

# PLANNED OBSOLESCENCE AND CONSUMER PROTECTION: THE UNREGULATED EXTENDED WARRANTY AND SERVICE CONTRACT INDUSTRY

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*This Article analyzes the billion-dollar market, mostly unregulated, for Extended Warranties and Service Contracts (EWSCs). EWSCs are ubiquitous in the modern marketplace, offered at every automobile dealership, electronics and appliance store either by a salesperson or the cashier. Incredibly, there is little legal scholarship in this important area where manufacturer-sellers often overreach by preying on consumer vulnerabilities. It will be argued that most sales of EWSCs result in price gouging due to informational asymmetry and behavioral manipulation. This Article looks at two core concepts that are inexorably interconnected—one in the legal world and the other in the world of business and technology. The former relates to the regulation of EWSCs. The latter addresses the idea of “planned obsolescence” in which manufacturers determine the life or durability of their products. Products are engineered to fail such that they will need to be repaired or replaced for the purpose of generating future revenues for manufacturers and sellers. This inside information also allows manufacturers and third-party insurers to predict the low costs and risks of selling EWSCs. This Article reviews the marketplace and the practices of the high-pressure selling of EWSCs for products ranging from automobiles to electronics and less expensive goods. It then provides a comparative analysis of the state of the law in the United States, the European Union, and individual European countries. This comparative metric is important due to the fact that different countries have moved faster to regulate this industry (the United States is not one of them). It concludes that sellers of EWSCs often overreach and that a stronger regulatory framework is needed. Recommendations are offered on how best to frame new rules to ensure a fair and efficient market in the sale of consumer goods.*

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## INTRODUCTION

There are always regulatory gaps in complex, modern economies. One of those gaps is the aggressive selling of the mostly worthless extended warranty (guarantee) or service contract (EWSC).<sup>1</sup> EWSCs are sold across different industries including in the automobile and electronic products industries. The selling of EWSCs is a multi-billion-dollar industry in which eight out of ten dollars of an EWSC's price is profit!<sup>2</sup> The following "Ode" provides a framework for the examination of this regulatory gap:

Ode to the Modern Marketplace  
(The Product)

There once were industries, which touted the new technologies that converted Grandma's old refrigerator (still working after sixty years) into a multi-dimensional refrigerator, entertainment system, and calorie-counting marvel of a product. But not all is well in the land of appliances, electronics, automobiles, and so forth. This increased use of technology, along with the use of less durable materials, act as a poison that profoundly impacts the lifespan of these products. If this is so, then these super-gadgets are not much of a sign of progress!

(The Consumer)

If the above observation is so, shouldn't purchasers be more fully informed of the shorter product lifespans due to technology or the quality of materials used in producing them? Maybe the manufacturer should be required to put a notice on its product that reads something like: "This high-priced product does a lot of 'cool' things, but it will cost you a lot more to repair; but, no worries, those repairs will be needed for a shorter period of time before you will need a replacement!"

(The Flimflam)

To ease your concerns, the retailer is willing to provide 'peace of mind' by selling to the unsuspecting consumer an extended warranty-

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<sup>1</sup> The European name for warranty is guarantee; the words will be used interchangeably throughout this Article. See, e.g., Consumers, Health, Agric. and Food Exec. Agency (Chafea), *Consumer Market Study on the Functioning of Legal and Commercial Guarantees for Consumers in the EU: Final Report*, at 18 (Dec. 2015), <https://publications.europa.eu/en/publication-detail/-/publication/146e59de-02d3-11e6-b713-01aa75ed71a1/language-en> [hereinafter *Market Study*].

<sup>2</sup> See *The SAFE Guys: As with Manufacturer's Product Warranties, the Extended Warranty Industry is Huge Yet Easy to Take for Granted. Two Industry Experts Explain Why They Left the Comfort of the Insurance Business to Open Their Own Extended Warranty Consultancy.*, Warranty Week (Sept. 28, 2004), <https://www.warrantyweek.com/archive/ww20040928.html> [hereinafter *The SAFE Guys*].

service contract (EWSC) at an obscene price based on the ‘planned obsolescence’ of the product (knowledge possessed by the manufacturer or third-party insurer) ensuring that the retailer-manufacturer-insurer will pay minimal repair costs and thereby generate exorbitant profits. Or, more poetically, the manufacturer confidently suggests that they “stand behind the quality of their products”; that is, they build their products to last but just a bit past the duration of the EWSC!

Isn’t it implausible to believe today’s products and their lifespans are generally shorter than bygone eras’, and that the rise of the multi-billion-dollar EWSC industry is merely a manipulation of this trend at the industry-level? Or is it? Ought we to do something about it? These questions are the focus of this Article.

Recently, one of the authors experienced the “thrill” of purchasing a new car. This experience provides a prototypical example of a consumer’s introduction to the EWSC industry. The true-life scenario, replicated thousands of times a day, involved the hard sell by the retailer of an EWSC—also known as a “paid-for commercial guarantee”<sup>3</sup>—on behalf of itself, a manufacturer, or a non-producer third-party insurer (third-party insurer), no doubt including a handsome fee for the auto dealership as a result of reverse competition.<sup>4</sup> The transaction involved the cash purchase of a new mid-sized car. Even though it was a cash purchase, the customer was told that he must first wait to talk to the finance manager. Since there was no financing or leasing involved, this could and did mean that the manager was in charge of the hard sell of an EWSC.

The sales pitch involved a two-pronged attack meant to manipulate the purchaser into seeing the “value” of a paid-for EWSC.<sup>5</sup> First, the manager “puffed”<sup>6</sup> that he normally wouldn’t buy such an EWSC, but

<sup>3</sup> *Market Study*, *supra* note 1. For alternative terminology see *infra* Section I.A.

<sup>4</sup> Reverse competition is most often a three-part deal where the buyer may or may not know about the commission, kickback, or finders’ fee. There are always three parties to make this work; in the case of EWSC: insurer-provider, retail seller, and the purchaser. See *The SAFE Guys*, *supra* note 2. As will be seen, it is often a four-party deal: insurer-provider, retail seller, administrator, and the purchaser.

<sup>5</sup> The term paid-for or pre-paid warranty is used to distinguish it from the ordinary express or implied warranty that is included in the purchase price. See *Market Study*, *supra* note 1, tbl.1, at 18.

<sup>6</sup> Puffery refers to an exaggeration, whether an outright opinion or an opinion that acts as a pseudo-fact, as that no reasonable person would take as factual but serves as a technique of persuasion. See *Phx. Payment Sol., Inc. v. Towner*, No. CV-08-651-PHX-DGC, 2009 U.S. Dist. LEXIS 91978, at \*16 (D. Ariz. Oct. 2, 2009) (quoting *Zack v. Allied Waste Indus., Inc.*, No. CIV04-1640-PHX-MHM, 2005 U.S. Dist. LEXIS 35323, at \*9 (D. Ariz. Dec. 15, 2005)). The characterization of statements as puffery is a defense to a fraud or warranty claim. The argument is that no reasonable person would have taken the seller or advertiser’s words as statements of fact. *Id.* (“[T]he difference between a statement of fact and mere puffery rests in the specificity or generality of the claim.” (quoting *Newcal Indus., Inc. v. IKON Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008))).

that with the increased use of computer applications and other new technologies in the manufacture of new cars, such warranties are almost a necessity. He followed this pitch with the statement that he had purchased such a warranty for his new car. Second, following the sales pitch, the customer was “forced” to view a four-minute video extolling the benefits and peace of mind that such paid-for EWSCs provide.

Given the above sales tactics, the customer is left feeling that there is a high probability that a major repair or defect is likely to occur during the EWSC period of coverage (but planned obsolescence upon which EWSCs are based show that this will not be the case). Further, the customer is made to believe that the rational, intelligent purchaser would buy such a service contract. Finally, there is the moral suasion affected by the manager’s passionate appeal to the customer that he has the customer’s best interests at heart.

Unfortunately, some retailers go well beyond mere hard selling or mere persuasion. Unscrupulous dealers have falsely claimed that an EWSC is required in order to obtain bank financing; others simply add the cost of the EWSC into the loan agreement without consent.<sup>7</sup> The EWSC also may have numerous anti-purchaser provisions that limit claims that a reasonable purchaser would expect to be covered given the high price charged for the EWSC—some EWSCs have deductibles on a repair basis or a per-visit basis (even if it is for the same repair); others have limits or absolute exclusions for some types of repairs (such as repairs due to “normal wear and tear”). Still others may limit the geographic scope of where the repairs can be made (thus, you may not be close to an authorized or designated repair shop if you move) or place caps on towing charges or rental car expenses. Some insurers add a depreciation factor in order to make only a partial payment for covered parts and repair.<sup>8</sup> Thus, not only are EWSCs overpriced, they often provide less coverage than expected. In the end, the U.S. Federal Trade

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<sup>7</sup> See U.S. FED. TRADE COMM’N (FTC), *AUTO SERVICE CONTRACTS AND WARRANTIES* (Aug. 2012), <https://www.consumer.ftc.gov/articles/0054-auto-service-contracts-and-warranties>. The U.S. Federal Trade Commission warns that:

If the dealer tells you that you have to buy a service contract to qualify for financing, contact the lender to find out if this is true. Some people have had trouble canceling their service contract after learning that the lender didn’t require one.

Also beware of unscrupulous dealers who may try to include an auto service contract in your loan without your consent. If you see a charge for a service contract that you didn’t agree to, tell the dealer to take it out before you sign the loan agreement.

• • • •

• • • [M]ake sure the dealer forwards your payment and you get written confirmation. Some people discovered too late that the dealer failed to forward their payment, leaving them with no coverage months after they signed a contract.

*Id.*

<sup>8</sup> The Federal Trade Commission notes that:

Commission and other federal agencies leave consumers to fend for themselves without any legal protections relating to the sale of EWSCs.

Normally, this particular purchaser would have stopped the manager before he got started, but it had been a while since he had purchased a new car and wanted to witness the “life and death” faux sincerity and pressure placed on customers to purchase the EWSC. Little did the manager know that the customer already calculated that the cost of the EWSC, about \$1,800 or 10% of the cost of the automobile, was outrageous and that its key importance was as a major revenue-generating enterprise and not consumer protection.<sup>9</sup>

EWSCs are not industry-specific; in fact, the high-pressure sales tactics to buy service contracts are found in many other areas, such as in the electronics industry, even when the actual product is simple and low cost, which makes the purchase of an EWSC nonsensical.<sup>10</sup>

This all too common scenario highlights consumer abuse in the area of paid-for EWSCs. There are numerous red flags—high-pressure sale tactics, informational asymmetry, standard-form contracting—that suggest additional regulation of the EWSC industry is needed. The high degree of pressure placed by sellers of such contracts suggests that these contracts are not meant to minimize the risks to the customer, but are sold for the benefit of the seller. The revenues generated from the sale of such contracts rest on probability estimates of the likelihood of EWSC claims being made during the extended period and the average amount of the costs of such claims. The ultimate insurer, generally the manufacturer

In addition, you may need to pay a deductible. Find out if the deductible is charged on a per visit or per repair basis. This can make a big difference . . . .

Service contracts often limit how much they will pay for towing or related rental car expenses—meaning you have to cover the remaining cost. There also may be transfer or cancellation fees if you sell your car or end the contract early.

. . . [Some service contracts have] absolute exclusions that deny coverage for any reason. For example: If a covered part is damaged by a non-covered part, the claim may be denied. Or if the contract specifies that only “mechanical breakdowns” will be covered, problems caused by “normal wear and tear” may be excluded . . . .

[Also, y]ou may not have full protection even for parts that are covered in the contract. Some companies use a “depreciation factor” in calculating coverage: the company may pay only partial repair or replacement costs based on your car’s mileage.

*Id.*

<sup>9</sup> For further comments on the relevance of EWSCs, see the U.S. and EU data *supra* Parts II.A.1, II.B.1. It would be more prudent and rational for the consumer to invest the \$1,800 for the eight years that the EWSC covers, because planned obsolescence shows that there will be a large surplus after paying for the handful of minor repairs needed for the eight years of the automobile’s life. See *The SAFE Guys*, *supra* note 2.

<sup>10</sup> Another example, involving one of the authors, involved the purchase of a paper shredder. The shredder, originally priced, at \$129 was on sale for \$69. At the cash register, the store’s employee began to enter the \$29 cost of the service contract! It was only after the author objected that the person removed the add-on costs of the paid-for EWSC.

or a third-party insurer, possesses the information needed to do the calculation while the buyer is ignorant as to the likelihood that she will have to make substantial claims in the future. As noted previously, this calculation is based on the concept of “planned obsolescence.”<sup>11</sup> As will be discussed, manufacturers are not making products meant to last, but rather made just to last until the expiration of the EWSC, forcing consumers to buy new products when the ones originally purchased stop working.<sup>12</sup>

This Article asks: what if products, even so-called high-quality ones, are being produced with shorter lifespans, not because of technological advancements,<sup>13</sup> but because of planned obsolescence? Should the law intervene, if not with higher quality standards, then in the area of warranty law?

Part I starts with a basic outline of the two core concepts of EWSCs and planned obsolescence. The definitions of these two core concepts will provide the framework for understanding the subsequent analysis. Part II discusses the significance of the EWSC industry in the United States and the European Union (EU) and outlines the underlying regulatory frameworks. It also highlights some of the most striking regulatory insufficiencies related to paid-for EWSCs in the EU and EU Member States. Relevant aspects of the planned obsolescence phenomenon will

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<sup>11</sup> Planned Obsolescence has been defined as the use of “strategies and techniques of premature product aging applied by producers and sellers for the purpose of making end users replace old products with new ones faster than they ordinarily would by shortening the time of their use.” Stefan Wrbka, *Warranty Law in Cases of Planned Obsolescence—The Austrian Situation*, 6 EuCML 67, 67 (2017).

<sup>12</sup> Things don’t seem to work or last like they used to. The new state-of-the-art, high-tech, high-priced substitutes seem to require constant attention (high maintenance and repair costs) in order to squeeze ten years or so of life out of them. One of the authors has described it as follows:

[D]eclining lifetimes in a historical context could be a further indicator of a non-acceptable, i.e. warranty-relevant[,] defect constituting lifetime. If, for example, a washing machine of a relevant product series shows a shorter lifetime than comparable products ten years ago, then one could see this as an additional argument for a possible warranty-relevant defect. One would have to consider, in particular, whether there is any justified reason that could explain a decline and further consider that technical advancement should rather—at least—maintain the lengths of product lifetimes over time.

*Id.* at 69.

<sup>13</sup> One would hope new technologies that allow a product, such as a refrigerator to do more things does not act as a poison that profoundly impacts the lifespan of the product. If so, that would not be much of an improvement. If it is the case that technology shortens product lifespans, shouldn’t the purchaser be given more information such as: “This high priced product does a lot of ‘cool’ things, but it will cost you more to repair it, but no worries those repairs will be needed for a shorter period of time before you will need a replacement! And, in addition, we are willing to sell an extended warranty-service contract at an obscene price based on the planned obsolescence of the product so that we can minimize our repair costs and insure ourselves an exorbitant profit”—or, more poetically—“We stand behind the quality of our product, that is, we build our products to last just a bit past the EWSC!”

be further discussed in Part III (in particular from a regulatory perspective). The Article will conclude with suggestions for further steps to be taken to better protect purchasers of EWSCs.

## I. EWSCs AND PLANNED OBSOLESCENCE

When taking a closer look, both terms—EWSC and planned obsolescence—turn out to be remarkably ambiguous. Depending on the concrete circumstances, the concepts can be used in a number of ways.<sup>14</sup> To facilitate the understanding of our analysis, it makes sense to briefly outline their meaning in the context of this Article.

### A. EWSCs

When buyers purchase goods, they usually expect to get what they pay for or—framed more objectively—what they reasonably may expect to receive. The equivalence between the amount of money paid and the qualitative or durability value of the good received could be impaired if the good does not conform to the quality owed. To remedy non-conformity issues, safeguards are sometimes found either in the form of legal and

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<sup>14</sup> For examples of EWSC definitions, see V. Padmanabhan & Ram C. Rao, *Warranty Policy and Extended Service Contracts: Theory and an Application to Automobiles*, 12 *MARKETING SCI.* 230, 230 (1993); Keyvan Samini, *Third Party Extended Warranties and Service Contracts: Drawing the Line Between Insurance and Warranty Agreements*, 54 *OHIO ST. L.J.* 537, 541 (1993); Joseph S. Cheng & Stephen J. Bruce, *A Pricing Model for New Vehicle Extended Warranties*, *CASUALTY ACTUARIAL SOC'Y F.* 1, 12 (1993); L. Nicholas Weltmann, Jr. & David Muhonen, *Extended Warranty Ratemaking*, *CASUALTY ACTUARIAL SOC'Y F.* 187, 190–91 (2001); Kenneth J. Rojc & Gregory Eidukas, *New Frontiers in Automotive Sale and Finance Products*, 60 *BUS. LAW.* 663, 668 (2005); Ruth N. Bolton, Katherine N. Lemon & Peter C. Verhoef, *Expanding Business-to-Business Customer Relationships: Modeling the Customer's Upgrade Decision*, 72 *J. MARKETING* 46, 46 (2008); Michelle Bertolini & Sharon S. Lassar, *Service-Warranty Companies—The Hybrid of the Insurance Industry*, 38 *TAX ADVISER* 402, 402 (2007); Lynden Griggs, *Extended Warranties and Internet Transactions*, *COMPETITION & CONSUMER L.J. LEXIS*, Nov. 2008, at \*5; Lynden Griggs, *Providing an Extended Warranty with an Online Transaction: The Model That Will Improve Consumer Confidence*, 13 *J. INTERNET L.* 16, 16–17 (2009); Tao Chen, Ajay Kalra & Baohong Sun, *Why Do Consumers Buy Extended Service Contracts?*, 36 *J. CONSUMER RES.* 611, 611 (2009); Peng Tong, Zixian Liu, Feng Men & Lisi Cao, *Designing and Pricing of Two-Dimensional Extended Warranty Contracts Based on Usage Rate*, 52 *INT'L J. PRODUCTION RES.* 6362, 6362 (2014); Nat Pope, Chiharu Ishida, Peter Kaufman & Frederick W. Langrehr, *Extended Warranties in the U.S. Marketplace: A Strategy for Effective Regulation*, 33 *J. INS. REG.* 67, 69 (2014); Pranav Jindal, *Risk Preferences and Demand Drivers of Extended Warranties*, 34 *MARKETING SCI.* 39, 39 (2015); Yukun Wang, Zixian Liu & Yiliu Liu, *Optimal Preventive Maintenance Strategy for Repairable Items Under Two-Dimensional Warranty*, 142 *RELIABILITY ENGINEERING & SYS. SAFETY* 326, 326 (2015); Duo Yang, Zhen He & Shuguang He, *Warranty Claims Forecasting Based on a General Imperfect Repair Model Considering Usage Rate*, 145 *RELIABILITY ENGINEERING & SYS. SAFETY* 147, 147 (2015); Zhi-Sheng Ye & D.N. Pra Murthy, *Warranty Menu Design for a Two-Dimensional Warranty*, 155 *RELIABILITY ENGINEERING & SYS. SAFETY* 21, 21 (2016).

statutory obligations placed on sellers or via party autonomy, as agreed on by the parties to the sales contract (warranty).

In the literature, various terms are used to refer to these two regulatory scenarios. A 2015 study<sup>15</sup> commissioned by the European Commission (2015 Market Study) offers a good overview of the linguistically and conceptually multilayered guarantee frameworks. It distinguishes between legal guarantees and commercial guarantees, subdivides commercial guarantees into “integral [no-cost] commercial guarantees” and “paid-for commercial guarantees” (a synonym for EWSCs),<sup>16</sup> and aims to unify the terms used in the literature under these three types of guarantees:

1. Legal guarantees, also known as “statutory guarantees”;
2. Integral commercial guarantees, also known as “guarantees”, “manufacturer’s guarantees”, “warranties”; and
3. Paid-for commercial guarantees, also known as “extended warranties”, “service contracts”, “care plans”, “service plans”, “extended service contracts”.<sup>17</sup>

Because of the significant conceptual differences, this Article will distinguish between and focus on two of these three forms of guarantees: legal guarantees on the one hand and paid-for EWSCs (paid-for commercial guarantees) on the other. Legal guarantees, prescribed by law, come at no extra cost to the purchaser of the respective good. EWSCs, on the other hand, result from party agreements offered at an additional price, are a collateral agreement to the sale contract, and form a business of their own.<sup>18</sup>

Paid-for EWSCs are provided by a number of entities. They are commonly offered by the manufacturer or seller of the product, but are sometimes sold by third-party insurers.<sup>19</sup> Third-party insurers often market their EWSCs after the sale of the product, often through mail advertisements or notices at the time the product warranty is due to expire. These types of expiration notices or advertisements are especially manipulative since they prey on owner fears that they are no longer covered.

