

THE RIGHT TO REPAIR IN EU COMPETITION LAW

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The Right to Repair-movement focuses on a fairly simple goal: an increase of sustainability through a consumer's right to repair a good instead of disposing it and buying a replacement. However, this thought has yet to be comprehensively anchored in European legislation. In US law, for example, the Right to Repair movement has already achieved some developments in copyright law and even is pursuing its goals in antitrust. These measures frequently revolve around the automotive industry (especially regarding agricultural vehicles) as well as the electronic aftermarket. In contrast, EU law has – despite ambitious efforts for sustainability goals – not given the right to repair the most prominent place in its environmentally-friendly toolbox yet. Still, the Right to Repair has left some marks in the EU and its traces can be found in the current legal framework – even in competition law.

1 THE RIGHT TO REPAIR MOVEMENT

The term *Right to Repair* ('R2R') summarizes the efforts to give a consumer the legal ability to repair a product once it ceases to function – rather than to buy a new one – a voice. Thus, not only the reparability of goods themselves is a demand but facilitating their reparation. This thought follows economical concerns, yet it is based mainly on reasons of sustainability.

In the last few years, R2R proactively advocated the possibility of reparation and sought to increase legislative endorsement. Especially since 2012 the movement is more operational and quite well-established in organisations for example with 'The Repair Association'¹ or 'FIGIEFA'² but mainly pursuing its goals overseas.

1.1 LEGISLATIVE MEASURES IN THE US

Having its roots in the US, the *Right to Repair* Movement has already achieved great progress in terms of US Copyright Law.

Section 1201 of the Digital Millennium Copyright Act ('DMCA')³ stipulates the unlawfulness of the circumvention of technological measures that prevent unauthorized access to copyrighted work. In other words, the DMCA prohibits taking apart and repairing electronic devices, since breaking the software locks (which is an imminent step when replacing parts of a gadget) is considered to be unauthorized access to copyrighted work. However, every three years US citizens can propose exemptions to Section 1201 of the DMCA. In 2018, an organization focusing on the repair of electronic goods petitioned, inter

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¹ See for example The Repair Association, <www.repair.org> accessed 19 28 February 2022.

² See for example FIGIEFA, 'The new competition law framework for the automotive aftermarket – Right to Repair Campaign' (FIGIEFA, July 2010) <www.figiefa.eu/wp-content/uploads/r2rc-newberframeworkbrochure.pdf> accessed 28 February 2022.

³ Digital Millennium Copyright Act, H.R.2281 (US).

alia, for a general exemption for the repair of smartphones and home appliances.⁴ In essence, this exemption was granted for voice assistant devices, new phones, motorized land vehicles including tractors, but dismissed, *inter alia*, for game consoles.⁵

For last year's exemption, the same organization took another leap forward and proposed to generally exempt the reparation of all software-enabled devices including medical devices, smart litter boxes, and video game consoles.⁶ At the end of last year, the Copyright Office granted the desired exemption for the most part. Unfortunately, this exemption does not apply to the distribution of repair tools, which considerably weakens the exemption.⁷ 2021 was an important year for the R2R movement in US antitrust: in July, US President Joe Biden signed an executive order aimed at limiting unfair anticompetitive restrictions on third party-repair and also self-repair. The Federal Trade Commission ('FTC') was encouraged to address such practices preventing farmers from repairing their own agricultural equipment.⁸

Additionally, the FTC issued a statement confirming to take unlawful restrictions of the right to repair on its agenda. And even before that, the FTC issued its 'Nixing the Fix' report in May 2021, explaining in detail how the possibilities of product repairs are being limited by manufacturers. Again, electronic goods such as smartphones and agricultural equipment were in the spotlight.⁹

The outcome is that on the one hand electronic goods and on the other hand motor vehicles and especially vehicles for agriculture are included in the important fundamental demands of the R2R movement and in US antitrust law. This leads to the question of how the repair of those goods is treated in EU competition law.

1.2 LEGISLATIVE MEASURES IN THE EU

In the EU, the R2R movement has also already left its marks: the European Commission has adopted in 2020 the Circular Economy Action Plan, aiming to achieve a carbon-neutral, sustainable, toxic-free and fully circular economy by 2050.¹⁰ However, while the action plan mentions in several occasions that the new circular economy will lead to a more competitive economy, competition law matters are not mentioned.

