

Francesco Salerno, *Adjunct Prof.*
University of Pavia, Italy

THE CHALLENGES OF THE “RIGHT TO REPAIR” IN THE EU LEGAL FRAMEWORK

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Summary

Manufacturers largely offer disposable products, and most products actually are not built to last and cannot be easily repaired or recycled. Often manufacturers actually design products to quickly become obsolete, forcing consumers into constant upgrades.

Replacing this production model with a system that, by providing access to the necessary information, encourages consumers to repair and reuse products, would offer many advantages. In addition to the environmental benefits, promoting repairable products is good for the local economy and the labour market, particularly small businesses, which consumers typically turn to for repairs. Consumers also benefit by having access to longer lasting and more cost-efficient products.

In view of these objectives and within the scope of a wider framework established by Directive 2009/125/EC, the European Community has adopted certain measures, including regulations for the ecodesign of energy-related products, which came into effect on 1 March 2021. Although they refer to a limited number of consumer goods, these regulations have essentially introduced the “right to repair.” This marks a first step, which will have to be followed by other initiatives but could open the door to a new system.

Starting from this EU legislation and the objectives it pursues, the author in this paper intends to investigate the “right to repair,” taking into account the various regulatory areas likely to be affected by it and highlighting, among other things, any limitations and possible challenges posed by its implementation.

Introduction: the “right to repair” with a view to building a “circular” economy

While most consumers would rather repair a product than buy a new one¹, most consumer goods in fact are not built to last and cannot be easily repaired. When consumers do not have access to spare parts or the necessary information, they are often left with no choice but to replace the product.

Some manufacturers intentionally design products to break or become unusable. Studies show that² some consumer products are specifically created to have a short lifespan that often coincides with the legal warranty period, after which the products become inefficient and obsolete, forcing consumers to constantly replace them. Despite what many believe, planned obsolescence is not a recent phenomenon. As early as 1925, the world’s leading lightbulb manufacturers had organized a cartel to drastically shorten the lifespan of bulbs from 2500 hours to no more than 1000. “General Electric” shortened it even further in an effort to boost sales. During the Great Depression some economic studies theorized that planned obsolescence was the answer to overcoming economic hardships and a way to incentivise consumption³.

Over the years, products that not only have a short life but are also not easy to repair have led to an economy based on disposable goods. The adverse effects have been far-reaching and have most notably impacted the environment. It is common knowledge that disposable products have led to energy waste in manufacturing, and because these products cannot easily be reused, recycled or repaired, they clog up our landfills.

Faced with this situation, Europe’s institutions have adopted a series of measures to create a “circular” system that promotes durable and repairable products. Putting into place such a system, however, requires a concerted effort. A first important step in this direction has been the recent implementation of the “right to repair.” Originally a response to the call for an eco-friendly economy, the “right to repair” seems destined to reverberate in other contexts too, particularly in the business world, the labour market and the field of consumer rights.

¹ A 2014 Eurobarometer survey revealed that 77% of European citizens would rather repair their goods than buy new ones and a study by the European Economic and Social Committee of 29 March 2016, entitled “The Influence of Lifespan Labelling on Consumers”, also found that 92% of Europeans want lifespans to be labelled on products. Available: <https://op.europa.eu/en/publication-detail/-/publication/13cac894-fc83-11e5-b713-01aa75ed71a1/language-en/format-PDF> [viewed 12.10.2021.].

² Schridde S. Kreiss C. “Geplante Obsoleszenz”, Entstehungsursachen, Konkrete, Beispiele, Schadensfolgen [“Planned obsolescence”, causes of emergence, actual examples, consequences of damage]. Handlungsprogramm, 2013, a study commissioned by the German green party Bündnis90. Available: https://scholar.google.co.uk/citations?view_op=view_citation&hl=en&user=8b1HY90AAAAJ&citation_for_view=8b1HY90AAAAJ:d1gkVwhDpl0C [viewed 12.10.2021.].

³ London B. Ending the Depression Through Planned Obsolescence. 1932. Available: https://upload.wikimedia.org/wikipedia/commons/2/27/London_%281932%29_Ending_the_depression_through_planned_obsolescence.pdf [viewed 15.10.2021.].

