

MATERIAŁY

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ACADEMIC PROPOSAL
FOR AMENDING THE 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*****

In recent years, modern contract law has been shaped and influenced by a series of issues. The COVID-19 pandemic has reopened discussions following fundamental issues of basic contract law, such as impossibility. The advancements in technology have paved the way for new possibilities and risks in relation to how we contract and the types of goods and services available — digitalisation as the familiar buz-

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zword. To a certain degree, the latter in particular has overshadowed a further buzzword used in our time, namely sustainability, particularly when used in relation to the role to be played by contract law — especially consumer sales law — in protecting the environment. At first glance one may question how consumer sales law may contribute to this worthy cause, but as this paper will demonstrate, viewing aspects of consumer sales law through green eyes can give pause for reflection on whether approaches in current law need to be reviewed.

Protecting the environment and the role of sustainability therein is of course an issue that spreads across the spectrum to become a global issue. Indeed, the 2030 UN Agenda for Sustainable Development¹, sets 17 goals for the matter of sustainability alone. In particular, point 12.5 of the 2030 Agenda refers to the obligation of the UN Members to substantially reduce waste generation via prevention, reduction, recycling and reuse. In addition, point 12.8 states that relevant information and awareness for sustainable development and lifestyles in harmony with nature should be ensured. The notion of sustainable development as presented in the Agenda goes far beyond environmental protection (which used to be prioritised in the earlier understanding of this concept²) but ecology remains still of vital importance for the UN.

The matter of sustainability has not escaped attention at European level. On a fundamental level, Art. 37 of the Charter of Fundamental Rights provides that EU policies must not only include a high level of environmental protection and the improvement of the quality of the environment but that a high level of environment protection is ensured in accordance with the principle of sustainable development. More concrete in this regard are, for instance, the 2015 Action Plan for the Circular Economy³ and, in 2020, the New Circular Economy Action Plan⁴. Furthermore, the New Consumer Agenda of 2020⁵ lists the green transition as one of the five key priorities. Consumer law has been identified as a regulatory area which can have a substantial influence over the degree of adverse environmental impact of commerce⁶. Consequently, the European Commission

¹ <https://sdgs.un.org/2030agenda> (accessed: 11/09/2022).

² E.B. Weiss: *In Fairness To Future Generations and Sustainable Development*, American University International Law Review 1992, No. 8.1, p. 20–22.

³ Commission, *Closing the Loop — An EU Action Plan for the Circular Economy*, COM (2015) 614 final, 2 December 2015.

⁴ Commission, *A new Circular Economy Action Plan*, COM(2020) 98 final, 11 March 2020.

⁵ Commission, *New Consumer Agenda*, COM (2020) 696 final, 13 November 2020.

⁶ N. Šajin: *Briefing: Sustainable consumption. Helping consumers make eco-friendly choices*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659295/EPRS_BRI\(2020\)659295_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659295/EPRS_BRI(2020)659295_EN.pdf) (accessed: 11/09/2022); EU Policy Department for Economic, Scientific and Quality of Life Policies. Directorate-General for Internal Policies, *Sustainable Consumption and Consumer Protection Legislation: How can sustainable consumption and longer lifetime of products be promoted through consumer protection legislation?*, PE 648.769, Luxembourg 2020 [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA\(2020\)648769_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA(2020)648769_EN.pdf) (accessed: 11/09/2022); E. Terryn, E. Van Gool: *The Role of European Consumer Regulation in Shaping*

strives to adjust the EU legal framework to effectively contribute to the development of ecologically efficient⁷ behaviour on the consumer market. The EU legislator has acknowledged the need for a holistic approach to the greening of consumer law⁸, but the attention of the legislator has tended to focus on specific issues (i.a. discussion on planned obsolescence⁹) and chosen institutions (i.a. repair)¹⁰.

It is particularly with the matter of repair that the link to consumer sales law becomes clearer. Repair is of course one of the central and first remedies available in the EU Member States to consumers who have purchased a non-conforming good, but more recently there has been a push to devise the right to repair as a self-standing right, not merely as part of the remedies available to the consumer of a non-conforming good¹¹. This means an in-depth awareness that repair as a remedy is complex and multi-faceted. Whereas the underlying motivation is to incentivize consumers to choose repair over replacement, taking repair apart reveals the need to inform consumers about the reparability of the item, its estimated lifespan, availability of spare parts, accessibility of repair services, and software updates, smart labelling such as QR codes or digital product passports, possible joint manufacturer-seller liability in case of non-conformity of products; and the existence of durability and repair requirements. On the other side of the

the Environmental Impact of E-Commerce, Journal of European Consumer and Market Law 2021, Issue 3, p. 89.

⁷ I. Bach, M. Wöbbecking: *Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit?*, Neue Juristische Wochenschrift 2020, p. 2672; F. Zoll: *Ekologiczne prawo sprzedaży — bardzo wstępne uwagi* (in:) *Księga jubileuszowa prof. dr. hab. Adama Brzozowskiego*, Warszawa 2021, p. 639–640.

⁸ Commission, ‘New Consumer Agenda’ COM (2020) 696 final, 13 November 2020, p. 1; E. Terryn: *The New Consumer Agenda: A Further Step Toward Sustainable Consumption*, Journal of European Consumer and Market Law 2021, Issue 1, p. 3.

⁹ A policy of designing products with an artificially limited lifetime. I.-U. Park, P.A. Grout: *Competitive planned obsolescence*, RAND Journal of Economics 2000, No. 2, p. 1–19; J. Valant: *Planned obsolescence: Exploring the issue*, European Parliamentary Research Service, 2016, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581999/EPRS_BRI\(2016\)581999_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581999/EPRS_BRI(2016)581999_EN.pdf) (accessed: 11/09/2022); A. de Franceschi: *Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy*, Journal of European Consumer and Market Law 2018, Issue 6, p. 217–221; J.M. Carvalho: *Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases*, European Consumer and Market Law 2018, Issue 6, p. 219; J.M. Carvalho: *The Premature Obsolescence of the New Deal for Consumers*, Journal of European Consumer and Market Law 2021, Issue 3, p. 85; rec. 32 directive 2019/771.

