FACULTY OF LAW AND CRIMINOLOGY

The impact of EU trademark legislation on sustainable development

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Preface

This master's thesis beautifully represents the past five years of my life, studying to obtain a master's degree in law: a lot of hard work and intellectual challenges, combined with a lot of support. With my academic career at Ghent University nearing its end, and my master's degree becoming more of a reality every day, it is high time to express some words of gratitude.

Firstly, I would like to thank prof. Dr. Inge Govaere for allowing me to write my master's thesis on a topic which deeply interests me and granting me the freedom to execute this research as I found appropriate, whilst at the same time giving me guidance and new insights when needed. In this regard, I must also thank Ms. Zuzanna Gulczyńska for her insightful feedback and recommendations.

Secondly, I want to thank my friends and family, for supporting me through every exam period and deadline, for reminding me to relax and for the unforgettable memories we have created in the past five years. Special thanks go out to my parents. Your unconditional love and support for me and everything I do has given me the strength to pursue all my dreams and made me into the person I am today. I am eternally grateful for having you two as parents, as friends and as my biggest supporters.

Sarah Gyssels
Gent, 12 May 2023

Samenvatting

Deze masterproef onderzoekt de impact die de huidige Europese merkenwetgeving heeft op de circulaire economie en duurzame ontwikkeling en beantwoordt de vraag of deze wetgeving moet worden aangepast in het licht van de duurzame ontwikkeling-doelstelling en integratieprincipes opgenomen in het primair Europees recht.

Na duiding bij de concepten 'duurzame ontwikkeling' en 'circulaire economie', wordt nagegaan wat de impact is van de huidige Europese merkenwetgeving op deze concepten. Meer bepaald wordt onderzocht in welke mate de merkenwetgeving hindernissen kan opwerpen voor het repareren en upcyclen van merkproducten. Daarnaast wordt ook gekeken naar de manieren waarop de merkenwetgeving kan bijdragen aan duurzame ontwikkeling. Rekening houdend met deze analyse, wordt vervolgens de vraag gesteld of deze wetgeving wel in overeenstemming is met het Europese primair recht, volgens dewelke duurzame ontwikkeling een doelstelling is van de Europese Unie en eisen van milieubescherming moeten worden geïntegreerd in Europees beleid en optreden.

Ten slotte worden in het laatste deel van het onderzoek voorstellen geformuleerd die kunnen verzekeren dat de Europese merkenwetgeving het primair recht respecteert en bijdraagt aan duurzame ontwikkeling. Concreet, wordt voorgesteld om de huidige merkenwetgeving 'duurzaam' te interpreteren, door niet telkens quasi-automatisch voorrang te geven aan de rechten van de merkhouder boven duurzaamheidsoverwegingen, maar in plaats daarvan een voorzichtige en gefundeerde afweging te maken tussen beide objectieven. Daarnaast worden ook concrete aanpassingen aan de huidige merkenwetgeving voorgesteld om deze duurzamer te maken.

Abbreviations

2015 CEAP	Closing the loop – An EU action plan for the Circular Economy
2020 CEAP	A New Circular Economy Action Plan – For a cleaner and more competitive Europe
CFR	Charter of Fundamental Rights
CFR Explanations	Explanations relating to the Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPD	Commercial Practices Directive
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EP	European Parliament
EU	European Union
EUIPO	European Union Intellectual Property Office
EUTMR	Regulation 2017/1001 on the European Union trademark
IPCC	Intergovernmental Panel on Climate Change
Madrid Agreement	Madrid Agreement Concerning the International Registration of Marks
Madrid Protocol	Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
Nice Agreement	Nice Agreement Concerning the International Classification of Goods and

	Services for the Purposes of the Registration of Marks
OEM	Original Equipment Manufacturer
OHIM	Office for Harmonisation in the Internal Market
Paris Convention	Paris Convention for the Protection of Industrial Property
SDGs	Sustainable Development Goals
Singapore Treaty	Singapore Treaty on the Law of Trademarks
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TLT	Trademark Law Treaty
TMD	Directive 2015/2436 to approximate the laws of the Member States relating to trademarks
TRIPs	Agreement on Trade-Related aspects of Intellectual Property rights
UN	United Nations
UNEP	United Nations Environment Programme
WCED	World Commission on Environment and Development
WMO	World Meteorological Organization
WTO	World Trade Organisation

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Introduction

1. The effects of global warming and climate change are becoming increasingly tangible in our daily lives. Consequently, over the past 50 years, awareness of these problems has grown, which has resulted in the emergence of a new development and economic model. In the 1980s, the concept of 'sustainable development' was introduced as a new development model which would simultaneously promote economic growth, environmental protection, and a just society. Additionally, since the prevailing (linear) economic model cannot be reconciled with the aim of developing sustainably, a process of transitioning to a circular economy was initiated as a crucial contributor to sustainable development.

2. Traditionally, efforts towards sustainable development and the circular economy have been confined to areas of public law, neglecting the important role that private law can play in achieving these goals.[1] However, gradually, sustainable development has been perceived more holistically, as a goal that must be integrated into all areas of law and policy.[2] This is enhanced by European primary law,[3] namely Articles 3 Treaty on the European Union (TEU),[4] 11 Treaty on the Functioning of the European Union (TFEU)[5] and 37 Charter of Fundamental Rights (CFR),[6] which posit sustainable development as an objective of the European Union (EU) and require the integration of environmental protection considerations in all EU policies and activities, with the

[1] R.M. BALLARDINI, J. KAISTO and J. SIMILÄ, "Developing novel property concepts in private law to foster the circular economy", *Journal of Cleaner Production* 2021, Vol. 279, (1) 2 and 7; T. PIHLAJARINNE and R.M. BALLARDINI, "Paving the way for the Environment – Channelling 'Strong' Sustainability into the European IP System", *EIPR* 2020, (239) 239.
[2] *Ibid*.
[3] Primary legislation consists of the Treaties and CFR (and the fundamental principles developed by the CJEU). Regulations and directives (and opinions, recommendations, and decisions) are secondary EU legislation. See *e.g.*, F. AMTENBRINK and H. VEDDER, *European Union Law: a textbook*, Den Haag, Eleven International Publishing, 2021, 18-24 and K. BRADLEY, "Legislating in the European Union" in C. BARNARD and S. PEERS (eds.), *European Union Law*, Oxford, Oxford University Press, 2020, (101) 108-109.
[4] Consolidated version of the Treaty on the European Union, *OJ C* 202, 7 June 2016, 13-388. Further: TEU.
[5] Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 202, 7 June 2016, 47-388. Further: TFEU.
[6] Charter of Fundamental Rights of the European Union, *OJ C* 202, 7 June 2016, 391-407. Further: CFR.

aim of promoting sustainable development. Consequently, increasing attention is being paid to the effect that different private law regimes have on sustainable development. This resulted, *inter alia,* in an expansion of academic literature examining the impact of different intellectual property rights, especially patents, copyrights, and trademarks, on the circular economy and sustainable development.[7]

3. Inspired by these academic efforts, the aim of this research is to examine the effects of contemporary EU trademark legislation on the circular economy and sustainable development and to assess the compatibility of this legislation with EU primary law. In the first part, the evolution and meaning of the concepts of 'sustainable development' and 'circular economy' will be clarified. Subsequently, the second part will shed light both on the ways in which EU trademark legislation counteracts sustainable development – by hindering repair and upcycling of trademarked goods, thereby blocking the circular economy – and the ways in which it contributes to sustainable development.[8] Based on the results of this examination, the compatibility of this legislation with EU primary law can be assessed and the question of the necessity and possibility of amending EU trademark legislation based on Articles 3(3) TEU, 11 TFEU and 37 CFR can be answered. This is the aim of the third part. Lastly, the fourth part contains concrete proposals on how to ensure compliance of EU trademark legislation with primary EU law and how to make it work for sustainable development.

[7] *E.g.,* BALLARDINI (n. 1), PIHLAJARINNE (n. 1) and O.-A. ROGNSTAD and I.B. ASTAVIK (eds.), *Intellectual Property and sustainable markets*, Northampton, Edward Elgar Publishing, 2021, 256 p.

[8] This assessment will be limited to trademarks on goods. However, the findings concerning the contributions of trademarks to sustainable development apply *mutatis mutandis* to service marks. Regarding this distinction, see *e.g.*, H. VANHEES, *Handboek intellectuele rechten*, Antwerpen, Intersentia, 2020, 313-314 and M.-C. JANSSENS, *Handboek Merkenrecht*, Antwerpen, Intersentia, 2022, 39-41.

4. This examination is based on a critical literature review,[9] combined with a thorough analysis of EU legislation and case law of the Court of Justice of the European Union (CJEU). Additionally, national case law from Belgium and the Netherlands,[10] and one case from Norway, is mentioned where relevant to provide examples of national applications of EU trademark legislation.

[9] For more on this research method, see *e.g.,* A. BOOTH, A. SUTTON and D. PAPAIOANNOU, *Systematic approaches to a successful literature review*, Los Angeles, SAGE, 2016, ix + 326 p. and M. SNEL and J. DE MORAES, *Doing a systematic literature review in legal scholarship*, Amsterdam, Boom, 2018, 99 p.

[10] These countries were selected based on accessibility of case law and knowledge of the language. However, since trademarks in these countries are unified under the Benelux trademark, reference might also be made to case law from the Benelux Court of Justice (this court will be considered as a 'national court'). See Benelux Convention on Intellectual Property (Trademarks and Designs) (Translation) (adopted 25 February 2005, entered into force 1 September 2006) TRT/BX001/001.

Part one: sustainable development and the circular economy

Section one: the need for a new development and economic model

1. The problem: global warming and climate change

5. The first and subsequent industrial revolutions have made the world an unrecognizable place over the span of roughly 200 years.[11] Whilst we can thank these revolutions for many of the material luxuries we have today, the many advantages produced were also accompanied by negative externalities, including global warming and climate change.[12] Even though the terms 'global warming' and 'climate change' are often used interchangeably in media and public debate, it is important to be aware of the difference between both concepts. Global warming can be defined as "*the long-term heating of Earth's surface observed since the pre-industrial period (between 1850 and 1900) due to human activities, primarily fossil fuel burning, which increases heat-trapping greenhouse gas levels in Earth's atmosphere".*[13] Climate change, however, is a broader concept which refers to "*a long-term change in the average weather patterns that have come to define Earth's local, regional and global climates*".[14] Thus, whilst the concept of global warming concerns solely the Earth's temperature, climate change covers all aspects of the climate, including *inter alia* temperature, precipitation, and wind patterns.

6. Evidence for both is omnipresent. Firstly, global warming can be measured by examining global temperatures over the years. In 2022 for example, the average global temperature was 1.15°C above the average pre-industrial temperatures, making it the eighth consecutive year (2015-2022) with annual global temperatures at least 1°C above pre-industrial levels.[15] Moreover,

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[11] *E.g.,* H.K., MOHAJAN, "The First Industrial Revolution: Creation of a New Global Human Era", *JSSH* 2019, Vol. 5, Issue 4, 377-387 and P.P. GROUMPOS, "A Critical Historical and Scientific Overview of all Industrial Revolutions", *IFAC PapersOnLine* 2021, Vol. 54, Issue 13, 464-471.
[12] *Infra,* n. 10-12.
[13] H. SHAFTEL (ed.), "Global Warming v. Climate Change", *NASA Global Climate Change*, last update 20 April 2023, https://climate.nasa.gov/global-warming-vs-climate-change/
[14] *Ibid*.
[15] "Past eight years confirmed to be the eight warmest on record", *WMO*, 12 January 2023, https://public.wmo.int/en/media/press-release/past-eight-years-confirmed-be-eight-warmest-record

nine of the ten warmest years on record occurred between 2013 and 2021,[16] and temperatures are still increasing at 0.2°C per decade.[17] Secondly, climate change is evidenced by an increase in extreme weather conditions, such as heatwaves, heavy precipitation and droughts,[18] and by long-term changes in the natural environment, including rising sea levels, ocean acidification, ice loss at the Earth's poles and in mountain glaciers and cloud and vegetation cover changes.[19] These effects of climate change disproportionally affect the most vulnerable people and systems[20].[21]

7. Some people, including certain scientists, believe that global warming and climate change are natural phenomena, on which human activity has zero impact.[22] However, 97% of climate scientists agree that human activities do contribute to climate change,[23] a consensus which can be deduced from scientific articles on climate change,[24] and which is also represented in Intergovernmental Panel on Climate Change (IPCC) reports. For example, in its Fifth Assessment Report, the IPCC established that there is a more than 95% probability that human-produced greenhouse gases caused much of the temperature increase over the past 50-plus years.[25] This consensus is substantiated by two main arguments.

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[16] R. LINDSEY and L. DAHLMAN, "Climate Change: Global Temperature", *NOAA Climate.gov*, 18 January 2023, https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature

[17] "Causes of climate change", *European Commission*, https://climate.ec.europa.eu/climate-change/causes-climate-change_en

[18] IPCC, "Climate Change 2021 The Physical Science Basis – Summary for Policymakers – Working Group I Contribution on the Sixth Assessment Report of the Intergovernmental Panel on Climate Change", October 2021, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf, 8.

[19] SHAFTEL (n. 13).

[20] IPCC, "Climate Change 2022 Impacts, Adaptations and Vulnerability – Summary for Policymakers – Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change", February 2022, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, 9.

[21] "Consequences of climate change", *European Commission*, https://climate.ec.europa.eu/climate-change/consequences-climate-change_en and N. ROORDA, *Fundamentals of Sustainable Development*, Boca Raton FL, Taylor & Francis, 2020, 300-316.

[22] A.B. BERLIE, "Global warming: A Review of the Debates on the Causes, Consequences and Politics of Global Response", *Ghana Journal of Geography* 2018, Vol. 10, Issue 1, (144) 150-154.

[23] *Ibid*, 150.

[24] N. ORESKES, "The Scientific Consensus on Climate Change", *Science* 2004, 1686 and ROORDA (n. 21), 296.

[25] IPCC, "Climate Change 2014 Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change", November 2014, https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf, v.

8. Firstly, evidence shows that much of global warming can be attributed to the greenhouse effect, which is the warming that results from the emission of greenhouse gases into the atmosphere that block radiation from the Earth towards space and thus prevent heat from escaping the atmosphere.[26] The relevant gases causing this effect are water (H_2O), nitrous oxide (N_2O), carbon dioxide (CO_2), methane (CH_4) and chlorofluorocarbons (CFCs), with CO_2 operating as the largest contributor to global warming.[27] Whilst the greenhouse effect is a natural and necessary process which makes life as we know it possible on this planet,[28] human activities have significantly increased the concentration of greenhouse gases in the atmosphere, causing the anthropogenic greenhouse effect and resulting in accelerated temperature rise.[29] This increase of greenhouse gases is primarily caused by burning fossil fuels, which is responsible for approximately 75% of human-caused carbon emissions since the 1980s.[30] Other causes are cutting down forests, increasing livestock farming and the use of fertilizers containing nitrogen and fluorinated gases.[31] Secondly, whilst it is true that solar variability has caused climate changes in the past, several lines of evidence demonstrate that current global warming cannot be explained by these changes in the Sun's energy output.[32] Consequently, the conclusion that current global warming and climate change are, at least partly, human-induced is unavoidable.

9. The IPCC has predicted that global surface temperature will continue to increase until at least mid-century and that a global warming of 1.5°C and 2°C will be exceeded during the 21st century[33] if rapid, deep, and immediate greenhouse gas emission reductions are not made in all

[26] SHAFTEL (ed.), "The Causes of Climate Change", *NASA Global Climate Change*, last update 20 April 2023, https://climate.nasa.gov/causes/
[27] *Ibid*.
[28] ROORDA (n. 21) 293 and D.W. KWEKU, O. BISMARK, A. MAXWELL, K.A. DESMOND, K.B. DANSO, E.A. OTI-MENSAH, A.T. QUACHIE and B.B. ADORMAA, "Greenhouse Effect: Greenhouse Gases and Their Impact on Global Warming", *Journal of Scientific Research & Reports* 2017, Vol. 17, Issue 6, (1) 5.
[29] *Ibid* and *ibid*, 6.
[30] J.A. ELLIOT, *An introduction to Sustainable Development*, Abingdon, Routledge, 2005, 72.
[31] "Causes of climate change", *European Commission*, https://climate.ec.europa.eu/climate-change/causes-climate-change_en and KWEKU (n. 28) 5.
[32] H. SHAFTEL (n. 26).
[33] IPCC (n. 18), 14.

sectors.[34] However, despite the importance of reducing greenhouse gas emissions, the total net emissions have continued to rise during 2010-2019.[35] Furthermore, the atmospheric levels of CO_2, N_2O and CH_4 all reached new record highs in 2021.[36] Without a strengthening of policies, these gases are projected to continue rising beyond 2025, which would lead to a median global warming of 3.2°C by 2100.[37] Such high global warming would be detrimental to the planet since the magnitude and rate of climate change and associated risks strongly depend on the temperature increase.[38] Consequently, immediate and profound changes are required to safeguard a liveable environment on our planet.

2. The cause: the Western development and economic model

10. One of the main culprits for this human-induced global warming and climate change, is the Western development and economic model that accompanied the First Industrial Revolution.[39] This mindset focused on growth, with growth meaning more of everything for everyone, thus requiring more production and consumption.[40] However, this continuous increase in production and consumption had important consequences, affecting our environment and contributing to global warming and climate change.

11. Firstly, economic growth was characterised by rising levels of greenhouse gas emissions because all steps of the production and consumption process result in the emission of these gases, particularly CO_2.[41] For example, the share of global greenhouse gas emissions from the production

[34] IPCC, "Climate Change 2022 Mitigation of Climate Change – Summary for Policymakers – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change", April 2022, https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf, 24.
[35] *Ibid*, 6.
[36] "Bad news for the planet: greenhouse gas levels hit new highs", *WMO*, 26 October 2022, https://public.wmo.int/en/media/press-release/more-bad-news-planet-greenhouse-gas-levels-hit-new-highs The report on 2022 has not been published at the moment of finishing this thesis.
[37] IPCC (n. 34), 17.
[38] IPCC (n. 20), 14 and IPCC, "Global Warming of 1.5°C – Summary for Policymakers", October 2018, https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf, 7-10.
[39] See more in *e.g.,* S. BAKER, *Sustainable Development*, London, Routledge, 2016, 1-6
[40] *Ibid*.
[41] S.K. GHOSH (ed.), *Circular Economy: Recent Trends in Global Perspective*, Singapore, Springer, 2021, 4.

of materials increased by almost 20% over the span of 20 years[42] and represented 23% of total global greenhouse gas emissions in 2015.[43] Secondly, more production required more extraction of natural resources, which was made possible due to technological developments.[44] This resulted in a major increase in the rate of extraction and depletion of natural resources, with the extraction of raw materials more than doubling between 1990 and 2017.[45] To date, half of total greenhouse gas emissions and more than 90% of biodiversity loss and water stress are caused by resource extraction and processing.[46] Furthermore, since the world's population is projected to continue growing,[47] the demand for these natural resources will continue increasing in the future, with in an estimated doubling of global materials extraction between 2017 and 2060.[48] Thus, there will likely be shortages of raw materials, and increased greenhouse gas emissions, biodiversity loss and water stress, if no changes are made to current production and consumption patterns. Thirdly, the rapid production and consumption of new products resulted in a vast increase of waste generation. Whilst in the past, society depended mostly on the capacity of natural systems to absorb, transport, and dissipate waste, the rate of waste generation that accompanied economic growth exceeded this natural capacity.[49] Since humans did not introduce adequate mechanisms to dispose of the additional waste, it often ends up in soil, water, and air where it pollutes our planet's environment.[50] Moreover, whilst in 2017 1.3 billion tonnes of municipal solid waste was generated

[42] UNEP, "Resource efficiency and climate change report – Material Efficiency Strategies for a Low-Carbon Future", November 2020, https://wedocs.unep.org/bitstream/handle/20.500.11822/34351/RECCR.pdf?sequence=1&isAllowed=y, 13.
[43] *Ibid*.
[44] R.C. BREARS, *Natural Resource Management and the Circular Economy*, Palgrave Macmillan, 2018, 4-5 and 7.
[45] GHOSH (n. 41), 5.
[46] 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, 11 March 2020, 2. Further: 2020 CEAP.
[47] UNDESA, "World Population Prospects 2022 – Summary of Results", October 2022, https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022_summary_of_results.pdf, 27.
[48] OECD, "Global Material Resources Outlook to 2060 – Economic drivers and environmental consequences" October 2018, https://read.oecd-ilibrary.org/environment/global-material-resources-outlook-to-2060_9789264307452-en#page1, 122.
[49] ELLIOT (n. 30), 48.
[50] L. LIU and S. RAMAKRISHNA, "Introduction and Overview" in L. LIU and S. RAMAKRISHNA (eds.), *An Introduction to Circular Economy*, Springer, 2021, (1) 2.

annually, this is expected to increase to 2.2 billion tonnes per year by 2050.[51] Therefore, environmental pollution can be expected to increase in absence of adequate responses.

12. In a business-as-usual scenario, the world economy is projected to triple by 2050.[52] World population will continue growing and living standards will rise, resulting in more consumption and demand for more resource-intensive goods.[53] This leads to an estimate of the equivalent of three planets being needed to sustain us by 2050.[54] Since humans do not have the capacity to create new planets, the inevitable consequence of these estimations was a rethinking of the contemporary development and economic model.

3. The consequence: the emergence of a new development and economic model

13. The dream of limitless growth started to crumble during the 1960s-1970s when scientists pointed out that the stock of natural resources is not inexhaustible and that this model of endless economic growth resulted in many negative externalities, including degradation of the environment.[55] Society realised that there are in fact ultimate limits to growth, imposed by the carrying capacity of the Earth, often illustrated by the nine planetary boundaries,[56] the crossing of which could result in abrupt or irreversible environmental changes.[57] Consequently, a new way of development was needed that would not transcend the ecological carrying capacity of the planet, would be socially just and economically inclusive.[58] This search led to the emergence of the

[51] BREARS (n. 44), 8-9.
[52] *Ibid*, 3.
[53] P. LACY, J. LONG and W. SPINDLER, *The Circular Economy Handbook – Realizing the circular advantage*, London, Palgrave Macmillan, 2020, 1-2.
[54] 2020 CEAP, 2.
[55] *E.g.,* BAKER (n. 39), 22-23; F. BONCIU, "The European Economy: from a linear to a Circular Economy", *RJEA* 2014, Vol. 14, Issue 4, (78) 81-82 and S. GOLDSTEIN, H. BEEMSTER, B.N. VAN GANZEN and C. SMIT, *Recht en duurzame ontwikkeling*, Apeldoorn, Maklun 2016, 22.
[56] These boundaries are stratospheric ozone depletion, loss of biosphere integrity, chemical pollution and the release of novel entities, climate change, ocean acidification, freshwater consumption and the global hydrological cycle, land system change, nitrogen and phosphorus flows to the biosphere and oceans and atmospheric aerosol loading. See "The nine planetary boundaries", *Stockholm Resilience Centre*, https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html
[57] BAKER (n. 39), 27.
[58] *Ibid*, 6.

concepts of sustainable development and the circular economy, with the latter being an important contributor to the first.[59]

14. The development of both concepts occurred gradually and for a large part through international political efforts. In 1972 the 'Limits to Growth' report[60] was published by the Club of Rome, which estimated that the Earth would not be able to support present rates of economic and population growth much beyond the year 2100.[61] This report was the starting point of debates concerning the Western development and economic model and laid the foundation for a new economic thinking,[62] which acknowledges that indefinite economic growth, translated in increased production and consumption, is not possible in a world with finite resources.[63] In the same year, the United Nations (UN) Conference on the Environment was held in Stockholm. This conference was the first of many conferences focusing on the preservation of our planet and was of pivotal importance since it recognised the relationship between the environment and development and called for the integration of these policies.[64] Important subsequent conferences include the UN Conference on Environment and Development (Earth Summit) held in 1992 in Rio de Janeiro, resulting in the Rio Declaration[65] and Agenda 2021,[66] and the World Summit on Sustainable Development held in 2002 in Johannesburg.

15. Another protagonist in the evolution of the sustainable development and circular economy paradigms was the report published in 1987 by the World Commission on Environment and

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[59] J. KORHONEN, A. HONKASALO and J. SEPPÄLÄ, "Circular Economy: The Concept and its Limitations", *Ecological Economics* 2018, Vol. 143, (37) 37.
[60] D.H. MEADOWS, D.L. MEADOWS, J. RANDERS and W.W. BEHRENS III, *The limits to growth*, New York, Universe Books, 1972, 205 p.
[61] "The Limits to Growth", *The Club of Rome*, https://www.clubofrome.org/publication/the-limits-to-growth/
[62] S. EISENRIEGLER (ed.), *The Circular Economy in the European Union – An Interim Review*, Vienna, Springer, 2020, 8.
[63] BONCIU (n. 55), 79 and Z. KOVACIC, R. STRAND and T. VÖLKER, *The Circular Economy in Europe – Critical Perspectives on Policies and Imaginaries,* London, Routledge, 2020, 16-17.
[64] "Report of the United Nations Conference on the Human Environment" (5-16 June 1972) UN Doc A.CONF.48/14/Rev.1, 3-4.
[65] "Report of the United Nations Conference on Environment and Development" (3-14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. I), Annex 1.
[66] "Report of the United Nations Conference on Environment and Development" (3-14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. I), Annex 2.

Development (WCED), titled 'Our Common Future' but often referred to as the 'Brundtland Report'.[67] This report introduced the concept of sustainable development into the political and academic realm and builds upon the Stockholm conference by emphasising that the environment and development are interconnected and inseparable.[68] Furthermore, the report stresses that new forms of economic growth are crucial to sustainable development.[69]

16. Since the first use of the terms 'sustainable development' and 'circular economy', both concepts have attracted immense popularity. They have developed throughout the years by being employed on different levels and in numerous settings and contexts. This led to popularization of the concepts, but it also resulted in ambiguity and uncertainty about their exact meaning. The use of both terms in different contexts and the abundance of academic literature on their meaning and scope often make them umbrella concepts without a clear core. Therefore, it is important to determine what these concepts entail exactly and how they will be understood in this research.

Section two: the concept of sustainable development

1. The definition and dimensions

1.1 The introduction of sustainable development with the Brundtland Report

17. As stated above, the 1987 Brundtland Report introduced the concept of sustainable development. The report defines sustainable development as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*".[70] This definition is built on two key concepts, namely, the concept of needs, in particular the essential needs of the world's poor, and the idea of limitations on the environment's ability to meet these needs both in the present and in the future.[71]

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[67] "Report of the World Commission on Environment and Development" (4 August 1987) UN Doc A/42/427, Annex. Further: Brundtland Report.
[68] *Ibid*, 14 and 48-51.
[69] *Ibid*, 14.
[70] *Ibid*, 54.
[71] *Ibid*.

18. Another, much less cited, definition of sustainable development in this report stipulates that sustainable development "*is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations*".[72] In my opinion, this second definition should receive much more attention than it does today since it adds two specifications that the first definition lacks. Firstly, it emphasises that sustainable development is a process of change rather than a way of developing that can ever truly be achieved.[73] There can be no point at which sustainable development is realised, at which we, as a society, are developing sustainably in all matters. Instead, sustainable development will always be a work in progress, requiring constant policy adaptations adjusting the sustainable development policy to the contemporary economic, environmental, and societal needs. Secondly, it is more precise and provides more guidance than the first definition by stating that crucial factors impacting sustainable development are the exploitation of natural resources, the direction of investments, the orientation of technological development and institutional change.

19. Despite the numerous definitions of sustainable development that came into existence in the decennia after the publication of this report, the Brundtland definition of sustainable development, as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*",[74] is still the most popular and most-cited definition.[75] Different authors provide different arguments explaining the popularity of this definition,[76] but in my opinion its vagueness and openness to interpretation are responsible for its popularity. The definition leaves open what is considered as needs and when future needs are

[72] *Ibid*, 57.
[73] BAKER (n. 39), 9-10.
[74] Brundtland Report, 54.
[75] *E.g.,* BAKER (n. 39), 24-25 and E. PAVLOVSKAIA, "Are we there yet? A legal assessment and review of the concept of sustainable development under international law", *JSDLP* 2014, Vol. 2, Issue 1, (139) 140.
[76] *E.g., ibid* 25 and *ibid*, 141.

compromised.[77] Consequently, every person using this definition can give their own interpretation to it, making it correspond to their objectives. Some appreciate this malleability for it allows sustainable development to be an open, dynamic and evolving concept that can be adapted to societal needs which differ across time and space.[78] Others, however, state that the definition is vague and elusive and that its implementation poses serious difficulties.[79] According to these opponents, its vagueness allows for misinterpretation and misuse of the concept, for example by businesses using it as a smokescreen behind which they can continue their operations without actually taking account of sustainability and environmental concerns.[80]

20. The Brundtland Report was ground-breaking since, contrary to previous views which associated the environment with conservation, it linked the environment to development.[81] The report stresses that "*Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base (…). These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect*.".[82] Additionally, the report stresses the importance of eradicating poverty and of social equity for both the environment and economy.[83] Consequently, three pillars of sustainable development can be deduced from the report, namely a social, economic, and environmental dimension, which are interdependent and influence each other in a complex web of relations.

[77] *E.g.,* A.M. HASNA, "Dimensions of sustainability*", Journal of Engineering for Sustainable Community Development* 2007, (47) 47-48.
[78] ELLIOT (n. 30), 10 and R.W. KATES, T.M. PARRIS and A. LEISEROWITZ, "What is Sustainable Development? Goals, Indicators, Values, and Practice", *Environment: Science and Policy for Sustainable Development* 2005, Vol. 47, Issue 3, (8) 20.
[79] PAVLOVSKAIA (n. 75), 142.
[80] S. MCKENZIE, "Social Sustainability: towards some definitions", *Hawke Research Institute Working Paper Series* 2004, No 27, 2.
[81] BAKER (n. 39), 24.
[82] Brundtland Report, 48.
[83] *Ibid*, *e.g.*, 14, 54-55, 154-155.

1.2 The three dimensions of sustainable development

21. Since the Brundtland Report, the existence of three dimensions of sustainable development has been dutifully repeated, for example in the Report of the World Summit on Sustainable Development, which commits to advancing and strengthening the "*interdependent and mutually reinforcing pillars of sustainable development*".[84] With everybody following this distinction, it is important to have an idea of what the three dimensions of sustainable development entail. Whilst the aim of this research is not to provide an in-depth analysis of these dimensions, a general understanding of each dimension and their interaction is crucial to understanding sustainable development and this research.

22. **Economic sustainability** can be understood as long-term economic growth that does not negatively impact society and the environment. On the one hand, it is based on the realisation that there can be no sustained development or meaningful growth without actions to preserve the environment and to promote the rational use of resources.[85] Sustainability includes the maximization of welfare over time,[86] which requires efficient resource allocation and maintenance and augmentation of all the kinds of capital (manufactured, natural, human and social) that make economic production possible.[87] Simply put, if current economic development exhausts all natural resources and capital, there will be nothing left for economic development in the future, thus making this way of development not sustainable. On the other hand, economic sustainability is based on the premise that many environmental problems in developing countries originate from a lack of economic development in those countries.[88] Consequently, eradicating poverty is a primary goal of (economic) sustainable development.

[84] "Report of the World Summit on Sustainable Development" (26 August-4 September 2002) UN Doc A/CONF.199/20.
[85] E.B. BARBIER, "The concept of sustainable economic development", *Environmental Conservation* 1987, (101) 102.
[86] J.M. HARRIS, "Sustainability and Sustainable Development", *International Society for Ecological Economics*, February 2003, https://isecoeco.org/pdf/susdev.pdf, 2.
[87] *Ibid*, 2-3.
[88] BARBIER (n. 85), 102-103.

23. **Social sustainability** refers to the people-aspect of sustainable development. Many definitions can be found, such as a system which must "*achieve fairness in distribution and opportunity, adequate provision of social services including health and education, gender equity, and political accountability and participation*"[89] and where "*the formal and informal processes, systems, structures and relationships actively support the capacity of current and future generations to create healthy and liveable communities. Socially sustainable communities are equitable, diverse, connected and democratic and provide a good quality of life*".[90] Despite the wide variety of definitions, a few key principles often reappear, such as equity, diversity, interconnectedness, quality of life, democracy, and governance.[91]

24. **Environmental sustainability** focuses on safeguarding the health of ecosystems and the planet. This requires the maintenance of natural capital, *i.e.,* the stock of assets provided by the environment, such as soil, atmosphere, forests, water, and wetlands.[92] An encompassing definition could be *"a condition of balance, resilience, and interconnectedness that allows human society to satisfy its needs while neither exceeding the capacity of its supporting ecosystems to continue to regenerate the services necessary to meet those needs nor by our actions diminishing biological diversity"*.[93]

[89] PAVLOVSKAIA (n. 75), 144.
[90] MCKENZIE (n. 80), 18.
[91] *Ibid*, 18-19; E. EIZENBERG and Y. JABAREEN, "Social Sustainability: A New Conceptual Framework", *Sustainability* 2017, Vol. 9, Issue 1, 1-16 and J. MORELLI, "Environmental Sustainability: A Definition for Environmental Professionals", *JES* 2011, (1) 3.
[92] R. GOODLAND, "The Concept of Environmental Sustainability", *Annual Review of Ecology and Systematics* 1995, (1) 14.
[93] MORELLI (n. 91), 5.

