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# Product lifetimes through the various legal approaches within the EU context: recent initiatives against planned obsolescence

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## Keywords

Planned obsolescence Circular economy National initiatives

# Abstract

Our today's society is often called a 'throwaway society', based on a linear 'take-make-usedispose' economy. Many studies point out that median lifespans of certain consumer products are in decline. One of the main sources of this problem is the phenomenon of 'planned obsolescence', covering all types of techniques used to artificially limit the durability of a manufactured good in order to stimulate repetitive consumption. Various types of planned obsolescence are omnipresent in our daily life. Planned obsolescence has huge drawbacks, for consumers as well for the environment, and, arguably, its potential positive side effects do not outweigh these drawbacks. The willingness to shift towards more durable and sustainable products has led to major legal developments and proposals over the past years. The purpose of this paper is to outline some of the various approaches followed in Europe to tackle planned obsolescence. After providing a glimpse into the EU policy actions, the paper will describe the recent purely national initiatives undertaken in France, Belgium and Germany.

### Introduction

In industrialized countries, the current economic conditions encourage producers and consumers to use more materials and energy for higher satisfaction, without developing the capacity to absorb and reuse waste and by-products. This problem of overconsumption and excessive production of short-lived and disposable items has been demonstrated in a growing number of empirical studies (Prakash et al., 2016; Schridde et al., 2014; Wang et al., 2013; Wieser & Tröger, 2015). The linear economy is generally identified as the root and support of planned obsolescence (Aladeojebi, 2013; Brönneke, 2014), defined as "the assortment of techniques used to artificially limit the durability of a manufactured good in order to stimulate repetitive consumption" (Slade, 2006). People and media typically confine the concept to material (introducing functional defects into the product or making it harder to disassemble) and technological obsolescence (incompatibility with later or competing versions). Yet this practice should be described in broader terms, encompassing psychological (no longer attractive in consumers' mind) and economic obsolescence (high costs preventing necessary repair and maintenance) (EP, 2016; Wieser, 2016).

The willingness to shift towards more durable and sustainable products, for the sake of protecting consumers and the environment, has led to major legal developments and proposals within the European Union (EU) over the past years. Nevertheless, the mechanisms to prevent and combat planned obsolescence are scattered across plenty of instruments, resulting in a three-tiered legal fragmentation. Firstly, both the EU and its Member States have devoted efforts to promote product durability and sustainability. Secondly, planned obsolescence has been addressed through various types of laws, which either have a general scope or concern only specific products. Finally, a range of norms shape the product throughout its whole life cycle, while others shape the relationship producers-consumers surrounding it. This paper fits into a PhD research (supervised by Prof. Dr. Bert Keirsbilck) that aims to identify and evaluate this panoply of rules. Here, the focus will specifically be on purely national initiatives undertaken in France, Belgium and Germany. After providing a brief overview of the EU legal framework governing planned obsolescence, the most recent initiatives of the selected Member States will be described and assessed in the light of EU law.

### **European Context**

Although no EU legislation makes explicit reference to planned obsolescence, the wide body of EU law comprises instruments that frame the practice. At the conception and production stage, EU rules such as the Ecodesign Directive (Directive 2009/125/EC), the Directives on Waste (Directive 2006/66/EC; Directive 2008/98/EC; Directive 2012/19/EU) or the Product Liability Directive (Council Directive 85/374/EEC), shape products to make them easy to repair, upgrade, re-use, disassemble and recycle. These product requirements include for example minimum durability for hoses and motors of vacuum cleaners (Commission Regulation (EU) No 666/2013) as well as the general obligation for manufacturers to provide independent operators with information to repair products (Directive 2012/19/EU, art. 15). At the marketing and contracting stage, some EU rules, including the Unfair Commercial Practices Directive (Directive 2005/29/EC), the EU labelling rules (Directive 2010/30/EU) and the Directive on Consumer Rights (Directive 2011/83/EU), allow for better information on products, to help consumers to take cost-effective and environment-friendly purchasing decisions and to incentivize producers to make sustainable goods. The principle of conformity laid down in the Consumer Sales Directive (Directive 1999/44/EC) also deters producers from shortening product lifetimes. If the product does not match the expected quality or performance, consumers are entitled to claim repair, replacement, price reduction or the rescission of the contract within two years from delivery, with a presumption of non-conformity for the first six months.1

