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Legal options for introducing a national ban on the destruction of unsold products and a national right to repair

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Content

1. Introduction

The Dutch Ministry of Infrastructure and Water Management (IenW) has commissioned the Utrecht Centre for Water, Oceans and Sustainability Law at Utrecht University (UCWOSL) to conduct a study on the legal possibilities for introducing a national ban on the destruction of unsold products and a national right to repair.

The research was prompted by a motion tabled in Dutch Parliament by Van der Graaff at the end of 2022. This motion called for the introduction of national legislation aimed at banning the destruction of unsold products and establishing a national right to repair. In response to this motion, the State Secretary of IenW promised to have legal research carried out into the possibilities for introducing such legislation (see, inter alia, letter of 2 March 2023, Parliamentary Paper 32852, no. 228, and letter of 2 October 2023, reference IENW/BSK-2023/266135). The possibilities for achieving a national ban on the destruction of unsold products and a national right to repair should be considered in the context and timeframe of the legislative initiatives already launched on both issues within the European Union (EU).

For example, the European Commission's initial proposal for the Ecodesign for Sustainable Products Regulation (hereafter Ecodesign Regulation), COM (2022) 142 final, included a reporting requirement for companies that destroy unsold products and a basis for prohibiting the destruction of unsold products at European level by delegated act for specific product groups.

On 4 December 2023, the European Council, the European Commission and the European Parliament agreed on the final text of the Ecodesign Regulation. This final text was not available at the time of research. However, it is clear that the final regulation will include a direct ban on the destruction of unsold clothing and footwear. The regulation is expected to enter into force in mid-2024. Two years after the entry into force of the regulation, the European ban on the destruction of unsold clothing and footwear products will apply.

Negotiations are also ongoing at the European level on legislation to promote repair, in particular a Directive on common rules promoting the repair of goods. These negotiations are expected to be concluded in the first half of 2024.

Against this background, the study aims to provide insight into the European legal framework that should be taken into account when introducing a Dutch ban on the destruction of unsold products and/or a national right to repair, and to clarify which legal options are feasible and which are not.

Scope of the study

As agreed with the State Secretary, the current Ecodesign Directive (Directive 2009/125/EC) was not included in the research on the European legal scope for a national ban on destruction, because it will soon be replaced by the Ecodesign Regulation. The second distinction concerns the study of the right to repair. This study will focus on the national scope of (elements of) a right to repair outside the statutory liability period, i.e. the liability period

for the seller under Directive (EU) 2019/771, the Sale of Goods Directive. Only limited consideration is given to the right to repair within the statutory liability period. Consumer rights to repair within the statutory liability period are already fully harmonised by the Sale of Goods Directive, including the strengthening introduced by the proposed directive. Therefore, from a legal point of view, there is little scope for Member States to introduce or maintain additional or different national repair rights within the statutory liability period.

We would like to emphasise that this study only considers the *legal scope* that Member States may or may not have to maintain or adopt national measures in addition to or in anticipation of the relevant European legislation. This report does not comment on the *desirability* of such national measures, as other aspects than legal ones must also be taken into account, such as the purpose of the European regulation concerned (prevention of market distortions), environmental effects, enforcement and evasion effects, the necessity and costs of monitoring and enforcement measures, and the (competitive) position of Dutch market participants.

1.1 Research questions

The main research questions and sub-questions are classified below on the basis of the two themes: 1) the legal scope for a national ban on the destruction of unsold products and 2) the legal scope for (elements of) a national right to repair.

Main question 1: To what extent does existing and future European law offer legal space for the Netherlands to introduce a national ban on destruction of unsold products in addition to or in anticipation of this European law?

Sub-questions ad 1:

Secondary European legal framework

a. What legal possibilities and limitations result from the (proposed) Ecodesign Regulation for the introduction of a national ban on the destruction of unsold products?

Primary European legal framework

b. Given the basis of the Ecodesign Regulation (Art. 114 TFEU[1]) and Art. 34-36 TFEU, what are the limitations under primary European law, in particular with regard to avoiding market distortions, barriers to trade or other conflicts with EU law?

European property law

c. What legal possibilities and limitations arise from European property law as laid down in Article 17 of the EU Charter of Fundamental Rights?

Design of prohibition and implementation

[1] Treaty on the Functioning of the European Union.

d. Does it make any difference to the answers to the previous sub-questions whether a national blanket ban is introduced for all unsold products or whether a national ban is introduced for specific groups of products?

e. What inspiration does the French regulation for a ban on destruction of unsold products offer? And could a similar ban be introduced in the Netherlands?

f. How should a national ban (general or product-specific) be anchored in national laws and regulations? Can a basis for this be found in existing laws and regulations, and if so, in which laws and regulations, or does this (in part also) require new laws and regulations?

Main question 2: To what extent does existing and future European law leave room for the Netherlands to introduce a national right to repair in addition to or in anticipation of this European law?

Sub-questions ad 2:

Secondary European legal framework

a. What legal possibilities and limitations result from existing European consumer law for the introduction of a national right to repair?

b. What legal possibilities and limitations result from the proposal for a Directive on common rules promoting the repair of goods, also in relation to the proposal for the Ecodesign Regulation, for the introduction of a national right to repair?

Primary European legal framework

c. What restrictions arise from European law, in particular with a view to avoiding market distortions, barriers to trade or other conflicts with EU law, given the basis of the proposed Directive in question (Art. 114 TFEU) and Art. 34-36 TFEU?

Design and implementation of the right to repair

d. What inspiration can be drawn from the Austrian repair incentive schemes (repair bonus) and the French schemes (repair bonus and repair index)? And can these instruments also be implemented in the Netherlands?

e. How can a 'right to repair' be defined and how should a national right to repair, in particular the possibility for consumers to have their products repaired outside the warranty period, be anchored in national laws and regulations? Can a basis for this be found in existing laws and regulations, and if so, in which laws and regulations, or does this require (in part) new laws and regulations?

1.2 Research method

The research is mainly classical legal research, consisting of the study of written sources (European and national legislation, case law, literature).

1.3 Clarifying some terms and order of assessment of national measures against EU law requirements

This section contains a brief explanation of the different kinds of EU law provisions and their hierarchy. Some basic EU law concepts are also explained. At the end, we provide an overview of how one should test national environmental measures for compatibility with EU law. Readers well versed in EU law can skip this section.

1.3.1 Clarifying some EU law terms and concepts

Primary EU law: the EU Treaties and the Charter of Fundamental Rights

EU law relevant to environmental law consists of the treaties (primary law) on the one hand and EU regulations and directives (secondary law) on the other. There are two treaties: the Treaty on European Union, also called the EU Treaty (TEU) and the Treaty on the Functioning of the European Union (TFEU). The TEU contains the basic pillars of the EU, such as the transfer of sovereignty by Member States, democratic principles, enumeration of the Union's institutions, legal personality of the Union, etc. More relevant to (national) environmental law is the TFEU. That treaty sets out the modus operandi of the European institutions, the allocation of powers, procedures for legislating and provisions concerning the internal market, including the four freedoms applicable therein (free movement of persons, goods, services and capital).[2] It also comprises the rules concerning EU citizenship. Also relevant is the EU Charter of Fundamental Rights. The Charter brings together all the rights (personal, civil, political, economic and social) that people have in the EU in a single text and codifies them as a set of fundamental rights.

Secondary EU law (regulations and directives)

EU regulations (see Art. 288, second and third sentences TFEU) apply directly in all Member States and therefore may not be transposed into national law. However, national legislation is generally required in order to operationalise EU regulations, e.g. by designating national bodies authorized to perform certain implementation and enforcement tasks. An EU directive (see Article 288, fourth sentence TFEU) does not apply directly in the Member States, but is addressed to the Member States and must be transposed into national legislation by the Member States. To this end, each directive contains a deadline, often two years. Only if the directive has not been transposed or has not been transposed correctly after that deadline can a citizen (or company) rely directly on directive provisions, as long as they are unconditional and sufficiently concrete to be used as a rule of law by courts. It is also possible that a directive provision still leaves room for differences in implementation by Member States, and as such is not unconditional and sufficiently concrete in itself, but the limits of this room are unconditional and sufficiently concrete. Then, after the expiry of the transposition period, recourse to these unconditional and concrete outer limits of the directive provisions is possible.[3] After the entry into force of a directive, but prior to the expiry of the transposition

[2] See more in detail chapter 2.

[3] See for example CJEU 24 October 1996, case C-72/95 *(Kraaijeveld)*.

period, Member States (legislative, administrative, and judicial authorities) must refrain from acts that could hinder the achievement of the objective of a directive.[4] This is a corollary of the principle of Union loyalty, which has its basis in Article 4 (3) TEU (hereinafter: principle of loyalty). Directive provisions cannot be invoked against a private individual – nor by the government (so-called reverse vertical effect)[5], nor by another private individual (horizontal effect)[6]. In environmental law, so-called 'triangular relationships' often occur, for example if a private individual or an environmental association invokes (the direct effect of) a directive provision, and a third party, also a private individual, is adversely affected by the invocation of the direct effect. In material terms, granting such an appeal by an administrative authority then corresponds to a case of (actually prohibited) reverse vertical effect. However, the Court ruled that this is possible and that authorities and courts must grant such appeals. 'Merely negative consequences' for a third private party due to direct invocation of a directive by a private individual vis-à-vis a government do not preclude the direct effect in this kind of triangular situations.[7]

National law must at all times be interpreted and applied in accordance with EU law. Thus, if national law allows multiple interpretations of a norm, or if discretionary power exists under national law, an interpretation and application of the discretionary power should be chosen that is in line with primary and secondary EU law. This also applies to directives' provisions that are not(potentially) directly effective. Within EU law, primary law takes precedence over secondary law (hierarchy of norms).

The most relevant competences for EU environmental measures

The TFEU confers several competences to the EU with corresponding procedures and corresponding conditions for national law when the EU issues legislation. Most relevant for environmental law are the bases provided in the chapters on environment (Art 192 ff. TFEU) and internal market (Art 114 ff. TFEU). EU measures that have environmental protection as their main objective and are adopted under Art. 192 TFEU generally contain 'minimum harmonisation'.[8] Member States may therefore, as Art. 193 TFEU expressly provides, in principle, maintain or adopt more far-reaching law after the EU has adopted a legislative measure under Art. 192 TFEU. This is different for measures whose main objective is the internal market. For these measures, Art 114 TFEU provides the legal basis. This legal basis is particularly relevant for the present report because both a national ban on the destruction of unsold products and a national right to repair concern requirements relating to goods and services, i.e. to the internal market. Paragraph 4 of that article sets out the conditions under which existing national measures may be maintained despite EU law adopted under Article 114 TFEU. Paragraph 5 sets out the conditions under which a Member State may adopt more far-reaching national law after the EU has adopted legislation under Article 114 TFEU. Both paragraphs contain restrictive conditions. The starting point is that no more far-reaching

[4] CJEU 18 December 1997, C-129/96, ECLI:EU:C:1997:216, *AB* 1998/192 (*Inter-environnement Wallonie*).
[5] CJEU 8 October 1987, C-80/86, ECLI:EU:C:1987:431 (*Kolpinghuis*).
[6] CJEU 14 July 1994, C-91/92, ECLI:EU:C:1994:292 (*Faccini Dori*).
[7] CJEU 7 January 2004, C-201/02, ECLI:EU:C:2003:502 (*Wells*). On national level in the Netherlands see Council of State, Administrative Jurisdiction Division 7 December 2005, *AB* 2006/67 (*Boxtel*).
[8] The notions minimum and maximum harmonisation will be dealt with hereafter.

national law should be established. A general competence to adopt more stringent measures as in Art. 193 TFEU is missing. This is also logical because the internal market is based on free movement and free movement would be hampered by additional national requirements.

In order to determine if, and to what extent, Member States have any legal room after the European legislator adopts a harmonisation measure under Article 114 TFEU, the following concepts need to be distinguished: partial/exhaustive harmonisation and minimum/maximum harmonisation.

Partial/exhaustive harmonisation

"The EU legislature may choose to regulate a certain issue comprehensively or rather only selected aspects thereof. The difference with the minimum/maximum harmonisation continuum is that here the scope of the measure is the defining factor. Legislation in the field of the free movement of goods may for instance be limited to labelling, leaving the actual characteristics of the product itself to be regulated by the Member States or to the discretion of market participants."[9]

To the extent that the harmonisation measures in question under Article 114 TFEU seek to harmonise certain subjects exhaustively, all national measures relating to them must be assessed against the provisions of those harmonisation measures and not against the Treaty provisions on the free movement of goods.[10] Also, and more important for practical purposes, the European legislator may, in the relevant harmonisation measure itself, provide opportunities to maintain existing national legislation, invoke exceptions, etc.

A Member State that would like to maintain an existing national provision after a European harmonisation measure has entered into force must, if the subject matter is exhaustively regulated, invoke Article 114(4) TFEU to do so. This stipulates that the national provisions to be maintained will have to be justified on grounds of major needs referred to in Article 36 TFEU, or should relate to the protection of the environment. Such national provisions, together with the grounds for maintaining them, must be put to the Commission, which may subsequently approve or reject them pursuant to Article 114(6) TFEU.

New national measures on an exhaustively regulated subject can only be adopted by a Member State if the conditions set out in Article 114(5) TFEU are met. The national provision must be based on new scientific evidence relating to the protection of the environment on grounds of a specific problem arising in that Member State after the harmonisation measure was adopted. These national measures and the grounds for adopting them must also be put to the Commission, which can then approve or reject them under Article 114(6).[11]

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[9] T. van den Brink, e.a. Unity and diversity, Synthesis Chapter, in press, April 2024, p. 16 printversion August 2023.

[10] Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (hereafter: Guide on Articles 34-36 TFEU), Commission Notice, C(2021) 1457 final, PbEU C 100/38, 23 march 2021, p. 42.

[11] When a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, Art. 114 (7) TFEU requires the Commission to examine without delay whether an adaptation of the relevant European harmonisation measure should be proposed.

Article 114(4) and (5) TFEU are an exception to the principles of uniform application of European law and market unity and should therefore be interpreted strictly.[12]

To the extent that the Ecodesign Regulation and the Directive on common rules promoting the repair of goods do not regulate certain issues, there is partial harmonisation. In that case, Member States may introduce or maintain national measures. If these measures create barriers to trade or to the movement of services, they will have to be assessed against the Treaty provisions on the free movement of goods and/or the free movement of services.

Minimum/maximum harmonisation

"Minimum harmonisation represents the EU's main strategy to balance the effective achievement of EU policy aims and respect for national diversity. It entails setting merely a floor in terms of the minimum standards the Member States (and thereby individuals) should comply with. The MS have the freedom to introduce or maintain stricter standards, meaning that they can protect the public interest involved in a more intensive way. This is contrasted with maximum harmonisation which represents the EU legislative strategy whereby the substantive standards are fully designed at the EU level, prohibiting Member States from introducing stricter standards. Here, both the 'floor' and the 'ceiling' are set by the EU. The fundamental difference between the two legislative strategies is thus that minimum harmonisation allows the Member States to make an individual assessment of the public interests involved and weigh these according to their own preferences (within the confines of the EU legislation), whereas maximum harmonisation explicitly excludes this."[13]

Insofar as the Ecodesign Regulation and the Directive on common rules for promoting the repair of goods contain minimum harmonisation on certain issues, Member States are in principle allowed to introduce or maintain stricter standards for the purpose of, for example, environmental protection. Such more far-reaching measures will have to be assessed against the Treaty provisions, especially the provisions on free movement of goods and/or free movement of services.

1.3.2 Order of assessment of national measures against EU law requirements

If it is necessary to determine whether a national legislative measure meets the requirements of EU law, the following 'order of review' should be applied:

a. First, it must be established whether the subject matter being regulated is already regulated in secondary EU law. To the extent that this is the case, it is relevant to what extent the EU law in question is meant to be exhaustive. Here, the distinction between partial and exhaustive harmonisation on the one hand and minimum and maximum harmonisation on the other is relevant. The starting point under Article 114 TFEU (harmonisation internal market) is maximum harmonisation (i.e. to the extent that a subject is regulated, EU secondary law is in principle exhaustive). Starting point for

[12] J.H. Jans en H.H.B. Vedder, European Environmental Law, After Lisbon, 4th edition, 2012, p. 123. See also Boeve, Groothuijse et al, Environmental Law, p. 60 and the case law cited there ('roetfilter' case).

[13] T. van den Brink, e.a. Unity and diversity, Synthesis Chapter, in press, April 2024, p. 11 printversion August 2023.

measures under Article 192 TFEU (environmental protection) is minimum harmonisation (see Article 193 TFEU, i.e. in principle non-exhaustive regulation).

b. 1. If the relevant secondary law framework shows that the national measure is complementary to EU law (only in the case of partial harmonisation or minimum harmonisation), the national measure can in principle be adopted complementary to EU law if it meets the requirements of the TFEU, in particular the four freedoms of the internal market, provisions on state aid, competition, etc. The measure must therefore be assessed, for example, under Articles 34 et seq. TFEU on the free movement of goods.

2. If the secondary law framework is meant to be exhaustive (exhaustive or maximum harmonisation), the national measure can only be adopted exceptionally. If the EU law framework is adopted under Article 114 TFEU (internal market), then Article 114(4) or (5) TFEU is decisive. If the measure has been adopted under Article 192 TFEU, then it is controversial whether the EU legislator can nevertheless adopt a measure intended to be exhaustive in secondary law (thus prohibiting additional national legislation), or whether Article 193 TFEU 'overrules' secondary law in that respect and national measures are possible even though the EU legislator has indicated in the secondary law norm that it is intended to be exhaustive.[14] However, such a question will not easily arise without the national measure coming into conflict with secondary EU law, which is of course prohibited at all times.

[14] See, for example, J.H. Jans and H.H.B. Vedder, European Environmental Law, 4th edition. European Law Publishing, Groningen 2012, p. 118 et seq.

2. European legal framework for the assessment of national measures

The upcoming chapters will delve into the legal scope available to the Netherlands for introducing national measures, both before and after the implementation of the Ecodesign Regulation and the Directive on common rules for promoting the repair of goods. The focus will be on whether the Member State can maintain its existing national measures or introduce new ones. The objective of this European harmonisation legislation is to establish common rules that apply across all Member States and embody the principle of free movement of goods for certain products.[15]

2.1 Legal basis European harmonisation legislation - 114 TFEU - Forms of harmonisation

Both the Ecodesign Regulation and the Directive on common rules for promoting the repair of goods are based on Article 114 TFEU, the legal basis for harmonisation measures contributing to the establishment of the internal market.

A Member State wishing to *maintain* an existing national provision after the entry into force of a European harmonisation measure under Article 114 TFEU must rely on Article 114(4) TFEU if it concerns an *exhaustively* regulated subject. *New* national measures on an exhaustively regulated subject may only be taken by a Member State if the conditions of Article 114(5) TFEU are fulfilled. In particular, a national measure should be based on new scientific evidence relating to protection of the environment or the working environment on the basis of a specific problem which has arisen in that Member State after the adoption of the harmonisation measure.

To the extent that the Ecodesign Regulation and the Directive on common rules for promoting the repair of goods do not regulate certain subjects, there is *partial harmonisation*. In this case, Member States may introduce or maintain national measures. If these measures create barriers to trade or services, they must be assessed in the light of the Treaty provisions on the free movement of goods and/or services.

To the extent that the Ecodesign Regulation and the Directive on common rules for promoting the repair of goods provide for *minimum harmonisation* on certain issues, Member States are in principle allowed to introduce or maintain stricter standards, for example to protect the environment. Such more far-reaching measures will have to be assessed in the light of the rules on the free movement of goods and/or services.

