



# From Planned Obsolescence to the Right to Repair in the Prism of Sustainability

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### Abstract

The work examines the phenomenon of planned obsolescence, now widespread in industrial societies, in relation to the problems it raises in terms of environmental protection requirements, using the parameter of sustainability as a lens through which to assess the merits of the interests involved.

### I. Introduction. Spread of the Phenomenon of Planned (and Early) Obsolescence. Clarification of Terminology Necessary to Delimit the Field of Investigation.

Modern industrial society appears to be characterised by a consumer system in which the interval between one product and another is increasingly short.<sup>1</sup> Products, especially electronic products, are designed, from the outset, to have a limited lifespan, which is almost always slightly longer than the expiry of the period of the legal guarantee of conformity,<sup>2</sup> and after which product malfunctions begin and are accompanied by the impossibility of repair due to the absence or excessive cost of spare parts. The consumer is thus induced to replace the product with a new version available on the market.<sup>3</sup>

This phenomenon is known by the term ‘planned obsolescence’:<sup>4</sup> the lifespan

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<sup>1</sup> See, among numerous contributions, M. Franchi, *Il senso del consumo* (Milano: Mondadori, 2007); Z. Bauman, *Per tutti i gusti, la cultura nell'età dei consumi* (Rome-Bari: Laterza, 2016).

<sup>2</sup> The phenomenon is well explained by G. D'Amico, ‘La compravendita’, in P. Perlingieri, *Trattato di diritto civile CNN* (Napoli: Edizioni Scientifiche Italiane, 2013), 461. See A. Luminoso, *La compravendita* (Torino: Giappichelli, 2018), 350; G. Recinto et al, *Diritti e tutele dei consumatori* (Napoli: Edizioni Scientifiche Italiane, 2014), 163; R. Calvo, *Vendita e responsabilità per vizi materiali*, II, *Il regime delle garanzie nelle vendite di beni di consumo* (Napoli: Edizioni Scientifiche Italiane, 2007). On these aspects see also S. Cherti, *Le garanzie convenzionali nella vendita* (Padova: CEDAM, 2004), 1.

<sup>3</sup> F. Trubiani, ‘I contratti di cloud computing: natura, contenuti e qualificazione giuridica’ *Il diritto dell'informazione e dell'informatica*, II, 395 (2022).

<sup>4</sup> On the phenomenon of planned obsolescence, see, without any claim to exhaustiveness, the following contributions of the doctrine: S. Zolea, ‘Verso un diritto dell'obsolescenza programmata: ipotesi legislative, novità giurisprudenziali e spunti comparativi’ *GiustiziaCivile.com*, 35 (2021); G. D'Ippolito and A. Re, ‘Obsolescenza programmata. The AGCM sanziona Apple e Samsung’ *MediaLaw.eu*, 325 (2019); A. Giannaccari, ‘Apple, obsolescenza tecnologica (programmata) e

of certain products is shortened at the design stage, ie the possibility of repairing or upgrading a programme or operating system is ruled out at the construction stage; the product assortment ages rapidly and requires cyclical and incessant replacement.<sup>5</sup>

It is easy to see how this practice is disadvantageous for consumers (due to the high costs they have to bear), but on the other hand extremely advantageous for manufacturers of consumer goods, who decide to shorten the life cycle of such goods with the primary intention of increasing their replacement rate.<sup>6</sup> It is not surprising, therefore, that so many products on the market today, although they can structurally and functionally last longer, are deliberately constructed and designed to have a limited lifespan.<sup>7</sup> This aim is pursued, in some cases, by using materials that wear down after a certain period of time (in this case we speak of physical obsolescence),<sup>8</sup> in others, through the inclusion in the product itself of

diritti dei consumatori' *Mercato concorrenza regole*, 149 (2019); S. Latouche, *Usa e getta. Le follie dell'obsolescenza programmata* (Torino: Bollati Boringhieri, 2015) (Italian translation edited by F. Grillenzoni), *passim*. In the foreign literature, see, among others, J. Bulow, 'An economic theory of planned obsolescence' *The Quarterly Journal of Economics*, IV, 729 (1986); G. Glade, *Made to break: technology and obsolescence in America* (Harvard: Harvard University Press, 2009). S. Rodotà, 'Diritto, scienza e tecnologia: modelli e scelte di regolamentazione', in G. Comandè and G. Ponzanelli eds, *Scienza e diritto nel prisma del diritto comparato* (Torino: Giappichelli, 2004), 397. Cf again with regard to the planned obsolescence of legal rules, R. Ferrara, 'L'incertezza delle regole tra indirizzo politico e "funzione definitoria" della giurisprudenza' *Diritto amministrativo*, IV, 651 (2014). In the same vein, M.A. Sandulli, *Codificazione, semplificazione e qualità delle regole* (Milano: Giuffrè, 2005), *passim*, who speaks of 'sunset rules', ie programmed obsolescence, in the sense that their cadenced revision is actually planned, in tune with scientific and technological evolution (the so-called B.A.T., *best technology available*) or, in any case, with the changing historical-environmental conditions or as a consequence of the evaluation and measurement of the performance rate (A.I.R. and V.I.R.).

<sup>5</sup> M. Cian, 'L'economia immaginaria: spigolature' *Giurisprudenza commentata*, II, 393 (2018).

