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Sustainability, the Circular Economy and Consumer Law in Spain

Ricardo Pazos*

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I.. The general policy plan on sustainability for the next years

Although ‘sustainability’ and ‘circular economy’ are relatively new concepts for the legal context, many of their core ideas are not. It has been noted, for instance, that the 1975 Spanish Act on waste and solid urban residues¹ already referred to the scarcity of raw materials, the recovery of energy and resources, the use of waste as a source of richness, or the problems arising at all stages of the waste cycle. However, it is clear that those issues have been receiving an ever-growing attention in the last years in Spain.² And this not only from public institutions, but also from private organisations, companies, and the general public. This raising awareness on sustainability issues is undoubtedly worth of praise. That said, responsibility also recommends not to excessively resort to it, not to overuse it, in order to avoid its banalisation.

Awareness on sustainability has been taken to a whole new level. It may be illustrated by a recent, notable example: the 50-page document containing the December 2019 coalition agreement to form a new government in Spain.³ The word ‘sustainability’ (*sostenibilidad*) appears up to 22 times, curiously the same number of times the adjective ‘sustainable’ (*sostenible*) is used. However, if one looked for a consumer law perspective within the document, the result could be somewhat discouraging. While it can be glimpsed, it is definitely not a central one. This reflects well the Spanish general context. Discussions including sustainability issues at a public or private level cover a wide range of topics, and consumers seem the ultimate recipients of the benefits attached to a more sustainable system, rather than one perspective discussions are initiated and held from. In the coalition agreement, sustainability is used in connection with topics such as the 2030

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¹ Act 42/1975, of 19 November 1975 (*Boletín Oficial del Estado* no. 280, of 21 November 1975, p. 24360).

² José Francisco Alenza García, ‘La economía circular en el derecho ambiental’ (2019) 35 Medio Ambiente & Derecho: Revista electrónica de derecho ambiental section 3.1.2 <https://huespedes.cica.es/gimadus/35/35_03-economia_circular.html> accessed 28 May 2020.

³ <www.psoe.es/media-content/2019/12/30122019-Coalici%C3%B3n-progresista.pdf> accessed 28 May 2020.



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Agenda for Sustainable Development, economic growth, the labour model, companies and the social economy, public accounts, the pension and social security systems, the national health system, intellectual property, water use, forestry activities, fisheries and aquaculture, the agri-food sector, stockbreeding, housing, mobility, road infrastructure, and tourism.

In the coalition agreement, the subsection on consumer rights (2.7) is included within the section on social rights, democracy, science and innovation. The main lines of action in this regard are food safety, reducing the consumption of fast food, improving non-judicial dispute settlement mechanisms, improving rules on sanctions, and enhancing cooperation between the State and the regions. For its part, the subsection dealing with the strategy on the circular economy (3.4) is contained in the section on fighting climate change, aimed to a fair ecological transition, the protection of biodiversity and a decent treatment of animals. Attention is to be brought to plastic use and the goal of zero waste, eco-design, eco-innovation and reuse of by-products and waste as raw materials in other production cycles. Another subsection (3.5) is devoted to regulating and fostering self-consumption. If one looks for more concrete proposals on sustainability and the circular economy in the agreement, some of them can certainly be found. But the link with consumer law is not very strong. For instance, one proposal is passing an act on sustainable mobility and funding of public transport. In a similar line, the document mentions supplying financial aid for electric vehicles and promoting an increase of the number of charging stations. And it also highlights the will of passing an act on one-use plastics, within the strategy to reach the goal of zero-waste.

This quick overview of the coalition agreement provides an approximation of what could be the lines of action in the immediate future regarding sustainability. Let us now turn to already existing rules or more developed plans on the matter.

II. Existing rules and strategies on sustainability and the circular economy

In Spain, there are currently efforts to create rules on sustainability and the circular economy, but the connection with consumer law is weak. Surely, some rules in the latter area could be read in such terms, but it would be quite ‘unnatural’ because they are not truly inspired by sustainability and circularity. The situation will be presented distinguishing the national and regional levels, something convenient due to the decentralisation that characterises Spain.⁴ As a preliminary remark, to date there is only one normative instrument specifically devoted to the circular model. It is Act 7/2019, of 29 November 2019, on the circular economy of Castilla-La Mancha⁵ – thus a regional one.

