

## Sustainability, Circular Economy and Consumer Law in Switzerland

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### I. Introduction

Switzerland, the EU and its Member States have all recognized the 17 United Nations Sustainable Goals. Goal 12 is to ensure sustainable consumption and production patterns.<sup>1</sup> The pursuit of this objective offers new opportunities for analysis and development in contract law, consumer law and in the field of unfair commercial practices.<sup>2</sup> However, although some changes are underway<sup>3</sup>, these areas often remain viewed through the traditional lens of protecting the economic interests of consumers<sup>4</sup> as a weaker party<sup>5</sup>, without usually taking environmental considerations into account.<sup>6</sup> In light of the ongoing climate crisis<sup>7</sup>, the need (i) to concretely protect the environment (ii) to put in place environmentally sustainable consumption patterns as well as (iii) to adopt a more circular economy<sup>8</sup> are pressing. To reach these goals, observers note that solutions can no longer be confined to national consumer laws but international cooperation in this area is needed.<sup>9</sup> As a country located in the centre of Europe, the European Green Deal (December 2019)<sup>10</sup>, the New Circular Economy Action Plan (March 2020)<sup>11</sup> and further developments based on these initiatives are also of great practical importance for Switzerland.

This paper assesses Swiss consumer law from the perspective of environmental sustainability and the circular economy. The objective is to present the general state of the law in this respect, considering important achievements and ongoing developments at the European level. To this end, we first present the Swiss legal framework of consumer protection and consumer contracts, as well as sustainable development and circular economy (II). We then conduct a "sustainability check" of Swiss consumer law (III), before concluding (IV).

### II. Swiss Legal Framework

#### 1. Preliminary Remarks

*How does Swiss consumer law compare to that of the EU and its Member States?*

Unlike some EU Member States such as e. g. France, Austria or Italy, Switzerland has neither a Consumer law Code nor a general Consumer Protection Act in the strict sense. Switzerland's approach can in this respect be defined as being "hybrid" with separate and often heterogeneous instruments in both civil codification and special laws (see section II.2).<sup>12</sup> Consumer protection is also usually less pronounced, as the legislator not infrequently relies on the principle of individual responsibility, including that of consumers. As a result, case law at federal level on the application of the statutory rule against the use of unfair terms in B2C contracts remains scattered compared to the numerous ECJ preliminary rulings in relation to the Unfair Contract Terms Directive. On a procedural level, there is also still some reluctance to grant consumers collective rights of action, which consequently tends to limit the collective enforcement of their rights (see section II.2.2).

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

58

Nevertheless, due to close cultural, economic<sup>13</sup> and geographic ties between Switzerland, the EU and its Member States, as well as with the internal market, Swiss law continues to be strongly influenced by EU law.<sup>14</sup> The "Europeanisation" of Swiss consumer law essentially dates back to the early 1990s although – or precisely because – the sovereign refused to join the EEA agreement at that time.<sup>15</sup> This dynamic and still ongoing process is taking place either in the form of so-called

autonomous adaptation ("*autonomer Nachvollzug*", "*adaptation autonome*") or in the form of a general alignment with EU law.<sup>16</sup> From a national perspective, Swiss consumer law must – very simply put – be adopted and maintained as close as possible to EU consumer law on which it is based (this also applies in principle to its interpretation by the internal courts).<sup>17</sup>

## 2. Consumer Protection and Consumer Contracts

Art. 97 of the Swiss Federal Constitution of 1999 (hereafter: Cst.) represents the constitutional basis of consumer protection in Switzerland. Its origin goes back to the approval by the people and the cantons of an express consumer protection provision in the previous Federal Constitution of 1874. Art. 97 Cst. reads as follows:

*1. The Confederation shall take measures to protect consumers. 2 It shall legislate on the legal remedies available to consumer organisations. These organisations shall have the same rights under the federal legislation on unfair competition as professional and trade associations. 3 The Cantons shall provide a conciliation procedure or a simple and rapid court procedure for claims of up to a certain sum. The Federal Council determines this sum.*

### a) Substantive Law: A Hybrid Approach

From the mid-1980s onwards<sup>18</sup>, there was legislative work to implement the constitutional mandate for consumer protection through the Federal Act on Information for Consumers<sup>19</sup> (hereafter: ConsumIA) and in the Swiss Federal Code of Obligations<sup>20</sup> (hereafter: CO; art. 6a [sending of unsolicited items, 1991<sup>21</sup>] and 40a ff CO [door-to-door sale, 1991]).

From the 1990s on, consumer protection was gradually further adapted and expanded in the CO, often – but not exclusively – pursuant to the above-mentioned (see section II.1) phenomenon of the "Europeanisation" of Swiss law. The provisions on door-to-door sales were the first adapted (1994). A few years later (2000), a specific consumer protection was adopted in the context of the marriage or partnership brokerage mandate including a right of withdrawal (art. 406a ff CO). More recently (2013), the limitation period for the buyers' warranty claim was extended from one to two years (art. 210 para 1 CO). Furthermore, nullity of the clause reducing the prescriptive period in B2C contracts in case of a breach of warranty was also regulated (art. 210 para 4 CO; see also section III.2.2.b). Three years later (2016), a right to withdraw from a contract concluded "*by telephone or by a comparable means of simultaneous verbal communication*" was introduced, and the withdrawal period for door-to-door sales contracts (as well as consumer credit contracts) extended from 7 to 14 days. Even more recently (2020), nullity of the waiver of prescription defence made by the addressee of general terms and conditions was introduced (art. 141 para 1bis CO).

Pursuant to the Swiss legislator's hybrid approach of consumer law, the abovementioned developments in general private law were paralleled by the adoption of special laws (Product Liability Law [1994], Consumer Credit Law [1994 and 2003]<sup>22</sup>, Package Travel Law [1994]<sup>23</sup> and Product Security Law [2010]<sup>24 25</sup>), as well as through amendments of the pre-existing Federal Act against Unfair Competition<sup>26</sup> (hereafter: UCA, which initially entered into force in 1945, the current version dating, however, from 1988; see art. 3 UCA [unfair and misleading commercial practices] and art. 8 UCA [control of unfair terms<sup>27</sup>]). Finally, a right to withdraw from insurance contracts within 14 days was also very recently (2022) adopted (art. 2 a and 2 b Insurance Contract Law<sup>28</sup>).

### b) Procedural Law: An Individualistic Approach

In the event of a civil dispute, (some) procedural protection is offered to the consumer by the Swiss Code of Civil Procedure<sup>29</sup> (hereafter: SCCP). This protection manifests itself in the form of a right to a *forum* at the consumer's domicile (art. 32 SCCP [jurisdiction for domestic disputes concerning consumer contracts]; see also arts. 114 and 120 Federal Act on Private International Law<sup>30</sup> for the jurisdiction and law

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

59

applicable to consumer contracts under private international law<sup>31</sup>). The condition for the consumer to benefit from this forum is that the contract concerns "ordinary consumption" ("*Leistung des üblichen Verbrauchs*" "*prestation de consommation courante*"), which is a Swiss specificity. One of its important practical functions is to limit consumer protection to situations where a particular need for social protection is identified.<sup>32</sup> In addition, a summary procedure can apply in so-called clear cases (art. 257 SCCP) as well as a simplified procedure if the value in dispute does not exceed CHF 30'000 (art. 243 SCCP). If the amount does not exceed CHF 2'000, the conciliation authority may decide on the merits, if the plaintiff so requests (art. 212 SCCP).

However, the approach to dispute resolution remains individualistic: there is no real and effective mechanism of collective redress for consumers in civil proceedings.<sup>33</sup> In the context of the Dieselgate, for example, a judgment of the Swiss Federal Supreme Court 4A\_43/2020 of 16 July 2020 denied the Foundation for Consumer protection ("*Stiftung for Konsumentenschutz*"<sup>34</sup>) the capacity to sue VW and the general car importer in Switzerland. The foundation's civil action had been filed in connection with the compensation claim ("*Schadenersatz*") on behalf of 6'000 buyers who had assigned their right to compensation to the foundation. The main argument of the Supreme Court was that the claim for compensation was not covered by the foundation's statutes, which had to be interpreted strictly (and therefore even if the stated purpose was to safeguard the interests of consumers).<sup>35</sup> After difficulties in introducing a regulation on collective redress in 2020<sup>36</sup>, the Federal Council nevertheless presented new proposals on 10 December 2021 to strengthen the protection of consumer's collective interests, the concrete outcome of which is still to be determined.<sup>37</sup> Indeed, on 24 June 2022, the Legal Affairs Committee of the National Council has decided to postpone its decision on the Federal Council's proposals and has instructed the relevant Department to carry out further investigations. It is not expected that the Legal Affairs Committee will resume its examination of the propositions before the second quarter of 2023.<sup>38</sup>

### 3. Sustainable Development and Circular Economy

In the 1999 Constitution, the principles of sustainable development and conservation of resources were expressly elevated to the status of goals of the Confederation.<sup>39</sup> Art. 2 paras 2 and 4 Cst. read as follows:

[...] 2 It [the Swiss Confederation] shall promote the common welfare, sustainable development, internal cohesion, and cultural diversity of the country. [...] 4 It is committed to the long-term preservation of natural resources and to a just and peaceful international order.

