

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



How an EU Lifespan Guarantee Model Could Be Implemented Across the European Union

STUDY





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Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee. It looks at the interrelation between the Consumer Sales and Guarantee Directive (CSD) and the Ecodesign Directive (EDD) with respect to guarantees and product expected lifetime. Through legal research and stakeholder surveys, it develops an EU lifespan guarantee model, which could be implemented by amendments to the proposal for an Online Sales Directive (OSD) and the EDD. It recommends extending the EDD to include the lifespan and extending the limitation period of the OSD. A commercial guarantee for the lifespan of a product is also suggested.

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LIST OF ABBREVIATIONS

CE	European conformity
CJEU	Court of Justice of the European Union
CRD	Consumer Rights Directive
CSD	Consumer Sales and Guarantee Directive
EDD	Ecodesign Directive
FI	Finland
IS	Iceland
IMCO	Committee on Internal Market and Consumer Protection
IPP	Integrated Product Policy
IE	Ireland
NL	The Netherlands
NO	Norway
OSD proposal	Proposal of the Online Sales Directive
PT	Portugal
SCP/SIP	Sustainable Consumption and Production and Sustainable Industrial Policy
SE	Sweden
UK	United Kingdom
WEEE	Waste Electrical and Electronic Equipment Directive

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EXECUTIVE SUMMARY

Background

Sustainable consumption affects two fields of European policy: consumer policy and environmental policy. Sustainability is an aim of consumer policy, and sustainable consumption is a component of environmental protection policy. One of the elements of both fields of policy is the durability of consumer goods: they should last as long as technically possible to save the resources and energy which would otherwise be necessary to replace them.

The existing EU law meets the requirements of a policy to support sustainable consumption with regard to the lifespan of consumer goods in only a very limited way. Two legal instruments can be identified, which are of relevance to the lifespan of products: The Consumer Sales and Guarantee Directive (CSD), and the Ecodesign Directive (EDD). However, because the CSD provides for a limitation period of a legal guarantee of two years, this means that a seller is liable for the lifespan of a product only for this period. Likewise, the EDD is in practice only applied to energy-related problems, not for those linked to durability and lifespan. It is therefore necessary to examine whether these two legal instruments are nevertheless adequate legal means capable of providing a reasonable legal frame that can encourage manufacturers to consider a lifespan as long as feasibly possible in the design of their products.

The current status of the CSD is that the European Commission has adopted a proposal for a Directive on Online Sales (COM(2015) 635), which could be extended to all consumer sales (that is, face-to-face sales) thereby replacing the existing CSD. A new Working Plan (COM(2016) 773) was adopted in November 2016 for the EDD which contemplates future development of the EDD. So the co-legislators could take the opportunity to amend these proposals and instruments in order to allow them to meet the requirements of a legal frame for an adequate lifespan of consumer goods. This In-depth Analysis can thus be seen to complement the European Parliament study "A longer lifetime for products: Benefits for consumers and companies" (IP(A/IMCO/2015-11) by focusing on the legal aspects of the subject.

Aim

Consumer Sales Law

The aim of the study is to propose amendments to the two proposals of the Commission to provide for an EU lifespan guarantee model. With regard to a recast of the Consumer Sales Directive three questions must be scrutinized:

1. Is an extension of the two years limitation period of the present EU law an adequate instrument? Seven Member States can be identified with longer periods on the basis of the minimum standard character of the present Directive. To make use of their experience, the study evaluates a survey of answers to a questionnaire of legal experts from these Member States to identify, whether one of the national laws is "best practice" in the sense that it could be recommended as a model for European law.
2. The present Directive provides for a reversal of proof for a period of six months after delivery: the seller has to prove, that a lack of conformity did not exist at the time of delivery if such a lack appears during the six months period. The aim of the study is to examine, whether an extension of this period – the proposal of the Commission provides for a reversal

of proof for the full length of the limitation period – is an adequate means for a lifespan legal guarantee.

3. According to the present Directive, a commercial guarantee is only a voluntary commitment of the producer. The study scrutinizes the commercial guarantee and considers whether it could be re-drafted as an instrument which strengthens a lifespan legal guarantee.

Ecodesign Directive

The aim of the study is to scrutinize, whether an amended Ecodesign Directive could work together with an amended Consumer Sales Directive for a lifespan guarantee model. Specific lifespans of products cannot be regulated by consumer contract law, which is according to its nature more general. So the Ecodesign Directive has to be examined to review whether its application can be extended to cover the lifespans of specific product groups enforceable through a lifespan guarantee model which is part of consumer sales law. The study includes the experience of stakeholders, which is collected by a survey.

Key findings

Consumer Sales Law

Seven EU and EEA Member States provide for a longer limitation period than two years as permitted by the Consumer Sales Directive. This is admissible under the existing Directive which is a minimum standard Directive. However, the proposed Online Sales Directive is to be a full harmonisation Directive which means that longer limitation periods could not be maintained by Member States.

The survey carried out in the study identifies three different models of longer limitation periods in the Member States: the two common law Member States (Ireland and the United Kingdom) traditionally have longer limitation periods (six years), whereas Sweden extended the limitation period generally to three years. In Iceland and Norway, a basic limitation period applies, which is extended for products with a longer lifespan than two years to five years. Finnish law provides for a three years period, starting from the date, when the lack of conformity becomes apparent. Dutch law does not provide for a limitation period at all. In the Netherlands, an informal list is in practice, which indicates the normal lifespan of certain categories of technical goods, in particular household equipment.

Contrary to the extension of the limitation period in the seven Member States mentioned, none of these Member States extended the limitation period for the reversal of proof. Only Portugal provides for a two years period, this is to say that the general limitation period and the period for the reversal of proof are identical, as proposed by the Commission in the proposal for an Online Sales Directive. In all other Member States, the consumer has to prove from the beginning of the seventh month after delivery that the lack of conformity already existed at the time of delivery. This mitigates the advantages for a lifespan legal guarantee significantly, if a longer limitation period is not accompanied by an extension of the period for the reversal of proof.

The survey shows that very different models for longer limitation periods are in place. To meet the requirements of a lifespan legal guarantee, a full harmonising Directive could at least extend the limitation period for products with a longer lifespan to five years, following the Icelandic/Norwegian model, which is also proposed by the draft report (Durand report) about the study “a longer lifetime for products” submitted to Parliament in 2016. The study recommends an alternative: the limitation period to be extended generally to three years, following the Swedish model, but it to be left to the Member States, whether they wish to extend their national limitation periods for products with a longer lifespan than three years

through an option clause. This allows Member States with a longer period to maintain their rules and allows other Member States discretion whether they wish to adopt the same approach.

The study does not only examine national rules with longer limitation periods, but also reviews possible European legal instruments with longer limitation periods. As recommended in the review of the Ecodesign Directive, this Directive should be extended to include lifespan as a factor to be incorporated into product design, which may result in implementing regulations based on the Ecodesign Directive requiring longer limitation periods for specific groups of products. It is necessary to avoid contradictions between the rules in a recast of the Consumer Sales Directive and such regulations in other EU legal instruments for products with a longer lifespan. A provision should be included in a recast of the Consumer Sales Directive, that the limitation period in this Directive shall not preclude longer limitation periods in other European legal instruments.

The study stresses that an extension of the period for the reversal of proof compared with the six months of the existing CSD is of utmost importance. Following our suggestion that Member States would be free to extend the limitation period on the basis of an option clause, a corresponding extension of the period for the reversal of proof to three years would be allowed.

The study recommends amending some information duties to the Consumer Rights Directive. It should be clarified that the information duty about the main characteristics of the good includes the lifespan. This would have the advantage, that the lifespan is part of the legitimate expectations of the consumer and so becomes part of the conformity of the good according to the CSD or its successor.

A lifespan legal guarantee cannot define on its own the lifespan of specific products. The study recommends filling the gap through implementing regulations based on an amended Ecodesign Directive. But there will remain in the foreseeable future a wide field of product groups for which a lifespan is not provided for by a regulation based on the Ecodesign Directive. To cover this field the study recommends an obligation of the producer for a commercial guarantee, in which he has to indicate the minimum lifespan of his product. The study does not recommend a general minimum lifespan provided by law, but suggests that, if a lifespan is not guaranteed, the producer has to clearly indicate that he does not guarantee the functioning of the good during its lifespan.

Ecodesign Directive

The study found that the Ecodesign Directive (EDD) is already capable of covering issues relating to durability but that it has been limited in practice to design requirements which focus on energy saving. The study found that strategic amendments of the EDD could be made to strengthen its coverage of durability and to specifically include lifespan guarantees within its provisions so that these could be required in implementing regulations for specific products and product groups. It also found that the definition of products to which the EDD applies should be redrafted to cover products having a significant environmental impact to extend coverage to any good having an impact on energy or resource consumption. The study also considered that a reduction on a transitional basis in the threshold figure which triggers the application of the EDD should be implemented. Information requirements for consumers were reviewed and it was found that amendments should be made to the EDD to include a requirement for information about the lifespan guarantees and the relevant market surveillance authority. This requirement for information should also include a statement that nothing affects the rights of the consumer under private law. The study considered the process under which implementing measures are developed and concluded that this process should ensure that consumer groups are fully involved to ensure transparency for lifespan

guarantees. A key aspect of the amendment of the EDD to incorporate lifespan guarantees is through the implementing measures where specific lifespans will be incorporated. It was found, therefore, that the implementing measures would need to include the expected lifespan and its length. This led to a consideration of the application of the EDD to product groups and it was found that while the measures could apply still to product groups, there could be a necessity to include the application of the EDD to complex products which would need to be addressed *sui generis*. Finally, it was recognised that there needed to be flexibility in the EDD to permit innovation and product replacement where that outweighed lifetime savings assessed on a lifecycle basis, so the study concluded that derogations should be permitted where a new product would result in greater resource efficiency.

The recommended policy options alongside their strengths and weaknesses can be seen in the following tables.

Table 1: Recommended policy options in the study and their strengths and weaknesses

Policy options	Strength	Weaknesses
Extension of the limitation period of the legal guarantee	All goods are covered; legal certainty for the seller	No distinction between goods with shorter or longer lifetime
Extension of period for a reversal of proof regarding conformity of the good at delivery	Seller has to prove that good was fit for purpose for a reasonably expected lifetime at delivery	No clarification on the actual length of the lifespan
Extension of limitation period of the legal guarantee only for goods with a longer lifetime	Allows a distinction between goods with shorter and longer lifetime	
Compulsory commercial guarantee for lifetime	Producer is liable	No clarification by law on the actual length of the lifespan
Extension of Ecodesign Directive to cover lifespan guarantees	Product improvements take place at design stage to enhance environmental impact and product innovation	Time needed to extend implementing regulations to new products / product groups; extended enforcement and compliance needs

Source: Assessments of the research team on the basis of desk research and empirical survey work.

Table 2: Potential implementation techniques of a Lifespan guarantee model

Techniques/Options	Strength	Weaknesses
Uniform European standardisation for certain types or groups of products	Harmonised approach using agreed criteria	Needs completely new and complex legal framework
Implementing acts for certain types or groups of products using the eco-design framework legislation for the products covered therein	Makes use of existing legal framework	
Information duties of the producer	Establishes liability of the producer; easy to implement in the frame of a recast of the Consumer sales Directive	
Information duties of the seller	Establishes criteria for conformity of the good; easy to implement in the Consumer Rights Directive	

Source: Assessments of the research team on the basis of desk research and empirical survey work.

INTRODUCTION

Sustainable consumption is one of the principles of European consumer policy.¹ This means that consumer rights must be brought in line with standards of sustainable consumption. Products for consumers must be durable to avoid their early deterioration. Therefore their lifespan, or “usability” over their lifetime, should be generally as long as technically possible and scientifically advisable. A long lifespan for products allows energy savings, and promotes sustainable consumer behaviour. The study takes up the study on “a longer lifetime for products”² and deepens the legal aspects of the subject.

The question of this In-depth Analysis is whether legal instruments can support a long lifespan, and to develop such instruments. It is a propitious time to discuss this question, as two of the legal instruments, which are suitable for that purpose, are in a recast process. These are the Sale of Consumer Goods Directive (CSD),³ which shall be – according to a proposal of the Commission - replaced by an Online Sales Directive,⁴ and the Ecodesign Directive (EDD), which has recently been subject to review and where a new Working Plan (COM(2016) 773) was adopted in November 2016 for the EDD which contemplates future development of the EDD.

It is not feasibly possible to specify one lifespan period for all goods, not even for technical products, as products are too different. As a result, should the legislator intervene with regards to the lifespan of a product it must be done within a legislative framework that allows specific answers for specific goods. In our view, such a framework is provided for by the Ecodesign Directive, which is a framework Directive for specific regulations.⁵ For the moment, the Ecodesign Directive is focused on energy saving aspects. We will suggest amending its goal to the consideration of durability through regulation of the lifespan of products. Within the process of drafting of specific regulations for groups of products, the pros and cons of longer or shorter lifespans can be assessed in a balanced way.

However, it will not be possible to specify the lifespan of all technical goods by way of this legal instrument within a reasonable time period; there will always be groups of products that are only “candidates” for specific regulations, which are yet to exist. A significant number of groups of products not subject to a specific regulation will remain. For these groups, general rules must be developed. We will suggest drafting such rules within the frame of consumer contract law, more exactly, in first instance by amendments to the existing proposal of an Online Sales Directive, and in second instance by amendments to the information duties of the Consumer Rights Directive,⁶ which is also currently under review.

¹ European Commission, *Communication of the Commission, European Consumer Agenda 2014-2020 – Boosting confidence and growth*, COM(2012) 225 of 22.5.2012.

² Montalvo, C, Peck, D, Rietveld, E, *Longer Lifetime for Products: Benefits for Consumers and Companies*, IP/A/IMCO/2015-11, European Parliament, Policy Department A: Economic and scientific policy, Brussels, 2016. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU\(2016\)579000_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf).

³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12 of 7.7.1999.

⁴ European Commission of the European Union, Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 of 9.12.2015.

⁵ Directive 2009/125/EC of the European Parliament and the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, recast, OJ L 285/10 of 31.10.2009.

⁶ Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council.

Contract law cannot replace the absence of lifespan regulations for specific groups of products. Its main task is to make existing lifespan rules more effective, by giving consumers rights to enforce the lifespan rules in place in the case of non-existing specific legislation. Also considered in this report with regards to consumer rights related to longer product lifespans is the draft Durand report of IMCO.⁷

First we will examine the legal guarantee according to the CSD, this is to say rights of consumers against the seller which result from a product's failure to be fit for purpose for its lifespan (Section 1.1). Because rights against the seller depend on a lack of conformity of the good, we will have to analyse the term of "conformity" and assess whether a failure to be fit during the lifespan is a "lack of conformity" (1.1.1). A second question to be examined is whether the limitation period for the rights of consumers – two years according to the existing CSD as well as in the proposal for an Online Sales Directive – is sufficient (1.1.2). Answers to this question shall be rendered in the light of the experience of EU/EEA Member States that with longer limitation periods that enable a liability to be placed on the seller during the entire lifespan period indicated. The study includes a comparative law analysis, which allows drawing conclusions from the experience of these countries. A further relevant point is the period for a reversal of the burden of proof with regard to the fact of whether or not the good was fit for purpose at the time of delivery – six months according to the present CSD, two years according to the proposal of the Online Sales Directive (1.1.3). In particular, we will assess, whether the lifespan has some influence on the limitation period in the existing law of the Member States and whether Member States regard a lifespan, which does not meet the legitimate expectations of the consumer, as a lack of conformity (1.1.2.2). We draw some conclusions about the limitation period of the legal guarantee at the end of this section (1.1.4).

The next part of Chapter 1 contains some short observations on information duties related to the expected lifetime of a product, which could be inserted into the CRD (1.2). This is then followed by an assessment of the liability of the producer for the fitness of the product during its lifespan (1.3). For the time being there is no such legal obligation. We will develop a model according to which the producer of a technical good is obliged to inform the consumer about the lifespan. The producer shall not be obliged to guarantee a minimum period, but he will be required to inform the consumer in a clear and comprehensible manner whether a lifespan is guaranteed or not.

In Chapter 2, the possibilities of how to develop the Ecodesign Directive from a mere energy saving approach – as is currently the case - to a legal instrument which also includes the lifespan in its approach will be discussed. We consider (2.2 and 2.3) the current remit of the implementing measures under the EDD as focussing on energy efficiency and recommend that this existing remit be extended to cover lifespan guarantees on all products which have a significant impact on the environment. We go on to consider (2.4) the current threshold for products falling under the EDD (200,000 units per annum market) and recommend that a transitional programme is introduced to reduce the current threshold to extend the impact of the Directive. In section 2.5 we consider how such proposed changes should affect the measures for conformity and enforcement under the EDD and we propose the inclusion of the lifespan guarantee within the information made available to the consumer. In section 2.6 we review the methodology current applicable for implementing measures and recommend that it should remain the same except to ensure that consumer groups are integrated into the consultation process for the development of implementing measures to increase transparency for lifespan guarantees. Section 2.7 considers the parameters for the

⁷ European Parliament, *Draft report on a longer lifetime for products: benefits for consumers and companies* of 22.12.2016, IMCO Committee, 2016/2272 (INI) (Durand Report).

implementing measures and concludes that a lifecycle approach requires them to include the expected lifespan of the product where deemed appropriate and that the length of the guarantee which will be applied to the product should be determined in the measures. In the section it is further argued that product lifespan guarantees may also be a measure which is most effectively attached to individual products especially where they are complex and that the EDD should be adapted to apply implementing measures to individual complex products as well as product groups. Finally, section 2.8 considers whether any limitations need to be recognised in applying lifespan guarantees and recommends that the methodology should be adapted to allow flexibility to apply for derogations from the Directive where a new product will result in greater resource efficiency.