⁴ According to the Regional Authority Index (<<http://garymarks.web.unc.edu/data/regional-authority/>> accessed 28 May 2020), Spain is the second most decentralised country in the world.

⁵ <www.boe.es/eli/es-cm/l/2019/11/29/7> accessed 28 May 2020.

At the national level, the main reference is Act 2/2011, of 4 March 2011, on the sustainable economy (*‘Ley de Economía Sostenible’*).⁶ This is a very broad instrument which deals with economic, environmental and social sustainability, trying to modernize the Spanish production model. Not a single time the word ‘circular’ is used, but related aspects do appear – mainly in Title III on environmental sustainability. The goals expressed in the Act connect with saving energy and increasing its efficiency, as well as promoting clean energies and investment on research, development and innovation. Thus, the text emphasizes more in the first stages of the process of the circular model (prevention and reduction) than in the subsequent ones (reusing, recycling and recovering). Nevertheless, the latter is not completely absent. For instance, investments made on facilities to reduce, recover or deal with their own industrial waste allow companies to apply some deductions in the corporate tax (art 92). Consumers are not at the core of the Act, but Title III contains a provision headed ‘transparency and information to consumers’ (art 83). It aims to ensure access to data about the costs, structure, origin and impact of the energy supply model, to information on energy consumption and the environmental impact of the goods purchased, and to energy performance certificates of buildings. This way, consumers can weigh those factors while making economic decisions.

Another normative instrument that is worth mentioning is Act 22/2011, of 28 July 2011, on waste and polluted soils.⁷ It mostly belongs to the area of administrative law, and no explicit mention of the circular economy is found within. However, it fosters – besides prevention – reuse, recycling and recovery of waste. At the same time, among the potential measures explored, there are some typical aspects of existing plans in Spain to spark a circular economy model. I am particularly referring to campaigns to raise awareness among consumers and the promotion of ecolabels and third-party certifications (Annex IV, points 12 and 13; Annex V, point 2.b). Another interesting aspect is the reference to ‘economic instruments such as incentives for green purchases’ (Annex IV, point 24).

From the consumers’ point of view, one of the most noticeable legal texts is Royal Decree 293/2018, of 18 May 2018, concerning the reduction of the consumption of plastic carrier bags.⁸ This deserves to be highlighted simply because its effects are perceived by consumers on a daily basis. Especially, since sellers must inform on the prices to be charged for plastic bags, by exhibiting a sign in a visible place and by including an explicit reference to the compliance with the legal duties (art 4.1.d) of Royal Decree 293/2018). Article 4.1.a) sets out that, since 1st July 2018, plastic carrier bags could not be provided free of charge, excluding very lightweight plastic carrier bags and those with a wall thickness equal or over 50 microns made of at least 70% recycled plastic. Since 1st January 2020, plastic carrier bags with a wall thickness equal or over 50 microns must be made of at least 50% recycled plastic (art 4.2.b). As of 1st January 2021, it will be prohibited to provide lightweight and very lightweight plastic carrier bags, unless they are made of compostable plastic (art 4.3).

⁶ <www.boe.es/eli/es/l/2011/03/04/2/con> accessed 28 May 2020.

⁷ <www.boe.es/eli/es/l/2011/07/28/22/con> accessed 28 May 2020.

⁸ <www.boe.es/eli/es/rd/2018/05/18/293/con> accessed 28 May 2020.

