




# Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law

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## Abstract

The role of consumers as citizens contributing to a circular economy must be seen as part of a broader policy mix aimed at stimulating sustainable production on the supply side of the market, and sustainable consumption on the demand side. Consumers can be active contributors to a circular economy through their actions on the demand side, and EU law has sought to facilitate environmentally-friendly consumer choices through information rights. Further reaching measures can however be envisaged whereby sustainability aims can be taken into account when shaping consumer law. Thus, consumers may be stimulated to opt for repair or to engage in shared use of products through “servitization.”

**Keywords** Circular economy · Consumer protection · Servitization · Information obligations

The dangers of environmental pollution and climate change have been highly visible in public debates in the last decades, and they continue to be so. After the recent report from the UN Intergovernmental Panel on Climate Change (IPCC), which states that coal-fired electricity must end by 2050 if we are to limit global warming rises to 1.5°C (IPCC Special Report 2018), even the staunchest climate change deniers will have a hard time maintaining their position. Still, while it is recognized by a growing number of the earth’s population that action must be taken to contain climate change and to preserve the environment, the actual choices that will have to be made are complex. They require re-evaluations of economic policies on growth and sustainability, which are politically sensitive and which countries cannot make entirely by themselves, as environmental policies in most cases have effects beyond a country’s borders.

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This article focuses on one aspect of environmental policy: The role of the consumer as a citizen with a responsibility for sustainable consumption. The idea of the consumer as a citizen – which regards consumers as active participants in the pursuit of sustainability goals and environmental policies – builds on notions of the “consumer-citizen” and “sustainable consumption” that have gained traction in recent decades (McGregor 2002). Whereas societies around the world have seen increasing consumption as a positive element of economic growth and societal welfare (Trentmann 2016), practice has equally shown that consumption is often pursued by businesses at the cost of consumer and worker interests, and of the environment. This has led to concerns with regard to sustainability. The term in its broadest definition implies that human activity seeks to “meet the needs of the present without compromising the ability of future generations to meet their own needs” (Geissdoerfer et al. 2017, p. 766; Keeble 1988). In the last 30 years or so, concerns for sustainability have resulted in global and regional movements for sustainable consumption and production (McGregor 2002; OECD 2001; UN Sustainable Development Goals). Sustainable consumption focuses on the demand side of the market and aims to influence consumers’ choice of goods and services to fulfil basic needs and improve quality of life (McGregor 2002; Tonner 2000), in contrast to sustainable production which focuses on the economic, social and environmental impact of production processes (Veleva and Ellenbecker 2001). Sustainable consumption policies therefore directly relate to the role that consumers, as citizens, can play in the pursuit of sustainability goals, albeit that they will have to be translated into more specific policies or regulation to become effective. In this article, we discuss regulation in the European Union (EU), with specific focus on EU consumer law regulations and directives.

In Western societies, furthermore, the response of citizens to the negative sides of consumption has been to claim individual rights to secure the quality of goods and services, but also for the pursuit of social welfare or environmental protection goals (Trentmann 2016, pp. 356–357). This is reflected in civil society’s increasing attention for ethical and sustainable consumption, exemplified by consumers’ demand for fair trade products (e.g., coffee and chocolate), organic food and “green” energy generated through windmills or solar panels. Through the promotion of consumer-related social affairs and through purchasing decisions that have an influence on market and living conditions, consumers can therefore support the protection of the environment. Also, consumers can as citizens give orientation to the development of legal frameworks governing the market through their vote for specific parliamentary representatives (Reisch 2004, pp. 2–3). In the EU, legal scholarship is engaging with the question how such demands can be backed up by social or civil rights that empower citizens to play a part in the pursuit of social policies (Beckers 2018; Ferri and Cortese 2018; De Vries et al. 2018).

The ramifications of citizenship in relation to rules of consumer law, nevertheless, have not been systematically examined in legal scholarship. This article aims to clarify how general conceptions of the consumer as a citizen with responsibilities for the environment are operationalised in EU consumer law. To that end, it explores how sustainability and environmental policies are reflected in rules of EU consumer law and which improvements may be made. Since these rules primarily focus on circular economy objectives (European Commission, Action Plan 2015),<sup>1</sup> the

<sup>1</sup> See also [http://ec.europa.eu/environment/green-growth/index\\_en.htm](http://ec.europa.eu/environment/green-growth/index_en.htm), for an overview of the areas in which actions are being taken.

substantive focus of the enquiry will be on circular economy aspects of sustainable consumption as reflected in EU regulations and directives. The term “circular economy” concerns the use and re-use of the earth’s resources in a continuous flow and is used as an opposite to the linear economy, in which resources are used to create goods and services and then discarded (Raworth 2017, p. 220; Webster 2017). In consumer law, the circular economy can be supported for example by promoting the remedy of repair for defective goods, rather than giving consumers a direct right to replacement with a new good (see below, the “[Taking Sustainability into Account when Shaping Consumer Law: Repair](#)” Section).

The structure of the articles is as follows. The “[Part of a Policy Mix](#)” section sets out the legal and policy framework for the pursuit of a circular economy through EU law. The role of consumers as citizens must in this context be seen as part of a broader policy mix aimed at stimulating sustainable production on the supply side of the market, and sustainable consumption on the demand side. Consumers can be active contributors to a circular economy through their actions on the demand side,<sup>2</sup> and EU law has sought to facilitate environmentally-friendly consumer choices through information rights. In addition, we submit, further reaching measures can be envisaged. Thus, consumers may be stimulated to opt for repair or to engage in shared use of products through “servitisation.” The regulatory possibilities and limitations of these two alternatives are examined in more detail in the “[Taking Sustainability into Account when Shaping Consumer Law: Repair](#)” sections and “[Servitization and Consumer Protection](#)” sections. As will be seen, there are possibilities for involving consumers in the pursuit of a circular economy, and thereby to boost sustainable consumption. At the same time, to achieve these goals, policy making in European consumer law has to re-think the balance between environmental goals and consumer protection. Consumer policy and environmental policy can no longer be seen as separate policies (Tonner 2000).

