

THE RIGHT TO REPAIR – A NEW DIMENSION TO THE RECALL LANDSCAPE?

The EU has recently witnessed the introduction of “right to repair” rules, which flow from the Ecodesign Directive. The rules are aimed at facilitating the availability of spare parts to enable the repair of a specific set of products, including household dishwashers, household washing-machines and washer-driers, refrigerating appliances, electric motors, and electronic displays. In short, manufacturers must now ensure the availability of spare parts within two years after the launch of a product, and then for between seven and ten years, depending on the type of product.

These new measures are intended to contribute to the EU’s transition to a circular economy which involves the reduction of waste and pressure on natural resources by, for example, influencing product designs to improve product lifespans, maintenance, repair, reuse, upgrades, recyclability, and waste handling.

A shift in product safety management, recall, and litigation

Although the focus of this new approach is primarily the environment and sustainability, there will inevitably be product safety and recall considerations arising from these changes. Manufacturers will need to be alert to new issues that may emerge. For example, with an increasing number of consumers installing spare parts on their own, there is likely to be an increase in product failures and product liability claims.

When product safety issues like these arise, it has always been customary to investigate whether any repairs have been carried out and, if so, by whom. If repairs were not carried out by authorised repair centres, then further investigations are often undertaken. It will be important to continue to ask such questions, but investigations may require an additional dimension to determine what repairs

the consumer carried out, what spare parts were used and whether the repair was completed correctly. Tensions may arise given that, in some circumstances, the person complaining of damage may be the very person who has carried out the repairs.

Similarly, with increased availability of spare parts, many products may remain in circulation for far longer than anticipated at the design stage. Where manufacturers could previously predict when most products would have reached their end of life, the duration of the product lifecycle may now be unknown. This could have several knock-on effects.

For example, if there is a potential safety issue in a product that has been on the market for some time, regulators will want to know how many products are on the market and how many are still likely to be in use. The latter question may well influence the corrective action taken and the expected response rate from the regulatory authorities. Additionally, with the expected lifetime of a product lengthening, the likelihood of product issues arising due to long-term use may also increase, leading to more safety issues that manufacturers need to investigate, notify, and undertake corrective action on.



These challenges raise an interesting issue with regard to product liability claims. Any claims under national legislation implementing the Product Liability Directive (PLD) will have a ten-year “long-stop”, meaning a consumer will not be able to bring a product liability claim ten years after a product is first placed on the EU market. Products which have seen an extended life due to the right of repair, will not be able to use the PLD as a means of redress if an issue arises with the product ten years after it is placed on the market (whether related to the repair or not). It is likely to still be possible to bring actions under other legal principles, such as negligence, but one could anticipate that such actions would face difficulties. For example, is it negligent to design or manufacture a product that does not last more than ten years?

A Closer Jurisdictional Focus

France has become the first EU country to introduce a “reparability index”, designed to encourage consumers to purchase more durable goods and manufacturers to produce more repairable products. The index assesses documentation, disassembly, spare parts availability, spare parts pricing and product-specific aspects such as software. The five pilot products that will be evaluated include smartphones, portable computers, washing machines, televisions, and electric lawn mowers.

The manufacturer, distributor or importer will be responsible for selecting and sharing reparability ratings with retailers, and retailers will have an obligation to display so that consumers may make an informed decision about the products that they purchase. By 2024, it is expected that new criteria will be added in relation to the robustness or reliability of products and the index widened to include other categories of products.

If France’s reparability index means that more repairable products are produced and sold in that jurisdiction than other countries in the EU, then the outcome could be an indicator as to what the rest of the EU could expect in terms of the implications of the right to repair. For that reason, as part of its commitment to establish a right to repair under its Circular Economy Action Plan, the European Commission is contemplating the implementation of a similar reparability index that would be valid across the EU.

In **Germany**, the federal government is pushing to strengthen its right to repair laws over and above the EU requirements and is hoping to convince the EU to follow suit. Germany is promoting the implementation of legislation relating to smartphones and tablets, requiring manufacturers to provide reasonably priced spare parts and to make security updates available for seven years.





**MARISA PEARCE, ASSOCIATE, AND ALISON NEWSTEAD, PARTNER,
SHOOK, HARDY & BACON INTERNATIONAL L.L.P.**

CONTINUED FROM PREVIOUS PAGE

What does the future hold?

As part of its Sustainable Products Initiative, the European Commission has indicated its intention to extend the scope of the EU regime by revising the Ecodesign Directive to include “the broadest possible range of products”. A public consultation was held this year and the response to it and a legislative proposal are expected before the end of 2021. It may be that an increased range of products will fall into the scope of those covered by the “right to repair” and command the attention of manufacturers in terms of new types of recall and litigation risk.

Access by consumers to information on product durability, reparability, and even upgradability, at the point of sale is considered by some as the appropriate next step in fulfilling the EU’s intention to promote a fully circular economy. This would complement the new “right to repair”.

However, there remains an opposing view that such reforms on a broad range of products may impact product and consumer safety. If manufacturers have systems in place to identify repairs by inexperienced consumers that lead to product failures, then the risk of product liability claims and corrective action could be minimised.

However, given that the right to repair is likely to give products a longer lifespan, there may well be a rise in recalls of products that would have previously been considered as unlikely to be in use. Manufacturers will need to take this into account when evaluating product designs. In addition, manufacturers will need to consider the length of time for which product-related documentation is preserved, verify that documentation for historic products for which spare parts are available is well managed and identifiable, and ensure that the usual recall measures such as traceability and recall plans take this new dimension into account.