For further details, see Chapter 1.

[15] Guide on Articles 34-36, p. 41.

2.2 EU Treaty provisions on the free movement of goods and exceptions

To the extent that certain products[16] are *not yet* or *not* covered by *exhaustive* European legislation, national measures that (may) create barriers to trade between Member States must be assessed against the Treaty provisions on the free movement of goods: Articles 34, 35 and 36 of the TFEU.

> "The scope of Article 34 TFEU is limited to obstacles in trade between the Member States. A cross-border element is therefore necessary for a case to be evaluated under this provision. Purely national measures, affecting only domestic goods, fall outside the scope of Articles 34-36 TFEU. For a measure to fulfil the cross-border requirement, it is sufficient that it is capable of either indirectly or potentially hindering intra-EU trade." [17]

Article 34 TFEU - prohibition of quantitative restrictions on imports and measures having equivalent effect

Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States. This article applies to national measures which discriminate against imported goods (so-called *distinctly applicable measures*) and to national measures which in law seem to apply equally to both domestic and imported goods, but in fact impose an additional burden on imports (so-called *indistinctly applicable measures*).[18]

In Dassonville[19], the Court set out what it understood by "measures having an effect equivalent to quantitative restrictions", namely any measure taken by Member States "which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". In this case the Court stressed that the most important element determining whether a national measure is caught under Article 34 TFEU is its effect ("capable of hindering, directly or indirectly, actually or potentially"). Consequently, there is no need for a discriminatory element in order for a national measure to be caught under Article 34 TFEU.[20]

It is also important to note that the definition of measures having an effect equivalent to quantitative restrictions is wide and constantly evolving.[21]

In this context, reference can also be made to the case law recently developed by the Court of Justice on national measures which do not restrict the sale of a product as such, but its *use*.

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[16] Or 'goods'. For the sake of clarity, the term 'products' will be used as much as possible in the following. This means 'consumer products' as referred to in the proposed Regulation. The term 'goods' has a broader meaning as it covers not only products but also waste materials. Waste materials are discarded materials, including discarded products.

[17] Guide on Articles 34-36 TFEU, p. 45. In this respect, the Commission refers to Case 8/74, 11 July 1974, ECLI:EU:C:1974:82, paragraph 5. 5 (*Dassonville)*. In that judgment, the ECJ held that the concept of "measures having an effect equivalent to quantitative restrictions" covers all measures which "may hinder, directly or indirectly, actually or potentially" trade between Member States. See: David Langlet and Said Mahmoudi, EU Environmental Law and Policy, Oxford University Press, 2016, p. 71.

[18] Guide on Articles 34-36 TFEU, p. 47.

[19] CJEU Case 8/74, 11 July 1974, ECLI:EU:C :1974 :82, under 5 (*Dassonville*). In 1974 the current European Union was still called Eureopean Community, hence the term 'intra-Community'.

[20] Guide on Articles 34-36 TFEU, p. 46.

[21] Guide on Articles 34-36 TFEU, p. 47 and there mentioned development in the case law of the Court of Justice.

> "Such restrictions are characterised as national rules which allow the sale of a product while restricting its use to a certain extent. Restrictions on use may include restrictions relating to the purpose or the method of the particular use, the context or time of use, the extent of the use or the types of use. Such measures may in certain circumstances constitute measures having equivalent effect to a quantitative restriction." [22]

Article 34 TFEU does not apply to so-called reverse discrimination, that is, when national measures result in domestic goods receiving less favourable treatment than goods originating in other Member States. The Court of Justice has made it clear that such differences in treatment which are not capable of restricting imports or of prejudicing the marketing of imported goods do not fall within the prohibition contained in Article 34.[23]

Article 35 TFEU - Prohibition of quantitative restrictions on exports and measures having equivalent effect

Article 35 TFEU prohibits quantitative restrictions on exports and all measures having equivalent effect between Member States. Initially, the Court limited the scope of the prohibition of Article 35 TFEU to directly discriminatory measures (*distinctly applicable measures*). For Article 35 TFEU to apply, two conditions had to be met: (a) the national measures must have as their object or effect a specific restriction on the external movement of goods; and (2) these measures must result in unequal treatment between a Member State's domestic and export trade, thereby conferring a special advantage on the national production or domestic market of the Member State concerned at the expense of the production and trade of other Member States.[24]

As a result, the prohibition of Article 35 TFEU had a narrower scope than Article 34 TFEU, as Article 35 TFEU only applied to *directly* discriminatory measures (*distinctly applicable measures*).

Meanwhile, the Court appears to have adapted its jurisprudence, following a plea in the literature for a broader test, bringing non-discriminatory and hindering measures within the prohibition of Article 35 TFEU.[25] It follows from this case law that indirectly discriminatory measures, i.e. measures that are indistinctly applicable, but that *de facto* have a more serious effect on exports of goods from the market of the exporting Member State than on trade in goods on the domestic market of the Member State concerned, also fall under the prohibition of Article 35 TFEU. In so doing, the Court appears to have definitively accepted the call for the prohibition of Article 35 TFEU to be extended to Article 34 TFEU.[26]

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[22] Guide on Articles 34-36 TFEU, p. 47 en 48 and the three cases cited therein, in which it is argued that the Court's assessment of restrictions of the use of products is partly determined by the market access criterion. These cases seem particularly relevant to the imposition of national destruction bans. See also: Boeve, Groothuijse e.a., Omgevingsrecht, p. 64 (in Dutch).

[23] David Langlet, Said Mahmoudi (2016), p. 74.

[24] In response to CJEU 8 November 1979, C-15/79, ECLI:EU:C1979 :253, under 7 (*Groenveld*). See: S.A. de Vries, Covid-19 en de veerkracht van de EU interne-marktvrijheden, SEW, 2021, nr. 4, pp. 127-142, on p. 128 (in Dutch) and the case law there mentioned. See also: Guide on Articles 34-36 TFEU, p. 64 and 65.

[25] See S.A. de Vries (2021), p. 129 and the case law discussed by author. See also: Boeve, Groothuijse e.a., Omgevingsrecht, p. 66 (in Dutch).

[26] Guide on Articles 34-36 TFEU, pp. 64-66.

> "In Gysbrechts[27], the Court dealt with Belgian legislation prohibiting the seller from requesting any payment in advance or in the 7 day 'withdrawal' period during which a consumer can withdraw from a distance contract. In this judgment, the Court confirmed the definition established in Groenveld. Nonetheless, it reasoned that although the prohibition on receiving advance payments is applicable to all traders active in the national territory, its actual effect is generally greater on cross-border sales made directly to consumers, and thus on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State. Interestingly, in this case the effects of the barrier primarily hampered the trading activities of companies established in the Member State of export and not in the Member State of destination." [28]

Exceptions under Article 36 TFEU

Considering the broad interpretation of the prohibition, particularly with respect to restrictions on imports, virtually every national measure which impedes trade between Member States would otherwise be prevented. That would have severe repercussions on the ability of the Member States to protect important public interests. For this reason there has been a number of legitimate grounds for exemptions from the outset, and these exemptions are now found in Article 36 TFEU.[29]

Article 36 TFEU provides that:

> "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

The justifications in Art. 36 TFEU, as far as they are relevant to environmental law, are limited to the protection of the health and life of humans, animals or plants. There must be a real threat to health or life.[30] According to the last sentence of Art. 36 TFEU, the measures must not be a means of arbitrary discrimination or a disguised restriction on trade between Member States.

> "Even if a measure is justifiable under Article 36 TFEU, it must not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The second part of Article 36 TFEU is designed to avoid abuse on the part of Member States. As the Court has stated, 'the function of the second sentence of Article [36] is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as to create discrimination in

[27] CJEU 16 december 2008, C-205/07 (*Gysbrechts and Santurel Inter*), ECLI:EU:C:2008:730.
[28] Guide on Articles 34-36 TFEU, p. 65.
[29] David Langlet, Said Mahmoudi (2016), p. 76.
[30] Boeve, Groothuijse e.a., Omgevingsrecht, p. 64 (in Dutch).

respect of goods originating in other Member States or indirectly to protect certain national products'[31], i.e. to adopt protectionist measures." [32]

Any national measure must comply with the principle of proportionality. "The principle of proportionality necessitates that the means chosen by the Member States are confined to what is actually appropriate and necessary to safeguard the legitimate objective pursued. Simply put, appropriateness requires that the measure in question is suitable for attaining the desired objective, whereas necessity requires that the means chosen do not restrict the free movement of goods more than what is necessary. In this context, it must be assessed whether there are any means which have a less restrictive effect on intra-Union trade, but which nevertheless reach the same result. Hence, an important element in the analysis of the justification provided by a Member State is the existence of alternative measures."[33]

Exceptions under the Rule of Reason

The importance of environmental protection has been recognised in the Court's 'rule of reason' jurisprudence[34] as an urgent need.[35] 'Urgent needs' can be invoked as a justification for national measures that may hinder intra-Union trade and do not fall within the exceptions of Article 36 TFEU. This justification is assessed in the same way as justifications under Article 36 TFEU: to be acceptable, national measures must be proportionate to the objective pursued.[36]

The invocation of 'urgent needs' is in principle only successful in the case of national measures that apply indistinctly to domestic goods and goods from other Member States. Therefore, grounds other than those covered by Article 36 TFEU, such as environmental protection, cannot, in theory, be invoked to justify discriminatory measures. However, the restriction that the 'rule of reason' (environmental protection) cannot be invoked to justify discriminatory measures no longer seems to be applied as strictly by the Court.[37]

Treaty provisions on the free movement of services (Art. 56-62 TFEU) and the Services Directive

Certain national measures to promote repair may have an impact on the free movement of services. In this case, these measures (also) have to be assessed in the light of the provisions of the TFEU on the free movement of services (Art. 56 - 62 TFEU) or the provisions of the Services Directive.[38] Similar to the provisions on the free movement of goods in the TFEU, restrictions on the free movement of services can be justified on grounds of public policy,

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[31] CJEU 14 December 1979, Case 34/79 (*Henn en Darby*), ECLI:EU:C:1979:295, under 21. See also joined cases CJEU C-1/90 and C-176/90 (*Aragonesa de Publicidad Exterior and Publivía*), ECLI:EU:C:1991:327, under 20.

[32] Guide on Articles 34-36 TFEU, p. 67.

[33] Guide on Articles 34-36 TFEU, p. 75.

[34] This follows from CJEU 20 February 1979, case C-120/78 (*Cassis de Dijon*), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0120.

[35] Boeve, Groothuijse e.a., Omgevingsrecht, p. 64 (in Dutch).

[36] Guide on Articles 34-36 TFEU, p. 71.

[37] Boeve, Groothuijse e.a., Omgevingsrecht, p. 66 (in Dutch) and the case law cited by these authors: CJEU 13 March 2001, case C-379/(*Preussen Elektra*), Milieu&Recht 2001, 94, with annotation J.H. Jans (in Dutch); CJEU 15 November 2005, case C-320/03 (*Commissie/Oostenrijk (Inntalautobahn)*, Milieu&Recht 2006, 14, with annotation J.H. Jans (in Dutch) and CJEU 21 December 2011, case C-28/09 (*Commissie/Oostenrijk (Inntalautobahn II*), Milieu&Recht 2012, 52, with annotation J.H. Jans (in Dutch).

[38] Directive 2006/123/EC of 12 December 2006 on services in the internal market.

public security and public health (art. 62 and art. 52 TFEU) or on the basis of 'mandatory requirements of general interest' ('rule of reason'). The Services Directive also contains a prohibition of restrictions to the free movement of services falling within its scope. In this context, as in primary law, national measures can be justified on grounds such as public health and environmental protection.

See in more detail: Chapter 5.

3. A national destruction ban: Possibilities and limits under European law

3.1 European Ecodesign Regulation for sustainable products

3.1.1 Introduction

On 30 March 2022, the European Commission presented a proposal for a European Ecodesign Regulation for sustainable products (hereafter Ecodesign Regulation).[39] This new Regulation will replace Directive 2009/125/EC[40] (the Ecodesign Directive) and extend its scope to set environmental design requirements for almost all types of products placed on the EU market. It also introduces a digital product passport and sets out rules on transparency and a ban on the destruction of certain unsold products.

A compromise text[41] was agreed in the Council of the European Union on 22 May 2023 and amendments to the proposed Regulation were adopted by the European Parliament (EP) in first reading on 12 July 2023. A political agreement between the EP and the Council on the text of the Regulation was reached on 4 December 2023.[42] The Regulation is expected to enter into force in mid-2024. The texts of the European Parliament and the Council are also discussed below, as both texts are more ambitious than the Commission's proposal with regard to the destruction ban.

Agreement between the Commission, the Council and the EP on the final text

The EP, Council and Commission agreed on the text of the Regulation on 4 December 2023. This text was not available at the time of writing of this report. As a result, our analysis of the content and background of the Regulation is based on the available Commission text, the Council compromise text and the EP amendments. Meanwhile, we heard from the client that agreement has been reached on the introduction of a European ban on the destruction of unsold clothing and footwear. This immediate ban will take effect two years after the entry into force of the Regulation (and no later than 2028), with the exception of medium-sized enterprises, for which the ban will apply six years after entry into force. EU lawmakers are also considering a ban on the destruction of unsold small electronic equipment after the new Regulation comes into force.

[39] Ecodesign for Sustainable Products Regulation (ESPR), COM (2022) 142 final. "Rules under ESPR will be laid down on a product-by-product basis, or on the basis of groups of products with enough similar characteristics. The Commission is therefore seeking views on the categories of new products and measures that ESPR should address first, so that priorities can be set transparently and inclusively." See: https://environment.ec.europa.eu/news/sustainable-products-commission-consults-new-product-priorities-2023-01-31_en.

[40] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, PbEU 2009, L 285/10.

[41] Council of the European Union, Brussels, 15 May 2023 (OR. en), 9014/23. See: https://data.consilium.europa.eu/doc/document/ST-9014-2023-INIT/nl/pdf.

[42] Texts adopted - Ecodesign Regulation - Wednesday, 12 July 2023 (europa.eu).

Objectives of the Regulation

According to the Commission, the main objectives of the proposed Regulation are to reduce negative environmental impacts during the life cycle of products and to improve the functioning of the internal market.[43] The proposed Regulation aims to provide a framework for setting ecodesign requirements based on the sustainability and circularity aspects of the Circular Economy Action Plan[44], such as durability, reusability, upgradability and repairability of products, the presence of substances of concern in products, energy and resource efficiency of products, recycled content of products, remanufacturing and high quality recycling of products, and the reduction of the carbon and environmental footprint of products.[45]

3.1.2 Transparency obligation and destruction bans

Commission proposal

Chapter VI of the Commission proposal is entitled 'Destruction of unsold consumer products' and contains one article, Article 20. The first paragraph of this article imposes an information ('transparency') obligation on economic operators[46] who dispose of unsold products themselves or on behalf of another economic operator. They must disclose data on the number of unsold products[47] they discard each year, broken down by type or category of product, the reason for discarding the products, and the operation in the waste hierarchy of Article 4 of the Waste Framework Directive 2008/98/EC for which they are destined.

Article 20(3) of the draft Regulation provides that the Commission may adopt delegated acts in accordance with Article 66 of the Regulation in order to prohibit economic operators from destroying 'unsold consumer products in the Union, where the destruction of unsold consumer products falling within a *certain product group*[48] has significant environmental impact'. This is therefore a ban on specific product groups and not a general ban on destruction. Where appropriate, taking into account the interests and situations referred to in the third paragraph, the Commission should also adopt exemptions to the ban on destruction.

The term 'destruction' is defined in Article 2(35) as follows:

> "the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering a product for preparing for re-use or remanufacturing operations."

[43] The Commission's proposal, p. 1.
[44] A new Circular Economy Action Plan (europa.eu).
[45] The Commission's proposal, p. 1.
[46] The term 'economic operator' is defined in Article 2(46).
[47] The terms 'consumer product' and 'unsold consumer product' are defined in Article 2(36, 37).
[48] The term 'product group' is defined in Article 2(5), as: "a set of products that serve similar purposes and are similar in terms of use, or have similar functional properties, and are similar in terms of consumer perception."

In interpreting the definition of 'destroy', it is necessary to follow the definitions set out in the Waste Framework Directive.[49]

Recital 46 of the Commission's proposal shows that the European Commission's aim in introducing a destruction ban is to stop the increase in the destruction of unused products, such as textiles and footwear, as a result of the growth of internet sales, and thus to reduce the generation of waste and discourage overproduction. In addition, the European Commission points out that the Regulation aims to prevent market distortions caused by Member States adopting separate national legal measures on the destruction of unsold products.

> Recital 46: "The destruction of unsold consumer products, such as textiles and footwear, by economic operators is becoming a widespread environmental problem across the Union, in particular due to the rapid growth of online sales. It amounts to a loss of valuable economic resources as goods are produced, transported and afterwards destroyed without ever being used for their intended purpose. It is therefore necessary, in the interest of environmental protection, that this Regulation establishes a framework to prevent the destruction of unsold products primarily intended for consumers pursuant to Directive (EU) 2019/771 of the European Parliament and of the Council , including products that have been returned by a consumer in view of their right of withdrawal as laid down by Directive (EU) 2011/83/EU of the European Parliament and of the Council. This will reduce the environmental impact of those products by reducing the generation of waste and by dis-incentivising overproduction of products. In addition, given that several Member States have introduced national legislation on the destruction of unsold consumer products thereby creating market distortions, harmonised rules on the destruction of unsold consumer products are necessary to ensure that distributors, retailers and other economic operators are subject to the same rules and incentives across Member States."

Article 20(6) states that, in principle, this article does not apply to micro, small and medium-sized enterprises (SMEs[50]), unless the Commission has provided otherwise in a delegated act.

Council compromise text/General approach[51]

On 22 May2023, the Council of the European Union (Competitiveness Council) adopted a compromise text based on the Commission's proposal. In this compromise text, Chapter VI 'Destruction of unsold consumer goods' has been divided into three sections and expanded to five articles. The first section contains a duty for economic operators to endeavour taking measures to prevent the discarding of unsold products that are fit for consumption.

In Recital 46 on the purpose of the destruction bans, the Council proposed important additions to the Commission's text, in particular a clarification of the definition of

[49] This follows from the text right after Article 2(59), where it reads: "In addition, the definitions of 'waste', 'hazardous waste', 're-use', 'recovery', 'preparing for re-use' and 'recycling' in Article 3, points (1), (2), (13), (15), (16) and (17), of Directive 2008/98/EC of the European Parliament and of the Council shall apply."

[50] This, too, follows from the text after Article 2(59), where it reads: "The definitions of 'SMEs', 'small enterprises' and 'microenterprises' in Article 2(1), (2) and (3), of Annex I to Commission Recommendation 2003/361/EC shall apply." A note is included that refers to: Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

[51] Text of the general approach as adopted at the Competitiveness Council on 22 May 2023, Brussels, 23 May 2023, 9649/23, Annex.

'destruction' from Article 2 of the Regulation in relation to the waste (treatment) hierarchy from Article 4 of the Waste Framework Directive:

> "46) (…) Products that have been returned, and cannot be sold again due to the condition of the product, and are not suitable for remanufacturing refurbishment, preparation for reuse or donation, should not constitute an unsold consumer product within the meaning of this Regulation. The concept of destruction as outlined in this Regulation should cover the last three activities on the waste hierarchy as defined in Directive 2008/98/EC: recycling, other recovery and disposal [52]. Remanufacturing[53] and preparation for re-use[54] should furthermore not be considered destruction. While recycling[55] is an important waste treatment activity for a circular economy, it is unreasonable that products are manufactured only to immediately be recycled, hence the inclusion of recycling in the concept of destruction. (…)"

The Council therefore considers that the ban on the destruction of unsold products should cover the lower three steps of the waste hierarchy[56]: disposal, other recovery (e.g. energy recovery) and recycling. This is important to keep in mind when defining the legal scope for national destruction bans. Indeed, differences between European and national destruction bans may exist or arise in the interpretation of 'destruction' and the operations it does or does not cover.