In the final Chapter 3, we seek to draw some conclusions about the mutual interplay between the two legal instruments, where the importance of needing both is stressed. Specific standards must be set by EDD based regulations. The task of contract law is enforcement by giving rights to consumers. In the absence of such standards by Regulations, we suggest that the producer could be bound by a compulsory commercial guarantee, which must include statements about the product lifespan. In this way, the commercial guarantee will be able to fill the gap resulting from the lack of specific lifespan EDD based regulations.

1 AMENDMENTS OF THE PROPOSAL FOR THE ONLINE SALES DIRECTIVE

KEY FINDINGS

- Scrutiny of the experience of EU/EEA Member States with a longer limitation period than two years, results in a recommendation to extend the proposal of the Online Sales Directive to three years and to amend an option clause for Member States to extend the period to a maximum of five years for products with a minimum lifespan of more than three years.
- The period for the reversal of proof regarding product lack of conformity at the time of delivery, should follow the proposal for the Online Sales Directive which suggests that it should be extended to two years. Member States should be allowed to extend this period to a maximum of three years if they provide for longer limitation periods for products with a longer lifespan than three years.
- The information duties of the Consumer Rights Directive should be clarified to show that lifespan is a main characteristic of the good, with information requirements on the seller prior to conclusion of the contract.
- The proposal for the Online Sales Directive should be amended by a provision, according to which the producer is obliged to provide for a commercial guarantee concerning the lifetime of the product.

We consider the proposal for an Online Sales Directive that its scope will be amended to all sales of consumer goods, so that it will replace and not only amend the existing Consumer Sales Directive (CSD), as suggested by the draft report of IMCO.⁸ Whenever the proposal for the Online Sales Directive (hereafter abbreviated as OSD proposal) is mentioned in this study it is meant to refer to its anticipated application to all consumer sales, leading to a complete replacement of the CSD.

The CSD distinguishes “legal guarantees” and “commercial guarantees”. The “legal guarantee” provides for rights of the consumer directed against the seller in case of non-conformity of the good. These rights are compulsory. According to the full harmonisation principle of the OSD proposal, once it has been adopted, no member state can grant more rights to their consumers. The manufacturer is not affected by the legal guarantee. In contrast, the “commercial guarantee” concerns rights of the consumer against the manufacturer. But a commercial guarantee is a voluntary act of the manufacturer only. This concept underlying the CSD – that is, mandatory rights against the seller, but rights against the manufacturer only when he grants them voluntarily – is not affected by the OSD proposal.

In this chapter, we discuss whether a better balance can be achieved between rights against the seller and against the manufacturer, especially in light of the fact that in the great majority of cases, and in particular in cases where the good does not meet the legitimate lifespan expectations of the consumer, the manufacturer is the principal cause of lack of conformity of the good. Therefore, in the first section (1.1), amendments to the existing

⁸ European Parliament, *Draft report on the proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods*, COM(2015) 635, of 10.11.2016 (C8-0391/2015, PE593.817v02-00), IMCO Committee, (Arimont Report). The Commission indicated in the proposal, that the co-legislators might extend the scope to face to face sales, if progress was made in the REFIT process of the CSD, COM(2015) 635, p. 3.

mandatory rules of the CSD (respectively the OSD proposal) concerning the legal guarantee will be examined, followed by a short outline of information duties in the second section (1.2) followed by a final section on the need to adopt a compulsory commercial guarantee providing for rights of the consumer against the manufacturer (1.3).

1.1 Legal Guarantee

1.1.1 The term of conformity

Rights of the consumer against the seller exist only if the good is not in conformity with what is agreed in the contract.⁹ The basic question is whether it can be considered as a lack of conformity if the lifespan of a product fails to meet the reasonably expected lifetime of products of such a type.

The term of conformity is already part of the CSD of 1999.¹⁰ The term as such is not changed by the OSD proposal, but the definitions are revised. They read according to the proposal:

"Article 4

Conformity with the contract

1. The seller shall ensure that, in order to conform to the contract, the goods shall, where relevant:

(a) be of the quantity, quality and description required by the contract, [...],

(b) be fit for any particular purpose for which the consumer requires them [...],

(c) possess the quality and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.

[...]"

The draft report of IMCO suggests integrating no. (c) into no. (a).

Article 5 provides that the goods shall

„(a) be fit for all the purposes for which goods of the same description would ordinarily be used,

(b) [...],

(c) possess quality and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the good [...]."

The draft report of IMCO suggests amending "reasonably expect".

With regard to a lifespan guarantee the new wording does not make a difference to the existing law, as already the CSD refers to the quality and requires that the goods

"show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect given the nature of the good, .." (Article 2 (2) (d) of the CSD).

⁹ The term of conformity in the OSD proposal is examined by Smits, J., *The new EU proposal for harmonized rules for online sales of tangible goods [COM(2015) 635]: conformity, lack of conformity and remedies*, European Parliament, Policy Department C: Citizen's Rights and Constitutional Affairs, Legal Affairs, Brussels, 2016, PE 536.492.

¹⁰ The term can be found in: Reich, N., Micklitz, HW., Rott, R., Tonner, K., *European Consumer Law*, 2nd ed. 2014, nos. 4.10 et seq.

Because the relevant parts of the definition are not changed, it is still possible also to apply the term of conformity according to the CSD and the OSD proposal to standards of sustainability without amending their wording. The lifespan is part of the quality of the product according to Article 2.2. of the CSD and Article 4.1. (a) of the OSD proposal respectively.

Pre-contractual information duties, which form an integral part of the contract, are provided for by the Consumer Rights Directive (CRD). If these duties are amended by duties to inform about sustainability standards, in particular the lifespan of a product, as discussed later (under 1.2), these statements will become part of the contract, so that the good is in conformity with the contract only if it meets these statements.

If standards about lifespan will be provided for by regulations within the frame of an amended Ecodesign Directive (EDD), as suggested in Chapter 2, such standards are part of the quality and performance capabilities which are considered as normal in goods of the same type according to Art. 5 (c) of the OSD proposal. Even if such specific regulations do not exist, the consumer may prove that a certain sustainability standard is "normal". However, such proof will not be easy to accomplish.

The wording "which the consumer may [reasonably] expect given the nature of the product" may be more helpful, because the consumer will then be in a position to argue that he had reasonably expected a certain lifespan (i.e. duration) when he bought the good.

The overview in the following sections of Chapter 1 shows that even the existing law, and also the proposal of the Commission, allows giving rights to consumers in cases of a lifespan which is shorter than what is provided for in specific legislation or what the consumer may reasonably expect. Nevertheless, we recommend amending the OSD proposal to clarify that sustainable standards are included in such terms as "quality" and "reasonable expectations". This can be implemented by amending Article 4. 1. (a) by the words "Quality includes the lifespan of the good" and Article 5 by "Reasonable expectations of the consumer include the lifespan of the product."

It was not a task of this study to examine the rights of consumers in respect of a legal guarantee. There is no need to amend the relevant provisions of the OSD proposal with regard to a better enforcement of legitimate lifespan expectations.

The term "lifespan", as used in this study, does not cover the whole lifecycle of a product. The term refers to the period from the delivery of the product to the consumer until it stops to function. It is intended to be a mere technical term. Other issues or problems such as how to determine the lifespan within the innovation cycle of a product cannot be discussed here.

1.1.2 Limitation period

1.1.2.1 Consumer Sales Directive

According to the existing CSD, the limitation period for consumer rights against the seller is two years beginning from the time of delivery. That is, the seller is responsible for the lifespan of a good for a maximum of two years only (i.e. a two year lifespan). Should the product have a lifetime of more than two years, no rights of consumers are enforceable when a failure, either to be fit for the lifespan, or to meet the reasonable expectations of the consumer regarding the lifespan, appears more than two years after delivery of the good. This means that the legislator must adopt a longer limitation period than two years if his objective is to have the seller responsible for a longer lifespan.

The present CSD is a minimum standard Directive. That is, Member States may introduce or maintain longer limitation periods than two years. Five EU Member States and two EEA countries have made use of this possibility.¹¹

As the OSD proposal includes a full harmonisation rule, this existing diversity would come to an end if the proposal were to be adopted as drafted by the European Commission. The OSD proposal provides for a two years limitation period after delivery; this is to say there is no alteration with regard to the two-year stipulated threshold as compared with the existing CSD. However, the change and consequences for national law come from the shift from minimum to full harmonisation. As it stands, it is expressly stated in recital 32 of the OSD Proposal that the limitation period in Article 14 (1) of the proposal is meant as a full harmonisation measure.

If the European Union legislator wishes to adopt measures for liability of the seller for goods with a longer lifespan than two years, there are two ways in which this can be done: either the legislator introduces a longer period himself, or he may amend Article 14 (1) of the proposal with an option clause which allows Member States to maintain or introduce longer limitation periods.

A recent study commissioned by the European Commission, examined the awareness of consumers about legal guarantees as well as commercial guarantees.¹² According to the findings only 35 % of consumers were aware of the legal guarantee period in their country. In about half of the Member States, consumers who thought that the legal guarantee period was one year outnumbered those who correctly stated it was two years. This shows that a mere extension of the limitation period is ineffective if no simultaneous measures are taken to make consumers aware of their rights.

1.1.2.2 Laws of Member States

Member States transposed the CSD in very different ways: some included the rules of the CSD into the sales law of their (general) Civil Code. Examples are Germany (Bürgerliches Gesetzbuch, BGB) and the Netherlands (Nieuwe Burgerlijk Wetboek, NWB). Others have separate Codes of consumer law, which include the rules of the CSD. Examples are the Code de la Consommation in France, the Codice del consumo of 2005 in Italy, and recently the Consumer Rights Act 2015, in the United Kingdom. A third group of Member States adopted separate consumer sales acts, in particular the Nordic countries, which partly already existed prior to the adoption of the CSD.

The laws of Member States with longer limitation periods can fall under three models: under the common law tradition, longer limitation periods were in place when the CSD was adopted. Therefore the two common law Member States, Ireland and the UK maintained their existing limitation periods when they implemented the CSD, not primarily motivated by reasons of guaranteeing longer lifespans, but more to maintain the existing rules.

Other Member States introduced longer limitation periods to meet lifespan expectations, but they chose different models. Only Sweden has a general limitation period for all consumer goods, which is three years, whereas Norway and Iceland grant a period which is longer than two years only for goods which are expected to have a longer lifespan than two years (five years). In Finland a three year period is applicable which begins when the buyer is aware of the lack of conformity. The most advanced model is applied in the Netherlands where there

¹¹ Under section 1.1.2.2.

¹² Ipsos, London Economics, Deloitte, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU*, European Commission, Directorate-General for Justice and Consumers , 2015.

is no general limitation period at all but where the period is identical to the respective individual expected product lifespan. It should be kept in mind that the advantages for consumers of an extension of the limitation period could be mitigated if the period for the reversal of proof is not extended correspondently.

1.1.2.2.1 Extensions in common law Member States

As mentioned, the two common law Member States, Ireland and the UK¹³, maintained their longer limitation periods, when they implemented the CSD. The reasons given for that were not merely tradition, but also “modern” considerations. The UK offers more protection than the CSD, as UK law gives consumers the right to return goods which are not in conformity, for up to six years after purchase. The reason for this is that the UK limitation period for a common law action for breach of contract is 6 years and because the rights in Part 1 Chapter 2 Consumer Rights Act 2015 are implied terms in the sense of common law. These are contractual rights, therefore, if the goods do not conform this constitutes a breach of contract.¹⁴ Thus, consumers may seek common law remedies for non-conformity. Another reason that the UK adopts a higher level of protection is because goods may carry a latent defect which may not become apparent within two years. This is particularly true for electronic and complex goods, such as motor vehicles and expensive electrical items which are expected to last for a much longer period of time.

It is not surprising that the influence of the lifespan on the limitation period is discussed in the two common law Member States, which have long limitation periods. In the UK, the explanatory notes to the Consumer Rights Act 2015 provide an example of a consumer purchasing a cheap kettle which stops working after 4 years. In such circumstances it is unlikely that a reasonable person would expect a bottom range kettle to last for a longer period. Perishable goods, in particular food, do not need to last the full limitation period of 6 years.¹⁵ The situation in the UK and in Ireland is similar, as in both countries the concept of merchantable quality is applicable, which includes the principle that goods have to be as durable as it is reasonable to expect.¹⁶ Durability is specially mentioned as an aspect of the quality of the good.¹⁷

In Ireland, the standard contractual limitation period of six years from the date of the breach applies to any action taken by a consumer under the Consumer Sale Regulations in Ireland.¹⁸ For consumer sales this follows from the Irish transposition of the CSD, but such a period was effective in Ireland even before that transposition. To avoid cutting down existing consumer rights, the Irish legislator did not transpose the two years rule of the CSD.

1.1.2.2.2 General extension of the limitation period

Sweden and Finland extended the two year limitation period of the existing Directive for all goods, notwithstanding the actual length of the product lifespan. In Sweden the limitation period is three years.¹⁹ The main reason for prolonging the time limit from two to three years is to improve the consumer’s position when a lack of conformity appears in the good after a

¹³ More exactly, common law is in place in England and Wales, whereas the law in Scotland goes back to Roman law. But the rules of the Consumer Rights Act 2015, are applicable in the whole UK.

¹⁴ Para 40, Explanatory Notes to the Consumer Rights Act 2015.

¹⁵ Williams, J., Hamilton, J., *The impact in the U.K. of the E.U. directive on the sale of consumer goods and associated guarantees: Part 2*, International Company and Commercial Law Review 12 (1) (2001) 31,33.

¹⁶ Mash and Murreil v. Joseph I. Emmanuel [1961] 1 All E.R. 485 concerning potatoes.

¹⁷ S. 9 (3) (e) of the Consumer Rights Act 2015.

¹⁸ Statutory Instruments No. 11 of 2003.

¹⁹ Article 23 § 3 of the Consumer Sales Law, 1990:932, updated by Lag 2005:92.

longer period of time and especially when it comes to goods that are expected to function for much longer than two years.²⁰ This means that the reason for the Swedish extension lies in the longer lifespan of technical products but nevertheless is not limited to such products. Products with an expected lifespan shorter than three years – the famous bunch of flowers example – are in conformity with the contract, even if the good does not last three years.

The advantage of the Swedish model compared with the Dutch model (see below 1.1.2.2.4) is that no list of average lifespan for specific groups of products is necessary. The Swedish model grants legal certainty. The disadvantage is that there are no remedies afforded to the consumer after three years, even if the lifespan of the product in question is longer than three years. The seller is not disadvantaged by the addition of a third year, as, in cases where he had sold a product with a normal lifespan of less than three years, he may simply prove how long the normal lifespan is.

Finnish consumer sales law also does not follow the minimum standard of the CSD but allows for a longer guarantee period. No specific time limit is set for a lack of conformity to become apparent in the Consumer Protection Act (FCPA). Instead, the issue is dealt with by the default rules on limitation of contract-based claims contained in the Act on Limitation Periods (708/2003). In Finland, contract-based claims expire once 1) three years have elapsed starting from the date when the buyer had or should have been aware of the lack of conformity or 2) after ten years have elapsed since the date on which the breach of contract occurred.

The right to make a claim is also restricted by the rules on giving notice of lack of conformity. For consumer contracts the time limit for giving notice is “the reasonable time”, but at least two months (FCPA Chapter 5 Section 16 Subsection 1).

1.1.2.2.3 Basic rule and extension for products with a longer lifespan

In Iceland, as a basic rule, the two year rule applies. This rule has been extended to five years regarding goods that are generally supposed to have a longer durability. This is explained in the explanatory note to the Consumer Sales Act 48/2003. The extension was expected to strengthen the legal position of consumers, especially when the lack of conformity was not apparent or hidden. In such cases the two year rule could be seen as not being sufficient for consumers when dealing with more durable goods.

The Supreme Court has not clarified the difference between the products that fall under the two year rule and those that fall under the five year rule. This difference has been addressed by a non-binding appeal body that decides claims between consumers and sellers.²¹ Examples of such more durable goods are refrigerators, television sets, washing machines, coffee machines, but not, for example, chairs. The explanatory note to the Consumer Sales Act states that the reference to the nature of the product is considered to apply to products with a short lifetime. Durability is particularly mentioned as part of the expectations of the buyer.

