Centro de Estudios de Consumo

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THE BANALITY OF THE "PROMOTION OF THE REPAIR OF GOODS" IN THE PROPOSAL FOR THE REFORM OF DIRECTIVE 771/2019, ON THE SALE OF CONSUMER GOODS*

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Publication date: September 7, 2023

Presentation

In the present paper I shall focus on the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common rules that promote the repair of goods and by which Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828 are amended, COM/2023/155 final.

As a departing point we refer to art. 13.2 of Directive (EU) 2019/771: *2. To bring the goods into conformity, the consumer may choose between repair or replacement, except when the corrective measure chosen is impossible or, compared to the other corrective measure, costs the seller disproportionate costs, taking into account all the circumstances, and between them* (...)

The reform proposal consists of adding the following sentence to article 13, paragraph 2, of Directive (EU) 2019/771: *Notwithstanding the provisions of the first sentence of this paragraph, when the replacement costs are equal to or greater than repair costs, the seller shall repair the goods to bring them into conformity*.

* Paper made within the framework of the Research Project PID2021-128913NB-I00, of the Ministry of Science and Innovation and the State Research Agency (AEI) co-financed by the European Regional Development Fund (ERDF) entitled "Consumer protection and risk of exclusion social: monitoring and progress", directed by Ángel Carrasco Perera and Encarna Cordero Lobato and within the framework of Aid for the implementation of applied research projects, within the framework of the Own Research Plan, 85% co-financed by the European Fund of Regional Development (FEDER), for the project titled "Efficient legal models of sustainable consumption", with Ref.: 2022-GRIN-34487 directed by Ángel Carrasco Perera and Ana I. Mendoza Losana.
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In what follows, I will also refer to the document *Feedback of the European Law Institute on the European Commission's Proposal for a Directive on Common Rules Promoting the Repair of Goods*, released by the European Law Institute as approved by ELI Council on 24 May 2023 (*ELI Feedback*).

An extensive commentary on the reform proposal has been made at CESCO by Manuel Jesús MARÍN LÓPEZ, *The reform of Directive 2019/771, on contracts for the sale of consumer goods, contained in the Directive Proposal of March 22*, 2023, June 2023.

The ideological and analytical trends to which the Proposal responds are aligned to the scholarly concern about the "sustainability hierarchy" of the legal remedies on the Law of sale conformity, concern that currently pervade most of the legal theory (see Evelyne TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", in Bert KEIRSBILCK and Evelyne TERRYN, eds. *Consumer Protection in a Circular Economy,* Intersentia, 2019).

Observations on the "right to reparation"

1. It is almost evident that a consumer of fungible personal property would always opt for replacement instead of repair in the event of a lack of conformity, when the decision is granted to it by Law, as the case now is in the Directive. A consumer only opts for repair when the search cost of the product has been high or the chosen one has idiosyncratic elements that make it infungible or the replacement cost appears severe. To repair rather than replace, the current owner of the product has to be subject to what is known as the *endowment effect*, which will only be credible in very idiosyncratic or highly singular real estate or singular assets. There is no endowment of pure commodity goods or, if there is, the endowment is almost overcome by the impetus to satisfy the continuous cheering for novelties. Therefore, ceteris paribus, the Proposal significantly reduces the level of consumer protection offered until today by Union Law, diminishing the level of wellbeing of the consumer as a class. In addition to the above reason, the substitution solution would always be imposed ceteris paribus if the buyer has the *ius electionis*, because the buyer enjoys a strategic windfall, which is to be gifted with a new good without deduction of old cost to new and without to bear the loss of commercial value of owning a good that has already passed through the workshop (cfr. ECJ Case C-404/06, *Quelle*).

2. The new standard presupposes, although does not say so, that ceteris paribus it is also cheaper for the seller to repair than to replace. However, it is not clear that this be the case even in most of situations. The sale for consumption has become so much fungible that it has largely lost its artisanal component. Anyone can sell a watch online, but few have a reputable technical service to repair it. The after-sales service has become very selective

and, therefore, very expensive, sometimes enclosed by the proprietary right of the owner of the trademark and not available to free vendors.

3. In practical terms, the proposed reform consists of the following. If the consumer chooses substitution, the seller may offer repair if repair is the cheapest option for him, regardless of whether the difference in costs between one remedy and another is *disproportionate* or not. It is the seller's costs that count, not the total costs (both seller's and buyer's) of each of the remediation options. Even if the total cost of the replacement is less than the total cost of the repair, the seller can choose this if its unilateral cost is lower.