Despite this set of rules, the EESC and the BEUC advocated further amendments, the former calling for a total ban on in-built (here 'material') obsolescence (EESC, 2013) and the latter suggesting a review of the EU legal framework to prolong the useful lifetime of consumer products (BEUC, 2015). As a reply, the European Commission (EC) delivered an Action Plan 'Closing the loop', with the aim of gradually transitioning towards a circular economy, where "the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised" (EC, 2015). This long-term target constitutes the guiding thread of all the measures capable of curbing the accelerating obsolescence of products. Along with these policy actions, several studies have been carried out at EU level and could contribute to the adoption of legislative proposals as well as to ongoing debates on existing regulations (EC, 2015; EESC, 2016; EP, 2017). A good example is the study on 'A Longer Lifetime for Products' commissioned by the European Parliament (EP) (EP, 2016), which gave rise to a Draft Report (EP, 2017) whereby the EP gives recommendations on possible measures to extend product lifetime.<sup>2</sup>

Hence, there is a wide array of existing and future EU rules that trigger product sustainability and durability. Not only do they harmonise the law framing planned obsolescence, but they also give incentives for Member States to address this matter in their legislation. Therefore, in addition to EU rules and the national measures implementing them, some Member States have taken the lead in complementing the EU minimum threshold of protection against planned obsolescence.

# Purely National Initiatives

In France, both public and private sectors are particularly active in the transition towards a green and circular economy.<sup>3</sup> Over the last decades, not only the Government, but also local authorities, have undertaken a significant number of policy initiatives and programmes to support that long-term objective (SWD(2017)44 final). An illustrative example is the two recently adopted legislative measures, which contribute to tackling planned obsolescence.

With the Energy Transition for Green Growth Act (Loi n° 2015-992), France became the first country worldwide to outlaw 'planned obsolescence', defined as "the set of techniques designed to deliberately reduce the lifetime of a product to increase its replacement rate" (Art. L. 441-2 Consumer Code) (Mugdal et al., 2012). Producers pursuing such a strategy in France could be held guilty of a criminal offence (two years' imprisonment and 300.000€ fine). This Energy Transition Act was adopted as part of the French Waste Prevention Programme 2014-2020 (Ministère de l'Écologie, du Développement durable et de l'Énergie, 2014), as required by Article 29 of the Directive 2008/98/EC and supported by Articles 4 and 22 of the Directive 2012/19/EU.

The French Consumer Code had earlier been modified by the Hamon Law (Loi n° 2014-344), the second act of utmost importance in the fight against planned obsolescence. It firstly extends to two years the period during which the non-conformity of the product is presumed, as allowed by the minimum harmonisation approach of the Consumer Sales Directive. This considerably strengthens consumers' guarantee rights as the burden of proof lies longer on producers.

Secondly, the Hamon Law improves product reparability by requiring information on the availability period of essential spare parts to be brought to the consumer's attention, and by imposing the provision of spare parts within two months of a request by a seller/repairer. Failing to comply with these two obligations may result in an administrative fine. Despite its protective aim, the Hamon Law has come under criticism, which mainly deplores the lack of clarity and precision (Dupont, 2016). Its effectiveness has also been called into question since, unlike the initial legislative proposal (Projet de loi n° 1015), a closer reading of the law and its implementing Decree (Décret n°2014-148) does reveal that producers are under no obligation to provide this information. Thus, it paradoxically encourages producers not to give any information on spare parts so that they escape these newly established obligations.4

<sup>&</sup>lt;sup>1</sup> This presumption period might be extended to two years for online and distant sales. See Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM/2015/0635 final.