The Norwegian model is similar. The Norwegian Consumer Sales Act provides for a time limit of two years.²² However, the time limit is five years if the goods or parts of them are meant to last for a considerably longer time than two years – assuming ordinary use of the goods. This rule is regarded as balancing the interests of consumers to have rights in case a lack of conformity becomes apparent only after two years, and the interest of the seller to calculate a maximum period for possible claims.

²⁰ Herre, J., *Konsumentenköplagen*, 4th ed. 2014, p. 276.

²¹ Established by Chapter XIII of Consumer Sales Act 48/2003.

²² Lov 21. Juni 2002 nr. 34 om forbrukerskøp.

In Norway, the question arose of how to draw the line between the basic period of two years and the longer period of five years. According to the Norwegian Consumer Sales Act the five year period is applicable if the good is "meant to last for a considerably longer time" than two years. The Norwegian Supreme Court discussed this issue in 2007.²³ The keyboard of a mobile phone stopped functioning and the consumer notified the seller of this fact two years and three months after delivery. The parties agreed that this was a lack of conformity which had been present at delivery (a hidden defect). The Court had to decide for how long the phone was meant to last.

The Court found – based, inter alia, on the explanatory notes – that the expectations regarding technical functionality were decisive, not the ordinary cycle of renewal of phones due to obsolescence or technical development. Further, according to the Court, the assessment must be based on the same criteria as in the general rules of conformity, in particular what the consumer can reasonably expect.²⁴ The starting point for assessing the consumer's expectations was the information given by the relevant trade association. This information suggested a normal lifespan of three to four years. The Court held that the phone was meant to last for three to four years. The remaining question was whether three to four years was considerably more than two years. The Court answered this question in the affirmative and thus concluded that the consumer's notification had been in time.

The Durand report follows the Icelandic and Norwegian model.²⁵

1.1.2.2.4 No general limitation period: The Dutch model

Dutch (consumer) sales law does not provide for a limitation period for consumers to exercise their rights in a case of lack of conformity. However, this is true only for hidden defects. When the consumer is aware of a defect, he has to give notice to the seller within two months, after which point a limitation period of two years begins.²⁶ In that respect, Dutch law is similar to Finnish law.

As a result, a consumer can make a claim based on non-conformity for the duration of the normally expected lifespan, which may be more than two years. There is no claim if the product deteriorated due to normal use. The question is how to determine the lifespan. While no official lists of expected product lifetimes exist,²⁷ a number of unofficial lists, based on surveys of products carried out by the Consumentenbond or other similar organisations, do provide an indication of expected lifespan. The most relevant is a list, to which the Dutch consumer organisation Consumentenbond also refers, published by UNETO-VNI, the association of Dutch plumbers and retailers of technical goods.²⁸ This trade association distinguishes ten groups of technical products, and within these groups there is a further differentiation according to the price, this is to say that they expect a cheaper product to have a shorter lifespan than an expensive one. The list is only applicable to products with a minimum lifespan of two years and to new products. The list and resulting categories of products and lifespans is based on an average lifespan and calculated on the basis of normal use. The list shows that it is only for a minority of the groups of products that the expected

²³ Judgment HR-2007-1592-A of 21 September 2007, Norsk Redstidene 2007, 1274.

²⁴ Art. 2 (2) (d) of the CSD, § 15 second paragraph lit. b of the Norwegian Consumer Sales Act.

²⁵ European Parliament, *Draft report on a longer lifetime for products: benefits for consumers and companies* of 22.12.2016, IMCO Committee, 2016/2272 (INI) (Durand Report).

²⁶ See Loos, M., *Consumer sales law in the Netherlands after implementation of the Consumer Rights Directive and with a view to the future Common European Sales Law*, Working paper 2014, p. 12..

²⁷ A plea has been made for the introduction of such lists by Coen Drion, *Een levensduurlijst voor producten*, NJB 2015, 355.

²⁸ www.uneto-vni.nl/stream/flyer-gebruiksduurverwachting (accessed 26.1.2017).

lifespan does not exceed two years. However, likewise, it is only for a few groups where specific products have a lifespan of more than four years. Products falling in these latter categories include expensive audio equipment and expensive household appliances ("white goods").

While the list is not a legal instrument and does not even constitute soft law, it nevertheless provides an orientation when a judge has to come to a conclusion on whether the prerequisites of Art. 7:17 NBW (conformity or non-conformity) are met.

1.1.3 Reversal of the burden of proof

1.1.3.1 Consumer Sales Directive

The good has to be in conformity to the contract at the time of delivery – not later. This is a basic principle of sales law all over the world. The seller is not responsible for what happens to the good after delivery; this is within the risk sphere of the buyer, which the seller cannot influence. This principle is part of the existing CSD, even though it is not quite clear from the wording. The OSD proposal is clearer insofar as the principle of being fit for purpose at the time of delivery is laid down in Article 8.

The result of this rule is that the consumer cannot just say that the good no longer functions even though its reasonable expected lifetime has not yet expired. The reason for the malfunctioning must have already existed at the time of delivery. This may be the case due to a poor design of the product or because of a failure in the manufacturing process of the individual product.

The decisive question is who has to prove that the lack of conformity already existed at the time of delivery. Usually – in all legal orders – the person who takes action has to prove that all the prerequisites for the claim are fulfilled. This is to say that in a case of the shortening of the lifespan, the consumer has to prove that the reason behind the shortened lifetime already existed at the time of delivery. It is easy to understand that in most cases the consumer will not be able to provide evidence of this, because he has no insight into the design and manufacturing process of the producer.

The answer to that problem was introduced in the Consumer Sales Directive in 1999 by way of a rule providing for a reversal of the burden of proof after courts in some Member States had already introduced such a rule by application of case law on a national basis. It is now the responsibility of the seller to prove that the non-conformity did not exist at the time of delivery. This evidence is as difficult to substantiate as the evidence for the consumer to substantiate the non-conformity at the time of delivery. So in most cases the consumer will be successful with the hearing of his claim if only the non-conformity appears during the period in which the reversal of the burden of proof is applicable.

The legislator of 1999 decided to limit the period in which the reversal of the burden of proof is applicable, to six months. This means that during those six months after delivery the consumer has only to give evidence that the non-conformity appeared during that time, whereas after the expiry of those six months the consumer then has to show that the conformity already existed at the time of delivery – maybe as a hidden defect. The legislator of 1999 thought that this would contribute to a fair balance between the interests of sellers and consumers. In reality, the limitation to six months has rendered the remaining 18 months of the limitation period of limited use for the consumer, because he will not be able to prove the existence of the non-conformity at the time of delivery when this time had elapsed. This is particularly true for a shortening of the lifespan. Therefore, if the legislator wishes to give rights to consumers in cases of non-conformity of the product he will need to consider whether the period for the reversal of the burden of proof should in fact be any shorter than the limitation period at all.

In the Faber case, the Court of Justice of the European Union had a consumer friendly view on this rule.²⁹ Mrs. Faber bought a second-hand car which caught fire during a journey and was completely destroyed. According to the Court the consumer has only to give evidence that a lack of conformity exists and appears during the six months period after delivery. The consumer does not have to prove the cause of that lack of conformity or to establish that its origin is attributable to his actions as the consumer. The last point is of utmost importance: the consumer does not have to prove that there is a causal link between the lack of conformity which became apparent and a probable lack at the time of delivery.

The Ipsos/London Economics/Deloitte study³⁰ includes some interesting findings with regard to the reversal of the burden of proof. Only 37 % of respondents were able to understand the relevance of different terms for the burden of proof. For 15 % of problems that had occurred within the first six months, survey respondents were asked to prove that the problem was not due to their own fault. Among mystery shoppers reporting that their camera stopped working within six months after the purchasing date, 20 % were told by the seller that they would need to prove that the problem was not due to their own fault.

1.1.3.2 Member States

Our survey of the laws of selected Member States conducted for this report shows that most Member States do not extend the period of six months for the reversal of the burden of proof (with the exception of Portugal) even though the minimum standard principle of the existing CSD would allow them to adopt a longer timeframe for the experience. This is also true for the Member States which modified the two year limitation period in favour of adopting a longer or even a lifespan liability of the seller. By not extending the period of the reversal of proof proportionally to the extension of the limitation period, those Member States mitigated the advantages of extending the limitation period significantly. In detail:

The two common law Member States with longer limitation periods than the CSD follow the six months rule of the CSD. This is true for *Ireland*, which transposes the six month rule into its Regulation implementing the CSD. There are no reported court decisions concerning this reversed burden of proof. In the *United Kingdom*, S 19(14) Consumer Rights Act 2015 also follows exactly this six month period.

The two Nordic Member States, which provide for a three year limitation period for all consumer goods, also do not extend the period for the reversal of the burden of proof. This is true for *Sweden*. An exception is made for purchase of building material for one or two family houses. The period in these cases are set at two years (20a § Consumer sales law). There is one case from the Supreme Court regarding burden of proof.³¹ Surprisingly it is also true for *Finland*, though, according to Finnish law, the limitation period begins only when a case of non-conformity becomes apparent. This may have the result, that the consumer has the burden of proof already at the beginning of the limitation period, if the lack of conformity becomes apparent later than six months after delivery.

The two EEA Member States (*Iceland*³² and *Norway*³³), which apply as a basic rule the two year period of the CSD but extend it for products with a longer lifespan, also transposed

²⁹ CJEU, 4.6.2015, C-497/13, ECLI:EU:C:2015:357 - Faber.

³⁰ Ipsos, London Economics, Deloitte, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU*, European Commission, Directorate-General for Justice and Consumers, 2015.

³¹ NJA 2013 p 524.

³² See Par. 2, Art. 18 of the Consumer Sales Act 48/2003.

³³ See Par. 18 of the Norwegian Consumer Sales Act.

exactly the six month period of the reversal of the burden of proof into their national law. In Iceland, the rule has been applied in one district court decision concerning humidity in flooring material.³⁴ In Norway there are no published court decisions to date.

In *The Netherlands* the reversal of the burden of proof is provided for in Art. 7:18 para 2 of the NWB. The provision is often invoked in case law, in particular in relation to goods where the presumption is factually difficult to apply, such as cars or animals. Sellers will often claim that the presumption of non-conformity should be rebutted on the ground that the consumer mishandled the goods, e.g. did not drive carefully or did not take proper care of the well-being of the animal. The Dutch legislator had indicated at the time of the CSD implementation that certain goods, because of their nature, will often be exempted from the presumption, mentioning animals in particular³⁵.

One of the countries, which do not provide for a longer limitation period than the CSD, adopted a longer period for the reversal of the burden of proof. This is *Portugal*, where the six months period has been extended to two years (in the case of movable goods) and to five years (in the case of immovable goods). The presumption that the lack of conformity already existed at the time of the delivery thus applies for the full period of the guarantee.³⁶ *Greece* is a noteworthy example of a member state that neither extended the limitation period nor the period for the reversal of proof. In Greece, Article 537, Greek Civil Code transposes Article 5(3) CSD verbatim and, therefore, Greek law does not explicitly provide for a longer period. Yet, the significance of the existence of this six month presumption of non-conformity is somewhat reduced when other provisions of the Greek Civil Code and Article 5, Law 2251/94 are taken into account, in particular the provision on commercial guarantees (see below).

A further example is *Germany*, where the Federal Supreme Court developed a very restrictive interpretation of the reversal of proof rule. The Court distinguished an apparent defect (the motor of a car does not work any longer) from an underlying defect ("Grundmangel", in the case: a defect of the toothed belt).³⁷ According to the Court, the consumer has to prove that the apparent defect is caused by the underlying defect and, only if this proof were to be successful, would it be assumed that the underlying defect existed at the time of delivery. This is not in line with the Faber case of the CJEU,³⁸ and so the German Federal Supreme Court gave up this kind of jurisdiction.³⁹

It should be stressed that the six month rule mitigates a limitation period which is longer than two years for the seller.

1.1.3.3 Proposal for an Online Sales Directive

The proposal for an Online Sales Directive extends the period of the reversal of the burden of proof to two years. This is a step forward for giving consumers rights in cases where a good fails to function during this period, despite no expiry of its normal lifetime. This does not deprive the seller from his right to prove that the normal life time is shorter than two years.

³⁴ District Court of Reykjanes Case E-2679/2010.

³⁵ See parliamentary proceedings: EK 2002-2003, 27 809, nr. 32, p. 2.

³⁶ See Article 3 (2) of Decree-Law No. 67/2003.

³⁷ BGH 02.06.2004 – VIII ZR 329/03, BGHZ 159, 215 – Zahnriemen.

³⁸ CJEU, 4.6.2015, C-497/13, ECLI:EU:C:2015:357 - Faber.

³⁹ BGH 12.10.2016 – VIII ZR 103/15.

The proposal is intended to include the Faber case by virtue of recital 26, according to which the consumer should only establish that the good is not conforming without needing to demonstrate that the lack of conformity actually existed at the relevant time for establishing conformity. The draft IMCO report⁴⁰ clarified that the lack of conformity became apparent within the period of the reversal of the burden of proof. This is exactly what the CJEU said in the Faber case.

Contrary to the proposal of the Commission, the draft IMCO report suggests to maintain the applicable period for reversal of burden of proof that is in the existing CSD, this is to say six months. This would mean that in the event that a product fails to function after six months, the consumer will have to prove that this is due to a failure in the design or in the manufacturing process. As already pointed out under section 1.1.3.1, this task of providing evidence will be difficult for the consumer to fulfil, and as a result, the legislator's decision for maintaining the six month rule of the present CSD would not tend to create liability of the seller for the lifespan of a product.

1.1.4 Conclusions

Overall, the analysis shows that the existing and proposed EU law and practice of the Member States offer a wide range of options regarding legal guarantees:

- (1) Maintaining the rule of the present CSD (two year limitation period, six month reversal of the burden of proof)
- (2) Extending the period for the reversal of proof to two years (proposal of the Commission, PT)
- (3) Extending the limitation period (IE, SE, UK)
- (4) Combination of a basic limitation period and a longer period for products with a longer lifespan (IS, NO)
- (5) No limitation during the expected lifetime of a product (NL)
- (6) Limitation period beginning when a lack of conformity becomes apparent (FI)
- (7) Options (1) or (2) combined with an option clause to allow Member States to opt for options (3) or (4)
- (8) Options (1) or (2) combined with a provision which allows longer periods for specific products in other European legal instruments

Without an option clause (option 7) all models would force six EU and EEA Member States (Finland, Ireland, Iceland, the Netherlands, Norway, and the United Kingdom) to cut down their existing limitation periods and so to reduce their standards of consumer protection. A compromise could be an option clause, which allows Member States to maintain or introduce longer limitation periods. However, we do not suggest an unlimited option but only an option which follows the model of Iceland and Norway. This is also the recommendation of the draft Durand report.⁴¹ This is to say, that the basic limitation period has to be in line with the limitation period provided for by the Directive, whereas exemptions can be made for products with an expected longer lifespan than three years. The maximum period in those cases should be five years. We have to admit that this model would be to the detriment of consumers in

⁴⁰ European Parliament, Draft report on the proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635, of 10.11.2016 (C8-0391/2015, PE593.817v02-00), IMCO Committee, (Arimont Report).

⁴¹ European Parliament, *Draft report on a longer lifetime for products: benefits for consumers and companies* of 22.12.2016, IMCO Committee, 2016/2272 (INI), no. 17.

Ireland and in the United Kingdom, as their existing six months periods would not be in line with such a full harmonising rule.

It should be stressed again, that an extension of the period for the reversal of proof compared with the six months of the existing CSD is of utmost importance. So Member States which extend the limitation period according to our suggestion on the basis of an option clause, should be allowed to extend the period for the reversal of proof to three years.

Not only Member States, but also the European legislator itself might have an interest in extending the basic limitation period for specific products. As we will explain in chapter 3 of this study, we will suggest that lifetime regulations for specific groups of products should be introduced into implementing regulations based on the EDD. Such provisions need enforcement not only by public bodies, but also through remedies which are granted to consumers. This means that the producer must be liable for his product during the whole lifespan. Such a requirement cannot be regulated by a general limitation period, but needs specific periods which have to be in line with statutory definitions of lifetime. This is to say that the proposed regulations based on the EDD must include provisions about the limitation period, during which the consumer has rights against the seller according to the OSD (or a recast of the CSD), which may be longer than the basic period of the OSD, without contradicting the OSD. For that purpose an exemption in the OSD is necessary to allow longer periods in other European legal instruments.

Our assessment leads us to make the following recommendations. We do not recommend option (1) because this is no improvement for sustainable consumption. We also do not recommend option (5), as this option does not meet the necessary requirements of legal certainty because in many cases the expected lifetime of a product can be only estimated which means that the seller cannot be sure for how long he will be liable, and the consumer does not know how long his rights will last. Option 6 has the disadvantage that it is difficult to determine exactly the date of the beginning of the limitation period. So options (2), (3), (4) and (8) remain.