¹⁰ 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, COM(2022) 143 final.

¹¹ *Right to repair: MEPs want more durable and more easily repairable products*, <https://www.europarl.europa.eu/news/pl/press-room/20220401IPR26537/right-to-repair-meps-want/-more-durable-and-more-easily-repairable-products> (accessed: 18/09/2022); Sustainable consumption of goods. Promoting repair and reuse. Factual summary. Open Public Consultation, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/public-consultation_en (accessed: 16/09/2022); European Law Institute, *Response to European Commission’s Public Consultation on Sustainable Consumption of Goods — Promoting Repair and Reuse*, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Sustainable_Consumption_of_Goods.pdf (accessed: 11/09/2022).

coin, though the general response during public consultations was predominantly positive¹², stakeholders have also raised numerous issues, especially regarding economic and intellectual property considerations, safety risks, and quality of the product¹³. Arguments to limit the scope of the right to repair were also raised, e.g. it should not cover software as its introduction would have negative effect on security, cost, and fragmentation for developers, and innovation¹⁴.

In contrast to focusing purely on one specific aspect of consumer sales law, we pursue a holistic revision of the recent Sale of Goods Directive 2019/771 (SGD) with the aim to illustrate how this Directive could be revised to be ecologically efficient.

Our starting point was the assumption that provisions of the SGD should not only balance the interests of the consumer-buyer (safeguarding the interests of the weaker party) and the seller (grant high level of legal certainty to the business when operating on the Single Market)¹⁵, but also fully incorporate common interests into the equation, and thus contribute effectively to the green transition. Contracting always takes place in a broader context, including ecological concerns, and contract law should not ignore it¹⁶. Otherwise, environmental concerns often impliedly, but also expressly enter contract law¹⁷.

Consumer law has a vital role to play in this context¹⁸, since it not only regulates consumer behaviour, but also shapes them. In particular, the SGD acknowledges its role in promoting sustainable consumption and circular economy. Yet, although the recitals 32 and 48 SGD touch upon the need for achieving more sustainable consumption patterns and a circular economy, it is apparent that the environmental perspective was not sufficiently considered when drafting the SGD's black-letter provisions¹⁹. This

¹² Sustainable consumption..., *op. cit.*, p. 3.

¹³ E.g. see ISFE contribution to the public consultation on the sustainable consumption of goods — promoting repair and reuse, ISFE, European Video Games Industry 2022, p. 1, 4–5, <https://www.isfe.eu/wp-content/uploads/2022/04/ISFE-position-paper-to-the-EC-public-consultation-on-sustainable-consumption-of-goods-FINAL.pdf> (accessed: 18/09/2022); UNIFAB SUSTAINABLE CONSUMPTION OF PRODUCTS — PROMOTING REPAIR AND REUSE Union Des Fabricants (UNIFAB) CONTRIBUTION, 2022, p. 2–3, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/F3011638_en (accessed: 18/09/2022).

¹⁴ Response of ACT, *The App Association to the European Commission's call for evidence for an impact assessment on a legislative initiative 'Sustainable consumption of goods — promoting repair and reuse'*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse/F3011613_en (accessed: 18/09/2022).

¹⁵ Art. 1 dir. 2019/771; F. Zoll: *Ekologiczne...*, *op. cit.*, p. 644.

¹⁶ U. Mattei, A. Quarta: *Contract Law* (in:) *The Turning Point in Private Law. Ecology, Technology and the Commons*, Camberley 2018, p. 109.

¹⁷ C. Poncibò: *The Contractualisation of Environmental Sustainability*, *European Review of Consumer Law* 2016, No. 12.4, p. 354.

¹⁸ E. Terryn: *A Right to Repair? Towards Sustainable Remedies in Consumer Law*, *European Review of Private Law* 2019, No. 4, p. 852.

¹⁹ A. Wiewiórowska-Domagalska, F. Zoll, K. Południak-Gierz, W. Bańczyk: *Transpozycja dyrektywy Parlamentu Europejskiego i Rady UE 2019/771 z dnia 20 maja 2019 r. w sprawie niektórych aspektów umów sprzedaży*

may be a result of plans for product specific legislation (such as Ecodesign Directive 2009/125²⁰)²¹.

We have identified areas in the SGD which require regulatory attention if they were to align with the ecological efficiency considerations. We revised and re-drafted the current SGD provisions to improve the Directive's contribution to sustainable development. This has resulted in rephrasing of certain provisions (such as conformity requirements) but also fundamentally reshaping the design of certain EU approaches, especially the hierarchy of remedies and direct producer's liability. For ease of presentation and explanation we have adopted the approach favoured by the EU legislator to present and justify legislative amendments. We recognise that this approach is not without limitations, yet it suffices to provoke a fruitful discussion on the contribution to be made by consumer sales law.

Our objective is a part of a more general tendency to favour environment in private law considerations²². Certainly, the SGD does not regulate all consumer contracts, and in particular it does not refer to contract types (growing popular amongst consumers) that may be more environmentally friendly, such as contracts for sharing goods²³ or exchange. The SGD also does not cover other areas, such as pre-contractual information duties and the right of withdrawal, which could also be amended to promote sustainable consumption²⁴. Sometimes other laws (especially creating public law requirements) that refer to ecology apply, not rarely having EU origin²⁵. It should not be overlooked that the green transition of contract law is not solely fuelled by the consumer sales law amendments.

towarów, *Kwartalnik Prawa Prywatnego* 2021, No. 4, p. 931–932; F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable consumption and circular economy in the Directive 2019/771*, *Pravovedenie* 2020, No. 4, p. 527, 529–530; J.M. Carvalho: *Sale of Goods and Supply of Digital Content and Digital Services — Overview of Directives 2019/770 and 2019/771*, *Journal of European Consumer and Market Law* 2019, Issue 5, p. 198; E. Van Gool, A. Michel: *The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis*, *Journal of European Consumer and Market Law* 2021, Issue 4, p. 136.