## **Consumer Law as an Instrument for Citizen Empowerment: Opportunities and Limitations**

### **Part of a Policy Mix**

Consumer law is only one part of a mix of policy instruments that are used in support of a circular economy. On the demand side of the market, the consumer can only make sustainable choices if certain prerequisites have been fulfilled, not least that sustainable choices *are* available. The pursuit of sustainable consumption through a circular economy, therefore, demands that governments and businesses work together to provide goods and services that can be used and reused in a continuous cycle. Notably, privatization of public services poses risks in this regard and places greater responsibility on consumers to monitor the quality of goods and services (Reisch 2004, p. 13). The European Commission has in recent years introduced a number of measures to promote sustainable choices in the production of goods and services. These include legislation to reduce the use of plastics, such as lightweight carrier

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<sup>2</sup> Consumers also have increasingly become active on the supply side of the market, facilitated by online platforms that enable non-professional traders to offer products and services to consumers. Which rules should apply to this “prosumer” is subject to debate. Due to reasons of space, we will not deal with that question here. For further reading, see Weitzenboeck (2015); Brown and Marsden (2013).

bags and packaging.<sup>3</sup> The range of measures adopted and proposed is however much broader and aims at the whole production cycle from the use of raw materials, the design, production, delivery, distribution and consumption of products and services to the disposal and recycling of materials and the use of secondary raw materials (European Commission, Action Plan 2015; European Commission, Implementation Report 2019; Schally 2019).<sup>4</sup> In December 2018, a provisional agreement was reached under the EU's Austrian Presidency on new EU-wide rules aimed at banning certain single-use plastics, such as straws, plastic plates, plastic utensils and cotton swabs with plastic stems (European Commission 2018c).

Once the prerequisites for the availability of sustainable products and services on the supply side of the market have been fulfilled, regulation can target the demand side and steer consumer behaviour towards sustainable choices. That could be done through various forms of regulation, with different degrees of impact on consumers' autonomy, ranging from a ban on non-sustainable products, to eco-taxes (Tonner 2000, p. 65), to information on sustainability. In an intermediate form, one might think of regulation that requires consumers to accept an attempt at repair of defective goods before being entitled to ask for replacement. Current rules of EU law however do not go that far (see Art. 3 Consumer Sales Directive 1999 and Art. 13 Consumer Sales Directive 2019; further, the "[Taking Sustainability into Account when Shaping Consumer Law: Repair](#)" Section below). The relatively sparse literature that has engaged with the relationship between consumer law and sustainability reveals that EU policy has primarily focused on "light touch" regimes that appeal to EU citizens to endorse sustainable lifestyles (Karsten and Reisch 2008, p. 48; Mont and Dalhammar 2005), without forcing them to change behaviour or reduce consumption (Tonner 2000, p. 65). The Commission formulated its policy in this regard as follows in its Consumer Policy Strategy 2007–2013, p. 11:

Consumers are major contributors to environmental challenges such as climate change, air and water pollution, land use and waste. The protection of the environment and the fight against climate change calls for better information in areas, such as energy and transportation, where informed consumers could make a real difference.

More recent policy strategies developed by the Commission have continued in the same vein. The EU's Circular Economy Package, for example, states that "[t]he choices made by millions of consumers can support or hamper the circular economy. These choices are shaped by the information to which consumers have access, the range and prices of existing products and the regulatory framework" (European Commission, Action Plan 2015, p. 6).

Translated into regulation, the consumer empowerment approach adopted by the Commission has primarily taken the form of information requirements that aim to encourage consumers to make sustainable choices, backed up by monitoring mechanisms to ensure fairness

<sup>3</sup> The latest revision of the Packaging and Packaging Waste Directive occurred in 2015 with the adoption of Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags [2015] OJ L115/11.

<sup>4</sup> See, i.a., the Proposal for a directive amending Directive 2008/98/EC on waste; COM/2015/0595 final; Proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste; COM/2015/0596; Proposal for a Directive amending Directive 1999/31/EC on the landfill of waste; COM/2015/0594 final; Proposal for a directive amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment; COM/2015/0593 final.

and transparency (the “Protecting ‘Green’ Consumers through Information” section). However, regulation could go beyond information rights to enable a circular economy and stimulate consumers to take part in it (the “Enabling and Stimulating a Circular Economy: Beyond Information Rights” Section).

### Protecting “Green” Consumers through Information

The most prominent examples of information provision to consumers are labels for “green” products (European Commission, Guidelines 2000; European Commission 2013a, Section 4.3.3; European Commission 2013b). The transparency and correctness of information can be monitored and enforced by supervisory authorities as well as by consumers themselves on the basis of the Unfair Commercial Practices Directive (UCPD). The Directive protects consumers against misleading information or omissions resulting in purchasing decisions that they would not have taken had they been aware of the correct information (UCPD, Art. 5). Apart from the general prohibition on misleading practices and omissions, several blacklisted practices are relevant for environmental claims.<sup>5</sup> To enhance the effectiveness of the UCPD’s application to false environmental claims, the European Commission updated the guidance on the Directive’s application in 2016, based on criteria concerning environmental claims agreed upon by a multi-stakeholder group (European Commission 2016) and inspired by existing national guidance documents on environmental claims.<sup>6</sup> The UCPD guidance focuses on the content and presentation of green claims and provides criteria for the assessment of vague claims. It also sets out what can be expected from traders in terms of evidence and documentation of environmental claims. This concretization of the general criteria of the Directive can facilitate enforcement and somewhat increases legal certainty for traders. However, this Commission guidance is not a binding document as it is up to the Court of Justice of the European Union (CJEU) and not up to the Commission to interpret EU law.

In addition to the general provisions of the UCPD, specific EU legislation also has implications for green claims (Directive 2009/72/EC; Directive 2009/125/EC; Directive 2010/31/EU; Directive 2012/27/EU; Regulation 834/ 2007; Regulation (EC) No 1222/2009), and in case of conflict, the more specific provisions precede over the UCPD. This is, e.g., the case for the regulation of energy labels of household appliances and other energy-related products. Stricter requirements have been introduced recently to update the existing labelling system that, with the increased efficiency of products, was no longer distinguishing for consumers (Regulation (EU) 2017/1369). The new regulations also aim to ban the use of “defeat devices,” which alter a product’s performance under test conditions, such as those used by Volkswagen (Regulation (EU) 2017/1369, Art. 3(5) and recital 35). The recent *Dyson* case, that, i.a., concerned the question whether traders could add additional labels on top of the official energy label as well as the question whether the testing conditions for

<sup>5</sup> See Annex I Directive 2005/29/EC, i.a., point 1 (claiming to be a signatory to a code of conduct when the trader is not), 2 (Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation), 3 (Claiming that a code of conduct has an endorsement from a public or other body which it does not have), 4 (Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorized by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation), 10 (Presenting rights given to consumers in law as a distinctive feature of the trader’s offer).

<sup>6</sup> Several national public authorities have indeed developed guidelines on environmental claims, see [https://ec.europa.eu/info/sites/info/files/factsheet\\_environmental\\_claims\\_non-food\\_2015\\_en.pdf](https://ec.europa.eu/info/sites/info/files/factsheet_environmental_claims_non-food_2015_en.pdf), i.a., Denmark, France, Finland, the UK.

vacuum cleaners needed to be mentioned, however illustrates that difficulties may persist in correctly informing consumers of the green character of a product, even if specific legislation is adopted (see also *Dyson v European Commission* 2018).