#### a) Absence of Specific Provision on Circular Economy

In addition to art. 2 Cst., there are further constitutional references to "sustainable development" in the areas of Environment and Spatial Planning (art. 73 Cst.<sup>40</sup>), Energy policy (art. 89 Cst.<sup>41</sup>), Agriculture (art. 104 Cst.) and Food security (art. 104a Cst.). These are guiding principles, which must be translated into law.<sup>42</sup> Sustainability is, for example, mentioned in the Federal Act on the Protection of the Environment (hereafter: EPA; see art. 1, 29 a, 29 f and 32 a EPA). This (public)

law is nevertheless considered a central framework act for environmental protection that encompasses the protection of natural resources.<sup>43</sup> Art. 30 EPA also states that “*waste must be recovered where possible*” and art. 30 a litt. a EPA mentions that “*the Federal Council may prohibit placing products intended for once-only, short-term use on the market if the benefits of such use do not justify the harm to the environment that they cause*”.

However, Switzerland has to date no specific constitutional provision for the implementation of a circular economy. In 2016, Swiss citizens rejected by 63.6 % the Green Party’s initiative “For a sustainable and resource-efficient economy”, which aimed to create an explicit constitutional basis for an economy that does not make excessive demands on natural resources and promotes the closure of material life cycles.<sup>44</sup> Still, art. 74 Cst. recognizes the broad competence of the Confederation in environmental protection. In combination with art. 2 and art. 73 Cst., this provision can thus be seen as an anchor for the circular economy (mainly also in connection with waste law).<sup>45</sup>

## b) Endorsement of the Circular Economy

In line with the usual, rather non-interventionist approach of the Swiss legislator, the Federal Council has until recently indicated that it relied primarily on the responsibility of

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

60

companies to contribute to the preservation of resources by applying appropriate business models.<sup>46</sup> Important private initiatives such as Circular Economy Switzerland, Go for Impact, the resources triologue, ECOS and öbu (an association for sustainable management) can be mentioned here.<sup>47</sup> In recent years, different initiatives and policy interventions have been carried out to achieve through “hard law” the implementation of a more circular economy (e. g. better availability of spare parts, improvement and identification of product repairability, development of the circular economy, incentives that can support business models based on circular use).<sup>48</sup> However, the motions for a better availability of spare parts and improvement and identification of product repairability were closed on 17 December 2021 because the Swiss National Council did not complete their review within two years. The other initiatives are still ongoing.

On 16 February 2022, the Federal Council also expressly stated that it wanted to promote the circular economy. A central element here is to extend the lifespan of products to preserve natural resources. Repairing, reusing and sharing products can be seen as promising approaches in this regard.<sup>49</sup> Moreover, the federal Government declared “*its aim to transition to a resource-saving, sustainable economy which fulfils its responsibilities along the entire value chain*” and that “*It is a challenge it intends to tackle in partnership with the private sector*”.<sup>50</sup> In addition, it has noted that traditional environmental protection measures are now insufficient to ensure the well-being of current and future generations.<sup>51</sup> These measures will thus have to be complemented by “*policies designed to preserve these resources and use them efficiently*” and “*such policies must look at the entire resource life cycle and promote what is known as the circular economy*”.<sup>52</sup> The use of secondary materials is also seen as a way to increase Switzerland’s resilience by mitigating the risk of cross-border supply interruptions or sudden price fluctuations.<sup>53</sup>

These intentions are likely to have an impact on the way contract and consumer law is perceived from the perspective of environmental sustainability and the circular economy. This leads us a “sustainability check” of current Swiss consumer Law (III).

## III. “Sustainability Check” of Swiss Consumer Law

## 1. Preliminary Remarks

*What do we mean by "sustainability check" of Swiss consumer law? What is the benchmark in this respect?*

Since the 1980s waste treatment and recycling have developed in a significant way in Switzerland. However, the country (still) consumes a large amount of raw materials and ranks among the top OECD countries in terms of urban waste.<sup>54</sup> Each year, Switzerland generates from 80 to 90 million tons of waste and the trend continues to grow.<sup>55</sup> According to a study by the NGO Oceancare, each Swiss citizen produces an average of 95 kg of plastic waste per year.<sup>56</sup> Moreover, according to the Global E-Waste Statistics Partnership, the country ranks third in the world's largest producers of e-waste per capita, with no less than 23.4 kilos per person in 2019, with an E-waste collection rate of 63% for 2017.<sup>57</sup> On a global scale, these values seem strongly correlated to the GDP per capita of a given country: the more money an individual has, the more he or she regularly buys new products. In this respect, Switzerland should undoubtedly do more to prevent, or at least significantly reduce the amount of waste generated, especially also e-waste.<sup>58</sup> Based on the current EPA, a federal ban on single-use plastics would constitute a first and welcomed step. This would standardise this ban at the Swiss level and symbolically point out the importance of gradually moving away from the throwaway society. Moreover, obviously from Switzerland's perspective too, encouraging repair rather than replacement would reduce the high global demand for raw materials and moderate the human and environmental externalities created by their extraction.<sup>59</sup>

Various regulatory strategies, previously identified and systematized from the specific perspective of combating premature product obsolescence (see also section III.2.3), can be mentioned here: resisting through durability, postponing through maintenance and upgrades, reversing through direct reuse, repair, refurbishment and remanufacturing, as well as reducing the environmental impact of products through recycling.<sup>60</sup> Through a "sustainability check", this article sheds

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

61

some light on the extent to which Swiss law applies – or fails to apply – some of these important considerations through consumer law.<sup>61</sup> Where appropriate, we will mention related political developments. Ultimately, the aim is to present how environmental sustainability as one of the three pillars of "sustainability"<sup>62</sup> is currently implemented. To do so, this article looks at sales law (2), information requirements and beyond (3), as well as the right of withdrawal (4).

## 2. Sales law

### a) A Neutral Approach

The sales contract is governed by art. 184 ff. CO.<sup>63</sup> These provisions do not make a fundamental distinction between B2C sales and other sales<sup>64</sup>, which can be seen as an important feature of the conception of Swiss sales law ("one size fits all model"<sup>65</sup>). This situation may be perceived negatively. However, it offers an opportunity for EU lawyers to assess sales law differently from a comparative perspective. For example, with the exception of art. 210 para 4 CO (for further details see section III.2.2.b), it saves the legal interpreter from some practical difficulties that may arise in distinguishing between the private and professional use of the good when determining the applicable rules. In contrast to EU sales law, however, environmental sustainability and circular economy considerations are essentially absent from Swiss sales law, which offers limited consumer protection in any event.<sup>66</sup>

### b) Elements

**ba) Remedies**

In claims for breach of legal warranty, the buyer may sue either to rescind the contract of sale (*actio redhibitoria*) or to have the sale price reduced (*actio minoratoria*) by way of compensation for the decrease in the object's value (art. 205 para 1 CO). However, rescission is excluded where it is not justified by the circumstances (art. 205 para 2 CO) and price reduction is excluded when the loss of value due to the defect is equal to or greater than the selling price (art. 205 para 3 CO).<sup>67</sup> For example, in a recent decision of the Geneva court of first instance rendered in the context of Dieselgate, the Swiss importer of a car was condemned to return the sale price to the buyer (CHF 36'800), after deduction of an indemnity for the use of the car (CHF 24'338.40), on the condition that the buyer return the vehicle (art. 208 CO). The buyers' lawsuit followed the rescission of the contract by the buyer on the ground that the vehicle still had a serious defect after the disputed software was updated.<sup>68</sup> It is also interesting to note here that the alternative remedy of price reduction can be a sustainable remedy "if a good lacking conformity still offers some functionality, if the consumer continues to use this good and if he refrains from any substitute consumption (like purchasing the same type of good again)".<sup>69</sup> In this regard, leaving aside possible procedural obstacles, some "sustainability potential" is already present in Swiss sales law.

That said, there is no legal right to repair for the buyer in Switzerland.<sup>70</sup> When it is designed as a primary legal remedy, a right to repair is recognised to promote environmental sustainability and the circular economy.<sup>71</sup> In a system of mass distribution, the sales contract has thus a significant potential to regulate the production, development, and consumption of durable goods, including digital goods and circular economy.<sup>72</sup> From a Swiss perspective, it should be borne in mind that a right to repair is often contractually provided for<sup>73</sup> in contracts of sale, making the case for enshrining current practice into law.

**bb) Limitation Period**

An action for breach of warranty of quality and fitness prescribes two years after delivery of the moveable good to the buyer, even if the buyer does not discover the defects until later, unless the seller has assumed liability under warranty for a longer period (art. 210 para 1 CO). Before 1 January 2013, this period was only one year. To strengthen consumer protection, this period was then extended to two years.<sup>74</sup> There are, however, no longer lasting or product-specific legal guarantee periods.<sup>75</sup>

Despite the "one size fits all model", art. 210 para 4 CO nevertheless envisages B2C sales specifically, albeit in the limited context of the nullity of the reduction of the default two-year<sup>76</sup> limitation period for an action in case of a defect. An extension of the warranty period is possible, however, within the ten-year limitation period of art. 127 CO.<sup>77</sup> The law therefore offers the parties the possibility of arranging limitation periods that are longer than the statutory two-year period (art. 210 para 1 CO). However, and this may rightly

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland(EuCML 2023, 57)

62

be surprising, the remedies of the consumer can still be excluded altogether within the limits of art. 199 CO (fraudulent concealment of the defect by the seller) and art. 8 UCA (unfair terms).<sup>78</sup> This can be seen as an important negative point for consumer<sup>79</sup> and environmental protection. Indeed, the very existence of a legal remedy in case of a defect most likely leads to a longer lifespan of the product because this usually incentivises the liable party to ensure that the product lasts at least for the duration of the limitation period.<sup>80</sup>

**bc) Notification of the Defect and Burden of Proof**

Swiss sales law is generally criticized for its complexity and formalism.<sup>81</sup> The buyer must for example inspect the purchased object “as soon as feasible” and notify the default immediately without delay usually seven days. However, the time frame is shorter if the defect is such that there is a risk that waiting may lead to greater damage (see art. 201 para 1 CO).<sup>82</sup> Should the buyer fail to do so, the purchased object is deemed accepted, except in the case of defects that would not be revealed by a usual inspection (art. 201 para 2 CO). Where such defects come to light subsequently (“hidden defect”), the seller must also be notified immediately, otherwise the object is deemed to have been accepted even in connection with those hidden defects (art. 201 para 3 CO).