²⁰ 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.

²¹ E. Terryn: *A Right...*, *op. cit.*, p. 859.

²² See e.g. W. Bańczyk: *Economic and Social Development in the Republic of South Africa's New Model of Mineral Rights: Balancing Private Ownership, Community Rights, and Sovereignty* (in:) P. Szwedo, R. Peltz-Steele, D. Tamada (eds), *Law and Development. Balancing Principles and Values*, Singapore 2019, p. 215; I. Wereśniak-Masri: *Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste*, *Monitor Prawniczy* 2018, No. 17, p. 942–944.

²³ E. Van Gool, A. Michel: *The New...*, *op. cit.*, p. 137.

²⁴ E. Terryn, E. Van Gool: *The Role...*, *op. cit.*, p. 94.

²⁵ See e.g. Ecodesign Directive 2009/125/EC.

**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**

**Proposed amendments
— Provisions and Brief Justification —**

Article 1

Subject matter and purpose

Original

The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.

Proposed amendment

The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection **in a manner that supports and complements sustainable consumption and a circular economy**, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.

Justification

The provisions of SGD seek to strike a balance between contributing to the proper functioning on the internal market while providing for a high level of consumer protection. Those are the rationales mentioned in the second sentence of Recital 2. Whereas the approaches and principles under the current version of the SGD may satisfy such objectives, they may also impede sustainable consumption and a circular economy²⁶ which is also mentioned as a rationale of the SGD, yet in the later Recitals 32 and 48. This shows the general need to view consumer law in a different light, provided it should promote sustainable consumption and circular economy²⁷.

²⁶ E. Van Gool, A. Michel: *The New Consumer...*, *op. cit.*, p. 136; F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 530–531.

²⁷ H.W. Micklitz: *Squaring the Circle? Reconciling Consumer Law and the Circular Economy*, *Journal of European Consumer & Market Law* 2019, No. 8, p. 229.

It must also be taken into consideration that an increased awareness of environmental issues may influence consumer preferences and expectations regarding goods. This may be observed in recent years in the increased use of environment-related matters in, for example, marketing and advertising but also in but also in the current discussion on the EU level to combat planned obsolescence and increase the reparability of the goods (see above). Accordingly, sales law has become a field in which there is a clear interplay between the consumer and the environment and the need to address this in policy.

Pursuant to Article 37 of the EU Charter of Fundamental Rights, ‘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’. Especially as sustainability principles need to guide broader policy developments and legislative developments²⁸, it is essential to highlight this aim, its relationship to the objectives underpinning the SGD and the flaws in the current system.

Article 2 **Definitions**

Original

Proposed amendment

For the purposes of this Directive, the following definitions apply:

- (1) sales contract’ means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof;
- (2) ‘consumer’ means any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person’s trade, business, craft or profession;
- (3) ‘seller’ means any natural person or any legal person, irrespective of whether privately or publicly owned, that is acting, including through any

²⁸ Commission, A new Circular Economy Action Plan, COM(2020) 98 final, 11 March 2020, p. 4.

other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession, in relation to contracts covered by this Directive;

- (4) 'producer' means a manufacturer of goods, an importer of goods into the Union or any person purporting to be a producer by placing its name, trade mark or other distinctive sign on the goods;
- (5) 'goods' means:
 - (a) any tangible movable items; water, gas and electricity are to be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity;
 - (b) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ('goods with digital elements');
- (6) 'digital content' means data which are produced and supplied in digital form;
- (7) 'digital service' means:
 - (a) a service that allows the consumer to create, process, store or access data in digital form; or
 - (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or

- created by the consumer or other users of that service;
- (8) ‘compatibility’ means the ability of the goods to function with hardware or software with which goods of the same type are normally used, without the need to convert the goods, hardware or software;
 - (9) ‘functionality’ means the ability of the goods to perform their functions having regard to their purpose;
 - (10) ‘interoperability’ means the ability of the goods to function with hardware or software different from those with which goods of the same type are normally used;
 - (11) ‘durable medium’ means any instrument which enables the consumer or the seller to store information addressed personally to that person in a way that is accessible for future reference, for a period of time adequate for the purposes of the information, and which allows the unchanged reproduction of the information stored;
 - (12) ‘commercial guarantee’ means any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to the seller’s legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

- (13) 'durability' means the ability of the goods to maintain their required functions and performance through normal use;
- (14) 'free of charge' means free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials;
- (15) 'public auction' means a method of sale where goods or services are offered by the seller to consumers, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services.

(13) 'durability' means the ability of the goods to maintain their required functions and performance through normal use;

(16) 'environmental added value' means a reduction of the strain on the environment and/or to preserve the environment in compliance with sustainable development including but not limited to removal, prevention, reduction, mitigation of pollutants released into the environment, restoration of damage to the environment or the use of natural resources in a more efficient and sustainable manner;

(17) 'adaptability' means the ability to extend, maintain or improve the functionality of the good;

(18) 'reparability' means the design of the good, the manner of its construction and the degree of complexity, as well as the availability of and reasonable access to spare parts do not prevent its repair;

- (19) ‘reusability’ means any operation by which a product or its components, having reached the end of their first use, can be used for the same purpose for which they were conceived, including the continued use of a product which is returned to a collection point, distributor, recycler or manufacturer, as well as reuse of a product following refurbishment;**
- (20) ‘recyclability’ means the ability to reprocess in a production process of waste materials for the original purpose or for other purposes but excluding energy recovery.**

Justification

Further legal definitions are required in relation to the new concepts included in the Directive to extend the notion of conformity to include environment-related issues and to draw a clear conceptual distinction between the new terms falling under the notion of conformity. Therefore, the catalogue of Art. 2 provides definitions of: environmental added value, adaptability, recyclability, reusability and reparability. These terms are legally binding and uniformly applicable.

