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Collana diretta da A. Celotto, F. Liguori, L. Zoppoli

CONSUMER AND MARKET LAW IN THE EUROPEAN CIRCULAR ECONOMY

Collected essays from the Jean Monnet Module "CoME CircLE"

edited by

Elisabetta Bergamini, Claudia Candelmo, Francesco Deana

Editoriale Scientifica

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INTRODUCTION

Elisabetta Bergamini, Claudia Candelmo, Francesco Deana

The transition from a linear to a circular economy is usually described through a simple change of perspective: from a model based on extracting resources, producing goods, consuming them and ultimately discarding them, to one in which products, components and materials remain in use for as long as possible through durability, repair, reuse, refurbishment, remanufacturing, sharing and recycling. Yet the apparent simplicity of this description should not obscure the scale of the legal transformation that it entails. Circularity is not achieved merely by improving waste management at the end of a product's life. It affects how products are designed and marketed, how consumers make choices and exercise rights, how markets for repair and second-hand goods are organised, how responsibilities are distributed along increasingly complex value chains, and how transactions taking place across borders and through digital platforms are regulated.

For this reason, the circular economy cannot easily be confined to a single branch of law. It reaches across environmental regulation, consumer protection, market law, private international law, competition and platform regulation, intellectual property, product liability and corporate responsibility. Nor does it provide a fully settled legal concept around which these different fields have already been reorganised. As the first contribution to this volume suggests, circular economy is more appropriately understood as an "umbrella concept": a broad framework capable of bringing together regulatory objectives and instruments originating in different areas, while retaining a degree of conceptual openness and even ambiguity. That characteristic is particularly important from a legal perspective. It explains both the capacity of circularity to influence an increasingly wide range of policies and the difficulty of translating it into a single, coherent body of rules.

This is also what makes the circular economy a particularly fruitful perspective from which to teach European Union law.

These remarks formed the basis of the Jean Monnet Module *Consumer and Market Law in the European Circular Economy* – CoME CircLE – carried out at the University of Udine between 2023 and 2026 and co-funded by the Erasmus+ Programme of the European Union.

The Module provided the framework for three editions of the Summer School bearing the same title, organised in cooperation with a network of European universities (University of Essex, Universitatea de Vest din Timişoara, East Anglia University, University of Rijeka, University of Belgrade and University of Szeged) and involving academics with different disciplinary backgrounds and experiences.

* * *

The premise underlying CoME CircLE was that the European transition towards a more circular economy creates an educational challenge as well as a regulatory one. If circularity changes how markets operate and what is expected from consumers, businesses and public institutions, legal education must enable students to understand those changes across the conventional boundaries between subjects. The aim was therefore not to create a narrowly specialised course devoted to a new legal subdiscipline called "circular economy law". It was to use circularity as a perspective from which participants could reconsider familiar areas of legal studies and observe the connections between them under the lens of EU law.

This approach is reflected in the organisation of the Summer School. Its syllabus brought together four principal dimensions: consumer protection and empowerment; private international law; dispute resolution and redress; and market regulation. Within these broad areas, the programme addressed topics ranging from unfair commercial practices, consumer rights, product liability and intellectual property to cross-border jurisdiction, applicable law, platform regulation, collaborative markets and corporate sustainability. Each year, the programme combined forty hours of lectures with a workshop and a substantial period of group work devoted to moot court preparation.

The European dimension of the Module was essential to this design. The participating teachers came from universities situated in different Member States, as well as from the United Kingdom and

from a candidate country. This composition created a setting in which EU law could be approached not only as a set of common rules, but also as a legal order applied, taught and experienced from different national perspectives. Such a setting is particularly valuable in fields such as consumer law, judicial cooperation and market regulation, where European harmonisation coexists with national legal systems, procedural traditions and institutional practices.

However, participants were not expected simply to acquire information about current EU legislation. They were asked to identify legal problems, work with others in multicultural groups, construct arguments and apply European rules to practical situations. The stated learning outcomes accordingly included not only knowledge of the European policy framework, consumer protection and market regulation, but also critical legal analysis, the application of private international law, problem-solving and argumentative reasoning. The moot court component made this relationship between legal knowledge and legal practice especially visible: training in legal argument was followed by group preparation and ultimately by the simulation itself.

The School was principally addressed to undergraduate and graduate students and doctoral candidates in law and related disciplines wishing to deepen their knowledge of EU law through one of the strategic fields of the Union's regulatory agenda. At the same time, the issues addressed throughout the Module have an obvious relevance beyond the university classroom. The transition towards more sustainable models of production and consumption requires knowledge and competences from professionals, policy makers, associations and civil society as well. An educational project devoted to circularity therefore inevitably raises the question of how the knowledge generated within the classroom can reach a wider audience.

This volume is one response to that question. The chapters are written versions of lectures delivered within the Summer School and subsequently developed and updated with essential bibliographical references: the contents of the book reflect the teaching programme itself. The result preserves something of the pedagogical character of the original lectures while making their substance available beyond the participants who attended the three editions. Publication in English and in open access is particularly important in this respect, allowing the outcome of a project based on European academic cooperation to circulate beyond the institutions and countries directly involved.

* * *

The contributions do not seek to establish a single doctrine of the circular economy. Their unity lies elsewhere. Read together, they show how circularity affects legal concepts and regulatory techniques that were often developed against the background of a predominantly linear economy.

Alexandra Burdulea provides the conceptual starting point by examining circular economy precisely as an umbrella concept. The absence of an agreed legal definition is not presented simply as a defect. The breadth and adaptability of the concept help explain how circularity has been able to connect product durability, ecodesign, resource efficiency, secondary-material markets, consumer protection and, increasingly, concerns regarding resilience and strategic dependencies. At the same time, such flexibility raises questions of legal certainty and conceptual coherence. Her analysis therefore offers an appropriate opening to a volume whose subsequent chapters explore different legal manifestations of a concept that remains broader than any individual regulatory instrument.

Claudia Candelmo then places the European circular transition within a wider legal setting. Her chapter reconstructs the constitutional foundations of EU environmental action and the development of circularity from policy objective to increasingly concrete normative instruments, before turning to public international law. The comparison is significant. While the EU possesses legal competences and regulatory instruments capable of supporting binding rules across the internal market, no equivalent comprehensive regime exists internationally. Circularity nevertheless appears through soft-law instruments, environmental agreements and, importantly, the external dimension of EU policy, including trade agreements and environmental conditionality. The result broadens the perspective of the volume: a European circular economy cannot be examined in isolation from global production, trade, resource flows and environmental commitments.

The interaction between environmental objectives and the organisation of markets becomes explicit in Tatjana Jovanić's analysis of market regulation. Her contribution asks who should lead the circular transition and resists reducing the answer to a choice between public regulation and private initiative. Different functions may require dif-

ferent combinations of hard law, soft law, co-regulation, self-regulation and partnership. Particularly important for the volume as a whole is the changing position of the consumer. The consumer remains a weaker party requiring protection, yet circular policy simultaneously expects consumers to repair, return, reuse, compare, resell and make more informed choices. Such participation can be meaningful only where reliable information, enforceable rights and institutional trust are already secured. Circular consumer empowerment is therefore not an alternative to consumer protection; it depends upon it.

This transformation can be observed directly within consumer law. Chris Willett examines how established mechanisms – unfair commercial practices rules, pre-contractual disclosure and sales law – are being adapted to circular objectives, while new mechanisms concerning durability and repair are being added to them. The significance of this development is that circularity does not replace traditional consumer law. It reorients and supplements it: questions about environmental claims, durability, reparability and the availability of repair become part of the legal conditions under which informed consumer choice is expected to occur.

Martin Morgan-Taylor describes the same development from a complementary angle as a movement from "transactional protection" towards "lifecycle protection". The traditional questions remain – whether goods conform to the contract, whether the trader has supplied the necessary information, whether cancellation or remedies are available – but circularity adds further questions about how long products last, whether they can be repaired, whether software support continues, whether spare parts are available and whether sustainability claims can be trusted. The comparison with the United Kingdom after Brexit adds a further dimension, illustrating the practical consequences that may follow when regulatory pathways begin to diverge even though markets and consumer transactions remain closely interconnected.

Product liability provides a particularly clear example of the pressure that circular and digital markets can place on legal categories inherited from a linear economy. Francesco Deana starts from the assumptions underlying the 1985 Product Liability Directive: relatively stable production chains, tangible products and an identifiable moment at which a product was placed into circulation. Connected and software-dependent products, together with repair, refurbishment,

upgrading, remanufacturing and redistribution, make those assumptions increasingly difficult to maintain. The revised product liability regime therefore has to address products whose characteristics may change during longer and more complex lifecycles. The problem is not merely to extend liability, but to allocate it coherently: too little protection would leave injured persons exposed, while excessive uncertainty for repairers, refurbishers and second-hand operators could itself discourage the practices that circular policy seeks to promote.

Digitalisation is not external to these developments. It is one of their principal enabling conditions and, at the same time, a source of additional complexity. Marco Inglese's contribution on the collaborative economy shows how digital platforms facilitate business models based on access and temporary use rather than ownership, while also generating difficult questions concerning the legal status of intermediaries, market power, network effects, data portability and competition. The collaborative economy thus becomes a testing ground for distinctions between intermediary and provider, competition and regulation, private ordering and public governance. The growing importance of ex ante platform regulation alongside traditional competition law further demonstrates how digital markets require regulatory techniques capable of responding before structural problems become irreversible.

Digitalisation also intensifies the cross-border character of circular markets. The chapters by Elisabetta Bergamini and Ivana Kunda make clear why private international law cannot be treated as a technical subject detached from consumer and market policy. Bergamini begins from a simple observation familiar to anyone who purchases goods or services online: cross-border legal relationships are now part of ordinary economic life, even when consumers are barely aware of the applicable law and jurisdiction clauses embedded in standard terms. Circular platforms complicate the picture further, particularly where the growth of consumer-to-consumer exchanges creates relationships that do not fit neatly within protective regimes designed around the B2C paradigm.

Kunda complements this jurisdictional perspective by examining applicable law. Repair services, refurbished goods, sharing arrangements and product-as-a-service models frequently involve platforms, consumers and businesses situated in different Member States. Applicable-law rules therefore contribute to the legal infrastructure on

which confidence in circular markets depends. They balance party autonomy with mandatory consumer protection and help ensure that cross-border contracting does not become a means of reducing rights through standardised choice-of-law clauses. The broader point is significant: a functioning circular market needs not only sustainable products and innovative business models, but also legal certainty, enforceability and trust.

Lucian Bojin adds the procedural dimension of consumer redress. His contribution shows why traditional ADR theory does not fit consumer disputes particularly well, given their low individual value, structural power imbalances and frequent digital or cross-border setting. Rather than presenting ADR simply as an alternative to litigation, the chapter emphasises the need for accessible, proportionate and cost-effective mechanisms. Particular attention is given to the modular design of dispute resolution and to online mechanisms, whose effectiveness depends not only on technology but also on institutional design and incentives to participate. In this sense, the chapter reinforces a central theme of the volume: substantive consumer rights matter only if they can be realistically enforced.

Other contributions expose tensions that arise when circular objectives encounter legal regimes pursuing different purposes. Péter Mezei uses upcycling to explore the relationship between sustainability and intellectual property. The contrast is particularly revealing because circularity depends upon reuse and transformation, while intellectual property law is structured around exclusive rights and incentives for creation and innovation. IP can facilitate sustainable innovation, but it can also restrict certain downstream uses of protected goods. Upcycling therefore becomes a concrete case through which to examine whether existing intellectual property rules leave sufficient space for practices that retain and create value from materials already in circulation.

Bernardo Calabrese approaches intellectual property from the distinct perspective of geographical indications. His chapter first reconstructs the sui generis character and multiple functions of the European GI system before considering the place of sustainability and circularity within its recent development. The treatment of derivative products illustrates how circular principles may become relevant even in a field not conventionally associated with the circular economy, particularly where the law must balance protection of reputation and

quality with the possibility of valorising genuine protected products in subsequent production processes. His contribution is consequently another example of the broader method running through the book: established legal institutions are reconsidered when circularity introduces new objectives into the balance of interests they already perform.

Finally, Youseph Farah places consumer choice and corporate responsibility within global value chains. His chapter reconstructs the movement from voluntary corporate social responsibility towards human-rights due diligence and more legally structured forms of corporate accountability. Consumers appear here not only as purchasers requiring protection from unsafe goods or misleading practices, but also as stakeholders whose expectations concerning environmental and social conditions may influence corporate behaviour. At the same time, the chapter shows the limitations of relying upon ethical consumption alone and emphasises the importance of effective remedies when prevention fails. This perspective is particularly relevant to circularity because the sustainability of a product or business model cannot be assessed solely at the point of sale: production conditions, sourcing, supply chains and access to redress form part of the wider regulatory environment in which claims of sustainability acquire legal meaning.

* * *

Taken together, these contributions reveal several recurring movements. Protection increasingly extends beyond the individual transaction towards the life of products and the organisation of markets. Consumers are simultaneously protected actors and participants in the achievement of regulatory objectives. Digital technologies facilitate sharing, resale, monitoring and new forms of access, while creating new problems of market power, classification, liability and cross-border enforcement. Circularity creates opportunities for innovation but also exposes conflicts with legal rights and regulatory objectives developed for different economic models. And throughout the volume, substantive rights repeatedly lead back to questions of implementation, enforcement and remedies.

This last element also explains why the practical dimension of CoME CircLE has been preserved in the book. The appendix con-

tains the case materials used for the moot court. Their inclusion is not incidental. It reflects the pedagogical conviction underlying the Module: understanding European consumer and market law requires more than familiarity with legislation and case law. Students must also learn to identify the relevant rules in complex factual settings, assess competing legal arguments and translate abstract principles into claims, defences and remedies.

The volume is therefore both a record and a continuation of the three-year project from which it emerged. It records a sustained teaching collaboration across European universities and the work developed around three editions of the Summer School. But by transforming lectures into accessible written contributions, it also allows that collaboration to extend beyond the duration of the Jean Monnet Module and beyond the participants who were able to attend it.

No single volume can provide a complete account of the legal implications of the transition towards a circular economy, nor do the chapters collected here suggest that those implications have already crystallised into an autonomous and internally coherent field of law. What they show instead is perhaps more useful for students and other readers approaching the subject: circularity is becoming a perspective through which established rules of EU (and International) law must increasingly be read, applied and sometimes reconsidered. Understanding that process requires moving between disciplines, between substantive and procedural law, between protection and participation, and between the internal market and the wider international environment in which it operates.

If the CoME CircLE Module began from the conviction that legal education has a role to play in preparing students for these transformations, this volume is intended to give that conviction a more durable form. Our hope is that the experience developed during the three editions of the Summer School may continue to support students, researchers, professionals, policy makers and civil society in understanding the legal dimensions of a European transition that remains very much in progress.

CIRCULAR ECONOMY AS AN UMBRELLA CONCEPT

Alexandra Burdulea[*]

SUMMARY: 1. Introduction. – 2. Conceptual framework: umbrella concepts, open-texture and essentially contested concepts. – 3. Circular economy and other concepts. – 4. Defining circular economy. – 5. Early judicial recognition of circularity principles. – 6. Conclusion: further evolution.

1. *Introduction*

The circular economy has evolved from a relatively marginal concept in environmental protection into one of the central directions of the current EU policy agenda. The concept has progressively expanded beyond its original focus on waste management and recycling to encompass a wide range of objectives, including product durability, ecodesign, secondary raw materials markets, resource efficiency, climate neutrality and supply-chain resilience. Therefore, it currently functions as a common frame of reference for regulatory initiatives in a diverse set of domains, including resource management, sustainable production or consumer protection.

Nevertheless, while it is widely used at EU level, this concept does not yet have a commonly agreed definition. Academic literature contains a large number of competing definitions, while EU legislation has so far refrained from providing a comprehensive and legally binding definition applicable across policy fields. Furthermore, the distinctions between the circular economy and other similar concepts within the environmental protection vocabulary are difficult to determine. From a legal perspective, this conceptual ambiguity raises concerns regarding clarity, predictability and coherence of policies. On the other hand, broad and adaptable concepts such as the circular economy are often capable of accommodating changing policy priorities and of creating a common narrative capable of bringing together

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heterogeneous regulatory initiatives that might otherwise develop in isolation.

This paper analyses the circular economy through the lens of the umbrella concept theory by reference to open-texture and essentially contested concepts. It argues that characterising it as an umbrella concept is provides a useful framework for explaining this phenomenon and predicting its further development. Further, it discusses it by comparison to other environmental protection concepts, before looking at some of the most relevant definitions identified in relevant literature. In order to understand it as a legal concept, it explores the extent to which its fundamental principles can already be identified in the early case-law of the Court of Justice of the European Union, by looking at some of the early environmental protection cases where the judicial activism of the Court has furthered environmental integration. Lastly, it concludes that the concept is still subject to expansion and is currently being adapted in order to respond to the recent challenges faced by the EU.

2. *Conceptual framework: umbrella concepts, open-texture and essentially contested concepts*

Given the persistent difficulties in defining the circular economy and distinguishing it from adjacent concepts, it is useful to examine whether the notion displays the features commonly associated with umbrella concepts. The theory of umbrella concepts offers a useful analytical framework for understanding how broad and heterogeneous ideas can acquire coherence despite including within their meaning diverse objectives, disciplines and regulatory instruments.

Umbrella concepts are generally described as wider notions, used in order to bind together ideas from different fields in order to create a new coherent narrative (Hirsch and Levin 1999). In another study, umbrella concepts have been defined as "*a broad concept or idea used loosely to encompass and account for a set of diverse phenomena*" (Blomsma and Brennan 2017). This suggests that such concepts can prove useful in areas characterised by a strong discursive fragmentation that hinders coherent progress. This cohesion is generated through focusing attention on one or more shared characteristics of the constituent elements, which come to be separated from their orig-

inal context and tied together to a common core. Generally, the development of umbrella concepts follows the following three main stages:

(i) Emergence;
(ii) Excitement period and;
(iii) Validity challenge.

During the excitement period, the concept gains visibility and, as a result, literature starts to become increasingly abundant, generating more understanding and potentially new meanings and areas where the concept becomes relevant. Once the concept is sufficiently popularized, it generally moves to the validity challenge period, where research and literature begin analysing it more in-depth and inevitably discovering the concept's vulnerabilities. In this phase, the concept is prone to have one of the two following outcomes: it will either be crystallised, if research and practical application is able to prove its utility or, it will become obsolete as a result of the fact that the validity challenge period surfaced insurmountable obstacles, usually linked to the lack of clarity or impossibility of implementation. As the notions it incorporates tend to be dispersed across multiple fields, the validity challenge period of the umbrella concept often reveals that the concept is not sufficiently coherent in order to withstand (Blomsma and Brennan 2017).

Analysed through the lenses of its umbrella character, circular economy is more of a framing of resource management strategies, rather than a coherent policy in itself. Its main contribution is therefore its catalyst potential, binding together concepts which are associated to different fields in order to create a coherent narrative and incentivise progress towards what is identified as its end goal. For the circular economy, this goal is usually defined by reference to the "take-make-waste" economy and the need for it to be replaced by a "reduce-recycle-reuse" type of economy (Norouz 2022).

Nevertheless, this does not clarify circular economy as a legal umbrella concept, as it does not provide a sufficiently precise normative framework capable of defining its legal content independently from the diverse regulatory instruments and policy objectives it encompasses. From the perspective of legal concepts, it can be argued that such fragmentation is even more undesirable than in other research fields, as it risks to generate legal uncertainty and negatively affect the application and interpretation of legislation. The concept of formal legal certainty requires that both law and adjudication adhere to

requirements of clarity, stability and intelligibility, while substantive legal certainty deals with the rational acceptability and of legal decision-making (Paunio 2019).

This inevitably leads to considering the open-texture narrative, since such concepts institutionalise conceptual indeterminacy by aggregating heterogeneous legal meanings under a single terminological framework. Therefore, it is necessary to briefly discuss whether the circular economy can be characterised as an open-texture concept or whether it should instead be framed as an umbrella concept, or even as a structurally indeterminate framework concept, whose uncertainty extends beyond marginal cases and affects its very core. As Hart suggested, almost every element in law can be open-textured (Hart 1994). As an umbrella concept, the circular economy encompasses a broad range of related ideas, including sustainability, green economy, industrial ecology, industrial symbiosis, and the bioeconomy, without establishing precise boundaries between them. The circular economy is not an umbrella concept merely because it displays open-textured characteristics. Rather, once established as an umbrella concept, it can display an open-textured character when applied to novel technologies, business models, and regulatory contexts. However, Hart's theory could become particularly relevant once the circular economy is incorporated into binding legal instruments and becomes subject to judicial or administrative interpretation.

Moving forward, Gallie's work on essentially contested concepts could provide a better framework for understanding the specific of the circular economy as a legal concept (Gallie 1956). Relevant studies in the field have already classified this concept as falling under the notion of essentially contested concepts (Korhonen et al. 2018). Such concepts arise where broad agreement exists regarding the value or objective pursued, while persistent disagreement remains regarding the appropriate means, conceptual content and practical implementation (Korhonen et al. 2018). By reference to this definition, the circular economy can be characterised as an essentially contested concept to the extent that its objectives are widely agreed. Based on the recent evolution in both legislation and literature on the topic, it can be reasonably argued that there is a high degree of consensus regarding some of its goals. The circular economy is generally associated with objectives such as resource efficiency, waste reduction and increased product lifespan through reuse and refurbishment (Kirchherr, Reike

and Hekkert 2017). Nevertheless, different definitions and different policy fields illustrate other objectives upon which consensus has not yet been reached. Secondly, disagreement persists regarding the definition. In an ample study published in 2017, Kirchherr, Reike and Hekkert identified 114 definitions for the circular economy (Kirchherr, Reike and Hekkert 2017). Furthermore, this concept is yet not clearly delimitated from other similar notions used in the environmental protection discourse, such as sustainability, industrial economy or bioeconomy. These distinctions shall be analysed in more detail in the next section.

Moreover, there is significant disagreement regarding the measurement of circular economy outcomes. The units of measurement vary from waste generation, raw material input or project longevity to recycling rates or value retention (Moraga and others 2019). Finally, there is no consensus regarding the theoretical foundations of the concept. Kenneth Boulding's Spaceship Earth is viewed by some as the incipient theory underlaying the development of circular economy as known today (Boulding 2011). The main argument for this is that this theory started from the premise of the finite character of natural resources and the need to develop processes that will allow the integration of waste from one production process into other production processes. Others credit the conceptual foundation of the circular economy to Stahel's *Performance economy,* developed in the 1980s (Stahel 2010). This work is associated with the origins of circular economy due to its closed loop theory. Closely connected with this theory, cradle-to-cradle can also be found in the list of theories that underlay today's notion of circular economy. This concept deals with the technical dimension of circular economy and provides principles for material processing metabolisms (Braungart, McDonough and Bollinger 2017). This theory laid the foundations for what is today known as eco-design, a manner of designing goods in order to increase their lifespan, energy performance and ensure easy repair and reuse of materials. Th most important element of cradle-to-cradle is the choice of materials in the design process in order for them to be reincorporated into new production processes at the end of the product's lifespan. However, while an important component, this does not account for the phenomenon of circular economy in its entirety. Nevertheless, while the circular economy shares several characteristics commonly associated with essentially contested concepts, this framework does

not fully capture its nature. The significant disagreement surrounding the circular economy appears to stem less from competing interpretations of a common value and more from the fact that the concept incorporates a wide range of objectives, theories, disciplines and policy instruments originating from different fields.

Consequently, the umbrella concept framework provides the most appropriate framework for discussing its structure and evolution, as it accounts for both the diversity of meanings attached to the notion and its capacity to accommodate new objectives over time without necessarily requiring conceptual uniformity.

3. *Circular economy and other concepts*

As environmental protection is becoming more of a priority worldwide, an increasing number of "buzzwords" are starting to emerge, generating both awareness and conceptual confusion. Some of these notions are sectoral and therefore express a certain dimension of the actions to reduce environmental degradation, some of them are umbrella concepts in themselves, making the delineation of circular economy even more problematic.

Firstly, one of the notions most associated with the circular economy is sustainability. In some cases, the two are used interchangeably. This can be explained by the fact that both concepts impose a multi-disciplinary perspective and rely heavily on legislation for their implementation, viewing business modelling as a crucial element towards the transition away from the current economic model (Geissdoerfer et al. 2017). While it can be reasonably argued that their goals align, their dimension within public discourse differs. While the circular economy focuses on closed loops and waste elimination, sustainability appears more open-ended and its goals tend to shift in accordance with the field in which it is discussed. (Geissdoerfer et al. 2017). Further, circular economy is characterised by a more practical approach that manifests itself in technical processes and business models. At the same time, sustainability tends to be used in policy measures such as corporate social responsibility, sustainable supply chains and green technologies. For example, circular supply chains could represent a premise for sustainable manufacturing (Rashid et al. 2013).

Secondly, apart from sustainability, industrial ecology is probably the closest concept to circular economy in the area of environmental protection. The similarity comes not only from their strategical overlap, but also from their broad umbrella character. Industrial ecology incorporates at least three sub-concepts, namely: industrial symbiosis, cradle-to-cradle and the sharing economy. Therefore, the two concepts share both similar foundations, as well as similar strategies. Looking closer, it can be nevertheless observed that industrial ecology is an interdisciplinary field that focuses on the study of industrial systems and their relationship with the natural environment. To this end, it uses concepts close to bioeconomy and the systems perspective, incorporating, as well, the industrial symbiosis concept. However, industrial symbiosis is understood differently under the two umbrella concepts. By contrast to industrial ecology, within the circular economy industrial symbiosis is more business-oriented, focusing on the economic advantages in order to lure investment, rather than on technical aspects, as in the case of industrial economy. From a policy perspective, the Commission's communication *Towards a Circular Economy: a zero-waste programme for Europe* describes industrial symbiosis as a strategy towards zero-waste and greenhouse emissions reduction. If sustainability appears to incorporate circular economy, industrial symbiosis can be argued to be included within the latter as an essential component. The same can be affirmed regarding product life extension. In other works, industrial symbiosis has been defined as "*a collective approach to competitive advantage in which separate industries exchange materials, energy, water and/or by-products*" (Baldassarre et al. 2019). Therefore, industrial symbiosis is mostly preoccupied with waste streams and industry-level material exchange. From this perspective circular economy is broader, incorporating strategies in order to reduce waste creation, as well as more ample goals such as changing the paradigm of ownership through strategies that encourage a service-based economy. Similarly, product life extension is an important component of the circular economy, expressly addressed through initiatives within the two Circular Economy Action Plans adopted so far.

Consequently, it can be observed that public discourse regarding environmental protection strategies is dominated by an array of keywords used either within multiple fields or only at sectoral level. Among these, circular economy distinguishes itself through its focus

on redesigning the entire economic system around circular material and value flows, rather than merely reducing environmental impacts or improving resource efficiency. In this context, sustainability can be framed as a normative goal of the circular economy, while industrial ecology provides the theoretical systems perspective in order to achieve resource circularity while industrial symbiosis offers an operational practice through which firms exchange resources to create circular value.

4. *Defining circular economy*

Some authors define circular economy using two definitions in order to capture the openness of the term (Moraga et al. 2019). One definition is *stricto sensu* and incorporates two dimensions, namely, design and life extension and post-life resource flows within closed loops. These two dimensions are the main differentiators when comparing the circular economy and the linear economy. In order to achieve a slower economy, it is necessary to extend the life span of the products and decrease the rhythm of the resource flow. In addition, the gap between post-use and production should be closed in order to obtain a circular flow of resources. The *lato sensu* definition describes circular economy as "*an economic model wherein planning, resourcing, procurement, production and reprocessing are designed and managed, as both process and output, to maximise eco-system functioning and human well-being*" (Moraga et al. 2019).

In another study, the circular economy is defined as "*as an industrial system in which the value of products is fully utilised by means of re-use, recycling and recovery and the value creation mechanisms are thereby decoupled from the consumption of finite resources products*" (Alaranta and Turunen 2021). This definition reflects one of the fundamental roles of the circular economy, namely value maintenance through reuse, recycling and recovery. This "3R" frame has been later developed to also include reducing, redesigning and remanufacturing as key strategies for the circular economy. However, these elements reflect only a predominantly industrial approach towards circular economy, focusing on resource and material flows. Other definitions attribute it a more ample meaning and which also include waste prevention, ecodesign and repairability. Furthermore, significant accent

is placed on decoupling value creation without sufficiently taking into account the social and sustainable dimensions of circular economy, which have become an essential part in the policy discourse at EU level.

More recently, circular economy was defined in the following terms: "*The circular economy is a regenerative economic system which necessitates a paradigm shift to replace the 'end of life' concept with reducing, alternatively reusing, recycling, and recovering materials throughout the supply chain, with the aim to promote value maintenance and sustainable development, creating environmental quality, economic development, and social equity, to the benefit of current and future generations. It is enabled by an alliance of stakeholders (industry, consumers, policymakers, academia) and their technological innovations and capabilities*" (Kirchherr, Reike and Hekkert 2017). This definition, apart from reflecting both the technical dimension of the circular economy, as well as the social one, together with the economic development goal, also highlights an important precondition for its success, namely, an array of stakeholders which need to actively participate in its implementation. Out of this list, consumers and policymakers appear especially important. Their inclusion in the definition suggests that the circular economy cannot be implemented exclusively through technical and industrial solutions and requires changes at policy level, as well as a shift in consumer behaviour. Their inclusion in the definition of the concept shows that the notion of circular economy has evolved past its strictly technical and industrial dimensions into broader socio-economic and governance framework. Achieving circularity no longer depends solely on technological solutions or production processes, but also on regulatory choices, market incentives, and behavioural changes among economic actors. The circular economy therefore emerges as a collective societal project requiring coordinated action from policymakers, businesses, consumers, and other stakeholders.

From a legislative perspective, unlike concepts such as waste, the circular economy has not been provided with a legally binding and universally applicable definition in EU primary or secondary legislation. Instead, the concept has primarily developed through policy documents, most notably the Circular Economy Action Plans adopted in 2015 and 2020. Consequently, the understanding of the circular economy within EU law remains largely policy-driven rather than

normatively defined, which partly explains the continuing conceptual diversity found in the academic literature. Furthermore, this development illustrates an important feature of umbrella concepts. Rather than progressively narrowing their meaning, umbrella concepts often expand by incorporating additional objectives, stakeholders and policy concerns.

The absence of a clear legislative definition also reinforces the relevance of judicial interpretation. As with many umbrella concepts, the legal meaning of the circular economy is not determined exclusively by formal definitions, but also by the manner in which courts accommodate its underlying objectives within existing legal frameworks. Consequently, even though the notion of circular economy itself is relatively recent, several of its constituent elements can be identified in earlier case-law concerning environmental protection, waste management and the functioning of the internal market.

5. *Early judicial recognition of circularity principles*

Despite the fact that, as mentioned above, the circular economy lacks a universally applicable legal definition in EU law, several of its core components have progressively emerged in the case-law of the Court of Justice long before the concept itself entered the Union's policy vocabulary. In particular, the Court's environmental integration case-law suggests an increasing willingness to accommodate objectives that today are commonly associated with circular economy, such as waste prevention, waste recovery, product life extension, recycling and resource efficiency. Consequently, while the circular economy may be conceptually recent and legally underdefined, many of its underlying principles can be traced back to earlier developments in the Court's interpretation of the Treaties. This suggests that the legal foundations of the circular economy may be less dependent on the formal definition of the concept itself and more closely linked to the doctrine of environmental integration within the EU legal order.

As early as 1983, in the landmark *ADBHU* case, the Court highlighted the importance of waste prevention and established that environmental protection is a Community objective (CJEU, C-240/83). The case was generated by a preliminary reference made by a French tribunal asking whether Directive 75/439/EEC of 16 June 1975 regu-

lating the disposal of waste oils was compatible with the principles of freedom of trade, free movement of goods and freedom of competition. The Court highlighted the importance of these principles while, at the same time, mentioning that the approvals system provided by the Directive is not automatically incompatible with freedom of trade, since this principle is not absolute. As a result, compatibility of the provisions of the Directive has to be analysed in light of its environmental protection scope, which is one of the essential objectives of the Community (CJEU, C-240/83, para. 13). According to the Court, rules on the discharge of waste oils have the purpose of protecting the environment and can therefore justify restrictions on freedom of trade as long as the principles of proportionality and non-discrimination are respected. In the same judgement, the compatibility of the provisions of the Directive which offer the possibility of undertakings being granted indemnities for the services of collecting and/or disposing waste oils was analysed against the prohibition of granting of state aid. Briefly, the Court held that the indemnities do not constitute aid, but rather consideration for the services performed by the collection or disposal undertakings.

While the decision in *ADBHU* is remarkably succinct in its reasoning, it is a very eloquent example of the CJEU's judicial activism in the area of environmental protection and it is considered to be the first time Community competence was established in the field of environmental protection. Furthermore, its relevance by reference to what was later to become circular economy should be taken into account. Even if the concept was not yet present in the legal and policy discourse and that the case contains no express reference to waste flows or circular economy, the Court highlighted the importance of separation of different types of waste and measures aimed to regulate the treatment of waste oils in light of their environmentally damaging potential. In some cases, these goals could even justify restrictions on fundamental market freedoms. The judgment can therefore be regarded as one of the earliest judicial acknowledgements of the idea that waste management is not merely a matter of environmental protection, but also a legitimate objective of economic regulation. Furthermore, it departed from its rather rigid case-law so far regarding the overriding nature of market protection and integration. In doing this, it provided no textual or constitutional argument except for the importance of environmental protection as a goal of the Communities. This decision

preceded by just days the signing of the Single European Act was signed, introducing express provisions in order to address the Union's lack of competence in the area of environmental protection. Lastly, by accepting the organisation of waste collection and treatment systems as a matter of public interest, the Court laid the groundwork for principles that would later become central to the circular economy, namely resource conservation, waste prevention, value recovery and the integration of environmental considerations into the functioning of the internal market.

The line of reasoning emerged under *ADBHU* was developed further in the *Danish Bottles* case (CJEU, C-302/86). In the case, the Commission initiated an infringement procedure against Denmark for failure to fulfil its obligations arising from the free movement of goods through the adoption of a national regulation that limited the selling of beer and soft drinks only in packaging for which a system of deposit and return was to be established. This legislation was considered by the Commission to be in breach of the principle of proportionality. One of the main arguments was the fact that voluntary return systems were in place for other types of products and therefore, a mandatory scheme exceeds what is necessary for the protection of the environment. These measures were analysed by both the Court and AG Gordon under the mandatory requirements framework established in *Cassis de Dijon* (CJEU, C-120/78). One of the main arguments was the fact that the legislation created a disproportionate burden on foreign producers by reference to national ones. To this end, AG Gordon stated that "*...even though on the surface indiscriminately applicable to Danish and nonDanish manufacturers, the rules bear in practice more heavily on the latter. On that basis Denmark cannot, as I see it, rely on the principle stated in Cassis de Dijon, since the Danish provisions in practice if not in form are indistinctly applicable even if, as I accept, environmental protection is within the category of possible exceptions to the basic rules*".

Recalling its *ADBHU* judgement, the Court found that "*the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty*" (CJEU, C-120/78, para. 9). The message of the Court was clear: environmental integration was a mandatory requirement which could, in some cases, justify restrictions to market freedoms. Apart from its significant impact on the development of environmental protection, similarly to the previous one, this

decision also highlights the importance of principles that nowadays sit at the basis of circular economy. The Court confirmed an earlier stage of the product life cycle thinking by promoting the reuse of packaging through a deposit-return system. From a contemporary perspective, such mechanisms constitute a classic circular economy instrument, as they aim to keep products and materials in use for as long as possible and reduce the generation of waste at source. The judgment therefore anticipates several principles that have subsequently become central to EU circular economy policies, including waste prevention, product life extension, reusable packaging systems and the shift from end-of-life waste management towards resource retention.

In *Walloon Waste*, the Court moved one step further and found that waste, whether recyclable or not, constitutes goods for the purposes of the Treaty (CJEU, C-2/90). Similarly to the *Danish Bottles* case, *Walloon Waste* also originated from an infringement procedure, this time against Belgium, for the adoption of legislation prohibiting the storage, tipping or dumping of waste from a foreign country in depots, stores and tips not annexed to an installation for the destruction, neutralization and disposal of toxic waste in the Wallonia region. These measures were regarded as contrary to the provisions of Directives 75/442/EEC and 84/631/EEC and Articles 30 and 36 of the Treaty. Analysing the compatibility of the national measures, the Court highlighted that waste, whether recyclable or not, was to be regarded as "goods" for the purposes of Article 30 of the Treaty (CJEU, C-2/90, para. 30). Furthermore, waste was "a matter of special kind" by reference to its environmentally damaging potential and should, therefore, be granted special attention in the analysis of national measures such as the ones in the case.

Beyond the Court's treatment of waste as a special category of goods, the Opinion of Advocate General Jacobs also offers an equally important perspective on the relationship between waste regulation and the internal market. This opinion generated ample debate, as environmental protection organisations, especially Greenpeace, expressed concerns regarding the arguments that he offered (Somsen 1992). He argued that, by contrast to Directive 75/442/EEC on waste, Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste excluded the possibility of Member States to introduce additional systems of control for waste imports, even if it allowed them to raise

objections on specific consignments of waste (CJEU, C-2/90, Opinion of Advocate General Jacobs, para. 26). The question of whether waste should be qualified as "goods" is also addressed extensively by the Advocate General. To this end he concluded that "*Not only, as I have argued above, would it be wrong in principle to confine the Treaty rules on the free movement of goods to items having a positive value; it would also be difficult to do so in practice*" (CJEU, C-2/90, Opinion of Advocate General Jacobs, para. 19). As a result, contrary to what the Court was to decide later, AG Jacobs concluded that the free movement of goods includes the freedom to move wastes across a national frontier in order to dispose of them in a more economically advantageous manner or more safely in another Member State (CJEU, C-2/90, Opinion of Advocate General Jacobs, para. 22).

While *Walloon Waste* was decided long before the emergence of circular economy policies, the Court's recognition of waste as goods and its acknowledgment of the specific environmental concerns associated with waste management provided an important legal foundation for later debates concerning the circulation, recovery and valorisation of secondary materials within the internal market. Later commenting on that decision, he concluded that "*That decision was remarkable, because the measure constituted an outright ban on imports of waste produced in other Member States, and the ECJ's finding that it was not discriminatory is widely regarded as unconvincing; indeed, the measure was directly discriminatory. Nonetheless, the judgment might be taken as an indication of the lengths to which the ECJ was prepared to go to save what it regarded as an environmentally friendly measure, contrasting starkly with its generally very strict approach to restrictions on trade*" (Jacobs 2006).

The three judgments reveal a gradual evolution in the Court's understanding of the relationship between environmental protection and market integration. In *ADBHU*, the Court recognised environmental protection as an essential Community objective capable of justifying certain restrictions on economic freedoms. *Danish Bottles* expanded this approach by accepting measures aimed at preventing waste generation and encouraging the reuse of products through deposit-return systems. Finally, in *Walloon Waste*, the Court acknowledged that waste itself forms part of the economic sphere and falls within the scope of the rules governing the internal market, while simultaneously recognising its specific environmental dimension. Considered

together, these decisions demonstrate that several principles that today underpin circular economy policies, such as waste prevention or resource recovery, had already begun to emerge within the Court's case-law long before the circular economy became an autonomous policy concept. His evolution illustrates that the legal foundations of the circular economy in EU law are rooted not in a single legislative definition, but in a broader process of environmental integration.

6. *Conclusion: further evolution*

The evolution and development of the circular economy suggests that this concept has entered the validity challenge phase identified in umbrella concept theory. As mentioned above, this phase is characterised by a significant amount of research and debates regarding the meaning of the concept. This debate will ultimately decide whether this notion is crystalised into an autonomous concept or whether it should be replaced by a clearer conceptual framework. The first part of this validity challenge has already established a clear set of goals that have come to be associated with the circular economy and which are widely accepted. These goals include moving away from the current linear economy, resource conservation, ecodesign and separation of waste flows. These directions were visible under the two Circular Economy Acts and the legislation adopted under them.

Nevertheless, the anticipated Circular Economy Act may represent an important turning point in the evolution of the concept. For the first time, the Union may move beyond policy coordination towards a more coherent legislative framework capable of consolidating the fragmented legal manifestations of circularity, while at the same time reshaping the notion in light of current tensions. The proposal of the Commission no longer focuses only on departing from the linear economy and increasing welfare, as the two previous policies did. Rather, it takes into account the feedback received in the last 10 years and introduces as a goal increasing economic resilience through reducing reliance on virgin materials and unstable global supply chains. The challenges this policy has to address are multidimensional and include economic security, environmental crisis, and industrial competitiveness. The Commission argues that this reframing of the circular economy could lead to it acting as a "geopolitical shield". This

development is particularly visible when circular economy is analysed alongside other recent EU policy initiatives. The Critical Raw Materials Act seeks to reduce strategic dependencies on third-country suppliers by increasing the recovery, recycling and reuse of critical raw materials within the Union. Similarly, the Competitiveness Compass identifies circularity as a key mechanism for improving productivity, reducing material costs and strengthening the resilience of European industry in an increasingly volatile global environment. In parallel, the Clean Industrial Deal links circularity to industrial decarbonisation and the preservation of Europe's manufacturing base, emphasising the need to retain valuable materials within the European economy for as long as possible.

The same rationale can be identified in the report prepared by Mario Draghi on the future of European competitiveness. While environmental objectives remain important, the report increasingly frames resource efficiency, material recovery and circular production systems as instruments for maintaining economic competitiveness in a context marked by geopolitical fragmentation, supply chain disruptions and growing international competition for strategic resources. From this perspective, circularity is no longer conceived merely as an environmental objective, but as a condition for economic resilience and long-term industrial prosperity.

All of the above initiatives suggest a process of normative expansion, by attaching new objectives to the policy. If analysed through the umbrella concept theory, this process either hinders the crystallisation of the concept or it could strengthen it by using the idea of imminent risk as a thread that holds together all the initiatives grouped under the umbrella of the circular economy. Furthermore, in the regulatory context of the EU, the conceptual ambiguity of the circular economy could be perceived as a strength, as its normative flexibility enables policymakers to connect environmental protection, competitiveness and resource security objectives within a single narrative capable of mobilising support across different policy domains.

Consequently, the validity challenge currently faced by the circular economy should not be understood solely as a debate concerning its definition. More fundamentally, it concerns the future role of the concept within EU law. The outcome of this process will determine whether the circular economy evolves into a more coherent autonomous legal category, particularly through the adoption of the forth-

coming Circular Economy Act, or whether it remains an umbrella concept whose primary function is to coordinate and legitimise a broad range of legal and policy developments. In either scenario, the evolution of the circular economy illustrates how contemporary EU law increasingly relies on flexible conceptual frameworks capable of integrating environmental protection, economic competitiveness and strategic autonomy within a common regulatory vision.

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NAVIGATING THE TRANSITION: CIRCULAR ECONOMY, THE EU AND PUBLIC INTERNATIONAL LAW

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SUMMARY: 1. Introduction. – 2. Circular Economy: a definition. – 3. The EU and the environment: constitutional foundations. – 4. The evolution of EU action on circular economy. – 5. A global awakening on circular economy. – 5.1 International law and circular economy: the early attempts in soft law. – 5.2 Multilateral environmental agreements: the relevance of circular economy. – 5.3 Where EU Law and International Law meet: EU trade agreements and conditionality. – 6. Conclusion.

1. *Introduction*

In the face of the intensifying global environmental crisis, the traditional linear economic model, based on a "take-make-use-dispose" cycle has increasingly exposed its unsustainability and ecological costs. As resource scarcity accelerates and waste generation outpaces environmental carrying capacities, the European Union has taken responsibility for promoting more sustainable patterns of consumption and production, among its Member States and externally. Its effort is placed in the broader context of an international shift towards a stronger protection of the environment and limitation of climate change, of which the promotion of circular economy is an integral part.

Nevertheless, despite the numerous efforts carried out internationally, the world seems still far to achieve global sustainability. Therefore, it is crucial to understand to what extent the international community is actually working towards the achievement of global circular economy and whether it is being effective in this struggle or, on the contrary, some form of improvement could be made. This is particularly relevant if we look at the striking differences existing between the EU, and the tools available to it, and international law.

To do so, the first section of this essay focuses on the constitutional

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foundations of EU environmental law, in particular under the Treaty on the Functioning of the European Union (TFEU), and on the timeline of EU action on circularity, underlying how circular economy has been translated from a general goal to specific normative instruments. The section shows the pervasiveness of EU action, thanks to the competences attributed to it. Then, the look shifts to international law, shows the gradual emergence of circular economy in the international discourse and explores the actual or potential role as legal vehicles to advance circularity globally played by both binding instruments as well as soft law.

2. *Circular economy: a definition*

Before discussing in detail the legal efforts put forward under international and European law, the notion of circular economy, under EU and international law, must be clarified.

What is the "circular economy"? At its core, the circular economy represents an economic model designed to decouple economic growth from natural resource consumption and environmental degradation. It operates as an alternative to the traditional, linear "take-make-use-dispose" industrial paradigm that has dominated international trade and industrial policy since the industrial revolution. As discussed elsewhere in this book, it can be conceived as an "umbrella concept", containing several dimensions, therefore it is hard to provide a single definition.

Surely, it is an economic model structured around the principles of reducing, reusing multiple times, transforming and, only when the product has entirely completed its lifecycle, recycling, to extend durability, minimize environmental footprints, and foster sustainable consumption and production patterns. By structuring economic activity around the principles of reducing material throughput, reusing products, repairing components, remanufacturing, and recycling waste, circularity aims to keep materials at their highest utility for a longer timeframe.

However, there is no single legal definition for circular economy. The EU itself provides several definitions in its policy documents. For example, the European Parliament affirmed that "*a circular economy is based on sharing, leasing, reuse, repair, refurbishment and recycling,*

in an (almost) closed loop, where products and the materials they contain are highly valued. In practice, it implies reducing waste to a minimum" (European Parliament Research Service 2016). The Circular Economy Action Plan, similarly, defined the concept as an "*economy where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised*" (European Commission 2015).

Despite the multiplicity of definitions, the concept points to enhancing and prolonging the value of products and to reduce waste to a minimum. This understanding is clearly replicated and implemented in EU directives and regulations on the topic. Advancing circular economy includes ensuring that products, and their materials, stay in the system for longer and only when they have completely exhausted their lifecycle, they will go do recycling: this includes preferring reparation to buying brand new products or ensuring that recycled components go into the production of new goods.

Under international law, not only there is no definition agreed upon of this concept (and, consequently, treaties drafted with the specific goal to advance and implement circular economy worldwide are absent), but specific definitions are lacking even in non-binding or policy documents. Circular economy, after all, is not a strictly legal concept, but an economic approach, and as such it is referenced in the international context. For example, during the negotiations for the global treaty on plastic pollution, the reference was made to "*circular economy approaches*" (UNEP 2022), without dwelling on the exact notion, but encouraging they employment of such approaches in order to combat, specifically, plastic pollution and support more sustainable patterns of consumption and production.

However, while this term is relatively recent in international law language, as it shall be seen further, the underlying principles (for example, waste minimization, sustainable production and consumption, prevention of environmental harm) have been evolving across international soft law and hard law for over half a century. Therefore, the absence of a legal agreement devoted to circular economy or the lack of customary rules on the matter, as well as the inexistence of an international definition of this concept, do not mean that the international community in general and international law in particular are entirely silent on the matter.

3. *The EU and the environment: constitutional foundations*

The European Union's authority to intervene in environmental matters and regulate the transition to a circular economy is rooted, as are the other competences of the EU, in its Treaties.

Specifically, Article 4(2)(e) of the TFEU establishes that the environment is an area of shared competence between the European Union and its Member States. This implies that while Member States retain the right to legislate and adopt legally binding acts, they can do so only to the extent that the Union has not exercised its competence or has explicitly decided to cease exercising it (as identified by art. 2(2), TFEU). The shared nature of this competence necessitates a rigorous adherence to the principles of subsidiarity and proportionality, which limit the scope of Union action, ensuring that its legislation provides clear added (European) value and does not exceed what is necessary to achieve treaty objectives (as required by art. 5 TEU and by Protocol 2).

Then, the substantive goals and operational principles guiding EU environmental policy are further described and detailed in Title XX of the TFEU. In particular, Article 191 TFEU delineates specific objectives, that are directly relevant to the circular economy. These objectives include preserving, protecting, and improving the quality of the environment, protecting human health, ensuring a prudent and rational utilization of natural resources; and promoting measures at the international level to deal with regional or worldwide environmental problems. In pursuing these aims, the EU's legal framework is aligned widely to the core principles developed under international environmental law since the Stockholm declaration, such as the precautionary principle, the principle of preventive action, the principle that environmental damage should as a priority be rectified at source, and the polluter-pays principle.

The objective concerning "*prudent and rational utilisation of resources*" (art. 191(1) TFEU), in particular, provides the main constitutional basis for the Union to introduce comprehensive regulatory mechanisms targeting product durability, waste minimization, and supply chain circularity as it has done in recent years.

This complex picture adds up to an obvious, but relevant, observation, in this context: the EU is, first and foremost, a community of Member States that relies heavily on economic cooperation.

Therefore, the homogeneous shift to circular economy is not only reasonable from the perspective of the protection of the environment, but also strategic from a policy perspective, in order to allow that all Member States align to new conditions of production and consumption, and one is not disadvantaged in the face of more lenient economic or environmental standards adopted by the other.

4. *The evolution of EU actions on circular economy*

As anticipated above, the effort to guarantee more sustainable patterns of production and consumption has not stopped at the level of the Treaties. The operationalization of the circular economy within the EU has developed through successive policy cycles characterized by a gradual transition from soft-law strategies to legally binding legislative instruments.

The modern journey began in December 2015 when the European Commission adopted the First Circular Economy Action Plan, which comprised 54 actions designed to address product life cycles, waste management, and secondary raw material markets. This foundational plan, that was essentially a policy document, laid the analytical and infrastructural groundwork for subsequent interventions of a legal nature and was followed by a first "monitoring framework" adopted by the European Commission in 2018, with a view of identifying relevant indicators to track the implementation of circularity in Member States.

A first significant shift occurred in December 2019 with the political adoption of the European Green Deal. Positioned as Europe's new growth strategy, the Green Deal explicitly identified the circular economy as an indispensable pillar for reaching climate neutrality, underlying that greenhouse gas emissions are also caused by heavy resource extraction (European Commission 2019).

Following these two documents and also in light of the evolving international framework, the Commission launched the Second Circular Economy Action Plan in March 2020. This updated strategy introduced 35 targeted actions aimed at redefining how products are designed, produced, and consumed. It prioritized resource-intensive sectors and set out interconnected sustainability principles to guide European industries towards greater resilience and strategic autonomy.

The regulatory framework has continued to densify through subsequent institutional steps. In 2022, the European Parliament and the Council adopted the 8th Environmental Action Programme, which anchored circular economy targets into a broader statutory timeline running up to 2030. Recognizing the need for precise metric-based enforcement, the Commission enacted a major revision of the Circular Economy Monitoring Framework in May 2023, which identified 5 key areas of monitoring (production and consumption; waste management; secondary raw materials; competitiveness and innovation; global sustainability and resilience). This revised framework added new indicators, such as material footprint and resource productivity, to track actual systemic progress accurately.

Looking forward, the institutional momentum is building toward a prospective Circular Economy Act in 2026 (European Commission 2025), which aims to further harmonize regulatory requirements and solidify the single market's alignment with strict environmental boundaries. This policy document, expected to be adopted by the end of 2026, has not yet been finalised.

The richness in policy documents was not moot. It created the ground for the subsequent adoption of relevant legal acts, including legislative acts, that allowed the transformation of circular economy from a policy objective to a normative standard. Examples of such acts, discussed also elsewhere in this book, are the Regulation 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of eco-design requirements for sustainable products and the Directive 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods.

The documents and the legal tools discussed so far show that, despite the existing uncertainties that are further explored and analysed by other lectures, the European Union has been very active and has regulated in detail several aspects of circular economy, that does not include exclusively the "environmental" side of this model, but also the related aspects, such as consumer protection, especially against controversial practices such as green washing and premature obsolescence.