<sup>6</sup> The first case of planned obsolescence in history dates back to 1924, when the world's first 'cartel' (it was called *Phoebus*) between incandescent bulb manufacturers was formed in Geneva. The aim was to control the production of light bulbs in all countries of the world (Europe, the United States, much of Asia and Africa) by exchanging patents. The following year, a special commission (the '1000 hours' commission) was set up with the aim of modifying the light bulbs to bring their life to the stipulated period. And so it was that the light bulbs, which until then had run for up to 2500 hours, began to run for up to 1000 hours. In 1940, a similar case concerned the chemical company *DuPont*, which was known for having invented nylon, a synthetic fibre, which was revolutionary for its characteristics at the time. Despite the fact that it was a particularly strong fibre, when it was used to make women's stockings, the *DuPont* engineers were ordered to make it less strong and resistant, so that the stockings would also have a limited lifespan.

<sup>7</sup> One thinks of the class action brought against Apple for having placed on the market millions of iPods that within eight to twelve months began to have battery problems that, however, could not be repaired or replaced, with the only solution being to buy a new iPod. For more details, see F. Passagnoli, 'La "sentenza Apple" nel processo europeo di contrasto alla pianificazione fiscale aggressiva' *Rivista giurisprudenza tributaria*, 207 (2021); F. Pepe, "'How to dismantle an atomic bomb': osservazioni sul caso "Apple" e sulla prima giurisprudenza europea in materia di "rulings" fiscali' *Rivista di diritto tributario*, 329 (2021). See, in a broader perspective, R. Coco, 'Taiwan imposes compulsory patent licences on Philips: the European Commission investigates' *Rivista di diritto industriale*, I, 36 (2008).

<sup>8</sup> Think, for example, of the filament that is inserted in light bulbs.

components capable of inhibiting, after a certain period of time, the functioning of the good (in this case we speak of functional obsolescence).<sup>9</sup>

The fact is that, increasingly often, planned obsolescence concerns a minimal component of the product in terms of cost (essential, however, for its functioning) that could easily be replaced, but instead, due to a specific company choice, ceases to be produced, rendering the product itself unusable.<sup>10</sup>

The strategy of planned (or, to be more precise, accelerated) obsolescence of technological goods and/or services, increasingly prevalent in today's production system,<sup>11</sup> has ended up having a strong impact on the very concept of durability of goods.<sup>12</sup>

It should also be added that obsolescence is often psychological (so-called 'perceived' or 'symbolic' obsolescence), since it is linked to a mere mental aspect of the consumer, who is influenced by advertising messages, or by the presence on the market of ever newer and more desirable models, perceived as more modern and performing, even though they do not present significant improvements from a functional point of view. It may also happen that obsolescence is merely technological, in the sense that it derives from a supervening inadequacy caused

<sup>9</sup> Consider, again purely by way of example, *chips* that jam printer cartridges after a certain time despite the fact that they are still equipped with ink suitable for use. For other examples, see S. Dalla Casa, 'Fatto per non durare: il cartello Phoebus e l'obsolescenza programmata' *www.wired.it*, 2016.

<sup>10</sup> An example could be the dust bag that is essential for the operation of a Hoover. The reference could, however, also be to *software* updates, if we think, for example, of a mobile phone or a computer: recent investigations have shown that often the goods, so to speak, digital, following an update, can present slowdowns and, sometimes, real malfunctions that give rise to the discipline provided for under Art 129 of the Italian Civil Code as the conformity of the goods to the contract is lacking. On the lack of conformity, see, for all, E. Capobianco, L. Mezzasoma and G. Perlingieri, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2019), 675. On how updates can affect consumer protection in relation to the three hypotheses that can be configured (ie, that a) the consumer decides to update the product and this, following the update, slows down its performance while remaining usable, b) the consumer decides to update the product and this stops working, c) the consumer decides not to update the product and this no longer supports certain *software*, such as those relating to system security), see *amplius* G. Toscano, 'Nuove tecnologie e beni di consumo: il problema dell'obsolescenza programmata' *Actualidad jurídica iberoamericana*, XVI, 372 (2022).

<sup>11</sup> This is well explained by the well-known French economist and philosopher S. Latouche, *Usa e getta* n 4 above, who focuses on the fact that 'obsolescence is an attempt to remedy industrial overproduction', explaining how it is one of the many reasons why we should condemn both the consumer society and the productivist system.

<sup>12</sup> On the notion of 'durability' of the good, see F. Addis, 'Spunti esegetici sugli aspetti dei contratti di vendita di beni regolati dalla nuova Direttiva (UE) 2019/771', in *Scritti in onore di Antonio Flamini* (Napoli: Edizioni Scientifiche Italiane, 2020), I, 13. On the issues underlying the notion, see G. Simonini, 'Verso una nozione allargata di difetto di conformità: sarà rilevante anche la "durabilità" del bene?' *Danno e responsabilità*, 471 (2019); M. D'Onofrio, 'Obsolescenza programmata: qualificazione giuridica e rimedi alla luce della Direttiva 2019/771/UE e del diritto interno' *Nuove leggi civili commentate*, 518 (2022). On the different definitions of 'durability' of products, found in the literature, especially economic literature, see European Commission, 'The Durability of Products - Final Report', August 2015, 36.

by the presence on the market of another, more economically efficient and competitive good.<sup>13</sup> In this specific hypothesis, the older good, although still structurally intact and in the abstract suitable for its productive function, in concrete terms appears technically obsolete, in that it is typologically superseded by another capable of guaranteeing greater productive utility and lower costs.<sup>14</sup> Nonetheless, the difference between these hypotheses and planned obsolescence is immediately obvious; the latter is characterised by absolute functional deterioration of the asset, which will necessarily have to be replaced with another of the same type, which is not necessarily more technologically advanced.<sup>15</sup>