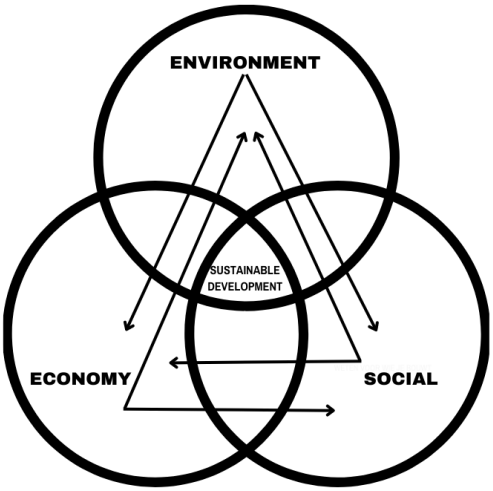

Figure 1: the overlapping and interacting nature of the three dimensions of sustainable development

25. However, these dimensions are strongly intertwined and interdependent. Therefore, they are often represented as three overlapping circles. Figure 1 depicts this overlapping nature of the three dimensions of sustainable development and their interdependent and mutually reinforcing nature. Perfectly sustainable practices remedy social inequalities and environmental damage whilst enhancing economic growth.[94] However, if priority must be given to one dimension this should be the environmental dimension because if liveable life on Earth is no longer possible due to destruction of the environment, then economic growth and social objectives such as equality, education and health become redundant. As S. BAKER puts it, "*if the health of the environment is compromised, everything else is undermined*".[95]

26. The three dimensions of sustainable development and their interconnectedness can be illustrated by examining the 17 Sustainable Development Goals (SDGs) adopted by the UN on 25 September 2015 in its 2030 Agenda for Sustainable Development.[96] In this agenda, the UN builds

[94] HARRIS (n. 86), 7.
[95] BAKER (n. 39), 26.
[96] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

on the Millennium Development Goals that it adopted 15 years prior,[97] but which were never achieved.[98] The SDGs can be regarded as the international strategy for working towards sustainable development in its three dimensions, by setting targets to stimulate action over the following 15 years (*i.e.*, over the period 2015-2030). The agenda itself emphasises that the SDGs are integrated and indivisible and that they balance the three dimensions of sustainable development.[99]

Figure 2: the UN SDGs.

Source: "Sustainable Development Goals kick off with start of new year", UN Sustainable Development Goals, 30 December 2015, https://www.un.org/sustainabledevelopment/blog/2015/12/sustainable-development-goals-kick-off-with-start-of-new-year/

27. Whilst at first sight, it appears that each goal focuses on a certain dimension, it becomes evident rapidly that not a single SDGs only affects that one dimension. With the three dimensions of sustainable development being interconnected, so do these goals affect all dimensions of sustainable development. Take for example SDG 4 (quality education). At first sight, this appears a purely social goal. However, quality education results in more highly educated people who can

[97] UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2.
[98] Res 70/1 (21 October 2015) UN Doc A/RES/70/1, 1.
[99] *Ibid*.

enter the workforce, which in turn leads to economic growth (economic sustainability). Moreover, quality education should also educate people on the effects of human life on Earth and the threat posed by global warming and climate change. Since awareness is the first step towards change, more awareness results in more people changing their habits to more sustainable and environmentally responsible practices (environmental sustainability). Additionally, more educated people equal more brainpower to work on scientifical and societal adaptation, mitigation, and prevention mechanisms to combat global warming and climate change. The interconnectedness of the SDGs themselves also clearly comes forward in this story, since quality education resulting in more educated people entering the workforce in better-paying jobs, leads to less poverty (SGD 1) and consequently less hunger (SDG 2). Since poverty results in overexploitation of resources to satisfy immediate needs and thus environmental deterioration, reduction of poverty in turn reduces negative impacts of humans on Earth.[100] This cycle can be continued endlessly, but I believe that my point has been made, namely the inevitably overlapping and mutually reinforcing nature of the interconnected dimensions of sustainable development.

1.3 An explosion of definitions

28. Since the publication of the Brundtland report, a multitude of definitions of sustainable development has seen the light. It seems as if there is only one thing that academics can agree on, namely that there is no generally accepted definition of the concept.[101] However, some recurring trends can be discerned from literature regarding the concept. Firstly, many authors make a distinction between weak and strong sustainability.[102] On the one hand, weak sustainability supports a minimalistic view of sustainable development which requires bringing environmental concerns into the existing structures and business systems.[103] According to this view, it is sufficient

[100] Brundtland Report, 40-43.
[101] *E.g.,* BAKER (n. 39), 7 and 36; KATES (n. 78), 20; H.M. OSOFSKY, "Defining Sustainable Development after Earth Summit 2000", *ILR* 2003, (111) 112 and S. CONNELLY, "Mapping Sustainable Development as a Contested Concept", *Local Environment* 2007, (259) 259.
[102] PIHLAJARINNE (n. 1), 241; HARRIS (n. 86) 3-4; BREARS (n. 44) 11-13; B. HOPWOOD, M. MELLOR and G. O'BRIEN, "Sustainable Development: Mapping Different Approaches", *Sustainable Development* 2005, (38) 40.
[103] PIHLAJARINNE (n. 1), 241.

that the total value of manufactured and natural capital remains constant over time,[104] without making a distinction between different forms of capital.[105] Consequently, exhaustion of natural resources is a non-issue since human-created gaps in the resource base can be filled by physical and human capital[106] or by technology.[107] Strong sustainability, on the other hand, presents a maximalist view which aims at integrating businesses into the environmental systems of the planet.[108] This view does not believe that human-made capital can replace the Earth's processes and ecosystems vital to human existence,[109] nor that it can substitute environmental resources.[110] Consequently, human activities must be limited to the carrying capacity of the planet instead of adapting the planet's systems to the effects of human activities. This requires, *inter alia*, the protection and conservation of natural resources and ecosystem services.[111]

29. Secondly, instead of focusing on providing an exact definition, the meaning of sustainable development is often clarified by emphasising certain fundamental principles of the concept. For example, O.-A. ROGNSTAD stipulates that the concept is based on two elements, namely a holistic element – simultaneous improvement of the three dimensions – and an inter-generational element according to which the present fulfilment of needs does not endanger the fulfilment of future generation's needs.[112] S. BAKER on the other hand bases her concept of sustainable development on seven principles, namely the principle of need, the principle of inter-generational equity, the principle of intra-generational equity, the principle of common but differentiated responsibilities, the principle of justice, the principle of participation and the principle of gender equality.[113]

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[104] HARRIS (n. 86), 3-4.
[105] BREARS (n. 44), 11.
[106] *Ibid*.
[107] HOPWOOD (n. 102), 40.
[108] PIHLAJARINNE (n. 1), 241.
[109] HOPWOOD (n. 102), 40.
[110] BREARS (n. 44), 11.
[111] *Ibid*, 11-12.
[112] H.M. HAUGEN, "Why are intellectual property rights hardly visible in the United Nations Sustainable Development Goals?" in O.-A. ROGNSTAD and I.B. ASTAVIK (eds.), *Intellectual property and sustainable markets*, Northampton, Edward Elgar Publishing, 2021, (12) 12.
[113] BAKER (n. 39), 45-54.

30. However, since this research aims to examine the impact of European trademark legislation on sustainable development, the question arises whether a single definition of sustainable development reigns within the EU that can be used as a reference-point in this research.

2. An EU definition?

2.1 Introduction and evolution of the concept of sustainable development in EU policy and legislation

31. Initially, European cooperation had a primarily economic focus which paid little attention to environmental and social concerns.[114] However, the environment quickly made its entrance into the European political debate because environmental problems often have a cross-border impact, thus requiring cross-border solutions and regulation.[115] Moreover, regulating environmental concerns at EU level proved necessary for the realisation of the internal market since national environmental regulations can hinder international trade and thus obstruct the internal market.[116] Similarly, social considerations became of interest to the EU with the aim of creating a level playing field to allow for the realisation of the internal market.[117] This new focus on environmental and social needs facilitated the introduction and growing importance of sustainable development, in its three dimensions, within the EU.

32. The notion of sustainability made its entrance into EU primary law with the Treaty of Maastricht in 1992,[118] which stipulated as one of the objectives of the European Community "*to promote economic and social progress which is balanced and sustainable*"[119] and "*to promote*

[114] P. NOVAK, "The historical development of European integration", *European Parliament*, 18 June 2018, https://www.europarl.europa.eu/RegData/etudes/PERI/2018/618969/IPOL_PERI(2018)618969_EN.pdf, 3-8.
[115] H. VOS, *De impact van de Europese Unie: Beleidsterreinen, strijdpunten en uitdagingen*, Leuven, Acco, 2017, 43-44.
[116] *Ibid*.
[117] *Ibid*, 44 and 62.
[118] Treaty on European Union, *OJ C* 191, 29 July 1992, 1-112.
[119] *Ibid*, Article B.

throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States".[120] It does not, however, explain what is meant by 'sustainable growth'. However, in accordance with international terminology, the Amsterdam Treaty[121] introduced the term 'sustainable development' into EU law, by obliging the European Community "*to promote throughout the Community a harmonious, balanced and sustainable development of economic activities*".[122] Consequently, the European concept of sustainable development in the 1990s was still focused on economic activities and growth, which overshadowed the social and environmental components of sustainable development.

33. The importance of the sustainable development concept grew considerably with the Treaty of Lisbon,[123] which included sustainable development, in its three dimensions, as one of the objectives of the EU in Article 3 TEU.[124] This demonstrates the increase in importance attributed to the concept within the EU, with sustainable development now being placed, by Article 3(3) TEU, on the same level as none other than the internal market itself, the *raison d'être* of the EU. The Lisbon Treaty also made sustainable development one of the cornerstones of the EU external policy[125] and introduced an environmental integration principle in the TFEU[126] and the CFR[127] (see Part three).[128] Consequently, sustainable development is now central to EU all activities and policy.

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[120] *Ibid*, Article G, B., 2).
[121] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ C* 340, 10 November 1997, 1-144.
[122] *Ibid*, Article 2.
[123] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306, 17 December 2007, 1-271.
[124] *E.g*., H. VEDDER, "The Treaty of Lisbon and European Environmental Law and Policy", *Journal of Environmental Law* 2010, (285) 287-289.
[125] See Article 3(5) and 21(2)(d) TEU.
[126] Article 11 TFEU.
[127] Article 37 CFR.
[128] E., KOZIEN and A. KOZIEN, "Efficiency of the principle of sustainable development in the European Union", *QPI* 2019, (206) 208-209; L.A., AVILES, "Sustainable Development and the Legal Protection of the Environment in Europe", *Sustainable Development Law & Policy* 2012, Vol. 12, Issue 3, (29) 30-32 and N., DE SADELEER, "Sustainable development in EU law: still a long way to go", *Jindal Global Law Review* 2015, (39) 43-46.

However, similarly as the (inter-)national debate on sustainable development, the European debate does not centre around one uniform definition.

2.2 EU Definition

34. Whilst the EU clearly attributes great importance to the principle of sustainable development, no definition can be found for this concept in EU primary law. Moreover, whilst the concept makes plenty appearances in secondary legislation,[129] it is rare that the EU includes a definition for it. Instances where a definition was given are, for example, Regulation 2493/2000[130] and Regulation 3062/95[131] in which sustainable development was defined as "*the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations*". Both regulations are, however, no longer in force. Generally, when primary and secondary legislation use a concept without defining it, one must turn to the CJEU for its interpretation. However, whilst the term sustainable development occurs in many CJEU judgements and opinions,[132] the CJEU has never formulated a definition for it. Additionally, the concept is rarely defined in policy documents and if it is, the Brundtland-definition – "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs"*[133] – is often cited,[134] which emphasises the great influence of this definition.

[129] For example, a search for the term 'sustainable development' on eur-lex.europa.eu conducted on 12 May 2023 gave 18.193 results, of which 1.364 were legal acts, including 354 Regulations and 76 Directives.
[130] Article 2 Regulation (EC) No 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, *OJ L* 288, 15 November 2000, 1-5.
[131] Article 2(4) Council Regulation (EC) No 3062/95 of 20 December 1995 on operations to promote tropical forests, *OJ L* 327, 30 December 1995, 9-13.
[132] For example, a search for the term 'sustainable development' on curia.europa.eu conducted on 12 May 2023 resulted in 272 judgements, orders, opinions of the court, decisions and opinions in which the term was used.
[133] Brundtland Report, 54.
[134] *E.g.,* Communication from the Commission, "A Sustainable Europe for a Better World: European Union Strategy for Sustainable Development", COM(2001) 264 final, 15 May 2001, 2 and Council of the European Union, "Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy", 10917/06, 26 June 2006, 2.

35. When looking for an EU definition of the concept, one thing that becomes apparent is the EU's strong adherence to the three interdependent dimensions of sustainable development. This can be deduced from Article 3(3) TEU which aims for "*balanced economic growth and price stability*" (economic sustainability), "*a highly competitive social market economy, aiming at full employment and social progress*" (economic and social sustainability) and "*a high level of protection and improvement of the quality of the environment*" (environmental sustainability).[135] Additionally, evidence for the recognition of the three dimensions can be found in many EU documents. For example, the European Commission (EC) stipulates that the essence of sustainable development is "*a life of dignity for all within the planet's limits and reconciling economic efficiency, social inclusion and environmental responsibility*".[136]

36. Guidance on what the EU understands under sustainable development can also be found in its 'Sustainable Development Strategy' published in 2001,[137] in which the EU recognizes that economic growth, social cohesion, and environmental protection must go hand in hand and that environmental degradation and resource consumption must be decoupled from economic and social development.[138] This strategy discusses the main threats to sustainable development – including *inter alia*, global warming, poverty, ageing of the population and loss of biodiversity[139] – and highlights that a comprehensive and cross-sectoral approach is required to address these challenges.[140] Subsequently, a set of priority objectives and measures at EU level to tackle these challenges is proposed.[141] This strategy was followed by the Declaration on Guiding Principles for Sustainable Development in 2005,[142] which posits four key objectives to achieving sustainable development, namely environmental protection, social equity and cohesion, economic prosperity

[135] Article 3(3) TEU.
[136] "Sustainable development", *European Commission*, https://ec.europa.eu/environment/sustainable-development/
[137] Communication from the Commission, "A Sustainable Europe for a Better World: European Union Strategy for Sustainable Development", COM(2001) 264 final, 15 May 2001.
[138] *Ibid*, 2-3.
[139] *Ibid*, 4.
[140] *Ibid*, 9.
[141] *Ibid*, 5-15.
[142] Council of the European Union, "Brussels European Council 16 and 17 June 2005 – Presidency Conclusions", 10255/1/05, 15 July 2005.

and meeting international responsibilities, thus again emphasising the three dimensions of sustainable development.[143] To achieve these objectives, ten policy guiding principles were included in the Declaration, including *e.g.*, the promotion and protection of fundamental rights and solidarity within and between generations. Based on this Declaration, the Renewed EU Sustainable Development Strategy[144] was adopted in 2006, which recognizes seven key challenges for sustainable development and identifies targets, operational objectives, and actions for each.[145]

37. Based on a similar analysis of the use of the sustainable development concept within the EU, S.R.W. VAN HEES proposed the following (EU) definition: "*Sustainable development means stimulating and encouraging economic development (e.g. more jobs, creativity, entrepreneurship and revenue), whilst protecting and improving important aspects (at the global and European level) of nature and society (inter alia natural assets, public health and fundamental rights) for the benefit of present and future generations*."[146]. Whilst this definition undoubtedly provides more clarity than the popularised Brundtland definition, it is still flawed because of its focus on economic development, whereby economic development is the goal, but should additionally benefit the environment and society. However, this research will adhere to a strong sustainability approach since section one demonstrated the critical importance thereof and since this seems to be the approach adopted by the EU.[147] Consequently, any definition of sustainable development within this research must start from the environmental dimension and planetary limits, within which sustainable economic and social development can be pursued.

[143] *Ibid*, 28-29.
[144] Council of the European Union, "Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy", 10917/06, 26 June 2006.
[145] *Ibid*, 7-21
[146] S.R.W., VAN HEES, "Sustainable Development in the EU: Redefining and Operationalizing the Concept", *ULR* 2014, Vol. 10, Issue 2, (60) 71.
[147] See *e.g.,* the definitions provided above which require *"the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems"* and *"a life of dignity for all within the planet's limits".*

3. Definition in this research

38. With the above-explored definitions, dimensions, and characteristics of the concept of sustainable development in mind, the question remains what exactly should be understood under this concept within this research. Whilst it is in no way my intention to provide a single 'correct' definition of the concept, – a task which seems impossible considering the eternally contested nature of the concept – it is important to demarcate what will be understood under the concept within this research. Thus, the purpose of my exercise is to formulate a workable definition that can be applied in this research, that is clear to the layman and that corresponds to the European vision on the concept.

39. Based on the conducted research, I have distinguished four key characteristics of sustainable development:

1) Sustainable development is a dynamic process, a goal which must always be worked towards, but which can never truly be achieved.
2) Sustainable development requires an intergenerational approach, obliging the current generations to take future generations into account.
3) Sustainable development consists of three dimensions, an economic, a social and an environmental dimension, which are interconnected and mutually reinforcing.
4) Any development is limited by the planetary boundaries, requiring economic and social development to occur within the carrying capacity of the planet (strong sustainability). Consequently, environmental considerations are at the heart of sustainable development and should be given great weight when conflicting with economic and social goals since there can be no sustainable life on Earth if life on Earth itself is jeopardized.

40. Based on these four building blocks of sustainable development, I have come to the following definition of the concept:

Sustainable development refers to a dynamic process of economic, social, and environmental development of present and future generations within the carrying capacity of the Earth, whereby economic, social, and environmental goals are pursued with recognition of their interconnectedness and the fact that all economic and social systems are based on the health of the environment.

Section three: the concept of the circular economy

1. The definition and main elements

41. The economic model that has dominated the economies of Western countries since the First Industrial Revolution can be described as linear.[148] Under this economic model, resources are extracted and transformed into products. These products are subsequently bought by consumers who use them until they no longer satisfy their personal needs or until a new and better product is placed on the market, after which the products are thrown away and become a burden on our planet's environmental system as waste.[149] This economic model is often described as a 'take, make, waste' economy[150] and could be compared to a river[151] as it has a clear begin- and endpoint, starting from the extraction of natural resources, flowing over into finished products, and finally debouching into the sea of waste. This take-to-waste linear process results in rapid depletion of

[148] *E.g.,* BREARS (n. 44), 2-3; M. CUI, "Key Concepts and Terminology" in L. LIU and S. RAMAKRISHNA (eds.), *An Introduction to Circular Economy*, Singapore, Springer, 2021, (17) 19 and W.R. STAHEL, "The circular economy", *Nature* 2016, (435) 436.
[149] BREARS (n. 44), 2-3 and S.H. GHEEWALA and T. SILALERTRUKSA, "Life Cycle Thinking in a Circular Economy" in L. LIU and S. RAMAKRISHNA (eds.), *An Introduction to Circular Economy*, Singapore, Springer, 2021, (35) 36.
[150] BREARS (n. 44), 1; CUI (n. 148), 19; M. SILLANPÄÄ and C. NCIBI*, The Circular Economy – Case studies about the Transition from the Linear Economy*, London, Academic Press, 2019, 18 and T. PIHLAJARINNE, "Repairing and re-using from an exclusive rights perspective: towards sustainable lifespan as part of a new normal?" in O.-A. ROGNSTAD and I.B. ASTAVIK (eds.), *Intellectual property and sustainable markets*, Northampton, Edward Elgar Publishing, 2021, (81) 86.
[151] STAHEL (n. 148), 436.

natural resources and uncontrollable amounts of waste being generated, exceeding the pace at which the Earth can produce natural resources and absorb and digest waste.[152]

42. As described above in section one, this model of economic development, and especially the resource extraction and waste that accompany it, is detrimental to the health of our planet. Additionally, the negative consequences that accompany this model have been magnified during the last decades because of two demographic trends, namely population growth[153] and increase in living standards,[154] resulting in more people with more money and buying power and thus more consumption. Consequently, a new economic model was required which could sustain the global population without depleting the natural resources base and without reducing the planet to one enormous landfill. This resulted in the emergence of the circular economy, introduced by W. STAHEL and G. REDAY-MULVEY in 1977,[155] which aims to fundamentally decouple economic growth and prosperity from the use of resources and the environmental impacts of traditional economic growth.[156]

43. However, similarly as in the case of sustainable development, no uniform and widely accepted definition exists of the concept.[157] This disparity in definitions can be explained by the multidisciplinary nature of the concept[158] and by the fact that the economic and environmental situation differs depending on the country or region, thus resulting in different interpretations and proposals for implementation of the circular economy.[159] However, a definition that is often cited is that of the Ellen MacArthur Foundation,[160] which describes the circular economy as: "*An*

[152] H. WIESMETH, *Implementing the circular economy for sustainable development*, Amsterdam, Elsevier, 2021, 12-13.
[153] BALLARDINI (n. 1) 1; BAKER (n. 39), 22.
[154] A.V. SEMENOV and I.A. SOKOLOV (eds.), *Sustainable Development: Society, Ecology, Economy*, Cham, Springer, 2021, 103.
[155] G. REDAY and W.R. STAHEL, *The potential for substituting manpower for energy: final report 30 July 1977 for the Commission of the European Communities*, Geneva, Geneva Research Centre, 1977, iv + 113 p.
[156] BREARS (n. 44), 13 and CUI (n. 148), 21.
[157] BALLARDINI (n. 1), 1 and CUI (n. 148), 18.
[158] SILLANPÄÄ (n. 150), 12.
[159] WIESMETH (n. 152), 13 and 24.
[160] *E.g.,* SILLANPÄÄ, (n. 150) 9; WIESMETH (n. 152) 27; J. KIRCHHERR, D. REIKE, and M.P. HEKKERT, "Conceptualizing the circular economy: An analysis of 114 Definitions", *Resources, Conservation & Recycling* 2017, (221) 226; J.P.

industrial system that is restorative or regenerative by intention and design. It replaces the 'end-of-life' concept with restoration, shifts towards the use of renewable energy, eliminates the use of toxic chemicals, which impair reuse, and aims for the elimination of waste through the superior design of materials, products, systems, and, within this, business models.".[161]

44. Generally, the aim of the circular economy is to maximise the lifespan of products through reuse, repair, remanufacturing, refurbishing, and recycling, so that extracted resources remain in the economic cycle, thus reducing resource extraction and waste generation.[162] Therefore, whilst the linear economy resembles a river, the circular economy can be compared to a lake.[163] To make the comparison more accurate, however, I would add a whirlpool in this lake to emphasise the dynamic character of the circular economy. More precisely, the circular economy should be perceived as a cycle, in which natural resources are constantly in use but in changing forms. Natural resources do not necessarily stay in the same composition within one product. Products can be dismantled, and resources used as building blocks for new products. Figure 3 illustrates this dynamic and cyclical process.

HANNEQUART, *Circular economy – The Political and Legal Ambition of the European Union*, Strépy, Le Livre en papier, 2018, 32 and M. GEISSDOERFER, P. SAVAGET, N.M.P. BOCKEN and E.J. HULTINK, "The Circular Economy – A new sustainability paradigm?", *Journal of Cleaner Production* 2017, Vol. 143, (757) 759.

[161] "Towards the Circular Economy, Economic and business rationale for an accelerated transition", *Ellen MacArthur Foundation*, 2013, https://ellenmacarthurfoundation.org/towards-the-circular-economy-vol-1-an-economic-and-business-rationale-for-an, 7.

[162] *E.g.,* BREARS (n. 44), 13; KORHONEN (n. 59), 41 and P. MHATRE, R. PANCHAL, A. SINGH, S. BIBYAN, "A systematic literature review on the circular economy initiatives in the European Union", *Sustainable Production and Consumption* 2021, Vol. 26, (187) 188.

[163] STAHEL (n. 148), 436.

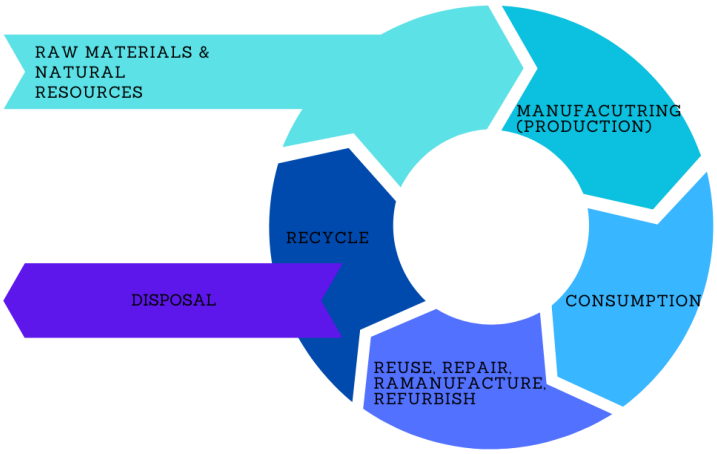

Figure 3: the circular economy

45. Despite the diversity, certain key principles recur in many definitions. Firstly, many definitions repeat the 3R paradigm – reduce, reuse, recycle – as the core of the circular economy.[164] However, often more Rs are added to the list, in particular repair, remanufacture and refurbish.[165] Secondly, reference is often made to the waste hierarchy, according to which preference should be given to practices that prolong product life (reuse, repair, remanufacturing, and refurbishing), followed by recycling[166] and disposal of waste as the *ultimum remedium.*[167] Thirdly, definitions often emphasise the restorative/regenerative nature of the circular economy, which entails that the circular economy wishes to repair previous damage, e.g., by rebuilding natural capital.[168] Lastly, the circular economy is often linked with certain business models, such as product as a service and the sharing platform.[169]

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[164] *E.g.,* BREARS (n. 44), 13; KIRCHHERR (n. 160), 226 and WIESMETH (n. 152) 20.
[165] *E.g.,* "Circular Economy", *EPRS*, December 2018, https://www.europarl.europa.eu/thinktank/infographics/circulareconomy/public/index.html and GEISSDOERFER (n. 160), 759.
[166] GHEEWALA (n. 149), 40.
[167] KIRCHHERR (n. 160), 227; KORHONEN (n. 59), 38 and WIESMETH (n. 152), 23.
[168] *E.g.,* KOVACIC (n. 63), 20; WIESMETH (n. 152), 25 and P. MORSELETTO, "Restorative and regenerative – Exploring the concepts in the circular economy", *Journal of Industrial Ecology* 2020, (763) 765.
[169] CUI (n. 148), 25-30; KIRCHHERR (n. 160), 228 and WIESMETH (n. 152), 21-23.

46. Another aspect of the circular economy that is often emphasised, is its contribution to sustainable development.[170] Based on the definition of sustainable development, it should be clear that the linear economy counteracts sustainable development, which requires the availability of sufficient natural resources and a healthy planet for present and future generations. The circular economy, on the other hand, pursues the same goals as sustainable development by reducing the extraction of natural resources and the generation of waste. Whilst the concepts of sustainable development and circular economy have some important similarities and differences,[171] in summary, one could describe their relationship by saying that "*sustainable development establishes goals to be achieved in order to solve the problems and their consequences, whereas circular economy is a tool to address some of the causes of these problems*".[172] Therefore, whilst the circular economy might not be the only economic model compatible with sustainable development, it is undoubtedly a great contribution towards this goal. For example, the International Resource Panel estimated that remanufacturing and refurbishment can contribute to a reduction of greenhouse gas emissions by 79-99% and that the production and use of new materials could be reduced by 80-98% through remanufacturing, by 82-99% through refurbishing and by 94-99% through repair. Moreover, the EU expects a reduction in carbon emissions of 450 million tonnes by 2030, a reduction of 600 billion EUR in production costs[173] and the creation 700.000 jobs due to the circular economy.[174]

47. Transitioning to a circular economy requires fundamental changes on many levels. Firstly, structural changes must occur at the macro (city, region, nation and beyond), meso (group of factories or entire industrial sector) and micro (products, companies, consumers) level of the economy.[175] Secondly, every step of the production and consumption process must undergo a

[170] *E.g.,* SILLANPÄÄ (n. 150), 281-311 and WIESMETH (n. 152), 23, 24, 25 and 27.
[171] SILLANPÄÄ (n. 150), 281-311 and GEISSDOERFER (n. 160), 762-764.
[172] SILLANPÄÄ (n. 150), 286.
[173] "Circular Economy closing the loop – An ambitious EU circular economy package", *European Commission*, https://commission.europa.eu/system/files/2016-04/circular-economy-factsheet-general_en.pdf
[174] 2020 CEAP, 2.
[175] GHEEWALA (n. 149) 39; KIRCHHERR (n. 160), 229 and WIESMETH (n. 152), 22.

circular transformation, starting from the design stage since products must be designed in a way that they can be reused, repaired, or remanufactured at a later stage.[176] Thirdly, structural changes are required not only of production and consumption patterns but also of the regulatory framework.[177] Consequently, the government has an important role to play in this transition since it must enact legislation that encourages better product design, facilitates better consumption choices, improves waste management, and creates a market for waste to resources.[178]

2. An EU definition?

2.1. Introduction and evolution of the concept into EU policy and legislation

48. Contrary to sustainable development, the circular economy is not mentioned in EU primary law. However, considering the historically economic objective of the EU,[179] the circular economy lies at the core of EU competences. Moreover, in light of the sustainable development objective of Article 3(3) TEU, it can be argued that the internal market should also be a circular market.[180]

49. The circular economy made its entrance into EU legislation and policy through the EU's resource efficiency and waste policy. The first document in which the EU explicitly uses the term circular economy, in its above-described meaning,[181] is the 2011 Communication regarding a resource-efficient Europe.[182] In this Communication, the EC stipulates that making the EU a 'circular economy' based on a recycling society with the aim of reducing waste generation and

[176] BREARS (n. 44), 14 and WIESMETH (n. 152), 15.
[177] BALLARDINI (n. 1), 1.
[178] BREARS (n. 44), 15-20.
[179] *Infra,* n. 165.
[180] *E.g.,* regarding trademarks: trademark rights may not hinder the free movement of goods (internal market) but may also not hinder repair and upcycling (circular economy). See Part two and three.
[181] Note: the term circular economy also occurs in an EC communication from 2005. However, in this document, the term is only used to refer to China which was at the time already pursuing a circular economy. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Taking sustainable use of resources forward: A Thematic Strategy on the prevention and recycling of waste", COM(2005) 666 final, 21 December 2005.
[182] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy", COM(2011) 21 final, 26 January 2011.

using waste as a resource is one of the measures for a resource-efficient Europe.[183] However, prior documents already mention aspects and characteristic principles of the circular economy, such as, for example, the Green Paper on Integrated Product Policy,[184] dating back to 2001, which already focused on a life cycle approach[185] aimed at the reduction of the environmental impacts of products.[186] Another example is the Raw Material Strategy of 2008[187] which prioritizes boosting overall resource efficiency and promoting recycling to reduce the EU's consumption of primary raw materials.[188]

50. However, the real circular breakthrough only occurred in 2014, with the development of the Circular Economy Package, which consisted of several documents,[189] including the EC Communication 'Towards a circular economy: A zero waste programme for Europe'.[190] This Communication emphasised the importance of transitioning to a circular economy and posited measures necessary for this transition. However, this package was replaced only one year later because of its focus on waste and the need for a more ambitious proposal that would include the entire product cycle.[191] Thus, in 2015 the EC Communication 'Closing the loop – An EU action plan for the Circular Economy' (2015 CEAP)[192] was published, which had a clear focus on economic growth and emphasised that the circular economy was a transition already under way but that needed enhancement.[193] The two most important improvements of the 2015 CEAP, compared to its predecessor, are its holistic approach and change of focus. Firstly, the 2015 CEAP emphasises

[183] *Ibid*, 6.
[184] Green paper on integrated product policy, COM(2001) 68 final, 7 February 2001.
[185] For more information on the life cycle approach, see for example "Why Take A Life Cycle Approach?", *UNEP*, 2004, https://sustainabledevelopment.un.org/content/documents/846Why_take_a_life_cycle_approach_EN.pdf
[186] Green paper on integrated product policy, COM(2001) 68 final, 7 February 2001, 5.
[187] Communication from the Commission to the European Parliament and the Council, "The raw materials initiative – meeting our critical needs for growth and jobs in Europe", COM(2008) 699 final, 4 November 2008.
[188] *Ibid*, 6.
[189] HANNEQUART (n. 160), 24.
[190] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Towards a circular economy: A zero waste programme for Europe", COM(2014) 398 final, 2 July 2014.
[191] HANNEQUART (n. 160), 24 and KOVACIC (n. 63), 40.
[192] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Closing the loop – An EU action plan for the Circular Economy", COM(2015) 614 final, 2 December 2015. Further: 2015 CEAP.
[193] KOVACIC (n. 63), 40-41.

that the transition to a circular economy requires a systemic change covering the entire economic and societal system.[194] This refers to what has already been established above, namely that the transition to a circular economy requires changes on all levels, in all sectors and at all stages of the production and consumption process. Secondly, whilst the 2014 Communication aims at a 'zero-waste-society', the 2015 CEAP distances itself from this goal as it is "*unachievable in an economically viable way*" and instead focuses on maximising reuse, recycling, and remanufacturing.[195]

51. In 2020, the 2015 CEAP was replaced by the 'new Circular Economy Action Plan – For a cleaner and more competitive Europe'[196] (2020 CEAP) as one of the main building blocks of the European Green Deal.[197] In succession to the 2015 CEAP, the 2020 CEAP introduces initiatives covering the entire life cycle of products and aims to prevent waste and keep resources in the EU economy for as long as possible.[198] In light of this goal, the 2020 CEAP calls*, inter alia*, for increased repair and remanufacturing of products.[199]

52. In 2023, the circular economy plays a vital role within the EU, as a contributor to the EU's objective of sustainable development as stipulated in Article 3(3) TEU, as a prerequisite to the EU's 2050 climate neutrality target and to halt biodiversity loss.[200] Therefore, the question again arises of what is understood under this concept within the EU.