We recommend option 2 (proposal of the Commission), combined with an option clause for Member States, to provide for longer periods for goods with a longer lifespan than two years up to a maximum period of five years (option 4, Norwegian model) combining these options by extending the basic limitation period to three years (option 3, following the Swedish model, but less than in the UK), and extending the period for the reversal of proof to two years (following the proposal of the Commission). Following this reasoning, the overall suggested path would favour a hybrid model comprised of options 2 and 3 (a 3/2 model), amended by an option clause following options (7) and (8).

To summarize: the overall limitation period should be three years, and the period for the reversal of proof two years. The provision should expressly not exclude longer limitation periods in other European legal instruments and allow Member States to extend the limitation period for goods with an expected lifespan of more than three years to a maximum of five years.

1.2 Information duties

Information duties about the lifespan of a product are important because such information is a legitimate expectation of consumers and is an influential factor in determining the contractual conformity of a product as already shown. The seller therefore should have a pre-contractual information duty about the lifespan of a product.⁴²

⁴² The relevance of information duties is also stressed by the draft Durand report, 2016/2272 (INI) no. 14.

Information duties are neither part of the CSD nor of the OSD Proposal. European consumer law leaves information duties to the CRD. The European legislator should examine whether the pre-contractual information duties of Art. 5 and 6 of the present CRD shall be amended by sustainability standards, in particular by notions of the lifespan of technical products. According to these two provisions the trader has to inform the consumer about the main characteristics of the goods. It could therefore be clarified to what extent the lifespan of a technical product is a main characteristic in that sense, and, if so, to what extent the trader has to inform about it. One further advantage of such an amendment would be that this kind of information would become part of the contract. In line with this, we would also recommend an amendment to the Ecodesign Directive by way of information duties (see Chapter 2).

The CRD is no part of the present REFIT of consumer protection Directives, but has to be reviewed in accordance with Article 30. This review process provides the opportunity to include information duties into a recast of the CRD.

Information is also an issue in the Unfair Commercial Practice Directive⁴³ (hereafter UCPD). According to its Article 7 it is a misleading omission if the seller (called "trader" in the CRD) does not inform about the main characteristics of the good. This is the same requirement as to be found in Articles 5 and 6 of the CRD. Article 7 of the UCPD could be amended by a clarification, that sustainability standards such as lifespan are part of the main characteristics. Article 7 applies in the case of an invitation to purchase. "Invitation to purchase" is a familiar legal term and allows clarity as to the time at which the information has to be given. More could be done if the Labelling Directive⁴⁴ were to be examined as that provides for clear indications where and when requisite information has to be placed. But that is beyond the scope of this study.

1.3 Commercial guarantee of the producer

1.3.1 Commercial guarantee beside legal guarantee

A legal guarantee as described and suggested in Section 1.1 of this study is insufficient to solve the problem of ensuring a reasonable liability for the lifetime of products, even if the limitation period is longer compared with the existing law, and even if there are exemptions for longer periods established at national level by Member States or set out in implementing regulations based on the EDD. The problem is that a general provision cannot define the lifetime of a specific product. Even if the limitation period of the legal guarantee is extremely long, say five or six years, the seller may object that the product he sold has a shorter lifetime. The famous example is the bunch of flowers. No reasonable consumer will expect, that it is "fit for purpose" for more than two weeks. But the same may occur in respect of technical products. Take as an example the establishment of a three year period as suggested in this study, where a consumer complains about his coffee machine 25 months after he bought it. How will we respond to the seller who argues that the lifetime of the coffee machine is exactly 24 months, therefore there are no remedies anymore, even if the limitation period is not expired?

The first answer is in the negative: a mere extension of the limitation period gives no answer about the lifetime of specific products, and Directives such as the OSD (or a recast of the

⁴³ Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ L 149 of 11.06.2005, p. 22.

⁴⁴ Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ No. L 304 of 22.11.2011, p. 18.

CSD) can include only general rules. Specific measures must be taken by other legal instruments. Even a reversal of proof does not give an answer about the lifetime. When the seller is arguing that he sold a coffee machine with a lifetime of two years and not more, then there is no lack of conformity if the machine collapses after the end of the second year. The reversal of proof is relevant only for the question, whether the machine was in conformity with the contract. It does not exclude the right of the parties to the contract to agree explicitly on a lifetime shorter than the usual lifetime of products of such type.. If nothing was agreed about lifetime in the contract, how shall the consumer give evidence that coffee machines of the type he bought, usually have a lifetime of more than two years? We therefore disagree with legal writers who find a solution in a longer limitation period for consumer sales only.⁴⁵ This may be part of the solution, but it is not the solution.

The second answer is that the necessary legal instruments can be found in European law. As already mentioned, these are regulations based on the EDD. We therefore will examine the EDD in Chapter 2 of this study. If we have an EDD based regulation on a coffee machine which sets a five year lifespan, then the answer to the seller in our example is that, if it expires after only 25 months of use, he cannot then object. The contractual remedies of the OSD help to enforce the regulations of European environmental law.

But regulations of that type are difficult to draft for various reasons. For instance, there are many different types of coffee machines in the market which may have different lifespans. It is not realistic to suppose that in a reasonably foreseeable time the whole market of technical consumer products will be covered by EDD implementing regulations providing for the lifespan of specific groups of products. We have to look for a solution for how to define the lifespan of a product in the many cases where a statutory regulation is not yet in place.

There is one member state which gives an answer to that question. This is the Dutch list, which we explained in the comparative law analysis of this study.⁴⁶ But the list is very informal and may work in a small member state with a long tradition of finding amicable solutions for consumer complaints, but is unlikely to be replicated in big Member States like France or Germany and in Member States without an ADR tradition. Our answer is to develop information duties and liability for the functioning of technical products during their lifespan within the frame of a commercial guarantee, that is to say, directed against the producer.

1.3.2 Legal background: CSD and CRD

We will develop a model of a commercial guarantee which obliges the producer to provide information about the lifespan of the product and to be liable for its functioning during its lifespan. We will analyse whether the producer of a technical product should be liable to the consumer for the fitness of the product during its lifespan. This will be an amendment in addition to the seller's liability, not an alternative.

The starting point for such a liability could be the provision about a commercial guarantee in the CSD. A guarantee according to Art 6, CSD is a voluntary act. The provision does not prescribe any specific rights which must be granted to the consumer, if anybody – be it the producer, be it the seller - uses the term "guarantee". The term "commercial guarantee" must not be confused with the term "legal guarantee", this is to say mandatory rights the consumer has against the seller in case of non-conformity of the good. A commercial guarantee does not exclude or limit the rights following from the legal guarantee. For this purpose a guarantor is obliged to clearly state that the legal rights against the seller are not

⁴⁵ E.g., in Germany, Gildeggen, R., *Abschied von der kurzen Verjährungsfrist des § 438 Abs. 1 Nr. 3 BGB in der Praxis?*, Verbraucher und Recht, VuR 2016, 83.

⁴⁶ Under section 1.1.2.2.4.

affected by a guarantee. This is existing law according to Article 6 of the CSD. The guarantor is free to determine how long the guarantee may be, in particular, whether it encompasses the whole lifespan of the product or not.

The Consumer Rights Directive introduced a definition of “commercial guarantee.” According to Article 2 no. 14:

“commercial guarantee means any undertaking by the trader or producer (guarantor) to the consumer in addition to his legal obligation relating to the guarantee of conformity to reimburse the price paid or to replace repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.”

This is to say that the trader, who uses the term ‘guarantee’, has to give the rights to the consumers which are mentioned in this definition, if not modified by a clear guarantee statement.

The proposal for an Online Sales Directive amends the existing rule of the CSD by the inclusion of pre-contractual information (Article 15). The obligation to inform consumers about their rights arising under the commercial guarantee and that they do not affect their legal rights against the seller, while more precise than in the 1999 CSD, is not altered in substance.

1.3.3 Member States

None of the Member States has any rule which provides for a compulsory commercial practice of the manufacturer. All Member States transposed, more or less, Article 6 of the CSD, which does not include any obligation for the manufacturer.

An exemption is Greece with regard to a commercial guarantee of the supplier (not the manufacturer). In the context of lifespan legal guarantees, the *Greek* experience is quite interesting because this country provides for a mandatory commercial guarantee. Article 5(4), Law 2251/94 provides for an obligation to provide a guarantee to consumers. The obligation is for a written guarantee and is imposed on the supplier of new durable consumer goods only. Importantly, this mandatory guarantee must be of a duration that is reasonable in the light of the possible lifespan of the goods. The duration of the guarantee in relation to such products must be reasonable in the light of the time period during which these goods are expected to remain contemporary (from a technological point of view) if this (latter) time period is shorter than their possible lifespan.

Most importantly, this legal obligation to provide a guarantee seems to go a long way towards introducing a lifespan legal guarantee. Indeed, as is recognized in the literature,⁴⁷ if the supplier omits to provide the guarantee required under Article 5(4) for the case of new durable consumer goods, such guarantee will be deemed as existing or being in force by operation of the law. Moreover, by virtue of Article 556, Greek Civil Code, the mandatory commercial guarantee of Article 5(4) has the effect of dramatically extending the two-year period of the legal guarantee. In the context of the mandatory commercial guarantee, the two-year period is only a period within which consumers must invoke their rights *after a problem becomes apparent* rather than a period of supplier liability; liability exists during the whole of a period that is reasonable taking into account the possible lifespan of the goods.

⁴⁷ Mpehlivanis A (2005) Articles 4, 4a, 5 Secondary Aspects of the Law of the Sale of Consumer Goods, in Alexandridou (ed.), Consumer Protection Law, Nomiki Bibliothiki Publications, 2015, p.434 (in Greek).

It could also be said that the legal obligation to provide a commercial guarantee entails much stronger protection for consumers than the legal guarantee does. Indeed, commercial guarantees are guarantees of good functioning in general. It is immaterial whether a problem with the functioning of the goods stems from a problem (or lack of conformity) existing at the time of delivery, as is required in the case of the legal guarantee.⁴⁸ As a result, the consumer is not burdened with the onus of proving that the problem or defect existed at the time of delivery in order to successfully invoke his or her rights under the mandatory commercial guarantee.

There is nothing comparable to the Greek commercial guarantee of the supplier in other Member States. Germany transposed the rule of Art. 6 CSD and the definition of the CRD to the sales law of the BGB.

In *Ireland* voluntary guarantees have been regulated since the Sale of Goods and Supply of Services Act 1980 (ss.15-19). The provisions contain minimum information requirements and rules about the enforceability of guarantees. Importantly, pursuant to this statute, there is no requirement to provide a guarantee; guarantees remain voluntary in Ireland. The provisions of the Sale of Goods and Supply of Services Act 1980 on guarantees go beyond the CSD. As well as the guarantee being enforceable against the manufacturer/offeror (s.19), the guarantee can also be enforced by the consumer against the seller (s.17). Accordingly, where the seller of goods delivers a guarantee to the buyer, howsoever it is delivered, the seller is liable to the buyer for the observance of the terms of the guarantee, unless the seller has expressly excluded himself from such liability at the time of delivery of the goods. This provision does not appear to have caused any difficulties for sellers in Ireland in practice, and it affords consumers a remedy against a person who may be more proximate to them.

In *Iceland*, Article 6 of the CSD has been adopted by Article 16a and 16b of Act 57/2005 on the surveillance of commercial practices and marketing. It does not include a rule that requires the seller to give such a guarantee. However, Art. 16a states that a declaration of warranty may be given provided it grants the receiving party more extensive rights than he holds according to the applicable law.

In the *Netherlands*, voluntary guarantees are dealt with in Art 7:6a of the Dutch Civil Code. The provision goes beyond Art 6 of the CSD in one respect, namely that it applies also to guarantees that can only be obtained if the consumer pays for them.⁴⁹

In *Norway* there is no rule requiring commercial guarantees. Also in *Portugal*, commercial guarantees are only voluntary.

Sweden has not implemented the definition of a guarantee from Art. 1.2(e) CSD. 21 § of the Consumer Sales Law which describes the effect of a guarantee. A guarantee or a similar undertaking will have effect so that it guarantees the product's function throughout the warranty period. It means that each defect during the warranty period shall be deemed to constitute defects in the product. The warranty definition in Swedish law is considered wider than the Directive. A guarantee under Swedish law can also trigger sanctions other than those listed in the Directive, such as damages.⁵⁰

In the *United Kingdom*, Regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002 implements Art 6 of the Directive into UK law. Reg 15(1) stipulates that:

⁴⁸ Mpehlivanis A, 2015, p.427.

⁴⁹ See the parliamentary proceedings: TK 2000-2001, 27 809, nr. 6, p. 3.

⁵⁰ See proposition 2001/02:134 p. 128.

"Where goods are sold or otherwise supplied to a consumer which are covered with a consumer guarantee, the consumer guarantee takes effect at the time the goods are delivered as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising."

This suggests that UK law does not provide traders with an obligation to give consumers guarantees and therefore offers no further protection than the directive's voluntary guarantee provision. However, whilst there is no obligation to provide a guarantee, if a trader chooses to do so this will become a contractual obligation and will be legally binding upon them. This is also restated in s 30(3) of the Consumer Rights Act 2015.

1.3.4 Producer's commercial guarantee model

We recommend adopting an additional responsibility for the lifespan functioning of technical products of the producer, which should be based on the commercial guarantee provision of Article 6 of the current CSD (respectively Article 15 of the proposal for the Online Sales Directive). The producer of a technical product shall be obliged to inform the consumer about the minimum lifespan to be expected of the good and give a commercial guarantee for the fitness of the good during the period he indicated in his information. Our recommendation has the advantage of legal certainty: consumer, producer and seller know in advance exactly how long the guaranteed lifespan will be.

We do not recommend a minimum lifespan guarantee. But there must be a requirement to provide information if the producer does not provide a commercial guarantee. We suggest an information duty only - the main reason being that technical goods are too different from one another for a uniform period to be feasible. There may even be products with a lifespan of less than two years. As a result, determination of individual product lifespans must be left to the legislation of specific groups of products, particularly within the framework of the Ecodesign Directive (see Chapter 2). A general legal instrument such as the CSD and its successor is not suitable for that purpose because too many exemptions would have to be inserted. If no specific legislation within the frame of the Ecodesign Directive exists, it is the producer who can and must give a commitment on the duration or length of the lifespan, or alternatively provide the consumer with an explicit statement that he will refuse any commitment. The producer shall also be free to express the lifespan either in terms of time (e.g. "three years") or in terms of intensity of use (e.g. "25,000 cups of coffee"), as ever more household goods are becoming equipped with software which is able to control the intensity of use.

Pending results of a survey, we believe that no producer has an interest in explicitly stating that no lifespan is guaranteed and that as a result he will be incentivised to guarantee at least a minimum lifespan. The duty to inform about not having a guarantee will "nudge" him to give such a commitment.⁵¹

This recommended producer commercial guarantee model solution takes into account the interest of producers for whom such an obligation is new. The introduction of a mandatory minimum lifespan guarantee for all technical products may be examined in a future review of the Online Sales Directive. The proposal does not provide for a review as other Directives do. We recommend amending a review provision similar to Art. 30 CRD. In a recital to this Article it could be mentioned that the review should consider a mandatory commercial minimum lifespan guarantee.

⁵¹ 'Nudging' is regarded as an advanced type of legislation, see Sunstein, C., *Nudging: A very short guide*, Journal of Consumer Policy 37 (2014) 583 et seq.

A definition of “producer” may refer to the Product Liability Directive, which provides for a definition in Art. 3, including the importer.⁵² Not every producer, but only producers of technical products shall be liable according to the model presented here, at least in a first step. A definition of “technical products” can be found in existing legal instruments, in particular in the Ecodesign Directive (EDD). The EDD currently provides for the term of “energy-related product”, which according to Article 2 no. 1 means:

“any good that has an impact on energy consumption during use which is placed on the market and/or put into service, and includes parts intended to be incorporated into energy-related products covered by this Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.”

We do, however, recommend in Chapter 2 an extension of this definition.

An alternative is the definition of electric and electronical equipment in Art. 3 No. 1 lit. a of the Waste Electrical and Electronic Equipment Directive (WEEE).⁵³

The consumer must be informed in the right place at the right time. We recommend that the proposed regulation shall refer to Art 7 of the Unfair Commercial Practices Directive (UCPD),⁵⁴ according to which information has to take place when the consumer needs it “to take an informed transactional decision.”

Already according to existing law (Article 6 CSD, cf. also Article 15 of the proposal of the Online Sales Directive), the producer has to inform the consumer that the commercial guarantee does not affect his legal rights against the seller. The information shall additionally include information whether the guarantee is shorter, exactly the same, or longer than the limitation period for the legal guarantee.

In the following Chapter we will discuss extensions of the scope of the Ecodesign Directive to aspects other than energy-related products. In that case, the model which is explained here, would also be applicable to such other products.