Hence, the practice of intentionally shortening the life cycle of products is of concern not only for the limitation of consumers' freedom of choice when they are called upon to bear greater costs (a concern that is beyond the scope of this discussion), but above all for the negative impact it has on the environment. Planned obsolescence, in fact, impacts the environment from a twofold point of view: that of the consumption of the raw materials needed to produce the new good, as well as that of the disposal of goods considered obsolete, presenting a surplus of waste that is difficult to manage, especially in the area of electronic products.<sup>16</sup>

## **II. Planned Obsolescence and the Environment. Towards Finding a Balance Point in a Circular Economy Perspective. From the Model of Planned Obsolescence to that Based on the Right to Repair.**

Faced with a context such as the one just outlined – the result of an almost century-long process of affirmation and diffusion of strategies aimed at defining (or, in reality, planning) the life cycle of a product so as to limit its duration to a pre-established period – in recent years, timid signs are beginning to appear that seem to presage a reversal of direction. This reversal stems from heterogeneous needs ascribable to the spread of a new and increasing awareness of environmental

<sup>13</sup> See A. Bellizzi Di San Lorenzo, 'Obsolescenza programmata dei prodotti e dei dati personali' *Osservatorio sulle fonti*, I, 1 (2019).

<sup>14</sup> Think of the difference between a computer that can only read *floppy disks* and one, on the other hand, that is able to allow the use of more advanced *pen drives* via USB ports.

<sup>15</sup> For a framing also from a historical point of view of the development of consumerism and the so-called disposable, see S. Latouche, *Usa e getta* n 4 above, who, starting from the distinction between technical obsolescence (loss of value of equipment due to the appearance of more efficient models), planned obsolescence (intentional introduction of defects into products) and symbolic obsolescence (early downgrading of the object by advertising and fashion), states that 'the starting point of planned obsolescence is the dependence of our production system on growth. Our society has tied its fate to an organisation based on unlimited accumulation'.

<sup>16</sup> On the delicate issue of waste management see, as of now, C. Verde, 'Profili privatistici del trasporto transfrontaliero di rifiuti: un regime differenziata sulla scorta di un criterio tipologico' *Annali SISDiC*, IX, 1 (2022), who 'envisages a modern conception of the 'waste' phenomenon, investigating its place in the current legal system'; on this topic see G. Resta, 'I rifiuti come beni in senso giuridico' *Rivista critica del diritto privato*, 207 (2018).

issues (in their interrelation with business and consumption),<sup>17</sup> in a legal context that appears to be increasingly oriented towards environmental protection.<sup>18</sup>

In this regard, it is worth recalling that, following the entry into force of Constitutional Law no 1 of 11 February 2022, environmental protection also finds explicit recognition in the Italian Constitution, thanks to the amendment of Arts 9 and 41.<sup>19</sup> To be specific, the reform added a new third paragraph to Art 9 of the Constitution, according to which the Republic ‘protects the environment, biodiversity and ecosystems, also in the interest of future generations’, and amended Art 41, second and third paras, of the Constitution, so that the current wording of the rule provides that

‘private economic initiative [...] [n]ot be carried out in conflict with social utility or in such a way as to harm health, the environment, security, freedom and human dignity. The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes’.<sup>20</sup>

And it is here that the issue of planned obsolescence is fully intertwined with that of sustainability,<sup>21</sup> a term that has now entered common parlance and which, as it is well known, finds its original definition in the 1987 Report of the World Commission on Environment and Development (*Brundtland Report*), which defines sustainable development as development that ‘meets the needs of the present generation without compromising the ability of future generations to meet their own needs’.<sup>22</sup>

Today, the term ‘sustainable development’ refers to the virtuous balance

<sup>17</sup> See M. Cossu, ‘Sostenibilità e mercati: la sostenibilità ambientale dell’impresa dai mercati reali ai mercati finanziari’ *Banca Borsa Titoli di Credito*, IV, 558 (2023).

<sup>18</sup> P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 2020), 49.

<sup>19</sup> Cf M. Del Frate, ‘La tutela dell’ambiente nel riformato art. 41, secondo comma, Cost.: qualcosa di nuovo nell’aria?’ *Diritto delle relazioni industriali*, III, 907 (2022).

<sup>20</sup> Recently on the subject, with a critical approach, F. Fimmanò, ‘Articolo 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell’impresa?’ *Giurisprudenza commerciale*, V, 777 (2023).

<sup>21</sup> On the three main areas of sustainability (environmental, social and economic) see S. Cosimato, *Sviluppo sostenibile e imprenditorialità. Competitività e innovazione nelle PMI*, (Napoli: Edizioni Scientifiche Italiane, 2015), 13.

<sup>22</sup> On the subject of sustainable development, with a careful approach to the protection of the human person, P. Perlingieri, ‘I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici’ *Rivista giuridica del Molise e del Sannio*, 11 (2000); in Id, *La persona e i suoi diritti. Problemi del diritto civile*, (Napoli: Edizioni Scientifiche Italiane, 2005), 73; and in Id, *Lezioni (1969-2019)*, I, (Napoli: Edizioni Scientifiche Italiane: 2020), 161. See, for interesting insights on the topic, also M. Pennasilico, ‘Sviluppo sostenibile e “contratto ecologico”: un altro modo di soddisfare i bisogni’ *Rassegna di diritto civile*, IV, 1291 (2016). On sustainability, with reference to the current legal system, see E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), *passim*, who appropriately identifies sustainability as a useful tool for the material and spiritual progress of society.

between the environmental, economic and social dimensions, as reflected in the 2030 Agenda adopted by the United Nations General Assembly in September 2015.