‘*Environmental added value*’. Human activities, i.a. exercising one’s entitlements under warranty, are not without influence on the environment²⁹ — differentiated environmental externalities are generated. For instance, if repair is performed, transportation related externalities arise as the good needs to be transported to the repair shop and back to the buyer and materials and energy are consumed to bring the good into conformity. In contrast, price reduction does not cause these negative environmental effects. Naturally, the level of produced environmental externalities may vary, depending on the design of legal framework. The right to replacement can serve here as an illustration: in a system where the good must be replaced with a brand-new item³⁰, the negative impact of exercising this right is higher than in a system where a defective item can be replaced with a refurbished good.

²⁹ F. Zoll: *Ekologiczne...*, *op. cit.*, p. 643.

³⁰ This is the approach under EU Law, see: judgment of CJEU of 17 April 2008, *Quelle*, case C-404/06, Reports of Cases 2008, I-02685; E. Van Gool, A. Michel: *The New...*, *op. cit.*, p. 145.

The core idea of the project is to verify whether the current design of provisions is optimal from the environmental perspective. If a norm can be shaped in a manner that will cause its application to produce lesser strain on the environment than its predecessor, an amendment is proposed. This reduction of the strain on the environment is referred to under the notion of ‘environmental added value’.

The purpose of introduction of this term in the Directive’s list of definitions is twofold. It provides a measure for the assessment whether departing from standard set in the Directive by the Member States is admissible (see amendment to Art. 4) and also serves for formulation of subjective and objective conformity requirements (see amendments to Art. 6–7).

A longer lifecycle of goods is important for achieving more sustainable consumption patterns and a circular economy³¹. Extending the product life cycle can be attained if the longevity of a product is granted, e.g. by requiring certain adaptability, durability, reparability³² and reusability of the goods.

‘*Adaptability*’ means the ability to extend, maintain or improve the functionality of the good. It refers to the ability to effect upgrades to key parts of the good itself without needing to replace the entire good, thus causing unnecessary waste. Adaptable products are flexible. They are able to respond to changing requirements along their entire lifetime³³. The core idea of adaptive design is to use fewer resources per product in order to maximise their utility for as long as physically possible. Adaptability becomes apparent, for instance, in products that are intended to be used for a long period of time, but into which new technologies and functions with better environmental performance cannot be integrated, e.g. old vehicles.

‘*Durability*’ means the ability of the goods to maintain their required functions and performance through normal use. The durability requirement should not be understood as meaning that the product should be as durable as technologically possible. Some goods due to their character are supposed to be used for a short period of time; in their case biodegradability is crucial. These products, therefore, should easily decompose after the time of the normal use³⁴.

‘*Reparability*’ serves to extend the durability of a product, which in turn affects production quantitatively. This has environmental merits: no resources are used for the production of a new product and the disposal of the defective one. Fulfilment of the ‘*reparability*’ requirement should be examined taking into account the design

³¹ See Rec. 32 and 48. See for product groups of small electronic devices, functional clothing and furniture also C. Fischer, K. Moch, S. Prakash, J. Teufel, I. Stieß, S. Kresse, B. Birzle-Harder (in:) *Nachhaltige Produkte — attraktiv für Verbraucherinnen und Verbraucher?*, Umweltbundesamt (Ed.), Dessau-Roßlau 2019, p. 105.

³² For reparability see E. van Gool: *A European ‘right to repair’: Yes! But how (far)?* (in:) CCM Blog, CCM Blog (Ed.), Leuven 2021.

³³ On the following see T. Nyström, D. Diener: *A companion for the design of future-adaptable products* (in:) RISE Research Institutes of Sweden (Ed.), Gothenburg 2018.

³⁴ J. Estifanos: *The EU’s Sale of Goods Directive: A Sustainable (Consumer Goods) Sales Law?*, *Transformacje Prawa Prywatnego* 2022, No. 2, p. 38–40.

of the good, the manner of its construction and the degree of complexity, as well as whether the availability of and reasonable access to spare parts does not prevent its repair. ‘*Reparability*’ should be understood as possibility to actually undertake repairs (not the promise that repair will be successful), to avoid excess waste. Thus, it signifies, in contrast to repair, that a product is *suitable* for repair³⁵. However, it should be noted that repair can take various forms, i.a. the *simple repair*, *refurbishing* and *remanufacturing*. First, the defective product can just be made operational (*simple repair*). Second, a defect-free or defective product that has been returned to the seller or manufacturer can be restored and updated into a defect-free product (*refurbishing*). Those are tested by the retailer, repaired and resold as defect-free products. Electrical devices are predominantly refurbished, such as for instance by the Viennese online retailer ‘refurbed’³⁶, Apple³⁷ and Amazon³⁸. Third, if the original product is restored by repaired, reused or new spare parts ‘like new’, it is *remanufactured*³⁹.

From the perspective of the environment, also reusability and/or recyclability of goods are recommended⁴⁰. In addition to extending the product lifetime, the continuous ‘recirculation’ of products back into the cycle has potential to achieve longer utilisation phases⁴¹.

‘*Reusability*’ means any operation by which a product or its components, having reached the end of their first use, can be used for the same purpose for which they were conceived, including the continued use of a product which is returned to a collection point, distributor, recycler or manufacturer, as well as reuse of a product following refurbishment. The core idea is to slow resource flows by intending to extend the product lifetime⁴².