⁴ Kyle Wiens, 'Copyright Office Ruling Issues Sweeping Right to Repair Reforms' (*iFixit*, 25 October 2018) <www.ifixit.com/News/11951/1201-copyright-final-rule> accessed 28 February 2022.

⁵ Library of Congress U.S./Copyright Office, Final Decision dated 19 October 2018, 37 CFR Part 201 <federalregister.gov/d/2018-23241> accessed 28 February 2022.

⁶ Kevin Purdy, 'We Told the Copyright Office that Repair Should be Legal, Period.' (*iFixit*, 22 April 2021) <www.ifixit.com/News/49993/we-told-the-copyright-office-that-repair-should-be-legal-period> accessed 28 February 2022.

⁷ Kerry Sheehan, 'Repair Isn't Piracy—And the Copyright Office (Kind of) Gets it Now' <www.ifixit.com/News/54317/section-1201-exemptions-for-2021-repair-consoles-medical-devices>

⁸ The White House, Executive Order on Promoting Competition in the American Economy (9 July 2021) <www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> accessed 28 February 2022, Section 5 (h)(ii).

⁹ Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions (May 2021) <www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf> accessed 28 February 2022.

¹⁰ Commission, 'Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions – A new Circular Economy Action Plan For a cleaner and more competitive Europe' COM(2020)98 final.

In EU law, solutions for sustainability concerns are being primarily sought in the regulatory area. For example, last year, various EU Ecodesign regulations have been amended which facilitate the repair of devices such as washing machines, displays, dishwashers and fridges.¹¹ This goal is primarily achieved by regulating the design of the products aiming for a more sustainable construction of goods.

Although the idea of sustainability is not foreign to EU competition law, the discussions mainly revolve around the legality of co-operations pursuing sustainability objectives. Also, the latest Competition Policy Briefs by the Commission – published in the light of the consultations regarding the European Green Deal – mainly focused on this topic.¹² Ideas for strengthening the R2R have not yet been taken up.¹³

However, also EU competition law has (indirectly) manifested concerns for the R2R as shown in the next section.

2 THE RIGHT TO REPAIR AND THE AUTOMOTIVE AFTERMARKET IN EU COMPETITION LAW

As elaborated above, the two issues frequently addressed by the R2R movement are repairs of motor vehicles, especially those for agricultural use, and repairs of electronic goods. Especially the automotive market and its aftermarket are subject to intense competition regulation in the EU.

In EU competition law there is the Block Exemption Regulation exempting vertical agreements in the motor vehicle sector relating to spare parts ('aftermarket BER').¹⁴ The aftermarket BER is the successor of a range of BER in the motor vehicle sector since 1985, the last being Regulation 1400/2002¹⁵, which was in force until 31 May 2010. While the aftermarket BER is only applicable to the automotive aftermarket, the scope of Regulation 1400/2002 also included the production and sale of motor vehicles. This limitation of the scope stems from evaluations of the Commission regarding the competitive conditions in the motor vehicle sector showing an ongoing concentration among vehicle manufacturers,

¹¹ Commission Regulation (EU) 2021/341 amending Regulations (EU) 2019/424, (EU) 2019/1781, (EU) 2019/2019, (EU) 2019/2020, (EU) 2019/2021, (EU) 2019/2022, (EU) 2019/2023 and (EU) 2019/2024 with regard to ecodesign requirements for servers and data storage products, electric motors and variable speed drives, refrigerating appliances, light sources and separate control gears, electronic displays, household dishwashers, household washing machines and household washer-dryers and refrigerating appliances with a direct sales function [2021] OJ L 68/108.

¹² Commission, 'Competition policy briefs' <https://ec.europa.eu/competition-policy/publications/competition-policy-briefs_de#ecl-inpage-378 > accessed 28 February 2022.

¹³ See for example Commission, 'Competition policy brief' (10 September 2021) <https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en > accessed 28 February 2022.

¹⁴ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L 129; of course, agreements regarding the automotive aftermarket are also subject to the Vertical Block Exemption Regulation (Regulation [EU] No 330/2010) which is currently under revision and especially its Articles 4 (b)(iv) and 4 (e).

¹⁵ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L 203.

an increase of market power of the remaining players and, therefore, risks of reduced competition.¹⁶

In Article 5, the aftermarket BER stipulates the hard-core restrictions, i.e. anti-competitive agreements which cannot be exempted under the Regulation. In particular, the restriction of sales of spare parts by a member of a selective distribution system to an independent repairer counts among them. This would mean that an authorized repairer or reseller is able to supply any repairer with spare parts. Additionally, a supplier of spare parts might not be prevented by the car manufacturer from selling spare parts to an independent repairer. Therefore, in essence, independent repairers must have access to technical repair and maintenance information, tools and training to the same extent and under the same conditions as the authorized repairers do.