Understanding the complexity of this picture is crucial before we turn to the international community. In fact, as it shall be seen, international law stands on a completely different path. On the one hand,

through intergovernmental cooperation, the international community has made steps forward to push States towards more stringent commitments to promote sustainable patterns of production and consumption. On the other hand, though, such objectives are currently either based in non-binding documents or rather lack mechanisms to ensure enforcement.

5. *A global awakening on circular economy*

While, the EU has adopted one of the most advanced legislations on circular economy around the world, international law is lacking similar initiatives for reasons linked both to the will of States to commit to binding standards as well as due to the profoundly different mechanisms that govern the EU legal order and the international legal order. While the first, in fact, own supranational tools to allow the adoption of legislation that becomes directly applicable in national legal orders, this possibility is generally precluded under international law. Nevertheless, the international community has not remained mute on the matter and several States, international fora as well as international organizations have taken the initiative to promote circularity.

In this connection, the picture worldwide shows some encouraging signs. Circular economy initiatives spread all continents (World Economic Forum 2018) with stronger or more lenient commitments taken both by individual States and by regional cooperation organizations. Examples include the Circular Economy Coalition in Latin America and the Caribbean, the African Circular Economy Network and the ASEAN Circular Economy Stakeholder Platform. Indeed, such initiatives were largely kept at the intergovernmental level and promoted non-binding commitments and resulted almost exclusively in voluntary guidelines, political declarations, soft-law action plans and reports (Candelmo 2026).

The activities of such initiatives are often sponsored by the EU itself: in this connection, EU internal action is mirrored by coherent external policies around the world, with the EU being a key partner and one of the main financial supporters of several networks. Nevertheless, such outputs cannot be considered as a mere extension of EU internal action. The commitment and the will of local actors to en-

gage in the promotion of circularity is essential. In this connection, the construction of regional platforms of cooperation and the adoption of documents supporting the relevance of circular economy at the regional level are a testimony that the necessity to switch to circular economy is not recognized only in the European continent, but spans around the world, in a truly global effort to promote more sustainable patterns of production and consumption.

At the same time, however, the framework just recalled does not seem to have a significant impact in practice. As reported by the Circularity Gap Report (2025), the global circularity rate has been recently measured at only 6.9%, meaning that a very low percentage of materials flowing into the economy are secondary materials, and the economy worldwide still largely (almost entirely) relies on raw materials to produce goods. This may be linked to several factors: new geopolitical tensions, fast population and economic growth in certain areas are some of the reasons that may have caused circularity to slow in certain areas of the world. At the same time, it should not be forgotten that the shift to cleaner means of production and to more eco-friendly technologies implies investments that show results in the longer term and that, in the short term, may require the expense of energies and raw materials (for example for the construction of electric vehicles, solar panels or wind turbines).

Therefore, despite some encouraging signs, the global picture still appears unsatisfactory and seems to move at an even less satisfactory pace. International action in this connection may be fundamental to encourage a quicker shift towards circularity worldwide.

5.1. International law and circular economy: the early attempts in soft law

The first indirect references to circularity in international law can be traced in soft-law documents that, despite their non-binding legal character, have become foundational instruments in international environmental law.

The first relevant act is the 1972 Stockholm Declaration on the Human Environment, which first explicitly recognized that "*the capacity of the earth to produce vital renewable resources must be maintained*" (Principle 3), and "*non-renewable resources of the Earth must be employed in such a way as to guard against the danger of their future*

exhaustion" (Principle 5). This approach, despite not referring explicitly to "circular economy", was based on the general principle that production and consumption must be separated from the exploitation of resources, in order to save them for longer periods of time and to allow future generations to benefit from them. This principle stands also at the basis of the concept of circularity, in contrast with the linear economic model, allowing to use resources sustainably and, applying circularity both at the production and at the consumption stage, maintaining products in the productive cycle as long as possible.

Twenty years later, the landmark 1992 Rio Declaration on Environment and Development made a few steps forward. Not only did it reiterate that States must cooperate to "*conserve, protect and restore the health and integrity of the Earth's ecosystem*" (Principle 7), but it also introduced some of the fundamental principles of international environmental law (such as sustainable development, precautionary principle and the principle of prevention) (Sands, Peel 2018).

For what circular economy is concerned, crucially, Principle 8 of the Rio Declaration explicitly affirmed that "*States should reduce and eliminate unsustainable patterns of production and consumption (…)*". In this connection, Principle 8 represents the foundational legal blueprint for modern circular economy: since linear economic models are clearly unsustainable from both perspectives (production and consumption), the global economy must move to more sustainable models: one such model can be identified in the "circular" one and its implementation is crucial to ensure sustainable development worldwide (Voigt 2015).

In contemporary international law, this soft-law trajectory culminates in the United Nations 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (hereinafter, SDGs). Born as a restructured version of the previous Millennium Development Goals (MDGs), the SDGs replaced MDGs in 2015. They do not constitute legally binding treaty obligations *per se* but establish a universal norm-setting framework that guides State action, international financial institutions, and global trade bodies towards a sustainable and dignified future for all populations. The SDGs are an integral part of the 2030 Agenda, promoted by the General Assembly (A/RES/70/1 2015), therefore they had a significant back up by the international community as a whole. Nevertheless, their non-binding

character leaves the improvement in each area to the capacity and the efforts of States and does not entail any mechanism to supervise their adherence by States.

At the same time, this should not be seen as an excuse to avoid action: the overall commitment to the SDGs should guide States in the adoption of policies to achieve the final goals. Safeguard the environment and promotion of circularity should become priorities to avoid further degradation. In this connection, their implementation is monitored (Wilson 2020), with reports being adopted on a yearly basis (the latest being the Sustainable Development Goals Report 2026) with a view of keeping track of the advancement of the international community towards the fulfilment of the 17 Goals and their targets.

Circularity is most directly anchored within SDG 12: Ensure Sustainable Consumption and Production Patterns. Since each goal is subsequently structured into more specific targets, with a total of 169 targets for the 17 Goals, some targets identified under SDG 12 are particularly connected to circularity. For example, target 12.2 calls for the sustainable management and efficient use of natural resources by 2030; target 12.4 mandates the environmentally sound management of chemicals and all wastes throughout their life cycle and target 12.5, which is the most specific of all three, explicitly demands that States substantially reduce waste generation through prevention, reduction, recycling, and reuse. These are the key actions required to implement circular economy: prevent waste or reduce their generation, by upscaling recycling and reuse.

Nevertheless, while the circular economy is functional to the implementation of SDG 12, a quick look at other SDGs shows that circularity serves as an indispensable cross-cutting facilitator for other SDGs. While circular economy may have little or no relevance for some selected SDGs (Schroeder, Anggraeni, Weber 2018), that aim at reaching very different objectives, for example gender equality (SDG 5), some of them, and the respective targets, may be strongly impacted by circularity, in particular SDG 6 (Clean Water), SDG 13 (Climate Action), SDG 14 (Life Below Water), and SDG 15 (Life on Land).

In this respect, for example, the reduction of waste (through circularity) is fundamental to preserve cleanliness of water; recycling is functional to reduce the exploitation of resources, preserve the environment and, in the long run, reduce climate vulnerability. Furthermore, the overall strategy behind the SDGs links the concepts of sus-

tainability and circularity, excluding that the former can exist without the latter. This approach is openly supported by the 2030 Agenda for Sustainable Development that underlies that it is a key objective to "*protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of present and future generations*" (General Assembly 2015).

Furthermore, each target under the SDGs provides indicators to monitor their implementation: some of them are particularly interesting to track the implementation of circular economy worldwide.

As highlighted in the United Nations Sustainable Development Goals Report 2026, national policy integration of sustainable consumption and production mechanisms has expanded worldwide, with over 600 specific policies enacted across 75 reporting countries as of 2025, signalling a 16% increase compared to the 2019-2024 period. Yet, despite this numerical growth, soft law inevitably suffers from a structural compliance deficit: without judicial enforcement mechanisms or state responsibility remedies, soft-law commitments remain largely based on the voluntary commitments of States. In this connection, the adoption of reports or policies do not necessarily result in higher circularity rates that, as already seen, remain very low. Unsurprisingly the SDG Report 2026 recalls that progress in circularity rates is uneven worldwide and that "*the next challenge for countries is translating policy commitments into measurable outcomes*" (SDG Report 2026).

5.2. Multilateral environmental agreements: the relevance of circular economy

This brings us to the binding, hard-law dimension of public international law. Is international law entirely void of binding obligations concerning circular economy? The answer is more complex than it might seem at a first glance.

As already mentioned, the premise is that there is no treaty dedicated to circular economy. This is understandable given the general hardships that feature environmental law and the absence of an accepted definition of circular economy under international law.

However, the rich landscape of Multilateral Environmental Agreements (hereinafter, MEAs) allows to detect binding circular duties in a

fragmented state across specialized treaties concerning other areas of international environmental law. Several agreements have been concluded on specific topics concerning environmental protection, spanning from treaties related to the prevention of climate change to those regarding the reduction of pollution at sea and from the safeguard of biodiversity to the protection of the ozone layer or the prohibition of persistent organic pollutants. Many of these agreements feature binding obligations that may be interpreted, on the one hand, as including duties that are relevant to the implementation of circularity or, on the other hand, in a way that allows to integrate circular economy considerations into the implementation of relevant obligations.

The most prominent example is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Article 4 of the Basel Convention imposes an explicit, legally binding obligation on all State Parties to ensure that the generation of hazardous and other wastes within their territory is reduced to a minimum, taking into account social, technological, and economic aspects. This "rectification and minimization at source" duty is one of the principles upon which circular economy policies are construed.

Similarly, binding obligations governing specific aspects of resource management and lifecycle protection are embedded within other international treaties, such as the 1987 Montreal Protocol, containing binding legal obligations requiring the systematic phase-out, recovery, and controlled destruction of ozone-depleting substances or the 2001 Stockholm Convention on Persistent Organic Pollutants, regulating the destruction, environmentally sound disposal, and strict re-use limitations of persistent bioaccumulative chemicals.

Furthermore, even when MEAs target topics that, apparently, are far from connected to circular economy, it is not rare that binding obligations can be read to be "circularity" oriented, in order to score a double goal: on the one hand, ensure the implementation of the relevant obligation; on the other, advance circularity through international law. It is the case of the 1982 United Nations Convention on the Law of the Sea, known as UNCLOS, that contains obligations (in particular, articles 192 and 194) requiring States to prevent, reduce, and control marine pollution from land-based sources. Or the 2015 Paris Agreement concluded under the United Nations Framework Convention on Climate Change, requiring States to identify Nationally Deter-

mined Contributions to reduce their impact on climate change and prevent the increase of temperatures beyond 1.5 degrees.

This approach departs from the understanding that environmental protection cannot be structured around strictly separate actions: efforts in one field, such as biodiversity or the law of the sea, can have substantial impacts on other areas of the environment, only apparently disconnected. For example, as recognised by the European Commission, 90% of biodiversity loss "is caused by resource extraction and processing" while "up to 80% of products' environmental impacts are determined at design phase" (European Commission website 2026): it becomes clear how actions in this area are deeply interconnected and the approach to promote circularity through other obligations under international law can gain significant importance.

In connection with the obligations recalled above, circularity considerations can be embedded in the policies or in normative acts adopted to implement such obligations, employing MEAs not specifically devoted to circular economy as a vehicle to advance circularity globally.

5.3. Where EU Law and International Law meet: EU trade agreements and conditionality

Multilateral treaty-making under public international law often moves at a slow, consensus-driven pace. Because global negotiations on a binding multilateral circular economy treaty face geopolitical friction, the European Union has pioneered an innovative bilateral approach: using international trade law and external conditionality as vehicles for environmental enforcement.

Since the landmark EU-Korea Free Trade Agreement in 2011, the European Union has systematically incorporated dedicated Trade and Sustainable Development (hereinafter, TSD) chapters into all its preferential trade agreements. TSD chapters obligate trading partners to effectively enforce their domestic environmental laws and adhere to MEAs, including, on a case-by-case basis, the ones recalled above, such as the Basel Convention, the Paris Agreement, and biodiversity treaties, that may be relevant to circular economy.

However, early TSD chapters were criticized for lacking hard dispute settlement mechanisms. In response, the EU unveiled a revised TSD policy framework that introduces unprecedented legal enforce-

ability. A primary example is found in the EU-New Zealand Free Trade Agreement, that entered into force in 2024. This agreement incorporates strict "essential elements" clauses. Under these clauses, a material breach of core environmental obligations, such as an act or omission that defeats the object and purpose of the Paris Climate Agreement, is treated as a fundamental breach of the trade agreement itself.

Such a breach can trigger the immediate suspension of trade concessions, tariff preferences, or the application of unilateral trade countermeasures. This "conditionality" mechanism encourages involved Parties to respect international law to avoid detrimental effects and suffer economic losses.

6. *Conclusion*

As we bring our analysis to a close, a few concluding remarks can be drawn.

The European Union's constitutional framework, anchored in shared competence under Article 4(2)(e) TFEU and environmental objectives under Article 191 TFEU, provides an unmatched legal basis for mandatory circularity rules, guided by the principle of subsidiarity as well as by key international environmental law principles, in particular precaution, prevention and polluter-pays. Upon these constitutional bases and principles, the EU has successfully transitioned from strategic action plans to binding legal instruments, comprehensively regulating both supply-side production and demand-side consumer rights.

Such commitment is evident both in internal action and on the external sphere. In this latter area, the EU has adopted a twofold strategy: on the one hand, it has partnered with interested countries and regional associations to support circular economy initiatives across the world; on the other hand, it has employed a more stringent tool, that is that of "environmental conditionality", proceeding with the inclusion of clauses concerning the protection of the environment in international partnership agreements with third Parties. This strategy shows how important the protection of the environment is for the EU and how relevant its action can be not merely on the internal side but also and especially on the international plane, in order to push

towards the global achievement of stronger commitments and more stringent standards on circularity.

In this respect, however, the EU cannot be the sole protagonist and should be able to count on a key supporting lead character: international law. The analysis has shown that, while a unified global circular economy treaty does not yet exist, circularity does not skip the eye of international law and such relevance could increase in the future, not necessarily through the adoption of an *ad hoc* treaty, but through the interpretation of existing international law instruments to advance circularity.

In the past, circularity consideration made their entrance in the international discourse through non-binding soft-law documents (the Stockholm Declaration, the Rio Declaration and, more recently, the Sustainable Development Goals). Such documents suffer from non-bindingness and, despite their ambitions, cannot be enforced internationally. Therefore, international treaties become fundamental: some binding duties, not necessarily directly connected to circular economy, can be traced, both in MEAs and in Treaties in principle devoted to other objectives (such as the UNCLOS). Such obligations can, as shown above, contribute to enhance circularity worldwide, if interpreted constructively.

Whether this hope becomes reality remains to be seen and largely depends on how much States truly become aware of the challenges ahead.

Surely, with global distrust in international law rising and lower commitment towards environmental protection by key States, such as the United States, the struggle to achieve circularity globally seems harder than ever. How the international community responds to the ever-pressing environmental threats will be crucial to ensure that the world does not stand still in the face of existential dangers, such as climate change but, rather, stands united to ensure the survival of humanity on earth.

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MARKET REGULATION PARADIGMS FOR THE CIRCULAR ECONOMY: AT THE INTERSECTION OF PUBLIC ECONOMIC LAW AND REGULATORY GOVERNANCE

Tatjana Jovanić[*]

SUMMARY: 1. Introduction. – 2. Market regulation, sustainability and the circular economy through the lens of public economic law. – 3. Regulatory design: instruments supporting the circular economy. – 3.1. Market regulation as a divided function: the public/private and ex ante/ex post matrix. – 3.2. The regulation landscape map: public/private and hard law/soft law. – 4. From protected consumer to active partner. – 5. A new entry on the map: competition law as gatekeeper. – 6. The 2026 update: a paradigm contest, not a paradigm choice. – 7. Who should lead the circular transition? – 8. Conclusion: market regulation, circularity and the active consumer.

1. *Introduction*

Market regulation theory enters the circular economy debate at the point at which the circular economy ceases to be only a concern of environmental policy and becomes a problem of market organisation. The question is no longer merely how to reduce waste, extend product life or stimulate repair. From the standpoint of Public Economic Law and Market Regulation, the focus shifts to how legal systems organise markets so that durability, reuse, repair, secondary materials and responsible consumption become not exceptional practices, but ordinary features of market functioning.

This Chapter therefore starts with the question that framed the lecture on which it builds: who should lead the circular transition? Is this a task of public authorities, private actors, consumers, or a structured combination of the three? Public Economic Law and Regulatory Governance do not answer that question by choosing between state and market in the abstract. What matters is which regulatory function is at stake, which market failure or public-interest objective justifies intervention, which actor is institutionally capable of carrying

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that function, and through which form of normativity and governance design (hard law, soft law, meta-regulation, co-regulation and partnership, self-regulation) that function can most credibly be discharged.

Applied to EU circular economy law as it stands in 2026 and viewed against the framework presented in the 2025 lecture, this analysis reveals an open contest between regulatory rationales. Approaches that previously appeared capable of coexistence are now being used to organise the field in different directions. Environmental and consumer protection rationales remain central to the existing acquis, yet they are increasingly constrained by simplification and competitiveness arguments. At the same time, market integration and competitiveness rationales are being strengthened through instruments such as the Critical Raw Materials Act and the forthcoming Circular Economy Act. However, the substantive requirements such as reduced resource use, functioning secondary-material markets, producer responsibility and more reliable circular claims, are not forgotten. What has changed is the public interest rationale through which they are authorised and defended. Circularity is increasingly justified not primarily as an ecological constraint on markets, but as a condition of market integration, competitiveness and industrial resilience.

A second transformation is related to the consumer, who is no longer addressed only as the weaker party in need of protection against information asymmetry, unfair practices or unsafe products. In the circular economy, the consumer is gradually repositioned as an active participant in the regulatory project itself, as a user who repairs, returns, reuses, compares, refuses, resells and thereby helps produce the public-interest outcome that law alone cannot deliver. This, however, does not eliminate the protective function of consumer law. In fact, it makes that function more demanding, because a consumer asked to act as a partner of the regulatory state must first be equipped with reliable information, enforceable rights and institutional trust.

The Chapter is based on the analytical framework developed in the lecture, especially the rationales for intervention, the public/private divide, the ex ante/ex post and hard law/soft law matrices, and the continuum extending from direct state regulation to partnership. Against that framework, it then examines the developments of 2025 and 2026, through which a previously latent tension seems to have become an open contest among competing regulatory rationales. The discussion begins in Section 2 by distinguishing the circular economy

from the broader idea of sustainability and locating it within Public Economic Law and Regulatory Governance, where the rationale for intervention matters alongside the choice of actor and instrument. Section 3 moves to regulatory design. Its two matrices map circular economy instruments according to the identity of the regulator, the timing of intervention and the degree of legal force, while recent EU measures show that formal classification does not always explain how an instrument operates in practice. Section 4 considers what this layered regime asks of consumers, whose participation in repair, return, reuse and informed choice depends on an effective legal floor. Competition law enters the analysis in Section 5 as a gatekeeper for forms of cooperation that may support circularity while still restricting competition. Section 6 then examines the policy changes of 2025-2026 and the growing reliance on market integration, competitiveness and strategic autonomy, with the choice between Articles 114 and 192 TFEU bringing the underlying paradigm contest into constitutional view. Section 7 treats leadership as a functional and multilevel question, requiring different actors and rationales to perform different regulatory tasks. The conclusion returns to the position of the active consumer and to the conditions under which circularity can remain a public-interest project while being organised through markets.

2. *Market regulation, sustainability and the circular economy through the lens of public economic law*

To understand the regulatory paradigms competing in the field of rules and regulatory tools related to the circular economy, it is first necessary to clarify what the circular economy means in regulatory terms: not as a policy slogan, but as a legal-economic object around which markets, product lifecycles, material flows and consumer conduct are to be reorganised. For this reason, the circular economy must first be distinguished from sustainability, even though the two are often used together. Sustainability supplies the broader normative horizon of Public Economic Law. It asks what kind of economy can be defended in the long term, under conditions of ecological constraint, social vulnerability and intergenerational responsibility. It is a meta-principle rather than a single regulatory technique, and as such, it orients the public interest, but it does not itself determine which

legal instrument should be used, which actor should carry the burden, or how far market freedom may be constrained (Kahl 2008; Kment 2019).

On the other side, the circular economy is a narrower concept and more operational. It concerns the organisation of material flows, product lifecycles, waste prevention, repair, reuse, remanufacturing, recycling and the conditions under which products and materials remain economically useful for longer. It is therefore not identical with sustainability, nor does it automatically produce it (Geissdoerfer, Savaget, Bocken and Hultink 2017; Kirchherr, Reike and Hekkert 2017). A few examples may illustrate the difference in practical terms. Circular practice may reduce waste while increasing energy use, transport costs or total consumption. Also, it may improve resource efficiency while leaving labour conditions, distributive effects or access to repair untouched. Rebound effects, social blind spots and the material costs of circulation are reminders that circularity is not, by itself, a complete theory of sustainable development (Zink and Geyer 2017).

This distinction matters for market regulation, as in its narrow, instrumental sense, Market Regulation is the legal apparatus through which a normative objective is translated into enforceable instruments. These instruments may take the form of product requirements, labelling duties, disclosure rules, producer-responsibility schemes, repair rights, market-surveillance powers, economic incentives, certification systems and forms of co-regulation. It is the level at which sustainability ceases to be only a horizon and becomes a set of institutional choices about markets. There are a number of questions that emerge from the standpoint of Public Economic Law and the Regulatory Governance approach to Market Regulation. Which failure is being corrected? Which public interest justifies intervention? Which actor is capable of performing the relevant function? Which form of normativity and governance: hard law, soft law, self-regulation, co-regulation or partnership, and is it suited to the task?

In EU law, the circular economy is therefore not merely a technical instrument of sustainability, but a legal and economic regime through which sustainability is selectively translated into the constitutive rules of markets. Its transformative potential lies in exposing, and progressively displacing, the growth-oriented premises of conventional consumer law. This is to be achieved not simply by enabling greener consumer choice, but by strengthening substantive rights, recasting the

consumer as a citizen, shifting the regulatory centre of gravity from ownership to access and services, and integrating a legally meaningful hierarchy of consumption with product-design obligations (Keirsbilck and Terryn 2019; Micklitz 2019).

Precisely for that reason, it becomes a field of contest between different rationales for regulation, examined in Section 6 of this Chapter. The same circular-economy measure may be presented as environmental protection, consumer protection, resource security, competitiveness, industrial resilience or internal-market organisation. The Regulatory State is placed under pressure because the objective remains broadly sustainable, while the policy instrument through which it is pursued may shift from one rationale to another.

The role of consumer protection should be understood within that structure. It does not exhaust the circular economy, but it supplies one of its regulatory layers. Where circularity depends on consumer conduct (such as repair, return, reuse, resale, rejection of misleading claims or acceptance of refurbished goods) consumer law performs both a protective and an activating function. It protects against information asymmetry, deception and weak redress, but it also makes participation legally possible. Without that protective floor, the active consumer becomes a fiction in the sense that the consumer is asked to contribute to a public objective without the information, rights or institutional trust needed to do so.

Public Economic Law as a discipline, in this instrumental sense, treats market regulation as a justified response to identifiable market failure or public-interest deficit, not as an exercise of authority for its own sake. The classical rationales (monopoly, externality, public goods and information asymmetry) already explain much of what circular economy regulation seeks to address. Resource extraction, pollution and waste generation are paradigmatic externalities; the consumer's inability to verify an environmental claim, a product's durability or its expected reparability is a familiar information asymmetry in a new regulatory setting. The lecture added two further rationales to this established framework. The first is solidarity, as the pursuit of distributive, rights-based and social objectives that markets do not deliver unaided. The second is climate risk, which treats ecological harm not merely as an externality to be corrected, but as a systemic risk to be governed. For present purposes, the figures matter less as empirical decoration than as a justification for regulatory category-building. Re-

source extraction and processing account for roughly half of global greenhouse gas emissions and the great majority of biodiversity loss, a figure the Commission invokes directly in the Circular Economy Action Plan (European Commission, COM(2020) 98 final). That scale is what prevents climate risk from being treated as a mere subcategory of externality. It supplies a rationale of its own, one in which Market Regulation is no longer only correcting discrete failures after they occur, but organising markets in anticipation of systemic ecological constraint.

If Public Economic Law is understood narrowly, as a set of limitations to economic freedoms, the central question is why public authority may intervene in markets at all. In that sense, the preceding discussion concerned the rationales for intervention. But Public Economic Law also has a broader meaning, closer to Regulatory Governance (Jovanić 2024, 11-14). It asks not only why markets are regulated, but who regulates them, through which forms of normativity, and under what public-interest constraints. The question of the regulating subject is therefore not secondary. It is one of the points at which modern Public Economic Law acquires its disciplinary identity. The Roman maxim "*Ius publicum privatorum pactis mutari non potest*" (public law cannot be altered by private agreement) captures the classical intuition that certain regulatory functions belong to public authority and cannot be displaced by private ordering alone. Yet the circular economy acquis also shows the limits of a simple public/private distinction. Contemporary market regulation does not operate only through the state commanding private actors from outside the market. It increasingly operates in a "regulatory capitalism", through a continuum of regulatory forms in which public authority, private standards, industry commitments, certification systems, platforms and consumers are differently combined (Levi-Faur 2005; Braithwaite 2008).

At one end of that continuum stands direct public regulation. When confined to the goals of circular economy, it is composed of binding product requirements, market-surveillance powers, mandatory labelling, take-back obligations and enforceable rights. Moving along the continuum, meta-regulation becomes increasingly important (Coglianese and Mendelson 2010). Here, the state does not regulate every market practice directly but regulates the conditions under which others regulate. In fact, it sets the framework for private standards, requires transparency, attaches legal consequences to certification, in-

corporates technical standards into public procurement or product regulation, and preserves enforcement backstops where private ordering fails. Co-regulation goes one step further, allowing industry-developed standards or schemes to acquire legal relevance through public recognition, supervision or endorsement. Self-regulation remains more private in form, but even there market actors write and police rules under the shadow of public law, reputational sanction and possible regulatory intervention (OECD 2010; on the wider menu of regulatory strategies see, for example, Baldwin, Cave and Lodge 2012).

The final point on the continuum is what the lecture termed partnership. In partnership arrangements, the regulated subject is no longer only the passive addressee of a rule. The consumer, in particular, becomes an active co-producer of the regulatory outcome. He or she opts for repairing rather than replacing, returns products into collection systems, relies on durability information, rejects misleading green claims, chooses refurbished goods, or participates in resale and sharing markets. This does not mean that regulation is privatised or that the state withdraws. It means that the public interest in circularity can no longer be achieved by public command alone, and therefore must be organised through a layered architecture in which state regulation, meta-regulation, co-regulation, self-regulation and consumer participation each perform a distinct function (Cafaggi and Micklitz 2009).

The lecture aimed to merge these rationales with a set of fundamental consumer rights that gain, rather than lose, relevance in the circular economy. The familiar eight-rights catalogue (satisfaction of basic needs, safety, information or awareness, choice, representation or consumer voice, redress, consumer education and a healthy environment – United Nations General Assembly, Resolution 39/248 (1985), as revised by Resolution 70/186 (2015a)) maps onto the circular economy acquis without difficulty. For instance, information underlies the Digital Product Passport, product labelling and durability disclosure. Redress supports enforcement against misleading claims and non-conforming products. The right to a healthy environment supports precautionary, ex ante instruments such as ecodesign requirements, restrictions on hazardous substances and producer-responsibility schemes. Consumer law is therefore no longer only a shield against market failure; it becomes part of the legal infrastructure through which participation in circular markets is made possible (Keirsbilck and Terryn 2019; Mak and Terryn 2020).

The same development can be expressed through the classical threefold structure of consumer protection. Safety-related protection acquires a lifecycle dimension: safety must be maintained not only at first sale, but through repair, software updating, reuse, refurbishment, resale and recycling. Protection of economic interests extends from the fairness of the initial transaction to the product's durability, repair cost, availability of spare parts, resale value and total cost over its useful life. Representation, education and access to justice undergo the strongest functional transformation, as they enable the consumer, in particular, to use product-passport information, activate take-back and deposit-return systems, participate in repair and resale networks, and challenge defective products or misleading environmental claims. The lecture has particularly stressed the fact that circular economy does not create a fourth category of consumer rights; it overlays the existing three with lifecycle and participatory logic.

This is why the public/private continuum, rather than the public/private divide, is the backbone of the analysis that follows. Circular economy regulation is not "produced" by the state alone, but neither is it left to private ordering. It is organised through a structured distribution of regulatory functions, in which public law preserves the floor, meta-regulation disciplines private norm-making, co-regulation and self-regulation mobilise market knowledge, and the consumer is activated only where protection has first made participation safe, informed and institutionally credible.

3. *Regulatory design: instruments supporting the circular economy*

3.1. Market regulation as a divided function: the public/private and ex ante/ex post matrix

The lecture mapped the regulatory governance landscape along two axes, public or private actor, as the first, and ex ante or ex post intervention, as the second axis. This typology of consumer law enforcement and regulatory design draws on the matrix developed by Issacharoff and Samuel (2009), which differentiates between the identity of the enforcer and the timing of intervention, so that, crossed, the axes generate four quadrants. For example, public ex ante regulation invokes licensing requirements, binding product-specific ecodesign

requirements and mandatory labelling. Public ex post regulation supplies market-surveillance fines, product recalls, liability and redress. Private ex ante regulation supplies voluntary sustainability standards and industry codes, such as Circular Plastics Alliance commitments. Private ex post regulation refers to, not limitatively, NGO campaigns, consumer boycotts and litigation against greenwashing or non-compliance.

Recent EU developments expose the contrasting forms and political trajectories of public ex ante regulation. Under the Critical Raw Materials Act, Strategic Project status operates through procedural acceleration, as projects located in the Union may benefit from the Act's permitting framework. The proposed Green Claims Directive, by contrast, was designed to operate through prior control of market conduct, requiring third-party verification before specified environmental claims could be used. Its stalling, examined in Section 6, may be understood as resistance to that proposed allocation of the regulatory function, not to environmental-claims regulation as such. The ex post framework already exists under the Unfair Commercial Practices Directive and will be strengthened by Directive (EU) 2024/825 from 27 September 2026. A manufacturer that ignores a binding product-specific ecodesign requirement faces public market-surveillance measures. A manufacturer who is in breach of a voluntary recycled-content pledge may instead face reputational pressure and, where its public statements are misleading, litigation under consumer or unfair-competition law. Taken together, these instruments constitute a regulatory regime rather than a single rule. They pursue the same public objective through different actors and at different stages, combining prevention, monitoring and sanction in different ways. This leaves a further design question: what degree of legal force does each instrument carry?

3.2. The regulation landscape map: public/private and hard law/soft law

A second matrix, the lecture's "Regulation Landscape Map", crosses the same public/private axis against bindingness, running from hard law to soft law. The vocabulary of public/private and hard/soft law has a close counterpart in the literature on European integration. Majone's account of the EU as a regulatory state distinguishes

market-making regulation, which removes barriers and harmonises standards, from market-correcting regulation, which intervenes in market outcomes to internalise externalities or protect vulnerable actors (Majone 1994, 1996). In the vocabulary used here, market-making corresponds broadly to the market-integration rationale examined in Section 6; market-correcting corresponds to environmental and consumer-protection rationales. Scharpf's related thesis holds that negative integration through Treaty freedoms and competition law structurally outpaces positive integration, which requires legislative agreement among Member States with divergent preferences (Scharpf 1999). That asymmetry remains contested (Höpner, Schmidt and Seikel 2025). Majone and Scharpf are used here as a second vocabulary for distinctions already captured by the lecture's matrices, not as a separate theory this Chapter needs to address. Public hard law supplies directly applicable regulations and transposed directives, such as the Ecodesign Regulation, the Batteries Regulation, the Right to Repair Directive. Public soft law supplies Commission guidelines, recommendations and strategy documents, such as the 2023 Horizontal Guidelines examined in Section 5. Purely private standards do not, on their own, constitute hard law in any strict sense. The better view is that what they can acquire is quasi-binding or legally relevant effect once incorporated into contracts, certification schemes, public procurement requirements, delegated legislation, market-access conditions, or public endorsement. At that point a nominally private standard begins to bind, for the undertakings caught by the incorporating instrument, much as a hard-law obligation would (Coglianese and Mendelson 2010). Private soft law, the more straightforward category, supplies voluntary eco-labels, corporate sustainability codes, and certification schemes such as ISO 14001 or B-Corp status, binding only those who choose to join. It is, however, worth noting that even purely voluntary schemes develop their own enforcement machinery of monitoring, certification withdrawal and exclusion, whose practical strength depends heavily on the public backstops standing behind it (Verbruggen 2014).

The 2026 examples also show that formal classification can conceal important differences in operation. The proposed Green Claims Directive was designed to occupy the public-hard-law, ex ante quadrant; its stalling has not converted it into soft law, but left it politically stalled and formally pending. The Digital Product Passport occupies

a different position. The ESPR creates a binding public-law architecture, but a passport becomes mandatory for a product group only through the applicable delegated act, which also determines the information to be included and the relevant access rights. Economic operators then generate, maintain and transmit much of the data carried by the passport. The legal infrastructure is public and mandatory; its operation depends on privately produced information channelled through that infrastructure. Under Articles 3 and 10 of the Green Claims proposal, a trader wishing to make an explicit environmental claim would have had to substantiate it according to prescribed criteria and obtain verification before commercial use. Under Chapter III of the ESPR, by contrast, the delegated act for a product group determines whether a passport is required and what it must contain.

The contrast between the Batteries Regulation and the Circular Plastics Alliance makes the hard-law/soft-law distinction concrete. Article 8 of the Batteries Regulation (Regulation (EU) 2023/1542) requires, from 18 August 2028 or 24 months after the relevant delegated act, whichever is later, specified industrial batteries above 2 kWh (other than those with exclusively external storage), electric-vehicle batteries and SLI batteries to be accompanied by documentation on recovered content. From 18 August 2031, those batteries must contain minimum recovered shares of 16 per cent cobalt, 85 per cent lead, 6 per cent lithium and 6 per cent nickel. From 18 August 2036, the minima rise to 26, 85, 12 and 15 per cent respectively and also apply to LMT batteries (Regulation (EU) 2023/1542, Article 8(2) and (3)). The Circular Plastics Alliance, by contrast, was built around an original collective pledge to use ten million tonnes of recycled plastics in new products annually by 2025. That pledge is not a generally applicable legal floor; its consequences are contractual, organisational or reputational for participating actors. The Regulation sets an enforceable minimum across the single market (European Commission 2026), while, on the other side, the Alliance can mobilise cooperation and ambition among participants but cannot compel non-participants. Knowing the quadrant applied to the circular economy therefore indicates what kind of enforcement to expect and against whom.

4. *From protected consumer to active partner*

Consider a female student moving through an ordinary day in autumn 2026 (adapted from Dudley and Brito 2012). She chooses a smartphone whose EU energy label displays battery endurance, resistance to accidental drops and a repairability class under Commission Delegated Regulation (EU) 2023/1669, alongside product requirements under Commission Regulation (EU) 2023/1670. She returns depleted portable batteries to a retailer without charge under the Batteries Regulation. At an e-bike shop, she learns that, from 18 February 2027, each LMT battery placed on the market will carry an electronic battery passport. Later, she encounters a "climate neutral" claim whose legal treatment has become stricter under Directive (EU) 2024/825. Namely, from 27 September 2026, a product may no longer be presented as having a neutral, reduced or positive greenhouse-gas impact where the claimed climate benefit derives merely from offsetting emissions elsewhere, rather than from reductions achieved within the product's own value chain. When her washing machine breaks down, she invokes the repair framework applicable from 31 July 2026 to product groups covered by the Right to Repair Directive. None of the above-mentioned presupposes that the consumer can identify, or even perceive, the regulatory instruments at work. Their function is performed upstream, through legal architecture that structures the market before the individual act of choice takes place. What matters, therefore, is not regulatory literacy, but legally constituted choice.

That is the shift the lecture placed at the centre of market regulation aimed at promoting circular economy. From a consumer shielded from market failure to a consumer recruited into helping remedy it. Classical rationales remain present, such as correcting information asymmetry, prohibiting unfair practices and guaranteeing minimum quality and liability standards. What changes is the assumption about what the consumer does once protection is in place. Older consumer law commonly assumed that an informed and protected consumer would make a private welfare-maximising choice and that the regulatory task would then be complete. Circular-economy regulation increasingly treats consumer choice as an input into a public objective, namely resource conservation. Behaviour, attention and habits thus become legitimate objects of regulatory design (Alemanno and Sibony 2015). The Ellen MacArthur Foundation accordingly places

consumers, alongside business and government, among the transition's principal actors (Ellen MacArthur Foundation 2013). The obligations do not present themselves as a single regulatory command. They accumulate across the routines of everyday consumption. For instance, households must separate waste; used batteries and electrical equipment must enter designated collection channels; entitlement to a deposit refund is made conditional upon an act of return; and the Digital Product Passport presupposes a user willing and able to scan, interpret and compare. Circularity is thus translated into a dispersed discipline of everyday conduct.

The same consumer, later that day, supplies the second half of the transformation. Rather than discard an appliance that is no longer worth repairing for her, she lists it on a peer-to-peer platform for spare parts. Another option is to avoid buying a new winter coat, and instead to visit a repair café supported by a municipality or a local social-economy initiative (Directive (EU) 2024/1799). At no point in this second half of the day is she responding to a mandatory rule. She is exercising the voluntary, system-relevant choice that the partnership end of the regulatory continuum exists to recruit, and no quantity of public hard law could produce that choice on its own.

This shift towards active consumers is best read along the continuum introduced in Section 2. At the state-regulation end, the consumer remains the protected addressee of mandatory rules such as durability requirements, take-back obligations and rules against misleading environmental claims. In the middle, public schemes with hybrid or co-regulatory implementation (deposit-return systems, producer-responsibility schemes and ecolabelling) depend on consumer participation to function. At the partnership end, repair cafés, sharing platforms and peer-to-peer secondary markets depend on consumers who choose to participate as co-producers of circularity. The behavioural evidence is an important corrective. The Commission's study found that clear durability and reparability information can strongly shift choices at the point of sale, yet sustained engagement remains vulnerable to cost, effort and doubt about the reliability of claims (European Commission 2018). Disclosure must therefore be combined with financial and structural measures. A durability label does little if repair is unavailable or a repair right has limited force if spare parts are expensive. Similarly, environmental information cannot activate responsible choice if trust is weak. To conclude, behavioural instruments

can orient attention, but they cannot reorganise the market conditions under which choice is made (Chater and Loewenstein 2023).

Mapping the OECD Consumer Policy Toolkit (OECD 2010) onto this continuum makes the argument concrete, although the continuum itself is this Chapter's analytical construction rather than an OECD classification. Education and disclosure sit at the protective end: they correct information asymmetry but cannot by themselves make circular choices affordable or institutionally reliable. Deposit-refund schemes, producer-responsibility fees and economic incentives restructure the conditions under which an active consumer response becomes rational. Codes, moral suasion and collaborative networks sit closer to self-regulation and partnership. The table below sets out that analytical mapping.

OECD instrument type	**Circular economy example**	**Position on the regulatory continuum**
Education and awareness	Public information campaigns on food waste and repairability	State regulation
Information / disclosure	Digital Product Passport; mandatory durability labelling	State regulation
Contract-term regulation	Warranty and liability rules for refurbished and second-hand goods	State regulation
Standards and licensing	Ecodesign for Sustainable Products Regulation requirements	State regulation
Financial instruments	Deposit-refund schemes; Extended Producer Responsibility fees	Public regulation with hybrid implementation
Economic incentives	Reduced VAT or subsidy for repair services	Public economic instrument (national)
Codes of conduct	Circular Plastics Alliance voluntary commitments	Self-regulation
Moral suasion	Sustainability pledges; corporate circularity reporting beyond legal minima	Self-regulation
Collaborative networks	Repair cafés; peer-to-peer resale and sharing platforms	Partnership
Dispute resolution / enforcement	Alternative dispute resolution for consumer circularity complaints	State regulation (backstop)

The continuum carries a further consequence worth making explicit. The circular economy is broader than corporate social responsibility, and the difference also lies in the consumer's active role. While

corporate social responsibility addresses the conduct of the firm, the circular economy, on the account given here, addresses the conduct of the whole system, where the household is also included. The Ellen MacArthur Foundation's tripartite division of circular economy actors into business, government and civil society makes the same point institutionally (Ellen MacArthur Foundation 2013). The United Nations' 2030 Agenda, and Goal 12 on responsible consumption and production specifically (United Nations General Assembly, Resolution A/RES/70/1 2015b), supplies the policy framework within which the EU acquis explicitly situates itself and confirms that consumption choices, not only production standards, are now a legitimate object of regulatory scrutiny.

That transformation should not be mistaken for completion. The consumer's movement from protected party to regulatory partner remains constrained by the conditions under which actual choices are made. Attention is limited, environmental information is often mistrusted or difficult to compare, and more durable or repairable goods may still carry price premiums that make circular choice economically unattractive. Habit and convenience do the rest as they remind us that participation in circular markets cannot be assumed simply because the law has made it desirable (European Commission 2018; Mak and Terryn 2020). This is precisely why the consumer protection rationale continues to matter even as the partnership rationale expands beside it. At least at the present stage of the acquis, however, the consumer whom the regulatory state enlists as a partner still requires the protective floor on which any meaningful partnership depends. The key elements of the protective floor are accurate information, enforceable rights, accessible repair, credible claims and effective redress. Without that floor, a partnership does not redistribute regulatory agency, but it merely invites the consumer to participate in a project whose terms, risks and conditions remain beyond her control.

5. *A new entry on the map: competition law as gatekeeper*

The matrices in Section 3 classify instruments by who acts and how bindingly, once it is already settled that the relevant cooperation is lawful. EU competition law performs a logically prior function, as it determines whether cooperation between competing undertakings

in pursuit of circularity is permitted at all. Joint take-back schemes, shared recycling infrastructure and coordinated phase-outs of non-recyclable materials may resemble the horizontal coordination that Article 101 TFEU exists to prevent. The risk is real and may be illustrated by the Commission's action undertaken in 2025. The Commission fined fifteen major car manufacturers and the European Automobile Manufacturers' Association approximately EUR 458 million for coordinating aspects of end-of-life-vehicle recycling, including an agreement not to pay dismantlers for processing vehicles and coordination over the communication of recyclability and recycled-material use (European Commission 2025). Circularity is a legitimate regulatory objective, but the pursuit of circularity does not place horizontal coordination beyond the reach of Article 101 TFEU.

The Commission's 2023 Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (OJ C 259, 21.7.2023, p. 1) introduced a dedicated chapter on sustainability agreements, including a soft safe harbour for sustainability-standardisation agreements satisfying six cumulative conditions. They also expressly recognise collective sustainability benefits under Article 101(3) TFEU, but without abandoning the logic of in-market consumer compensation: such benefits may be taken into account only where consumers in the relevant market substantially overlap with, or form part of, the wider group of beneficiaries, and where the share accruing to them (whether alone or together with individual benefits) outweighs the competitive harm they suffer. The opening is therefore real, but carefully contained (Colangelo 2025; Holmes 2024). Wang's discourse analysis of the consultation responses and the Commission's own policy communications reinforces this more cautious reading. Notwithstanding the formal recognition of collective benefits, DG Competition continues to translate environmental interests predominantly into the language of economic efficiency and a limited conception of consumer identity (Wang 2024).

Here is an example to make this gatekeeping function concrete. Two competing furniture manufacturers that prefer one joint take-back and refurbishment network to two inefficient networks are not free to cooperate merely because the scheme would reduce waste. They must first satisfy Article 101(3) TFEU conditions the Guidelines now make slightly, but only slightly, easier to meet. This matters for how the regulatory design matrix in Section 3 should be read. Competition

law is therefore best understood not as a fourth paradigm beside environmental protection, consumer protection and market integration, but as the gate each of the other three must pass through before its preferred instrument can take the form of cooperation between rivals. That gate's current setting still favours caution over circularity driven cooperation. In fact, this is a point of practical consequence for the Critical Raw Materials Act's own strategic-project cooperation, which will itself have to pass through this gate, as any cooperation between undertakings undertaken in implementing CRMA Strategic Projects (Regulation (EU) 2024/1252) remains subject to Article 101 TFEU.

6. *The 2026 update: a paradigm contest, not a paradigm choice*

The matrices set out in Section 3, as presented in the July 2025 lecture, classified the instruments then in force or already on the regulatory horizon. For the 2026 lecture, updating that inventory was no longer sufficient. The matrices still work, but developments over the intervening year have changed the picture they produce. Rationales that previously appeared to coexist within the circular-economy project are now being used to organise the same regulatory field in different ways. This change occurred quickly. Legislation, enforcement and market practice in this field may move faster than the classroom cycle, so the regulatory settlement students examine may already look different when they encounter it in practice. Teaching must therefore go beyond the rules currently in force and prepare students to recognise the rationales likely to shape their next configuration.

The first development is the stalling of the proposed Green Claims Directive. Proposed in March 2023 as a lex specialis complement to the UCPD framework, subsequently amended by Directive (EU) 2024/825, it would have required traders to substantiate explicit environmental claims and, in the negotiated design, submit them to advance third-party verification. The proposal thus placed environmental claims within a public-hard-law, ex ante model. On 20 June 2025 the Commission announced its intention to withdraw it, and the trilogue scheduled for 23 June was cancelled. The Commission Work Programme 2026 nevertheless continues to list the proposal as pending. As at 30 August 2026 (the date of submission of this Chapter), it remains politically stalled but formally pending (European Parliament

2026). For present purposes, the important point extends beyond the immediate dispute over small firms. The proposal stalled during the broader simplification programme that culminated in Directive (EU) 2026/470 of 24 February 2026, which narrowed the CSRD scope to undertakings with more than 1,000 employees and more than EUR 450 million net turnover, and the CSDDD scope to undertakings with more than 5,000 employees and more than EUR 1.5 billion net turnover.

The second development concerns the consolidation of instruments that place circularity within the policy agenda of market integration, strategic autonomy and competitiveness (Jakimów, Samokhvalov and Baldassarre 2024). The Critical Raw Materials Act, in force since 23 May 2024, sets three benchmarks for Union extraction, processing and recycling capacity and a fourth diversification benchmark aimed at limiting dependence on any single third country. In 2025 the Commission recognised 47 Strategic Projects located in the Union under Decision (EU) 2025/840 and 13 projects in third countries and overseas countries or territories under Decision (EU) 2025/1174. The Union projects benefit from the Act's permitting framework; the external projects receive strategic recognition and may be supported through partnerships and financing. A second selection round closed on 15 January 2026 and remains under assessment.

The forthcoming Circular Economy Act follows the same policy line. The Clean Industrial Deal (European Commission, COM(2025) 85 final) and the Competitiveness Compass place circularity within a wider programme of industrial renewal, economic security and strategic autonomy, rather than presenting it solely in the conventional vocabulary of environmental protection. The Act is expected to build on the Single Market, reduce dependence on primary and imported resources, increase the supply of high-quality recyclates and stimulate demand for secondary materials and circular products. The Commission Work Programme 2026 gives this policy framing a provisional constitutional form: it lists the Act as a legislative initiative scheduled for the third quarter of 2026 under Article 114 TFEU. The Programme cautions that both the timing and the legal basis remain indicative. Even so, the agenda already shows that the Commission currently conceives the proposed intervention through the internal market.

The environmental content of these measures remains clear. A

more integrated market for secondary raw materials, less fragmented end-of-waste rules, more coherent administration of Extended Producer Responsibility, stronger demand for recycled content and a viable market for recyclates all continue objectives long pursued through the environmental-law architecture mapped in Section 3. The newer policy documents also attach those objectives to industrial resilience, resource security, competitiveness and the functioning of the internal market. That additional rationale has legal consequences. If it is carried into the eventual proposal, it will influence the Treaty basis used to authorise intervention, the institutional terms in which the measure is defended and the regulatory burdens against which it is assessed. The lesson for students is that continuity in the regulatory objective does not guarantee continuity in legal rationale. Familiar measures may occupy a different institutional position when they are justified through another Treaty competence.

The distinction becomes constitutional in the relationship between Article 114 TFEU, the internal-market legal basis, and Article 192 TFEU, the environmental legal basis. At that point, the disagreement over regulatory rationales also becomes a question of Union competence (de Sadeleer 2012; Jans and Vedder 2024, ch. 2). Where internal-market and environmental components coexist, a measure will ordinarily follow its centre of gravity. Recourse to a dual legal basis is possible only where the components are inseparably linked, neither is secondary or indirect, and the applicable legislative procedures are compatible. Recent scholarship places this competence question within a wider constitutional problem: whether the legal paradigm of the internal market can accommodate the scale of ecological transformation demanded by the Green Deal without itself being normatively recalibrated (de Vries and Neergaard 2026).

Article 114 may sustain far-reaching environmental and consumer-protection requirements. Internal-market legislation has increasingly served public-policy objectives extending beyond market integration as such (De Witte 2025; Karageorgou 2023). Its jurisdictional premise nevertheless remains that divergent national rules create, or are likely to create, genuine obstacles to trade or appreciable distortions of competition (case C-376/98 Germany v Parliament and Council, paras 83-84) and that harmonisation improves the conditions for the establishment and functioning of the internal market. Article 192 provides the more appropriate basis when the aim and content of a

measure place environmental protection at its centre of gravity. The choice affects the constitutional position of the regulatory technique used (Cuyvers et al. 2024). Under Article 114, regulatory fragmentation performs the competence-bearing work and environmental protection enters the substance of the harmonising measure. Under Article 192, the justification comes directly from ecological harm and the objectives of Union environmental policy. The distinction between market-making and market-correcting regulation captures this difference, although neither provision is confined to a single policy effect.

Recent legislation illustrates this distribution without settling it. Regulation (EU) 2025/40 on packaging and packaging waste, the Right-to-Repair Directive (EU) 2024/1799 and the Net-Zero Industry Act (Regulation (EU) 2024/1735) rest on Article 114 TFEU. Directive (EU) 2025/1892 amending the Waste Framework Directive and the Nature Restoration Regulation (Regulation (EU) 2024/1991) rest on Article 192(1) TFEU. No mechanical taxonomy follows from these examples: the environmental intensity of a measure does not by itself determine its legal basis. They do show that legal-basis choice forms part of the constitutional design of circular regulation and cannot be treated as a technical label added after the content has been settled.

The debate over the forthcoming Circular Economy Act brings these issues into view. The Commission Work Programme 2026 provisionally lists the proposal for the third quarter of 2026 under Article 114 TFEU, while cautioning that both timing and legal basis remain indicative. Industry associations support reliance on Article 114 alone and describe fragmented waste rules and national regulatory divergence as obstacles to a functioning market for secondary raw materials (BusinessEurope 2026). A coalition of environmental organisations has pressed for a dual basis incorporating Article 192, arguing that an exclusively internal-market foundation would understate the Act's environmental centre of gravity (ECOS 2025). Neither position determines the legally correct basis, but the disagreement shows what is at stake in the drafting choice. Consider a recycled-content target. Under Article 192, its competence-bearing justification derives from environmental protection; under Article 114, it is authorised through the removal or prevention of obstacles generated by regulatory fragmentation. The target may serve environmental purposes in either case, but its constitutional position is different. The legal basis will affect the rationale authorising intervention, the terms in which the

measure is defended and the space left for national regulatory divergence.

The Circular Economy Act's placement within the Clean Industrial Deal and the 2026 Work Programme therefore matters. If Article 114 is retained, the Act's legal justification will be tied to dismantling divergent national burdens and constructing a single market for circular products and secondary materials. That framing may broaden the political constituency for harmonisation. It also makes market integration the rationale that carries the principal competence burden. Environmental objectives would remain part of the measure, while circularity would be presented in constitutional terms as supporting industrial resilience, resource security and the functioning of the internal market (de Vries and Neergaard 2026).

The distinction between market-correcting and market-making regulation remains useful for analysing this shift, provided that it is not treated as an exhaustive label. The choice of legal basis identifies competence and also indicates the public rationale on which Union intervention relies. The stalled Green Claims proposal, the narrowed CSRD and CSDDD, the Critical Raw Materials Act and the anticipated Circular Economy Act can all be located within the matrices developed in Section 3. They broadly occupy the public, hard-law and ex ante regulatory space, although their operation across the ex ante/ex post axis is not identical. That common location does not account for the different rationales involved. Environmental and consumer protection are central to the first group; market integration, competitiveness and strategic autonomy carry greater weight in the second.