Section 2, titled 'Transparency', contains Article 20 and deals only with the transparency obligations of economic operators in relation to unsold products. It has been partly clarified and extended as compared to Article 20 of the Commission proposal.

The most relevant provisions for this study are those relating to the ban on destruction, contained in Section 3, titled 'Prohibition'. Article 20b(1) introduces a directly applicable European ban on the destruction of unsold *apparel and clothing accessories*.[57] This ban will take effect 36 months after the entry into force of the Regulation. It appears that in the final text agreed upon on 4 December 2023 this has been changed to 24 months. Paragraph 2 gives the Commission the competence to adopt implementing acts within 18 months of the entry

[52] Definition in article 2, sub 19 of the Waste Framework Directive (WFD), 2008/98/EC: "'disposal' means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations.

[53] No definition in article 2 or elsewhere in the WFD.

[54] Definition in article 2, sub 16 of the WFD: "'Preparing for re-use' means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing".

[55] Definition in article 2, sub 17 of the WFD: "'recycling' means any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations."

[56] Artikel 4, lid 1 KRA: "1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:
(a) prevention;
(b) preparing for re-use;
(c) recycling;
(d) other recovery, e.g. energy recovery; and
(e) disposal."

[57] That are included in chapters 61 and 62 of the TARIC (EU customs tariff), a multilingual database covering all measures relating to tariff, commercial and agricultural legislation.

into force of the Regulation, which will include specific exemptions from the ban on destruction in paragraph 1. These exemptions should be based on the principles set out in Article 20c(4) and the justifications set out in Article 20c(5).

A ban on destruction applies to economic operators. This term is defined as "the manufacturer, the authorised representative, the importer, the distributor, the dealer and the fulfilment service provider" and covers both those who dispose of unsold products themselves and those who have them disposed of by third parties. This is not explicitly stated in the text of Article 20b, but can be inferred from the transparency obligation in Article 20(1) and Recital 46a of the proposed Regulation:

> "(46a) Economic operators should take necessary measures to prevent the need to discard unsold consumer products that are fit for use. This should only include measures that are technically feasible and economically viable. Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste lays down rules to prohibit export of products to third countries under the false pretense that they are being sold or donated for use, when such products are in fact destined for destruction."

Thus, a ban on destruction does not apply to all operators, such as those carrying out waste management operations, but only to operators within the meaning of the Regulation.

According to Article 20b(3), the ban on the destruction of unsold apparel and clothing accessories does not apply to micro, small and medium-sized enterprises (SMEs). However, four years after the entry into force of the Regulation, the ban will also apply to SMEs. In the political agreement that was recently reached on the Regulation, this deadline has been extended to six years.

Article 20c also empowers the Commission to adopt implementing acts[58], which may introduce destruction bans for product groups other than clothing and clothing accessories. When preparing an implementing act, the Commission must carry out an impact assessment and consult stakeholders, the Ecodesign Forum and the Ecodesign Expert Group.[59] The Commission may also formulate exemptions to such prohibitions on the basis of the principles and justifications set out in Article 20c(4) and (5). Article 26c also does not apply to SMEs, but will apply to medium-sized enterprises four years after the entry into force of the proposed Regulation.

Article 20d(1) requires the Commission to publish, no later than 24 months after the entry into force of the Regulation and every 36 months thereafter, a list of products for which it intends to carry out impact assessments in accordance with Article 20c and the deadlines by which it intends to do so.

The second paragraph of Article 20d refers to Article 5 ('Ecodesign requirements') of the proposed Regulation. Article 5(4) requires the Commission to carry out an impact assessment in preparation for the setting of ecodesign requirements for product groups. In carrying out

[58] In accordance with the Committee procedure referred to in Article 67(3) of the proposed Regulation.
[59] As provided in Article 17 and 17a.

this impact assessment, the Commission shall consider whether a destruction ban should be introduced for the product group concerned.

Amendments of the European Parliament

The European Parliament adopted amendments to the Commission proposal at first reading on 12 July 2023. Of particular relevance to this review are the amendments to Article 20(3) and a newly proposed Article 20a. An amendment to Article 20(3)(1) empowers the Commission to introduce a ban on the destruction of unsold products in a delegated act if the destruction of these products has a *non-negligible* environmental impact and not, as in the Commission proposal, if it has a *significant* environmental impact.[60] This implies a lower threshold for imposing a destruction ban than in the Commission proposal. In addition, on the basis of the information provided by operators under Article 20(1) on the disposal routes of unsold products, the Commission must publish a report on the destruction of unsold products within two years of the entry into force of the Regulation and every three years thereafter. In this report, the Commission should identify the products for which it considers it necessary to introduce a ban on destruction by delegated act, according to the amendment in question.[61]

Most relevant for this study is the new Article 20a proposed by the European Parliament, which, like the Council compromise text, also introduces directly effective destruction bans in the Regulation itself, i.e. not only on the basis of delegated acts of the Commission. According to the first paragraph of this provision, a direct ban on the destruction of unsold products will apply to the product groups (a) textiles and footwear and (b) electrical and electronic equipment one year after the entry into force of the Regulation.[62] The second paragraph empowers the Commission to adopt delegated acts providing for certain exemptions to the ban on destruction set out in the first paragraph where this is appropriate in the light of the interests or circumstances referred to in the second paragraph (the same as in Article 20(3)).[63] It is still unclear which of these amendments made it into the final text of the Regulation. In any case, they do not (yet) include a direct ban on the destruction of unsold electrical and electronic equipment.

3.2 Scope for national destruction bans in the light of Article 114 TFEU

Now that the Ecodesign Regulation has been adopted on 4 December 2023, we will first look at the legal scope that the Regulation itself, in the light of its legal basis, provides for the continuation of existing national destruction bans and the creation of new national destruction bans.

In this context, it is significant that the Council added a recital (46c) in the compromise text of 22 May 2023, which reads as follows

[60] Amendment 160 to Article 20(3), first paragragh.
[61] Amendment 161 to Article 20(3), second paragraph (new).
[62] Amendment 168 to Article 20a (new).
[63] Paragraphs 3 and 4 of Article 20a have essentially the same effect as Article 20(5, 6) of the Commission's proposal, and are therefore not considered further here.

> "Member States should not be prevented from introducing or maintaining national measures concerning the destruction of unsold consumer products for products which are not subject to the direct ban or which are not yet covered by an implementing act establishing a ban, provided that such measures are in conformity with Union law."[64]

Although at the time of writing of this report it is not certain whether this or any other text proposals will be included in the final text of the Regulation, it shows that Member States in any case want to explicitly reserve legal space to maintain or introduce existing or new national destruction bans that are not (yet) covered by a European destruction ban.

Once in force, the Ecodesign Regulation will include a ban on the destruction of two product groups: unsold clothing and unsold footwear. This ban will apply in all Member States two years after the entry into force of the Regulation (and no later than 2028).

From the choice of legal basis, Article 114 TFEU, on the basis of which the EU legislator generally presumes exhaustive harmonisation[65], read together with the text of Recital 46c), it can be concluded that a directly effective destruction ban on the basis of the Regulation or on the basis of a delegated act of the Commission for the product group in question results in exhaustive harmonisation for that specific product group.

Scope for national bans in anticipation of European bans

To the extent that no other European bans are yet applicable under the Ecodesign Regulation and are not expected in the foreseeable future, it could be argued that Member States can easily introduce national bans. These national measures will have to be assessed in the light of Articles 34, 35 and 36 TFEU (see Chapter 2 and, more generally, Section 3.3).

Less clear is the situation where the Commission has announced its intention to introduce a destruction ban for a certain product group, say within three years, but has not yet adopted a delegated act to that effect. Can Member States then introduce a national destruction ban for this product group in anticipation of the announced European ban? Or may they not do so, given that the European legislator has delegated the creation of destruction bans by means of a delegated act to the Commission, which, according to its proposal for a regulation, considers that there will be market distortions if Member States adopt national measures? The latter conclusion seems too far-reaching in the light of recital 46(c) described above, which explicitly states that Member States may maintain or adopt national measures "for products which are not subject to the direct ban or which are not yet covered by an implementing act establishing a ban", provided that they comply with Union law (namely Articles 34, 35 and 36 TFEU). And also because, assuming that the Regulation's destruction bans are fully harmonised, Member States would in principle still be able to rely on Article 114(4) and (5) TFEU to maintain or create national destruction bans even after the Regulation enters into force, although these national measures would require the approval of the European Commission and would have to meet stricter requirements, including proportionality, than under the review framework of Articles 34-36 TFEU.

[64] https://data.consilium.europa.eu/doc/document/ST-9649-2023-INIT/EN/pdf.
[65] See Chapter 1.

Principle of loyal cooperation - Article 4(3) TEU

However, the question of whether Member States may introduce a national destruction ban *in anticipation* of the entry into force and application of a European destruction ban must also be considered in the light of the principle of loyal cooperation set out in Article 4(3) of the Treaty on European Union (TEU). According to this provision, Member States must refrain from any action that could jeopardise the achievement of the objectives of the Union. If Member States adopt a national ban on destruction in anticipation of a European ban on destruction, it would seem to follow from the principle of loyalty that, in any event, the national provision in question should provide for the national ban to lapse as soon as the European ban becomes applicable. The more likely the introduction of a European ban is, the stronger the obligation under the principle of loyalty.

In view of the above, it is assumed that until the European Commission adopts delegated acts, destruction bans (except for clothing and footwear) will be *partially harmonised* under the Regulation. As a consequence, Member States in principle have the legal scope to introduce national destruction bans.[66] These measures will be assessed in the light of Articles 34, 35 and 36 TFEU, including the proportionality of the national measure, and the principle of loyalty under Article 4 TEU.

Scope for national bans after the introduction of a European ban

Once a European destruction ban for a particular product group is in force, either on the basis of the Regulation itself or on the basis of a delegated act of the Commission, exhaustive harmonisation applies to the product group in question, as shown above. This means that, for this product group, Member States may only maintain existing national destruction bans or introduce new destruction bans on the basis of the narrowly defined exceptions in Article 114 TFEU and with the approval of the European Commission.

A Member State wishing to maintain an existing national destruction ban for this particular product group must comply with the requirements of Article 114(4) TFEU. New national destruction bans for a product group subject to a European destruction ban can only be introduced by a Member State if the conditions of Article 114(5) TFEU are fulfilled (see Chapter 1).[67]

It is also important to note that, given the exhaustive nature of a European ban on destruction, a national ban on destruction will have to cover at least the last three steps of the waste hierarchy (disposal, other recovery and recycling), which are covered by the European ban on destruction as a result of the definition of destruction in the Regulation (see section 3.1.2).

[66] The way we read it, H.E. Woldendorp (Milieu & Recht 2024, p. 20 (in Dutch)) shares our opinion that nothing stands in the way of national measures as long as there is no EU legislation for specific product groups.

[67] Boeve, Groothuijse e.a., Omgevingsrecht, p. 60 en 61 (in Dutch). The authors also describe here the so-called 'Dutch roetfilter case' which provides a good example of the review against Article 114 (5) TFEU (Court of first instance EU 26 June 2007, case T-182/06 (*Netherlands/Commission*) Milieu&Recht 2007, 88, with annotation J.H. Jans (in Dutch) and CJEU 6 November 2008, case C-405/07 P (*Netherlands/Commission*), Milieu&Recht 2009, 1, with annotation J.H. Jans (in Dutch).

3.3 Scope for national destruction bans in the light of Articles 34-36 TFEU

Prohibited import and export restrictions as a result of a national destruction ban?

Whether Member States may introduce national destruction bans in anticipation of European destruction bans depends on whether these national measures result in prohibited quantitative restrictions on imports and exports or measures having equivalent effect between Member States and, if so, whether they can be justified on the basis of Article 36 TFEU interests or the 'rule of reason' (environmental protection). In order to be justified, a destruction ban must also pass the proportionality test (see Chapter 2).

What barriers to intra-Union trade may arise if Member States introduce national destruction bans on unsold products? Or, to use the terminology of Articles 34 and 35 TFEU, to what extent do national destruction bans on unsold products qualify as prohibited quantitative restrictions on imports or exports or measures having equivalent effect?

If a Member State imposes a national destruction ban on (certain) unsold products, this means that the economic operators holding these goods in that Member State are restricted in the operations they can perform with these goods. After all, they are not allowed to 'destroy' them (or have them destroyed), and it will be crucial for the operators perspective which actions the Member State concerned will legally qualify as 'destruction'. It seems reasonable to assume that, as in the case of the Ecodesign Regulation, individual Member States will seek, or have sought, affiliation to the waste hierarchy under Article 4 of the Waste Framework Directive for this purpose (e.g. France, see below in section 3.1.2). A national ban on 'destruction' then means in practice that these goods may not be discarded as waste for certain waste treatment operations, such as disposal and some forms of recovery (incineration with energy recovery), which are the least desirable forms of waste treatment from an environmental (and circular economy) point of view. Whether the disposal of unsold products for waste recovery operations should also be banned is difficult to answer in general terms. This seems to depend partly on the nature of the product and the availability of appropriate recycling technologies.

A national destruction ban therefore prohibits certain waste recycling operations in respect of unsold products. Whether or not a national destruction ban results in prohibited import and export restrictions or measures of equivalent effect within the meaning of Articles 34 and 35 TFEU will depend on the design of the ban in question.

For the sake of completeness, it should be noted that the definition of 'destruction' in the proposed Regulation suggests that it includes *deliberately damaging* products. To the extent that a national ban on destruction includes deliberately damaging products, this part of the ban does not seem to have an impact on trade between Member States. This is because the ban on deliberately damaging products only applies to products located within the territory of the Member State concerned. Seen from the European legal framework, Member States can probably easily incorporate this part of the ban in a national destruction ban. It is therefore not considered further below.

In theory, a national destruction ban could only apply to unsold products on the domestic market and to waste treatment operations taking place within the Member State itself. In this case, there would be no cross-border element and Articles 34 and 35 TFEU would not apply (see Chapter 2).

However, this purely national approach does not seem very likely as it would still allow the export of unsold products to other Member States (or third countries) for waste treatment operations prohibited in the Member State. This is undesirable from the point of view of implementation and enforcement of the national destruction ban. A national destruction ban must therefore be accompanied by restrictions on the export of unsold products for certain waste treatment operations, under the same conditions and with the same exemptions as apply to unsold products on the domestic market from the point of view of implementation and enforcement. Exports for other operations, such as donation or preparation for re-use, will still be possible.

A national destruction ban could also be designed to apply to unsold products from other Member States that are not placed on the market in the Member State of destination but are shipped with the aim of being destroyed as waste there. In this case, imports of unsold products from other Member States destined for certain waste treatment operations in the importing Member State should be prohibited. This may be desirable from the point of view of promoting a (European and national) circular economy. However, prohibiting the import of unsold products from other Member States for certain waste treatment operations in the Member State of destination seems to us more difficult to justify from the point of view of the need to implement and enforce a national destruction ban. Indeed, such a prohibition does not in itself contribute to the objective of the national measure: to prevent unsold products placed on the national market from being destroyed too early in their life cycle (waste prevention).[68]

Therefore we conclude that, in order to implement and enforce a national ban on the destruction of unsold products which prohibits certain waste treatment operations involving those products within a Member State, that Member State must also prohibit the export of those products for the same waste treatment operations, under the same conditions and with the same exceptions as for unsold products on the domestic market.

This export prohibition constitutes a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 35 TFEU. As the scope of this prohibition appears to have been broadened by the case law of the Court of Justice (in addition to direct discriminatory measures, indirect discriminatory measures are also covered), the precise form of a national destruction ban and the export restriction associated with it is a question of how a national destruction ban and the export restriction associated with it are designed. In order to fall outside the prohibition of Article 35 TFEU, the national destruction ban must apply *indistinctly* both to unsold products within the Member State and to exports of unsold

[68] By prohibiting the import of unsold goods from another member state, the environmental interest of that other member state is served. On that ground, an import ban cannot be justified, see a.o. J.H. Jans, Europees Milieurecht in Nederland, Groningen (1994), pp. 252-254 (in Dutch).

products to other Member States. However, the national destruction ban must *not indirectly discriminate* against exports of unsold products to other Member States.

A national destruction ban applies to certain operations with unsold products based on the classification in the waste hierarchy. In our view, this clear classification of operations lends itself well to formulating a national destruction ban, including export bans, in such a way that it applies indistinctly and also in a way that is not indirectly discriminatory to unsold products both domestically and abroad. In this case, Article 35 TFEU does not apply and the national measure does not need to be further justified (see Chapter 2).

If, contrary to our assumption, there is a conflict with Article 34 or 35 TFEU, a justification of the measure for a national destruction ban could be found in the ground of 'environmental protection' (which could also include the promotion of a circular economy through waste prevention). Next, the concrete design of the measure would have to pass the proportionality test.

3.4 Restrictions under European property law

Article 17 of the EU Charter of Fundamental Rights

The European right to property is enshrined in Article 17 of the EU Charter of Fundamental Rights (the Charter), which reads as follows:

> "1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
>
> 2. Intellectual property shall be protected."[69]

This right has the same content and scope as Article 1 of the Additional Protocol[70] to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[71] Property, as the Court of Justice has held, does not refer to purely commercial interests or opportunities, the changeability of which is essential to economic activity, but concerns rights with a property value from which, from the point of view of the rule of law, a vested legal

[69] Intellectual property will not be discussed in more detail below. See E. Thomas, Lexplicatie, Commentaar op art. 17 Handvest Grondrechen EU, p. 1: Lexplicatie, Bronnen en citaten bij: Handvest van de grondrechten van de Europese Unie, Artikel 17 Het recht op eigendom | InView Essential (in Dutch)

[70] This provision states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[71] Pursuant to Artikel 52 (3) EU Charter of Fundamental Rights. See also: E. Thomas, Lexplicatie, Commentaar op art. 17 Handvest Grondrechen EU, p. 1: Lexplicatie, Bronnen en citaten bij: Handvest van de grondrechten van de Europese Unie, Artikel 17 Het recht op eigendom | InView Essential (in Dutch).

status arises on the basis of which those rights can be exercised autonomously by or for the benefit of their holder. [72]

With regard to the scope of Article 17 of the Charter and Article 1 of the Additional Protocol to the ECHR, it is important to recall Article 51(1) of the Charter. This states that the provisions of the Charter are "addressed to the institutions, bodies, offices and agencies of the Union, with due regard for the principle of subsidiarity, and to the Member States only *when they are implementing Union law*".[73] This means that Article 17 of the Charter and the conditions for its limitation constitute the assessment framework for national legal destruction bans that fall within the scope of Articles 34-36 TFEU and/or the Ecodesign Regulation.[74]

If a European destruction ban does not yet apply, Article 1 of the Protocol to the ECHR applies, as mentioned above. If a European prohibition on destruction does apply, it is obvious that Article 52(1) of the Charter should be used as the test for reviewing national prohibitions on nullification. As we have been informed that agreement has now been reached on the Regulation, we will use the text of the latter provision of the Charter as a starting point in what follows.