However, so far, only the aftermarket regarding usual street vehicles is protected by the restrictions of the aftermarket BER. Currently, the aftermarket BER is being reviewed in sight of its expiration in 2023. In the course of the public consultation, it has been suggested that also off-road vehicles like agricultural machinery (and especially tractors) should fall under the scope of the automotive BER.¹⁷ If the EU regulators will follow this claim, one of the main subjects of the R2R movement - farmers and their agricultural vehicles - would be included in the scope of protection of the aftermarket BER.

If tractors were included in the scope of the regulation, farmers would be able to choose from a range of authorised as well as independent repairers to have their vehicle fixed, without suffering from any potential tensions with the manufacturer of their tractor as all the garages are – at least in theory – able to provide the same services to the farmers. In this way, they might not be forced to travel to an authorised repairer, but can get their tractors to, or spare parts from independent repairers within their area.

With the aftermarket BER, EU competition law already supports independent repairers on the automotive aftermarket by prohibiting certain clauses which significantly restrict their business possibilities on the aftermarket. However, there is room for an extension of the scope of the BER to the aftermarket for agricultural vehicles, levelling the playing field for its specialised independent repairers so that also farmers currently facing issues in finding repairers for their vehicles would have a larger number of options and could therefore benefit from EU competition law.

3 THE RIGHT TO REPAIR AND THE ELECTRONIC AFTERMARKET IN EU COMPETITION LAW

While the automotive aftermarket is already subject to sector specific EU competition law regulation, there are no specific rules for what seems to be the second flagship topic of the R2R movement – electronic goods. The electronic sector aftermarket is only subject to the general rules of competition law and independent repairers are not supported in the way motor vehicle repairers are.

¹⁶ Commission, 'Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002' SEC (2008) 1946, 2.

¹⁷ Commission 'Staff Working Document of the Motor Vehicle Block Exemption Regulation', COM(2021) 264 final, 122.

There might be two main reasons why the automotive aftermarket seems to get more attention by the regulators.

First of all, the automotive aftermarket is considered to have certain specialities and cannot per se be compared with other aftermarkets, as the General Court confirmed in the *Watch repair* case.¹⁸

The *Watch Repair* case revolved around the practise of Swiss watch manufacturers which limited independent repairers' access to spare parts under a selective distribution system. In essence this practice did not only mean that many independent repairers were excluded, but also that consumers' options to have a product repaired were also limited. The claimant submitted that these prohibitions are hard core restrictions analogue to the automotive BER. However, the Commission and subsequently the General Court confirmed that the automotive BER is limited in its sectoral scope. The General Court was reluctant to draw parallels between the automotive sector and the luxury watch business. The arguments used were, inter alia, that the aftermarket for luxury watches is not as profitable compared to the aftermarket of the automobile market, and does not 'represent a high proportion of total consumer expenditure'.¹⁹ The General Court also indicated that it is less important to have repair centres close to customers as watches can easily be shipped to be repaired.²⁰ In this case, the General Court approved the Swiss watch manufacturers' practice to limit the aftermarket's possibilities to obtain spare parts to repair the watches. Therefore, the prohibition for members of a selective distribution system to sell to independent repairers is a hardcore restriction only in the automotive aftermarket.

The General Court ruled that it is up to the Swiss watch manufacturers to maintain a selective distribution system, excluding companies not fulfilling the selective distribution criteria from its network of authorized repairers and correspondingly refusing to supply those with spare parts necessary for repair.

The *Watch Repair* case mainly sparked interest in the General Court's considerations regarding the question of community interest (since the case concerned Swiss manufacturers) and in general as a further clarification in the application of case law on the conditions of the legality of a selective distribution system.²¹ Additionally, with its decision, the General Court also determined that EU competition law considers an aftermarket to be worthy of protection and accordingly intends to protect it by applying a specific BER only if the market requires this due to its particular characteristics. In the case of the automotive sector, the profitability and the proportion of total consumer expenditure warrants the special protection of its aftermarket. The aftermarket for the repair of watches, however, does not live up to these standards and therefore the specific rules of the automotive aftermarket BER cannot provide a benchmark.