‘*Recyclability*’ means the ability to reprocess in a production process of waste materials for the original purpose or for other purposes but excluding energy recovery. Recyclability includes the ability to completely disassemble the product⁴³. It is therefore about material recycling. The core idea is to close the product lifecycle by intending to use resources efficiently⁴⁴.

³⁵ J. Croon-Gestefeld: *Die nachhaltige Beschaffenheit der Kaufsache*, Neue Juristische Wochenschrift 2022, Issue 8, p. 501.

³⁶ <https://www.refurbed.de/vorteile/> (accessed: 05/09/2022).

³⁷ <https://www.apple.com/uk/shop/refurbished/about> (accessed: 05/09/2022).

³⁸ <https://www.amazon.co.uk/Certified-Refurbished-on-Amazon/b?ie=UTF8&node=8362590031> (accessed: 25/08/2022).

³⁹ Definitions after: B. Gözet, H. Wilts, S. Manshoven, I. Bakas: *Progress towards preventing waste in Europe: the textile case*, EEA Report No 15/2021, Luxembourg 2021, p. 12.

⁴⁰ In addition, the positive economic and social side effects of these strategies should not be underestimated — both durability and reparability create (local) jobs.

⁴¹ T. Nyström, D. Diener: *A companion...*, *op. cit.*, p. 20.

⁴² *Ibidem*, p. 15.

⁴³ E. Van Weelden, R. Mugge, C. Bakker: *Paving the way towards circular consumption: exploring consumer acceptance of refurbished mobile phones in the Dutch market*, Journal of Cleaner Production 2016, Volume 113, p. 743.

⁴⁴ T. Nyström, D. Diener: *A companion...*, *op. cit.*, p. 15.

Prolonging the life of products proves to have positive effect on the environment, e.g. longer durability of electrical and electronic devices reduces greenhouse gas emissions⁴⁵ and supports the assumption that the greater the durability of a product, the less it has to be reproduced⁴⁶.

Article 3
Scope

Original

Proposed amendment

1. This Directive shall apply to sales contracts between a consumer and a seller.

2. Contracts between a consumer and a seller for the supply of goods to be manufactured or produced shall also be deemed sales contracts for the purpose of this Directive.

3. This Directive shall not apply to contracts for the supply of digital content or digital services. It shall, however, apply to digital content or digital services which are incorporated in or inter-connected with goods in the meaning of point (5)(b) of Article 2, and are provided with the goods under the sales contract, irrespective of whether such digital content or digital service is supplied by the seller or by a third party. In the event of doubt as to whether the supply of incorporated or inter-connected digital content or an incorporated or inter-connected digital service forms part of the sales contract, the digital content or digital service shall

⁴⁵ The annual savings in Germany for five product groups (televisions, smartphones, washing machines and notebooks) would be 3.93 million tonnes of CO₂e, which would correspond to the emissions of 1,853,500 cars, see a study by the Öko-Institut on behalf of the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband, vzbv), I. Rüdener, S. Prakash: *Ökonomische und ökologische Auswirkungen einer Verlängerung der Nutzungsdauer von elektrischen und elektronischen Geräten. Am Beispiel von Smartphones, Notebooks, Waschmaschinen, Fernsehgeräte und E-Bikes (Pedelecs)* (in:) Öko-Institut e.V. (Ed.), Freiburg 2020, p. 12. https://www.vzbv.de/sites/default/files/downloads/2020/11/25/vzbv_verlaengerung_nutzungsdauer_20201218_mit_engl.pdf (accessed: 25/08/2022).

⁴⁶ See J. Croon-Gestefeld: *Die nachhaltige Beschaffenheit...*, *op. cit.*, p. 500.

be presumed to be covered by the sales contract.

4. This Directive shall not apply to:

- (a) any tangible medium which serves exclusively as a carrier for digital content; or
- (b) any goods sold by way of execution or otherwise by authority of law.

5. Member States may exclude from the scope of this Directive contracts for the sale of:

- (a) second-hand goods sold at public auction; and
- (b) living animals.

In the case referred to in point (a), clear and comprehensive information that the rights deriving from this Directive do not apply shall be made easily available to consumers.

6. This Directive shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in this Directive, or the right to damages.

7. This Directive shall not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days. In addition, this Directive shall not affect national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract.

6. This Directive shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, or the right to damages, in so far as they are not regulated in this Directive, ~~or the right to damages~~.

7. ~~This Directive shall not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days. In addition;~~ This Directive shall not affect national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract.

Justification

Article 3(6) is to be restructured to take account of the proposed amendment regarding the potential restrictions on damages under national law in order to ensure the effectiveness of the remedies and their hierarchy.

The possibility for Member States to allow consumers to choose a specific remedy may increase the level of consumer protection in the respective Member State, but circumvents the hierarchy of remedies foreseen in this Directive. In relation to the proposed changes to the system of remedies, which aims to lower the amount of waste by subjecting the remedies of the termination and replacement to stricter requirements, continuing to allow such circumvention at national level would undermine the objective of creating a system of remedies that promotes sustainable consumption.

Article 4

Level of harmonisation

Original

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

Proposed amendment

1. Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

2. This Directive shall not prevent the Member States from maintaining or introducing deviating provisions of national law that increase the environmental added value without lowering the protection provided for the consumer in this Directive.

Justification

Sustainability and promoting the circular economy represent further necessary — but also competing — interests alongside contributing to the proper functioning of the internal market and a high level of consumer protection. The maximum

harmonisation model may prove inadequate due to the complexity of realising this new rationale⁴⁷.

The rationale of the maximum harmonization model is to ensure consistency among Member States' laws so that neither of them is more favourable to the consumer (and detrimental to the sellers) as such differences would raise transaction costs⁴⁸. The level of protection of environment granted by the national law transposing the Directive may higher than provided in the Directive (against traditional maximal harmonisation approach). Whereas full harmonisation should not prevent Member States from introducing rules to increase the level of protection for the environment, this ought not result in a lower level of consumer protection provided in the Directive. Member States should therefore not be prevented from maintaining or introducing provisions of national law which increase both the level of environmental protection and the level of consumer protection. An example of such solution is e.g., prolonging the liability period above the one indicated in the SGD (Art. 10.1., 10.1a).