Justifying restrictions on European property rights

The fundamental right to property is not absolute. Restrictions on the European right to property will have to be assessed, depending on the situation, against the test developed by the European Court of Human Rights (ECHR) to justify interference with the right to property under Article 1 of the Protocol to the ECHR[75] or the conditions set out in Article 52(1) of the Charter, which reads as follows:

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

The wording used is inspired by the case law of the Court of Justice.[76]

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[72] E. Thomas, Lexplicatie, Commentaar op art. 17 Handvest Grondrechten EU, p. 2 (in Dutch) and there mentioned cases: CJEU HvJ 15 April 2021, joined cases C-789/18 en C-799/18 (*Federazione nazionale dell impresse elettrotecniche ed elettroniche (Anie) a.o.*).

[73] See further: E. Thomas, Lexplicatie, Commentaar op art. 51 Handvest Grondrechten EU (in Dutch): Lexplicatie, Bronnen en citaten bij: Handvest van de grondrechten van de Europese Unie, Artikel 51 Toepassingsgebied | InView .

[74] For the interpretation of whether or not Member States "implement Union law" by a national measure, E. Thomas, Lexplicatie, Commentaar op art. 17 Handvest Grondrechten EU, p. 11 en 12 refers to CJEU 5 May 2022, C-83/20 (*BPC Lux 2 a.o.*), under 27.

[75] As elaborated in the case law of the European Court of Human Rights. See more detailed: T. Barkhuysen en M.L. van Emmerik, Europese grondrechten en het Nederlandse bestuursrecht (MM SBR) 2016/4.11.3 (in Dutch), Europese grondrechten en het Nederlandse bestuursrecht. De betekenis van het EVRM en het EU-Grondrechtenhandvest (Staats- en bestuursrecht Wetenschap), 4.11.3 Beperking | InView Essential.

[76] According to E. Thomas, Lexplicatie, Commentaar op art. 52 Handvest Grondrechen EU, p. 1 (in Dutch): Lexplicatie, Bronnen en citaten bij: Handvest van de grondrechten van de Europese Unie, Artikel 52 Reikwijdte en uitlegging van de gewaarborgde rechten en beginselen | InView Essential. To this end, this author refers to

European and national bans on the destruction of unsold products do not aim to deprive the holder of the products of his property, but to restrict his use of them without (completely) depriving him of his right to dispose of them.[77] The owner's right of ownership is affected to the extent that he is no longer allowed to dispose of the goods (or have them disposed of) at his discretion for certain waste treatment operations in the public interest (environmental protection/promotion of CE/waste prevention). In order to be justified, such measures restricting the use of the goods must comply with Article 17(1) and the conditions set out in Article 52(1) of the Charter.

For the establishment of European and national destruction bans, it is important to note that it follows from the case law of the European Court of Justice (ECJ) that the protection of the environment is one of the objectives of general interest recognised by the Union and that environmental protection may justify a restriction on the use of the right to property.[78]

In recital 47(a) of the compromise text, the Council justifies the European ban on the destruction of unsold clothing and clothing accessories (from 4 December 2023: clothing and footwear) in the light of the right to property enshrined in Article 17 of the Charter:

> "(47a) In addition to disincentivising the destruction of unsold consumer products, this Regulation should introduce the logic of prohibiting the destruction of unsold consumer products in the Union, considering, pursuant to Article 52(1) of the Charter of Fundamental Rights, the right to property and to conduct a business are not absolute rights and, according to the case law of the Court of Justice, protection of the environment is an objective of general interest capable of justifying a restriction on the use of those rights, provided that such restriction does not constitute a disproportionate and intolerable interference, impairing the very substance of such rights. Specifically, the unnecessarily high production volumes and short use phase of textiles, of which clothing comprises the largest share of consumption in the EU, cause significant environmental impact as described in the Communication of the Commission 'EU Strategy for Sustainable and Circular Textiles'. Newly produced but unsold textiles and especially clothing are among the items reportedly being destroyed. Clothing should be valued higher, worn, and cared for more than what today's fast fashion culture entails. From a circular economy perspective, such wasting of valuable resources is in clear contradiction to the objectives of this Regulation of improving the environmental sustainability. It is therefore justified to prohibit the destruction of unsold consumer apparel and clothing accessories while providing for certain specific exemptions, under which destroying unsold consumer apparel and clothing accessories may still be permitted, notably in view of health and safety concerns or protection of intellectual property rights, in order to comply with the requirement of proportionality. Implementing powers should be conferred

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CJEU 13 April 2000, case C-292/97, para 45: "(…) However, it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights."

[77] T. Barkhuysen en M.L. van Emmerik, Europese grondrechten en het Nederlandse bestuursrecht (MM SBR) 2016/4.11.3 (in Dutch), Europese grondrechten en het Nederlandse bestuursrecht. De betekenis van het EVRM en het EU-Grondrechtenhandvest (Staats- en bestuursrecht Wetenschap), 4.11.3 Beperking | InView Essential.

[78] E. Thomas, Lexplicatie, Commentaar op art. 17 Handvest Grondrechten EU, p. 5 (in Dutch). The author refers to recital 34 of CJEU 27 January 2022, case C-238/20 (*SÄ•tiÅ†i-S' SIA*) or (*Sātiņi-S*).

on the Commission to specify such exemptions. This prohibition should not apply to SMEs. However, it should apply to medium-sized enterprises from 4 years (authors: now six years) after entry into force of this Regulation."

It seems obvious that Member States would be entitled to derive similar arguments from this reasoning of the Council in order to justify the interference with property rights resulting from national destruction bans which they wish to maintain or adopt. In order to be justified as a national measure, a national destruction ban must be provided for by law, it must serve the general interest of the Member State concerned (environmental protection/promotion of CE/waste prevention) and the resulting interference with the right to property must be proportionate to, and actually correspond to, the general interest to be served. With regard to the proportionality of the measure, the ECJ clarified that where there is a choice between several appropriate measures, the least restrictive measure must be chosen and the disadvantages caused must not be disproportionate to the objectives pursued.[79] Provided these conditions are met, the regulation of property as a result of national bans on destruction is also justified in the light of Articles 17 and 52(1) of the Charter. So far, we have no reason to believe that the proposed Dutch ban will not meet this requirement.

3.5 Partial conclusion

A directly applicable European destruction ban for unsold product groups in the Ecodesign Regulation, e.g. for clothing and footwear, or on the basis of a future delegated act of the European Commission, will lead to *exhaustive harmonisation* for that specific product group. Where European destruction bans do not yet apply under the Ecodesign Regulation itself or under delegated acts of the European Commission, *partial harmonisation* is achieved under the Regulation.

As a result, in principle, Member States have legal scope to maintain or introduce national destruction bans *in anticipation* of a European destruction ban. These measures will be assessed in the light of Articles 34, 35 and 36 TFEU, including the proportionality of the national measure. The more likely it becomes that the European Commission will issue a European destruction ban for a particular product group, the more important the principle of loyalty under Article 4(3) TEU becomes. This principle may imply that Member States should refrain from imposing a national destruction ban on a given product group in anticipation of a European ban on that product group or, for example, that in the national legislation they should provide for the national ban to lapse as soon as the European ban becomes applicable. Ultimately, the key question in such a situation seems to be whether there is still an important reason for a Member State to introduce a national ban 'just now' in anticipation of EU law. That reason must serve the general interest, specifically environmental protection (including

[79] Zie E. Thomas, Lexplicatie, Commentaar op art. 52 Handvest Grondrechen EU, p. 14 (in Dutch): Lexplicatie, Bronnen en citaten bij: Handvest van de grondrechten van de Europese Unie, Artikel 52 Reikwijdte en uitlegging van de gewaarborgde rechten en beginselen | InView Essential. The author refers to CJEU 23 March 2023, C-412/21 (*Dual Prod SRL*), under 71.

the promotion of circular economy and waste prevention) of the Member State in question, and must require direct action. Also, as said before, the measure should be proportionate.

Whether Member States may introduce national destruction bans *in anticipation* of European destruction bans will also depend on whether these national measures result in prohibited quantitative restrictions on imports and exports or measures having equivalent effect between Member States and, if so, whether they can be justified on the basis of the interests set out in Article 36 TFEU or the 'rule of reason' (environmental protection). The design of a national destruction ban will depend on whether there are prohibited import and export restrictions or measures having equivalent effect within the meaning of Articles 34 and 35 TFEU. In order to implement and enforce a national ban on the destruction of unsold products that prohibits certain waste treatment operations with those products within a Member State, the export of those products for those waste treatment operations must also be prohibited, under the same conditions and with the same exemptions as for unsold products on the domestic market. Prohibiting the import of unsold products from other Member States for certain waste treatment operations in the Member State of destination is more difficult to justify in terms of the need to implement and enforce a national destruction ban, and does not seem necessary for achieving the policy objectives associated with a destruction ban.

A national destruction ban applies to certain operations with unsold products based on the classification in the waste hierarchy. In our view, this clear classification of operations lends itself well to formulating a national destruction ban, including export bans, in such a way that it applies indistinctly, and in a way that is not indirectly discriminatory to unsold products both domestically and abroad. In this case, Article 35 TFEU does not apply and the national measure does not need to be further justified. Should a conflict with Articles 34 or 35 TFEU nevertheless arise, a justification for a national ban on destruction could be found in the ground of 'protection of the environment' (which could include the promotion of the circular economy through waste prevention). Next, the concrete design of the measure would have to pass the proportionality test.

Once a European destruction ban has become applicable to a particular product group, Member States may maintain or introduce national destruction bans for that product group only on the basis of the narrowly defined exceptions in Article 114(4) or (5) TFEU and with the approval of the European Commission. In particular, a new destruction ban to be introduced by a Member State should then be necessary in the light of new scientific evidence relating to the protection of the environment or the working environment because of a specific problem that has arisen in that Member State after the adoption of the European harmonisation measure.

The purpose of European and national bans on the destruction of unsold products is not to deprive the owner of his property in those products, but to restrict his use of them without (completely) depriving him of the right to dispose of them. In order to be justified as a national measure in the light of Articles 17 and 52(1) of the Charter of Fundamental Rights, a national ban on destruction must be provided for by law, must serve the general interest of the Member State concerned (environmental protection/promotion of CE/waste prevention) and the resulting interference with the right of property must be proportionate to, and actually

correspond to, the general interest sought to be served. Member States will need to have good grounds for justifying the introduction of such a national ban.

4. Design and legal embedding of a Dutch destruction ban

This chapter first discusses the design of a Dutch ban on the destruction of unsold products. The question to be answered here is whether the Ecodesign Regulation and primary European law, as described in the previous chapters, leave room for Member States to introduce a national ban on the destruction of all unsold products, or whether this is only possible per product group. We will also consider what inspiration can be drawn from the destruction ban that has been in force in France for several years.

Secondly, we will describe how a national destruction ban, whether or not modelled on the French destruction ban, could be enshrined in Dutch law. We will examine whether existing Dutch legislation already offers sufficient basis for this purpose or whether new provisions are necessary.

4.1 Design

4.1.1 Basic principles

Section 3.3 concluded that in order to implement and enforce a national ban on the destruction of unsold products, Member States also need to prohibit the export of these products to other Member States under the same conditions and for the same waste treatment operations as for unsold products on the domestic market. The resulting export restriction is not a prohibited measure under Article 35 TFEU, provided that it is indistinctly applicable and does not indirectly impose a higher burden on products that would be exported abroad than on unsold products on the domestic market. Our current understanding is that a destruction ban would affect unsold products remaining in the Netherlands as much as unsold products that would be shipped abroad. It is, after all, an absolute ban on carrying out certain operations with these products. In the concrete design of a destruction ban, however, care must be taken to ensure that the measure does not (actually) affect products that could be taken abroad and 'destroyed' there to a greater extent than products that would be 'destroyed' domestically. If this were the case, this might be a measure that impedes exports and falls under Article 35 TFEU. It would then need to be justified under the rule of reason based on the environmental interest, and the key question would be whether the measure in this form is necessary to achieve the environmental objective.

In our view, it is not necessary to prohibit imports in order to implement and enforce a national destruction ban. However, if it is deemed necessary to prohibit not only exports, but also the import of unsold products from other Member States for certain waste treatment operations, this constitutes a prohibited restriction on imports within the meaning of Article 34 TFEU. This measure must apply indistinctly to domestic and foreign goods and must be proportionate in order to be justified on the basis of the protection of the environment, one of the 'mandatory requirements of general interest' ('rule of reason'). Proof of a mandatory reason (environmental protection/promotion of circular economy/waste prevention) may be difficult to establish in this case, because a ban on the import of unsold products for certain waste treatment operations in the Member State concerned does not in itself contribute to

the purpose of the national destruction ban: to prevent unsold products placed on the domestic market from being destroyed too early in their life cycle (waste prevention).

In designing a Dutch destruction ban, it is important not only to determine *which product groups* it should apply to, but also to determine *which acts of destruction* are prohibited. As a result of the Regulation's definition of destruction, intentional damage and waste disposal, other recovery and recycling, the three lowest rungs of the waste hierarchy, are considered as prohibited acts. Depending on the specifics of a particular product group and for reasons of environmental protection and/or the promotion of a circular economy, a Dutch ban on destruction could possibly allow recycling operations for certain unsold products in addition to refurbishment and preparation for reuse.[80]

Finally, it is also important to determine which *exceptions* should be included in a Dutch ban on the destruction of unsold products. The French ban on destruction (see 4.1.3) may provide some inspiration.

4.1.2 General ban or ban by product group?

The text of the Regulation that was agreed upon on 4 December 2023 reportedly includes an immediate ban on the destruction of unsold clothing and unsold footwear. This ban will apply to these product groups two years after the entry into force of the Regulation.

Under European law, there is only room for a Dutch general destruction ban, i.e. applicable to all product groups[81], if there are no European destruction bans yet. As soon as a European destruction ban becomes applicable to a specific product group, there is in principle no longer any scope for Member States to maintain a national destruction ban for this specific product group, unless they successfully invoke Article 114(4) TFEU (major needs as referred to in Article 36 TFEU or related to the protection of the environment) (see Chapter 2). This means that a Dutch general ban must be restricted for a product group as soon as a European destruction ban becomes applicable for that product group. See also section 4.1.3 on the French destruction ban.

The creation of a Dutch destruction ban *per product group* is possible as long as a European destruction ban does not yet apply to the product groups in question. It remains to be seen whether it is desirable to establish a Dutch destruction ban for a product group in anticipation of the entry into force of a European destruction ban for that product group. It is not inconceivable that the adoption of the national destruction ban will be overtaken in time by the adoption of the European destruction ban, and it is quite conceivable that the Commission will not accept such a ban after the entry into force of the European destruction ban in the context of an invocation of Article 114(4) TFEU.

If a European destruction ban for a certain product group is not to be expected in the short term, the Netherlands can introduce its own destruction ban. The design of such a ban will

[80] To what extent this is desirable and realistic cannot be answered within the scope of this legal study.
[81] Whether a general destruction ban for *all product groups* is desirable from the point of view of environmental protection and/or the development of CE is a question that cannot be answered in the context of this legal study either.

have to take into account what has been described in section 4.1.1 and may possibly be inspired by the French destruction ban.

4.1.3 The French ban on destruction of unsold products[82]

The French Law on the fight against waste and on the circular economy[83]was adopted at the beginning of 2020. This 'umbrella' legislation is largely integrated into the existing 'Code de l'environnement'.[84]

The law on the fight against waste prohibits the disposal of unsold non-food products.[85] Disposal in this prohibition means dumping or incineration, including energy recovery. All types of products, from both household and professional cycles, are covered by this prohibition.[86]

Since 1 January 2022 the ban applied to products covered by an Extended Producer Responsibility (EPR) scheme that existed before the CE Act came into force, and to hygiene and childcare products, food storage and cooking equipment, educational and leisure products, and books and school supplies. As of 31 December 2023, the ban applies to all other household and professional products.

Producers, importers and distributors must reuse or recycle their unsold products in accordance with the waste hierarchy. Unsold products must therefore be reused, preferably by donation, or recycled if reuse is not appropriate or possible (see exceptions below). It is not permitted to circumvent this obligation by exporting unsold products for disposal.[87]

Persons who own products covered by an EPR scheme[88] and who have refused to donate them three times may transfer their obligations by handing them over free of charge to recognised EPR organisations which will manage them, provided that the Producer Responsibility Organisation fees (cf. waste disposal fees in the Netherlands) have been paid for these products.[89]

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[82] To describe this prohibition, the text below relies on and quotes from a document obtained from Dutch Ministry of Infrastructure and Water Management: Non-Paper, The management of unsold products in France, Courtesy translation, DGPR/SRSEDPD/SDDEC/BPLG, 19 January 2023.

[83] 'Loi relative à la lutte contre le gaspillage et à l'économie circulaire', see Article 35 https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041553759/.

[84] Code Lénvironnement: Article L541-15-8 (https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043975010); D541-320 ; Article R541-321; Article R541-322; Article R541-323; Article R541-324. See : Wybe Th. Douma, Chris Backes, Lorenzo Squintani, Onur Güven, Marlon Boeve, Rechtsvergelijkend onderzoek in het kader van het project verkenning modernisering Wet milieubeheer, in opdracht van het ministerie van Infrastructuur en Waterstaat, eindrapport maart 2021, p. 30 (in Dutch).

[85] This paragraph refers to a prohibition applicable to non-food products. As of 2016, France already has a legal ban on shops throwing away edible food, see: Wybe Th. Douma, Chris Backes, Lorenzo Squintani, Onur Güven, Marlon Boeve (2021), 52.

[86] Non-Paper (2023), p. 1.

[87] Non-Paper (2023), p. 1.

[88] Extended Producer Responsibility (EPR): arrangement for extended producer responsibility.

[89] Non-Paper (2023), p. 3.

The ban on destruction does not apply to unsold products that meet the following cumulative criteria:

- Products whose material recovery is prohibited, whose disposal is required, or whose reuse and recycling pose serious risks to health or safety;

- Where there is no market or demand for products with the same essential functions and characteristics as the unsold product or where none of these products are still being marketed;

- Where there is no recycler within a radius of 1,500 km willing to recycle such unsold products at a price of less than 20 % of the selling price of the unsold product or less than twice the cost of disposing of the unsold product.[90]

Unsold hygiene and childcare products, defined by decree[91], are subject to a stricter obligation. These products must be reused, except for products with a minimum use-by date of less than three months and in cases where reuse by charities and social economy organisations is not possible.[92]

With regard to the donation of products, the French law on the fight against waste provides for the establishment of specific agreements to facilitate the donation process, based on the principles of agreements already in place in France for the donation of food products. In particular, such agreements should specify the methods for managing the unsold products eligible for donation (sorting, storage, control of legal health and safety requirements, traceability), as well as the conditions for refusing the donation or transferring ownership of these products from the donor to the recipient.[93]

Inspiration for the Netherlands?

From 1 January 2024, France has a general ban on the disposal of all unsold (non-food) products. This ban also applies to the export of unsold products. It is therefore a general ban with specific exceptions.

The French destruction ban prohibits disposal and 'other recovery' (such as incineration with energy recovery) of unsold products, the two lowest steps of the waste hierarchy in Article 4 of the Waste Framework Directive (Directive 2008/98/EC[94]). Thus, in principle, the scope for action of economic operators who are holders of unsold products is much wider than if all recovery operations were prohibited. The holder must have the unsold products recycled, preferably by donation. If this is not possible, he is also free to recycle, unless recycling is not possible or permitted for the product in question. The French ban on destruction aims to encourage the reuse of unsold products, but still leaves the door open for recycling. For the

[90] Non-Paper (2023), p. 3 See : Article R541-323 Code de l'environnement https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042883227.
[91] Article L541-15-8 Code de lénvironnement and Article D541-320 'Décret n° 2020-1724 du 28 décembre 2020 relatif à l'interdiction d'élimination des invendus non alimentaires et à diverses dispositions de lutte contre le gaspillage' (https://www.legifrance.gouv.fr/loda/id/LEGIARTI000042877515/2020-12-31/.
[92] Non-Paper (2023), p. 2.
[93] Non-Paper (2023), p. 2 en 3.
[94] EUR-Lex - 02008L0098-20180705 - EN - EUR-Lex (europa.eu).

time being, only unsold hygiene and childcare products are subject to a stricter ban on destruction, as it includes a ban on recycling for these product groups.

