 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 530.
 - 20 Zuzana Selementová, 'Common but Differentiated Responsibilities for Developed and Developing States: A South African Perspective' in Piotr Szewdo, Richard Peltz-Steele and Dai Tamada (eds), *Law and Development. Balancing Principles and Values* (Springer 2019) 86–87.
 - 21 For example, the Polish legislator, when implementing Directive 1999/44 (a minimum harmonisation directive that introduced a hierarchy of remedies) to the Polish Civil Code in 2014, decided to place all the remedies at the same level. See articles 560 § 1 and 561 § 1 the Polish Civil Code.
 - 22 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 124.
 - 23 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 15.

- 24 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), Explanatory Memorandum 3.
- 25 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 [1999] OJ L 171 12–16 (hereinafter: Directive 1999/44).
- 26 'Right to repair: MEPs want more durable and more easily repairable products' (7 April 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220401IPR26537/right-to-repair-meps-want-more-durable-and-more-easily-repairable-products>> accessed 21 January 2023.
- 27 Limited amount of waste is the main goal of circular economy; Katarzyna Kryła-Cudna, 'Sales Contracts and the Circular Economy' (2020) 6 *European Review of Private Law* 1207, 1213.
- 28 Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 4 *European Review of Private Law* 851, 853, 858; Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136, 145.
- 29 Katarzyna Klimkiewicz, Anna Dubel, Katarzyna Południak-Gierz, 'Supporting Environmentally Conscious Consumer Sales Law by Life-Cycle Thinking' (2023) 17 *Contemporary Economics* 174.
- 30 Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 4 *European Review of Private Law* 851, 853–854.
- 31 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 139–144.
- 32 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 9.
- 33 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 10.
- 34 Fryderyk Zoll, 'Ekologiczne prawo sprzedaży—bardzo wstępne uwagi' in Katarzyna Bilewska and Dorota Krekora Zając (eds) *Księga jubileuszowa prof. dr. hab. Adama Brzozowskiego* (C.H. Beck Poland 2021) 644.
- 35 Cf. the plentiful feedback on the European Commission's initiative <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/feedback_en?p_id=27653994> accessed 21 January 2023.
- 36 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 9.
- 37 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 536–537.
- 38 Roman Trzaskowski, Witold Borysiak, 'Dochodzenie roszczeń o naprawienie szkody w postaci kosztów najmu pojazdu zastępczego w ramach ubezpieczenia OC posiadaczy pojazdów mechanicznych (perspektywa prawnoporównawcza)' (Raport Instytutu Wymiaru Sprawiedliwości 2016) 37.
- 39 Eugeniusz Kowalewski, 'Uprawnienie poszkodowanego w wypadku komunikacyjnym do pojazdu zastępczego – ujęcie prawnoporównawcze' (2011) 1 *Wiadomości ubezpieczeniowe* 13–14.
- 40 Similar postulates start to appear also, e.g., in Polish doctrine: Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'State Liability for Damage Caused by COVID-19 Restrictions Under Polish Law', in Ewoud Hondus, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador-Coderch, Christiane Wenfhorst and Fryderyk Zoll (eds) *Coronavirus and the Law in Europe* (Intersentia 2021) 359; Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Zakres odpowiedzialności odszkodowawczej Skarbu Państwa za szkody majątkowe spowodowane ograniczeniami wprowadzonymi w związku z COVID-19' (2021) 3 *Studia Prawa Prywatnego* 1, 17.
- 41 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 540.
- 42 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 142–143.