[194] 2015 CEAP, 18.
[195] KOVACIC (n. 63), 42.
[196] 2020 CEAP (n. 46).
[197] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "The European Green Deal", COM(2019) 640 final, 11 December 2019.
[198] "Circular economy action plan", *European Commission*, https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en
[199] 2020 CEAP, 4, 10, 17.
[200] *Ibid*.

2.2. EU Definition

53. The eur-lex database contains a total of 3914 documents[201] which mention 'circular economy', 252 of which are legal acts. However, a definition of the concept is rarely provided. An important definition of the circular economy within the EU is that of the 2015 CEAP which describes it as an economy "*where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized*" and which recognizes the transition to a circular economy as "*an essential contribution to the EU's efforts to develop a sustainable, low carbon, resource efficient and competitive economy*".[202] The 2020 CEAP does not provide a new definition, thus it can be assumed that the definition of the 2015 CEAP is upheld in absence of its repeal. Another clear definition is the one provided by the European Parliament (EP) which defines the circular economy as "*a production and consumption model which involves reusing, repairing, refurbishing and recycling existing materials and products to keep materials within the economy wherever possible. A circular economy implies that waste will itself become a resource, consequently minimizing the actual amount of waste.*".[203]

54. Additionally, in its questions and answers on the Commission Communication 'Towards a Circular Economy' and the Waste Targets Review, the EC clarified that: ***"****A circular economy preserves the value added in products for as long as possible and virtually eliminates waste. It retains the resources within the economy when a product has reached the end of its life, so that they remain in productive use and create further value.*".[204] Subsequently, the EC sums up some examples of what this might involve, such as increasing the durability of products and creating markets for recycled materials.

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[201] On 12 May 2023.
[202] 2015 CEAP, 2.
[203] "Circular Economy", *European Parliament*, December 2018, https://www.europarl.europa.eu/thinktank/infographics/circulareconomy/public/index.html
[204] "Questions and answers on the Commission Communication 'Towards a Circular Economy' and the Waste Targets Review", *European Commission*, 2 July 2014, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_450

55. Thus, certain key principles of the circular economy that have been identified above make their comeback in EU definitions, namely:

- Keeping resources and materials in the economy for as long as possible and thereby reducing resource extraction and minimising the generation of waste.
- The link between the circular economy and sustainable development.
- The Rs-paradigm (reuse, repair, refurbish, recycle).

56. Building upon the Rs-paradigm, an important aspect of the circular economy within the EU is the waste hierarchy, as determined in Article 4 of the Waste Framework Directive,[205] which determines the priority order in waste prevention and management.[206] According to this hierarchy, waste must primarily be prevented.[207] If prevention is not possible, products should be prepared for reuse and only if re-use appears unachievable, can products be recycled. Other types of recovery and disposal of waste are only permitted if all the above steps are impossible. Thus, an attempt at reusing, repairing, refurbishing, and remanufacturing products must always be made before turning to recycling since those practices produce greater benefits.[208]

[205] Article 4 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), *OJ L* 312, 22 November 2008, 3-30.
[206] See specifically for electrical and electronic equipment: Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE)(recast) Text with EEA relevance, *OJ L* 197, 24 July 2012, 38-71.
[207] *E.g.*, by repairing and upcycling products, see Part two.
[208] M. DE SCHOENMAKERE and J. GILLABEL, "Circular by design – Products in the circular economy", *EEA*, 2017, https://circulareconomy.europa.eu/platform/sites/default/files/circular_by_design_-_products_in_the_circular_economy.pdf, 7.

Figure 4: the waste hierarchy
Source: "Waste Framework Directive", European Commission, https://environment.ec.europa.eu/topics/waste-and-recycling/waste-framework-directive_en

57. Consequently, whilst there is no definition of the circular economy used by the EU in all instances where reference is made to the concept, there are some returning features of the concept which provide insight into the meaning attributed to it by the EU.

3. Definition in this research

58. Similarly as for the concept of sustainable development, a definition of the circular economy must now be provided to clarify the meaning of this concept when used within this research, so that the impact of EU trademark legislation on this concept can correctly be assessed. However, since I am by no means an economist, the same disclaimer concerning the absence of a 'correct' definition as made regarding the definition of sustainable development applies to this definition.[209]

59. Based on the executed research, I have again distinguished four key characteristics that must feature in the definition of the circular economy:

1) The circular economy aims to keep materials and resources in the economic cycle for as long as possible, thereby reducing the amount of resources extracted and waste generated.

[209] *Cf.* n. 38.

2) This goal is achieved through respect for the waste hierarchy, which prefers reducing, reusing, repairing, remanufacturing and refurbishing over recycling and which depreciates the disposal of waste to a measure of last resort.
3) The circular economy contributes to sustainable development in its three dimensions and is an indispensable transition to be made towards this goal.
4) The circular economy requires a holistic approach, demanding changes at all levels of the economy and at all stages of production and consumption. These changes require legislative measures and mental and behavioural adaptations amongst producers and consumers.

60. Based on these characteristics, the following definition of the circular economy is proposed for the understanding of the concept within this research:

The circular economy is an economic model which aims to keep materials and resources in the economic cycle for as long as possible, consequently reducing the amount of resources extracted and waste generated and thereby contributing to sustainable development in its three dimensions. Achieving this aim requires 1) preference to be given to reducing, reusing, repairing, remanufacturing and refurbishing products over recycling and disposal and 2) a holistic approach calling for legislative and behavioural changes at all levels of the economy and throughout all stages of production and consumption.

Part two: the impact of contemporary EU trademark legislation on sustainable development

Section one: EU trademark legislation

1. The *raison d'être* and functions of trademarks

1.1 Definition and economic raison d'être of trademarks

61. The explosion of innovation and creativity and the vast increase in international trade that accompanied the First Industrial Revolution, necessitated the international regulation of intellectual property protection.[210] Subsequently, roughly 150 years of legislative evolution has made the landscape of intellectual property protection a complicated terrain, only fully understood by lawyers specialised in the matter. However, whilst the average layman has little understanding of, and interest in, *e.g.,* patents, trademarks guide our consumerism choices on a daily basis. Therefore, it is important to question what exactly a trademark is, what its functions are and which rights it grants to its owner. Most importantly, how could a simple word or symbol impact sustainable development?

62. A trademark can be defined as a word, symbol, or other characteristic (*e.g.,* shape, colour, sound), used to identify and distinguish a good or service from those of other undertakings.[211] Regarding their economic *raison d'être*, trademarks fundamentally differ from other intellectual property rights, such as patents and copyrights, which receive legal protection to encourage innovation and creativity.[212] Trademarks, on the other hand, are intended, firstly, to protect producers from competitors free riding on their brand image and, secondly, to reduce search costs for consumers and to protect them from being confused or mislead about the origin of goods or

[210] E.P. WINNER and A.W. DENBERG, *International trademark treaties with commentary*, New York, Oceana, 2004, 3 and M.A. LEAFFER, "The New World of International Trademark Law", *Marquette Intellectual Property Law Review* 1998, (1) 2

[211] See for example similar definitions in W.M. LANDES and R.A. POSNER, *The economic structure of intellectual property law*, Cambridge, Belknap Press, 2003, 166 and L.A. TANCS, *Understanding trademark law: A beginner's guide*, New York, Oceana, 2009, 1.

[212] See more on this in LANDES (n. 211), 37-41 and 294-302.

services.[213] However, trademarks indirectly stimulate innovation as well since a trademark is only valuable to its owner if it can attract and retain customer loyalty, which requires that customers can trust that the quality of the products will match that of those previously purchased[214] and that the products are modern and innovative.[215] Consequently, producers must continuously invest in product improvement and development to attract and retain consumers, thus stimulating innovation and creativity.

1.2 Trademark functions

63. Traditionally, the only recognized function of trademarks, was that of indicating origin. This function entails that a trademark is intended to identify the goods or services bearing the mark as originating from the owner of that mark, thereby distinguishing them from goods or services of other undertakings.[216] Consequently, the consumer is guaranteed that all goods or services bearing this mark have been manufactured or supplied by the same undertaking, which can be held responsible for their quality.[217]

64. The origin function is the most essential trademark function,[218] and it remains the only function explicitly acknowledged in EU trademark legislation.[219] However, the CJEU has attributed

[213] LANDES (n. 211), 167-168 and M.P. MCKENNA, "The normative foundations of trademark law", *Notre Dame Law Review* 2007, Vol. 82, Issue 5, (1839) 1841-1843.
[214] LANDES (n. 206), 168 and I. GOVAERE, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, London, Sweet & Maxwell, 1996, 25.
[215] Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, COM(2013) 162 final, 27 March 2013, 1.
[216] Judgement of 25 July 2018, *Mitsubishi*, C-129/17, EU:C:2018:594, para 35; VANHEES (n. 8), 313; JANSSENS (n. 8), 42-43; I. VANHAUTE, Eigen belang vs. algemeen belang – Botsende belangen in het merkenrecht, *I.R.D.I.* 2007, (110) 114; J.P. HEIDENREICH, "The Development of the Concept of Trade Mark Functions" in F. PETILLION (ed.), *EU Marks a Quarter of a Century*, Antwerpen, Intersentia, 2022, (25) 28-29.
[217] *Ibid*.
[218] *E.g.*, Judgement of 23 May 1978, *Hoffman-La Roche*, C-102/77, EU:C:1978:108, para 7; Judgement of 10 October 1978, *Centrafarm*, C-3/78, EU:C:1978:174, para 12; Judgement of 11 September 2007, *Céline*, C-17/06, EU:C:2007:497, para 16 and 26; Judgement of 18 June 2009, *L'Oréal and Others*, C-487/07, EU:C:2009:378, para 58; Judgement of 8 July 2010, *Portakabin*, C-558/08, EU:C:2010:416, para 30 and Judgement of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474, para 80.
[219] Recital 16 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast) (Text with EEA relevance), *OJ L* 336, 23

several other functions to trademarks.[220] Firstly, strongly linked to the origin function, trademarks guarantee the quality of goods or services. More precisely, trademarks aid consumers in their consumption decisions by creating the presumption that goods or services bearing a certain trademark will satisfy the quality standards known for that mark.[221]

65. Secondly, trademarks fulfil an important communication, advertising, and investment function.[222] The investment function entails that the proprietor of a trademark can acquire or preserve a reputation linked to his trademark, capable of attracting customers and retaining their loyalty.[223] One way of building such a reputation and informing and persuading consumers, is through advertising. Consequently, the investment and advertising function can overlap, but the first is broader than the latter since it entails building a reputation by various commercial techniques, with advertising only being one of them.[224] However, the investment function should not be interpreted too broadly either. More precisely, the sole fact that the trademark owner is obliged to adapt or increase his efforts to acquire and/or preserve his trademark's reputation because of the use by a third party of an identical sign for identical goods or services, does not negatively affect this function.[225] Lastly, the communication function is linked to all these functions since through the trademark, consumers are informed about the origin, and thus quality and reputation, of the goods or services.

66. These trademark functions are of great importance, since it is settled case law that a trademark owner can only invoke an infringement of his rights, if the third party's use of the

December 2015, 1-26 (further TMD) and Recital 11 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) (Text with EEA relevance), *OJ L* 154, 16 June 2017, 1-99 (further EUTMR).

[220] *E.g.,* C-487/07 (n. 218), para 58; Judgement of 23 March 2010, *Google France and Google,* C-236-238/08, EU:C:2010:159, para 77; Judgement of 22 September 2011, *Interflora*, C-323/09, EU:C:2011:604, para 60 and C-129/17 (n. 210), para 34.

[221] HEIDENREICH (n. 216), 32-34; VANHAUTE (n. 216), 114 and VANHEES (n. 8), 314.

[222] *Cf.* M. PEGUERA, "Trademark Functions and Trademark Rights", *IP Scholars Conference* 2014, 12-14.

[223] C-129/17 (n. 216), para 36.

[224] *E.g.,* C-323/09 (n. 220), para 61 and C-129/17 (n. 216), para 36-37.

[225] C-323/09 (n. 220), para 64.

trademark adversely affects, or is liable to adversely affect, one of the trademark's functions.[226] This requirement is justifiable since the exclusive rights granted to a trademark holder are intended to ensure that the trademark can fulfil its functions.[227] Consequently, if the functions of the trademark are not affected, neither should the rights of the trademark holder be able to block the contested third-party conduct.

2. The inclusion of trademark legislation in the EU

2.1 The international trademark framework

67. Whilst this research intends to examine the European trademark legislation, it is important to give an overview of the most important international trademark instruments since they provide the background against which the European trademark legislation was developed. Therefore, the present section provides a brief introduction into the international trademark landscape.

68. The first international instrument dealing, *inter alia*, with trademarks, was the Paris Convention for the Protection of Industrial Property[228] (Paris Convention), adopted in 1883.[229] This convention contained two fundamental principles, that are still the cornerstones of trademark protection today, namely the national treatment principle and the principle of independent rights. Firstly, the national treatment principle entails that nationals of all member states to the convention must receive the same treatment as your own nationals.[230] Consequently, member states cannot discriminate between their own nationals and those of other member states in

[226] *E.g.*, Judgement of 12 November 2002, *Arsenal Football Club*, C-206/01, EU:C:2002:651, para 51; Judgement of 25 January 2007, *Adam Opel*, C-48/05, EU:C:2007:55, para 21-22; C-487/07 (n. 218), para 58 and 60; C-236-238/08 (n. 220), para 75-76; C-558/08 (n. 218), para 29; C-323/09 (n. 220), para 37 and C-129/17 (n. 216), para 34.
[227] *Ibid*.
[228] Industrial property is a sub-category of intellectual property and encompasses patents, trademarks, industrial designs and models and designations of origin.
[229] Paris Convention for the Protection of Industrial Property (as amended on 28 September 1979) (adopted 28 September 1979, entered into force 3 June 1984) TRT/PARIS/001. Further: Paris Convention.
[230] Article 2 Paris Convention.

affording trademark protection.[231] Secondly, the principle of independence of rights[232] means that trademark rights granted in one member state to the convention, are independent from those obtained in other member states and are solely determined by the national law of that country.[233] Consequently, *e.g.,* revocation of registration in one member state does not affect the registration of that trademark in other countries.[234] Besides these two fundamental principles, the Paris Convention also provides procedural harmonization, *e.g.,* through the introduction of a right of priority,[235] which grants the date of first registration as the registration date for subsequent registrations made within a period of six months.[236]

69. Whilst the Paris Convention has laid the foundations of international trademark law, its substantive and procedural provisions were still very limited. For example, due to the principle of territoriality, which limits the effects of a trademark to the country where it is registered,[237] trademark holders seeking protection in multiple countries needed to apply for registration in each country where protection was sought. This resulted in a substantial administrative burden and high costs, thus discouraging trademark holders from seeking wide-spread protection. This burden was alleviated by the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement) concluded in 1891,[238] which introduced the possibility of obtaining trademark protection in multiple countries through a single filing. More precisely, under this agreement, an application for registration can be filled with the International Bureau of Intellectual Property,

[231] LEAFFER (n. 210), 9 and T.W. BLAKELY, "Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection", *University of Pennsylvania Law Review* 2000, Vol. 149, Issue 1, (309) 314.
[232] Article 6(3) Paris Convention.
[233] BLAKELY (n. 231), 314.
[234] J. SCHMIDT-SZALEWSKI, "The International Protection Trademarks After the TRIPS Agreement", *Duke Journal of Comparative & International Law* 1998, Vol. 9, Issue 189, (189) 194-195.
[235] Article 4 Paris Convention.
[236] For a more in-depth analysis of the Paris Convention, see *e.g.,* S. RICKETSON, "The Trademark Provisions in the Paris Convention for the Protection of Industrial Property" in I. CALBOLI and J.C. GINSBURG (eds.), *The Cambridge Handbook of International and comparative Trademark Law*, Cambridge, Cambridge University Press, 2020, 3-26.
[237] Y.T. COBAN, "The EU-wide Exhaustion of Trademark Rights in Relation to Parallel Imports from Third Countries", *BFHD* 2018, (877) 879.
[238] Madrid Agreement concerning the international registration of marks (as amended on 28 September 1979) (adopted 28 September 1979, entered into force 23 October 1983) TRT/MADRID-GP/001. Further: Madrid Convention.

indicating the countries where protection is sought. This application is subsequently sent to those countries, who treat it as a national application and determine whether or not to grant trademark protection in their country.[239]

70. The Madrid Agreement, however, contained several rules which resulted in limited membership and problems in practice.[240] Therefore, it was supplemented with the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) in 1989,[241] which contained several improvements to the Madrid registration system.[242] The Madrid Union can now undoubtedly be called a success story, with 114 members in May 2023[243] and an increase in applications for international registration, thus clearly indicating an increased demand for cross-border trademark registration and the benefit of harmonization thereof.[244]

71. Supplementing the single-filing system established by the Madrid Union, other international agreements aim at the harmonisation of national registration procedures. Firstly, the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Agreement),[245] concluded in 1961, provides a uniform classification of goods and services, thereby creating consistency in classifications used by national

[239] See Article 1-5 Madrid Agreement and BLAKELY (n. 231), 316-317 and LEAFFER (n. 210), 12-15.
[240] For example, important trade countries such as the United Kingdom, the United States, Australia, Canada, and Japan refused to participate in this convention. See S.H.S. LEONG, "The internationalization of Trademark protection" in I. CALBOLI and J.C. GINSBURG (eds.), *The Cambridge Handbook of International and comparative Trademark Law*, Cambridge, Cambridge University Press, 2020, (46) 49.
[241] Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (as amended on November 12, 2007) (adopted 12 November 2007, entered into force 1 September 2008) TRT/MADRIDG-GP/001 (Madrid Protocol).
[242] For more on this matter, see for example BLAKELY (n. 231), 318-320; LEAFFER (n. 210), 15-18 and LEONG (n. 240), 48-51.
[243] "WIPO-Administered Treaties", *WIPO*, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=B&bo_id=20
[244] LEONG (n. 240), 51.
[245] Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (as amended on 28 September 1979) (adopted 28 September 1979, entered into force 6 September 1982) TRT/Nice/001 (Nice Agreement).

trademark offices, thus making it easier to apply for registration in different countries.[246] Secondly, the Trademark Law Treaty (TLT) of 1994,[247] aims to harmonize and simplify the procedural requirements for trademark protection, ranging from registration to maintenance of trademark rights.[248] This objective is pursued through the imposition of maximum procedural requirements that member states can impose for various actions[249] and the creation of model forms to standardize applications.[250] This treaty was followed by the Singapore Treaty on the Law of Trademarks (Singapore Treaty) in 2006,[251] which aims to revise and expand the scope of the TLT.[252]

72. The last international agreement that plays a crucial role is the Agreement on Trade-Related aspects of Intellectual Property rights (TRIPs),[253] concluded in 1994 under the auspices of the World Trade Organisation (WTO). Unsurprisingly considering its origin, this agreement is focused on the impact of trademarks on international trade. Consequently, on the one hand it aims to promote effective and adequate protection of intellectual property rights, whilst on the other hand ensuring that measures and procedures to enforce these rights do not become barriers to legitimate trade.[254] It contains provisions on various aspects of trademarks, ranging from, *inter alia*, the types of marks that can be protected, to the registration procedures and enforcement of trademark rights.[255] Since both the EU and its Member States are members of the WTO,[256] this agreement is binding for them and must therefore be respected under EU trademark legislation.

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[246] JANSSENS (n. 8), 17 and WINNER (n. 210), 44.
[247] Trademark Law Treaty (adopted 27 October 1994, entered into force 1 August 1996) TRT/TLT/001.
[248] JANSSENS (n. 8), 18.
[249] LEAFFER (n. 210), 20 and LEONG (n. 240), 52.
[250] LEAFFER (n. 210), 20-21.
[251] Singapore Treaty on the Law of Trademarks (adopted 27 March 2006, entered into force 16 March 2009) TRT/SINGAPORE/001.
[252] For more on these treaties, see for example, LEAFFER (n. 210), 18-22 and LEONG (n. 240), 51-54.
[253] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 186 (TRIPS Agreement).
[254] WINNER (n. 210), 52.
[255] For more on the TRIPs Agreement, see for example D.J. GERVAIS, "A Look at the Trademark Provisions in the TRIPS Agreement" in I. CALBOLI and J.C. GINSBURG (eds.), *The Cambridge Handbook of International and comparative Trademark Law*, Cambridge, Cambridge University Press, 2020, 27-45.
[256] "The EU and the WTO", *European Commission*, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-and-wto_en

2.2 The evolution of the EU trademark legislation

2.2.1 The introduction and binary character of EU trademark legislation

73. Soon after the establishment of the European Economic Community in 1957, the participating countries realised that the harmonization and unification of intellectual property rights would be a prerequisite to achieving economic integration and creating a common market. Consequently, already in 1959, work began on the unification of industrial property law.[257] The aim was to create unitary and autonomous laws for the protection of industrial property within the entire territory of the common market, which would supplement national laws.[258] Thus, EU efforts were from the onset focused on creating a unitary and autonomous European trademark, instead of solely aiming for the harmonization of national trademark legislation.[259] This was motivated by the fact that the objective of the internal market could not be achieved solely through the approximation of national laws, because approximation could not surmount the principle of territoriality.[260] Because of this principle, even if national trademark laws were assimilated, different individuals could acquire trademark protection in individual member states of the EU for identical or similar signs, thereby impairing the above-mentioned trademark functions and causing confusion to consumers.[261]

74. Subsequent evolutions and working groups built upon these first initiatives, finally resulting in the Commission submitting two proposals on 25 November 1980, namely a proposal for a first

[257] Memorandum on the creation of an EEC trade mark, SEC(76) 2462, 6 July 1976.
[258] *Ibid*, 5.
[259] Current Article 118 TFEU provides a legal basis for the creation of a uniform European trademark. However, initially, the creation of a European trademark was based on the flexibility clause of Article 235 of the Treaty establishing the European Community, *OJ C* 224, 31 August 1992 (now Article 352(1) TFEU). Harmonisation of trademark legislation, on the other hand, is based on the fundamental competence of the EU to approximate laws where required for the internal market (Article 100a of the Treaty establishing the European Economic Community, *OJ L* 169, 29 June 1987; now Article 114 TFEU).
[260] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, *OJ L* 11, 14 January 1994, 1.
[261] Memorandum on the creation of an EEC trade mark, SEC(76) 2462, 6 July 1976, 12-13.

Council Directive to approximate the laws of the Member States relating to trademarks[262] and a proposal for a Council Regulation on Community trademarks.[263] These two proposals laid the foundation for the current binary system of trademark protection within the EU, based both on the introduction of an autonomous EU trademark and on the harmonisation of national trademark laws.

2.2.2 The harmonization of national trademark laws

75. Whilst the creation of a European trademark was considered indispensable for the free movement of goods and services, approximation of national laws still had an important role to play.[264] Therefore, on 21 December 1988, the First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trademarks (Directive 89/104/EEC)[265] was adopted to harmonise national trademark protection. This Directive was later codified by Directive 2008/95/EC.[266] However, harmonization was only partial and remained limited to those national provisions most directly affecting the functioning of the internal market,[267] such as, *e.g.,* the signs of which a trademark may consist, the grounds for refusal or invalidity, the rights conferred by a trademark and the limitations to and exhaustion of those rights.[268] These matters were regulated through both mandatory[269] and optional provisions,[270] thus leaving discretion to member states for certain matters.[271] Importantly, member states remained responsible for regulating all

[262] Proposal for a first Council Directive to approximate the laws of the Member States relating to trade marks, *OJ C* 351, 31 December 1980, 1-5.
[263] Proposal for a Council Regulation on Community trade marks, *OJ C* 351, 31 December 1980, 5-31.
[264] Memorandum on the creation of an EEC trade mark, SEC(76) 2462, 6 July 1976, 13.
[265] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, *OJ L* 40, 11 February 1989, 1-7. Further: Directive 89/104/EEC.
[266] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version) (Text with EEA relevance), *OJ L* 299, 8 November 2008, 22-33. Further: Directive 2008/95/EC.
[267] Directive 89/104/EEC, 1 and Recital 4 Directive 2008/95/EC.
[268] Articles 2-7 Directive 2008/95/EC.
[269] *E.g.,* Article 3(1) and (3) Directive 2008/95/EC.
[270] *E.g.,* Article 3(2) and (4) Directive 2008/95/EC.
[271] BLAKELY (n. 231), 326 and JANSSENS (n. 8), 24.

procedural issues, including the procedure for registration,[272] revocation and invalidity of trademarks acquired by registration.[273]

76. In 2013, the EC presented a trademark reform package, aimed at amending both the trademark directive and regulation to make the EU trademark system more accessible, efficient, and less costly.[274] This resulted in the adoption of Directive 2015/2436 to approximate the laws of the Member States relating to trademarks (TMD).[275] The most important innovation of this new Directive is that it not only covers provisions of substantive trademark law, but that it also contains procedural harmonisation.[276] This was motivated by the need to make trademark registrations throughout the EU easier to obtain and administer, which required the alignment of procedural rules for trademark registration in the Member States with those of the EU trademark system.[277] Other amendments compared to the previous directive are *inter alia*, the abolition of the graphical representation requirement, provided that the sign is capable of being represented on the register in a manner which enables the competent authorities and public to determine the clear and precise subject matter of the protection,[278] the protection of geographical indications[279] and the right to prohibit use in comparative advertising[280] and preparatory acts in relation to the use of packaging or other means.[281]

[272] The protection of trademarks acquired through use was also left to the discretion of the members states, see Recital 5 Directive 2008/95/EC.
[273] *Ibid*, Recital 6.
[274] T. MADIEGA, The EU Trademark reform package, *EPRS*, 14 December 2015, https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/573887/EPRS_BRI(2015)573887_EN.pdf, 2.
[275] TMD (n. 219).
[276] Article 37-52 TMD.
[277] Recital 8-9 TMD.
[278] Article 3 TMD.
[279] *E.g.*, Article 4(1)(i) and 5(3)(c) TMD.
[280] Article 10(3)(f) TMD.
[281] Article 11 TMD.

2.2.3 The EU trademark

77. Supplementary to and independent from the harmonized national trademark systems, Regulation 40/94[282] created the Community trademark, later codified in Regulation 207/2009 on the Community trademark[283] and relabelled as the European Union trademark (EU trademark) in 2015. In essence, the EU trademark provides unitary protection in all Member States based on three fundamental principles.[284] Firstly, the EU trademark has a unitary character.[285] This entails that it can only be registered for the entire territory of the EU and that rights resulting from this registration can only expire or be transferred with effect for this entire territory, decisions which are made by a central organ.[286] This unitary character distinguishes the EU trademark from the Madrid system, where the applicant can indicate in which countries protection is sought and where each country decides independently whether or not to grant protection. Secondly, the EU trademark has an autonomous character, which means that it is only governed by EU legislation, unless this legislation explicitly refers to the application of national laws.[287] Thirdly, the system is based on the principle of co-existence between the EU trademark and (harmonized) national trademark law.[288] The EU trademark was never intended to replace national trademark systems but instead aimed at providing an additional option for trademark owners who desire trademark protection in multiple countries.[289] They now have the possibility to a) apply for trademark protection in the desired countries through individual national applications, b) apply for trademark protection in the desired countries through a single filing under the Madrid system, or c) apply for an EU trademark if protection is sought in all EU countries. Thus, it remains possible to apply for trademark protection only in a single or a couple of EU countries.

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[282] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, *OJ L* 11, 14 January 1994, 1-36. Further: Regulation 40/94.
[283] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (Text with EEA relevance), *OJ L* 78, 24 March 2009, 1-42. Further: Regulation 207/2009.
[284] Memorandum on the creation of an EEC trade mark, SEC(76) 2462, 6 July 1976, 18-19.
[285] Article 1(2) Regulation 207/2009.
[286] BLAKELY (n. 231), 339.
[287] *Ibid*, see Article 14 Regulation 207/2009.
[288] JANSSSENS (n. 8), 26.
[289] *E.g.,* Proposal for a Council Regulation on Community trade marks, *OJ C* 351, 31 December 1980, 6.

78. The Community trademark system established by Regulation 40/94 introduced both substantial and procedural provisions. It created the Office for Harmonisation in the Internal Market (OHIM) and provided clear procedures for the registration, opposition, publication, and enforcement of EU trademark rights.[290] However, the 2013 EU Trademark reform package also introduced amendments to the EU trademark system, with the adoption of Regulation 2015/2424,[291] codified in 2017 by Regulation 2017/1001 on the European Union trademark (EUTMR).[292] Firstly, this new framework adapted the terminology to the Lisbon Treaty, introducing the concept of 'EU trademark' instead of 'Community trademark'[293] and changing the name of OHIM to the European Union Intellectual Property Office (EUIPO).[294] Secondly, certain changes made to the TMD were also introduced in the EUTMR, such as *e.g.*, the abolition of the graphical representation requirement[295] and the right to prohibit use in comparative advertising[296] and preparatory acts in relation to the use of packaging or other means.[297] Thirdly, several important amendments were made to the procedural provisions of the regulation. For example, Regulation 2015/2424 eliminated the possibility of applying for registration with national trademark offices by obliging applications to be filed at EUIPO, [298] required that the priority claim is made together with the EU trademark application[299] and made adaptations to include technological developments and the rise of the internet in the procedure[300].[301]

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[290] For the registration procedure under this regulation, see *e.g.,* BLAKELY (n. 231), 339-344.
[291] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015, amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (Text with EEA relevance), *OJ L* 341, 24 December 2015, 21-94. Further Regulation 2015/2424.
[292] EUTMR (n. 219).
[293] Article 1 EUTMR.
[294] Article 2 EUTMR.
[295] Article 4 EUTMR.
[296] Article 9(3)(f) EUTMR.
[297] Article 10 EUTMR.
[298] Article 30 EUTMR.
[299] Article 35 EUTMR.
[300] See for example the possibility of notification by electronic means in Article 98(3) EUTMR and the electronic register made possible by Article 111(5) EUTMR.
[301] For an overview of some changes, see *e.g.,* H.R. TASEV and M. ALEKSOV, "European Union Trademark Reform Package: Qualitative and Quantitative Analysis", *Iustinianus Primus Law Review* 2020, Vol. 11, Issue 1, 1-17.

79. The regulation is supplemented by an Implementing Regulation,[302] which further elaborates on certain provisions of the EUTMR in light of their implementation, and a Delegated Regulation,[303] which provides more details concerning several aspects of the different procedures before EUIPO.[304]

2.2.4 TMD v. EUTMR: different aim but similar provisions

80. It is important to emphasise that the EU trademark and the harmonization of national trademark laws have increasingly influenced each other, with the EU aiming at coordination between these two systems.[305] On the one hand, with the first trademark regulation being adopted 5 years after the first directive, the substantive provisions of the first were intended to be the same as those of the latter,[306] thereby limiting differences and facilitating trademark applications under both systems. The current TMD and EUTMR are still parallels when it comes to the substantive provisions.[307] On the other hand, as stated above, whilst the first approximation directive lacked any procedural provisions, the 2015 TMD harmonizes principal procedural rules, based on the procedures already existing under the EU trademark system.[308] However, since the TMD only seeks to harmonize important procedural aspects in the Member States, without needing to create a

[302] Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council of the European Union trade mark, and repealing Implementing Regulation (EU) 2017/1431, *OJ L* 104, 24 April 2018, 37-56.
[303] Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430, *OJ L* 104, 24 April 2018, 1-36.
[304] Since this research does not focus on the implementation and procedures concerning trademarks, an analysis of these regulations lies outside the scope of the research.
[305] See for example Recital 5 TMD and Recital 8 Regulation 2015/2424.
[306] BLAKELY (n. 231), 338.
[307] See Articles 4-15 EUTMR and 3-15 TMD. Exceptions: Articles 5, 6 and 11 EUTMR and Articles 6, 7, 8 and 9 TMD and small differences between Articles 7 EUTMR and 4 TMD, 8 EUTMR and 5 TMD, 9 EUTMR and 10 TMD, 12-14 EUTMR and 12-14 TMD.
[308] Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast), COM(2013) 216 final, 27 March 2013, 5.

comprehensive procedural system, the procedural provisions of the TMD are much more limited compared to those of the EUTMR.[309]

81. Because of the limited scope of this research, a full examination of both the TMD and the EUTMR and a comparison thereof will not be provided. However, certain aspects of trademark protection are of crucial importance when examining the impact of European trademark legislation on the circular economy, namely the exclusive rights granted to the trademark holder and the limitations to and exhaustion of those rights. Therefore, the following section provides an examination of these aspects.