In the European context, sustainable development is regarded as a fundamental principle, as clearly outlined in the preamble and in Art 3(3) of the EU Treaty, which expressly states that the European Union

‘[s]trengthens the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment’.<sup>23</sup>

It is immediately evident, even after reading the above-mentioned article, how the principle of sustainable development implies real ‘antinomian tensions’,<sup>24</sup> since on the one hand it presupposes an evolution of society towards an ever greater level of well-being, but on the other hand it sets an insurmountable limit on growth, to be found in the protection of the environment and in the most rational use of resources.<sup>25</sup>

This need for sustainability undoubtedly calls for a reconsideration of the phenomenon of planned obsolescence, since the impact that the production of goods with a limited lifespan creates on the environment is clear to all. One thinks, as already mentioned, not only of the excessive consumption of natural resources required for production of the new good (destined to replace the ‘obsolete’ one) but also of the increase in waste due to the disposal of products considered (prematurely) obsolete. Add to this the extensive use of minerals, considered fundamental in advanced technology, which risk becoming potential weapons of blackmail in the hands of non-European mining countries.

It is evident that planned obsolescence represents a real ecological problem, requiring alternative solutions aimed sustainability and longevity of products in the context of a circular economy, which can be defined as an alternative development model to the linear economic approach that sequences production, use and disposal of goods.<sup>26</sup>

<sup>23</sup> Art 3 para 3 of the EU Treaty.

<sup>24</sup> The expression used is from M. Pennasilico, ‘Sviluppo sostenibile’ n 22 above.

<sup>25</sup> Cf M. Libertini, ‘La responsabilità d’impresa e l’ambiente’, in *La responsabilità dell’impresa, Convegno per i trent’anni di Giurisprudenza commerciale*, Bologna, 8-9 October 2004 (Milano: Giuffrè, 2006), 199-217, where the author defines sustainable development as ‘a modernised formula to indicate the traditional criterion of the rational use of natural resources’.

<sup>26</sup> On the circular economy, the literature is now copious. Among the various authors, without any claim to exhaustiveness, see V. Cavanna, ‘Economia verde, efficienza delle risorse ed economia circolare: il rapporto “Signals 2014” dell’Agenzia europea dell’Ambiente’ *Rivista giuridica dell’ambiente*, 821 (2014); F. De Leonardis, ‘Economia circolare: saggio sui suoi tre aspetti giuridici. Verso uno stato circolare?’ *Diritto amministrativo*, 163 (2017); Id ed, *Studi in tema di economia circolare* (Macerata: Edizioni Università di Macerata, 2019); M. Meli, ‘Oltre il principio chi inquina paga: verso un’economia circolare’ *Rivista critica del diritto privato*, 63 (2017); R. Ferrara, ‘Brown economy, green economy, blue economy: l’economia circolare e il diritto dell’ambiente’

The typical approach of the circular model, instead of creating products that will become waste at the end of their useful life, focuses on redesigning the production system to make materials continuously reusable and regenerable; in fact, products are designed to minimise the creation of waste and consequently pollution, avoiding the use of hazardous materials and ensuring that the objects created are easily disassembled, repairable, reusable and recyclable. The aim is to be able to extend the time and possibilities of use of products as much as possible through strategies of reuse, reconditioning and recycling, thus keeping material and energy resources within the economy as long as possible.<sup>27</sup>

The long-term goal of the circular economy is, therefore, to create a sustainable production system, capable of decreasing dependence on natural resources, while also contributing to climate change mitigation.<sup>28</sup>

### III. Actions Taken by the European Legislator to Counter the Phenomenon of Premature Obsolescence of Products

The initiatives put in place in recent years by the European legislator to combat premature obsolescence and promote the durability, recyclability, reparability and accessibility of products, so as to enable the so-called green transition<sup>29</sup> are part of movement towards sustainability and a circular economy. More specifically, on 25 November 2020 the European Parliament adopted a Resolution aimed at encouraging production and consumption models compatible with sustainable development,<sup>30</sup> inviting the Commission

*Diritto processuale amministrativo*, 801 (2018); E. Scotti, 'Poteri pubblici, sviluppo sostenibile ed economia circolare' *Il Diritto dell'economia*, 493 (2019); S. Cavaliere, 'Economia circolare e intervento pubblico nell'economia: spunti di riflessione' *dirittifondamentali.it*, 922 (2020); M. Cocconi, 'Un diritto per l'economia circolare' *Il Diritto dell'economia*, 113 (2019); B. Pozzo, 'I Green claims, l'economia circolare e il ruolo dei consumatori nella protezione dell'ambiente: le nuove iniziative della Commissione europea' *Contratto e impresa*, 286 (2021).

<sup>27</sup> See F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, 2015), *passim*.

<sup>28</sup> On this topic, we would like to mention the 17<sup>th</sup> Conference of the Italian Society of Civil Law Scholars (S.I.S.Di.C.) entitled 'Climate Change, Sustainability and Civil Relations', held in Rome at La Sapienza University on 11, 12 and 13 January 2024, the proceedings of which are currently being published in the 'Atti Sisdic' series (Napoli: Edizioni Scientifiche Italiane, 2024).