1. Directive 2009/125/EC and the regulatory framework for the ecodesign of energy-related products

The need for a greener system has been particularly pressing for energy-related products, which are notorious for their intensive use of resources and requiring environmentally unsound methods of disposal. In an effort to remedy this situation, the European Union issued Directive 2009/125/EC⁴, which has affirmed the need to regulate the design phase in order “to achieve a high level of protection for the environment by reducing the potential environmental impact of energy-related products, which will ultimately be beneficial to consumers and other end-users”⁵.

Having acknowledged that designs needed to be more eco-friendly, the next step was to put the principles laid down in Directive 2009/125/EC into practice. To this end, the Commission approved several regulations to set ecodesign requirements for products that represent significant volumes of sale and trade in the EU.

By focusing on a well-defined category of products – servers and data storage products, electric motors and variable speed drives, light sources, electronic displays, washing machines, dishwashers, refrigerators, etc. – these ecodesign regulations have established, in addition to design rules intended to ensure product durability, a number of other obligations that apply to products even after they have been put on the market. The obligations, which apply to manufacturers, as well as importers and their authorized representatives, include, for example, making specific repair information and instructions available to users and maintenance and repair providers and making replacements easier by ensuring that spare parts are accessible and that replacements can be made using common tools; providing adequate information, whether printed or online, on how to access and order spare parts, ensuring delivery to the consumer within 15 working days; guaranteeing the ready availability of spare parts for a minimum number of years after purchase of the product⁶.

⁴ 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. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021.].

⁵ See Directive 2009/125/EC, recital 10.

⁶ See Commission Regulation (EU) 2019/424 of 15 March 2019, laying down ecodesign requirements for servers and data storage products; Commission Regulation (EU) 2019/1781 of 1 October 2019, laying down ecodesign requirements for electric motors and variable speed drives; Commission Regulation (EU) 2019/2019 of 1 October 2019, laying down ecodesign requirements for refrigerating appliances; Commission Regulation (EU) 2019/2020 of 1 October 2019, laying down *ecodesign* requirements for light sources and separate control gears; Commission Regulation (EU) 2019/2021 of 1 October 2019, laying down ecodesign requirements for electronic displays; Commission Regulation (EU) 2019/2022 of 1 October 2019, laying down ecodesign requirements for household dishwashers; Commission Regulation (EU) 2019/2023 of 1 October 2019, laying down ecodesign requirements for household washing machines and household washer-dryers; Commission Regulation (EU) 2019/2024 of 1 October 2019, laying down ecodesign requirements for refrigerating appliances with a direct sales function. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021] and on the Official Journal of the European Union 5.12.2019.

These obligations, which came into effect on 1 March 2021, ushered in the entry into force of the “right to repair.”

2. The implications of the “right to repair” for companies, the labour market and consumer rights

The principles underlying these Community rules stem from a desire to use resources that are not only effective, but also environmentally sustainable. While neither Directive 2009/125/EC nor related regulations have expressed the pursuit of any other objectives, it is certain that the effects of the right to repair will inevitably extend beyond the environment.

It is easy to foresee that the right to repair will affect, for example, production and the labour market⁷. In all likelihood, product reparability will lead to new opportunities for artisans and small businesses, segments that have suffered over the last decades. A prime example in the energy field is the decreasing number of firms specialized in electronics repair, the drastic disappearance of radio and TV repair shops despite the increase in ownership of these types of goods, and the general decrease in the number of workers in this sector⁸.

And yet, the area in which the impact of the right to repair should be most evident is that of consumer rights. The bulk of the costs arising from the reduced lifecycle of goods and the difficulties arising from limited repair possibilities are shouldered by consumers, who are thus forced to constantly replace products. The burden is even heavier for consumers who have less spending power and are unable to buy higher-quality products. They are forced to settle for lower-quality, shorter-life goods and make repeated purchases, often in instalments and in many cases becoming over-indebted.

⁷ See European Commission Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth. March 2014. COM(2014) 130 final/2. Available: https://ec.europa.eu/info/sites/default/files/europe2020stocktaking_annex_en.pdf [viewed 20.10.2021.]. DEFRA – Department for Environment, Food and Rural Affairs UK Longer Product lifetimes. Final Report, p. 41 *et seq.* 2011. Available: <http://sciencesearch.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&Completed=0&ProjectID=17254> [viewed 18.10.2021.].