3. The rights of the trademark holder and the principle of exhaustion

3.1 The rights of the trademark holder

3.1.1 General conditions

82. Article 10(1) TMD and Article 9(1) EUTMR grant exclusive rights to the trademark proprietor of a registered trademark, which allow the proprietor to prohibit third parties from using his trademark in any matter prohibited under the second paragraph.[310] However, for the use to qualify as a trademark infringement, four general conditions must be fulfilled in all three scenarios contained in the second paragraph. These requirements can be deduced from the first sentence of Article 10(2) TMD/Article 9(2) EUTMR which stipulates: "*Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:…*"[311].[312]

[309] Whilst the 'Procedures' subsection of the TMD consists of only 16 Articles (Articles 37-52), that of the EUTMR, contains 28 Articles (Articles 94-121). Moreover, most of the procedural provisions included in the TMD do not find their counterpart in those 28 Articles of the EUTMR but in other provisions of the EUTMR, thereby increasing the disparity in comprehensiveness of procedural regulations.
[310] VANHEES (n. 8), 409-410.
[311] Emphasis added.
[312] See more on these general requirements in *e.g.,* JANSSENS (n. 8), 296-301 and VANHEES (n. 8), 411-428.

83. Firstly, a trademark holder can only invoke these trademark rights if his trademark is registered.[313] Secondly, there can only be trademark infringement when the trademark is used by a third party. The interpretation of this criterion is facilitated by the third paragraph of Article 10 TMD/Article 9 EUTMR, which provides a non-exhaustive list of examples of what constitutes use. These examples include, *inter alia*, affixing the sign to goods or packaging, offering trademarked goods or putting them on the market, importing or exporting trademarked goods and using the trademark in advertising. Additionally, the CJEU has elaborated on the concept of use, clarifying that use requires active behaviour on the part of the third party who must have (in)direct control of the act constituting the use and must be effectively able to stop that use.[314] However, throughout the years, the CJEU has interpreted the use-requirement increasingly flexible, qualifying more actions as use and thus expanding the rights of the trademark proprietor. For example, in 2018 the CJEU ruled that even the removal of a trademark from goods (de-branding) constitutes use of that trademark (*infra,* nr. 123).[315]

84. Thirdly, the trademark must be used in the course of trade. The CJEU has iterated on several occasions that this requires use in the context of a commercial activity, aimed at economic advantage, and not use as a private matter.[316] Therefore, use of a trademark for private purposes – for example the sale of a trademarked product through an online marketplace outside the context of a commercial activity[317] – or for scientific purposes does not amount to use in the course of trade.[318] However, if this 'private use' goes beyond the scope of a private activity because of its volume, frequency or other characteristics, the third party will be considered to be acting in the course of trade.[319] Fourthly, the trademark must be used in relation to goods or services. This

[313] Some countries also provide trademark protection for marks acquired through use, but this protection remains a matter of national law, see Recital 11 TMD. In this research, it will always be assumed that the trademark is registered.
[314] Judgement of 3 March 2016, *Daimler*, C-179/15, EU:C:2016:134, para 40-41.
[315] C-129/17 (n. 216), para 28-52.
[316] *E.g.,* C-206/01 (n. 226), para 40; C-17/06 (n. 218), para 17; Order of 19 February 2009, *UDV North America,* C-62/08, EU:C:2009:111, para 44 and C-236-238/08 (n. 220), para 50.
[317] C-324/09 (n. 218), para 55.
[318] VANHEES (n. 8), 423.
[319] C-324/09 (n. 218), para 55 and Judgement of 30 April 2020, *A*, C-772/18, EU:C:2020:341, para 23.

covers both the use of the trademark to identify the goods or services of the third party,[320] or the goods or services of another person on whose behalf the third party is acting,[321] and the use of the trademark to distinguish the goods or services of the trademark proprietor.[322]

3.1.2 Three infringement scenarios

85. Subsequently, the three different infringement scenarios and their conditions for infringement can be examined. Firstly, Article 10(2)(a) TMD/Article 9(2)(a) EUTMR provides the double identity clause, which prohibits use of an identical sign in relation to goods or services identical with those for which the trademark is registered. Whilst the identity between the goods or services is strict, requiring the use of the sign on the exact same goods or services as those for which the trademark is registered,[323] the CJEU has introduced some flexibility concerning the identity between the signs. More precisely, whilst identity must be interpreted strictly and requires that the sign reproduces, without any modification or addition, all the elements constituting the trademark, there can also be identity when the sign, viewed as a whole, contains differences so insignificant that they may go unnoticed by an average consumer.[324] This flexibility is justified by the fact that the assessment of identity must be done globally, from the viewpoint of an average consumer who is reasonably well informed, observant, and circumspect. However, since consumers rarely have the chance to make a direct comparison between the sign and the trademark, they must depart from the imperfect picture that they have of the trademark in their minds, allowing for small differences to go unnoticed[325].[326]

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[320] *E.g.,* C-48/05 (n. 226), para 28-29; Judgement of 12 June 2008, *O2 Holdings ET O2 (UK),* C-533/06, EU:C:2008:339, para 34 and C-236-238/08 (n. 220), para 60.
[321] *E.g.,* C-62/08 (n. 316), para 48 and 51 and C-236-238/08 (n. 220) para 60.
[322] Judgement of 23 February 1999, *BMW*, C-63/97, EU:C:1999:82, para 38-39; C-533/06 (n. 320), para 34-60 and C-236-238/08 (n. 220), para 69-72. See *infra,* n. 103 and especially reference 399.
[323] *E.g.*, VANHEES (n. 8), 431.
[324] *E.g.,* Judgement of 20 March 2003, *LTJ Diffusion*, C-291/00, EU:C:2003:169, para 50-54; Judgement of 25 March 2010, *BergSpechte*, C-278/08, EU:C:2010:163, para 25 and C-558/08 (n. 218), para 47.
[325] C-291/00 (n. 324), para 52-53.
[326] See more in *e.g.,* JANSSENS (n. 8), 311-315 and VANHEES (n. 8), 429-438.

86. Secondly, Article 10(2)(b) TMD/Article 9(2)(b) EUTMR prohibits the use of a sign identical with, or similar to, the trademark in relation to goods or services identical with, or similar to, the goods or services for which the trademark is registered. On the one hand, similarity between the sign and the trademark requires an *in concreto* assessment of the visual, aural, and conceptual similarity and the importance attached to these elements, depending on the category of goods or services in question and the circumstances in which they are marketed.[327] This requires a global analysis, taking account of all the circumstances, based on the overall impression of an average consumer, who has an imperfect picture of the trademark in his mind.[328] However, similarity on all three levels (visual, aural, and conceptual) is not required because these levels interact.[329] For example, high visual and aural similarity can balance out low conceptual similarity, resulting in overall similarity. On the other hand, similarity between goods or services requires an assessment taking account of all the relevant factors relating to those goods or services,[330] including *inter alia*, their nature, their intended purpose and method of use and their competing or complementary character.[331]

87. However, this second infringement scenario adds an important condition for infringement compared to the first, namely that there must be a likelihood of confusion on the part of the public, including a likelihood of association between the sign and the trademark. A likelihood of confusion exists when, because of the similarity between the signs and the goods or services, consumers could wrongly believe that the goods or services come from the same undertaking or from economically linked undertakings.[332] This requirement is thus strongly linked to the origin function of the trademark. The fact that the public associates the sign and trademark can be taken into account in this assessment. However, mere association does not suffice to conclude that there is

[327] *E.g.*, Judgement of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528, para 23 and Judgement of 22 July 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, para 27.
[328] *Ibid* and *ibid,* para 25-26.
[329] JANSSENS (n. 8), 446 and VANHEES (n. 8), 429-438.
[330] See "Trademark and Design guidelines", *EUIPO*, 31 March 2022, https://guidelines.euipo.europa.eu/1935303/1950066/trade-mark-guidelines/1-introduction, Part C, Section 2, Chapter 2
[331] *E.g.,* Judgement of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, para 23.
[332] *Ibid*, para 26 and 29.

a likelihood of confusion.[333] Instead, a global assessment is required to examine the likelihood of confusion on the part of the average consumer with an incomplete image of the trademark in his mind,[334] taking account of all the relevant circumstances and in particular the recognition of the trademark on the market, the association that can be made and the degree of similarity between the sign and the trademark and between the goods and services.[335] Importantly, the CJEU has clarified that there is interdependence between the similarity between the sign and the trademark and between the goods or services.[336] Therefore, little similarity between the signs can be offset by a great degree of similarity between the goods or services and *vice versa*.[337] Additionally, in general, there is a greater likelihood of confusion for highly distinctive trademarks.[338] Thus, highly distinctive trademarks are granted broader protection than less distinctive marks[339].[340]

88. Lastly, Article 10(2)(c) TMD and Article 9(2)(c) EUTMR prohibit use of an identical or similar sign, irrespective of whether it is used in relation to identical, similar or unsimilar goods or services, provided that the trademark has a reputation in the Member State (TMD)/EU (EUTMR) and the sign, without due cause, takes unfair advantage of or is detrimental to the distinctive character or repute of that mark. The meaning of an identical or similar sign and identical or similar goods or services has already been discussed above.[341] However, the possibility of establishing infringement when the sign is used in relation to goods or services that are not similar to those for which the trademark is registered, vastly expands the rights of the trademark proprietor. Moreover, in contrast to the second scenario, this provision does not require any likelihood of confusion.[342] However, the possibility of invoking trademark rights in this scenario is limited by two new

[333] *E.g.,* C-251/95 (n. 327), para 18; C-342/97 (n. 327), para 17 and Judgement of 22 June 2000, *Marca Mode*, C-425/98, EU:C:2000:339, para 34.
[334] *E.g.,* C-251/95 (n. 327), para 23 and C-342/97 (n. 327), para 25-27.
[335] Recital 16 TMD and 11 EUTMR and *e.g.,* C-251/95 (n. 327), para 22.
[336] *E.g.*, C-39/97 (n. 331) para 17 and C-342/97 (n. 327), para 19.
[337] *Ibid*.
[338] *E.g.,* C-251/95 (n. 327), para 24 and C-342/97 (n. 327), para 20.
[339] C-39/97 (n. 331), para 18 and C-342/97 (n. 327), para 20.
[340] See more on this in *e.g.,* JANSSENS (n. 8), 316-319 and VANHEES (n. 8), 438-454.
[341] *Supra,* n. 86.
[342] *E.g.*, C-251/95 (n. 327), para 20; C-425/98 (n. 333), para 36; Judgement of 10 April 2008, *Adidas and adidas Benelux*, C-102/07, EU:C:2008:217, para 40 and Judgement of 27 November 2008, *Intel Corporation*, C-252/07, EU:C:2008:655, para 30 and 58.

requirements. Firstly, the trademark must have a reputation.[343] This entails that the trademark must be known by a significant part of the public concerned with the products or services covered by that trademark.[344] The relevant public depends on the product or service marketed and can either be the public at large, or a more specialised public.[345] However, it suffices that the trademark is known by the public concerned in a substantial part of the territory of the Member State[346]/EU[347] without needing a reputation throughout the entire territory. Moreover, it is not required that the public knows that the sign is registered as a trademark, knowledge of the sign is sufficient.[348]

89. Secondly, the use must take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark. The first type of injury, detriment to the distinctive character of the trademark – also called 'dilution' or 'blurring' – entails that the trademark's ability to identify the goods or services for which it is registered is weakened.[349] This is particularly the case when a trademark that used to trigger immediate association with the goods or services of the proprietor is no longer capable of doing so.[350] To invoke this harm, the proprietor must prove that the economic behaviour of the average consumer of the goods or services for which his mark is registered has changed because of the use of the later sign or that such change is very likely in the future.[351] The second type of injury, namely detriment to the reputation of the trademark is also referred to as 'tarnishment' or 'degradation'.[352] This injury occurs when the goods or services for which the identical or similar sign is used may be perceived by the public in a way that reduces

[343] However, some authors are of the opinion that the threshold for having a reputation is very low in the EU, see for example M. SENFTLEBEN, "Adapting EU Trademark Law to New Technologies – Back to Basics?" in C. GEIGER (ed.), *Constructing European Intellectual Property – Achievements and Perspectives*, Cheltenham, Edward Elgar Publishing, 2013, (137) 150.
[344] *E.g.,* Judgement of 6 October 2009, *PAGO International*, C-301/07, EU:C:2009:611, para 21-24; Judgement of 3 September 2015, *Iron & Smith*, C-125/14, EU:C:2015:539, para 17 and Judgement of 11 April 2019, *ÖKO-Test Verlag*, C-690/17, EU:C:2019:317, para 47.
[345] *Ibid*.
[346] Judgement of 14 September 1999, *General Motors*, C-375/97, EU:C:1999:408, para 28.
[347] C-301/07 (n. 344), para 27-30.
[348] C-690/17 (n. 344), para 49.
[349] C-487/07 (n. 218), para 39.
[350] *Ibid*.
[351] C-252/07 (n. 342), para 77.
[352] C-487/07 (n. 218), para 40.

the power of attraction of the trademark, particularly, when the goods or services possess a characteristic or quality liable to negatively impact the image of the mark.[353] The last type of injury covers taking unfair advantage of the distinctive character or repute of the trademark, also described as 'parasitism' or 'free-riding'.[354] This scenario not only concerns the detriment caused to the trademark but also to the (unfair) advantage taken by the third party.[355] If the trademark proprietor can provide prima facie evidence of one of these three types of injury or of a future non-hypothetical risk thereof, and the other conditions for infringement are fulfilled, he can prohibit the contested conduct.[356] However, the third party can defend his use if he can prove a 'due cause', which relates both to objectively overriding reasons and to the subjective interests of the third party in using an identical or similar sign[357].[358]

90. However, it must be kept in mind that the four general conditions discussed above must always be fulfilled to establish infringement of trademark rights.[359] Additionally, as mentioned above,[360] infringement requires that the use by the third party negatively impacts one of the functions of the trademark. In this regard, two comments must be made. Firstly, whilst traditionally, the double identity clause was considered to be absolute, the CJEU has emphasised in several judgements that also in this scenario, infringement can only be established if one of the trademark's functions is (potentially) affected.[361] Secondly, whilst in all three scenarios, breach can be established if the use of the third party negatively impacts the origin function of the trademark, the other trademark functions (quality, communication, advertisement, and investment) only

[353] *Ibid*.
[354] C-487/07 (n. 218), para 41.
[355] *Ibid*.
[356] *E.g*., C-252/07 (n. 342), para 28; C-487/07 (n. 218), para 42 and Judgement of 10 May 2012, *Helena Rubinstein*, C-100/11 P, EU:C:2012:285, para 95.
[357] Judgement of 6 February 2014, *Leidseplein Beheer and de Vries*, C-65/12, EU:C:2014:49, para 45.
[358] See more in *e.g*., JANSSENS (n. 8), 340-357 and VANHEES (n. 8), 455-471. See also n. 148.
[359] *Supra*, n. 82-84.
[360] *Supra*, n. 66.
[361] *E.g.,* C-206/01 (n. 226), para 54; C-48/05 (n. 226), para 21; C-236-238/08 (n. 220), para 76; C-278/08 (n. 324), para 30 and C-558/08 (n. 212), para 29.

apply to cases of double identity and cannot be relied upon to establish infringement in the two other infringement scenarios.[362]

3.1.3 Limitations to trademark rights

91. The rights of the trademark proprietor are, however, not without limitations. Articles 14(1) and (2) TMD and EUTMR provide that the trademark proprietor cannot prohibit use by a third party of:

a) His name or address if he is a natural person;
b) Signs or indications which are non-distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or rendering of services or other characteristics of the goods or services;
c) The (EU) trademark for the purpose of identifying or referring to goods or services as those of the trademark proprietor, provided that such use is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

92. However, to fall under these limitations, it is required that the use by the third party is *"in accordance with honest practices in industrial or commercial matters*".[363] The CJEU has clarified that this requirement entails, for example, that the trademark cannot be used in a way which creates an impression that there is a commercial connection between the reseller and the trademark proprietor,[364] which takes unfair advantage of the distinctive character or reputation of the trademark,[365] which harms, discredits or denigrates the trademark,[366] or which presents the product as an imitation or replica of the trademarked product[367].[368]

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[362] *E.g.,* C-487/07 (n. 218), para 58-59; C-236-238/08 (n. 220), para 79; C-558/08 (n. 218), para 30 and C-179/15 (n. 314), para 26-27. *Cf. e.g.*, HEIDENREICH (n. 216), 35.
[363] Article 14(2) TMD/EUTMR.
[364] C-63/97 (n. 322), para 51; Judgement of 17 March 2005, *Gillette*, C-228/03, EU:C:2005:177, para 42; C-17/06 (n. 218), para 34 and C-558/08 (n. 218), para 67-71.
[365] C-63/97 (n. 322), para 52 and C-228/03 (n. 364), para 43.
[366] C-228/03 (n. 364), para 44.
[367] *Ibid*, para 45.
[368] More on this criterion at n. 106-112.

3.2 The principle of exhaustion

93. The principle of exhaustion is a fundamental principle within trademark law.[369] Briefly put, the principle entails that a trademark proprietor's rights are limited to the right of first placement of the trademarked goods on the market. Once the trademarked products have been placed on the market by the trademark proprietor or with his consent, they can freely circulate without the latter being able to prohibit subsequent use (*e.g.*, sales). Importantly, exhaustion always relates to individual items put on the market by the trademark proprietor.[370] Moreover, this principle pertains only to the trade of goods and not to the provision of services.[371]

94. Exhaustion can work on three levels, namely the national, regional, or international level. National exhaustion limits the scope of the principle to the national market. Consequently, once the trademark holder has placed trademarked goods on the market in a certain country, these goods are free to circulate within that country. However, the trademark owner can still oppose the importation of his trademarked goods, placed on the market by him in other countries.[372] Regional exhaustion expands this principle to a certain region. Thus, if the proprietor has placed his goods on the market in country X belonging to the region, he cannot prohibit the importation of these goods into country Y that is also part of the region. He can, however, stop importation from countries outside the region into countries within the region.[373] Lastly, international exhaustion stretches the exhaustion principle over the entire world. Consequently, once the proprietor places his trademarked goods on the market in any country of the world where he enjoys trademark

[369] Note: in the US this principle is often called the first-sale rule.
[370] *E.g.,* Judgement of 1 July 1999, *Sebago and Maison Dubois,* C-173/98, EU:C:1999:347, para 19 and 20; Judgement of 3 June 2010, *Coty Prestige Lancaster Group*, C-127/09, EU:C:2010:313, para 31 and C-129/17 (n. 216), para 32.
[371] *E.g.,* C-63/97 (n. 322), para 56.
[372] COBAN (n. 237), 880; I. CALBOLI, "Trademark Exhaustion in the European Union: Community-Wide or International? The Saga Continues", *Marquette Intellectual Property Law Review* 2002, (47) 48-49; I. CALBOLI, "The relationship between Trademark Exhaustion and Free Movement of Goods" in I. CALBOLI and J.C. GINSBURG (eds.), *The Cambridge Handbook of International and comparative Trademark Law,* Cambridge, Cambridge University Press 2020, (589) 591-592 and I. CALBOLI, "The (avoidable) effects of territoriality different approaches to trademark and copyright exhaustion" in I. CALBOLI and L. EDWARD (eds.), *Trademark protection and territoriality challenges in a global economy*, Northampton, Edward Elgar Publishing, 2014, (151) 157.
[373] *Ibid*.

protection, these goods are free to circulate throughout the entire world, without the proprietor being able to prevent any importation of genuine products bearing his trademark.[374]

95. Before the harmonization of trademark legislation within the EU, different EU countries had different approaches regarding the scope of trademark exhaustion (national or international).[375] However, it was evident when harmonizing national trademark legislation and introducing an EU trademark, that the EU would have to opt for a single exhaustion regime applicable within the territory of the EU. Consequently, Articles 15(1) TMD and EUTMR provide for a system of regional exhaustion, under which trademark rights are exhausted after first placement on the European Economic Area (EEA) market by the proprietor or with his consent. After this rule was first introduced in the 1988 TMD and 1993 EUTMR, there was some debate regarding the possibility for Member States of preserving their practice of international exhaustion, or whether, instead, 'Community-wide' exhaustion was the new criterion mandatorily applicable in all Member States.[376] However, the CJEU has clarified that the latter is correct, thus excluding the possibility for Member States of applying international exhaustion.[377] Consequently, placing goods on the market outside the EEA does not exhaust the proprietor's right to oppose importation.[378]

96. This 'Community/EU-wide' exhaustion rule aims to find a balance between the rights of the trademark proprietor on the one hand and the free movement of goods on the other.[379] The CJEU has repeatedly held that, in order to ensure the protection of trademark rights, it is essential that the proprietor can control the initial marketing of his trademarked goods in the EEA.[380] However, after this initial marketing, which allows the trademark proprietor to realise the economic value of

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[374] *Ibid*.
[375] CALBOLI (n. 372, 2), 593.
[376] Regarding this debate, see CALBOLI (n. 372, 1), 47-86.
[377] *E.g.,* Judgement of 16 July 1998, *Silhouette International Schmied*, C-355/96, EU:C:1998:374, para 15-31; C-173/98 (n. 370), para 17 and Judgement of 20 November 2001, *Zino Davidoff and Levi Strauss*, C-414-416/99, EU:C:2001:617, para 30-34.
[378] *E.g.,* C-355/96 (n. 377), para 26; C-414-416/99 (n. 377), para 32-33 and C-129/17 (n. 216), para 31-32.
[379] *E.g.,* Judgement of 4 November 1997, *Parfums Christian Dior*, C-337/95, EU:C:1997:517, para 37 and 38; C-63/97 (n. 322), para 57; C-228/03 (n. 364) para 29 and C-558/08 (n. 218) para 57.
[380] *E.g.,* C-414-416/99 (n. 377), para 33; Judgement of 15 October 2009, *Makro Zelfbedieningsgroothandel and Others*, C-324/08, EU:C:2009:633, para 32; C-324/09 (n. 218), para 60 and C-129/17 (n. 216), para 32.

his trademarked goods, the goods should be able to circulate freely throughout the internal market.[381] Thus, after the trademark proprietor has had the opportunity of obtaining the economic value of the trademarked goods, the free movement of goods should prevail over his trademark rights.

97. However, there is a way for the trademark proprietor to escape exhaustion, namely if he can prove legitimate reasons to oppose further commercialisation of the goods, especially if the condition of the goods is changed or impaired after they have been put on the market. It is settled case law that the use of 'especially' indicates that the alteration or impairment of the condition of the goods, is only an example of what may constitute legitimate reasons.[382] Legitimate reasons to oppose the further commercialisation are, for example, taking unfair advantage of the distinctive character or reputation[383] or (seriously) damaging the reputation[384] of the trademark and creating the impression that there is a commercial connection between the trademark proprietor and the third party.[385] Noticeably, over the years, the CJEU has expanded the number of grounds that may constitute legitimate reasons to oppose further commercialisation, thereby expanding the rights of the trademark proprietor, to the detriment of the free circulation of goods.[386]

[381] *E.g*., Judgement of 30 November 2004, *Peak Holding*, C-16/03, EU:C:2004:759, para 40; Judgement of 14 July 2011, *Viking Gas,* C-46/10, EU:C:2011:485, para 32 and C-129/17 (n. 216), para 31-32.
[382] *E.g.,* Judgement of 11 July 1996*, Bristol-Myers Squibb*, C-427/93, C-429/93 and C-436/93, EU:C:1996:282, para 26 and 39; C-337/95 (n. 379), para 42; Judgement of 23 April 2009, *Copad*, C-59/08, EU:C:2009:260, para 54 and C-46/10 (n. 381), para 37.
[383] *E.g.,* C-337/95 (n. 379), para 43-44 and C-63/97 (n. 322), para 52.
[384] *E.g.,* C-337/95 (n. 379), para 43; C-63/97 (n. 322), para 49; C-59/08 (n. 382), para 55 and C-46/10 (n. 381), para 37.
[385] *E.g.,* C-63/97 (n. 322), para 51 and C-46/10 (n. 381), para 37. More on this *infra*, n. 116-119.
[386] I. CALBOLI, "Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union (Ten Years Later)", *Marquette Intellectual Property Law Review* 2012, (257) 273-280.

Section two: the impact of EU trademark legislation on the circular economy

1. The repair of trademarked products by independent repairers

98. Now that the meaning of 'sustainable development' and 'circular economy' have been clarified and an overview has been provided of the European trademark legislation, the present section will assess the impact of this legislation on the circular economy, and thus on sustainable development. This assessment will be done through an examination of two 'circular economy activities' – *i.e.*, activities that contribute to the circular economy – namely the repair and upcycling of (trademarked) products. Subsequently, the next section will examine whether there are ways in which contemporary EU trademark legislation contributes to sustainable development.

99. The first circular economy activity under review is that of repairing trademarked goods. As explained above, the circular economy prefers repair over recycling.[387] Repairing products is also gaining popularity amongst consumers, with 77% claiming that they would rather repair their goods than buy new ones.[388] This is in line with 68% of European consumers agreeing that their consumption patterns negatively impact the environment[389] and 93% considering climate change to be a serious problem.[390] This desire to repair is also translated in a wide range of repair initiatives[391] and the right to repair movement which advocates for the introduction of a right to repair in consumer protection legislation.[392] However, notwithstanding this attitude change, a lack of repair activities remains in practice.

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[387] *Cf.* the waste hierarchy, n. 45 and 56.

[388] EC, "Flash Barometer 388 – Attitudes of Europeans towards waste management and resource efficiency – Report", December 2013-June 2014, https://op.europa.eu/en/publication-detail/-/publication/e3932343-3c82-4a5f-8a1a-e22eafd050a6, 20.

[389] EC, "Special Eurobarometer 501 – Attitudes of European citizens towards the Environment – Summary", December 2019-March 2020, https://europa.eu/eurobarometer/surveys/detail/2257, 14.

[390] EC, "Special Eurobarometer 513 – Climate Change – Summary", March-April 2021, https://europa.eu/eurobarometer/surveys/detail/2273, 7.

[391] See for example the global network of repair cafés (www.repaircafe.org) (started in Amsterdam by Martine Postma) and the Brussels Tournevie initiative (www.tournevie.be).

[392] See *e.g.*, E. TERRYN, "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *ERPL* 2019, 851-874; L.C. GRINVALD and O. TUR-SINAI, "Intellectual Property Law and the Right to Repair", *Fordham Law Review* 2019, Vol. 88, Issue 1, (63) 71-83 and S. SVENSSON, J.L. RICHTERH, E. MAITRE-EKERN, T. PIHLAJARINNE, A. MAIGRET and C.

100. When a consumer has a broken product, he has four courses of action, namely 1) consulting the seller, original equipment manufacturer (OEM) or an authorized repair service, 2) repairing the product himself, 3) seeking the services of an independent repairer or 4) disposing the old and purchasing a new product. His choice between these alternatives is driven by many factors, most importantly by the total price, including the ratio of the price to repair to the price to replace, the waiting times and travel costs.[393] Since these costs for repair are often very high, especially for repair by the seller, OEM or an authorized repairer, consumers still frequently consider replacement more economically advantageous.[394] Therefore, repair services provided by independent repairers could prove essential for the circular economy because, due to the lower price, more consumers would be persuaded to repair their products instead of discarding them. However, significant barriers still hinder this practice. Firstly, the current market and policy context do not incentivize OEMs to engage in, or enable, repair activities.[395] Consequently, they are often not willing to provide repair information and spare parts, thereby paralysing the repair market.[396] Secondly, legislation, including EU trademark legislation, still hinders repair by independent repairers. Both these barriers will be examined bellow.

DALHAMMAR, "The Emerging 'Right to Repair' legislation in the EU and the U.S.", *Paper presented at Going Green CARE INNOVATION* 2018, 19 p.

[393] *E.g*., TERRYN (n. 392), 854 and S. SVENSSON-HOGLUND, J.L. RICHTER, E. MAITRE-EKERN, J.D. RUSSELL, T. PIHLAJARINNE and C. DALHAMMAR, "Barriers, enablers and market governance: A review of the policy landscape for repair of consumer electronics in the EU and the U.S.", *Journal of Cleaner Production* 2021, Vol. 288, (1) 2.

[394] O.-A. ROGNSTAD, "Revisiting the concept of 'trade mark piracy' in light of sustainable development goals: a discussion of the Norwegian 'Apple Case'" in O.A. ROGNSTAD and I.B. ARSTAVIK (eds.), *Intellectual property and sustainable markets,* Northampton, Edward Elgar Publishing, 2011, (101) 110.

[395] SVENSSON-HOGLUND (n. 393), 6.

[396] TERRYN (n. 392), 864; D.R. CAHOY, "Trademark's Grip Over Sustainability", *University of Colorado Law Review* 2023, Vol. 94, Issue 4, (1) 14 and K. WIENS, "Intellectual Property is putting circular economy in jeopardy", *The Guardian*, 4 June 2014, https://www.theguardian.com/sustainable-business/intellectual-property-circular-economy-bmw-apple

1.1 Repair as a service

1.1.1 The BMW case

101. Firstly, certain practices connected to providing repair services for trademarked goods can present infringement risks. An important question that arose in this regard was whether independent repairers can use the product's trademark in advertisements for their services. This question was answered by the CJEU in the *BMW* case.[397]

102. The *BMW* case concerned a Dutch garage holder, Mr. Deenik, specialised in selling, repairing, and maintaining second-hand BMW cars. However, Mr. Deenik was not part of the BMW dealer network, which encompasses the dealers allowed to use the BMW mark for their business. Regardless, Mr. Deenik used the BMW mark in his advertisements, including statements such as "*Repair and maintenance of BMWs*", "*BMW specialist*" and "*Specialised in BMWs*". BMW claimed before the Dutch District Court that this use of the trademark in advertisements was infringing its rights, consequently seeking prohibition of the use. On appeal before the Regional Court, this question was referred to the CJEU for a preliminary ruling.[398]

103. The CJEU started its analysis by confirming that the use of a trademark aimed at informing the public that another undertaking than the trademark proprietor provides repair and maintenance of the trademarked goods or is specialised or a specialist in such goods, constitutes use of the mark within the meaning of Article 5(1)(a) Directive 89/104/EEC (Article 10(2)(a) TMD).[399] Consequently, the trademark proprietor can prohibit such use if none of the limitations to his rights are applicable. However, whilst the principle of exhaustion is not applicable to these

[397] C-63/97 (n. 322).
[398] *Ibid*, para 7-12.
[399] *Ibid*, para 42 j° para 39-41. *Caveat*: in later case law, the CJEU stated that only in the specific circumstances of the *BMW* case, use of the trademark to distinguish the goods of the trademark owner is considered as trademark use but that normally, there must be use of the trademark to distinguish the goods of the third party himself (C-48/05 (n. 226), para 27-28). However, the possibility provided in *BMW* was repeated in subsequent case law concerning comparative advertising (C-533/06 (n. 320), para 36). *Cf.* PEGUERA (n. 222), 6-8 and T.C. JEHORAM and M. SANTMAN, "Opel/Autec: does the ECJ realize what it has done?", *JIPLP* 2008, (507) 508-510.

advertisements since they do not concern the further commercialisation of the goods,[400] the CJEU clarified that the limitation of Article 6(1)(c) Directive 89/104/EEC (Article 14(1)(c) TMD) concerning referential use applies in this case. More precisely, the use of the trademark to inform the public that the advertiser repairs and maintains trademarked goods constitutes use of the trademark necessary to indicate the intended purpose the service.[401]

104. However, for this limitation to apply, the use must be "*in accordance with honest practices in industrial or commercial matters*" (Article 6(1) *in fine* Directive 89/104/EEC, Article 14(2) TMD). According to the CJEU, this requirement is an expression of the duty to act fairly in relation to the legitimate interests of the trademark proprietor[402] and entails that the advertisements may not create the impression that there is a commercial connection between the advertiser and the trademark proprietor, in particular that the advertiser's business is affiliated to the trademark proprietor's distribution network or that there is a special relationship between the two undertakings.[403] Consequently, if the independent repairer does not create this impression, he is entitled to use the trademark in his advertisements without risking trademark infringement.

105. This judgement is desirable in light of the circular economy and the resulting need to upscale repair activities. When offering services of any kind, the possibility of advertising for those services is crucial to attracting customers, which in turn is essential for the survival of the economic activity. Moreover, when repairing trademarked goods, use of the trademark in advertisements is inevitable to communicate the purpose of the service, a fact which was recognized by the Advocate-General[404] and confirmed by the CJEU.[405] Consequently, allowing repair services for trademarked goods, but prohibiting the use of the trademark in advertisements for these services, would paralyse the repair market in practice. However, whilst the CJEU allows independent repairers to use the trademark in advertisements, this use must be in accordance with 'honest

[400] C-63/97 (n. 322), para 56-57.
[401] *Ibid*, para 59-60.
[402] *Ibid*, para 61.
[403] *Ibid*, para 64.
[404] Opinion of Advocate General Jacobs of 2 April 1998, *BMW*, C-63/97, EU:C:1998:160, para 54.
[405] C-63/97 (n. 322), para 60.

practices', a requirement which poses many interpretational questions. Firstly, whilst the CJEU clarified in the *BMW* case that this requirements entails that the independent repairer may not create an impression of a commercial connection, it gave no further elaboration on which conduct would create such an impression, solely stating that it is a question of fact left to the national courts to decide on in light of the circumstances of each case.[406] Secondly, the question arises whether the CJEU has given other examples of conduct that would infringe the 'honest practices'-requirement.