Self-regulation in the form of codes of conduct and voluntary labelling schemes complete the regulatory framework for green claims. Environmental claims have received ample attention in both national and international marketing and advertising codes<sup>7</sup> that often have their own self-regulatory enforcement systems. In addition to these codes of conduct, there is a wide range of voluntary (eco)labelling schemes that aims to facilitate traders' communication on the green character of their products. In order to use an environmental label, specific environmental criteria need to be complied with. Apart from the EU Ecolabel (Regulation (EC) No 66/ 2010), several national labels exist such as The Blue Angel (*der Blaue Engel*) label in Germany<sup>8</sup> or the similar Nordic Swan Ecolabel for the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden).<sup>9</sup> Like the Blue Angel label, it wants to enable customers to choose the most environmentally friendly goods and services (Bracquené 2018, p. 22).

There is however still a role here for increased and improved enforcement. Indeed, despite the wide range of regulatory and self-regulatory initiatives, misleading practices and green-washing have not been eradicated. Enforcement remains problematic. A 2014 study on environmental claims found that there pro-active surveillance or inspections are limited.<sup>10</sup> Action is however being taken on this front too. The New Deal for Consumers (European Commission 2018a) is a promising initiative, as it proposes strengthened enforcement tools for the UCPD in the form of penalties. The proposed penalties (fines of up to 4% of the turnover) would nonetheless remain limited to widespread cross-border infringements. Stronger sanctions are necessary for infringements that do not have such cross-border element. Stronger enforcement tools for the UCPD are in any event desirable as they could also be used to reinforce the enforcement of self-regulatory initiatives. Indeed, the misleading use of a label or the non-compliance with a code of conduct can also qualify as an unfair practice (Art. 6(2)(b) UCPD).

Even with a better enforcement and thus protection against misleading claims and labels, the limitations of labelling to achieve industry change and larger scale sustainability need to be kept in mind. Even if self-regulatory and governmental enforcement would succeed in eradicating all misleading claims and labels, not all faith can be put in labelling and in responsible consumer choices. Wilhelmsson (1998) already questioned the effectiveness of ecological information for consumers if there is no (economic) incentive to decide according to this information. Moreover, the proliferation of labels risks to confuse consumers and available empirical data on the understanding of environmental logos are somewhat discouraging. A study on environmental claims indeed found that consumers are generally unable to

<sup>7</sup> See, i.a., chapter D International Code of Commerce Advertising and Marketing Communications, <<https://cms.iccwbo.org/content/uploads/sites/3/2018/09/icc-advertising-and-marketing-communications-code-int.pdf>>; see, e.g., for France the recommendation on sustainable development of the Autorité de Régulation Professionnelle de la Publicité, <https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/developpement-durable/>; in the Netherlands an environmental code of advertising was developed (Milieureclamecode), <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=262%20&deel=2> and a similar code exists in Belgium, [http://www.jep.be/sites/default/files/rule\\_reccommendation/milieu\\_nl.pdf](http://www.jep.be/sites/default/files/rule_reccommendation/milieu_nl.pdf).

<sup>8</sup> See <https://www.blauer-engel.de/en>.

<sup>9</sup> See <https://www.nordic-ecolabel.org/the-nordic-swan-ecolabel/>.

<sup>10</sup> See [https://ec.europa.eu/info/sites/info/files/study\\_on\\_environmental\\_claims\\_for\\_non\\_food\\_products\\_2014\\_en.pdf](https://ec.europa.eu/info/sites/info/files/study_on_environmental_claims_for_non_food_products_2014_en.pdf).



understand the meaning of environmental logos, and make no distinction between non-certified (self-declarations) and third party certified labels (European Commission 2010). Not only consumer education but also the limitation of the number of labels is therefore desirable.

Second, the effect of labelling on bringing about changes in industry may be limited. The research of Parker et al. on the effect of food labelling is illustrative in this regard. Food labelling, and more specifically animal welfare labelling, can be seen as an example for a broader consumer and citizen activist concern to address the externalities of markets (Parker et al. 2018). Their research suggests that higher welfare labelling (“free range labelling”) in Australia did increase animal welfare, but at best in a marginal and incremental way. Their research also shows the impact of the network of actors behind the label, in the case of food labelling the involvement of supermarkets as intermediaries requiring or influencing the label and of governmental enforcement in filtering out misleading claims (Parker et al. 2018, p. 368). Their conclusion is that ethical labelling can act as a pathway to embed social concerns in a market, but only if it prompts changes that become enshrined in standard practices and possibly the law itself. Such voluntary schemes should therefore ideally be seen as part of a broader regulatory approach in which these schemes may prompt industry change but also regulatory action, e.g., in the form of higher (mandatory) standards (Parker et al. 2018, p. 368). Although the direct impact of consumer /citizen concerns translated into labelling initiatives may be limited, such systems may nevertheless have effect in a broader regulatory approach that also involves government enforcement and governmental regulation. Standards set by labels can however help to build capacity for imposing higher governmental standards.

### **Enabling and Stimulating a Circular Economy: Beyond Information Rights**

Other initiatives to involve consumers in the pursuit of a circular economy envisage a review of existing rules of consumer protection going beyond information requirements. The EU’s Action Plan for the circular economy highlights the potential of legal guarantees to promote durability of products, and repair and re-use to prevent waste (European Commission 2015, pp. 6–7). Such initiatives seem promising, seeing that they fit with perceptions on consumer behaviour with regard to their role as citizens with a responsibility to support sustainability. A recent study, published in October 2018, reveals that consumers are generally willing to engage in circular economy practices, but that their actual engagement is rather low (European Commission 2018d). The main findings of the study are that a majority of consumers repair products (64%), but that a substantial share has not repaired products in the past (36%). Further, close to 90% of the consumers involved in the study had no experience renting/leasing or buying second-hand products. The study suggests that consumer engagement in the circular economy might improve with better information, so that purchasing decisions are shifted towards products with greater durability and repairability, but also that regulation could be used to take away barriers for consumers to pursue repair. The survey and experiment conducted as part of the study found that repair decisions are easily disrupted if arranging repair requires effort (European Commission 2018d; Executive Summary, p. 2). While the price-quality ratio is the most important driver but also barrier for consumer engagement in the circular economy, it is followed by convenience (European Commission 2018d, p. 65). It would seem therefore that regulation aimed at promoting and facilitating repair of goods could have significant effects on consumers’ behaviour, and could therefore be effectively used to stimulate consumers’ role as citizens with a responsibility for the pursuit of

sustainability goals. We will discuss the existing regime for repair, and potential alternatives, in the “[Taking Sustainability into Account when Shaping Consumer Law: Repair](#)” Section below.

Another model of shared use has emerged in the so-called “servitization” of consumer markets. The term implies a shift from buying products to using products, or from buying goods to buying services. Users obtain access to goods rather than ownership of them. See in more detail the “[Servitization and Consumer Protection](#)” Section below.