⁸ See Montalvo C., Peck D., Rietveld E. A Longer Lifetime for Products: Benefits for Consumers and Companies. June 2016, p. 40 (a document commissioned by the European Parliament’s Committee on Internal Market and Consumer Protection), which states, among other things, that in the Netherlands, over 10 years, the number of specialized electronics repair firms went down from 4 500 to 2 500. In Germany, in one year, 13% of radio and TV repair shops closed down (Ask and Axe 1997). In Poland, between 2008 and 2010, the number of enterprises repairing and servicing consumer and household goods decreased from 16 793 to 14 070, a decrease of 16% in two years. The number of employees dropped in this period from almost 28 000 to about 21 000 (Central Statistics Office of Poland 2012). In the US, shoe-repair shops decreased from 60 000 in 1995 to some 7 000 today. In the US in 1963, some 110 000 people were employed as radio/TV repairmen. In 1982 there were 80 000, and in 2006, only 4 000. This is despite the doubling of TV ownership per household. Available: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU\(2016\)579000_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf) [viewed 20.10.2021.].

Confirming the tight link with consumerism, many Member States have addressed this matter in their legislation by explicitly invoking the right to repair within the context of consumer rights.

In March 2014, France strengthened consumer rights by passing legislation that requires manufacturers and importers of movable goods to provide information on the availability of spare parts, to make this information available to consumers, and to provide retailers or professional repairers with *the spare parts that are indispensable for the use of the goods on the market*⁹. Instead, the Swedish government has supported the right to repair through a fiscal stimulus, by lowering the VAT rates on repairs of certain goods, allowing the cost of labour incurred in the repair of domestic appliances to be partially deducted from taxes, and taxing products which contain materials that are difficult to repair or recycle. Belgium, Spain and Austria have also been active in combatting planned obsolescence and increasing product reparability¹⁰. Regulatory amendments have also been undertaken in Italy with a view toward raising consumer empowerment.

3. (Continued): Consumer-related legislative proposals in Italy

In Italy, the right to repair has been taken into consideration in various pieces of draft legislation, presented to Parliament since 2017¹¹ and providing for modifications to the Italian Consumer Code¹². To date, however, none of these drafts have passed through all Parliamentary stages.

⁹ See Law No. 2014-344 of 17 March 2014 on consumer protection whose Art. 6 defines the contents of Art. L. 111-3 of the French Consumer Code and, among other things, specifically requires that (i) manufacturers and importers of movable goods notify professional sellers of the period during which the spare parts that are indispensable for the use of the goods will be available on the market; (ii) this information be issued mandatorily to the consumer by the seller in a legible form before the conclusion of the contract; (iii) within two months, retailers or professional repairers be provided with *the spare parts that are indispensable for the use of the goods sold*. In confirmation of its support of consumer rights, in August 2015 the French government also took a stand on the problem of planned obsolescence and held that this latter essentially constitutes consumer fraud subject to criminal penalties. This rigorous approach also took account of the results of a survey conducted by the French environmental agency, which revealed that the purchase of electronic appliances increased six-fold between 1990 and 2007, while, during the same period, expenditure to repair appliances fell by 40%. As a result, most of these electronic appliances end up in landfills without any attempted repair.

¹⁰ References on this initiative can be found in the Report of the European Parliament, of June 9 2017, on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)), p. 17, also containing indications on other legislation. Available: https://www.europarl.europa.eu/doceo/document/A-8-2017-0214_EN.html [viewed 25.10.2021.].

¹¹ Among the initiatives undertaken in Italy, all of which entail changes to the Italian Consumer Code, special mention should be given to Draft Law no. 4559 of 22 June 2017, presented to the Italian Parliament, Draft Law no. 872 of 5 July 2018, presented to the Italian Parliament, and Draft Law 615 of 9 July 2018, presented to the Italian Senate. Available: at the official website of the Parliament www.camera.it and of the Senate www.senato.it [viewed 30.10.2021.].

¹² Contained in D.lgs. 6 settembre 2005, No. 206.