A 178-page draft for informative purposes on the Spanish strategy on the circular economy was issued in February 2018,⁹ but we are still waiting for a final version. The main sectors where a change of paradigm is envisaged are construction, agri-food, industry, consumer goods and tourism. Within the area of consumer goods, the core aspects are eco-design and ecolabel, recycling of textile products and packages, and durability and reuse of technological and electronic products (recycling would be the last resort).¹⁰ Some voices have expressed a pessimistic opinion on the strategy, underlining its low ambition and the lack of specification.¹¹

In the draft, action is not predominantly oriented to normative instruments. Consumers are considered essential in the process of making the economy more circular. This requires more information, transparency, third-party voluntary-based certifications, ecolabels, and so on.¹² In order for a transition into a circular model to take place, consumers must be aware of the environmental consequences of their choices and take responsibility. According to the draft, four factors influence those choices, namely information, product variety, price, and the legal framework. The strategy highlights the need to make clear some characteristics of the goods, such as their ecological footprint and energetic efficiency. It is also acknowledged that more consumer trust is needed, if we want them to be willing to pay a bit more for goods of higher quality or more durable.¹³ Regarding normative instruments, the focus is mostly placed on the transposition of the European ‘circular economy package’ into Spanish law.¹⁴ This might be a sign of an excessive link between the circular model and policies on waste, whereas the latter is just one of the many dimensions of the former. Such current narrow-mindedness is a risk scholars are concerned about.¹⁵ It is therefore unsurprising that some authors argue that the circular economy model should be erected as not only a general principle of regulation on waste, but also of environmental law, public law, and at least of some areas of private law.¹⁶

An aspect which is for the most part lacking in the Spanish agenda are obligations directly attached to consumers. The circular economy demands both sustainable production and

⁹ Gobierno de España, ‘España Circular 2030. Estrategia Española de economía circular’ (2018) <www.miteco.gob.es/images/es/180206economicircular_tcm30-440922.pdf> accessed 28 May 2020.

¹⁰ Ibid 46–48.

¹¹ Beltrán Puentes Cociña, ‘¿España Circular 2030? Comentario al borrador de la estrategia española de economía circular’ (2018) IX(2) *Revista Catalana de Dret Ambiental* 1, <<https://doi.org/10.17345/rcda2445>> accessed 28 May 2020.

¹² Gobierno de España (n 9) 30.

¹³ Gobierno de España (n 9) 89–90.

¹⁴ Gobierno de España (n 9) 64.

¹⁵ Alba Nogueira López, ‘Cuadrar el círculo. El complejo equilibrio entre el impulso de la economía circular y unas reglas de mercado expansivas’ (2019) 3 *InDret* 1, 8–9, <<https://indret.com/wp-content/uploads/2019/10/1480.pdf>> accessed 28 May 2020.

¹⁶ René Javier Santamaría Arinas, ‘Economía circular: líneas maestras de un concepto jurídico en construcción’ (2019) 10(1) *Revista Catalana de Dret Ambiental* 1, 17, <<https://doi.org/10.17345/rcda2567>> accessed 28 May 2020.

responsible consumption.¹⁷ In the latter dimension, one of the ways consumers can take action and help to build the circular model is by assuming the duty to return the goods so they can be reused or renewed.¹⁸ In this area, not a long path has been walked so far, although I would not like to forget to mention Royal Decree 110/2015, of 20 February 2015, on waste electrical and electronic equipment.¹⁹ Both private and professional users of electrical and electronic equipment must, when possible, deliver the used devices to certain recipients for further use (art 13). Making it systematically possible is a precondition for the effectiveness of the duty.

At the regional level, Act of Castilla-La Mancha 7/2019 has already been cited. The Explanatory memorandum stresses the importance of the principles of the circular economy, which must be given ‘coercive force’ in order to become key principles for the social and economic policy of the region. It highlights that it is the first act in the Spanish context that takes an approach where the circular economy model is at the core, since previous initiatives considering the circular model were focused on environmental policy.²⁰ Act of Castilla-La Mancha 7/2019 certainly refers to consumers, but these are not given a primary position. Consumer issues are merely one among several areas, and initiatives are not very concrete. The circular economy is understood as an economic model related to sustainable development (art 2.1), whose principles play a role in sectors such as water, energy, industry, commerce, consumption, education, soil and territorial planning (art 2.2). Promoting consumer ‘information, participation and consciousness’ in order to achieve a joint environmental responsibility between consumers and administrations, is one of the goals pursued (4.j)).²¹ Among the lines of action, article 5.b) highlights fostering sharing and cooperative uses, as well as extending the product lifespan of both goods and infrastructures, whereas article 5.h) expresses the will to raise consumers’ awareness of the need to evolve towards a more circular model. Article 6.1 sets out the obligation to design a strategy on the circular economy for the region. Citizens will be asked for their participation in the discussions (art 6.3), and consumer issues will be included within the strategy (art 6.6).