<sup>15</sup> *Market Study*, *supra* note 1.

<sup>16</sup> *Id.* tbl.1, at 18.

<sup>17</sup> *Id.*

<sup>18</sup> Again, ‘integral commercial guarantees’ are distinguishable from EWSCs in that in the first case the guarantee is offered at no additional cost even though it is beyond the warranty period required by law, while the latter is a paid-for extended warranty. The first type is likely given for branding and signaling purposes to show that the seller is selling a quality product.

<sup>19</sup> See *The SAFE Guys*, *supra* note 2. Third-party insurers are commonly insurance companies.

EWSCs offer longer guarantee periods beyond statutory or integral warranties, and thereby create additional obligations and liabilities for the seller and other parties involved in the EWSC scheme.<sup>20</sup> These additional liabilities arise from extending the time of the guarantee period, and also from expanding the scope of guarantee protections for additional services and insurance coverage, such as compensation for accidental damage loss. Unless indicated otherwise, the term EWSC in the present context refers to paid-for EWSCs of any kind, including those that extend beyond the expiration of other types of guarantees to those that provide different types of coverage, such as additional loss coverage.<sup>21</sup>

### B. *Planned Obsolescence*

The idea of planned obsolescence has been around for a while, traceable to at least the Great Depression.<sup>22</sup> For example, the charge has been made that appliances today are not made to last, but are instead made to fail in a shorter period of time than the state of the art allows without any prohibitive increase in production costs.<sup>23</sup> One of the first reported (and confirmed) cases of planned obsolescence dates back to the 1920s, when a group of manufacturers—commonly known as the “Phoe-

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<sup>20</sup> See *Market Study*, *supra* note 1, tbl.1, at 18. For example, under the EU framework for legal guarantees, the directly liable party would (only) be the seller of a product. EWSCs could go beyond and would in many cases introduce a manufacturer liability and occasionally (also or alternatively) a third-party insurer liability.

<sup>21</sup> One must, however, not neglect the fact that the term “commercial guarantees” is occasionally used in a narrower way. One of the most prominent examples is the Consumer Rights Directive (CRD) outlined further below. Article 2(14) of the CRD defines CRD-relevant EWSCs as:

Any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64, 73 [hereinafter CRD]. This statement represents a remarkably narrow understanding because it excludes third-party guarantors (other than producers) from the application of the CRD regime.

<sup>22</sup> See BERNARD LONDON, *ENDING THE DEPRESSION THROUGH PLANNED OBSOLESCENCE* 1 (1932); GILES SLADE, *MADE TO BREAK: TECHNOLOGY AND OBSOLESCENCE IN AMERICA* 5 (2006).

<sup>23</sup> See *Planned Obsolescence*, *THE ECONOMIST*, Mar. 23, 2009, <https://www.economist.com/news/2009/03/23/planned-obsolence>; SLADE, *supra* note 22.

bus cartel”<sup>24</sup> or “Phoebus agreement”<sup>25</sup>—agreed on limiting the lifetime of light bulbs to a maximum of 1,000 hours of operation.<sup>26</sup> The revelation of the Phoebus cartel initiated a debate on the interrelationship between increasing profits, producing eco-friendly and sustainable goods, and consumers’ interests in being able to buy goods that will last as long as technologically possible.<sup>27</sup>

Since the 1970s, there have been an increasing number of economic studies aimed at defining the most profitable strategies to balance technological innovation with businesses’ rights to maximize profits (such as calculating the likely financial impact of shortening product lifetimes).<sup>28</sup> The following decades have witnessed an increasing number of additional, less economic-focused reports that indicate the existence of obsolescence strategies.<sup>29</sup> In more recent years, environmental concerns linked to sustainable production and use of goods has intensified the

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<sup>24</sup> See, e.g., JÜRGEN REUß & COSIMA DANNORITZER, KAUFEN FÜR DIE MÜLLHALDE: DAS PRINZIP DER GEPLANTEN OBSOLESCENZ 13 (Orange Press 2013); Jana Valant, European Parliamentary Research Serv., *Planned Obsolescence: Exploring the Issue*, at 3 (May 2016) (“One of the last remaining examples of the old bulb, the Centennial Light Bulb, manufactured by the Shelby Electric Company and installed in 1901, still continues to function 24 hours a day in 2016.”).

<sup>25</sup> See, e.g., Monopolies & Restrictive Practices Comm’n, *Report on the Supply of Electric Lamps*, at 141–42 (Oct. 4, 1951).

<sup>26</sup> Markus Krajewski, *The Great Lightbulb Conspiracy*, IEEE SPECTRUM (Sept. 24, 2014), <https://spectrum.ieee.org/tech-history/dawn-of-electronics/the-great-lightbulb-conspiracy>.

<sup>27</sup> See Valant, *supra* note 24.

<sup>28</sup> See e.g., Peter L. Swan, *Optimum Durability, Second-Hand Markets, and Planned Obsolescence*, 80 J. POL. ECON. 575 (1972); Jeremy Bulow, *An Economic Theory of Planned Obsolescence*, 101 Q.J. ECON. 729 (1986); Winand Emons, *On the Limitation of Warranty Duration*, 37 J. INDUS. ECON. 287 (1989); Michael Waldman, *A New Perspective on Planned Obsolescence*, 108 Q.J. ECON. 273 (1993); Gregory E. Goering, *Durability Choice under Demand Uncertainty*, 60 ECONOMICA 397 (1993); Arthur Fishman, Neil Gandal & Oz Shy, *Planned Obsolescence as an Engine of Technological Progress*, 41 J. INDUSTRIAL ECON. 361 (1993); Jay Pil Choi, *Network Externality, Compatibility Choice, and Planned Obsolescence*, 42 J. INDUS. ECON. 167 (1994); Michael Waldman, *Planned Obsolescence and the R&D Decision*, 27 RAND J. ECON. 583 (1996); Arthur Fishman & Rafael Rob, *Product Innovation by a Durable-Good Monopoly*, 31 RAND J. ECON. 237 (2000); Atsuo Utaka, *Planned Obsolescence and Marketing Strategy*, 21 MANAGERIAL & DECISION ECON. 339 (2000); Paul A. Grout & In-Uck Park, *Competitive Planned Obsolescence*, 36 RAND J. ECON. 596 (2005); Atsuo Utaka, *Durable-Goods Warranties and Social Welfare*, 22 J.L. ECON. & ORG. 508 (2006); Roland Strausz, *Planned Obsolescence as an Incentive Device for Unobservable Quality*, 119 ECON. J. 1405 (2009); Chun-Hui Miao, *Tying, Compatibility and Planned Obsolescence*, 58 J. INDUS. ECON. 579 (2010); Yijuan Chen, *Innovation Frequency of Durable Complementary Goods*, 48 J. MATHEMATICAL ECON. 407 (2012).

<sup>29</sup> See, e.g., Centre Européen de la Consommation & Zentrum für Europäischen Verbraucherschutz e.V., *L’Obsolescence Programmée ou les Dérives de la Société de Consommation*, at 3, (April 2013), [https://www.cec-zev.eu/fileadmin/user\\_upload/eu-consommateurs/PDFs/publications/etudes\\_et\\_rapports/Etude-Obsolescence.pdf](https://www.cec-zev.eu/fileadmin/user_upload/eu-consommateurs/PDFs/publications/etudes_et_rapports/Etude-Obsolescence.pdf); Taiwo K. Aladeojebi, *Planned Obsolescence*, 4 INTL. J. SCI. & ENGINEERING RES. 1504, 1505–06 (2013); STEFAN SCHRIDDE, MURKS? NEIN DANKE! WAS WIR TUN KÖNNEN, DAMIT DIE DINGE BESSER WERDEN (2014); Adrian Porter, *Are Washing Machines Built to Fail? We Chart the Rise of the Throwaway*

planned obsolescence debate. This came at a time when sustainability gained importance as a broad international construct. In 2000, the World Business Council for Sustainable Development (WBCSD) issued a report on “eco-efficiency.”<sup>30</sup> Bearing in mind that the WBCSD operates as a platform for businesses, it does not come as a surprise that the report did not directly address the problem of planned obsolescence. The report focused on the environmental soundness of production processes rather than the durability of products.<sup>31</sup> Nevertheless, the shared view of the WBCSD members, expressed in the report as an emphasis on strategies of eco-friendly production,<sup>32</sup> indicates the direction responsible-minded producers should be heading. They noted that an increasing number of producers have identified a market niche for ecologically friendly strategies, and that this recognition may be a sign of a slow shift towards increased environmental awareness relating to the durability of goods.<sup>33</sup> Eventually, policy-makers and legal academics began to exchange views on how to counteract or limit planned obsolescence.<sup>34</sup>

It should also be noted that (just as is the case with guarantees) the phenomenon of planned obsolescence should be understood in multi-layered ways. As early as 1960, Vance Packard in his book, *The Waste Makers*, differentiated types of obsolescence strategies—“obsolescence of desirability,” “obsolescence of function,” and “obsolescence of quality.”<sup>35</sup>

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*Appliance, WHICH? NEWS*, Jun. 17, 2015, <https://www.which.co.uk/news/2015/06/are-washing-machines-built-to-fail-406177/>.

<sup>30</sup> World Bus. Council for Sustainable Dev. (WBCSD), *Eco-Efficiency: Creating More Value with Less Impact* (Oct. 2000).

<sup>31</sup> See *id.* at 16.

<sup>32</sup> See *id.* at 28–29.

<sup>33</sup> See *id.* at 17–19. See also Joseph Guiltinan, *Creative Destruction and Destructive Creations: Environmental Ethics and Planned Obsolescence*, 89 J. BUS. ETHICS 19 (2009) (discussing the interplay of sustainable production and planned obsolescence).

<sup>34</sup> See, e.g., Gerhard Wortmann & Peter Schimikowski, *Geplanter Produktverschleiß und bürgerliches Recht [Planned Product Wear and Civil Law]*, 16 Zeitschrift für Wirtschaftsrecht 978 (1985) [hereinafter *Planned Product Wear and Civil Law*]; Schriftenreihe Des Instituts Für Europaisches Wirtschafts- Und Verbraucherrecht e.V. [Series of the Institute for European Economic and Consumer Law e.V.], *Obsoleszenz interdisziplinär: Vorzeitiger Verschleiß aus Sicht von Wissenschaft und Praxis [Obsolescence Interdisciplinary: Premature Wear from the Perspective of Science and Practice]* (Tobias Brönneke & Andrea Wechsler eds., 2015); Wrбка, *supra* note 11; Eléonore Maitre-Ekern & Carl Dalhammar, *Regulating Planned Obsolescence: A Review of Legal Approaches to Increase Product Durability and Reparability in Europe*, 25 REV. EUR. COMMUNITY & INT’L ENVTL. L. 378, 379 (2016); Anaïs Michel, *Product Lifetimes through the Various Legal Approaches within the EU Context: Recent Initiatives Against Planned Obsolescence*, PLATE 266, 269 (Conny Bakker & Ruth Mugge eds., 2017).

<sup>35</sup> VANCE PACKARD, *THE WASTE MAKERS* 55 (1960). For some more recent contributions that include slightly differently nuanced categories, which nevertheless follow Packard’s basic classification, see, e.g., John R. Mansfield & James A. Pinder, “Economic” and “Functional” Obsolescence: Their Characteristics and Impacts on Valuation Practice, 26 PROP.

From a guarantee perspective, it is obsolescence of quality that is most relevant. Here, the lifetime of a product ends prematurely because of technical issues. In cases of obsolescence of desirability and function, on the other hand, the good still runs flawlessly. Users choose to stop using the still usable item because they feel that they “need” a follow-up product—either “convinced” by marketing strategies (obsolescence of desirability) or because the newer product would objectively show different, additional or enhanced technical functions (obsolescence of function). Neither legal guarantees nor EWSCs can be applied to remedy the end of the use of a product in cases that do not relate to qualitative issues.

## II. MARKETPLACE AND REGULATORY LANDSCAPES OF EWSCs IN THE UNITED STATES, THE EU, AND EUROPEAN MEMBER STATES

This Part examines the EWSC marketplace, as well as the existing regulatory schemes in the United States, the EU, and some EU Member States. It first examines the size and characteristics of the different markets, as well as the unevenness of the regulatory schemes aimed at protecting consumer abuse.

### A. *United States*

This Section first provides empirical evidence of the size and depth of the American market for EWSCs. It will show the types of products that EWSCs are most associated with, as well as the fluidity over time of the size of the market for different categories of products. It will also show the revenues generated by the sale of EWSCs and the allocation of the revenues between the different players on the sales side of the transactions: manufacturers, retailers, third-party insurers. The second part examines the mix of regulatory authorities and laws that relate to the EWSC industry in the United States.

#### 1. Relevance of EWSCs in the U.S.

The EWSC industry has reached the menu of items sold by Amazon in the area of electronics. A website dedicated to EWSCs for electronic products numbers over 20,000 entries.<sup>36</sup> As of 2014, the EWSC market in the U.S. had reached \$39.5 billion dollars, with an annual growth rate of 7.33%.<sup>37</sup> As Chart 1 shows, the auto-related EWSC share of the market is about 40%, followed by mobile phones (22%), electronics (18%),

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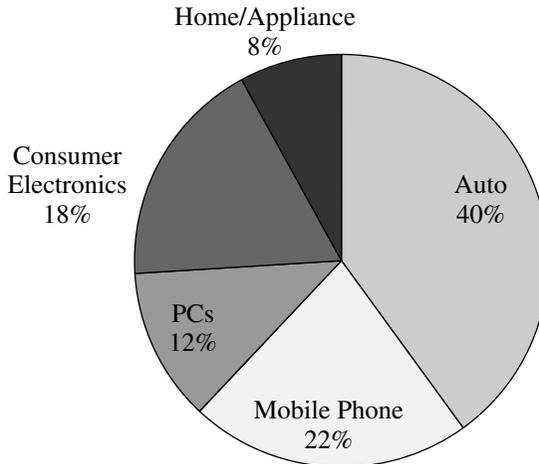
MGT. 191, 193 (2008); *Planned Product Wear and Civil Law*, *supra* note 34, at 978 (discussing qualitative obsolescence and psychological obsolescence).

<sup>36</sup> Search results for extended warranties, AMAZON, <https://www.amazon.com> (search in search bar for “extended warranties”) (last visited Jan. 28, 2019).

<sup>37</sup> *Mid-Year Service Contract Report*, WARRANTY WEEK (Oct. 9, 2014), <https://www.warrantyweek.com/archive/ww20141009.html>; Abhishek Yadav, *Extended Warranty &*

personal computers (12%), home warranties (4.6%), and appliance warranties (3.4%).<sup>38</sup> Between 2008 and 2014, U.S. economic growth averaged 2.2% per year, while the growth of the EWSC industry averaged 8.33% per year.<sup>39</sup> The sales of extended warranties on mobile phones increased on average 28.07% per year from 2009–2013.<sup>40</sup>

CHART 1: U.S. CONSUMER EWSC INDUSTRY (2014): \$39.5 BILLION



The insurer of EWSCs varies and includes the following: retailer protection plans, such as the Best Buy Geek Squad Protection Plan;<sup>41</sup> manufacturer or OEM-branded protection plans,<sup>42</sup> such as Apple Care; and third-party, direct to-the-consumer providers' protection plans, such as Assurant 360.<sup>43</sup> Commonly, plans include three parties other than the purchaser of the EWSC. These include the seller (retailer), the obligor or party responsible for paying the claims under the EWSC, and third-party networks of service providers (companies that do the actual work of re-

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*Service Contract Industry USA 5*, SLIDESHARE (July 11, 2015), <https://www.slideshare.net/AbhishekYadav23/extended-warranty-industry-in-us>.

<sup>38</sup> Yadav, *supra* note 37, at 5.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *See id.* at 11.

<sup>41</sup> *See Geek Squad Terms and Conditions*, BEST BUY, <https://www.bestbuy.com/usw/termsconditions/anonymous> (use drop-down menus to select plan based on plan type and date range).

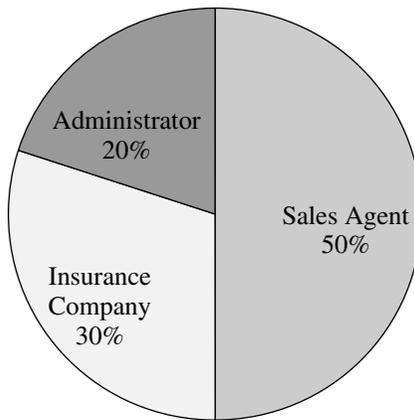
<sup>42</sup> OEMs are not actually the “original manufacturer” of the equipment, but are actually a company who has a relationship with the original manufacturer to resell that manufacturer’s product under its own name and branding. Usually OEM products are the same quality as the retail versions, but warranties may be different. *See Original Equipment Manufacturer—OEM*, INVESTOPEDIA, <https://www.investopedia.com/terms/o/oem.asp> (last visited Nov. 16, 2018).

<sup>43</sup> *See, e.g., Assurant 360° Protection Summary*, ASSURANT SOLUTIONS (March 2014), [https://www.assurantsolutions.com/extended-warranty/-/media/Files/TCs/amazon\\_sample\\_terms\\_and\\_conditions\\_0314.ashx](https://www.assurantsolutions.com/extended-warranty/-/media/Files/TCs/amazon_sample_terms_and_conditions_0314.ashx) (containing sample Terms and Conditions for an Assurant 360 Protection Plan that is purchased through Amazon).

pair and replace).<sup>44</sup> One estimate of the allocation of the purchase price for EWSCs shows 50% is retained by the seller (retailer), 30% is allocated to the insurance company (underwriter), and 20% for the administrator (see Chart 2: ESC Premium Split).<sup>45</sup>

Within the 30% received by the insurance company, the money is allocated as follows: fees of 5.25%, payment of claims 19.8%, and a buffer or reserve fund of 4.95%.<sup>46</sup> The allocations of the premiums and allocation within the insurance share of the premium depend on the product and factors such as the product's estimated lifespan (planned obsolescence) and the length of protection provided by the EWSC.<sup>47</sup> In general, Chart 2 shows that based upon the probability calculation (an estimate of the likelihood of EWSC claims), which acts as a surrogate for planned obsolescence, only 19.8% of the purchase price is used to make repairs or to satisfy claims. The reserve fund not used to pay for an unexpectedly high number of claims or costs of repair become additional profit for the insurance company.

CHART 2: ESC PREMIUM SPLIT



This tripartite scheme is not consumer friendly. In the automobile sale, the car purchaser buys the policy from the car dealer, but any claim must be made to the manufacturer or a third-party insurer, and often a third company performs the actual repair work.<sup>48</sup> The retailer simply

<sup>44</sup> See *id.* at 1–2, 6.

<sup>45</sup> *The SAFE Guys*, *supra* note 2. Some terms, like “administrator,” may be defined by state statute. See, e.g., N.Y. INS. LAW § 7902(b) (McKinney 2018) (“Administrator means any person designated by a provider to be responsible for administration of service contracts, including servicing, claims management and processing, recordkeeping, customer service and collection of fees.”).