<sup>&</sup>lt;sup>2</sup> For example, it recommends voluntary European label with durability and reparability criteria, obligation for producers to make spare parts available and inform consumers about it, European definition of planned obsolescence.

<sup>&</sup>lt;sup>3</sup> A wide range of associations and agencies are involved in sustainable consumption, and some of them actively participate in the adoption and implementation of environmental policies. See amongst others: les Amis de la Terre, la Fabrique écologique, ADEME, Association « Halte à l'Obsolescence programmée ».

 $<sup>^4</sup>$  See the claim for annulment brought before the Council of State ('Conseil d'Etat') by the association Holte à l'Obsolescence Programmée, which deplores the implementation of the Hamon law: C.E. (FR) 27 mars 2017

## Belgium

Belgium had already been considered as pioneer in the field of planned obsolescence on account of the 2012 Senate Resolution, whereby the Government was requested to curb the practice at national level and to call for the adoption of a legal framework at EU level (*e.g.* product labelling including information on product lifetime and reparability). While progress has been made on the part of the EU, Belgium is still at the stage of making legislative proposals.

In 2016, three legislative proposals have been dedicated to this topic, putting forward different types of measures. One is to define planned obsolescence, with the support of sanctions, either from the Civil Code (nullity of the contract and full reimbursement) or from the Criminal Code (from 500 to 100.000€ fine and from one to five years' imprisonment). It is noteworthy that sanctions already exist according to the Law of 29 June 2016, as planning the obsolescence of products could be qualified as an unfair commercial practice. For instance, producers who misleadingly fail to give information on essential characteristics of products (like on their lifetime) could be asked to submit their products to a quality check at their own cost (Art. 39) and might have to withdraw them from the market (Art. 40), together with a fine from 26 to 10.000€.

In addition to coercive measures, others rather aim to provide incentives to make longer lasting and reparable products, without regulating the product design in itself. They consist in (1) extending the guarantee period beyond the two-year minimum of the Consumer Sales Directive (either five years for all products or a period that varies depending on products)<sup>5</sup> as well as the presumption period (from six months to two years), (2) providing more information on products (lifetime expectancy, reparability, availability of spare parts and repair instructions), (3) imposing the availability of spare parts and (4) giving economic and fiscal support to circular economy (*e.g.* a lower VAT on repair and selling spare parts services).

In October 2016, an Action Plan on circular economy(Peeters & Marghem, 2016) restated and complemented the measures abovementioned with a total of 21 measures to be taken by 2019, some of which having already been implemented. As a first example, a contact point has been established to enable consumers to report their suspicions of planned obsolescence cases and to receive answer from competent services.<sup>6</sup> Moreover, a report on planned obsolescence issued in May 2017 identified, assessed and recommended different packages of measures to the federal legislator. They aim to foster ecodesign and sustainable purchases, encourage a better use of consumer products and facilitate repair.

#### Germany

In Germany, the concepts of circular economy and planned obsolescence increasingly permeate into policies and laws (BGBl. I, Nr. 10, S. 212). In addition to timely and full implementation of EU environmental rules, the German Government pursues a proactive sustainable development strategy at national level, characterised by high recycling rates, no landfill, high worldwide demand for German technology and good eco-innovation performance (SWD(2017) 38 final).

Given this involvement to keep production and consumption patterns within sustainable bounds, it is not surprising that two legislative proposals against planned obsolescence were launched in 2013 (BT-Drucks. 17/13096; BT-Drucks. 17/13917). Although they were finally rejected, they were both characteristic examples of legislation promoting longer product lifetime. The first proposal was consumer-focused, calling for the introduction of a minimum period for the use of products. Concretely, it proposed to provide information on this period, as well as a list of products with their corresponding period of use, to ensure better after sales services, to maintain the two-year guarantee period and to place the burden of proof on producers in case the product breaks before the minimum period of use. Furthermore, similarly to the French approach, it prescribed the prohibition of intentional in-built obsolescence.