The result is the paradigm contest named in the title. There has been no wholesale shift from environmental regulation to market regulation. Many of the techniques remain familiar, and some of the substantive ambitions do as well. The change concerns the constitutional and economic justification attached to their use. This matters even where circularity continues to be the practical objective. The matrices can identify the institutional source, legal form and timing of an instrument. They cannot, on their own, explain why the Union has chosen to intervene or which rationale bears the legal burden. Two instruments may therefore occupy the same public, hard-law and ex ante quadrant while relying on materially different accounts of why EU intervention is warranted.

7. *Who should lead the circular transition?*

The lecture posed the question of leadership in the circular transition without resolving it. The analysis developed here suggests that the question, when framed in the singular, is misleading. No single actor, legal basis or regulatory form can lead the transition as a whole. Leadership in this field is functional rather than hierarchical, as it refers to the regulatory problem to be addressed and the institutional capacity required to address it.

Where the central problem is market fragmentation (as in the case of end-of-waste criteria, recycled-content standards, harmonised Extended Producer Responsibility governance or the data architecture of the Digital Product Passport) Article 114 TFEU may provide an appropriate constitutional basis for public hard law. Its regulatory function is to construct a functioning internal market for circular goods, materials and information. Where the task is instead to establish precautionary ecological floors (through restrictions on hazardous substances, minimum environmental design requirements or binding reduction targets) Article 192 TFEU offers the more direct constitutional expression of the environmental-protection rationale. This is not an exclusive doctrinal division, as Article 114 measures may themselves pursue a high level of environmental protection. The point is that legal basis, regulatory rationale and institutional function should remain aligned.

The consumer-facing layer occupies a different position. Rules on environmental claims, the right to repair and redress remain anchored in consumer protection, while also extending towards the partnership end of the regulatory continuum introduced in Section 2. Public hard law must establish the indispensable floor in the sense that information must be reliable, rights enforceable and remedies available. But law cannot perform the remaining work of circularity by itself. That work is distributed across repair networks, resale markets, digital platforms, co-regulatory schemes and consumers themselves. The consumer should therefore be understood neither as the sovereign author of sustainable choice nor as the passive addressee of regulation, but as a regulated participant whose agency becomes meaningful only after law has made participation safe, informed and practically usable.

Leadership also has a multilevel dimension, only briefly addressed in the lecture. The European Circular Economy Stakeholder Platform,

established in 2017 as a joint initiative of the European Commission and the European Economic and Social Committee (European Economic and Social Committee 2021), together with comparable national bodies, occupies the institutional seam between the public hard-law floor and the private, co-regulatory and partnership mechanisms operating above it. Platforms of this kind neither legislate in the strict sense, nor merely observe implementation from the outside. They can instead be understood as regulatory intermediaries: they translate EU standards into sector-specific practice, facilitate implementation and return the expertise and feedback generated through that process to EU rule-makers (Abbott, Levi-Faur and Snidal 2017). Their importance lies in performing one of the least visible functions of circular economy governance: keeping its otherwise dispersed components connected. Leadership in the circular transition is therefore not a competence allocated once and for all, but a continuing problem of coordination across levels, sectors and forms of normativity (Hooghe and Marks 2003; Jänicke and Quitzow 2017). Stakeholder platforms matter because they institutionalise that problem rather than assuming that legislation alone can resolve it.

The present risk is that this functional allocation will not stabilise, but collapse. The political stalling of the Green Claims proposal may leave the consumer-facing layer under-governed precisely as market-integration instruments are being asked to carry an increasing share of the transition's regulatory ambition. Those instruments can reduce fragmentation, structure secondary-material markets and create the conditions for industrial scale. They cannot, without more, supply the precautionary floor, consumer trust or rights-based infrastructure on which circular participation depends. One rationale should not defeat the others, and a good regulatory policy should allow each to perform the function for which it is institutionally and constitutionally suited. In this way, market integration is aimed to organise circular markets, environmental protection to justify ecological constraints, and consumer protection to secure the conditions of meaningful participation. The danger is that the most procedurally convenient rationale will cease to operate alongside the others and begin to organise functions it was never designed to discharge, a pattern of regulatory layering and patching already identified within the EU circular economy package itself (Howlett 2019; Fitch-Roy, Benson and Monciardini 2020).

8. *Conclusion: market regulation, circularity and the active consumer*

Seen from Public Economic Law, circular economy law belongs within the existing architecture of EU market regulation. It is also one of its more demanding tests. The central problem is how public authority can organise markets around public-interest objectives while still relying on market mechanisms to give those objectives practical effect. Circularity cannot be produced by command alone. Voluntary corporate conduct, consumer choice and ordinary market incentives are equally insufficient. Different regulatory tasks therefore have to be allocated to different instruments. Public hard law sets basic floors, supplies infrastructure and defines conditions of market access. Market-correcting instruments address externalities and protect weaker actors. Competition law must leave room for necessary cooperation while limiting its anticompetitive use. Partnership mechanisms then become relevant where implementation depends on conduct that public law cannot generate directly.

The two governance matrices developed in the lecture help to locate those instruments, but their function is limited. They identify the actor, the time of intervention and the degree of legal force. They say much less about the rationale that supports the intervention or the constitutional basis on which its burdens are imposed. The stalled Green Claims proposal illustrates the point. The proposal had a clear position in the public, hard-law and ex ante part of the matrix, yet that position did not secure its adoption once the supporting rationale lost political stability. Classification remains useful, but it is only a first step. The durability of an instrument also depends on whether its public justification can withstand political and economic pressure.

The paradigm contest described in this Chapter concerns that justificatory level. Legal bases and institutional choices matter because they connect a measure to a particular account of why EU intervention is warranted. Circularity may be pursued through environmental protection, consumer protection, market integration or competitiveness policy, and in practice several of these rationales will often be present together. Their relationship is not neutral, and the rationale doing the principal justificatory work affects the reach of intervention, the distribution of burdens and the place accorded to other public interests.

A wholesale replacement of one paradigm by another is unlikely. The more obvious risk is gradual expansion of market integration into

functions that depend on the normative claims of environmental and consumer protection. Article 114 is familiar, institutionally workable and often politically easier to defend. Those advantages can make it the preferred route even where the regulatory objective reaches beyond fragmentation of the internal market. Circularity may remain firmly on the policy agenda, while its ecological and consumer-protection rationales are treated mainly as expected benefits of market integration. They would still be present, but in a secondary position. This is why the current contest matters: the rationale chosen to carry the measure also influences which interests are able to shape its design.

The position of the consumer shows the same difficulty in another part of the regulatory structure. Circular economy law does not address the consumer solely through the familiar categories of information asymmetry, unfair practices and contractual weakness. It also expects consumers to help produce circular outcomes. Information duties, repair rights, incentives, infrastructure and product design are used to make that participation possible. The consumer is thus both protected by the regime and assigned a role in its operation.

A consumer can participate meaningfully only if information is reliable, environmental claims are controlled, repair is genuinely accessible and redress is available. Partnership loses its regulatory legitimacy where the consumer is expected to assume responsibility without meaningful control over the conditions of participation. In that situation, the issue of choice and partnership risks becoming a transfer of responsibility rather than a form of regulatory participation. Circular economy legal framework therefore offers a useful view of how market regulation is changing under ecological pressure. It leaves Public Economic Law with practical questions as well as doctrinal ones: how far law can redirect markets while continuing to rely on them; what protection must exist before consumers are expected to act as partners; and whether the public interest can retain its own legal force when policy is increasingly expressed through simplification, competitiveness and market integration.

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CIRCULARISING EU CONSUMER LAW: TOOLS AND QUESTIONS

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SUMMARY: 1. Introduction. – 2. Unfair Commercial Practices Law. – 3. Pre-contractual Disclosure. – 4. Substantive Durability and Repair Rights; European Repair Information Form; European Online Repair Platform. – 5. Summing Up.

1. *Introduction*

In recent years the EU has done a significant amount of work on creation of a legal framework to support development of the circular economy (European Commission (a), 2026), aiming to make the EU the world leader in the circular economy by 2030. This legal framework includes the *Circular Economy Act*, due to be adopted in 2026, which is aimed at creating a Single Market for secondary raw materials, increasing the supply of high-quality recycled materials and stimulating demand for such materials in the EU. Included in this (existing and in some cases, proposed) legal framework are measures such as the Industrial and Livestock Rearing Emissions Directive (2010/75/EU or "IED 2.0"); a New Batteries Regulation requiring batteries placed on the EU market to be sustainable and circular throughout their whole life cycle (2023/1542); the EU strategy for sustainable and circular textiles (COM/2022/141 final); a Regulation on end-of-life vehicles (2026/1738); a Regulation on waste shipments (2024/1157); and a Regulation on Microplastics (2025/2365).

The framework also includes various rules that we would perhaps more typically think of as within the purview of consumer law: rules on unfair practices; pre-contractual information, and seller and manufacturer obligations in relation to the durability and repair of goods. This paper focusses on these provisions: showing how they blend the nuancing to circular ends of traditional consumer law rules (on unfair

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practices, sales, information disclosure); with the development of new approaches (manufacturer repair obligations, the Repair Information Form, and the Online Repair Platform); while also raising some questions as to the interpretation and effectiveness of some of the rules.

2. *Unfair Commercial Practices Law*

The EU regime on unfair practices in business to consumer relations is contained in the Unfair Commercial Practices Directive (UCPD) (2005/29/EC). This applies across all commercial sectors, catching "*any act, omission, course of conduct or representation... [or] commercial communication... by a trader, directly connected with the promotion, sale or supply of a product to...consumers*", "*before, during or after*" a transaction (Art. 3(1)). What we have then is a "cradle to grave" regime, applicable to commercial practices during promotion, negotiation, conclusion, performance, and enforcement of any contract the parties may enter. Indeed, there need not ever actually be a contract. All that matters is that the practice causes or is likely to cause, consumers to take a "transactional decision" that would not otherwise be taken, meaning: "*any decision ….. concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting*" (Art. 2(k)).

Practices may be unfair on the basis that they violate the general ("professional diligence") test (Art. 5(2)). In particular, practices are unfair where they are either misleading (whether by action or omission) or where they are aggressive; within the meaning of the general tests on these issues (Arts. 6-9). There is also a ("black") list of (misleading and aggressive) practices that are always treated as unfair; i.e., without the need to satisfy the general tests (Art. 5(5) and Annex 1). Further the rules are enforceable preventively by public enforcement agencies and consumer bodies, and also ex post by individual consumers who have been affected (Art. 11(a)).

The broad professional diligence concept has so far generally been considered more of an organising high-level principle, with the real work being done by the misleading and aggressive tests and the blacklist (Willett 2010; Koutsias, Willett 2012).

Amendments by the Green Transition Directive

The UCPD has been amended by the Directive empowering consumers for the green transition (The Green Transition Directive- hereafter "GTD") (2024/825), nuancing key generally applicable *UCPD* provisions to circular ends (see generally Keirsbilck 2024; Mac Lennan, De Catelle 2025).

Art. 6(1) has always provided that a misleading action is one that is false, deceives or is likely to deceive the average consumer, thereby causing or being likely to cause a transactional decision that would not otherwise have been taken, in relation to one of a number of elements: e.g. the trader's commitments, the motives for the commercial practice; any statement or symbol in relation to sponsorship or approval of the trader or the product; the price; the need for a service, part, replacement or repair. Also included in the list have always been the 'main characteristics of the product, such as its availability, benefits, risks, execution, composition' etc. Art. 1(2)(a) of the GTD adds to this "main characteristics" list reference to "*environmental or social characteristics, accessories, circularity aspects, such as durability, reparability or recyclability*"; thereby emphasising that these are matters about which a practice can be said to mislead consumers.

Art. 1(2)(b) GTD further amends UCPD Art. 6(1), again expanding the list of matters about which there can be said to be a misleading practice, providing that this also includes:

> "*making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings are made available to consumers*".

This is an even more interventionist provision, which is obviously intended to force traders to think through systematically, and spell out as part of a proper plan, how they will achieve environmental results that they promise, so helping consumers to make informed judgements about whether they trust such plans; or be sanctioned for a misleading practice.

Now we turn to misleading omissions. A practice is a misleading omission if:

> "*in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*" (UCPD Art. 7(1)). Even if information is provided there is still a misleading omission if it is hidden, unclear, unintelligible, ambiguous, or untimely (UCPD Art. 7(2)).

Here again the GTD amends the UCPD, to emphasise the importance of environmental matters. We can see that key to the misleading omissions concept is whether the information omitted is 'material'. GTD Art. 1(3) adds a new Art. 7(7) to the UCPD, providing that:

> "*Where a trader provides a service which compares products and provides the consumer with information on environmental or social characteristics or on circularity aspects, such as durability, reparability or recyclability, of the products or suppliers of those products, information about the method of comparison, the products which are the object of comparison and the suppliers of those products, as well as the measures in place to keep that information up to date, shall be regarded as material information*".

In other words, traders cannot make general comparative statements on environmental matters, without spelling out in detail how such comparisons are, and will continue, to be measured. So, again, this is about encouraging traders to reflect systematically on such issues, and to aid more informed-environmental-consumer decision-making.

There is a point of caution in relation to those cases under the misleading actions and omissions test where, respectively the trader should set out "*implementation plan*", "*measurable and time-bound targets*", etc (where the trader has made an environmental claim related to future environmental performance); and provide "*information about the method of comparison*, [and] *the products which are the object of comparison…*" (where comparisons have been made with other products). Such provisions will only be effective if the said information must be provided in as prominent a manner as the trader's basic

claims. If traders can make prominent claims, e.g. in advertising or on packaging, but then hide the legally mandated information in the terms and conditions or somewhere non-prominent, then consumers are much less likely to find the important mandated information and to be able to use it to make more informed environmental decisions. As indicated above, the misleading omissions test requires material information such as this to be provided in plain and intelligible language, but there is no equivalent requirement in relation to information to be provided under the misleading action test; and neither the misleading action nor omission test makes *any* reference to *prominence*. The answer must surely be to read such a requirement, where appropriate, into the general idea of what is 'misleading' (as an action or omission). On such an approach, runs the argument, it is misleading if legally mandated information is not presented in a manner that is of equal prominence to the trader claims which the legally mandated information is intended to qualify and/or elaborate on.

The next important amendment to the UCPD comes in GTD, Art. 1(4), which adds to the UCPD Annex of 'always unfair' practices (cases in which there is no need even to apply the general tests of misleading actions or omissions) the following:

> A. To Annex, para 2, a new 2a): "*Displaying a sustainability label that is not based on a certification scheme or not established by public authorities.*"
> B. To Annex, para 4, a new 4a), 4b) and 4c):
> - "*Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.*"
> - "*Making an environmental claim about the entire product or the trader's entire business when it concerns only a certain aspect of the product or a specific activity of the trader's business.*"
> - "*Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions*".
> C. To Annex, para 23, new 23 f)-j):
> - "*Any commercial communication in relation to a good containing a feature introduced to limit its durability despite information on the feature and its effects on the durability of the good being available to the trader*".
> - "*Falsely claiming that under normal conditions of use a good has a certain durability in terms of usage time or intensity*".

- "*Presenting a good as allowing repair when it does not*".
- "*Inducing the consumer to replace or replenish the consumables of a good earlier than necessary for technical reasons*".
- "*Withholding information concerning the impairment of the functionality of a good when consumables, spare parts or accessories not supplied by the original producer are used, or falsely claiming that such impairment will happen.*"

Here then we see instances of what are considered to be the most obviously and always misleading environmental claims or omissions being added to the Annex, so that it is clear that these are never justifiable.

There is a clear pattern in the above additions to the misleading actions and omissions concepts and to the Annex of always unfair practices. This is a pattern of nuancing these tools to the particular needs of the circular economy. It is about fostering more informed consumer decision-making on environmental issues, in particular by retaining the flexibility and future proof nature of general clauses, while aiming for maximum specificity on circular matters: carefully specifying numerous ways in which environmental claims may be said to mislead, whether under the misleading action or omission tests, or under the always unfair Annex. This approach is clearly aimed at making it easier for traders to comply with the rules, and for consumers and public enforcers to identify breaches. It should also assist in AI enforcement, with AI being able to be given specific prompts based on the above specific requirements, thereby identifying potential violations relatively easily.

This search for specificity, under the umbrella of a flexible, future-proof general clause, has been a trend in EU consumer law: e.g. with the Unfair Terms in Consumer Contracts Directive (UTCCD) (93/13/EEC) blending the general test of unfairness with the Annex of indicatively unfair terms, and, as we have seen above, the UCPD long since elaborating on the sorts of issues about which a trader might potentially mislead, and also having the Annex of always unfair practices. The difference here is that we see a shift to even greater specificity, focussed on development of the circular economy: moving beyond referring generally to statements or information about the "main characteristics of the product, such as its availability, benefits, risks, execution, composition" (misleading action test), moving beyond general references to "material" information (misleading omissions), and be-

yond the generally applicable depictions of always misleading practices (Annex). The significant number of circular-nuanced additions to the Annex are perhaps especially significant in assisting compliance and enforcement. Most of these are relatively specific and violations should be fairly easy to spot; and certainty and clear goal posts are provided by the fact that there is no need in these cases to apply the general test-no need to ask, e.g., whether the practice would 'mislead' or cause the 'average consumer' to take a different 'transactional decision' (all matters about which there is often significant scope for debate). Environmental claims (as with other things) on the Annex are unfair, full stop.

This approach is part of a broader trend in EU consumer law, such as in relation to dealing with so-called dark practices. The approach, soon to be seen reflected in the Digital Fairness Act, is to look for much greater specificity: to continue for sure to rely on broad general clauses such as under the UCPD and the General Data Protection Regulation (GDPR) (2016/679), but to assist compliance and enforcement by much more specification of examples of types of misleading, aggressive and manipulative online practices that may lead to bad economic decisions or decisions relating to privacy and data (European Commission (b), 2026).

The UCPD regime will often be of most significance in relation to pre-contractual claims. However as noted above, it does also apply to claims (including environmental) at later stages such as during the performance, and enforcement of any contract the parties may enter. As such it would be applicable, e.g., to environmental claims made about digital updates or repair or replacement of physical or digital items.

We now turn to rules applicable solely to the pre-contractual stage.

3. *Pre-contractual Disclosure*

The Consumer Rights Directive (CRD) (2011/83/EU) has long since, inter alia, required that prior to conclusion of a distance (online usually) or off-premises (e.g. concluded at home, a hotel etc) contract, and even in on-premises contract where appropriate, consumers should be provided with information on key issues such as the main characteristics of the goods or services; the price and other charges;

the identity and address of the trader; arrangements for payment, delivery and performance; and procedures for dispute resolution etc (Arts. 5 and 6).

In addition to the above amendments to the UCPD, the GTD amends the CRD, adding a number of new disclosure requirements to aid consumers to make better informed precontractual choices specifically on environmental matters: so as with the UCPD amendments, nuancing the regime to the needs of the circular economy.

Here are some key examples (see generally Keirsbilck 2024; MacLennan, De Catelle 2025).

First, there is the requirement to provide a prominent notice (in harmonised form, specified in Art. 22(a)) a reminder of the existence of the legal guarantee of conformity for goods, owed by the seller to the consumer, and its main elements, including its minimum duration of two years as provided in the Sale of Consumer Goods Directive (SCGD) (2019/771/EU), in a prominent manner (e.g. GTD Art. 2(2)(a), CRD Art. 5(1)(e)). This promotes circularity in cases where the goods are defective at the time of sale, seeking to remind consumers that they have legal remedies for this, against the seller, including the repair remedy (see SCGD, Art. 13(2)); the repair remedy often being viewed as being more environmentally friendly than remedies such as replacement and rescission, as the goods remain in use and are not discarded.

Second, there are similar provisions requiring that where the *producer* offers the consumer a commercial guarantee of durability at no additional cost, covering the entire good and with a duration of more than two years and makes that information available to the seller, then the seller must indicate to the consumer prominently and again in the form specified by Art. 22(a), that this commercial guarantee exists (e.g. GTD Art. 2(2)(b), CRD Art. 5(1) (ea-ed)) ("*'durability' means the ability of the goods to maintain their required functions and performance through normal use*": GTD Art. 2(13), CRD Art. 2(14)(b), SCGD Art. 2(13)).

This is about highlighting to consumers the existence of the commercial guarantee of durability from the producer which may involve (environmentally friendly) repair commitments, and which may exist for longer than the 2-year minimum limitation period for claims against the seller under the *SCGD*.

Third, the prior rule (CRD Art. 6(1)(g)) requiring provision of

information on arrangements for payment, delivery and performance is replaced by one requiring information on 'the arrangements for payment, delivery, *including environmentally friendly delivery options where available*, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy' (GTD Art. 2(3)(a), CRD Art. 6(1)(g)). The clear aim here is to make for informed consumer choices as to how goods will be delivered, helping consumers to choose, if they wish, means of delivery that are the most environmentally friendly.

Fourth, a new requirement is added, for the seller to provide information to the consumer, where applicable, on the 'repairability score' for the goods; or where this is not applicable and provided that the producer makes the information available to the seller, for the seller to provide the consumer with information about the availability and estimated cost of, and procedure for ordering, spare parts that are necessary to keep the goods in conformity, about the availability of repair and maintenance instructions and about repair restrictions (GTD, Art. 2(3)(d), CRD, Art. 6(1)(u)-(v)) ("*'repairability score' means a score expressing the capacity of a good to be repaired, based on harmonised requirements established at Union level*" (GTD Art. 2(1), CRD Art. 2(14(d))).

Here then the focus is on aiding informed consumer decision-making on repairability (as indicated already this often being the most environmentally friendly option); and how to maintain the goods so as to avoid the need for repair in the first place.

Overall, then, the CRD has been amended to improve the prospect of informed pre-contractual consumer decision making in relation to the durability and repairability of goods, and environmentally friendly delivery.

4. *Substantive Durability and Repair Rights; European Repair Information Form; European Online Repair Platform*

We now turn to substantive durability and repair rights introduced by the Right to Repair Directive (RRD) (2024/1799/EU). This amends the obligations and remedies (to encourage repair and recycling) in the seller-consumer contract as laid down in the *SCGD;* in-

troduces a new set of repair obligations on manufacturers; and makes provision for European Repair Information forms, and a European Online Repair platform (see generally Pouikli et al. 2026).

Durability and Repair obligations owed by the seller under the contractual conformity standard

The SCGD, inter alia, provides non-excludable conformity standards in consumer contracts for the sale of goods (Arts. 3, 5, 7 and 21). Art. 7(1) originally provided that the goods shall:

> *"(a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;*
> *(b) where applicable, be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract;*
> *(c) where applicable, be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive; and*
> *(d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling".*

In this form, one could conceivably read into the open textured references to "quality" and "fitness for purpose" the idea that goods should not be damaging to the environment. In addition, the para d) reference to 'durability' may be said to go to environmental friendliness, in that the longer a product lasts (without needing to be discarded) the more it can be said to be environmentally friendly.

The RRD inserts the word "repairability", with para d) now reading that the goods should "*be of the quantity and possess the qualities and other features, including in relation to durability, repairability, functionality, compatibility and security etc.…*" (RRD Art. 16). This adds a further circular economy emphasis, with repairability building on durability as an environmentally friendly requirement: it is one thing for

the goods to be durable, but it is even more environmentally friendly if when they are insufficiently durable or are defective in whatever manner, they are repairable and therefore need not be discarded.

Repair Remedies against the Seller

The RRD then builds further on this repairability theme by seeking to encourage repair as a consumer remedial choice.

The remedies scheme is set out in SCGD Art. 13:

> "*1. In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article.*
> *2. In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:*
> *(a) the value the goods would have if there were no lack of conformity;*
> *(b) the significance of the lack of conformity; and*
> *(c) whether the alternative remedy could be provided without significant inconvenience to the consumer.*
> *3. The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2.*
> *4. The consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or the termination of the sales contract in accordance with Article 16 in any of the following cases:*
> *(a) the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement in accordance with Article 14(2) and (3), or the seller has refused to bring the goods into conformity in accordance with paragraph 3 of this Article;*
> *(b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity;*
> *(c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or*
> *(d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer.*
> *5. The consumer shall not be entitled to terminate the contract if the*

lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller.
6. The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment.
7. Member States may regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies."

We see then that, impossibility and disproportionality aside, the consumer has a free choice between repair and replacement at the first tier of remedies. The RRD seeks to encourage consumers to choose repair by providing that the minimum 2-year limitation period for claims will be extended by 1 year if the consumer chooses repair (RRD Art. 16(2)(a), SCGD, Art. 10(2)(a)); and that the seller should inform the consumer of the right to choose between repair and replacement and the extension of the limitation period if repair is chosen (RRD Art. 16(3), SCGD Art. 13(2)(a)). (Another option is for member states not to use the minimum 2-year limitation period plus the extension in cases where repair is chosen; but simply to have a general limitation period of at least 3 years at least for the repair remedy-RRD, Art. 16 (b) and (c), SCGD Arts. 10(3) and (5)(a)).

Clearly the general idea of these rules is that repair is preferable as it keeps the product in use, in contrast to replacement which may result in the seller discarding the defective product. However, one thing which is not clear about the rule on extending what would otherwise be a 2-year limitation period, is whether this extension covers cases in which on the facts in question, *more than 2 years have already elapsed*, e.g. 2 years and 2 months. In a case such as this, is the limitation period extended to 3 years, so that the consumer's claim (for repair) is covered when they would otherwise have been out of time? Alternatively, must the dispute triggering the extension of the limitation period have taken place within the 2-year limitation period, with the extension only being applicable to *future* defects which emerge after the 2-year period has elapsed? This issue requires further research.

Finally, the *RRD* aims to encourage repair by amending Art. 14(1) SCGD, which requires that repairs or replacements shall be carried out:

"*(a) free of charge;*
(b) within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity; and
(c) without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods".

The *RRD* adds to this, providing that:

"*During repair, depending on the specificities of the relevant category of goods, in particular of the need of the consumer to have such goods permanently available, the seller may provide the consumer free of charge with a replacement good, including a refurbished good, on loan. The seller may provide, at the explicit request of the consumer, a refurbished good to fulfil his obligation to replace the good.*" (RRD Art. 16(4), SCGD Art. 14(1)).

The idea, then, is to further encourage repair by including the possibility of the consumer receiving replacement goods during a repair, and to yet further foster environmental friendliness by encouraging recycling through the use of refurbished goods as temporary replacements during repair. Of course, the limitation here is that while the consumer can request such temporary replacement, there is no obligation on the seller to provide them.

Manufacturer Repairs

RRD Art. 5 introduces certain repair obligations on manufacturers. It is provided that:

"*1. Member States shall ensure that upon the consumer's request, the manufacturer shall repair goods for which, and to the extent that, repairability requirements are provided for by Union legal acts listed in Annex II. The manufacturer shall not be obliged to repair such goods where repair is impossible. The manufacturer may sub-contract repair in order to fulfil its obligation to repair.*
2. The repair pursuant to paragraph 1 shall be carried out subject to the following conditions:
(a) it shall be carried out either free of charge or for a reasonable price;
(b) it shall be carried out within a reasonable period of time from the moment the manufacturer has physical possession of the good, has received the good or has been given access to the good by the consumer;
(c) the manufacturer may provide the consumer with the loan of a

replacement good free of charge or for a reasonable fee for the duration of the repair; and
(d) in cases where the repair is impossible, the manufacturer may offer the consumer a refurbished good.
3. Where the manufacturer obliged to repair pursuant to paragraph 1 is established outside the Union, its authorised representative in the Union shall perform the obligation of the manufacturer. Where the manufacturer has no authorised representative in the Union, the importer of the good concerned shall perform the obligation of the manufacturer. Where there is no importer, the distributor of the good concerned shall perform the obligation of the manufacturer. The authorised representative, importer and distributor may sub-contract repair in order to fulfil their obligation to repair.
4. Manufacturers that make spare parts and tools available for goods covered by Union legal acts listed in Annex II shall offer these spare parts and tools at a reasonable price that does not deter repair.
5. Manufacturers, or, where applicable, authorised representatives, importers or distributors who have an obligation to repair pursuant to this Article shall ensure that consumers can access, via a free access website, information on the indicative prices that are charged for the typical repair of goods covered by Union legal acts listed in Annex II.
6. Manufacturers shall not use any contractual clauses, hardware or software techniques that impede the repair of goods covered by Union legal acts listed in Annex II unless justified by legitimate and objective factors including the protection of intellectual property rights under Union and national law. Manufacturers shall, in particular, not impede the use of original or second-hand spare parts, compatible spare parts and spare parts issued from 3D-printing, by independent repairers when those spare parts are in conformity with requirements under Union or national law such as requirements on product safety or in compliance with intellectual property. This paragraph is without prejudice to the specific requirements of Union legal acts listed in Annex II and without prejudice to Union and national law providing for the protection of intellectual property rights.
7. Manufacturers shall not refuse to repair goods covered by Union legal acts listed in Annex II for the sole reason that a previous repair has been performed by other repairers or by other persons.
8. Without prejudice to the obligation to repair under this Article, consumers may seek repair from any repairer of their choice.
9. The Commission shall adopt delegated acts in accordance with Article 20 to amend Annex II by updating the list of Union legal acts laying down repairability requirements in the light of regulatory developments. The Commission shall adopt such delegated acts without

> *undue delay after publication of the respective Union legal act, and at the latest 12 months after such publication*".

RRD Art. 6 aims to help inform consumers as to these manufacturer repair obligations, providing that:

> "*Member States shall ensure that the manufacturer or, where applicable, the authorised representative, importer or distributor make available free of charge, at least for the entire duration of their obligation to repair pursuant to Article 5, information on their repair services in an easily accessible, clear and comprehensible manner*".

Manufacturers were never previously under any general legal obligations in relation to repair, other than being bound (contractually) to perform whatever repairs they may have promised under the guarantees that they may choose to provide. Even under this new provision they are only required to repair where repairability requirements are provided for by the Union legal acts listed in Annex II (see below). It may be useful now to support these legal acts in Annex II with these various provisions in RRD, Arts. 5 and 6 e.g. as to cost, time, temporary replacements etc. One possible problem may be that the entitlement to charge a 'reasonable price' could encourage some manufacturers to charge for repairs that they would previously have provided for free under their guarantees. This will need to be monitored by future research.

European Repair Information Form

RRD Art. 4(1) provides that repairers may provide consumers with the European Repair Information Form (ERIF) set out in Annex I (see below), which should be provided on a durable medium and within a reasonable period of time after the request and before the consumer is bound by a contract for the provision of repair services (see Annex 1 below). This is to be provided free (Art. 4(2)), but "*where a diagnostic service, including a physical or remote examination is needed to identify the nature of the defect, the type of repair and to estimate the price of repair, the repairer may request the consumer to pay the necessary costs of this service…. [and] the repairer shall inform the consumer about the costs of the diagnostic service*" (Art. 4(3)).

Under Art. 4 the ERIF must specify the following repair conditions in a clear and comprehensible manner:

> "*(a) the identity of the repairer;*
> *(b) the geographical address at which the repairer is established as well as the repairer's telephone number and email address and, if available, other means of online communication which enable the consumer to contact, and communicate with, the repairer in a quick, efficient and accessible manner;*
> *(c) the good to be repaired;*
> *(d) the nature of the defect and the type of repair suggested;*
> *(e) the price or, if the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and the maximum price for the repair;*
> *(f) the time needed to complete the repair;*
> *(g) the availability of temporary replacement goods during the time of repair and the costs of temporary replacement, if any, for the consumer;*
> *(h) the place where the consumer hands over the good for repair;*
> *(i) where applicable, the availability of ancillary services, such as removal, installation and transportation, offered by the repairer, and the detailed costs of those services, if any, for the consumer;*
> *(j) the period of validity of the European Repair Information Form;*
> *(k) where applicable, additional information".*

Art. 4(5) provides that the repairer must not change the conditions of repair specified in the ERIF for 30 calendar days from when the form was provided to the consumer. The repairer and the consumer can agree a longer period of validity for the ERIF. Where the consumer accepts, within the period of validity, the conditions set out in the ERIF the repairer must perform the repair service under those conditions.

Art. 4(6) links the ERIF with the CRD, by providing that where the repairer has supplied a complete and accurate ERIF to the consumer, this fulfils the various *CRD* information requirements in relation to:

- the main features of the repair service (CRD Arts. 5(1)(a) and 6(1)(a));
- the repairer's identity and contact information (CRD Art. 5(1)(b) and Art. (6)(1)(b) and (c));
- the price (CRD Arts. 5(1)(c) and 6(1)(e)); and
- the arrangements for the performance and the time to perform the repair service (CRD Arts. 5(1)(d) and 6(1)(g)).

These various ERIF requirements provide a useful support for whatever repairs are being carried out, whether by the manufacturer under the provisions discussed above, or by the seller in the form of remedies for breach of the conformity standard under the *SCGD* also discussed above: a way of improving the take up and efficiency of the repair process.

European Online Repair Platform

Further support will be provided by the provision in RRD Art. 7(1) for establishment of a European online platform for repair ("European online platform" – EOP), enabling consumers to source repairers and, where applicable, sellers of refurbished goods, buyers of defective goods for refurbishment or community-led repair initiatives. Further, under Art. 7(1), the EOP must include links to national online repair platforms which should be set up by member states by 31 July 2027 (Art. 7(3)). Member States may extend the coverage of their national sections or online platforms to cover, in addition to repairers, also sellers of goods that have been refurbished, and buyers of defective goods for refurbishment or community-led repair initiatives (Art. 7(4)).

Use of national sections and online platforms in the EOP must be free of charge for consumers; while registration is voluntary for repairers, sellers of goods that have been refurbished, and buyers of defective goods for refurbishment or community-led repair initiatives (Art. 7(5)).

Art. 7(6) provides that national sections and the national online platforms shall:

> "*(a) include search functions regarding goods, location of repair services, including a map based function, the cross-border provision of services, repair conditions, including the time needed to complete the repair, the availability of temporary replacement goods and the place where the consumer hands over the goods for repair, availability and conditions of ancillary services, including removal, installation and transportation, offered by repairers, and applicable European or national repair quality standards;*
> *(b) where applicable, include a search function to find sellers of goods that have been subject to refurbishment, purchasers of defective goods for refurbishment or community-led repair initiatives;*
> *(c) enable consumers to request the European Repair Information Form from repairers offering it;*

(d) allow for regular updates of contact information and services by repairers;
(e) allow repairers to indicate their adherence to applicable Union or national quality standards;
(f) enable accessibility through national websites connected to the Single Digital Gateway established by Regulation (EU) 2018/1724 of the European Parliament and of the Council;
(g) ensure accessibility for persons with disabilities; and
(h) provide contact forms for users to report technical issues related to the functioning of the European online platform as well as inaccuracies concerning the information provided by repairers, and, where applicable, by the sellers of goods that have been subject to refurbishment, purchasers of defective goods for refurbishment or community-led repair initiatives."

The EOP will enable collection of non-personal data on the functioning of the national sections (Art. 7(7)); while Member States and the Commission should take appropriate steps to inform consumers, relevant economic operators and sellers about the availability of the EOP (Art. 7(7)).

As with the ERIF, the EOP is aimed at improving the take up and efficiency of repair, whether to be carried out by sellers or manufacturers; as well as further contributing to the circular economy by putting consumers in touch with sellers of refurbished goods or those who may wish to buy defective goods to refurbish them.

5. *Summing Up*

This paper has discussed how the EU has made various amendments of pre-existing unfair commercial practices and pre-contractual disclosure law, to prevent businesses misleading consumers, and to aid informed consumer decision making, in relation to environmental matters such as durability, reparability or recyclability. It has also discussed how the EU has reformed sales law to encourage repair and recycling; added manufacturer repair obligations; and introduced the ERIF and EOP to help facilitate repairs and recycling. Some questions have been raised, e.g. as to the degree of prominence required under some of the unfair practices rules, and as to the correct interpretation of the repair-oriented remedies regime in sales law; and further research is needed on these issues and more broadly as to the operation of the new regime as we go forward.

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Annex 1 of Right to Repair Directive
European Repair Information Form

Part I
Identity and contact details of the repairer providing the repair service

Repairer	[Identity]
Address	[Geographical address to be used by the consumer]
Telephone number	
Email address	
If provided by the repairer, other means of online communication, which enable the consumer to contact, and communicate with, the repairer quickly and efficiently	

Part II
Information on the repair service

Good to be repaired	[Identification of the good]
Nature of the defect	[Description of the defect]
Type of repair suggested	[What kind of measures will be taken to repair the defect]
Price for repair or, if it cannot be calculated, the applicable calculation method and maximum price of repair	[This means the total amount or, if not possible, the calculation method and the ceiling for the repair service, in EUR/national currency]
Time to complete repair	[Time by which the repairer undertakes to perform the service in days]
Availability of temporary replacement goods	[A temporary replacement good means that the consumer will receive an equivalent good for use during the time of repair, the repairer has to indicate 'Yes' or 'No']
If yes, indicate the corresponding costs, if any:	[In EUR/national currency]
Place to hand over the goods	[The place where the consumer hands over the goods for repair]
If applicable, the availability of ancillary services	[Indicate if and to which extent ancillary services such as removal, installation and transportation are offered, or 'None' if no ancillary service is offered for the repair concerned]
If yes, indicate the corresponding costs, if any:	[In EUR/national currency, per service offered]
The period of validity of the European Repair Information Form	[Period of validity of at least 30 days]
If applicable, additional information	

Indications between square brackets provide explanations for the repairer and must be replaced with the corresponding information.

Annex II of Right to Repair Directive

Annex II
List of Union Legal Acts Laying Down Repairability Requirements

1. For household washing machines and household washer-dryers, Commission Regulation (EU) 2019/2023

2. For household dishwashers, Commission Regulation (EU) 2019/2022

3. For refrigerating appliances, Commission Regulation (EU) 2019/2019

4. For electronic displays, Commission Regulation (EU) 2019/2021

5. For welding equipment, Commission Regulation (EU) 2019/1784

6. For vacuum cleaners, Commission Regulation (EU) No 666/2013

7. For servers and data storage products, Commission Regulation (EU) 2019/424

8. For mobile phones, cordless phones and slate tablets, Commission Regulation (EU) 2023/1670

9. For household tumble dryers, Commission Regulation (EU) 2023/2533

10. For goods incorporating light means of transport batteries, Regulation (EU) 2023/1542 of the European Parliament and of the Council

NEW CONSUMER RIGHTS IN THE CIRCULAR ECONOMY

Martin Morgan-Taylor[*]

SUMMARY: 1. Introduction. – 2. The direction of travel: from transaction protection to lifecycle protection. – 3. The UK baseline: goods, services and digital content. – 3.1. Consumer Rights Act 2015: goods. – 3.2. Consumer Rights Act 2015: services and digital content. – 3.3 Why the baseline is not enough. – 4. Information, cancellation and online purchasing. – 4.1. Consumer Contracts Regulations 2013 and EU Consumer Rights Directive 2011/83/EU. – 4.2. The architecture of online choice. – 5. Cross-border purchasing between the EU and the UK after Brexit: divergence. – 5.1. Post-Brexit customs taxes. – 5.2 Consumer-rights significance. – 6. Unfair terms, unfair practices and the limits of consent. – 6.1. Consumer Rights Act 2015: unfair terms. – 6.2. Unfair commercial practices. – 7. Circular economy policy: why consumer law is involved. – 7.1. EU Circular Economy Action Plan. – 7.2. Why information is treated as a circular-economy tool. – 8. Directive (EU) 2024/825: empowering consumers for the green transition. – 8.1. Amendments to two existing directives. – 8.2. Misleading actions: environmental, social and circularity characteristics. – 8.3. Definitions: environmental claim and generic environmental claim. – 8.4. Annex I blacklist: practices prohibited in all circumstances. – 8.5. Future environmental performance. – 8.6. Sustainability labels and certification schemes. – 9. Durability, software support and repairability information. – 9.1. Commercial guarantee of durability and legal guarantee of conformity. – 9.2. Software updates. – 9.3. Reparability score and spare parts information. – 10. Premature obsolescence and product life. – 11. Directive (EU) 2024/1799: repair of goods directive. – 11.1. Purpose and relationship with other EU measures. – 11.2. Repair outside the seller's liability. – 11.3. European repair information form and repair platform. – 11.4. Repair within the seller's liability period. – 12. What consumers gain, and what they do not gain. – 13. EU measures and the UK's position. – 14. The future direction of consumer rights.

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1. *Introduction*

This paper examines the policy changes in consumer protection for online sales, from linear transactions to the emerging circular economy agenda. It briefly outlines the development of consumer rights from the traditional purchase of goods and services towards a wider model concerned with online markets, cross-border purchasing, reliable sustainability information, product durability and repair. The coverage is deliberately succinct on historical background and gives greater weight to the emerging direction of European consumer law policy. The legal position is correct as of 9 October 2026.

We will also examine the direction of travel from a UK point of view with respect to cross-border sales with the EU. Post-Brexit divergence may affect consumer sales in the circular economy. New EU measures no longer automatically become law in Great Britain; adopting equivalent rules generally requires domestic legislation. Existing UK legislation derived from earlier EU measures remains relevant, subject to subsequent amendment or repeal (European Union (Withdrawal) Act 2018, sections 1-2, as amended). However, EU rules may still affect UK businesses selling to EU consumers, depending on the applicable law and activity concerned. (Note that although Northern Ireland is within the UK, it requires separate consideration under the relevant post-Brexit arrangements.)

2. *The direction of travel: from transaction protection to lifecycle protection*

Consumer law is no longer concerned only with whether a single transaction went wrong. Of course goods must still meet statutory standards, services must be performed with reasonable care and skill, and traders must give basic information before the consumer is bound. However the newer circular economy trajectory is wider. It asks, with respect to these circular economy issues, whether the consumer had reliable information before purchase; whether the online market design distorted choice; whether cross-border charges were clear; whether environmental claims were specific and verifiable; and whether goods can be maintained, updated and repaired rather than discarded.

This movement can be described as a shift from transactional protection to lifecycle protection. Transactional protection addresses identity of the trader, price, delivery, conformity and cancellation. Lifecycle protection adds durability, repairability, software support, spare parts, sustainability labels and the after-sales repair market. The policy assumption is that individual consumers cannot inspect complex goods or verify sustainability claims for themselves. The law therefore increasingly places information and conduct obligations on professional traders, producers and repairers.

The regimes show a policy progression: consumers are protected as contracting parties, online purchasers, cross-border purchasers and participants in markets that are expected to become more circular.

Stage in development	Main provision or measure	Consumer-rights function
Traditional sale and supply	Consumer Rights Act 2015 (UK); Sale of Goods Act 1979, principally for sales outside the CRA consumer-contract regime, with some provisions still applying to consumer sales	Mandatory standards for goods, services and qualifying digital content; remedies for failure to meet the relevant standards.
Pre-contract and distance contracting	Consumer Contracts Regulations 2013 (UK); EU Consumer Rights Directive 2011/83/EU	Information before the contract, cancellation rights for many distance and off-premises contracts, and clearer allocation of delivery and payment responsibilities.
Fair marketing and unfair practices	Digital Markets, Competition and Consumers Act 2024, Part 4, Chapter 1 (previously the Consumer Protection from Unfair Trading Regulations 2008); EU Directive 2005/29/EC	Control of misleading actions, misleading omissions, aggressive practices and blacklisted practices.

Stage in development	Main provision or measure	Consumer-rights function
Post-Brexit cross-border purchases	UK-EU customs, VAT and excise rules after the end of the Brexit transition period	Consumers in Great Britain buying from overseas retailers may face import VAT, customs duty, carrier charges and separate tax-refund procedures; Northern Ireland has different arrangements.
Sustainable consumption and product lifecycle	EU Circular Economy Action Plan; Ecodesign for Sustainable Products Regulation; Directive (EU) 2024/825; Directive (EU) 2024/1799	Moves consumer law towards durability, repairability, green-claims control and keeping products and materials in use for longer.

3. *The UK baseline: goods, services and digital content*

3.1. Consumer Rights Act 2015: goods

The Consumer Rights Act 2015 is the main UK statute for consumer contracts for goods, digital content and services (Part 1, Chapters 2-4). It consolidated previous UK statutes (which in turn had adopted a number of EU Directives), and implemented elements of the Consumer Rights Directive (Directive 2011/83/EU). For goods, the core terms require satisfactory quality, fitness for a particular purpose made known to the trader, subject to the statutory reliance conditions, and conformity with description. These are statutory terms which the trader cannot exclude by drafting contrary standard terms (Consumer Rights Act 2015, sections 9-11 and 31).

The short-term right to reject, repair or replacement, price reduction and final right to reject give the consumer a structured set of remedies, subject to their statutory conditions. And this remains the foundation of consumer protection for the sale of goods. Durability is already an aspect of satisfactory quality under section 9(3)(e). However, the remedies mainly trigger after non-conformity. They do not in themselves provide comparable pre-contract information about durability, reparability or environmental performance. That information

gap helps explain why the newer EU green-transition measures concentrate on pre-contract information and market conduct (Consumer Rights Act 2015, sections 9 and 19-24).

3.2. Consumer Rights Act 2015: services and digital content

For services, the Consumer Rights Act 2015 requires reasonable care and skill; the core goods conformity obligations generally do not depend on proof that the trader was negligent. Where the services contract does not fix the price or time for performance, the Act supplies reasonableness standards (sections 9-11, 49 and 51-52). Digital content is defined as data produced and supplied in digital form. Within Chapter 3, which principally covers paid digital content and qualifying bundled digital content, it must be of satisfactory quality, fit for a particular purpose and as described (sections 2(9) and 33-36). This was a significant development because products increasingly involve software, streamed content or embedded digital functions. Cloud-based transactions may involve digital content, services, or both; a trader that merely provides the connection through which digital content reaches the consumer is not, for that reason alone, deemed to be the content supplier (section 33(4)).

The digital-content provisions anticipate later sustainability problems. A connected product may be physically sound but become much less useful if software updates stop, if an update reduces performance, or if functions are locked behind incompatible systems. Modern consumer protection therefore has to consider both physical durability and digital continuity over the reasonable lifespan of the product.

3.3. Why the baseline is not enough

This existing baseline remains essential, but it has limits. It is mostly organised around the contract and the trader who supplied the goods, services or digital content. A consumer may still struggle to know before purchase whether a product will last, whether spare parts will be available, whether independent repair is practically possible, or whether a sustainability claim is meaningful. This is where the emerging circular economy developments take over, in order to regulate these pre-contract and post-contract matters more directly.

4. *Information, cancellation and online purchasing*

4.1. Consumer Contracts Regulations 2013 and EU Consumer Rights Directive 2011/83/EU

The UK Consumer Contracts Regulations 2013 implement the Consumer Rights Directive's model of protection through informed choice. For the distance and off-premises contracts which are covered, traders must supply prescribed information before the consumer is bound. This includes the trader's identity, the main characteristics of the goods, services or digital content, the total price or calculation method, additional delivery costs, payment and delivery arrangements, cancellation rights where applicable and, where applicable, the trader's complaint handling policy (Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, regulations 10 and 13 and Schedule 2).

A consumer who buys at a distance often cannot inspect goods as in a shop. The right to cancel many distance contracts normally ends 14 days after delivery of the goods; for services and digital content not supplied on a tangible medium, the normal period ends 14 days after the contract is entered into. Exclusions and conditions apply, and failure to provide cancellation information can extend the period. The consumer may be liable for diminished value caused by handling beyond what is necessary to establish the goods' nature, characteristics and functioning ("use"), but not if the trader omitted the required cancellation information (Consumer Contracts Regulations 2013, regulations 28-31 and 34(9)-(12)).

4.2. The architecture of online choice

Online contracting makes information duties more important but also more difficult. Information may be technically present but practically hidden, scattered through hyperlinks, or displaced by advertising and interface design. A right to information is of limited value if the consumer cannot see it at the decision point. The new Directive (EU) 2024/825 tries to address this by requiring harmonised notices and labels for certain guarantee information, and by requiring specific information on durability, reparability and software updates in appropriate cases.

5. *Cross-border purchasing between the EU and the UK after Brexit: divergence*

5.1. Post-Brexit customs taxes

Cross-border purchasing shows that consumer protection is not only about contract terms. Since the end of the Brexit transition period, goods sent from the EU to Great Britain have been subject to import formalities. (Note that Northern Ireland has different arrangements.) Customs duty, VAT and excise duty are distinct charges (Marshall 2018). Goods satisfying the relevant rules of origin can qualify for zero tariffs under the UK-EU Trade and Cooperation Agreement; ordering goods from an EU retailer does not by itself establish their origin (HM Revenue & Customs 2021).

For purchases sent to Great Britain, non-excise consignments worth £135 or less currently benefit from customs-duty relief, but this does not mean they are VAT-free. VAT is normally collected at purchase by the seller for these consignments; for goods above £135 it is generally collected by the delivery company from the buyer. Customs duty above that threshold depends on the goods and their origin. Excise goods have separate rules. Carriers may also charge administration fees; these are distinct from taxes (HM Revenue & Customs, current website; Marshall 2018). The Government's July 2026 consultation response announced removal of the low-value customs-duty relief and new arrangements by October 2028 at the latest. This is an announced reform, rather than the rule currently applying (HM Treasury 2026).

An apparently cheaper foreign online purchase may therefore cost more once applicable taxes, duties and carrier charges are included. Returns may also involve a separate tax-refund process. Official guidance directs consumers returning goods to claim VAT or customs-duty refunds using the appropriate form (HM Revenue & Customs, current website.). The Institute for Government highlights the practical difficulty of these procedures for consumers (Marshall 2018). These additional costs and procedures are highly likely to create friction in cross-border trade.

5.2. Consumer-rights significance

These issues are relevant to the evolution of consumer law be-

cause cross-border online purchasing can make the consumer's total cost and practical remedy position less obvious. The trader's headline price may not be the consumer's final cost. A consumer returning defective goods across a customs border may face additional procedures. Modern consumer protection therefore has to consider online information, customs charges, delivery intermediaries and returns processes. Differences between the EU and UK regimes may create confusion and discourage cross-border transactions.

6. *Unfair terms, unfair practices and the limits of consent*

6.1. Consumer Rights Act 2015: unfair terms

The Consumer Rights Act 2015 controls unfair terms in consumer contracts and consumer notices. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the consumer's detriment. An unfair term or notice is not binding on the consumer (section 62). Fairness is distinct from whether the consumer agreed to the contract: a signature or click does not itself make every term fair or binding. The law therefore controls the enforceability of terms even where a contract has been validly agreed. This is relevant to online sales, including terms presented through hyperlinks, where the Act's existing fairness and transparency requirements apply (Consumer Rights Act 2015, sections 62, 64 and 68).

6.2. Unfair commercial practices

The Consumer Protection from Unfair Trading Regulations 2008 implemented the EU Unfair Commercial Practices Directive 2005/29/EC. For practices taking place from 6 April 2025, their main prohibitions were replaced by Part 4, Chapter 1 of the Digital Markets, Competition and Consumers Act 2024. The Act continues protection against misleading actions, misleading omissions and aggressive practices, with a list of practices deemed to be unfair in all circumstances (sections 225-230 and Schedule 20; SI 2025/272, regulation 2). The 2008 Regulations remain relevant to earlier conduct and saved private rights of redress (section 252). Separately, Directive (EU) 2024/825

amends the EU Directive by expressly addressing environmental, social and circularity characteristics and adding targeted prohibitions. This makes sustainability claims more explicit within the existing legal protection of consumer choice (Directive (EU) 2024/825, Article 1 and Annex).

7. *Circular economy policy: why consumer law is involved*

7.1. EU Circular Economy Action Plan

The European Commission describes the circular economy as one in which products and materials are kept in circulation for as long as possible and waste and resource use are minimised (European Commission, current website.-a). It contrasts that approach with the linear model of "take, make, use, dispose". The Commission links the transition to reduced pressure on natural resources, biodiversity, climate neutrality and economic resilience (European Commission, current website.-a).