Article 5

Conformity of goods

Original

Proposed amendment

The seller shall deliver goods to the consumer that meet the requirements set out in Articles 6, 7 and 8, where applicable, without prejudice to Article 9.

Justification

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Article 6

Subjective requirements for conformity

Original

Proposed amendment

In order to conform with the sales contract, the goods shall, in particular, where applicable:

⁴⁷ E. Van Gool, A. Michel: *The New Consumer...*, *op. cit.*, p. 137; F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 531. Also in this direction, European Law Institute, *Response...*, *op. cit.*, p. 15.

⁴⁸ F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 530.

- (a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract;
 - (b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance;
 - (c) be delivered with all accessories and instructions, including on installation, as stipulated by the sales contract; and
 - (d) be supplied with updates as stipulated by the sales contract.
- (a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability, **durability, adaptability, reparability, reusability, recyclability**, and other features, as required by the sales contract;
 - (aa) conform with express pre-contractual statements made by the seller concerning the environmental added value, including durability, adaptability, reparability, reusability and recyclability, beyond public statements made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer.**
 - (bb) satisfy applicable environmental standards relating to the particular purpose for which the consumer requires the goods and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller should be reasonably aware;**

Justification

Greater protection is needed of the consumer's expectations regarding the environmental aspects concerning the good. This requires increased recognition that a consumer's purchasing decisions may be influenced by environmental concerns. Although the use of 'other features' in Article 6(a) means that the list of factors is not exhaustive, express reference to the stated criteria increases the transparency of the provision and provides certainty for the consumer and seller.

Admittedly, individual factors can influence a consumer's consumption decision. For example, the contracting parties can individually agree on the environmental characteristics of a product in the form of a quality agreement according to Art. 6(a). However, consumption is also influenced by factors outside the consumer's decision such as land consumption, raw material and energy consumption as well as production, transport and the legal framework⁴⁹. For consumers, it is difficult to take stock of both, the individual and external factors that influences the environmental impact of consumption. Thus, the express inclusion of the ecological terms serves consumer protection.

The inclusion of the express requirements 'adaptability', 'durability', 'reparability' takes account of these aspects of conformity that are related to improving the longevity of goods. The new terms are meant to protect environmental interests. By implementing them in the requirements for conformity they become more enforceable and more substantial.

Furthermore, greater attention is needed with regard to the product lifecycle, in particular in relation to manufacture and disposal, as concerns that may be a driving factor in the consumer's decision to purchase a good. For this reason, it is necessary to include 'recyclability', 'reusability', and 'environmental added value' under the notion of conformity.

It should be clarified that not only adaptability, durability, recyclability, reparability and reusability should be understood as forming the quality of a product. Requirements as to the quality of the product are equally shaped by the seller's pre-contractual declarations (such declarations are to be distinguished from public declarations of other persons in previous links of the chain of transactions, especially the manufacturer, i.e. eco-labels or CSR-Codices referred to in Art. 7.1.d). This amendment is intended to underline that the seller legally binds himself through pre-contractual declarations and, by this, to create incentives for contractual partners to keep ecological promises⁵⁰.

⁴⁹ https://www.umweltbundesamt.de/sites/default/files/medien/384/bilder/dateien/infografik_konsum_2022-05-31.pdf (accessed: 12/09/2022). See also F. Ekarth: *Theorie der Nachhaltigkeit*, Baden-Baden 2021, p. 127.

⁵⁰ See also J.-E. Schirmer: *Nachhaltigkeit in den Privatrechten Europas*, *Zeitschrift für Europäisches Privatrecht* 2021, Issue 1, p. 43.

It is also necessary to distinguish between goods that are factually fit for a particular purpose for which the consumer requires it, but cannot be used lawfully for such purpose due to restrictions under public law, such as emissions, noise or other pollutants. The quality of a product must comply with (applicable) environmental standards. These environmental standards are the ‘direct link’⁵¹ between material defect and sustainability. The German Diesel-cases serve as an example: in 2019, the German Federal Court of Justice (Bundesgerichtshof, BGH) adduced environmental protection regulations for the legal interpretation of German sales law. The BGH affirmed a material defect under § 434 para. 1 sentence 2 no. 2 of the German Civil Code (BGB) if a motor vehicle with an inadmissible defeat device causes a risk of an operating licence ban by the registration authority, in other words, if the motor vehicle does not satisfy emissions standards⁵². For this purpose, the BGH consulted the Regulation (EC) No 715/2007⁵³ which sets emission limits in Art. 5 para. 2 sentence 1 and, according to Art. 10 para. 1, provides the prohibition of the operating licence⁵⁴.

Article 7

Objective requirements for conformity

Original

Proposed amendment

1. In addition to complying with any subjective requirement for conformity, the goods shall:

- (a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;

- (a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct **and satisfy reasonable expectations of the consumer as**

⁵¹ J. Croon-Gestefeld: *Die nachhaltige Beschaffenheit...*, *op. cit.*, p. 499.

⁵² Ruling of 8th January 2019, VIII ZR 225/17, position 3–23.

⁵³ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

⁵⁴ Ruling of 8th January 2019, VIII ZR 225/17, position 3–23.

to the environmental added value.

- (b) where applicable, be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract;
 - (c) where applicable, be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive; and
 - (d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.
- (c) where applicable, be delivered along with such accessories, including packaging, installation instructions, **disposal instructions** or other instructions, as the consumer may reasonably expect to receive; and
 - (d) be of the quantity and possess the qualities and other features, including in relation to **environmental added value, such as adaptability, durability, functionality, compatibility, recyclability, reparability, reusability,** and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.