The integration of environmental policy into consumer law therefore is being pursued by the EU through regulation on the supply and on the demand side of the market. The development of a circular economy indeed requires that action is taken on both sides of the market, and that consumers are actively engaged in the process. Still, it should also be realized that consumers are in most cases weaker parties in the market in comparison to producers who determine the availability, quality and price of goods and services. Consumer law’s primary aim is to diminish that asymmetry between businesses and consumers, in particular by providing consumers with information that enables them to assess the quality of goods and services. Considering that premise, it is not surprising that consumer policy and environmental policy do not always coincide. The protection of consumers’ economic rights in relation to the quality of goods and services through consumer law in principle takes no account of the effects that such rights have on the environment. If government or business policies focus on consumer protection or consumer satisfaction, that may well be to the detriment of environmental protection. This tension has been recognized in the literature on consumer law and sustainability (Kye 1995, p. 32; Tonner 2000). Put simply, “[c]onsumers may advocate for a better environment, but they may advocate even more strongly in favour of the rights of the widest possible selection of goods at the cheapest price” (Kye 1995, p. 31).

In terms of convergence, however, environmental and consumer policy also share many common interests. The protection of a clean environment, or more specifically clean water and clean air, can also be translated into consumer rights with regard to product quality (Directive 98/83/EC; Kye 1995, p. 33). The Volkswagen emissions scandal, also, has implications that bring together both fields. In environmental law, the case raises issues of enforcement of emission standards, while in consumer law, the question is if and how consumers can be compensated for harm suffered as a result of false information on environmental standards. The latter has proved difficult under existing laws, where a legal basis for claims is not easily established and the lack of collective redress procedures stands in the way of consumer action.<sup>11</sup> The EU’s New Deal for Consumers has been proposed partly as a response to tackle such problems (European Commission 2018b).

Wilhelmsson’s view that the relationship between consumer law and environmental protection is one of conflict rather than harmony (Wilhelmsson 1998), therefore, may have shifted as regulators and consumers have increasingly become more aware of the need to integrate environmental policy into consumer law. The pursuit of an integrated approach to environmental and consumer policy, moreover, can find support in the EU Treaties, in particular through Articles 11 and 12 of the Treaty on the Functioning of the European Union (TFEU). These provisions prescribe that environmental and consumer protection are integrated into the definition and implementation of the Union’s policies and activities. Articles 11 and 12 TFEU therefore give hands and feet to the more general objectives and values laid down in Article 3(3) of the Treaty on European Union (TEU), which stipulates that the Union shall work for “a

<sup>11</sup> An analysis of the potential for legal actions in different EU member states has been published in a series of country reports in the Journal of European Consumer and Market Law (EuCML). See issues 2017/1 and 2017/2.



highly competitive social market economy” and for “a high level of protection and improvement of the quality of the environment.” Further expression is given to environmental and consumer protection goals through Articles 37 and 38 of the EU Charter of Fundamental Rights. Taken together, the EU Treaties therefore support integrated regulatory action in the fields of environmental law and consumer law. Moreover, if the Union paid heed to the obligation to integrate environmental and consumer policies into the definition and implementation of the Union’s policies and activities, a push could be made towards a better integration of sustainability goals into consumer law.

The following section will consider in more detail how consumer rights may be designed so that they lend support to business models aimed at a circular economy. In that analysis, the issues at which environmental and consumer protection goals diverge will become more clearly defined. Also, potential alternatives for regulation that might stimulate consumers to act as citizens with their own responsibility to work towards a circular economy will be considered.

### Taking Sustainability into Account when Shaping Consumer Law: Repair

One blatant example where in our opinion, sustainability aims are not sufficiently taken into account when shaping consumer law is the case of repair. Apart from practical obstacles to repair, there are also legal obstacles and consumer law could be shaped to overcome such obstacles. The case of repair is however also an example where consumer protection aims and sustainability aims do not always coincide. Indeed, whereas consumer advocates still plead for a free choice of remedies for consumers as this indeed is the most consumer friendly choice (at least in the short term; see BEUC 2016), consumers/citizens may need to accept that their choices have an impact on the environment and could at least be *nudged* to choose for a more sustainable remedy. The current legal framework does not provide such nudge.

Repair can be an important tool to reduce the amount of waste and to prolong the lifespan of goods, which is the aim of a more circular economy. Although repair (and re-use) is evidently not the only way to extend the lifetime of goods or to reduce waste,<sup>12</sup> it is a far more efficient strategy than recycling Prakash 2016). Repair (and re-use) conserves energy, materials, water and the transportation costs to put a product back into use are in general lower (Ellen MacArthur Foundation 2016; UN Environment Programme 2011; APSRG 2014). Recycling is less efficient as it causes a loss of material and a deterioration of the quality of the materials; rare elements may moreover be entirely lost. In addition, recycling a product implies that it has to go through a secondary production stage to bring it back into a reusable form, thus requiring more material consumption than re-use (McCullough 2009, p. 620).

Consumer law, however, is not designed to encourage repair. In the EU, the legal guarantee is regulated by the Consumer Sales Directive 1999 that sets out the remedies for non-conformity of goods. In case of non-conformity, the consumer can in the first place ask for repair or replacement (Art. 3(3) Consumer Sales Directive 1999), free of charge (on which see the pending case C-52/18 *Fùlla*). The choice lies with the consumer in the system of the Directive (Art. 3(3)), but there is no incentive or obligation for the consumer to opt for repair

<sup>12</sup> See, e.g., the initiatives taking in the field of waste and recycling (e.g., Directive 2008/98/EC on waste; Directive 1999/31/EC on the landfill of waste; Directive 94/62/EC on packaging and packaging waste, Directive 2000/53/EC on end-of-life vehicles; Directive 2006/66/ZC on batteries and accumulators and waste batteries and accumulators; Directive 2012/19/EU on waste electrical and electronic equipment).

instead of replacement. Even if the consumer opts for repair, the seller can in turn refuse repair and offer replacement if repair would be “disproportionate” and would cause “unreasonable costs” (Art. 3(3)). Environmental consequences do not seem to play any role in the balancing exercise. This is different in, e.g., Norway. A 2006 Norwegian Supreme Court case is quite interesting in this regard. In Norway consumers also have the right to choose between repair or replacement unless the chosen remedy entails “unreasonable costs” for the seller (Rt 2006, s 179). The case concerned the heels of boots that broke 6 weeks after purchase. The seller refused replacement as this would entail unreasonable costs. The Supreme Court considered this justified and explicitly referred to environmental reasons: Repair was justified as it also appeared the more environmentally-friendly option, i.a., as there was no market for second-hand shoes in Norway (see Maitre-Ekern and Dalhammar 2019). We are not aware of similar cases under EU law in which the environmental impact is taken into account in the balancing exercise. It would in any event be a step forward if it would be made explicit under the system of the Consumer Sales Directive that the environmental impact can also be taken into account to determine whether the remedy chosen by the consumer is “disproportionate.”