Among these, Draft Law No. 615/2018 (presented to the Senate) proposes to introduce, among other things, a specific obligation for manufacturers, or importers, to guarantee buyers an adequate technical service for long-lasting consumer goods. It also proposes to require manufactures and importers to provide spare parts for at least five years after goods go out of production or, in the case of spare parts for household appliances, for different periods of time, proportionate to cost. Moreover, the draft law sets out that spare parts and non-renewable components of consumer goods should be made available to consumers at a “fair price and in proportion to the value of the goods.” Along with right to repair provisions, the draft law includes a series of other provisions on planned obsolescence and, like the laws in France, envisages criminal penalties.

In addition to these proposals, aimed at defining precise modes of conduct, the other important change introduced by Draft Law No. 615/2018, and emphasising more strongly the issue of repairs, is that regarding the provision of the Italian Consumer Code which lays down the fundamental rights of consumers. It does so by proposing amendments to the provision listing the fundamental rights of consumers¹³ and suggests the following addition to the list: “product and service repair at affordable costs.”

Approval of this draft law would mark an important step in shining a light on the “right to repair” as an essential tool for furthering consumer interests. However, it should also be noted that, despite this formal acknowledgement of the right to repair as a fundamental right, the principle does not automatically provide consumers with concrete safeguards. Being classified as a fundamental consumer right does not make it a directly applicable individual right nor does it necessarily or automatically guarantee and protect individuals. Not all fundamental rights have the same value: their value depends on further legislation¹⁴ and it is widely held that, at least where certain rights are concerned, they are simply principles that should in turn be defined more clearly by further regulations, which it is up to the legislator to enact¹⁵. In other words, affirming the “right to repair” as a fundamental right of consumers, without introducing specific rules and penalties as well, is unlikely to result in certainty about individual rights, and therefore about the initiatives that can be taken by individuals; it would merely enable class

¹³ Art. 2 of the Italian Consumer Code.

¹⁴ Among the fundamental rights of consumers, the Italian Consumer Code mentions some which are even protected under the Constitution, such as the “right to health” and “right to safety”; together with others, such as the “right to consumer education” and the “right to fair advertising”, which do not enjoy this protection and which academics, highlighting the fact that their declaration simply serves to promote their importance, have deliberately classified as “social” rights.

¹⁵ See Vettori G. *sub* art. 2. In: Capobianco E. and Perlingieri G. (eds.). Codice del consumo [Consumption Code]. Naples: Edizioni Scientifiche Italiane, 2019, p. 11 *et seq*; Alpa G. *sub* art. 2. In: Alpa G. and Rossi Carlo L. (eds.). Codice del consumo [Consumption Code]. Naples: Edizioni Scientifiche Italiane, 2006, p. 22 *et seq*; Chinè G. *sub* art. 2. In: Cuffaro V. (ed.). Codice del consumo³ Milan: Giuffrè, 2012, p. 11 *et seq*. Benucci S. *sub* art. 2. In: Vettori G. (ed.). Codice del consumo Padova: Cedam, 2007, p. 23 *et seq*.

actions led by consumer protection associations or interventions by competition authorities.

With regard to the initiatives taken by these authorities, it is worth noting that, in Italy, measures connected in some way to the issue of product repair have been taken by the Italian Competition Authority (AGCM) in its capacity as the authority responsible, also according to Regulation 2006/2004/EC¹⁶, for the enforcement of Community legislation protecting consumer interests. In September 2018, the AGCM fined Apple and Samsung for “planned obsolescence” and ordered them to respectively pay EUR10 million and EUR5 million for having released firmware updates for their mobile phones which caused serious malfunctions and significantly reduced their performance, in this way speeding up product replacement¹⁷. This was the world’s first decision to have tackled planned obsolescence and it also highlighted the problem of repairs. Indeed, a key factor in AGCM’s decision was that the assistance offered to consumers was inadequate and overpriced. After updating the software, consumers requested the repair of their damaged products, but then had to backtrack due to the high repair costs. The AGCM supported its decision by stating that the conduct of Apple and Samsung violated the “unfair commercial practice prohibition” contained in the Italian Consumer Code enacting Directive 2005/29/EC¹⁸, which pursues the well-known objective of promoting commercial practices that are within the boundaries of good faith and fairness and prohibiting behaviour that is contrary to professional diligence and likely to distort consumer behaviour.