Section 4.1.2 concluded that, from the point of view of European law, there is room for a general ban on the destruction of unsold products, i.e. applicable to all product groups, only if there are no European bans on the destruction of unsold products. Now that a European ban on the destruction of unsold clothing and footwear is imminent, with which the European legislator intends to achieve an exhaustive regulation, the general French destruction ban will have to be repealed for these product groups (and therefore adapted by the legislator).[95] In concrete terms, this means that the recycling of unsold clothing and footwear will also be prohibited under the European ban, as is currently the case for the French ban on unsold hygiene and childcare products. Article L541-15-8 of the Environmental Code and its implementing decree will have to be adapted.

The French destruction ban can serve as an inspiration for the design of a Dutch general destruction ban that aims to promote the reuse of unsold products, preferably through donation, and thus reduce surplus stocks. The advantage of the French ban could be that it does not (yet) automatically prohibit recycling, as will be the case with a European destruction ban. This means that the market actors concerned will have more options than under a European destruction ban, which could be an advantage if there are not yet sufficient recycling options for all types of unsold products. The legal encouragement of donation as the preferred option and recycling as a second option, combined with a ban on disposal (landfill and incineration) and other recovery (incineration with energy recovery), would send a clear signal to operators. In France, the ban appears to lead companies to adjust their production planning in order to create less surplus stocks.[96]

As soon as a European ban on destruction of unsold products becomes applicable to a specific product group, such a Dutch general ban, like the French ban, will have to provide for the expiry of the national ban for that product group.

4.2 Legal embedding

The Dutch Environment and Planning Act (Omgevingswet) entered into force on 1 January 2024 and incorporated most parts of the Environmental Management Act (Wet milieubeheer). Yet, not all provisions of the Environmental Management Act have been incorporated into the Dutch Environment and Planning Act. Of relevance to this study is that Chapter 9 'Substances and Products' and Chapter 10 'Waste' have been kept in the Wm.

A legal basis for the introduction of a general or specific ban on the destruction of unsold products can be found in Section 9.5.2(1) of the Wm. This paragraph provides for the possibility of laying down rules by general decree in the Council "in order to promote re-use, prevention, recycling and other forms of recovery, the efficient management of waste or

[95] Reportedly within two years of the entry into force of the Ecodesign Regulation.

[96] Kathrin Graulich, Ashleigh McLennan, Viviana López H. (Oeko-Institut e.V.), 'Data on destruction of unsold consumer products', Short study – final report, October 2022, Intended for European Commission, DG Environment, p. 14.

otherwise in the interest of environmental protection (...) with regard to the manufacture, importation into the Netherlands, use, possession, making available to another person, receipt, reception, recovery and disposal of substances, mixtures or products or waste covered by the measure." According to Article 9.5.2(2), these rules may include a prohibition on certain operations or set specific rules for certain operations.

In our view, this paragraph provides a sufficient basis for a national ban on the destruction of unsold products, for the purposes of reuse and prevention. The ban could at least cover intentional damage to unsold products and the undesirable disposal of these products from an environmental and circular economy point of view. This would have to take into account the entry into force of European bans on the destruction of unsold clothing[97] and footwear, as well as future European bans on destruction, as these have a direct effect. We assume that it will be a matter of legislative technique to formulate a Dutch general destruction ban for product groups following the French example, while excluding product groups that are subject to a European destruction ban.

Chapter 10 Wm is important because it contains the legal basis for the national waste management plan (LAP) (Article 10.3 Wm) and the implementation of the waste hierarchy from the Waste Framework Directive (Article 10.4 Wm), which is detailed in the LAP.[98] This waste hierarchy will also have to guide the establishment of a Dutch destruction ban in an executive decree under Article 9.5.2 Wm. The LAP is also important as an assessment framework for waste exports and may have to be adapted before a national destruction ban is implemented.

4.3 Partial conclusion

Member States must take the scope of Article 35 TFEU into account when designing a national destruction ban and a related ban on the export of unsold products to other Member States. A national destruction ban which is designed as a non-discriminatory measure, but which de facto restricts the outward flow of unsold products more than the unsold products on the national market, falls under Article 35 TFEU. This means the ban will have to be justified under the 'rule of reason' (environmental protection/promotion of CE/waste prevention) and will have to be proportionate.

In our view, there is less legal scope for an import ban if a Member State wants to implement and enforce a national destruction ban. If it is nevertheless deemed necessary to ban the import of unsold products from other Member States in addition to ban exports for certain waste treatment operations, this would constitute a prohibited restriction on imports under Article 34 TFEU. It would also require justification under the 'rule of reason'. Justification will

[97] For the European destruction ban on clothing and its national implementation, a connection could possibly also be sought with the Dutch Decree on Extended Producer Responsibility for Textiles (wetten.nl - Regeling - Besluit uitgebreide producentenverantwoordelijkheid textiel - BWBR0048093 (overheid.nl). This decree (in Dutch) is based on Article 9.5.2 (1) Wm.

[98] National waste management plan 2017 – 2029 (second amendment), Dutch Ministry of Infrastructure and Water Management, p.30 (A4 Algemene uitgangspunten en algemeen beleid - LAP3) (in Dutch).

not be easy, however, because not destroying foreign unsold goods seems to be a policy objective of those foreign powers rather than of the Netherlands.

When designing a Dutch destruction ban, it is important for the Dutch legislator to determine to *which product groups* it should apply (general or product-specific), *which destruction acts* should be prohibited and (if and for which products) *which exceptions* should apply.

Under European law, there is only room for a Dutch *general destruction ban*, i.e. applicable to all product groups, if there are no European destruction bans yet. A Dutch general ban must cease to apply for a product group as soon as a European destruction ban becomes applicable for that product group.

There is legal scope to introduce a Dutch destruction ban *per product group* as long as a European destruction ban does not yet apply to that product group. The introduction of such a ban in anticipation of an already announced European destruction ban for that product group carries the risk that it will be overtaken in time by the adoption of the European destruction ban and that, after the European destruction ban has entered into force, the Commission will not accept the national ban in the context of an invocation of Article 114(4) TFEU. Furthermore, under the principle of loyalty of Article 4(3) TEU, it would be necessary to justify the introduction of a national ban for that product group in anticipation of an imminent European ban.

In Dutch legislation, a basis for the introduction of a general or specific ban on the destruction of unsold products can be found in Article 9.5.2(1) of the Environmental Management Act (Wet milieubeheer (Wm)). Chapter 10 of the Wm is important because it contains the legal basis for the Dutch national waste management plan (Landelijk afvalbeheerplan, Article 10.3 Wm) and the implementation of the waste hierarchy from the Waste Framework Directive (Article 10.4 Wm), which is detailed in the LAP. This waste hierarchy will also have to guide the establishment of a Dutch destruction ban in an executive decree under Article 9.5.2 Wm. The LAP is also important as an assessment framework for waste exports and may have to be adapted before a national destruction ban is implemented.

5. A national right to repair: Possibilities and limits under European law

5.1 Introduction

One of the action points of the European Green Deal for the transition to a circular economy is the promotion of the supply of reusable, sustainable and repairable goods. At the launch of the Green Deal in 2020, the European Commission (EC) announced that "consideration will be given to establishing a 'right to repair'".[99] Following up on this announcement, on 22 March 2023 the EC published a proposal for a Directive on common rules promoting the repair of goods.[100] The explanatory memorandum to the proposal states that current European rules provide few incentives for consumers to have defective products repaired. Often, these products are replaced when they could have been repaired and reused longer. Repairing products instead of throwing them away is in line with the transition to a circular economy and will reduce waste, greenhouse gas emissions and the demand for resources to produce new goods.[101]

Several current and future European directives and regulations are relevant to promoting the repair of goods. On the manufacturer side, the proposed Ecodesign Regulation discussed in Chapter 3 is particularly relevant. [102] Under this regulation, requirements can be imposed on products to improve their repairability. On the other side of the chain, the demand side, the Directive on the Sale of Goods, that was introduced in 2019, is particularly relevant. This Directive contains obligations regarding a right of repair or replacement for consumers, within the legal liability period for sellers, in case of non-conformity of a product. In addition, on the demand side, there are two new legislative proposals.

The first is the proposed Directive on Empowering consumers for the green transition.[103] This Directive amends two existing consumer directives and aims, among other things, to provide consumers with better information on the sustainability and repairability of certain products and to better protect consumers against unfair and misleading sustainability claims ('greenwashing'). The second important proposal concerns the above-mentioned Directive on common rules promoting the repair of goods. In the following, we will focus on the obligations resulting from this proposal.

[99] European Green Deal 11 december 2019, COM (2019) 640 final, p. 9.
[100] Proposal for a Directive on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828 of 22 March 2023, COM (2023) 155 final.
[101] See explanatory memorandum to proposal for directive on common rules promoting the repair of goods, p. 1. Unlike Chapter 3, this chapter does consistently use the term "goods," namely as defined in Article 2(8) of the proposed Directive.
[102] Directive 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.
[103] COM (2022) 143 final.

5.2 Interpreting the 'right to repair'

The announcement of the European Green Deal explicitly mentions the possibility of a 'right to repair' for consumers. What exactly such a right entails, or to what extent there actually is a 'right' in the strict legal sense, can be deduced from the measures proposed by the European legislator in this context and the measures already taken by certain Member States.

A significant part of the existing and proposed European measures involves promoting the repair of goods without creating an actual 'right to repair' for consumers, for example through information obligations on the repairability of goods or on available repairers. Two measures (one within and one outside the legal liability period for sellers) could be qualified as a real 'right to repair' - in the most literal sense. With the caveat that this 'right' is significantly limited by, inter alia, the possibility of cost recovery (within the liability period) and a limited scope (outside the civil liability period).

In the following, the European legal package of measures promoting the repair of goods will be explained in more detail, distinguishing between measures within and outside the liability period for the seller. Existing national schemes to promote the repair of goods are also discussed, in particular the Austrian repair bonus and the French repair index.

5.2.1 Measures within the statutory liability period

Sale of Goods Directive

Under the 2019 Sale of Goods Directive, the seller is liable to the consumer in the event of a lack of conformity that exists when the goods are delivered and comes to light within two years.[104] The consumer then has the right to have the goods "brought into conformity (...)".[105] In doing so, pursuant to Article 13(2) of the Directive, the consumer has a free choice between repair and replacement. Only if the chosen remedy - repair or replacement - is impossible or would entail disproportionate costs for the seller compared to the other remedy, the seller may refuse the chosen remedy. If repair or replacement is refused, the consumer is entitled to a proportionate price reduction or termination of the sales contract.[106] The Directive applies to all sales contracts where movable tangible items, including goods with 'digital' elements, are supplied to the consumer against payment of a price.[107] The Directive requires that consumers be given a minimum two-year statutory warranty when purchasing goods, with the consumer having the choice of repair or replacement. The Sale of Goods Directive allows Member States to prescribe "longer time limits" for sellers' liability.[108] The Directive does not limit the length of this longer liability period. An exception is made for second-hand goods, for which Member States may allow a shorter liability period in contracts, provided it

[104] Sale of Goods Directive, art. 10 (1). Under Art. 11 of the Directive, there is also a reversal of the burden of proof for a period of one year with respect to the lack of conformity. Member States can also opt for a period of two years (Art. 11(2)). During that period, the producer will have to prove that the product was not in conformity when it was delivered (exceptions do apply).
[105] Sale of Goods Directive, art. 13 (1).
[106] Sale of Goods Directive, art. 13 (1) and (4).
[107] See definitions art. 1 Sale of Goods Directive.
[108] Sale of Goods Directive, art. 10 (3).

is not less than one year. [109] So far The Netherlands has not used this exception for second-hand goods. Member States may also choose to link the liability period to a limitation period or to apply a limitation period only in case of a lack of conformity. [110] Member States must then ensure that such limitation periods do not affect the consumer's right to pursue remedies (i.e. repair/replacement, proportionate price reduction or termination of the sales contract) for any defect that becomes apparent during the civil liability period.[111]

The Netherlands has transposed the requirements of the Sale of Goods Directive into Book 7 of the Dutch Burgerlijk Wetboek (BW, Civil Code) (Art. 7:17 et seq.). In doing so, use has been made of the exception of Art. 10 (3) Sale of Goods Directive to provide a longer liability period. Under Dutch law, this period is not limited to two years, but depends on what the consumer may reasonably, under normal use, expect from the lifespan of the product (Art. 7:17-7:18 BW). There is thus an 'open' term in the Netherlands, meaning that the term may vary in length from product to product.[112] The reasonable expectation of the lifespan of the (second-hand) product is also taken as the starting point in the case of second-hand products.

Amendment to the Sale of Goods Directive by the proposed Directive on common rules promoting the repair of goods

The proposed Directive for common rules promoting the repair of goods adds the following sentence to Article 13(2): "In derogation from the first sentence of this paragraph, where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods in order to bring those goods in conformity."[113] This is meant to limit the consumer's choice to repair except where repair is as expensive or more expensive than replacement.

Under these (existing and proposed) directive provisions, consumers have some degree of a 'right to repair'. Whether this is actually the case in practice depends partly on the cost of parts and the cost of labor for repairs. Literature points out that the 'information asymmetry' between consumer and seller is a problem here; it is not easy for the consumer to gain insight into the costs of repair or replacement.[114] If repair is refused because of the costs, the consumer has limited opportunities to check whether this is correct. The Directive and the proposed Directive contain no provisions on (the determination of) the price of repair. The BNC Fiche on the proposed Directive actually points out the opposite practice on the Dutch market; sellers often do not give the consumer any choice in the event of a defect and usually proceed to repair the defect if it can be remedied. [115] Regarding the implementation of the

[109] Sale of Goods Directive, art. 10 (6). Member States are free to exclude from the scope of the Directive contracts involving the sale of second-hand goods sold at public auctions, see Article 3(5) Sale of Goods Directive.
[110] Sale of Goods Directive, art. 10(4) and (5)
[111] Sale of Goods Directive, art. 10(4) and (5) and recital 42.
[112] The Civil Code contains no provision guaranteeing the minimum period of two years. The starting point is the expected lifespan of the product under normal use, which period is not limited to two years.
[113] Proposal for a Directive on common rules promoting the repair of goods, COM (2023) 155 final.
[114] C.M.D.S. Pavillon, Papieren tijger in de maak? Pogingen om het herstel van goederen te bevorderen in de EU en de VS, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2023-4 (in Dutch).
[115] *Parliamentary Papers II* 2022/23, 22 112, no. 3672, p. 6. BNC means 'Beoordeling Nieuwe Commissievoorstellen' (Assessing New Commission Proposals).

amendment to Article 13(2), the BNC fiche indicates that 'Book 7 of the Civil Code must be amended because Directive 2019/771/EU is implemented therein'.[116]

5.2.2 Measures outside the statutory liability period

The current Sale of Goods Directive does not contain any measures for repair or replacement of goods outside the statutory liability period. The new proposal for a Directive on common rules promoting the repair of goods aims to change this and contains several measures that explicitly cover the period after the statutory liability period.

Here it is important to point out the relation to the existing Sale of Goods Directive. Art. 1(2) of the proposed Directive on common rules promoting the right to repair stipulates that:

"This Directive shall apply to the repair of goods purchased by consumers in the event of a defect of the goods that occurs or becomes apparent outside the liability of the seller pursuant to Article 10 of Directive (EU) 2019/771."

This means that the proposed Directive only applies outside the two-year liability period as follows from the Sale of Goods Directive, or in so far as Member States apply a longer period of liability under Article 10(3) of the Sale of Goods Directive.[117]

As discussed, the Netherlands is one of the Member States that apply a longer period (depending on what can be expected from the lifespan of a product). This means that the obligations mentioned below only come into play outside the statutory liability period (including any extended period), with the result that in the Netherlands a different period applies per product for the start of the producer's obligations outside the statutory liability period. This seems to provide little insight for consumers in possibilities for both national and cross-border repair.

The proposed Directive first of all introduces an obligation for the producer to repair goods at the consumer's request after the (national) legal liability period for the seller (pursuant to Article 10 of the Sale of Goods Directive) has expired. Art. 5(1) of the proposed Directive states:

"Member States shall ensure that upon the consumer's request, the producer shall repair, for free or against a price or another kind of consideration, goods for which and to the extent that repairability requirements are provided for by Union legal acts as listed in Annex II. The producer shall not be obliged to repair such goods where repair is impossible. The producer may sub-contract repair in order to fulfil its obligation to repair."

The producer may therefore pass on the cost of the repair to the consumer and may sub-contract it to third parties.

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[116] *Parliamentary Papers II* 2022/23, 22 112, no. 3672, p. 12

[117] Moreover, a conformity defect is also outside the seller's liability in case 'the presumption that the lack of conformity existed at the relevant time for establishing conformity could be incompatible with ... the nature of the lack of conformity (Recital 45 and Article 11(1) of the Sales of Goods Directive. This may be the case if the defect is an "act" "of the consumer" (Recital 45). There may be a defect, within the legal liability period, that the consumer has caused.

According to Art. 2(4) of the proposed Directive, producer “means a manufacturer as defined in Article 2, point (42) of Regulation [on the Ecodesign for Sustainable Products]”. The Ecodesign Regulation contains a broad definition: ”any natural or legal person who manufactures a product or who has such a product designed or manufactured, and markets that product under its name or trademark or, in the absence of such person or an importer, any natural or legal person who places on the market or puts into service a product” (art. 2 point 42 Ecodesign Regulation).[118] In this regard, ”placing on the market” is to be understood as ”the first making available of a product on the Union market” (Art. 2 point 40 Ecodesign Regulation), i.e., ”any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge” (Art. 2 point 39 Ecodesign Regulation) and "putting into service" is to be understood as the ”first use, for its intended purpose, in the Union, of a product” (Art. 2 point 41 Ecodesign Regulation).

Article 5(1) shows that the ‘right to repair’ (or in other words, the repair obligation on the producer) that arises after the statutory liability period under the Sale of Goods Directive is nevertheless restricted in several respects.

First, the obligation on Member States applies only to products for which repairability requirements have been established at EU level, more precisely in the legal acts listed in Annex II of the proposed Directive. These include, for example, household washing machines and dishwashers, vacuum cleaners and welding machines. The list of product groups is currently limited, but will be expanded. The European Commission will be empowered to adopt delegated acts supplementing the list of product groups. In particular, it is envisaged that under the future Ecodesign Regulation more product groups will be subject to repairability requirements (and thus the list attached to the proposed Directive can be expanded). This limitation of the obligation to repair, according to the preamble to the proposed Directive, “ensures that only those goods which are reparable by design are subject to such obligation.”[119]

A second limitation concerns the clause in Article 5(1) of the proposed Directive: “goods for which and to the extent that repairability requirements are provided for by Union legal acts as listed in Annex II”. This means that the repair obligation for the producer must correspond to the repairability requirements. For example, these may be limited to certain parts of a product or to a certain period of time during which spare parts must be made available.[120] The repair obligation is therefore limited to those parts or to that period. Moreover, the other side of the coin is that obligations in the delegated acts of Annex II to the proposed Directive - mostly under the now-adopted Ecodesign Regulation or under the current Ecodesign Directive - requiring producers to provide access to spare parts and repair-related information or other tools, such as software tools, apply mutatis mutandis. Producers must ensure that

[118] The ‘importer’ means ‘any natural or legal person established in the Union who places a product from a third country on the Union market’ (Art. 2 point 44 Regulation Ecodesign).
[119] Recital nr. 16.
[120] See also preamble to the proposed Directive recital 16.