- 43 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 11; Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 135–137.
- 44 Katarzyna Kryla-Cudna, 'Sales Contracts and the Circular economy' (2020) 6 *European Review of Private Law* 1207, 1222.
- 45 Cf. the implementation of refurbishing made by Apple: <<https://www.apple.com/uk/shop/refurbished/about>> accessed 22 January 2023; and Amazon: <<https://www.amazon.co.uk/Certified-Refurbished-on-Amazon/b?ie=UTF8&node=8362590031>> accessed 22 January 2023.
- 46 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 11; Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 135–137; Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136, 138.
- 47 Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136, 138.
- 48 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 145–146. However, the EU Council's stand on the matter, presented on 14.02.2024, is that the seller should be allowed to fulfill his obligation to replace the good by providing a refurbished good only upon explicit request by the consumer (Art. 14(1) cb).
- 49 Johanna Croon-Gestefeld, 'Die nachhaltige Beschaffenheit der Kaufsache' (2022) 8 *Neue Juristische Wochenschrift* 497, 501.
- 50 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption – Promoting Repair and Reuse, Response of the European Law Institute' (2022) 13.
- 51 COM(2022) 142 final.
- 52 The matter is addressed in the Art. 19(1) of Proposal for a Directive of the European Parliament and of the Council on the legal protection of designs (recast), COM(2022) 667 final, 28 November 2022 which states that protection shall not be conferred on a registered design which constitutes a component part of a complex product, upon whose appearance the design of the component part is dependent, and which is used within the meaning of article 16(1) for the sole purpose of the repair of that complex product so as to restore its original appearance. Denying design protection to 'must-match' spare parts is encouraged to grant third-party repairers' easy access to the latter. Susanne Augenhofer, Yeşim Atamer, Katarzyna Południak-Gierz, 'Feedback of the Europe-an Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final)' (2023). For a general overview, see Circular economy versus copyright protection of computer programs in the EU: Bohdan Widła, 'Challenges and lessons from the CJEU's judgment in Top System' (2023) 18(5) *Journal of Intellectual Property Law & Practice* 353.
- 53 This approach, however, has evolved, and the ELI position presented under Susanne Augenhofer, Yeşim Atamer, Katarzyna Południak-Gierz, 'Feedback of the Europe-an Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final)' (2023) resembles the one argued for in the Academic Proposal.
- 54 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 542–543.
- 55 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 139.
- 56 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 143.

- 57 Case C-343/19 *Verein für Konsumenteninformation v Volkswagen AG* [2020] ECR, ECLI:EU:C:2020:534.
- 58 Cf. Fryderyk Zoll, 'Czy nowa dyrektywa o sprzedaży zapowiada ekologiczną rewolucję? Uwagi na kanwie kilku niemieckich orzeczeń odnoszących się do kwestii ochrony środowiska w związku z odpowiedzialnością z tytułu rękojmi' in Krzysztof Oplustil, Piotr Tuleja and Kamil Prokopowicz (eds) *Nauka prawa a wyzwania XXI wieku. Księga jubileuszowa z okazji 170-lecia istnienia Towarzystwa Biblioteki Słuchaczy Prawa Uniwersytetu Jagiellońskiego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2023) 344–345.
- 59 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 146.
- 60 As indicated, the process of self-repair may be more harmful for the environment than the repair proposed by the seller/producer. For those reasons, the Academic Proposal provides a limit on price reduction of 5% of the price, to encourage consumer to benefit from the repair made by the seller if the process of bringing back the conformity is more complicated; cf. Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 142–143.
- 61 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 543.
- 62 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 111–113.
- 63 The case law on car software manipulating the emission-testing results is an excellent example of that. See Case C-343/19 *Verein für Konsumenteninformation v Volkswagen AG* [2020] ECR ECLI:EU:C:2020:534, Judgement of the Polish Supreme Court of 3 July 2019, II CSK 306/18, with commentary by Maciej Bujalski (2022) 4 *Osteuropa Recht* 538.
- 64 For more, see Katarzyna Południak-Gierz, 'Eco-Reasonableness. Possibility of Incorporating Green Principles into General Private Law Clauses' in Maren Heidemann and Mads Andenas (eds) *Quo Vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice of Global Commerce* (Springer 2023) 115–121.
- 65 Even though they are incorporated in the later ELI position presented under Susanne Augenhöfer, Yeşim Atamer, Katarzyna Południak-Gierz, 'Feedback of the Europe – An Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods (COM(2023) 155 final)' (2023).
- 66 For more, see Katarzyna Południak-Gierz, 'Eco-Reasonableness. Possibility of Incorporating Green Principles into General Private Law Clauses' in Maren Heidemann and Mads Andenas (eds) *Quo Vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice of Global Commerce* (Springer 2023) 115–121.
- 67 Cristina Poncibò, 'The Contractualisation of Environmental Sustainability' (2016) 12.4 *European Review of Consumer Law* 353, 342.
- 68 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 125–132.
- 69 Alberto De Franceschi, 'Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases' (2018) 6 *Journal of European Consumer and Market Law* 217, 219; Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136, 138; judgement of *Oberster Gerichtshof* (Austria) of 23 April 2015, I Ob 71/15.
- 70 Alberto De Franceschi, 'Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases' (2018) 6 *Journal of European Consumer and Market Law* 217, 220; Jorge Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 3 *Journal of European Consumer and Market Law* 85, 85.