<sup>46</sup> *The SAFE Guys*, *supra* note 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

takes half of the premium paid as pure profit with no continuing obligations. Further, under this system, the car owner technically cannot make a claim or deal directly with the repair company since it has no privity of contract.<sup>49</sup> This is because there is no contractual relationship between the repair company and the customer. The customer, under the common law, cannot make the argument that she is a third-party beneficiary<sup>50</sup> since she has direct privity to the insurer and thus has an avenue of recourse. Thus, the car owner has to work through the insurer, and in some cases is required to file a new claim in order to “repair a repair.”<sup>51</sup> As such, a common complaint relates to the prolonged time for automobile repair or for the car owner to be reimbursed after paying the repairs upfront; not uncommonly, the repair work may take a month or more.<sup>52</sup> This is likely due to a long queue as insurers are incentivized to lower costs by using a limited number of service providers.<sup>53</sup>

The retailer in this tripartite scenario obtains a windfall by receiving half the purchase price of the EWSC with no follow-up responsibilities. This creates a moral hazard because it incentivizes the retailer to pressure the consumer to buy an EWSC that is often not in the interest of the consumer. In some cases, the car dealer makes as much on selling the EWSC as it does selling the automobile.<sup>54</sup> The hard sell tactics utilized are generally not subject to government regulation because any such regulations are directed to the principal (insurer) and not to its agent (retailer).<sup>55</sup> The only claim that may be lodged against the retailer is common law misrepresentation or fraud. This is unlikely to be successful since the sale tactics do not amount to a material misrepresentation of fact. The other avenue of recourse in American, but not English,<sup>56</sup> com-

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<sup>49</sup> The privity doctrine holds that only direct parties to a contract have standing to sue for breach of contract. 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 5 (3d ed. 2004).

<sup>50</sup> There are exceptions to the privity doctrine when an outside party is recognized as a third-party beneficiary. Professor Farnsworth traces the common law’s third-party beneficiary rule to the 1677 case of *Dutton v. Poole*, 83 Eng. Rep. 523 (K.B. 1677). *Id.* at 7.

<sup>51</sup> See FTC, *supra* note 7.

<sup>52</sup> The U.S. Federal Trade Commission warns: “If the auto service contract doesn’t specify how long reimbursement usually takes, ask. Find out who settles claims in case you have a dispute with the service contract provider and need to use a dispute resolution program.” *Id.*

<sup>53</sup> Nancy A. Lutz & V. Padmanabhan, *Why Do We Observe Minimal Warranties?*, 14 *MARKETING SCI.* 417, 418 (1995).

<sup>54</sup> *NADA Data 2017: Annual Financial Profile of America’s Franchised New-Car Dealerships*, NAT’L AUTO. DEALERS ASS’N 3, <https://www.nada.org/2017NADAdatal/> (“Service, parts and body shop gross as % of total gross” hit 49% in 2017.).

<sup>55</sup> For example, if the third-party insurer is an insurance company, then it must meet the capitalization requirements mandated by state insurance law. See, e.g., N.Y. INS. LAW § 7903(c) (McKinney 2018).

<sup>56</sup> Larry A. DiMatteo, *A Study of Judicial Reasoning—When Penalties are not Penalties?*, 85 *GEO. WASH. L. REV.* 1846, 1857 (2017) (English common law does not recognize unconscionability as an independent policy doctrine. However, the term “unconscionable” is a free-floating construct found in court decisions striking terms in consumer contracts.).

mon law is the doctrine of unconscionability.<sup>57</sup> However, such a claim is likely to fail due to a lack of substantive unconscionability because the price alone is rarely enough to be considered unconscionable in a market economy. Another avenue of recourse exists in state “price gouging” statutes, but these statutes target overpricing in cases involving a natural disaster or emergency.<sup>58</sup> Although contract law does not provide a degree of certainty in policing EWSCs, it does have constructs (expanded privity, misrepresentation, and unconscionability, as well as current warranty law) that could be modified to allow contract law to regulate EWSCs.

## 2. Regulatory Landscape of EWSCs in the U.S.

In the U.S., the regulatory landscape relating to EWSCs is a haphazard mix of federal and state regulations. Many of these regulations do not specifically target the EWSC; rather, they are extrapolated from long-existing regulatory schemes, such as insurance and warranty law.<sup>59</sup> There is no single regulatory authority at the federal or state levels whose scope extends to all legal issues relating to the EWSC industry. Such a piecemeal approach leaves numerous gaps in the regulation of the EWSCs, as well as incongruences in approach among the American states. In sum, the EWSC marketplace has not been immune from government regulation, but the level of consumer protection is at a lower threshold than consumer protection laws tailored for specific industries and issues.

Since there is no independent consumer contract law or standard terms regulation in the U.S. as is found in Europe,<sup>60</sup> regulation of EWSCs is relegated to a fragmented legal regime including common law, as well as state and federal regulatory law. In the end, the below review will show that there are gaps in the regulation of EWSCs and the protection of consumers from abusive selling tactics and one-sided contracts.

### a. Federal Warranty Law

Federal warranty law in the U.S. is encased in the Magnuson-Moss Act (MMA).<sup>61</sup> It is important to understand that EWSCs are treated differently than warranties under the law. The U.S. Federal Trade Commis-

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<sup>57</sup> U.C.C. § 2-302.

<sup>58</sup> See, e.g., FLA. STAT. § 501.160 (2011) (“[D]uring a state of emergency, it is unlawful to sell, lease, offer to sell, or offer for lease essential commodities, dwelling units, or self-storage facilities for an amount that grossly exceeds the average price for that commodity during the 30 days before the declaration of the state of emergency.”).

<sup>59</sup> See FTC, *supra* note 7.

<sup>60</sup> See, e.g., Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EC) [hereinafter UCTD].

<sup>61</sup> Magnuson-Moss Act, 15 U.S.C. §§ 2301–12 (1975).

sion describes a service contract as “a promise to perform (or pay for) certain repairs or services.”<sup>62</sup> “Sometimes called an ‘extended warranty,’ a service contract is not a warranty as defined by federal law.”<sup>63</sup> Warranties are considered part of the product, while EWSCs are treated as independent of the underlying sale and purchase contract, and, therefore the MMA does not apply to them.<sup>64</sup> A brief review is undertaken here to see if some of the law’s features could be useful in the regulation of EWSCs, despite its failure to directly regulate EWSCs. The MMA requires that warranty terms and conditions be presented in a conspicuous manner and written in plain language. The concept of conspicuousness is also found in the Uniform Commercial Code, as discussed below.

Unfortunately, the MMA’s coverage of warranties is broad, but short on specifics. The law is more about form, than substance. It does not provide minimum standards for warranties; it mandates how warranties and warranty disclaimers are to be presented to the consumer.<sup>65</sup> Any consumer disclosure requirements only apply to the manufacturer and not to the retailer-seller.<sup>66</sup> Also, the manufacturer-seller of an EWSC cannot disclaim the implied warranties, but agents (such as automobile dealers) may disclaim such warranties.<sup>67</sup>

#### b. State Law: Common Law of Contracts and Uniform Commercial Code (UCC)

In the U.S., the common law, found in individual state laws, fails to distinguish between commercial and consumer contracts and except for a few exceptions in Article 2 of the UCC, does not distinguish between commercial and consumer sale of goods.<sup>68</sup> Up to the present, despite a

<sup>62</sup> FTC, *supra* note 7.

<sup>63</sup> *Id.*

<sup>64</sup> See § 2301(8).

<sup>65</sup> See § 2303(a) (requiring plain language and conspicuousness).

<sup>66</sup> See §§ 2301(5), 2303(a).

<sup>67</sup> See § 2308(a).

<sup>68</sup> The handful of provisions in the UCC that provides additional protections is collectively noted as the merchant-consumer distinction. Except for these few provisions, the UCC applies equally to commercial and consumer transactions. See generally, Ingrid M. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1184 (1985) (“Other scholars as well have noted the doctrinal confusion and poor results that flow from a unitary approach to situations involving different issues and policy concerns.”); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 520 (1987) (suggesting Llewellyn believed that merchant associations wielded too much power in the unregulated marketplace). While the UCC does not define Consumer, it defines Merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” U.C.C. § 2-104(1).

host of consumer protection laws, American contract law remains generic in nature without any recognized body of consumer contract law.<sup>69</sup> The exception is that the merchant-consumer distinction plays a role in the use of the doctrine of unconscionability found in the UCC and, applied by analogy to other types of contracts, is in practice used exclusively to void terms in consumer contracts.<sup>70</sup> This is despite the fact that as written, UCC § 2-302 equally applies to commercial contracts.<sup>71</sup> The bargaining power and informational imbalances found in consumer contracts have become the linchpin for the application of the doctrine of unconscionability.<sup>72</sup> However, it is important to note that the general rule is that one-sided (pro-merchant) terms in a consumer contract are enforced and that the unconscionability doctrine is only applied in ad hoc cases, and cannot itself be considered a form of standard terms regulation.<sup>73</sup> In American contract law, there is no “fairness concept,” as found in the EU Unfair Terms in Consumer Contracts<sup>74</sup> or “surprising terms” principle, as found in German law.<sup>75</sup>

A seller of goods is not obligated to provide a warranty. However, any contract language that attempts to limit the scope of an express warranty is unenforceable.<sup>76</sup> The UCC implies certain warranties, whether or not an express warranty is provided.<sup>77</sup> The implied warranty of merchantability<sup>78</sup> and implied warranty for a particular purpose<sup>79</sup> are attached to sale of goods contracts unless expressly disclaimed. However,

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<sup>69</sup> For example, fine print terms, often incorporated by reference, are enforceable whether they are found in consumer or commercial contracts. See *Int'l Ass'n of Machinists & Aerospace Workers v. ISP Chems.*, 261 F. App'x 841, 848 (6th Cir. 2008).

<sup>70</sup> See U.C.C. §§ 2-104, 2-302.

<sup>71</sup> *Id.* § 2-302.

<sup>72</sup> Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First-Century Survey*, in *COMMERCIAL CONTRACT LAW TRANSATLANTIC PERSPECTIVES* 309 (Larry A. DiMatteo et al. eds., 2013) (noting that the U.S. Supreme Court has narrowed the use of unconscionability to void arbitration clauses in consumer contracts).

<sup>73</sup> See U.C.C. § 2-302; see also Paul Bennet Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, 72 N.Y. St. B.J. 18, 22 (2000).

<sup>74</sup> See UCTD, *supra* note 60; see also CRD, *supra* note 21.

<sup>75</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 305c, translation at <https://germanlawarchive.iuscomp.org/?p=632> (Ger.) [hereinafter BGB] (“Surprising and ambiguous clauses” state that standard business terms that “are so unusual that the contractual partner of the user could not be expected to have reckoned with them, do not form part of the contract.”).

<sup>76</sup> U.C.C. § 2-316(1) (“Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.”).

<sup>77</sup> §§ 2-314, 2-315.

<sup>78</sup> § 2-314.

<sup>79</sup> § 2-315.

§ 2-316(2)<sup>80</sup> limits the effectiveness of a disclaimer. First, to exclude the implied warranty of merchantability the disclaimer must explicitly use the word “merchantability.”<sup>81</sup> Second, the disclaimer language must be presented in a conspicuous manner.<sup>82</sup> But, these requirements are simply formalities, easily surmounted by boilerplate disclaimer clauses. However, violations of the warranty provisions of the UCC make manufacturers susceptible to claims under § 5 of the Federal Trade Commission Act (Act).<sup>83</sup> The Act simply states in broad terms that any “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>84</sup> The Act assigns regulatory authority to the Federal Trade Commission.<sup>85</sup> Violations can be punished by penalties of \$10,000 to be collected by the Attorney General through civil actions.<sup>86</sup>

Again, unfortunately warranty law does not currently regulate EWSCs since it focuses on product warranties, which are part and parcel to the product being sold. EWSCs are considered a separate product from the standard warranty provided in the sale. The EWSC is independent of the sale of the good for which the consumer pays an additional price. However, there is little reason that the conspicuousness and plain language requirements should not be extended to EWSCs.

In the end, the lack of federal regulation leaves it to state law to provide governance. Unfortunately, such state regulation is also lacking or sporadic, especially given that there is no existing model law on the subject. The state regulatory law closest to EWSCs is found in insurance law. For example, New York Insurance Law applies to certain service contracts and commercial guarantees, which is discussed in the next section.

### c. State Regulation: New York Insurance Law

Technically, state insurance laws regulate EWSCs. Given its prominence in the area of commercial law, New York State (NYS) Insurance law will be reviewed here. NYS Insurance Law makes a distinction between warranty and service contracts. Generally, insurance law does not cover warranties, but the NYS Department of Insurance regulates service contracts.<sup>87</sup> The law defines a service contract as an “agreement, for a

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<sup>80</sup> § 2-316(2) (“[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . .”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 15 U.S.C. § 45(a) (2012) (codifying Section 5 of the Federal Trade Commission Act).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See, e.g.,* N.Y. INS. LAW § 7901 (McKinney 2012).

separate or additional consideration, for a specific duration to perform the repair, replacement or maintenance of property, or indemnification for repair, replacement or maintenance, due to a defect in materials or workmanship or wear and tear.”<sup>88</sup>

However, that regulation simply requires registration, certification, licensing, and conformity to solvency regulations.<sup>89</sup> The third-party insurer-provider of the service contract is required to meet these requirements, but the retailer or seller, and the contractor providing the services or doing the repairs are not. However, a company independent of the third-party insurer if “it actually obligates itself to make repairs and maintenance under a service contract, [ ] would have to register as a service contract provider.”<sup>90</sup>

NYS Insurance Law does not require a service contract provider to file their rates and contract forms for review by the Department. Article 79, entitled “Service Contracts,” states that its purposes are to “create a legal framework within which service contracts may be sold in this state; encourage the marketing and developing of more economical and effective means of providing services under service contracts; and permit and encourage fair and effective competition among different systems of providing and paying for these services.”<sup>91</sup> Article 79 authorizes the Superintendent of Insurance to enforce the law by, for example, conducting investigations and issuing cease and desist orders.<sup>92</sup>

The key question is what distinguishes extended warranties from a service contract under NYS Insurance Law? First, the service contract is independent of the product itself. However, if the manufacturer is the underwriter or provider of the service contract, then the contract is not covered under insurance law.<sup>93</sup> Second, if the EWSC coverage insures against a risk external (“fortuitous risk”) from the product, then it is deemed to be a service contract.<sup>94</sup> In one case, a third-party insurer provided protection for restaurant equipment against damage due to a fire.<sup>95</sup> The Office of General Counsel held that the product was a service con-

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<sup>88</sup> N.Y. INS. LAW § 7902(k) (McKinney 2012).

<sup>89</sup> N.Y. INS. LAW § 7903(c) (McKinney 2012) (requiring that the insurer maintain a reserve fund not less than 5% of the price of the contracts sold).

<sup>90</sup> N.Y. INS. LAW art. 79 (McKinney 2012); Office of Gen. Counsel, N.Y. Ins. Dep’t, *Re: Licensing/Registration Requirements for Service Contract Providers*, DEP’T FIN. SERVS. (June 3, 2002), <https://www.dfs.ny.gov/insurance/ogco2002/rg206033.htm> [hereinafter *Service Contract Providers*].

<sup>91</sup> N.Y. INS. LAW § 7901.

<sup>92</sup> N.Y. INS. LAW § 7910(b)(1).

<sup>93</sup> *Service Contract Providers*, *supra* note 90.

<sup>94</sup> Office of Gen. Counsel, N.Y. Ins. Dep’t, *Re: Marketing an Extended Warranty Program*, DEP’T FIN. SERVS. (Sept. 17, 2007), <https://www.dfs.ny.gov/insurance/ogco2007/rg070915.htm>.

<sup>95</sup> *Id.*

tract because the third-party undertook an obligation that involved a fortuitous risk, thereby, making the contract a type of insurance.<sup>96</sup>

Some EWSCs may restrict transfers of the contract to future owners. For example: a home purchaser or owner buys an EWSC. Does the purchaser-owner have the right to transfer the contract when she resells the home with time remaining on the EWSC? If not, should the third-party insurer be required to refund a pro rata amount of the contract price? NYS Insurance Law simply requires that service contracts state the terms, restrictions or conditions governing the transferability of such contracts.<sup>97</sup> But, other than this disclosure requirement, as a general matter, the transferability of a service contract depends upon the provisions in the specific contract in question, including a non-transferability provision.<sup>98</sup> The law also requires the service contract to specify any limitations on the right to terminate the service contract by the provider or contract holder and the right, if any, to receive a refund.<sup>99</sup> The law does not deal with the issue of whether the seller or provider of the EWSC should be able to assign the contract to another party, which may provide lower cost and lower quality services.

A more proactive provision of NYS Insurance Law provides a right of rescission in which a purchaser of a service contract has ten, and sometimes twenty, days to rescind the contract unless the purchaser already filed a claim.<sup>100</sup> The third-party insurer must give a refund in full

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<sup>96</sup> *Id.* Another New York case involved the sale of a new tire with a “road hazard warranty program.” Office of Gen. Counsel, N.Y. Ins. Dep’t, *Re: The Product Warranty of a Tire Product*, DEP’T FIN. SERVS. (May 11, 2004), <https://www.dfs.ny.gov/insurance/ogco2004/rg040512.htm>. The product included placing a sealant on the tire to provide added protection. *Id.* But, it is not the product or sealant being warranted; instead, it is insurance against the tire rupturing due to an external event that is being provided. The product warranty was not related to any defect in materials or workmanship in the tires; rather, it was based upon the product’s failure to prevent tire damage from road hazards. The Office of General Counsel reasoned: “[I]f the tire be damaged due to a road hazard, it is not because the product did not work as intended to prevent drying out or rotting of the tire, but rather it is because there was something in the roadway, an intervening ‘fortuitous event,’ within the meaning of the Insurance Law.” *Id.* Road hazards, such as a nail on the road, are outside the control of either the provider of the warranty or the car dealer who sells the warranty. Since the warranty was independent of the product and insured against a fortuitous event, it was held that the warranty was a service contract. In either situation, the service contract provider and any administrator liability were subject to NYS Insurance Law, and thereby liable for the damage to the tire since it was due to a protected occurrence. N.Y. INS. LAW § 7902 (McKinney 2012) (Administrator is defined as a “person designated by a provider to be responsible for administration of service contracts, including servicing, claims management and processing, recordkeeping, customer service and collection of fees.”).

<sup>97</sup> N.Y. INS. LAW § 7905(j) (McKinney 1998).

<sup>98</sup> Office of Gen. Counsel, N.Y. Ins. Dep’t, *Transferability of Service Contract*, DEP’T FIN. SERVS. (Mar. 13, 2008), <https://www.dfs.ny.gov/insurance/ogco2008/rg080311.htm>.

<sup>99</sup> N.Y. COMP. CODES R. & REGS. tit. 11, § 390.5(a) (1999).

<sup>100</sup> N.Y. INS. LAW art. 79 (McKinney 2000); N.Y. COMP. CODES R. & REGS. tit. 11 §§ 390.0–390.13 (1999) (Regulation 155); N.Y. INS. LAW § 7903(e) (McKinney 2012).

within thirty days after receiving the notice of rescission.<sup>101</sup> If the third-party insurer-provider fails to make a timely refund, then it must pay the holder an additional ten percent, as well as an additional ten-percent penalty for each subsequent month until the refund is paid.<sup>102</sup>

#### d. Restatement of Consumer Contract Law

The EWSC is essentially a consumer standard form contract. As previously stated, there are no general standard term regulations or body of consumer contract law as is found in Europe. However, the American Law Institute recently sponsored the drafting of a *Restatement of Consumer Contract Law* (Consumer Restatement).<sup>103</sup> The new Restatement project can be seen as a supplement to the Restatement (Second) of Contracts<sup>104</sup> and UCC, dedicated solely to consumers. The reporters of the Consumer Restatement recognize that “consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts—the business and the consumer.”<sup>105</sup> They list two techniques for preventing consumer abuse in contracts: (1) assuring mutual assent by focusing on the rules that determine how terms are adopted and which processes a business can use to introduce and to modify terms in the agreement; and (2) the use of mandatory restrictions over the substance of the deal—rules that limit the discretion of the business in drafting contract terms and the setting of boundaries to permissible contracting.<sup>106</sup> In essence, the Consumer Restatement project is a soft law form of European standard terms regulation.<sup>107</sup>

The goal of the Consumer Restatement is to take the first steps in creating a separate body of consumer contract law: first, by recognizing specific contract law rules that only apply to consumer transactions; and second, by incorporating existing government regulations of the consumer market place into a standalone consumer contract law. This would include the following: (1) formulating “principles for punitive treatment

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<sup>101</sup> N.Y. INS. LAW § 7903(e) (Mckinney 2012).