¹⁸ Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* EU:T:2017:748.

¹⁹ *ibid* para 69.

²⁰ *ibid*.

²¹ Dimitris Vallindas, 'Selective Distribution Systems Relating to Luxury and Prestige Products: Advocate General Wahl's Opinion in the Coty Case' [2017] 1 Eur. Competition & Reg. L. Rev. 361, 362; Andrezej Kmiecik, 'European Union: EU General Court Endorses Selective Distribution Of Spare Parts for Luxury Watches', (*Mondaq*, 27 November 2017) <www.mondaq.com/x/650200/Antitrust+Competition/EU+General+Court+endorses+selective+distribution+of+spare+parts+for+luxury+watches>_accessed 28 February 2022.

While the aftermarket for electronic goods might also not be comparable to the automotive aftermarket, there are certain indicators that the EU plans to take a closer look at this sector, considering it to be worth of further protection in the light of its pursuit for a more sustainable economy.

First, the Commission's Circular Economy Action Plan mentions the fight against electronic waste as one of the main agendas of the new economy.²² It criticizes the waste of resources due to the frequent impossibility to repair an electronic device. A R2R is explicitly mentioned as a possible solution. Regulatory measures should therefore relate to the reparability of mobile phones, tablets and laptops, among other things. Remarkably, the Commission also seems to make an effort to establish a R2R by considering new horizontal material rights for consumers, for instance as regards the availability of spare parts or access to repair.²³

As already mentioned above, it seems that the creators of this plan did not primarily think of competition law as a solution for a stronger regulation of these secondary markets. However, this stronger emphasis on R2R is a reason to take a closer look at these markets and to evaluate whether they also need support from a competition law perspective - be it through the establishment of (soft) law or through an analogous application of existing law, like the aftermarket BER.

The second reason why the automotive aftermarket seems to get more attention by the regulators than the aftermarket for electronic goods might simply be the louder voices of the interest group of the automotive industry.

When amending the aftermarket BER in 2010 the Commission examined the automotive aftermarket sector and saw a need to further support independent repairers, by facilitating their access to technical information and spare parts.²⁴ This was especially pushed by interest groups like AIRC, CECRA, EGEA, FIA and FIGIEFA²⁵, as well as other R2R associates emphasizing the importance of specific rules for the automotive market for both consumers as well as market players like garages.²⁶ These were the interest groups which identified and fought for the need for changes in EU competition law in connection with the automotive industry.

In contrast, the part of the R2R movement dealing with electronic goods mainly focused on copyright law and has already achieved remarkable success in the US (as shown above). So far, no similar efforts by R2R interest groups have materialized regarding competition law.

As a result there seems to be a lack of advancement regarding the R2R in the area of EU competition law. However, if one looks at the EU's advances and plans in the area of

²² COM(2020)98 (n 10) 7.

²³ COM(2020)98 (n 10) 5.

²⁴ Commission, 'Commission Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 concerning motor vehicle distribution and servicing' <https://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf> accessed 28 February 2022, 9.

²⁵ AIRC – Association Internationale des Réparateurs en Carrosserie; EGEA – European Garage Equipment Association; CECRA – European Council for Motor Trade and Repairs; FIA – Fédération Internationale de l'Automobile; FIGIEFA – International Federation of Automotive Aftermarket Distributors.

²⁶ *Anthony Seely*, 'Independent garages and the Motor Vehicle Block Exemption Regulation' (House of Commons Library, 6 July 2010), 4.

sustainability and, in particular, the R2R, it now appears that the demand for regulating the electronic aftermarket will also find its way into EU competition law.

4 CONCLUSION

As the discussion above shows, the R2R movement has many strong and important claims. Some of them, have already been heard by EU competition law legislation like those relating to the support of the aftermarket in the automotive sector – at least relating to common street vehicles. Others, like the facilitation of the repair of electronic goods and therefore, the reduction of electronic waste have left their traces in general EU law but are not as well established in terms of competition law.

Nevertheless, this raises the question of whether sustainability aspects, such as the demands of the R2R movement, are in general better regulated by legislative measures, or whether they should belong in the jurisprudence of the competition authorities. The latter, however, would require a difficult compromise or balance between competitive concerns, sustainability claims and measures that are restrictive of competition but perceived as necessary by the enterprises practicing them. Hence, it is essential to carefully monitor these developments in competition law (as well as in other fields of law), especially since it is to be expected that the voices for the R2R movement will become stronger and louder.

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