2. The seller shall not be bound by public statements, as referred to in point (d) of paragraph 1 if the seller shows that:

- (a) the seller was not, and could not reasonably have been, aware of the public statement in question;
- (b) by the time of conclusion of the contract, the public statement had

been corrected in the same way as, or in a way comparable to how, it had been made; or

- (c) the decision to buy the goods could not have been influenced by the public statement.

This paragraph does not apply to public statements as to the environmental added value, referred to in Art. 6. aa.

3. In the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time:

- (a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or
- (b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time.

4. Where the consumer fails to install within a reasonable time updates supplied in accordance with paragraph 3, the seller shall not be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that:

- (a) the seller informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it; and

(b) the failure of the consumer to install or the incorrect installation by the consumer of the update was not due to shortcomings in the installation instructions provided to the consumer.

5. There shall be no lack of conformity within the meaning of paragraph 1 or 3 if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity laid down in paragraph 1 or 3 and the consumer expressly and separately accepted that deviation when concluding the sales contract.

6. The parties may not deviate from the standards related to the environmental added value.

Justification

Greater protection is needed of the consumer's expectations regarding the environmental aspects concerning the good⁵⁵. This requires greater recognition that a consumer's environmental concerns may influence purchasing decisions. Although the use of 'other features' in Article 7(d) means that the list of factors is not exhaustive, express reference to the stated criteria increases the transparency of the provision, provides certainty for the consumer and seller, and recognises the role of environmental factors in driving purchasing decisions. As seen, the consumer is cognitively and structurally weaker than the seller or manufacturer. Therefore, the inclusion of objective ecological terms in mandatory law is necessary.

For instance, under existing (German) law, the problem is not to consider reparability as a component of a good (the ability of repair is physically directly inherent in the object), but to consider reparability as a 'normal use' (übliche Beschaffenheit) under Art. 7(1d)⁵⁶. The benefit of objective requirements is that

⁵⁵ On the issues related to determining these expectations see: K. Południak-Gierz: *Eco-reasonableness. Possibility of incorporating green principles into general private law clauses* (in: M. Heidemann, M. Andenas (Ed.), *Quo vadis commercial contract? Reflections on sustainability, ethics and technology in the emerging law and practice of global commerce*, Springer 2022 (in press), *passim*).

⁵⁶ J. Croon-Gestefeld: *Die nachhaltige Beschaffenheit...*, *op. cit.*, p. 501.

they can influence the market structure in general⁵⁷. Including reparability and longer durability within the objective conformity criteria should incite manufacturers and sellers to offer repairable and durable products more often and optimise potential defects in order to be able to meet their obligations. ‘Every sales contract would become a sustainability vehicle’⁵⁸ and the risk of obsolescence would be transferred onto the seller. Lists or tables on the usual lifespan of specific product sectors, as imposed in the Netherlands (‘UNETO-VNI Tabel met gemiddelde gebruiksduurverwachtingen’/UNETO-VNI Table of average life expectancy)⁵⁹ or France (‘indice de réparabilité’ and ‘indice de durabilité’)⁶⁰, can — optionally — amend the objective durability.

Furthermore, the seller shall be bound by his public statements concerning the ecological added value. Here, the actual knowledge of the seller or the expectations of the buyer should not be the point of reference. Art. 6(aa) is designed to protect environmental interests — objectively and independently of actual knowledge or expectations, to allow environmental interests to be implemented comprehensively and effectively. It intends to strengthen the binding effect and importance of public ecological statements and to provide an incentive to keep such promises.

Art. 7(6) sets the ecological standards as minimum requirements in order to cover all types of applicable standards: not only public law but also standards stemming from private-law-actors agreements e.g. codes of conduct. The inclusion of additional requirements for objective conformity are related not only to improving the longevity of goods but also to their production and disposal in order to give due attention to product lifecycles. In this context, it is important that contractual agreements that seek to circumvent public or industry standards (e.g. codes of conduct) are not admissible.

Article 8

Incorrect installation of the goods

Original

Proposed amendment

Any lack of conformity resulting from the incorrect installation of the goods shall be regarded as lack of conformity of the goods, if:

⁵⁷ A. Hellgardt, V. Jouannaud: *Nachhaltigkeitsziele und Privatrecht*, Archiv für die civilistische Praxis 2022, Issue 2, p. 214.

⁵⁸ J.-E. Schirmer: *Nachhaltigkeit...*, *op. cit.*, p. 43.

⁵⁹ <https://www.technieknederland.nl/stream/richtlijnenafschrijvingsmethoden> (accessed: 25/08/2022).

⁶⁰ Legal basis: Rule n° 2020–105 of 10th February 2020, JORF n°0035, texte n° 1; Decree n° 2020–1757 of 29th December 2020, JORF n° 0316, texte n° 5; Decree of 29 December 2020, JORF n° 0316, texte n° 18. See <https://www.service-public.fr/particuliers/actualites/A14590> (accessed: 25/08/2022).

- (a) the installation forms part of the sales contract and was carried out by the seller or under the seller's responsibility; or
- (b) the installation, intended to be carried out by the consumer, was done by the consumer and the incorrect installation was due to shortcomings in the installation instructions provided by the seller or, in the case of goods with digital elements, provided by the seller or by the supplier of the digital content or digital service.

Justification

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Article 9

Third party rights

Original

Proposed amendment

Where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the goods in accordance with Articles 6 and 7, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in Article 13, unless national law provides for the nullity or rescission of the sales contract in such cases.

Justification

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Article 10
Liability of the seller

Original

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time. Without prejudice to Article 7(3), this paragraph shall also apply to goods with digital elements.