1.1.2 The 'honest practices'-requirement

106. On the one hand, the criterion of not creating an impression of a commercial connection has been interpreted by the CJEU in a limited number of cases. Firstly, in the *Daimler* case,[407] which also concerned advertisements for the sale and repair of motor vehicles,[408] the CJEU clarified that the trademark proprietor cannot invoke his rights against advertisements containing a sign identical with or similar to the trademark that create an impression that there is a commercial relationship between the advertiser and the trademark proprietor if the advertisement was not placed by that third party or on his behalf, or if this third party explicitly requested the removal of the advertisement or of the trademark mentioned therein.[409] This limitation is reasonable since in this scenario, the third party is not using the trademark, which is an essential condition for establishing trademark infringement.[410] Secondly, in the *Viking Gas* case,[411] which concerned the refilling of trademarked gas bottles by a third party,[412] the CJEU stated that in assessing whether an impression of a commercial connection was created, account had to be taken of the labelling

[406] *Ibid*, para 55.
[407] C-179/15 (n. 314).
[408] *Ibid*, para 6-18.
[409] *Ibid*, para 44. *Caveat*: beware that in this case, the 'creation of a commercial connection'-requirement was not assessed in light of Article 14(2) TMD but was taken into account as a parameter to establish infringement under Article 10(2) TMD. However, this criterion should be interpreted in the same way in both scenarios.
[410] *Ibid*, para 34, 36, 44. *Supra*, nr. 83.
[411] C-46/10 (n. 381).
[412] *Ibid*, para 8-14.

of the bottles and the circumstances in which they were exchanged.[413] These two factors must not create an impression of a commercial connection between the two undertakings for the average consumer who is reasonably well informed and reasonably observant and circumspect, taking account of the practices in the relevant sector.[414]

107. Thirdly, in the *Portakabin* case,[415] concerning keyword advertising,[416] the CJEU established that an impression of a commercial connection is created in "*circumstances in which use of that sign by the advertiser does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of that mark or from an undertaking economically linked to it or, on the contrary, originate from a third party*".[417] Moreover, the CJEU stated that, in principle an advertiser using a keyword identical with, or similar to, a trademark for an internet referencing service in relation to goods identical with those for which the trademark is registered, cannot claim to have acted in accordance with honest practices.[418] Consequently, the advertiser will be presumed to be infringing trademark rights, unless he can provide convincing evidence that he was acting in accordance with honest practices. The CJEU based this presumption on the fact that the creation of confusion amongst consumers about the existence of an economic link between the advertiser and the trademark proprietor, which leads to the establishment of an infringement because it harms the origin function and causes consumer confusion (Article 5(1) Directive 89/104/EEC, now Article 10(2)(b) TMD),[419] excludes the possibility of acting in accordance with honest practices.[420]

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[413] *Ibid*, para 39.
[414] *Ibid*, para 40.
[415] C-558/08 (n. 218).
[416] For more on keyword advertising in light of trademark law, see C-236-238/08 (n. 220); C-278/08 (n. 324); C-323/09 (n. 220). See *e.g.*, B. HITCHENS and B. CLARK, "Keyword advertising in the European Union", *WTR*, 4 February 2016, https://www.worldtrademarkreview.com/global-guide/anti-counterfeiting-and-online-brand-enforcement/2016-obe/article/keyword-advertising-in-the-european-union
[417] C-558/08 (n. 218), para 67-68 and 80-81.
[418] *Ibid*, para 71.
[419] *Ibid*, para 34 and 52.
[420] *Ibid*, para 67-70.

108. On the other hand, in its interpretation of the 'honest practices'-requirement, the CJEU consistently repeats that the 'honest practices'-test requires a global assessment of all the relevant circumstances.[421] However, its approach concerning what these relevant circumstances are, varies.[422] Firstly, in the *Anheuser-Busch* case,[423] concerning the use of trade names allegedly conflicting with an earlier trademark,[424] the CJEU established three factors, which must be considered when assessing the 'honest practices'-criterion. These factors are, firstly, the extent to which the use of the third party's name is understood by the relevant public, or at least a significant section of that public, as indicating a link between the third party's goods or services and the trademark proprietor or a person authorised to use the trade mark, secondly, the extent to which the third party ought to have been aware of that and thirdly,[425] whether the trademark concerned enjoys a certain reputation in the Member State in which it is registered.[426]

109. Secondly, in the *Gillette* case,[427] which concerned the use of a trademark on packaging of spare parts to indicate compatibility with the trademarked goods,[428] the CJEU distinguished four types of use of a trademark that are not in accordance with honest practices. These forbidden types of use are, firstly, use that creates the impression that there is a commercial connection between the reseller and the trademark proprietor,[429] secondly, use that affects the value of the trademark by taking unfair advantage of its distinctive character or repute,[430] thirdly, use that discredits or denigrates the trademark,[431] and fourthly, use by which the third party presents its

[421] *E.g.,* Judgement of 7 January 2004, *Gerolsteiner Brunnen*, C-100/02, EU:C:2004:11, para 24 and 26; Judgement of 16 November 2004, *Anheuser-Busch*, C-245/02, EU:C:2004:717, para 82 and 84; C-228/03 (n. 364) para 41 and Judgement of 20 July 2017, *Ornua*, C-93/16, EU:C:2017:571, para 44.
[422] *Caveat*: this requirement was also interpreted in C-100/02 (n. 421), para 25 and C-93/16 (n. 421), para 46 but these interpretations are very fact-specific to the case, making them less relevant for the interpretation of the 'honest practices'-requirement when applied to advertisements containing a trademark.
[423] C-245/02 (n. 421).
[424] *Ibid*, para 24-39.
[425] It is unclear how this third criterion is to be interpreted, see P.J. YAP, "Honestly, Neither Céline nor Gillette is defensible!", *EIPR* 2008, (286) 286-287.
[426] C-245/02 (n. 421), para 83.
[427] C-228/03 (n. 364).
[428] *Ibid*, para 13-23.
[429] *Ibid*, para 42.
[430] *Ibid*, para 43.
[431] *Ibid*, para 44.

product as an imitation or replica of the trademarked product.[432] Moreover, the CJEU clarified that this assessment should take account of the overall presentation of the product marketed by the third party, particularly the circumstances in which the mark of which the third party is not the owner is displayed in that presentation, the circumstances in which a distinction is made between that mark and the mark or sign of the third party, and the effort made by that third party to ensure that consumers distinguish its products from those of which it is not the trademark owner.[433] However, only one year later, in the *Céline* case,[434] concerning identical trade names,[435] the CJEU restated its *Anheuser-Busch* case law.[436] These criteria were also repeated in the *Portakabin* case.[437]

110. The *Portakabin* case and the case law on the 'honest practices'-requirement clearly demonstrate the circular reasoning adopted by the CJEU when assessing conformity with honest practices. More precisely, the CJEU uses the same criteria, especially the criterion of causing consumer confusion/harming the origin function, to conclude to the absence of honest practices, that it has already applied to establish infringement. This circular reasoning is criticized in literature since it makes it practically impossible for third parties to successfully invoke the limitations of Article 14 TMD/EUTMR because they are required to disprove what the trademark proprietor has already successfully proved.[438] Meaningful defence against trademark infringement, however, requires an interpretation of the 'honest practices'-requirement which is not just a repetition of the elements which establish infringement.[439]

[432] *Ibid*, para 45.
[433] *Ibid*, para 46.
[434] C-17/06 (n. 218).
[435] *Ibid*, para 5-12.
[436] C-245/02 (n. 421), para 83.
[437] C-558/08 (n. 218), para 67.
[438] YAP (n. 425), 287; L. ANEMAET, "Which Honesty Test for Trademark Law? Why Traders' Efforts to Avoid Trademark Harm Should Matter When Assessing Honest Business Practices", *GRUR International* 2021, (1025) 1026-1027 and M. SENFTLEBEN, "Robustness Check: Evaluating and Strengthening Artistic Use Defences in EU Trademark Law", *IIC* 2022, (567) 588-590.
[439] YAP (n. 425), 287-288 and 291.

111. Based on these interpretations by the CJEU, the following conclusions can be drawn concerning the permissibility of using the trademark in advertisements for repair services. Firstly, it is crucial to avoid confusing or misleading consumers about the presence of a commercial connection between the independent repairer and the trademark owner. In this regard, the CJEU has emphasised the importance of the conduct of the third party and his efforts to avoid confusing consumers.[440] Therefore, it could be advised to include disclaimers in the advertisements for the repair services, clearly stating that the repairer provides independent repair services for the trademarked goods, without there being a commercial connection with the trademark proprietor.[441] However, it is uncertain whether the CJEU and national courts would find this sufficient to avoid creating an impression of a commercial connection.

112. Secondly, independent repairers must beware of the way in which they use the trademark in their advertisements and must avoid discrediting or denigrating the trademark or taking unfair advantage of its distinctive character or repute.[442] The CJEU has already clarified in het *BMW* case that the trademark proprietor cannot act against the mere fact that the reseller derives an advantage from using the trademark in his advertisements by lending an aura of quality to his business.[443] However, uncertainty remains concerning the question when the use of a trademark in advertisements would discredit or denigrate the trademark or take unfair advantage of its distinctive character or repute. Thirdly, additional caution is required when using the trademark in keyword advertising, since, according to the *Portakabin* case, using the trademark or a similar word as a keyword for identical goods will in principle constitute infringement, even if the trademark does not appear in the advertisement itself.[444]

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[440] C-228/03 (n. 364), para 46 *in fine* and C-46/10 (n. 381), para 39-40.
[441] *Cf.* E. DERCLAYE, "Repair and Recycle between IP Rights, End User License Agreements and Encryption" in C. HEATH and A.K. SANDERS (eds.), *Spares, Repairs and Intellectual Property Rights*, Alphen aan den Rijn, Kluwer Law International, 2009, (21) 33.
[442] C-228/03 (n. 364), para 43-44.
[443] C-63/97 (n. 322), para 53.
[444] C-278/08 (n. 324), para 19, C-323/09 (n. 220), para 31, Judgement of 2 July 2020, *mk advokaten*, C-684/19, EU:C:2020:519, para 20.

113. Additionally, it must be kept in mind that Article 14(1)(c) TMD/EUTMR explicitly requires use of the trademark to be limited to what is necessary to indicate the intended purpose of a product or service. Such necessity requires that the information cannot in practice be communicated to the public without using the trademark.[445] Consequently, any use of the trademark that is not strictly necessary to communicate to the public that one repairs trademarked goods, *e.g.,* additionally using the signs and logos of the trademark proprietor,[446] will most likely not be covered by this limitation and therefore risks infringing trademark rights.[447]

1.2 Repair and resale

1.2.1 The infringement risks of selling repaired goods under the trademark

114. The second repair situation is that in which an independent repairer repairs a trademarked product and subsequently sells this repaired good. This practice can be a trademark infringement under Article 10(2)(a) TMD/Article 9(2)(a) EUTMR, provided that the conditions of this infringement scenario are fulfilled.[448] Firstly, if the independent repairer repairs and resells the trademarked goods as a commercial activity, the trademark is used in the course of trade (*cf.* Article 10(3)(b) TMD). Secondly the use occurs in relation to goods or services, namely the repaired goods. Thirdly, both the sign and the goods are identical, since it are the goods themselves, containing the trademark, that are put on the market after repair. Lastly, the repair and resale in question must have an adverse impact on one of the trademark's functions. Taking the essential origin function as an example, the goods placed on the market by the trademark proprietor have undergone certain changes due to the repair after leaving his hands, consequently jeopardising the origin function when the trademark is used in relation to those repaired goods.[449]

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[445] C-63/97 (n. 322), para 60 and C-228/03 (n. 364), para 35.
[446] M.-C. JANSSENS, "In welke mate kan men zich specialist of gespecialiseerde in automerk X noemen? Een merkenrechtelijke stand van zaken na het arrest BMW/Deenik", *I.R.D.I.* 2000, (228) 233. This has been explicitly prohibited in Belgian case law, *e.g.,* Gent 13 December 2004, *I.R.D.I.* 2005, (331) 332.
[447] JANSSENS (n. 446), 233.
[448] *Infra*, n. 82-85.
[449] A. KUR, "'As Good as New' – Sale of Repaired or Refurbished Goods: Commendable Practice or Trade Mark Infringement?", *GRUR International* 2021, (228) 231.

115. However, in the case where the independent repairer uses a sign similar, but not identical, to the trademark (*e.g*., in advertisements), or when the goods are no longer identical after repair, infringement of Article 10(2)(b) TMD/Article 9(2)(b) EUTMR could occur. This infringement scenario requires additionally the establishment of a likelihood of confusion.[450] Consequently, to escape infringement, it is crucial that independent repairers avoid damaging the origin function and creating consumer confusion. Therefore, similarly as above, it is advisable for independent repairers to clearly communicate that the goods they are placing on the market were repaired by an undertaking not economically linked to the trademark proprietor.[451] An application of this principle can be found, for example, in the Dutch *Montis* case,[452] where the Amsterdam Court concluded that there was no trademark infringement because the defendant had explicitly communicated that the goods were second-hand and refurbished and had not at any moment suggested that the goods were refurbished under the control of the trademark proprietor or that a special relationship existed between him and the trademark proprietor.[453]

116. If a court does find infringement under Article 10(2)(a) or (b) TMD/Article 9(2)(a) or (b) EUTMR, the independent repairer might be protected by the principle of exhaustion, which prevents trademark proprietors from prohibiting the resale of their trademarked goods after repair, provided that these goods were originally put on the EEA market by the proprietor or with his consent. Moreover, the CJEU has clarified that this principle not only covers the resale of the repaired product itself but extends to the advertisements for this resale.[454]

117. However, as mentioned above,[455] the principle of exhaustion is limited, allowing trademark proprietors to oppose further commercialisation if there are legitimate reasons to do so, especially

[450] *Supra*, n. 87.
[451] *Supra*, n. 111.
[452] Gerechtshof Amsterdam (Court of Amsterdam) 29 January 2019, ECLI:NL:GHAMS:2019:216, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHAMS:2019:216
[453] *Ibid*, 3.10
[454] C-337/95 (n. 379), para 38 and C-63/97 (n. 322), para 48.
[455] *Supra*, n. 97.

where the condition of the goods is changed or impaired after they have been put on the market. Such legitimate reasons are deemed to exist, firstly, when the use takes unfair advantage of the distinctive character or reputation of the trademark,[456] or damages the reputation of the trademark.[457] To avoid damaging the reputation of the trademark, independent repairers must ensure that their repair meets 'ordinary quality standards'.[458] These standards depend on the quality level of the trademarked goods and the expectations of the buying public concerning the repair and quality thereof.[459]

118. Secondly, independent repairers may not create a false impression that there is a commercial connection with the trademark proprietor.[460] Concerning this requirement, the CJEU ruled in the *Portakabin* case, similarly as above, that the circumstances in which a trademark proprietor can prohibit the use by the third party of a sign identical with or similar to the trademark as a keyword, because it "*does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of that mark or from an undertaking economically linked to it or, on the contrary, originate from a third party*", also constitute a legitimate reason to oppose further commercialisation.[461] Thus, the CJEU applies the same criteria to establish a breach of honest practices as it does to conclude to legitimate reasons to prohibit the further commercialisation of trademarked goods. Consequently, the critiques concerning the circular reasoning also apply in this case.[462]

[456] *E.g.,* C-337/95 (n. 379), para 43-44 and C-63/97 (n. 322), para 52.
[457] E.g., *ibid,* para 43; *ibid,* para 49; C-59/08 (n. 382), para 55 and C-46/10 (n. 381), para 37.
[458] KUR (n. 449), 233
[459] *Ibid*.
[460] *E.g.,* C-63/97 (n. 322), para 51; C-558/08 (n. 218), para 80 and C-46/10 (n. 381), para 37.
[461] C-558/08 (n. 218), para 81.
[462] *Supra*, n. 110.

119. Thirdly, some national courts interpret the legitimate reasons-exception as allowing the proprietor to oppose the sale of goods after 'substantial' repair.[463] This entails that the repair has been so comprehensive that the product's identity has changed, and it can no longer be considered the same product.[464] For example, in the Belgian *Ligne Roset* case,[465] the defendant had purchased LIGNE ROSET products (namely the TOGO sofas) and changed these products by reupholstering them with other fabrics than those used by the trademark proprietor and changing the filling and zippers of the sofas.[466] Consequently, the repair was considered substantial since little remained of the original sofa, making the 'repaired' product in fact a completely new product. Distinguishing 'substantial' from 'normal' repairs requires a case-by-case analysis based on the scale of intervention, the expectations of the public, the customs in the sector and the specificities of the actual product.[467] It is evident that this criterion is very unclear and the outcome of such assessment very unpredictable.

120. This analysis of the permissibility of repair and resale of trademarked products under EU trademark legislation demonstrates that independent repairers are faced with major uncertainty regarding the infringement risks of their conduct. More precisely, uncertainty remains regarding how to avoid creating an impression of a commercial connection, what the ordinary quality standards are that must be met to ensure that the repair does not damage the reputation of the trademark and how far they can go with their repairs before the repair is considered too substantial, allowing the trademark proprietor to invoke legitimate reasons and establish trademark infringement. Moreover, by using the same criteria to conclude that there are legitimate reasons to oppose the further commercialisation as for the establishment of

[463] *E.g.,* Benelux Gerechtshof (Benelux Court of Justice) 6 November 1992, A 89/1 and A 91/1, AP/Valeo, https://vena.be/rechtspraak/#buitenlandserechtspraak and Antwerpen 26 February 2015, *I.R.D.I.* 2015, 155. See also KUR (n. 449), 232-233 for more national examples.
[464] KUR (n. 449), 232-233.
[465] Voorz. Orb. Brussel (Nl.) (Chair of the Brussels Commercial Court, Dutch division) 15 November 2018, A/18/00618, *D.A.O.R.* 2019*,* 89, para 24-25 and 28-29. See also, J. CASSIMAN and H. DHONDT, "Grenzen aan de uitputting: kan een merkhouder zich steeds verzetten tegen de wederverkoop van "refurbished" producten op grond van een wijziging in de toestand van de waar?", *D.A.O.R*. 2019, 95-101.
[466] A/18/00618 (n. 465), para 27.
[467] KUR (n. 449), 233.

infringement, the CJEU considerably reduces the cases of repair and resale exempted under the principle of exhaustion.

1.2.2 The infringement risks of de-, re- and cobranding

1.2.2.1 De- (and re-)branding

121. Given the infringement risks when reselling a repaired product under the trademark, an independent repairer might consider it a good solution to remove the trademark from the repaired goods before reselling them and/or adding an additional label to the repaired goods with his own trademark and business information. However, these practices might pose their own problems under trademark legislation.

122. On the one hand, independent repairers might see a solution in removing the trademark from the repaired goods before reselling them (de-branding), since in this case, they would not be using the trademark and thereby cannot infringe the trademark proprietor's rights.[468] However, in the *Portakabin* case,[469] whilst interpreting Article 7 Directive 89/104/EEC (Article 15 TMD), the CJEU clarified that a reseller cannot use the trademark of the OEM in his advertisements if he has removed this trademark from the goods. More precisely, PRIMAKABIN engaged in the sale of second-hand PORTAKABIN mobile buildings and for this reason had invested in online advertisements announcing their sale of "*used portakabins*". However, PRIMAKABIN had removed the PORTAKABIN trademark from the used mobile buildings before reselling them and replaced it with a PRIMAKABIN label.[470] Considering these circumstances, the CJEU concluded that in the case of de-branding and rebranding, resulting in complete concealment of the original trademark, the trademark proprietor is entitled to prevent the reseller from using his mark to advertise the resale since this use could damage the origin function.[471] Thus, whilst the CJEU allows independent

[468] *Supra*, n. 83.
[469] C-558/08 (n. 218).
[470] *Ibid*, para 11-21.
[471] *Ibid*, para 86.

repairers to use the trademark of the repaired goods in their advertisements, this right expires once they have removed said trademark from the goods.

123. Whilst in the *Portakabin* case, the CJEU clarified that the proprietor can act against the de-branding if there is subsequent use of his trademark, such as in advertisements,[472] the question remains whether the proprietor can also prohibit the de-branding as such. Thus, whether de-branding itself can be considered use of the trademark. This question was answered in the *Mitsubishi* case.[473] The case concerned the removal of the trademark by a third party (de-branding) and the affixing of other signs on the products (rebranding) whilst they were under the customs warehousing procedure, with a view to importing them into the EEA where they had not been marketed before.[474] Regarding the use question, the CJEU stated that de-branding and rebranding can be considered as use in the course of trade because it involves active conduct by the third party carried out in the exercise of a commercial activity for economic advantage.[475] Consequently, based on the establishment of use combined with other considerations,[476] the CJEU concluded that Article 5 Directive 2008/95/EC (Article 10 TMD) and Article 9 Regulation 207/2009 (Article 9 EUTMR) entitled the trademark proprietor to prohibit the contested actions.[477]

124. However, two important caveats must be made concerning the *Mitsubishi* case. Firstly, the case is heavily criticized for qualifying de-branding as use, as this would overstretch the use-requirement.[478] This discord is also demonstrated by the fact that the Advocate General appointed to the case did not consider de-branding as use and thus saw no trademark infringement.[479]

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[472] K. ROOX and A. DE BOECK, "Is rebranding merkwaardig", *RABG* 2011, (72) 75.
[473] C-129/17 (n. 216).
[474] *Ibid*, para 11-21.
[475] *Ibid*, para 48.
[476] *Ibid*, para 42-47
[477] *Ibid*, para 49.
[478] *E.g.,* C. GIELEN, "Prejudiciële beslissing. Levert het zonder toestemming van de merkhouder weghalen van een merk van een product merkinbreuk op?", *NJ* 2019, (3029) 3036-3038; S. PARIMALAM, "Trade Mark Infringement or Unfair Commercial Conduct? The Complications of Case C-129/17 "Mitsubishi"", *QMLJ* 2021, (184) 187-190; S. STOLZENBURG-WIEMER, "Debranding and rebranding of goods: the Mitsubishi decision and the scope of trademark protection based on function theory", *JIPLP* 2020, (326) 329 and W.J.H. LEPPINK, A.I.P. MARTENS and M. POULUS, "Mitsubishi/Duma", *IER* 2018, (511) 519-521.
[479] Opinion of Advocate General Sánchez-Bordona of 26 April 2018, *Mutsibishi*, C-129/17, EU:C:2018:292, para 44-71.

Moreover, national courts, before and after this judgement, considered the removal of the trademark as excluding the possibility of trademark infringement, claiming that there is no trademark use when the repaired goods are subsequently placed on the market without the trademark.[480]

125. Secondly, this case concerned goods that were not previously placed on the EEA market by the proprietor or with his consent, thus not triggering the principle of exhaustion. It is uncertain whether the CJEU would reach the same conclusion in a case where the principle of exhaustion is applicable or whether its conclusion of considering de-branding as use is limited to the specific facts of this case, namely the removal of trademarks from goods purchased outside the EEA under the customs warehousing procedure before their importation into the EEA.[481] On the one hand, the reasoning to establish infringement in *Mitsubishi* for a great deal relied on the fact that the trademark proprietor was robbed of his essential right of first placement of the goods in the EEA market.[482] Consequently, it is plausible that the CJEU would see no problem in de-branding if the trademark proprietor has had the chance of placing his goods on the EEA market and obtaining the economic value thereof, thus exhausting his trademark rights. On the other hand, it could seem unfair that the exact same conduct would infringe trademark rights if it occurs outside the EEA, whilst it would be lawful when taking place inside the EEA.[483] However, the *raison d'être* of trademark rights and the corresponding exhaustion thereof,[484] combined with the great importance of increasing repair activities to promote the circular economy and sustainable development, could justify such differentiation in treatment.

126. Future case law of the CJEU on the issue of de-branding must be awaited to provide clarity on the matter but, in light of transitioning to a circular economy, the CJEU would hopefully limit

[480] A 89/1 and A 91/1 (n. 463), para 37 and ECLI:NL:GHAMS:2019:216 (n. 452), 3.10.3. See also STOLZENBURG-WIEMER (n. 478), 330.
[481] F. ANGELINI and S. VERDUCCI GALLETTI, "If you remove it, you use it: the Court of Justice of the European Union on debranding – On the Mitsubishi v. Duma judgement by the Court of Justice of the European Union", *TMR* 2019, (875) 885.
[482] C-129/17 (n. 216), para 31-32 j° 42, 46.
[483] ANGELINI (n. 481), 885.
[484] C-129/17 (n. 216), para 31-32.

the qualification of de-branding as use to the specificities of this case. However, in the meantime, independent repairers are again faced with uncertainty, not knowing whether removing the trademark from the repaired goods provides a safe haven, or instead constitutes trademark infringement in itself.

1.2.2.2 Cobranding

127. On the other hand, with the aim of avoiding consumer confusion, harming the origin function, or creating a false impression of a commercial connection with the trademark proprietor, an independent repairer might consider placing an additional label on the repaired goods, without covering the original trademark (cobranding). This label could contain his own trademark and/or business information and clarify that the goods have been repaired by an undertaking not economically linked to the trademark proprietor. The CJEU's case law on the interpretation of legitimate reasons to oppose further commercialisation (Article 15(2) TMD/EUTMR) seems to favour such an approach.

128. Firstly, indications concerning the permissibility of cobranding can be found in the CJEU's extensive case law regarding the parallel importation of repackaged or relabelled pharmaceuticals.[485] In this case law, the CJEU developed five criteria which must be fulfilled to exclude the trademark proprietor from invoking legitimate reasons to oppose the further commercialisation of repackaged/relabelled medicines.[486] The CJEU has applied these criteria outside the parallel importation of pharmaceuticals as well, stating that they apply whenever the

[485] KUR (n. 449), 231-233. Regarding the assessment of repackaging and adding labels to trademarked goods under Article 15(2) TMD/EUTMR, there is a vast body of CJEU case law concerning the parallel importation of repackaged or relabelled pharmaceuticals, *e.g.*, C-427/93 (n. 382); Judgement of 26 April 2007, *Boehringer Ingelheim and Others*, C-348/04, EU:C:2007:249; Judgement of 22 December 2008, *The Wellcome Foundation*, C-276/05, EU:C:2008:756; Judgement of 17 May 2018*, Junek Europ-Vertrieb*, C-642/16, EU:C:2018:322; Judgement of 17 November 2022, *Bayer Intellectual Property*, C-204/20, EU:C:2022:892 and Judgement of 17 November 2022, *Merck Sharp & Dohme and Others*, C-224/20, EU:C:2022:893. It could be a very interesting exercise to assess the application of this case law on situations occurring in the repair market. However, such an exercise lies outside the scope of this master thesis and is therefore recommended for future research.

[486] *E.g.,* C-427/93 (n. 382), para 79; C-348/04 (n. 485), para 21; C-276/05 (n. 485), para 23; C-642/16 (n. 485), para 28; C-204/20 (n. 485), para 61 and C-224/20 (n. 485), para 52.

trademarked product has been subject to interference by a third party, without the authorization of the trademark proprietor, which is liable to impair the trademark's essential origin function.[487] Consequently, this case law can also be applied to the resale of repaired trademarked goods. One of the criteria developed in the pharmaceuticals case law that must be fulfilled to avoid legitimate reasons is that the packaging must clearly state who repackaged the product and the name of the manufacturer. Consequently, applying this case law to the repair and resale of trademarked goods, it could be argued that attaching an additional label to the repaired goods, containing a disclaimer that the goods have been repaired and the repairer's information, but leaving the original trademark visible, could provide a way for repairers to avoid legitimate reasons and thus trademark infringement.

129. Secondly, in two cases concerning the attaching of labels to trademarked bottles refilled by a third party, the CJEU gave guidance on the possibility of the trademark proprietor to oppose further commercialisation of these bottles based on legitimate reasons. Firstly, in the *Viking Gas* case,[488] the CJEU clarified that the affixing of a label to the bottles bearing, *inter alia*, the defendant's name was relevant in the assessment of the applicability of Article 7(2) Directive 89/104/EEC (Article 15(2) TMD), to the extent that this additional label rules out alteration to the condition of the bottles by masking their origin.[489] Consequently, this case seems to suggest that adding an additional label with the repairer's name could reduce the chances of the trademark proprietor successfully invoking legitimate reasons. Secondly, in the *Soda-Club* case,[490] the CJEU elaborated on its *Viking Gas* case law, stating that the trademark proprietor can only invoke legitimate reasons against the further commercialisation of the cobranded bottles if the added label creates a false impression amongst consumers about the existence of an economic link between the reseller and the trademark proprietor.[491] Examining the existence of such an impression requires a global assessment, based on the information contained on the goods and

[487] Judgement of 11 November 1997, *Loendersloot*, C-349/95, EU:C:1997:530, para 27.
[488] C-46/10 (n. 381).
[489] *Ibid*, para 41.
[490] Judgement of 27 October 2022, *Soda-Club (CO2) and SodaStream International*, C-197/21, EU:C:2022:834.
[491] *Ibid*, para 54.

on the additional label, the normal practices in the sector and the extent to which consumers are aware of these practices.[492] Moreover, the CJEU took account of the fact that the goods in question were destined to be reused and refilled multiple times[493] and that it is common practice in the sector that bottles are refilled by third parties other than the trademark proprietor,[494] both factors which reduce the likelihood of consumer confusion about the existence of a commercial connection.

130. Consequently, the CJEU case law demonstrates that attaching an additional label to the repaired goods, specifying that the goods have been repaired, the identity of the repairer, and the absence of a commercial connection with the trademark proprietor, could reduce the risk of trademark infringement since it could exclude the applicability of Article 15(2) TMD/EUTMR. Based on the *Soda-Club* case, clearly specifying the absence of any economic link with the trademark proprietor on this additional label seems crucial to obtain this result, especially in sectors where repair and resale are less common. Moreover, adding such a label would not only reduce the chances of the trademark proprietor successfully invoking legitimate reasons to oppose the further commercialisation, it could also reduce the likelihood of establishing trademark infringement *in se*, since it could exclude harm to the origin function and consumer confusion.[495]

131. Additionally, based on the *Arsenal/Reed* case[496] it is advisable to include this label on the goods themselves and not, for example, on an accompanying information sheet since this would still risk harming the origin function. In this case, the defendant sold goods bearing ARSENAL FC's trademarks from stalls outside the stadium, which displayed a large sign disclaiming that "*The word or logo(s) on the goods offered for sale, are used solely to adorn the product and does not imply or indicate any affiliation or relationship with the manufacturers or distributors of any other product,*

[492] *Ibid*, para 45-53.
[493] *Ibid*, para 49.
[494] *Ibid*, para 48.
[495] Consequently, trademark infringement would only be possible under Article 10(2)(a) TMD/Article 9(2)(a) EUTMR, which requires identical signs and identical goods, if the quality, communication, investment or advertising functions are harmed. This considerably reduces the likelihood of trademark infringement.
[496] C-206/01 (n. 226).

only goods with official Arsenal merchandise tags are official Arsenal merchandise".[497] The CJEU, however, found that the use of the trademark could create the impression that there was a material link between the goods and the trademark proprietor,[498] and that there was a possibility that consumers, especially those viewing the goods after they had been sold *(i.e.*, those who did not see the disclaimer) may believe that the trademark indicates that the goods originate from the trademark proprietor.[499]

1.3 The spare parts issue

1.3.1 The need for but absence of spare parts

132. Another barrier that independent repairers are faced with is the lack of willingness from OEMs of trademarked goods to provide the spare parts required for the repair of these goods. Consequently, spare parts are often manufactured by third parties and sold to independent repairers of trademarked goods. The use of the trademark in relation to these spare parts is permitted under EU trademark law when such use is necessary to indicate that the goods are intended as spare parts for the trademarked goods (Article 14(1)(c) TMD/EUTMR), and provided that the use conforms with honest practices (Article 14(2) TMD/EUTMR). However, placing the trademark on these independently manufactured spare parts is not allowed and would infringe the rights of the trademark proprietor since this would harm the origin function and confuse consumers, who might believe that the spare parts were manufactured by the trademark proprietor (Article 10(2)(b) TMD/Article 9(2)(b) EUTMR).[500]

[497] *Ibid*, para 17.
[498] *Ibid*, para 5.
[499] *Ibid*, para 57.
[500] A. TISCHNER and K. STASIUK, "Spare Parts, Repairs, Trade Marks and Consumer Understanding", *IIC* 2023, (26) 33-40 and L.J. COHEN and A.N. COOKE, "How trademarks and other rights may be used to limit parallel imports in Europe", *TMR* 1991, (371) 392.

133. Moreover, OEMs often place trademarks on spare parts for their products, thus considerably increasing the risk of trademark infringement for independent repairers,[501] *e.g.,* when importing spare parts (*cf.* Article 10(3)(c) TMD/Article 9(3)(c) EUTMR). In this regard, it is important to note that the EU legislation on protection of design explicitly excludes the possibility of obtaining design protection for spare parts.[502] However, the CJEU has ruled that this limitation does not extend to trademarks,[503] thus allowing trademark protection on spare parts, and the additional barriers that this can pose to the repair market.[504] Consequently, the question arises whether, in light of the circular economy and sustainable development, a provision should be included in EU trademark legislation, similar to that existing in design protection, excluding the possibility of obtaining trademark protection on spare parts.

