

## Our position

# Proposal for a Directive on common rules promoting the repair of goods: coherence with the Eco-design Directive is crucial to avoid conflicting legislation

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

The European Parliament and Council have recently adopted their respective negotiating mandates on the EU Right to Repair Directive. The proposal aims to encourage more sustainable consumption by making it easier to repair defective goods, reducing waste and supporting the repair sector.

While the European Commission proposed a practical and proportionate framework, the Parliament position introduces important issues as it adopted amendments that drastically change the initial proposal, especially around Article 5 ‘Obligation to Repair’. Maintaining the link with the Eco-design Framework (and later, the Ecodesign for Sustainable Products Regulation) is crucial not only to secure legal certainty and consistency but also to avoid the overproduction, overstocking and waste of spare parts and safeguard users’ safety, privacy and the device’s integrity.

## Introduction

The ambition of the European Commission to encourage sustainable use of goods and reduce waste is fully in line with the Green Deal objectives. The main industry priority is to create products that are secure, durable and safe for consumers. To achieve this goal, the industry adheres to international regulations and develops products that have longevity and ensure consumer safety. The goal is also to ensure that qualified and authorised professionals can repair products while maintaining their built-in safety features. Nonetheless, safety and security are key concerns, and any regulations regarding repairs should not interfere with these essential concerns. Products consist of many parts that can be dangerous if handled incorrectly, posing a risk to both the repair person and the consumer.

The initial proposal rightly focuses on product-specific repairability requirements covered by the Eco-design Framework for the new repair obligations outside of the legal guarantee and aligns with the timeframe required to provide spare parts. This approach is essential to avoid inconsistencies and potentially contradictory requirements in these different pieces of legislation.

The amendments to Article 5 ‘Obligation to Repair’ proposed by the Parliament add new requirements that were not adopted in the context of the Eco-design Framework in Article 5 ‘Obligation to Repair’ and are putting at risk the equilibrium that the Commission’s proposal initially found. Below are key recommendations for consideration when the Council and the Parliament enter into their triologue discussions.

### 1. Maintain the link to the Eco-design Framework

#### Scope

**Amendment 39:** Although the Parliament report references the Union legal acts listed in Annex II, it also leaves open the option to add goods for which no repair requirements have been adopted in accordance with the Eco-design Framework. This could lead to goods being added for which there are no repair requirements established under the Eco-design Framework, which would create separate and different regulatory processes for adopting repair requirements. The adoption of delegated acts under the Eco-design Framework allows for broad stakeholder consultation and product-specific assessments instead of a one-size-fits-all approach that ignores differences in how products are reported, even within one sector (eg information and communications technology product categories).

## Spare parts

**Amendment 42:** The Parliament introduces new repair requirements that contradict the eco-design delegated acts listed in Annex II. In fact, the Parliament amendment proposes to provide all spare parts to all actors and unlimited information sharing. This goes against the eco-design delegated acts that already provide clarity on product-specific spare part availability and what information and/or tools must be made available. Having to provide unlimited access to information and having to make it available publicly, as the Parliament proposes, also increases cybersecurity risks of that information being used improperly. This could potentially be the case for products used in a critical infrastructure.

Similarly, delegated acts from the Eco-design Framework already define which spare parts are critical (risk of failure) and need to be made available for a reasonable period of time. Nevertheless, the Parliament adopted an amendment to make all parts available. As a result, \_\_ might have to keep a significant number of spare parts in stock without any demand for them. That would lead to unnecessary waste, as well as increased cost and higher prices.

No clear exemption has been proposed for information, parts and tools that are subject to trade secrets or intellectual property (IP) rights. The amendment proposes that trade secrets only apply to diagnostic tools, not to any other type of information that has been developed or designed by a manufacturer. Access to spare parts and repair information in Article 5 should guarantee the protection of business sensitive information and IP rights. The Right to Repair Directive should not require manufacturers to divulge their valuable intellectual property, whether trade secrets, copyrights or patents. Instead, it should ensure that manufacturers' legitimate efforts to protect their IP and the security of their ecosystems are taken into account, as current provisions could result in the loss of valuable intellectual property. Certain products integrate technological protection measures (TPMs) which are important to protect a range of IP, such as trade secrets and copyright-protected material, against unauthorised reproduction, distribution and potential piracy. In this regard, the Parliament's Committee on Environment, Public Health and Food Safety opinion considers that access to spare parts and repair-related information should be 'without prejudice to the protection of sensitive information and business secrets provided for in Directive (EU) 2016/943'. This is a welcome addition that should be considered during policymakers' negotiations.