The second proposal, by contrast, was mainly intended to improve product requirements (*e.g.* extension of ecodesign requirements, improvement of product reparability, collection, reuse and recycling) on the basis of the 2014 study commissioned by the parliamentarian representation Büdnis 90/Die Grünen (Schridde et al., 2014). This proposal also insisted on examining the possibilities given by EU legislation, like the Ecodesign Directive and the EU Waste Directives, to curb planned obsolescence, and on strengthening them at EU level.

Although there is currently neither specific legislation on planned obsolescence nor a concrete project to put into place such measures, many studies have been issued (Prakash et al., 2016; Schlacke et al., 2012; Schridde et al., 2014) and workshops been organised by legislative key stakeholder groups (Brönneke & Wechsler, 2015). In a policy brief from March 2017, the German Environmental Agency ('Umwelt Bundesamt') recommended six political strategies against planned obsolescence: (1) product standards with minimum lifetime, (2) information on availability of spare parts and repair services, (3) a manufacturer's duty to issue a guarantee statement, (4) improved framework conditions for repairs, (5) reduced value added tax for repairs, and (6) strengthened product appreciation. Furthermore, there are many German selfregulatory initiatives, the best known being the Blue Angel ('der Blaue Engel'). The latter certifies the ease of repair and durability of many products, but also ensures guarantees that go beyond legal requirements and spare parts provided after the end of the sale.

<sup>&</sup>lt;sup>5</sup> The guarantee period has already been similarly extended in some Member States, like in Ireland and in the Netherlands.

<sup>&</sup>lt;sup>6</sup> This contact point adds up to the one set up by Test-Achats ("trop-vite-usé") which counted more than 6000 claims in June 2017, attesting the consumer disstisfaction with product lifetime.

# Conclusions

In brief, it can be asserted that Europe is actively engaged in the fight against planned obsolescence, along with the search for the implementation of new economic models, mainly the Circular Economy ideal. The EU has already positioned itself against the limited product lifetime through the policy actions and studies undertaken by its institutions and organs, the most recent ones being the EC's Action Plan 'Closing the Loop' or the Draft Report delivered by the EP on 'A Longer Lifetime for Products'. The Member States are also following this trend. In addition to implementing EU rules, many have deployed initiatives to tackle planned obsolescence. The commitment of France, Belgium and Germany accurately reflects the general mobilisation against the phenomenon.

Through this paper, it has been seen that various approaches can be followed to settle the issue, although most of them combine the different types of measures. While some are product-oriented, with either a general or specific scope, other measures rather focus on consumer rights. At EU level, both types of measures can be found. Another distinction exists between coercive measures, like the criminalisation of planned obsolescence in France, and preventive or incentive measures, as exemplified by the Belgian legislative proposals which suggest economic and fiscal support for repair services. The German approach also highlights the potential of self-regulatory measures, like the Blue Angel certification, as an alternative to mandatory legal requirements. While purely national initiatives are generally encouraged by EU institutions (EC, 2015), the same measures could be regarded as barriers to market access and market integration. Having to satisfy rules different from one Member State to another could indeed create financial and administrative burden for producers who will then pass on the costs to final consumers. Moreover, it exacerbates the legal fragmentation issue, obliging consumers and producers to deal with a real legal maze. Allowing for greater levels of protection for consumers and the environment could thus undermine the smooth functioning of the internal market. Therefore, to facilitate and increase cross-border trade within the European Union, it might be preferable to define and clarify the rules governing planned obsolescence at EU level.

However, the fact that Member States take initiatives could serve as an experiment and an example for the EU, provided that they are consistent with EU rules. Since it takes less time to adopt measures at national level, the Member States could play the role of national laboratories. If it is successful at their level, the measures could then be initiated at EU level. Hence, it goes both ways: the EU feeds the Member States and the Member States feeds the EU. On the one hand, actions at EU level are needed to facilitate and support the uptake of activities at national level and also to ensure a level playing field for producers. On the other, it is important to leave Member States a margin of manoeuvre in adopting national legislation, so they could be a source of inspiration and discussion within the EU.

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