For details concerning how to provide information about lifespan, the Energy Labelling Directive could serve as a model.⁵⁵

The rights granted to consumers by the guarantee, shall follow the existing rules on commercial guarantees, which is to say that the guarantor is obliged to reimburse the price paid or to replace the goods if they do not meet the specifications with regard to the lifetime. If the producer fails to inform the consumer about the lifespan, he should be liable to the consumer to the same extent as if he were the seller. This shall “nudge” him to fulfil his information duties.

1.3.5 Conclusion

The proposal of the Online Sales Directive could be amended by a new Article 15a as follows:

⁵² Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ no. L 210 of 7.8.1985, p. 29.

⁵³ Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), OJ No. L 397 of 24.7.2012, p. 38.

⁵⁴ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business to consumer commercial practices in the internal market, OJ No. L 149 of 11.6.2005, p. 22.

⁵⁵ Directive 2010/30/EU of the European Parliament and the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ No. L 153 of 18.6.2010, p. 1.

Commercial guarantees for lifespan

1. The producer of a technical product shall

(1) guarantee to the consumer the fitness of the product for such foreseeable minimum lifespan as is normal in goods of the same type, and shall indicate the duration of this lifespan, or

(2) clearly indicate that he does not guarantee the fitness of the product during its lifespan.

This information shall be made available to the consumer at the time where he takes an informed transactional decision. The producer shall inform the consumer whether the guaranteed lifespan is shorter or longer than the limitation period according to Article 14. Article 15 [commercial guarantees] is applicable.

2. If the producer does not fulfil his obligations according to no. 1, he has the same obligations to the consumer as the seller.

2 ECODESIGN DIRECTIVE

KEY FINDINGS

- The recital to the Directive to include a reference to lifespan guarantees as a measure to be adopted as part of a circular economy approach.
- Insertion of an article specifically including lifespan guarantees in the implementing measures for product groups.
- Extension of the scope of the Directive from energy-related products to include on a transitional basis all products with significant environmental impacts and potential for environmental improvement.
- Progressive reduction of the threshold criteria to trigger the requirements of the Directive.
- Adaptation of methodology to implement a lifespan measure.
- Requirement for information to include reference to conformity measures for lifespan guarantees.
- Requirement for information to be included to indicate that conformity measures for lifetime guarantees does not affect consumer rights under private law.
- Adapt methodology to review the adoption of lifespan guarantees under a life cycle approach to allow flexibility to apply for derogations from the Directive where a new product will result in greater resource efficiency.
- Consideration to be given to enforcement and compliance needs.

Chapter 2 examines the potential for using the Ecodesign Directive to promote a longer lifetime for products so as to be consistent with the proposed lifespan guarantees under the Consumer Sales Directive. It follows the European Parliament report: 'A Longer Lifetime for Products: Benefits for Consumers and Companies',⁵⁶ the European Commission Communication: Ecodesign Working Plan 2016-2019,⁵⁷ and the EU Action Plan on a Circular Economy,⁵⁸ and makes specific recommendations for amending the Ecodesign Directive to achieve the objectives of lifespan guarantees under the Consumer Sales Directive.

It asks the question: **can the Ecodesign Directive be used as a vehicle for the implementation of lifespan guarantees on products in accordance with proposals set out and described above⁵⁹ in the Consumer Sales Directive?** The report considers the genesis of the Directive, the current state of play in respect of implementing measures, the potential benefits and weaknesses in including durability issues in the implementing measures for product categories, the possibility of linking lifespan consumer guarantees were

⁵⁶ Montalvo, C, Peck, D, Rietveld, E, *Longer Lifetime for Products: Benefits for Consumers and Companies*, IP/A/IMCO/2015-11, European Parliament, Policy Department A: Economic and scientific policy, Brussels, 2016. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU\(2016\)579000_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf).

⁵⁷ European Commission, *Communication 'Ecodesign Working Plan'* COM(2016) 773 final, Brussels, 30.11.2016. See also BIO by Deloitte, Oeko-Institut and ERA Technology, *Preparatory Study to establish the Ecodesign Working Plan 2015-2017 implementing Directive 2009/125/EC – Executive Summary*, European Commission, DG ENTR, 2015.

⁵⁸ European Commission, *Communication Closing the loop - An EU action plan for the Circular Economy* COM(2015) 614/2 adopted on 2.12.2015.

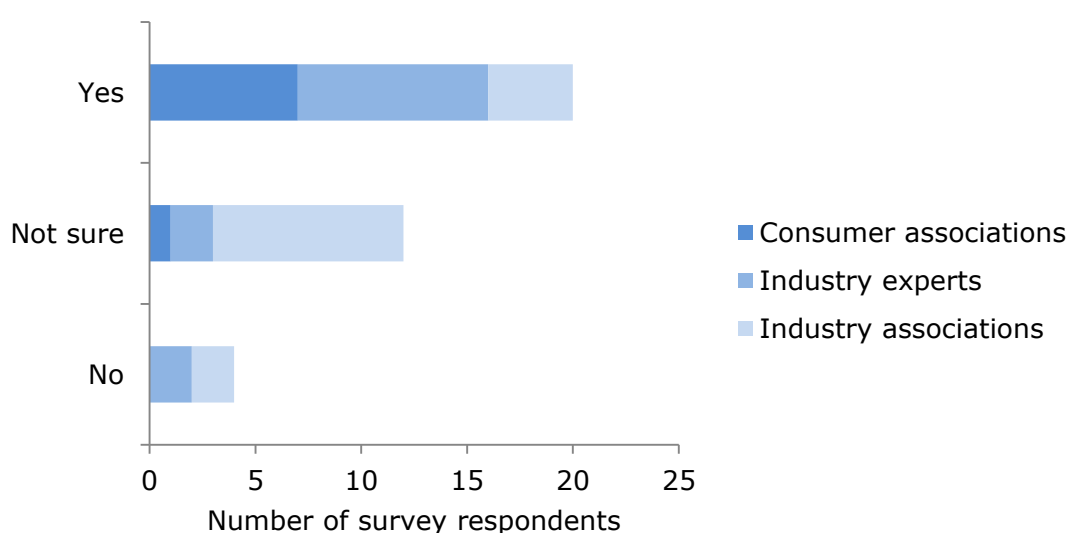
⁵⁹ See Chapter 1 of this report.

they to be introduced through the Consumer Sales Directive into the implementing measures, and questions concerning their conformity and enforceability. It also incorporates responses from a limited survey of industry and consumer groups together with experts (See Annex for brief details of the survey).

2.1 Introduction

More than half (56 %) of stakeholder survey respondents agree that the Ecodesign regulations are the best way of improving the environmental performance of products, with only a minority (11 %) disagreeing and the remaining respondents (33 %) uncertain. Of those respondents that disagreed with the statement, their reasons included that it is an effective way for some product categories, but not all, and that other regulations are better suited for these other products.

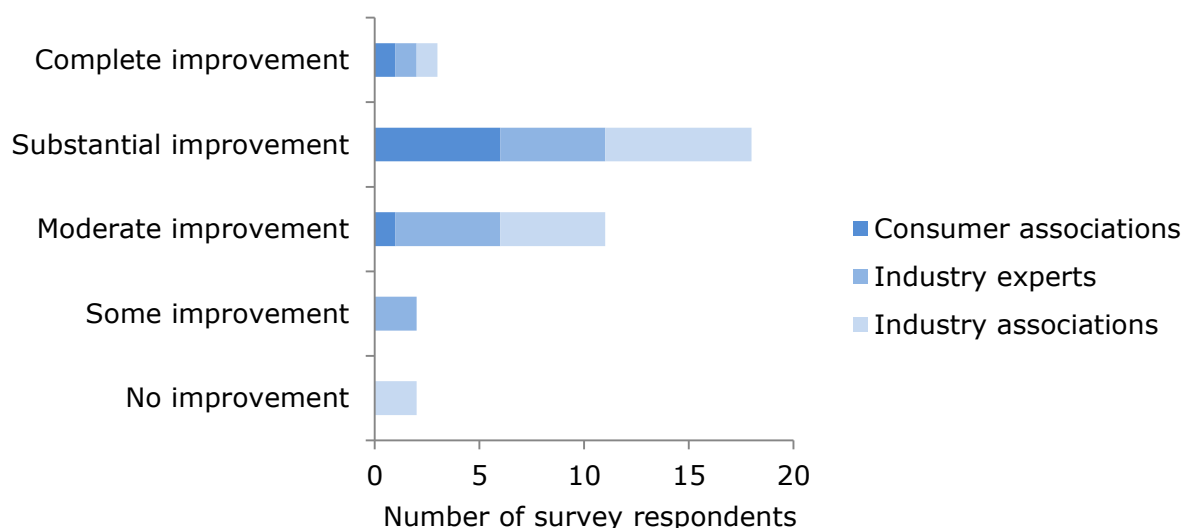
Figure 1: Response to survey question: “Are the Ecodesign regulations the best way of improving the environmental performance of products?”



Source: iff survey.

Additionally, as shown in Figure 2, most respondents (94 %) think the Ecodesign regulations are currently already improving the environmental performance of products to some extent, with most (81 %) perceiving the regulations as having moderate or substantial improvement. Only some (6 %) of respondents consider the regulations to have no effect.

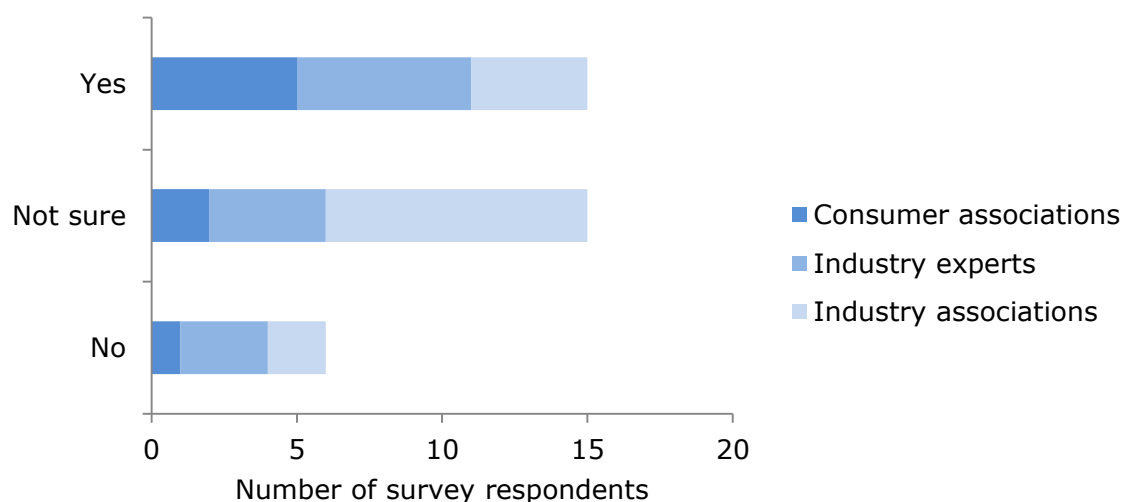
Figure 2: Response to survey question: "Do you think the Ecodesign regulations are currently improving the environmental performance of products?"



Source: iff survey.

Despite most stakeholder respondents considering that the regulations are improving environmental performance, there are still questions regarding their effectiveness (Figure 3). An equal amount of the total respondents consider the regulation to be effective (42 %) or are uncertain of its effectiveness (42 %). Only across the surveyed consumer associations, more than half (63 %) considered the regulations to be effective. The main reason to which ineffectiveness was attributed was the focus on energy efficiency. While one respondent summarised this issue with the statement "It does not require eco-design, just energy-design", another respondent added that there is "little or no concern on biodiversity materials use, water-use, and social fairness". The main reasons given for uncertainty regarding the effectiveness were lack of compliance in certain areas and that standards were only effective for particular product groups.

Figure 3: Responses to survey question: "Do you think the implementing Ecodesign regulations as they current stand are working effectively?"

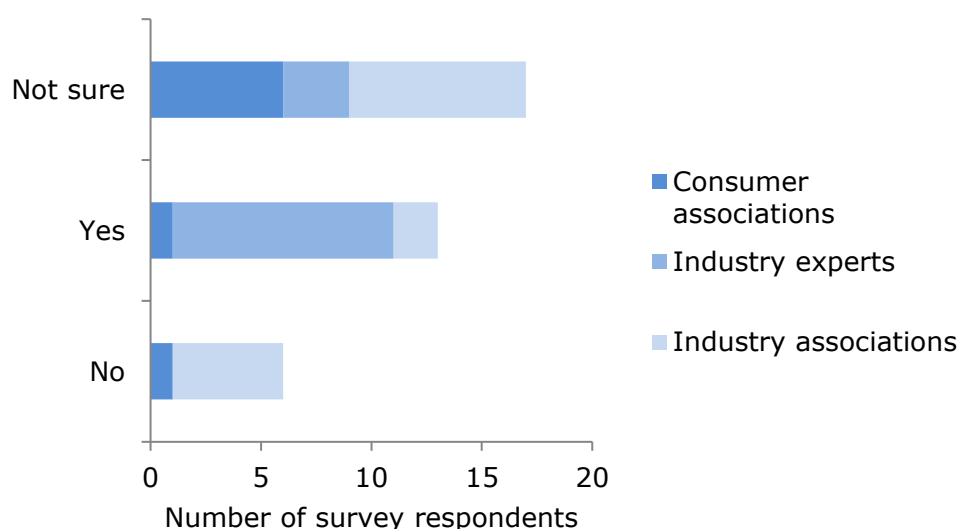


Source: iff survey.

The Ecodesign Directive already has scope to allow the implementing measures to take durability of a product into account. This is currently formulated in broad terms of resource efficiency. As Recital 10 of the Preamble states, 'Improving the energy and resource efficiency of products contributes to the energy supply and to the reduction of the demand on natural resources which are preconditions of sound economic activity and therefore sustainable development'.⁶⁰ Further, Part 1 of Annex 1 to the Directive lists a range of parameters which expressly include 'extension of lifetime as expressed through: minimum guaranteed lifetime, minimum time for availability of spare parts, modularity, upgradeability, reparability'.⁶¹ However, to date, the implementing measures have focussed on energy saving – possibly because that was the original focus of the first iteration of the Directive and because these are easily measurable.

As shown in Figure 4, almost half of the stakeholder survey respondents are not certain (47 %) that it is feasible to measure product durability, but more than a third (36 %) do think it is feasible, and just a sixth (17 %) do not think it is feasible. Most industry experts (77 %) consider it feasible, with the remainder unsure; more than half the industry associations surveyed (53 %) are uncertain, with 38 % stating it is not possible and the remaining 13 % stating that it is possible.

Figure 4: Responses to question: "Is it feasible to measure product durability?"



Source: iff survey.

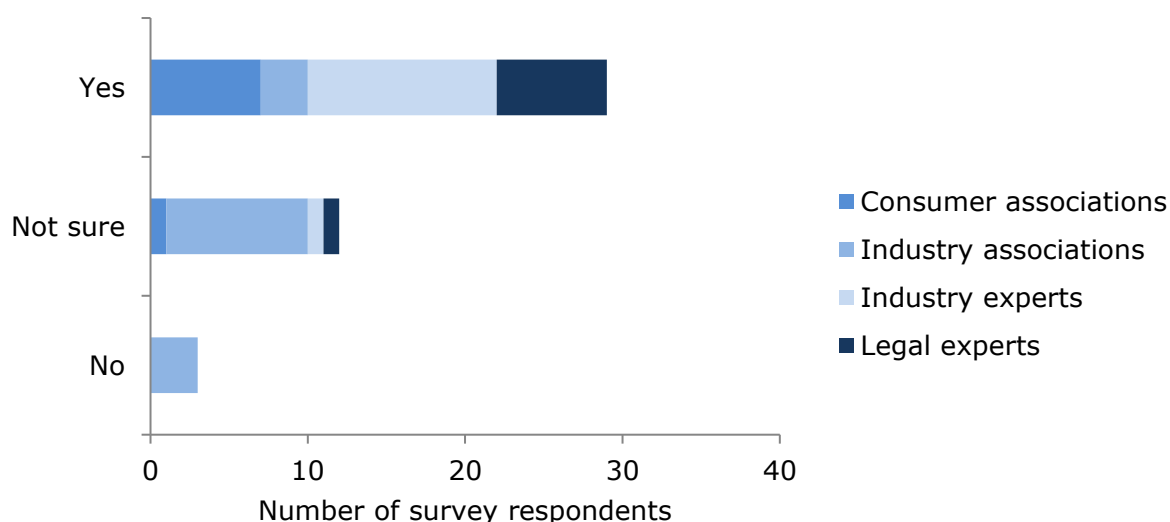
Most of the stakeholder survey respondents (61 %) agree that the Ecodesign regulations can be adapted to incorporate a lifespan approach (Figure 5). In particular, most consumer associations (88 %) and industry experts (92 %) agree, with the remainder unsure. Across stakeholder participants, only 20 % think it is possible, with the same number considering it impossible, and the remaining respondents uncertain (60 %). The reason given for disagreeing is that it depends on the product – ventilation systems are given as an example of a system that is too complex, while certain construction products are stated to have a lifespan of more than 50 years for which a lifespan guarantee makes no sense. Legal experts

⁶⁰ Recital 10 of the Ecodesign Directive 2009/125/EC.