<sup>102</sup> *Id.*

<sup>103</sup> See *Restatement of the Law, Consumer Contracts*, AM. LAW INST., <https://www.ali.org/projects/show/consumer-contracts> (All nine sections of the Restatement have been drafted, and the initial draft was presented for discussion at the 2017 ALI Annual Meeting. It is expected to be re-presented at the 2019 Meeting.).

<sup>104</sup> RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

<sup>105</sup> *Project Feature: Restatement of the Law, Consumer Contracts*, THE ALI ADVISER (May 2017), <http://www.thealiadviser.org/consumer-contracts>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (Restatement Draft including sections entitled “Adoption of Standard Contract Terms” (§ 2) and “Modification of Standard Contract Terms” (§ 3).).

of some types of willful breaches of consumer contracts;”<sup>108</sup> (2) “[u]nify[ing] the framework” for developing rules mandating pro-consumer terms and banning terms that are deemed to be abusive;”<sup>109</sup> (3) clarifying the contours of the unconscionability doctrine, including how it applies in the area of arbitration;<sup>110</sup> and (4) “[d]istilling the common principles that ought to guide” courts in applying the FTC Act, state laws prohibiting “unfair or deceptive” acts or practices and the Dodd-Frank<sup>111</sup> prohibition on “unfair, deceptive or abusive” acts or practices.<sup>112</sup>

Unfortunately, the proposed Consumer Restatement places emphasis on the first of the above two techniques by re-emphasizing the importance of consent and de-emphasizing the importance of mandatory regulations aimed at setting boundaries of impressible consumer contracting (restrictive consumer-specific rules). For example, § 2 provides rules on the adoption of standard contract terms.<sup>113</sup> It provides that a consumer signifies assent to the transaction as long as she is given reasonable notice of the standard terms and a reasonable opportunity to review them.<sup>114</sup> This does little to ensure the quality of the consent under the reality that most consumers do not read or understand such terms; this is especially common where the standard contract is long and detailed.

The unitary concept of consent, generally resting on a person’s agreement or signing of a contract, fails to recognize the absence of true consent, understanding of agreement found in many consumer contracts. The Restatement does provide for the buttressing of consent through pre-contract disclosures.<sup>115</sup> Thus, the unitary construction of consent is modified in consumer contracts to mean only consent that is “adequately informed.”<sup>116</sup> In the case of EWSCs, disclosures as to the risk of needing repairs, costs, and rights would be helpful, but only if the disclosures are

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<sup>108</sup> Consumer Fin. Services Grp., *ALI Launches Restatement Project for Consumer Contracts*, BALLARD SPAHR (Dec. 6, 2012), <https://www.ballardspahr.com/alertspublications/legalalerts/2012-12-06-ali-launches-restatement-project-for-consumer-contracts.aspx>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (“[O]ne goal will be to translate research on consumer decision-making, and on the limits of consumer understanding, into specific guidelines for the courts”).

<sup>111</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. (July 21, 2010). Part of the long title of the law that states that one of its purposes is “to protect consumers from abusive financial services practices.” It established the Consumer Financial Protection Bureau (CFPB) as an agency responsible for consumer protection in the financial sector.

<sup>112</sup> *Id.*

<sup>113</sup> Florence Marotta-Wurgler, Omri Ben-Sharar & Oren Bar-Gill, *Adoption of Standard Contract Terms*, THE ALI ADVISER (Apr. 27, 2017), <http://www.thealiadviser.org/consumer-contracts/adoption-standard-contract-terms>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Alan S. Kaplinsky & Brian Slagle, *Proposed Consumer Contracts Restatement Critiqued at ALI Annual Meeting*, CONSUMER FIN. MONITOR (June 2, 2017), <https://>

meaningful. For example, the disclosure should state whether the purchaser has a right of rescission and whether the contract is transferable. Also, disclosure is not meaningful if buried in lengthy, fine print contracts. The seller should be required to ensure that the purchaser is aware of key options, restrictions, and rights.

Instead of standard terms regulations, the Consumer Restatement advocates for expanded judicial review of consumer contract terms to ensure a fair bargain. In order to “insure” such an outcome, § 5 “encourages” the courts to more aggressively use the doctrine of unconscionability.<sup>117</sup> This fails to recognize that more and more businesses are inserting arbitration clauses into their contracts. Although, the doctrine of unconscionability has been used to void unfair arbitration clauses that leave a consumer without an adequate recourse to seek a remedy,<sup>118</sup> recent trends<sup>119</sup> do not bode well for consumers. The Supreme Court has re-emphasized that arbitration is the preferred means of dispute resolution under the Federal Arbitration Act,<sup>120</sup> while at the same time limiting consumers’ ability to obtain a remedy through arbitration. It has held that contract clauses waiving the consumer’s right to join class action arbitration are enforceable.<sup>121</sup> In the end, it is likely to be a very long time, if and when the *Restatement of Consumer Contract Law* is adopted, before courts recognize and use its provisions. There is greater uncertainty if and how it is likely to impact consumer abuse in the sale of EWSCs. The Consumer Restatement project, however, does provide options and concepts that could be incorporated into future regulatory initiatives relating to EWSCs.

#### e. Lemon Laws

Most states have enacted some form of lemon law; however, the content of those laws vary. They are most commonly associated with the sale of motor vehicles, but can also extend to the sales of heavy equipment and electrical appliances.<sup>122</sup> The standard warranty law in the U.S.

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[www.consumerfinancemonitor.com/2017/06/02/proposed-consumer-contracts-restatement-critiqued-at-ali-annual-meeting](http://www.consumerfinancemonitor.com/2017/06/02/proposed-consumer-contracts-restatement-critiqued-at-ali-annual-meeting).

<sup>117</sup> *Project Feature: Restatement of the Law, Consumer Contracts*, THE ALI ADVISER (May 2017), <http://www.thealiadviser.org/consumer-contracts>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Federal Arbitration Act (FAA), 9 U.S.C. ch. 1, 43 Stat 883, Pub. L. 68-401 (1925) (“An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States.”).

<sup>121</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (holding that class action waivers contained in arbitration agreements are enforceable under the Federal Arbitration Act and cannot be invalidated on state law grounds).

<sup>122</sup> Terence J. Centner & Michael E. Wetzstein, *Obligations and Penalties under Lemon Laws: Automobiles versus Tractors*, 20 J. AGRIC. & RESOURCE ECON. 135, 135–36 (1995).

only requires the seller to repair or replace defective products.<sup>123</sup> In the area of “big ticket” items, such as automobiles, the manufacturer-seller will almost always elect the repair remedy in order to avoid the more costly remedy of replacement.<sup>124</sup> This causes hardship on the purchaser and an avenue of abuse for the seller. If a defect proves difficult to rectify, requiring numerous trips for repair or the product continually presents new types of defects, then the purchaser suffers a great deal of inconvenience and loses trust in the durability of the product. A seller may use the repair remedy in bad faith until the warranty period expires leaving the purchaser without further recourse for subsequent defects. Of course, this is a scenario where an EWSC would prove desirable. However, unless the EWSC provides a right to replacement, the purchaser will continue to experience the same type of inconvenience and harm due to the need for serial repair. This type of harm is what lemon laws are intended to alleviate.

But as noted earlier, most products are manufactured to last as long as the express warranty under the sales contract and the period of coverage of an EWSC; otherwise, the ability to generate large revenue streams through the sale of EWSCs would not be possible. Nonetheless, there are at least some products that are shoddy, due to faulty assembly, use of lower quality materials and component parts, which make them “lemons.” The lemon laws preempt the remedial structure of warranty law by converting the seller’s option of making continuous repairs to a buyer’s right to a replacement or refund.<sup>125</sup> This type of right should be included in EWSCs when a product is in constant need of repair during the period of coverage.

### *B. EU and Member States*

This Section examines a variety of consumer protection laws in the EU and in different European countries. This includes a review of the Consumer Sales Directive, Unfair Contract Terms Directive, Consumer Rights Directive, Unfair Commercial Practices Directive, Austrian Consumer Protection Act, and the German Civil Code.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* It should be noted that most state lemon laws, as well as the Federal Magnuson-Moss Act, allow the purchaser to claim the costs of legal fees as damages, which is a rarity in the American legal fee system.

## 1. Relevance of EWSCs in the EU

EWSCs exist in all Member States, although the regulatory approaches differ at the domestic level.<sup>126</sup> The 2017 Study on the Costs and Benefits of Extending Certain Rights Under the Consumer Sales and Guarantees Directive 1999/94/EC (Costs and Benefits Study), for example, points out that three Member States—Finland, Latvia and Slovenia—take a comparatively strict approach, allowing paid-for extensions only in the form of insurances, and not as guarantee extensions or alterations.<sup>127</sup>

In 2015, the European Consumer Centres Network (ECC-Net) published an evaluation on EWSCs (2015 ECC-Net Report)<sup>128</sup> The 2015 ECC-Net Report discusses whether EWSCs are “worth the money” and offers some important insights.<sup>129</sup>

Spot on- and off-premise tests<sup>130</sup> showed that the marketing and costs of EWSCs is of practical relevance throughout Europe. In approximately 60% of the examined online sale cases EWSCs were advertised or otherwise offered.<sup>131</sup> A second 2015 study report, the “Study on the Functioning of the Legal and Commercial Guarantees for Consumers in the EU,” confirmed the importance of the EWSC market, showing that approximately 75% of the examined products offered online or offline were offered in combination with EWSCs.<sup>132</sup>

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<sup>126</sup> See ICF, *Study on the Costs and Benefits of Extending Certain Rights Under the Consumer Sales and Guarantees Directive 1999/94/EC*, at 33 (Mar. 2017), <https://publications.europa.eu/en/publication-detail/-/publication/4d120ad5-deee-11e7-9749-01aa75ed71a1/language-en>.

<sup>127</sup> *Id.*

<sup>128</sup> The 2015 ECC-Net Report is arguably the most comprehensive overview of the European EWSC market. See EUROPEAN CONSUMER CTR. NETWORK, COMMERCIAL WARRANTIES: ARE THEY WORTH THE MONEY? 6 (2015), [https://www.europe-consummateurs.eu/fileadmin/user\\_upload/eu-consommateurs/PDFs/PDF\\_EN/REPORT-\\_GUARANTEE/Garanties\\_2014\\_FINAL.pdf](https://www.europe-consummateurs.eu/fileadmin/user_upload/eu-consommateurs/PDFs/PDF_EN/REPORT-_GUARANTEE/Garanties_2014_FINAL.pdf) [hereinafter ECC-NET].

<sup>129</sup> *Id.* Overall, the 2015 ECC-Net Report takes a different approach on guarantees than the vast majority of older European studies do, in the sense that it does not simply follow the common approach of determining how the Consumer Sales Directive (CSD) has been implemented by the Member States or measuring the CSD regime’s impact on the legal guarantee market. See, e.g., EC CONSUMER LAW COMPENDIUM: THE CONSUMER ACQUIS AND ITS TRANSPOSITION IN THE MEMBER STATES 1–3 (Hans Schulte-Nölke et al. eds., 2008). It goes one step further and provides data and feedback on the EWSC market. The 2015 ECC-Net Report is built upon a field study, comprised of consumer surveys, contacts with sellers, website analyses, case studies, and interviews carried out by the European Consumer Centres (ECCs) across the EU, Iceland and Norway in late 2014. See ECC-NET, *supra* note 128, at 6.

<sup>130</sup> A “spot test” is a test conducted on the spot to yield immediate results. See ECC-NET, *supra* note 128, at 109–18 (details on how spot tests were used by ECC-Net in its 2015 evaluation of EWSCs).

<sup>131</sup> ECC-NET, *supra* note 128, at 50.

<sup>132</sup> See IPSOS ET AL., EUROPEAN COMMISSION, CONSUMER MARKET STUDY ON THE FUNCTIONING OF LEGAL AND COMMERCIAL GUARANTEES FOR CONSUMERS IN THE EU: EXECUTIVE SUMMARY 3 (2015), <https://ec.europa.eu/info/sites/info/files/legal-guarantees-executive-sum>

The costs of EWSCs rarely reach 10% of the price of the purchased goods.<sup>133</sup> Relevant data show that a considerable number of consumers have actual experience with EWSCs. In a survey carried out by ECC Belgium, 56.1% of the 543 participants stated that they had, at least once, purchased an EWSC.<sup>134</sup> About one-third of the participants who made claims or requests on their EWSCs noted that they did not have a positive experience.<sup>135</sup> Overall, less than one-third considered purchasing an EWSC in the future.<sup>136</sup>

## 2. Regulatory Landscape of EWSCs in the EU

The generally relevant guarantee framework in the EU and its Member States rests on a strict division between legal guarantees on the one hand and EWSCs on the other. While both types of guarantees aim to support buyers of non-conforming products in endeavors to enforce their legal interests, there is a great deal of differentiation between these two guarantee forms.<sup>137</sup> This is important, particularly because different regulatory regimes apply to each type.

As explained above, statutory provisions do not mandate the use of EWSCs. EWSCs cover purchased goods but are conceived via party autonomy either as an addendum to the sales agreement or in the form of a separate contract, where the seller and the liable party under the EWSC are independent companies. EU purchasers create the EWSC with different parties: the seller of the good, the manufacturer, or a third-party insurer. Some of the relevant pan-EU legislation, such as the CSD, do not consistently cover all three types of sellers of EWSCs.<sup>138</sup> Further, some EU laws do not distinguish between legal guarantees and EWSCs. The Unfair Contract Terms Directive<sup>139</sup> and the Unfair Commercial Practices Directive<sup>140</sup> are two such laws, as discussed later in this Section.<sup>141</sup>

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mary\_en\_0.pdf (arriving at the conclusion that “commercial guarantees have become an integral part of marketing”).

<sup>133</sup> See ECC-NET, *supra* note 128, at 118.

<sup>134</sup> *Id.* at 120.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Supra* notes 15–21 and accompanying text.

<sup>138</sup> See, e.g., Council Directive 1999/44, art. 1, 1999 O.J. (L 171) 12, 14 (EC) [hereinafter CSD]. CSD is also known as the Consumer Sales and Guarantees Directive, do not consistently cover all three types of sellers of EWSCs. See ICF, *supra* note 126, at 3.

<sup>139</sup> See UCTD, *supra* note 60, art. 3(2), 3(3).

<sup>140</sup> See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L149) 22 (EU) [hereinafter UCPD] (concerning unfair business-to-consumer commercial practices in the internal market).

<sup>141</sup> *Infra* notes 173–83 and accompanying text.

Unlike the U.S., the EU has increasingly differentiated consumer contracts from general contract and commercial law. In particular, since the 1990s, the EU has intensified efforts to regulate business-to-consumer (B2C) transactions, most notably and initially, with the help of numerous laws aimed at different areas or issues of the consumer economy.<sup>142</sup>

In the area of consumer guarantees, there are a handful of European directives that provide a regulatory framework for the B2C market. At the center of the scheme stands the CSD with its main focus on legal guarantees. The key aim of the directive is to create a level playing field for guarantees across the EU and to raise consumer protection standards in a number of Member States by introducing a minimum period of two years for legal guarantees.<sup>143</sup> This is accompanied by some additional consumer protections, such as a partial reversal of the burden of proof<sup>144</sup> and the enunciation of a mandatory catalogue of minimum remedies.<sup>145</sup>

The CSD incorporates additional rules for associated-integral guarantees or express warranties included in the sale of the product in Article 6 (guarantees). The CSD defines such guarantees as “any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.”<sup>146</sup> Article 6 guarantees have to fulfill two primary requirements, notice and intelligible language.<sup>147</sup>

With this obligation, the European legislature aimed to maximize the certainty and comprehensibility level with respect to the rights of

<sup>142</sup> These directives were part of what is usually called the “consumer acquis,” which is a group of eight sectoral consumer directives focused on selected consumer issues introduced in the EU during the end of the 20th century. See EC Consumer Law Compendium, *supra* note 129, at 1; see also STEFAN WRBKA, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED 162 (2015) (identifying the eight directives as “seven substantial law directives and one procedural law directive”).

<sup>143</sup> See CSD, *supra* note 138, art. 1(1), 5(1) (starting at the time of the delivery of the goods).

<sup>144</sup> See CSD, *supra* note 138, art. 5(3) (“Unless proved otherwise, any lack of conformity [with the contract of sale as articulated in Article 2] which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery . . .”).

<sup>145</sup> See CSD, *supra* note 138, art. 3 (detailing means of determining the appropriate remedies consumers may have available to them in the case of lack of conformity with the sales contract as identified in Article 2).

<sup>146</sup> See CSD, *supra* note 138, art. 1 (2)(e) (emphasis added).

<sup>147</sup> “The guarantee shall: state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee [and] set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.” See CSD, *supra* note 138, art. 6(2).

buyers.<sup>148</sup> Consumers must be made aware of the fact that the legal guarantees are an absolute, mandatory minimum and that Article 6 guarantees cannot be limited in anyway. In addition, traders who offer Article 6 guarantees must make arrangements to enhance the understanding of consumers about the content of the guarantee. Article 6 guarantees are not comparable to what was earlier defined as EWSCs.<sup>149</sup> Paid-for EWSCs fall outside the scope of Article 6 and the CSD in general.

Member States have implemented the relevant European defaults, but have rarely exercised their legislative leeway (where granted) to go beyond the minimum standards of the European directives. Consequentially, most Member States apply a principally unified EWSC regime to ensure the highest possible level of comprehensibility.<sup>150</sup> Some countries have increased the level of protections beyond the mandatory minimum standards provided in the CSD.<sup>151</sup> For example, in implementing the CSD, some countries opted for a broad approach and introduced a comparatively comprehensive provision on consumer guarantees that reads as follows:

(1) When an entrepreneur undertakes to a consumer to improve or replace any defective good, to refund the purchase price or otherwise make good the defect (commercial warranty), he shall also inform the consumer of the legal warranty imposed on the person handing over the good and shall point out that such legal warranty shall not be limited by the commercial warranty. The entrepreneur shall be bound by the promises made in the warranty statement and its content as notified in his advertising.

(2) The warranty statement shall include the name and address of the warrantor and, in simple and straightforward terms, the content of the warranty, including but not limited to the term and geographical application and all other information necessary for drawing on the warranty. If the warranted features are not made clear from the statement, the warrantor shall be liable for the good to have those features customarily required of it.

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<sup>148</sup> See CSD, *supra* note 138, art. 6(2).

<sup>149</sup> *Supra* Part I.A.

<sup>150</sup> See Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, (Coase-Sandor Inst. for Law & Econ., Working Paper No. 598, 2012).

<sup>151</sup> See *id.*

(3) The commercial warranty shall be furnished to the consumer at his request in writing or by another permanent data carrier that the consumer can make use of.

(4) If the warrantor violates Paragraphs 1 through 3 above, this shall not affect the validity of the commercial warranty. The warrantor shall furthermore be liable to the consumer for any loss or damage caused by such violation.<sup>152</sup>

Note that in those broad approaches, the concept of the “commercial warranty” goes beyond integral guarantee, such as a manufacturer’s warranty or integral guarantees offered by the seller, and encompasses EWSCs.<sup>153</sup> The law does not merely refer to the manufacturer or seller, but to the entrepreneur or warrantor in general.<sup>154</sup> As to substantive content the law is not very detailed but does require that the warrantor honor its obligations made in the form of advertisements, disclose any geographic limitations, and clarify the content or scope of the warranty. In the event of not providing a clear statement, the law provides: “If warranted features are not made clear from the statement, the warrantor shall be liable for the good to have those features customarily required of it.” This provision mandates that courts perform a contextual interpretation of the warranty. Contextualism in this instance refers to an interpretation not based solely on the words of the warranty, but based upon the reasonable expectations of the purchaser. These expectations are circumscribed by what is “customarily required.” Thus, if the EWSC provides a lower than customary level of protection, then it will be assumed that the EWSC provides the higher customary level of protection.