In sum, Act of Castilla-La Mancha 7/2019 is a trailblazing instrument for integrating the circular economy model into the legal system. But action is yet to be defined. The text has been said to remain within the domain of ‘concepts, principles and goals.’²² From the

¹⁷ Sara García García, ‘Economía circular: 30 años del principio de desarrollo sostenible evolucionan en el nuevo gran objetivo medioambiental de la Unión Europea’ (2018) 71 *Revista de Estudios Europeos* 309, 311, <www.ree-uva.es/images/numeros/71/2018-71-309-321.pdf> accessed 28 May 2020.

¹⁸ Faustino Gudín Rodríguez-Magariños, ‘La economía circular: Reexaminando los residuos, en relación al objetivo más importante de la UE para el año 2050’ (2018) 33 *Medio Ambiente & Derecho: Revista electrónica de derecho ambiental* section 3, <https://huespedes.cica.es/gimadus/33/01_la_economia_circular.html> accessed 28 May 2020.

¹⁹ <www.boe.es/eli/es/rd/2015/02/20/110/con> accessed 28 May 2020.

²⁰ For example, Act of Navarre 14/2018, of 18 June 2018, on waste and its taxation (<www.boe.es/eli/es-nc/lf/2018/06/18/14/con> accessed 28 May 2020) and Act of the Balearic Islands 8/2019, of 19 February 2019, on waste and polluted soils (<www.boe.es/eli/es-ib/l/2019/02/19/8> accessed 28 May 2020).

²¹ See also art 28 of Act of Navarre 14/2018, of 18 June 2018, on waste and its taxation.

²² Alenza García (n 2) section 2.2.

point of view of consumer law, the aforementioned article 5.b) contains the most important line of action to be further defined. First, it seems the lawmaking bodies of Castilla-La Mancha want to set the ground for a flourishing sharing economy and increase the opportunities of collaboration between consumers. And second, product lifespan considerations evoke both the problem of planned obsolescence and the wish of more durable goods.

Action on the sharing economy will possibly need a careful assessment of the regulatory framework for these activities. One in which users are sufficiently protected without increasing the costs and duties too much – this might outweigh the gains through price rises, cause market concentration to the benefit of big companies, reduce consumer choice, and so on. Obsolescence is a trickier question than it may appear at first sight, because of two somehow diverging trends. On the one hand, a clear goal is for goods to last longer so once acquired they are used for more time. It is admitted that more sustainable products in this sense might cost a bit more, and that is why awareness among consumers should be promoted, so they are willing to assume that extra cost. On the other hand, another clear goal is to develop better, greener, more efficient goods over time. But the more durable a good is and the higher the price paid, the weaker the incentives for consumers to move on to new, (even) more sustainable ones. How to achieve a proper balance is not an easy task.

There are more strategies on the circular economy at the regional level. For instance, Catalonia designed and approved a strategy of eco-design for a circular and eco-innovative economy in 2014,²³ and a strategy on the circular economy in 2015.²⁴ Madrid launched the project ‘MADRID7R Economía Circular’ in 2017.²⁵ Extremadura counts with a strategy on the circular economy since 2018.²⁶ Also in 2018, Andalusia issued its own plans.²⁷ In December 2019, Galicia presented its action plan.²⁸ Other autonomous communities that have published their strategies are Navarre (in 2019)²⁹ and Basque

²³ <http://mediambient.gencat.cat/web/.content/home/ambits_dactuacio/empresa_i_produccio_sostenible/estrategia_ecodisseny/contingut/Estrategia-catalana-ecodisseny_Acord-Govern.pdf> accessed 28 May 2020.