In Swiss law, there is no presumption concerning a lack of conformity which becomes apparent within one year from the time the goods were delivered (as per art. 11 para 1 Directive 2019/771). Therefore, no specific reversal of the burden of proof applies in favour of the consumer, who essentially bears the full burden of proving the defect if the goods have been accepted.<sup>83</sup> A reversal of the burden of proof during a certain period after the purchase as is the case in EU law could contribute to combating premature obsolescence (see also section III.2.3), as it is then assumed that the goods are functional at least during the relevant period.<sup>84</sup>

**c) Premature Obsolescence****ca) General Aspects**

As this is still the case in many other countries – with the notable exception of France, it seems<sup>85</sup> – Swiss law does not contain a specific provision on premature obsolescence either.<sup>86</sup> The traditional contractual remedies (i. a. defects of consent, guarantees) and those based on the UCA are, however, rather ineffective in tackling this phenomenon.<sup>87</sup> In particular, art. 3 para 1 litt. b<sup>88</sup> and art. 3 para 1 litt. i<sup>89</sup> UCA do not seem to be able to combat it effectively. For example, a cantonal court has ruled that the fact that the seller subsequently and publicly acknowledged a problem with the batteries of certain models of telephones did not necessarily imply that consumers had been misled.<sup>90</sup>

As mentioned (see section III.2.2.a), there is also no legal right to repair for the consumer – and more generally the buyer – in case of defect of the purchased good. Therefore, the right to repair is also not considered a primary remedy either.<sup>91</sup> However, commercial practice and the general terms and conditions of sellers often provide for a contractual right to repair (see also section III.2.2.a); it remains voluntary though. Furthermore, there is no specific legal obligation to update goods with digital elements or in the context of the supply of digital content and digital services<sup>92</sup> which could, however, help curb technological obsolescence.<sup>93</sup> Moreover, although theoretically possible for customers and consumer associations (see art. 10 UCA), collective redress is (very) limited in general and especially in cases of premature obsolescence.<sup>94</sup>

**cb) Political Perspectives**

Various political initiatives have been tabled to evaluate a possible reform of sales law and to address the issue of premature obsolescence in Switzerland. In September 2021, the Federal Council was mandated to present a report outlining the legislative and regulatory changes needed to allow for the legal sanctioning of intentional or fraudulent shortening of a product’s lifespan.<sup>95</sup> In December 2021, a Swiss parliamentary representative called for the introduction of a legal right to

repair for consumers.<sup>96</sup> Another parliamentary initiative aimed to reverse the burden of proof in the case of a

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

63

defect<sup>97</sup> while another sought to extend the guarantee period from the current two years (art. 210 para 1 CO) to five years.<sup>98</sup> The concrete legislative outcome remains to be seen but they could prove positive for both consumer protection and environmental sustainability.

In addition, federal offices are carrying out an overall analysis of the modernization of warranty law.<sup>99</sup> In this respect, a cost-benefit analysis of various measures is being prepared, including a time-limited reversal of the burden of proof for the buyer and an extension of the warranty period.<sup>100</sup> These measures could help to combat the phenomenon of premature obsolescence, although it should be borne in mind that this is a complex issue that requires a multi-layered legal approach (e. g. ecodesign, contract law and fight against unfair competition).<sup>101</sup>

### 3. Information Requirements and beyond

#### a) A Measured Use of Information Obligations

As a principle, apart from good faith (art. 2 Swiss Civil Code) and specific information obligations under sectoral consumer legislation<sup>102</sup>, there is no pre-contractual "material" information obligation in Swiss contract law, especially for B2C contracts.<sup>103</sup> Consequently, there is also no specific legal provision on sustainability information<sup>104</sup>, in particular the degree of repairability of a good.<sup>105</sup>

More generally, the Swiss legislator is rather reluctant to adopt legal information obligations, preferring to leave the voluntary initiative to the private sector. The abovementioned ConsumIA is not considered to be particularly suitable for setting mandatory information requirements.<sup>106</sup> Indeed, implementation of objective information to consumers through regulations on declarations relating to goods and services is primarily the responsibility of businesses and consumer organisations. The Federal Council has only a subsidiary role to regulate the declaration procedure by ordinance<sup>107</sup> if no private agreement has been reached within a reasonable time or if such an agreement is not satisfactorily complied with (art. 3 and 4 ConsumIA).<sup>108</sup> From the point of view of achieving environmental sustainability in consumer law, this legal situation eventually implies also taking into consideration complementary legal rules, such as ecodesign rules.<sup>109</sup>

#### b) Towards an Incremental Importance of Ecodesign Rules?

Observers note that relying and focusing only on information will often not be sufficient to achieve environmental sustainability<sup>110</sup>, as the main impact of a product occurs at the design stage. In other words, the product *itself* must be sustainable.<sup>111</sup> The limitation and emphasis on information obligations can thus be seen as a classic "act on the cause rather than on the effects" consideration, which is not fully addressed by mere information on sustainability (however well adapted<sup>112</sup>). The information must therefore often be complemented by ecodesign rules, which the EU also intends to address, by extending the scope of these requirements to the widest possible range of products.<sup>113</sup> Furthermore, as a reminder of the need to (re)unite consumer law and environmental law, information requirements alone do not guarantee a minimal consumer protection level, even if they steer consumers to more sustainable goods and services.<sup>114</sup>

Especially from the perspective of sales law, the existence of ecodesign rules raises the question of the relationship between these standards and the provisions on the seller's liability for a defect. In other words, how do ecodesign requirements (if any) affect the conformity of a given good from a contractual and environmental sustainability perspective? In contrast to EU law, Swiss law does not

explicitly provide for the criterion of “durability” as an objective requirement.<sup>115</sup> Moreover, the concept of “non-conformity” has primarily a subjective meaning, in the sense that what matters first is the

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

64

conformity of the good delivered with the good agreed upon by the parties.<sup>116</sup> However, it does not seem inconceivable that, via the criterion of the expected quality (“*vorausgesetzte Eigenschaft*”, “*qualité attendue*”) of the good<sup>117</sup>, durability or reparability considerations based on relevant ecodesign rules, could gradually flow into the assessment of its defectiveness. Indeed, linking ecodesign e. g. durability standards to individually, product-specific, determined limitation periods (Finland and the Netherlands have such flexible periods) should allow the latter to evolve and adapt more quickly, also from the perspective of the expected quality of a given consumer product.<sup>118</sup>

Such a “heteronomous” influence is potentially not without impact on substantive private law, insofar as the seller’s liability for the guarantee against defects would then eventually be objectified, even “imposed” by public law standards (at least in the hypothesis of the absence of a voluntary agreement on ecodesign on the producer’s side).<sup>119</sup> Under Swiss law, a defect can, however, also affect the legal quality of the good, this being the case if the good does not correspond to the legal requirements or does not allow the buyer to take full advantage of it (e. g. if it does not comply with administrative requirements).<sup>120</sup> In this respect, the aforementioned judgment of the court of first instance of Geneva in connection with Dieselgate (see section III.2.2.a), ruled that the vehicle returned to the buyer after updating the incriminating software was still defective. This was the case because the car did not comply with the antipollution EU5 standard. Therefore, it was unfit for use. The court ruled that this justified the rescission of the contract of sale, with the deduction of a customary indemnity.<sup>121</sup>

### c) Green Claims and Fight Against Greenwashing

#### ca) General Aspects

Under Swiss law, given a certain reluctance to impose legal information obligations to contractual parties, as seen above (see section III.3.1), there are also no specific provisions or effective procedural enforcement against greenwashing in consumer law and the UCA.<sup>122</sup> However, the UCA contains statutory provisions that oversee voluntary commercial disclosures to ensure that they are “correct”, i. e. that they do not mislead consumers<sup>123</sup> Depending on the circumstances, they may be relevant to environmental claims in B2C, and even B2B relationships. Indeed, with the exception of art. 8 LCD on unfair terms, the scope of application of the UCA is not limited to B2C contracts. This can be seen as a further materialisation of a “one size fits all model” (for sales law, see section III.2).