The 2020 Circular Economy Action Plan is important because it addresses the whole life cycle of products, including design, waste prevention and keeping resources in the EU economy for as long as possible (COM(2020) 98 final). The Commission's current overview identifies the later Directive (EU) 2024/825 as part of that policy framework, providing better point-of-sale information on durability, reparability and legal guarantee rights. It also identifies Directive (EU) 2024/1799 as the measure establishing the "right to repair" (European Commission, current website.-a).

7.2. Why information is treated as a circular-economy tool

Consumer law is relevant because markets cannot reward the manufacturers of durable and repairable goods unless consumers can identify them. A consumer choosing between two products needs more than a general claim that one is "green" or "sustainable". They need reliable information about the features that matter: expected durability, the producer's guarantee (and its terms), whether software will be supported in the future with updates, whether spare parts are available, whether repair is restricted, and whether a claimed envi-

ronmental benefit applies to the whole product or only one minor aspect.

The new policy is therefore both demand-side and supply-side, helping both consumers and manufacturers. Product regulation can require better design from manufacturers. And consumer law can help direct demand towards products that last longer and are easier to repair. Directive (EU) 2024/1799 expressly places Directive (EU) 2024/825 in this framework: Regulation (EU) 2024/1781 provides a framework for setting product-specific ecodesign requirements, Directive (EU) 2024/825 supplies demand-side information at the point of sale, and the Repair of Goods Directive promotes repair and reuse in the after-sales phase (Directive (EU) 2024/1799, recital 5; Regulation (EU) 2024/1781, Articles 4-8).

8. *Directive (EU) 2024/825: empowering consumers for the green transition*

8.1. Amendments to two existing directives

Directive (EU) 2024/825 is not a complete code for sustainability or repair (European Commission, current website.-b). It amends two existing consumer-law measures. First, it amends the Unfair Commercial Practices Directive 2005/29/EC by expanding the matters about which commercial practices may be misleading and by adding new blacklisted practices. Secondly, it amends the Consumer Rights Directive 2011/83/EU by adding pre-contract information duties concerning durability guarantees, legal guarantee information, software updates, reparability and environmentally friendly delivery options.

Directive 2024/825 amendment	**Existing measure amended**	**Main effect**
Article 1	Unfair Commercial Practices Directive 2005/29/EC	Adds environmental, social and circularity characteristics to the misleading-practices framework and adds new practices prohibited in all circumstances.

Directive 2024/825 amendment	Existing measure amended	Main effect
Article 2	Consumer Rights Directive 2011/83/EU	Adds pre-contract information duties and harmonised presentation of legal guarantee and commercial guarantee information.
Articles 3-6	Directive (EU) 2024/825 itself	Required national implementation by 27 March 2026 and application from 27 September 2026; Commission review is due by 27 September 2031.

The Directive's recitals explain the purpose clearly. Consumers should be able to make informed purchasing decisions that contribute to sustainable consumption. Traders should provide clear, relevant and reliable information, and EU consumer law should tackle unfair commercial practices that mislead consumers or prevent them from making sustainable consumption choices (Directive (EU) 2024/825, recitals 1-3 and Article 1).

8.2. Misleading actions: environmental, social and circularity characteristics

Article 1 of Directive (EU) 2024/825 amends Article 6(1)(b) of the Unfair Commercial Practices Directive so that a product's main characteristics expressly include environmental and social characteristics and circularity aspects such as durability, reparability and recyclability. A false or deceptive presentation of those matters may be a misleading action where it causes, or is likely to cause, the average consumer to take a transactional decision they would not otherwise have taken (Directive (EU) 2024/825, Article 1(2)(a)).

The legal significance is that durability, reparability and recyclability are expressly included in the misleading-practices framework. If a trader markets a product by reference to those characteristics, the claim must be legally defensible in the same way as claims about price, specification or performance.

8.3. Definitions: environmental claim and generic environmental claim

Directive (EU) 2024/825 inserts definitions into the Unfair Commercial Practices Directive. An "environmental claim" covers a message or representation not mandatory under Union or national law, in any form and in a commercial communication, stating or implying that a product, product category, brand or trader has a positive or zero environmental impact, is less damaging than others, or has improved its impact over time. A "generic environmental claim" is a written or oral environmental claim, including through audiovisual media, not included on a sustainability label and whose specification is not provided in clear and prominent terms on the same medium (Directive (EU) 2024/825, Article 1(1)(b), inserting Article 2(o)-(p) into Directive 2005/29/EC).

This distinction is important; EU law is not banning all environmental claims. It is pushing traders away from vague advertising towards specific, checkable claims. A general claim such as "eco-friendly" or "green" is much more legally vulnerable than a concrete statement explaining the precise environmental feature, its basis and its limits.

8.4. Annex I blacklist: practices prohibited in all circumstances

Some practices remain subject to the ordinary misleading-practices assessment. Others are added to Annex I of the Unfair Commercial Practices Directive and are prohibited in all circumstances.

For these listed practices, there is no separate need to establish that the practice caused, or was likely to cause, the average consumer to take a transactional decision they would not otherwise have taken. The Directive therefore combines flexible standards with specific prohibitions, providing greater legal certainty about what is permitted (Directive (EU) 2024/825, Article 1(4) and Annex).

Practice	Provision in Directive (EU) 2024/825 / UCPD as amended	Impact for consumers
Displaying an unsupported sustainability label	New Annex I point 2a	A sustainability label must be established by a public authority or based on a qualifying certification scheme.
Making a generic environmental claim without recognised excellent environmental performance	New Annex I point 4a	Generic claims require recognised excellent environmental performance relevant to the claim; Article 2(s) defines the qualifying standards.
Overstating the scope of an environmental benefit	New Annex I point 4b	A trader cannot imply that the whole product or business has a benefit where it applies only to one aspect.
Product-level offsetting claims	New Annex I point 4c	A product cannot be presented as having a neutral, reduced or positive environmental impact in terms of greenhouse gas emissions based on greenhouse-gas offsetting.
Presenting legal requirements as distinctive features	New Annex I point 10a	A trader cannot present a requirement imposed by law on all products in the relevant category on the Union market as a distinctive feature of its offer.
Obsolescence and false repairability claims	New Annex I points 23d-23j	Prohibits withholding adverse-update information, presenting functionality-only updates as necessary, specified communications about durability-limiting features, false durability or reparability claims, premature replacement or replenishment of consumables, and withholding or falsifying information about impairment from non-original parts or consumables.

8.5. Future environmental performance

The Directive also addresses future-looking claims, such as a promise to become climate neutral by a particular date. Article 6(2)(d) of the Unfair Commercial Practices Directive addresses claims lacking clear, objective, publicly available and verifiable commitments in a detailed and realistic implementation plan. The plan must include measurable and time-bound targets and other relevant elements, such as resource allocation, and be regularly verified by an independent third-party expert whose findings are available to consumers. The practice is misleading where it causes, or is likely to cause, the average consumer to take a transactional decision they would not otherwise have taken (Directive (EU) 2024/825, Article 1(2)(b); recital 4).

The consumer-rights point is that aspirational branding is not the same as a substantiated transition plan. The Directive does not require the law to wait until the target date has passed. It asks whether the claim had an adequate evidential and organisational basis when it was made.

8.6. Sustainability labels and certification schemes

A sustainability label compresses complex information into a badge or symbol. The risk is that traders create labels that look official but are self-awarded or weakly verified. Directive (EU) 2024/825 therefore prohibits displaying such a label unless it is established by a public authority or based on a certification scheme. The scheme's terms must be publicly available and participation transparent, fair and non-discriminatory. Requirements must be developed with relevant experts and stakeholders, with procedures for non-compliance and withdrawal or suspension. Objective monitoring must be carried out by a competent third party independent of the trader and scheme owner (Directive (EU) 2024/825, Article 1(1)(b) and Annex, inserting Article 2(r) and Annex I point 2a into Directive 2005/29/EC).

This does not mean every permitted label proves that a product is sustainable in every respect. A label may certify only defined criteria. The value is that labels should be traceable to a public authority or a genuine certification scheme rather than being invented as marketing decoration.

9. *Durability, software support and repairability information*

9.1. Commercial guarantee of durability and legal guarantee of conformity

Directive (EU) 2024/825 amends the Consumer Rights Directive 2011/83/EU to make guarantee information more visible. A commercial guarantee of durability is a producer's commitment that the good will maintain the functions and performance required through normal use during the stated period, with the producer directly liable for repair or replacement if durability is not maintained. The harmonised label must be used prominently where the producer offers such a guarantee at no additional cost, covering the entire good and lasting more than two years, and makes the information available to the trader (Directive (EU) 2024/825, Article 2(1)-(3)).

The Directive also requires a harmonised notice for the legal guarantee of conformity. The notice must contain the main elements of the legal guarantee, including the minimum two-year duration under Directive (EU) 2019/771 and the possibility that national law gives a longer period (Directive (EU) 2024/825, Article 2(5), inserting Article 22a into Directive 2011/83/EU). The legal function is to prevent confusion between a statutory legal guarantee and a voluntary commercial guarantee.

9.2. Software updates

For goods with digital elements, digital content and digital services, consumers must be told the minimum period, expressed as a period of time or by reference to a date, for which the producer or provider provides software updates, where that information is made available to the trader. For this information duty, software updates mean free updates, including security updates, necessary to keep the product in conformity. This does not create one universal update period or displace existing conformity or product-specific obligations. It makes the disclosed support period visible before purchase (Directive (EU) 2024/825, Article 2(1)-(3); recital 33).

The Unfair Commercial Practices Directive as amended prohibits withholding information that a software update will negatively affect the functioning of goods with digital elements or the use of digital

content or digital services. It also prohibits presenting an update as necessary when it merely enhances functionality. These provisions address the practical reality that a digital product's value depends on the software environment in which it operates (Directive (EU) 2024/825, Annex, inserting Annex I points 23d-23e).

9.3. Reparability score and spare parts information

Where applicable, the trader must provide the "reparability score" based on harmonised Union requirements before the consumer is bound. Where no such score applies, and the producer makes the information available to the trader, the trader must disclose the availability, estimated cost and ordering procedure for spare parts necessary to keep the goods in conformity, the availability of repair and maintenance instructions, and repair restrictions. The trader is not required to actively seek this information from the producer. The objective is an informational one, rather than a universal duty to make every product repairable (Directive (EU) 2024/825, Article 2(1)-(3); recital 36).

The practical importance is that repairability becomes a pre-purchase comparison factor. Consumers may be willing to pay more for a product that can be repaired or updated for longer, but only if that characteristic is visible at the point of decision. And this in turn should drive product development towards sustainability.

10. *Premature obsolescence and product life*

Directive (EU) 2024/825 treats premature obsolescence as both a consumer and an environmental detriment. The recitals refer to practices involving deliberately planning or designing a product with a limited lifespan so that it becomes obsolete or non-functional prematurely. Such practices may lead consumers to buy products that last for less time than expected, while also increasing waste and resource use (Directive (EU) 2024/825, recital 16), as well as costing the consumer more money.

The new Annex I prohibitions address several mechanisms by which product life may be shortened or repair discouraged. These include:

Commercial communications concerning goods containing a feature introduced to limit durability where information about the feature and effect is available to the trader.

False claims about durability under normal use.

Incorrectly presenting goods as allowing repair.

Inducing the consumer to replace or replenish consumables earlier than necessary for technical reasons.

Withholding information about impairment of functionality when consumables, spare parts or accessories not supplied by the original producer are used, or falsely claiming that such impairment will occur.

This is a particularly important example of the evolution of consumer rights. The law is not merely asking whether the product failed and what remedy follows. It is asking whether the trader influenced the consumer's choice by concealing design features, exaggerating durability, discouraging independent repair or pushing unnecessary replacement.

11. *Directive (EU) 2024/1799: repair of goods directive*

11.1. Purpose and relationship with other EU measures

Directive (EU) 2024/1799 on common rules promoting the repair of goods complements the Sale of Goods Directive (EU) 2019/771 and Directive (EU) 2024/825. Regulation (EU) 2024/1781 provides a framework for setting supply-side requirements for sustainable product design; Directive (EU) 2024/825 provides demand-side requirements for better information on durability and reparability at the point of sale. The Repair of Goods Directive then promotes repair and reuse in the after-sales phase (Directive (EU) 2024/1799, recital 5; Regulation (EU) 2024/1781, Articles 4-8).

11.2. Repair outside the seller's liability

For defects outside the seller's liability, the manufacturer must repair at the consumer's request goods for which, and to the extent that, repairability requirements exist under the Union legal acts listed in Annex II, unless repair is impossible. This is not a universal right to repair every consumer product. Repair must be free or for a reason-

able price and completed within a reasonable period after the manufacturer receives or is given access to the goods. Recital 16 explains that the price may reflect repair costs and a customary margin, but should not intentionally deter consumers from using the obligation to repair. Consumers remain free to choose another repairer (Directive (EU) 2024/1799, Articles 1(2)-(3), 5(1)-(2) and 5(8); recital 16).

For goods covered by the Union legal acts listed in Annex II, manufacturers must not impede repair through contractual clauses or hardware or software techniques unless justified by legitimate and objective factors, including intellectual property rights. They must not impede independent repairers' use of compliant original, second-hand, compatible or 3D-printed spare parts, or refuse repair solely because another person previously repaired the goods. Applicable product-specific requirements and intellectual property law remain relevant. Therefore unjustified software locks, parts restrictions or refusal after independent repair could undermine a formal right to request repair (Directive (EU) 2024/1799, Article 5(6)-(7)).

We can consider a household washing machine to illustrate the point. The manufacturer cannot refuse repair solely because another person previously repaired it. This does not resolve every dispute about a later fault: Article 5 and the relevant product-specific repairability requirements still govern the obligation. Motor vehicles (which often have expensive repair bills) are not a listed category in Annex II, so this Directive should not be treated as establishing a general manufacturer duty to repair cars or determining the validity of motor-vehicle warranty restrictions (Directive (EU) 2024/1799, Article 5 and Annex II, as amended).

11.3. European repair information form and repair platform

The European Repair Information Form standardises repair information. Use is voluntary, but a supplied form must contain the prescribed details, including the repairer's identity, the goods and defect, suggested repair, price or calculation method and maximum price, repair time, temporary replacement goods and costs, handover arrangements and ancillary services. The form is free, although necessary diagnostic services may be charged for if the consumer is informed of their cost. Conditions must remain unchanged for at least 30 calendar days; a longer period may be agreed. Acceptance within that period

binds the repairer to perform the service on those conditions (Directive (EU) 2024/1799, Article 4 and Annex I).

The Directive provides for a European online platform for repair. The Commission must develop the common online interface by 31 July 2027; national sections or qualifying national platforms must be operational by the same date. Consumers will be able to search for repairers using matters such as location, repair time, temporary replacement goods and ancillary services. Use must be free for consumers, while repairer registration is voluntary. The policy idea is to make repair a practically accessible option (Directive (EU) 2024/1799, Article 7).

11.4. Repair within the seller's liability period

Directive (EU) 2024/1799 amends Directive (EU) 2019/771 so that repair under Article 13(2) to bring goods into conformity extends the seller's liability period once by 12 months. Member States may provide longer periods. Those without fixed liability periods, or providing only a limitation period for remedies, may derogate if protection in the event of repair is at least equivalent to three years. Before providing the remedy, the seller must inform the consumer of the right to choose repair or replacement and of the possible extension. That choice remains subject to the limits where a remedy is impossible or disproportionately costly. Repair and replacement under this scheme remain free. These changes make repair more attractive compared with replacement (Directive (EU) 2024/1799, Article 16; Directive (EU) 2019/771, Articles 10, 13 and 14).

12. *What consumers gain, and what they do not gain*

Consumer gain	Main provision	Limits
Clearer sustainability claims	Directive (EU) 2024/825, amendments to UCPD 2005/29/EC	Claims are not banned altogether; specific, substantiated claims remain possible.
Fewer unsupported labels	Directive (EU) 2024/825, Annex; UCPD Annex I, point 2a	A permitted label may still cover only limited criteria and must be read carefully.

Consumer gain	Main provision	Limits
More visible guarantee information	Directive (EU) 2024/825, amendments to CRD 2011/83/EU	The Directive does not require every producer to offer a long commercial guarantee.
Information on software update periods	Directive (EU) 2024/825, amendments to CRD 2011/83/EU	Disclosure concerns free conformity updates, depends on information made available to the trader, and does not set one support period for every product.
Information on repairability and spare parts	Directive (EU) 2024/825, Article 2	Information depends on Union scores or information made available by the producer.
A stronger repair framework	Directive (EU) 2024/1799, Article 5 and Annex II	The manufacturer repair obligation is tied to product categories covered by Union repairability requirements and repair need not be provided where impossible.
Better repair incentive within legal guarantee period	Directive (EU) 2024/1799 amending Directive (EU) 2019/771	Sales-contract amendments apply to contracts concluded on or after 31 July 2026. National periods and liability systems may differ.

The 2024 EU measures do not create a single universal right to sustainable goods. Nor do they guarantee that all goods will last longer, that all goods will be repairable, or that every green claim will disappear. Rather their approach is targeted so as to ban defined misleading practices, make certain information visible, encourage comparison on durability and repairability, and remove obstacles to repair for covered goods.

13. *EU measures and the UK's position*

Directive (EU) 2024/825 required Member States to adopt and publish implementing measures by 27 March 2026 and apply them from 27 September 2026. The Commission must report on its operation by 27 September 2031. Directive (EU) 2024/1799 required transposition by 31 July 2026 and application from that date; its sales-con-

tract amendments apply to contracts concluded on or after 31 July 2026. The repair-platform deadline is 31 July 2027. These are the EU requirements (Directive (EU) 2024/825, Articles 3-4; Directive (EU) 2024/1799, Articles 7, 21-22).

New EU measures do not automatically become law in Great Britain. A trader based there may nevertheless encounter obligations under the national laws implementing these measures when directing activities towards consumers in an EU Member State (Competition and Markets Authority, 2020, paragraphs 5(7) and 5(10)). The applicable law, the trader's role and the activity concerned must be considered. Some traders may choose common standards across markets; that preference is not itself a legal duty. Northern Ireland requires separate consideration under the relevant arrangements. Differences between the regimes may increase compliance costs and influence circular-economy policy, but these consequences should not be treated as inevitable.

Closer alignment in relevant consumer-law provisions could reduce some differences between the two markets. Whether this occurs, and which provisions it covers, depends on future domestic legislation and agreements. This is a possible policy direction, rather than an established commitment to general consumer-law alignment.

Either way, EU consumer law remains influential. It may set commercial expectations for product information, repairability and environmental claims. UK traders who ignore that direction may face practical compliance problems when selling into EU markets and reputational risk where consumers expect substantiated sustainability communication.

14. *The future direction of consumer rights*

The emerging pattern in the EU is coherent. Traditional consumer law protected against defective goods, poor services and unfair standard terms. Distance-selling law then recognised that many modern purchases are made without direct inspection and need clearer pre-contract information and cancellation rights. Digital-content rules recognised that value may lie in software and data rather than purely physical goods. Post-Brexit import rules show that the real cost and practical enforceability of rights may depend on cross-border tax

and delivery arrangements. Circular-economy measures now add the product lifecycle itself: how long goods last, whether they can be repaired, how software support affects use, and whether environmental claims can be trusted.

Consumer rights are becoming increasingly market-shaping as well as transaction-correcting. The law still remedies individual harm, but it also tries to act preventatively by influencing consumer demand and business behaviour to both avoid harm, and to lead down the path of sustainability. Directive (EU) 2024/825 does this by regulating information and marketing at the point of sale. Directive (EU) 2024/1799 does it by making repair more accessible after sale. The Circular Economy Action Plan provides the policy frame: products and materials should remain in use for longer, and consumer law is one mechanism for achieving that shift.

Information duties depend on effective presentation and enforcement. Repair rights depend on product-specific repairability requirements, spare parts, reasonable pricing and viable repair markets. Consumers may still choose cheaper short-life products, especially where budgets are tight. Yet the legal direction is clear: consumer protection is moving beyond the narrow question "what remedy follows if this product fails?" towards the wider question "what legal structure helps consumers choose, use, maintain and repair products more sustainably?"

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EU LIABILITY RULES IN THE DIGITAL AND CIRCULAR ECONOMY

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SUMMARY: 1. Introduction. – 2. The 1985 Product Liability Directive and the notion of strict liability in a linear economy. – 3. Why did the old regime become inadequate? – 4. The expanded scope of Directive (EU) 2024/2853. – 5. Liable economic operators and circular product lifecycles. – 6. Evidence, presumptions and open questions. – 7. Conclusion.

1. *Introduction*

In 1985, the world in which the first harmonised European legislation on product liability was adopted looked very different from today. Mikhail Gorbachev became General Secretary of the Communist Party of the Soviet Union. Microsoft released Windows 1.0. The Nintendo Entertainment System was launched in the United States, while Super Mario Bros. became one of the symbols of a new mass culture of video games.

That year, Directive 85/374/EEC (so-called "Product Liability Directive", hereinafter: PLD) became one of the building blocks of what is now EU consumer law. Its basic idea was simple: a person injured by a defective product should be able to obtain compensation without having to prove that the producer was at fault. The Directive introduced a common regime of strict liability intended to ensure a fair allocation of the risks that reflected the economic and technological context of its time. Products were mainly tangible goods; production and distribution chains were relatively stable; and the moment at which a product was "put into circulation" could normally be identified with reasonable certainty (Fairgrieve and Goldberg 2020; Howells 2005).

This point is important for what follows. Almost four decades later, those assumptions have become much less convincing. Products

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are no longer only physical objects released once onto the market and then used until disposal. They are often connected, software-dependent and data-driven. Their safety may depend on software updates, cybersecurity patches, digital services, machine-learning functions and interactions with other products. At the same time, the EU transition towards a circular economy encourages products to last longer and to be repaired, reused, refurbished, upgraded, remanufactured and redistributed through secondary markets and digital platforms (COM(2015) 614 final; COM(2019) 190 final). These changes affect some of the basic categories on which the PLD was built: product, producer, defectiveness, causation, placing into circulation and the temporal limits of liability (Luzak, 2020; Ulfbeck, 2022).

The revision of EU product liability law through Directive (EU) 2024/2853 (hereinafter: RPLD) must therefore be read in this broader context. The RPLD, which Member States must transpose into state law by 9 December 2026, does not simply update an old legal instrument, but it responds to a mismatch between a liability regime designed for a linear industrial economy and a market increasingly shaped by digitalisation, circular business models and global supply chains. This is expressly recognised in the recitals to the new Directive, which refer to new technologies, including artificial intelligence, circular economy business models and new global supply chains as sources of inconsistencies and legal uncertainty under the former regime (see Recital no. 3). In this sense, the reform is part of the legal framework supporting the EU's digital and green transitions.

The main point of this analysis is that the RPLD adapts product liability to products that are no longer static objects, but dynamic and modifiable systems. The Directive expands the material scope of product liability by including software, digital manufacturing files and certain related digital services. It also broadens the range of potentially liable economic operators and introduces rules intended to make claims more effective, especially where technical or scientific complexity makes it difficult for injured persons to prove defectiveness and causation.

However, the key question is not only what the new Directive changes, but why those changes were needed. The Chapter therefore follows the logic of the reform. Section 2 recalls the main features of the PLD and explains its connection with a linear model of production and consumption. Section 3 examines why that model became

increasingly inadequate in the digital and circular economy. Section 4 analyses the expanded scope of the RPLD. Section 5 focuses on liable economic operators and substantial modifications in circular product lifecycles. Section 6 discusses disclosure, presumptions and remaining open questions.

2. *The 1985 Product Liability Directive and the notion of strict liability in a linear economy*

The adoption of the PLD responded to two related concerns. First, different national rules on liability for defective products could distort competition and fragment the internal market. Secondly, fault-based liability was seen as insufficient to protect persons injured by defective products, especially in the context of mass production and increasingly complex industrial goods. The Directive therefore introduced a common regime of liability without fault, under which the producer could be held liable where a defective product caused damage, irrespective of negligence (Howells 2005; Whittaker 2005).

The basic idea was simple but important. In order to obtain compensation, the injured person did not have to prove that the producer had acted negligently, failed to comply with a duty of care, or breached a contractual obligation. The claimant had to prove three elements: damage, defectiveness of the product, and a causal link between the defect and the damage (Fairgrieve, Goldberg 2020). The Directive was therefore based on strict liability, but not on automatic liability. The claimant was relieved from proving fault, but still had to prove that the product was defective and that this defect caused the damage.

Under the 1985 Directive, a product was defined as a movable, even where incorporated into another movable or into an immovable, and including electricity (Article 2 PLD). The central liable person was the producer: the manufacturer of the finished product, the producer of a raw material or the manufacturer of a component part (Article 3(1) PLD). The regime also covered the so-called quasi-producer, namely a person who presented themselves as producer by putting their name, trademark or other distinguishing feature on the product (Article 3(1) PLD). Importers into the European Economic Community could also be held liable (Article 3(2) PLD). Suppliers were liable only in a subsidiary way, where the producer

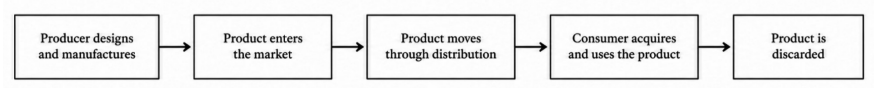
or importer could not be identified and the supplier failed to inform the injured person of the relevant identity within a reasonable time (Article 3(3) PLD).

The key point is that the Directive did not ask whether the producer had behaved badly. It asked whether the product was safe enough. A product was defective when it did not provide the safety that a person was entitled to expect, taking all circumstances into account (Article 6(1) PLD). The assessment of defectiveness was mainly linked to the moment when the product left the producer's sphere and entered the market.

The compensable damage was also limited. The Directive covered death and personal injury, as well as damage to private property (subject to a threshold of 500 ECU/euro), provided that the property was ordinarily intended for private use or consumption and was mainly used by the injured person for that purpose (Article 9 PLD). The regime was therefore not a general system for compensating all losses linked to unsafe products, but a more targeted instrument for death, bodily injury and certain forms of private property damage (Article 9 PLD; CJEU 10.5.2001, C-203/99).

The PLD represented a major step in the development of European consumer protection and internal market law, while operating through the broader category of the "injured person" rather than through the narrower category of the "contracting consumer". However, the PLD also contained important defences. The producer could avoid liability, among other cases, by proving that they had not put the product into circulation, that the defect probably did not exist when the product was put into circulation or came into being afterwards, that the product had not been manufactured for sale or distribution in the course of business, that the defect was due to compliance with mandatory regulations, or that the state of scientific and technical knowledge at the time did not allow the defect to be discovered (Article 7(a)-(e) PLD). A component manufacturer could also avoid liability where the defect was due to the design of the final product or to the instructions given by its manufacturer (Article 7(f) PLD).

These rules show the economic model implicitly underlying the Directive. Although the text did not refer to a "linear economy", its structure presupposed a relatively linear product life cycle.



The legally relevant moment was the initial release of the product onto the market. Later events could matter, but often as reasons to exclude liability rather than as reasons to create new responsibility.

This point can be illustrated with a simple example. If a defective household appliance caused injury shortly after being sold, the question was whether the appliance already lacked the safety that could legitimately be expected when it was put into circulation.

This architecture corresponded to the dominant industrial economy of the mid-1980s, as it organised liability around the first placing of a product into circulation, rather than around the product's entire life cycle. The Directive was much less prepared to deal with a product whose safety changed later because of a software update, a remote service, a refurbishment or a substantial modification made by another operator.

However, the reform of EU product liability law should not be seen only as a reaction to new technologies. It also responds to a broader concern about the effectiveness of the 1985 Directive as a compensation mechanism (Wuyts 2014; Borghetti 2020). A strict liability regime may formally remove the need to prove fault, but still offer limited practical protection if the claimant (since the burden of proving defect, damage and causation remained on them) cannot access the evidence needed to prove defectiveness and causation, or if the relevant economic operator cannot be identified and sued. The list of potentially liable persons was relatively narrow. Cross-border enforcement could be difficult, especially where the producer was not easily identifiable or was not established in the same jurisdiction as the injured person. The development risk defence and the ten-year longstop period also limited the remedial potential of the regime.

Nevertheless, the limits of the 1985 Directive became particularly visible once the market moved away from the linear model on which the regime implicitly relied. The central question, then, is whether a regime organised around a single moment of market entry can still govern products that continue to evolve, circulate and be modified throughout their lifecycle.

3. *Why did the old regime become inadequate?*

Before turning to the solutions recently introduced by the EU legislator, it is necessary to understand why the assumptions underlying the 1985 Directive became increasingly inadequate. The main reason is the combination of the digital and the green transition and the globalization of the supply chain (see COM(2022) 495 final, *Proposal for a directive of the European Parliament and of the Council on liability for defective products*, p. 1 and Recital 3).

In digital markets, product safety may depend on software, data, updates, cybersecurity and related services supplied after the first placing on the market. In circular markets, a product may be repaired, refurbished, upgraded, resold, repurposed or substantially modified before causing damage. In global value chains, the original manufacturer may be established outside the Union, while access to the EU market is facilitated by importers, fulfilment service providers, distributors or online platforms. As a consequence, liability cannot be assessed mainly by reference to the moment when the product is put into circulation (Luzak 2020; Ulfbeck 2022).

Let us therefore examine each of these three aspects in greater detail.

The first issue is the changing nature of products. In contemporary markets, many products are no longer separable from the software that allows them to function. Software may be embedded in a tangible object, subsequently integrated into it, supplied remotely, or accessed through cloud-based infrastructures. Product safety may depend not only on material composition or design, but also on code, data flows, algorithmic behaviour, software updates and cybersecurity maintenance. A smart medical device, a connected vehicle, a domestic robot or a smart home appliance may cause damage not because a physical component breaks, but because a digital component malfunctions, is not updated, interacts unexpectedly with other products, or becomes vulnerable to external interference (Fairgrieve, Howells, Pilgerstorfer 2013; Koch 2020).

Artificial intelligence makes this difficulty even clearer, because AI systems may learn, adapt or acquire new features after the product has been placed on the market. Their behaviour may be difficult to predict in advance and difficult to explain after damage has occurred. A product may therefore be safe when first supplied, but become unsafe be-

cause of later updates, lack of updates, changes in data environments, machine-learning processes or cybersecurity vulnerabilities. The PLD was not designed to deal systematically with products whose relevant safety characteristics evolve over time (Wendehorst 2020).

A second, and for the purposes of this analysis even more important, challenge came from the transition towards the circular economy. In legal terms, circularity changes the very object around which product liability law is organised. A product is no longer necessarily a good that is manufactured, sold, used and discarded. It may instead be repaired, reused, refurbished, upgraded, remanufactured, resold, shared or repurposed. It may have several users, several market entries and several technically relevant interventions during its life cycle (Ulfbeck 2022; Mak, Terryn 2020). This creates a structural challenge for a regime centred on the first putting into circulation of the product. If EU law encourages goods to remain in use for longer and to re-enter the market after repair, refurbishment or upgrading (see Regulation (EU) 2024/1781, and Directive (EU) 2024/1799), liability law must determine who bears the risk when damage occurs after such interventions. What if a repaired or refurbished product causes injury? Should liability fall on the original manufacturer, the repairer, the refurbisher, the reseller or the platform through which the product was supplied? If the defect results from poor maintenance or an intervention by a third party, can it still be attributed to the original producer? If a product is modified so extensively that its performance, purpose or risk profile changes, should it still be treated as the same product? The PLD did not provide clear answers.

A third challenge concerned global supply chains and platform-based distribution (Busch 2021). Products sold in the Union may be manufactured outside of it and reach consumers through importers, authorised representatives, fulfilment service providers, distributors and online platforms. E-commerce allows consumers to access non-EU products more easily, while new intermediaries facilitate market access without fitting neatly into the old categories of producer, importer or supplier. This matters because product liability is effective only if the injured person can identify and sue a solvent and reachable defendant. If the manufacturer is established outside the Union and no clear EU-based operator can be identified, the right to compensation may become difficult to enforce (Fairgrieve et al. 2024; Verbruggen, Ulfbeck 2022).

The combination of the above issues gives rise to a fourth one: information asymmetry. Relevant evidence may be held by manufacturers, software developers, service providers, platform operators or actors involved later in the product's life cycle. It may concern source code, update logs, risk assessments, cybersecurity documentation, maintenance records or information about prior modifications. Without access to such evidence, claimants may be unable to prove defectiveness or causation, even where the product was in fact unsafe (de Ridder 2023).

Directive (EU) 2024/2853 responds to these issues through a combination of substantive and procedural reforms. As the following sections will show, it expands the concept of product to include software and digital manufacturing files (para 4.1); treats certain digital services as components (para 4.2); adapts the defectiveness test to connected and learning products (para 4.3); broadens the categories of liable economic operators and introduces specific rules for substantial modifications (para 5); alleviates evidentiary burdens through disclosure obligations and presumptions (para 6).

4. *The expanded scope of Directive (EU) 2024/2853*

The RPLD responds to the limits of the previous regime by updating the basic concepts of product liability. It does not abandon the structure of strict liability inherited from the PLD. Liability still depends on damage caused by a defective product, and the claimant must still prove damage, defectiveness and causation. But the Directive changes the material scope of the regime in important ways. It broadens the concept of product, clarifies the position of software and digital manufacturing files, brings certain related digital services within the liability framework, expands compensable damage and adapts defectiveness to connected, evolving and safety-regulated products. These changes matter not only for digital markets. They also matter for circular markets, where products are expected to remain in use for longer and to undergo updates, repairs or other interventions during their lifecycle.

4.1. Product: from movable goods to digital and hybrid products

The starting point is the new definition of "product". Article 4(1)

defines it as "*all movables, even if integrated into, or inter-connected with, another movable or an immovable*", and expressly includes electricity, digital manufacturing files, raw materials and software. There is continuity with the PLD, which already covered movables and electricity, but the new text also removes much of the uncertainty concerning intangible and digital elements.

The clearest example is software. Under the former regime, it was debated whether software could qualify as a product, especially when it was supplied separately from a tangible carrier. The RPLD resolves this uncertainty.

At the same time, the Directive draws a limit. Information as such is not a product. Digital content such as media files, e-books or the mere source code of software does not trigger product liability simply because it is information. The point is therefore not to create a general liability regime for all digital content, but to cover digital elements that function as products or components and may affect safety.

Digital manufacturing files are also included, and Article 4(2) defines them as digital versions of, or templates for, movables containing the functional information necessary to produce tangible items by enabling the automated control of machinery or tools. This is relevant for 3D printing and other forms of digitally enabled manufacturing. In these cases, the safety risk may lie not only in the finished physical object, but also in the file that allows it to be produced.

The Directive also protects certain forms of open and collaborative innovation. Indeed, Article 2(2) excludes free and open-source software developed or supplied outside the course of a commercial activity, in order not to discourage research, innovation and non-commercial collaboration. The exclusion is limited. Where open-source software is supplied commercially, or later integrated by a manufacturer into a product placed on the market, liability may still arise under the Directive. This point is also relevant for circular and sustainable innovation, since open-source solutions may support repairability, interoperability and collaborative design, but they should not create a liability gap when incorporated into commercial products.

4.2. Related services and the extension of the component concept

A second important change concerns related services. Article 4(3) defines a related service as a digital service integrated into, or

interconnected with, a product in such a way that its absence would prevent the product from performing one or more of its functions. Article 4(4) then treats related services as possible components of a product. The reason is clear: in many digital products, safety may depend not only on a physical part or on software, but also on a service connected to the product.

The point can be seen through simple examples. Traffic data may be necessary for a navigation system. A health monitoring service may be connected to product sensors. A temperature control service may be necessary for a smart fridge. A voice-assistant service may allow products to be controlled through voice commands. In these cases, the service is not external to the product in a purely incidental way. It is functionally integrated into the product and contributes to its operation. If its absence would prevent the product from performing one or more functions, and if the service is within the manufacturer's control, it may fall within the product liability framework.

The notion of manufacturer's control is therefore central. Under Article 4(5), control exists where the manufacturer performs, authorises or consents to the integration, interconnection or supply of a component, including software updates or upgrades, or where the manufacturer has the ability to supply those updates or upgrades itself or through a third party. This concept allows liability to extend beyond the first placing on the market. A product may remain within the manufacturer's sphere of responsibility if the manufacturer continues to control the software, updates or digital services on which its safety depends. However, the extension is not unlimited. Internet access services, for example, are not treated as related services, because they are not part of the product within the manufacturer's control.

4.3. Damage: psychological health, property and data

The revised Directive also broadens the types of compensable damage. Article 6(1) covers death and personal injury, expressly including medically recognised damage to psychological health. Property damage is also covered, but with a different structure from the 1985 regime. The old Directive limited compensation to property ordinarily intended for private use or consumption and mainly used by the injured person for private purposes. Article 6(1)(b) RPLD instead covers damage to, or destruction of, any property, while excluding the

defective product itself, a product damaged by a defective component integrated or interconnected by the manufacturer or within its control, and property used exclusively for professional purposes. This is better adapted to mixed-use property, which is increasingly common in contemporary life.

The most innovative addition is the destruction or corruption of data not used for professional purposes. A defective product may delete, corrupt or make inaccessible data stored on a device or in a connected environment. The Directive therefore recognises that harm in the digital economy may affect intangible assets even where no traditional physical damage occurs.

The revised regime is relevant also for circular markets, at least under a twofold perspective. First, the new rules on property damage are better suited to goods used in mixed contexts, both private and professional. This may also matter in circular markets, where used, repaired, refurbished or resold goods may circulate among different users and different contexts of use. Second, data-related harms may also become relevant for digitalised circular products. A connected product that is repaired, updated, resold or refurbished may contain data, settings, software or information relating to a previous user. If a later intervention causes the loss or corruption of non-professional data, digital damage becomes connected with the extended lifecycle of the product.

Finally, Article 6(2) further provides that compensation covers all material losses resulting from the listed types of damage, as well as non-material losses insofar as they can be compensated under national law.

4.4. Defectiveness in a connected and evolving product environment

The broader concept of product also requires a broader way of assessing defectiveness. Article 7(1) provides that a product is defective where it does not provide the safety that a person is entitled to expect or that is required under Union or national law. This last reference is important. Mandatory safety requirements, including cybersecurity requirements, may now matter not only for product safety regulation, but also for civil liability.

Article 7(2) lists the circumstances to be considered. Some are familiar from the PLD, such as presentation, labelling, design, instruc-

tions and reasonably foreseeable use. Others are clearly directed at digital and connected products. Courts must consider whether the product can continue to learn or acquire new features after being placed on the market or put into service, and how it may interact with other products, including through interconnection. These criteria are especially relevant for AI systems, smart devices and connected product ecosystems.

The timing of defectiveness also changes. Article 7(2)(e) refers not only to the moment when the product was placed on the market or put into service, but also, where the manufacturer retains control, to the moment when the product left that control. This is a significant departure from the traditional linear model. The safety assessment may extend beyond the first market entry where software, updates, upgrades or related services remain under the manufacturer's control. This also matters for circular markets, where products may remain in use for longer and may be updated, upgraded, repaired or modified before damage occurs.

Finally, Article 7(3) clarifies that a product is not defective merely because a better product, including an update or upgrade, has already been or is later placed on the market or put into service. This is important for innovation and also for circularity. The law should not discourage operators from improving or updating products only because those improvements could later be used as evidence that previous versions were defective. At the same time, this does not exclude liability where the earlier version was already unsafe at the relevant time.

5. *Liable economic operators and circular product lifecycles*

The expansion of the material scope of Directive (EU) 2024/2853 is accompanied by an equally important reorganisation of the persons who may be held liable. The RPLD no longer relies on the simpler structure of the previous regime, centred on the producer, the importer and, in subsidiary terms, the supplier. Article 8 RPLD introduces a broader system of liable economic operators, designed to respond to complex supply chains, online distribution and circular product lifecycles.

The primary liable person remains the manufacturer of the defective product. The Directive also confirms the liability of the man-

ufacturer of a defective component where that component has been integrated into, or interconnected with, a product within the manufacturer's control and has caused the product to be defective. This is important for digital and connected products, where the relevant component may be tangible or intangible, including software or a related service. The manufacturer of the final product may therefore be liable, but the component manufacturer may also be liable. Where several economic operators are responsible for the same damage, the RPLD provides for joint and several liabilities.

A major innovation concerns cases where the manufacturer of a product or component is established outside the EU. In such cases, Article 8 creates a cascade of EU-based liable persons: first the importer, then the authorised representative and, where neither exists in the Union, the fulfilment service provider. This reflects the reality of global value chains and e-commerce: service providers which may offer warehousing, packaging, addressing and dispatching services without owning the product, acquire a subsidiary but significant role.

Distributors' liability is only subsidiary, where no EU-established economic operator among those primarily liable can be identified. Notably, a distributor may be held liable if, upon request by the injured person, it fails to identify the relevant EU-based operator or its own supplier within one month. Online platforms are treated with similar caution in Article 8(4), which extends the distributor-liability mechanism to providers of online platforms that allow consumers to conclude distance contracts with traders, where the conditions of Article 6(3) of the Digital Services Act are met. The Directive therefore avoids automatic liability for mere intermediaries, but recognises that platforms may shape consumer perception and market access.

However, for the circular economy, the central rule is Article 8(2). It provides that any natural or legal person who substantially modifies a product outside the manufacturer's control and then makes it available on the market or puts it into service is to be considered the manufacturer of that product. This is the main way in which the RPLD adapts product liability to circular product lifecycles. In a market that promotes repair, reuse, refurbishment, upgrading and remanufacturing, products may change after their first placing on the market. The law must therefore decide when the modified product remains attributable to the original manufacturer and when responsibility shifts to the actor who intervened later.

A repair, refurbishment or upgrade is not automatically a substantial modification. Conversely, an operation presented as repair or refurbishment may amount to a substantial modification if it changes the product in a legally relevant way. Article 4(18) defines substantial modification by reference, first, to relevant EU (i.e. Regulation (EU) 2023/988 on general product safety and, where applicable, sector-specific EU product safety legislation) or national product safety rules. Where those rules do not provide a threshold, a modification is substantial if it changes the product's original performance, purpose or type in a way not foreseen in the manufacturer's initial risk assessment and changes the nature of the hazard, creates a new hazard or increases the level of risk.

This test is crucial for reconciling product liability with sustainability policy. If every repair or second-hand transaction exposed the intervening operator to strict liability as a manufacturer, circular economy practices could be discouraged. Repairers, refurbishers and resellers might face disproportionate legal uncertainty, especially where their intervention merely restores the product to a safe condition or prolongs its ordinary use. On the opposite, if operators who significantly alter a product's safety profile could avoid liability by describing their activity as repair or reuse, injured persons would be insufficiently protected. The Directive therefore draws a line between ordinary circular operations and interventions that effectively create a new product from the point of view of safety risk.

The same logic applies to the original manufacturer. Where a substantial modification is carried out by the original manufacturer or within its control, and that modification makes the product defective, the manufacturer cannot avoid liability by arguing that the defect came into being only after the product was first placed on the market or put into service. This is particularly important for products that remain within the manufacturer's control through software updates, upgrades or related services. The rule prevents manufacturers from benefiting from continued control while externalising the risks generated by that control.

Where, by contrast, the substantial modification is made outside the manufacturer's control, the person making the modification may be treated as the manufacturer of the modified product. This reflects a fair allocation of risk: the actor who materially changes the product's safety profile and reintroduces it into the market should bear

responsibility for the risks created by that intervention. At the same time, Article 11(1)(g) provides a specific defence for such persons. A substantial modifier is not liable if it proves that the defectiveness that caused the damage is related to a part of the product not affected by the modification. This prevents the modifier from becoming a guarantor of the entire original product where the damage is unrelated to its intervention.

The temporal consequences are also significant. Under Article 17(1)(b), where a product has been substantially modified, the ten-year expiry period runs from the date on which the product was made available on the market or put into service following that modification. The substantially modified product therefore acquires a new legal life for product liability purposes. The same approach applies where substantial modification occurs through a software update or upgrade, or through the continuous learning of an AI system. In such cases, the product is considered to be made available on the market or put into service when the modification is actually made.

In the light of the above, we can argue that the RPLD reorganises liability around control, market access and risk creation. The role played by manufacturers remains central, but responsibility may extend to component manufacturers, importers, authorised representatives, fulfilment service providers, distributors, online platforms and substantial modifiers. This approach seeks to support longer product lifecycles – and, therefore, circularity – without creating liability gaps.

6. *Evidence, presumptions and open questions*

A strict liability regime may look strong on paper, but it offers little help if the claimant cannot obtain and understand the evidence needed to prove defectiveness and causation. With digital products, AI systems, cybersecurity vulnerabilities, complex supply chains and circular product histories, this problem becomes more serious, because the relevant information is often in the hands of manufacturers, software developers, service providers or other economic operators. This is the reason why the reform of EU product liability is not only substantive, as it also changes the way in which injured persons may actually prove their claims, through disclosure obligations and rebuttable presumptions.

Under Article 9, where the claimant has presented facts and evidence sufficient to support the plausibility of the claim, the defendant may be required to disclose relevant evidence at its disposal. In technically complex cases, this may concern design choices, risk assessments, software behaviour, update logs, cybersecurity documentation, data records, maintenance records or previous modifications. Without access to this kind of evidence, the claimant may have a right to compensation in theory, but be unable to prove the claim in practice.

This mechanism is not unlimited. National courts must ensure that disclosure remains necessary and proportionate, and that the legitimate interests of all parties, including third parties, are taken into account. The Directive also protects confidential information and trade secrets. Where proportionate, courts may require evidence to be presented in an easily accessible and understandable manner. That requirement is not secondary. Technical documentation is of little use if the claimant, or even the court, cannot realistically understand it.

The basic rule remains that the claimant must prove defectiveness, damage and the causal link between them. Article 10, however, introduces presumptions that make this burden less difficult in specific situations. Defectiveness is presumed where the defendant fails to disclose relevant evidence, where the claimant shows non-compliance with mandatory product safety requirements intended to protect against the risk of the damage suffered, or where the damage was caused by an obvious malfunction during reasonably foreseeable use or under ordinary circumstances. In this way, product safety law and product liability law are brought closer together. A breach of mandatory safety requirements is no longer only a regulatory issue; it may also help the injured person in a civil claim.

Causation may also be presumed where the product is defective and the damage caused is of a kind typically consistent with that defect. This does not abolish causation. It only recognises that, especially in complex technological, medical or scientific contexts, the claimant may not be able to reconstruct the precise causal pathway between the defect and the damage. Where the type of damage normally corresponds to the defect established, the court may infer the causal link.

Article 10(4) goes one step further. It deals with cases where the claimant faces excessive difficulties in proving defectiveness, causation or both, in particular because of technical or scientific complexity.

In such cases, even after disclosure, the national court must presume defectiveness or causation if the claimant shows that it is likely that the product is defective or that there is a causal link between defectiveness and damage. The provision may be especially relevant for AI systems, advanced medical devices, pharmaceuticals, food products, connected devices and other cases where the claimant cannot reasonably be expected to reconstruct the technical or scientific process that produced the harm.

Even here, however, there is no full reversal of the burden of proof. The claimant must still show likelihood, and the defendant may rebut all presumptions. The practical effect may nevertheless be significant. Strict liability loses much of its protective function if the claimant must prove matters that are structurally difficult to access. For this reason, the procedural reform completes the substantive reform: broader definitions of product and broader categories of liable persons would have limited effect if claimants remained unable to substantiate claims involving opaque technologies or complex product lifecycles.

The notion of "technical or scientific complexity" is not exhaustively defined. National courts will have to decide, case by case, when the complexity of the product, the technology used, the information to be analysed or the causal link justifies the use of presumptions. This flexibility is useful, but it may also lead to different interpretations across Member States. The Directive tries to reduce this risk through full harmonisation and transparency obligations, including the publication of final judgments and the creation of a publicly accessible database. Still, much will depend on judicial practice.

Cybersecurity illustrates the difficulty. The Directive recognises that cybersecurity vulnerabilities may be relevant to defectiveness, especially where a product fails to comply with safety-relevant cybersecurity requirements. But no connected product can be perfectly secure. Courts will therefore have to distinguish between ordinary residual cyber risk and vulnerabilities that make a product less safe than persons are entitled to expect or than Union or national law requires.

A similar evidentiary problem may arise in circular markets. Where a product has been repaired, refurbished, remanufactured, updated or substantially modified before damage occurs, it may be difficult to identify which intervention created the relevant risk. The claimant may need information about the original design, later main-

tenance, software updates, spare parts, previous users and technical modifications. The rules on disclosure and presumptions may therefore be important not only for digital products, but also for products with longer and more complex lifecycles.

The RPLD also operates alongside other EU regimes. Product safety and market surveillance rules aim to prevent unsafe products from being placed or remaining on the market. Consumer contract law provides remedies where goods or digital elements do not conform to the contract. Data protection law governs unlawful processing of personal data. The RPLD has a different function: it provides compensation for certain types of damage caused by defective products, irrespective of contractual links and without requiring proof of fault.

The revised Directive is therefore a significant step, but not the end of the debate.

7. *Conclusion*

The RPLD should be welcomed as an attempt to make product liability more effective and more coherent across the contemporary EU internal market.

The practical relevance of these changes can be seen through a few examples. Suppose that a person suffers damage caused by equipment leased through a peer-to-peer platform, such as a camera, a drone or a power tool. The issue is no longer only whether the product was defective when it was first put into circulation by its original manufacturer. It may also be necessary to ask whether the product was later repaired, refurbished or substantially modified, whether the owner who leased it acted merely as a private user or as an economic operator, and whether the online platform merely hosted the transaction or presented the product in a way that could lead an average consumer to believe that it was supplied by the platform itself or by a trader acting under its authority or control (on this, see in this book the chapter by M. Inglese). Similar questions may arise, although in a different form, in shared mobility contexts, such as carpooling platforms. If damage is linked to a vehicle used in a shared ride, product liability will not answer every question, since driver conduct and transport rules may also be relevant. Yet the example shows the same broader point: in

circular and sharing markets, products are used more intensively, pass through different hands and may generate risks after their first market entry. Under the 1985 Directive, such situations were difficult to accommodate within a regime centred mainly on the original producer and the first putting into circulation of the product. The RPLD does not automatically make every user, owner or platform liable, but it offers a more articulated framework for asking who controlled the product, who enabled its access to the market, and who created or increased the relevant safety risk.

A further example concerns circular peer-to-peer activities carried out through platforms such as Vinted. A person who occasionally sells second-hand goods will normally remain a private user and will not be treated as a manufacturer merely because they resell a product. The situation may become less clear where the activity is frequent, organised and carried out on a semi-professional basis. In such cases, the seller may start to resemble an economic operator rather than a purely private user. The question becomes even more significant if the person repairs, refurbishes, alters or upgrades the product before reselling it. If that intervention amounts to a substantial modification and the product is then made available on the market, the person who carried it out may be treated as the manufacturer of the modified product. This example shows why circular platforms raise difficult questions for product liability law: they blur the line between private reuse, commercial resale and the creation of new safety risks.

They also show how there is a tension between product liability and circularity. If liability remains too closely attached to the original manufacturer, it may be unfair to make that manufacturer responsible for risks introduced later by actors outside its control. Conversely, if repairers, refurbishers and second-hand operators face uncertain or excessive liability risks, circular business models may become less attractive, thereby undermining the EU's sustainability objectives. Product liability must therefore protect injured persons without discouraging the practices that circular economy policy seeks to promote.

Circularity also complicates the claimant's position. Second-hand, repaired and refurbished goods may have a longer and less transparent history than newly manufactured goods. Information about prior use, maintenance, interventions and modifications may be fragmented or unavailable. The injured person may not know whether the damage was caused by the original design, by a component, by a later

repair, by a software update, by misuse, by lack of maintenance or by a modification made before resale. A strict liability regime that relieves the claimant from proving fault may still provide limited protection if proving defectiveness and causation becomes excessively difficult.

The RPLD marks an extremely significant legislative intervention on product liability law in a EU that is transitioning towards a circular economic model. Its importance does not lie only in the fact that it updates a legal instrument adopted almost forty years earlier. More fundamentally, it adapts strict product liability to a market in which products, supply chains and consumption patterns have changed profoundly.

Whether the reform will succeed depends on interpretation and implementation. Concepts such as manufacturer's control, related service, substantial modification, technical or scientific complexity, cybersecurity defectiveness and platform-related distributor liability will require careful judicial development. If interpreted too broadly, the new regime could create legal uncertainty and discourage repair, refurbishment and innovation. If interpreted too narrowly, it could reproduce the compensation gaps and evidentiary obstacles that justified the reform in the first place. The central challenge is therefore to maintain a fair balance between effective protection of injured persons, legal certainty for economic operators and support for sustainable circular markets.