For example, Section 443 of the German Civil Code (BGB) stipulates as follows:

(1) Where the seller, the producer or some other third party enters into obligation, in addition to his statutory liability for defects, by way of making a declaration or in relevant advertising that was available prior to the purchase agreement being concluded or at the time of its conclusion, such obligation being in particular to reimburse the purchase price, to exchange the thing, to repair it or to provide services in this context should the thing

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<sup>152</sup> KONSUMENTENSCHUTZGESETZ [KSCHG] [CONSUMER PROTECTION LAW] BUNDESGESETZBLATT [BGBl], No. 140/1979 as amended, § 9b, translation at [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=erv&Dokumentnummer=ERV\\_1979\\_140](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=erv&Dokumentnummer=ERV_1979_140) (Austria) [hereinafter KSchG]. The term “commercial warranty” used by the translator is a synonym for “EWSC.”

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

not exhibit the quality or not fulfill other requirements than those concerning its freedom from defects, in each case as described in the declaration or in the relevant advertisement (guarantee), the buyer shall be entitled, in the case of a guarantee having been given, and notwithstanding his statutory claims, to the rights under the guarantee in relation to the person who has given the guarantee (guarantor).

(2) To the extent that the guarantor gives a guarantee as to the thing having a specified quality for a specified period (guarantee of durability), the presumption will be that a material defect, which appears during the guarantee period [and] triggers the rights under the guarantee.<sup>155</sup>

Again, as found in the Austrian law, the German BGB Section 443(1) emphasizes that the scope of an EWSC can be determined not only on the written form but also by oral declarations, promises, and representation, as well as relevant advertising prior to the purchase.<sup>156</sup> No such broad evidential base is found in American law. First, advertisements are considered to be non-binding in nature.<sup>157</sup> Second, oral representations before, or contemporaneous to, the signing of the EWSC are merged into the written form and are barred by the parol evidence rule<sup>158</sup> from being entered into evidence to contradict the written form. Section 443(2) refers to the EWSC as a guarantee of durability and provides a legal presumption that any material defect is covered under the guarantee, whether expressly stated or not.<sup>159</sup>

Section 477 of the BGB adds special requirements for consumer guarantees:

- 1) A declaration of guarantee (section 443) must be expressed simply and comprehensibly. It must contain:
  1. a reference to the statutory rights of the consumer and a statement that they are not restricted by the guarantee, and
  2. the contents of the guarantee and all essential information required for asserting rights under the

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<sup>155</sup> BGB, *supra* note 75, at § 443.

<sup>156</sup> *Id.*

<sup>157</sup> Professor Farnsworth states that common law courts “show a reluctance, in doubtful cases, to characterize a proposal as an offer.” See FARNSWORTH, *supra* note 49, at 237.

<sup>158</sup> Parol evidence rule bars the admission of extrinsic evidence (prior dealings, course of performance, trade usage) to contradict the plain meaning of a written contract intended to be the final integration of the party’s agreement. See *id.* at 210; see also *id.* at 210–29 (explaining the definition and application of the parol evidence rule).

<sup>159</sup> See BGB, *supra* note 75, § 443(2).

guarantee, including, without limitation, the duration and the area of territorial application of the guarantee protection as well as the name and address of the guarantor.

(2) The consumer may demand that the declaration of guarantee is given to him in text form.

(3) The effectiveness of the duty under the guarantee is not affected by the fact that one of the above requirements is not satisfied.<sup>160</sup>

Section 477 makes clear that it is the obligation of the guarantor to provide the contents and all “essential information required for asserting rights under the guarantee”<sup>161</sup> in a simple and comprehensible manner. This language sets the interpretive threshold well above the practice of obfuscation and hard selling of detailed standard form EWSCs in the U.S. Also, the Austrian and German approaches have to be understood as exemplary extensions of CSD Article 6 guarantees in several ways.<sup>162</sup> First, and unlike CSD Article 6, these national frameworks are not limited to no-cost guarantees, but additionally cover paid-for EWSCs.<sup>163</sup> The 2001 explanatory memorandum accompanying the Austrian amendment to the Austrian Consumer Protection Act (national warranty regime) described this framework as the wish to treat the beneficiaries of paid-for EWSCs and no-cost EWSCs equally.<sup>164</sup> The explanatory memorandum further explains that the regulatory differentiation between these types of guarantees in which greater protections are provided for non-paid-for guarantees than are provided for paid-for guarantees is simply not justifiable.<sup>165</sup>

Second, the Austrian and German laws of guarantee show that the circle of guarantors is wider than under the CSD. Whereas CSD Article 6 explicitly restricts the scope to the “seller or producer” of the respective product, the Austrian and German laws have provided norms for ex-

<sup>160</sup> BGB § 477.

<sup>161</sup> *Id.*

<sup>162</sup> Both national solutions are not the exception, but rather the rule. Member States have widely opted for broader regulations of the EWSC regime at the national level. *See, e.g.*, EC CONSUMER LAW COMPENDIUM, *supra* note 129 (reporting on the legislative techniques of European Community Member States).

<sup>163</sup> Compare CSD, *supra* note 138 (focusing on no-cost guarantees), with KSCHG, *supra* note 152, and BGB, *supra* note 75, § 477 (additionally covering paid-for EWSCs).

<sup>164</sup> 422 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXI. GP (Jan. 22, 2001) 25 (explanatory memorandum accompanying GEWÄHRLEISTUNGSRECHTS-ÄNDERUNGSGESETZ [GEWRÄG] [WARRANTY AMENDMENT ACT] BUNDESEGESETZBLATT I [BGBL I] No. 48/2001, *as amended*, [https://www.parlament.gv.at/PAKT/VHG/XXI/I/I\\_00422/fname\\_202157.pdf](https://www.parlament.gv.at/PAKT/VHG/XXI/I/I_00422/fname_202157.pdf) (Austria)).

<sup>165</sup> *Id.*

panding the scope to cover third parties (other than the producer).<sup>166</sup> In this sense the national regimes cover “pseudo” guarantees<sup>167</sup> given by sellers, as well as “genuine” guarantees<sup>168</sup> given by third parties (manufacturers and other third parties including third-party insurers). At the same time, however, it should be noted that in practice the situation remains complex. German scholars point out that despite the comprehensiveness of the German EWSC regime, distinctions continue to be made with respect to the type of guarantees in a wider sense. This is largely the case because the provisions do not go beyond “dependent” guarantees,<sup>169</sup> which are guarantees that relate to the contractual conformity most notably by extending the duration of legal guarantees or broadening the scope of liable parties to third-party insurers that would finance a repair or replacement of a defective good. Hence, “independent” guarantees<sup>170</sup> merely cover for accidental damage. These types of guarantees do not cover contractual non-conformities and therefore there is no right to repair or replacement costs related to such non-conformity. This distinction between harm caused by accident and harm caused by non-conformity is the basis for the division between EWSCs and EWSC equivalent insurances on the one hand and insurances that are to a greater extent standalone.<sup>171</sup> The standalone-types of third-party insurance have features that are different from ordinary guarantee remedies, such as only making compensation payments instead of repair and replacement.<sup>172</sup> Drawing clear distinctions between the different types of insurance and associated hybrids proves difficult. In practice, one would have to closely look at the contractual relationships between the parties and the terms of the respective guarantee.

Three additional, broader directives add perspective to the regulation of guarantees under EU law, albeit in different ways. The Unfair Contract Terms Directive (UCTD) was introduced in 1993 with the aim of establishing a common framework relating to the use of standard con-

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<sup>166</sup> See Christian Berger, § 443, in *BÜRGERLICHES GESETZBUCH: BGB* (Rolf Stürmer et al. eds., 15th ed. 2014) § 443 Recital 8 (German law); Christian Berger, § 477, in *BÜRGERLICHES GESETZBUCH: BGB* § 477 Recital 1 (Rolf Stürmer et al. eds., 15th ed. 2014); Georg Kathrein & Thomas Schoditsch, § 9b *KSchG*, in *ABGB KURZKOMMENTAR* § 9b *KSchG* Recital 1 (Helmut Koziol, Peter Bydlinski & Raimund Bollenberger eds., 4th ed. 2014) (Austrian law); Peter Apathy, § 9b *KSchG*, in *ABGB PRAXISKOMMENTAR-BAND 5* § 9b *KSchG* Recital 1 (Georg Kodek & Michael Schwimann eds., 4th edn. 2014).

<sup>167</sup> Apathy, *supra* note 166, at §9b *KSchG*, Recital 2 (unechte Garantien).

<sup>168</sup> *Id.* (echte Garantien).

<sup>169</sup> Berger, *supra* note 166, § 443, Recital 9 (*unselbständige Garantien*).

<sup>170</sup> *Id.* (*selbständige Garantien*).

<sup>171</sup> Under European nomenclature, extended warranties or service contracts provided by third parties would be considered an insurance product and not a commercial guarantee. Thus, EWSC-like is an EWSC issued by a third-party (insurance company). In the U.S., such a product would be simply known as an EWSC. See *supra* Part I.A.

<sup>172</sup> See *infra* Part II.C.

tract forms, terms, and conditions that have a negative impact on consumer interests.<sup>173</sup> The UCTD is remarkably wide in its application and, in principle, does not necessitate distinguishing between different guarantee and insurance instruments.<sup>174</sup> Most notably, the UCTD covers both third-party agreement types of insurance and genuine insurance.<sup>175</sup>

However, the impact of the UCTD and its national implementations as a means of regulating EWSCs is not likely to be significant, even if future findings of planned obsolescence show that such regulation is needed. EWSCs' failure to offer durations long enough to cover obsolescence-related repairs may not meet the threshold of unfairness required by the UCTD. The perceived "unfairness" would not be of a nature that would cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."<sup>176</sup> The Annex of UCTD lists "indicative and non-exhaustive"<sup>177</sup> unfair terms. Cases of insufficiently long guarantee periods are not covered. Overall, it remains highly questionable and uncertain whether the duration of EWSCs would constitute unfairness, particularly, in cases where the offeror of the guarantee had no knowledge about the expectable lifespan of the product. Also, since EWSCs provide an additional period of protection, even for a short period of time, beyond the mandatory duration of legal guarantees they make a weak case for a party claiming unfairness under the UCTD.<sup>178</sup>

Roughly ten years after the introduction of the UCTD, the EU legislature enacted the Unfair Commercial Practices Directive (UCPD).<sup>179</sup> The UCPD amended a number of older initiatives on banning socially and widely unacceptable business strategies that had been applied to maximize profits.<sup>180</sup> The directive includes a number of provisions that prohibit unfair commercial practices.<sup>181</sup> Most notably, the broadly de-

<sup>173</sup> See UCTD, *supra* note 60.

<sup>174</sup> See OFFICE OF FAIR TRADING (OFT), UNFAIR CONTRACT TERMS GUIDANCE: GUIDANCE FOR THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999 35–36, 50–51 (Sept. 2008), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284426/oft311.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf).

<sup>175</sup> *Id.*

<sup>176</sup> See UCTD, *supra* note 60, art. 3(1), at 31.

<sup>177</sup> UCTD, *supra* note 60, art. 3(3), at 31.

<sup>178</sup> One can justifiably argue that such clauses relate to the main subject matter of the guarantee contract and hence, in principle, are exempted by the UCTD, as explained in its recitals as follows: "[F]or the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied." *Id.* at 30.

<sup>179</sup> See UCPD, *supra* note 140.

<sup>180</sup> See UCPD, *supra* note 140; see also Jana Valant, European Parliamentary Research Serv., *Application of the Unfair Commercial Practices Directive: Overview of the Commission's May 2016 Guidance Document*, at 4 (Jan. 2017).

<sup>181</sup> See Valant, *supra* note 180.

financed catalogue of UCPD Article 5 includes misleading and aggressive business practices.<sup>182</sup> Compared with the UCTD, the UCPD might offer a more suitable approach towards banning “abusive” sale of EWSCs, particularly in the context of planned obsolescence.<sup>183</sup> Notably, the UCPD Article 5(2)(a) requires the applied commercial practices be “contrary to the requirements of professional diligence” to be considered unfair in the sense of the directive. Hence, here as well, one would have to identify a culpability element to allow for remediation under the law.

In an attempt to standardize the fragmented nature of older consumer directives, the 2011 Consumer Rights Directive (CRD; also known as the Directive on Consumer Rights) repealed two earlier directives on distance and doorstep selling and added a Member State obligation to inform the EU Commission of stricter national legislation that is passed as consequence of the legislative leeway provided by the UCTD and CSD. In the present context, particularly noteworthy are the two information catalogues of the CRD—one for distance and off-premises B2C transactions (CRD Article 6(1)) and one for B2C transactions other than distance and off-premises contracts (CRD Article 5(1)).<sup>184</sup> With respect to guarantees, the information obligations are similar in both groups. Traders have to inform consumers “in a clear and comprehensible manner” about “the existence of a legal guarantee of conformity for goods,” as well as where applicable, “the existence and the conditions of . . . commercial guarantees.”<sup>185</sup> The CRD and its possible application to EWSCs will be further discussed in the next Part.<sup>186</sup>

### C. *Regulatory Insufficiencies Related to EWSCs in the EU and EU Member States*

Though some national schemes have gone beyond the minimum requirements enshrined in EU laws,<sup>187</sup> there is a need for further ancillary regulations, especially due to challenges posed by planned obsolescence to be discussed in Part III.<sup>188</sup>

The 2015 ECC-Net Report commences with a summary of some of the positive and negative characteristics of EWSCs.<sup>189</sup> First, EWSCs offer some additional protections that go beyond legal guarantees.<sup>190</sup> Most

<sup>182</sup> See UCPD, *supra* note 140, at 27.

<sup>183</sup> See GERAINT HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW 210 (2d ed. 2005) and text accompanying note 197.

<sup>184</sup> CRD, *supra* note 21, at 74–76.

<sup>185</sup> CRD, *supra* note 21, arts. 5(1)(e), 6(1)(l) & 6(1)(m), at 74–76.

<sup>186</sup> See *infra* Part IV.B.0 (Austrian and German laws).

<sup>187</sup> See observations in *supra* Part III.B.2.

<sup>188</sup> ECC-NET, *supra* note 128; IPSOS ET AL., *supra* note 132.

<sup>189</sup> See ECC-NET, *supra* note 128, at 7.

<sup>190</sup> *Id.*

notably these include longer guarantee periods, additionally liable parties, or additional coverage, such as repair at home services or compensation for damages due to accident.<sup>191</sup>

In the context of the present analysis on EWSCs and planned obsolescence, the incremental length of the extended duration provided by EWSCs becomes the key issue. The length of guarantee periods, given engineered product lifetimes, becomes central to the assessment of whether guarantees are really worth the money charged or are cases of overreaching. The findings revealed in the 2015 ECC-Net Report on the average durations of EWSCs (related to the sale of photo cameras, washing machines and televisions) showed that in a significant number of cases, the duration of the advertised EWSCs actually added little, if any, additional benefits to the consumer.<sup>192</sup> In 95 of the 173 examined cases (55%) the EWSC offered did not exceed the two-year period of legal guarantees, which is the minimum duration required by CSD Article 5(1).<sup>193</sup> The 2015 ECC-Net Report further shows that in cases where extensions were offered, the vast majority did not go beyond a total of five years (i.e. an extension of three years past the two years provided by legal guarantees).<sup>194</sup>

The 2015 Market Study found a slightly higher percentage where EWSCs offered longer guarantee durations than legally required; nevertheless, that study found that approximately one-third of the examined paid-for EWSCs did not include any extension of duration of coverage.<sup>195</sup>

Particularly in cases where longer product lifetimes are justifiably expected, the true extra benefits remain questionable.<sup>196</sup> Geraint Howells and Stephen Weatherill's review of the 2015 Market Study on the EWSC market concluded that:

In theory this two tier guarantee level—normal [i.e. legal] and extended [i.e. commercial] guarantee—should be applauded as it allows consumers to select the level of cover desired, but does not force all consumers to pay for long-term guarantees. The danger is that the addi-

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<sup>191</sup> *Id.* at 7, 50–51.

<sup>192</sup> *Id.* at 62–63.

<sup>193</sup> *Id.* at 116.

<sup>194</sup> *Id.*

<sup>195</sup> *Market Study*, *supra* note 1, at 92.

<sup>196</sup> ECC-NET, *supra* note 128, at 116–17. Just see the example of washing machines. Among the tested product categories, washing machines showed the highest percentage of extended warranties. But even here, the offered durations stayed largely behind the standard lifetimes generally expected or examined. *See id.* at 117. A similar, but slightly more critical way is proposed by Petra Kirchhoff, *Garantie-Verträge—Teurer Extraschutz*, FAZ (May 11, 2009), [www.faz.net/aktuell/rhein-main/wirtschaft/garantie-vertraege-teurer-extraschutz-1799624.html](http://www.faz.net/aktuell/rhein-main/wirtschaft/garantie-vertraege-teurer-extraschutz-1799624.html).

tional cover is both overpriced and provides only what consumers had come to expect under the normal guarantee.<sup>197</sup>

It should be noted that in a considerable number of jurisdictions, such as Sweden, Iceland, Norway, Ireland, the U.K., the Netherlands and Finland, the legally required duration of legal guarantees exceeds the CSD model of two years from delivery.<sup>198</sup> These extended guarantee durations are on the surface pro-consumer, but some of the unintended negative consequences include less coverage derived from paid-for EWSCs and higher prices.

Overall the 2015 ECC-Net Report is inconclusive as to the benefit of EWSCs relative to costs.<sup>199</sup> Thus, more study is needed on issues exposed by the Report. First, the European EWSC industry is characterized by a significant degree of non-transparency and often fails to provide appropriate, effective consumer information. This is despite the mandates in the CSD<sup>200</sup> and CRD<sup>201</sup> that require the disclosure of consumer information. As outlined above, Article CSD 6(2) obliges the offeror of EWSCs to:

state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and [to] make clear that those rights are not affected by the guarantee [and to] set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.<sup>202</sup>

Comparable provisions can be found in the CRD, most notably in Article 5(1)(e) (for contracts other than distance or off-premises contracts) and in Article 6(1)(m) (for distance and off-premises contracts). Moreover,

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<sup>197</sup> GERAINT HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW 210 (2d ed. 2005).

<sup>198</sup> ECC-NET, *supra* note 128, at 96. The duration of the legal guarantee provided under national legislation is three years in Sweden; five years in Iceland, Norway, and Scotland; and six years in Ireland, England, Wales and Northern Ireland. *Id.* In Finland and the Netherlands, the duration is more flexible and takes the expected lifetime of the product into consideration (with a minimum duration of two years). *Id.* For details and references to domestic legislation on these and other European schemes, see ICF, *supra* note 126, at 13–16.

<sup>199</sup> ECC-Net, *supra* note 128, at 73–83.

<sup>200</sup> See CSD, *supra* note 138, art. 6(2).

<sup>201</sup> See CRD, *supra* note 21, art. 26.

<sup>202</sup> See CSD, *supra* note 138, art. 6(2).

many Member States have opted for an even stricter approach that covers scenarios not encompassed by the pan-EU instruments.<sup>203</sup>

Despite these legal requirements, the EWSC industry may either lack knowledge of the regulatory standards or simply fail to fully comply; or, more importantly, regulators may have been lax in enforcing the disclosure requirements. In response to non-enforcement or non-compliance issues, Article 9 of the 2014 Consumer Protection Cooperation Regulation (CPC Regulation) encourages national consumer protection authorities to participate in market surveillance and enforcement activities, commonly referred to as “sweeps.”<sup>204</sup> The EU has now codified the need for sweeps in Article 29 of a new CPC Regulation, which takes effect on January 17, 2020.<sup>205</sup> In the 2014 Sweep on Guarantees in the Electronic Goods Sector (2014 Guarantee Sweep), consumer protection authorities in twenty-six Member States<sup>206</sup> surveyed a substantial number of websites with Iceland and Norway screening more than 400 websites on which EWSCs were offered on electronic goods.<sup>207</sup> The websites were graded on their conformity with the information and disclosure requirements of pertinent EU legislation.<sup>208</sup> Irregularities were found in more than half of the cases.<sup>209</sup> The most common issues concerned misleading information with respect to the duration or geographical scope of the advertised EWSCs, the identity (including the name and address) of the guarantor,<sup>210</sup> and a lack of reference to mandatory legal guarantees.<sup>211</sup> The 2014 Guarantee Sweep confirmed that consumers were not provided sufficient information to make informed decisions. Though, the

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<sup>203</sup> See *supra* Part III.B.2.