In concrete terms, art. 3 para 1 litt. b UCA and art. 3 para 1 litt. i UCA<sup>124</sup> could for instance be considered in the case of misleading environmental claims on the supply side (in relation to premature obsolescence, see section III.2.3).<sup>125</sup> From the point of view of legal application and the principle of *nullum crimen, nulla poena sine lege*<sup>126</sup>, however, the challenge lies in relying on measurable criteria such as the lifetime of a product or hours of operation to assess the accuracy of commercial statements at the advertising and marketing stage.<sup>127</sup> Furthermore, how can the actual impact and overall externalities associated with the design, production and marketing of a given product be “correctly” assessed, especially when it is advertised and described as environmentally responsible or with a low environmental impact? Similarly, it has been argued that claims relating

to repairability, and circularity of a product have yet to be legally substantiated and may not currently be considered as measurable claims under UCA.<sup>128</sup>

### cb) Political Perspectives

As with premature obsolescence (see section III.2.3), there have been policy developments in recent years related to green claims and the fight against greenwashing. Their results are not always positive from a consumer and environmental protection point of view. For example, in a 2014 draft revision of the EPA, the Federal Council proposed to adopt an article 35 d EPA on environmental product information, which would have allowed it to enact provisions similar to international requirements to require manufacturers, importers and sellers of products whose manufacture, use or disposal significantly harms the environment to inform consumers of the environmental impact caused.<sup>129</sup> However, it was rejected by the Parliament.<sup>130</sup> More recently, the Federal Council was invited to make extensive use of the “Retained Environmental Value” (hereafter: REV) indicator to assess the environmental sustainability of circular economy and of individual products. The proposal was welcomed by the Swiss National Council. The Federal Council also shares the view expressed in it and has announced that it will deal with it in a forthcoming report. This REV would integrate the whole life cycle of products as well as the quality aspects of

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

65

materials.<sup>131</sup> Another proposal from June 2020 aimed to introduce a unified reference system based on the “Product Environmental Footprint” (PEF).<sup>132</sup> While noting that environmental labelling of products “*seems a promising approach*”, the Federal Council nevertheless proposed to reject the postulate. The main reason for this was, however, that it did not believe that an additional report would add any value given other related work in progress. This proposal was then eventually closed in June 2022 because the Swiss National Council did not complete its review within two years.

In any case, these and other initiatives<sup>133</sup> demonstrate that it is probably only a matter of time before more precise environmental benchmarks become available, which in turn could have an impact on the application of possible UCA provisions on green claims and the fight against greenwashing. That said, in June 2021, a parliamentary initiative entitled “Stop advertising greenwashing” proposed to amend art. 3 para 1 litt. i UCA to expressly extend the deception of the customer to the carbon footprint or neutrality of a product and to sanction the concealment of its dangers and climate impact.<sup>134</sup> On February 3rd, 2022, a narrow majority (13 to 8, with 2 abstentions) of the members of the Legal Affairs Committee of the National Council proposed to reject this parliamentary initiative<sup>135</sup> once again defeating – or at least postponing – any positive development and reinforcement of protection against green claims. One of the arguments put forward was that such a ban would be difficult to enforce as determining whether a given product can be presented as climate-neutral or environmentally friendly would create a significant administrative burden. The current legal *status quo* therefore remains.

### 4. Right of Withdrawal

If the contract qualifies as a doorstep selling agreement, the consumer benefits from a right to withdraw from the contract (art. 40 a ff CO). This right is not systematically included in the provisions on the sales contract but in the context of the general “Obligations arising by Contract” (art. 1 to 40 f CO). Furthermore, if the contract qualifies as a consumer credit contract, the consumer has a right of withdrawal under this sectoral law (art. 16 Consumer Credit Law).

An important difference between EU consumer law and its Swiss counterpart is the absence, in the latter, of a (legal) right of withdrawal for domestic sales made in the context of e-commerce. The Swiss provisions on revocation in door-to-door sales and similar contracts (art. 40 a ff CO) only offer the consumer the possibility to revoke his offer to enter a contract or his acceptance of such an offer if the transaction was proposed by telephone or by a comparable means of simultaneous verbal communication (art. 40 b litt. d CO).<sup>136</sup>A legal situation which, through the traditional prism of consumer protection, illustrates a gap in protection may prove that Swiss law is more sustainable, or at least more flexible in addressing sustainability in this context.<sup>137</sup> Indeed, recent discussions in the EU<sup>138</sup> and some Member States<sup>139</sup> on the environmental adequacy of maintaining the right of withdrawal in e-commerce (taking into account environmental externalities such as failed deliveries, traffic congestion, possible excess packaging and waste from returns that are not reused or remanufactured)<sup>140</sup> would not be so immediately relevant for Switzerland. The same applies to the question of abolishing the mandatory nature of the right of withdrawal in e-commerce for such reasons, which is a non-issue under Swiss Law.

However, an associated issue that may be relevant from both the point of view of EU and Swiss law is whether to prohibit free returns offered by sellers on a contractual basis<sup>141</sup> for sustainability reasons.<sup>142</sup> The Federal Council has rejected the introduction of a minimum return fee and expects e-commerce companies to describe their products and sizes as well as possible to reduce returns due to incorrect sizes or incomplete infor-

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

66

mation.<sup>143</sup> Other measures could include the use of specific technologies such as virtual dressing rooms<sup>144</sup> to allow consumers to “try on” fashion items such as clothes<sup>145</sup> or explicitly stating that consumers must exercise their right in good faith.<sup>146</sup> Stimulating – for example through nudging in a digital context – sustainable delivery and return options may also provide further improvements when considering the right of withdrawal from an environmental sustainability perspective.<sup>147</sup>

#### IV. Conclusion

In terms of environmental sustainability, circular economy and recycling, Swiss law has since the 1980s focused mainly on waste management aspects. However, there is still much room for development from the perspective of consumer law despite some change being on the way in Switzerland as it is in other EU countries.

As seen above (see section III.2.3), an overall analysis of the modernization of warranty law is being conducted, which also includes aspects of premature obsolescence. This initiative has recently led to a comparative law and regulatory assessment on the modernization of warranty law (May 2022). However, the concrete legislative outcome for Swiss sales law (as well as for consumer protection in general) remains to be seen. In parallel, other studies related to the circular economy and with a possible effect on private law have also been undertaken, such as on a register to facilitate use-based business models in the field of land ownership (August 2022)<sup>148</sup> and on a register for moveable property in the field of circular economy (December 2022).<sup>149</sup>

From a European lawyer’s point of view, some developments in Switzerland are worthy of notice. Although the right to repair is not legally provided for in Swiss sales law, the potential explicit adoption of such a right in the CO through a modernization of warranty law could immediately be extended to all contracts, i. e. not only B2C contracts. Because Swiss law essentially followed its own hybrid approach of consumer law in relation to general private law, Swiss law can usually be less stringent than EU consumer law can be. This may be an advantage in addressing some of the

challenges of the climate crisis with greater legal coherence (i. e. without the need to focus on how or where to implement sector-specific consumer protection legislation in national law).

Furthermore, it often avoids having to distinguish between the private or professional purpose of the good(s) acquired, which can pose unnecessary problems of delineation in practice from an environmental sustainability perspective. However, a “one size fits all” approach is unlikely to overcome the adoption of flexible, i. e. product-specific, guarantee periods if Switzerland wants to implement and promote sustainable consumption especially through sales law.

Conversely, the absence of a legal right of withdrawal in B2C e-commerce transactions in Switzerland implies that difficulties that may be encountered in the EU in trying to limit the availability of the right of withdrawal for ecological reasons (e. g. denying the right in certain situations to combat externalities such as pollution and waste accumulation originating from compulsive buyer behaviour and improper reuse of returned goods) can likely be bypassed. Swiss consumers will at least not have to experience a legal “step backwards” and an “undermining” of the substance and principle of such right (although prohibiting e. g. free return would presumably be perceived rather negatively by both businesses and consumers as an undue restriction of their private autonomy). In any event, it should also be borne in mind that the determination of the actual environmental impact of e-commerce – and hence also of a B2C right of withdrawal in such context – compared to traditional trade ultimately depends on multiple factors (e. g. transportation means used by “traditional” customers or energy-impact of stores).<sup>150</sup>

Furthermore, it remains interesting to keep an eye on the legal solutions that may be adopted by the Swiss Confederation, as the country already has a completely unified private law system in operation between different linguistic and cultural communities, which also covers consumer protection. As a non-EU Member State, Switzerland is not bound by the “maximum harmonization standard paradigm” that is in vogue in EU legislation.<sup>151</sup> The completion of the EU internal market is not, as such, an objective of Swiss consumer law. This situation may again allow for greater flexibility and hindsight on solutions taken by the EU and does not imply legal balancing acts to maintain national competence over (secondary) EU law on certain aspects covered, or not, by directives.

Nevertheless, the Swiss legislative process is not necessarily faster or more efficient and consistent in dealing with pressing issues in practice, and those involving environmental sustainability and consumer protection are no exceptions. In any event, Switzerland often sides with the adoption of EU solutions because of its particular geographical, economic and political position towards the EU. Legal developments regarding environmental sustainability, circular economy and consumer law are therefore likely to follow suit, at least to some extent. However, for the same reasons, it seems rather unlikely – though desirable with its unique position in Europe – that the country will pioneer the realisation of the circular economy and environmental sustainability through the adoption of legal rules at the level of consumer law.

Referring also to the latest EU developments, a current legislative proposal (draft act) in fact envisages anchoring important concepts relating to environmental sustainability and the circular economy in the EPA, particularly with regard to the lifespan and reparability of products.<sup>152</sup> The latter act is, however, a

Hug: Sustainability, Circular Economy and Consumer Law in Switzerland (EuCML 2023, 57)

67

public law text. At least at this stage, this choice seems to imply the maintenance in Switzerland of a certain “silo approach” in relation to general private law and consumer law on the one hand, and environmental protection on the other. However, especially sales law cannot (any longer) afford to

act in a vacuum totally detached from external conditions, and these aspects also become increasingly interconnected (think here e. g. of the possible impact of ecodesign rules on the assessment of the "ordinary" life and reparability of a product from a sales law perspective, see section III.3.2). In turn, this promises to bring many fundamental and exciting questions for lawyers to discuss, that are also necessary for society to be addressed.