'independent repairers' have access to these.[121] The preamble to the proposed Directive notes in this regard that "those requirements ensure the technical feasibility of repair, not only by the producer, but also by other repairers. As a consequence, the consumer can select a repairer of its choice."[122]

A third limitation concerns the exception that the duty to repair does not arise if "repair is impossible". The text of the proposed Directive contains no further provisions on this. According to the preamble to the proposed Directive, it refers to the situation where "repair is factually or legally impossible". For example, the producer should not refuse repair for purely economic reasons, such as the costs of spare parts.[123]

For manufacturers located outside the EU, national implementing legislation should provide that the authorised representative in the EU, or failing that, the importer, and failing that, the distributor, fulfills the repair obligation.[124]

In addition to the manufacturer's repair obligation, the proposed Directive also contains the following measures to promote the repair of goods:

- In conjunction with the repair obligation for producers, an information obligation for the producer is also included. Consumers must be informed about the repair obligation and producers must also provide information about repair services (e.g. through the online platform mentioned below).[125]
- Member States must provide a national online repair platform that allows consumers to find repairers. This should allow, among other things, a search by goods, locations of repair services, and repair conditions.[126] Insight in the various repair services, etc., would make the pros and cons of repair easier to understand which, according to the explanatory memorandum, may encourage consumers to opt for repair rather than for purchasing new goods.[127]
- The proposed Directive also provides for the introduction of a European repair information form.[128] The form provides a standardized presentation of repair terms and prices, among other things. It would allow consumers to compare repair services more easily.

These measures regarding the provision of information cannot be separated from the repair obligation to be introduced for producers. After all, the information provided brings, among other things, the consumer and the repairer 'together' and is therefore also of great importance from the perspective of implementing the repair obligation for producers (who will often be located abroad).

[121] Proposal for a Directive on common rules promoting the repair of goods, Art. 5 (3).
[122] Recital 14 to the proposed Directive.
[123] Recital 19 to the proposed Directive.
[124] Proposal for a Directive on common rules promoting the repair of goods, Art. 5 (2).
[125] Proposal for a Directive on common rules promoting the repair of goods, Art. 6.
[126] Proposal for a Directive on common rules promoting the repair of goods, Art. 7.
[127] Explanatory Memorandum, Proposal for a Directive on common rules promoting the repair of goods p. 14.
[128] Proposal for a Directive on common rules promoting the repair of goods, Art. 4.

There is still little clarity on the implementation of the obligations of the proposed Directive. The BNC fiche remarks on this: ”For the rest of the directive, it remains to be seen exactly where its implementation will take place.”[129]

5.2.3 Inspiration from existing national measures

Several European countries have already introduced repair promotion measures. In response to the motion of Dutch MP Van der Graaf, two measures in particular were examined: the repair bonus introduced by Austria and the French 'repair index' and requirements regarding the availability of spare parts. [130] We will explain these measures below. In section 5.3.3 we will consider whether these measures can be introduced at the national level in anticipation of or in addition to European regulations.

Repair bonus Austria

As part of the so-called ‘Covid funds’, Austria has received European funding for, among other things, a ‘repair bonus’. [131] An amount of 130 million euros has been made available. According to Austria's recovery and resilience plan, this measure involves the following:

”The investment consists of setting up a support program to stimulate the repair of electrical and electronic equipment. The repair voucher system provides financing for households in the form of vouchers, which cover part of the costs of repairing or renewing electrical and electronic equipment.”[132]

The system is designed as follows.[133] Consumers, only individuals residing in Austria, can apply for a repair bonus (subsidy) through a simple online procedure. The bonus is available from 2022 to 2026. With the repair bonus, they receive a subsidy of up to 200 euros for the repair of electrical and electronic devices or up to 30 euros for obtaining a cost estimate from participating partner companies. The applicant receives a repair voucher that can be turned in at a participating partner company in Austria. The voucher is valid for up to 3 weeks after application. The customer must first pay the full invoice amount to the partner company. The subsidy is then paid directly (by the government) to the client. The application for reimbursement is submitted by the partner company for the customer. The repair bonus amounts to 50% of the repair costs (thus with a maximum of 200 euros). Participating partner companies apply via the website reparaturbonus.at. Partner companies must have a branch in Austria. Repair companies, socio-economic companies, industrial companies and commercial companies are eligible to participate, with different conditions. E.g., commercial

[129] *Parliamentary Papers* 2022/23, 22 112, no. 3672, p. 12.
[130] *Parliamentary Papers* 2023/24, 21 501-30, 585.
[131] Council Implementing Decision of 13 July 2021 on the approval of the assessment of the recovery and resilience plan for Austria.
[132] Annex to a Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Austria, COM (2021) 338 final, p. 20.
[133] Information taken from: https://www.reparaturbonus.at. (last accessed December 19, 2023). The legal basis for the repair bonus is Art. 24 Umweltförderungsgesetz, accessed at: https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010755&Paragraf=24

companies can only accept devices from manufacturers that they already normally carry in their product range.

Other member states have also already introduced incentives, such as reduced VAT rates on repairs of certain goods.[134] The Netherlands also has such a reduced VAT rate for (minor) repairs of bicycles, footwear and leather goods, clothing and household linen.[135] France, for example, has a consumer repair bonus for electronic products (financed from the extended producer responsibility system) and for footwear and clothing. [136]

Repairability index and availability of spare parts France

To encourage repair of products, French legislation contains several instruments. The 'Code de la consommation', art. L. 111.4, contains obligations for the producer (referred to in the French text as: 'fabricant') and the importer. [137] The producer or importer must inform the (professional) seller of the availability of spare parts and the period during which or the date until which these parts are available on the market. Also, according to this provision:

> "Producers and importers of household electrical appliances, monitors and displays shall (ensure) that, for a defined list of products, spare parts for these products are available during the trading period of the model concerned and for an additional minimum period after the date on which the last unit of this model was placed on the market. This additional minimum period shall not be less than five years."[138]

Thus, the producer or importer must guarantee the availability of spare parts for a certain period of time. This obligation will be further elaborated by decree (including the list of products and parts and the deadlines). In addition, the provision contains the obligation for the producer or importer of goods to be defined in more detail by decree, to provide technical information at the request of the seller or repairer for the purpose of 3D printing parts of goods no longer available on the market. In doing so, applicable intellectual property rights must be respected.

In addition to this provision in French consumer legislation, the French 'Code de l'environnement', art. L.541-9-2, contains the obligation to label electrical and electronic appliances with a repairability index.[139] On a scale of 1-10, this index gives consumers an insight into the extent to which appliances are repairable. The index is based, among other

[134] The French European Consumer Centre provides a brief overview of the measures in different member states, see https://www.europe-consommateurs.eu/en/shopping-internet/spare-parts-and-repairs.html (last accessed Jan. 19, 2024).
[135] For an overview: https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/btw/tarieven_en_vrijstellingen/diensten_9_btw/
[136] https://faq.refashion.fr/hc/fr/articles/11670467977501-Quels-sont-les-critères-d-éligibilité-à-la-labellisation-au-Bonus-Réparation- and https://refashion.fr/citoyen/fr/je-repare-bonus-reparation
[137] Available via: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044330854. See also: C.M.D.S. Pavillon, Duurzaam consumentenkooprecht: het Franse voorbeeld, *WPNR* 2020, 7283 (in Dutch).
[138] Translation via deepl.com of the French legal text.
[139] Available via: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041555848

things, on the availability of spare parts and of technical manuals, the extent to which the product can be disassembled, etc.[140]

French legislation thus introduces measures in anticipation of EU legislation. The Ecodesign Regulation allows the Commission to include information requirements for specific product groups in delegated acts. These may include requirements for a repairability index.[141] In addition, the Energy Labeling Regulation also offers the possibility of including requirements for this purpose in delegated acts.[142]

> An example is found in the energy label regulation for smartphones and slate computers, which will enter into force on June 20, 2025.[143] Under this regulation, the energy label for these products must display the repairability class (A easiest to repair to E most difficult to repair) so that it is understandable to consumers. The Regulation Energy Label for Smartphones and Slate Computers indicates how the repairability class is determined using a repairability index.[144] According to a European Commission press release, this is the first time a repairability score must be displayed on a product marketed in the EU.[145] It is expected that future regulations will also include such a requirement for a repairability index.

A repairability index as such is not explicitly mentioned in the published texts of the Ecodesign Regulation. However, it is known from oral information from the Dutch ministry of IenW that agreement has been reached to express the possibility of requiring a repairability index more clearly in the Ecodesign Regulation, especially also in the recitals.[146]

The proposed Directive on empowering consumers for the green transition sets out an obligation for traders to provide information on the repairability of products through a repairability score or other relevant repair information at the point of sale of the product. However, this is only mandatory to the extent that such a repairability score is established for the relevant product under EU law or the repair information is available.[147]

5.2.4 Partial conclusion

A 'right to repair' can be interpreted in different ways. We have distinguished, briefly, the following measures:

- An obligation for the seller to repair rather than replace within the statutory liability period (minimum two years), unless repair is as expensive as or more expensive than replacement. This obligation follows from the proposed Directive on common rules

[140] See on this subject, among others, RLI, Weg van de wegwerpmaatschappij, 2023, p. 67 en C. Backes, M. Boeve, W.T. Douma, O. Guven & L. Squintani (2021), Rechtsvergelijkend onderzoek in het kader van het Project Verkenning Modernisering Wet Milieubeheer, p. 26 e.v. (in Dutch).
[141] Art. 7 Ecodesign Regulation, see also recitals under 24 Ecodesign Regulation.
[142] Regulation EU 2017/1369 of 4 juli 2017 setting a framework for energy labelling and repealing Directive 2010/30.
[143] Commission Delegated Regulation (EU) 2023/1669 of 16 juni 2023 supplementing Regulation (EU) 2017/1369 with regard to the energy labelling of smartphones and slate tablets.
[144] See a.o. Annex IV to the Regulation.
[145] See: https://ec.europa.eu/commission/presscorner/detail/nl/IP_23_3315

[146] Regarding the division between the Ecodesign Regulation and the Energy Labeling Regulation, the provisions of Art. 14 (3) Ecodesign Regulation can be pointed out, among other things.
[147] Proposal for a Directive empowering consumers for the green transition, Art. 2.

promoting the repair of goods. The existing Sale of Goods Directive already contains an obligation for the seller to repair or replace within the legal liability period. This duty is transposed in Book 7 (Art. 7:17 et seq.) of the Dutch Civil Code.

- An obligation on the producer to repair goods which are subject to repairability requirements under EU legislation outside the liability of the seller at the consumer's request and where repair is 'not impossible'. The producer may pass on the cost of the repair and may subcontract it to third parties. The term 'producer' is used here in a broad sense. It includes both the person who manufactures the product, or has it designed and manufactured, or the importer, or failing that, the person who places a product on the market or puts it into service (which may include the seller). This measure is included in the proposed Directive on common rules promoting the repair of goods.
- In relation to the producer's repair obligation: an information obligation for the producer on the repair obligation and on repair services, a national online repair platform to be set up by Member States that allows consumers to find repairers, and a European repair information form to be used by repairers. These information requirements follow from the proposed Directive on common rules promoting the repair of goods.
- A repair bonus: a subsidy for consumers to have certain products repaired (Austria).
- A repairability index that gives consumers an indication of the extent to which appliances are repairable on a scale (e.g. from 1-10) (France).

5.3 Legal scope for a national right to repair

5.3.1 National measures promoting repair

Section 5.2 provided an overview of existing and future provisions of European and national law aimed at promoting product repair. In the following, we will assess the extent to which these measures can be introduced at the national level in anticipation of or in addition to European law obligations. The first point to be made here is that there are currently no national measures in the Netherlands regarding the promotion of repair, with the exception of the aforementioned tax rate advantages for certain products. The Netherlands has also developed a national repairers register, a first version of which can be consulted online.[148] Below, we will - in summary - assess the following measures:

Anticipating European law obligations

- The measures mentioned in art 4- 7 of the proposed Directive on common rules promoting the repair of goods. The focus will be on whether a national repair obligation for the producer (Art. 5) can be introduced in anticipation of the entry into force of the Directive.

In addition to European law obligations

[148] See https://www.nationaalreparateursregister.nl.

- A national repair obligation for the producer for products or product groups for which, after the entry into force of the proposed Directive, no repairability requirements have yet been established or proposed at EU level (and thus not included in Annex II of the proposed Directive or included in delegated legal acts)
- A national repairability index (to the extent not yet required by EU delegated acts) (like France)
- A national repair bonus (like Austria)
- Requirements for when repair is 'impossible' within the meaning of Art. 5(1) of the proposed Directive.

5.3.2 Legal basis and maximum harmonisation

The objective of the proposed Directive on common rules promoting the repair of goods is "promoting the repair of goods, with a view to contributing to the proper functioning of the internal market, while providing for a high level of consumer and environmental protection".[149] Thus, compared to the Sale of Goods Directive (SGD), this proposed Directive adds 'environmental protection' as an objective. The explanatory memorandum to the proposed Directive notes in this regard that "in particular, by promoting sustainable consumption through repair and reuse this Directive contributes to a circular economy and the green transition."[150] According to the preamble to the proposed Directive, the establishment of uniform rules is necessary in order "to achieve these objectives, and in particular to facilitate cross-border provision of services and competition among repairers of goods purchased by consumers in the internal market."[151]

Legal basis

The legal basis of the proposed Directive is Article 114 TFEU, the basis for harmonisation measures aimed at the establishment and functioning of the internal market. The explanatory memorandum to the proposal points out, in justification of this choice, that the existing "SGD fully harmonises the remedies available to consumers within the legal guarantee framework for the lack of conformity of goods and the conditions under which such remedies can be exercised."[152] The Sale of Goods Directive also has Article 114 TFEU as its legal basis. In addition to the obligations of the Sale of Goods Directive, individual Member States have introduced, or intend to introduce, rules to promote the repair and reuse of goods purchased by consumers. However, these national rules may, according to the explanatory memorandum of the proposal, create actual or potential obstacles to the proper functioning of the internal market, thus negatively affecting cross-border transactions in the internal market. Examples given are the incurring of additional (legal) costs for finding out the specific national requirements and the need to align repair agreements with the (different) national

[149] Proposal for a Directive on common rules promoting the repair of consumer goods, Art. 1(1).
[150] Explanatory Memorandum, Proposal for a Directive on common rules promoting the repair of consumer goods, p. 9.
[151] Proposal for a Directive on common rules promoting the repair of consumer goods, recital 2.
[152] Explanatory Memorandum, Proposal for a Directive on common rules promoting the repair of consumer goods, p. 2.

rules.[153] Also, according to the explanatory note, the different national rules may discourage consumers from using repair services. Indeed, if there are different national regulations, there may be little transparency for consumers as to which repair options are available for a product. This will occur particularly with repair services 'across borders', something that is likely to increase in the future given the development of digital technologies that may lead to more remote repairs. As the explanatory memorandum points out: "The obstacles that discourage consumer demand for repair indirectly also discourage the cross-border movement of goods, such as spare parts and repair equipment that are necessary for repair services."[154] Also in the preamble of the proposed Directive, it is mentioned that: 'The objective of this Directive can rather, by reason of its scale and effects, better be achieved at Union level through fully harmonised common rules promoting repair within and outside the liability of the seller established in Directive (EU) 2019/771.'[155]

Maximum harmonisation

Maximum harmonisation has been chosen for both the Sale of Goods Directive and the Directive on common rules promoting the repair of goods. Art. 4 Sale of Goods Directive states:

> "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive."

Art. 3 Directive on common rules promoting the repair of goods states:

> "Member States shall not maintain or introduce in their national law provisions diverging from those laid down in this Directive."

Consequently, Member States are not allowed to maintain or introduce measures that deviate from the Sale of Goods Directive and the proposed Directive. Thus, this refers only to the subjects regulated by the directives and then only to the extent that it is exhaustively regulated. Given the text of the provisions of the Sale of Goods Directive and the proposed Directive on common rules promoting repair of goods, these are:

- The obligation to provide a European Repair Information Form (art. 4)
- The obligation to repair (art. 5) with associated information requirement (art. 6)
- The platform for repair and refurbished goods (Art. 7) of the proposed Directive
- The amendment in the remedies of Article 10(2) of the Sale of Goods Directive (Art. 12).

A number of provisions entail exceptions to maximum harmonisation, inter alia Art. 10(2) Directive on common rules promoting the repair of goods (which allows repairers to offer more far-reaching protection to the consumer by contract than the Directive) and Art. 10(3)

[153] Explanatory Memorandum, Proposal for a Directive on common rules promoting the repair of goods, p. 3 and recital 2.
[154] Explanatory Memorandum, Proposal for a Directive on common rules promoting the repair of goods, p. 3.
[155] Proposal for a Directive on common rules promoting the repair of goods, recital 32.

and 10(6) Sale of Goods Directive (which provide longer duration of liability periods for sellers).

National measures that cannot be traced back to the above obligations, are not related to them and/or do not affect them can in principle be maintained or introduced. To that extent, there would then be partial harmonisation. However, this will not easily be the case since the proposed Directive explicitly aims to establish fully harmonised common rules to promote repair within and after the statutory liability period.

To the extent that those national measures (may) create barriers to trade for Member States, they must be assessed in the light of the Treaty provisions on the free movement of goods, Art. 34-36 TFEU, and the principle of loyalty as contained in Art. 4(3) TEU (see also Chapter 2 of this report). In addition, for the adoption of national measures to promote repair, the provisions of the Services Directive,[156] or if the Services Directive does not apply, the provisions in the TFEU on the free movement of services may also be relevant (Art. 56 - 62 TFEU). Indeed, as indicated above, harmonising measures were chosen partly with a view to facilitating cross-border service provision and competition between repairers. Under Art 56 TFEU, "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended." Similar to the provisions on the free movement of goods in the TFEU, restrictions on the free movement of services can be justified on grounds of public policy, public security and public health (Art. 62 jo. Art. 52 TFEU) or on grounds of "overriding reason relating to the public interest". The latter follows from ECJ case-law and, as with the free movement of goods, is known as the 'rule of reason'.[157] The Services Directive, which further specifies and harmonises provisions on the free movement of services, also contains a prohibition on obstructing the free provision of services falling within the scope of the Directive, including a prohibition on placing restrictions on the free provision of services by a service provider established in another Member State.[158] In doing so, as under primary law, national measures may be justified on grounds such as public health and environmental protection.[159] On this, see further section 5.3.3 (repair bonus).

National measures affecting a service will often also affect the movement of goods (e.g. the restriction of cross-border repairs and related restrictions on the free movement of spare parts). Whether a national measure should be assessed under the freedom to provide services or the free movement of goods will have to be assessed on a case-by-case basis. The Guide on articles 34-36 TFEU notes in this regard that, according to the ECJ, the Treaties do not establish an order of precedence between different freedoms. Where more than one fundamental freedom may be affected by a national measure, the Court usually tests that

[156] Directive 2006/123 of 12 December 2006 on services in the internal market.
[157] ECJ 30 November 1995, C-55/94 (Gebhard).
[158] Services Directive, Art. 16 (2).
[159] Services Directive a.o. Art. 16 (3).

measure against only one fundamental freedom, deciding which freedom takes precedence.[160]

To the extent that national measures cover subjects that the above harmonisation measures aim to regulate (exhaustively), they will have to be tested against the relevant harmonisation measures and not against primary law. National deviation or national additions to these measures will then, as discussed in Chapter 2, only be possible to a very limited extent, namely only if they pass the strict test of Article 114(4) and (5) TFEU. Except for an initial version of a register of repairers and a VAT reduction for the repair of certain goods, the Netherlands has not yet introduced any national measures regarding the right to repair, as will be regulated by the proposed Directive on common rules promoting the repair of goods. Any national measure, once the Directive enters into force, will have to be assessed under Article 114(5) TFEU. Under this provision, a Member State can adopt new national measures after harmonisation, but only if they are based on new scientific evidence relating to the environment or the working environment because of a specific problem arising in the Member State after the harmonisation measure was adopted.[161] The measure will then have to be put to the Commission, which must assess it within six months. For the time being, we do not see any reasons that could be invoked to introduce and justify Dutch measures deviating from the Directive after its entry into force.