The same system of the Consumer Sales Directive also does not seem to allow a seller to replace a defective good with a refurbished or remanufactured good, although that solution can come close to repair in terms of sustainability. Remanufacturing is the process whereby a used product is returned into the “like-new” condition: It includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly and it may involve a combination of old and new as parts which cannot be brought back to the original quality may be replaced (see Bracquené et al. 2018, p. 18). Dutch courts have held in several cases, referring to the *Quelle* judgement of the European Court of Justice, that consumers were indeed entitled to a *new* replacement good and that the seller did not comply with its obligations under the legal guarantee when replacing a defective phone with a refurbished phone (NL:RBAMS:2016:4197; NL:RBAMS:2017:2519).<sup>13</sup> Under the Consumer Sales Directive 1999 as interpreted by the European Court of Justice in the *Quelle* judgement, the analysis made by the Dutch courts is probably correct. Although *Quelle* focused on the question whether compensation could be required from the consumer in case defective goods were replaced by new goods, the reasoning in that judgement does seem to imply that a consumer is entitled to a new good. The Court indeed held in *Quelle* that no compensation could be demanded for a replacement with new goods and that this did not imply an unjust enrichment as a replacement meant that the consumer merely receives, belatedly, what he was entitled to from the outset (*Quelle*, para. 41).

The Dutch decisions are comprehensible in terms consumer protection. Indeed, consumers are probably best off with a new phone, as the quality of the refurbished phones cannot always be guaranteed.<sup>14</sup> However, neither the reasoning of the Dutch courts nor of the Court of Justice takes sustainability arguments into account. A compromise solution that could align both aims could be to allow a seller to replace a defective product by a refurbished phone or other remanufactured good under the legal guarantee, but to oblige him to give the consumer a new

<sup>13</sup> A Dutch ADR body decided in the same sense; see Geschillencommissie May 30, 2017, <https://www.degeschillencommissie.nl/consumenten/uitsprakenoverzicht/108944/commissie-gaat-uitvan-een-gebrek-aan-het-toestel-dat-niet-door-de-consument-is-veroorzaakt>.

<sup>14</sup> A study by Test-Achats confirmed that problems may occur with refurbished phones. Half of the (18) tested refurbished iPhones, showed important defects (<https://www.test-aankoop.be/hightech/gsms-en-smartphones/nieuws/een-op-twee-refurbished-iphones-deugt-niet>, October 2016). Only one phone (refurbished by Apple) was flawless.

(2-year) guarantee period in such case. An additional guarantee period could help to overcome the lack of trust consumer may have in refurbished phones or other remanufactured goods. Such an obligation would not be a complete novelty as, at national level, several Member States currently already provide for a new guarantee period after repair or replacement (European Commission 2017, p. 14). This is more specifically the case in Austria, Croatia, Denmark (three years for repair), Estonia and Greece. Some other countries only provide for a new guarantee period in case of replacement (Hungary, Poland, Portugal, Slovakia, Spain).

The Consumer Sales Directive 1999 has been under review since 2015 and a new directive on consumer sales was adopted in 2019 (Consumer Sales Directive 2019). The national implementation measures will apply from January 1, 2022 (Art. 23 Consumer Sales Directive 2019). However, the Consumer Sales Directive 2019 does not provide a substantial improvement in terms of sustainability.<sup>15</sup> Although the recitals mention that “enabling consumers to require repair should encourage a sustainable consumption and could contribute to a greater durability of products” (recital 48), the seller can still refuse repair on the same grounds as before. Whether the hierarchy ought to be maintained under the new directive has been a point of discussion. It is of course correct that the consumer is in the best position if he has a free choice of remedies, as is currently the case in some Member States (Greece, Portugal, Slovenia) and as is proposed by BEUC in its position paper (BEUC 2016). However, such a free choice does not take into account externalities and is hard to reconcile with sustainability goals. A sustainable consumer law therefore requires a hierarchy of remedies whereby repair would be the primary remedy. It is (at this stage) not realistic nor desirable to impose repair as the sole remedy in all circumstances. However, a clear hierarchy whereby repair would be prioritized over replacement instead of being treated as an alternative of equal merit/value as replacement would at least have an awareness raising effect on both consumers and businesses and may nudge parties in a sustainable direction (Michel 2016, p. 228). Such a clear preference for repair is moreover not completely novel. In Belgium, e.g., a Royal Decree of July 9, 2000, provides that the buyer of a car was entitled to repair in case of a hidden defect. In case that was technically impossible, the parties had to agree which remedy was appropriate to cure the defect. Furthermore, the guarantee also applied to repaired cars (Art. 4 Royal Decree 2000).

Repair, besides its availability as a remedy for defective goods, could also be encouraged more generally. At EU level, however, there is still a lack of general accompanying measures that stimulate repair, including ensuring the availability of spare parts and technical manuals (Michel 2016, p. 228). At national level, some countries already provide information obligations on the availability of spare parts (European Commission 2017, pp. 19–20). The Consumer Sales Directive 2019 does not provide for additional information requirements concerning the repairability of goods.<sup>16</sup> This is regrettable since a Consumer Market Study demonstrated that the provision of specific durability and repairability information can indeed lead the consumer towards choosing more durable and more easily repairable products (European Commission DG Justice and Consumers 2017, p. 50). Such an obligation does

<sup>15</sup> Durability was added as an objective criterion for the assessment of conformity (recital 32 and Art.7), but it remains to be seen whether this will actually contribute to more sustainable products. In addition, the final text of the 2019 directive fortunately still allows Member States to impose longer guarantee periods than the two-year period imposed by the directive (Art. 10).

<sup>16</sup> The recitals of the proposal only mention that “insofar as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the criteria for conformity” (recital 32). A (general) obligation to provide such durability information in order to allow the consumer to make a sustainable product choice is not provided for.

not require a difficult balancing exercise between consumer protection and sustainability as it does not reduce consumer choice and as the additional costs for producers appear limited. Some progress is however being made for specific products, as the latest Ecodesign implementing measures include obligations to provide information on reparability as well as obligations on the availability of spare parts.<sup>17</sup>

Independent repair is finally also hindered through the lack of publicly available technical information in the form of manuals or repair information is especially problematic for electronic devices (Ellen MacArthur Foundation 2016). “Reverse engineering,” is only a second best solution as it is costly and time-consuming, especially given the vast number of different electronic devices. Quite an important number of producers furthermore refuse to make repair information available and in case such information is placed online by third parties, the copyright protection of such manuals can be successfully invoked by the producers (both in the USA and in the EU; Wiens 2013). In certain sectors, including the vehicle industry, specific legislation has been adopted to tackle this problem. Thus, e.g., in the USA, the state of Massachusetts adopted “automotive repair legislation” in 2012 (Schuller 2018). That legislation guarantees that independent repairers and owners have access to the same diagnostic and repair information as authorized repair providers, while respecting trade secrets. This state legislation has been the basis for a national agreement committing vehicle manufacturers also in other states to comply with these requirements (Auto Alliance et al. 2014; Nelson 2014). In the EU, Regulations 715/2007 and 595/2009 regulate access to such information.