<sup>204</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws (the Regulation on Consumer Protection Cooperation), 2004 O.J. (L 364) 1, 6.

<sup>205</sup> Regulation (EU) No 2017/2394 of the European Parliament and of the Council of 12 December 2017 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws and Repealing Regulation (EC) No 2006/2004, 2017 O.J. (L 345) 1, 20.

<sup>206</sup> See *Better Application of EU Guarantees in Online Shopping of Electronics*, EUR. CONSUMER CTR. AUSTRIA (June 1, 2015), <http://europakonsument.at/en/page/better-application-eu-guarantees-online-shopping-electronics>. Austria and Poland did not take part in the sweep. *Id.*

<sup>207</sup> See *Sweeps*, EUR. COMMISSION, [https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/sweeps\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/sweeps_en).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See *Commission Staff Working Document, Impact Assessment, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws*, at 5, COM (2016) 283 final (May 25, 2016) (both occurred in 20% of the examined cases) (both occurred in 20% of the examined cases).

<sup>211</sup> *Id.* (both occurred in 40% of the examined cases).

sweep did lead to a significant improvement as authorities intervened to increase compliance levels from 46% to 82%.<sup>212</sup>

Another key finding is the inconsistency of the regulatory schemes between EWSCs sold by manufacturers and retailers versus those sold by third-party insurers. The regulatory situation with respect to sellers and producers appears widely coherent. In both cases the requirements, particularly as introduced by the CSD and CRD and their national implementations, apply equally to EWSCs sold by manufacturer-retailers. In contracts, the regulation relating to EWSCs offered by third-party insurers remains complex and incoherent.<sup>213</sup> In this context, the 2015 ECC-Net Report looks at the differences between EWSC-like insurances and genuine insurances given that different legal frameworks apply to them.<sup>214</sup> EWSC-like insurances (particularly if provided for by national legislation) might be treated equally to ordinary EWSCs. Genuine insurances, on the other hand, are explicitly exempted from the applicability of the CRD<sup>215</sup> and fall within the domain of sectoral legislation, most notably the 2002 Distance Marketing of Consumer Financial Services Directive<sup>216</sup> and the 2009 Solvency II Directive (Solvency II).<sup>217</sup>

The ECC-Net and other studies indicate that the complexity of the regulatory framework has practical relevance. The 2015 ECC-Net Report, for example, notes that at least 13% of the evaluated EWSCs concerned third-party stakeholders that offered either commercial guarantees or genuine insurances.<sup>218</sup> The 2015 Market Study found that 30% of the

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<sup>212</sup> See *Sweeps*, *supra* note 207.

<sup>213</sup> Recall already the narrow definition of EWSCs used by the CRD. CRD Article 2(14) on the definition of EWSCs principally excludes agreements with third parties (other than manufacturers) from the scope of application. See CRD, *supra* note 21, at 73. With respect to “genuine” insurances see further the exclusion by Article 3(d) CRD. *Id.* at 73–74. A definition of financial services is found in Article 2(12) CRD: “any service of a banking, credit, *insurance*, personal pension, investment or payment nature.” *Id.* at 73 (emphasis added).

<sup>214</sup> See ECC-NET, *supra* note 128, at 81–82.

<sup>215</sup> See CRD, *supra* note 21, arts. 2(12), 3(3)(d), at 73–74.

<sup>216</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271) 16; see CRD, *supra* note 21, at 68 (“Member States should . . . draw inspiration from existing Union legislation when legislating in areas not regulated at Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured.”).

<sup>217</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the Taking-up and Pursuit of the Business of Insurance and Reinsurance (Solvency II), 2009 O.J. (L 335) 1 [hereinafter Solvency II]. Solvency II broadly aligns national insurance frameworks in the EU. For the sake of focusing on the key topics EWSCs and planned obsolescence, it shall suffice to highlight that Articles 183–86 of Solvency II because they contain substantive rules on the content of insurance contracts. *Id.* at 74–76. They cover questions relating to, for example, pre-contractual information, withdrawal rights and cooling-off periods and the monitoring of unfair contract terms. *Id.*

<sup>218</sup> ECC-NET, *supra* note 128, at 113.

screened guarantee services were insurance-based.<sup>219</sup> A number of important, more generally applicable regulatory frameworks, such as the UCTD and UCPD could apply regardless of the design of the guarantee product. But practical issues might arise when trying to determine whether the concrete package constitutes an EWSC-like insurance that would fall under the regulatory regime for EWSCs or genuine insurance that would have to be treated differently. This difficulty in distinguishing EWSC and genuine insurance is discussed in the 2015 ECC-Net Report: “Given the content of some commercial warranties and the organizations providing them, especially if they are not free, it is tempting to draw a parallel with insurance. It is an open question whether some commercial warranties are not actually insurance policies. Some are even sold as such.”<sup>220</sup> Taking the complexity of the instruments and the possible lack of legal knowledge of the average buyer and seller, it is imperative that rules on EWSC-like insurances are aligned with those that apply to genuine insurances to avoid unnecessary confusion.<sup>221</sup> By aligning or unifying the regulatory frameworks, consumers will be better equipped to make informed decisions in purchasing EWSCs and EWSC-like service packages that include genuine insurances.

### III. PLANNED OBSOLESCENCE AND EWSCS

The issue in the EWSC industry is not the long-term durability of the product, but the durability of the product during the period of the EWSC. Is the seller of the contract a gambler betting that the premium or

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<sup>219</sup> *Market Study*, *supra* note 1, at 92.

<sup>220</sup> ECC-NET, *supra* note 128, at 81. For a practical example, see “Amazon Protect” advertised on Amazon Germany for a wide range of electronic goods. See Amazon Protect Products, AMAZON.DE, <https://www.amazon.de> (enter “amazon protect” into search bar). Offered and sold by a third-party insurer—at the time of writing this Article: London General Insurance Company Limited—it comes in different package principally distinguishing between time-wise extensions—“extra guarantees” (*Extra-Garantie*)—on the one hand and additional cover—“device protection” (*Geräteschutz*)—on the other. See *id.* Purchasers would have to contact Amazon service centers. The services offered would financially be covered by the third-party insurer, who himself operates pursuant to agreements with Amazon. See *id.* Are these products genuine insurances that fall outside the regulatory scope of the CRD or could they—per analogy—be considered as EWSC like insurances, or as “ancillary contracts” in the sense of Article 2(15) CRD, *supra* note 21, at 73. Case-law has yet to settle this issue.

<sup>221</sup> One should additionally note the likely relevance of Articles 2(15) and 15 CRD on ancillary contracts that could introduce a third category. See CRD, *supra* note 21, at 73, 80. Article 2(15) CRD defines ancillary contracts as “contract[s] by which the consumer acquires . . . services related to a distance contract or an off-premises contract and where . . . those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.” *Id.* at 73. With respect to this third group (and under the condition that the contract is not excluded by Article 3(d) CRD), alternative regulations come into play, most notably Article 15 CRD on the effect of withdrawals from the main contract and Article 15 of the Consumer credit agreements directive to which Article 15(1) CRD refers. *Id.* at 80.

price paid for the EWSC will exceed the cost of any claims? This seeming gamble is a sure win for the seller. In the ad hoc case, the outlay of costs of repair may be larger than the price paid for the EWSC, but over a large quantity of cases, the surplus generated in favor of the seller (price minus costs or repair) is always substantial. The certainty of generating great profits is due to the planned or engineered obsolescence of a product extending beyond the term of the EWSC. Putting it in more sinister terms, the manufacturer plans and produces its products to fail, in order to generate future revenues related to the products' lack of durability, but beyond the time of the EWSC. A side benefit to the manufacturer is any repairs require the purchase of manufacturer-specific replacement parts. This fact lowers the costs in the probability calculation.<sup>222</sup> The benefits to the manufacturer from planned obsolescence continue since the sale replacement after the expiration of the EWSC provides an additional source of revenue. The actual level of intentionality or culpability is found in the files of the manufacturers; especially those that sell EWSCs.

The problem with planned obsolescence is that the purchaser is no longer able to use price as a surrogate for quality or, more minimally, for the durability of products. Planned obsolescence, generally an industry-wide phenomenon, often results in the reduction of durability (less than is achievable using state of the art design and materials) across product categories and brands within a given category of products. This diminishment of the state of art is motivated by the manufacturers seeking to increase future sales or repairs.<sup>223</sup> This industry-wide manipulation of product quality produces a collusion or antitrust effect by lowering competition in the area of durability, as high-end (brand-related) and high-priced products are manufactured with lower-grade or less durable materials.

#### A. *United States*

The regulation of EWSCs can take two forms. First, existing contract law principles can be applied to police abusive practices in the sale of EWSCs. Second, federal and state governments could enactment new

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<sup>222</sup> The price of the EWSC is based upon the seller's probability estimate of the cost of future claims. The probability calculation is the mathematical side of what has been called planned obsolescence. From the manufacturer-provider perspective of EWSC: Price (-) probability of claim X average costs of claim = profits. The part of the calculation that states: "probability of claim X average costs of claim" is based upon the planned obsolescence determined by the manufacturer.

<sup>223</sup> State of the art may be related to different characteristics of a product. For example, an appliance may reflect, or not reflect, various states of art—technological state of the art (the things the appliance can do); quality or durability state of the art, energy efficiency state of the art, and environmental state of the art.

laws or regulations targeted at the EWSC industry. Unfortunately, unlike some of the initiatives taken in Europe, there has been little interest in such oversight in the U.S.

### 1. Contract Law's Response to Planned Obsolescence

The U.S. does not have a separate, holistic consumer sales or contract law regime. Consumers are protected by implied warranties, but they are easily disclaimable.<sup>224</sup> A gap in this piecemeal regulatory network has been demonstrated by the evolution of the EWSC industry, which remains largely unregulated.<sup>225</sup> However, tying of planned obsolescence to the duration of EWSCs could theoretically make the EWSC part and parcel with the sale of goods. This would allow EWSCs to be captured by the general principles of Articles 1 and 2 of the UCC.<sup>226</sup> The general principles, whether taken from the UCC or the common law—including unconscionability, good faith and fair dealing, misrepresentation, duress, and undue influence—are inherently malleable creatures.

However, that the courts have neither utilized these principles to monitor the EWC industry nor have the developed specialized rules to regulate EWSCs. This is unfortunate for two reasons. First, the principles of unconscionability and good faith could easily be applied to the EWSC scenario. There is both strong evidence of procedural unconscionability (EWSCs are almost always sold to consumers; high pressure sales tactics; contracts of adhesion or standard forms; no representation by a lawyer; severe informational asymmetries) and substantive unconscionability (exorbitant price of product). Second, the courts have developed specialized rules to monitor other troublesome contract clauses.<sup>227</sup> Thus, there are established precedents where the courts have escaped the gravitational pull of freedom of contract to develop rules to protect the weaker party from the stronger party; such rules should be developed for EWSCs. These fairness-based tendencies have always existed in the common law dating back hundreds of years with equitable principles continuing to influence the law and judicial discretion in the name of

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<sup>224</sup> U.C.C. § 2-316.

<sup>225</sup> See *Vehicle Service Contract Industry: How Consumers Lost Millions of Dollars*, BETTER BUS. BUREAU, <http://stlouis.bbb.org/storage/142/documents/vehicleservicecontract-study2011.pdf> (last updated Feb. 18, 2019); see also David Bakke, *6 Reasons Why You Should Never Purchase an Extended Warranty*, U.S. NEWS & WORLD REP. (Apr. 24, 2012), <http://money.usnews.com/money/blogs/my-money/2012/04/24/6-reasons-why-you-should-never-purchase-an-extended-warranty> (explaining that warranties are not cost-effective; necessity of repairs is rare).

<sup>226</sup> See Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 151 (1970).

<sup>227</sup> Examples of such clauses, many created in the common law and later codified by the U.C.C., real estate law, and so forth, include: covenants not-to-compete, liquidated damages or penalty clauses, attorney fee clauses, anti-assignment clauses in commercial leases, and limitation of damages and limitation of remedies clauses. See, e.g., U.C.C. § 2-718.

justice.<sup>228</sup> But, courts have refused to see the abusive nature of EWSCs and have fully enforced them.

## 2. Regulatory and Judicial Responses

Even though the steps toward regulation in Europe are tentative or first steps, the regulatory response in the United States has been non-existent. Information on durability or reliability of automobiles and other products are readily available online, but federal and state governments have not intervened to regulate the sale of overpriced EWSCs. Furthermore, the courts have been reluctant to use existing constructs, such as price gouging statutes<sup>229</sup> or the doctrine of unconscionability<sup>230</sup> to curb excesses in this industry.<sup>231</sup>

The only significant case involving planned obsolescence is *Tatum v. Chrysler Group*,<sup>232</sup> which involved a class action suit against Chrysler in the sale of the Dodge Journey crossover vehicle. The plaintiff alleges that the brakes on the vehicle required frequent and costly repairs. Chrysler's "advertisements, which touted the Journey as safe, durable and reliable."<sup>233</sup> Chrysler claimed that: "the brakes routinely outlasted their sales warranty, and that the advertising was not intended to create a literal representation, but was merely puffery."<sup>234</sup> A stronger case of misrepresentation would be available under most European advertising laws, which see such statements as factual in nature. The court rationalizes that

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<sup>228</sup> See T. LEIGH ANENSON, JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS 1-4 (forthcoming 2019); LARRY A. DiMATTEO, EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES xii (2001).

<sup>229</sup> Price gouging statutes are targeted to the overcharging for services and goods due to natural disasters or emergencies. FLA. STAT. § 501.160 (2005). "Florida's law prohibits the unconscionable pricing of commodities during a state of emergency. It is prima facie evidence that a price is unconscionable." Edward J. Page & Min K. Cho, *Price Gouging 101: A Call to Florida Lawmakers to Perfect Florida's Price Gouging Law*, 80 FLA. BAR J. 49, 49 (2006).

<sup>230</sup> See U.C.C. § 2-302 (unconscionability). The hard selling of EWSCs meets the two requirements for a claim of unconscionability: procedural unconscionability (high-pressure selling tactics, no legal representation, unsophisticated purchasers, lack of full disclosure of clear information) and substantive unconscionability (highly inflated prices), but courts have not seen as such, preferring to view EWSCs as products of freedom of contract and fair bargaining. See *infra* discussion accompanying notes 231-42.

<sup>231</sup> A Lexis search of cases using the phrase "planned obsolescence" uncovered only sixteen federal and state cases and only two were relevant to the sale of durable goods. See search results, LEXISNEXIS, <https://advance.lexis.com> (search "planned obsolescence"); see e.g., *Tatum v. Chrysler Group LLC*, No. 10-4269, 2011 U.S. Dist. LEXIS 32362, at \*1 (D.N.J., Mar. 28, 2011).

<sup>232</sup> *Tatum*, 2011 U.S. Dist. LEXIS 32362. Another case in which planned obsolescence was discussed in dissent is not relevant to the current analysis because it involved the assessment of property; further, this case involved an unpublished opinion and under Michigan Court of Appeals Rules, has no precedential value. See *Danse Corp. v. City of Madison Heights*, No. 215486, 2001 Mich. App. LEXIS 1058, at \*1 (Ct. App. Mar. 23, 2001).

<sup>233</sup> See *Tatum*, 2011 U.S. Dist. LEXIS 32362, at \*2.

<sup>234</sup> *Id.*

the statement of products' durability and reliability is not a misrepresentation by placing the failure of the braking system in the context of the automobile as a whole. Since it is a single component of many in the vehicle, then braking failure does not contradict the claim of durability and reliability.<sup>235</sup>

Unfortunately, the court granted summary judgement determining that there was not a sufficient factual record to decide the case on its merits. However, in dictum, the court addressed the issue of planned obsolescence as the basis for a claim, but dismissed the idea out of hand: "Planned obsolescence, either deliberately or accidentally engineered, is not actionable, and if the brakes outlasted their sales warranty even by a day or a mile, there would be nothing rising to the level of a design flaw for Defendants to warn of."<sup>236</sup> Thus, the court equates planned obsolescence with the express warranty: as long as the product works properly during the period of the warranty, then planned obsolescence that results in failures soon after the expiration of the warranty is not actionable. The court goes further by reasoning that there is no claim in products liability for defects of design since there is no such patent defect if the product lasts through the warranty period. This is an unusually narrow interpretation of products liability.

The court reasoned that two factors weighed against the vehicle owners' claim. First, "that the complaint alleges nothing more than disappointed consumer expectations, which may well turn out to be correct."<sup>237</sup> Second, the "Court [wa]s struck, however, by the apparent fact that none of the cars detailed in the complaint save for one, seem to have suffered brake failure until after the one year or 12,000 mile sales warranty had expired."<sup>238</sup> The court further "note[d] that if the sales warranty covered the Journey's brakes up to 12,000 miles, and the brakes routinely failed at 12,001 miles, Chrysler would have had no obligation to repair them."<sup>239</sup> The court rejected the idea that reasonable expectations of the purchasers could be used to sustain a claim of products liability, misrepresentation, or unconscionability.

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<sup>235</sup> As to the claims of misrepresentation durability and reliability in Chrysler's advertisements, the court suggests that "to the extent that any warranty of reliability and durability could be teased from the advertising, durability and reliability may be based on multiple factors, not just one element of the car, albeit a vitally important one. Absent specific claims as to the braking system, Defendant's general advertising was puffery [hyperbole] as that is understood in the law." *Id.* at \*13-14.

<sup>236</sup> *Id.* at \*10.

<sup>237</sup> *Tatum*, 2011 U.S. Dist. LEXIS 32362, at \*8. Again, the court did not rule that this was in fact true, but its phraseology indicates that it is likely to be true once a full factual record is produced during the trial. *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at \*9.

The court then referred to the case of *Abraham v. Volkswagen of America, Inc.*<sup>240</sup> decided by the Second Circuit for the following proposition:

The *Abraham* Court concluded “virtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a ‘latent defect’ that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to ‘know’ that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such ‘knowledge’ would render meaningless time/mileage limitations in warranty coverage.”<sup>241</sup>

The *Abraham* Court saw the warranty as the only protection owed to the purchaser. The use of planned obsolescence to ensure failures soon after the expiration of the warranty period was not seen as anything sinister but is viewed simply as a business model. The court rejected the owners’ claim of reasonable expectations that the brakes would last beyond the warranty period. The owners claim that “the size of the brakes compared to the weight of the car cause the brake pads and rotors to wear out prematurely “after under 20,000 miles, rather than the 40,000 which would normally be expected” begs the questions who might have had those expectations, and on what were they based? If, as Defendant suggests, they are nothing more than consumer expectations and not based on representations by Chrysler there is nothing actionable.”<sup>242</sup> Again, this is an affirmation that the use of planned obsolescence to set warranties and escape liability is a perfectly acceptable business practice.

### B. *The EU and Member States*

This section analyzes a number of studies and reports authorized by institutions of the EU. It then outlines selected national initiatives and implementations in Austria, Belgium, Finland, France, Italy, the Netherlands, and Germany.

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<sup>240</sup> 795 F.2d 238 (2d Cir. 1986).

<sup>241</sup> *Tatum*, 2011 U.S. Dist. LEXIS 32362, at \*9–10 (quoting *Abraham*, 795 F.2d at 250 (2d Cir. 1986)).

<sup>242</sup> *Id.* at \*11–12.

## 1. Legal Development at the EU level

In the 20th century, the phenomenon of planned obsolescence did not attract significant attention among EU policy-makers. The first, indirect references date back to the start of the new millennium, when environmental directives and regulations addressed the issue of reducing waste in general. Examples include the Waste Electrical and Electronic Equipment Directive<sup>243</sup> and the Waste Framework Directive.<sup>244</sup> Others, such as the Ecodesign Directive<sup>245</sup> and the Energy Labelling Directive<sup>246</sup> aimed to provide consumers with information on ecologically relevant information to allow for an informed decision-making by buyers interested in purchasing eco-friendly products.