5.3.3 Legal scope in the light of Art 34 -36 TFEU and Art 56 -62 TFEU or the Services Directive

Anticipating European law obligations

It should be examined whether, in anticipation of the entry into force of the proposed Directive, the measures mentioned in Art. 4-7 of that directive can already be introduced into national law. The focus below is on introducing a national obligation to repair after the seller's statutory liability period.[162] The other measures, that mainly focus on information provision (Articles 4, 6 and 7 of the proposed Directive), are related to this, but do not in themselves constitute barriers to trade. These include the introduction of a national online repair platform, already introduced in the Netherlands as discussed above in the form of a first version of a national repairers register.

First of all, it is worth noting that Art. 114 TFEU - in particular the derogation possibilities included in paragraphs 4 and 5 of this provision - is not relevant, at least, insofar as the design of the national obligation does not affect obligations of other, already existing, directives. After all, this is at present still a proposed Directive. The derogation options in Article 114(4) and (5) deal with the situation after its entry into force (see chapters 1 and 2).

[160] Guide on Articles 34036 TFEU, p. 56-57. See also: M.R. Botman, De Dienstenrichtlijn in Nederland, diss. VU, 2015, p. 181 e.v. (in Dutch).
[161] See also ECJ 6 November 2008, C-405/07, *MenR* 2009, 1 m.nt. Jans. Boeve, Groothuijse, Omgevingsrecht, p. 60-61 (in Dutch).
[162] There may also be other cases where a conformity defect is beyond the seller's liability, e.g., if the consumer himself has caused the defect within the legal liability period.

It is also worth noting that depending on the time frame in which the Directive on common rules promoting the repair of goods is adopted, 'anticipating' is more or less theoretical. After all, if the directive is adopted in 2024 and no concrete legal national measures are yet pending in the Netherlands, there is little time for 'anticipation'.

In a theoretical sense, as long as the Directive - in particular its Art. 4-7 - has not been adopted, Member States can introduce corresponding measures in national legislation. These national measures will have to be assessed in the light of Art 34- 36 TFEU, if necessary, the Services Directive or 56-62 TFEU and the loyalty principle of Art 4 TEU.

An (anticipatory) national obligation to repair after the seller's liability period would be imposed on the national producer. As indicated earlier, the term 'producer' should be interpreted broadly (see section 5.2.2). It includes both the person who manufactures the product or has it designed and manufactured or the importer, and in the absence thereof, the person who places a product on the market or puts it into use (which may include the seller). Or in short, anyone who brings the goods into the national market.

The question is whether such a national measure would create potential intra-Union trade barriers. In our view, obstacles would mainly occur in two situations. (a) It may be less interesting for foreign producers to put a product on the Dutch market, because the repair obligation may entail higher costs for the foreign producer than for Dutch producers. After all, the foreign producer has to take the goods back and forth to a foreign country or ensure that a repair service is organised by the producer in the Netherlands. A comparison can be drawn, for example, with the so-called *Danish bottle case*, in which the establishment of a deposit system was seen as a barrier to trade partly due to the fact that foreign producers have to incur relatively higher transport costs to return packaging.[163] Thus the national repair obligation would constitute a measure of equivalent effect as a quantitative restriction within the meaning of Article 34 TFEU (see also Chapter 2). (b) Market access may be hindered because, after all, it would be more difficult to bring a product to, in this case, the Dutch market than to, say, the Spanish market. Therefore, additional provisions would have to be made in the Netherlands to create market conditions that can be compared to Spain.

To the extent that there are (potential) intra-Union barriers to trade, the question is whether the introduction of the national measure can be justified under Art 36 TFEU and the 'rule of reason'. A legitimate public interest can easily be found in the environmental or consumer protection objective of the national measure.[164] In addition, the measure will have to comply with the principle of proportionality. This will be more difficult to justify, the question being not so much whether the measure is appropriate, but mainly whether the measure is necessary (is this the least far-reaching measure for the internal market). Furthermore, if there are no European repairability requirements yet, at least when considering the introduction of a national measure, the actual repairability possibilities of the product groups

[163] Commission v. Denmark (Case 302/86) 1988, ECR 4607. In the Danish bottle case, the interest of environmental protection was successfully invoked to justify the mandatory deposit system.
[164] E.g. the Danish Bottle Case.

concerned will have to be taken into account for the sake of the execution and enforceability of the national obligation.

The principle of loyalty under Article 4 TEU will also have to be assessed. It will have to be justified why the Netherlands wants to adopt national measures ahead of the entry into force of the Directive. The reason for this can be found in the (possibly still long) duration of the entry into force of the European obligations. The national measure will therefore have to be designed in such a way that it does not stand in the way of 'loyalty', e.g. by ensuring that the national measure is consistent/shaped as much as possible in the same way as the obligations under the proposed Directive, so that no implementation problems arise when the Directive comes into force. After all, a premature introduction of the measure has the risk that the producer's national obligation to repair will be overtaken in time by the entry into force of the Directive. After all, once the European provisions in the proposed Directive have entered into force, national derogations can only be granted by invoking Article 114(4) TFEU. This will not be easy given the strict conditions of Article 114(4) TFEU.

In addition to European law obligations

In addition to the question of the legal scope for national repair promotion measures that anticipate European law obligations, the question of the legal scope for existing or new national measures after the European Directive has entered into force also arises. Insofar as this concerns additional national measures on subjects not yet or not exhaustively regulated in the Sale of Goods Directive and, after its entry into force, the Directive on common rules promoting the repair of goods, this is partial harmonisation (see chapter 1). For these national measures, Art 114 TFEU is not relevant, but Treaty provisions on the free movement of goods and services (and, where applicable, the Services Directive) are.

Repair obligation for producers for products not (yet) included in EU legal acts, Annex II Directive on common rules promoting the repair of goods

Above, we described the situation in which a Member State wants to take national measures in anticipation of the proposed Directive. As discussed, such national measures must be assessed in the light of Articles 34-36 TFEU and 56-62 TFEU and the principle of loyalty. Provided that it is consistent with these provisions, a Member State may include a national repair obligation on the producer (producer in the broad sense of the word, as given in the proposed Directive (see above).

This is less clear for the situation in which the proposed Directive has entered into force and the Commission has announced that it will adopt, by delegated act, repairability requirements for a particular product group, say within three years, and also add them to the list in Annex II to the Directive. May Member States establish a national repairability requirement in anticipation of the adoption of the requirements for that product group? Or are they precisely not allowed to do so, given the Directive's intended exhaustive harmonisation?

It could be argued that there is partial harmonisation (only for the product groups listed in Annex II to the Directive). The European Commission still has to adopt delegated acts for the other/newly added product groups, there could therefore still be room for national

obligations for these products or product groups (repair obligation for the producer after the seller's liability period has expired). In doing so, however, the national measures will again have to be assessed in the light of Articles 34-36 TFEU and 56-62 TFEU, also assessing the proportionality of the measure. In any case, if European repairability requirements do not yet exist, the actual possibilities of repairing the product group in question will have to be taken into account when considering whether to create a national measure, for the sake of the execution and enforceability of the national obligation. As it becomes more likely that a delegated act as referred to in Article 5(1) jo. Annex II to the Directive will be adopted for certain products or product groups, creating a European law obligation to repair the products, the principle of loyalty will take on greater significance. Reasons will have to be given as to why a national measure is adopted 'just now' in anticipation of the EU legislation.

Repairability index

As indicated above, the Ecodesign Regulation provides a basis for the Commission to include repairability index requirements for specific product groups in delegated acts.[165] Such a requirement leads to exhaustive harmonisation for that specific product group (such as from June 2025 for smartphones and tablets). To the extent that European obligations with regard to a repairability index do not yet apply at European level on the basis of delegated acts, it can be argued that partial harmonisation exists under the Regulation. This means that in principle there is legal scope for Member States to continue or create national repairability index obligations for certain product groups. Again, the measures will then have to be assessed in the light of Articles 34-36 TFEU. The Guide on Articles 34- 36 TFEU points out that requirements regarding labelling, as a result of which the labelling of imported products has to be changed (and therefore entails additional packaging costs), qualify as a prohibited measure of equivalent effect to a quantitative restriction within the meaning of Article 34 TFEU.[166] The question then again is whether justification can be found in the test of Article 36 TFEU and the 'rule of reason'. A legitimate public interest can be found in the environmental or consumer protection objective of the regulation. In addition, the measure will have to comply with the proportionality principle and, given the loyalty principle, The Netherlands will have to justify why it wants to introduce a national repairability index in anticipation of EU legislation. Again, the risk of introducing a national measure in advance is that the national obligation to apply a repairability index to certain product groups will be overtaken in time by the entry into force of a European obligation under the Ecodesign Regulation or the Energy Labelling Regulation. After such a European obligation comes into force, it will apply directly in the Member States. Existing national measures can then only be allowed by invoking Article 114(4) TFEU. This will not be easy given the very strict test of Article 114(4) TFEU.

Repair bonus

So far, the Sale of Goods Directive does not include a measure such as the repair bonus, similar to the Austrian scheme, nor does the proposed Directive on common rules promoting

[165] As indicated, the Energy Labeling Regulation also contains a basis for this purpose.
[166] Guide on Articles 34 – 36 TFEU, C(2021)1457 final, p. 28-29. Language requirements can also be a barrier to trade within the EU 'when they lead to an additional burden on products from other member states,' according to the Guide on Articles 34 -36 TFEU, p. 34-35.

the repair of goods. Developments on this point will have to be monitored. According to the European Parliament's press release on the negotiations on the Directive on common rules promoting the repair of goods: “to make repairs more affordable and attractive, MEPs propose offering consumers vouchers and other financial incentives via national repair funds.”[167] Text proposals on this point are not yet known (to us).

As long as there is no relevant EU legislation on this point, a national measure in the form of a repair bonus would have to be assessed mainly in the context of the Services Directive or Articles 56-62 TFEU, and the loyalty principle of Article 4(3) TEU.

If the national scheme is designed like the Austrian scheme then there could be a (potential) barrier to the provision of cross-border repair services within the meaning of the Services Directive, or if the Directive does not apply, Art. 56 TFEU. Indeed, for consumers, low-cost repairs - for which they receive a 'bonus' - may only be carried out by repairers based in Austria.

In this sense, the performance of repair services outside the Member State is potentially hampered, as repair by foreign providers becomes less attractive.[168]

Whether the Services Directive applies depends on whether there is a 'service' as well as a prohibited 'requirement' within the meaning of the Services Directive. There is little doubt that repairing goods falls within the concept of a 'service' within the meaning of the Directive. After all, ‘service’ means “any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty”.[169] The Directive does not apply in the field of taxation. [170] A repair bonus similar to the Austrian bonus is not a tax within the meaning of the Directive. As to whether the repair bonus also falls under 'requirement' within the meaning of the Services Directive, there may be some doubt. Article 16(2) of the Directive provides that Member States shall not restrict the freedom to provide services by a service provider established in another Member State by (inter alia) requiring the service provider to have an establishment in their territory. Whether the repair bonus should be seen as such a requirement is uncertain. After all, there is no requirement to exercise the repair service as such. However, it can be said in general terms that the concept of 'requirement' within the meaning of Article 4(7) Services Directive should be seen broadly.[171]

[167] https://www.europarl.europa.eu/news/en/press-room/20231117IPR12211/new-eu-rules-encouraging-consumers-to-repair-devices-over-replacing-them

[168] The extent to which State aid within the meaning of Art. 107(1) TFEU may exist has not been elaborated in this study. In this regard, it can be briefly noted that one of the criteria for state aid is that it is granted to companies, which does not apply in the case of the Austrian bonus, for example (the Austrian bonus is provided directly to consumers). To the extent that it would be concluded that there would be indirect aid or in the case of direct aid, it is important to note that a repair bonus involves relatively small amounts which will often fall under an exemption or exception regime (see, for example, the de minimis Regulation EU No 1407/2013 which allows aid up to amounts of €200,000).

[169] Services Directive, Art. 4 (1).

[170] Services Directive, Art. 2 (3).

[171] See M.R. Botman, De Dienstenrichtlijn in Nederland, p. 218 a.f. (in Dutch) via: Botmanhttps://research.vu.nl/ws/portalfiles/portal/42148374/complete+dissertation.pdf)

If the Services Directive does not apply, the repair bonus will be assessed as a potential barrier to trade under the treaty provisions Art 56 TFEU -62 TFEU.

If a conflict with the Services Directive or Art. 56 TFEU occurred, a justification of the measure for a national repair bonus could be sought in the environmental or consumer protection objective of the scheme. After all, the Services Directive also includes environmental protection as a justification (Art. 16(3) Services Directive). Next, the concrete design of the measure would have to pass the proportionality test. Here, too, the appropriateness of the measure is not expected to be an obstacle any time soon, but a justification of why the measure is necessary will be required. It is likely that the loyalty principle of Art. 4(3) TFEU will not easily be compromised, to the extent that the EU legislator does not want to regulate a 'repair bonus' (or similar) at EU level. As indicated, this is still under negotiation.

If a repair bonus is indeed introduced at EU level, this will have to be taken into account in the design of the national bonus.

5.3.4 Legal scope in the light of Art. 114(4) and (5) TFEU

Anticipating European law obligations

The proposed Directive on common rules promoting the repair of goods limits the seller's choice of repair within the liability period, unless repair is as expensive as or more expensive than replacement. There is little legal scope to introduce this measure into national law prior to of the entry into force of the Directive. As there is exhaustive harmonisation under the existing Sale of Goods Directive, such a national measure will have to be assessed under the strict requirements of Article 114(5) TFEU. This would require the existence of a national problem specific to that Member State, which is unlikely with regard to more far-reaching obligations to repair.

In addition to European law obligations

Art. 5(1) of the proposed Directive on common rules promoting the repair of goods provides that the producer is not obliged to repair goods when repair is 'impossible'. This so-called 'open' standard is not further specified in the proposed Directive (except for the recitals which, as indicated above, note that it refers to the situation where repair is factually or legally impossible). Such an 'open standard' could leave room for Member States to set further requirements on this.

In the light of the fact that an exhaustive regime has been chosen in the Directive on common rules promoting the repair of goods, there may be a derogation from the requirements of the Directive, depending on how Member States define the open standard 'impossible' in their national measures. In that case, only Article 114(5) TFEU can be invoked, which, as discussed in chapter 2, has strict conditions. We would therefore advise drawing up a national definition of the open standard 'impossible' in a way that is not 'legally binding', for example, by including the further requirements only in guidelines or explanatory notes.

5.3.5 Partial conclusion

The legal scope for a Member State to introduce the measures contained in the proposed Directive on common rules promoting the repair of goods into national law ahead of the entry into force of this Directive, is as follows.

In a general sense, it should be noted that the scope for 'anticipating' is limited insofar as the entry into force of the directive is not far off. 'Anticipating' is then a more theoretical possibility.

As far as the limitation of the seller's choice of repair over replacement within the liability period is concerned (unless repair is as expensive as or more expensive than replacement), there is little legal scope to introduce this measure into national law prior to the entry into force of the Directive. Since there is exhaustive harmonisation under the existing Sale of Goods Directive, such a national measure will have to be assessed under the strict requirements of Article 114(5) TFEU. This would require the existence of a problem specific to that Member State, which is unlikely in the case of more far-reaching obligations to repair.

In principle, there is more legal scope for introducing a national obligation to repair after the seller's liability period in anticipation of the entry into force of the Directive. This obligation would be imposed on the national producer, and in this context the word 'producer' should be understood broadly: in short, anyone who places the goods on the national market. In principle, Member States may introduce such a measure into national law before the Directive enters into force. However, this national measure will then have to be assessed in the light of Articles 34- 36 TFEU, the Services Directive if necessary or 56-62 TFEU, and the loyalty principle of Art 4(3) TEU. Relevant in this assessment is whether the national measure creates potential barriers to intra-Union trade (a measure having the same effect as a quantitative restriction within the meaning of Art 34 TFEU). Potential barriers are mainly: (a) It may be less attractive for foreign producers to introduce a product on the Dutch market because of higher costs for the foreign producer, e.g. relatively higher transport costs for foreign producers when they return products. (b) Market access may be hampered because the foreign producer has to take certain precautions in the Netherlands that are not necessary when launching the product in another Member State. The question is then whether the introduction of the national measure is justified under Art. 36 TFEU and the 'rule of reason'. A legitimate public interest can be found in the environmental or consumer protection objective of the national measure. In addition, the measure will have to comply with the proportionality principle. The substantiation of this will require more attention, the question being not so much whether the measure is appropriate, but mainly whether the measure is necessary (is this the least intrusive measure for the internal market). In view of the loyalty principle of Article 4(3) TEU, it will also be necessary to justify why the Netherlands wishes to adopt national measures ahead of the entry into force of the Directive. The reason for this can be found in the duration of the entry into force of the European obligations. The national measure will therefore have to be designed in such a way that it does not stand in the way of 'loyalty', e.g. by ensuring that the national measure is designed as much as possible in the same way as the obligations in the proposed Directive, so that no implementation problems arise when the Directive enters into force. A premature introduction of the measure carries

the risk that the producer's national repair obligation will be overtaken by the Directive's entry into force. After all, once the European repair obligation has entered into force, national derogations can only be granted on the basis of Article 114(4) TFEU. This will not be easy given the strict conditions of Article 114(4) TFEU.

The other measures in the proposed Directive on common rules promoting the repair of goods focus mainly on the provision of information, such as the national repair platform. These are linked to the producer's obligation to repair but do not in themselves constitute barriers to trade. These measures can be introduced or continued in national law in anticipation of the Directive.

To the extent that a Member State wants to take additional national measures on issues not yet or not exhaustively regulated in the Sale of Goods Directive and, after its entry into force, the Directive on common rules promoting the repair of goods, it can be argued that there is *partial harmonisation*. It should be noted, however, that the substantive scope of the directives, according to their own purpose, is apparently quite broad. These national measures are not covered by Art 114 TFEU, but by the TFEU rules on the free movement of goods and services and, where applicable, the Services Directive.

Repair obligation for producers for products not (yet) included in EU legal acts, Annex II Directive on common rules promoting the repair of goods

If, after the entry into force of the Directive on common rules for promoting the repair of goods, the Netherlands wishes to introduce a national repair obligation for producers for product groups not (yet) included in Annex II of the Directive, there is, in principle, legal scope to do so. It can be argued that there is partial harmonisation (only for product groups listed in Annex II of the Directive). However, the national measures must be assessed in the light of Art. 34-36 TFEU and 56-62 TFEU, including an assessment of the proportionality of the national measure and the principle of loyalty. In any case, if there are no European repairability requirements yet, the actual possibilities for repair of the product group in question will have to be taken into account when considering the introduction of a national measure, for the sake of the execution and enforcement of the national obligation. As it becomes more likely that for certain products or product groups a delegated act will be adopted at European level pursuant to Art. 5(1) jo. Annex II of the Directive, creating a European repair obligation for the products, the principle of loyalty will become more important. Reasons will have to be given as to why a national measure is taken 'just now' in anticipation of the EU Directive.