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<sup>1</sup> Bundesamt für Raumentwicklung, 'Die Schweiz auf dem Weg zur Agenda 2030 für nachhaltige Entwicklung' (*DETEC Press Release*, 18 December 2018) <<https://www.uvek.admin.ch/uvek/de/home/uvek/medien/medienmitteilungen.msg-id-73462.html>> accessed 31 January 2023. See also Sebastian Heselhaus, *Rechtsvergleich bestehender rechtlicher Massnahmen in der Europäischen Union und ausgewählten Staaten sowie der Schweiz zur Förderung der Kreislaufwirtschaft im Konsumbereich* (Gutachten Bundesamt für Umwelt, 2020) 17.

<sup>2</sup> For further details, A Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 *Archiv für die civilistische Praxis* 717, 749-762.

<sup>3</sup> In relation to the 2018 New Deal for Consumers, M Grochowski, 'European Consumer Law after the New Deal: A Tryptich' (2020) 39 *Yearbook of European Law* (OUP 2020) 387, 393.

<sup>4</sup> V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) 43 *Journal of Consumer Policy* 227, 234. See also B Keirsbilck and S Rousseau, 'The Marketing Stage: Fostering Sustainable Consumption Choices' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 93, 99.

<sup>5</sup> Halfmeier (n 2) 750.

<sup>6</sup> For notable exceptions, L Krämer, 'On the Interrelation Between Consumer and Environmental Policies in the European Community' (1993) 16 *Journal of Consumer Policy* 455; C Kye, 'Environmental Law and the Consumer in the European Union' (1995) 7 *Journal of Environmental Law* 31; K Tonner, 'Consumer protection and environmental protection: Contradictions and suggested steps towards integration' (2000) 23 *Journal of Consumer Policy* 63.

<sup>7</sup> Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2022: Synthesis Report' (Assessment Report 6, 2022) <<https://www.ipcc.ch/report/sixth-assessment-report-cycle/>> and IPCC, 'Climate Change 2021: The Physical Science Basis' (Assessment Report 6, 2021) <<https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>> both accessed 31 January 2023.

<sup>8</sup> Grochowski (n 3) 392 and 393.

<sup>9</sup> Halfmeier (n 2) 748; M Durovic and F Lech, 'International and Transnational Consumer Law on Sustainable Consumption', in A Do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption – The Right to a Healthy Environment* (Springer 2020) 13; H-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 323, 335.

<sup>10</sup> European Commission (EC), 'The European Green Deal' COM(2019) 640 final.

<sup>11</sup> EC, 'Circular Economy Action Plan – For a cleaner and more competitive Europe' COM(2020) 98 final.

<sup>12</sup> For a detailed presentation of Swiss consumer law, H Heiss and L D Loacker (eds), *Grundfragen des Konsumentenrechts* (Schulthess 2020). On the systematic approach of Swiss consumer law, D

Hug, *La formation du contrat de consommation: Entre régime général et approche sectorielle – analyse et perspectives en droit suisse* (Helbing Lichtenhahn 2020) para 2141 ff.

<sup>13</sup> In 2021, Switzerland's merchandise trade volume with the EU represented 57.70 % of the total volume of Swiss merchandise trade (exportations CH-EU for 130.26 billion Swiss francs, importations EU-CH for 135.81 billion swiss francs), <[https://www.eda.admin.ch/dam/europa/fr/documents/faq/schweiz-eu-in-zahlen\\_fr.pdf](https://www.eda.admin.ch/dam/europa/fr/documents/faq/schweiz-eu-in-zahlen_fr.pdf)> accessed 31 January 2023.

<sup>14</sup> A Morin, 'L'influence du droit européen sur le droit privé suisse de la consommation' in O Lauren and P-F Vuillemin (eds), *Le droit de la consommation dans son contexte économique* (CEDIDAC 2009) 17.

<sup>15</sup> Swiss Federal Sheet 1993 I 757 (following the rejection of the European Economic Area which froze Switzerland's EU application). For further details, E Kohler, *Le rôle du droit de l'Union européenne dans l'interprétation du droit suisse* (Stämpfli 2015).

<sup>16</sup> P Pichonnaz, 'art. 97' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 21.

<sup>17</sup> DFT 145 III 409, C. 5.2. (Leading Decisions of the Federal Supreme Court; German: BGE; French: ATF; Italian: DTF); DFT (BGE/ATF/DTF) 139 III 217, C. 2.1.3. and DFT (BGE/ATF/DTF) 129 III 335, C. 6. See also P Jung, 'Das Argument der Europakompatibilität im schweizerischen Privatrecht' (2010) ZSR 513 and T Probst, 'La jurisprudence de la Cour de justice des Communautés européennes: un nouveau défi pour la pratique juridique en droit privé Suisse' (2004) RJN 2004 13, 18, 25 and 36 f.

<sup>18</sup> For an overview of consumer protection in Swiss federal law before 1981 (dating back as far as the 1905 Food Act, Classified Compilation [hereafter: CC] 817.0), Swiss Federal Sheet 1986 II 360.

<sup>19</sup> Federal Act of 5 October 1990 on Information for Consumers (CC 944.0; "*Bundesgesetz über die Information der Konsumentinnen und Konsumenten*", "*Loi fédérale sur l'information des consommatrices et des consommateurs*").

<sup>20</sup> Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (CC 220: "*Obligationenrecht*", "*Code des obligations*").

<sup>21</sup> These dates refer to the year of entry into force.

<sup>22</sup> Federal Act of 23 March 2001 on Consumer Credit (CC 221.214.1; "*Bundesgesetz über den Konsumkredit*", "*Loi fédérale sur le crédit à la consommation*").

<sup>23</sup> Federal Act of 18 June 1993 on Package Travel (CC 944.3; "*Bundesgesetz über Pauschalreisen*", "*Loi fédérale sur les voyages à forfait*").

<sup>24</sup> Federal Act of 12 June 2009 on Product Safety (CC 930.11; "*Bundesgesetz über die Produktesicherheit*", "*Loi fédérale sur la sécurité des produits*").

<sup>25</sup> Federal Act of 18 June 1993 on Product Liability (CC 221.112.944; "*Bundesgesetz über die Produkthaftpflicht*", "*Loi fédérale sur la responsabilité du fait des produits*").

<sup>26</sup> Federal Act of 19 December 1986 against Unfair Competition (CC 241; "*Bundesgesetz gegen den unlauteren Wettbewerb*", "*Loi fédérale contre la concurrence déloyale*"). As opposed to Directive 2005/29/EU the scope of application is in principle not limited to B2C contracts (see however ftn 27).

<sup>27</sup> See D Frei and P Jung, 'Revised Control of Unfair Terms in Swiss Law – Consumer Protection by Competition Law?' (2015) 5 EuCML 165. Contrary to the general conception of UCA (see ftn 26 footnote), this provision currently limited to B2C contracts.

<sup>28</sup> Federal Act of 2 April 1908 on the Insurance Contract (CC 221.229.1; "*Bundesgesetz über den Versicherungsvertrag*", "*Loi fédérale sur le contrat d'assurance*").

<sup>29</sup> Federal Code of Civil Procedure of 19 December 2008 (CC 272; "*Zivilprozessordnung*", "*Code de procédure civile*").

<sup>30</sup> Federal Act of 18 December 1987 on Private International Law (CC 291; "*Bundesgesetz über das Internationale Privatrecht*", "*Loi fédérale sur le droit international privé*").

<sup>31</sup> Switzerland is a depository State of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see art. 15 of the Convention for jurisdiction over consumer contracts).

<sup>32</sup> Federal Supreme Court Decision 4A\_432/2007 from 8 February 2008, C. 4.3.2. (sale of a luxury car).

<sup>33</sup> For more details and nuances, D Hug, 'Le consommateur en procédure civile suisse', RJN 2018 15, 34 ff. See also, Pichonnaz (n 16) paras 28 ff.

<sup>34</sup> This foundation is a private law foundation pursuant to art. 80-89 c of the Swiss Civil Code. Especially, art. 3 of its statutes provides that its purpose is "*to safeguard the interests of the consumers*". See Federal Supreme Court Decision 4A\_43/2020 from 16 July 2020, C. A.a and 3.

<sup>35</sup> Federal Supreme Court Decision 4A\_43/2020 from 16 July 2020, C. 3.2.5.: "*Der Vorinstanz ist insgesamt keine Verletzung von Bundesrecht vorzuwerfen, wenn sie gestützt auf die Auslegung der Zweckumschreibung in Art. 3 der Stiftungsurkunde erwog, die Einreichung einer Klage zur gerichtlichen Durchsetzung von Tausenden von Schadenersatzforderungen einzelner Konsumenten aus ausservertraglicher Haftung sei vom konkreten Stiftungszweck nicht umfasst. Sie ging zudem zutreffend davon aus, dass es sich beim fraglichen Vorgehen, mit dem sich die Beschwerdeführerin als Inkassovehikel gerichtlich für eine Vielzahl abgetretener ausservertraglicher Schadenersatzforderungen betätigt, auch nicht um eine vorbereitende oder unterstützende Nebenhandlung handelt, die der Zweck mit sich bringen kann*".

<sup>36</sup> Swiss Federal Council, 'Zivilprozessordnung: Zugang zum Gericht soll leichter werden' (*Press release*, 26 February 2020)

<<https://www.admin.ch/gov/fr/accueil/documentation/communiqués/communiqués-conseil-federal.msg-id-78231.html>> accessed 31 January 2023.

<sup>37</sup> Swiss Federal Council, 'Bundesrat verabschiedet Vorlage zum kollektiven Rechtsschutz' (*Press release*, 10 December 2021)

<<https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-86344.html>> accessed 31 January 2023.