⁶¹ Annex 1, Part 1(i) of the Ecodesign Directive 2009/125/EC.

are in agreement with this general trend, with 88 % stating that the approach can be incorporated.

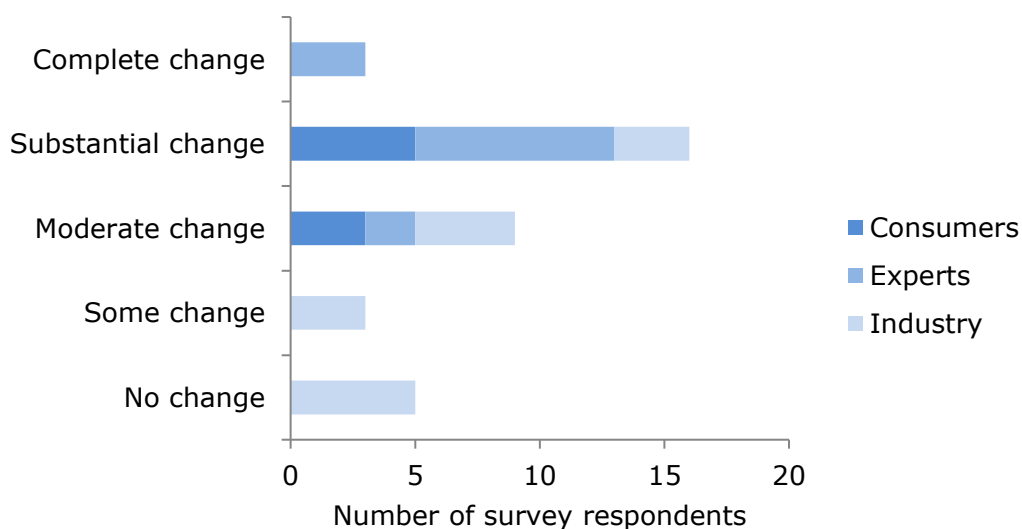
Figure 5: Responses to question: "Could the Ecodesign regulations be adapted to incorporate a lifespan approach?"



Source: iff survey.

Figure 6 shows that most stakeholder respondents expect a lifespan approach would moderately (25 %) or substantially (44 %) change product design. No industry association respondents thought it would completely change, with a third (33 %) of industry association respondents considering a lifespan approach to have no change. In contrast, no consumer associations or expert respondents expect the lifespan approach to have no or only some change, with most of both groups (63 % and 62 % respectively) expecting substantial change. Reasons for responses include that it depends on the ambition and particular criteria of the approach adopted.

Figure 6: Responses to survey question: "Do you think that a lifespan approach would change product design?"



Source: iff survey.

2.2 Why the implementing measures under the EDD focus on energy efficiency

The Ecodesign Directive was designed to promote the development of all products which were related to energy use in a manner which ensured their energy efficiency in terms of their environmental impact throughout their life cycle. It was aimed at the security of energy supply and the reduction of emissions of greenhouse gases and other pollutants without interfering with free movement of goods and the functioning of the internal market. Its predecessor, the original Energy-Using Products Directive,⁶² was set up directly further to the Integrated Product Policy (IPP) initiative⁶³ and the related policy and strategy developments.⁶⁴ The Sustainable Consumption and Production Plan and Sustainable Industry Policy Action Plan⁶⁵ provided a framework integrating a 'mutually-enforcing set of existing and new policy instruments and initiatives (both mandatory and voluntary) to promote resource efficient and eco-friendly products and raise consumer awareness'.⁶⁶ This Energy-Using Products Directive was the first piece of legislation which addressed the environmental performance of energy using products across their life cycle.⁶⁷ The aims of the Directive were to harmonise the internal market and also to control imports into the EU with the objective of controlling the design of products emanating outside the single market zone. The limitation of the Directive to energy using products was intended with such products as washing machines highlighted as likely key objects for the legislation to address.⁶⁸

The Working Plan 2009-2011⁶⁹ for the original Energy-Using Products Directive 2005/32/EC⁷⁰ specified that the Directive was a key component of the EU's policy for improving the energy

⁶² Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products OJ L191/29.

⁶³ European Commission, Communication *Integrated Product Policy – building on environmental Life-Cycle Thinking* COM (2003)302 final, 18 June 2003. The 7th Environmental Action Programme (Decision of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" 2012/0337 (COD)) no longer explicitly refers to IPP but instead deals specifically with the ecodesign legislation addressing production and consumption patterns and the need to improve the environmental efficiency of products.

⁶⁴ European Commission, Communication *Sixth Community Environment Action Programme*, COM (2001) 31 final; European Commission, Communication *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan* COM (2008) 397 final, 25 June 2008.

⁶⁵ European Commission, Communication *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan* COM (2008) 397 final, 25 June 2008.

⁶⁶ European Commission, *Staff Working Document Accompanying the Report from the Commission to the Council, the European Parliament, the European and Social Committee and the Committee of the regions On the State of Implementation of Integrated Product Policy* COM(2009)693 final 21 December 2009.

⁶⁷ Directive 2005/32/EC (n7). See Malcolm, R., *Integrated Product Policy: Products and their Impact on Energy*, 2011, Volume 3, Issue 1 (2011) *International Journal of Law in the Built Environment* 48, for a detailed description of this history.

⁶⁸ See the European Commission press release: "Commission welcomes the adoption of the directive for environmentally friendly design of energy-using products", IP/05/427, 13/04/2005; Peterson, S., *A Sectoral View of Climate Change Policy Development in IEA Nations*, 2007, *International Energy Law and Taxation Review* 1, 1-11.

⁶⁹ European Commission, Communication *Establishment of the Working Plan for 2009-2011 under the Ecodesign Directive*, COM (2008)660 final, 21 October 2008.

⁷⁰ Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council [2005] OJ L 191/29 amended by Directive 2008/28/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using products, as well as Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC, as regards the implementing powers conferred on the Commission [2008] OJ L 81/48.

and environmental performance of products on the internal market. Its potential to cover other environmentally significant products, namely all energy-related products, was highlighted in the Action Plan on Sustainable Consumption and Production and Sustainable Industrial Policy (the SCP/SIP Action Plan).⁷¹ According to the Commission, the Ecodesign Directive can be considered the legislative cornerstone of the SCP/SIP Action Plan.⁷² As a result, the scope of the EuP Directive was widened in 2009 to include energy-related products and was recast as Directive 2009/125/EC (the Ecodesign Directive) in order to include all energy-related products into the legal framework.⁷³ "Ecodesign" is the 'integration of environmental aspects into product design with the aim of improving the environmental performance of the product throughout its whole life cycle'.⁷⁴

The key principles of the amended and extended Ecodesign Directive did not change from those expounded in the earlier directive and continue to focus on the identification of environmental aspects at the product design stage – the very embodiment of the preventive principle. Now compulsory minimum Ecodesign requirements for energy-using products (such as different types of electrical appliances including boilers, water heaters, computers, televisions or industrial fans), can be applied to all energy-related products (except vehicles for transport⁷⁵) and cover all energy sources. This emphasis on energy efficiency,⁷⁶ while producing substantial savings, has been a limiting factor in the application of the Directive to issues of durability and is one of the issues addressed by this study.

The recast Ecodesign Directive is part of a regulatory framework which addresses energy consumption from the perspective of mandatory requirements, standardisation and ecolabelling. It deals with whole life as opposed to end of life and a guaranteed lifespan approach sits easily within its framework. Further, the new proposals for an improved energy efficiency directive contemplate, in addition to improved design for energy efficiency under the Ecodesign Directive, a more 'systematic focus on elements such as durability, reparability and recyclability in developing new Ecodesign measures and in-depth assessment of ICT products such as mobile/smart phones'⁷⁷ which will be launched to explore their circular economy potential.⁷⁸

⁷¹ European Commission, Communication *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*, COM (2008) 397 final, 25 June 2008.

⁷² European Commission, *Staff Working Document Accompanying the Report from the Commission to the Council, the European Parliament, the European and Social Committee and the Committee of the regions On the State of Implementation of Integrated Product Policy* COM(2009)693 final 21 December 2009.

⁷³ European Commission, *Staff Working Document Accompanying the Report from the Commission to the Council, the European Parliament, the European and Social Committee and the Committee of the regions On the State of Implementation of Integrated Product Policy* COM(2009)693 final 21 December 2009. This Directive has, in fact, gone through three incarnations culminating in the current Ecodesign Directive which provides the framework for setting ecodesign requirements for energy-related products.

⁷⁴ Article 2.23 of the EDD.

⁷⁵ The Directive does not apply to means of transport for persons or goods (Article 1.3).

⁷⁶ European Commission, Fact Sheet, *Putting energy efficiency first: consuming better, getting cleaner*, Brussels, 30 November 2016; European Commission, Communication *Establishment of the Working Plan for 2009-2011 under the Ecodesign Directive*, COM (2008)660 final, 21 October 2008; Sutherland, E. *Regulating the energy efficiency of ICT equipment*, International Energy Law Review, 8, 2009, pp.282-284; European Commission, *Energy efficiency – Ecodesign of Energy using Products*, Directorate-General for Enterprise and Industry website; and European Commission *Your Future: How Ecodesign can help the environment by making products smart* Directorate-General for Enterprise and Industry.

⁷⁷ European Commission, Fact Sheet, *Putting energy efficiency first: consuming better, getting cleaner*, Brussels, 30 November 2016.

⁷⁸ European Commission, Communication *Clean Energy For All Europeans*, COM(2016) 860 final, Brussels, 30.11.2016.

Thus it is clear that the Ecodesign Directive already has the capability of requiring implementing measures for product groups to include issues affecting resource efficiency and specifically lifespan guarantees. However, in practice the product groups selected have been those which impact primarily on energy use and the implementing measures have been mainly restricted to savings in energy usage. So, it is recommended that the power to adopt lifespan guarantees in implementing measures should be expressly stated within the Directive.

Recommendation

Retain existing remit of Ecodesign Directive with extension added to cover lifespan guarantees on products.

Add Recital 'X',

whereas

'the development of a circular economy requires such matters as reuse, recycling and repair to be facilitated in the development of products, a simple and highly resource efficient approach is to extend the initial lifetime or first use of a product. The use of lifespan guarantees within the Ecodesign requirements for a product will capture this approach.'

2.3 Should the lifespan guarantee be applied to energy-related products only?

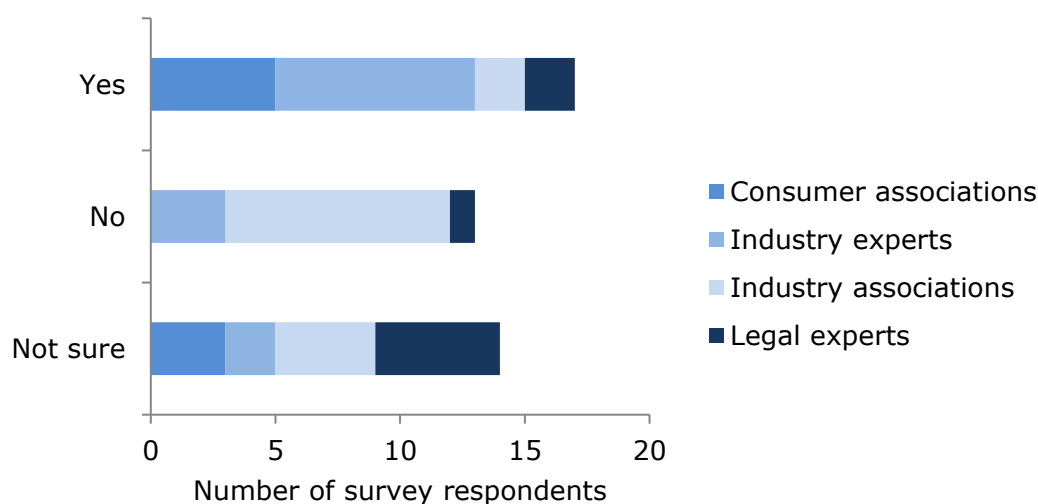
It is clear, as discussed in the previous section that the policy of the European Union is to manage the impact of products on the environment in a manner which promotes a circular economy and to go beyond a focus on their impact on energy usage and efficiency. Energy-related products are a significant contributor to the overall consumption of energy and other natural resources and controlling their design has a potentially high impact for limiting the exploitation of resources and the use of energy.⁷⁹ While the Ecodesign Directive is actually wide enough to cover a broader range of environmental impacts, it can only apply to energy-related product groups. This raises the question whether the scope of the Directive should be broadened so that lifespan guarantees (and other measures relating to resource efficiency) can be applied to all products which have a significant environmental impact and potential for environmental improvement. This would enable them to achieve both energy and resource efficiency together with environmental improvements within a circular economy. This is therefore one area where an amendment to the Directive to make clear that its scope is not limited to energy-related products but can extend to all products is a necessary measure and that implementing measures can include where appropriate, lifespan guarantees.

From our survey, and as shown in Figure 7, 42 % of all respondents support this in that they agree that the lifespan requirement should apply to all categories of products, however this was closely followed by 33 % respondents who think it should not. The remainder (25 %) are uncertain. The majority of consumer associations surveyed (63 %) and experts (62 %) thought it should apply to all, while the majority of industry associations surveyed (60 %) thought it should not apply to all. The reasons given for not thinking lifespan categories should apply to all products include: doubt that it can be enforced, not useful for certain products, particularly long-life products which are already maintained, upgraded and repaired without any legal requirements but as a result of customer requirements, and some products

⁷⁹ European Commission, Communication *Establishment of the Working Plan for 2009-2011 under the Ecodesign Directive* COM 660 final, 21 October 2008.

customers want to change even though they still work (e.g. electronics). Out of those that do think that lifespan agreement should apply to all categories, most of them highlight that different lifespan requirements are required for different product categories. More than half (63 %) of the legal experts surveyed are uncertain whether lifespan should apply to all categories. [So across survey respondents, there is a close spread. This might indicate the need for a careful transitional period extending the remit of the Ecodesign Directive gradually to more product groups.

Figure 7: Responses to survey question: "Should the lifespan requirement of the Ecodesign implementing regulations apply to all categories of products?"



Source: iff survey.

Recommendation

Extend application of the Ecodesign Directive on a transitional basis to all product groups having a significant environmental impact on energy or resource consumption:

Amended definition Article 2:

'Products having a significant environmental impact' means any good that has an impact on energy or resource consumption during manufacture or use which is placed on the market and/or put into service, and includes parts intended to be incorporated into such products covered by the Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.

2.4 Should the threshold for products falling under the EDD be reassessed if lifespan guarantees are implemented?

Indicative of the commercial nature of the Ecodesign Directive is its application to products which have significant sales and trade in the EU and where the ecodesign requirements are cost-effective. The focus was on those domestic appliances which are traded extensively within the EU (more than 200,000 units per annum),⁸⁰ which have a significant environmental

⁸⁰ Ecodesign Directive, Article 15(2)(a) 'the product shall present a significant volume of sales and trade, indicatively more than 200 000 units a year'.

impact,⁸¹ and significant potential for improvement in terms of environmental impact.⁸² Where a product meets the above criteria, it is covered by implementing measures or by a self-regulation measure in accordance with Article 15(3)(b).⁸³ Bearing in mind the size of the EU market where the number of households in the EU, according to 2015 figures, show around 219 million households in EU-28,⁸⁴ making the European market larger than that of North America, the threshold is a limiting factor. Further there is the impact of the Directive to consider on imports into the EU. Given the strength, breadth and power of the EU market this study suggests a progressive reduction in the threshold for application of the Ecodesign Directive.

Recommendation

Implement progressive reduction in the threshold figure of 200,000 units sold per annum for application of the Ecodesign Directive.

2.5 Should the measures for conformity and enforcement under the EDD be reviewed if lifespan guarantees are implemented?

When a product is covered by a measure under the Ecodesign Directive, Article 3(1) also requires that it shall bear the CE (European conformity) mark. Article 5 requires a declaration of conformity with the measures to be issued by the manufacturer or authorised representative in the EU. Before placing a product on the EU market, a manufacturer or authorised representative must also carry out a conformity assessment procedure in order to ensure the product's conformity according to one of the systems mentioned in Annex IV or V of the Directive.⁸⁵ Once CE marked, a product can be placed anywhere on the EU market.⁸⁶ Furthermore, in accordance with the implementing measures, manufacturers will be obliged to provide certain information to consumers,⁸⁷ such as an ecological profile of the product describing the materials, emissions and waste associated with the product throughout its lifecycle, and a statement of the benefits of ecodesign and the role that consumers can play in the sustainable use of the product. If the product is being imported into the EU then Article 4 requires that these obligations fall on the importer – an important requirement which rolls out the effect of the Directive worldwide to all producers hoping to export products to the EU. The lifespan guarantee will also need to be included as information to consumers to enable them to trigger enforcement action should the product not conform with the lifespan guarantee.