²⁴ <http://mediambient.gencat.cat/web/.content/home/ambits_dactuacio/empresa_i_produccio_sostenible/economia_verda/impuls/IMPULS-EV_150519.pdf> accessed 28 May 2020.

²⁵ <www.madrid7r.es/> accessed 28 May 2020.

²⁶ <<https://extremadura2030.com/wp-content/uploads/2018/05/estrategia2030.pdf>> accessed 28 May 2020.

²⁷ <www.juntadeandalucia.es/export/drupaljda/Estrategia_Andaluza_Bioeconomia_Circular_EABC_18.09.2018.pdf> accessed 28 May 2020.

²⁸ <https://ficheiros-web.xunta.gal/transparencia/informacion-publica/EGEC_cas.pdf> accessed 28 May 2020.

²⁹ <https://gobiernoabierto.navarra.es/sites/default/files/3291_anexo_agenda_para_el_desarrollo_de_la_economia_circular.pdf> accessed 28 May 2020.

Country (in 2020).³⁰ At a local level, the Spanish Federation of Municipalities and Provinces (*Federación Española de Municipios y Provincias*) counts with a local strategy on the matter, too (published in November 2019).³¹

In sum, everyone is marching, maybe slowly but certainly steadily, towards a circular economy. However, it remains to be seen how this translates into concrete measures, particularly in the area of consumer law.

III. Other features regarding the link between sustainability, the circular economy, and consumer law

Sustainability considerations appear in procedures related to the validity of a modification of an urban plan, for instance.³² And, of course, there are cases where infringements of environmental rules are assessed.³³ But I am not aware of litigation in which the core of the dispute touches the relationship between sustainability, the circular economy, and consumer law. There are not many specific consumer law rules on the matter, and it is therefore difficult for cases to come out.

Consumers do have a voice in the discussions on environmental and sustainable development issues. It is worth noting Spanish Act 27/2006, of 18 July 2006, regulating the rights to access to information, public participation and access to justice with regard to the environment.³⁴ Article 19 covers an environment advisory council (*Consejo Asesor de Medio Ambiente*) with several tasks related to participating in and monitoring the policy for sustainable development. Two representatives of consumer organisations are part of the council (art 19.3.d). Unfortunately, I am in no position to assess whether their influence has been meaningful, or other perspectives equally present at the council – non-governmental organisations focused on the environment, trade unions, or business organisations – have prevailed.

The predominant perspective in academic legal literature on sustainability and the circular model is the one of scholars specialised in administrative law. I do not know of any study on the relationship between sustainability and consumer law similar to the one made by

³⁰ <www.euskadi.eus/contenidos/documentacion/economia_circular/es_def/adjuntos/EstrategiaEconomiaCircular2030.pdf> accessed 28 May 2020.

³¹ <<https://static1.squarespace.com/static/58a3606bb8a79bb8ae7d7847/t/5de64b9f1926db29b1658a8f/1575373793836/Estrategia+Local+de+Econom%C3%ADa+Circular.pdf>> accessed 28 May 2020.

³² Spanish Supreme Court (Administrative Chamber), judgment of 17 June 2015 (ECLI:ES:TS:2015:2724).

³³ Tribunal Superior de Justicia de Cataluña (Administrative Chamber), judgment of 26 June 2017 (ECLI:ES:TSJCAT:2017:9594).

³⁴ <www.boe.es/eli/es/l/2006/07/18/27/con> accessed 28 May 2020.

Mak and Terryn.³⁵ This is not to say that sustainability is completely absent in research oriented towards consumer issues, but only that a more or less comprehensive analysis is – if I am not mistaken – still lacking. Authors do not forget sustainability when addressing topics such as the sharing economy,³⁶ and they have certainly paid attention to concrete aspects connected with the circular model, such as planned obsolescence and how to combat it with consumer law.³⁷ In any case, any reading of consumer law rules through the lens of sustainability and circularity should not make us think that such ideas have inspired their adoption.