**Amendment 43:** It is unclear what is meant by 'all information related to repair'. Furthermore, in accordance with Article 6, this information would already have to be made available and therefore it is unnecessary to add it to Article 5 as well.

## **2. Cost of repair and option for refurbishment**

**Amendment 40:** The Commission proposes that the producers shall repair 'for free or against a price or another kind of consideration'. The Parliament deleted the words 'against a price' from the Commission text when it drafted a new Article 5.1a. Such a change would create ambiguity about whether repair should be for free or whether a price can be charged.

While the option of mandating repair as the primary solution under legal guarantee makes sense, the Right to Repair Directive should allow additional flexibility to provide the most suitable option, as this would be beneficial to both the environment and the consumer. This is important for creating a true circular economy as defective products can be collected and repaired at the same time. It also means that customers can get a solution quickly instead of waiting for their product to be shipped for repair.

The defective product or component can then be fixed and sold as a refurbished product later. This would encourage consumers to choose repair over replacement, as highlighted by the Commission's impact assessment.<sup>1</sup>

For this reason, the inclusion of Article 5.1a point d 'in cases where the repair is factually or legally impossible, the producer may provide the consumer with a refurbished product that shall upon acceptance by the consumer discharge the producer from the repair obligation under this Article' is welcome. In addition, the proposal from the Council General Approach to delete 'in return for consideration' should not be supported. Though the meaning of 'return for consideration' is vague, it would likely offer the possibility for the consumer and the manufacturer to agree on alternatives to choose from (for example, accepting a refurbished good).

### **3. Protect user's safety, privacy and the device's integrity**

The Parliament's position includes the use of compatible parts and a broad limitation on software for authentication (new art 5[3]b) without safeguards for those parts that might pose safety or privacy risks for consumers or for those parts that are important for device security. Components such as the facial recognition camera or the fingerprint sensor capture biometric data and connect to the secure part of the device for authentication, meaning unlocking the device. However, this authentication is also used for several applications, including online banking. At a minimum, the requirement related to the use of compatible parts and the limitation on the use of software should include an exemption for parts that are critical to protect user's safety, privacy or the device's integrity.

In addition, the Parliament forbids 'any contractual, hardware or software method that could hinder or restrict repair'. This broad language could prevent the use of legitimate TPMs, which offer genuine protection for original copyrighted content, business sensitive information, IP and devices' integrity and protect against piracy challenges (download of illegal content, for instance). The Directive should not undermine original equipment manufacturers' efforts to protect their intellectual property or the security of their ecosystems and provide customers with high quality repair services that safeguard customers' privacy and security.

## Conclusion

The initial Commission proposal for the Right to Repair Directive by making a clear link with the Eco-design Framework established an equilibrium under Article 5 which avoided inconsistencies and potentially contradictory requirements. As they enter into trilogues, the co-legislators should aim to maintain this balance in the interest of not only ensuring legal certainty but also avoiding the overproduction and waste of spare parts and safeguarding of users' safety, privacy and the device's integrity.

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<sup>1</sup> 'Even in case consumers find a suitable service and the price is acceptable, the repair process itself may require too much hassle. Repair takes time and that time is even longer where spare parts need to be ordered. Time matters to consumers because during repair they are deprived of the product'. [https://commission.europa.eu/system/files/2023-03/SWD\\_2023\\_59\\_1\\_EN\\_impact\\_assessment\\_part1\\_v5.pdf](https://commission.europa.eu/system/files/2023-03/SWD_2023_59_1_EN_impact_assessment_part1_v5.pdf)