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THE COLLABORATIVE ECONOMY UNDER EU LAW: COMPETITION, DATA GOVERNANCE AND PLATFORM REGULATION IN THE DIGITAL SINGLE MARKET

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SUMMARY: 1. Introduction: The Digital Single Market, Online Platforms and the Collaborative Economy. – 2. Uber and the Problem of the Underlying Service *vs* AirBnb and the Problem of Control. – 3. Selected Topic: Competition Law Challenges in Platform Markets, Data Portability, Data Governance and Market Power. – 4. Concluding Remarks: The Digital Markets Act and the Future of Platform Regulation.

1. *Introduction: The Digital Single Market, Online Platforms and the Collaborative Economy*

The emergence of the collaborative economy constitutes one of the most significant developments in the evolution of the European Union (EU or the Union) digital single market (DSM). Over the last two decades, digital technologies have transformed the manner in which goods and services are produced, distributed and consumed. Online platforms, through their intermediary role, have facilitated new forms of economic coordination by connecting providers and users via digital infrastructures that operate across national borders. The result has been the creation of novel business models that challenge traditional regulatory categories and require a reconsideration of established legal concepts. Not only is this challenge visible from a purely regulatory standpoint – sparking a lively debate in academic scholarship, especially under the motto that "regulation stifles innovation" and that "the law always lags behind technological development" (Hatzopoulos 2018; Inglese 2019) – but also from the incumbent economic operators' concerns. Be that as it may, consumers

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enjoy a wider range of products, benefitting from lower prices and better opportunities.

From the perspective of European Union law, the collaborative economy must be understood within the broader context of the DSM, which, in turn, is nothing more than a part of the wider internal market and, as such, follows the same integration logic: no barriers of any nature whatsoever should hinder the free movement of information society services. Dating back to 2016 (COM(2016) 288 final and COM(2016) 356 final), updated in 2017 (COM(2017) 651 final), concretised in 2023 (COM(2023) 162 final), and adjourned in 2025 (COM(2025) 500 final), the various strategies – under the forms of Commission's communications, i.e., non-binding legal acts –, encompassing a decisive focus on digital markets, were designed to remove regulatory barriers, encourage innovation and facilitate the free movement of digital services throughout the Union.

However, at least three additional elements are to be taken into account: i) ensuring a high level of consumer protection as per Articles 12 and 169 TFEU as well as 38 of the Charter; ii) guaranteeing data protection as per Article 16 TFEU and 8 of the Charter; iii) enforcing fair competition as per Articles 101 and 102 TFEU. All these elements, cumulatively taken, ensure a stable yet dynamic DSM.

Within this framework, collaborative platforms have been regarded as important drivers of economic growth because they reduce transaction costs, improve resource allocation and facilitate participation in economic activities by both consumers and businesses.

At the same time, the increasing economic significance of digital intermediaries has generated concerns regarding market concentration, consumer protection, labour rights, taxation and data governance. Platforms often exercise substantial influence over market conditions through algorithmic management, ranking systems and the accumulation of large datasets containing personal data. Consequently, the legal classification and regulation of collaborative platforms have become central questions to ensure the smooth functioning of the DSM.

In this respect, the Commission has repeatedly emphasised the strategic importance of online platforms within the DSM. Platforms possess several distinctive characteristics. They create and shape markets, operate in multisided environments, benefit from network effects and rely extensively upon the collection and processing of data. Their ability to connect different groups of users instantaneously has

transformed traditional commercial relationships and facilitated the emergence of new forms of economic organisations. Put simply, this is the reason why the average Union consumer uses WhatsApp: most probably, the vast majority of their friends use it alongside the vast ecosystem of Meta apps, e.g., Facebook and Instagram. Moreover, each of these apps is inextricably linked to others; suffice it to consider online payments or sharing one's personal data to listen to one's favourite music.

Additionally, a key feature of platform markets is the existence of indirect network effects. The value of a platform frequently increases as the number of participants grows. This phenomenon may generate powerful self-reinforcing dynamics and contribute to market concentration and compartmentalisation. Following the aforementioned example, this is the typical lock-in effect whereby a user is deterred from migrating to another platform, even if better conditions are available. The resulting economic structures differ significantly from those typically observed in traditional brick-and-mortar industries and require competition authorities – at the national or supranational level – to carry out more sophisticated antitrust investigations and, consequently, make the antitrust arsenal more flexible and fit for purpose. It is evident now more than ever that cases such as Google Shopping – concerning the ranking and personalisation of advertisement and prices – regard the average functioning of digital platforms and, as such, pose challenges to fair competition and consumer welfare.

The European Commission defines the collaborative economy as a set of business models in which activities are facilitated by collaborative platforms creating marketplaces for the temporary use of goods or services. These services are often provided by private individuals rather than traditional commercial undertakings. Three principal actors participate in this ecosystem: service providers, users and digital intermediaries. However, providers can offer their service in a professional or non-professional capacity and this makes it difficult to trigger EU consumer protection law and EU labour law. Regarding the former, according to the Unfair Commercial Practices Directive, consumer protection is triggered if, and only if, one of the counterparties is a professional, i.e., anybody acting within the domain of a professional activity. Instead, concerning labour law, the impact of the Platform Workers Directive is yet to be tested since its term of implementation is set at December 2026.

The collaborative economy differs from traditional commerce because transactions frequently occur without a transfer of ownership. Instead, the emphasis is placed upon access and utilisation. This distinction has important legal implications because many regulatory frameworks were originally designed for ownership-based transactions.

The aforementioned triangular structure of collaborative markets generates significant legal complexity. Questions arise concerning contractual liability, consumer protection, regulatory compliance and the legal status of platforms themselves. Determining whether a platform merely facilitates transactions or actively participates in the provision of the underlying service often becomes decisive for regulatory purposes, data and consumer protection as well as antitrust enforcement.

Furthermore, collaborative platforms frequently operate across multiple jurisdictions. This cross-border dimension raises additional challenges concerning the allocation of regulatory competences and the application of national laws within the framework of the internal market. As a consequence, the collaborative economy has become an important testing ground for the capacity of EU law to adapt to technological innovation.

Within this context, competition policy and internal market regulation should be understood as complementary instruments. Competition law seeks to preserve contestability and consumer welfare, whereas internal market measures facilitate participation and reduce regulatory fragmentation.

Aside from pure technological innovation, the development of the collaborative economy is also closely connected to the European Union's sustainability agenda. The Circular Economy Action Plan (COM(2020) 98 final) recognises that digital technologies can facilitate more efficient use of resources through sharing, renting and collaborative consumption. By encouraging access rather than ownership, collaborative platforms may contribute to reducing waste and promoting more sustainable patterns of consumption. Digitalisation and sustainability have therefore become increasingly interconnected policy objectives. After all, the principle of sustainable development is clearly embedded in the Union's constitutional texture, as per Article 3(3) TEU and Article 11 TFEU. More recently, the Commission acknowledged that there are side effects as well; in particular, so-called

micro-shipments – i.e., a shipment whose value falls below 150 € – and low quality items purchased online put under stress the Union's objective to pursue an effective green transition towards climate neutrality (COM(2025) 37 final).

Together, these policies provide the foundation for the governance of digital markets within the European Union.

2. *Uber and the Problem of the Underlying Service vs AirBnb and the Problem of Control*

In the contexts described in the previous section, it was highly likely that incumbent – or, if one prefers, traditional – economic operators would have been dissatisfied with the new modes of functioning of digital platforms, essentially arguing various infringements of fair competition. The two major cases respectively are Elite Taxi – so-called Uber Spain – and AirBnb. Started at the national level – the former in Barcelona and the latter in Paris – they soon reached the Court of Justice through the preliminary ruling procedure via Article 267 TFEU.

The litigation concerning Uber represents one of the most important judicial examinations of the collaborative economy. In Elite Taxi, the Court of Justice was asked to determine whether Uber should be classified as an information society service or as a transport service. In essence, an information society service is required to meet four cumulative criteria according to Article 1(b) of the Information Society Service Directive, namely, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. More precisely: "*i) "at a distance" means that the service is provided without the parties being simultaneously present; ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment […]; iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request*". If those three criteria are met, then the information society service falls within the scope of application of the E-Commerce Directive and enjoys free movement. Basically, Member States cannot hinder it. Obviously, this was the legal argument supported by Uber, whereas the association of taxi drivers of Barcelona argued that Uber is a transport service and, consequently, it must be subjected to local rules.

Advocate General Szpunar emphasised the broader significance of the dispute, observing that Uber – and, extensively taken, digital platforms – had become emblematic of a phenomenon commonly described as "uberisation". The central question concerned the relationship between the digital platform and the transport services provided through it.

The Court concluded that Uber's intermediation service formed an integral part of an overall transport service. Several factors supported this conclusion. Uber exercised significant influence over the conditions under which transport services were provided, including pricing structures, quality standards and access conditions. The platform, therefore, did not merely facilitate transactions but actively participated in the organisation of the service. In conclusion, Uber is a transport service, and since the Union has not yet exercised its competence in this field, its regulation is still in the Member States' hands.

The judgment illustrates a functional approach to legal classification. Rather than focusing exclusively upon the technological characteristics of the platform, the Court examined the economic reality underlying the service. This approach is particularly important because it demonstrates that digital intermediation cannot automatically shield an undertaking from sector-specific regulation.

From a competition law perspective, the decision raises broader questions regarding market definition. If the underlying service determines legal classification, should it also determine the relevant market for competition purposes? The answer remains controversial and continues to generate significant academic debate.

The Court revisited these issues in AirBnb Ireland. Similarly to Uber, AirBnb was accused by the Parisian association of hoteliers of unfair competition. Following a preliminary ruling request to the Court of Justice, AirBnb was ultimately classified as an information society service. The Court emphasised that the accommodation services provided by hosts remained distinct from the digital intermediation services supplied by the platform. AirBnb offered numerous ancillary services, including pricing recommendations, insurance mechanisms and reputation systems. Nevertheless, these additional services were insufficient to transform the platform into a provider of accommodation services. Unlike Uber, AirBnb did not exercise the same degree of control over the underlying economic activity.

The contrast between Elite Taxi and AirBnb Ireland is particularly

revealing. Both cases involve digital intermediaries operating within collaborative markets. Yet the Court reached different conclusions because the factual circumstances differed significantly. The decisive criterion appears to be the extent of platform control over the underlying service. However, this risks undermining the coherence of the case law of the Court. In particular, the Court engaged with a thorough analysis of the mode of functioning of both Uber and AirBnb whereas it is often believed that the Court should only rely on the information provided by the referring courts and should interpret the law and not the facts of a given case.

These judgments demonstrate that platform regulation cannot rely exclusively upon formal categories. Instead, legal classification requires a careful examination of economic realities and organisational structures. The resulting approach is flexible but also generates uncertainty because the precise boundaries of platform responsibility remain contested.

3. *Selected Topic: Competition Law Challenges in Platform Markets, Data Portability, Data Governance and Market Power*

Competition law – epitomised in Articles 101 and 102 TFEU – occupies a central position in the narrative and regulation of digital markets. However, platform-based business models challenge several assumptions underlying traditional competition law analysis. The first difficulty concerns the definition of the relevant market. Conventional methodologies generally rely upon substitutability analysis and pricing mechanisms. In multisided digital environments, however, services may be offered free of charge to one category of users while generating revenue from another.

A second challenge concerns the measurement of market power. Traditional indicators such as market shares remain relevant but may not fully capture the competitive significance of data, network effects and ecosystem integration. Large digital platforms frequently benefit from economies of scale and scope that strengthen their competitive position and make market entry more difficult for potential competitors. An example of this is the clearance of the acquisition of WhatsApp by Meta or, more recently, the identification of ByteDance as a gatekeeper according to the DMA, as already confirmed by

the General Court and currently under appeal before the Court of Justice.

The increasing importance of data further complicates competition analysis. Data may generate competitive advantages by improving algorithms, facilitating personalisation and strengthening user engagement. Consequently, access to data has become a central issue in contemporary competition policy debates. Scholars have increasingly questioned whether certain datasets should be treated as essential facilities capable of requiring access by competitors under specific circumstances, thereby putting under stress the settled essential facility doctrine.

Finally, enforcement itself presents difficulties. Traditional *ex post* investigations under Articles 101 and 102 TFEU may struggle to address rapidly evolving digital markets. These concerns have contributed to the development of new regulatory instruments designed to complement conventional competition law enforcement.

The relationship between competition law and data protection law has become increasingly important within digital markets. Data constitutes a strategic asset capable of generating substantial competitive advantages. Large platforms benefit from data-driven feedback loops whereby increased participation generates additional data, which in turn improves services and attracts further users.

Article 20 GDPR introduced the right to data portability. Individuals have the right to receive personal data concerning them in a structured, commonly used and machine-readable format and to transmit that data to another controller. The provision seeks to empower users and potentially facilitate competition by reducing switching costs.

Despite its innovative character, the practical impact of data portability remains uncertain. First, the right applies only under specific conditions. Second, technical interoperability challenges may limit its effectiveness. Third, the economic significance of data frequently depends upon analytical capabilities rather than mere possession.

Particularly important is the question of reputational capital, often under the form of rate-and-reviews or dedicated marks such as coloured stars and alike. Service providers operating on collaborative platforms often accumulate ratings and reviews over long periods. These reputation systems may constitute one of the most valuable assets available to professional users. However, transferring reputational information between platforms remains difficult. Consequently,

switching costs may persist even where personal data portability is available. And, as anticipated in Section 1, this typically gives rise to the lock-in effect, thereby preventing mobility from one platform to another.

The debate surrounding data portability and competition law has therefore expanded into broader discussions concerning interoperability, access obligations and data governance. These issues illustrate the growing convergence between competition law and data protection law within the Union's regulatory framework.

4. *Concluding Remarks: The Digital Markets Act and the Future of Platform Regulation*

The DMA represents the most ambitious attempt by the Union to address structural problems within digital markets. Unlike traditional competition law, which operates primarily through *ex post* intervention, the DMA introduces an *ex ante* regulatory framework applicable to designated gatekeepers.

A gatekeeper, under Article 3 DMA, is defined as a provider of core platform services possessing significant economic influence, acting as an important gateway between business users and end users, and enjoying a durable market position. The DMA establishes both quantitative and qualitative criteria for designation.

The DMA imposes a range of obligations designed to ensure contestability and fairness. Gatekeepers must refrain from self-preferencing practices, facilitate access to certain forms of data and comply with interoperability requirements in specified circumstances. The objective is not merely to sanction anticompetitive conduct after it occurs but to prevent structural market failures from emerging.

The relationship between the DMA and collaborative platforms remains particularly interesting. Some collaborative platforms may satisfy the criteria necessary for designation as gatekeepers. Others may remain outside the DMA's scope of application while continuing to exercise considerable influence within specific sectors. An example could be inferred from the PWD whereby it identifies a platform offering labour service; if that platform reaches the quantitative and qualitative threshold envisaged by the DMA then it will be considered a gatekeeper. Consequently, the interaction between competition law,

platform regulation and sector-specific legislation is likely to remain an important area of potential litigation before EU Courts and, consequently, a promising topic of future research.

From a systemic approach, the DMA reflects a shift in the Union's economic governance. It demonstrates an increasing willingness to intervene proactively in order to preserve contestability and fairness within digital ecosystems. Whether this approach will ultimately succeed remains an open question, but its significance for the future development of EU digital regulation is undeniable.

The collaborative economy has become a laboratory for some of the most important legal questions the European Union should cope and keep the pace with. Digital platforms challenge traditional distinctions between intermediary and provider, competition and regulation, private ordering and public governance.

The case law of the Court of Justice demonstrates that legal classification must focus upon economic realities rather than purely formal criteria. At the same time, the increasing importance of data has revealed the close relationship between competition law, data protection and platform governance.

The right to data portability and the DMA represent important attempts to address the challenges generated by digital transformation. Nevertheless, significant questions remain unresolved. How should relevant markets be defined in multisided environments? Can data constitute an essential facility? Are traditional competition law tools sufficient to address platform power?

The answers to these questions will shape the future evolution of EU digital regulation. What is clear is that the collaborative economy will continue to occupy a central position within EU legal scholarship and policymaking. Its development will depend not only upon technological innovation but also upon the capacity of legal institutions to preserve openness, contestability and fairness in increasingly complex digital markets.

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INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW CONTRACTUAL AND NON-CONTRACTUAL OBLIGATIONS: PART I – JURISDICTION RULES

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SUMMARY: 1. Introduction. – 2. The evolution of judicial cooperation in European Union Law. – 3. General contractual obligations (B2B relationships). – 4. The protection of the "weaker party". – 5. The concept of "directed activities". – 6. Specific exclusions and limitations – The role of ADR. – 7. Non-contractual obligations and EU rules on jurisdiction. – 8. Final remarks.

1. *Introduction*

The need to study and deeply understand the functioning of private international law is often underestimated in the academic curricula of our universities. However if you consider the number of cross-border situations in which we all incur (for example when travelling abroad or buying on-line) it is quite clear that all of us conclude contracts with a possible link to a different legal order every week, if not every day.

In some cases, without realizing it, people are also making a choice of law and a choice of jurisdiction. That is why one of the first assignments I give my students when they start studying private international law is, next time they are buying something online, to open the terms and conditions and read them until the point in which they will find a clause related to the choice of law and a clause related to the choice of jurisdiction. In fact all big platforms selling online have similar clauses and nowadays even relatively small sellers tend to introduce them. Some of them might be more general and meant do not make distinctions between "business to business" (from now on B2B) and "business to consumer" (from now on B2C) contracts, other ones being clearer in explaining the differences if a contract is entered into

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by a consumer. For instance the Amazon terms and conditions declare that the conditions are governed by the laws of the Grand Duchy of Luxembourg but that "*If you are a consumer and have your habitual residence in the EU, you may additionally enjoy the protection afforded to you by mandatory provisions of the law of your country of residence.*" And that "*We both agree to submit to the non-exclusive jurisdiction of the courts of the district of Luxembourg City. Therefore, as a consumer you may bring a claim in connection with these Conditions of Use before the Courts of the district of Luxembourg city or the Member State of the EU in which you reside or are domiciled*".

These clauses on choice of law and choice of jurisdiction are not meant to protect the buyer, as a consumer, as they are aimed to grant the seller, the application of a legal system more favourable to him or at least well known, shielding the business from the risk of application of a different (unknown) law or to enter into litigation in front of a far away jurisdiction each time they deal with consumers based in different countries. Both situations would increase risks and costs for the business and therefore professional sellers try to avoid as much as possible to be in similar positions.

From the jurisdictional point of view we also need to stress that the more we are able to define one (possibly only one) judge who retains jurisdiction, the easier it gets for the decision of this judge to be recognized also in other countries. The less we have common rules on conflict of jurisdiction, the higher is the risk that in the end we have conflicting judgements that would create problem when enforcement was requested. Moreover it is relevant to point out that we do not have at EU level a harmonized judicial system, as we just have a cooperation in the field of civil justice, as we will see, and the national judicial systems are strictly regulated by the constitutional systems of each country. These differences might lead to a problem of forum shopping: the situation in which you decide, depending on the kind of consequence you want to obtain, in front of which judge to start the proceeding.

Forum running is a consequence of the possibility of forum shopping: leading the parts to quickly file a case in front of a tribunal which has a jurisdiction, in order to avoid the possibility for another, different, judge to be addressed and declare his jurisdiction

In this paper I will try to introduce the functioning of private international law, in particular from the point of view of consumer con-

tracts, and will focus in particular on the evolution at European Union level from the point of view of jurisdiction rules.

It is true that if we are in an intra-European Union cross-border situation, independently from the national law that would be chosen, we still need to apply all the legal framework that was created at EU level in the field of consumer law: regulations directly applicable and directives that provide at least a minimum standard of consumer protection that shall be granted. However, in many cases, consumers might be unaware that they are entering into a contract with these boundaries and that each time they buy from a company based outside the European Union, they are not covered by this umbrella of protection that is recognized by European Union law, as you will be subject to completely different rules.

Moreover private international law is still relevant also inside the European Union because, as you will see also in the different papers collected in this book, we still don't have a fully harmonized system.

2. *The evolution of judicial cooperation in European Union Law*

When the Treaty of Rome was negotiated in 1957, the main focus was on the establishment of the four freedoms of movement (goods, persons, services and capital) and on the creation of common rules on competition law.

Civil judicial cooperation was not considered at the time as a main objective and remained formally in the background.

In that period private international law rules were still a prerogative of the national legal systems, or at best were being harmonized using general conventions that might be bilateral ones or more frequently multilateral conventions drafted in the framework of international organisations such as the Hague Academy of Private International Law, or UNCITRAL or UNIDROIT.

However while some of these conventions have been a huge success (the best example being the Hague Convention of 1980 on international child abduction, ratified by more than 100 countries) many of them were not so easily accepted by the States that had to renounce to their traditional conflict criteria and modify their framework of PIL rules for the sake of harmonization.

In its original version Article 220 of the Treaty of Rome allowed the Member States to "*engage in negotiations with each other with a view to ensuring for the benefit of their nationals*" inter alia "*the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards*".

This legal basis was used in 1968 by the Member States to draft and approve the text of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, a leading text that set out the main rules on jurisdiction and recognition/enforcement of judgements among Member States also in the field of contractual and non-contractual obligations. The text entered into force on 1 February 1973.

The difference between a convention based on Article 220 and other conventions falling outside its scope is that such conventions are only open to access of Member States and that under a specific protocol (that in our case was signed in 1971) the Court of Justice of the EU (at that time of the EEC) might be recognized as competent to answer requests for preliminary ruling presented by national judicial authorities. This would grant a uniform interpretation of the rules set by the Convention that will be applied in the same way in the different Member States.

A few years later the Rome Convention of 1980 on the law applicable to contractual obligations (Rome Convention) was negotiated using the same legal basis. Unfortunately in this case the interpretative protocol (dated 1988) recognizing the possibility to present requests for preliminary ruling was not promptly ratified by the Member States and entered into force only in 2005.

Both conventions were meant to simplify the formalities governing the reciprocal recognition and execution of judicial decisions as the Rome Convention too, by creating a harmonized set of conflict of law rules, was enhancing the effectiveness of the free movement of judgements and was minimising the risk of forum shopping and running by avoiding that the competence of a different judge might lead to the application of a different legal system.

Under these rules it was possible to create, as some authors wrote, a fifth freedom of movement related to judicial decisions.

From the point of view of our interests we need to remember that both instruments tackled the field of contractual obligations but only the Brussels Convention took into consideration non contractual obli-

gations too. Therefore at the time no common rules on PIL regarding torts existed at EU level.

A pivotal shift occurred with the Treaty of Amsterdam, (entered into force May 1, 1999) which transferred judicial cooperation in civil matters from the "third pillar" (intergovernmental) to the "first pillar" (Community), allowing for the adoption of directly applicable Regulations as a new approach was possible to face the need to harmonize private international law rules.

Therefore a new regulation substituting the Brussels Convention was approved (Regulation 44/2001) under Articles 61(c) and 67(1) of the Treaty Establishing the European Community (TEC). In particular Article 61 allowed the adoption of measures in the field of judicial cooperation in civil matters to the extent necessary for the proper functioning of the internal market (clearly including measures for the recognition and enforcement of judgments). The same legal basis was then used to approve more recently the updated Brussels I Recast (Regulation 1215/2012).

A similar evolution took place also regarding the Rome Convention that was substituted by Regulation (EC) 593/2008 (Rome I).

In some cases, new regulations were approved in fields in which no previous convention existed as was the case for non-contractual obligations whose private international law rules are now provided by Regulation (EC) 864/2007 (Rome II).

3. *General contractual obligations (B2B Relationships)*

In business-to-business (B2B) contexts, the EU PIL framework prioritizes legal certainty and party autonomy. Under the Brussels I-bis Regulation, the general rule is that persons should be sued in the Member State of their domicile. However, Article 7(1) provides a special jurisdiction for contracts: a party may be sued in the place of performance of the obligation in question (e.g., where goods were delivered or services provided).

For specific contracts, the Regulation defines this place:

- Sale of goods: the place where, under the contract, the goods were delivered or should have been delivered.
- Provision of services: the place where, under the contract, the services were provided or should have been provided.

Moreover in B2B contracts choice of Court is allowed under the limits set by Article 25, declaring that businesses have broad freedom to agree on a specific court to resolve disputes, even choosing a "neutral" court with no connection to the contract.

A critical development in online B2B jurisdiction is the case of *El Majdoub v. CarsOnTheWeb.Deutschland GmbH* (case C-322/14). This dispute involved an online B2B contract for the sale of an electric car. The buyer, a car dealer, sued in Germany (his domicile), but the seller's terms and conditions included a choice-of-court clause favoring courts in Belgium.

The buyer argued that the clause was invalid because it was only accessible via a "click-wrap" agreement – meaning a box labeled "click here to open the conditions of delivery and payment" had to be clicked to view the terms. The Court of Justice of the European Union (CJEU) was asked whether this met the requirement for "writing" under Article 25(2) of the Regulation that considers that

> "*The agreement conferring jurisdiction shall be either:*
> (a) in writing or evidenced in writing;
> (b) in a form which accords with practices which the parties have established between themselves; or
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
> *2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'*".

The Court ruled that click-wrapping is equivalent to writing if it provides a durable record of the agreement, meaning the terms can be printed and saved by the party before the contract is concluded. This ruling reflects a move away from excessive formalism, placing a level of due diligence on businesses when entering digital contracts. The CJEU considered that as long as the terms and conditions might be downloaded by the buyer and might have been saved on a computer of the person entering the contract "in writing" the condition is deemed to be satisfied.

This decision was criticized as apparently diverging from a previous case (*Colzani,* case 24/76) in which the CJEU had ruled that when a jurisdiction clause is included in a party's *General Conditions of Sale*

printed on the back of a contract, the "in writing" requirement is only satisfied if the main contract signed by both parties contains an express reference to those General Conditions and the reference is clear enough that the other party, exercising reasonable care, can verify it.

4. *The protection of the "weaker party"*

The EU PIL framework departs from general rules when a contract involves a consumer, defined as a natural person acting for a purpose outside their trade or profession. Because the consumer is deemed the economically weaker and legally less experienced party the law grants them enhanced protection to prevent national legislative differences from harming them in cross-border transactions.

Under Articles 17-19 of Brussels I-bis, consumers have a dual possibility: they can sue the professional either in the professional's domicile or in the courts of their own domicile (*forum actoris*).

Conversely, the professional can only sue the consumer in the courts of the Member State where the consumer is domiciled. Parties can only deviate from these rules through an agreement entered into after the dispute has arisen, or if the agreement allows the consumer to bring proceedings in additional courts (Article 19). This provision is meant to avoid choice of court imposed by the professional to the consumer in the terms and conditions such granting a higher level of protection for the weak part of the contract.

In particular in B2C relationships, the Regulation provides protective forums to ensure the "weaker party" (the consumer) is not deterred from seeking justice due to the costs of foreign litigation.

One of the main problems since the entry into force of the Brussels Convention is the need to elaborate a precise Definition of a Consumer. The text qualifies as consumer "*a natural person acting for a purpose outside their trade or profession*". The CJEU interprets this strictly; for "mixed-use" contracts (part private, part business), the consumer rules only apply if the business purpose is so limited as to be negligible (*Gruber*, case C-464/01).

The Court ruled that a person cannot rely on consumer protections if the goods are intended for both private and professional use, unless the professional purpose is so limited as to be negligible. The fact that the private element is predominant is considered irrelevant

(*Gruber* case). Similarly, (in the *Milivojević*, case C-630/17) the CJEU ruled that a debtor who enters into a credit agreement to renovate a property – with the intent to provide tourist accommodation services – is generally not considered a consumer. The protection only applies if the link to the professional activity is so tenuous that the contract appears essentially private.

The Court also considered that a person who enters a contract with the intent of pursuing a trade or profession in the future (but is not yet doing so) cannot be regarded as a consumer (*Dentalkit* case C-269/95).

However, a consumer's technical expertise (e.g., in finance or IT) does not disqualify them from this status, as the status is determined objectively by the contract's nature, not subjective knowledge (*Petruchová* case C-208/18). The Court held that a university student with significant financial knowledge who engaged in complex online trading was still a "consumer". Her status did not depend on her subjective expertise or information, but rather on her position relative to the specific contract. Following the logic of *Petruchová*, a consumer's IT proficiency (e.g., using a VPN to mask their location or circumvent geo-blocking) does not strip them of their status, as the status is determined by the contract's private purpose.

Factors such as a high volume of transactions in a short period or the investment of significant sums do not, in principle, disqualify a person from being a consumer (case *Reliantco* C-500/18). The same solution was reached by the CJEU also in case *Kamenova* C-105/17 (related however to the application of different set of rules on consumer protection from the ones we are discussing now) the CJEU clarified that a person who publishes a high volume of sales advertisements on a website (like Vinted or eBay) is not automatically a "trader". Status must be examined case-by-case, considering whether the sales go beyond the realm of private activity. This creates an "enforcement nightmare" because platforms often rely on user self-selection, leading to "hidden traders" (professionals pretending to be consumers) to avoid B2C obligations.

5. *The concept of "directed activities"*

Under the Brussels I regulation (both first version and recast one),

for these consumer protections to apply, the professional must either pursue activities in the consumer's Member State or "by any means, direct such activities" to that State.

In particular Article 17(1) states:

> "*In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:*
> *a) it is a contract for the sale of goods on instalment credit terms;*
> *b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
> *c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.*"

The previous Brussels Convention was no more apt to tackle digital disruption and the evolution of the digital data as it was created in a period in which the passive consumer was the one entering a contract that was preceded by specific invitation addressed to the consumer or by a specific advertising. So if an Italian consumer saw an advertising on a newspaper in Italy or was invited by mail to buy a product from a German company, then the special rules of jurisdiction would apply. If instead the same Italian consumer decided on his own will to travel as a tourist to Germany, and he entered into a contract there, the general rules would apply.

Under the Brussels Regulations the most innovative approach was to substitute this idea of advertising with a reference to the notion of "directed activities".

Following the *Pammer* and *Hotel Alpenhof* joined cases C-585/08 and C-144/09, the CJEU established that mere website accessibility is insufficient. Instead, national courts must look for evidence of an intent to do business with consumers in that specific state, such as using international dialing codes, neutral top-level domains (.com or .eu), or referencing an international clientele.

These leading cases were joined such giving the possibility to the CJEU to decide two different preliminary ruling requests coming from different (but both German speaking) countries. In the *Pammer* case the buyer was an Austrian resident having a dispute with a company

established in Germany related to a voyage by freighter from Trieste (Italy) to the Far East. He had booked his trip through a German company, advertising the offer on its website with misleading information. He refused to embark and sought reimbursement filing the case in front of the Austrian courts, as place of his residence, but the other party contended that they were not conducting business activity in Austria and that the website in itself was not enough to make them being considered as directing their activities towards that country. The second case, *Hotel Alpenhof*, was a case in which a small Austrian hotel started a dispute with a consumer resident in Germany, who had not paid the hotel bills. Hotel Alpenhof had a non-interactive website, advertising their services, where an email address for reservations was proposed. The Hotel brought an action before the Austrian courts using the general contract forum but the consumer put in doubt their jurisdiction because he considered that Hotel Alpenhof was directing activities also towards Germany. The CJEU decided to use a restrictive approach declaring that that the presence of a website is insufficient to evaluate direction of activities towards all countries from where the website is potentially accessible.

We need to evaluate all the other pieces of evidence regarding the targeted consumer such as, inter alia, a mention of itineraries on how to reach the premises, the use of a specific language the use of local currency, international phone numbers, the mention of international clientele composed by customer domiciled in various member states.

More recently the CJEU also de-linked the contract from the website: in particular in the *Mühlleitner* case (C-190/11), the CJEU clarified that the contract does not necessarily have to be concluded at a distance for the protections to trigger; the establishment of "contact at a distance" through a website is sufficient to apply the special protective rules. Neither the history of the provision, nor its purpose nor the decision of the CJEU in *Pammer* and *Alpenhof* required that the contract be concluded at a distance.

Crucially, under this new interpretation offered by the Court of Justice, the consumer does not need to prove a causal link between the website and the contract. Even if the consumer was unaware of the professional's "directed" digital activities at the time of purchase, the protective jurisdiction rules still apply (*Emrek*, case C-218/12). This shifts the legal focus from the consumer's behavior to the professional's objective targeting of foreign markets.

The CJEU has still had no chance to explore the problems related to the functioning of PIL rules on jurisdiction in the field of consumer protection in cases in which new technologies, now easily accessible to many consumers, are used in the conclusion of a contract. This might happen in cases in which the consumer is masking his place of habitual residence by using a VPN connection, in order to prevent the decision of a company decides to operate geo-blocking, (prohibited under the Geo-Blocking Regulation 2018/302 with some exceptions) and therefore to expressly avoid the direction of its activity towards a specific EU country.

6. *Specific exclusions and limitations – The role of ADR*

A relevant limit to the application of rules on consumer contracts is the one related to the specific exclusions listed in the legal texts that we have considered above. In fact not all private contracts trigger the special PIL on jurisdiction meant to protect consumers.

Without the willingness to be exhaustive we might just remember some of the more relevant exclusions:

- Transportation contracts: passengers who purchase simple flight tickets, rather than a full travel package, cannot rely on the consumer contract rules under Article 17(3) of Brussels I bis Regulation 1215/2012. On the other side the CJEU in case, *Maletic v lastminute.com GmbH* (C-478/12) confirmed that the booking of a package holiday is included and also allowed the consumer to sue both – the platform and the Austrian operator subsequently involved by the platform itself – before the courts of his own domicile, even though one of the two businesses happened to be domiciled in the same country as the consumer considering the dispute "international" in character, because the booking was a single, indivisible transaction.
- Employment Context: as by the CJEU ruling in case *ROI Land* (C-604/20) an employee signing an agreement (such as a letter of comfort) linked to their professional role is not acting as a consumer, as the agreement is not outside their profession.

Moreover, we also need to consider that consumers are protected only as long as they act individually. Any collective Entities or "purchasing groups" (common in the green economy) may find it difficult

to rely on consumer protections as the rules are not easily applied extensively to groups, and were specifically designed for the consumer as a single person.

Given the high costs of cross-border litigation, Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) are vital for consumer trust. The EU ODR platform, established by Regulation (EU) 524/2013, was designed to facilitate out-of-court settlements. However, this platform, due to low usage rates and high administrative costs, was discontinued as of July 2025 after the previous regulation was repealed by Regulation (EU) 2024/3228. Online shops, that previously needed to display a direct link to the defunct platform on their websites, have now decided to establish (like eBay) their own internal "Digital Justice" systems to resolve disputes, focusing on speed and community trust rather than formal PIL rules. Other platforms just make reference to other alternative dispute resolution methods, while we still have platforms that have not updated yet their website in order to comply with the new regulation. We also need to stress, in the field of circular economy, that there is now a push to extend the ADR framework to include extra-contractual disputes (like misleading green claims) and to better regulate the self-regulation of large online platforms.

7. *Non-contractual obligations and EU rules on jurisdiction*

Regarding jurisdiction for non-contractual obligations, the primary legal framework is Regulation (EU) 1215/2012 (Brussels I-bis) as the new Rome II Regulation only deals with applicable law.

While the general rule remains that a defendant must be sued in the Member State of their domicile (Article 4), the Regulation provides a special jurisdiction rule for matters relating to tort, delict, or quasi-delict. Under Article 7(2), a person may be sued in the courts of the place where the harmful event occurred or may occur.

The CJEU has interpreted this "place of the harmful event" to include both the place where the damage occurred (*locus damni*) and the place of the event giving rise to the damage. In the specific context of product liability, one of the most relevant cases for consumers in particular in the circular economy, this has been interpreted as the place where the product was manufactured. Unlike the protective

rules for consumers (B2C), these jurisdiction criteria are based on the proper administration of justice and the proximity of the court to the evidence, rather than a desire to protect a "weaker party".

Furthermore, the CJEU's 2020 ruling in the *Wikingerhof* (case C-59/19) clarified the boundary between contract and tort jurisdiction, establishing that a claim should be treated as non-contractual if the obligation being invoked does not require an interpretation of the contract itself, even if a contract exists between the parties. Finally, while parties can agree to a choice-of-court clause for non-contractual disputes under Article 25, certain matters such as the validity of intellectual property registrations (a situation that might be related to the selling of counterfeit goods) fall under the exclusive jurisdiction of the courts where the registration occurred.

8. *Final remarks*

EU Private International Law has evolved from a simple intergovernmental framework to a sophisticated system of protection for the weaker party. However, digital disruption – including VPNs, geo-blocking, and the explosion of C2C platform transactions in the circular economy – continues to test the limits of existing Regulations. One of the most relevant challenges in the creation of a PIL framework of common rules at European Union level is to keep them updated in the evolving scenario.

A good example of the problems involved can be found in the platform paradox. The rules that we have seen from the point of view of private international law are usually meant for B2C contracts and for B2B contracts. However, the creation of platforms for re-selling used products, so relevant for the circular economy, leads to an increased number of C2C cross-border contracts to which the general rules on contracts shall apply.

Future interventions may require a shift toward further harmonization of substantive consumer law and a rethinking of how PIL rules apply to the hybrid relationships created by digital intermediaries and how to deal with the new technologies that are evolving offering new and easier opportunities to all consumers to enter contracts in a cross-border context.

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CIRCULAR ECONOMY AND APPLICABLE LAW

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SUMMARY: 1. Introduction. – 2. Understanding the circular economy. – 2.1. Beyond recycling. – 2.2. New business models: digital and cross-border.– 3. Why applicable law matters in the circular economy. – 3.1. When parties think about applicable law. – 3.2. Main concerns in the cross-border context. – 4. Applicable law in the circular economy: the central role of the Rome I Regulation. – 4.1. Party autonomy as the starting point. – 4.2. Consumer protection and the limits of party autonomy. – 4.3. Relevance for circular economy business models. – 5. Transparency and the role of the substantive consumer protection acquis. – 6. Case study: *VKI v Amazon*. – 6.1. Factual background and contractual setting. – 6.2. The relationship between the Rome I Regulation and Directive 93/13. – 6.3. Transparency as a substantive requirement. – 6.4. Assessment of imbalance and consumer disadvantage. – 6.5. Relevance for digital platforms and circular economy models. – 7. Conclusion.

1. *Introduction*

The transition from a linear to a circular economy has become one of the central objectives of contemporary European Union policy. Moving beyond the traditional model of production and consumption based on the sequence of taking resources, manufacturing products, using them and ultimately discarding them as waste, the circular economy seeks to maintain the value of products, materials and resources for as long as possible. This objective is pursued through a variety of mechanisms, including repair, reuse, refurbishment, remanufacturing, recycling, sharing and leasing arrangements, all of which aim to reduce waste generation and promote more sustainable patterns of production and consumption.

The circular economy is frequently discussed through the lenses of sustainability, environmental protection, technological innovation

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and economic development. Indeed, much of the public and academic debate focuses on the environmental benefits of reducing resource extraction, extending product lifecycles and lowering greenhouse gas emissions. Equally important are the technological innovations that enable new forms of production and consumption, such as digital platforms, connected products and data-driven services. Yet the success of the circular economy depends not only on environmental ambitions and technological progress, but also on the existence of an appropriate legal framework capable of supporting these new economic models.

Particular legal questions arise because circular economy activities increasingly transcend national borders and are frequently organised through digital infrastructures. Consumers purchase refurbished electronic devices from sellers located in other Member States, participate in product-as-a-service arrangements offered by foreign providers, access repair services through online marketplaces and engage in secondary markets for used products operating across the European Union. At the same time, businesses offering circular products and services rely heavily on digital platforms that connect users, facilitate transactions and manage contractual relationships. As a result, products, services, consumers, businesses and digital intermediaries are often located in different jurisdictions, creating complex legal relationships that cannot be adequately understood solely through the lens of domestic law.

In this environment, legal questions emerge long before a dispute actually occurs. A consumer purchasing a refurbished smartphone from an online platform established in another Member State may wish to know which legal system protects them if the product proves defective. A business offering repair or refurbishment services through a digital platform may require certainty regarding its contractual obligations towards customers located abroad. Similarly, platform operators facilitating thousands or even millions of transactions each day require predictability regarding the legal regimes governing their relationships with users. Questions concerning applicable law and jurisdiction in consumer cases therefore become fundamental elements of the circular economy ecosystem rather than merely technical legal considerations.

The legal framework governing cross-border circular economy transactions performs several essential functions. First, it promotes le-

gal certainty by enabling parties to foresee their rights and obligations before entering into a contractual relationship. Secondly, it contributes to the development of trust, which is a crucial precondition for participation in circular markets. Consumers are unlikely to embrace innovative business models involving repaired, refurbished or shared products if they fear that their rights will be difficult to enforce once a transaction crosses national borders. Trust is particularly important in digital environments where consumers frequently contract with businesses they have never met and whose operations may be located in another country altogether. Thirdly, legal rules help ensure fairness between the parties by addressing the significant asymmetries of information, bargaining power and technical expertise that often characterise relationships between consumers and businesses operating through digital platforms.

These concerns are especially relevant in the context of consumer contracts. The circular economy increasingly relies on standardised digital contracting processes through which consumers agree to terms and conditions drafted unilaterally by platform operators or service providers. Such terms frequently include contractual provisions on applicable law and jurisdiction, matters which consumers rarely read, understand or negotiate. Nevertheless, these clauses may have a significant impact on the consumer's ability to enforce their rights. A choice-of-law clause designating the law of a foreign country or a jurisdiction clause directing disputes to courts located abroad may discourage consumers from pursuing legitimate claims and may undermine the effectiveness of the substantive consumer protection rules established by European Union law.

For this reason, the legal framework governing applicable law and jurisdiction occupies a particularly important position within the broader regulatory architecture of the European Union. Through instruments such as Regulation (EC) 593/2008 on the law applicable to contractual obligations (hereinafter: Rome I Regulation) and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels I bis Regulation), as well as the consumer protection acquis, the European Union seeks to ensure that the benefits of the internal market are not achieved at the expense of consumer protection. These instruments establish mechanisms designed to balance party autonomy with the need to protect weaker parties, thereby

ensuring that cross-border economic activity remains both efficient and fair.

The importance of these issues is further amplified by the growing role of digital platforms in facilitating circular economy activities. Whether consumers are purchasing refurbished goods, accessing repair services, participating in sharing schemes or engaging in product-as-a-service models, their interactions increasingly take place within platform environments governed by extensive contractual terms. Understanding how the rules on applicable law and jurisdiction operate in this context is therefore essential for assessing the legal foundations upon which circular economy business models depend.

Against this background, this chapter examines the legal framework governing cross-border private relationships within the circular economy, with particular emphasis on applicable law, jurisdiction and consumer protection. Rather than providing an exhaustive theoretical analysis, the chapter follows the structure and logic of the Summer School lecture on which it is based. Its objective is to introduce the principal legal concepts, explain the underlying regulatory rationale and illustrate their practical significance through examples and selected case law. Particular attention is devoted to the operation of consumer protection mechanisms in digital contracting environments and to the ways in which European private international law contributes to ensuring fairness and legal certainty within the emerging circular economy.

2. *Understanding the circular economy*

The concept of the circular economy has become one of the most influential policy ideas of the twenty-first century. It appears in European Union legislation, policy documents, academic literature and business strategies, often being presented as a key instrument for achieving sustainable development and addressing environmental challenges. Although the term is now widely used, its meaning is not always fully understood. For many people, the circular economy is associated primarily with recycling. While recycling is certainly an important component of the circular economy, the concept is considerably broader and more ambitious.

2.1. Beyond recycling

At its core, the circular economy represents a different way of thinking about the relationship between economic activity, natural resources and waste. Traditional economic systems have largely been based on a linear model of production and consumption. In this model, natural resources are extracted, transformed into products, consumed and eventually discarded. This approach can be summarised by the sequence "take, make, use and dispose". For decades, the linear model has supported economic growth and improvements in living standards. However, it has also generated significant environmental pressures, including resource depletion, pollution, biodiversity loss and climate change.

The circular economy seeks to challenge this model by rethinking the entire lifecycle of products and materials. Instead of viewing products as items that eventually become waste, the circular economy aims to maintain their value for as long as possible. Products should be designed, produced, used and managed in ways that minimise waste generation and maximise the continued use of resources. In this sense, waste is no longer regarded as the inevitable end point of economic activity but rather as a resource that can re-enter economic circulation.

The European Union has embraced this approach as part of its broader sustainability agenda. The Circular Economy Action Plan (COM(2020) 98 final), adopted within the framework of the European Green Deal, reflects the ambition to transform production and consumption patterns across the Union. The objective is not merely environmental protection. The transition is also expected to strengthen economic resilience, reduce dependence on imported raw materials, stimulate innovation and create new business opportunities. Circular economy policies therefore pursue environmental, economic and social goals simultaneously.

To understand the circular economy, it is useful to distinguish between several interconnected strategies. One of the most important is the extension of product lifecycles. In the traditional economy, products are often designed with relatively short useful lives, encouraging consumers to replace them rather than repair them. By contrast, circular economy principles favour durable products that can be maintained, repaired and upgraded over time. This approach is

particularly visible in the so-called "right to repair", now laid down in Directive (EU) 2024/1799 on common rules promoting the repair of goods (whose national transposing measures apply from 31 July 2026), which seeks to ensure that consumers can access spare parts, repair services and technical information necessary to prolong the lifespan of products.

Another important strategy involves reuse. Products that are no longer needed by one user may still have significant value for another. Second-hand markets, both physical and digital, play an increasingly important role in facilitating such transactions. Consumers today regularly purchase used electronics, clothing, furniture and vehicles through online marketplaces operating across national borders. These practices reduce demand for new products and contribute to more efficient resource use.

Refurbishment and remanufacturing represent additional dimensions of circularity. Refurbishment generally involves restoring a product to a satisfactory working condition, often after inspection, cleaning and replacement of selected components. Remanufacturing goes further by rebuilding products to meet standards comparable to those of newly manufactured goods. These activities are particularly important in sectors such as electronics, automotive manufacturing and industrial equipment. By preserving much of the original product's value, refurbishment and remanufacturing reduce both resource consumption and waste generation.

2.2. New business models: digital and cross-border

The circular economy also encourages the development of entirely new business models. Traditionally, consumers purchase products and acquire ownership over them. Increasingly, however, businesses offer access to products without transferring ownership. This trend is reflected in product-as-a-service models, leasing arrangements and sharing platforms. Instead of purchasing a product outright, users pay for access, performance or functionality. Examples include car-sharing services, bicycle-sharing systems, leased household appliances and subscription-based technology services.

Digitalisation has played a crucial role in enabling these developments. Many circular economy activities rely heavily on digital technologies that facilitate information exchange, matching of users

and providers, monitoring of product use and management of transactions. Online platforms connect buyers and sellers of second-hand goods, enable the booking of repair services and support sharing economy initiatives. Sensors and connected devices allow products to be monitored throughout their lifecycle, facilitating predictive maintenance and extending their useful life.

As a result, the circular economy is increasingly becoming a digital economy as well. This transformation creates new opportunities but also new legal challenges. Digital platforms frequently operate across multiple jurisdictions and involve participants located in different countries. A consumer in Croatia may purchase a refurbished smartphone from a seller in Germany through an online platform established in Ireland. A repair service may be arranged through a platform headquartered in another Member State. The parties may never meet physically, and the contractual relationship may be governed by standard terms drafted unilaterally by the platform operator. These examples illustrate an important characteristic of contemporary circular economy activities: they are often inherently cross-border. While the environmental objectives of the circular economy may be global, the legal relationships through which circular activities take place remain subject to national legal systems. Questions therefore arise concerning which law governs a transaction, which court has jurisdiction in the event of a dispute and how consumer rights can be effectively protected when economic activities transcend national borders.

Another feature of the circular economy is the growing importance of trust. Consumers may be hesitant to purchase refurbished goods if they are uncertain about product quality. They may be reluctant to participate in sharing arrangements if they do not understand their legal rights and obligations. Businesses, for their part, require predictable legal frameworks that enable them to operate across borders without facing excessive legal uncertainty. Trust therefore becomes a critical factor in the success of circular economy initiatives. Law plays an essential role in creating this trust. Product safety regulations ensure that goods placed on the market meet appropriate standards. Consumer protection rules seek to address information asymmetries between businesses and consumers. Environmental regulations encourage sustainable practices throughout product lifecycles. Contract law provides mechanisms for allocating rights and responsibilities between parties. Private international law determines which legal system

applies when disputes involve cross-border elements. Together, these legal instruments create the framework within which circular economy activities can flourish.

Importantly, the transition towards a circular economy does not merely require the adaptation of existing legal rules. In many cases, entirely new regulatory questions emerge. For example, who bears responsibility when a refurbished product causes harm? How should ownership be understood in product-as-a-service arrangements? What legal obligations apply to digital platforms facilitating circular transactions? How should consumer protection rules operate when contracts are concluded entirely online? These questions demonstrate that the circular economy is not only an environmental and economic transformation but also a legal transformation.

For students of law, the circular economy therefore provides a particularly interesting field of study. It brings together multiple areas of law, including contract law, consumer protection, environmental law, competition law, intellectual property law, data protection law and private international law. Understanding how these areas interact is essential for appreciating both the opportunities and the challenges associated with the transition towards more sustainable forms of production and consumption. The circular economy is ultimately about more than recycling or waste management. It represents a fundamental rethinking of how economic value is created, maintained and shared. As circular business models continue to expand across national borders and increasingly rely on digital technologies, legal questions concerning applicable law, jurisdiction and consumer protection become ever more important. It is to these questions that the following sections now turn.

3. *Why applicable law matters in the circular economy*

The circular economy is often presented as a technological, environmental and economic project. Discussions typically focus on reducing waste, extending product lifecycles, improving resource efficiency and encouraging sustainable consumption patterns. While these objectives are undoubtedly important, they cannot be achieved solely through technological innovation or environmental policy. The transition towards a circular economy also depends upon the exis-

tence of legal frameworks capable of supporting increasingly complex economic relationships that transcend national borders.

3.1. When parties think about applicable law

In everyday life, participants in circular economy activities rarely think about applicable law when entering into transactions. Consumers purchasing refurbished electronic devices, subscribing to product-as-a-service schemes or arranging repairs through digital platforms are generally interested in practical matters such as price, quality, delivery times and product functionality. Businesses similarly tend to focus on commercial opportunities, customer acquisition and operational efficiency. Questions concerning applicable law and jurisdiction usually remain invisible until a problem arises.

Yet the legal framework governing a transaction begins to operate long before any dispute emerges. Every contract exists within a legal system that determines the rights and obligations of the parties. These rules influence issues such as contract formation, performance, liability, remedies, consumer protection and dispute resolution. In purely domestic situations, identifying the relevant legal system is relatively straightforward. However, circular economy activities increasingly involve parties located in different jurisdictions, making the determination of applicable law considerably more complex.

To illustrate this point, consider a simple example. A consumer residing in Croatia purchases a refurbished smartphone through an online platform established in Ireland. The device is sold by a professional trader located in Germany and delivered from a warehouse in the Netherlands. After several weeks, the smartphone develops a serious defect. The consumer seeks a repair, replacement or refund, but the trader refuses responsibility. At this stage, several legal questions immediately arise. Which country's law governs the contract? Can the consumer rely on Croatian consumer protection legislation? What happens if the platform's terms and conditions designate the law of a different country? Must the consumer bring proceedings before a Croatian court or in another Member State if he or she is not satisfied with the way the trader dealt with his or her request?

These questions demonstrate that legal certainty is not merely a technical concern reserved for lawyers. Rather, it is a fundamental precondition for the functioning of cross-border markets. Consumers

are unlikely to participate confidently in circular economy initiatives if they are uncertain about their legal rights. Likewise, businesses may hesitate to expand their operations across borders if they cannot predict the legal consequences of their activities. Applicable law therefore serves an important economic function by reducing uncertainty and facilitating participation in the internal market.