- 71 Katarzyna Klimkiewicz, Anna Dubel, Katarzyna Południak-Gierz, 'Supporting Environmentally Conscious Consumer Sales Law by Life-Cycle (2023) 17(2) Contemporary Economics 187.
- 72 Cf. Thomas Nyström, Derek Diener, 'A Companion for the Design of Future-Adaptable Products' (RISE Research Institutes of Sweden 2018) <<https://www.ri.se/sites/default/files/2019-10/A%20companion%20for%20the%20design%20of%20future-adaptable%20products%20for%20use%20in%20circular%20business%20models.pdf>> accessed 22 January 2023.
- 73 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 115–122.
- 74 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 126, 129. The EU Council on 14.02.2024 suggested including an explicit reference to reparability within objective conformity criteria (see Art. 7(1) d).
- 75 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 132.
- 76 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 130–132.
- 77 For example, emission standards resulting from Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO₂ emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) 443/2009 and (EU) 510/2011 [2019] OJ L 111 13–53
- 78 Judgement of BGH (Germany) of 25 May 2020, VI ZR 252/19, paras 54–54; Christoph Schmid, 'Germany' in Marco Frigessi di Rattalma (ed) *The Dieselsegate. A Legal Perspective* (Springer, 2017) 36; Carl-Heinz Witt, 'Der Dieselskandal und seine kauf- und deliktsrechtlichen Folgen' (2017) 51 *Neue Juristische Wochenschrift* 3681, 3682. See also Fryderyk Zoll, 'Czy nowa dyrektywa o sprzedaży zapowiada ekologiczną rewolucję? Uwagi na kanwie kilku niemieckich orzeczeń odnoszących się do kwestii ochrony środowiska w związku z odpowiedzialnością z tytułu rękopisami' in Krzysztof Oplustil, Piotr Tuleja and Kamil Prokopowicz (eds) *Nauka prawa a wyzwania XXI wieku. Księga jubileuszowa z okazji 170-lecia istnienia Towarzystwa Biblioteki Słuchaczy Prawa Uniwersytetu Jagiellońskiego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2023) 340–343. Similarly, under Polish law in the judgement of SN (Poland) of 3 July 2019, II CSK 306/18.
- 79 Another possibility is the invalidity of the contract due to national law and its critics see Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 537–539.
- 80 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 128.
- 81 For more, see Alberto De Franceschi, 'Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases' (2018) 6 *Journal of European Consumer and Market Law* 217–221; Jorge Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 3 *Journal of European Consumer and Market Law* 85–89.
- 82 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 134–136.
- 83 Susanne Augenhöfer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 10. Similarly, also BEUC 'Sustainable Consumption of Goods—Promoting the Right to Repair and Reuse. Accompanying paper to the BEUC

- response to the public consultation' (5 April 2022) 6 <https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-034_public_consultation_on_right_to_repair.pdf> accessed 25 January 2023.
- 84 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 [2009] OJ L 285 10–35 which is currently planned to be revised. See European Commission's Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022) 142 final) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0142>> accessed 25 January 2023.
- 85 In accordance with the postulates of legal scholars: Elias Van Gool, Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *Journal of European Consumer and Market Law* 136, 142; Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 4 *European Review of Private Law* 851, 872.
- 86 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 134; Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 10. The Council on 14.02.2024 stated that if the good is repaired under seller's liability regime, the liability period should be extended once by twelve months (see Art. 10(2a)).
- 87 Cf. Rupprecht Podszun, 'Procedural Autonomy and Effective Consumer Protection in Sale of Goods Liability: Easing the Burden for Consumers (Even If They Aren't Consumers). Comment on Case C-497/13 Froukje Faber v. Autobedrijf Hazet Ochten BV, Judgment of the Court of Justice (First Chamber) of 4 June 2015' (2015) 4 *Journal of European Consumer and Market Law* 149, 152.
- 88 Ivo Bach, Maren Wöbbecking, 'Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit?' (2020) 37 *Neue Juristische Wochenschrift* 2672–2675.
- 89 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 137–138; Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 10.
- 90 Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, 'Sustainable Consumption and Circular Economy in the Directive 2019/771' (2020) 4 *Pravovedenie* 526, 535.
- 91 The ELI's Proposal uses the notion of 'manufacturer', but the meaning remains the same. However, the notion of producer suits better and is already defined in article 2(4) of Directive 2019/771.
- 92 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 151; Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 14.
- 93 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods' (2022) 4 *Transformacje Prawa Prywatnego* 109, 141.
- 94 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 14.
- 95 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 14.
- 96 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 14.
- 97 Susanne Augenhofer, 'EC's Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute' (2022) 14.
- 98 See article 18 of Directive 2019/771, which replaced article 4 of Directive 1999/44.
- 99 That is why the Polish legislator decided to abandon a particular regulation on the right to redress while transposing Directive 2019/771 and has claimed that general rules on contractual liability will be