<sup>29</sup> See, in this regard, point 3.1. under the heading 'Green Transition' of the 'New Consumer Agenda - Strengthening consumer resilience for sustainable recovery'. In doctrine, for an in-depth study of the subject, see L. Giurato, 'Il percorso della transizione energetica: da un'economia basata sull'energia pulita alla "rivoluzione verde e transizione ecologica"' del Recovery Plan' *ambientediritto.it*, 841 (2021).

<sup>30</sup> The reference is to the European Parliament resolution of 25 November 2020 on 'Towards a more sustainable single market for businesses and consumers' (2020/2021(INI)). In doctrine, among various contributions, see: A. De Franceschi, 'Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases' *Journal of European Consumer and Market Law*, VII, 217 (2018); D. Imbruglia, *Mercato unico sostenibile e diritto dei consumatori*, *Persona e Mercato*, 189-201.



‘to develop, in consultation with stakeholders, a comprehensive strategy that includes measures that differentiate between product categories and take into account technological and market developments, in order to support businesses and consumers and promote sustainable production and consumption models’.<sup>31</sup>

The strategy proposed by the European legislator includes a series of information obligations relating not only to the expected life of the product (which must ‘be expressed in years and/or cycles of use and be determined before the product is placed on the market by means of an objective and standardised methodology, based inter alia on actual conditions of use, differences in intensity of use and natural factors’) but also to its reparability. The information should be provided to the consumer at the time of purchase, in a clear and comprehensible manner, by means of mandatory labelling;<sup>32</sup> the latter, together with the EU eco-label, should aim to raise the awareness of both consumers and producers towards ever greater environmental protection.

Among the objectives of the European legislator, with a view to the revision of Directive (EU) 2019/771 (referred to in this resolution),<sup>33</sup> is also to determine ‘how to align the duration of the legal guarantee with the expected lifetime of a product category’, as well as to assess the ‘feasibility of strengthening the position of sellers *vis-à-vis* manufacturers by introducing a joint producer-seller liability mechanism within the framework of the legal guarantee regime’.<sup>34</sup>

Further, in order to combat premature obsolescence of products, the Resolution envisages the possibility of including among the practices listed in Annex I of Directive 2005/29/EC also those ‘which effectively shorten the lifetime of a product in order to increase its replacement rate and unduly restrict the reparability of products, including software’; practices to be defined on the

<sup>31</sup> Resolution 25 November 2020.

<sup>32</sup> This labelling, developed with the involvement of all stakeholders, should in particular include information on the durability and reparability of the product, for example through a reparability score; the latter could take the form of an environmental performance index, taking into account different criteria over the entire life cycle of the product depending on its category.

<sup>33</sup> EU Directive 2019/771, adopted on 20 May 2019, and implemented by Legislative Decree No 170 of 4 November 2021 (in GU No 281 of 25 November 2021), repealed, as of 1 January 2022, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The implementation process has been quite troubled: Law No 53/2021, in force since 8 May 2021, better known as the European Delegation Law 2019-2020, had given the Italian Government the delegation of powers to transpose EU Directive 2019/771; subsequently, with the Government Act submitted for parliamentary opinion no. 270/2021, approved with observations on 5 October 2021, the draft legislative decree implementing the directive was prepared, replacing the entire Chapter I (Of the sale of consumer goods) of Title III of Part IV of the Consumer Code, including Arts 128 to 135. For more in-depth analysis, see S. Pagliantini, ‘Contratti di vendita di beni: armonizzazione massima, parziale e temperata della direttiva europea 2019/771’ *Giurisprudenza italiana*, 271 (2020); F. Bertelli, ‘L’armonizzazione massima della direttiva 2019/771 UE e le sorti del principio di maggiore tutela del consumatore’ *Europa e diritto privato*, 953 (2019).

<sup>34</sup> Resolution 25 November 2020.

basis of an objective and common definition, taking into account the assessment of all interested parties, including research institutes, consumers, businesses and environmental organisations.

Lastly, the Resolution envisages a series of strategies aimed at the repair<sup>35</sup> and reuse of products,<sup>36</sup> together with a ‘digital strategy in the service of a sustainable market’ and so called responsible advertising.

Less than two years after adopting this Resolution, the European Parliament has once again taken up the issue, approving a new Resolution,<sup>37</sup> in which it has asked the European Commission, in an even more decisive manner, to put in place legislation guaranteeing the durability of products through the provision of a real ‘right to repair’ (the invitation is to ‘design products that last longer and can be repaired’), in order to reduce waste production. More specifically, the Resolution states that the aim is to ‘enable consumers to choose repairable products’, through clear information about the durability and reparability of the product they are about to buy, so as to allow them to choose between repair and replacement. The possibility of repair, although provided for by the directive on the sale of goods,<sup>38</sup> currently encounters a number of difficulties in its practical ‘realisation’, as after-sales services are often non-existent and, more often than not, the difficulty of finding information on how to repair a product leads people to prefer to replace it without the possibility of assessing the alternatives. This is why the Parliament

<sup>35</sup> In this respect, the Resolution expressly requires that ‘the following information on the availability of spare parts, *software* updates and reparability of the product be made available in a clear and easily readable manner at the time of purchase: estimated period of availability from the date of purchase, average price of spare parts at the time of purchase, approximate recommended delivery and repair times, information on repair and maintenance services, where applicable; it also requires that this information be provided in the product documentation together with a summary of frequently encountered faults and ways to repair them’.