The importance of applicable law becomes even more apparent when considering the variety of business models associated with the circular economy. Traditional sales contracts remain important, but they are increasingly accompanied by innovative arrangements involving leasing, rental, subscription services, sharing schemes and platform-mediated transactions. These models often blur conventional distinctions between ownership and use. In a product-as-a-service arrangement, for example, the provider may retain ownership of the product while the customer pays for access or functionality. Such arrangements create ongoing legal relationships that may continue for years and involve multiple actors operating in different jurisdictions. Digital platforms play a particularly significant role in this context. Many circular economy activities are organised through online intermediaries that connect users, facilitate transactions and provide standard contractual frameworks. These platforms frequently operate on a global scale, serving millions of users across numerous jurisdictions.

3.2. Main concerns in the cross-border context

The terms and conditions of online platforms often include provisions specifying applicable law and competent courts. While such clauses may appear routine, they can have profound consequences for the parties involved. From the perspective of businesses, the possibility of choosing the applicable law offers predictability and efficiency. A company operating across multiple jurisdictions may prefer to apply a single legal system to all of its contractual relationships. This reduces transaction costs, simplifies compliance efforts and facilitates risk management. From the perspective of consumers, however, such arrangements may create difficulties. Consumers may be unfamiliar with the chosen legal system, unable to understand their rights under foreign law or discouraged from pursuing claims altogether. The imbalance of information and bargaining power between consumers and businesses therefore becomes particularly relevant.

These concerns are not unique to the circular economy. They have long been recognised within European private international law and consumer protection law. However, the circular economy amplifies their importance because of its reliance on digital technologies and cross-border transactions. A growing proportion of circular economy interactions take place online, often through standardised contractual processes in which consumers have little or no opportunity to negotiate contractual terms. Therefore, questions concerning applicable law become closely linked to broader concerns regarding fairness, transparency and effective consumer protection.

The relationship between applicable law and trust deserves particular attention. Trust is frequently identified as one of the key drivers of successful circular economy initiatives. Consumers must trust that refurbished products are safe and reliable. They must trust that repair services will be performed competently. They must trust that sharing arrangements will operate fairly. Importantly, they must also trust that their legal rights will be protected if problems arise. Legal certainty contributes significantly to the creation of such trust. When consumers know which legal rules apply to a transaction and understand how those rules protect their interests, they are more likely to participate in innovative business models. Conversely, uncertainty regarding legal rights may discourage participation. A consumer who believes that enforcing their rights would require navigating an unfamiliar foreign legal system may decide not to engage in a cross-border transaction at all. The effectiveness of circular economy policies therefore depends, at least in part, on the existence of legal mechanisms that make cross-border transactions accessible and predictable.

The European Union has long recognised this connection between legal certainty, consumer confidence and market integration. One of the central objectives of the internal market is to enable individuals and businesses to engage in cross-border activities without facing unnecessary legal obstacles. Private international law plays a crucial role in achieving this objective by providing rules that determine which courts have jurisdiction and which legal systems govern cross-border disputes. These rules do not seek to eliminate differences between national legal systems. Rather, they establish mechanisms for managing those differences in a predictable and fair manner. Within the context of consumer contracts, these objectives are complemented by a strong commitment to consumer protection.

European Union law recognises that consumers generally occupy a weaker position than businesses. This weakness may arise from limited bargaining power, information asymmetries or a lack of legal expertise. In digital environments, these challenges are often intensified. Consumers rarely read lengthy terms and conditions, have limited opportunities to negotiate contractual terms and may be unaware of the legal implications of clauses relating to applicable law or jurisdiction.

Online platforms frequently rely upon standardised contractual terms and conditions that consumers accept without meaningful engagement. Although such practices are not unique to circular economy transactions, they are highly relevant within platform-based circular business models. Consumers purchasing refurbished goods, arranging repairs or participating in sharing schemes typically interact with businesses through standardised digital interfaces designed to facilitate rapid contracting. The legal complexity underlying these transactions remains largely invisible to users.

This reality explains why European Union law does not rely solely on party autonomy when determining applicable law in consumer contracts. While freedom of contract remains an important principle, it is balanced against the need to protect consumers from contractual arrangements that might undermine their legal rights. The result is a sophisticated legal framework that seeks to combine market efficiency with social fairness. Understanding this balance is essential for understanding how the law supports the development of the circular economy.

The importance of applicable law therefore extends far beyond the resolution of individual disputes. It influences consumer confidence, business planning, market integration and the overall effectiveness of circular economy policies. By determining which legal standards govern contractual relationships, applicable law shapes the incentives and expectations of all participants in the circular economy ecosystem. For this reason, any meaningful analysis of the legal dimensions of the circular economy must engage with the rules governing cross-border private relationships. The following sections therefore turn to the European private international law framework, examining how the rules on jurisdiction and applicable law seek to balance party autonomy, legal certainty and consumer protection in an increasingly digital and circular economy.

4. *Applicable law in the circular economy: the central role of the Rome I Regulation*

As discussed in the previous section, circular economy transactions increasingly involve parties located in different countries. Whenever such transactions involve an international element, two distinct legal questions arise. First, which court is competent to hear a potential dispute? Secondly, which law will govern the contractual relationship?

The first question concerns jurisdiction and is primarily governed within the European Union by the Brussels I bis Regulation. Since this topic is examined elsewhere in this volume (see in this book the chapter by Bergamini), only a brief observation is necessary. The Brussels I bis Regulation establishes rules determining which Member State's courts may hear disputes arising from cross-border civil and commercial matters. In consumer contracts, these rules (Articles 17–19 Brussels I bis Regulation) generally seek to facilitate access to justice by allowing consumers to bring proceedings before the courts of their own domicile while restricting the trader's ability to sue consumers elsewhere. Jurisdiction therefore addresses the question of where litigation may take place.

The second question concerns applicable law. Even when a court's jurisdiction is clearly established, the court must still determine which legal system governs the substance of the dispute. A Croatian court, for example, may be competent to hear a dispute involving a consumer domiciled in Croatia and a trader domiciled in another Member State, yet the law governing the contract may not necessarily be Croatian law. Determining the applicable law is therefore a separate and equally important exercise.

Within the European Union, the primary instrument governing contractual obligations in civil and commercial matters is the Rome I Regulation. The Regulation applies in all Member States of the European Union, with the exception of Denmark, and constitutes one of the cornerstones of European private international law.

The importance of the Rome I Regulation for the circular economy cannot be overstated. Circular business models frequently operate across borders, involve digital contracting and connect participants from different legal systems. Without common conflict-of-law rules, uncertainty would arise regarding the legal framework governing contractual relationships. Such uncertainty would under-

mine consumer confidence, discourage business participation and ultimately hinder the development of circular markets within the internal market.

The Rome I Regulation seeks to achieve several objectives simultaneously. It aims to enhance legal certainty, facilitate the proper functioning of the internal market, promote predictability of outcomes and ensure an appropriate balance between party autonomy and the protection of weaker parties (see Recitals 6, 16 and 23 Rome I Regulation). These objectives are particularly relevant in the context of the circular economy, where innovative business models often challenge traditional legal assumptions concerning ownership, possession and contractual relationships.

4.1. Party autonomy as the starting point

One of the fundamental principles underlying the Rome I Regulation is party autonomy. Article 3(1) Rome I Regulation provides that a contract shall be governed by the law chosen by the parties. This choice may be express or clearly demonstrated by the terms of the contract or the circumstances of the case. Party autonomy reflects the idea that contracting parties are generally best positioned to determine the legal framework governing their relationship. Businesses operating internationally often value this flexibility because it enables them to reduce legal complexity and standardise contractual arrangements across multiple jurisdictions.

In the context of the circular economy, party autonomy frequently manifests itself through standard terms and conditions used by digital platforms. A platform facilitating the sale of refurbished products throughout Europe may designate the law of the Member State in which it is established as the law governing all transactions concluded through its services. Similarly, providers of sharing services, leasing arrangements or repair platforms often include choice-of-law clauses within their standard contractual documentation. At first sight, such arrangements appear entirely consistent with contractual freedom. However, the practical reality of digital contracting reveals important limitations. Consumers rarely negotiate contractual terms. Indeed, they often do not read them. The choice of applicable law is therefore commonly determined unilaterally by the trader rather than through genuine agreement between the parties. This reality explains why in

the Rome I Regulation party autonomy is not an absolute principle, especially in consumer contracts.

4.2. Consumer protection and the limits of party autonomy

European private international law recognises that consumers generally occupy a weaker position than professional traders. This weakness stems from multiple factors, including informational asymmetries, limited bargaining power and lack of legal expertise. These concerns become particularly acute in digital environments. Consumers engaging with online platforms are frequently presented with lengthy standard terms drafted entirely by the service provider. Although consumers formally consent to these terms by clicking an acceptance button, such consent is often largely fictional in practical terms. The consumer's primary objective is obtaining access to the desired product or service rather than making an informed assessment of applicable law clauses.

The Rome I Regulation therefore establishes a special regime for consumer contracts in Article 6. This provision represents one of the most important legal safeguards within the European system of consumer protection. Under Article 6, a consumer contract is generally governed by the law of the country where the consumer has their habitual residence, provided that the trader pursues commercial activities in that country or directs such activities towards that country and the contract falls within the scope of those activities. The rationale is straightforward. Consumers should normally benefit from the protection offered by the legal system with which they are most closely connected and which they can reasonably expect to apply to their transactions. The concept of directing activities has acquired particular significance in the digital age. A trader does not need to be physically established in the consumer's country. It is sufficient that the trader directs its commercial activities towards consumers located there. Websites offering products in multiple languages, accepting foreign currencies, providing international delivery or specifically targeting consumers in other Member States will frequently satisfy this requirement (see, on the corresponding notion in the Brussels I regime, CJEU 7.12.2010, joined cases C-585/08 and C-144/09, Pammer and Hotel Alpenhof; Recital 24 Rome I Regulation). Many circular economy platforms operate precisely in this manner. Their business

models depend upon attracting users from numerous jurisdictions simultaneously. Consequently, the consumer protection mechanism established by Article 6 often becomes applicable in practice.

The objective of Article 6, however, is neither to allow absolute autonomy nor to prohibit businesses from choosing applicable law altogether. Rather, it is to ensure that such choices do not deprive consumers of essential protections. Thus, Article 6(2) permits parties to choose the applicable law under Article 3. However, such a choice may not have the result of depriving the consumer of the protection afforded by mandatory provisions of the law that would otherwise have applied under Article 6(1). This mechanism creates a sophisticated balance between contractual freedom and consumer protection.

Here is an example. Suppose a platform established in Ireland includes a clause providing that Hungarian law governs all contracts concluded through the platform. An Italian consumer purchases a refurbished laptop from a trader using the platform. If Italian law would have applied under Article 6(1), the contractual choice of Hungarian law cannot deprive the consumer of the mandatory consumer protections available under Italian law. The practical consequence is that the trader cannot simply escape consumer-protective legislation by selecting a more favourable legal system. The chosen law applies only insofar as it offers at least the same level of protection as that guaranteed by the law of the consumer's habitual residence. In effect, Article 6 creates a minimum floor of protection beneath which contractual arrangements may not fall.

4.3. Relevance for circular economy business models

The significance of Article 6 becomes particularly evident when considering emerging circular economy practices. Many circular business models rely on long-term contractual relationships rather than one-off sales. Product leasing, subscription services, repair contracts, maintenance arrangements and sharing schemes often involve continuing obligations between the parties. Disputes may arise concerning performance standards, termination rights, liability for defects, data use, maintenance responsibilities or warranty obligations.

At the same time, these services are increasingly offered through digital platforms operating across multiple jurisdictions. Without the protective mechanism established by Article 6, consumers could eas-

ily find themselves subject to unfamiliar foreign legal systems selected exclusively by platform operators. Such a result would undermine consumer confidence and create barriers to participation in circular economy initiatives. The Rome I Regulation therefore contributes directly to broader sustainability objectives. By strengthening consumer trust in cross-border transactions, it facilitates participation in innovative business models that support resource efficiency and circularity.

5. *Transparency and the role of the substantive consumer protection acquis*

Private international law does not operate alone in its task of protecting consumers, but instead works in tandem with the broader EU consumer protection acquis, in particular Council Directive 93/13/EEC on unfair terms in consumer contracts (hereinafter: Directive 93/13), as amended by Directive (EU) 2019/2161. Under this Directive, a contractual term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Article 3(1) Directive 93/13). This assessment is not purely formal. It requires a contextual evaluation of the term, taking into account the nature of the goods or services, all the circumstances surrounding the conclusion of the contract (Article 4(1) Directive 93/13), and the extent to which the consumer was in a real position to understand and influence the content of the term. In practice, this means that standard-form clauses in consumer contracts, particularly those used by online platforms, are subject to a substantive fairness test that goes beyond mere consent.

A term may therefore be regarded as unfair not only because of its content, but also because of its effects. This is particularly relevant for clauses that restrict or impede the consumer's access to legal remedies, including choice-of-court or choice-of-law clauses that create the impression that the consumer cannot rely on the mandatory protections of their home jurisdiction. In such cases, the imbalance arises from the combined effect of informational asymmetry, lack of negotiation power, and the potential deterrent effect of the clause on the consumer's willingness to pursue their rights.

The Court of Justice of the European Union (hereinafter: CJEU) has consistently confirmed that transparency plays a central role in

this. Contractual terms must be drafted in plain and intelligible language (Article 5 Directive 93/13), and the consumer must be placed in a position where they can understand not only the grammatical meaning of the clause, but also its legal and practical consequences. Where a term fails to meet this standard of transparency, this may contribute to its unfairness under the Directive.

In this way, Directive 93/13 complements the conflict-of-laws rules in instruments such as the Rome I Regulation. While private international law determines which legal system is applicable, consumer protection law ensures that the content and effect of contractual terms remain within acceptable limits. Together, these two strands of EU law form a coherent protective framework designed to safeguard consumers in increasingly complex and cross-border contractual environments; complementing each other, they make up the consumer's "survival kit" (Kunda 2026).

6. *Case study: VKI v Amazon*

The judgment of the CJEU of 28 July 2016 in *Verein für Konsumenteninformation v Amazon EU Sàrl* (C-191/15, EU:C:2016:612; hereinafter: VKI v Amazon) is one of the most significant modern authorities on the interaction between private international law and consumer protection in digital contracting. Although mainly concerned with the fairness of contractual terms under Directive 93/13, the case also provides important interpretative guidance on the operation of Article 6 of the Rome I Regulation and the broader limits of party autonomy in cross-border consumer contracts.

The case is particularly relevant for the circular economy context because it concerns standard-form digital contracting practices that are now typical for online platforms facilitating cross-border transactions, including those involving resale, refurbishment, and service-based access to goods. The reasoning of the Court therefore extends beyond e-commerce in the narrow sense and is directly relevant to platform-mediated circular business models.

6.1. Factual background and contractual setting

The dispute arose from the contractual terms used by Amazon

EU Sàrl, a company established in Luxembourg, in its electronic sales contracts with consumers residing in Austria. The contested clause provided that the contract was governed by the law of Luxembourg, expressly excluding the United Nations Convention on Contracts for the International Sale of Goods (CISG). The clause was included in standard terms and conditions that consumers accepted when using Amazon's services. The Austrian consumer association VKI brought an action for an injunction before the Austrian courts, arguing that this clause was unfair within the meaning of Directive 93/13 because it deprived consumers of the protection they would otherwise enjoy under the mandatory provisions of the law of their habitual residence. In essence, the argument was not that parties cannot choose applicable law, but that such a choice cannot be presented in a way that obscures or weakens the mandatory protective framework guaranteed by EU law.

The case thus raised a fundamental question: to what extent can a trader, through standard contractual terms, influence or shape the applicable law in a way that may reduce the level of consumer protection?

6.2. The relationship between the Rome I Regulation and Directive 93/13

In addition to Directive 93/13, the Court directly interpreted the EU conflict-of-laws instruments: it held that the law applicable to an action for an injunction brought by a consumer association is to be determined under Regulation (EC) 864/2007 (Rome II Regulation), whereas the law applicable to the assessment of the contested contractual terms is to be determined under the Rome I Regulation, including its Article 6. Article 6 of the Rome I Regulation establishes a protective conflict-of-laws rule for consumer contracts. It allows parties to choose the applicable law, but ensures that such a choice cannot deprive the consumer of the protection afforded by mandatory provisions of the law of the consumer's habitual residence, provided the conditions for Article 6 are met.

The Court's reasoning in *VKI v Amazon* reflects the structural logic of this provision. Even where a contractual choice of law is formally valid under Article 3 of the Rome I Regulation, its practical effect is limited by mandatory consumer protection rules. This dual structure

– party autonomy combined with mandatory protective safeguards – forms the core of the European approach to consumer contracts in private international law. In this sense, the Court effectively reinforced the idea that the Rome I Regulation does not merely allocate applicable law mechanically, but embeds substantive policy considerations, particularly in consumer contracts, into its conflict-of-laws structure.

6.3. Transparency as a substantive requirement

A central aspect of the Court's reasoning concerns transparency. The Court held that a choice-of-law clause may be assessed for fairness under Directive 93/13 if it creates a significant imbalance in the rights and obligations of the parties to the detriment of the consumer, contrary to the requirement of good faith. However, the key issue was not the existence of the clause itself, but the manner in which the choice-of-law clause was presented and its practical effects. The Court emphasised that contractual terms must be drafted in plain, intelligible language, enabling the average consumer to understand their legal consequences. This includes an understanding of the fact that, even where a foreign law is chosen, mandatory consumer protection rules of the consumer's habitual residence may still apply under Article 6 of the Rome I Regulation.

In other words, transparency is not satisfied merely by linguistic clarity. It requires functional intelligibility: the consumer must be able to understand the legal consequences of the clause in real terms, including its interaction with the mandatory protections of the law of his or her habitual residence. This approach is particularly important in digital environments, where contractual terms are often standardised, lengthy and presented in a way that discourages meaningful engagement. In such contexts, transparency becomes a substantive safeguard against structural inequality in contracting power.

6.4. Assessment of imbalance and consumer disadvantage

The Court further clarified that a choice-of-law clause in a consumer contract is not automatically unfair simply because it designates the law of the trader's Member State. However, such a clause may be regarded as unfair if it misleads the consumer or gives the

impression that only the chosen foreign law applies, thereby discouraging the consumer from enforcing their rights. The decisive factor is whether the clause causes a significant imbalance between the parties' rights and obligations. This may occur where the clause is not accompanied by adequate information about the protective effect of Article 6 of the Rome I Regulation, or where it is drafted in a way that obscures the consumer's right to rely on mandatory protections of their habitual residence.

The Court thereby introduced an important functional test, according to which the fairness of a choice-of-law clause depends not only on its formal validity but also on its informational and behavioural effects on the consumer. A clause that deters consumers from exercising their rights, even indirectly, may be considered unfair.

Therefore, a key contribution of *VKI v Amazon* lies in its implicit confirmation of the structural role of Article 6 of the Rome I Regulation. The Regulation does not prohibit the choice of a foreign law, but it neutralises its potentially harmful effects by preserving mandatory consumer protections. The Court's reasoning reinforces this structure by making clear that traders cannot rely on choice-of-law clauses to create the impression that consumers are deprived of their domestic legal protections. Even where a foreign law is designated, the protective framework of Article 6 continues to operate as a mandatory constraint. This interpretation is particularly significant in the context of digital platforms, where consumers are often exposed to uniform contractual terms across multiple jurisdictions. Without such safeguards, platform operators could effectively standardise legal regimes in a way that weakens consumer protection across borders.

6.5. Relevance for digital platforms and circular economy models

Although *VKI v Amazon* concerns a traditional e-commerce platform, its implications extend directly to circular economy business models. Many circular economy transactions are now facilitated through the same types of digital intermediaries: platforms for resale of goods, refurbishment services, product leasing systems, repair marketplaces and sharing economy applications. These platforms typically operate across multiple Member States and rely on standardised contractual frameworks. Choice-of-law clauses are therefore commonly used as a tool for legal centralisation and risk management. However,

the Court's reasoning makes clear that such clauses cannot be used to reduce the level of consumer protection indirectly.

This has practical consequences for circular economy governance. Consumers purchasing refurbished goods or entering into product-as-a-service agreements must retain the ability to rely on the mandatory protections of their habitual residence. This includes rules on conformity and remedies (see, in particular, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods), unfair commercial practices and transparency obligations. From a systemic perspective, the judgment supports the broader policy objective of ensuring that innovation in business models does not lead to fragmentation or erosion of consumer protection standards across the internal market.

7. *Conclusion*

Like electronic commerce, the circular economy depends on trust. Consumers are unlikely to participate in repair, reuse, refurbishment and sharing markets unless they are confident that their rights remain protected across borders. EU private international law provides an important foundation for this trust. Through the combined operation of the Brussels I bis Regulation, the Rome I Regulation and consumer protection law – the consumer's "survival kit" – the European Union legal framework seeks to ensure that digital platforms cannot use contractual clauses to undermine consumer rights. The CJEU judgment in *VKI v Amazon* illustrates this approach particularly well. It confirms that transparency, fairness and effective consumer protection remain essential principles in the digital economy and will continue to play a central role in the transition towards a more sustainable and circular economic model.

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ALTERNATIVE DISPUTE RESOLUTION IN CONSUMER DISPUTES

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SUMMARY: 1. Introduction: dispute, resolution, alternative. – 2. The actors and their objectives. – 3. Approaches to conflict. – 4. The main mechanisms of dispute resolution: negotiation, mediation, arbitration, litigation. – 5. Choosing the appropriate mechanism. – 6. Why standard ADR theory does not fit consumer disputes. – 7. The contribution of ADR to consumer disputes: modularity. – 8. Online dispute resolution: private systems. – 9. The EU framework: design and results. – 10. Lessons and future challenges. – 11. Conclusions.

1. *Introduction: dispute, resolution, alternative*

Before discussing the mechanisms of alternative dispute resolution, and before asking what the word "alternative" refers to, we need to clarify some basic notions: on the one hand, dispute and conflict, and the differences between the two. On the other hand, what resolution of a dispute means. These notions are often used as if their meaning were self-evident. In legal and social science writing, however, each of them carries assumptions that affect the way dispute resolution mechanisms are designed and evaluated.

A widely used account of how disputes arise is the "naming, blaming, claiming" model. A grievance is first identified as such (something wrong has happened); responsibility for it is then attributed to someone; finally, a claim for redress is addressed to the person held responsible. Only after these three steps, one can speak of a fully-fledged dispute, especially in the legal realm.

This model is useful, but it has limits. Real conflicts more often do not follow a clean, linear sequence. They may involve several parties, overlapping grievances, a long history of interaction and connected issues that cannot be reduced to one claimant and one respondent.

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Treating a dispute as a two-sided matter is a simplification that is, somehow, required by the legal procedure. A court can decide only on a claim that has been formulated, and this usually occurs in a two-sided dispute. But such formulation can hide a big part of what is actually happening in a given conflict.

Therefore, we can use the word "dispute" for a legal dispute that was brought in front of a court under the name/blame/claim paradigm, and which only covers the facts that are object of the request brought in court and the rights that the two parties rely on. On the other hand, we can use the word "conflict" to describe the entire situation that is conflictual between the two parties, only a part of which constitutes the properly speaking dispute. In a "dispute", the parties are guided by their rights. In a "conflict", they are guided by their interests.

Lawyers and courts tend to treat disputes/conflicts as problems that must be solved. Moreover, their resolution is understood as being based by an authoritative decision, by the judgment.

Other disciplines treat conflicts less as problems that must be solved and more as situations that can be managed, transformed or even used productively. From this perspective, resolution in the sense of a final settlement is only one possible objective. Others include developing new solutions, coping with a tension that will continue, or simply giving the grievance a forum in which it can be expressed and acknowledged (what is sometimes called "airing" the grievance). The distinction has practical consequences, because different mechanisms pursue different objectives.

The third notion to clarify is the meaning of "alternative". In ADR terminology the word means, in principle, an alternative to litigation before courts, which is treated as the standard method of dispute resolution. This standard method implies an authoritative decision by the judge, based on the legal arguments of the parties and proofs of facts.

Some authors, based on a question raised by Lon Fuller, suggested that "A" in ADR might as well mean "appropriate". Instead of asking whether a mechanism is an alternative to the courts, we should ask whether it is "appropriate" for the type of dispute concerned. In *The Forms and Limits of Adjudication* (Fuller 1978) he analysed what adjudication can and cannot do. His main argument was that dispute resolution processes are not interchangeable routes to the same result:

each has its own logic, its own strengths and its own limits. Some disputes are "better solved" by judges, some others by mediators and some others by mere negotiation between the parties. This idea is used throughout this material as the main criterion for comparing mechanisms.

It should also be noted that, before the ADR movement, there was no general theory of dispute resolution in law (Menkel-Meadow 2000). There was a long-standing body of thought on resolving disputes in court or by similar mechanisms such as arbitration, and an equally old reflection on negotiation. The ADR movement brought these two lines of thought into a single framework of analysis. In doing so, it also questioned something that the theory of civil procedure had taken for granted, namely that every dispute needs to be resolved by an authoritative decision.

2. *The actors and their objectives*

An analysis limited to the two immediate parties is incomplete. Disputes affect a wider group of actors, and the efficiency and appropriateness of a resolution mechanism can only be assessed if all of them are taken into account (Moffitt and Bordone 2005).

The parties are the most visible actors. They are directly affected actors and gain or lose depending on the outcome. But disputes also affect third parties who did not take part in the transaction or event at the origin of the conflict. Economists describe this as an externality: part of the costs and consequences of the dispute falls on persons outside it. Consider a consumer dispute about a defective product. The immediate parties are the consumer and the trader. If the defect creates a safety risk, or if the dispute reveals a systematic practice of misleading advertising, the interests of other consumers are also affected, although they are not parties to the dispute.

Society as a whole also has an interest, and the society is represented institutionally by the state. This interest has two components. The first is normative: dispute resolution is one of the ways in which the law states what is permitted and what is not and discourages future wrongdoing. The second is economic: dispute resolution uses public resources, which should be used efficiently. Individual court actions also have an informational function. Taken together, they

provide information about social developments, in this case about the types of problems consumers encounter (Hodges, Benöhr and Creutzfeldt-Banda 2012). This last function is often neglected in the cost-benefit analyses. As we will see, a consumer ADR system may resolve individual disputes more cheaply and quickly than the courts, but this also might reduce the flow of information about patterns of misconduct by traders that aggregated litigation would reveal.

Finally, there is the third party who intervenes to resolve the dispute: the judge, the arbitrator, the mediator or the ombudsman. This person is not a simply neutral channel through which the dispute passes (besides the fact that in some of these roles, the person must be neutral or impartial). However, he or she brings a professional culture, habits of reasoning, ethical commitments and a specific set of powers, all of which influence the process. The methodological consequence is that a dispute resolution process should be assessed from the perspective of all these actors at the same time (Moffitt and Bordone 2005).

Once the actors have been identified, the next question is what do they expect from the process. Let's take, first, the parties. For them, outcomes are usually classified as win/lose, lose/lose and win/win. In everyday thinking (but also in the legal realms) the dominant category is win/lose. Whether a result counts as a win, however, depends on the time horizon and on the scope of what is contested. A claimant who wins a case but loses a long commercial relationship as a result may be worse off overall. A respondent who loses a case but has delayed payment for a long period may, in financial terms, have obtained an acceptable result. Winning and losing are therefore relative categories, which depend on what the parties are actually trying to achieve. When we enlarge the focus from just the parties to the other actors, we can note different preferences. The parties may want vindication, compensation, an apology or simply recognition of their grievance. The state, instead, may want deterrence, consistent application of the law and efficient use of judicial resources. These preferences do not always coincide, and the design of a dispute resolution system requires an understanding of where they diverge.

Uncertainty is a further factor. When a dispute arises, neither party knows what the outcome of a given procedure will be. A negotiated or mediated settlement is possible only if there is a "zone of possible agreement", that is, a range of outcomes that both parties prefer to the continuation of the conflict and the uncertainty that follows from

it. An example illustrates the point. A consumer claims a refund of 400 euros for a defective appliance and would accept 300 rather than go to court. The trader would pay up to 250 to avoid the cost and publicity of proceedings. In this situation there is no zone of possible agreement, and negotiation alone will fail unless one of the parties revises its expectations. If an independent assessment shows the consumer that a court would probably award less than claimed, or shows the trader that a court would probably award the full amount, the two ranges may begin to overlap. Much of what ADR mechanisms do consists in providing information that leads the parties to adjust their expectations in this way.

3. *Approaches to conflict*

Several classifications of the ways in which people approach conflict are used in the ADR literature. Mary Parker Follett distinguished three main approaches. The first domination, where one party prevails and imposes its solution on the other, through superior power, authority or force. The second is compromise, where each side gives up part of what it wanted. Both of these approaches are win/lose approaches, although compromise is more balanced in outcomes. The third approach is integration, where the parties look for a solution in which the desires of both find a place, so that neither has to sacrifice anything essential. This is an approach that may bring a win/win outcome. Morton Deutsch proposed a simpler distinction between competitive and cooperative processes. If we combine the two matrixes, Follett's "domination" is obviously competitive in Deutsch's terms, while compromise and integration might be seen as cooperative.

Litigation, with its adversarial procedure, its binary outcomes and its focus on rights rather than interests, tends to push the parties towards competitive behaviour. This is a description of how adjudication is structured, not a criticism of it. Fuller observed that the purpose of the rule of law is to replace violence with peaceful methods of settling disputes. The main achievement of a legal system is that it makes peaceful dispute resolution the norm. The question is whether a court-centred structure is appropriate for every type of dispute. The authors that belong to the ADR current, and much of their empirical research, suggest that it is not.

Approaches to conflict can also be classified according to the instruments used: direct negotiation between the parties, the use of force, or the involvement of a third party with varying powers and tasks. If we exclude the use of force, which is illegal, we are left with a spectrum of methods which can be represented as a "dispute resolution continuum", which arranges the available mechanisms according to the degree of intervention of the third party and, inversely, the degree of control the parties keep over the process and the outcome (Susskind 2005). At one end is negotiation without any third party; at the other is litigation, in which a judge decides and the decision binds the parties. Between them are conciliation, mediation, ad hoc and institutional arbitration, court-annexed mediation, the mini-trial, med-arb and automated systems such as blind bidding. Each represents a particular combination of third-party power, party control (overt outcome and procedure), procedural flexibility and predictability of outcome.

4. *The main mechanisms of dispute resolution: negotiation, mediation, arbitration, litigation*

Negotiation precedes or accompanies almost every other mechanism. The Harvard Negotiation Project identifies seven elements present in any negotiation and are enumerated below. "Interests" are the needs that motivate a party and must be distinguished from "positions", the demands it formulates openly. "Legitimacy" refers to the standards used to assess whether a solution is fair. "Relationship" covers both the existing relationship and the one the parties wish to have. "Alternatives", in particular the BATNA (Best Alternative to a Negotiated Agreement), set the minimum below which a rational party should not settle. "Options" are the possible agreements. "Commitments" are the offers and undertakings made during the negotiation. For lawyers, it os important to distinguish commitments (that are still provisional and do not close the dispute), from consent (which is final, binding and closes the dispute through a settlement). "Communication" is the medium through which all the other elements operate.

There are several negotiations techniques. Positional bargaining, sometimes called a "dance of concessions", proceeds by gradual concessions from initial positions; it is simple but rarely produces in-

tegrative solutions and tends to reinforce adversarial attitudes. The "chicken-game" technique tests the resolve and limits of the other party, but it can bring to escalation and failure to reach an agreement. Problem-solving negotiation has a reversed approach: it starts with a joint examination of interests and then develops options. It requires, however, a less adversarial approach.

The BATNA is the calculation that each party makes (even intuitively) before a negotiation. It is particularly relevant for consumers. In consumer disputes the consumer's BATNA is usually weak, because going to court costs too much in relation to the amount at stake. The trader generally knows this, which reduces its incentive to make a reasonable offer. A cheap and accessible ADR procedure improves the consumer's alternative and, by this, the consumer's position in the negotiation itself.

Mediation preserves party autonomy: the mediator decides basically nothing, and the parties keep control of the process and of the outcome. It is procedurally flexible and allows solutions that a court cannot provide. A court can award damages or declare rights; it cannot reorganise a commercial relationship, obtain an apology or design an arrangement for the future. Mediation also makes it possible to maintain the relationship between the parties after the dispute. According to Fuller, the essential feature of mediation is that it orients the parties towards their relationship and allows them to continue it or end it according to their interests, without being bound by impersonal rules. Its focus is on the persons, not on rights. Adjudication is the opposite case: the parties present, in an adversarial manner, demands supported by arguments, evidence and rights, and the focus is on rules. For this reason, familiarity with the parties is an advantage for a mediator, who needs to understand their relationship, and an obstacle for an adjudicator, who must be impartial (Fuller 1963).

If mediation has these advantages, why can the parties not simply negotiate without a mediator? Once a dispute has escalated and the parties perceive each other as opponents, direct communication often becomes unproductive. Each party is defensive and concentrates on protecting its position rather than on exploring common interests. A mediator can change this by managing the flow of information, reformulating the issues and helping each party understand the other's perspective. Mediation also has an important limit: it depends on the consent of both parties, and its outcome cannot be imposed. It is

therefore unsuitable where one party has no interest in a settlement, for example where the stronger party benefits from a power imbalance that adjudication would correct, or where a party's main objective is delay or vindication. Mandatory and court-annexed mediation schemes require an attempt at mediation before litigation, but they cannot ensure that the parties actually engage in the process.

Arbitration combines some of the flexibility of mediation with the binding character of adjudication. The arbitrator's authority comes from the parties' agreement, which may be a submission agreement ("compromis") concluded after the dispute has arisen or an arbitration clause in a contract. Arbitration is procedurally more flexible than litigation and it is confidential. Whether it actually saves time and money is disputed: in complex commercial cases its costs can equal or exceed those of litigation. The selection of arbitrators, and in particular the tension between expertise and impartiality, is one of the most debated questions in arbitration theory and practice. Often each party appoints one arbitrator and the two party-appointed arbitrators choose the presiding arbitrator. The arrangement is intended to ensure that each party's perspective is represented, but it carries the risk that party-appointed arbitrators act as quasi-advocates for the party that appointed them. The problem is more pronounced in specialised fields with a small pool of arbitrators, where the same persons appear frequently in different cases and roles. The final character of the award is an advantage from the point of view of legal certainty and a disadvantage from the point of view of quality control, since errors of law or procedure may remain uncorrected (most legal systems provide for a legality review of arbitral proceedings, but on limited grounds). In practice, most arbitrations are organised by arbitral institutions, and the parties' control over the procedure is then reduced largely to the appointment of the arbitrators.

The main strength of litigation is its formal structure and the predictability that results from it. It is also rigid, expensive and slow, and it discourages the disclosure of information, because in an adversarial setting the parties have an incentive to conceal their real interests. Proceedings are largely conducted by lawyers, whose strategic considerations do not always coincide with the interests of their clients. Litigation can also escalate conflicts, since positions tend to become more polarised as proceedings advance. It is public, which is an advantage where important social values are involved and a disadvantage in many

commercial disputes. Only courts can produce binding legal rules through the resolution of individual disputes; a mediator cannot create precedent, in the legal systems that accept precedent as source of law. This norm-generating function of adjudication illustrates Fuller's point about the forms and limits of dispute resolution processes. This norm-generating function of adjudication illustrates Fuller's point about the forms and limits of dispute resolution processes. It is also the basis of the best-known criticism of ADR. Owen Fiss argued that the function of courts is to give force to public values and to promote justice rather than peace; a system oriented towards settlement risks depriving the courts of the opportunity to perform this function (Fiss 1984). Related criticisms concern the weaker procedural guarantees of ADR, which favour the stronger party, and its private character, which removes the external scrutiny that might restrain abuses. These criticisms also indicate the limits of ADR: disputes in which procedural guarantees are essential, in which public supervision is required, or in which the imbalance of power would lead to socially unacceptable results should not be diverted from the courts.

The binary logic of adjudication should also be noted. Courts apply legal rules to established facts and decide on rights: the claimant has the right or does not; the contract is valid or not; the defendant is liable or not. This is appropriate when the dispute really concerns rights. Many disputes, however, concern relationships, interests and future arrangements, and for them a binary decision may be insufficient.

5. *Choosing the appropriate mechanism*

On this basis we can address the most practical question of ADR theory: which mechanism is appropriate for a given dispute? The best-known image proposed by the ADR movement for this problem is Frank Sander's "multi-door courthouse". In this model the court first assesses each dispute and then directs it to the most appropriate "door": mediation, arbitration, litigation or another procedure (Rule 2015). The underlying principle is that the procedure should be adapted to the dispute, or, in the formula of Sander and Goldberg, that one should "fit the forum to the fuss" (Sander and Goldberg 1994). For this reason ADR is sometimes read as "appropriate" dispute resolution.

Fuller's theory provides the most systematic criteria for this allocation. Disputes in which the relationship matters to the parties are more suitable for mediation than for adjudication. Where the imbalance of power between the parties makes a fair outcome of a flexible procedure unlikely, adjudication is preferable. Where at least one party seeks vindication, that is, a declaration that it has been wronged, ADR is less likely to satisfy it. Also, where important social values are at stake, the dispute should be resolved by a court.

The answer also depends on the moment at which the question is asked. When parties choose a mechanism in a contract, before any dispute exists, they must decide in the abstract. When the parties are comparable in resources and knowledge and/or are operating in the same trade, their possible future are good candidates to be solved by arbitration. Where one party is systematically weaker, as in the typical consumer relationship, adjudication would be, again in the abstract, the appropriate forum, because its formal guarantees are designed to compensate for such imbalances. For a claimant already involved in a dispute, further considerations apply. If the other party refuses to cooperate, adjudication is the only realistic option. If the parties have an ongoing relationship, mediation might be preferable. Cross-border commercial disputes are often best handled by institutional arbitration, whose awards are enforceable under the New York Convention.

6. *Why standard ADR theory does not fit consumer disputes*

When the criteria just described are applied to consumer disputes, it becomes quite clear that they do not recommend ADR. The imbalance of power between a large business and an individual consumer is always present; it is probably the first feature that comes to mind when one characterises consumer law. For the trader, each individual consumer is one customer among many, while the consumer can easily change supplier. Consumers also usually seek vindication for a wrong, and courts seem better suited for this purpose (Seul 2005).

The imbalance has a procedural dimension as well. The business is a "repeat player": it knows the rules, has experience with the procedure and has better information. The consumer is a "one-shot-er", with no experience of the mechanism and often without legal advice. The repeat player can learn which arguments succeed before a par-

ticular body, choose which disputes to settle and which to fight in court or in a different mechanism. It also can accept occasional losses in exchange for favourable results over many cases. The individual consumer cannot follow such a strategy, because for him or her each dispute is a single event. Adjudication is designed to correct this kind of asymmetry through formal procedure and judicial control; ADR does not correct it automatically and may, actually, increase it.

Moreover, the parties to a consumer dispute have no particular interest in their relationship. The main advantage of mediation, its orientation towards the relationship between the parties, therefore does not apply. The classic theory of civil procedure does not examine the motivations of the parties: when and why they make a claim, and when and why they refrain from doing so. These motivations are, however, central when designing dispute resolution systems for consumers (Bojin and Doroga 2025).

Why, then, has so much attention been given to consumer ADR? The answer that I propose (Bojin and Doroga 2025) is that the appropriateness criteria of ADR overlook its more ordinary advantages, which in consumer matters are the most relevant ones: relatively low cost and shorter duration. Flexibility, a third advantage commonly attributed to ADR, is relevant when it leads to simplification, since fewer formal requirements save time and money. In consumer disputes, the low economic value of individual claims is more important than any other feature. The contribution of ADR therefore comes from one of its secondary features, the possibility of reducing costs, and not from its central principles.

Consumers rarely bring their complaints before a court (Creutzfeldt 2018), mainly because the small sums at stake do not justify the cost and duration of civil proceedings. Judicial enforcement has therefore had limited practical effect, and allowing consumer associations to sue changed little. Aggregating claims, as in the American class action model, is the most consistent answer in principle. In practice it has raised ethical concerns and procedural difficulties for national courts (Hodges, Benöhr and Creutzfeldt-Banda 2012). Collective and associational actions thus remain only secondary mechanisms.

If consumers do not go to court, the design question becomes this one: what would make them initiate a claim. If they do not initiate proceedings because these are too expensive, too complicated or too long, ADR must address these obstacles. This is not only a technical

matter. It requires an understanding of how grievances develop into disputes, of the strategic behaviour of the parties and of the role of communication at each stage of an emerging conflict.

7. *The contribution of ADR to consumer disputes: modularity*

An argument that I brought forward (Bojin and Doroga 2025) is that the main contribution of ADR to consumer dispute resolution did not come from its core principle, that different types of disputes require different types of process. It came from a by-product of the ADR approach: the breaking down of dispute resolution processes into their successive stages, which can be described as a "microscopic" analysis.

To design alternatives to litigation, the ADR movement first analysed the civil trial itself. It treated the trial as a sequence of distinct stages, each serving a particular purpose. For each stage it asked three questions: what purpose the stage actually served, whether that purpose could be achieved more efficiently, and whether the stage was necessary at all for bringing the dispute to an end. Once the trial had been de-constructed in this way, its elements could be selected and recombined into new procedures, keeping only those suited to a given type of dispute (Rule 2016). This drew attention to stages that the theory of civil procedure had largely neglected, such as the preliminary communications between the parties or the moment at which each party first understands the full picture of an emerging dispute.

Applied to consumer disputes, this analysis can be organised according to the stages of a typical dispute. At the first stage a grievance is forming, but has not yet become a formal claim. What matters here is not the choice of a mechanism but the design of the channel of communication. Some early contacts from consumers are in fact requests for clarification, which can turn into real disputes if they are handled badly. As it has been noted (Hodges, Benöhr and Creutzfeldt-Banda 2012), many initial contacts with traders and with consumer ADR bodies are requests for information rather than proper complaints or disputes. A "mediating" approach at this stage is useful not because the dispute, in the abstract, is suitable for mediation, but because the "situation" may not yet have become a dispute. A clarification may be enough, and no resolution in the formal sense may be needed. Avoid-

ing the treatment of a misunderstanding as a dispute saves costs for the parties and for the system as a whole.

The importance of this early stage can be explained with the help of the "dispute pyramid". At its base is the very large number of grievances that consumers experience: dissatisfaction with a product, a billing error, a service failure. Most of them never become formal claims; consumers accept the loss or stop buying from the trader concerned. Only some grievances become claims addressed to the trader, fewer reach a dispute resolution body, and very few reach a court. This shape reflects a rational assessment by consumers that the cost of pursuing a claim exceeds the expected benefit. Consumer ADR seeks to change this assessment by reducing transaction costs at each level of the pyramid, and not only at the stage of formal claims. The design question therefore concerns not only the choice of a procedure for an existing dispute, but also the point at which an intervention is most effective and least costly, which is often earlier than the point at which a legal claim is formulated.

After the initial misunderstandings have been cleared up, the next useful step is an early assessment of the dispute. It looks at two things: the complexity of the facts and the complexity of the legal rules involved. In most consumer cases neither is particularly difficult to determine. The result of this assessment shapes the way the exchange between the parties is structured. A strongly adversarial framework of the kind used in civil litigation risks hardening the parties' positions at a moment when an agreement could still be reached. Early assessment therefore follows the logic of the multi-door courthouse. Its immediate purpose is to send the claimant through the most suitable door. That door may not be the procedure that eventually resolves the dispute, but it is the most suitable framework for the parties' dialogue at that stage (Hodges, Benöhr and Creutzfeldt-Banda 2012; Katsh and Rabinovich-Einy 2017).

When a real dispute has emerged and its scope has been determined, the way the parties communicate becomes decisive. The consumer may prefer a quick solution even if it obtains less than in a hypothetical court judgment. The trader may prefer a quick solution in order to keep the customer and protect its reputation. These incentives are limited but real, and they can support an amicable settlement if the communication process is not excessively adversarial. In consumer disputes, where the amounts are small and the facts usually

simple, the cost of a fully adversarial exchange is often disproportionate to the value of the claim.

The design of a dispute resolution mechanism can also take into account the strategic behaviour of the actors, that is, the way each party reacts to the actions of the other (Williamson 2010). Formal adjudication is designed to neutralise strategic asymmetries. A designed ADR process can instead use the parties' strategic incentives to make them more prone to cooperation.

The modularity of dispute resolution processes, meaning the possibility of breaking them down into stages and then recombining and resizing these stages according to the value of the dispute, is what made consumer ADR possible. The successful consumer ADR systems all rely on some form of standard procedure in which time and costs are adapted to what is at stake (Bojin and Doroga 2025). Digital technology has had its greatest effect at this level. It has not simply automated existing procedures; it has made individual stages cheaper, more efficient and more accessible. In consumer dispute resolution, improvement has come from attention to each procedural stage and to the possibilities it offers for reducing costs and settling early, rather than from a general theoretical redesign.

8. *Online dispute resolution: private systems*

Electronic commerce has created both new problems and new possibilities for consumer dispute resolution. Online commerce multiplied transactions with consumers, many of them cross-border. Litigation was already expensive and slow; the cross-border element added questions of jurisdiction and enforcement, which made court proceedings even less likely (Cortés 2010).

Online commerce also suggested a solution: if goods can be sold online, disputes about them could also be resolved online. The first successful online consumer dispute resolution systems were developed by private marketplaces and payment intermediaries such as eBay, PayPal, Amazon and Alibaba (Katsh and Rabinovich-Einy 2017). At first, these companies tried to avoid any involvement in disputes between their users, in order to limit their liability. Some of them later concluded that their initial approach was not the best. They realized that they were not only providing a commercial service. They were,

actually, creating communities of users, and maintaining these communities was essential for their business' survival.

Bearing this in mind, eBay introduced the first online mechanism for disputes between sellers and buyers. Other platforms followed. They prioritized speed, both of communication between the parties and of decisions where decisions were needed. A study commissioned by eBay and PayPal in 2010 found that rapid dispute resolution maintained, and possibly increased, customer satisfaction, including among users who "lost" the dispute (Katsh and Rabinovich-Einy 2017). According to the European Commission, the eBay Resolution Center handles more than 60 million disputes a year. Buyers and sellers are first encouraged to communicate directly; the system then diagnoses the problem and conducts an automated negotiation, and about 90% of cases end in an amicable solution (European Commission 2023).

The automated techniques used in such systems can be illustrated by blind bidding. Each party submits confidentially the amount it is prepared to pay or accept. If the two figures fall within a pre-agreed range of each other, the dispute is settled automatically, usually at the midpoint; if not, the parties may submit new offers in a limited number of rounds. The technique removes the tactical disadvantage of making the first concession and shortens the negotiation. When it is implemented manually rather than automatically, the same technique is known as "last binding offer": after an unsuccessful mediation, each party submits a final offer, and the neutral chooses one of them and imposes it. Blind bidding is, in this sense, the automated version of the last binding offer (Cortés 2010).

Private platforms are not the only providers of consumer dispute resolution. Internal complaint handling by trader's offices can be efficient when the request of consumer is a mere clarification or it concerns rare and small-value defects. In early neutral evaluation, a neutral expert gives the parties a non-binding opinion on the likely outcome of the case in court. Fact-finding is a similar procedure limited to questions of fact. Such opinions allow the parties to compare the certain costs and benefits of a settlement with the uncertain costs and benefits of litigation. Ombudsman procedures are particularly important in consumer matters, because the ombudsman, usually a public or publicly recognised body, is in a position to correct part of the imbalance between the parties. The UK Financial Ombudsman Service is a frequently cited example. Its decisions bind the financial

institution but not the consumer: if the consumer accepts the decision, it becomes binding on the firm; if not, the consumer remains free to go to court. The asymmetry is deliberate. It reflects the imbalance between consumers and financial institutions and the low risk of abuse by consumers.

The factor behind these private systems is the platform's interest in the relationship. This is not the relationship between a buyer and a seller in a single transaction, but the relationship that both have with the platform. eBay and Alibaba have an interest in maintaining long-term relations with sellers and buyers alike. They also have the means to ensure compliance with the outcome: payments can be held until the dispute is resolved or reversed depending on the result. In addition, their private ODR systems (PODR) function as a "one-stop shop", integrated into the platform the user already knows, so that the consumer does not need to find and learn a separate procedure.

This experience confirms, in a different form, Fuller's argument about the importance of the relationship. Fuller's observation on the link between suitability for mediation and the focus on the relationship is, in fact, not disproved by consumer ODR. It is confirmed by it. The explanation is that the relevant relationship is not that between the parties to the dispute, but between each party and the third party that set up the ODR system, namely the marketplace that created the community to which both belong.

Albert Hirschman's distinction between "exit" and "voice" helps to explain this (Hirschman 1972). In Hirschman's terms, exit is the typical reaction to dissatisfaction in markets: the dissatisfied customer leaves for another supplier. Voice is the typical reaction in a political community: a citizen who cannot easily leave expresses the dissatisfaction instead. Voice, however, needs an audience, which is usually the community itself (in a broader sense, the judge represents the community, as justice is a public service, in the end). Thus, initiating a dispute resolution procedure is a form of voice. In the systems of eBay and Alibaba there was even a mechanism similar to a jury, in which other users of the platform acted as jurors. By creating communities, however limited in scope, these platforms encouraged voice as a way of dealing with consumer dissatisfaction. The same analysis also suggests an answer to the question of funding. The marketplace has an interest in a quick resolution of disputes, but no direct interest in their outcome, which reduces the risk of a conflict of interest (Bojin and Doroga 2025).

Proportionality is important in this context. Lord Neuberger, former President of the UK Supreme Court, acknowledged that ODR may lead to a less perfect form of justice than court proceedings, but argued that the dispute resolution provided by the state should be proportionate to the issues involved (Creutzfeldt 2018). A dispute about a small household appliance does not require the procedural apparatus appropriate for a major commercial case.

9. *The EU framework: design and results*

Political interest in consumer ODR followed the developments in the private sector. EU policy makers considered that the growth of cross-border trade within the Union was held back because litigation in national courts was impracticable for consumers. Resolving consumer disputes was seen as necessary for consumer confidence in the cross-border internal market, and ADR and ODR were the solution proposed.

In 2013 the EU adopted two complementary instruments: the ADR Directive 2013/11/EU and the ODR Regulation (EU) 524/2013. The Directive requires Member States to ensure that quality ADR procedures are available for domestic and cross-border disputes between consumers and traders concerning contractual obligations under sales or service contracts. It covers a variety of procedures, including mediation, conciliation, ombudsman schemes, arbitration and complaint boards, but excludes complaint-handling systems operated by the trader, attempts by a judge to settle a dispute in the course of judicial proceedings, and direct negotiation between the parties. Given the diversity of national approaches, the Directive follows minimum harmonisation in order to accommodate different legal traditions. In doing so, it started what was described as a process of professionalising a sector that had traditionally been unregulated (Cortés 2016).

The ODR Regulation created a European ODR platform: a website maintained by the European Commission as a single point of entry for consumers and traders seeking out-of-court resolution, free of charge and available in all official EU languages. The platform offered electronic complaint forms, a case management tool, translation and a link to the certified ADR entities. At the time of the Commission's 2023 report, there were about 430 such entities, ranging from two in

Romania to 82 in France (European Commission 2023b). About 64% of the notified entities delivered non-binding outcomes and about 20% outcomes binding on both parties; the remaining entities delivered outcomes binding only on the trader, or more than one type of outcome (European Commission 2023b). Member States also had to establish national ODR contact points, with at least two ODR advisers each, to assist the parties in using the platform and to provide information on consumer rights and redress options. In 2019 a "direct talks" module was added, allowing the consumer to send the complaint to the trader and attempt an amicable solution within 90 days before turning to an ADR entity.

The results were disappointing. The main weakness of the platform was its dependence on the trader's express agreement to the procedure. According to the Commission's impact assessment, about 13,000 complaints were submitted EU-wide in 2021, a low number given the strong growth of e-commerce during the pandemic. In about 80% of cases the trader did not respond, and in about 20% it refused explicitly. As a result, 99% of cases were closed automatically after 30 days, and only 169 complaints, about 1% of the total, were resolved through the platform mechanism (European Commission 2023a). Since several attempts to improve the platform had not changed this picture, the Commission concluded in October 2023 that further changes were unlikely to produce a different result (European Commission 2023b). The platform was discontinued on 20 July 2025, following Regulation (EU) 2024/3228.