Repair index

In principle there is legal scope for maintaining or introducing a national repair index for certain product groups. To the extent that European obligations regarding a repairability index do not yet apply at the European level on the basis of delegated acts, this is a case of partial harmonisation, in this case based on the Ecodesign Regulation or the Energy Labeling Regulation. The measures will have to be assessed in the light of Art. 34-36 TFEU. Labeling requirements constitute a prohibited import restriction under Art. 34 TFEU. A justification will then have to be found in order to comply with Art. 36 TFEU and the 'rule of reason'. A

legitimate public interest can be found in the environmental or consumer protection objective of the measure. In addition, the measure will have to comply with the proportionality principle and, in given the loyalty principle, it will have to be justified why the Netherlands wishes to introduce a national repairability index in anticipation of EU law obligations. Again, the risk of introducing a national measure in advance is that the national obligation to apply a repairability index to certain product groups will be overtaken in time by the entry into force of a European obligation under the Ecodesign Regulation or the Energy Labeling Regulation. When such a European obligation enters into force, it will be directly applicable in the Member States. Existing national measures can then only be allowed by invoking Article 114(4) TFEU. This will not be easy given the strict conditions of Article 114(4) TFEU.

Repair bonus

A national measure in the form of a repair bonus will have to be assessed under the Services Directive or Articles 56-62 TFEU and the loyalty principle of Article 4(3) TEU. Depending on the national design, a (potential) obstacle to the cross-border provision of repair services within the meaning of the Services Directive or, if the Directive does not apply, Art. 56 TFEU, may occur because repair by foreign providers may become less attractive for consumers (e.g. if, according to the Austrian regulation, repair may only be performed by national repairers). Again, the justification for the national measure must be sought in the environmental or consumer protection objective of the measure. Next, the concrete design of the measure would have to satisfy the proportionality test. Again, the appropriateness of the measure is unlikely to be an obstacle in the immediate future, but it will be important to justify why the national measure is necessary in anticipation of European legislation. It is plausible that the loyalty principle of Art. 4(3) TFEU will not easily be compromised to the extent that the EU legislator does not want to regulate a 'repair bonus' (or something similar) at EU level.

National interpretation of when repair is 'impossible' (art. 5(1) proposed Directive)

The legal scope to further specify at the national level the criterion that repair is 'impossible' within the meaning of Art. 5(1) of the Directive on common rules promoting the repair of goods is limited once the Directive enters into force. To remain outside the scope of Art. 114(5) TFEU, we would advise the use of a national interpretation of the open standard 'impossible' in a way that is not 'legally binding', for example, by including the further requirements only in guidelines or explanatory notes.

5.4 Shaping the legal obligation

Current Dutch national laws and regulations do not provide explicit bases for legally enshrining the various measures discussed. Several options could be explored, with the relevance that the right to repair involves both an environmental and a consumer protection objective.[172] Regarding a right to repair after the statutory liability period, partly in view of the environmental protection objective of the measure, the obvious option would be to explore the possibility of including a basis in Chapter 9 of the Dutch Environmental

[172] The proposed Directive on common rules promoting the repair of goods aims to contribute to a high level of consumer - and environmental protection.

Management Act. This chapter currently contains regulations on substances and products, including, for example, provisions implementing the Ecodesign Directive. However, from a coherence point of view, exploring a basis in consumer laws and regulations could also be considered. As far as a repair bonus or subsidy is concerned, alignment with financial laws and regulations could be sought.

6. Conclusions

In this report we have examined the legal scope for EU Member States to maintain or adopt national measures in anticipation of, or in addition to, the proposed Ecodesign Regulation and the proposed Directive on common rules promoting the repair of goods. This report does not comment on the *desirability* of such national measures, as other aspects than legal ones have also to be taken into account, such as the purpose of the European regulation concerned (prevention of market distortions), environmental effects, enforcement and evasion effects, the necessity and costs of monitoring and enforcement measures, and the (competitive) position of Dutch market participants.

A national ban on destruction

European legal scope for national measures

A directly applicable European destruction ban for unsold product groups in the Ecodesign Regulation, e.g. for clothing and footwear, or on the basis of a future delegated act of the European Commission, will lead to *exhaustive harmonisation* for this specific product group. Where European destruction bans do not yet apply under the Ecodesign Regulation itself or under delegated acts of the European Commission, *partial harmonisation* is achieved under the Regulation.

As a result, in principle, Member States have legal scope to maintain or introduce national destruction bans *in anticipation* of a European destruction ban. These measures will be assessed in the light of Articles 34, 35 and 36 TFEU, including the proportionality of the national measure. The more likely it becomes that the European Commission will issue a European destruction ban for a given product group, the more important the principle of loyalty under Article 4(3) TEU becomes. This principle may imply that Member States should refrain from imposing a national destruction ban on a given product group in anticipation of a European ban on that product group or, for example, that in the national legislation they should provide for the national ban to lapse as soon as the European ban becomes applicable. Ultimately, the key question in such a situation seems to be whether there is still an important reason for a Member State to introduce a national ban ‘just now’ in anticipation of EU law. This reason must serve the general interest, specifically environmental protection (including the promotion of circular economy and waste prevention) of the Member State in question, and must require direct action. Also, as said before, the measure should be proportionate.

Whether Member States may introduce national destruction bans *in anticipation* of European destruction bans will also depend on whether these national measures result in prohibited quantitative restrictions on imports and exports or measures having equivalent effect between Member States and, if so, whether they can be justified on the basis of the interests set out in Article 36 TFEU or the ‘rule of reason’ (environmental protection). The design of a national destruction ban will depend on whether there are prohibited import and export restrictions or measures having equivalent effect within the meaning of Articles 34 and 35 TFEU. In order to implement and enforce a national ban on the destruction of unsold

products, that prohibits certain waste treatment operations with those products within a Member State, the export of those products for those waste treatment operations must also be prohibited, under the same conditions and with the same exemptions as for unsold products on the domestic market. Prohibiting the import of unsold products from other Member States for certain waste treatment operations in the Member State of destination is more difficult to justify in terms of the need to implement and enforce a national destruction ban, and does not seem necessary for achieving the policy objectives associated with a destruction ban.

A national destruction ban applies to certain operations with unsold products based on the classification in the waste hierarchy. In our view, this clear classification of operations lends itself well to formulating a national destruction ban, including export bans, in such a way that it applies indistinctly, and in a way that is not indirectly discriminatory to unsold products both domestically and abroad. In this case, Article 35 TFEU does not apply and the national measure does not need to be further justified. Should a conflict with Articles 34 or 35 TFEU nevertheless arise, a justification for a national ban on destruction could be found in the ground of 'protection of the environment' (which could include the promotion of the circular economy through waste prevention). Next, the concrete design of the measure would have to pass the proportionality test.

Once a European destruction ban has become applicable to a particular product group, Member States may maintain or introduce national destruction bans for that product group only on the basis of the narrowly defined exceptions in Article 114(4) or (5) TFEU and with the approval of the European Commission. In particular, a new destruction ban to be introduced by a Member State should then be necessary in the light of new scientific evidence relating to the protection of the environment or the working environment because of a specific problem that has arisen in that Member State after the adoption of the European harmonisation measure.

The purpose of European and national bans on the destruction of unsold products is not to deprive the owner of his property in those products, but to restrict his use of them without (completely) depriving him of the right to dispose of them. In order to be justified as a national measure in the light of Articles 17 and 52(1) of the Charter of Fundamental Rights, a national ban on destruction must be provided for by law, must serve the general interest of the Member State concerned (environmental protection/promotion of circular economy/waste prevention) and the resulting interference with the right of property must be proportionate to, and actually correspond to, the general interest sought to be served. Member States will need to have good grounds for justifying the introduction of such a national ban.

Design and legal embedding

Member States must take the scope of Article 35 TFEU into account when designing a national destruction ban and a related ban on the export of unsold products to other Member States. A national destruction ban which is designed as a non-discriminatory measure, but which *de facto* restricts the outward flow of unsold products more than the unsold products on the national market, falls under Article 35 TFEU. This means the ban will have to be justified under

the 'rule of reason' (environmental protection/promotion of circular economy/waste prevention) and will have to be proportionate.

In our view, there is less legal scope for an import ban if a Member State wants to implement and enforce a national destruction ban. If it is nevertheless deemed necessary to ban the import of unsold products from other Member States in addition to ban exports for certain waste treatment operations, this would constitute a prohibited restriction on imports under Article 34 TFEU. It would also require justification under the 'rule of reason'. Justification will not be easy, however, because not destroying foreign unsold goods seems to be a policy objective of those foreign powers rather than of the Netherlands.

When designing a Dutch destruction ban, it is important for the Dutch legislator to determine *which product groups* it should apply to (general or product-specific), *which destruction acts* should be prohibited and (if and for which products) *which exceptions* should apply.

Under European law, there is only room for a Dutch *general* destruction ban, i.e. applicable to all product groups, if there are no European destruction bans yet. A Dutch general ban must cease to apply for a product group as soon as a European destruction ban becomes applicable for that product group.

There is legal scope to introduce a Dutch destruction ban *per product group* as long as a European destruction ban does not yet apply to that product group. The introduction of such a ban in anticipation of an already announced European destruction ban for that product group carries the risk that it will be overtaken in time by the adoption of the European destruction ban and that, after the European destruction ban has entered into force, the Commission will not accept the national destruction ban in the context of an invocation of Article 114(4) TFEU. Furthermore, under the principle of loyalty of Article 4(3) TEU, it would be necessary to justify the introduction of a national ban for that product group in anticipation of a European ban.

In Dutch legislation, a basis for the introduction of a general or specific ban on the destruction of unsold products can be found in Article 9.5.2(1) of the Environmental Management Act (Wet milieubeheer (Wm)). Chapter 10 of the Wm is important because it contains the legal basis for the Dutch national waste management plan (Landelijk afvalbeheerplan, Article 10.3 Wm) and the implementation of the waste hierarchy from the Waste Framework Directive (Article 10.4 Wm), which is detailed in the LAP. This waste hierarchy will also have to guide the establishment of a Dutch destruction ban in an executive decree under Article 9.5.2 Wm. The LAP is also important as an assessment framework for waste exports and may have to be adapted before a national destruction ban is implemented.

A national right to repair

Clarification

A 'right to repair' can be interpreted in different ways. What a 'right to repair' could entail for the purpose of this report, we have deduced from the measures proposed by the European

legislator in this context and the measures already taken by certain Member States. In brief, we have distinguished the following measures:

- An obligation for the seller to repair rather than replace within the statutory liability period (at least two years), unless repair is as expensive as or more expensive than replacement. This obligation follows from the proposed Directive on common rules promoting the repair of goods. The existing Sales of Goods Directive already contains an obligation for the seller to repair or replace within the legal liability period. This duty is transposed in Book 7 (Art. 7:17 et seq.) of the Dutch Civil Code.
- An obligation on the producer to repair goods which are subject to repairability requirements under EU legislation outside the liability of the seller at the consumer's request and where repair is 'not impossible'. The producer may pass on the cost of the repair and subcontract it to third parties. The term 'producer' is used here in a broad sense. It includes both the person who manufactures the product or has it designed and manufactured, or the importer or, failing that, the person who places a product on the market or puts it into service (which may include the seller). This measure is included in the proposed Directive on common rules promoting the repair of goods.
- In relation to the producer's repair obligation: an information obligation for the producer on the repair obligation and on repair services, a national online repair platform to be set up by Member States to allow consumers to find repairers, and a European repair information form to be used by repairers. These information requirements follow from the proposed Directive on common rules promoting the repair of goods.
- A repair bonus: a subsidy for consumers to have certain products repaired (Austria).
- A repairability index that gives consumers an indication of the extent to which appliances can be repaired on a scale (e.g. 1-10) (France).

Scope for national measures under European law

The legal scope for a Member State to introduce the measures contained in the proposed Directive on common rules promoting the repair of goods into national law before the Directive enters into force, is as follows.

In a general sense, it should be noted that the scope for 'anticipating' is limited insofar as the entry into force of the Directive is not far off. 'Anticipating' is then a more theoretical possibility.

As far as the limitation of the seller's choice of repair over replacement *within the l liability period* is concerned (unless repair is as expensive as or more expensive than replacement), there is little legal scope to introduce this measure into national law prior to the entry into force of the Directive. As there is exhaustive harmonisation under the existing Sales of Goods Directive, such a national measure will have to be assessed under the strict requirements of Article 114(5) TFEU. This would require the existence of a problem specific to that Member State, which is difficult to imagine in the case of more far-reaching repair obligations.

In principle, there is more legal scope for introducing a national obligation to repair *after* the seller's liability period in anticipation of the entry into force of the Directive. This obligation would be imposed on the *national* producer, which should be understood broadly: in short, anyone who places the goods on the national market. In principle, Member States may introduce such a measure into national law before the Directive enters into force. However, this national measure will then have to be assessed in the light of Articles 34-36 TFEU, the Services Directive if applicable, or Articles 56-62 TFEU, and the loyalty principle of Article 4(3) TEU. What is relevant for this assessment is that the national measure creates potential barriers to intra-Union trade. Potential barriers are mainly: (a) It may be less attractive for foreign producers to introduce a product on the Dutch market because of higher costs for the foreign producer, e.g. relatively higher transport costs for foreign producers return products. (b) Market access may be hampered because the foreign producer has to take certain precautions in the Netherlands that are not necessary when launching the product in another Member State. Thus, the national repair obligation would constitute a measure having the same effect as a quantitative restriction within the meaning of Article 34 TFEU. The next question is whether the introduction of the national measure is justified under Art. 36 TFEU and the 'rule of reason'. A legitimate public interest can be found in the environmental or consumer protection objective of the national measure. In addition, the measure will have to comply with the principle of proportionality. The justification for this will require more attention, the question being not so much whether the measure is appropriate, but mainly whether the measure is necessary (is it the least intrusive measure for the internal market).Furthermore, if there are no European repairability requirements yet, at least when considering the introduction of a national measure, the actual repairability possibilities of the product groups concerned will have to be taken into account for the sake of the execution and enforcement of a national obligation. Also, in view of the principle of loyalty of Art. 4(3) TEU, it will be necessary to justify why the Netherlands wishes to adopt national measures before the entry into force of the Directive. The reason for this can be found in the duration of the entry into force of the European obligations. The national measure will therefore have to be designed in such a way that it does not stand in the way of 'loyalty', e.g. by ensuring that the national measure is as similar as possible to the obligations under the proposed Directive, so that no implementation problems arise when the Directive comes into force. A premature introduction of the measure carries the risk that the producer's national repair obligation will be overtaken by the Directive's entry into force. Finally, once the European repair obligation has entered into force, national derogations can only be granted on the basis of Article 114(4) TFEU. This will not be easy, given the strict conditions of Article 114(4) TFEU.

The other measures in the proposed Directive on common rules promoting the repair of goods focus mainly on the provision of information, such as the national repair platform. These are linked to the producer's obligation to repair, but do not in themselves constitute barriers to trade. These measures can be introduced or continued in national law in anticipation of the Directive.

To the extent that a Member State wishes to take additional national measures on issues not yet or not exhaustively covered by the Sale of Goods Directive and, after its entry into force, the Directive on common rules promoting the repair of goods, it can be argued that there is

partial harmonisation. It should be noted, however, that the substantive scope of the directives, according to their own purpose, is apparently quite broad. These national measures are not covered by Article 114 TFEU, but by the TFEU rules on the free movement of goods and services, and, where applicable, the Services Directive.

Repair obligation of producers for products not (yet) included in EU legal acts, Annex II Directive on common rules for promoting the repair of goods.

If, after the entry into force of the Directive on common rules for promoting the repair of goods, the Netherlands wishes to introduce a national repair obligation for producers for product groups not (yet) included in Annex II of the Directive, there is, in principle, legal scope to do so. It can be argued that there is partial harmonisation (only for product groups listed in Annex II of the Directive). However, the national measures must be assessed in the light of Art. 34-36 TFEU and 56-62 TFEU, including an assessment of the proportionality of the national measure and the principle of loyalty. In any case, if there are no European repairability requirements yet, the actual possibilities for repair of the product group in question will have to be taken into account when considering the introduction of a national measure, for the sake of the execution and enforcement of the national obligation. As it becomes more likely that for certain products or product groups a delegated act will be adopted at European level pursuant to Art. 5(1) jo. Annex II of the Directive, creating a European repair obligation for the products, the principle of loyalty will become more important. Reasons will have to be given as to why a national measure is taken 'just now' in anticipation of the EU regulation.

Repair index

In principle, there is legal scope for continuing or introducing a national repair index for certain product groups. To the extent that European obligations regarding a repairability index do not yet apply at European level on the basis of delegated acts, this is a case of partial harmonisation, in this case on the basis of the Ecodesign Regulation or the Energy Labelling Regulation. The measures then have to be assessed in the light of Articles 34-36 TFEU. Labelling requirements constitute a prohibited import restriction under Art. 34 TFEU. A justification will then have to be found in order to comply with Art. 36 TFEU and the 'rule of reason'. A legitimate public interest can be found in the environmental or consumer protection objective of the measure.

In addition, the measure will have to comply with the principle of proportionality and, given the principle of loyalty, it will have to be justified why the Netherlands wishes to introduce a national repairability index in anticipation of obligations under EU law. Again, the risk of introducing a national measure in advance is that the national obligation to apply a repairability index to certain product groups will be overtaken by the entry into force of a European obligation under the Ecodesign Regulation or the Energy Labelling Regulation. When such a European obligation enters into force, it will be directly applicable in the Member States. Existing national measures can then only be allowed by invoking Article 114(4) TFEU. This will not be easy given the strict conditions of Article 114(4) TFEU.

Repair bonus

A national measure in the form of a repair bonus will have to be assessed under the Services Directive or Articles 56-62 TFEU and the loyalty principle of Article 4(3) TEU. Depending on the national design, a (potential) obstacle to the cross-border provision of repair services within the meaning of the Services Directive or, if the Directive does not apply, Art. 56 TFEU, may occur because repair by foreign providers may become less attractive for consumers (e.g. if, according to the Austrian regulation, repair may only be performed by national repairers). Again, the justification for the national measure must be sought in the environmental or consumer protection objective of the measure. Next, the concrete design of the measure would have to pass the proportionality test. Again, the appropriateness of the measure is unlikely to be an obstacle in the immediate future, but it will be important to justify why the national measure is necessary in anticipation of European legislation. It is plausible that the loyalty principle of Art. 4(3) TFEU will not easily be compromised to the extent that the EU legislator does not want to regulate a 'repair bonus' (or something similar) at EU level.

National determination of when repair is 'impossible' (Art. 5(1) of the proposed Directive)

The legal scope to further specify at national level the criterion that repair is 'impossible' within the meaning of Art. 5(1) of the Directive on common rules promoting the repair of goods, is limited once the Directive enters into force. To remain outside the scope of Art. 114(5) TFEU, we would advise the use of a national interpretation of the open standard 'impossible' in a way that is not legally binding, for example by including the further requirements only in guidelines or explanatory notes.

Legal embedding

Current Dutch national laws and regulations do not provide an explicit basis for the legal embedding of the various measures discussed. Several options could be explored, bearing in mind that the right to repair has both an environmental and a consumer protection objective. Regarding a right to repair after the civil liability period, the obvious option would be to explore the possibility of including a basis in Chapter 9 Wm (Substances and products), also in view of the environmental protection objective of the measure. However, for reasons of coherence, a basis in consumer laws and regulations could also be considered. As far as a repair bonus or subsidy is concerned, an alignment with financial laws and regulations could be sought.