Compliance and enforcement

Surveyed industry stakeholders currently state that compliance with the Ecodesign regulations is mainly achieved through voluntary agreements, with some of the respondents aware of some legal enforcement. The legal experts highlighted that enforcement is mainly administrative, though in most Member States surveyed there is also the possibility of criminal enforcement, but this often seems a less adopted enforcement method. Enforcement

⁸¹ Ecodesign Directive, Article 15(2)(b) '... as specified in the Community strategic properties as set out in Decision No 1600/2002/EC'.

⁸² Ecodesign Directive Article 16(2).

⁸³ Ecodesign Directive Article 15(1).

⁸⁴ Eurostat, *Household Composition Statistics*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Household_composition_statistics (accessed 8 December 2016).

⁸⁵ Ecodesign Directive, Article 8.

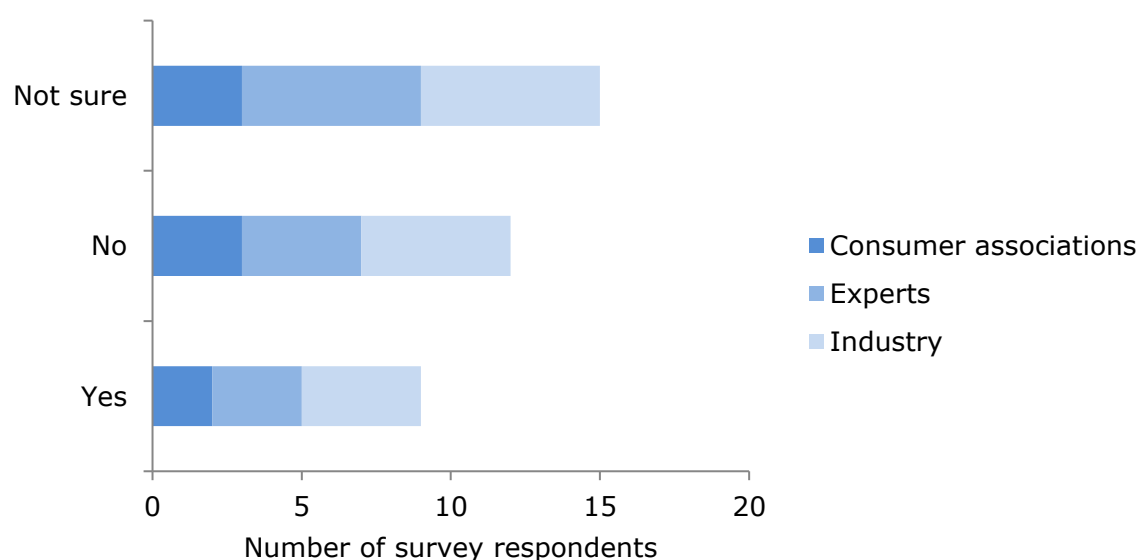
⁸⁶ Ecodesign Directive, Article 9.

⁸⁷ Ecodesign Directive, Article 14.

is delegated to particular government authorities in all the surveyed Member States. The sanctions for both administrative and criminal enforcement are fines, with administrative sanctions also including the option of restricting or banning sales of the concerned product. Market surveillance and enforcement action appears to have been relatively limited to date.⁸⁸

Only 25 % of stakeholder respondents think current enforcement methods are effective in ensuring all products comply with the Ecodesign regulations. Almost half (42 %) are unsure, with a third (33 %) considering the methods ineffective. Across all three stakeholder groups the general trend was that most were unsure with the least number of respondents considering the compliance methods effective.

Figure 8: Responses to survey question: "Is the current method of enforcement effective in making sure all products comply with the Ecodesign regulations?"



Source: iff survey.

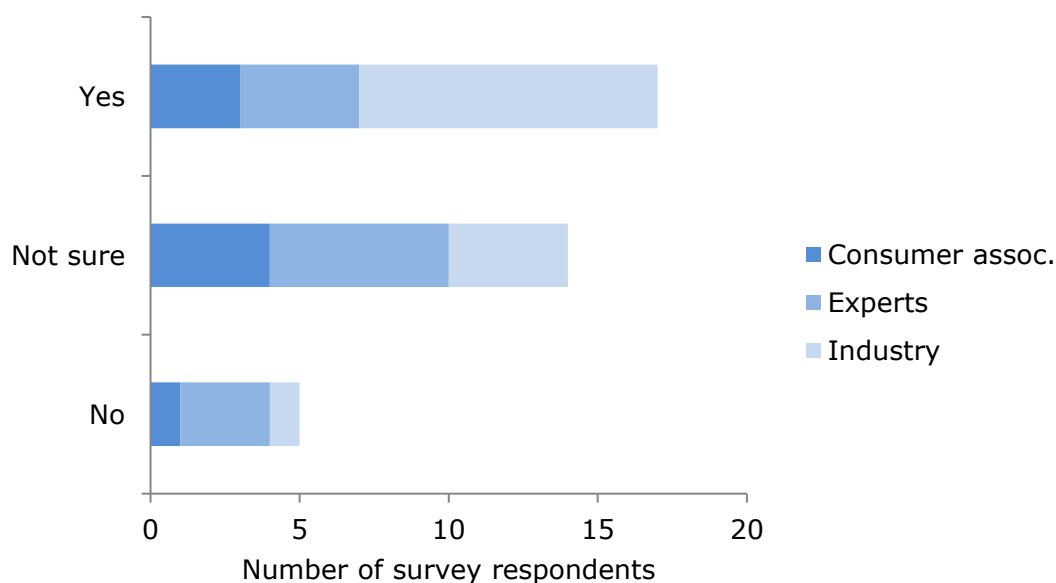
The desired form of compliance from the industry stakeholders' perspective is legal enforcement, with voluntary agreements and even a combination of both also featuring in respondents' perception of how compliance should be achieved. Legal experts differed in their recommendations for how a lifespan approach should be enforced: private enforcement, linking lifespan requirements with guarantees/warranty, technical inspections and controls. The general consensus is that market surveillance authorities should be able to enforce the lifespan requirements of the Ecodesign, with some also suggesting a role in this for consumer protection agencies.

Almost half (47 %) of stakeholder survey respondents expect that adapting the Ecodesign Directive to apply a lifespan approach would affect compliance, with many industry stakeholders (67 %) considering there would be change. Only 14 % of stakeholders surveyed

⁸⁸ CSES, Oxford Research, *Evaluation of the Ecodesign Directive – Final Report*, Sevenoaks, March 2012; the European Ecodesign Compliance Project, *Final Report*, 2015 <http://www.ecopliant.eu/wp-content/uploads/2012/10/Final-Publishable-Report.pdf> UK Department for Energy and Climate Change, *Post-Implementation Review of the Ecodesign for Energy-Related Products Regulations 2010* (Cm 9187), 2016; AREA, CECE, DIGITALEUROPE, EHI, EPEE, EVIA, LightingEurope, *Market Surveillance in Europe: Joint Industry Call for Action*, January 2015 http://www.lightingeurope.org/uploads/files/Market_Surveillance_in_Europe_-_Industry_Call_for_Action_-_January_2015.pdf; the CompliantTV project (www.complianttv.eu/eu/about-the-project/home) (all accessed 26.1.2017).

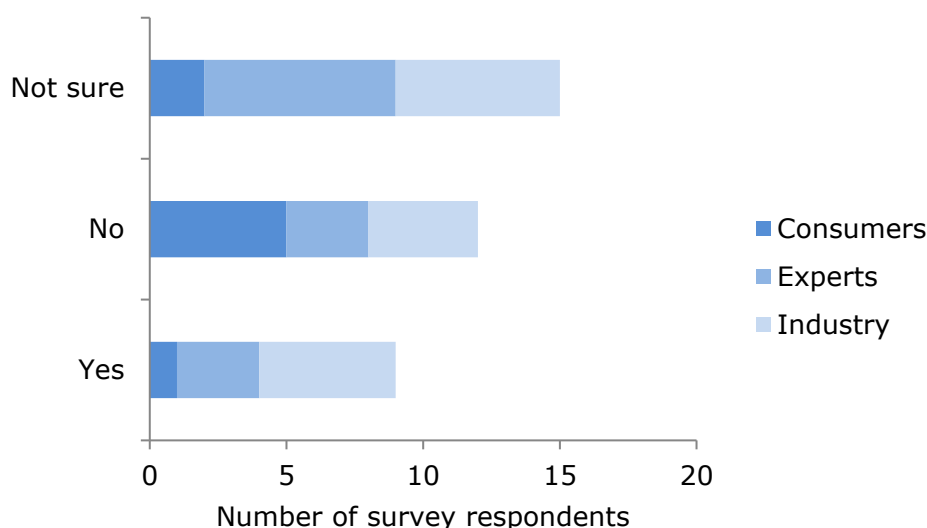
do not think compliance would be affected, and the remaining 39 % of respondents are unsure. Of those respondents that expect compliance to be affected or are unsure, most state that the lifespan approach is complicated, and that additional standards and guidelines (possibly for the different product groups) are needed before compliance can even be checked.

Figure 9: Responses to survey question: "Would incorporating a lifespan approach affect compliance?"



Source: iff survey.

Most stakeholder respondents (42 %) are uncertain whether current sanctions should change (Figure 8). Only in the consumer associations, 63 % stated that they should not change, while less than half across the expert (43 %) and industry (27 %) associations surveyed stated that sanctions should not change. A number of respondents stated the reason that sanctions should not change is because they are ineffective. When EDD legal experts from 9 countries were surveyed separately for their knowledge of enforcement, this small group of respondents either agree (38 %) or were unsure (62 %) whether the sanctions should remain the same.

Figure 10: Responses to survey question: "Should the sanctions remain the same as the current sanctions?"

Source: iff survey.

Other issues mentioned by respondents as to what would make the implementing Ecodesign regulations more effective include: more ambitious goals set; more awareness/communication; regular and timely reviews including quick implementations; extension of product groups (though one respondent interestingly said that the focus should ONLY be on energy product groups), as well as clearer definitions of product groups; monitoring of compliance.

It is recommended that enforcement should remain under the Ecodesign Directive with the market surveillance authority currently designated within the Member State. This is in addition to any private law remedies that the consumer may have under the Consumer Sales Directive.

Recommendation

Require the inclusion of the lifespan guarantee within the information made available to the consumer.

Insert

Article 14 Consumer Information

In accordance with the applicable implementing measure, manufacturers shall ensure, in the form they deem appropriate, that consumers of products are provided with

(c) the requisite information on the lifespan guarantee and information as to the market surveillance authority responsible for conformity together with information that this does not affect their rights under private law.

2.6 Should the methodology for implementing measures be reviewed with a view to adopting lifespan guarantees?

The Ecodesign Directive is a framework directive and, under Article 16(1), Working Plans must be prepared to roll out the ecodesign standardisation requirements to different product groups. This is a Directive which requires major planning in its implementation since the range of products to which it can eventually apply is huge. Following the Commission

Communication: *Establishment of the Working Plan for 2009 – 2011 under the Ecodesign Directive*⁸⁹ two Working Plans for the periods 2009-2011⁹⁰ and 2012-2014⁹¹ were developed, with the third Working Plan 2016-2019⁹² issued, after a delay, on 30 November 2016.

The process for regulating a product under the Directive is to undertake a preparatory study and an impact assessment conducted by external experts and the Commission with the aim of identifying cost-effective solutions to improve the overall environmental performance of the product. Implementing measures are eventually adopted by the Commission under the regulatory procedure with scrutiny. The impact assessment in relation to these groups is undertaken in accordance with the established Methodology for the Ecodesign of Energy-Related Products which includes statistics on potential energy savings coupled with the cost this will have on industry. Following that, a draft Commission Regulation is submitted to the Consultation Forum (comprising Member States' representatives and groups concerned with the product or product group such as industry, trade unions, traders, retailers, importers, environmental protection groups and consumer organisations).⁹³ Their role is to assist in defining the implementing measures, to examine market surveillance mechanisms and to assess voluntary agreements and other self-regulation measures. From there it will go to the Regulatory Committee (representatives of EU Member States) and then a draft Commission Regulation is formulated which is subject to the scrutiny of the European Parliament. An Ecodesign Working Group has also been set up which ensures harmonisation issues are kept to the forefront. This mechanism permits the consideration and inclusion of lifespan guarantees as one of the requirements and no change is foreseen as being necessary to accommodate this extension of the Directive. In fact, the extensive consultations taking place as part of the preparation for the implementing measures are perfectly suited for such a requirement to be debated and agreed. It would be necessary to ensure that consumer groups are particularly involved in this process to ensure information channels are open to consumers.⁹⁴ More of a problem is the time delay (it can take 4 years for this process) in terms of the impact of delay on manufacturers in bringing new products onto the market.

Recommendation

Make no change to the process of developing the implementing measures except to ensure that consumer groups are integrated into the consultation process for the development of implementing measures to increase transparency for lifespan guarantees.'

2.7 Should the parameters for the implementing measures be reviewed?

Provisions are contained in Annexes to the Ecodesign Directive which define the various parameters to be used for identifying an ecological profile for the product and then the process to be adopted to set the requirements in the implementing measure. So, as a

⁸⁹ European Commission, Communication on the *Establishment of the Working Plan 2009-2011* COM(2008) 660 final. In addition to the measures, 39 standardisation mandates have been launched for these product groups which have been dealt with by the European standardisation bodies: CEN and CENELEC.

⁹⁰ See fn above (COM(2008)660).

⁹¹ European Commission, Staff Working Document, *Establishment of the Working Plan under the Ecodesign Directive, '2012-2014 Working Plan* SW9(2012)434 final, 2012.

⁹² European Commission, Communication *Ecodesign Working Plan 2016-2019*, COM(2016) 773 final, 2016.

⁹³ EDD Article 18.

⁹⁴ Braithwaite, N., Densley-Tingley, D. and Moreno, M. A. *Should energy labels for washing machines be expanded to include a durability rating?*, 2015, PLATE conference. Nottingham Trent University, 17-19 June 2016.

framework directive, it establishes a process for the pursuant legislation. As part of the trend to using directly applicable means of transposition at EU level, all the legislation which contain the implementing measures have been in the form of regulations.

The first part of the framework process is to identify the significant environmental aspects of the product and these cover:

- (a) raw material selection and use;
- (b) manufacturing;
- (c) packaging, transport, and distribution;
- (d) installation and maintenance;
- (e) use; and
- (f) end-of-life, meaning the state of a product having reached the end of its first use until its final disposal.

For each phase of the life cycle, the following environmental aspects must be assessed where relevant:

- (a) predicted consumption of materials, of energy and of other resources such as fresh water;
- (b) anticipated emissions to air, water or soil;
- (c) anticipated pollution through physical effects such as noise, vibration, radiation, electromagnetic fields;
- (d) expected generation of waste material; and
- (e) possibilities for reuse, recycling and recovery of materials and/or of energy, taking into account Directive 2002/96/EC."⁹⁵

Other parameters to be used to evaluate the potential for improving the above environmental aspects include: characteristics of the product such as its weight and volume; use of recycled materials; consumption of energy and other resources; use of hazardous substances; extension of lifetime; waste generated and emissions. Further requirements include the supply of information relating to the manufacturing process and the information to be supplied to the consumer. This information requirement includes information on the characteristics of the product such as its energy efficiency and information on how to use the product to minimise its environmental impact. The burden then placed on the manufacturer is to undertake the life cycle assessment in order to identify those characteristics which can be influenced as part of the design of the product. The types of requirements which can be imposed include reduced consumption of resources at various stages of the life cycle (e.g. water consumption). With the introduction of lifespan guarantees the framework process needs to be amended to include the process for deciding on the length of the guarantee taking into account longevity and durability of the product. Durability may be defined as the ability of the component or product to maintain its functions and performance over its lifecycle.⁹⁶ This is the point where improvements in durability can be driven in the design of products and it is essential that this is a feature of the process. The lifespan guarantees are unlikely to be of the same length for each product so this will need to be individually decided

⁹⁵ EDD Annex 1.

⁹⁶ Ardente F., Mathieux F., JRC Technical Reports: *Integration of resource efficiency and waste management criteria in European product policies – Second phase, Report no. 3*. DG Joint Research Centre, 2012, <http://eplca.jrc.ec.europa.eu/uploads/ecodesign-Refined-methods-and-guidance-documents-final.pdf>.

for each implementing measure.⁹⁷ It is proposed therefore that the process should be amended to include such consideration.

Recommendation

Taking a lifecycle approach requires the implementing measures to include the expected lifespan of the product where deemed appropriate and determine the length of the guarantee which will be applied to it.

Product lifespan guarantees may also be a measure which is most effectively attached to individual products especially where they are complex.

Recommendation

Extend Ecodesign Directive to apply implementing measures to individual complex products as well as product groups.