Recently, there has been some movement by a number of stakeholders to recognize a link between obsolescence and legal guarantees, as well as EWSCs. In 2011, the European Parliament held a forum for an exchange of views on the sustainability of products. The European Commission was asked to provide answers to a series of Parliamentary questions concerning planned obsolescence and existing EU law. In this context the Commission expressed the opinion that planned obsolescence had become a substantial problem. To accommodate the quest for more sustainable and resource efficient production, the Commission pointed out three legal instruments that might be used to regulate product duration: competition law,<sup>247</sup> the UCPD,<sup>248</sup> and the CSD.<sup>249</sup>

Subsequently, the European Economic and Social Committee (EESC) adopted an opinion on planned obsolescence.<sup>250</sup> The EESC referred to planned obsolescence broadly as “a form of industrial produc-

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<sup>243</sup> See Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on the Waste Electrical and Electronic Equipment (WEEE), 2003 O.J. (L 37) 24.

<sup>244</sup> See Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, 2008 O.J. (L 312) 3.

<sup>245</sup> See 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, 2009 O.J. (L 285) 10.

<sup>246</sup> See Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the Indication by Labelling and Standard Product Information of the Consumption of Energy and Other Resources by Energy-related Products, 2010 O.J. (L 153) 1, 2.

<sup>247</sup> See *supra* notes 24–25 and accompanying text (describing the Phoebus Cartel); Janez Potočnik (European Commissioner for the Environment), *Written Questions: E-001284/11, E-002875/11, E-004273/11*, EUROPEAN PARLIAMENT (July 8, 2011), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-001284&language=EN>. The Commission suggests that—under the assumption that culpable behavior is constituted—“the fact that a trader does not inform the consumer when a product has been designed to have a limited lifetime could be considered as an unfair commercial practice.” *Id.*

<sup>248</sup> See UCPD, *supra* note 140.

<sup>249</sup> See CSD, *supra* note 138.

<sup>250</sup> See generally *Opinion of the European Economic and Social Committee and the Committee on “Towards More Sustainable Consumption: Industrial Product Lifetimes and Restoring Trust Through Consumer Information,”* 2013 O.J. (CCMI 112) 1.

tion that relies on a minimum renewal rate for its products,” leading to consumer abuse.<sup>251</sup> The committee highlighted different advantages of sustainable production, ranging from positive influences on the environment to greater economic innovation.<sup>252</sup> With respect to guarantees, the EESC suggested an enhanced system to “curb . . . out the most flagrant cases.”<sup>253</sup> The Committee suggested that greater sustainability could be achieved by the introduction of “a minimum operating period, during which the cost of any repairs should be borne by the producer.”<sup>254</sup> This type of regulation would severely reduce the attractiveness of EWSCs.

The initial work by the EU Commission and the EESC was followed by additional investigations by other European institutions and committees aimed at evaluating ways to ensure product durability and to improve the disclosure of information with respect to product lifetimes. The Influence of Lifespan Labelling on Consumers study (2016 EESC Study) concluded that the introduction of lifespan labeling would likely have a positive effect in terms of the purchase of sustainable products.<sup>255</sup> First, a significant number of consumers would have an interest in obtaining information on product lifespans. Second, comprehensible information would increase the sale of sustainable products.<sup>256</sup> Also in 2016, European Parliament’s Committee on Internal Market and Consumer Protection (IMCO) intermediary report (2016 IMCO Report)<sup>257</sup> concluded that longer product lifetimes (reduction of planned obsolescence) would produce overall benefits for society, the environment, consumers, as well as some industrial sectors that would outweigh possible costs.<sup>258</sup> Although extending product lifetimes would reduce the sale of new products, it would create new opportunities in the repair and maintenance sector as well as product service systems.<sup>259</sup> The 2016 IMCO Report lists nineteen possible regulatory strategies that range, most notably, from durability labeling to additional consumer support to possible extensions of

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 5–6.

<sup>253</sup> *Id.* at 1.

<sup>254</sup> *Id.* at 3.

<sup>255</sup> *ILLC Study: The Influence of Lifespan Labelling on Consumers*, EUR. ECON. & SOC. COMM. 2, 84 (Mar. 2016), [https://www.eesc.europa.eu/resources/docs/16\\_123\\_duree-dutilisation-des-produits\\_complet\\_en.pdf](https://www.eesc.europa.eu/resources/docs/16_123_duree-dutilisation-des-produits_complet_en.pdf).

<sup>256</sup> *Id.* at 2. “The results of the test show that lifespan labelling has an influence on purchasing decisions in favour of products with longer lifespans. On average, sales of products with a label showing a longer lifespan than competing products increased by 13.8%.” *Id.*

<sup>257</sup> See Carlos Montalvo, Devid Peck & Elmer Rietveld, Directorate-General for Internal Policies, Comm. on the Internal Mkt. & Consumer Protection, *A Longer Lifetime for Products: Benefits for Consumers and Companies* (June 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL\\_STU\(2016\)579000\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf).

<sup>258</sup> See *id.* at 81, 82–83.

<sup>259</sup> *Id.* at 83.

guarantee periods, as well as mechanisms to monitor planned obsolescence cases.<sup>260</sup>

In June 2017, the IMCO released its final report touting the benefits from prolonging the lifetime of products for benefits for consumers and companies (2017 IMCO Report).<sup>261</sup> The 2017 IMCO Report was mostly a restatement of the findings of the 2016 EESC study, the 2016 IMCO Report, and some earlier studies.<sup>262</sup> The 2017 IMCO Report emphasizes the expected advantages of longer product lifetimes and explicitly links the debate to planned obsolescence and the role of guarantees. The Committee suggested a mix of measures ranging from a closer examination of alleged obsolescence cases and deterrent strategies (such as whistle blower protection and undefined “dissuasive measures for producers”) to encouraging Member States to intensify domestic initiatives.<sup>263</sup> Focusing predominantly on legal guarantees, the 2017 IMCO Report arrives at a twofold strategy. First, buyers should receive enhanced, conspicuously displayed information on their statutory rights.<sup>264</sup> Second, the 2017 IMCO Report suggests that in cases where “the reasonably expected period of use [of products] is longer” than the statutorily enshrined guarantee period, refined mechanisms could be introduced.<sup>265</sup> Unfortunately, it does not define what refined measures would entail, but a tailor-made approach to setting guarantee periods based upon the expected duration of given products might arguably be one such measure.

## 2. Situation in Selected Member States

Parallel to the debates in the EU Parliament and Commission, several Member States began to intensify discussions of possible mechanisms to counteract the manipulation of product duration. The first concrete result was presented in France in 2015, when the legislature crafted an explicit prohibition of planned obsolescence. The key provision is found in Article L213-4-1 (I) and (II) of the French Consumer Code: “Planned obsolescence is defined as any measure with the intent to conceptually reduce the operating life of a good for economic considerations” and “[i]t is punishable with two years of imprisonment and a fine

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<sup>260</sup> See *id.* at 86–88.

<sup>261</sup> See Comm. on the Internal Mkt. & Consumer Protection, *Report on a Longer Lifetime for Products: Benefits for Consumers and Companies* (June 9, 2017), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0214+0+DOC+XML+V0//EN> [hereinafter 2017 IMCO Report].

<sup>262</sup> *Id.*; see, e.g., TNS Political & Soc., Directorate-General for the Env’t, *Attitudes of Europeans Towards Waste Management and Resource Efficiency* (June 2014), [ec.europa.eu/commfrontoffice/publicopinion/flash/fl\\_388\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_388_en.pdf).

<sup>263</sup> See 2017 IMCO Report, *supra* note 261, at 11–12.

<sup>264</sup> *Id.* at 12.

<sup>265</sup> *Id.*

of EUR 300,000.”<sup>266</sup> Thus, French lawmakers felt that the shortening of product lifespans merely for economic reasons (e.g., manufacturer-seller profits) was serious enough to impose a criminal penalty. A more recent French strategy includes the possible introduction of a tailor-made lifetime labelling scheme.<sup>267</sup>

In 2015, the Italian Parliament considered draft bills on regulating planned obsolescence. At the time of writing this Article, both initiatives were still being discussed in the Chamber of Deputies.<sup>268</sup> One of the proposed key provisions aims to guarantee the sustainable use of products by obliging manufacturers to offer spare parts for a minimum period of five years.<sup>269</sup> Manufacturers and sellers would be required to inform consumers of their right to repair parts during the statutory period.<sup>270</sup>

In 2012, the Belgian Senate passed a resolution on limiting planned obsolescence requesting the government to develop strategies to combat planned obsolescence.<sup>271</sup> This project has led to a number of draft bills, which are currently pending. The proposed approaches range from new contract law rules to sanctions under criminal law.<sup>272</sup> Other ideas being discussed, likely influenced by the above studies at the EU level, include recognizing planned obsolescence as an unfair commercial practice, lifespan labeling for energy-related goods, and the expansion of legal guarantees. In the area of guarantee law, potential reforms include the extension of warranty-legal guarantee periods and adopting a more flexi-

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<sup>266</sup> Loi 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte [Law 2015-992 of August 17, 2015 on the Energy Transition for Green Growth], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 18, 2015, art. L.213-4-1, p. 14263, <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069565&idArticle=LEGIARTI000031053376> (translated by an author of this Article, Stefan Wrba) [hereinafter French Consumer Code].

<sup>267</sup> See Marion Candau, *France Pushes for Product ‘Lifetime’ Labeling*, EURACTIV (Nov. 21, 2018, 12:07 AM), <https://www.euractiv.com/section/circular-economy/news/france-pushes-for-product-lifetime-labelling>.

<sup>268</sup> See *Proposta di Legge 4 novembre 2015, n.3404, Disposizioni per il Contrasto dell’Obsolescenza Programmata dei Beni di Consumo* [Draft Provisions on Fighting Planned Obsolescence of Consumer Goods] (It.), <https://parlamento17.openpolis.it/atto/documento/id/163692> (Known as Camera dei deputati).

<sup>269</sup> *Id.* art. 4(1), at 10.

<sup>270</sup> *Id.* art. 4(4).

<sup>271</sup> For its basis, see *Senat de Belgique, Session de 2010-2011, Proposition de résolution en vue de lutter contre l’obsolescence programmée des produits liés à l’énergie* [Proposal for a Resolution to Combat the Planned Obsolescence of Energy-related Products], (Oct. 7, 2011), [www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1251&VOLGNR=1&LANG=fr](http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1251&VOLGNR=1&LANG=fr) (Belg.) [hereinafter Belgian resolution] (*Sénat de Belgique*).

<sup>272</sup> See Anaïs Michel, *Product Lifetimes through the Various Legal Approaches within the EU Context: Recent Initiatives Against Planned Obsolescence*, PLATE 266, 269 (Conny Bakker & Ruth Mugge eds., 2017) (pointing out that the plans comprise contractual nullity and reimbursement measures (under the Belgian Civil Code) as well as comparatively strong criminal punishments—with up to five years of imprisonment).

ble system that takes account of the respective product or product category.<sup>273</sup>

In Germany, there have been a number of political initiatives discussing strategies for regulating planned obsolescence. Most notably the German Federal Environment Agency and the German Green Party commissioned reports suggesting a proactive regulatory approach towards ensuring the production of sustainable goods.<sup>274</sup> In 2013, two draft bills emanating from these studies were introduced.<sup>275</sup> Although neither bill was passed into law, the initiatives increased the level of visibility of the problem of planned obsolescence. A more recent 2017 position paper issued by the German Federal Environment Agency<sup>276</sup> suggests, unlike the Belgian approach of revising the existing guarantee framework that would affect all sellers,<sup>277</sup> the implementation of additional guarantees that would only apply to *manufacturers*.<sup>278</sup> Under this approach, manufacturers would be obligated to guarantee a minimum period of usability.<sup>279</sup>

Austrian legal academics have recently intensified debates on planned obsolescence in response to greater awareness by public stakeholders.<sup>280</sup> One of the most active institutions has been the Vienna Chamber of Labour, which has hosted a number of events on planned obsolescence and its regulation.<sup>281</sup> It commissioned an expert opinion to

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<sup>273</sup> *Id.*

<sup>274</sup> See Umweltbundesamt, *Einfluss der Nutzungsdauer von Produkten auf ihre Umweltwirkung: Schaffung einer Informationsgrundlage und Entwicklung von Strategien gegen 'Obsoleszenz'* [Strategies Against Obsolescence: Ensuring a Minimum Product Life and Improving Product Life and Consumer Information] (Nov. 2016), [http://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte\\_11\\_2016\\_einfluss\\_der\\_nutzungsdauer\\_von\\_produkten\\_obsoleszenz.pdf](http://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_11_2016_einfluss_der_nutzungsdauer_von_produkten_obsoleszenz.pdf); Arge Regio, *Stadt- und Regionalentwicklung GmbH*, Geplante Obsoleszenz [Planned Obsolescence] (2013), [https://www.gruenebundestag.de/fileadmin/media/gruenebundestag\\_de/themen\\_az/umwelt/PDF/Studie-Obsoleszenz-aktuell.pdf](https://www.gruenebundestag.de/fileadmin/media/gruenebundestag_de/themen_az/umwelt/PDF/Studie-Obsoleszenz-aktuell.pdf) (The German Federal Environment Agency is Umweltbundesamt, and the German Green Party is Bündnis 90/Die Grünen).

<sup>275</sup> DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 17/13096 [Printed Matter 17/13096], 17/04/2013, on "Ressourcenschutz durch Vorgabe einer Mindestnutzungsdauer für technische Produkte" (Ger.); DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 17/13917 [Printed Matter 17/13917], 12/06/2013, on "Geplanten Verschleiß stoppen und die Langlebigkeit von Produkten sichern" (Ger.).

<sup>276</sup> Umweltbundesamt, *Strategien gegen Obsoleszenz: Sicherung einer Produktmindestlebensdauer sowie Verbesserung der Produktnutzungsdauer und der Verbraucherinformation* [Strategies Against Obsolescence] (Nov. 2017).

<sup>277</sup> Belgian resolution, *supra* note 271 and accompanying text.

<sup>278</sup> Umweltbundesamt, *supra* note 274, at 13.

<sup>279</sup> *Id.*

<sup>280</sup> See, e.g., HELMUT KOZIOL, *OBsoleszenzen im ÖSTERREICHISCHEN RECHT: GELTENDES RECHT, SCHUTZLÜCKEN UND REFORMBEDARF* (Wein, Jan Sramek Verlag ed., 2016).

<sup>281</sup> See, e.g., RENATE HÜBNER, *GEKAUFT UND SCHON KAPUTT. LEBEN IN EINER WEGWERFGESELLSCHAFT?* (2013).

evaluate the use of legal guarantees in obsolescence cases.<sup>282</sup> In 2014, the Austrian Standards Institute took a pioneering role in the lifespan labelling movement by issuing the non-binding “Label of Excellence” for durable, repair-friendly designed electrical and electronic appliances.<sup>283</sup> It recommends the use of specific labels to indicate compliance with a minimum period of usability—five years in the case of brown goods (home entertainment equipment) and ten years with respect to white goods (household appliances).<sup>284</sup> This trend relating to the issue of planned obsolescence or minimum levels of durability is likely to continue in Austria.

Finally, it should be pointed out that a number of Member States have extended or, alternatively, have diversified or created tailored legal guarantee periods to cover as many obsolescence cases as possible. Particularly noteworthy in this respect are the flexible regimes found in the Netherlands and Finland. In both jurisdictions the regulatory schemes now take account of different product types and link the guarantee duration to the expected average lifetimes of the products.<sup>285</sup>

#### IV. RECOMMENDATIONS FOR REGULATORY REFORM

There are various conceivable approaches to dealing with the manipulation of product life by manufacturers and the related issue of the sales of EWSCs tailored to expire within those lifespans. The simplest approach would simply be to refine the law to require longer warranties. This would require the recognition of planned obsolescence as a hidden or latent defect. As such, the fixed manufacturer warranty period would be tolled until the discovery of the product’s lack of durability. In sum, the law would recognize a connection between warranty and planned obsolescence.

A more preferable approach would be to enact a new regulatory scheme based upon the disclosure of information and more free market friendly forms of self-regulation. Such an approach would incentivize

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<sup>282</sup> STEFAN WRBKA, *GEPLANTE OBSOLESCENZ AUS SICHT DES GEWÄHRLEISTUNGSRECHTS* (2015).

<sup>283</sup> Austrian Standards Institute, *ONR 192102:2014, Gütezeichen für langlebige, reparaturfreundlich konstruierte elektrische und elektronische Geräte [Label of Excellence for Durable, Repair-Friendly Designed Electrical and Electronic Appliances]* (2014).

<sup>284</sup> *Id.* criteria 10, 40.

<sup>285</sup> In Finland, this task falls on an ombudsman, who has the competence to define the expectable product lifetimes. See *Statutory Liability for Lack of Conformity and Guarantee in the Sale of Consumer Goods*, FINNISH COMPETITION & CONSUMER AUTH. (Aug. 8, 2018), <https://www.kkv.fi/en/decisions-and-publications/publications/consumer-ombudsmans-guide-lines/by-subject/statutory-liability-for-lack-of-conformity-and-guarantee-in-the-sale-of-consumer-goods/>; see also 2017 IMCO Report, *supra* note 261 (referencing specific measures introduced in additional Member States); *supra* discussion in note 262–64 & *infra* discussion in note 305.

manufacturers to brand the durability of their products, thus allowing manufacturers to differentiate their products, while at the same time improving consumer protection.

There are numerous existing templates relating to safety, quality, health, and environmental standards and regulations, such as energy efficiency standards. Also in place are customary lifetime ratings and disclosures for items such as automobile tires and batteries, windshield wiper blades, other types of batteries (flashlight, electronic devices), light bulbs, and so forth.<sup>286</sup>

Thus, there are three currently plausible approaches to the regulation of product durability and EWSCs. First, reforming current warranty law by mandating longer durations to cover the period for planned obsolescence. Second, requiring additional information disclosures similar to energy efficiency disclosures that estimate the lifetime efficiency of a product. Third, combining extended warranty periods with disclosure of expected lifespan information. Existing examples of the third approach are seen in twenty-year-rated tires or twenty-year-rated roof shingles, which allow a pro rata price credit on replacement tires or shingles based upon the actual lifetime of the product. Replacement ratings are subject to manipulation by manufacturers or rating agencies, but such manipulation would be a case of fraud that could be regulated privately through litigation or through statutory regulations. Such required disclosures are likely to incentivize manufacturers to produce more durable products to protect the marketability of their brand. Presently, most consumers use price as a surrogate for quality, denying them the choice of buying a lesser-priced product with an as long or longer life span.<sup>287</sup>

#### A. *Initial Considerations*

This Section highlights the most striking conclusions derived from the current research. Based on these conclusions a number of regulatory approaches will be examined and recommendations will be offered. For the purpose of clarification, before assessing regulatory options it first needs to be determined, from a sustainability perspective, the reasons why consumers consider the purchase of EWSCs. The 2015 Market

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<sup>286</sup> There are also numerous private rating services for durable products. For example, Consumer Reports rate refrigerators on a number of criteria including “predicted reliability.” See *Refrigerators*, CONSUMER REPORTS, <https://www.consumerreports.org/products/bottom-freezer-refrigerator/ratings-overview>. Some national “experiments” have been initiated on a few European countries such the initiative by the Austrian Standards Institute, *supra* note 283 (proposing voluntary lifetime labelling). Such labelling allows manufacturers to brand their products as satisfactorily durable. See also *supra* notes 266–67 (discussing France’s legal regime) and notes 271–73 (discussing Belgium’s legal regime).

<sup>287</sup> Although some consumers may choose less durability for high-tech products with shorter lifespans because they are susceptible to defects that have higher repair costs.

Study on guarantees makes a commonsensical conclusion that consumers who pay for EWSCs do so because they want additional protection in fear of obsolescence and the high costs of repair that makes an extended guarantee period appealing.<sup>288</sup> This was verified in the Market Study's listing of the most common consumer responses as wanting a "longer guarantee coverage period," "peace of mind," and "cost of repairing the product would be too high."<sup>289</sup> In short, most consumers, with the exception of those who purposely purchase disposable items prefer purchasing durable goods; and these consumers are disappointed by or fear relatively short technical product lifetimes, as well as the high costs of repairs, whether real or imagined. It is this irrational fear that makes consumers susceptible to the high-pressure sales tactics discussed at the beginning of this Article, and it is also the reason that sellers of EWSC are able to charge exorbitant prices.