4. The justification of the proposal is purely environmental. The substitution of the product generates waste and removes unused assets from the course of the circular economy. "A clear hierarchy, whereby repair would be prioritized over replacement (…) would at least have *an awareness raising effect* on both consumers and businesses (Evelyne TERRYN, 133). Consumerism sacrificed to eco-friendliness.

5. In theory, the seller cannot charge in the estimated replacement costs that the seller has to bear the delivery of a new good without deducting the price of the useful use made by the buyer of the worn and replaced good. In other words, although they are truly costs for the seller, they would not properly be "replacement costs", and the seller could not take them into account to impose the repair. Subject to what is said later.

6. It is not that the seller "will" (shall) repair (in the English version), but that "can" repair, instead of attending to the consumer's request to replace. *ELI Feedback* is also wrong when it states that the seller is "obligated to repair" when this solution is cheaper. Absolutely not: the seller is taken in the Proposal as a person *miraculously having* economic interests aligned to the sustainability global trend, not a an agent fiduciary bound to serve sustainable standards.

7. This is relevant because the new rule is not mandatory, obviously. Although it is true that the Proposal innovation is not introduced as a primary consideration of the seller's interests, but rather because it is, it is said, a remedy in accordance with the requirements of sustainability (waste reduction), there is no instance higher than the seller and buyer, who are arbitrators of their interests, even if they agree to an environmentally unsustainable solution, because the so-called sustainability standards do not limit the autonomy of the seller and buyer. No other authoritative agent may check the unsustainable consequences of the mutual election.

8. Accepted the above thesis, the seller is entitled not only to waive his right ex post, but also ex ante, in the contract of sale, by means of the "promotional" offer made to the future buyer that the seller will satisfy every demand for substitution of the product for a

new one when the good delivered suffers from a lack of conformity, even where the lack of conformity were minor and the cost of repair almost negligible.

9. It would not make sense trying to avoid this result by introducing a norm *irritans* that would declare the contrary agreement null and void. Obviously, if the two opposing parties have aligned incentives, it is useless for the rule to disapprove the solution chosen by those, when it does not produce external effects on third parties. It cannot be claimed that civil law is put at the service of satisfying public interests that are not coincident with the interest of, at least, one of the parties.

10. The generous offer to unconditionally replace can be more expensive for the seller, of course. But this seller will already incorporate, where appropriate, this higher cost into the price. Or, in other words, the seller is offering the buyer an option: either I charge less and stick with the repair, if it is cheaper than other remedy, or I give up this faculty and charge you a supplement in the price. *Ceteris paribus,* the proposed European new rule becomes inflationary.

11. Consequently, the new rule is not likely to increase the number of efficient cure solutions for material defects. Rather it will create a choice, and the consumer will pay more for the option than in the past, when he could choose without restriction. But note that it is not an environmental fee, because the overprice ultimately rests in the hands of the seller. Of course, seller can waive this surcharge depending on the behavior of his competitors. If the competition between sellers is strong, the most probable result is that none of the entrepreneurs will want to increase their price for the substitution offered.

12. The ideological background underlying the European proposal is not based on substantiated considerations. It is assumed (many assume indeed) that substitution generates waste, wasted goods. But this presupposition will be correct sometimes, not always. Everything will depend on the existence or not of a second-hand goods market and of recycling costs. The repair of an asset as such, and without other consideration, can be more wasteful of resources than the replacement of this product.

13. Both then and now, consumer choice has always been unrealistic, since cost testing can only be approximate, and lies always within the exclusive domain of the seller. That is to say, in the non-reformed version, the seller was the only one who could pay the cost of an expert that demonstrated that the option chosen by the consumer was "disproportionate". Now it is enough for seller to prove that substitution is simply more expensive. But in any case, it is almost unimaginable that the buyer could dispute the seller's higher cost claim. Therefore, the remedy that the seller prefers will always prevail.

14. But notice that if the buyer opts for the repair, the seller cannot theoretically refuse it, alleging that it is cheaper for him to deliver a new good. Here the rule has not changed:

to bring about this change, the seller still needs to prove that the option chosen by the buyer is disproportionate, and not just more expensive. Absurd result.

15. But, as it is said, since the domain of the test remain as the vendor's monopoly, in the end the most efficient solution will almost always prevail, except for errors or lack of information of the parties. If the lack of conformity is slight, the consumer will have to bear a repair of the good. If the cost of repair is uneconomical for the seller, the buyer will have to accept the replacement of the product, which will certainly happen when the repair value is equal to or greater than the cost of the good as new. In this balance of efficiency nothing will influence the consideration of sustainability as such.