<sup>38</sup> Sekretariat der Kommissionen für Rechtsfragen, 'Kollektiver Rechtsschutz: zu viele offene Fragen zum heutigen Zeitpunkt' (*Press release*, 24 June 2022)

<<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20210082>> accessed 31 January 2023.

<sup>39</sup> A Papaux and V Martenet, 'art. 2' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 4.

<sup>40</sup> While art. 2 para 2 Cst. embodies a three-dimensional sustainability conception – social, economic, and environmental – art. 73 Cst. refers to purely ecological sustainability. Both refer, however, to an intergenerational perspective, R Mahaim 'art. 73' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 26.

<sup>41</sup> This provision contains an explicit mandate for the efficiency of resources in the field of energy, Heselhaus (n 1) 23.

<sup>42</sup> M Malzacher, 'Prémices de l'engagement fédéral en matière d'économie verte' in L Heckendorn Urscheler and K Topaz Druckman (eds), *Les difficultés économiques en droit*, (Schulthess Editions romandes 2015) 127, 130. For a detailed analysis of the justiciability of sustainable development, Mahaim (n 40) para 20 ff.

<sup>43</sup> A Griffel and H Rausch, 'art. 1' in Vereinigung für Umweltrecht (ed), *Kommentar zum Umweltschutzgesetz* (2nd edn, Schulthess Verlag 2011) para 6 ff. See also Heselhaus (n 1) 24.

<sup>44</sup> <<https://www.uvek.admin.ch/uvek/fr/home/detec/votations/initiative-populaire-economie-verte.html>> accessed 31 January 2023.

<sup>45</sup> Heselhaus (n 1) 22 ff.

46 Interpellation 20.4555, Marionna Schlatter, Fehlanreize zum Ersatz von funktionstüchtigen Handys (closed on 13 March 2021).

47 <<https://circular-economy-switzerland.ch/?lang=fr>> ; <<https://www.go-for-impact.ch/fr/>> ; <<http://www.ressourcentrialog.ch/>> ; <<https://ecos.ch/>> ; <<https://www.oebu.ch/>> all accessed 31 January 2023.

48 Motion 19.4595, Müller-Altermatt, Kreislaufwirtschaft: Bessere Verfügbarkeit von Ersatzteilen für Produkte (closed on 17 December 2021); Motion 19.4597, Birrer-Heimo, Kreislaufwirtschaft. Verbesserung und Kennzeichnung der Reparaturfreundlichkeit von Produkten (closed on 19 February 2020); Parliamentary Initiative 20.433, Committee on the Environment, Regional Planning and Energy CN, Développer l'économie circulaire en Suisse; Postulate 20.3062, Bourgeois, Prévention et valorisation des déchets à renforcer; Postulate 20.3090, Munz, Mehr Recycling statt Deponien von Baumaterialien; Postulate 22.3064, Wettstein, Kreislaufwirtschaft konkret. Schaffung von Anreizen für nutzenbasierte zirkuläre Geschäftsmodelle. See also Heselhaus (n 1) 24 ff.

49 Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

50 Swiss Confederation, Switzerland implements the 2030 Agenda for Sustainable Development (Switzerland's Country Report, 2018) 18 <<https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/die-umsetzung-der-agenda-2030-fur-nachhaltige-entwicklung-durch-.html>> accessed 31 January 2023.

51 Swiss Confederation, Switzerland implements the 2030 Agenda for Sustainable Development (Baseline assessment of Switzerland serving as a basis for the Country Report, 2018) 37, <<https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/die-umsetzung-der-agenda-2030-fur-nachhaltige-entwicklung-durch-.html>> accessed 31 January 2023.

52 Swiss Confederation (n 51) 37.

53 See the opinion of the Swiss Federal Council of 16 February 2022 in the context of the Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

54 In 2016, the recycling rate for urban waste was only 53 %, Swiss Confederation (n 50) 18 f. See also <<https://circular-economy-switzerland.ch/politique/?lang=fr>> accessed 31 January 2023.

55 Swiss Confederation (n 51) 67. Municipal solid waste is the second largest waste category in Switzerland (in 2020, 6.1 million tonnes of waste) after waste generated by construction activity (57 million tonnes). The quantity of waste per capita rose from 659 kg in 2000 to 700 kg in 2020, which makes Switzerland one of the highest waste producers in Europe, see Federal Office for the Environment, 'Raw materials, waste and the circular economy: In brief' <<https://www.bafu.admin.ch/bafu/en/home/topics/waste/in-brief.html>> accessed 31 January 2023.

56 <[https://www.oceancare.org/wp-content/uploads/2023/01/Factsheet-OceanCare\\_Plastik-in-der-Schweiz\\_2023.pdf](https://www.oceancare.org/wp-content/uploads/2023/01/Factsheet-OceanCare_Plastik-in-der-Schweiz_2023.pdf)> accessed 31 January 2023. Moreover, although the waste disposal functions quite well, around 14'000 tonnes of plastic are still being released into the environment in Switzerland, see Federal Office for the Environment (n 55).

57 <https://globalewaste.org/statistics/country/switzerland/2019/> accessed 31 January 2023. At present, 70 % of Switzerland's total waste volume is recycled, see Federal Office for the Environment (n 55).

58 Interpellation 20.4618, Friedl, Fast Weltmeister im Anfall von Elektroschrott (closed on 19 March 2021).

59 A Perzanowski, 'Consumer Perceptions of the Right to Repair' (2021) 96 Indiana Law Journal 361, 364 mentioning cobalt extraction in the Democratic Republic of Congo about 20 % of which is extracted by hand by people, including children as young as 6 years old, in often disastrous conditions.

60 A Michel, 'Premature Obsolescence: In Search of an Improved Legal Framework', thesis, KU Leuven and UCL Louvain, 2022, 75 ff.

61 For an in-depth analysis from the perspective of the sale of goods, Y M Atamer, 'Nachhaltigkeit und die Rolle des Kaufrechts: Eine rechtsvergleichende Übersicht zu den Regulierungsmöglichkeiten' (2022) 141 ZSR 285.

62 On the "*Drei-Säulen-Konzept*", A Hellgardt and V Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 Archiv für civilistische Praxis 164, 167-170. See also Halfmeier (n 2) 721-725 and Mahaim (n 40) para 15.

63 For a comparison of EU Sales law and Swiss law, Y M Atamer and S Hermidas, 'Die neue EU-Richtlinie zum Verbrauchsgüterkauf Regelung, Neuerung und mögliche Ausstrahlung auf das schweizerische Kaufrecht' (2020) 1 Aktuelle Juristische Praxis 48.

64 S Marchand, *Droit de la consommation – Le droit suisse à l'épreuve du droit européen* (Schulthess Editions romandes 2012) 187.

65 Atamer (n 61) 311.

66 For an in-depth analysis on the need for reform of Swiss sales law, Y M Atamer and M Eggen, 'Reformbedürftigkeit des schweizerischen Kaufrechts – eine Übersicht' (2017) 153 ZBJV 731.

67 S Venturi and M-N Zen-Ruffinen, 'art. 205' in L Thévenoz and F Werro (eds), *Commentaire romand du Code des obligations* (Helbing Lichtenhahn 2021) para 1.

68 Judgment JTPI/13464/2021 of the 19th chamber of the court of first instance of the Republic and Canton of Geneva of 21 October 2021, available here: <<https://avocats-route.ch/wp-content/uploads/2021/12/jugement-tribunal-geneve-contre-amag.pdf>> accessed 31 January 2023.

69 E Van Gool, Anaïs Michel, B Keirsbilck and E Terryn, *Public consultation as regards the Sustainable consumption of goods – promoting repair and reuse initiative*, submitted to the EC on 4th April 2022, 5f. The position paper is available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4211301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211301)> accessed 31 January 2023.

70 DFT (BGE/ATF/DTF) 95 II 119, C. 6.: "[...] *la garanzia dei difetti non conferisce all'acquirente un diritto alla riparazione dei vizi, quest'ultimo non potendo optare che tra l'azione redibitoria e l'azione estimatoria*". However, a right to repair is provided for the contract for work and services in the case of minor defects or only slight deviations from the contractual terms (art. 368 para 2 CO).

71 E Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 127, 128 f. See also K Van Acker, 'Technology for Circular Economy: A New Paradigm for the Way We Use Resources' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 21, 25.

72 K Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 28 ERPL 1207.

73 Marchand (n 64) 200; Venturi/Zen-Ruffinen (n 67) para 28.

74 Swiss Federal Sheet 2011 2699 and Swiss Federal Sheet 2011 3655.

75 On the impact of longer legal guarantee periods on the durability of the goods from the perspective of EU Sales law, E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 EuCML 136, 141.

76 Respectively less than one year in the case of a B2C sale of second-hand goods (art. 210 para 4 lit. a CO).

77 S Venturi and M-N Zen-Ruffinen, 'art. 197' in L Thévenoz and F Werro (eds), *Commentaire romand du Code des obligations* (Helbing Lichtenhahn 2021) para 8.

78 For further details, Y M Atamer and J Küng, 'Haftungsbegrenzung bei kaufvertraglicher Sachgewährleistung, Wie viel Freiheit braucht es?' (2021) 9 AJP 1093.

79 Critical, E A Kramer, 'Korrespondenz zum neuen Art. 210 Abs. 4 OR', recht 2013 52 and Marchand (n 64) 203 f. See also J Kren Kostkiewicz, 'art. 210' in J Kren Kostkiewicz and S Wolf (eds), *OR Kommentar Schweizerisches Obligationenrecht* (Orell Füssli Verlag AG 2016), para 11; P Pichonnaz, 'Les nouveaux délais de prescription de l'action en garantie (CO 371 et CO 210)' (2013)

109 SJZ 69, 75; P Tercier, L Bieri and B Carron, *Les contrats spéciaux* (Schulthess Verlag 2016) para 747.

80 On legal warranties as a quality incentive for the seller, H-B Schäfer and C Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn, Springer Gabler 2021) 578-579 with further references.