The current state of EWSCs and the profitability of this growing industry works against the durability interests of consumers. The rise in popularity of EWSCs incentivized manufacturers and sellers of EWSCs to capitalize on obsolescence. From an alternative perspective, the EWSC market is a market of the manufacturers' own creation. Planned obsolescence may have been motivated by economic motives to increase future sales and the product repair market. But, it soon became apparent that the period from the expiration of the express warranty and the end of the time of planned obsolescence provided a new avenue for profit. Based on the vulnerability of purchasers of automobiles and durable products, enhanced marketing techniques were developed in the creation of the EWSC marketplace.

The above scenario has resulted in a vicious cycle. Producers have an interest in shortening product lifetimes to force end-users to buy new products more frequently. At the same time, the EWSC and "genuine" insurance markets flourish because consumers are willing, with the encouragement of manufacturer-sellers, to purchase additional coverage. While this is not always necessarily an abuse in the strict sense, it presents a number of moral hazard problems—questionable shortening of product lifecycles and marketing of dubious and non-transparent EWSCs—that should be removed through additional regulations of the EWSCs market.

Before going into detail, regulation for the sake of regulation may have unintended consequences, so what is needed is a refinement of current warranty law or new, targeted regulation of planned obsolescence and EWSCs. The focus should be put on efficiency and effectiveness. The main characteristic of an appropriate EWSC regulatory framework

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<sup>288</sup> See *Market Study*, *supra* note 1, at 92–93.

<sup>289</sup> *Id.*

must include ideas on product sustainability within the parameters of fairness, informed-decision making, product durability, proportionality (lowest possible or necessary degree of state interference), and consumer satisfaction. The following suggestions and considerations all address one or more of these concepts.

### B. *Generalized Versus Specialized Rules*

There has been a long running theoretical debate over the benefits of a general rules regime versus specialized bodies of rules.<sup>290</sup> Generalization is the essence of the common law of contracts and civil codes. Contract law's abstractness is needed because its rules and principles must be applied to various, disparate types of contracts. The benefits of generalized rules are that they provide a single place in which contractual obligations are predicated. The twentieth century has witnessed the development of specialized bodies of rules for particular transaction types.<sup>291</sup> The most obvious preemption of the common law of contracts in the U.S. was the adoption of the UCC with its specialized rules for sale of goods, leasing of goods, letters of credit, secured transactions, and negotiable instruments. However, American contract law has retained its generality regarding commercial and consumer contracts. The same set of contract rules apply to both. In contrast, EU Directives outlined in this Article have diminished the generality of contract law, so much so that it can be said that there is a separate consumer contract law in the EU.

Before specialized bodies of rules are adopted, the costs of developing and applying such rules need to be balanced against the benefits of retaining a general law of contracts. This balance can be determined by asking: (1) has the general law of contracts become obsolete or an ill fit for a particular type of contract? (2) Does the general law of contracts fail to provide adequate or comprehensive coverage of an evolving contract-type? (3) Does the particular contract or transaction-type<sup>292</sup> require a specialized body of rules to deal with issues not adequately dealt with by the general law of contracts? These questions may be applied to

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<sup>290</sup> See e.g., Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 582 (2010) (asserting that the common law of contracts was a better fit for Islamic marriage contracts than the specialized rules of divorce law or prenuptial agreements); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77 (1990) (reviewing the critiques of general contract law).

<sup>291</sup> See Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 440–42 (1990) (documenting the diminishment of abstraction in contract law).

<sup>292</sup> Karl Llewellyn, a founder of the American Legal Realist Movement and Reporter of the UCC, coined terms such as transaction-types and situation sense, which were core concepts in his view of contract law as specialized areas of contract types, in which the application of contract law is context dependent. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 260, 368 (1960).

EWSCs as a new type of contract in need of specialized rules to prevent overreaching by the manufacturer-seller.

The common law's continual insistence that consumer contracts are the product of true consent has prevented the creation of a body of specialized rules relating to consumer contract law. The likelihood of the adoption of specialized consumer contract law even in the long-term is slim. One of the questions presented in this Article is whether EWSCs deserve a special body of rules to prevent consumer abuse. The issues raised throughout this Article strongly indicate that, at the very least, a set of *explicit* rules is necessary given the size of the EWSC industry.<sup>293</sup> The new approaches, as discussed in this Article, taken by the EU and some EU Member States support the need for express, specialized rules relating to the sale of EWSCs. Developments in Europe emphasize the "practical relevance"<sup>294</sup> of EWSCs by introducing specific regulatory concepts. However, there has been no recognition as to the best method of regulating the EWSC industry. Most EU countries have no specialized regulations, while some countries, such as Austria and Germany, have taken first steps in regulating EWSCs as a separate product area. The problem of planned obsolescence lags behind the study of EWSCs requiring more investigation and deliberations at the EU and Member State levels. With the exception of the remarkably specific regulation of planned obsolescence in France,<sup>295</sup> no other countries at this time have enacted tailored law on this subject.

### C. *Comprehensive and Specialized Laws are Needed*

The current state of affairs relating to EWSCs presents numerous issues that to a large extent have already been addressed in Europe, but have yet to be met by stronger regulations in the U.S. Some of the issues that should be regulated include: (1) how long can the administrator (repairer) keep an automobile or other product in order to make necessary repairs? (2) What are the consumer's legal rights when the product has to be continuously repaired? (3) Should the seller of an EWSC be required to subtract the product warranty period from the advertised EWSC period?<sup>296</sup> (4) Should the seller of a service contract be required to disclose if the product is or is not likely to need repairs or the expected costs of

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<sup>293</sup> There are other instances where the American law of contracts has developed specialized rules for troublesome clauses, such as covenants not-to-compete and liquidated-penalty clauses. *See, e.g.*, U.C.C. § 2-718.

<sup>294</sup> Practical relevance signifies that an issue is of substantial importance to the common market to warrant investigation and possible enactment of law.

<sup>295</sup> *See supra* note 266–67 and accompanying text.

<sup>296</sup> For example, instead of representing the period of the EWSC as 8 years, the seller must represent it as a 5-year duration because of duplicate coverage of the 3 years provided under the product warranty.

repairs?<sup>297</sup> (5) Should the seller be required to alert the consumer to any exemptions from liability in the service contract, such as a clause allowing the company to deny coverage if the consumer fails to follow instructions for routine maintenance? (6) Should the seller be required to alert the consumer of expenses not covered by the service contract?<sup>298</sup> (7) Should specific regulations be imposed on after-point-of-sale marketers of EWSCs (cold call or mail solicitations) that use high-pressure sales tactics, often requesting a deposit or financial information before actually providing the terms of the contract? Affirmative answers to these questions seem to be reasonable and rational. The following Sections explore strategies for responding to the above questions.

#### D. *Improving Informed Decision-Making*

Informed decision-making refers to strategies aimed to provide consumers with the information needed to make rational decisions. But since human beings possess “bounded rationality,”<sup>299</sup> too much information is likely to be ignored or not fully processed by the purchaser. How information is delivered is just as important as the actual disclosure or content of the information. Few consumers read overly long and detailed form contracts or long lists of online terms and conditions.<sup>300</sup> There are two elements to information dissemination: one from the seller’s and the

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<sup>297</sup> Such information surely exists and can be disclosed. An example by analogy is the current controversy in American law school admissions, where likeliness of passing the bar exam is available. Evidence shows a strong connection between law school admission test scores (LSAT) and the likelihood of passing the bar exam. Some schools have lowered admission standards so low that they are admitting students in the bottom 8% of LSAT test scores, thus resulting in low bar exam passing rates. This and other relevant information are not disclosed to law school applicants, making this a potential case of misrepresentation or fraud. This allows the law schools to continue their revenues flows, while leaving their students with high student loan debt and worthless degrees. See Myanna Dellinger, *Desperate Times for Law Schools*, CONTRACTSPROF BLOG (Nov. 21, 2017), [https://lawprofessors.typepad.com/contractspof\\_blog/2017/11/desperate-times-for-law-schools.html](https://lawprofessors.typepad.com/contractspof_blog/2017/11/desperate-times-for-law-schools.html).

<sup>298</sup> These questions were derived from information provided by the U.S. FTC. See Colleen Tressler (Consumer Education Specialist), *Warranties and Service Contracts 101*, CONSUMER INFO., FED. TRADE COMM’N (Jan. 15, 2015), <https://www.consumer.ftc.gov/blog/2015/01/warranties-and-service-contracts-101>; *Extended Warranties and Service Contracts*, CONSUMER INFO., FED. TRADE COMM’N, <https://www.consumer.ftc.gov/articles/0240-extended-warranties-and-service-contracts> (last visited May. 2, 2019).

<sup>299</sup> Bounded rationality recognizes that humans use heuristics or short cuts in making quasi-rational decisions. Even if full information is provided or is available, humans generally will not take the time or possess the cognitive capacity to process the information. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) (discussing the use of heuristics and related biases to assess and predict uncertainties); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995) (using behavioral biases to justify regulations in contract law); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179–93 (1997) (reviewing a list of heuristics and biases).

<sup>300</sup> See STEFAN WRBKA, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED 292–94 (2015) (discussing American and European studies).

other from the buyer's perspective. First, sellers through the manipulation of information, emphasizing only positive features or using high-pressure sales tactics, are able to frame the desirability of the EWSC. Second, the reception of the information by the purchaser—characteristics like prior experiences,<sup>301</sup> level of sophistication, and independent research—can counter the manipulative presentations of information. These two elements are intimately interconnected. The binary nature of informational manipulation and bounded rationality is a core reason for regulatory intervention. For example, if key information is required to be presented in a conspicuous and intelligible manner, then the buyer will be better able to process the benefits and costs of the EWSC.

In the present context, effective information disclosure must include posting or marking the expected period of usability of products. In this sense, effective information would allow buyers interested in purchasing durable products to make informed decisions. Arguably the most effective strategy is using “durability labels” that follow the example of EU “eco labels.” In 1992, the EU introduced a color-coded energy consumption label with a classification of covered goods, largely household goods, and then was extended to other types of products.<sup>302</sup> Under the eco label scheme, products are classified, with a letter grade with the most eco-friendly products given an “A” rating.<sup>303</sup> The energy consumption labels contain intelligible information and have become an integral part of the consumer and commercial marketplaces.

To provide buyers with a comparable degree of comprehensibility, tailor-made durability labels could be introduced to signify the expected lifespans of products. This is, for example, highlighted by more recent policy discussions in the EU, where a number of national policy-makers

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<sup>301</sup> Behavioral law and economics have shown that biases, such as prior experience, often intervene to prevent the decision-maker from making a less than rational decision. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973) (describing a heuristic that predicts that people evaluate risk more seriously when a past incident is readily called to mind).

<sup>302</sup> The color code runs from green to red. One of the most recent examples is the provisional agreement between the EU Parliament, Council, and Commission to identify the energy performance of buildings. See, e.g. *Welcomes Agreement on Energy Performance of Buildings*, EUROPEAN COMMISSION (Dec. 19, 2017), [http://europa.eu/rapid/press-release\\_IP-17-5129\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5129_en.htm) (proposing new legislative methods for improving the energy performance of buildings).

<sup>303</sup> See Council Directive 92/75/EEC of 22 September 1992 on the Indication by Labelling and Standard Product Information of the Consumption of Energy and Other Resources by Household Appliances, 1992 O.J. (L 297) 16, 17, *repealed by* Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the Indication by Labelling and Standard Product Information of the Consumption of Energy and Other Resources by Energy-Related Products, 2010 O.J. (L 153) 1, 1, *further repealed by* Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 Setting a Framework for Energy Labelling and Repealing Directive 2010/30/EU, 2017 O.J. (L 198) 1.

have given this topic serious consideration.<sup>304</sup> A two-level labeling system would signify the expected durability of comparable products, products of the same category and identify the evaluated lifespan of a specific product, Durability Level 1 and Durability Level 2.

One of the parameters to determine the general expected durability would be the overall level of technical development with respect to a product category. Examples of systems utilizing the first level or type of durability include the Finnish ombudsman system's defining of expected usability periods and the labeling initiative of the Austrian Standards Institute, which were previously discussed.<sup>305</sup> The Durability Level 1 refers to a durability period that function as a mandatory minimum standard for products that are not explicitly sold as "disposable products." Durability Level 2 adds a more flexible system that gives manufacturers of longer-lasting products the chance to label them as more durable in order to attract potential buyers with strong preferences for sustainability. This two-fold durability label scheme would allow a clearer linkage between sustainable products and guarantees.

A durability rating system would enhance an informed decision-making process. Added value to such a rating system would include the provision for comprehensive information on the applicable guarantee schemes. To vest potential purchasers with the ability to assess the value of an EWSC, guarantees should be required to provide concise, intelligible, accurate, and appropriately complete information in a visible way. The effectiveness of this disclosure regime would be improved through effective enforcement and stakeholder guidance. The importance of enforcement and guidance will be discussed in a subsequent section.<sup>306</sup>

In summary, producers should be required to comply with sustainability and guarantee labeling standards. The benefits of such mandatory disclosures would include increased consumer confidence, stimulation of competition in the production of more innovative, durable, and eco-friendly products. The EWSC market would need to be retooled; the new disclosure requirements would incentivize sellers of EWSCs to design more attractive guarantees.

#### *E. Refined Warranty Regime*

A three-level guarantee framework would provide an optimal mix of legal, integral (no-cost), and paid-for EWSCs while also maximizing the potential of durability labeling schemes. Following the examples of

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<sup>304</sup> See *supra* Part IV.H.

<sup>305</sup> See *supra* note 285 (discussing the Finnish ombudsman scheme); *supra* notes 280–84 (discussing the Austrian Standards Institute's initiative).

<sup>306</sup> See *infra* Part IV.F.

the Netherlands and Finland,<sup>307</sup> products would be classified into product-specific durability categories that determine the generally expected minimum period of usability for that respective product category. These periods would further define the length of the respective legal guarantee—the duration of legal guarantees would principally follow the durability period of the respective product category.<sup>308</sup>

Manufacturers who want to produce longer-lasting products would be able to attract customers interested in long product lifespans or consumers who are eco-minded. The manufacturer would signal its products durability with a Durability label. To ensure the functionality of the respective product during the longer durability periods and to prevent misleading information, the respective product would have to provide an extended guarantee or integral EWSC at no additional cost, covering the time between the expiration of the legal guarantee and the durability period stated in the Durability label. Optional EWSCs could then be offered to customers wanting protection beyond the legal guarantee and integral EWSCs. Thus, adding a third level of guarantees. Such a scheme would create a level playing field for stakeholders participating in the sale of goods and guarantees EWSC markets through enhanced transparency and comprehensibility.

The three-level scheme proposed above may lead to further diversification of the market and greater consumer choice. First, some manufacturers might want to produce less durable, “disposable” products with expected durations shorter than the generally expected duration of goods in the same product category. This goes hand in hand with the interests of buyers who want to purchase less durable products, in particular if they come at a significantly lower price. To accommodate this market, the above-tiered system of guarantees would need to be fine-tuned with a shorter running time than the generally expected. This exception would be consistent with the goal of informed decision-making if such products were visibly and clearly labeled as “less durable than the standard” of durability of that category of products. This would be consistent with preventing the manipulation of information tied to planned obsolescence and the overpricing of EWSCs. The labeling of goods as less durable aligns planned obsolescence with informed decision-making.

Second, it must be noted that there are a variety of EWSC-like products whose purpose is not to temporarily extend the duration of guarantee periods, but to provide for extra services, such as enhanced repair services or extending liability to other parties. Such variety or diversification, whether in products or in paid for guarantees is a good thing as long

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<sup>307</sup> See *supra* note 285 (outlining the Finnish ombudsman scheme).

<sup>308</sup> Exceptions and shorter legal guarantee durations apply with respect to disposable products.

as the strict standards of clarity and comprehensibility proposed above are applied.

#### F. *Enhanced Support and Enforcement*

The studies, reports and initiatives referred to in this Article indicate a lack of transparency on product durability coupled with unintelligible or misleading information and slick selling tactics in the sale of EWSCs. The 2014 Sweep on Guarantees in the Electronic Goods Sector highlighted the practical issues in the sale of such extended guarantees as their failure to reference applicable, mandatory legal guarantees and overlapping coverage. For example, does the EWSC extend the duration of coverage beyond the legal guarantee or does it merely provide some additional services?

New regulatory requirements for the use of clear, intelligible language in EWSCs offers a certain degree of improvement. But in many instances, existing regulatory language remains imperfect for EWSCs. Article 6(2) CSD, for example, seems to be comparatively precise when it states that EWSCs should “set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.” In practice, however, the lack of concrete guidelines has made application of these requirements problematic. Hence, a more precise substantive regulatory regime would denote clear, specific requirements and criteria.

The 2014 Guarantee Sweep and comparable projects show the EWSC market is characterized by a considerably high degree of non-compliance with existing rules. Thus, a refined regulatory scheme needs to be coupled with enhanced enforcement. In modification of the motto “*ubi non accusator ibi non iudex*” (“where there is no claimant, there is no judge”), one of the most proportionate and adequate ways would be to establish information and monitoring authorities. Such authorities should be imbued with competencies to launch enforcement actions. The market surveillance activities (sweeps) performed under the CPC Regulation have been a highly effective mechanism to identify shortcomings in existing regulations and cases of non-compliance. As repeatedly shown, the actions launched by competent government agencies or private institutions<sup>309</sup> have significantly improved the level of pertinent compliance.<sup>310</sup>

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<sup>309</sup> To assist market surveillance institutions, local and nationwide business and consumer information centers could support substantive regulation and help to decrease levels of non-transparency and incomprehensibility, and limit the necessity to involve courts and other dispute resolution bodies.

<sup>310</sup> For more information on the CPC Regulation sweeps conducted prior to 2015, see, e.g., STEFAN WRBKA, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED 66–67 with further references. For information on more recent sweeps see, e.g., *Sweeps*, *supra* note 207.

In some cases, non-complying businesses do not possess sufficient knowledge of the law or elect to strategically non-comply.<sup>311</sup> However, in cases of intentional non-compliance or partial compliance, harsher actions are needed, such as standing to sue for overpricing and injunctions, and decertification for repeat offenders.

#### CONCLUSION

There are many regulatory gaps in the law; rightly so, otherwise, overregulation would smother the free market system. A balance needs to be struck between freedom of contract and the regulatory need to ensure a fair marketplace. This balance has been recalibrated from time to time. Human and societal preferences are the bases of capitalism; as such, they have increasingly defined that balance as creating an eco-friendly, sustainable use of resources, fair and competitive markets that encourage technological advancements and innovation in the interests of consumers in a transparent, rights-observing marketplace. Achieving such a balance requires greater disclosure of the durability of products so that consumers and other purchasers are provided the means to make informed decisions. Currently, the Extended Warranty-Service Contract (EWSC) market can be characterized as unfair, non-transparent, and overreaching (price gouging). Studies support the view that a truly sustainable marketplace would benefit from regulation of this growing market.

This Article discusses both the EWSC markets and the phenomenon of planned obsolescence (products engineered to fail prematurely) in the United States and Europe. Both pose challenges from the viewpoint of creating a fair and level playing field. Most notably, concerns include the absence of clear regulatory rules and, in cases where such rules exist, there have been numerous enforcement issues. Recommendations are provided for the creation of more comprehensive and effective rules to ensure procedural fairness in the purchase of EWSCs: labeling schemes, refined techniques of enforcement, monitoring, and support institutions. In effectuating such rules, the phenomenon of planned obsolescence can be brought out of the shadows and made transparent in the marketplace. In the end, the regulation of EWSCs and the issue of planned obsolescence are inherently interconnected.

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<sup>311</sup> See Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559 (2004) (arguing that businesses do not have an absolute duty to obey the law). The reciprocal reversion of strategic compliance is strategic enforcement. See Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010).