<sup>36</sup> More specifically, among other things, the Resolution ‘stresses the importance of strengthening circular economy and sustainable business models, which will minimise product destruction and promote repair and reuse; calls on the Commission to encourage the use of such models while keeping them cost-effective and attractive and ensuring a high level of consumer protection, and to encourage Member States to raise awareness of such models through educational campaigns and training aimed at both consumers and businesses; stresses the importance of investment in research and development in this area’. Furthermore, it ‘stresses the need to create incentives for consumers to buy second-hand; points out that the transfer of the guarantee, in the event of resale of a good still covered by it, could increase consumer confidence in the second-hand market; calls on the Commission, in this connection, to examine the extent to which the guarantee of the first buyer could be transferred to each additional buyer in the event of subsequent sales, particularly in the context of a passport for digital products also asks the Commission to examine the need to revise the exception clause for second-hand products within the legal guarantee regime of Directive (EU) 2019/771 when revising the Directive, following an impact assessment of the possible effects on second-hand and reuse-based business models.

<sup>37</sup> European Parliament resolution of 7 April 2022 on the right to redress (2022/2515(RSP)), available at [www.europal.europa.eu](http://www.europal.europa.eu).

<sup>38</sup> See G. Toscano, n 10 above, 372, who analyses the impact on European contract law of new goods with digital elements in the light of the many innovative aspects of EU Directive 2019/771 and the problem of planned obsolescence in the sale of consumer goods between consumer protection and sustainable development.

### Resolution calls on the Commission to introduce

‘in all new product legislation and in the revision of the Ecodesign Directive, an obligation for manufacturers to provide: smart labelling tools such as QR codes and digital product passports<sup>39</sup> [...] through close cooperation with industry and stakeholders, taking into account in particular the principle of proportionality and paying special attention to the needs of SMEs’.<sup>40</sup>

The fight against planned obsolescence is also present in the Proposal for a Directive of the European Parliament and of the Council (‘amending Directives 2005/29/EC<sup>41</sup> and 2011/83/EU<sup>42</sup> as regards empowering consumers for the green transition by improving protection against unfair practices and information’) of 30 March 2022,<sup>43</sup> which outlines a real policy framework on sustainable products, fitting in with the initiatives of the new consumer agenda<sup>44</sup> and the action plan for the circular economy.<sup>45</sup>

The Proposal’s objectives range from ‘contributing to a circular, clean and green EU economy’ to

‘tackling unfair commercial practices that distract consumers from making sustainable consumption choices’ and improving ‘the quality and consistency of enforcement of EU consumer protection rules’.

In order to achieve these objectives, the Proposal provides incentives for greater consumer participation in the circular economy, in particular by providing consumers with more and more detailed information on the durability and reparability of certain products prior to the conclusion of the contract and by protecting them more effectively against unfair commercial practices that prevent, so to speak, sustainable purchases. With specific regard to the latter, the Proposal expressly refers to greenwashing practices (better known as misleading environmental claims), premature obsolescence practices (ie premature failure of goods), and the use of

<sup>39</sup> Regarding the so-called digital passport for products, it should be pointed out that it was already present in the proposal for a regulation establishing the framework for the setting of ecodesign requirements for sustainable products, presented on 30 March 2022.

<sup>40</sup> European Parliament resolution of 7 April 2022, n 37 above.

<sup>41</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (O.J. L 149 of 11 June 2005, p 22).

<sup>42</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22 November 2011, p. 64).

<sup>43</sup> COM (2022) 143 final of 31 March 2022.

<sup>44</sup> COM (2020) 696 final of 13 November 2020.

<sup>45</sup> COM (2020) 98 final of 11 March 2020.

unreliable and non-transparent sustainability labels and information tools.<sup>46</sup>

It is thus evident that the actions of the European legislator are destined to have a significant impact on domestic consumer legislation of the individual Member States, foreseeing (and advocating) a veritable re-education not only of consumers, but also of manufacturers and vendors. Under the current rules suppliers can limit themselves to providing consumers with information the main characteristics of the goods or services, such as the existence of the legal guarantee of conformity and other commercial guarantees; after the entry into force of the new rules they will also have to ensure correct and complete information also on the durability of the products.<sup>47</sup>

Completing the framework outlined above is European Union Regulation 2021/341<sup>48</sup> which, with the clear intention of combating environmental pollution

<sup>46</sup> The proposed Directive expressly establishes that ‘information shall be provided on the existence and duration of a commercial manufacturer’s durability guarantee for all types of goods, or on the absence of such a guarantee in the case of energy-using goods; information shall be provided on the availability of free software updates for all goods comprising digital elements, digital content and digital services; information is provided on the reparability of products, by means of a reparability index or other repair information, where available, for all types of goods; traders do not mislead consumers as to the environmental and social impacts, durability and reparability of products; the trader may present an environmental statement claiming future environmental performance only when this implies clear commitments the trader may not advertise as a benefit to consumers what is considered common practice in the relevant market; the trader may only compare products, including through a sustainability information tool, if it provides information on the method of comparison, the products and suppliers involved and the measures taken to keep the information up-to-date the display of a sustainability label that is not based on a certification scheme or is not established by public authorities is prohibited; the use of generic environmental claims in consumer marketing activities is prohibited, where the excellence of the environmental performance of the product or the trader is not demonstrable, depending on the claim, in accordance with Regulation (EC) No 66/2010 (EU Ecolabel), an officially recognised eco-label scheme in the Member States or other applicable Union legislation; the presentation of an environmental statement concerning the product as a whole when in fact it covers only a certain aspect is prohibited; the presentation of requirements imposed by law on the Union market for all products belonging to a given category as if they were a distinctive feature of the trader’s offer is prohibited; certain practices related to the premature obsolescence of goods are prohibited’.