134. A clear illustration of the problems faced by independent repairers concerning spare parts, is the *Huseby* case[505] of the Supreme Court of Norway[506] on the importation of iPHONE screens for repair purposes. The case concerned actions by Mr. Huseby, the owner of a one-person enterprise PCKompaniet active in the repair of APPLE smartphones and the replacement of broken iPHONE screens. To conduct his business, Mr. Huseby had imported mobile phone screens from Hong Kong, which contained an APPLE logo concealed by marker. These screens were seized by the customs services at Oslo Airport, upon which APPLE demanded their destruction.[507]

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[501] GRINVALD (n. 392), 116-117 and A. PERZANOWSKI, "Consumer Perceptions of the Right to Repair", *Indiana Law Journal* 2021, (361) 374-375.
[502] Article 110(1) Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L* 3, 5 January 2002, 1-24 and Article 14 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, *OJ L* 289, 28 October 1998, 28-35.
[503] Order of 6 October 2015, *Ford Motor Company*, C-500/14, EU:C:2015:680, para 38-42.
[504] See more on this in D. BELDIMAN and C. BLANKE-ROESER, *An International Perspective on Design Protection of Visible Spare Parts*, Cham, Springer, 2017, 60-63.
[505] Noregs Høgsterett (Surpeme Court of Norway) 2 June 2020, 19-141420SIV-HRET, *Henrik Huseby v. Apple Inc.*, https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-1142-a.pdf
[506] Whilst Norway is not a member state of the EU, its trademark law is subject to the same harmonization through the EEA Agreement, thus making this judgement relevant for this research. See Article 1(2) and (3) Protocol 28 and para 14 Annex XVII of the Agreement on the European Economic Area – Final Act – Joint Declarations – Declarations by the Governments of the Member States of the Community and the EFTA States – Arrangements – Agreed Minutes – Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area, *OJ L* 1, 3 January 1994, 3-522.
[507] 19-141420SIV-HRET (n. 505), para 1-12.

135. Based on the established facts, namely that the imported screens were not original products, that the affixed logos were identical to APPLE's registered figure mark, that the logos were not affixed by APPLE and that they were concealed by removable marker,[508] the Supreme Court started its infringement assessment under Section 4 of the Norwegian Trademarks Act, which implements Article 5(1)(a) Directive 2008/95/EC (Article 10(2)(a) TMD). The relevant question again concerns the use-requirement, namely whether the importation of screens with a concealed APPLE trademark amounts to trademark use. Whilst importation of goods under the trademark unquestionably constitutes use (*cf.* Article 10(3)(c) TMD),[509] it is less clear whether use remains when the trademark has been concealed by marker.

136. In this regard, the Supreme Court asserted that the central issue was whether the trademark's functions may be harmed by the practice. It answered this question in the affirmative, stating that the marker is removable and if removed, the screens would look like original APPLE screens, thus affecting the origin function of the trademark.[510] Moreover, according to the Supreme Court, the origin function is harmed even if the marker is not removed since the screens are identical to APPLE's original screens and the marker is placed exactly where the logo appears on the original screens. This can confuse consumers, who might think that the screens are original APPLE screens with marker over the trademark, and this confusion is sufficient to establish a risk of harm to the trademark's functions.[511] Based on these considerations, the Supreme Court agrees with the Court of Appeal and finds the import of screens with APPLE trademarks concealed by marker a trademark infringement.[512]

137. An interesting element in this case is that the defendant had invoked sustainability considerations, claiming that competition in the spare parts market is important from a sustainability perspective.[513] The Supreme Court, however, dismissed this argument, stating that

[508] *Ibid*, para 20.
[509] *Ibid*, para 27.
[510] *Ibid*, para 35-36.
[511] *Ibid*, para 38.
[512] For criticism on the arguments of the Supreme Court, see *e.g.,* ROGNSTAD (n. 394), 106-109.
[513] 19-141420SIV-HRET (n. 505), para 39.

it is not relevant for the case since the problem is not the import of screens as such, but the trademark illegally affixed to them. The Court emphasised that importing screens compatible with APPLE smartphones is not prohibited under trademark law, provided that the screens do not have trademarks unlawfully affixed to them.[514] This reasoning is criticized in literature for neglecting the sustainability perspective and being blind to the realities of the repair market, in which it is often very hard to obtain spare parts.[515] However, from a trademark perspective, the judgement is very reasonable, since an opposite outcome (*i.e.,* allowing the importation of screens with an illegally affixed but covered trademark) could create incentives for producing trademark-infringing goods.[516] Consequently, whilst this judgement is in no way binding for other national courts or *a fortiori* for the CJEU, it demonstrates the difficult balancing that courts must make between sustainability and trademark considerations. Moreover, it shows that when engaging in such balancing, courts today still tend to give precedence to trademark considerations over sustainability.

1.3.2 Improvements by EU legislation

138. With the increased importance attributed to sustainable development and the circular economy, the EU has adopted legislation aimed at addressing this spare parts issue and thereby contributing to the circular economy.

139. Firstly, the Ecodesign Directive[517] and its annexes oblige manufacturers to make spare parts and repair and maintenance information available to professional repairers. However, the scope

[514] *Ibid*.
[515] *E.g.,* ROGNSTAD (n. 394), 109-113 and M. VAN DER VELDEN, "Apple uses trademark law to strengthen its monopoly on repair", *University of Oslo*, 3 July 2020, https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/companies-markets-and-sustainability/velden--apple-uses-trademark-law.html
[516] ROGNSTAD (n. 394), 109.
[517] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) (Text with EEA relevance), *OJ L* 285, 31 October 2009, 10-35. Further: Ecodesign Directive.

of this Directive is limited in two important ways.[518] Firstly, spare parts and repair information must only be provided to professional repairers, *i.e.,* undertakings which provide services of repair and professional maintenance of products, and not to independent repairers.[519] Secondly, these obligations only exist for household refrigerators,[520] electronic displays,[521] dishwashers,[522] washing machines and washer-dryers,[523] refrigerators with direct sales function,[524] and welding equipment.[525]

140. This framework is undoubtably a step in the right direction since it prevents refusal of supplying spare parts and repair information to professional repairers,[526] who thereby avoid infringement risks since they are no longer forced to use unauthorized spare parts. However, its impacts could be much more significant if its scope would be extended. Especially considering the circular economy, a rule mandating all OEMs to provide spare parts and repair information to all

[518] The obligation is also limited in time, ranging from 7 to 10 years depending on the type of goods. See on these limitations also, T. PIHLAJARINNE, "European Steps to Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials?", *University of Oslo Faculty of Law Research Paper* 2020, No. 2020-31, 7.

[519] Commission Regulation (EU) 2019/2019 of 1 October 2019 laying down ecodesign requirements for refrigerating appliances pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulation (EC) No 643/2009, *OJ L* 315, 5 December 2019, 194.

[520] *Ibid*, 198-199.

[521] Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) 642/2009, *OJ L* 315, 5 December 2019, 258-260.

[522] Commission Regulation (EU) 2019/2022 of 1 October 2019 laying down ecodesign requirements for household dishwashers pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) No 1016/2010, *OJ L* 315, 5 December 2019, 276-278.

[523] Commission Regulation (EU) 2019/2023 of 1 October 2019 laying down ecodesign requirements for household washing machines and household washer-dryers pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) No 1015/2010, *OJ L* 315, 5 December 2019, 298-300.

[524] Commission Regulation (EU) 2019/2024 of 1 October 2019 laying down ecodesign requirements for refrigerating appliances with a direct sales function pursuant to Directive 2009/125/EC of the European Parliament and of the Council (Text with EEA relevance), *OJ L* 315, 5 December 2019, 323-325.

[525] Commission Regulation (EU) 2019/1784 of 1 October 2019 laying down ecodesign requirements for welding equipment pursuant to Directive 2009/125/EC of the European Parliament and of the Council (Text with EEA relevance), *OJ L* 272, 25 October 2019, 129-130.

[526] *Caveat*: an arbitrary refusal to deliver spare parts to independent repairers can be considered an abuse of a dominant position, *e.g.,* Judgement of 5 October 1988, *CIRCA and Others v Renault*, C-53/87, EU:C:1988:472, para 16. However, including competition law would exceed the limits of this research.

third parties, including independent repairers, for all goods put on the EEA market, is highly desirable. A potential step towards this goal is made with the EC Proposal for a regulation establishing a framework for setting ecodesign requirements for sustainable products,[527] aimed at replacing the Ecodesign Directive. In this proposal, and in execution of the 2020 CEAP,[528] the EC communicates its intention to extend the scope of the Ecodesign Directive beyond energy-related products, to make it cover the broadest possible range of products and to help achieve the circular economy.[529] Consequently, this revision of the Ecodesign Directive provides the ideal setting to extend the obligation to provide spare parts and repair information to all third parties and regarding all products.

141. Secondly, motivated by the right to repair movement and in execution of the European Green Deal[530] and 2020 CEAP,[531] the EC recently published a proposal for a directive on common rules promoting the repair of goods.[532] This proposal is aimed at amending the current directive on contracts for the sale of goods,[533] more precisely, at extending the obligation of the OEM to repair products within and beyond the legal guarantee period.[534] Additionally, the proposal also contains an improvement compared to the Ecodesign Directive, by obliging OEMs to provide

[527] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final, 30 March 2022.
[528] 2020 CEAP, 4.
[529] 2020 CEAP, 3.
[530] Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM(2023) 155 final, 22 March 2023, 1. Further: Right to Repair Proposal.
[531] 2020 CEAP, 5.
[532] Right to Repair Proposal (n. 530).
[533] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA relevance), *OJ L* 136, 22 May 2019, 28-50.
[534] Since this aspect of the proposal concerns consumer legislation and not trademark legislation, it will not be examined within this research. However, for an overview of the proposal, see *e.g.*, C. GANAPINI, "Not yet accessible, affordable nor mainstream: campaigners tighten the screw on new EU Right to Repair proposal", *Right to Repair*, 22 March 2023, https://repair.eu/news/not-yet-accessible-affordable-nor-mainstream-campaigners-tighten-the-screw-on-new-eu-right-to-repair-proposal/ and A. OBERSCHELP DE MENESES and C.G. MOLYNEUX, "European Commission Publishes Directive on the Right of Repair Proposal", *Covington*, 11 April 2023, https://www.globalpolicywatch.com/2023/04/european-commission-publishes-directive-on-the-right-of-repair-proposal/

access to spare parts and repair-related information and tools to independent repairers. However, the limitation of the product categories for which this obligation exists, is upheld in the proposal.[535] These limitations should be abolished under the new Ecodesign framework.

2. Upcycling

2.1 The concept

142. The second circular economy activity that will be assessed is that of upcycling. Whilst upcycling is not a new concept, it gained popularity in 2002 with the publication by W. MCDONOUGH and M. BRAUNGART of their book, 'Cradle to Cradle: Remaking the Way We Make Things',[536] and has recently also been widely recognized in the fashion industry.[537] The concept refers to the creation of new products out of old and discarded ones. When used by the public, it usually refers to the creation of jewellery, fashion, and house-decorative items out of used objects.[538] Think, for example, of transforming broken dishes into a nice picture frame, creating earrings from CHANEL buttons,[539] or making a handbag out of old jeans. However, the concept of upcycling can be applied to all product categories, extending far beyond the domestic sphere. Moreover, the circular economy calls for the application of upcycling practices to all markets and products.

143. Little explanation is needed to demonstrate the advantages that upcycling has for the circular economy. In essence, upcycling aims at reusing materials, giving them a new life, purpose, and value, instead of throwing them away.[540] Consequently, the materials remain in the economic

[535] Article 5(3) j° Annex II Right to Repair Proposal.
[536] W. MCDONOUGH and M. BRAUNGART, *Cradle to Cradle: Remaking the Way We Make Things*, New York, North Point Press, 2002, 193 p.
[537] *E.g.,* N.Q. DORENBOSCH, "Upcycling – op het snijvlak van duurzaamheid en intellectuele eigendom", *IER* 2022, (147) 147 and L. VAN DEN BERG, "De kledingindustrie: upcycling en het merkenrecht", *Dirkzwager*, 6 December 2022, https://www.dirkzwager.nl/kennis/artikelen/de-kledingindustrie-upcycling-en-het-merkenrecht/
[538] PIHLAJARINNE (n. 150), 92.
[539] VAN DEN BERG (N. 537).
[540] *E.g.,* C. WEGENER, "Upcycling" in V.P. GLAVEANY, L. TANGGAARD and C. WEGENER (eds.), *Creativity – A new vocabulary*, Basingstoke, Palgrave Macmillan, 2016, (181) 181.

cycle as part of a new product. This avoids on the one hand the creation of waste and the accompanying adverse environmental impacts,[541] and on the other hand the need for new raw materials and thus the accelerated depletion thereof. Moreover, in contrast to downcycling and recycling,[542] which both consume energy and create waste, upcycling transforms something that has become useless into something useful, thus creating value instead of waste.[543] Consequently, upcycling unquestionably contributes to the circular economy and should thus be encouraged. However, goods and materials used to create upcycled products frequently have trademarks on them. Therefore, the question arises whether the trademark proprietor can act against these upcycled goods bearing his trademark.

2.2 The infringement risks

144. In order for the trademark proprietor to be able to act against upcycling of this trademarked goods, one of his rights must be violated. In this regard, a violation of Article 10(2)(a) TMD/Article 9(2)(a) EUTMR is unlikely since the upcycled goods on which the trademark appears will almost never be identical with the goods for which the trademark is registered.[544] There could however be infringement of Articles 10(2)(b) or (c) TMD/Articles 9(2)(b) or (c) EUTMR.[545]

145. Firstly, under subparagraph b, infringement can be established if the upcycled goods are identical with or similar to the original trademarked goods. Think for example of the CHANEL buttons transformed into earrings. To establish infringement, firstly, use in the course of trade in

[541] EC, "LIFE and the Circular Economy", 2017, https://wayback.archive-it.org/12090/20201016035427/https://ec.europa.eu/environment/archives/life/publications/lifepublications/flippingbook/circulareconomy/HTML/files/assets/common/downloads/publication.pdf, 50.
[542] Downcycling entails that materials are broken down into lower-value raw materials. Recycling refers to the process of turning (a part of) a product into a new product and is often used to cover both downcycling and upcycling. More on these concepts: M. WILSON, "When creative consumers go green: understanding consumer upcycling", *JPBM* 2016, (394) 395.
[543] *E.g.*, C. WEGENER (n. 540), 181; WILSON (n. 542), 395 and DORENBOSCH (n. 537), 147.
[544] M. OKER-BLOM, "Some thoughts on sustainability and upcycling from a copyright and trademark law point of view", *IPRinfo,* 6 September 2022, https://iprinfo.fi/artikkeli/some-thoughts-on-sustainability-and-upcycling-from-a-copyright-and-trademark-law-point-of-view/
[545] KUR (n. 449), 231-232.

relation to goods or services must be demonstrated. In this regard, an important distinction must be made, namely between independent consumers upcycling trademarked goods for their own use and third parties who have made a business out of upcycling trademarked goods and selling these goods to consumers (professional upcyclers). In both cases the trademark is used in relation to goods, however, whilst upcycling consumers will be safe from trademark infringement since they do not use the mark in the course of trade,[546] professional upcyclers do, and consequently fulfil the first requirement for infringement. Secondly, the use must create a likelihood of confusion, including a likelihood of association. This will often be the case for upcycled goods, since, for example in the case above, consumers might believe that the earrings originate from CHANEL.

146. Secondly, most upcycled goods will not be similar to the trademarked goods, thereby requiring assessment under subparagraph c.[547] For example, the fabric of scarfs or coats with the famous trademarked BURBERRY check pattern could be used to reupholster a chair or sofa. To establish infringement under this subparagraph, firstly, the trademark must be used in the course of trade, in relation to goods or services. This requirement must be interpreted in the same way as above. Secondly, the concerned trademark must have a reputation in the Member State where it is used (TMD)/in the EU (EUTMR). Consequently, if the upcycled goods are not similar to the original ones, only the use of 'famous' trademarks on upcycled goods risks trademark infringement. Whilst this might seem a positive limitation to the possibility of trademark infringement, it provides little comfort to upcyclers since often the trademarks used on upcycled goods are those with a reputation because they are the ones that can increase the marketability and profitability of the upcycled goods.[548]

[546] *Supra,* nr. 84: if the upcycled goods are not sold, this remains entirely outside the commercial sphere. Additionally, even the sale of upcycled products by non-professional upcyclers is allowed as long as the volume, frequency or other characteristics do not exceed the realm of private activities (C-324/09 (n. 218), para 55).
[547] PIHLAJARINNE (n. 150), 94.
[548] A.M. KEATS, "Trendy Product Upcycling: Permissible Recycling or Impermissible Commercial Hitchhiking?", *TMR* 2020, (712) 720.

147. Lastly, there is only infringement under subparagraph c if the use takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark. As stated above, upcyclers often use trademarks with a reputation to increase the profitability and marketability of their upcycled goods, thus potentially taking unfair advantage of the reputation and distinctive character of the trademark. Situations in which the upcycled goods damage the distinctive character or reputation of the trademark can also be imagined.[549] On the one hand, damage to the distinctive character would occur when consumers attribute the upcycled goods to the trademark proprietor and are not aware of the fact that they were not manufactured by the latter. Damage to the reputation of the trademark, on the other hand, occurs whenever the trademark is used in upcycled goods that *e.g.*, damage the prestigious image and aura of luxury of the trademarked goods.[550] However, it must also be emphasized that in many instances upcycling can be beneficial to the trademark's reputation instead of damaging it. More precisely, on the one hand, in the age of increased consumer awareness of the climate problem and therefore increased popularity of sustainable practices such as upcycling, it can be beneficial to a trademark's reputation to be associated with upcycled products.[551] On the other hand, upcycling can give a new life to out-of-style trademarked goods, making them hip again and thereby reaching new and different demographics and augmenting the trademark's reputation.[552]

148. If the conditions for infringement under subparagraph c are fulfilled, the upcycler might, however, still escape infringement if he can demonstrate a due cause for his use of the trademark.[553] As mentioned above, such due cause can be both objectively overriding reasons and subjective interests of a third party.[554] Moreover, the CJEU has clarified that this concept intends to strike a balance between the interests involved.[555] Consequently, the question arises whether,

[549] KEATS (n. 548), 719-720.
[550] *E.g.*, C-337/95 (n. 379), para 45 and C-59/08 (n. 382), para 24.
[551] OKER-BLOM (n. 544) and CAHOY (n. 3), 42.
[552] J.B. SCHENERMAN, "One Consumer's Trash is Another's Treasure: Upcycling's Place in Trademark Law", *Cardozo Arts & Entertainment Law Journal* 2020, (745) 759.
[553] *E.g.,* Judgement of 23 October 2003, *Adidas-Salomon and Adidas Benelux*, C-408/01, EU:C:2003:582, para 39 and C-252/07 (n. 342), para 39.
[554] C-65/12 (n. 357), para 45.
[555] *Ibid*, para 46.

sustainability, achieving the circular economy, or the protection of the environment through the repurposing of trademarked goods to decrease waste generation and the need for new raw materials, would be accepted by courts as a due cause in the balancing exercise with the interests of the trademark proprietor.

149. Additionally, to establish infringement under subparagraph b or c, it is required that the origin function is harmed by the use. As demonstrated above, consumers might be misled about the origin of the upcycled goods bearing a trademark, since they might believe that the upcycled goods were manufactured by the trademark proprietor, who can be held responsible for their quality.[556] Thus, there exists a risk of harm to the essential origin function, linked with the quality function.[557] Negative impacts on the other trademark functions could be argued as well. However, since the CJEU does not take these additional functions into account when assessing an infringement under subparagraph b or c, these functions do not need to be examined in the case of upcycling.[558]

150. If an upcycling case fulfils the conditions of one of these two infringement scenarios, the trademark proprietor can invoke his rights against the upcycled goods, unless the trademarked goods were placed on the EEA market by him or with his consent (Article 15(1) TMD/EUTMR). However, even in the case of exhaustion, Article 15(2) TMD/EUTMR specifies that the trademark proprietor can still oppose the further commercialisation if he has legitimate reasons to do so, especially if the condition of the goods is changed or impaired after they have been put on the market. This criterion should be interpreted in the same way as above. Thus, if the upcycled good takes unfair advantage of the distinctive character or reputation of the trademark, damages the reputation of the trademark, creates an impression of a commercial connection between the trademark proprietor and upcycler, or if the changes to the trademarked good are too

[556] A. ANDERSON, "Trash or treasure? Controlling your brand in the age of upcycling", *Trademark World* 2009, Issue 219, (1) 1-2.
[557] KEATS (n. 548), 714-715.
[558] *Supra*, n. 90.

'substantial', the trademark proprietor can prohibit further commercialisation based on legitimate reasons.[559] These requirements can be detrimental to many upcycling cases.

151. Additionally, the question arises whether the upcycler can invoke any of the limitations on trademark rights listed in Article 14 TMD/EUTMR.[560] In this regard, Article 14(1)(b) TMD/EUTMR – which allows the use of signs which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or other characteristics of goods – can be relevant. More precisely, provided that the upcycled product is considered a new, independent product, due to the stage of alteration,[561] it could be argued that the trademark is used as an indication of a characteristic of the upcycled good, namely the origin of the raw material used.[562] However, the CJEU has clarified that the use of a trademark for purely decorative purposes, does not fall under this limitation.[563] Thus, it is uncertain whether this limitation would provide protection to upcyclers since this depends on the interpretation by the CJEU/national courts in the specific case and whether they would consider the use of a trademark in the upcycled goods as an indication of the origin of the raw material or as a decoration.[564]

152. Moreover, to benefit from this limitation, upcycling must occur "*in accordance with honest practices in industrial and commercial matters*". This criterion must also be interpreted in the same way as above.[565] Consequently, if the upcycler is free-riding on the reputation and distinctive character of the trademark to increase the desirability and price of the upcycled goods, if the upcycled goods damage the reputation or distinctive character of the trademark, or if they create an impression of a commercial connection with the trademark proprietor, the limitation will not apply. Thus, the critiques against the circular reasoning adopted by the CJEU in its interpretation of Article 14(2) and 15(2) TMD/EUTMR, which makes successfully invoking the principle of

[559] *Supra*, nr. 117-120.
[560] *Cf.* SENFTLEBEN (n. 438), 581-584.
[561] PIHLAJARINNE (n. 150), 96.
[562] C-48/05 (n. 226), para 42-43.
[563] C-102/07 (n. 342), para 48.
[564] PIHLAJARINNE (n. 150), 96-97. However, a sustainable interpretation of EU trademark legislation would require the first, infra, n. 183-185 j° 195.
[565] *Supra*, n. 106-112.

exhaustion or the limitations to trademark rights practically impossible, can be repeated in the case of upcycling.[566] However, the above analysis concerning de-branding and cobranding, applies to upcycling as well.[567] Thus, adding a label to the upcycled trademarked goods, disclaiming that the goods have been upcycled, by whom and the absence of a commercial connection between the upcycler and the trademark proprietor, might provide some protection against trademark infringement.[568]

153. A final question concerning upcycling is whether it can be considered an artistic expression.[569] Both the TMD and EUTMR provide in their recitals that "*Use of a trademark by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters*".[570] Since upcycling often involves a great deal of creativity by the upcycler, it could be argued that upcycled goods are an artistic expression. The fact that the resulting products are also useable and practical does not prejudice this conclusion and can only be applauded as it creates added value. However, to be considered an artistic expression, the upcycling must again occur "*in accordance with honest practices in industrial and commercial matters*". Consequently, due to the circular reasoning, in many cases where infringement is established, the artistic expression-exception will not protect the upcycler.[571]

[566] *Supra*, n. 110 and 118.
[567] *Supra*, n. 121-131.
[568] KEATS (n. 548), 718; DORENBOSCH (n. 537), 149 and VAN DEN BERG (n. 537).
[569] KEATS (n. 548), 712-726 and SENFTLEBEN (n. 438), 567-603.
[570] Recital 27 TMD and Recital 21 EUTMR.
[571] More on this, see SENFTLEBEN (n. 438), 586-590.

Section three: contributions of trademarks to sustainable development

154. One key takeaway can be deduced from the above analysis of repair and upcycling , namely that contemporary European trademark legislation still creates barriers hindering the full development of these practices and consequently counteracts the circular economy and sustainable development. Whilst this is unquestionably regrettable from a sustainability perspective, it is also crucial to emphasise the importance of trademarks for our economy, undertakings, and consumers. Trademarks considerably reduce searching costs for consumers, consequently benefiting them, since instead of needing to examine all products for their characteristics and quality, consumers can trust on trademarks to guide them in their consumption choices.[572] Consequently, trademarks also benefit our economy by ensuring that products of high quality are consistently produced in order for the trademark to continue performing its function of attracting and retaining customers.[573] Because of these advantages produced by trademarks, trademark proprietors are granted legal protection, allowing them to prevent competitors from free-riding on the reputation they have created for the trademark.[574] This *raison d'être* and importance of trademarks in our society must be kept in mind when analysing their impact on the circular economy and sustainable development because it gives weight to trademark considerations in the balancing exercise with sustainable development, thereby justifying that sustainability considerations do not always prevail.

155. Additionally, trademarks might also contribute to sustainable development. Firstly, as explained above,[575] whilst contrary to other intellectual property rights, the primary aim of trademarks is not to incentivize innovation and creativity, the necessity to keep the trademark relevant promotes continuous investments in research and development, resulting in product

[572] LANDES (n. 211), 167.
[573] I. GOVAERE (n. 214) 25-26; LANDES (n. 211), 168 and G.B. RAMELLO, "What's in a sign? Trademark law and economic theory", *Journal of Economic Surveys* 2006, (547) 551.
[574] LANDES (n. 211), 168 and RAMELLO (n. 573), 549.
[575] *Supra*, n. 62.

improvement and innovation.[576] Especially considering the increased consumer awareness of the climate problem and the subsequent demand for climate-friendly products,[577] brands have a high interest in developing sustainable products under their trademark as this will benefit their reputation and attract consumers.

156. Secondly, the massive increase in green trademarks being registered can also greatly contribute to sustainable development.[578] A green trademark is a trademark that conveys a message of environmental friendliness.[579] Consequently, green trademarks can be a massive aid for consumers conscious of sustainable development and climate change since these trademarks can guide them to products and services that are sustainable and environmentally friendly.[580] This can be done through three different types of trademarks, namely individual trademarks, collective marks, and certification marks.

157. Firstly, undertakings can register individual trademarks containing indications of sustainability and environmental friendliness.[581] However, these individual trademarks are often refused registration due to their lack of distinctiveness (Article 4(1)(b) TMD/Article 7(1)(b) EUTMR)

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[576] *E.g.,* Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast) (Text with EEA relevance), COM(2013) 162 final, 27 March 2013, 1.
[577] *E.g.,* K. PARK, "Green trademarks and the risk of greenwashing", *WIPO Magazine* 2022, Vol. 4, (32) 32; M. MAGGIORE, "Can Trademarks Ever Be Green? Between Green-Branding and Greenwashing", *INTA*, 10 March 2021, https://www.inta.org/perspectives/features/can-trademarks-ever-be-green-the-line-between-green-branding-and-greenwashing/ and "World Intellectual Property Day 2020 – Innovate for a Green Future – How trademarks can promote sustainability", *WIPO*, https://www.wipo.int/ip-outreach/en/ipday/2020/articles/sustainable_trademark.html
[578] Whilst in 1996 there were only 1.588 green trademarks, this number has risen to almost 16.000 in 2020. EUIPO, "Green EU trade marks", September 2021, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Green_EU_trade_marks/2021_Green_EU_trade_marks_FullR_en.pdf, 19.
[579] "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f and MAGGIORE (n. 577).
[580] C.H. FARLEY, "Green marks" in J.D. SARNOFF (ed.), *Research Handbook on Intellectual Property and Climate Change*, Cheltenham, Edward Elgar Publishing, 2018, (399) 404-406. This strategy seems to work, see N.M. SUKI, "Green product purchase intention: impact of green brands, attitude, and knowledge", *British Food Journal* 2016, 2893-2910.
[581] *E.g.,* FARLEY (n. 580), 400-402. For more on the registration of trademarks, see *e.g.,* JANSSENS (n. 8), 205-266.

or descriptive nature (Article 4(1)(c) TMD/Article 7(1)(c) EUTMR).[582] In this regard, the EUIPO Guidelines explicitly state that terms merely denoting a particular positive or appealing quality or function of the goods and services may be refused if applied for alone or in combination with descriptive terms.[583] Amongst the examples given are 'eco' as denoting 'ecological',[584] and 'green' to indicate 'environmentally friendly'.[585] Consequently, undertakings must be creative in thinking of trademarks that indicate the sustainable and environmentally friendly nature of their products, without being entirely descriptive.[586]

158. Moreover, since deceptive trademarks are also refused registration (Article 4(1)(g) TMD/Article 7(1)(g) EUTMR), no environmental or sustainability claims may be made if these do not correspond to reality.[587] Moreover, such misleading trademarks risk being qualified as greenwashing, *i.e.,* any form of misleading, false or unsubstantiated claim about the environmental friendliness of products, services or a company.[588] In this regard, the Commercial Practices Directive (CPD) gives guidance on what could be qualified as greenwashing by establishing which practices are considered as misleading in Annex I.[589] Moreover, in 2021, the EC

[582] MAGGIORE (n. 577); "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f and P. FROMLOWITZ and N. VON BARGEN, "Green brands: how trademark law can promote sustainable business practices", *WTR*, 25 March 2021, https://www.worldtrademarkreview.com/article/green-brands-how-trademark-law-can-promote-sustainable-business-practices

[583] "Trademark and Design guidelines", *EUIPO*, https://guidelines.euipo.europa.eu/2058843/2199801/trade-mark-guidelines/1-introduction, Part B, Section 4, Chapter 3, Word Elements.

[584] Judgement of 24 April 2012, *Leifheit v OHIM (Ecoperfect)*, T-328/11, EU:T:2012:197, para 25.

[585] Judgement of 27 February 2015, *Universal Utility International v OHIM (Greenworld),* T-106/14, EU:T:2015:123, para 24.

[586] FROMLOWITZ (n. 582).

[587] "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f

[588] FARLEY (n. 580), 407; MAGGIORE (n. 577) and M. RUTKOWSKA-SOWA and P. POZNANSKI, "Legal aspects of green-branding", *EEJTR* 2022, Vol. 6, Issue 2, (57) 67. More on this concept: S.V. DE FREITAS NETTO, M.F.F. SOBRAL, A.R.B. RIBEIRO and G.R. DA LUZ SOARES, "Concepts and forms of greenwashing: a systematic review", *ESEU* 2020, 1-12.

[589] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), *OJ L* 149, 11 June 2005, 35. See MAGGIORE (n. 577) and PARK (n. 577), 33.

published a new guidance on the interpretation and application of the CPD,[590] containing a specific segment on environmental claims. This guidance clarifies that essentially, environmental claims must be truthful, clear, specific, accurate and unambiguous and must be supported by evidence.[591]

159. Additionally, in March 2022, the EC published a proposal for a Directive empowering consumers for the green transition,[592] which seeks to amend the CPD, *inter alia* by adding to the prohibited list of Annex I the actions of displaying a sustainability label which is not based on a certification scheme or not established by public authorities, making a generic environmental claim for which the trader cannot demonstrate recognized excellent environmental performance and making an environmental claim about the entire product when it actually concerns only a certain aspect of the product.[593] This proposal is complemented by a proposal for a Green Claims Directive,[594] aimed at making green claims reliable, comparable and verifiable across the EU, protecting consumers from greenwashing and contributing to creating a circular and green EU economy by enabling consumers to make informed purchasing decisions and helping establish a level playing field concerning the environmental performance of products.[595] Since consumers nowadays are often misled and overwhelmed by the explosion[596] of green claims and labels,[597]

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[590] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), *OJ C* 526, 29 December 2021, 1-129.
[591] *Ibid*, 75.
[592] Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (Text with EEA relevance), COM(2022) 143 final, 30 March 2022.
[593] *Ibid*, Annex.
[594] Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final, 22 March 2023, 1. Further: Proposal for a Green Claims Directive. See also S. FEIJAO, "European Commission published proposal for a Green Claims Directive to combat greenwashing", *Linklaters*, 30 March 2023, https://sustainablefutures.linklaters.com/post/102ibre/european-commission-publishes-proposal-for-a-green-claims-directive-to-combat-gre
[595] "Green claims", *European Commission*, https://environment.ec.europa.eu/topics/circular-economy/green-claims_en
[596] Overview of the 231 active ecolabels in Europe at present (May 2023): "All ecolabels in Europe", *Ecolabel Index*, https://www.ecolabelindex.com/ecolabels/?st=region=europe
[597] An EC study from 2020 found that 53.3% of examined claims were vague, misleading or unfounded and 40% were completely unsubstantiated. Commission Staff Working Document, "Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC

therefore reducing their trust in them,[598] the proposed directive establishes criteria on how companies should prove their environmental claims and labels, requires these claims and labels to be checked by an independent and accredited verifier and creates new rules on the governance of environmental labelling schemes to ensure they are solid, transparent and reliable.[599] Consequently, this directive could greatly impact the making of green claims through trademarks in the future, particularly through certification marks.[600]

160. Secondly, green trademarks can take the form of collective marks, *i.e.,* marks owned by an organisation or association which can be used by any trader that is a member of that association.[601] An example of a collective mark with a sustainable connotation is the GREEN DOT mark, which indicates that for the packaging bearing the mark, a financial contribution has been paid to a qualified national packaging recovery organization.[602] The CJEU has recognized that the presence of this mark on goods can influence consumer decisions,[603] thus acknowledging the impact green marks can have.

161. Thirdly, certification marks[604] indicate that the goods or services bearing the mark comply with the standards determined in the regulations of use[605] and controlled by the certification mark

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and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information", SWD(2020) 85 final, 30 March 2022, 10.