Two structural factors might explain this outcome. The first is national legal culture. Consumer ADR developed unevenly across Member States, and its use depends largely on how familiar each society is with informal dispute resolution and on how much it trusts such procedures (Creutzfeldt 2018). This helps to explain the large differences in the use of the EU platform, from almost 3,000 complaints in Germany to fewer than five in Lithuania in 2020 (European Commission 2021).

The second factor is the development of large online marketplaces. These now include most of the small and medium-sized enterprises for which the EU platform had been designed, and they have taken most ODR "in-house". Consumers and traders do use online dispute resolution, but they use the marketplaces' own systems, which are better adapted to the business conducted on the platform and give

quicker results. The Commission itself acknowledged that the ADR Directive, in its existing form, was not adapted to digital markets (European Commission 2023a).

10. *Lessons and future challenges*

The contrast between the success of private ODR systems and the results of the EU platform suggests that the successes of technology-based consumer ADR were achieved contrary to the expectations of lawyers. Mixed teams of lawyers with technological knowledge and technology entrepreneurs appear to have been better placed for this task than lawyers working from theoretical principles. Approaches that were "too legalistic" failed.

However, these solutions are not without challenges. One is digital vulnerability. Consumers interact with sellers in digital environments that can learn about them and adapt to them. Given the data-driven character of current commercial practices, every consumer is, to a varying degree, exposed to being profiled and targeted in an exploitative way (Helberger et al. 2022). Future ODR mechanisms will need to address this kind of power imbalance and restore a balance between trader and consumer when a conflict arises.

It is uncertain whether any EU-level mechanism can reproduce the success of marketplace systems. These are specific settings, in which the provider of the dispute resolution system has both the incentive and the means to ensure that it functions adequately: an interest in long-term relations with all users, enforcement instruments such as holding or reversing payments, and full integration into the platform. A public framework will find it difficult to reproduce these features. Business support is in any case essential. In a voluntary system, consumer ADR schemes are not established, financed or publicised, and their decisions are not observed, without the active support of businesses (Hodges, Benöhr and Creutzfeldt-Banda 2012).

The Commission's response was to abandon the platform and, in its proposal to amend the ADR Directive, to extend the scope of the Directive, for example to disputes not directly related to the contract and to disputes between EU consumers and non-EU traders, and to encourage online marketplaces to meet quality standards in their own dispute resolution systems through self-certification. This marks a

move from a public, top-down model towards a co-regulatory model, in which private platforms bear the main responsibility for dispute resolution, subject to minimum standards and supervision. The difficulty will be to balance requirements that may conflict with each other: procedural guarantees, speed, low cost, adaptation to digital markets and attractiveness for both consumers and traders.

11. *Conclusions*

Consumer ADR, properly understood, is not about avoiding the courts but about adapting mechanisms to disputes at each stage of their development. The basic idea of the ADR movement, that different forms of dispute resolution have different logics, strengths and limits, remains valid, even though the criteria it developed for choosing between mechanisms do not fit the consumer context well.

Consumer disputes have features that make them both an obvious field for ADR but also a problematic one: low individual value, high volume, significant power imbalance, frequent cross-border elements and the absence of an ongoing relationship between the parties. They require mechanisms different from the standard models developed for commercial or civil disputes between parties of comparable resources and sophistication. The starting point must be the observation that consumers do not take their complaints to court. A system that ignores this, however sound in theory, will not work in practice.

The main lesson of three decades of experimentation is that improvements did not come from applying the central principles of ADR theory to consumer disputes. They came from a by-product of the ADR movement that had received less attention: the breaking down of the dispute resolution process into stages, each of which can be redesigned for efficiency, accessibility and proportionality. Digitalisation was important for this redesign because it made new forms of communication, early diagnosis and resolution possible at a fraction of the cost and time of traditional procedures.

The objective should be mechanisms that are both fair and accessible, that reduce rather than increase power imbalances and that produce outcomes the parties can accept. The proportionality approach associated with Lord Neuberger, according to which imperfect but accessible and affordable justice is better than no justice or excessively

costly justice, is in this context a recognition of practical conditions rather than an abandonment of principle. As for procedural guarantees, improving existing systems that work is likely to be more effective than building theoretical models from nothing (Bojin and Doroga 2025).

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INTELLECTUAL PROPERTY LAW AND SUSTAINABLE INNOVATION IN THE CIRCULAR ECONOMY

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SUMMARY: 1. Introduction. – 2. The conceptualisation of upcycling. – 3. The history of upcycling. – 4. The effects of the linear economy on nature. – 5. The rationale of upcycling. – 6. Major intellectual property law concerns regarding upcycling. – 6.1. Exclusive IP rights versus inclusive upcycling. – 6.2. IP overlaps. – 6.3. Spatial conflicts. – 7. Concluding remarks.

1. *Introduction*

Intellectual property (hereinafter: IP) is a centuries-old concept of the Western world and forms a fundamental interest and value of the European Union (hereinafter: EU), triggering robust legislation as well. Sustainability is often treated to be a novel phenomenon, irrespective of its historic roots in thriftiness and reuse of resources. In our 21st century society, the overlap and interplay of the two concepts is far from being settled, which is predominantly due to two major reasons.

On the one hand, the legally relevant contours of sustainability are not fixed yet. As such, it is hard to elaborate how to quantify and overall conceptualise sustainability. Is it predominantly an environmental or an economic concept or something else? Is it focusing on social (macro-level) or also individual (micro-level) sustainable practices? Is it per se legally enforceable or more like a principle, a framework, or a starting point rather than an end point? Most probably all aspects are relevant – meaning that the contours of sustainability are even harder to delineate.

On the other hand, sustainability and intellectual property are visibly at odds with each other. This conflict might stem from two main reasons.

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First, the discussions and the narrative on sustainability seem to be partially misplaced. It is typically centred on (pure) environmental issues; and when it comes to intellectual property law, typically on the fashion industry (even more precisely, mainly on the differences between haute couture and fast fashion). In fact, however, it can affect any other parts of the creative economy, ranging from copyright to industrial property and from analogue to digital. Also, sustainability is often represented to separate conscious consumerism from devastating corporate practices, although there are activities that lie in between these two extremes (as it will be shown later on, there are artisan upcyclists, too). Finally, sustainability is often attached to the concept of poverty, which is far from reality, as anyone – including the rich and the socially responsible corporations alike – might carry out environment-friendly activities. In sum, sustainability is *not limited to commercial activities*; the added value of sustainable practices is often artistic or purely sentimental. At the same time, these misunderstandings position sustainability vis-à-vis intellectual property on the 'wrong side', meaning that sustainable practices harm the existing intellectual property regime.

Second, the conceptual underpinnings of the two concepts show significant differences, too. Let us approach this question from the direction of intellectual property law. It is generally treated to be exclusive (meaning that rightholders have exclusive rights and therefore they can prohibit others – with certain caveats – from acting against those rights); proprietary (that is, property-like rights are granted, as Article 17(2) of the Charter of Fundamental Rights of the European Union as well as many other human rights treaties and documents confirm); it is territorial (rights are limited to certain geographical areas, excluding the operation as well as any interest in using them outside of the given space); progressive / value creation (protection is granted as a reward for past uses and an incentive to create/invent even more in the future, leading to a loop of novel creations and innovations); linear (intellectual property is forward-looking and terminates with the end of term of protection, typically diminishing any interests in the continued use of resources); finally it is technologically and socially determined (meaning that lots of factors, e.g. the form, type, technology, method etc. of the use of a work, mark or innovation affect its legal categorisation and the limits to such rights). Sustainability is typically just the exact opposite: it is inclusive (aiming to reach the overall good of soci-

ety); non-proprietary (focussing on the commons); it does not have any spatial limits for the good of our overall Globe; it does not necessarily aim at the creation of any direct or economic value, but social benefits; it is circular and hence is based on the many 're'-s (reuse, recycling, redistribution etc.); and the technological and social aspects do not necessarily affect the overall need to act for environmental progress.

Based on this, it is easy to conclude that intellectual property can both facilitate (through e.g. green patents or exceptions for certain re-uses) and hinder sustainability (by e.g. foreclosing unauthorised uses of protected goods, like clothes wearing trademarks).

Yet, that conclusion leads nowhere when it comes to finding the right place to start our analysis of the overlap and interplay of the two concepts. Maybe surprisingly, I recommend looking back at the definition of sustainability as designed by the Brundtland Commission, namely, it means "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*" (World Commission on Environment and Development 1987). Although the language of the sentence is broad and absolutely 'soft', it is a great one since anyone can read any reasonable argument into it. My reading is as follows: *sustainability represents a new philosophy for environment-conscious producers and consumers, promising new bottom-up approaches to decrease the negative consequences of human activities on Earth*. As such, it is more like a lighthouse, showing the right direction, but the actual steps (including legally binding ones) on how to arrive at the desired locus are on us humans, including our legal fictions, corporations as well as states.

The present chapter continues as follows: we will take a look at one of the timeliest case studies for the conflicts of sustainability and intellectual property law, namely, the practice of upcycling. Through that, we can find convincing arguments on how the two fundamental concepts could effectively co-exist for the sake of humanity and the whole Earth.

2. *The conceptualisation of upcycling*

Upcycling is often referred to as the re-collection, improvement and use for different purposes of data, the value-recovering recycling of plastic bottles or aluminium. The common element of any upcy-

cling is the *ability (though in certain cases, not a necessity) to create added value.* Zimring conceptualised upcycling as "the creation of new goods from salvaged ones in a way that increases the value of the material" (Zimring 2016). For the purposes of the present chapter, upcycling is limited to the aspects of this activity that are relevant for IP law, and hence where the use affects tangible items (objects) that embody certain forms of IP protection. Hence, upcycling is defined as *transformative – recontextualised or repurposed – recycling and redistribution of tangible copies of works or goods that are protected by IP law*. Upcyclists recontextualise the physical embodiments of IP-protected contents (the complete copy of the works or goods, or a part of it) for "pure" artistic/creative or commercial purposes. The source objects of upcycling shall be more than raw materials, but goods that represent, embody, visualise etc. IP-protected expressions.

Upcycling is a prominent movement in the fashion industry; however, it is also present in other fields of the creative industry, e.g. art, design or architecture. Consequently, upcycling might be carried out for commercial purposes, but that is not an obligatory conceptual element of the process. Attention shall be paid to the 'non-industrialised' nature of the work of numerous upcyclists, many of whom are 'artisans', who produce a small number of unique handicraft goods in a do-it-yourself manner, and represent the grassroots nature of this movement. As such, upcycling might only be a 'sentimental' activity; yet the added value of these unique upcycled goods might be more than that or something that aims to raise awareness regarding (or protesting) certain social phenomena. Overall, upcycling might be a special transformative form of freedom of expression.

3. *The history of upcycling*

Upcycling is by no means a new phenomenon. A product that is about to be upcycled might still work for its original purpose. However, as times change, that purpose might become irrelevant or worthless or the product simply has *more value* in serving another function. The product is transformed, *cycled upwards*, into another, more valuable product. As consumers and businesses are increasingly aware of environmental issues, upcyclists are turning their eyes on everyday items that have decreased in value in their original function, whereas they

turn innovative uses of old goods into a business that would without doubt align with the aims and targets laid out in the European Union's Green Deal (COM(2019) 640 final).

There are lots of examples of early upcycling practices: starting from the late 1800s and lasting at least until the 1960s, cotton feed sacks were commonly transformed into garments in rural America. Stiff bags were used for rags and rough towels, whereas lighter and softer sacks were recycled into everything from undergarments to dresses and from dish towels to bedsheets and curtains. At the time, this was called neither upcycling nor recycling, but *conserving*. Brandes explains that upcycling was neither fashionable, trendy nor cool – it was exactly the opposite, and a mark of poverty (Brandes 2009). This is a key difference between 'old' and contemporary upcycling: nowadays, upcyclists tend to highlight the recycled nature of their transformative products.

4. *The effects of the linear economy on nature*

The global fashion and textile industry largely relies on linear business models, and the continuous production of new garments and accessories. Obviously, such trash-by-design business models are far from the green transitions that the EU Green Deal desires, and incredibly unsustainable. The global fashion and textile sector is one of the biggest polluters of the Earth. It is estimated to be responsible for 10% of global carbon emissions. Due to the growth of the global middle class, the number of garments purchased annually has increased drastically during the 21st century. The problem of such conspicuous consumption is particularly pressing in the wealthy Global North. For example, the average person living in Scandinavia buys and wears between 26 and 48 garments annually and throws away around 11 kilograms of textiles (Nordic Council of Ministers 2023).

Now, the circular potential of old garments and textiles is not utilised. Most of the textile waste ends up in landfills. One of the solutions would be to encourage various fashion stakeholders and consumers to upcycle at least the part of this waste that is still suitable for such purposes. Moreover, policy decisions that embrace and help to normalise upcycling would perhaps change consumer attitudes towards textile waste in general: to see its potential in becoming some-

thing beautiful, instead of viewing it as disgusting, dirty, or something that must be thrown away.

5. *The rationale of upcycling*

By its very nature, upcycling is becoming the next conflict zone for IP rightholders and sustainability-oriented producers over the recycling of used consumables as IP law and the circular economy are relying on the same resources with significantly different logics and policies. Transformative uses or – merely – reuses of protected subject matters are not evidently lawful or illegal. Certain secondary uses are expressly reserved – via exclusive rights – for the rightholders, e.g. the adaptation of a copyrighted work, affixing the trademark on a new packaging of the product or relying on a patented invention to come up with an innovation. At the same time, IP norms also list various transformative exceptions or limitations for the benefit of users of the works or goods, e.g. freedom of speech-based parody of a copyrighted work or a designed good; artistic reappropriation of a physical object or the resale or rebinding of books; maybe even repackaging pharma products.

IP law might act as an enabler of the circular economy, but it typically acts as an obstacle to it. As, however, Kur and Calboli (Kur, Calboli 2023) noted, if the current framework does not provide sufficient room for responding to the pressing need to promote a circular economy, then we should consider alternatives to modify the IP system to better suit a quality-focused, eco-friendly and sustainable economy. With the growing need for green transition, upcycling can work as a case study for decision-makers from the domestic to the international level to re-imagine IP policies to support green transitions at *micro* level by allowing individuals (upcyclists) the reuse of IP-affected goods; at *meso* level by convincing investors and industry-level organisations to renew economic models and invest in transformative recycling; and at *macro* level by allowing legislation to incentivise innovative activities to minimise waste and maximise the benefits of consumables for their full life-cycle.

6. *Major intellectual property law concerns regarding upcycling*

Based on the above, there are at least three distinct, but intertwined concerns that IP law must address when it comes to upcycling. First, the contrast between exclusive IP rights and inclusive sustainability and circularity that also leads to a 'commercial paradox of upcycling'. Second, the need for holistic IP legislation to mitigate IP overlaps in consumables. Third, spatial conflicts exist, that is, there might be divergent needs of waste exporters and importers and there might be a clash of developed and developing nations over the reuse of trash. This also relates to the phenomenon of 'waste colonialism'.

6.1. Exclusive IP rights versus inclusive upcycling

The exclusive nature of IP rights aims to guarantee a high level of protection of creators, innovators and businesses. The underlying theory of IP is to provide incentives for creativity and innovation and to guarantee rewards for such acts to the benefit of those who come up with culturally, economically and/or socially desirable expressions in the fields of arts, literature, science, commerce and industry. Consequently, these 'absolute' rights allow, on the one hand, the exclusive exercise or licensing of the relevant rights. On the other hand, in the lack of any exception or limitation, the rightholders might also enforce those rights against third parties carrying out unauthorised activities.

As indicated above, upcycling differs from this logic on a conceptual as well as a practical level. It aims to enable downstream market players (and, indeed, average persons) to (re)use materials or objects for a purpose that might only be indirectly connected to the original goal of the expressions embodied in those materials/objects. As such, upcycling does not only trigger novel creative and innovative solutions, but it is predominantly based on resources which their original creators/producers are unwilling to use. In other terms, upcycling does not only fill the void but also targets a different socially and economically desirable goal, namely, a more sustainable living environment via more circularity of materials.

As upcycling is a 'secondary' use of goods, the downstream market might be of crucial importance from an IP perspective, too. On the one hand, such commerce shall not be monopolised by IP rightholders. The doctrine of exhaustion allows lawful owners of copies

of works/goods to legitimately resell those copies. The doctrine guarantees the resale of the originals themselves, even if they are embedded into new tangible objects via physical recontextualisation. On the other hand, various forms of IP law, e.g. trademark law, are based on the distinctiveness or non-confusing nature of the IP good (in case of trademark law, the mark itself). Therefore, upcycled goods might be able to mislead consumers on the source (authenticity) of the given product, and hence rightholders might have a legitimate ground to tackle upcycling. Such situations might arise e.g. in cases of repackaging pharmaceutical products, where "a presentation of a product (...) does not enable normally informed and reasonably attentive consumers, or enables them only with difficulty, to ascertain whether the product originates from the proprietor of the trade mark or an undertaking economically linked to him or her or, on the contrary, originates from a third party adversely affects the function of indicating the origin of the mark", as confirmed by the Court of Justice of the European Union (hereinafter: CJEU) in *Merck Sharp & Dohme and Others* (CJEU 17.11.2022, C-224/20, para. 127). Trademark holders might lawfully oppose further commercialisation, if they have a legitimate reason to do so, "*especially where the condition of the goods is changed or impaired after they have been put on the market*" (Article 15(2) Directive (EU) 2015/2436; Article 15(2) Regulation (EU) 2017/1001). The same right of objection is granted to patent holders, e.g. in cases of remanufacturing of patented goods (Article 29 Agreement on a Unified Patent Court 2013).

Global leaders of the luxury fashion industry (e.g. Chanel and Louis Vuitton) have taken steps every now and then to prohibit downstream (or underdog) companies from producing and selling fashion products, like jewellery, apparel, handbags and accessories. Although many of the cases end up in a settlement between the parties (e.g. Louis Vuitton Malletier S.A.S. v. Sandra Ling Designs, Inc., 2021 WL 3742024; Chanel Inc. v. Shiver and Duke LLC, et al., 2022 WL 3868113), there is some case law that confirms the viability of IP rightholders' classic argument, namely, that the secondary products might confuse average consumers and hence infringe the claimants' exclusive trademark rights.

This can be illustrated by comparing two cases concerning the sale of upcycled watches, which also shed light on 'dirty' and 'clean' upcycling practices.

On the one hand, in *Hamilton v. Vortic* (Hamilton International Ltd. v. Vortic LLC, et al., 486 F.Supp.3d 657 (S.D.N.Y. 2020)), the defendant Vortic LLC refurbished antique pieces (so-called "Railroad-Era movements") produced by plaintiff Hamilton Watch Company between 1894 and 1950 to sell 'new' watches called 'The Lancaster'. The Lancaster had a Gorilla Glass back, which made the internal workings of the watch visible, including the trademarked term 'Hamilton', too. The 'Hamilton' trademarks were also visible on the antique face of the watches. The trial judge concluded that the infringement of trademarks necessitates the consumers' likelihood of confusion. Amongst others, Judge Nathan relied on two seminal trademark decisions, namely *Polaroid v. Polarad* and *Champion*, to decide on the claim of likelihood of confusion.

In *Polaroid v. Polarad* (Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961)), the Second Circuit listed eight factors to be checked as regards likelihood of confusion: "[w]here the products are different, the prior owner's chance of success is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers". The Second Circuit nevertheless left the analysis flexible by adding that "[e]ven this extensive catalogue does not exhaust the possibilities—the court may have to take still other variables into account" (Polaroid v. Polarad, p. 495). This is where the holding in *Champion* comes into play. In that judgment, the U.S. Supreme Court found that "[f]ull disclosure gives the manufacturer all the protection to which he is entitled" (Champion Spark Plug Co. v. Sanders, et al., 331 U.S. 125 (1947), p. 130).

The trial court in *Vortic* ultimately found that both cited cases support defendants' position. On the one hand, Vortic's website description and magazine advertisements highlighting the use of antique pieces to produce The Lancaster watches as well as the lack of any suggestion of sponsorship or affiliation between the parties made the defendant's disclosure 'full' per Champion. On the other hand, the Polaroid factors supported finding against infringement: the plaintiff was found not to put forward strong enough evidence as regards its mark's distinctiveness on the market; the overall impression of the

similarity of marks seemed not to mislead average consumers; the market for the parties' watches might not be close enough; the quality differences of the products do not confuse consumers either; there is no evidence for any actual confusion either; the defendants produced evidence for good faith in producing the watches; and, finally, the consumer base of the two companies' watches was found to be highly sophisticated. Quite interestingly, the trial judge expressly referred to upcycling as part of the defendant's good faith behaviour. In sum, upcycling was found to be lawful if trademarked products or pieces of them are used in good faith and in a non-confusing manner. The judgment was subsequently affirmed on appeal (Hamilton International Ltd. v. Vortic LLC, 13 F.4th 264 (2d Cir. 2021)).

Such 'clean upcycling' might be, however, countered by 'dirty' practices, where the use is carried out with the aim of commercially free riding on the reused source in a materially different form so that customers might be confused. This was confirmed in *Rolex v. Beckertime* (Rolex Watch USA, Inc. v. Beckertime, L.L.C., et al., 96 F.4th 715 (5th Cir. 2024)), where the defendant used decades-old Rolex watches to 'customise' (rather than 'recondition' or 'repair') them by modifying the watches, adding extra diamonds and aftermarket bezels, bracelets or straps. In sum, the newly marketed watches looked 'materially different' from vintage Rolex watches, leading to the confusion of customers. In a very similar case, the Swiss Supreme Court found in January 2024 that Artisans de Genève's (AdG) private customisation practice, where clients provide watches they own to AdG for personalisation, is lawful; yet AdG would not be allowed to carry out any such customisation on a commercial level, upon its own initiative, without prior authorisation (Artisans de Genève SA contre Rolex SA, Tribunal fédéral, 19.1.2024, 4A_171/2023). Likewise, the Japanese IP High Court found in the *Junkmania* case (Intellectual Property High Court, 23.10.2018, 2018 (Ne) No. 10042) that installing elements of plaintiff's trademarked and designed products on defendant's originally cheap products to generate a 'now feeling', 'cool feeling' or 'interesting feeling' runs against plaintiff's exclusive rights. In 2025 and 2026, French courts declared the reuse of worn, but functional scarves and buttons of luxury brands such as Hermès, Chanel and Louis Vuitton to infringe trademark and copyright laws (S.A.S. MAISON R&C, S.A.S. ATELIER R&C, and Géraldine Lugassy Demri, No RG 22/10720, No Portalis, 352J-W-B7G-CXY7J, 10

April 2025; S.A.S. Z and S.A.R.L. KAMAD REWORKED, 21 May 2026, Tribunal judiciaire de Paris, RG No 25/00621; Hermès v. Le Bidon français, Paris Judicial Court, June 2026).

From a copyright perspective, the Finnish Tableware jewellery and copyright case (Finnish Copyright Council, Statement TN 2021:9, 'Astiakorut ja tekijänoikeus') deserves the closest look. In the underlying case, upcycling artist A had used pieces of broken porcelain tableware, such as plates and cups, to make jewellery (necklaces and earrings) out of them. The tableware was originally produced and marketed by company F. The used plates and cups had been decorated, inter alia, with floral patterns and berries of different colours. Earrings and necklaces from each set of broken tableware had been designed and produced in a way so that decoration themes would match each other.

In its statement, the Finnish Copyright Council (FCC) assessed the doctrine of exhaustion in the context of upcycling works of applied art. It was concluded by the FCC that the decoration passed the threshold of originality and hence it is protected by the copyright of company F. The porcelain pieces used for earrings and matching pendants had been chosen among the pieces of the same set of tableware. The FCC had to consider, among other things, whether the distribution right to the copyright-protected tableware had been infringed by such use, or, alternatively, the said right had been exhausted in accordance with the Finnish Copyright Act.

The upcycling case law is yet limited. Many other questions might arise from transformative recycling in the future. Apart from economic rights of copyright and industrial property rightholders, authors' moral rights might kick in as a possible ground to treat upcycling as illegal. Here, we must consider the right of attribution, and the right of integrity. First of all, we must note that the rightsholder of moral rights can never be a corporate entity, such as a fashion brand. Only the natural person who created the work can invoke these rights. Thus, the big corporations who tend to object to upcycling cannot use moral rights as the legal basis for their objections. When it comes to the right to attribution, it would be hard to argue why the original author would not have the right to be attributed as such if the original work can be identified in the upcycled product. However, crediting the author in the context of an upcycled work is far from complicated. The author's name need not necessarily appear in the product

itself. Mentioning the name in, for instance, the sales packaging, price tag, digital product passport or washing instructions label can be considered sufficient. Thus, if an upcyclist just pays attention to author credits, the right of attribution does not conflict with the upcycling of a copy of the work. The right of integrity, on the other hand, is a bit more complicated in the context of upcycling. The author of the original work may try to claim that the amendments the upcyclist made cause prejudice to their honour or reputation. However, whether an amendment to a work is de facto prejudicial is generally assessed by using an objective yardstick – i.e., it is not based on the author's own opinion. It would be difficult to argue how transforming an old, broken, or worn-out copy of a work into a new object would cause prejudice to its author. Moreover, changes to utilitarian works are typically more easily justified than changes to purely artistic works. As the works that are upcycled are more often garments, interior textiles, furniture, tableware and other utilitarian works, the possibility to use the right of integrity to prohibit the upcycling of a work remains a rather theoretical one. It can thus be concluded that the right of integrity can hardly ever be used to hamper upcycling activities.

A similarly undiscovered territory of upcycling might be its overlaps with exceptions and limitations. In the European Union, these might include educational uses, quotation for criticism/comment, parody or pastiche in copyright law (Article 5(3)(a), (d) and (k) Directive 2001/29/EC, respectively); or non-distinctive/descriptive, expression-related, referential (Article 14(1)(b) and (c) Directive (EU) 2015/2436; Article 14(1)(b) and (c) Regulation (EU) 2017/1001) or nominative use (New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302 (9th Cir. 1992); Playboy Enterprises, Inc. v. Welles, 279 F.3d 796 (9th Cir. 2002)) defences in trademark law. The question of exceptions is equally important under United States law. On the one hand, Keats treats upcycling as free riding on the goodwill and creativity of IP rightholders, describing upcyclists' practices as 'lesser efforts' compared to those of rightholders (Keats 2020); hence he refuses the reliance on any exceptions under United States law. More constructively, Lepesant suggests that United States trademark law ought to be amended to create an affirmative defence for upcycling practices (Lepesant 2023). On the other end of the scale, Schenerman argues that upcycling can already fit into the concept of United States fair use doctrine and thus it does not infringe trademark rights

(Schenerman 2020). Also, Calboli and Armstrong argue that upcycling should be considered lawful under a broad interpretation of the doctrines of trademark, first sale and fair use (Calboli, Armstrong 2025). In addition, they argue that upcycling – particularly when clearly communicated through labelling and disclaimers – warrants First Amendment protection under the United States' Constitution as a form of expressive speech advocating for circular economy principles and environmentally conscious practices. Lemley and Mazzurco (Lemley, Mazzurco 2023) offered a multi-faceted analysis to exclude liability for upcycling/customisation activities. They claim that such non-commercial users shall fall outside of trademark law's domain; customised goods might be treated as expressive works, and hence they might be sheltered by the Rogers test (Ginger Rogers v. Alberto Grimaldi, et al., 875 F.2d 994 (2d Cir. 1989)) under U.S. law; the inclusion of branded products in the upcycled goods represents only components; and the first sale doctrine shall not prohibit the modification of branded goods.

Finally, exceptions and limitations might direct us toward a more detailed review of the role and interplay of fundamental rights, including the protection of intellectual property as a form of property (Article 17(2) of the Charter) and a high level of environmental protection (Article 37 of the Charter).

6.2. IP overlaps

The second major concern regarding upcycling might stem from the fact that numerous IP-relevant objects/materials are capable of embodying distinct IP rights, e.g. garments might secure copyright, trademark and design rights for their creators or producers. Since upcycling is based on the reuse of the whole or parts of these source materials, the partially different logics of copyright and industrial property laws might complicate the transformation or reuse of these mixed goods.

There are numerous concepts of the various forms of IP rights that differ in detail. For example, the underlying theories and incentives of IP laws are significantly distinct; the thresholds of protection differ significantly in copyright, trademark and design law; the rights and their scope might also diverge; exceptions and limitations might also look and work differently in these subcategories of IP law. Trade-

mark law's rules on confusion might prohibit something that could fit into the freedom of speech under copyright law.

Likewise, the doctrine of exhaustion has a slightly different scope in industrial property law than in copyright law. Consequently, the doctrine might allow for certain uses under copyright law, but not under trademark or design law. Which field of law shall prevail in a case involving both (or more) IP rights? Those who criticise the application of copyright law in protecting mass market products (like cosmetics or clothes) may be correct, as after all the basic goal of copyright law has historically been the protection of culture (literary, artistic, and scientific works) rather than the protection of trade control (Euro-Excellence Inc. v. Kraft Canada Inc., [2007] 3 S.C.R. 20, 2007 SCC 37). At the same time, the CJEU has recently refused the horizontal application of IP defences. In Audi (CJEU 25.1.2024, C-334/22, para. 27), a case involving design and trademark overlaps, the Court found that "the scope of Article 110 of Regulation No 6/2002, in that it imposes certain limitations only on protection conferred on designs and applies without prejudice to the provisions of EU law relating to trademarks. That provision therefore contains no derogation from EU trademark law". Article 110 of Regulation (EC) 6/2002 was a transitional provision; following the EU design reform, the repair clause has now been made permanent in Article 20a of that Regulation, as amended by Regulation (EU) 2024/2822, and in Article 19 of Directive (EU) 2024/2823. The correctness of any such argument against the horizontal application of defences has long been subject to criticism. As Senftleben put it (Senftleben 2020), "[i]nstead of paving the way for a maximization of benefits, the cumulation of intellectual property rights must lead to a minimization of protection that is readily available". Only time will tell which of these arguments prevails in upcycling cases.

6.3. Spatial conflicts

Strong IP regimes originate from the Global North, predominantly Europe and North America. By contrast, other parts of the globe lag behind in the level of protection of IP rights. We will not judge whether the Global North's approach is the right one. We shall, however, flag that strong IP rights led to capitalism (quickly outpacing the romantic view of authorship in copyright law) and, even worse,

consumerism. The latter is notorious for the production of enormous waste and high carbon footprint. How the trash of such a system is handled is a serious concern of our modern society, and that brings us closer to the spatial concern of upcycling. Namely, that most waste – in luckier situations, the unsold but fully functional products – ends up in the countries of the Global South, making them the dustbin of Global North companies. To remain optimistic, however, we shall look at the bright side of such a situation: numerous innovative start-ups have grown in those Global South countries (as well as in other more environment-conscious regions, e.g. Scandinavia in North Europe) that repurpose the wasted materials. In sum, there is a great chance that the pursuit of a more sustainable living environment will lead to significantly different policies, legislation and practices in the various nations of the Global North and South in the long term.

7. *Concluding remarks*

Overall, humankind is at a policy momentum with respect to sustainability. IP law might have a significant role in preserving the Earth as a liveable environment, upkeeping human well-being, managing the global environmental crisis and eliminating technological metabolism. Sustainability and IP co-exist in parallel and overlap to a certain degree. Nevertheless, they are distinct concepts, and their general goals are far from each other. The ultimate paradox is that no sustainability might be reached without incentivising the creation and profit-oriented rewarding mechanisms. Unfortunately, the current paradigm of IP law does not focus on sustainability, either at the normative or at the policy level. Policymakers should therefore pay closer attention to and should not hinder (and, if possible, even prioritise) green solutions to maximise the positive effects of the circular economy on our society's survival. As such, any proposals that aim to reach this goal shall be heavily supported.

In sum, upcycling, though still in its infancy, might function as an excellent case study for this discussion. Indeed, we cannot but expect greater debates around it.

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EU GEOGRAPHICAL INDICATIONS AND CIRCULAR ECONOMY: GENERAL OVERVIEW AND FURTHER REFLECTIONS

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SUMMARY: 1. Introduction. – 2. Geographical Indications as *sui generis* intellectual property rights. – 3. The EU legal regime of geographical indications. – 4. A unitary GIs system with two schemes: Protected Designations of Origin (PDO) and Protected Geographical Indication (PGI). – 5. Registration procedure and relevant documents. – 6. Right to use, control mechanisms, and enforcement of Geographical Indications. – 7. The scope of protection of Geographical Indications. – 8. Sustainability of Geographical Indications in the EU reformed regime. – 9. The new discipline of Geographical Indications for derivative products. – 10. Further reflections on GI System and circular economy (not) to conclude.

1. *Introduction*

Geographical Indications ("GIs") represent a very important intellectual property regime in the context of the EU legal order. That is why, in the context of the new paradigm shift towards a sustainable circular economy that characterizes the EU policy agenda, it could be interesting to link the two aspects in order to provide some insights and further reflections within the broader debate.

In order to do so, it is necessary first to provide a general overview of GIs, presenting them as a peculiar regime of EU law whose legal characteristics remain relatively unfamiliar, even among European consumers.

Then, more advanced legal issues concerning GIs can be addressed, with particular emphasis on the challenges arising from sustainability and circular economy, in light of the evolving policy priorities of the European Union. This final part is intended to offer just some perspective for reflections rather than ready-made conclusions,

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since this is not the forum for developing a thorough elaboration of relevant proposals and viable solutions.

2. *Geographical Indications as* sui generis *intellectual property rights*

Geographical Indications are recognised under EU law as intellectual property rights. Although considerable academic debate exists regarding their precise legal nature from a theoretical point of view, it is sufficient for our purposes to observe that their status as intellectual property rights is firmly established in the principal international agreements (e.g. TRIPS Agreement) and, even more clearly, in EU legislation.

One aspect deserves particular emphasis from the outset: GIs constitute a *sui generis* intellectual property right. In other words, they represent an autonomous and independent legal institution, distinct from every other form of intellectual property. They differ not only from copyright and patents, but, most importantly, from trademarks.

The distinction between GIs and trademarks is fundamental to understanding the EU system. A trademark is an intellectual property right protecting the distinctive sign of a product or service originating from a specific commercial source. In other words, it identifies the business responsible for placing a product or service on the market and enables consumers to distinguish that undertaking from its competitors.

Geographical Indications pursue a different objective. Although they also constitute intellectual property rights, and although they also function as distinctive signs, they are not designed to identify the commercial origin of a product. Instead, they indicate that a product originates from a specific geographical area and possesses qualities, characteristics, or a reputation linked to that territory.

Consequently, under EU law, GIs and trademarks are separate legal institutions that fulfil different functions and should not be regarded as overlapping forms of protection.

To better understand the practical significance of GIs, it is useful to consider a number of well-known examples. Products such as Champagne, Parmigiano Reggiano, Prosciutto di San Daniele, Queso Manchego, and Münchener Bier all constitute GIs protected under EU law. These products originate from defined geographical areas and

possess specific qualities or characteristics associated with those territories. Importantly, a geographical indication does not identify an individual producer; rather, it designates an entire "subcategory" or "group" of products sharing a common geographical origin and complying with the relevant production requirements.

Another example can clearly illustrate this distinction. Numerous producers manufacture Champagne, each marketing its products under its own trademark, such as Veuve Clicquot. In this example, Veuve Clicquot is the trademark identifying the commercial source of the product, whereas Champagne is the GI identifying the protected subcategory of sparkling wines originating from the Champagne region and complying with the applicable production specifications.

Accordingly, the term Champagne does not function as a "classic" trademark because it does not identify a single commercial undertaking. Rather, it communicates information concerning the geographical origin and quality of a product.

However, the names corresponding to GIs could be protected with further special types of trademark, namely collective marks and certification marks. Collective marks identify the commercial origin of a product but in a "collective" sense, indicating membership in an organized association. Certification marks indicate the possession of certain characteristics as verified by a responsible rightholder. Even if in the abstract these two special types of trademarks could both be adapted to protect GIs, they would lack a fundamental element of GIs as *sui generis* intellectual property rights in the EU fashion: that is, the role of the public authority in underpinning the credibility of the regime. That is why GIs could be defined as a hybrid between a private collective mark and a public certification scheme.

Understanding this distinction between trademarks and GIs is essential for appreciating the rationale underlying the EU *sui generis* system. In fact, GIs do not pursue a mere "market" objective of reducing search-costs for consumers while enabling business to invest and capitalize their reputation. On the contrary, GIs pursue a multifaceted policy mission, mixing classic objectives of consumer information and fair competition with more peculiar objectives of territorial development and cultural preservation.

3. *The EU legal regime of Geographical Indications*

Going into detail in the EU legal framework, another fundamental aspect of GIs concerns the distribution of legislative competence. This issue is particularly significant in the context of EU law because GIs constitute one of the few areas of intellectual property in which the European Union exercises exclusive competence.

Unlike other forms of intellectual property protection, GIs are governed exclusively at the EU level. In many areas of intellectual property law, national and EU systems coexist. Trademarks provide a clear example of this dual structure. A business may register a trademark before its national intellectual property office, thereby obtaining protection limited to the territory of a single Member State. Alternatively or indeed cumulatively, it may apply to the European Union Intellectual Property Office (EUIPO), headquartered in Alicante, to obtain an EU trademark that enjoys unitary protection throughout the European Union. These two systems coexist, allowing applicants to choose the form of protection most appropriate to their commercial interests.

This dual approach reflects one of the traditional principles of intellectual property law: the principle of territoriality. Historically, intellectual property rights have been closely linked to State sovereignty. Since intellectual property rights are granted by public authorities, their legal effects have traditionally been limited to the territorial jurisdiction of the authority that confers them. Consequently, territoriality remains a fundamental principle governing intellectual property law both within domestic legal systems and at the international level.

Obviously, when the sovereignty discourse concerns the EU legal order, the situation is more complicated. To a certain extent, this can explain why competences are so fragmented between European and national level. However, GIs represent a notable exception. Over time (and somehow not in proper way) the EU has progressively established a unitary system in which GIs may be registered and protected only at the EU level. Today, the Union enjoys exclusive competence in this field, meaning that Member States cannot establish independent national systems of protection for Geographical Indications. National authorities continue to play an important administrative role during the application procedure, but the legal recognition of a GI belongs exclusively to the EU.

Accordingly, there is not (anymore) an autonomous Italian, French, or Spanish system of Geographical Indications comparable to national trademark systems. Products originating in individual Member States may certainly qualify for geographical indication protection, but registration is ultimately granted through the EU legal framework rather than under national legislation. This exclusive competence constitutes one of the defining characteristics of the EU GI system and distinguishes it from most other branches of intellectual property law.

Another distinctive feature of GIs is their historical relationship with the so-called Common Agricultural Policy. The development of the GI regime was originally driven by agricultural policy objectives rather than by intellectual property considerations alone. This can be appreciated in those multifaceted policy objectives as described above. Consequently, the first categories of products benefiting from geographical indication protection were "agri-food" products, with a special position for wines.

Although GIs have subsequently evolved, this historical background continues to influence the structure of the current legal framework. Even today, the EU system remains organised according to different categories of products, namely agri-food products, wines, spirit drinks, and, more recently, craft and industrial products.

At first sight, this categorisation may appear somewhat artificial. On the one hand, the legal framework continues to distinguish between different classes of products. On the other hand, the recent extension of GI protection to craft and industrial products has considerably broadened the scope of the system, making GIs potentially applicable to almost any kind of goods. Nevertheless, the division into product categories remains a structural characteristic of the EU regime.

Despite these categories, the legal principles governing GIs are largely uniform. The substantive concepts, registration procedures, and mechanisms of protection are substantially common across the different sectors. Consequently, although the legislation distinguishes between various categories of products, the overall architecture of the system remains coherent, allowing the same fundamental principles to govern GIs regardless of the products concerned.

A significant reform of the EU legal framework was recently enacted. Before this reform, GIs were regulated through separate legislative instruments. Specific regulations governed agri-food products,

wines, and spirit drinks, while no regime existed for craft and industrial products.

The recent reform fundamentally reorganised this framework. A consolidated regulation now governs agri-food products, wines, and spirit drinks under a common legislative structure, replacing the previous sector-specific approach with a more coherent and harmonised framework (Regulation (EU) 2024/1143). At the same time, a separate regulation introduced a dedicated regime for craft and industrial products, which became operational on 1 December 2025 (Regulation (EU) 2023/2411).

The introduction of a separate regime for craft and industrial products responded to differing political sensitivities among the Member States about GIs, which historically were present and still are so. While several Member States have traditionally supported a strong GI policy, others have been less prone to do so. Consequently, the EU legislator considered it preferable to establish a distinct legal framework specifically designed to promote the development of this new category of GIs, rather than simply extending the considerably more complex agricultural regime already existing.

As said, the underlying principles governing GIs remain substantially identical. However, the coexistence of these two legislative instruments inevitably raises certain issues concerning consistency and coordination. This is particularly true because of certain normative discrepancies not so easy to reconcile. In this sense, it should be anticipated that this distinction between the two regulations reflects primarily political and institutional considerations rather than fundamental legal differences. That is why an objective of overall consistency can (and should) be pursued, as it will be argued further.

4. *A unitary GIs system with two schemes: Protected Designations of Origin (PDO) and Protected Geographical Indication (PGI)*

Having outlined the institutional framework governing GIs, it is now useful to examine their essential legal features. Although GIs constitute a unitary category of intellectual property rights, the EU system distinguishes between two main different forms of protection: the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI).

Both PDOs and PGIs fall within the broader family of GIs and are represented by official EU quality symbols (respectively, the "red" and the "blue" logo) that consumers can commonly see on such products (Delegated Regulation (EU) 2025/26, Annex XVII). Nevertheless, they constitute two distinct legal schemes characterised by different eligibility requirements and different degrees of territorial connection. In general terms, the PDO represents the more stringent form of protection, whereas the PGI provides a broader and more flexible regime.

To qualify as a Protected Designation of Origin, three cumulative conditions must be satisfied (Article 46(1) Regulation (EU) 2024/1143).

First, the product must originate from a specific geographical area, which normally consists of a defined place or region and, only in exceptional circumstances, an entire country. The territorial element is therefore fundamental. In most cases, the protected area is relatively limited in geographical scope. For example, Champagne originates exclusively from the Champagne region, while Münchener Bier is linked specifically to the city of Munich and its surrounding area rather than to the whole of Bavaria. Although broader geographical areas may occasionally be recognised, such as for Scotch Whisky, the underlying principle remains the existence of a clearly defined territory.

Secondly, the product must possess qualities or characteristics that are intrinsically linked to that geographical area. It is therefore insufficient merely to identify a product with a particular place of origin. Furthermore, the relevant qualities must derive from the territory itself. EU law requires the existence of a genuine qualitative link between the product and the geographical environment in which it is produced.

For PDOs, this territorial link is understood in a particularly strict and objective sense through the concept of *terroir*. Borrowed from French legal and agricultural terminology, the notion of *terroir* has evolved in the context of GI in order to encompass considerably more than the physical location of production. It includes the natural environment, climatic and geological conditions, traditional production methods, local know-how, and the historical experience of the producers operating within that territory. These natural and human factors combine to create the distinctive characteristics that justify protection under the PDO regime.

The third requirement concerns the production process itself. In the case of a PDO, all stages of production must take place within the defined geographical area. This requirement reflects the particularly strong territorial connection characterising the PDO system and reinforces the objective relationship between the product and its geographical origin.

Protected Geographical Indications follow a more flexible approach. This broader scheme was introduced to accommodate products whose relationship with the territory is less intensive but nevertheless sufficiently significant to justify legal protection. In many cases, products have acquired a long-standing reputation associated with a particular geographical area even though their characteristics cannot be explained exclusively by natural or environmental factors.

Like the PDO, the PGI requires that the product fulfil three conditions of the same kind (Article 46(2) Regulation (EU) 2024/1143).

First, the product shall originate from a defined geographical area. The territorial element therefore remains an essential prerequisite. However, the nature of the required link differs significantly.

Under the PGI scheme, the relevant qualities of the product may derive not only from objective environmental conditions but also from its reputation. The geographical connection may therefore be established through the historical recognition enjoyed by the product, the continuity of traditional production methods, or the long-standing association between the product and the territory in the perception of consumers. In other words, the emphasis shifts from the objective concept of *terroir* towards the historical and cultural reputation developed by the product over time.

From a theoretical perspective, this distinction has generated considerable academic debate. PDOs are traditionally regarded as embodying an objective, terroir-based model, whereas PGIs rely on a broader reputational connection. In practice, however, the distinction has become progressively less pronounced. Both schemes increasingly emphasise the longstanding continuity of production, local know-how, and the territorial traditions that justify protection. Both schemes rely on this mix of geography and history as the roots of the specific distinctive qualities of the product to be protected as GI. As a result, the practical differences between PDOs and PGIs are often less significant than the legal definitions might suggest, at least from this point of view.

Another substantial distinction between the two regimes concerns the production process. Whereas a PDO requires that every stage of production takes place within the protected geographical area, a PGI requires only that at least one stage of production occurs within that territory. This considerably relaxes the territorial connection and provides producers with greater organisational flexibility.

This more flexible structure of the PGI in terms of production process has also attracted criticism. Allowing only one production stage to take place within the geographical area may weaken the genuine territorial link and, in some circumstances, facilitate abusive or excessively broad claims to protection. Whether these concerns materialise depends largely on the specific content of each product specification. In practice, many PGIs maintain a much stronger territorial connection than the legal minimum would require. For instance, although raw materials may originate outside the protected area, most or all subsequent production processes may still take place within the designated territory, thereby preserving a substantial geographical link. At the same time, it is true that certain PGIs are too loose, following mere business logic rather than sound territorial rooting. Consequently, the flexibility of PGIs should not be regarded as problematic in itself: its appropriateness ultimately depends on how the single PGI is structured and managed. However, the system should consider appropriate correction considering the existence of such problematic practices.

In addition to PDOs and PGIs, EU quality policy includes several other quality schemes, such as the Traditional Speciality Guaranteed (Article 52 Regulation (EU) 2024/1143) and optional quality terms, including "mountain product" (Article 82 Regulation (EU) 2024/1143). These schemes differ fundamentally from proper GIs because they are not based on a specific geographical origin. A TSG protects a traditional recipe or production method rather than a territorial link, so that it can be reproduced elsewhere than the place of origin, while the designation "mountain product" refers to production in mountainous areas defined in general, rather than located in a certain geographical region. Since neither scheme requires the close territorial connection that characterises GIs, they fall outside the scope of the present discussion.

5. *Registration procedure and relevant documents*

Protection as a GI is granted only upon registration. Unlike other forms of protection that may arise through use or reputation alone, GIs benefit from the specific legal regime established under EU law only after completion of the formal registration procedure. Consequently, all well-known GI examples recalled above are protected because they have been duly entered in the EU register of GIs.

The registration procedure operates through a two-stage structure, combining national and European administrative procedures. As a general rule, applicants must first complete a preliminary examination at national level before the application is transmitted to the EU level for final assessment and registration (Articles 10 and 13 Regulation (EU) 2024/1143, as well as Article 7(1) Regulation (EU) 2023/2411).

A limited exception has recently been introduced for craft and industrial products (Article 7(2), Regulation (EU) 2023/2411). Under the new legal framework, Member States that have not established a national authority responsible for conducting the preliminary examination may allow applicants to submit their applications directly to the competent EU authority. This solution was introduced primarily to facilitate the implementation of the new regime in Member States with limited experience or interest in GIs. Nevertheless, the ordinary procedure remains based on two successive administrative stages: an initial national examination followed by a final decision at EU level.

During the first stage, applications are examined by the competent national authority, which may be either the national intellectual property office or another public body, such as the competent ministry (agriculture or trade), depending on the institutional organisation of the Member State concerned.

Once the national examination has been successfully completed, the application proceeds to the European level. Here, the institutional framework reflects the ongoing evolution of the EU system. For agri-food products, wines, and spirit drinks, the European Commission continues to act as the authority responsible for registration. By contrast, under the recently introduced regime for craft and industrial products, responsibility has been entrusted to the European Union Intellectual Property Office (EUIPO). This institutional distinction illustrates the peculiar nature of the GI system, which combines el-

ements of traditional agricultural governance with those of modern intellectual property administration.

The registration procedure is initiated exclusively upon application by the interested operators. The competent authorities do not act *ex officio* to identify products deserving protection. Rather, the process follows a bottom-up approach, requiring the producers themselves to seek registration of the GI for their product (Article 9 Regulation (EU) 2024/1143 and Article 8 Regulation EU 2023/2411).

It is important to stress that applications are generally submitted not by individual producers but by producer groups. This reflects the collective nature of GIs. Since a GI identifies, as said, a sub-category or "group" of products rather than the product of a single undertaking, the legal framework assumes that several producers operating within the same geographical area share an interest in protecting the geographical name. Consequently, local producers are expected to organise collectively and submit a joint application. Although EU law provides limited exceptions allowing applications by individual producers in exceptional circumstances, the collective model remains the general rule and one of the defining features of the GI regime.

Every application must be accompanied by a number of supporting documents (Article 12 Regulation (EU) 2024/1143 and Article 11 Regulation (EU) 2023/2411). Among these, two are particularly significant: the single document and the product specification.

The single document summarises the essential characteristics of the GIs and provides the legal justification for its protection. It explains the geographical origin of the product, the territorial link, the historical tradition underlying its production, and the specific qualities or reputation that justify recognition as a GI. In essence, it presents the substantive grounds supporting the application (Article 50 Regulation (EU) 2024/1143 and Article 10 Regulation (EU) 2023/2411).

The product specification serves a different function. It constitutes the technical document defining the production rules and parameters applicable to the GI. It specifies the process methods and quality standards that producers must comply with in order to market their products under the protected geographical name (Article 49 Regulation (EU) 2024/1143 and Article 9 Regulation (EU) 2023/2411).

The registration procedure also includes the possibility of opposition. Interested parties may challenge an application on several legal grounds, including, for example, the generic nature of the proposed

name or conflicts with earlier trademark rights (Articles 15(3) and 26 Regulation (EU) 2024/1143 as well as Article 19 Regulation (EU) 2023/2411). The opposition system mirrors the two-stage registration procedure and therefore distinguishes between the national and European phases. During the national stage, opposition may be lodged by operators established within the Member State where the application originates. Once the procedure reaches the European level, however, those national operators are no longer entitled to raise objections. At this stage, opposition is reserved for third parties who were not entitled to participate during the national examination. This procedural separation prevents duplication of objections and contributes to the orderly conduct of the registration process. However, interested parties should be aware of this preclusion.

Finally, registration does not render a GI immutable. The legal framework allows amendments, particularly to the product specification, whenever adaptation becomes necessary (Article 24 Regulation (EU) 2024/1143 and Article 31 Regulation (EU) 2023/2411). Such amendments may reflect technological developments, changing environmental conditions, evolving consumer preferences, or other circumstances requiring modifications to production and presentation rules.

The applicable procedure depends on the significance of the proposed amendment. Minor modifications may be approved by the competent national authority alone. Conversely, amendments affecting the essential characteristics of the GI require a new two-stage procedure involving both the national authorities and the competent EU institution. This mechanism ensures that substantial changes remain subject to the same level of scrutiny as the original registration while allowing sufficient flexibility to accommodate the evolving needs of producers and markets.

6. *Right to use, control mechanisms, and enforcement of Geographical Indications*

One of the most distinctive features of the EU system of Geographical Indications is the concept of the right to use (Article 36 Regulation (EU) 2024/1143 and Article 47 Regulation (EU) 2023/2411). In this respect, GIs differ significantly from other forms of intellec-

tual property protection. Traditionally, intellectual property rights are based on the principle of exclusivity: the rightholder alone may exploit the protected right or authorise its use by third parties. Geographical Indications follow a different logic. As collective intellectual property rights, they are founded on an open and non-discriminatory system of access. Any economic operator satisfying the legal requirements governing a geographical indication is entitled – has the "right" – to use the protected name.

Alongside the right to use, the GI regime also establishes a duty to use the official EU quality symbols (Article 37 Regulation (EU) 2024/1143 and Article 48 Regulation (EU) 2023/2411). For agri-food products, the PDO and PGI logos must appear on the label. Although exceptions exist for certain categories, including some wines, spirit drinks, and the recently introduced craft and industrial Geographical Indications, the mandatory display of the official symbols remains the general rule. This obligation reflects an important policy objective. As previously noted, public awareness of GIs remains relatively limited, even within the EU. The mandatory use of the official logos therefore serves not only an informative function but also contributes to increasing consumer awareness and promoting the EU quality schemes.