<sup>47</sup> In this regard it must be pointed out, however, that the directive does not expressly provide for consumers to be given information on the reparability of goods, it expressly requires that they be given information, for example, on after-sales services, which should facilitate consumers, should they decide to repair the good, thus contributing to the realisation of a circular economy. More generally, on the suitability of information as a juridical good, see P. Perlingieri, ‘L’informazione come bene giuridico’ *Rassegna di diritto civile*, II, 329 (1990), who aptly states how ‘information is not configured as a unitary and monovalent good’: as the fruit ‘of the life of relations between subjects, it takes on a meaning and a role in the dynamics of human activities’. Therefore, the Master notes how ‘information in itself’ can represent a good in the legal sense, ‘a point of reference and content of subjective situations’ whenever it possesses a juridically relevant utility, inasmuch as it is susceptible of satisfying interests deemed worthy by the legal system.

<sup>48</sup> The reference is to Regulation EU 2021/341 of the European Commission of 23 February 2021 (entered into force on 1 March 2021) amending Regulations EU 2019/424, EU 2019/1781, EU 2019/2019, EU 2019/2020, EU 2019/2021, EU 2019/2022, EU 2019/2023 and EU 2019/2024 with regard to ecodesign requirements for servers and data storage products, electric motors and variable speed drives, refrigeration appliances, light sources and separate power supply units,

and resource waste, effectively obliges manufacturers of household appliances to make available spare parts that enable consumers to repair the product within a reasonable time frame ranging between seven and ten years.<sup>49</sup> Unfortunately, the regulation excludes from its scope precisely those products that in today's consumer society lend themselves most to being designed as planned obsolescence goods, ie those in the electronics and technology sector (such as tablets, computers and smartphones); so that, although the regulation appears worthy in its intentions, it lends itself to a narrow scope of application.

#### **IV. Concluding Remarks. Repairability of Products as a New Building Block of the Circular Economy. Sustainability Becomes a Tool for Evaluating the Interests Pursued.**

The analysis conducted thus far allows us to draw certain conclusions which, although general in nature, we hope will be of some guidance to the interpreter.

In a scenario in which large companies and, more specifically, the so-called 'technology giants' continue to feed a market that insists on offering products with an ever-shorter lifespan,<sup>50</sup> the European legislator, with the measures in question, has openly taken sides in favour of the right to product repair, with a view to sustainability, contributing to providing the issue with an initial regulatory reference framework, able to act as a compass to guide the action of the institutions and Member States.<sup>51</sup> It would seem, therefore, that European legislative policy in economic matters is currently moving in the direction of asking businesses to adopt a sustainable economic approach, ie cooperative behaviour with a view to implementing general interest objectives such as the protection of the environment and the ecosystem.

However, many issues, in particular relating to the effectiveness of protection, continue to be left to the discretion of national legislators,<sup>52</sup> who are responsible

electronic displays, household dishwashers, household washing machines and washer-dryers, and refrigeration appliances with direct sales function.

<sup>49</sup> In more detail, and in continuity with EU Directive 2019/771, it is stated that 'with regard to the restoration of conformity of goods, the consumer should have the choice between repair and replacement. Allowing the consumer to request repair should encourage sustainable consumption and contribute to a greater durability of products'.

<sup>50</sup> Products destined to feed more and more the modern consumer society: this has been well highlighted for some time by P. Perlingieri, *Il diritto dei contratti tra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2002), 269.

<sup>51</sup> On the necessary functionalisation of economic interests with respect to the requirements of protection of the human person, which must necessarily guide the work of the European legislator, see P. Perlingieri, 'Il "diritto privato europeo" tra riduzionismo economico e dignità della persona' *Europa e diritto privato*, 357(2010), and earlier Id, 'L'incidenza dell'interesse pubblico' *Rassegna di diritto civile*, 937 (1986).

<sup>52</sup> With specific regard to Directive 2019/771, S. Pagliantini, *Il diritto privato* n 67 above, 4, writes: 'any harmonisation, minimum or maximum, can in fact be full or partial: and 771/2019 is undoubtedly a directive that pursues, with respect to the conformity rule it regulates, a global

for deciding on a wide and heterogeneous range of profiles relating to the regulated cases.

In France, for example, planned obsolescence is currently considered a criminal offence and is punished with imprisonment of up to two years and a fine of three hundred thousand euros; a fine that can increase to five per cent of the turnover produced by the company.<sup>53</sup> In Spain, on the other hand, manufacturers are obliged to dispose of spare parts for a period of ten years,<sup>54</sup> so that consumers can decide whether they want a repair or a replacement in the event of problems with the durability of the purchased goods.

Italy still lacks such provisions. It is no coincidence that Bill No 615 of 2018 on Amendments to the Code referred to in Legislative Decree No 206 of 6 September 2005 and other provisions to combat the programmed obsolescence of consumer goods, which proposed not only to introduce a detailed definition of programmed obsolescence in our legal system, - including ‘the use of software components or operating systems having the effect of worsening the general condition of the good and its operation’ - remained a dead letter, as did the effort to novate Art 132 of the Consumer Code by raising the time limit set forth in the first paragraph from two ‘to five years from the date of delivery of household appliances and small goods and within ten years from the date of delivery of household appliances and large goods’.