The plea to adopt similar legislation with a far broader scope of application is attracting increasing support. In the USA, such “right to repair” bills with a broader scope of application have been proposed in several states (Bluff 2017). The proposed legislation would require manufacturers of digital electronic products sold after a certain date to make available to independent repair facilities and owners the same diagnostic and repair information that it makes available to its authorized repair providers and this free of charge (New Hampshire House Bill 1733 2018). Service parts should also be made available for product owners at reasonable prices (“fair and reasonable terms”). At EU level, a draft regulation on electronic displays of 2016<sup>18</sup> goes somewhat in that direction as it proposes to make it obligatory for certain categories of products to make repair information available. Once more such measures could reconcile sustainability and consumer protection aims.

In sum, different policy measures could be adopted to stimulate repair through consumer law and thereby actively engage consumers as citizens in the pursuit of a circular economy. These policy measures range from the stage of production where the ecodesign requirements (including reparability criteria) could be adopted for a broader range of products (Michel 2019), to the pre-contractual stage in which additional information could be provided on reparability and availability of spare parts, over the contractual stage in which repair could be made the primary remedy. In addition, independent and DIY repair can be stimulated by imposing obligations to ensure access to repair and diagnostic information and to spare parts on similar terms as manufacturers’ own repairers. Furthermore, tax incentives, both in the form of deductions for repair services or in the form of lower VAT can be considered (as is the case, e.g., in Sweden; see Maitre-Ekern and Dalhammar 2019).

<sup>17</sup> See, e.g., Ecodesign requirements related to computers ([https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-770780\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-770780_en)) and household refrigerators ([https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-476272\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-476272_en)).

<sup>18</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2016-7108187\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2016-7108187_en).

## Servitization and Consumer Protection

“Servitization” as a business model may also help to achieve the circular economy (Goedkoop et al. 1999). The basic idea is that the user needs a specific functionality but not necessarily the product and the materials to realize that functionality (Van Acker 2017, p. 89). “People do not want a quarter-inch drill, they want quarter inch holes” (Freeman 2000) or in a more recent version, “people do not want light bulbs but light” (Hojnik 2018, p. 174). Servitization implies a shift from buying a product to using products (Reim et al. 2015; Tukker 2004), and from selling products to selling services. It underpins the idea of access-based consumption in which consumers do no longer own goods, mere access suffices. Servitization can cover a wide variety of (business) models and shifts towards a more service-oriented manufacturing industry, and various product-service combinations or systems (“PSS”) are possible (Tukker 2004, pp. 248–249). Such systems may be use-oriented and imply a right of use for the recipient and the payment of a regular user fee or a pay per use user fee. There is no shift in ownership and the provider is responsible for repair, maintenance etc. Thus, e.g., the TU Delft spin off “Homie” to provides pay per use washing machines.<sup>19</sup> Result-oriented PSS guarantee the fulfilment of a specific need; e.g., when light is sold instead of light bulbs,<sup>20</sup> a pre-determined product is not necessarily involved (Tukker 2004, pp. 248–249; Zaring 2001, pp. 22–23).

These models *can* provide incentives to producers and users to use resources in a more sustainable way (Hojnik 2018, p. 164). Producers may take responsibility for the full life cycle costs and this creates an incentive to optimize use of energy, to recycle materials where possible, to increase the durability and to prolong the service life of goods to ensure that they are used as intensively as possible (Tukker 2004, pp. 248–255). Renting products may also imply that a product is more intensively used, with further potential high impact reductions (Tukker 2004, pp. 248–255). Consumers who pay per use may also be stimulated to use goods in a more efficient way (Hojnik 2018, p. 164). However, there are risks involved, not only for the producer, but also for consumers who are concluding service contracts and are no longer owners (Van Acker 2017). Whereas consumer protection rules have traditionally focused on sales contracts, service contracts are regulated to a far lesser extent and there is less mandatory protection. Subscription-based access models involve regular payment obligations on consumer and constraints on their budget although the protection consumer credit law provides may not apply. And the replacement of ownership by access involves its own risks, i.a., in terms of creditworthiness of consumers, protection against bankruptcy of the service provider, etc. Consumer law has a role to play in protecting consumers against these risks. Consumer law furthermore has a role to play in informing consumer of these models that are truly sustainable. Servitization is not necessarily sustainable (Tukker 2004)<sup>21</sup> and the link with greenwashing is easily made. These aspects are explored in more detail below.

<sup>19</sup> See <https://www.homiepayeruse.com/>. Even Ikea is considering to rent home furniture as part of a more sustainable business, see <https://www.theguardian.com/business/2019/feb/04/kitchen-for-rent-ikea-to-trial-leasing-of-furniture>.

<sup>20</sup> e.g., Philips at Schiphol airport, but also at Kortrijk library, [Philips.com](https://www.philips.com); see <http://www.lighting.philips.be/systemen/circular-lighting>.

<sup>21</sup> See (Tukker 2004) who points out that the majority of the eight reviewed PSS types only results in marginal environmental improvements; some PSS types could even lead to increased environmental impacts, i.a., due to less responsible user behaviour.

Environmental reasons are not the only reason why companies engage in servitization, nor the main driver for developing additional services.<sup>22</sup> Companies engage in servitization to assure increased stability of revenue (Wise and Baumgartner 1999) and generating increased margins as the margin on service may be higher than the revenue from the one-off sale of a product (Gebauer et al. 2005). Costs can be cut through subscription models by “cutting out the middle man.”<sup>23</sup> Servitization can also be used to create a competitive advantage, i.e., by developing tailor made offers, as service-centred business models allow a closer relationship with a customer and allows companies to collect information about their customers and their needs. Further competitive advantages may follow as product-service bundles are in general harder to imitate than pure products and from the possibility to “lock-in” consumers that may become more loyal through a range of after sales services (Hojnik 2016, p. 1590).

It is therefore important not to depart from the assumption that the shift from products to services is always eco-efficient (Hojnik 2018, p. 165). Consumer law has a role to play in informing consumers of models that are truly sustainable in order to take informed choices. One way in which consumer law can contribute is through information, namely the expansion of the ecolabel, that has traditionally focused on products, to eco-efficient services (Zaring 2001 p. 498). This presupposes the existence of reliable and practicable environmental evaluation methods for services (Zaring 2001 p. 498),<sup>24</sup> as well as the strict enforcement of the regulatory framework that prohibits misleading claims (see the “Part of a Policy Mix” Section above).