Since, albeit in the wider context described above, company behaviour during the repair of consumer goods has already been taken into account in the past to determine whether commercial practices were fair, affirmation of the “right to repair” as a fundamental right of consumers should at least have an effect in this regard. Moreover, that there is a close link between the right to repair and obligations of fairness and good faith in commercial practices can be clearly seen from the fact that the rules banning unfair commercial practices already include explicit references to aspects – such as the “main characteristics of the product,”

¹⁶ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Available: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R2006> [viewed 28.10.2021.].

¹⁷ See the twin decisions of 25 September 2018. Available: at the official website of the AGCM <https://www.agcm.it/> [viewed 25.10.2021.]. The Regional Administrative Court of Lazio rejected the appeals against AGCM’s decisions brought by the tech companies on 29 March 2020 (Apple) and on 18 January 2021 (Samsung). Available: www.giustizia-amministrativa.it [viewed 25.10.2021.].

¹⁸ 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. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021.].

“after-sale customer assistance,” “need for a service, part, replacement or repair”¹⁹ – that are clearly connected with the issue of product repairs.

Conclusion and next steps

It follows from the above that affirmation of the “right to repair” is taking two parallel paths. On the one hand, certain Member States have taken steps that highlight the issue, adopting non-superimposable approaches that sometimes reflect more than just environmental concerns. On the other, Community institutions, by framing the issue within the wider issue of the need for a circular system, have, through regulation, introduced a whole series of obligations that are already in and of themselves binding²⁰.

While much progress has been made, there is still ample room for Europe’s institutions to take bolder action.

Considering the narrow scope of application of the regulations described above, the first move should be to expand existing obligations to include all consumer goods. This would mark a first and important step, considering that current Community regulations do not apply to key products like computers and mobile phones. Indeed, initiatives aimed at widening the scope of application have already been taken by the Commission, which in its communications has underlined the need for a generalized extension of the scope of application of the ecodesign directive, with the aim of creating a circular economy framework within which the “right to repair” is “applicable to the broadest possible *range of products*.”²¹

What consequences non-compliance with “right to repair” obligations should lead to, poses another possible challenge, given that Community regulations do not seem to mention the repercussions. Identifying these could prove useful in guiding Member States towards harmonization and “effective” application of

¹⁹ See Art. 6 (1) (b) and (e) of Directive 2005/29/EC and Art. 2 (1) (b) and (e) of the Italian Consumer Code.

²⁰ Investigating to what extent EU regulations are binding is not the aim of this paper. However, it is worth noting that such regulations are directly applicable to and binding on all parties of the Member States (Conforti B. *Diritto internazionale*¹¹. Naples: Editoriale Scientifica, 2018, p. 373). Even so, EU regulations may leave the States a margin of discretion or require the establishment of competent bodies or, in any case, have content that is insufficient for them to be directly and automatically implemented and, in such cases, it is necessary for another institution to pass implementing or supplementary measures. CJUE decision of 11 January 2001, Case No. C-403/98. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2001%3A6> [viewed 18.10.2021.].

²¹ See the Communication from the Commission “New Circular Economy Action Plan for a cleaner and more competitive Europe” of 11 March 2020. See also the Communication from the Commission “European Green Deal” of 11 December 2019; the Communication from the Commission “Ecodesign Working Plan 2016–2019” of 30 November 2016; the Communication from the Commission “Closing the loop – An EU action plan for the circular economy” of 2 December 2015. Available: at the official website of the European Commission <https://ec.europa.eu/> [viewed 25.10.2021.].

European rules. Obviously, on the understanding that even if EU regulations do not specify the legal consequences, “right to repair” obligations remain binding and any non-compliance should be taken into consideration by national courts, whose duty it is to guarantee the application of Community obligations and, also based on the principles of their national legal system, impose the legal consequences.

The biggest challenge might, however, be a cultural one, and it could be even more difficult to overcome as a result of the recent events brought about by the pandemic. By this, I mean the exponential growth, in all social contexts and in relation to all types of goods, of online sales. It cannot be ruled out that these may influence the future choices of consumers and prompt them, at least in certain cases, to take the easy option of replacing a product by simply purchasing it online rather than searching for a qualified repairer to mend the item properly.

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