While being aware that the phenomenon of planned obsolescence also has positive aspects linked to technological progress and, more generally, to the (encouragement of) scientific research, we can only hope for a more incisive intervention by the national legislator, capable of providing concrete answers to the need for an overall rebalancing of the consumption system,<sup>55</sup> which are able to virtuously impact on the issues of environmental sustainability<sup>56</sup> and public

harmonisation of the provisions of the Member States, but it is not a directive that practices a complete harmonisation of the field of the seller’s contractual liability towards a consumer purchaser’. See also Id, ‘Eccezione (sostanziale) di risoluzione dintorni. Appunti per una nuova mappatura dei rimedi risolutivi’, in C. Perlingieri and L. Ruggieri, *L’incidenza della dottrina e della giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 337.

<sup>53</sup> The *loi* No 2015-992 of 17 August 2015 had inserted in the Consumer Code Article L 213-4-1, the rules of which were then repealed (by *Ordonnance* 2016-301 of 14 March 2016) and re-proposed in a new Article. L441-2, which prohibits this kind of entrepreneurial conduct (‘Est interdite la pratique de l’obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d’un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement’); the sanctions established by Art. L454-6, imprisonment, interdiction and fines, are decidedly severe.

<sup>54</sup> Initially, the period was five years.

<sup>55</sup> L. Mezzasoma, *Il percorso della meritevolezza nel sovraindebitamento del consumatore (from L. n. 3 of 2012 to L. n. 137 of 2020)* (Napoli: Edizioni Scientifiche Italiane, 2021), 77; Id, ‘Consumatore e Costituzione’ *Rassegna di diritto civile*, 311 (2015).

<sup>56</sup> He considers that incentivising a system of recycling goods could certainly be one of the possible solutions to protect the environment, M. Pennasilico, ‘Sviluppo sostenibile, legalità costituzionale e analisi “ecologica” del contratto’ *Persona e mercato*, 37 (2015) and Id, ‘Contratto ecologico’ n 22 above, 809.

spending,<sup>57</sup> especially with regard to the consumption of raw materials and the production of waste,<sup>58</sup> hopefully in a circular economy model.<sup>59</sup>

Now more than ever it is necessary to strike a balance between the different interests and values involved,<sup>60</sup> based on the criterion of reasonableness;<sup>61</sup> a balance that cannot disregard the proper consideration of the constitutional principle of solidarity, of which sustainability itself is considered a declination in application.<sup>62</sup>

From this perspective, '[s]ustainability becomes the yardstick of the worthiness of the interests pursued'.<sup>63</sup> It is on sustainability that the progress of society depends.<sup>64</sup>

<sup>57</sup> To the extent that consumer products and their obsolescence impact on the budgets of public administrations, as purchasers of those products. In this regard, it seems useful to recall that the reference to public expenditure is contained in the text of the hearing at the Senate of the Republic (Committee on Industry, Trade and Tourism) of the President of the Antitrust Authority, Dr Roberto Rustichelli, on 30 July 2019, regarding Ddl No 615 'Amendments to the Code referred to in Legislative Decree No 206 of 6 September 2005, and other provisions to combat planned obsolescence of consumer goods'.

<sup>58</sup> Cf P. Perlingieri, 'Formazione dei giudici e Scuola superiore della magistratura' *Giusto processo civile*, 313 (2017), who considers reasonableness and sustainability as 'hermeneutic canons, essential parts of any interpreter's cultural baggage', capable of contributing 'to the downsizing of old, die-hard bromides, such as *in claris non fit interpretatio* and *dura lex sed lex*, with a renewed focus on the practical consequences of the decision, which must not only not be absurd, but also in accordance with constitutional legality'. Cf VV. AA., 'Il problema dell'uomo nell'ambiente', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 73, where it is stated that man's death will come, 'alternately, either from the environment or from the impossibility of using it for those productive purposes that its protection excludes'.

<sup>59</sup> See *back* § 2, esp fn 26.

<sup>60</sup> In the balancing of patrimonial and non-patrimonial interests, as a rule, the latter must prevail if sustainability is to be guaranteed. In this perspective the myth of the legislator's omnipotence or the idea that the market can prevail over the individual falls (Thus G. Perlingieri, "Sostenibilità", *ordinamento giuridico e "retorica dei diritti"*. A margine di un recente libro' *Foro napoletano*, 106 (2020).

<sup>61</sup> On reasonableness, the writings of G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015) 35; Id, 'Ragionevolezza e bilanciamento nell'interpretazione recente della Corte costituzionale', in P. Perlingieri and S. Giova eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016*, Conference proceedings of the 12<sup>th</sup> S.I.S.Di.C. National Conference (Napoli: Edizioni Scientifiche Italiane, 2018), 283, now in *Rivista di diritto civile*, 716 (2018) (from which we quote); Id, 'Presentazione', in A. Fachechi ed, *Dialoghi su ragionevolezza, e proporzionalità* (Napoli: Edizioni Scientifiche Italiane, 2019), VII. See also A. Ruggeri, 'Interpretazione costituzionale e ragionevolezza', in VV. AA., *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Principi fondamentali*, Proceedings of the 2<sup>nd</sup> S.I.S.Di.C. National Conference, Capri 18-19-20 April 2006, I (Napoli: Edizioni Scientifiche Italiane, 2007), 233.

<sup>62</sup> On the subject, recently, G. Alpa, *Solidarietà. Un principio normativo* (Padova: Primiceri editore, 2023), 275.

<sup>63</sup> Thus, verbatim, G. Perlingieri, n 60 above, 102.

<sup>64</sup> *ibid* 109.