- sufficient; cf. the justification of the draft act amending the act on consumer rights and certain other acts (5 January 2022) <<https://legislacja.gov.pl/docs//2/12341810/12752766/12752770/dokument539139.pdf>> accessed: 23 January 2023. On the right to redress under Directive 1999/44 see Fryderyk Zoll, *Rękopis. Odpowiedzialność sprzedawcy* (C.H. Beck Poland 2018) 383–396.
- 100 This instrument was also indicated as a possible measure of transposing the right to redress resulting from article 4 of Directive 1999/44; Fryderyk Zoll, *Rękopis. Odpowiedzialność sprzedawcy* (C.H. Beck Poland 2018) 383–384. The solution was adopted in French law. See Michel Cannarsa, Olivier Moreteau, ‘The French “Action Directe”: The Justification for Going beyond Privity’ in Martin Ebers, André Janssen and Olaf Meyer (eds) *European Perspectives on Producers’ Liability. Direct Producers’ Liability for Non-conformity and the Sellers’ Right of Redress* (Sellier 2009) 311–321.
- 101 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210 29–33.
- 102 Susanne Augenhöfer, ‘EC’s Public Consultation on Sustainable Consumption—Promoting Repair and Reuse, Response of the European Law Institute’ (2022) 14.
- 103 Evelyne Terryn, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’ (2019) 4 *European Review of Private Law* 851, 861; Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, ‘Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods’ (2022) 4 *Transformacje Prawa Prywatnego* 109, 109.
- 104 Hans-Wolfgang Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 *Journal of European Consumer & Market Law* 229, 229.
- 105 Fryderyk Zoll, ‘Ekologiczne prawo sprzedaży—bardzo wstępne uwagi’ in Katarzyna Bilewska and Dorota Krekora-Zajac (eds) *Księga jubileuszowa prof. dr. hab. Adama Brzozowskiego* (C.H. Beck Poland 2021) 639–641.
- 106 For example, on the example of ownership law, see Wojciech Bańczyk, ‘Economic and Social Development in the Republic of South Africa’s New Model of Mineral Rights: Balancing Private Ownership, Community Rights, and Sovereignty’ in Piotr Szwedo, Richard Peltz-Steele and Dai Tamada (eds) *Law and Development. Balancing Principles and Values* (Springer 2019) 215.
- 107 Fryderyk Zoll, Jonathon Watson, Katarzyna Południak-Gierz, Wojciech Bańczyk, Gesa Richter, Judit Estifanos, ‘Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contract for the Sale of Goods’ (2022) 4 *Transformacje Prawa Prywatnego* 109, 114–115.
- 108 Aleksandra Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich* (Wolters Kluwer Poland 2013) 81.
- 109 For more on pro-ecological interpretation, see Fryderyk Zoll, Katarzyna Południak-Gierz, Wojciech Bańczyk, ‘Sustainable Consumption and Circular Economy in the Directive 2019/771’ (2020) 4 *Pravovedenie* 526, 530–532. Generally, on a value-oriented interpretation of EU law Jorg Neuner, ‘Die Rechtsfortbildung’ in Karl Riesenhuber (ed) *Europäische Methodenlehre* (De Gruyter 2010) 392.

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