

PRODUCT LIABILITY

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IN THIS ISSUE

Electrical and electronic equipment make up one of the fastest-growing waste streams in the European Union. This article address planned obsolescence – the voluntary introduction by a manufacturer of a defect in a product – and looks at current and potential legislation promoting the design of lasting products, the reparability of products, and consumer information about expected useful life.

Planned Obsolescence: Impending European Legislation?

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

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According to European statistics, waste electrical and electronic equipment is considered one of the fastest-growing waste streams in the European Union, with an annual growth rate of 3 to 5%.¹

The accelerated renewal of these products led the European Parliament to take a stand for the first time on the issue regarding the extension of their lifetime by adopting, on July 4, 2017, a report requesting that the European Commission legislate against planned obsolescence.

This has re-opened the debates around this notion, while on September 18, 2017, the first criminal complaint was filed in France against manufacturers of printers, HP, Canon, Brothers and Epson, on the grounds of deceit. Apple was the second target in December 2017. An NGO by the name of HOP has filed a complaint alleging that the products marketed in France by these manufacturers breach the legal prohibition of "planned obsolescence", as their lifetime would be deliberately limited. Just before that, Greenpeace published a report, on June 27, 2017, on the electronic products which would allegedly be the most difficult to repair and fall under the category of products which obsolescence would be planned by their manufacturers, urging for sanctions.

Definitions

The obsolescence of a product includes all the reasons leading a consumer to get rid of it. It relates to the different production methods and consumption patterns and may be *functional* or related to *evolution*.

These two types of obsolescence correspond to the fact that a product no longer meets newly expected functions for technical, regulatory or economic reasons or the needs of consumers, who wish to acquire a new model due to functional or design evolutions.

However, obsolescence may also be intentional.

In this case, the obsolescence is planned and refers to all the techniques that include the voluntary introduction by a manufacturer of a defect in a product. It thus concerns different types of situations²:

- when a defective part is intentionally integrated in a product to limit its lifetime (i.e. the "*voluntary functional defect*");
- when a product is the subject of a scheduled stoppage (i.e. the "*planned expiry*");
- when the products are not repairable or when the software is no longer compatible or when associated products are no longer available (i.e. the "*indirect expiry*").

¹ Eurostat, Waste electrical and electronic equipment (WEEE) - [link](#)

² Report established by the Government for the Parliament regarding planned obsolescence, its legal definition and economic impacts (April 2017) - [link](#)

French law

In France, planned obsolescence is considered an offense since July 1, 2016.

The Law of August 17, 2015 defined this practice as "*the use of techniques whereby the person responsible for placing a product on the market deliberately intends to reduce its lifetime to increase its replacement rate*".³

It is punished by a prison sentence of no more than 2 years and a fine of €300,000, which may be increased to 5% of the average annual turnover.⁴ Additional sentences, such as the withdrawal of the products, may also be ordered.⁵

France previously addressed this issue from the perspective of consumer information on the availability of spare parts. Indeed, since the Law of March 17, 2014, manufacturers or importers of goods, placed on the market for the first time by March 1, 2015, must inform the professional seller of the period during which the spare parts that are essential to use the goods are available.⁶ This information must appear on any commercial document or any lasting medium provided at the time of the sale of movable goods and must be brought to the consumer's attention by the seller, in a legible way, before the completion of the sale, on any appropriate medium. It must also appear on the order form, if any, or on any lasting medium acknowledging the sale

or provided at that time.⁷ Any breach of these provisions may be punished by an administrative fine, which cannot exceed €3,000 for an individual and €15,000 for a legal entity.⁸

With regard to class actions, consumers retain the possibility to act through an authorized consumer protection association on the basis of the planned obsolescence offense revealing the manufacturer's breach of its legal or contractual obligations at the time of the sale of goods.⁹

However, the detection of planned obsolescence cases is the subject of controversy insofar as such cases are exceptional and more often result from suspicion. The intentional nature of the offense is particularly difficult to establish. It will therefore be interesting to see how French Courts will address this point in the case launched against HP, Canon, Epson and Brother.

European Parliament Resolution of July 4, 2017

Faced with this situation, the European Parliament adopted an own-initiative report on the extension of the lifetime of products¹⁰

³ Article L. 441-2 of the French Consumer Code

⁴ Article L. 454-6 of the French Consumer Code

⁵ Article L. 454-7 of the French Consumer Code

⁶ Article L. 111-4 of the French Consumer Code

⁷ Article D. 111-4 of the French Consumer Code

⁸ Article L. 131-2 of the French Consumer Code

⁹ Article L. 623-1 of the French Consumer Code

¹⁰ Report of the European Parliament of June 9, 2017 on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)) - [link](#)

by a non-binding resolution dated July 4, 2017.¹¹

With this initiative, the European Parliament intends to invite the European Commission to legislate on the issue of planned obsolescence by promoting: the design of lasting products, the reparability of products and consumer information (notably by mentioning the expected useful life).

As regards planned obsolescence, the European Parliament encourages the European Commission to:

- provide a European definition of planned obsolescence for physical goods and software;
- examine the possibility to implement an independent system capable of testing and detecting planned obsolescence in products, in cooperation with the market surveillance authorities;
- ensure better protection of "*whistle-blowers*";
- adopt dissuasive measures for producers;
- protect consumers against software obsolescence by encouraging transparency from suppliers and manufacturers, by means of additional information in sales contracts, as regards the minimum

period during which security updates for operating systems are available.

For the moment, the consequences of this resolution are still uncertain insofar as the European Commission would have to draft a directive to be submitted to the European Parliament and the Council of the European Union for adoption prior to the possible transposition into the different domestic laws of the Member States. There is still a long way to go....

Other European examples

This resolution echoes the various laws already enacted by Member States of the European Union.

Belgium, for instance, adopted in 2012 a resolution to fight against planned obsolescence of energy-related products. It recommended the implementation of a labeling system regarding product lifetime and reparability at the European level.¹²

As for Sweden, it implemented several tax measures in 2016 to strengthen the repair and recycling sectors. These measures provide for a decrease in repair costs by reducing for some goods the applicable VAT, from 25% to 12%. They also provide for a 50% tax reduction of labor costs for

¹¹ European Parliament resolution of July 4, 2017 on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)) - [link](#)

¹² Senate of Belgium, Draft resolution to fight against planned obsolescence of energy-related products, February 1st, 2012 - [link](#)

consumers who choose to repair their household appliances.¹³

In Germany, the fight against planned obsolescence is carried out through product liability, which promotes the development, production and marketing of reusable and technically lasting products.¹⁴

¹³ Strategy for sustainable consumption, Government Offices of Sweden, Ministry of Finance – [link](#)

¹⁴ KrWG, Tei 3, §23, (2), 1 (Kreislaufwirtschaftsgesetz) – federal law in force since 1996 on waste recycling – [link](#)

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