[598] "Questions and Answers on European Green Claims", *European Commission*, 22 March 2023, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_1693

[599] "Green claims", *European Commission*, https://environment.ec.europa.eu/topics/circular-economy/green-claims_en For a brief overview of what the proposal entails, see *e.g.*, B. WHITE, "The EU's New Green Claims Directive – It's Not Easy Being Green, *Barnes & Thornburg*, 30 March 2023, https://btlaw.com/insights/alerts/2023/the-eus-new-green-claims-directive-its-not-easy-being-green

[600] *Cf.* Article 2(7), (8) and (10) j° Article 7 and 8 Proposal for a Green Claims Directive.

[601] "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f For more on collective marks, see *e.g.*, JANSSENS (n. 8), 479-486.

[602] "The Green Dot Trademark", *PRO Europe*, https://www.pro-e.org/the-green-dot-trademark

[603] Judgement of 12 December 2019, *Der Grüne Punkt v EUIPO*, C-143/19 P, EU:C:2019:1076, para 70.

[604] With the adoption of the new trademark regulation in 2015 (Regulation 2015/2424) an EU certification mark was created, in addition to the national certification marks existing in Member States (*cf.* Articles 83-93 EUTMR).

[605] These regulations contain, in particular, the characteristics of the goods and services to be certified, the conditions governing the use of the certification mark and the testing and supervision measures to be applied by the certification mark owner. *Cf.* "Certification marks", *EUIPO*, https://euipo.europa.eu/ohimportal/en/certification-marks?TSPD_101_R0=089375ec4aab200059f87d5e01508d8a5b33fb45a53e47db1235bf44d77da809b9b87286cc5f3

owner, irrespective of the identity of the undertaking producing the goods or providing the services who uses the certification mark.[606] Examples are the MARINE STEWARDSHIP COUNCIL and the FAIRTRADE certification marks.[607] Green certification marks, containing sustainability and environmental standards in their regulations of use, can serve as a guarantee for consumers that the goods bearing the mark have been produced in a sustainable and environmentally-friendly manner and/or that the goods are sustainable and environmentally friendly in use.[608] Because of the fixed standards in the regulations of use and the control and enforcement thereof by the certification mark owner, use of a certification mark is the least likely to qualify as greenwashing, therefore being the safest way for producers, and the most reliable way for consumers, of communicating the sustainability and environmental benefits of goods through trademarks.[609]

162. A more in-depth analysis of the admissibility of registering green trademarks and the dangers of greenwashing would surpass the limits of this research.[610] However, this overview demonstrates that, whilst needing to avoid non-distinctiveness, descriptiveness and greenwashing, green trademarks can pay an important contribution to sustainable development by steering consumers towards more sustainable consumption choices. Moreover, the essential reputational value of a trademark motivates the creation of sustainable products and the adoption of sustainable business practices under the trademark.

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[606] *Ibid* and "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f. For more on certification marks, see *e.g.,* JANSSENS (n. 8), 487-495.

[607] PARK (n. 577) 37 and "Intellectual property and environmentalism: How can green trademarks help brands promote sustainability?", *Lexology*, 18 November 2018, https://www.lexology.com/library/detail.aspx?g=ee6d14b6-5778-41fb-9ca0-de0a537d320f. See more examples: "World Intellectual Property Day 2020 – Innovate for a Green Future – How trademarks can promote sustainability", *WIPO*, https://www.wipo.int/ip-outreach/en/ipday/2020/articles/sustainable_trademark.html

[608] FROMLOWITZ (n. 582).

[609] PARK (n. 577) 37 and A. MOGYOROS, "Improving eco-labels: are green certification marks up to the task?", *JIPLP* 2023, (1) 2.

[610] For more information on the matter the articles cited in this section can be consulted.

Part three: compatibility of contemporary EU trademark legislation with EU primary law

163. As mentioned in the first part,[611] sustainable development has a prominent place in EU primary law, featuring as a horizontal objective in Article 3(3) TEU and as an integration rule in Articles 11 TFEU and 37 CFR.[612] However, whilst these provisions clearly demonstrate the importance attributed to sustainable development within the EU, their exact legal value is less clear.[613] In literature, different authors take different stances concerning the status of sustainable development within the EU, with some claiming that it can only be regarded as a principle, policy[614] or goal,[615] whilst others advocate that it constitutes a legally binding (constitutional)[616] objective.[617] This ambiguity is nourished by the terminological inconsistency within EU primary law, which refers to the "*principle of sustainable development*" in the preamble to the TEU and in Article 37 CFR, whilst at the same time including "*sustainable development*" in Article 3(3) TEU with the objectives of the EU and in the integration principle of Article 11 TFEU, which at first reading seems to refer to a binding ("*must be integrated"*) policy goal.

164. However, regardless of the semantic ambiguities, what really matters are the legal consequences these provisions produce in practice. Consequently, it must be examined whether the inclusion of sustainable development in Articles 3 TEU, 11 TFEU and 37 CFR can have any effect on the contemporary trademark legislation or whether instead, the provisions primarily fulfil a symbolic function, with little impact in practice.

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[611] *Supra*, n. 31-33.
[612] Sustainable development is also mentioned in Article 3(5) and 21 TEU as a goal for the EU's external policy. However, since this research concerns the European trademark legislation, these provisions will not be examined.
[613] N. DE SADELEER, *EU Environmental Law and the Internal Market*, Oxford, Oxford University Press, 2014, 16.
[614] AVILES (n. 128), 30.
[615] E. KOZIEN and A. KOZIEN, "The sustainability development concept under the regulations in force of the Treaty on the Functioning of the European Union – legal and economical view*", 35th International Scientific Conference on Economic and Social Development* 2018, (402) 410.
[616] DE SADELEER (n. 128), 58.
[617] VAN HEES (n. 146), 63 and M. KENIG-WITKOWSKA, "The Concept of Sustainable Development in the European Union Policy and Law", *Journal of Comparative Urban Law and Policy* 2017, (64) 67.

Section one: the relevant provisions of EU primary law and their possibility of invalidating EU secondary legislation

1. Sustainable development as a horizontal objective of the EU

165. In accordance with one of the main characteristics of international organisations, the EU was established with the aim of achieving specific objectives.[618] However, since the beginning of European cooperation, a significant deepening of integration has occurred, resulting in a great expansion of the objectives.[619] Whilst the 1957 Treaty establishing the European Economic Community only mentions economic objectives associated with the creation of a common market,[620] the current Article 3 TEU provides a vast array of objectives, including non-economic ones (*e.g.*, environmental protection and gender equality).[621] Included in this list of objectives is sustainable development, with the current third paragraph of Article 3 TEU stipulating that "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. (…)".*[622] Thus, sustainable development in its three dimensions is explicitly mentioned as one of the objectives of the EU,[623] obliging the EU institutions to proactively work towards the continuous promotion thereof.[624]

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[618] J. LARIK, "From speciality to a constitutional sense of purpose: on the changing role of the objectives of the European Union", *International and Comparative Law Quarterly* 2014, (935) 939-940.
[619] *Ibid*, 940-945.
[620] Article 4 Treaty establishing the European Economic Community (Document 11957E/TXT), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11957E%2FTXT. Comment: similar provision in Article 2 Treaty establishing the European Coal and Steel Community (Document 11951K/TXT) https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN
[621] LARIK (n. 618), 944-945.
[622] Emphasis added.
[623] *Supra,* n. 35 j° 21-25.
[624] See I. GOVAERE, "Internal Market Dynamics: on Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU" in S. GARBEN, and I. GOVAERE (eds.), *The Internal Market 2.0*, Oxford, Hart Publishing 2020, (75) 83-84.

166. These objectives must be pursued in harmony with each other and in case of conflict, an appropriate balance should be sought between them.[625] Concerning this balancing exercise, the CJEU has already ruled in the past that environmental protection can prevail over economic considerations[626] and the internal market objective.[627] However, as Advocate General LEGER clarifies "*The concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community in accordance with Article 3 of the EC Treaty (now, after amendment, Article 3 EC). On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled*.".[628]

167. The objectives are the cornerstones of the EU since they (should) guide all EU actions and policies.[629] Consequently, considering their fundamental importance, they are generally[630] considered to be legally binding for all EU institutions.[631] Therefore, the CJEU can take them into account when reviewing the legality of EU acts.[632] However, since the objectives are usually formulated in a broad and general manner instead of providing clear and delimitated obligations, EU institutions have a wide margin of discretion in implementing them.[633] More precisely, the CJEU contends that where the EU legislature is called upon to legislate in an area which entails political, economic and social choices and in which it must make complex assessments, it must be allowed a broad discretion.[634] Consequently, CJEU review concerning the objectives is limited to manifest

[625] H.-J. BLANKE and S. MANGIAMELI, *The Treaty on European Union (TEU): a commentary*, Berlin, Springer, 2013, 161 and 165-166; L.A. AVILES, "Sustainable Development and Environmental Legal Protection in the European Union: a Model for Mexican Courts to Follow?", *MLR* 2014, Vol. 6, Issue 2, (251) 265.
[626] Judgement of 17 May 2018, BASF Argo and Others v Commission, T-584/13, EU:T:2018:279, para 55.
[627] Judgement of 20 September 1988, *Commission v Denmark*, C-302/86, EU:C:1988:412, para 9.
[628] Opinion of Advocate General Léger of 7 March 2000, *First Corporate Shipping*, C-371/98, EU:C:2000:108, para 54.
[629] BLANKE (n. 625), 158; LARIK (n. 618), 938 and B. SJÅFJELL, "The Legal Significance of Art 11 TFEU for EU Institutions and Member States", *LSN Research Paper Series* 2014, No. 14-08, (51) 54.
[630] Contra *e.g.,* DE SADELEER (n. 613), 16 and J. VERSCHUUREN, "The growing significance of the principle of sustainable development as a legal norm" in D.E. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental law*, Cheltenham, Edward Elgar Publishing, 2016, (276) 285.
[631] BLANKE (n. 625), 161; KENIG-WITKOWSKA (n. 617), 65 and LARIK (n. 618), 953.
[632] See Article 263-264 TFEU.
[633] *E.g.*, Judgement of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, para 37; See BLANKE (n. 625) 161; LARIK (n. 618), 953 and SJÅFJELL (n. 629), 54-57.
[634] *E.g.*, Judgement of 22 June 2017, *E.ON Biofor Sverige*, C-549/15, EU:C:2017:490, para 50 and case law cited there.

errors of appraisal or abuse of powers by the EU institutions or situations where they manifestly exceed the limits of their discretion.[635]

168. This is especially the case for the concept of sustainable development since, as demonstrated in the first part of this research, this concept is characterised by ambiguity and depending on which dimension is prioritised, vastly different policies and legislation can be enacted with reference to the same principle. Therefore, instead of creating precise obligations,[636] the objective of sustainable development could be perceived more as a binding policy guideline,[637] which the institutions must consider when adopting legislation in the different policy fields.[638] Consequently, due to the absence of concrete legal obligations and the ambiguity of the concept, successfully invoking Article 3(3) before the CJEU with the aim of declaring an act of the EU institutions invalid because it does not "*work for the sustainable development of Europe*", whilst possible in theory, seems unlikely in practice.[639]

169. In accordance with the definition of sustainable development provided above,[640] Article 3(3) TEU stipulates that, "*a high level of protection and improvement of the quality of the environment*" is at the core of sustainable development. Thus, the EU recognizes that development must promote environmental protection and improvement to be sustainable.[641] Consequently, the integration of environmental concerns into all EU policies is pivotal to promoting sustainable development.[642] This need for integration is translated in Articles 11 TFEU and 37 CFR.

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[635] *E.g., ibid*; Judgement of 24 November 1993, *Mondiet v Armement Islais*, C-405/92, EU:C:1993:906, para 47 and Judgement of 8 July 2010, *Afton Chemical*, C-343/09, EU:C:2010:419, para 28 and 34.
[636] AVILES (n. 625), 265-266.
[637] VERSCHUUREN (n. 630), 285 and M. PEETERS and M. ELIANTONIO, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, 40.
[638] *E.g.*, C-268/94 (n. 633), para 23. See LARIK (n. 618), 953 and F. KERSCHNER and E. WANGER, "Sustainability – A Long, Hard Road" in V. MAUERHOFER (ed.), *Legal Aspects of Sustainable Development,* Cham, Springer, 2015, (57) 62.
[639] BLANKE (n. 625), 161.
[640] *Supra*, nr. 40.
[641] L. KRÄMER, "Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies" in S. KINGSTON (ed.*), European Perspectives on Environmental Law and Governance*, London, Routledge, 2013, (83) 86.
[642] DE SADELEER (n. 128), 51-52; DE SADELEER (n. 613), 21; PEETERS (n. 637), 41; SJÅFJELL (n. 629), 52-53 and

2. The integration principle

170. The TFEU and CFR contain a similar obligation of integrating environmental considerations into other EU domains. On the one hand, Article 11 TFEU states that "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"*. Article 37 CFR, on the other hand, obliges that "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*". Consequently, both provisions contain the same obligation, but with minor textual differences.[643] Firstly, whilst Article 11 TFEU refers to "*environmental protection requirements*", Article 37 CFR repeats the wording of Article 3(3) TEU by referring to "a *high level of environmental protection and the improvement of the quality of the environment".* However, both formulations should be interpreted in accordance with Articles 191-193 TFEU, and especially Articles 191(1) and (2) TFEU which contain the objectives and principles of EU environmental policy.[644] Additionally, the CJEU has clarified that a high level of protection does not necessarily have to be the highest level technically possible.[645]

171. Secondly, Article 11 TFEU appears to be broader than Article 37 CFR by referring to the definition and implementation of the EU's policies and activities, whilst Article 37 CFR solely

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A. LIBERATORE, "The integration of sustainable development objectives into EU policy-making: barriers and prospects" in S. BAKER, M. KOUSIS, D. RICHARDSON and S. YOUNG (eds.), *The Politics of Sustainable Development*, London, Routledge, 1997, (107) 107.

[643] *E.g.,* E. MORGERA and G.M. DURAN, "Article 37 – Environmental Protection" in S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), *The EU Charter of fundamental rights – A commentary*, Oxford, Hart Publishing, 2014, (983) 988-995 and O. QUIRICO, "Integrating Human Rights and Environmental Duties: Prospective Implications of Article 37 of the EU Charter of Fundamental Rights", *ILJ* 2021, (41) 49.

[644] AVILES (n. 625), 261-262; KERSCHNER (n. 638), 63; KRÄMER (n. 641), 84; J.H. JANS, "Stop the Integration Principle", *ILJ* 2010, (1533) 1542 and M. MONTINI, "The principle of integration" in M. FAURE (ed.), *Elgar Encyclopedia of Environmental law*, Elgar Online, 2016-2023, (139) 145. More on the principles of EU environmental law in M. CLEMENT, *Droit européen de l'environnement*, Brussels, Bruylant, 2021, 79-146.

[645] Judgement of 14 July 1998, *Safety Hi-Tech*, C-284/95, EU:C:1998:352, para 49 and Judgement of 14 July 1998, *Bettati*, C-341/95, EU:C:1998:353, para 47.

mentions the policies. Article 37 CFR should, however, be interpreted in accordance with the broader and more precise wording of Article 11 TFEU.[646] This conclusion is supported by the Explanations relating to the Charter of Fundamental Rights (CFR Explanations), which stipulate that Article 37 CFR is grounded in Article 11 TFEU,[647] and by Articles 52(2) and 53 CFR which provide that CFR rights for which provision is made in the Treaties must be exercised under the conditions and within the limits of the Treaties and that the CFR may not be interpreted as restricting or adversely affecting human rights and freedoms recognized by EU law.[648] This position is also endorsed by the CJEU, which stipulated that Article 37 CFR is based on Article 3(3) TEU and Articles 11 and 191 TFEU and must be interpreted in accordance with these provisions.[649]

172. Neither of these principles provide a direct claim for positive action, allowing them to be invoked to oblige the EU to adopt an environmentally friendly measure.[650] However, the question arises whether it is possible to challenge EU secondary legislation – including trademark legislation – based on a violation of this integration obligation, *i.e.,* annulling the EU trademark legislation because it does not take environmental considerations into account at all or to a sufficient degree.

[646] MORGERA (n. 643), 995.
[647] Explanations relating to the Charter of Fundamental Rights, *OJ C* 303, 14 December 2007, 27. Further: CFR Explanations.
[648] QUIRICO (n. 643), 50.
[649] Judgement of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, para 62.
[650] *E.g.*, Judgement of 8 December 2016, *Lemnis Lighting*, T-600/15, EU:C:2016:937, para 47-48. CFR Explanations, 35; DE SADELEER (n. 613), 110; N. DE SADELEER, "Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases", *Nordic Journal of International Law* 2012, (39) 45 and S. PEERS and S. PRECHAL, "Article 52 – Scope and Interpretation of Rights and Principles" in S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), *The EU Charter of fundamental rights – A commentary*, Oxford, Hart Publishing, 2014, (1455) 1505.

2.1 The integration principle(s) of the TFEU

173. The environmental integration principle now contained in Article 11 TFEU was introduced into EU primary[651] law with the Single European Act in 1987,[652] driven, *inter alia*, by increased awareness of the links between economic integration and environmental protection and the popularity of the sustainable development concept.[653] Since then, the principle has undergone several changes, strengthening its position with every treaty amendment by changing the wording into a clear obligation[654] and by moving it to the beginning of the treaty[655].[656]

174. However, some authors are of the opinion that the strength of the environmental integration principle has diminished due to the proliferation of integration principles in the TFEU under the Title "*Provisions having general application"* since the Lisbon Treaty. More precisely, Article 7 TFEU obliges the EU to ensure consistency between all its policies and activities, taking all its objectives into account. Subsequently, Articles 8-13 TFEU contain several integration obligations concerning, *inter alia*, gender equality (Article 8) and consumer protection requirements (Article 12).[657] Because the TFEU does not indicate any priority amongst these integration principles, they must all be considered by the EU institutions when exercising their competences, therefore possibly undermining the integration of environmental requirements.[658] Other authors, however, are of the opinion that this proliferation has no effect on the

[651] The principle was mentioned before this for the first time in the Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, *OJ C* 112, 20 December 1973, 1-53. See *e.g.,* JANS (n. 644), 1535-1536; KRÄMER (n. 641), 85; MONTINI (644), 139 and J. NOWAG, "The Sky is the Limit: on the drafting of Article 11 TFEU's integration obligation and its intended reach" in B. SJÅFJELL and A. WIESBROCK (eds.), *The Greening of European Business under EU Law*, London, Routledge, 2014, (15) 18-19.
[652] Article 130r(2) Treaty establishing the European Economic Community, *OJ L* 169, 29 June 1987, 11.
[653] LIBERATORE (n. 642), 109-110.
[654] Article 130r Treaty on European Union, *OJ C* 191, 29 July 1992, 29.
[655] Article 2 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ C* 340, 10 November 1997, 25. Whilst this change evidently has no impact on the legal value of the principle, it does make the principle more visible, which demonstrates the importance attributed to it by the EU Member States.
[656] See this evolution in *e.g*., JANS (n. 644), 1537-1540; MONTINI (n. 644), 142-145 and NOWAG (n. 651), 19-29.
[657] Comment: there are also other integration obligations not contained under this Title, *e.g.,* Article 114(3) TFEU.
[658] DE SADELEER (n. 613), 24; JANS (n. 644), 1543-1547; MONTINI (n. 644), 144-145 and PEETERS (n. 637), 42.

environmental integration principle. Firstly, they emphasise that the Lisbon Treaty solely provided a reorganization which does not substantially affect the obligations as such, since most clauses were already included in previous versions of the treaty.[659] Secondly, they argue that Article 11 TFEU contains a stronger obligation than most of the other horizontal clauses because it pursues one of the objectives of Article 3(3) TEU.[660] However, this argument fails since many of the other integration clauses represent EU objectives stipulated in Article 3 TEU as well (*e.g.*, gender equality, a high level of employment…). Thirdly, they claim that Article 11 TFEU contains a stronger obligation because its wording ("*must be integrated"*) is stronger than that of the other principles, which merely state that the EU "*shall aim"* (Article 8 and 10 TFEU), "*shall take into account"* (Article 9 and 12 TFEU) or "*shall pay full regard"* (Article 13 TFEU).[661]

175. However, both stances are forgetting one important element, namely that sustainable development requires all economic and social goals to be pursued within the ecological limits of the Earth.[662] The vast number of objectives and goals that must be integrated when contemplating EU policies and actions does create a risk of overshadowing environmental considerations. Moreover, since no action or policy can pursue all these objectives at the same time, priority will always be given to one or more of the objectives, which is permissible as long as no objective is completely ignored or violated.[663] Consequently, the other integration principles could be used as justifications for granting minor attention to environmental requirements. However, it must be kept in mind that sustainable development requires all socio-economic policies to stay within the limits of the planetary boundaries and to promote, or at least not harm, the environment. Consequently, when balancing the different objectives and goals of the EU, the health of the natural environment sets the limits within which this balancing can take place, since the EU has little to gain from *e.g.*, a high level of employment, if the environment within which such

[659] NOWAG (n. 651), 26.
[660] DE SADELEER (n. 613), 24.
[661] *Ibid*, 24; NOWAG (n. 651), 26-27.
[662] *Supra*, definition n. 40.
[663] JANS (n. 644), 1546.

employment takes place is rapidly deteriorating.[664] Thus, environmental considerations should underlie all EU policies and actions, not at the expense of the other objectives and goals but as their foundation, allowing them to flourish.

176. However, as with Article 3(3) TEU, the exact legal value and enforceability of this principle is contested. Most authors[665] agree that the principle is legally binding because of its wording ("*must be integrated"*) and that, contrary to Article 3(3) TEU, it entails a concrete obligation.[666] More precisely, it obliges the EU institutions to take environmental considerations into account at every step of the legislative process, including during the review of legislation by the CJEU.[667] This was confirmed by the EC who stated that "*Adherence to the integration requirements is in principle subject to judicial control by the European Court of Justice…*".[668] The CJEU has also emphasised the binding nature of the objectives laid down in the integration principles,[669] and there are examples of cases in which integration principles were invoked to challenge secondary legislation.[670] Whilst these cases did not lead to the annulment of the secondary legislation in question, they demonstrate that the integration principles can be invoked for the judicial review of secondary legislation.[671]

177. However, the lack of clarity regarding the meaning of integration – what must be integrated, how and to what extent – limits the legal enforceability of the principle.[672] Therefore,

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[664] SJÅFJELL (n. 629), 56 and E. LEPTIEN, G. MOCHALOVA and E. ALBRECHT, "European Union Policy for Sustainable Development" in M. SCHMIDT, D. GIOVANNUCCI, D. PALEKHOV and B. HANSMANN (eds.), *Sustainable Global Value Chains*, Cham, Springer, 2019, (85) 91.

[665] Contra: *e.g*., PEETERS (n. 637), 39.

[666] *E.g*., DE SADELEER (n. 613), 25 and NOWAG (n. 651), 28-29.

[667] For an overview of how the different EU institutions should take this principle into account see *e.g.,* KRÄMER (n. 641), 96-99 and SJÅFJELL (n. 629), 57-65.

[668] Communication from the Commission to the European Council, "Partnership for integration – A strategy for Integrating Environment into EU Policies", COM(1998) 333 final, 27 May 1998, 3.

[669] Judgement of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, para 46.

[670] Judgement of 18 March 2014, *Z.*, C-363/12, EU:C:2014:159 and Judgement of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335.

[671] E. PSYCHOGIOPOULOU, "The Horizontal Clauses of Arts 8-13 TFEU through the lens of the CJEU", *European Papers* 2022, (1357) 1378.

[672] DE SADELEER (n. 128), 51-52; DE SADELEER (n. 613), 26; JANS (n. 644), 1541-1542 and PEETERS (n. 637), 42.

similarly as with Article 3(3) TEU, the EU institutions are granted large discretion in implementing the environmental integration principle. Consequently, whilst EU courts can review acts adopted by the institutions in light of Article 11 TFEU and examine whether environmental considerations were sufficiently taken into account,[673] this review is limited in scope since the CJEU can only annul the act if it is manifestly clear that it does not take environmental concerns sufficiently into account.[674] Such an interpretation was also endorsed by Advocate-General GEELHOED, who claimed that "*It is only where ecological interests manifestly have not been taken into account or where they have been completely disregarded that Article 6 EC may serve as the standard for reviewing the validity of Community legislation.*".[675]

2.2 The Charter of Fundamental Rights

178. In addition to the integration principle contained in Article 11 TFEU, a similar obligation is included in the CFR. The Lisbon Treaty has given the CFR the same legal value as the Treaties, thus promoting this document from a non-binding declaration to EU primary law (*cf.* Article 6(1) TEU).[676] This legally binding character of the CFR has two major consequences for EU secondary legislation. Firstly, all secondary legislation must be interpreted in accordance with the fundamental rights.[677] Secondly, secondary legislation must be annulled if incompatible with fundamental rights.[678] Consequently, the question arises whether EU trademark legislation could

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[673] JANS (n. 644), 1543 and PSYCHOGIOPOULOU (n. 671), 1377.

[674] C-341/95 (n. 645), para 35; Judgement of 13 March 2019, *Poland v Parliament and Council*, C-128/17, EU:C:2019:194, para 135. *Cf.* DE SADELEER (n. 613), 27; MONTINI (n. 644), 146 and PSYCHOGIOPOULOU (n. 671), 1377.

[675] Opinion of Advocate General Geelhoed of 26 January 2006, *Austria v Parliament and Council*, C-161/04, EU:C:2006:66, para 59. Sadly, the case was removed from the register, thus excluding an interpretation by the CJEU.

[676] For the introduction of fundamental rights in the EU legal order, see *e.g.*, BLANKE (n. 625) 289-292 and T. BONTINCK, "L'effectivité des droits fondamentaux dans le traité de Lisbonne" in B. FAVREAU and S. VASSILIOS (eds.), *La charte des droits fondamentaux de l'Union européenne après le traité de Lisbonne*, Brussels, Bruylant, 2010, (101) 103-107.

[677] J. KOKOTT and C. SOBOTTA, "The Charter of Fundamental Rights of the European Union after Lisbon", *EUI Working Papers* 2010, No AEL 2010/6, 6-7. See also *infra*, n. 183-185.

[678] *Ibid*, 6 and L.S. ROSSI, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights", *German Law Journal* 2017, (771) 777. The CJEU has on several occasions declared acts invalid because of incompatibility with CFR rights. See *e.g.,* Judgement of 9 November 2010, *Volker und Markus Schecke*

be declared invalid due to a violation of the integration principle contained in Article 37 CFR. Additionally, since the CFR also contains a fundamental right to intellectual property in Article 17(2), the question of balance arises. More precisely, it must be assessed whether, and to what extent, the fundamental right to intellectual property can be limited based on the integration principles of Article 37 CFR and Article 11 TFEU and the sustainable development objective of Article 3(3) TEU (see section 3).

179. To answer these questions, firstly, mention must be made of the distinction in the CFR between rights and principles,[679] with Article 51(1) CFR stipulating that the EU institutions, bodies, offices and agencies shall "*respect the rights, observe the principles and promote the application thereof in accordance with their respective powers*".[680] However, no guidance is given on which provisions contain rights and which contain principles. Some provisions have a very clear character, *e.g*., Article 17 CFR which explicitly contains a *right* to property, including intellectual property. Regarding the provisions whose character is less clear, clarification can be found in the CFR Explanations, which give as examples of principles Articles 25, 26 and 37 CFR.[681]

180. Thus, it is established that the CFR contains a *right* to intellectual property and a *principle* of integrating environmental considerations into other policies. However, what is the importance of this distinction? In this regard, Article 52(5) CFR stipulates that "*principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union*" and that they are "*judicially cognisable only in the interpretation of such acts and in the ruling on their legality"*. This provision seems to limit the congisability of principles by stating that they can

and Eifert, C-92-93/09, EU:C:2010:662; Judgement of 1 March 2011, *Association Belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100; Judgement of 8 April 2014, *Digital Rights Ireland*, C-293/12 and C-594/12, EU:C:2014:238 and Judgement of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650.

[679] More on this distinction*, e.g.,* E. SCOTFORD, "Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights" in S. BOGOJEVIC, R.G. RAYFUSE and L. HEINZERLING, *Environmental rights in Europe and beyond,* Portland Oregon, Hart Publishing, 2018, (133) 140-142 and T. LOCK, "Rights and Principles in the EU Charter of Fundamental Rights", *Common Market Law Review* 2019, (1201) 1207-1226.

[680] The CFR is also addressed to the Member States when they are implementing EU law (Article 51(1) CFR). However, an analysis of this obligation lies outside the scope of this research, which focuses on EU law.

[681] CFR Explanations, 35.

only be relied upon for the interpretation and review of the legality of legislative and executive acts which implement them.[682] However, besides the absence of a claim to positive action,[683] this limitation seems of little importance to the principle of Article 37 CFR since this provision obliges environmental considerations to be integrated into *all* EU policies and activities. Thus, every piece of secondary legislation – including trademark legislation – must be seen as an implementation of this principle, regardless of whether it explicitly refers to this principle or not. Consequently, all secondary legislation risks being invalidated if it does not sufficiently integrate a high level of environmental protection and improvement of the quality of the environment.[684] This conclusion is supported by a systemic interpretation of Article 37 CFR in light of Article 11 TFEU, which does not have a similar limitation to its justiciability.[685]

181. Secondly, a look at the origin and interpretation of Articles 17(2) and 37 CFR is required. On the one hand, Article 17(2) plainly states that "*Intellectual property shall be protected*". Thus, the wording of the provision itself is very vague, providing little insight into its meaning and scope.[686] However, guidance can be found in different places. Firstly, whilst the Article itself provides no clarification on what is meant by 'intellectual property', the CFR Explanations explicitly mention, *inter alia*, trademark rights.[687] Secondly, since this provision is based on Article 1 of Protocol No. 1 to the European Convention on Human Rights[688] (ECHR),[689] it must, in accordance with Article

[682] LOCK (n. 679), 1216.
[683] *Supra,* n. 172.
[684] DE SADELEER (n. 613), 110-111; PEERS (n. 650), 1508-1510. But compare this with LOCK (n. 679), 1220-1222 and SCOTFORD (n. 679), 150-153.
[685] MORGERA (n. 643), 998.
[686] C. GEIGER, "Intellectual Property shall be protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope", *EIPR* 2009, (113) 113 and J. GRIFFITHS and L. MCDONAUGH, "Fundamental rights and European IP law – the case of Art 17(2) of the EU Charter" in C. GEIGER (ed.), *Constructing European Intellectual Property*, Cheltenham, Edward Elgar Publishing, 2013, (75) 77 j° 80-82.
[687] *Ibid*.
[688] On the relationship between the CFR and ECHR, see Articles 6(2) TEU and 52(3) and 53 CFR.
[689] Whilst this article does not explicitly mention intellectual property, the European Court of Human Rights (ECtHR) has specified in several cases that intellectual property is included in this provision. *E.g.,* concerning trademarks in ECtHR 11 January 2017, No 73049/01, Anheuser-Busch Inc/Portugal, para 72. See M. HUSOVEC, "The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter", *German Law Journal* 2019, (840) 844-845 and P. TORREMANS, "Article 17(2) in S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), *The EU Charter of fundamental rights – A commentary*, Oxford, Hart Publishing, 2014, (489) 501.