Information is however unlikely to be sufficient. While it may steer consumers towards environmentally friendly products, it cannot guarantee that minimum levels of consumer protection are met. Consumer protection in relation to the quality and safety of services is underdeveloped in EU law and national private laws, as consumer protection law has traditionally been focused on sales. The existing instruments indeed mainly focus on the transfer of property of tangible goods (Hojnik 2016, p. 1601–1603). This is the case for the Consumer Sales Directive 1999 and 2019,<sup>25</sup> but also for the legislation on product liability and product safety. The Product Liability Directive only applies to tangible goods. It does not cover “defective” services as such<sup>26</sup> and a 1990 Commission proposal for a directive on service supplier liability was never adopted (European Commission 1990). Similar gaps exist regarding safety. The General Product Safety directive 2001/95 also focuses on products including products used “in the context of as service,” but a parallel regime regulating the safety of services is missing. There are horizontal instruments such as the Unfair Contract Terms Directive that also apply to services and definitely have an

<sup>22</sup> The study of Zaring et al. even suggests that when environmental reasons are the main driver it is rare for the business to be profitable.

<sup>23</sup> Thus, e.g., in the car industry where producer start offering certain models solely on subscription based usage thus cutting out car dealers, see Bostoen and Devroe 2018, p. 411. The authors refers to the example of Volvo’s Polestar hybrid sports coupe that would only be offered on a subscription based usage.

<sup>24</sup> Zaring 2001, p. 498. Life Cycle Assessment can be applied to services (see, e.g., M Goedkoop e.a. Product Service Systems. Ecological and economic basis, [https://www.pre-sustainability.com/download/Product\\_Service\\_Systems\\_main\\_report.pdf](https://www.pre-sustainability.com/download/Product_Service_Systems_main_report.pdf). Over the past years, the ‘Product and Organisation Environmental Footprint (PEF/OEF)’ methodology - a life cycle-based multicriteria measure of the environmental performance of products, services, and organizations - has been further tested and refined (European Commission 2019b, pp. 46–47). This methodology has however also been criticized for creating confusion and limitations in applicability to practice, see, i.a., Goldstein and Lessard 2018.

<sup>25</sup> Although certain ancillary services (e.g., the installation of the goods) are covered, cf. Art. 2 (5) Consumer Sales Directive 1999 and although the Consumer Sales Directive 2019 includes certain goods with incorporated or interconnected digital services.

<sup>26</sup> Although damage caused by a defective product while providing a service is covered by the directive, see, e.g., Case C-2013/99, *Veefald*, ECLI:EU:C:2001:258.



important role to play here in filtering out terms that create a significant imbalance, also in services contracts (Micklitz and Reich 2014). However, not all faith can be put in this instrument as it merely determines what clauses cannot be upheld, it does not set out the rights consumers have. Services Directive 2006/123 would seem more promising, at least in name, as it provides a general legal framework for services in the internal market. This instrument however also fails to provide substantive harmonization and mainly focuses on prohibiting national measures restricting the provision of services (Heremans 2012, p. 233–234). Although it has a chapter V entitled “quality of services,” it provides very little substantive rules. The focus is instead on the encouragement of soft law initiatives, like quality charters and labels (Art. 26 Services Directive). Sector specific legislation that deals with certain aspects already exists at EU level, e.g., for payment services, financial services, information society services, certain touristic services like transport and package travel, and a directive on digital content and digital services has just been adopted. Although some of this sector specific legislation is relevant for circular economy services, it does not cover all contracts, nor all aspects relevant for consumers.

A horizontal legal framework setting out the remedies consumers have in case of inadequate services and the liabilities for damages caused by such services is therefore still missing. Contractual freedom reigns to a larger extent than in sales contracts and the rights of consumers will depend on national qualifications as renting or hiring contracts or general services contracts in case such provisions exist under national law. This creates legal uncertainty that is exacerbated by the complexity that is created by the involvement of several players in the provision of services, the so-called “service ladder” (Hojnik 2016, 1601–1605). The challenge and task for consumer law remains therefore to provide more certainty concerning the rights and remedies for consumers and to provide protection for consumers contracting for services instead of buying products.

Services however are extremely varied bunch and this is no different for services in a circular economy (Tukker 2004, p. 248–255), which partly explains the difficulty to develop a general legal framework (Heremans 2012, p. 233–234). Some of the distinguishing features for services (Wendehorst 2016) provide further clarification of the difficulty to cover these contracts in one set of legal rules. The lack of materiality of the performance and the fact that the value of the performance cannot be reduced to the value of an object that make it difficult in services contracts to determine a uniform quality standard as the quality of the performance cannot be measured on the basis of physical attributes (Zoll 2019). Result-oriented PPS sharply illustrates this feature as only the result is (contractually) determined, but there may be no direct link to a specific product (Tukker 2004, p. 248–255), making it difficult to agree on a standard for all result-oriented PPS systems. Services furthermore involve “production factors” in the sphere of the creditor. There is a high level of interaction between supplier and customer: The customer may need to provide information, instructions, etc. and the service provider may therefore not totally control the performance of the service (Wendehorst 2016; Zoll 2019), which also makes it difficult to impose uniform standards for the regulator.

Given the difficulties to develop a hard law solution, standardization and certification have been advocated as an alternative way to proceed. Standards to determine technical specifications have a long tradition for products. There is however a rather recent tendency to also develop standards for services (CEN 2017).<sup>27</sup> These standards differ from the standards

<sup>27</sup> See for examples of existing services standards see, e.g., CEN 2015 standard on Aesthetic Surgery services (<<http://www.cen.eu/news/brief-news/Pages/NEWS-2015-001.aspx>>; EN 15838:2009 Customer Contact Centres; EN ISO 17100: 2015 requirements for translation services etc. ...

developed for products in that they also determine the legal relationship between parties of services and are more legal than technical as they resemble standard terms (Busch 2010, p. 3061; Zoll 2019). Such standards may therefore not only help to facilitate informed consumer behaviour and to combat green claims (cf. above), but also to protect consumers by imposing minimum requirements and by managing complex supply chains and related risks (CEN 2017, p. 12). At national level, the first steps towards the creation of circular economy standards are currently being set.<sup>28</sup> Although the diversity in services also poses challenges for standardization bodies (CEN 2017, p. 16), their voluntary character and shorter development times make it somewhat easier to overcome the diversity.

The gap in consumer protection caused by the absence of a general EU regulatory framework for services can however not be completely overcome through standardization. Firstly, although the absence of (EU) regulation indeed creates a need for best practices in the form of standards, diverse (mandatory) national regulations cannot be put aside or be overcome by voluntary standards as they cannot derogate from mandatory law. Moreover, standards remain voluntary and will therefore never provide the same level of protection as mandatory legislation as their voluntary character implies per definition that traders may choose not to apply these standards. The copyright protected nature of these sets of private law rules also makes them less transparent than legal rules (Busch 2010, p. 3061). The further development of substantive EU rules on services therefore remains necessary.