81 For further details, Y M Atamer and M Eggen, 'Reformbedürftigkeit des schweizerischen Kaufrechts – eine Übersicht' (2017) 153 ZBJV 731, 763-765. See also E A Kramer, 'Die konsumentenrechtliche Defizite des schweizerischen Kaufrechts vor dem Hintergrund der europäischen Rechtsentwicklung' (1998) JKR, 205 and Marchand (n 64) 193 ff.

82 Federal Supreme Court Decision 4A\_53/2012 from 31 July 2012, C. 6.2.

83 Heselhaus (n 1) 91 f.; H Honsell, 'art. 197' in C Widmer Lüchinger and D Oser (eds), *Basler Kommentar, Obligationenrecht I* (Helbing Lichtenhahn 2020) para 12.

84 Van Gool and Michel (n 75) 142.

85 Art. L 441-2 Code de la consommation indeed provides for a definition of premature obsolescence. See Thierry Bourgoignie, 'Sustainable Consumption and Obsolescence of Consumer Products' in A Do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption – The Right to a Healthy Environment* (Springer 2020) 28, 30 f.

86 See Federal Supreme Court Decision 6B\_437/2019 from 8 August 2019, C. B.

87 For further details, A F Rusch, 'Geplante Obsoleszenz' (2012) 6 recht, 176; G Geissbühler, 'L'obsolescence programmée : main invisible versus défaut invisible' in Olivier Hari (ed), *Protection de certains groupements de personnes ou de parties faibles versus libéralisme économique : quo vadis ?* (Schulthess Verlag 2016) 133; B Mathez, 'Le consommateur face à l'obsolescence programmée en droit suisse: analyse sous l'angle contractuel et sous l'angle des pratiques commerciales déloyales', Master's thesis, University of Neuchâtel, 2021 (<<https://bib.rero.ch/global/documents/2121774>> accessed 31 January 2023).

88 According to this provision, the person who makes false or misleading statements about himself, his company, his business name, his goods, his works, his services, his prices, his stocks, his sales methods, or his business or who, by such statements, gives third parties an advantage over their competitors acts unfairly.

89 According to this provision, the person who deceives customers by misrepresenting the quality, quantity, usability, or usefulness of goods, works or services or by concealing the dangers they present acts unfairly.

90 See Federal Supreme Court Decision 6B\_437/2019 from 8 August 2019, C. B. in reference to the preliminary cantonal judgment.

91 Advocating in this direction on EU Level, Van Gool, Michel, Keirsbilck and Terryn (n 69).

92 Atamer and Hermidas (n 63) 65 f.

93 On the sustainability potential of updates under EU Sales law, Van Gool and Michel (n 75) 139 f.

94 Federal Supreme Court Decision 6B\_437/2019 from 8 August 2019, C. 1.3 denying the right to appeal to the association NoObs who filed a criminal complaint against Apple before the public ministry of the canton of Geneva in the so-called "Batterygate", <<https://www.tdg.ch/suisse/obsolescence-iphones-jugee/story/29510997>> accessed 31 January 2023.

95 Postulate 21.4224, Brenzikofer, Rechtliche Konsequenzen bei absichtlicher Verkürzung der Lebensdauer von Produkten (adopted). See also Motion 20.4025, Hurni, Non à l'obsolescence programmée ! Garantir une durée de vie d'au minimum cinq ans pour les objets électroniques (closed on 8 June 2022).

96 Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

97 Motion 19.4598, Masshardt, Kreislaufwirtschaft: Einführung einer Beweislastumkehr auch in der Schweiz (rejected by the Swiss National Council on 22 September 2020).

98 Motion 19.4594, Streiff-Feller, Kreislaufwirtschaft. Längere Gerätelebensdauer durch längere Garantiefrieten (accepted by the Swiss National Council on 30 September 2021).

99 With access to the documents of the study commissioned in this context by the Federal Office of Justice, the Federal Office for the Environment and the State Secretariat for Economic Affairs, <[https://www.seco.admin.ch/seco/fr/home/Publikationen\\_Dienstleistungen/Publikationen\\_und\\_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/modernisierung\\_des\\_gewaehrleistungsrechts\\_2022.html](https://www.seco.admin.ch/seco/fr/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/modernisierung_des_gewaehrleistungsrechts_2022.html)> accessed 31 January 2023.

100 <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20204025>> accessed 31 January 2023.

101 For an in-depth analysis, Michel (n 60).

102 E.g. art. 4 Travel Package Law or art. 9 ff. Consumer Credit Law.

103 With further, although more nuanced references, Hug (n 12) para 867. Admittedly, in the context of e-commerce, art. 3 litt. s UCA imposes the clear indication of the identity and contact information of the seller. However, this is not strictly speaking a "material" information.

104 For an in-depth analysis of the impact of ethical production processes as an informational characteristic for conformity of the purchased good, see Y M. Atamer and P Gerber, 'Ethische Produktionsprozesse als Merkmal der Mangelfreiheit der Kaufsache' (2022) 11 Aktuelle Juristische Praxis 1159, 1162 ff.

105 See Motion 19.4597, Birrer-Heimo, Kreislaufwirtschaft. Verbesserung und Kennzeichnung der Reparaturfreundlichkeit von Produkten (closed on 19 February 2020).

106 In relation to a motion asking for clearer information on the durability and replacement of light bulbs, the Federal Council indicated that ConsumIA primarily focused on agreements between the business and consumer organisations concerned rather than the adoption of mandatory information requirements. See Motion 19.4434, Michaud Gigon, Pour une information claire lors d'achats de produits non réparables (closed on 17 December 2021).

107 There are currently two federal ordinances regulating the declaration procedures based on art. 4 and 11 of the ConsumIA. The first concerns the declaration for timber and timber products with a duty to declare to the consumer the timber species and the place of origin of the timber (Ordinance on The Declaration for Timber and Timber Products of 4 June 2020 [CC 944.021]). The second, concerns the declaration of furs and fur products (Ordinance on the Declaration for Fur and Fur Products of 7 December 2012 [CC 944.022]).

108 Heselhaus (n 1) 12 and 120.

109 To date, Switzerland has largely adopted the European Commission's implementing regulations for the Ecodesign Directive by means of autonomous adaptation through art. 44 of the Federal Act of 30 September 2016 on Energy (CC 730.0; "*Energiegesetz*", "*Loi sur l'énergie*") and an implementing ordinance. See, however also with proposals to better integrate life cycle and reparability aspects into the law, Heselhaus (n 1) 107 ff. Currently, a legislative proposal is underway to allow the Federal Council to incorporate requirements relating to product design (e. g. reparability, lifetime and information) into the EPA.

110 Keirsbilck and Rousseau (n 4) 98 and 103; Mak and Terry (n 4) 233 ff. See also M Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25 ERPL 25. A 2014 Consumer market study on environmental claims for non-food products shows that 61 % of consumers state that they find it difficult to find out which products are truly environmentally friendly and 44 % say they do not trust environmental claims. See further, E Terry, 'Lutter contre l'écoblanchiment est nécessaire mais ne suffit pas pour atteindre une consommation responsable' (2022) 1 RJE 2022 73, 77 f.

111 Terry (n 71) 2.

112 For a Dutch initiative allowing e. g. the consumers to calculate Co2 emissions linked to a delivery, <<https://bewustbezorgd.org/>> accessed 31 January 2023. See further, C Montalvo, D Peck and E Rietveld, *A Longer Lifetime for Products: Benefits for Consumers and Companies* (Study commissioned by the IMCO Committee, 2016) 83 f.

<[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL\\_STU\(2016\)579000\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf)> accessed 31 January 2023. This study mentions the use of smartphone technology to communicate environmental information in an obvious (i.e difficult to miss) and explicit (i.e easy to understand) way.

113 See from 30th March 2022 : EC, 'On making sustainable products the norm' COM(2022) 140 Final <[https://ec.europa.eu/environment/system/files/2022-03/COM\\_2022\\_140\\_1\\_EN\\_ACT\\_part1\\_v8.pdf](https://ec.europa.eu/environment/system/files/2022-03/COM_2022_140_1_EN_ACT_part1_v8.pdf)> accessed 31 January 2023.

114 Mak and Terryn (n 4) 240.

115 Art. 7 para 1 lit. d Directive 2019/771.

116 D Akikol, *Sachmängelhaftung beim Warenkauf – Obligationenrecht und UN-Kaufrecht (CISG)* (Schulthess Verlag 2008) para 164, 174, 226 and 353; Ch Müller, *Contrats de droit suisse – Présentation systématique des contrats les plus importants en pratique* (Stämpfli 2021) para 304 f.; Venturi and Zen-Ruffinen (n 77) para 2 (they note a tendency towards a certain objectification in B2C relationships through the "expected qualities").

117 See Atamer and Gerber (n 104) 1162 ff and 1168.

118 Van Gool and Michel (n 75) 142.

119 On the role of public law provisions for the non-conformity of the sold good, Akikol (n 116) para 459 ff. On ecodesign and conformity requirements, see further H-W Micklitz, V Mehnert, L Specht-Riemenschneider, C Liedtke and P Kenning, *Recht auf Reparatur. Veröffentlichungen des Sachverständigenrats für Verbraucherfragen* (Sachverständigenrats für Verbraucherfragen, 2022), 42 and 46 ff.