52(3) CFR, be granted the same scope and meaning.[690] Thirdly, the CFR Explanations clarify that the guarantees provided for property apply *mutatis mutandis* to intellectual property.[691] Consequently, the right to intellectual property entails the right to own, use, dispose of and bequeath.[692]

182. Article 37 CFR, on the other hand, obliges a high level of environmental protection and the improvement of the quality of the environment to be integrated into the policies of the EU in accordance with the principle of sustainable development.[693] This provision must be interpreted in the same way as Article 11 TFEU.[694] Because of this link with Article 11 TFEU and its own strict wording ("*must be integrated*"), Article 37 CFR must also be considered a legally binding obligation.[695] However, the same problems concerning the justiciability of this principle arise as were seen when examining Articles 3(3) TEU and 11 TFEU, namely the broad discretion left to the EU institutions, which limits judicial review to situations where the competent institution manifestly violated the principle.[696] Because of this high similarity with Article 11 TFEU, the added value of Article 37 CFR in the EU legal order is often questioned,[697] and many critique the missed chance of including a true 'right to a healthy environment' in the CFR.[698] However, whilst it is true that Article 37 CFR does not create any new obligations,[699] including the environmental integration

[690] CFR Explanations, 23; TORREMANS (n. 689), 489 and 501. A separate examination of the ECtHR case law on intellectual property lies outside the scope of this research.
[691] CFR Explanations 23. See also *e.g.,* Judgement of 12 December 2018, *Unichem Laboratories v Commission*, T-705/14, EU:T:2018:915, para 313.
[692] On the interpretation of Article 17(1) CFR, see *e.g.*, GRIFFITHS (n. 686), 81-86.
[693] On the drafting of this principle, see *e.g.,* M. LOMBARDO, "The Charter of Fundamental Rights and the Environmental Policy Integration Principle" in G. DI FEDERICO (ed.), *The EU Charter of Fundamental Rights – From declaration to binding instrument*, Dordrecht, Springer, 2011, (217) 220-222.
[694] MORGERA (n. 643), 984-995.
[695] *E.g., ibid*, 995-997 and QUIRICO (n. 643), 56-59.
[696] *E.g.,* 341/95 (n. 645), para 32-35. See MORGERA (n. 643), 999.
[697] *E.g.,* MORGERA (n. 643), 1002; LOMBARDO (n. 693), 222-225 and KERSCHNER (n. 638), 64.
[698] *E.g.,* MORGERA (n. 643), 984 and G.M. DURAN and E. MORGERA, "Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection", *Edinburgh School of Law Research Paper Series* 2013, No 2013/20, 3-4. For a more nuanced view, see QUIRICO (n. 643), 41-78.
[699] C-444/15 (n. 649), para 61-64.

principle in the CFR does enhance its status and emphasises this obligation and its importance[700].[701]

Section two: interpretational value of EU primary law

183. As clarified above, the binding nature of Articles 3 TEU, 11 TFEU and 37 CFR entails that secondary legislation which violates these articles could in principle be declared invalid. However, due to the large margin of discretion left to the EU institutions when implementing these principles, this result is very unlikely.[702] The Articles, however, also play an important role in their second function, namely as interpretational principles.[703]

184. Whilst the CJEU utilizes several interpretational methods,[704] one of its most-used methods is the teleological (functional, purposive) interpretation, according to which EU law provisions must be interpreted in light of their aim and purpose.[705] Applying this interpretational method to trademark legislation, the provisions of EU trademark legislation must be interpreted in accordance with their purpose of, *e.g.,* distinguishing goods and services.[706] However, this interpretational principle additionally requires that account is taken of the objectives pursued by the Treaties when interpreting EU secondary law provisions.[707] This has been endorsed by the CJEU, who has repeatedly ruled that EU law is to be interpreted and applied in light of the Treaty objectives.[708] Consequently, trademark legislation should be interpreted in accordance with Article

[700] *E.g.,* Opinion of Advocate General Bot of 8 May 2013, *IBV & Cie*, C-195/12, EU:C:2013:293, para 82.
[701] SCOTFORD (n. 679), 139.
[702] *Supra*, n. 167-168, 176-177 and 182.
[703] *E.g.,* KOKOTT (n. 677), 6-7 and LARIK (n. 618), 949-950 and 953.
[704] See *e.g.,* K. LENAERTS and J.A. GUTIERREZ-FONS, "To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice", *CJEL* 2014, Vol. 20, Issue 2, 3-61.
[705] *Ibid*, 31-37.
[706] Recital 18 and 31 TMD.
[707] BLANKE (n. 625), 161; GOVAERE (n. 624), 7; LARIK (n. 618), 949-950 and 953; LENEARTS (n. 704), 31-32 and A. VON BOGDANDY, "Founding Principles of EU Law. A Theoretical and Doctrinal Sketch", *European Law Journal* 2010, (95) 100.
[708] *E.g*., Judgement of 6 March 1974, *Istituto Chemioterapico Italiano Commercial Solvents v Commission*, C-6-7/73, EU:C:1974:18, para 32; Judgement of 23 March 1982, *Levin v Staatssecretaris van Justitie*, C-53/81, EU:C:1982:105, para 15; Judgement of 5 May 1982, *Schul*, C-15/81, EU:C:1982:135, para 33; Judgement of 19 July 2012, *Parliament v*

3(3) TEU and the objective of promoting sustainable development. The same is true for the integration principles of Article 11 TFEU and 37 CFR,[709] which require an interpretation of EU secondary legislation that facilitates the integration of environmental protection requirements.[710]

185. Additionally, the systematic interpretation,[711] which is based on the premise that the EU legislator is a rational actor, favours an interpretation which preserves the validity of his acts over one which would lead to their annulment.[712] Consequently, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which preserves the effectiveness and validity of the provision,[713] *i.e.,* the interpretation which is compatible with EU primary law.[714] Thus, this interpretational rule favours an interpretation of the existing trademark provisions in light of the obligations of Articles 3(3) TEU, 11 TFEU and 37 CFR over the annulment of trademark provisions for unsatisfactorily taking these obligations into account.

Council, C-130/10, EU:C:2012:472, para 61-65; Judgement of 18 July 2013, *UEFA v Commission*, C-202/11, EU:C:2013:519, para 26-27.

[709] Examples of cases in which the CJEU used integration clauses in its interpretation: Judgement of 23 April 2015, *Zuchtvieh-Export*, C-424/13, EU:C:2015:259; Judgement of 26 February 2019, *Oeuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137; Judgement of 15 April 2021, *Olympiako Athlitiko Kentro Athinon*, C-511/19, EU:C:2021:274.

[710] DE SADELEER (n. 613), 28; SJÅFJELL (n. 629), 52; PSYCHOGIOPOULOU (n. 671), 1369 and 1374 and M. WASMEIER, "The integration of environmental protection as a general rule for interpreting community law", *Common Market Law Review* 2001, 159-177.

[711] More on this *e.g*., LENAERTS (n. 704), 16-23.

[712] *E.g*., Judgement of 4 October 2001, *Italy v Commission*, C-403/99, EU:C:2001:507, para 37; Judgement of 22 May 2008, *Feinchemie Schwebda and Bayer CropScience*, C-361/06, EU:C:2008:296, para 49; Judgement of 19 November 2009, *Sturgeon and Others*, C-407/07 and C-432/07, EU:C:2009:716, para, 47 and Judgement of 16 September 2010, *Chatzi*, C-149/10, EU:C:2010:534, para 43.

[713] *E.g*., Judgement 22 September 1988, *Land de Sarre v Ministre de l'Industrie*, C-187/87, EU:C:1998:439, para 19 and Judgement of 24 February 2000, *Commission v France*, C-434/97, EU:C:2000:98, para 21. See LENAERTS (n. 704), 17 and ROSSI (n. 678), 775-776.

[714] *E.g.,* Judgement of 13 December 1983, *Commission v Council*, C-218/82, EU:C:1983:369, para 15 and Judgement of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, para 44. See *e.g*., ROSSI (n. 678), 775-776.

Section three: limiting the right to intellectual property based on the sustainable development objective and the environmental integration principle

186. The analysis in Part two of the impact of EU trademark legislation on the circular economy and sustainable development demonstrates that this legislation still poses important hindrances to these objectives. Consequently, EU trademark legislation does not "*work for the sustainable development of Europe*", as is required by Article 3(3) TEU, and seems to violate the integration principles of Article 11 TFEU and Article 37 CFR by not taking sustainability and environmental considerations sufficiently into account. Moreover, an examination of the legislative procedure that preceded the adoption of the 2015 TMD and EUTMR (and its 2017 codification) revealed that at no step in this process, were any sustainability or environmental considerations raised, nor was reference made to the circular economy. Therefore, to comply with primary law obligations, contemporary EU trademark legislation should be reviewed to include more sustainability considerations. However, with the CFR safeguarding a fundamental right to intellectual property, the question arises whether and to what extent this right could be limited by sustainability and environmental protection requirements.

187. In answering this question, it is crucial to emphasise that the CJEU has on multiple occasions clarified that the right to intellectual property is in no way an absolute right.[715] Consequently, based on Article 52(1) CFR, this rights can be limited provided that the limitation is provided for by law, respects the essence of the right, and, subject to the principle of proportionality, is necessary and genuinely meets the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.[716] These requirements will now be examined in turn,

[715] *E.g.*, Judgement of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, para 43; 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, para 41; Judgement of 27 March 2014, *IPC Telekabel Wien*, C-314/12, EU:C:2014:192, para 61; Judgement of 29 July 2019, *Funke Medien NRW*, C-469/17, EU:C:2019:623, para 72 Judgement of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, para 33; Judgement of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, para 56 and Judgement of 28 October 2020, *BY*, C-637/19, EU:C:2020:863, para 32.

[716] According to the CFR the guarantees of Article 17(1) CFR apply to intellectual property as well. Thus, the conditions for the limitation of property rights contained in this provision should also apply to intellectual property. However, in so far as these conditions concern the situation of deprivation of property, they are of limited relevance

with specific application to trademark rights and the limitation thereof based on Articles 3(3) TEU, 11 TFEU and 37 CFR.

188. Firstly, any limitation to the rights of the trademark proprietor must be provided for by law.[717] According to the European Court of Human Rights (ECtHR),[718] whilst this law does not have to be statutory,[719] it must reach a certain quality level.[720] This has been confirmed by the CJEU, which clarified, referring to ECtHR case law, that this requirement implies that the legal basis must be sufficiently clear and precise and that the requirement affords legal protection against arbitrary interferences.[721] Moreover, in a case concerning the limitation of rights related to copyright, the CJEU stipulated that the legal basis which permits interferences with a right must itself define, clearly and precisely, the scope of the limitation on the exercise of the right.[722] In this regard, it must be mentioned that a feature of EU intellectual property legislation is that the legislation itself contains the limitations and exceptions on the exclusive rights, thus satisfying the 'provided for by law'-criterion.[723] Moreover, in three cases concerning copyrights, the CJEU clarified that the fundamental right to freedom of expression and information cannot function as an external exception or limitation to the exclusive rights of authors or phonograms beyond the list of codified exceptions in EU copyright law (Article 5 InfoSoc[724]).[725] Consequently, these cases demonstrate that in order for Articles 3(3) TEU, 11 TFEU and 37 CFR to limit trademark rights, it is advisable to

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to the situation discussed in this section, which concerns the balancing of intellectual property rights with other objectives (sustainable development). Additionally, the requirement of necessity for the general interest to regulate the use of property does not add anything to Article 52(1) CFR. *Cf*. HUSOVEC (n. 689), 851.

[717] See more on this in *e.g.,* PEERS (n. 650), 1470-1475.

[718] This case law is also applicable to the interpretation of the CFR based on Article 52(3) CFR.

[719] X. GROUSSOT and G.T. PETURSSON, "Review essay: Je t'aime… moi non plus: Ten years of application of the EU Charter of Fundamental Rights", *Common Market Law Review* 2022, (239) 246.

[720] *Ibid*, 246 and PEERS (n. 650), 1470.

[721] Judgement of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, para 81.

[722] Judgement of 8 September 2020, *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677, para 86.

[723] TORREMANS (n. 689), 515.

[724] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ L* 167, 22 June 2001, 10-19.

[725] C-469/17 (n. 715), para 55-64; C-476/17 (n. 715), para 56-65 and C-516/17 (n. 715), para 40-49. For a more in-depth analysis of these cases: C. GEIGER and E. IZYUMENKO, "The constitutionalization of Intellectual Property law in the EU and the *Funke Medien, Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!", *IIC* 2020, 282-306.

include an explicit limitation based on sustainability considerations within the EU trademark legislation.

189. Secondly, any limitation must respect the essence of trademark rights.[726] The essence of a fundamental right is considered to be compromised when the limitation in question empties the right of its content and calls its very existence into question.[727] This requires an examination of both the intensity and the extent of the limitation.[728] Generally, measures which only limit the exercise of certain aspects of a fundamental right will not be considered to compromise the essence of the fundamental right.[729] This requirement is essential since measures that compromise the essence of a fundamental right cannot be justified on any ground.[730] More precisely, a measure that compromises the essence of a fundamental right is *per se* incompatible with the CFR, without requiring a proportionality assessment[731] (*infra,* n. 192).[732]

190. The CJEU has so far not interpreted what must be considered as the essence of trademark rights. It did, however, clarify that the right to property, which includes intellectual property, must

[726] More on this, see *e.g.,* HUSOVEC, (n. 689), 840-863.; K. LENAERTS, "Limits on Limitations: The Essence of Fundamental Rights in the EU", *German Law Journal* 2019, 779-793 and C. SGANGA, "A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online", *EIPR* 2019, 683-696.
[727] LENAERTS (n. 726), 784.
[728] *Ibid*, 785.
[729] *Ibid*. *Cf.* Judgement of 6 October 2015, *Delvinge*, C-650/13, EU:C:2015:648, para 48; Judgement of 15 February 2016, *N*., C-601/15 PPU, EU:C:2016:84, para 52; Judgement of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para 39 and 43.
[730] *Cf.* LENAERTS (n. 726), 782-784.
[731] Examples of cases in which the essence of the fundamental right to intellectual property was considered to be violated, therefore ruling out the presence of a fair balance: Judgement of 16 July 2015, *Coty Germany*, C-580/13, EU:C:2015:485, para 35-41 and Judgement of 18 October 2018, *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 46-52. Examples of cases where the CJEU clearly assessed whether the measure compromised the essence of the fundamental right before, and only if the answer was in the negative, engaging in a proportionality assessment: Judgement of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28; C-314/12 (n. 715); Judgement of 15 September 2016, *Mc Fadden*, C-484/14, EU:C:2016:689 and Judgement of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567.
[732] LENAERTS (n. 726), 786-787. However, the CJEU has not always been consistent in the application of this test, therefore raising voices against the presence of an absolute theory of essence within the CJEU case law, see *e.g*., HUSOVEC (n. 689), 840-863 and GROUSSOT (n. 719), 248-525.

be viewed in relation to its social function.[733] Consequently, based on the analysis above of the trademark legislation and the interpretation thereof by the CJEU, it seems very likely that, *e.g*., the origin function would be part of the essence of trademark rights. Therefore, any measure limiting trademark rights with the aim of promoting sustainable development would need to respect the origin function of trademark rights.

191. Thirdly, the limitation must "*meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others"*. In this regard, the CFR Explanations clarify that the objectives of Article 3 TEU fall under the "*objectives of general interest recognized by the Union",*[734] thus allowing limitations to trademark rights based on the sustainable development objective. Additionally, the CJEU has on several occasions recognized that the integration clauses of Articles 8-13 TFEU can justify restrictions of fundamental rights.[735] Consequently, the integration of environmental requirements prescribed in Article 11 TFEU also provides an objective of general interest which can justify limitations to trademark rights. Moreover, since Article 37 CFR is in essence a copy of Article 11 TFEU, this Article must be interpreted in the same way (*cf.* Articles 52(2) and 53 CFR). This premise is supported by CJEU case law concerning the limitation of fundamental rights, which clarifies that the right to intellectual property must be balanced against other fundamental rights.[736]

192. Lastly, provided that the essence of the fundamental right is not compromised by the limitation, an assessment of the proportionality of the measure is required.[737] According to settled CJEU case law, the principle of proportionality requires that acts of the EU institutions are

[733] *E.g.,* Judgement of 15 January 2013, *Krizan and Others*, C-416/10, EU:C:2013:8, para 113 and Judgement of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, para 94.
[734] CFR Explanations, 32.
[735] *E.g.,* Judgement of 6 September 2012, *Deutsches Weintor*, C-544/10, EU:C:2012:526, para 49 and Judgement of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, para 68 j° 73. See more in PSYCHOGIOPOULOU (n. 671), 1369-1373.
[736] *E.g.,* Judgement of 12 September 2006, *Laserdisken*, C-479/04, EU:C:2006:549, para 64-65; Judgement of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, para 62-70 and C-70/10 (n. 715), para 43-50. See TORREMANS (n. 689), 502-505 and GEIGER (n. 686), 116.
[737] More on the principle of proportionality in *e.g.,* PEERS (n. 650), 1480-1486 and D. SAMARDZIC, "The Principle of Proportionality as Justification Test on the Ground of Art. 52 I CFR", *Review of European Law* 2017, 5-34.

appropriate for attaining the legitimate objectives pursued and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives.[738] Additionally, a fair balance must be achieved between the competing objectives (strict proportionality).[739] This test has also repeatedly been performed by the CJEU in cases[740] concerning the fundamental right to intellectual property.[741] Specifically regarding the proportionality assessment in the situation where a fundamental right is limited based on an integration principle, the CJEU has clarified that the EU legislature must be allowed a broad discretion in areas which entail political, economic and social choices and which require a complex assessment.[742] Consequently, the EU legislature has a wide margin of appreciation when limiting trademark rights based on the integration of sustainability and environmental considerations and the CJEU will only invalidate such a measure where it is manifestly disproportionate.

193. In conclusion, this analysis demonstrates that it would be possible to limit the trademark proprietor's rights with the aim of contributing to the circular economy and sustainable development. Such limitation would preferably be included in the trademark legislation itself and may not affect the essence of trademark rights. Additionally, the measure would need to be appropriate and necessary to promoting the circular economy and sustainable development and must strike a fair balance between these objectives and the trademark proprietor's rights, a balancing exercise in which the EU legislature enjoys a wide margin of appreciation.

[738] *E.g.,* C-343/09 (n. 635), para 45; C-92-93/09 (n. 678), para 74; C-283/11 (n. 731), para 50 and C-293/12 (n. 678), para 46.
[739] SGANGA (n. 726), 687.
[740] On the application of the fair balance test in the sphere of the fundamental right to property, see *e.g*., C-275/06 (n. 736), para 68; C-92-93/09 (n. 678), para 77 and 86; C-283/11 (n. 731), para 58 and 60 and Judgement of 24 November 2011, *ASNEF*, C-468-469/10, EU:C:2011:777, para 43 and 47.
[741] More on the application of this balancing exercise in intellectual property cases *e.g.,* M. HUSOVEC, "Intellectual Property Rights and Integration by Conflict: The Past, Present and Future", *Cambridge Yearbook of European Legal Studies* 2016, (239) 246-252 and SGANGA (n. 726), 683-696.
[742] C-157/14 (n. 735), para 76.

Part four: proposals for change

Section one: an interpretation of contemporary EU trademark legislation that contributes to the circular economy and sustainable development

194. When balancing trademark rights with sustainability and environmental considerations, courts today still often give preference to the protection of trademarks.[743] However, as established above, the teleological interpretation requires that contemporary EU trademark legislation is interpreted in accordance with the goal of promoting sustainable development and integrating environmental considerations into other policy fields.[744] Consequently, an interpretation must be found which strikes a fair balance between protecting trademark rights as fundamental rights and promoting sustainable development and environmental protection as EU primary law obligations.[745]

195. Part two of this research demonstrated that EU trademark legislation contains many provisions which are open to interpretation, thus leaving room to incorporate more sustainability and environmental considerations. For example, in the sphere of upcycling and the possibility for the upcycler to escape trademark infringement under Article 10(2)(c) TMD/Article 9(2)(c) EUTMR if he can prove a 'due cause', sustainability considerations and the achievement of the circular economy could be considered as providing such a 'due cause'.[746] Consequently, upcycling would not constitute a trademark infringement if the upcycler can successfully argue that his business is aimed at enhancing the circular economy and promoting sustainable development.

196. Most importantly, the 'honest practices'-requirement of Article 14(2) TMD/EUTMR and the 'legitimate reasons'-exception to trademark exhaustion of Article 15(2) TMD/EUTMR leave a wide margin of appreciation, amounting to great uncertainty amongst repairers and upcyclers, since it

[743] See for example the cases discussed above, *e.g.*, 19-141420SIV-HRET (n. 505) and C-129/17 (n. 216).
[744] *Supra*, n. 183-185.
[745] WASMEIER (n. 710), 162-163 and C. VRENDENBARG, "IE en de circulaire economie: stimulans of obstakel", *NJB* 2023, (1072) 1078.
[746] *Supra*, n. 88-89 j° 148.

is often unclear where exactly the line lies between legitimate conduct and trademark infringement. Regarding both concepts, the CJEU has clarified that repairers and upcyclers must not create an impression of a commercial connection with the trademark proprietor, take unfair advantage of the reputation or distinctive character, or harm the reputation of the trademark. Based on the teleological interpretation, when analysing whether any of these situations are present in a certain case, the CJEU/national courts should interpret these concepts with the aim of promoting sustainable development and integrating environmental considerations. Moreover, because of the difficulty for repairers/upcyclers to escape trademark infringement due to the circular reasoning adopted in the interpretation of 'honest practices' and 'legitimate reasons',[747] a different interpretation of these concepts, which would provide an actual chance of escaping infringement, would be more in accordance with the sustainable development objective and integration principles.

197. The delicate balancing exercise that is required when engaging in this assessment can be demonstrated by analysing the prohibition of creating a false impression of a commercial connection with the trademark proprietor, which constitutes both a legitimate reason to oppose further commercialisation and a breach of honest practices. Above, it was advised to independent repairers and upcyclers to avoid creating such an impression by including a label on the repaired/upcycled goods, disclaiming that they have been repaired/upcycled by an undertaking independent from the trademark proprietor.[748] However, in every case, it is up to the courts to determine whether such a label would sufficiently protect the trademark proprietor's interests, especially the essential origin function. When engaging in this assessment, the teleological interpretation requires an interpretation which protects the aim and purpose of trademark protection, whilst simultaneously promoting sustainable development and environmental protection. Consequently, a fundamental balancing question arises between the seemingly contradictory objectives of protecting the essential origin function of the trademark, which lies at

[747] *Supra*, n. 110 and 118.
[748] *Supra*, n. 127-131 and 152.

the core of trademark protection, and promoting repair and upcycling, both crucial for the circular economy and sustainable development.

198. On the one hand, repair and upcycling may not harm the essential origin function. This justifies prohibiting practices by repairers/upcyclers which misleadingly create the impression that they are commercially connected with the trademark proprietor. Such prohibition would moreover not be contrary to the sustainable development objective since falsely creating an impression of a commercial connection for personal economic benefit is not required for repair or upcycling. However, on the other hand, when an independent repairer/upcycler has made all reasonable efforts to avoid falsely creating an impression of a commercial connection with the trademark proprietor, a more balanced interpretation is required. More precisely, if a repairer/upcycler has included a label on the repaired/upcycled goods, clarifying distinctly the changes the goods have undergone after leaving the hands of the trademark proprietor (through repair or upcycling), who is responsible for those changes and the absence of a commercial connection between this person and the trademark proprietor, an interpretation taking account of Articles 3 TEU, 11 TFEU and 37 CFR requires that courts would find this conduct in accordance with honest practices, not to constitute legitimate reasons and not to harm the origin function.

199. Additionally, whilst to date the case law of the CJEU seems to require that such a label is added to the goods themselves,[749] the flourishing of the repair and upcycling market would benefit greatly from the possibility of including this information on a separate information sheet accompanying the repaired/upcycled goods upon purchase.[750] This possibility is required since often, adding this information on a visible label affixed to the goods themselves considerably decreases the marketability of the repaired/upcycled goods.[751] Moreover, not adding this information on the goods themselves would only risk very limited harm to the origin function[752]

[749] *Supra*, n. 131.
[750] KUR (n. 449), 234-235.
[751] DORENBOSCH (n. 537), 149.
[752] Harm to the origin function would be limited since the consumer buying the goods would be aware of the true origin of the goods due to the accompanying information. The risk of harm therefore lies solely in other consumers mistakenly believing that the repaired/upcycled goods originate from the trademark proprietor. However, it can be

but would, however, greatly contribute to the circular economy and sustainable development by providing a safe haven for repairers and upcyclers to engage in such practices without risking infringement. Consequently, a fair balance between trademark protection and the promotion of sustainable development requires that, to avoid infringement, it would be sufficient for independent repairers/upcyclers to include a label on the repaired/upcycled goods or provide accompanying product information which clarifies that the goods have undergone changes after leaving the hands of the trademark proprietor, who is responsible for these changes and the absence of a commercial connection between this person and the trademark proprietor.

Section two: amending EU trademark legislation

200. Interpreting contemporary EU trademark legislation in accordance with Articles 3(3) TEU, 11 TFEU and 37 CFR is crucial to ensure the compatibility of this legislative framework with EU primary law and required in light of a systematic interpretation.[753] However, interpretation is always uncertain and this uncertainty disincentivizes repairers and upcyclers to engage in these practices due to infringement risks.[754] Therefore, solely interpreting trademark provisions in a sustainable manner is not sufficient to ensure the realization of the circular economy and the promotion of sustainable development.[755] Instead, EU trademark legislation itself should be amended to clearly incorporate the circular economy and sustainable development and to ensure that repair and upcycling are not blocked by unfair or excessively restrictive intellectual property practices.[756] Since I am not a legislator and lack the practical experience required to do so, I do no aim to provide one concrete proposal that would solve all problems and strike a perfect balance

assumed that if they would be interested in buying a similar product themselves, they would ask more information from the first consumer, who would inform them of the repaired/upcycled nature of the good, or they would look for the good on the website of the trademark proprietor and when not finding this exact model, would realise that they mistakenly attributed the good to the trademark proprietor.

[753] *Supra*, n. 185.

[754] T. PIHLAJARINNE (n. 150), 98.

[755] *Cf.* C. GEIGER (n. 725), 299-300.

[756] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Making the most of the EU's innovative potential – An intellectual property action plan to support the EU's recovery and resilience", COM(2020) 760 final, 25 November 2020.

between trademark rights and sustainable development. Instead, the aim of this section is to develop suggestions of possible amendments that could be made to the EU trademark legislation, hoping to inspire someone to build on these suggestions and set in motion the required changes.

201. Sustainable development could be incorporated into the trademark legislation on two levels, namely on the level of the exceptions and limitations to trademark rights and on the level of the trademark rights themselves.[757] At the limitations and exceptions level, sustainability considerations could be incorporated into Articles 14(2) TMD/EUTMR (honest practices) and 15(2) TMD/EUTMR (legitimate reasons to oppose further commercialisation). Firstly, a second Alinea could be added to these Articles, clarifying that repair and upcycling are presumed to be in accordance with honest practices in industrial or commercial matters/not to constitute legitimate reasons to oppose further commercialisation,[758] unless the trademark proprietor can provide evidence for a manifest breach of the trademark's functions.[759] Consequently, the burden of proof would be reversed and increased, obliging the trademark proprietor to demonstrate that exceptional circumstances render the repair or upcycling infringing.

202. Such amendment is highly desirable for the repair and upcycling markets and meets the conditions for limiting trademark rights set out above. Firstly, the limitation would be included in the trademark legislation itself, thus satisfying the 'provided for by law'-requirement. Secondly, the limitation does not compromise the essence of trademark rights since it allows the trademark proprietor to invoke his rights in case of serious damage to the functions of the trademark, particularly the essential origin function. Thirdly, the amendment is necessary and appropriate since the current uncertainty around the permissibility of repair and upcycling practices still manifestly hinders these circular economy activities. This uncertainty would be greatly reduced by the amendment, since repairers and upcyclers would, in principle, not infringe trademark rights.

[757] S. SVENSSON-HOGLUND (n. 389), 7.
[758] *Caveat*: it must be examined whether there is a need to include other practices in this Alinea, such as refurbishing and remanufacturing. However, since this research only examined repair and upcycling, the following analysis will also be limited to those practices.
[759] *Cf.* SENFTLEBEN (n. 438), 592-595.

Only in exceptional circumstances, where the repair or upcycling manifestly harms one of the functions of the trademark, does the repairer or upcycler risk infringement. This presumption of non-infringement could provide an immense boost for the repair and upcycling markets, required for the circular economy and the promotion of sustainable development.

203. Lastly, the amendment strikes a fair balance between trademark rights and the promotion of sustainable development. Repair and upcycling often do not harm the trademark proprietor's interests or even benefit him.[760] However, promoting the circular economy and sustainable development, through the repair and upcycling market, is of immense societal interest. Consequently, reversing the burden of proof and increasing the threshold of infringement to manifest damage to trademark functions does not disproportionately affect trademark rights. Additionally, concerning Article 15(2) TMD/EUTMR, it must be repeated that the aim of the principle of exhaustion is to strike a balance between trademark rights and the free movement of goods, thereby limiting trademark rights to the first sale.[761] After the trademark proprietor has obtained the economic value connected to the goods and his trademark, the free movement of goods should prevail over trademark rights. Similarly, the sustainable development objective should be given precedence over trademark rights once the trademark proprietor has exercised his right of first placement of the goods on the EU/EEA market.[762]

204. Additionally, requiring evidence of manifest harm to the trademark's functions would solve the current problem of the circular reasoning adopted by the CJEU under Articles 14(2) and 15(2) TMD/EUTMR.[763] More precisely, whilst the CJEU to date uses the same criteria to establish infringement and to conclude to a breach of honest practices/the presence of legitimate reasons, this amendment would oblige the trademark proprietor to demonstrate *manifest* harm to the trademark's functions to prove a breach of honest practices or a legitimate reason to oppose the further commercialisation. Thus, the amendment would increase the likelihood of escaping

[760] CAHOY (n. 396), 45-46. See also *supra*, n. 147.
[761] *Supra*, n. 96.
[762] CAHOY (n. 396), 46-48
[763] SENFTLEBEN (n. 438), 594.

infringement in the case of repair or upcycling, since the trademark proprietor would have to demonstrate that the repair/upcycling in question causes exceptionally grave harm to the trademark's functions. This could for example be the case if the repairer or upcycler through his conduct deliberately creates a false impression that there exists a commercial connection with the trademark proprietor, and this significantly harms the origin function.

205. Secondly, instead of reversing and augmenting the burden of proof, a second Alinea could be added to Articles 14(2) and 15(2) TMD/EUTMR, clarifying the conditions under which repair and upcycling would be in accordance with honest practices/would not constitute legitimate reasons. This Alinea could, for example, provide that the repair/upcycling does not breach honest practices/does not constitute legitimate reasons if the repairer/upcycler has added an additional label or accompanying information to the repaired/upcycled goods which clearly disclaims that the goods have been repaired/upcycled, by whom and that there is no commercial connection with the trademark proprietor.[764] Only if an independent repairer/upcycler does not include this information on the goods themselves or on an accompanying information sheet, does he risk infringing trademark rights. The concrete conditions proposed in this Alinea would need to ensure respect for the essence of trademark rights and the proportionality principle.

206. However, T. PIHLAJARINNE claims that solely taking sustainability considerations into account at the level of exceptions and limitations to trademark rights is not sufficient to fully incorporate sustainable development into the trademark legislation.[765] According to her, the exclusive rights themselves should be re-formulated to incorporate sustainability considerations.[766] This could, for example, be done through reformulating the first sentence of Articles 10(2) TMD/9(2) EUTMR in the following way:

[764] *Cf.* CAHOY (n. 396), 47-48. It is advisable that the Alinea would clearly and precisely stipulate the information that must be included on this label or accompanying information sheet to avoid future disputes.
[765] PIHLAJARINNE (n. 1), 245-250; PIHLAJARINNE (n. 150), 97-100.
[766] *Ibid*.

"Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, ***with the exception of repaired or upcycled goods that do no manifestly harm trademark functions****, any sign where:"*

207. This amendment would have the same effects as the one proposed above, namely obliging the trademark proprietor to provide evidence of manifest harm to the trademark functions.[767] However, it would require this evidence in order to establish infringement, instead of to escape limitation/exhaustion of trademark rights. This difference, whilst leading to the same result in practice, would emphasise the importance of sustainable development by clearly providing that, in principle, repair and upcycling – both beneficial to sustainable development – do not constitute trademark infringement. Additionally, whilst the amendment of Articles 14(2) and 15(2) TMD/EUTMR would require the repair or upcycling to fall under one of the limitations provided in Article 14(1) TMD/EUTMR or to concern goods that had previously been placed on the EEA market by the trademark proprietor or with his consent, this would not be required under the present proposal. Since, in principle, repair and upcycling would not infringe trademark rights, there would also be no need to fall under one of the limitations or the exhaustion thereof. Consequently, this proposal would protect repairers and upcyclers to a greater extent, thus maximally promoting the circular economy and sustainable development.

208. Additionally, it must be considered whether a provision should be included in the trademark legislation, prohibiting trademark protection on spare parts. Inspiration for such a provision could be found in the existing prohibition in design protection.[768] Moreover, exceeding the trademark legislation itself, the current obligation of the Ecodesign Directive to provide spare parts and repair information to professional repairers, should be extended to all products and all third parties (*supra*, n. 139-144).

[767] The analysis regarding the permissibility of the limitation in n. 202-203 applies to this scenario as well.
[768] *Supra*, n. 134.

Conclusion

209. The current state of the Earth and the disheartening prognoses of its future call for increased, immediate, and holistic efforts towards sustainable development, including transitioning from a linear to a circular economy. This requires action on all levels, covering all aspects of human life and all law fields, both public and private. Thus, it is essential that EU trademark legislation contributes to the promotion of sustainable development and the circular economy as well.

210. However, the examination of contemporary EU trademark legislation has demonstrated that, whilst this legislation can be beneficial to sustainable development through green labelling and by providing an incentive to produce environmentally friendly and sustainable goods, it still poses many barriers to the flourishing of the circular economy. More precisely, independent repairers and upcyclers are faced with much uncertainty concerning the permissibility of both practices, especially caused by the ambiguous meaning of the 'legitimate reasons'-exception and 'honest practices'-requirement. This uncertainty disincentivizes engaging in these practices and thus hinders the circular economy. Since the circular economy is a prerequisite to sustainable development, blocking the first also counteracts the latter. Thus, contemporary EU trademark legislation does not "*work for the sustainable development of Europe*".

211. Consequently, in theory, contemporary EU trademark legislation could be declared invalid based on Articles 3(3) TEU, 11 TFEU and 37 CFR because it insufficiently incorporates environmental and sustainability considerations. However, based on current CJEU practice, achieving this result in practice would prove very challenging. Instead, Articles 3(3) TEU, 11 TFEU and 37 CFR provide a legal basis for interpreting trademark legislation in a sustainable and environmentally friendly manner. Moreover, these articles could motivate amendments to contemporary EU trademark legislation, both at the level of exceptions and limitations as at the level of trademark rights.

212. Therefore, to reach the goals of the European Green Deal and its implementing 2020 CEAP, to respect EU primary law and to ensure a liveable and sustainable future for human life on this planet, it is time to rethink EU trademark legislation. Whilst trademark protection remains an essential aspect of our economy, this protection should be restricted by the boundaries of what a circular economy and sustainable society allow. Moreover, since the circular economy and sustainable development require integration into all law fields and policies, amending trademark legislation is only a small step towards the full promotion and realisation of these goals. Consequently, a similar exercise as undertaken above should be conducted for all law fields. Hopefully, this research can provide the required incentive to do so.

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