Secondly, consumer protection is not necessarily guaranteed through the development of standards. Dealing with public policy safety issues like safety, consumer protection in standards and not merely with technical issues, indeed also involves dangers in terms of guaranteeing a sufficient level of protection. The sufficient involvement of consumer representatives in standardization should therefore at least be legally guaranteed. As Micklitz pointed out already in his 2007 study (Micklitz 2007, p. 210), the vague reference in Art. 26 Services Directive to the involvement of consumer organizations in the shaping of the quality of services does not suffice in this regard. A clear legal right to participate in standardization and to have access to relevant documents is needed. Such rights will moreover only be effective if they are accompanied by sufficient funding for consumer representation (Micklitz 2007, p. 210).

Another concern is that the proliferation of access-based consumption and of subscriptions could lead to new forms of overindebtedness. Indeed, long-term subscriptions may lead to financial obligations that are quite similar to obligations stemming from credit contracts, but whereby the consumer is not protected by consumer credit legislation, that includes transparency requirements,<sup>29</sup> credit registry systems, caps on costs, nor is the undertaking providing the access subject to the strict prudential rules and conduct of business rules credit institutions need to comply with. By way of example: In the car sector in the Netherlands, a rise of “private lease” contracts has been noted (Machiels and Penninks 2015, nr. 5). The Dutch Financial Authority mentioned that certain credit providers would switch to private lease in case the credit rules on overindebtedness would not allow them to conclude a traditional credit contract. Less protection then applies although the risks for consumers are similar.<sup>30</sup>

<sup>28</sup> See the British Standard 8001; <https://ecostandard.org/first-standard-on-circular-economy/>.

<sup>29</sup> The Dutch financial authority, e.g., confirmed that the warning “borrowing money costs money” that is obligatory when marketing consumer credit, does not apply to private lease: <https://www.amweb.nl/financieel-planning/nieuws/2017/04/afm-private-lease-huur-dus-geen-waarschuwing-nodig-10194509>.

<sup>30</sup> See Wetgevingsbrief AFM 2014 aan het ministerie van financiën, 10 juli 2014, p. 5

No easy solution for this problem exists in current regulation. Under the consumer credit directive, lease contracts only qualify as consumer credit if they contain an obligation to purchase the object (Art. 2(2) Consumer Credit Directive). Leasing or hiring agreements without such obligation are excluded.<sup>31</sup> National laws may extend the scope of application of the Directive, but often also exclude renting contracts that do not contain the possibility to purchase the good for the consumer.<sup>32</sup> Those excluded contracts are then in principle governed by the national legislation on rental contracts (Machiels and Penninks 2015, nr. 5). In many countries, there is elaborate mandatory legislation protecting tenants of immovable property but this is often not the case for renters of movables. Consumers therefore do not enjoy the same protection. In a 2015 position paper, the Dutch credit registry BKR already pleaded to incorporate all private lease contracts in the registry: Even though they do not qualify as credit agreements, they lead to similar financial obligations and potential overindebtedness.<sup>33</sup> Including such contracts in a credit registry would at least allow for a more accurate check of creditworthiness. A further proliferation of access-based consumption contracts may therefore demand a reconsideration of the scope of application of consumer credit laws and the protection this legislation provides.

Coming back to the starting point of this article, the consumer as a citizen with a shared responsibility for environmental protection, the role for the consumer in the transition towards a services-based circular industry seems problematic. Consumers are exposed to numerous risks when they enter into services agreements. In terms of circular economy goals, there is little scope for consumer responsibility beyond taking an informed choice for sustainable product-service bundles. A task for the legislator therefore lies in making such an informed choice possible and ensuring a high level of protection of consumers in PSS either through hard law, or at least by ensuring that consumer interests are sufficiently and structurally taken into account when setting standards for services.

## Concluding Remarks

While studies reveal that consumers generally are willing to adapt their behaviour towards “green” choices, EU consumer law has been of limited success in facilitating, or even stimulating, such choices. Existing rules have focused on consumer information, e.g., in the form of energy labels, to help consumers make reliable choices in relation to green products. While these rules can be seen as a first step to ensuring the engagement of consumers as citizens with a shared responsibility for pursuing a circular economy, their practical impact is limited, in part due to problems of enforcement.

More problematic is the absence, at a general level of policy making, of a consistent approach to environmental policy in relation to consumer policy. Consumer protection and environmental protection in some cases go hand in hand, but they may also conflict. For the

<sup>31</sup> See also the definition of credit agreement in Art. 3 c) Consumer credit directive 2008/48/EC: “credit agreement” means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments.”

<sup>32</sup> Thus “leasing” (“financieringshuur”) only qualifies as a credit agreement under Belgian law if the contract includes an explicit or implicit option to purchase the good, see Art. 1.9, 47 Code of economic law. See also the comments of the FOD economic on the former, similar definition of financieringshuur in Art. 1, 10 Consumer credit act <http://www.consumercredit.be/nl/article-1,-10%C2%B0-financieringshuur.html>.

<sup>33</sup> <https://www.bkr.nl/globalassets/documenten/positioning-papers/positioning-paper%2D%2D-private-lease.pdf>.

EU to work towards a circular economy and an overall policy of sustainable consumption, a re-think of existing policies will be needed.

Alternatives for engaging consumers as citizens with a responsibility for the environment can be the stimulation of repair instead of replacement of defective goods, and the stimulation of shared use of goods through “servitization.” Having examined both options, we find that the current regulatory framework of EU consumer law and of national private laws in many respects fall short of what is needed for the pursuit of a circular economy. In case of repair, consumer law’s aims of ensuring the quality of goods and otherwise the conformity with the contract override concerns regarding the environment. In fact, environmental concerns are seldom taken into account by courts or legislators in relation to defective goods. This is reflected in consumers’ very strong rights with regard to replacement, instead of repair, of defective goods. For servitization, problems are exacerbated by a lack of specific consumer protection regulation. Many transactions are regulated through general contract law. While business models for the purchase of services rather than goods can be a powerful means for reducing waste, therefore, consumers take a risk when entering into such transactions. They may not enjoy the same protection as they have for consumer sales.

As a more general conclusion, it seems that consumer law has much work still to do if it seeks to include sustainability goals in its framework. If it succeeds, however, in fortifying the regulatory framework, the consumer has powerful tools for contributing to a circular economy: Information rights to facilitate “green” choices, repair as a high-quality and indeed also green option, and servitization as a means to increase the shared use of goods and thereby reduce the impact of consumption on the environment. It almost goes without saying that these rights will only work if the supply side is also regulated so that sustainable goods and services are available in the market.

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