120 Venturi and Zen-Ruffinen (n 77) para 5 with further reference to DFT (BGE/ATF/DTF) 95 II 119, C. 3 b.

121 Judgment JTPI/13464/2021 of the 19th chamber of the court of first instance of the Republic and Canton of Geneva of 21 October 2021, available here: <<https://avocats-route.ch/wp-content/uploads/2021/12/jugement-tribunal-geneve-contre-amag.pdf>> accessed 31 January 2023.

122 For already mentioned exceptions, see ftn 107 on the declaration of timber and fur. Furthermore, art. 16 a of the Federal Act of 29 April 1998 on Agriculture (CC 910.1; "*Landwirtschaftsgesetz*", "*Loi sur l'agriculture*") regulates the indication of characteristics or production methods, including environmentally friendly production) and art. 18 of the Federal Act of 20 June 2014 on Foodstuffs and Utility Articles (CC 817.0; "*Lebensmittelgesetz*", "*Loi sur les denrées alimentaires*") provides protection against deception relating in particular to the country of production and the origin of the raw materials or components.

123 As highlighted by O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 CMLR 109 one can distinguish between two methods to deliver information: (i) affirmative disclosures requiring to convey certain information and (ii) provisions that supervise voluntary disclosures for them to be "correct".

124 See ftn 88 and 89.

125 The scope of application of art. 3 para 1 litt. i UCA is broader and aiming to protect customers against misleading information and the concealing of information, Heselhaus (n 1) 117.

126 The violation of art. 3 UCA can indeed lead to a criminal conviction under art. 23 UCA with a maximum penalty of three years in prison.

127 For an independent testing programme on premature obsolescence of products funded by Horizon 2020 (started May 2019), <<https://prompt-project.eu/project/>> accessed 31 January 2023. One main objective of this project is to support the assessment of the longevity of consumer products when they are put on the market.

128 Heselhaus (n 1) 117 ff.

129 Swiss Federal Sheet 2014 1751, 1793

130 Object of the Federal Council 14.019, Pour une économie durable et fondée sur une gestion efficiente des ressources (économie verte). Initiative populaire et contre-projet indirect.

131 Postulate 20.3727, Clivaz, Mesurer la durabilité environnementale de l'économie circulaire à l'aide de l'indicateur "Retained Environmental Value". For this indicator, M Haupt and S Hellweg, 'Measuring the environmental sustainability of a circular economy' (2019) 1-2 Environmental and Sustainability Indicators 1000005 1. As explained by the authors: "*The indicator extends the focus from end-of-life to the entire life cycle and includes substitution of primary materials. Furthermore, it allows for monitoring the transition towards a circular economy from an environmental and possibly economic and social perspective*".

132 Postulate 20.3834, Friedl, Klima- und Umwelttransparenz von Produkten verbessern mit einer Umweltproduktdeklaration (closed on 17 June 2022).

133 See further Interpellation 21.4641, Andrey, Mehr Zähne für die Finma zur Prävention und Bekämpfung von Greenwashing?; Postulate 19.4490, Michaud Gigon, Informer les clients sur la durabilité des investissements financiers proposés (closed on 22 September 2021); Motion 19.4434, Michaud Gigon, Pour une information claire lors d'achats de produits non réparables (closed on 17 December 2021).

134 Parliamentary Initiative 21.457, Pasquier-Eichenberger, Stop à l'éco-blanchiment publicitaire (closed on 16 June 2022).

135 <[https://www.parlament.ch/centers/kb/Documents/2021/Rapport\\_de\\_la\\_commission\\_CAJ-N\\_21.457\\_2022-02-03.pdf](https://www.parlament.ch/centers/kb/Documents/2021/Rapport_de_la_commission_CAJ-N_21.457_2022-02-03.pdf)> accessed 31 January 2023.

136 Interestingly, however, based on information provided by the shipping company DPD for 2021, Switzerland is the European champion for returning goods, with a return rate of 27.1 % (ahead of the Netherlands [24.5 %] and Belgium [19.0 %]). See Moritz Kaufmann, 'Gekauft, probiert, zurückgeschickt' NZZ am Sonntag (Zurich, 27 March 2022).

137 See, however, BSS Volkswirtschaftliche Beratung, *Impact of the growing Mail Order on Traffic* (Schweizerische Vereinigung der Verkehrsingenieure und Verkehrsexperten, 2020) <[https://www.bss-basel.ch/files/berichte/BSS\\_Auswirkungen\\_Versandhandel.pdf](https://www.bss-basel.ch/files/berichte/BSS_Auswirkungen_Versandhandel.pdf)> accessed 31 January 2023. According to this study, the impact of mail order on traffic and kilometres travelled is rather small in relation to total traffic volume. Also, the ecological consequences of government measures in the retail sector are difficult to assess because of the substitution effects between stationary and online trade. The increase in goods transport mileage due to online shopping can indeed be accompanied by a decrease in private vehicle traffic (and other environmental impact of shopping in a "brick and mortar" context), as consumers visit shopping centres less often. See answer by the Federal Council to Motion 21.4208, Töngi, Unnötige Transporte vermindern mit weniger Retouren.

138 In a written answer of 7 May 2020 by Mr Reynders on behalf of the European Commission to the Parliamentary Question – E-000477/2020(ASW), *E-commerce: right of withdrawal and cost-free return of goods*, the Commission stated that it "*intends to look into measures to address this environmental impact of excessive return of goods bought online*", <[https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html)> accessed 31 January 2023.

139 In Belgium, see DOC 55 2335/001, Chambre des représentants de Belgique, 23 novembre 2021, Proposition de résolution relative à l'évolution vers un droit de rétractation durable et équilibré dans le cadre du commerce électronique, <<https://www.dekamer.be/FLWB/PDF/55/2335/55K2335001.pdf>> accessed 31 January 2023.

140 On this topic, E Terry and E Van Gool, 'The Role of European Consumer Contract Law in Shaping the Environmental Impact of E-commerce' (2021) 3 EuCML 89, 94 ff. See also A Michel, 'Matelas et vêtements dans le même sac?' (2020) 126 DCCR 34, 45. A study of the University Bamberg found that 238'000 tons (0.0262 %) of overall Co2 emissions in Germany resulted from

returned packages. Concretely, this corresponds to 2'200 daily trips by car from Hamburg to Moscow, <<http://www.retourenforschung.de/info-retourentacho2019-ausgewertet.html>>; see further <[https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html)> both accessed 31 January 2023.

141 Article 14 para 1 Directive 2011/83/EU permits the seller to offer free returns to the consumer.

142 Motion 21.4208, Töngi, Unnötige Transporte vermindern mit weniger Retouren. For a Swiss study arguing that "*returns must be reduced – for financial and ecological reasons*", P Spreer, T Pfrang, M Linzmajer, *Die Psychologie der Retoure: Wie Behavioral Design die Rücksendequote im E-Commerce senken kann* (elaboratum, 2021). A study of the University Bamberg also found that 238'000 tons (0.0262 %) of overall Co2 emissions in Germany resulted from returned packages. Concretely, this corresponds to 2'200 daily trips by car from Hamburg to Moscow, <<http://www.retourenforschung.de/info-retourentacho2019-ausgewertet.html>>. See further <[https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html)> both accessed 31 January 2023. For another German study on the management of the return of goods, <<http://www.retourenforschung.de/>> accessed 31 January 2023.

143 Motion 21.4208, Töngi, Unnötige Transporte vermindern mit weniger Retouren. Another option is to uniformize the size of the goods, e. g. by a label indicating the size in centimetres only as to avoid consumer confusion. See DOC 55 2335/001 (n 139) 11 f.

144 See <<https://www.shavatar.me/>> accessed 31 January 2023.

145 See DOC 55 2335/001 (n 139) 8. As mentioned in this proposition, fashion items are indeed the goods that are most returned by consumers.

146 DOC 55 2335/001 (n 139) 10 and 14 gives the example of a consumer ordering many clothes without having the intention of keeping them but one. On the abuse of right under Swiss law in the context of the right of withdrawal, Hug (n 12) para 1411.

147 Terryn and Van Gool (n 140) 89.

148 <[https://www.seco.admin.ch/seco/de/home/Publikationen\\_Dienstleistungen/Publikationen\\_und\\_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung\\_nutzenbasierter\\_geschaeftsmodelle\\_grundeigentum.html](https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung_nutzenbasierter_geschaeftsmodelle_grundeigentum.html)> accessed 31 January 2023.

149 <[https://www.seco.admin.ch/seco/de/home/Publikationen\\_Dienstleistungen/Publikationen\\_und\\_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung\\_mobilien\\_im\\_bereich\\_kreislaufwirtschaft2022.html](https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung_mobilien_im_bereich_kreislaufwirtschaft2022.html)> accessed 31 January 2023.

150 Terryn and Van Gool (n 140) 89 with further references in ftn 8, especially to J Edwards, A McKinnon and S Cullinane, 'Comparative analysis of the carbon footprints of conventional and online retailing' (2010) 40 International Journal of Physical Distribution & Logistics Management 103.

151 J Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 3 EuCML 85, 86 calling the EU legislative process an "*elephant in the room*" in the context of maximum harmonization confronted to the need for the legislator to intervene quickly "*in many cases*" for an effective intervention.

152 For further information, <<https://www.parlament.ch/fr/organe/commissions/commissions-thematiques/commissions-ceate/consultation-ceate-20-433>> accessed 31 January 2023. For the preliminary draft: <<https://www.parlament.ch/centers/documents/fr/vernehmlassung-20-433-urek-n-vorentwurf-f.pdf>> accessed 31 January 2023.