2.8 Are there limitations which need to be recognised in applying lifespan guarantees?

The methodology for assessing lifespans for products or product groups needs to include the assessment of the following before the benefits of extended product durability can be fully assessed:

- Practical limits on lifetimes from current manufacturing methods
- Cost implications of changing product materials, components and manufacturing methods
- Innovation rates which could make lifetime products obsolete and inefficient
- Consumer buying habits and expectations
- Possible impacts of more durable products on their second life potential
- Availability and acceptance of appropriate standards, testing and compliance methods for enhanced durability⁹⁸

The balance to be struck is between the resource impacts of replacing the product and the reduced impacts of the new product throughout its lifetime. The measurement is complex entailing an examination of what the impact would be of continuing to use the old product and what the impact would be of the new product taking into account its production costs plus usage plus waste (i.e. lifetime costs). So, it is the lifetime environmental impacts of the old product (OLI) after production (OP) (the product is already in existence) against lifetime environmental impacts (NLI) including production (NP) (it has to be made) of the new product. (OLI-OP) v (NLI+NP). Two life-cycle assessments are required to achieve the values before a rational decision could be made. We argue that the methodology for the development of implementing measures for product groups needs to address these factors in order to ensure market acceptability and real environmental benefits.

⁹⁷ Dalhammar, C. (2016), *Industry attitudes towards ecodesign standards for improved resource efficiency*. Journal of Cleaner Production. 123, 155-166.

⁹⁸ European Commission, *The durability of products*, 2015. Luxembourg: Publications Office for the European Union; see also Dalhammar, C., Machacek, E., Bundgaard, A., Zacho, KO. and Remmen, A. *Addressing resource efficiency through the Ecodesign Directive: A review of opportunities and barriers*, 2014, Copenhagen: Nordic Council of Ministers.

As an EU approach, ecodesign principles must not interfere with the principles of the free movement of goods.⁹⁹ Trade and economic benefit are viewed as pluses of the Directive as the pressure for innovation can mean new products and therefore opportunities for profit¹⁰⁰. While, as considered below, one of the disadvantages of new developments is that this causes old products to become out-of-date and not 'the latest' in technological enhancement, this can be an economic and an environmental advantage.¹⁰¹ The new 'better' product¹⁰² may mean that the shelf life of the old product is reduced but the enhanced environmental performance of the new product may outweigh any disadvantage in this.¹⁰³ Only when the production and end of life stages have high impacts compared to use phase, is the more durable option preferred from both an economic and environmental point of view. Durability (i.e. extended lifetime) can result in environmental life cycle benefits for impact categories whose contribution depends mainly on the production phase, e.g. freshwater eco-toxicity and mineral, fossil and renewable resource depletion. Reduction of life cycle impacts is independent of the improved energy efficiency of replacing the product. For impact categories dependent on energy consumption during use phase (e.g. climate change), extending durability does not result in significant environmental benefits in respect of energy consumption. E.g. refrigeration appliances where a small improvement in energy efficiency can lead to a significant reduction of life cycle environmental impacts compared to durability. Two cases in which the more durable option is preferred from both an economic and environmental perspective is when production and end of life stages have very high impacts compared to use phase (e.g. very low energy consumption during the use phase) or when there is only a small increase in the energy efficiency.¹⁰⁴ This is an issue for longer lifetimes for products and one to be addressed in designing parameters for lifespan guarantees.¹⁰⁵

Recommendation

Adapt methodology to review the adoption of lifespan guarantees under a life cycle approach to allow flexibility to apply for derogations from the Directive where a new product will result in greater resource efficiency.

Other criteria for the development of implementing measures under the Directive include no significant negative impacts on the use of the product; no adverse effect to health, safety

⁹⁹ Art. 34 and 35 of the TEU– except the extent to which derogations are permitted under mandatory requirements (Case 37/83 *Rewe-Zentralen Landwirtschaftskammer Rheinland* [1984] ECR 1229 ('Cassis de Dijon') or Article 36); Barnard (n 61).

¹⁰⁰ See 'Siemens has set itself the target of making €40bn (£34.5bn) from its 'environmental portfolio' products in 2014, after meeting its 2011 target a year early.' Endsreport.com, 10 November 2010, 13:14.

¹⁰¹ Iraldo, F., Facheris, C. and Nucci, B. (2017) *Is product durability better for environment and for economic efficiency? A comparative assessment applying LCA and LCC to two energy-intensive products*, Journal of Cleaner Production. 140, 1353-1364; Dalhammar, C. (2014) *Promoting energy and resource efficiency through the Ecodesign Directive*. Scandinavian Studies in Law. 59, 147-179; Dalhammar, C. (2016) *Industry attitudes towards ecodesign standards for improved resource efficiency*. Journal of Cleaner Production. 123, 155-166; Dalhammar, C., Machacek, E., Bundgaard, A., Zacho, KO. and Remmen, A. *Addressing resource efficiency through the Ecodesign Directive: A review of opportunities and barriers*, 2014, Copenhagen: Nordic Council of Ministers.

¹⁰² Sometimes described as the 'cool product' - <http://www.coolproducts.eu> (accessed 9 December 2016).

¹⁰³ Bundgaard, A.M., Remmen, A., Overgaard Zacho, K., *Ecodesign Directive Version 2.0: from Energy Efficiency to Resource Efficiency*. Report. Danish Environmental Protection Agency, Miljøstyrelsen, 2015.

¹⁰⁴ Iraldo, F., Facheris, C. and Nucci, B. 2017. *Is product durability better for environment and for economic efficiency? A comparative assessment applying LCA and LCC to two energy-intensive products*. Journal of Cleaner Production. 140, 1353-1364.

¹⁰⁵ Gann, D., Wang, W., Hawkins, R., (1998) *Do regulations encourage innovation? The case for energy efficiency in housing*, Building Research and Information 26(4), 280-296; Europa, Rapid Press Releases 'More eco-friendly products for a low carbon future' (Brussels 24 April 2009).

and environment; no negative impact on user regarding the affordability of the product and its cost during its life cycle; no negative impact on competitiveness; no imposition of proprietary technology and no excessive administrative burden. These achieve a balance for the costs to industry of the imposition of new requirement such as lifespan guarantees and we consider that they should remain to help achieve acceptability of the proposals on lifespan guarantees.

2.9 Conclusion

The Ecodesign Directive is a perfect vehicle for the implementation of lifespan guarantees on products and we recommend amendment of the directive to include:

- The recital to the Directive to include a reference to lifespan guarantees as a measure to be adopted as part of a circular economy approach.
- Insertion of an article specifically including lifespan guarantees in the implementing measures for product groups.
- Extension of the scope of the Directive from energy-related products to include on a transitional basis all products with significant environmental impacts and potential for environmental improvement.
- Progressive reduction of the threshold criteria to trigger the requirements of the Directive.
- Adaptation of methodology to implement a lifespan measure.
- Requirement for information to include reference to conformity measures for lifespan guarantees.
- Requirement for information to be included to indicate that conformity measures for lifetime guarantees does not affect consumer rights under private law.
- Adapt methodology to review the adoption of lifespan guarantees under a life cycle approach to allow flexibility to apply for derogations from the Directive where a new product will result in greater resource efficiency.

Finally, the impact of the Directive and its implementing regulations and their control of products, are only as good as the enforcement mechanisms accompanying them and equal conformity in practice across the Member States is an essential requirement. As one important step of enforcement we recommend contractual rights of the consumer against the seller and the producer as well, as developed in chapter 1. This does not make superfluous further research to review the visibility of compliance measures and the enforcement measures currently in place together with compliance statistics.¹⁰⁶

¹⁰⁶ European Commission, Communication *Ecodesign Working Plan 2016-2019*, COM(2016) 773 final, 30.11.2016; UK Department for Energy and Climate Change, *Post-Implementation Review of the Ecodesign for Energy-Related Products Regulations 2010* (Cm 9187), 2016; AREA, CECED, DIGITALEUROPE, EHI, EPEE, EVIA, LightingEurope, *Market Surveillance in Europe: Joint Industry Call for Action*, January 2015 http://www.lightingeurope.org/uploads/files/Market_Surveillance_in_Europe_-_Industry_Call_for_Action_-_January_2015.pdf; the European Ecodesign Compliance Project (www.ecopliant.eu/); the CompliantTV project (www.complianttv.eu/eu/about-the-project/home) (accessed 26.1.2017).

3 CONCLUSIONS

We recommend an integrated concept of environmental law and consumer contract law for an EU lifespan guarantee. Our concept consists of three steps:

1. Standards for lifespan of specific groups of products must be developed by statutory law.
2. Such standards must be enforced by means of private law, in particular by the legal guarantee of consumer sales law.
3. For products, which do not fall under statutory law with respect to their lifespan, we recommend a compulsory commercial guarantee of the producer.

3.1 Amendments to the EDD

The Ecodesign Directive is an adequate legal instrument as a frame for developing lifespan standards. Its main focus is at present energy saving, but its structure is open for development in the direction of providing for lifespan regulations. As the EDD is only a framework, specific regulations on groups of products including lifespan regulations must be drafted. For that purpose adaptations of the EDD to the needs of regulating lifespan are required. We therefore recommend amending the EDD as follows:

1. Retain existing remit of Ecodesign Directive with extension added to cover lifespan guarantees on products.

Add Recital 'X',

whereas

'the development of a circular economy requires such matters as reuse, recycling and repair to be facilitated in the development of products, a simple and highly resource efficient approach is to extend the initial lifetime or first use of a product. The use of lifespan guarantees within the Ecodesign requirements for a product will capture this approach.'

2. Extend application of the Ecodesign Directive on a transitional basis to all product groups having a significant environmental impact on energy or resource consumption:

Amended definition Article 2:

'Products having a significant environmental impact' means any good that has an impact on energy or resource consumption during manufacture or use which is placed on the market and/or put into service, and includes parts intended to be incorporated into such products covered by the Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.'

3. Implement progressive reduction in the threshold figure of 200,000 units sold per annum for application of the Ecodesign Directive.
4. Require the inclusion of the lifespan guarantee within the information made available to the consumer.

Insert

Article 14 Consumer Information

'In accordance with the applicable implementing measure, manufacturers shall ensure, in the form they deem appropriate, that consumers of products are provided with

(c) the requisite information on the lifespan guarantee and information as to the market surveillance authority responsible for conformity together with information that this does not affect their rights under private law.'

5. Make no change to the process of developing the implementing measures except to ensure that consumer groups are integrated into the consultation process for the development of implementing measures to increase transparency for lifespan guarantees.

6. Taking a lifecycle approach requires the implementing measures to include the expected lifespan of the product where deemed appropriate and determine the length of the guarantee which will be applied to it.

7. Extend the EDD to apply implementing measures to individual complex products as well as product groups.

8. Adapt the methodology to review the adoption of lifespan guarantees under a life cycle approach to allow flexibility to apply for derogations from the Directive where a new product will result in greater resource efficiency.

3.2 Enforcement by the legal guarantee of the CSD

Standards as provided for by EDD based regulations shall be enforced by national market surveillance authorities and also by private law means, in particular by the legal guarantee of the CSD respectively its successor, the OSD. Therefore some amendments are required. First, it should be clarified, that the term of conformity includes sustainability standards such as the lifespan of a product. Second, the limitation period must be extended. As a result of our analysis of Member States' law we recommend a model consisting of a basic limitation period of three years and an extension to five years for products with a lifespan of more than three years as an option for Member States. Third, pre-contractual information duties concerning lifespan should be added to the CRD. The relevant provisions could read as follows:

1. Article 5 of the OSD proposal:

"(c) possess quality and performance capacities which are normal in goods of the same type which the consumer may expect given the nature of the goods **including their lifetime**, and taking into account ..."

2. Article 14 of the OSD proposal:

"The consumer shall be entitled to a remedy for the lack of conformity with the contract of the goods where the lack becomes apparent within **three years** as from the relevant time for establishing conformity. **Member States may extend the limitation period for products with a lifespan of more than three years to a maximum of five years.**"

3. Article 5 (1) (a) and Article 6 (1) (a) of the CRD

"the main characteristics of the goods **including their lifetime** and services to the extent appropriate to the medium and to the goods or services"

3.3 Compulsory commercial guarantee

As the drafting of EDD based regulations is a complex and lengthy procedure, there will be a number of products groups, for which a lifespan is not yet provided by a regulation. To cover this gap, an obligation of the producer to give a commercial guarantee, in which he has to indicate the lifespan of his product, should be considered. We do not recommend a general minimum lifespan provided for by law, as products are too different. It must be left to the

EDD based regulations to provide for legal standards for specific groups of products with regard to lifetime. Correspondingly, the provision to amend the OSD proposal with regard to the commercial guarantee could read as follows:

Article 15a

Commercial guarantees for lifespan

1. The producer of a technical product shall

(1) guarantee to the consumer the fitness of the product for such foreseeable minimum lifespan, as is normal in goods of the same type, and shall indicate the duration of this lifespan, or

(2) clearly indicate that he does not guarantee the fitness of the product during its lifespan.

This information shall be made available to the consumer at the time where he takes an informed transactional decision. The producer shall inform the consumer whether the guaranteed lifespan is shorter or longer than the limitation period according to Article 14. Article 15 [commercial guarantees] is applicable.

2. If the producer does not fulfil his obligations according to no. 1, he has the same obligations to the consumer as the seller.

The recommendations in this report highlight the close interplay between the EDD based regulations and the consumer contract law provisions. This is because the EDD recommendations made would not be effective in the absence of the complementary CSD or OSD recommendations, and vice versa.

3.4 Short term and long term measures

There is already a proposal of the Commission concerning online sales of goods, which is to be extended to all consumer sales including face-to-face sales thus replacing the existing CSD. Because we do not favour separate solutions for online and face-to-face sales, the recommendations of this report refer to a proposal extended in that way. As the proposal is already on its way through the legislative process, it would be possible and timely to amend the necessary provisions to ensure lifespan guarantees now. Making use of this opportunity could be the first step.

Since drafting regulations based on a revised EDD will take some time, this measure would be undertaken as the second step on pure timing grounds. The regulations however, are a necessary and integrated component of the concept recommended this report.

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ANNEX I: SURVEY METHODOLOGY

The research for this In-depth Analysis was conducted by using national legal experts in civil law in order to understand and analyse the legal frameworks relating to lifespan legal guarantees in the EU Member States and EEA/EFTA States where such models already exist. In addition, we collected answers regarding enforcement addressed to a set of legal experts and Market Surveillance Authorities on the EDD, and conducted empirical research by way of a survey of stakeholders. This survey was conducted between December 2016 and January 2017, with the aim of collecting views on the applicability of the Ecodesign Directive to a lifespan approach. This section outlines how these surveys were administered.

Participants were selected using purposive sampling.¹⁰⁷ Participants were targeted from three stakeholder groups: consumer associations, industry experts and industry associations were targeted. Industry stakeholders were identified from the list of members of the Consultation Forum to consult stakeholders on the implementation of the EDD, as well as those that are not members of the Forum but have previously engaged with the European Commission on the EDD.

The surveys comprised two sections. The first section included questions on the current state of play with the implementing regulations for the Ecodesign regulations, while the second section focused on questions on adapting the EDD to apply a lifespan approach. The questionnaire contained both multiple choice questions and open-ended ones, the former yielding quantitative data analysed using frequencies, and the latter yielding qualitative data¹⁰⁸ analysed using content analysis, facilitated by coding. Coding is a process which organises, sorts and analyses data by ascribing a word or short phrase to portions of text. An inductive approach was used to develop the codes, identifying key and repeated terms across the text analysed.

The questionnaires were sent to all the main EU trade associations as well as primarily to the national associations of the countries of greatest interest for the subject of this study, namely those EU/EEA Member States that had longer legal guarantee periods than the two years in the CSD. Experts were identified from academic and policy papers and reports that have been published in the field of environment and sustainability, with thus knowledge or opinions about the EDD. In total, 36 questionnaires were received in time for the analysis and as can be seen from the figures provided in Chapter 2, there was a fairly even split between the three stakeholder groups, with consumer associations being the small group of respondents. While hundreds of persons and organisations were contacted with a request to complete the survey, the short time frame – with favourable extension into January has shown an interest and willingness in the subject of this study, which will most certainly be a target of wider and broader consultation by the European Institutions in the near future.

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¹⁰⁸ Downe-Wamboldt, B. 1992. *Content analysis: Method, applications, and issues*. Health Care for Women International. 13, 313-321; Saldaña, J., *The coding manual for qualitative researchers*. London: SAGE Publishing, 2012.

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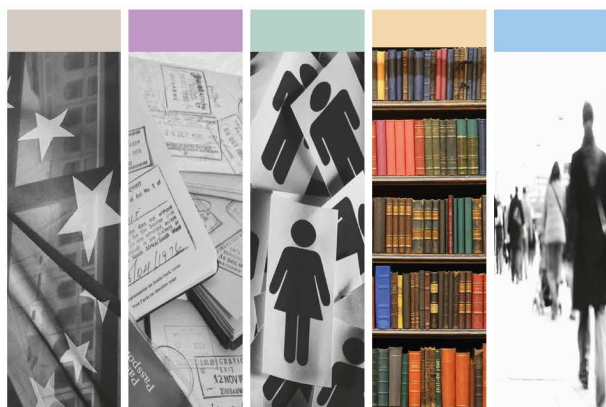
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