For example, one consumer law tool that can contribute to achieve circular economy goals, is article 127 of the 2007 Spanish Consumer Protection Act.³⁸ It grants, as regards long-lasting products, the right ‘to a suitable technical service and to the existence of spare parts for a minimum period of five years following the date on which the product ceases to be manufactured.’ At the same time, it prohibits increasing the price of spare parts when using them in repairs, while mandating the price list of those parts to be available to the public. It also prohibits charging more than the average estimated costs in each sector for labour, shipping or visiting. A successful control and enforcement of this provision would help the Spanish market to become more circular. However, sustainability and circularity cannot be said to be the rationale behind article 127, since this provision merged other rules that dated from 1984 and 1996,³⁹ when such considerations were not at the forefront of the public debate.

As regards second-hand products, the seller is liable for any lack of conformity appearing within a one-year period (art 123.1 of the Consumer Protection Act). It is uncertain whether making the period longer would ultimately contribute to the circular model. With such a change, consumers would be more prone to buy second-hand goods, but only provided that some side-effects do not occur. If liability increases, second-hand dealers might be incentivised to pay less to acquire used goods, to acquire only goods in very good condition, or to increase the resale price. If the first effect took place, people would have

³⁵ Vanessa Mak and Evelyne Terryn, ‘Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law’ (2020) 43 *J Consum Policy* 227. <<https://doi.org/10.1007/s10603-019-09435-y>> accessed 28 May 2020.

³⁶ Ana María De la Encarnación, ‘El alojamiento colaborativo: Viviendas de uso turístico y plataformas virtuales’ (2016) 5 *Revista de Estudios de la Administración Local y Autonómica*. Nueva Época 30, 31, 33–34, 50. <<http://dx.doi.org/10.24965/reala.v0i5.10350>> accessed 28 May 2020.

³⁷ Jesús Alfonso Soto Pineda, ‘Reflexiones acerca de las posibles incompatibilidades de la obsolescencia programada con el sistema de defensa de los consumidores’ (2015) 6 *Actualidad Civil* 40.

³⁸ Royal Legislative Decree 1/2007, of 16 November 2007, approving the consolidated text of the general consumer and user protection act and other complementary laws (<www.boe.es/eli/es/rdlg/2007/11/16/1/con> accessed 28 May 2020). A translation into English is available at <www.mjusticia.gob.es/cs/Satellite/Portal/1292427277249?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DConsolidated_text_of_the_general_consumer_and_user_Protection_Act_and_other_complementary_laws_%28Ley.PDF> accessed 11 April 2020.

³⁹ Articles 11.4 and 11.5 of Act 26/1984, of 19 July 1984 (the ancient consumer protection act) (<www.boe.es/eli/es/l/1984/07/19/26> accessed 28 May 2020), and article 12.3 of Act 7/1996, of 15 January 1996, on retail commerce (<www.boe.es/eli/es/l/1996/01/15/7/con> accessed 28 May 2020).

less incentives to sell their used goods to second-hand dealers. If the second effect were caused, people might not find a buyer for many of their used goods. Finally, were the cost passed on to consumers through the resale price, potential buyers could find second-hand goods less attractive. In all three cases, the market of second-hand goods would get worse, undermining the circular model. The interplay of environmental considerations, the legal framework, and economic ideas is something to carefully weigh.

IV. Conclusion

The link between sustainability, the circular economy, and Spanish consumer law, is weak and ill-defined. Most of the normative instruments on the former areas belong to administrative law, emphasize corporate responsibility, and focus on waste management. Consumers enter the equation mainly on two levels. First, as beneficiaries of obligations of information imposed on businesses. Second, being subject to sensibilisation campaigns aimed at steering them to ‘demand’ sustainable and circular models. There are many strategies on the circular economy, both at the national and regional levels, but policy is yet to be specified and translate into specific consumer law rules. Even the pioneering Act of Castilla-La Mancha on the circular economy must be developed. When discussing concrete rules, a broad point of view including environmental, legal, and economic dimensions, should be followed. Those spheres intertwine and influence each other. Special care must be taken to identify potential side-effects that might reduce the effectiveness of any strategy to make the economic model more circular. The goals are pacific. Finding or agreeing on the proper means is a much more complicated task.