The right to use GIs, in terms of open and non-discriminatory access, should not, however, be understood as unrestricted access. The right to use a geographical indication is limited to producers operating within the defined geographical area. Nevertheless, all producers established within that territory are entitled to use the GI provided that they comply with the applicable legal requirements. It could be also defined as a "club" system, but actually as an "open" club: in fact, membership of the producer group or consortium responsible for managing the GI is not a precondition. Likewise, participation in the procedure that originally promoted or registered the GI is unnecessary. The only decisive conditions are that the producer operates within the designated geographical area and that the product complies with the applicable Product Specification. Consequently, any producer meeting these requirements is entitled to market its product under the protected geographical indication. In practical terms, a producer established within the Champagne region who complies with the Product Specification is entitled to market its wine as Champagne, irrespective of membership in the relevant producer consortium.

At the same time, it should be stressed that geographical origin and quality compliance constitute a double cumulative condition. In other words, geographical origin alone is insufficient. A producer operating within the protected geographical area may use the GI only if the product fully complies with the technical standards established in the product specification. To illustrate, ownership and cultivation of vineyards located within the Champagne region does not automatically entitle the producer to market its wine as Champagne. The producer must also comply with the detailed production rules governing such a PDO, as laid down in the relevant product specification.

In truth, a third condition must also be satisfied. In addition to geographical origin and quality compliance, producers must successfully undergo the relevant control procedures. Only producers who are local, compliant, and duly certified are entitled to use the protected geographical indication.

This is a very defining characteristic of the GI system, being based on a comprehensive framework of independent controls regulated by law and inspired by public logic. Compliance with the product specification is not left exclusively to the producer group managing the GI. Instead, producers must undergo verification carried out by public authorities or independent third-party certification bodies (Article 39 Regulation (EU) 2024/1143 and Article 52 Regulation (EU) 2023/2411). Independent certification constitutes one of the principal features distinguishing GIs from other forms of quality claims, including certification marks that merely indicate certain product characteristics without being subject to systematic external verification. The existence of an independent control system reinforces the credibility of GIs by ensuring that the quality guarantees associated with the protected name are effectively monitored and enforced.

The recently introduced regime for craft and industrial Geographical Indications partially departs from this traditional model. Under certain circumstances, self-certification is permitted (Article 51 Regulation (EU) 2023/2411). This innovation proved controversial during the legislative process. It was introduced primarily to facilitate the development of the new regime and encourage wider participation by producers. Nevertheless, this solution is strongly criticized, because of the risk of weakening one of the fundamental pillars of the GI system.

The control system extends beyond the ex ante certification stage, in terms of compliance verification preceding the marketing of the

product. It also encompasses ex post controls, in terms of market surveillance about the respect of this intellectual property rights (Article 42 Regulation (EU) 2024/1143 and Article 54 Regulation (EU) 2023/2411). Market surveillance is intended to identify products unlawfully using protected GIs in order to prevent the marketing of goods that fail to satisfy the relevant standards, to the detriment of the objectives of the system.

An important feature of the EU system is that enforcement of GIs is not left exclusively to private initiative. Member States are required to ensure the ex officio protection of GIs. Consequently, the competent public authorities must monitor compliance with the legal regime and take appropriate enforcement measures whenever infringements are identified, regardless of whether individual producers initiate legal proceedings.

This principle has not always been uniformly accepted. In the past, some Member States argued that protecting GIs originating in other Member States should remain primarily the responsibility of the affected producers. This objection has since been overcome. Under the current legal framework, all Member States are required to protect all registered GIs, irrespective of their national reference. This solution consistently reflects the unitary nature of the EU system. Since GIs constitute EU intellectual property rights rather than national rights, every Member State bears responsibility for ensuring their effective protection throughout the internal market, in a spirit of "loyal" cooperation.

In this regard, the enforcement of GIs should take into account the territorial scope of the exclusive right as extending also to products intended exclusively for export. A product manufactured within the EU in violation of a protected GI infringes the exclusive right even if it is destined solely for markets outside the Union. Accordingly, a market operator (or the public authority entrusted with enforcement) cannot rely on the argument that the unlawful use of the GI is for products addressed exclusively to consumers in third countries. Under the principle of territoriality, as said fundamental to intellectual property rights, the relevant infringement occurs where the unlawful use takes place also at the stage of production, so in this case within the territory of the European Union.

Finally, one of the most significant innovations introduced by the recent reform concerns the digital enforcement of GIs (Article 43 Reg-

ulation (EU) 2024/1143 and Article 60 Regulation (EU) 2023/2411). The new legislative framework extends enforcement mechanisms to internet domain names and services provided by online intermediary, including digital marketplaces and platforms. In this respect, GIs have been brought into line with other categories of intellectual property rights, which already benefit from enforcement mechanisms specifically designed to address infringements occurring within the digital environment.

7. *The scope of protection of Geographical Indications*

Having examined the institutional framework governing GIs, it is now appropriate to consider their substantive dimension as intellectual property rights, namely the scope of protection conferred by EU law. As with all intellectual property rights, the legal mechanism of GIs is to provide protection by granting the rightholder the ability to exclude unauthorised third parties from using the protected subject matter. While copyright protects creative works, patents protect inventions, design rights safeguard the appearance of products, and trademarks protect the distinctive signs identifying the commercial origin of goods and services, GIs protect the names of such sub-categories of typical products whose (renowned) quality or (qualitative) reputation are linked to a specific geographical area.

Despite the articulation of the EU system, GIs enjoy a uniform standard of protection. The same substantive rules apply regardless of whether the protected designation is registered as a PDO or a PGI and irrespective of the category of product concerned, including agri-food products, wines, spirit drinks, and craft and industrial products. Similarly, the protection applies equally in both offline and online environments. Consequently, although the GI regime encompasses different product categories and legal schemes, the substantive protection afforded by EU law is unitary.

The legal framework establishes four principal forms of protection (Article 26 Regulation (EU) 2024/1143 and Article 40 Regulation (EU) 2023/2411). While protection against misleading practices represents the traditional and internationally recognised core of GI protection, the EU system extends considerably beyond this minimum standard by introducing broader and more distinctive mechanisms.

Starting from the end of the norm, the fourth hypothesis represents these the most conventional form of protection: that is, misleading indications regarding geographical origin. A GI is infringed where the presentation of a product misleads consumers into believing that it originates from the protected geographical area when this is not the case. This form of protection is based upon the traditional concept of consumer confusion. If consumers purchase a product believing it to be an authentic Champagne, whereas it does not originate from the Champagne region, the GI has been infringed through a misleading indication of origin in this most "classic" sense.

A similar rationale underlies the third hypothesis of protection against false or misleading indications appearing on packaging or product presentation. Here again, the objective is to prevent consumers from being deceived regarding the true geographical origin of the product. In this case, the same logic applies to those practices that go beyond the use of the GI in the product name. In this sense, also this provision corresponds to the more traditional understanding of GI protection that exists in many legal systems worldwide.

However, the most distinctive feature of the EU regime for GIs regards the first and second hypothesis. The first one extends protection beyond situations involving consumer confusion by prohibiting direct or indirect commercial use of GIs. In the case of comparable products, the use of a GI is prohibited based on the sole condition that such products are not compliant with the product specification. This applies irrespective of whether consumers are actually misled, so granting a therefore considerably broader protection than the simple prohibition of deceptive practices.

Furthermore, even where the products concerned are not comparable, unauthorised use may still be prohibited if it results in the unfair exploitation of or detriment to the reputation of the GI. Obviously, this aspect of the regime requires a case-by-case assessment, and it is open for debate in its actual and correct extension. However, it demonstrates well that the EU system protects not only consumer information but also the economic and reputational value embodied in GIs themselves.

An even more distinctive form of protection of GIs is provided through the concept of evocation. Under EU law, a GI may be infringed even where the protected name is not used directly, and even where expressions such as "style", "type", "method", "imita-

tion", "kind", or similar qualifying terms accompany the disputed designation. Such disclaimers do not exclude infringement. The prohibition is therefore exceptionally broad and reflects one of the defining characteristics of the EU system.

The practical implications of this regime are best illustrated through the case law of the Court of Justice of the European Union, which has progressively expanded the concept of evocation.

One of the basic cases to show how evocation works in practice is the use of the designation "Parmesan" for cheeses that did not comply with the PDO Parmigiano Reggiano (CJEU, case C-132/05). The Court confirmed that geographical indications are protected against translation, as the very black letter of the law provides, so concluding that the use of term "Parmesan" constituted an infringement of the relevant GI.

Historically, the landmark decision for evocation is the "Cambozola" case (CJEU, case C-87/97), concerning a cheese marketed under a name combining references to Camembert and Gorgonzola. The Court held that the nominal part "zola" was sufficient to evoke the PDO Gorgonzola, thereby infringing GI protection. Importantly, the decision did not depend upon any finding of consumer confusion. It is a fact that consumers were unlikely to purchase the Cambozola cheese believing that it was genuine Gorgonzola. Nevertheless, the mental association created between the two names was sufficient to establish infringement, exactly because evocation protects GIs from any mechanism of unauthorized market association.

Subsequent case law further broadened this principle. In the "Verlados" case (CJEU, case C-75/15), a Finnish spirit produced by a company located in the town of Verla was marketed under such a name resembling the protected French GI Calvados. Applying the reasoning developed in Cambozola, the Court easily concluded that the designation was unlawful under the notion of evocation.

The judgment is particularly significant for several additional reasons. First, the Court rejected any so-called "truth" defence. The fact that the producer was genuinely established in the town of Verla did not justify the use of a name evoking the GI. Secondly, the Court denied the applicability of a "de minimis" principle. In this sense, the producer argued that only a limited number of bottles had been produced, but the Court held that the scale of production was irrelevant for determining infringement. Finally, the Court reaffirmed that

consumer confusion is not a necessary element of evocation, also with regard to local consumers. More precisely, even if Finnish consumers in this case clearly understood that Verlados differed from Calvados, the mental association between the two products remained sufficient to establish infringement.

The concept of evocation was expanded even further in the "Glen Buchenbach" case (CJEU, case C-44/17). The product concerned was a whisky produced in Germany bearing such a designation allegedly considered in violation of the GI Scotch Whisky. Although the word "Glen" is actually not a part of the GI, the Court concluded that this characteristically Scottish term, widely use by the local whisky industry, was capable of leading consumers to associate the product with the protected GI. The absence of any textual similarity with the GI was therefore immaterial. What mattered was already the conceptual association created in the consumer's mind.

Then, the broadest interpretation of evocation (at the moment) was reached in the "Queso Manchego" case (C-614/17). Queso Manchego is a PDO for a typical cheese produced in the La Mancha region of Spain. The dispute concerned a producer who used imagery associated with *Don Quixote de la Mancha*, including references to the literary character Rocinante and visual elements depicting the cultural landscape of La Mancha, without directly using the protected designation itself. The Court held that evocation may arise not only through words but also through figurative elements capable of establishing the said mental link with the GI. Moreover, this case is even more important because the infringing producer was actually established in the relevant geographical area (although its products were not compliant with the GI in question). Consequently, also labels, images, symbols, and other visual representations may all constitute infringements where they evoke the protected GI according to the mental mechanism so established.

This presentation cannot cover all relevant decisions about GIs. However, this line of case law clearly demonstrates the exceptionally broad scope of protection enjoyed by GIs as a matter of principle under EU law. Although the breadth of this protection remains the subject of considerable debate, the EU judges tend to support the legislature's objective to safeguard not only consumers against deception, but also the distinctiveness, reputation, and economic value associated with GIs.

8. *Sustainability of Geographical Indications in the EU reformed regime*

After this general overview about GIs as *sui generis* regime in the EU legal framework, some further reflections can be provided in light of the new paradigm of a sustainable circular economy.

As known, sustainability has become one of the central priorities of contemporary EU agenda. Nevertheless, this policy objective has only marginally influenced most areas of intellectual property law. Neither trademark law, patent law, nor copyright law has undergone substantial reform aimed at incorporating sustainability through new substantive requirements, conditions, or exceptions. However, GIs represent a notable exception in this sense.

Owing to their close relationship with agricultural policy, territorial development, and the preservation of cultural heritage, GIs have integrated sustainability into their regulatory framework. Rather than treating sustainability as an external policy objective, the recent reform has embedded it within the operation of the GI system itself.

Starting with agricultural products, GIs now expressly allow producer groups to agree on sustainable practices (Article 7 Regulation (EU) 2024/1143).

These practices must exceed by definition the minimum standards already required under applicable legislation, thereby encouraging producers to pursue higher levels of environmental, social, or economic sustainability.

The norm further provides that such practices may either remain voluntary or become binding upon all producers operating under the GI. Where the producer group decides to make them mandatory, the sustainability commitments must be incorporated into the product specification and consequently become legally binding conditions governing the use of the relevant GI.

An important feature of this mechanism is its bottom-up character. The EU legislator deliberately refrained from prescribing specific sustainability requirements applicable to all GIs. Instead, producer groups are entrusted with determining which sustainability practices are appropriate for their particular products and geographical contexts, as well as whether such practices should remain voluntary or become mandatory.

This approach presents both advantages and disadvantages. A top-

down regulatory model would undoubtedly provide greater uniformity and stronger legal certainty, but it would also reduce the flexibility necessary to accommodate the considerable diversity of GIs. By contrast, the bottom-up model allows sustainability commitments to reflect local conditions, traditional production methods, and the specific needs of individual producer communities. Moreover, because these commitments originate from the producers themselves, they may benefit from greater acceptance and more effective implementation.

The sustainability framework also includes an important element of public transparency (Article 8 Regulation (EU) 2024/1143). After the reform, producer groups may prepare sustainability reports describing the relevant practices agreed and enacted for the GI. The norm requires such reports to be both accurate and comprehensible, thereby ensuring that the information provided is reliable and accessible to consumers and any other interested stakeholders. Furthermore, the European Commission is responsible for making these reports publicly available, reinforcing their visibility and enhancing the public dimension of sustainability within the GI regime.

Here again, the legislator has favoured a voluntary rather than mandatory approach. Unlike the (highly controversial) corporate sustainability reporting obligations or due diligence requirements, the preparation of sustainability reports remains optional for GI producer groups. Nevertheless, the reform establishes a legal framework designed to ensure that voluntarily disclosed information satisfies minimum standards of accuracy, transparency, and reliability.

The situation is somewhat different for craft and industrial Geographical Indications. The corresponding regime does not contain provisions equivalent to those governing sustainability practices and sustainability reports in the agricultural sector.

In particular, this parallel regime lacks a proper discipline in terms of definition, scope and conditions of such sustainable practices and obligations. In this sense, there is no definition of a "legal-plus" standard, nor even the reference to the environmental and social dimension of sustainability. Moreover, no regulated form of public reporting is provided. Instead, the reform just generally entrusts producer groups with the task to agree on possible sustainability commitments, admitting the option to integrate such obligations into the product specification or through separate instruments (Article 45(2)(c) Regulation (EU) 2023/2411).

Apart from the single operative issues, this normative divergence illustrates more broadly one of the principal challenges created by the recent reform. Several provisions governing craft and industrial Geographical Indications differ from those applicable to agricultural products, raising questions regarding the future coherence of the EU GI system. It remains uncertain whether such differences respond to a rationale of "agricultural" speciality, or whether agricultural GIs should be considered the original model of general inspiration, or even whether the gradual extension of GIs beyond the agricultural sector should ultimately lead to a new "de-agriculturalized" model across all product categories. However, as anticipated before, consistency should be preferred and pursued to the benefit of the GI system itself.

9. *The new discipline of GIs for derivative products*

This issue becomes particularly evident in relation to the legal regime governing GIs used as ingredients or components of derivative products, one of the most significant innovations introduced by the recent reform. Even if this aspect is not directly linked with circular economy, it presents a remarkable affinity with the logic that inspires this new paradigm of continuous "redevelopment" of value within the productive system.

For many years, it was highly debated the issue of determining if a protected GI could be freely used to express the fact that typical products constituted an ingredient or component of the final product. The central question was to weigh up the conflicting interests of "competitors", who actually used genuine GI ingredients and components, with the ones of "rightholders", who generally claim exclusive control on the use of the protected GI.

To better illustrate this problem, it is enough to recall the well-known litigation concerning the "Champagne sorbet" case (CJEU, case C-393/16). A supermarket chain marketed an ice-cream under this commercial name, on the basis that the recipe contained Champagne as an ingredient. The legal issue was not (only) whether Champagne had actually been used, but whether the presence of a genuine GI ingredient entitled the producer to refer to the protected GI in the commercial name of the derivative product.

The Court of Justice held that, in principle, a producer may refer to a GI in the name of a derivative product where the product genuinely contains the protected ingredient. However, the mere presence of the ingredient is not sufficient. The GI product must be used in a quantity capable of conferring an essential characteristic upon the final product. In other words, a negligible quantity of Champagne would therefore not justify marketing an ice cream as "Champagne Sorbet". In reaching this conclusion, the Court largely confirmed the approach previously adopted by the European Commission in its interpretative soft-law guidance.

The recent reform has followed this case law, codifying a specific legal framework governing the use of GIs as ingredients in the agricultural sector (Article 27 Regulation (EU) 2024/1143).

Under the new regime, three cumulative objective conditions must be satisfied. First, the derivative product must not contain any another comparable ingredient with respect to the GI. This is to avoid any ambiguity or misuse. Secondly, the GI ingredient must be present in a quantity sufficient to confer an essential characteristic upon the final product. This is to establish substantial justification of such use. Thirdly, the percentage of the GI ingredient must be indicated on the product label. This is to provide consumers with transparent information.

In addition, the recent reform introduced a procedural mechanism applicable only to prepacked food products containing GIs. While the substantive conditions remain the same, producers of prepacked foods must comply with a further procedural requirement before marketing the product.

More precisely, the producer intending to market a prepacked food containing a protected GI ingredient must provide prior written notification to the producer group responsible for the GI. The notification must not merely communicate the producer's intention, but it must also demonstrate that all objective legal requirements governing such use have been satisfied.

Accordingly, the producer is expected to provide documentation showing, for example, the proposed product label, information about the supply of genuine GI products used as ingredients, and other evidence of this kind. The notification therefore serves as a transparency mechanism enabling the producer group to verify whether the legal framework has been correctly applied.

On the other side, it is important to emphasize that this procedure does not establish a system of prior authorization for the producer group. The producer group is not empowered to grant or refuse permission to use the GI. Rather, its role is limited to verifying whether the objective legal conditions governing the use of the GI have been fulfilled. Where the producer group considers that the statutory requirements have not been satisfied, disagreement may arise and of course it may ultimately be resolved through ordinary judicial mechanisms. Nevertheless, the producer group is only entrusted with the possibility to "acknowledge" or not the lawfulness of the situation in its response to the producer, providing at most "non-binding" information about correct use of the GI. The possibility of contractual agreements between the parties is also envisaged by the legislature as a mere voluntary option. In this sense, such a notification mechanism remains fundamentally different from an authorization system. Its primary objective is to encourage transparency and dialogue between the producer of the derivative product and the producer group responsible for the GI, thereby facilitating compliance while avoiding unnecessary disputes.

However, a different solution has been enacted for craft and industrial Geographical Indications (Article 41 Regulation (EU) 2023/2411).

In this context, the parallel regime establishes a discipline that appears to depart significantly from the objective approach governing agricultural Geographical Indications as just described. Where a derivative product incorporates a protected craft or industrial GI as a component, the producer may not refer to the GI in the commercial designation of the final product unless the "consent" of the relevant producer group has been obtained.

This provision introduces a substantially different regulatory model. Unlike the regime governing agricultural Geographical Indications, this regime does not expressly rely upon objective substantive conditions capable of automatically entitling producers to use the protected GI. Instead, the reference to the producer group's consent suggests a discretionary mechanism resembling prior authorization.

10. *Further reflections on GI system and circular economy (not) to conclude*

The distinction between the two systems is significant. Under the agricultural regime, the use of GIs in derivative products is governed by objective legal requirements. Prior notification merely enables verification that these requirements have been fulfilled, while any contractual arrangements between the parties remain voluntary and must not involve – as a matter of principle – royalty payments. This approach preserves one of the fundamental principles underlying GIs: open and non-discriminatory access for all economic operators satisfying the statutory conditions.

By contrast, the craft and industrial regime appears to make the use of the GI dependent upon the producer group's consent. Since the norm does not establish equivalent objective criteria, the producer group's decision concerning the use of the protected GI may depend upon discretionary commercial assessments. Such a mechanism inevitably raises concerns regarding legal certainty, equal treatment, and the risk of discriminatory access. Moreover, if authorization depends upon the producer group's consent, contractual negotiations become unavoidable, thereby introducing a logic close to licensing which is quite distant – if not dangerous – to the GI system.

As anticipated, this normative divergence represents one of the most evident inconsistencies introduced by the recent reform between agricultural GIs and craft and industrial GIs (even if perhaps not the most serious one, considering the questionable exception of self-certification as affecting the core value of GIs' controls and relevant trustworthiness). The coexistence of two different models governing comparable situations raises important questions regarding the future coherence of the EU GI system.

From this perspective, the question of derivative products requires delicate balancing of several different policy objectives. The legal framework seeks simultaneously to inform consumers, assure objective quality, preserve fair competition, safeguard subjective reputation of GIs, as well as maintain the cultural and social value associated with traditional products. Reconciling these objectives is particularly complex, taking account the legitimate interests of GIs producers (pushing for more restrictive rules) and competing operators (pushing for more liberal rules).

First of all, it should be repeated that consistency appears preferable in terms of systemic solidity and of legal certainty itself, to the benefit of consumers, producers, economic operators and public authorities alike. So, if the issue becomes choosing the reference point for the future development of EU GI law, the principles underlying the circular economy may offer useful guidance. In fact, from a systemic point of view, the question is not merely how to reconcile the two parallel GI regimes, but which regulatory model should better serve the overall policy vision of EU.

Against this background, the agricultural model appears particularly compatible with the objectives of the circular economy. By relying upon objective legal conditions, transparent procedures, and prior notification rather than discretionary authorization, the system facilitates the lawful reuse of protected products as ingredients while maintaining appropriate safeguards for the protected value of GIs. This approach promotes dialogue between economic operators in a spirit of commercial respect, supporting the legitimate interests of operators who conduct honest business on both sides. In this sense, the necessary protection of GIs is confirmed in a proportional way, without creating unnecessary barriers to the circulation and valorization of products incorporating genuine GI ingredients.

Accordingly, the agricultural regime may provide a persuasive interpretative model for the craft and industrial regime. Rather than understanding the producer group's consent as an unfettered discretionary power, it may be interpreted consistently with the broader principles governing GIs, namely as a mechanism for verifying compliance with objective legal requirements. Such an interpretation would preserve fairness, transparency, and equal treatment while remaining faithful both to the foundational principles of the GI system and to the broader objectives of the EU circular economy.

Ultimately, the recent reform illustrates how GIs are progressively evolving from a system concerned primarily with the protection of geographical names into a broader regulatory framework capable of integrating sustainability, market transparency, product valorisation, and circular economy principles in the govern of local production districts. In this respect, the continued pursuit of convergence between the agricultural and craft regimes, in full consistency with the legal foundations of this *sui generis* intellectual property right, will be essential for ensuring the long-term effectiveness of GIs.

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FROM THE UN GUIDING PRINCIPLES TO CORPORATE SUSTAINABILITY DUE DILIGENCE: A GUIDE TO THE LEGAL FRAMEWORK

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SUMMARY: 1. Introduction. – 2. Consumers and invisible business-related human rights violations. – 3. The evolution of the business and human rights framework. – 3.1. From corporate social responsibility to human rights responsibility. – 3.2. The failed UN Draft Norms. – 4. The United Nations Guiding Principles. – 4.1. The protect-respect-remedy framework. – 4.2. Why have the UNGPs become the international benchmark? – 5. Human rights due diligence: moving from responsibility to accountability. – 5.1. The elements of human rights due diligence. – 5.2. The emergence of value-chain responsibility. – 5.3. Corporate leverage and the prevention of harm. – 6. Access to an effective remedy: the forgotten pillar. – 6.1. Judicial remedies and their limitations. – 6.2. Principle 31 and non-judicial grievance mechanisms. – 6.3. Mediation. – 6.4. Arbitration and the future of effective remedies.

1. *Introduction*

Business and human rights has emerged over the last two decades as one of the most significant developments in international regulation. Once regarded primarily as a matter of corporate self-regulation, often described as corporate social responsibility (hereinafter: CSR) and framed within the softest possible normative framework, respect for human rights is now increasingly recognised as an integral component of corporate governance and risk management. This development has produced binding and, at times, quasi-binding norms with which businesses are expected to comply.

When Friedman stated that "*there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without*

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deception or fraud", he was undoubtedly contemplating a different regulatory and commercial environment (Friedman 1970). Corporate operations and supply chains were then considerably less globalised than they are today. The contemporary reality is one in which global supply chains permeate almost every aspect of corporate activity.

Corporations are now expected to identify, prevent and address the adverse human rights impacts of their activities throughout increasingly complex global value chains. This evolution reflects a broader shift in expectations concerning the role of business in society. While states remain the principal guarantors of human rights under international law, corporations are now expected to conduct their activities in a manner consistent with internationally recognised human rights standards, regardless of where they operate.

Global supply chains have profoundly altered the relationship between business activity and human rights. Production and the provision of services are no longer confined within national borders. Instead, goods and services are frequently designed in one jurisdiction, manufactured in another, assembled elsewhere and marketed and consumed worldwide. Such global production processes have generated substantial economic benefits but have also created significant human rights risks. Businesses are often accused of being complicit (legally as well as morally) in human rights violations occurring along their global value chains, such as child labour, forced labour, unsafe working conditions, environmental degradation (which may also endanger human health and welfare) and the displacement of indigenous communities. These adverse impacts often occur in jurisdictions where regulatory institutions are weak or where effective judicial protection is limited, making it difficult for affected communities to obtain meaningful remediation.

At the same time, consumers have become increasingly aware of the social consequences of their purchasing decisions. Traditionally, consumer law focused primarily upon protecting consumers against unsafe products, unfair contractual terms and misleading commercial practices. However, contemporary consumer protection has gradually acquired a broader social dimension. Increasingly, consumers expect businesses to demonstrate that products have been manufactured responsibly and that corporate activities respect human rights, environmental sustainability and ethical labour practices.

Consequently, consumers are no longer merely purchasers of

goods and services; they increasingly act as stakeholders capable of influencing corporate behaviour through purchasing choices, public campaigns and litigation. In fact, the early CSR cases were no more than consumer misrepresentation claims. The decision of the Supreme Court of California in *Kasky v. Nike Inc.* (27 Cal. 4th 939 (2002)) demonstrated that voluntary CSR communications are not necessarily insulated from generally applicable rules on false advertising and unfair commercial practices. EU legislation expressly links the provision of clear and reliable sustainability information with consumers' ability to make informed purchasing decisions and contribute to more sustainable consumption patterns (Directive (EU) 2024/825, Recital 1; the national measures transposing this Directive apply from 27 September 2026).

This growing interaction between consumer law and business and human rights has encouraged governments, international organisations and civil society to reconsider the traditional boundaries of corporate responsibility. Initially, much of this development occurred through voluntary initiatives, codes of conduct and industry standards. While these instruments contributed to raising awareness, their voluntary nature often limited their effectiveness, particularly where significant commercial interests were involved. The gradual movement from voluntary corporate responsibility towards legally enforceable obligations therefore represents one of the defining characteristics of the modern business and human rights agenda.

The European Union has played an increasingly important role in facilitating this transition. Although the Treaties contain no comprehensive legal basis specifically regulating business and human rights, the Union has progressively integrated human rights considerations into various policy areas, including corporate reporting, sustainable finance, consumer protection, conflict-mineral regulations (see Regulation (EU) 2017/821) and, more recently, mandatory human rights due diligence. The adoption of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs) in 2011 provided the conceptual foundation upon which many of these developments have been built. More recently, Directive (EU) 2024/1760 on corporate sustainability due diligence (hereinafter: CSDDD) has sought to transform many of the voluntary expectations reflected in the UNGPs and in the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023) into legally enforceable corporate

obligations. The CSDDD has, however, been significantly amended before becoming applicable: following Directive (EU) 2025/794 (the so-called "stop-the-clock" Directive) and Directive (EU) 2026/470 (the so-called "Omnibus I" Directive), it must be transposed by 26 July 2028 and will apply from 26 July 2029 to a much narrower group of very large companies (for EU companies, those with more than 5,000 employees and a net worldwide turnover exceeding EUR 1.5 billion).

This chapter examines that evolution. It begins by exploring the relationship between consumers, globalisation and business-related human rights. It then explains the emergence of the UNGPs as the principal international framework governing corporate responsibility before examining the European Union's evolving regulatory response. Particular attention is devoted to the concept of human rights due diligence, access to effective remedies and the growing significance of corporate sustainability due diligence within European Union law.

2. *Consumers and invisible business-related human rights violations*

The relationship between business and human rights cannot be understood without first appreciating the profound transformation that globalisation has brought to international commerce. Modern corporations frequently operate through networks of subsidiaries, contractors, subcontractors, suppliers and commercial partners dispersed across multiple jurisdictions. These global value chains enable businesses to maximise efficiency and reduce production costs. Often, they are the only way of bringing food items, products and services to consumers. However, they also increase the difficulty of ensuring that internationally recognised human rights standards are respected throughout every stage of production and along the business's global supply chain.

Many of the most significant human rights controversies associated with multinational enterprises arise not from the activities of the company itself but from the conduct of its direct business partners, such as suppliers, and of its indirect business partners, which, for example, supply components of products to its direct business partners. While these adverse human rights impacts frequently occur outside the European Union, they also occur within the European Union, in

hidden sweatshops, through human trafficking and through the abuse of vulnerable and marginalised groups such as refugees. All of this is increasingly influencing the purchasing decisions of consumers in the EU and elsewhere, as well as the reputational standing of companies that are knowingly or unknowingly involved.

Thus, the emergence of what is commonly described as ethical consumerism has fundamentally altered this relationship. Consumers increasingly evaluate products not only according to their quality and price but also by considering how they have been produced. Information concerning labour standards, place of production, environmental protection, modern slavery and responsible sourcing has become an important factor influencing commercial behaviour. Allegations of business-related human rights abuses may expose companies to reputational damage, investor concerns, regulatory investigations and civil litigation. Consequently, human rights due diligence (hereinafter: HRDD) increasingly forms part of mainstream corporate risk management rather than representing a purely ethical aspiration. This mainstreaming, however, is usually carried out by medium – or large – sized enterprises, which can afford the costs associated with HRDD, and not the small and family size businesses which may not be able to afford that cost.

Nevertheless, relying solely upon market pressure raises important limitations. Consumer purchasing decisions are often influenced by price, convenience and availability rather than ethical considerations alone. Moreover, consumers frequently lack reliable information concerning the conditions under which products have been manufactured. Voluntary corporate reporting may also suffer from inconsistency, selective disclosure and difficulties of verification. These shortcomings explain why reliance upon voluntary corporate responsibility alone, such as codes of conduct or CSR, has gradually given way to demands for greater regulatory intervention. It is within this context that the UNGPs emerged as the first comprehensive international framework seeking to clarify the respective responsibilities of states and corporations to respect, protect and realise human rights.

3. *The evolution of the business and human rights framework*

For many years, the relationship between business and human

rights remained uncertain. International human rights law addresses primarily states (Clapham 2006), while corporations, despite their growing economic power and impact on society, remained largely outside the direct reach of international legal obligations. The prevailing assumption was that governments alone bore responsibility for protecting individuals against human rights abuses, including those committed by private actors. Corporations, by contrast, were expected to comply with domestic legislation and were increasingly encouraged – but rarely legally obliged – to adopt voluntary standards of responsible business conduct.

This traditional allocation of responsibility became increasingly difficult to sustain as multinational enterprises expanded their operations across national borders. Many corporations developed economic resources exceeding those of the states in which they operated. While foreign investment frequently generated employment, infrastructure and economic development, it also gave rise to situations in which corporate activity adversely affected labour rights, environmental protection, indigenous communities and public health. In many host states, weak regulatory institutions, limited judicial capacity and political instability meant that victims were often unable to obtain meaningful remedies, and corporate interests prevailed over those of people who were often too poor to challenge corporate human rights violations. These developments exposed an important gap between the international protection of human rights and the practical ability to hold corporations accountable for harm associated with their business activities.

3.1. From corporate social responsibility to human rights responsibility

The first responses to this accountability gap were largely voluntary. Throughout the 1990s and early 2000s, many multinational corporations adopted codes of conduct, ethical trading initiatives and CSR programmes. These initiatives encouraged businesses to consider the wider social consequences of their commercial activities and to integrate environmental and labour standards into their operations.

Although these voluntary initiatives represented an important cultural shift, they also demonstrated significant limitations. Their content varied considerably between companies, they were often im-

plemented only by large enterprises, and their implementation was frequently inconsistent. Most importantly, voluntary commitments rarely created rights capable of being enforced by individuals affected by corporate misconduct, apart from isolated examples such as *Kasky v. Nike*. For example, in *Doe I v. Wal-Mart Stores Inc.* (572 F.3d 677 (9th Cir. 2009)), the US Court of Appeals for the Ninth Circuit held that employees of Wal-Mart's foreign suppliers could not rely on Wal-Mart's code of conduct, which stated that Wal-Mart monitored its suppliers' labour standards and working practices. The court's reasoning rested on the fact that rights-holders, such as the suppliers' employees, are often not the intended beneficiaries of such codes. Consequently, while CSR succeeded in raising awareness of responsible business practices, it proved insufficient to address systemic human rights risks arising throughout increasingly complex global value chains.

The international community therefore began searching for a more coherent framework capable of clarifying the respective responsibilities of states and businesses in relation to business conduct that has an adverse human rights impact.

3.2. The failed UN Draft Norms

An important milestone occurred in 2003 with the publication of the United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, hereinafter: Draft Norms). Unlike previous voluntary initiatives, the Draft Norms proposed that corporations themselves should bear obligations under international human rights law (Article 1 Draft Norms). Had they been adopted, they would have represented a profound transformation in international legal doctrine by recognising corporations as direct duty-bearers alongside states.

The proposal, however, encountered substantial opposition from governments and the business community. Critics argued that the Draft Norms blurred the distinction between the legal responsibilities of states and private corporations, while many businesses feared that binding international obligations would generate significant legal uncertainty and commercial costs. As a consequence, the Draft Norms failed to secure sufficient political support and were never adopted as binding international law.

Although unsuccessful, the Draft Norms played an important role by demonstrating both the growing international concern regarding corporate accountability and the need for a more politically acceptable framework.

4. *The United Nations Guiding Principles*

Recognising the lack of consensus surrounding the Draft Norms, the United Nations appointed Professor John Ruggie in 2005 as the Special Representative of the Secretary-General on Business and Human Rights. Rather than attempting to impose legally binding obligations upon corporations under international law, Professor Ruggie sought to develop a framework capable of attracting broad support from governments, businesses and civil society alike.

This work culminated in the endorsement of the UNGPs by the Human Rights Council in June 2011 (Resolution 17/4; UN Doc. A/HRC/17/31). Although the UNGPs are themselves not legally binding, they have become the most authoritative international standard governing business and human rights. Their influence extends well beyond the United Nations and has shaped legislative reforms such as the CSDDD, other influential instruments such as the OECD Guidelines for Multinational Enterprises (whose 2011 update introduced a human rights chapter aligned with the UNGPs, while the 2023 update further strengthened their environmental dimension), corporate governance practices, investment policies and judicial reasoning across numerous jurisdictions.

The success of the UNGPs lies partly in their pragmatic approach, and partly in their emphasis on the responsibility to conduct HRDD. Rather than attempting to redefine international law, they clarify how existing human rights principles should operate within the context of modern business activity. In doing so, they establish a common conceptual framework capable of guiding governments, corporations and other stakeholders.

4.1. The protect-respect-remedy framework

At the heart of the UNGPs lies a simple yet highly influential three-pillar structure.

The first pillar confirms that states have the duty to protect individuals against human rights abuses committed by third parties, including business enterprises. This obligation reflects long-established principles of international human rights law. States are expected to establish appropriate legislative, administrative and judicial mechanisms capable of preventing corporate misconduct and ensuring that effective remedies remain available where violations occur.

The second pillar introduces the concept of the corporate responsibility to respect human rights. Importantly, the UNGPs deliberately use the term "responsibility" rather than "legal obligation". This reflects the continuing position that corporations are not generally regarded as direct bearers of international human rights obligations in the same way as states. Nevertheless, corporations are expected to avoid causing or contributing to adverse human rights impacts and to address such impacts where they occur. This responsibility applies independently of whether domestic law expressly imposes equivalent duties.

The third pillar concerns access to an effective remedy. It recognises that respect for human rights cannot be achieved unless individuals affected by business-related human rights abuses have access to an effective remediation process. The latter includes not only judicial proceedings before national courts but also operational-level grievance mechanisms established by the corporation itself and other forms of non-judicial dispute resolution, such as mediation and arbitration. The emphasis is therefore placed not simply upon recognising rights but also upon ensuring that those rights can be effectively enforced.

The interaction between these three pillars demonstrates that responsibility for protecting human rights is shared. Governments continue to occupy the central position within the international legal system. However, businesses are increasingly expected to exercise HRDD, identify potential human rights risks, prevent or mitigate adverse impacts where possible and cooperate in providing effective remediation where harm has occurred.

4.2. Why have the UNGPs become the international benchmark?

One of the principal reasons for the remarkable influence of the UNGPs is that, rather than imposing controversial new legal obligations, they established a common language capable of being accepted

by governments, businesses, investors and civil society. This broad consensus enabled the UNGPs to become the principal reference point for subsequent regulatory developments.

Within the European Union, for example, the Commission endorsed the UNGPs shortly after their adoption and encouraged Member States to develop National Action Plans implementing these principles (COM(2011) 681 final). Increasingly, European Union legislation concerning corporate reporting, sustainable finance and mandatory HRDD has drawn directly upon the conceptual foundations established by the UNGPs. Consequently, although the UNGPs themselves remain non-binding, they have exercised a noticeable influence upon the development of binding domestic and regional legislation.

Perhaps their greatest contribution has been to shift the discussion away from whether businesses should respect human rights and towards the more practical question of how this responsibility should be implemented. HRDD across the entire global supply chain has emerged from this broader normative framework. These concepts now constitute the foundation of contemporary business and human rights regulation and have become central features of the European Union's evolving legislative response.

5. *Human rights due diligence: moving from responsibility to accountability*

The adoption of the UNGPs marked a decisive shift in the business and human rights discourse. Rather than asking whether businesses should respect human rights, attention increasingly turned to the practical mechanisms through which corporations could identify, prevent and address adverse human rights impacts. This shift gave rise to the concept of HRDD, now widely regarded as the operational heart of the UNGPs.

Unlike traditional corporate due diligence, which focuses primarily on protecting the commercial interests of the business itself, HRDD adopts an outward-looking perspective. Its primary concern is the protection of individuals and communities whose rights may be affected by corporate activity. This distinction is fundamental. Conventional commercial due diligence seeks to identify risks to the

business; HRDD seeks to identify risks created by the business. Properly understood, HRDD represents an important mechanism through which corporations contribute to the prevention of human rights violations and, where prevention proves impossible, facilitate effective remediation.

5.1. The elements of human rights due diligence

Drawing heavily upon the OECD Due Diligence Guidance for Responsible Business Conduct (2018), the HRDD process requires companies to integrate human rights considerations into their governance structures, identify and assess actual or potential adverse impacts, prevent or mitigate identified risks, monitor the effectiveness of corrective measures, communicate transparently with relevant stakeholders and provide appropriate remediation where adverse impacts occur.

Each stage reinforces the next. A corporation cannot meaningfully prevent adverse impacts without first identifying them. Likewise, monitoring is of limited value unless businesses are prepared to modify their practices. Finally, due diligence cannot be regarded as complete if corporations fail to provide appropriate remedies where their activities have caused or contributed to human rights harm.

Importantly, due diligence is intended to be a continuous process rather than a one-off exercise. Commercial relationships evolve, supply chains change and new risks emerge over time. Monitoring suppliers, as well as the company's own ownership structure, is fundamental when implementing a human rights due diligence plan. Businesses are therefore expected to review their due diligence processes regularly and adapt them to changing operational circumstances.

5.2. The emergence of value-chain responsibility

Perhaps the most significant contribution of modern HRDD lies in expanding corporate responsibility beyond the legal ownership structure of the company. Contemporary business models increasingly rely upon extensive networks of suppliers, contractors, subcontractors, foreign governments as public procurement counterparts, and direct and indirect business partners operating across multiple jurisdictions. Many of the most serious human rights risks arise precisely within these wider commercial relationships.

The UNGPs therefore recognise that corporations should seek not only to avoid causing adverse human rights impacts directly but also to prevent or mitigate impacts that are linked to their operations, products or services through business relationships (Principle 13(b) UNGPs). Accordingly, HRDD requires businesses to examine their broader business relationships through which products are designed, manufactured, transported, marketed, consumed and ultimately disposed of. This broader conception recognises that adverse human rights impacts frequently arise upstream, during the extraction of raw materials or manufacturing processes, as well as downstream during distribution, recycling or disposal.

5.3. Corporate leverage and the prevention of harm

One of the more innovative aspects of the UNGPs concerns the concept of corporate leverage. Businesses cannot always eliminate every human rights risk arising within complex international supply chains. Nevertheless, they are expected to use whatever influence they possess to encourage responsible conduct among suppliers, contractors and business partners.

Leverage may arise through contractual relationships, long-term commercial partnerships, financial incentives or collaborative industry initiatives. Its practical expression varies according to the nature of the business relationship. A multinational purchaser, for example, may require suppliers to adopt human rights policies, submit to independent auditing, improve working conditions or implement corrective action plans as a condition of maintaining business relationships.

Importantly, leverage should not be understood as imposing unlimited responsibility for the conduct of third parties, i.e. direct or indirect business partners. Rather, it reflects the broader expectation that corporations should exercise the influence reasonably available to them to prevent identifiable human rights risks. Where not all risks can be addressed at the same time, priority is to be given to addressing the most severe adverse impacts (Principle 24 UNGPs; Article 9 CSDDD).

A comparison between the Commission's proposal for the CSDDD (COM(2022) 71 final) and the text finally adopted by the European Parliament and the Council shows a striking difference as regards what businesses must do when exercising leverage and, more impor-

tantly, the consequences of failing to do so. While the Commission's proposal already envisaged civil liability for companies failing to comply with their obligations to prevent and bring to an end adverse impacts (Article 22 of the proposal), and Article 29 CSDDD, as originally adopted, laid down a harmonised civil liability regime, that regime was removed by Directive (EU) 2026/470: civil liability is therefore now left to the domestic law of the Member States. Moreover, Article 12(1) CSDDD stipulates that Member States must ensure that companies provide remediation where they have caused or jointly caused an actual adverse impact. However, Article 12(2) CSDDD clarifies that, where the adverse impact is caused only by a direct or indirect business partner, the company is not obliged to provide remediation, although it may do so voluntarily and may use its ability to influence the business partner to enable remediation.

6. *Access to an effective remedy: the forgotten pillar*

The significance of this third pillar is often underestimated. Contemporary discussion frequently concentrates upon corporate due diligence and sustainability reporting (see Directive (EU) 2022/2464, hereinafter: CSRD, as amended by Directive (EU) 2026/470) and, as far as HRDD is concerned, understandably upon prevention. Prevention is undoubtedly important. Yet prevention alone does not guarantee justice for those whose rights have already been violated. Effective remediation remains the ultimate test of whether business and human rights protection operates successfully in practice. Without effective remediation, the objectives of the UNGPs cannot be fully realised. Respect for human rights requires not only the prevention of harm but also the existence of grievance processes capable of providing victims with meaningful redress when prevention fails.

The right to an effective remedy and the right to a fair hearing have deep roots in international and regional human rights law. Articles 2(3) and 14 of the International Covenant on Civil and Political Rights, Articles 8 and 10 of the Universal Declaration of Human Rights, Article 13 of the European Convention on Human Rights, and Article 47 of the Charter of Fundamental Rights of the European Union all recognise that rights must be accompanied by effective mechanisms of enforcement. The UNGPs build upon these princi-

ples by recognising that states continue to bear primary responsibility for ensuring effective remedies and enabling access to justice while simultaneously expecting businesses to participate in grievance mechanisms capable of resolving business-related human rights disputes.

6.1. Judicial remedies and their limitations

For many victims, judicial proceedings remain the preferred mechanism for obtaining reparation and public accountability. Courts possess powers unavailable to most private grievance mechanisms, including compulsory disclosure, binding judgments and the ability to award damages, specific performance, or injunctions.

In practice, however, transnational human rights litigation has proved exceptionally complex. Victims frequently face significant financial, procedural and evidential barriers long before the substantive merits of their claims can be examined. These obstacles are particularly acute where harm is caused by a subsidiary in one jurisdiction while the complicit parent company, which has deeper pockets to repair the harm, is domiciled elsewhere. It is even more complex when the harm is committed by a business partner of the company domiciled or based in a jurisdiction with a complex or inefficient civil justice system, and may indeed be rife with corruption and lack of independence and impartiality.

One of the principal developments in recent years has been the emergence of claims against parent companies for harms caused by foreign subsidiaries or even business partners. Rather than relying directly upon international human rights obligations, claimants have generally framed their actions in the tort of negligence, arguing that the parent company exercised sufficient control over the subsidiary's operations to owe a duty of care to the claimants (victims of the business related human rights violations).

The decision of the Court of Appeal in *Chandler v. Cape plc* ([2012] EWCA Civ 525) represented an important turning point by recognising that, in certain circumstances, a parent company may owe a direct duty of care towards those affected by the operations of its subsidiary. Although the case arose in an employment context (i.e. a claim brought by an employee of a subsidiary against its parent company), the judgment subsequently provided the analytical framework for business and human rights litigation involving corporations.

The Supreme Court's decision in *Vedanta Resources plc v. Lungowe* ([2019] UKSC 20) further advanced this development. The Court confirmed that liability depends not upon the corporate structure itself but upon the extent to which the parent company has intervened in, controlled or assumed responsibility for relevant aspects of the subsidiary's operations. Importantly, the Court found that Zambia is the forum conveniens (not England), however refused to stay proceedings on forum non conveniens grounds because there was a real risk that the claimants would not obtain substantial justice in Zambia.

This approach was reinforced in *Okpabi v. Royal Dutch Shell plc* (RDS) *and Shell Petroleum Development Co of Nigeria Ltd* (SPDC) ([2021] UKSC 3), a case which concerned the joinder of the Nigerian subsidiary (SPDC) in England under Paragraph 3(1)(3) of Practice Direction 6B. The claimants had to show that there was a real issue between the claimants and the anchor defendant (RDS) to enable the joinder under Paragraph 3(1)(3). To do this the claimants had to evidence that there was an arguable case against RDS under the tort of negligence by demonstrating that RDS owed a duty of care to the Nigerian claimants (Farah and Makhoul 2024). The focal enquiry is not to demonstrate control of the subsidiary by the parent company, although that finding is very determinative for the purpose of demonstrating a duty of care. "Controlling a subsidiary", in accordance with the SC, and "its *de facto* management", are two different matters (*Okpabi* para. 147). The SC emphasised that the existence of a duty of care depends upon the factual relationship between the parent and subsidiary. Group-wide policies, management systems and operational oversight may therefore be capable of establishing sufficient proximity to justify the imposition of a duty of care, which is essential to fulfilling the conditions of the tort of negligence.

More recently, claims in tort (and even in unjust enrichment) were also brought against a UK-based multinational group by employees of one of its suppliers, thereby widening the range of potential victims to whom a corporation may owe a duty along its global supply chain (*Limbu v. Dyson Technology Ltd* [2024] EWCA Civ 1564). The decision of the Court of Appeal concerned only whether England was the appropriate forum (the Supreme Court refused permission to appeal in 2025), and the claims were eventually settled in February 2026.

These decisions demonstrate a gradual judicial willingness to look beyond traditional corporate structures. Nevertheless, their effect

should not be overstated. They do not establish general parent company liability, nor do they remove the considerable evidential burdens facing claimants. Rather, they illustrate the fact-intensive nature of transnational tort litigation and the continuing procedural complexity associated with business-related human rights claims.

6.2. Principle 31 and non-judicial grievance mechanisms

Recognising the practical limitations of court litigation, the UNGPs envisage a broader conception of access to justice. Principle 31 establishes a bundle of effectiveness criteria designed to ensure that non-judicial grievance mechanisms provide credible and rights-compatible alternatives to judicial proceedings.

According to Principle 31, effective grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and based upon continuous learning. They should also encourage dialogue and meaningful stakeholder engagement where appropriate. These criteria recognise that procedural fairness is itself an essential component of effective remediation, but also the need to deliver human rights-compatible outcomes.

Importantly, Principle 31 does not seek to replace judicial remedies. Rather, it recognises that effective access to justice requires a pluralistic civil justice system in which judicial and non-judicial mechanisms perform complementary functions. Some disputes may require judicial determination, others may be resolved more efficiently through non-judicial grievance mechanisms capable of delivering timely and practical solutions.

This broader understanding of remediation represents one of the most innovative aspects of the UNGPs. It acknowledges that business-related human rights disputes frequently involve continuing commercial relationships, community interests and complex factual circumstances that cannot always be addressed adequately through conventional litigation alone (Farah and Kunuji 2021).

6.3. Mediation

Among non-judicial mechanisms, mediation occupies an important place because it encourages dialogue, flexibility and mutually agreed solutions. Mediation enables parties to explore remedies ex-

tending beyond financial compensation, including apologies, rehabilitation, environmental restoration, community investment and guarantees of non-repetition.

These characteristics are particularly valuable where disputes affect local communities and where preserving future relationships remains important. Nevertheless, mediation also presents significant limitations. Its consensual nature means that powerful corporations may possess greater bargaining power and also knowledge of how to utilise the system than affected communities, which could render imbalanced outcomes. Furthermore, agreements remain dependent upon voluntary compliance unless supported by appropriate enforcement mechanisms. Finally, at the heart of these disputes are alleged human rights violations which may require transparency, and outcomes which are human rights compatible, a challenge where mediation in its very nature operates on the understanding that the parties have to reach a compromise.

For these reasons, mediation should be approached cautiously, and adapted to the very need that ultimately that respect, protection, and the realisation of human rights are fundamental in order to conform to the effective remedies criteria established under Principle 31. Therefore, it must not be seen as a substitute for judicial remedies but rather as one component of a broader remedial framework.

6.4. Arbitration and the future of effective remedies

Arbitration has received increasing attention as a possible mechanism for resolving business-related human rights disputes. Unlike mediation, arbitration binds the parties, once they have agreed to it, to participate in the process and delivers a binding and enforceable outcome (the arbitral award), while retaining significant procedural flexibility.

The discussion surrounding arbitration has often concentrated upon adapting traditional commercial arbitration to human rights disputes. However, this chapter adopts a different perspective. Building upon previous research, it is suggested that the potential of arbitration lies not simply in replicating court proceedings but in developing procedures capable of safeguarding the public dimension of business-related human rights disputes while preserving procedural fairness for both parties. This is the challenge: how can privately appointed

arbitrators deliver human rights-compatible outcomes? Will arbitrators safeguard the public interest in the protection of human rights, and will such procedures and outcomes be subject to public scrutiny, which is not normally the case in commercial arbitration? Business-related human rights claims therefore present serious challenges for arbitration, which can, however, be overcome through careful design.

In this context, the concept of unilaterally binding arbitration provides an innovative means of addressing the imbalance frequently experienced by victims (Farah 2020). Under this model, arbitration would be binding upon the corporation but remain optional for victims, thereby preserving access to judicial remedies while simultaneously encouraging businesses to offer meaningful, enforceable and rights-compatible grievance procedures. Such an approach seeks to reconcile the efficiency traditionally associated with arbitration with the broader objectives of access to justice embodied in the UNGPs.

Viewed in this way, judicial remedies, mediation and arbitration should not be regarded as competing alternatives. Instead, they form part of an integrated remedial architecture in which different mechanisms perform different functions according to the nature of the dispute. Collectively, they strengthen the practical realisation of the third pillar of the UNGPs and reinforce the transition from corporate responsibility towards genuine corporate accountability.

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