2. In the case of goods with digital elements, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that oc-

Proposed amendment

1a. Where in the sales contract with the consumer the seller gives an express or implied assurance of durability for certain goods for a certain period of time, the seller shall be liable for resulting lack of conformity during the entire period of the guarantee of durability for price reduction or repair of the goods in accordance with Article 14. This is without prejudice to commercial guarantees under Article 17.
1b. The period under paragraph 1 applies to goods repaired or replaced in accordance with Article 14.

curs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract.

3. Member States may maintain or introduce longer time limits than those referred to in paragraphs 1 and 2.

4. If, under national law, the remedies provided for in Article 13 are also subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of this Article, and which becomes apparent within the period of time referred to in those paragraphs.

5. Notwithstanding paragraphs 1 and 2 of this Article, Member States may maintain or introduce only a limitation period for the remedies provided for in Article 13. Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of this Article, and which becomes apparent during the period of time referred to in those paragraphs.

6. Member States may provide that, in the case of second-hand goods, the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period than those referred to in paragraphs 1, 2 and 5, provided that such shorter periods shall not be less than one year.

6. Member States may provide that, in the case of second-hand goods, the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period than those referred to in paragraphs 1, 2 and 5, provided that such shorter periods shall not be less than one year. **This does not apply to second-hand goods that have been refurbished.**

Justification

The period for durability may exceed the two-year period stated in paragraph 1. In many cases only then sustainable consumption will truly be favoured⁶¹ — two-year durability in case of many products will not be ecologically friendly while losing durability after the current two-year period in many instances would approximate to the planned obsolescence practices. It is therefore necessary to extend an expressly or impliedly (e.g., following the good type) stated period for durability beyond the two-year period in order to ensure that the consumer has recourse to the remedies throughout this period. Accordingly, there is an amendment of the Article 11.2 provided adjusting the extension of the reversed burden of proof and, therefore, allowing for better usefulness of the prolonged liability period⁶².

At the same time, admissible remedies in the extended period should be limited to those generally not producing ecological externalities. This goes in a similar direction as the other proposed amendment, but is still placed within the contractual relationship, and not the externally financed repair services⁶³.

Additionally, in case of repair or replacement the liability period as to the good should renew⁶⁴. This would allow e.g., to use refurbished good or its parts to replacement or repair without burden to the consumer⁶⁵ who would be entitled to remedies (in case of further lack of conformity of the repaired or replaced good). It should be added that in case of repair regarding solely a part of the sold good, the lack of conformity of any part of such good should lead to the extension of liability period with regard to the whole good (alike as reversed burden of proof in Article 11.1a). This results from the difficult interaction of varied parts of the good with one another that may be difficult to be analysed by the consumer invoking lack of conformity.

The notion of second hand goods requires a distinction for goods which have been professionally refurbished and before being put on the market. Where a second hand good has been refurbished by, for instance a repair to restore functionality and/or a hardware upgrade, the limited guarantee period should not apply. Clarification is thus needed that the standard two-year period under paragraph 1 applies, thus protecting the consumer's expectations regarding the conformity of the good. Although refurbishing goods should be agreed as ecologically reasonable, and should be favoured per se, this should not lead to worsening the consumers' situation when they buy such products⁶⁶, not reasonably assuming their worse quality comparing with new goods (which they might assume with regard to used goods, which unlike

⁶¹ Similarly European Law Institute: *Response...*, *op. cit.*, p. 10.

⁶² European Law Institute: *Response...*, *op. cit.*, p. 10.

⁶³ *Ibidem*, p. 11.

⁶⁴ In accordance with common public postulates: Sustainable consumption..., *op. cit.*, p. 4.

⁶⁵ E. Terryn: *A Right...*, *op. cit.*, p. 861.

⁶⁶ Against, E. Van Gool, A. Michel: *The New Consumer...*, *op. cit.*, p. 138.

refurbished ones have not undergone improvement⁶⁷). Thus, in case of many refurbished goods even higher quality may be expected, e.g., an old piece of wooden furniture is refurbished to be more durable than new furniture.

Article 11
Burden of proof

Original

Proposed amendment

1. Any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. This paragraph shall also apply to goods with digital elements.

2. Instead of the one-year period laid down in paragraph 1, Member States may maintain or introduce a period of two years from the time when the goods were delivered.

3. In the case of goods with digital elements where the sales contract provides for the continuous supply of the digital content or digital service over a period of time, the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time referred to in Article 10(2) shall be on the seller for a lack of conformity which becomes apparent within the period of time referred to in that Article.

1a. The period under paragraph 1 applies to goods repaired or replaced in accordance with Article 14.

2. Instead of the one-year period laid down in paragraph 1, Member States may maintain or introduce a period of two years **commencing** from the time when the goods were delivered, **or longer following Article 10.1a.**

⁶⁷ European Law Institute: *Response...*, *op. cit.*, p. 11.

Justification

The link between the presumption of lack of conformity and ecology is very strong and featured in the current SGD, as well as its predecessor, Directive 1999/44⁶⁸. It is thus argued that it is the instrument of the presumption of non-conformity that protects durability, since anytime within the period the lack of conformity arises, the deterioration of the product or limited functionality during this such period enables consumers to execute their rights under the SGD, unless the seller proves that the good was in conformity when passing the risk⁶⁹. Although the function of the presumption of non-conformity is different (allowing for the factual, efficient execution of consumer rights resulting from any lack of conformity in the sold goods with the contract, whereas such lack of conformity may but does not have to result from a lack of durability), it may be an incentive to maintain the durability requirement at least for the relevant period from this provision⁷⁰.

The presumption of non-conformity is strictly connected with the liability period (Article 10). An extension of the liability period as suggested in Article 10.1a should therefore lead to admissible extension of the reversed burden of proof period; otherwise, the extension as in Article 10.1a might not prove useful⁷¹.

The addition serves to clarify that the presumption of the lack of conformity applies following a repair or replacement. In the interests of legal certainty and consumer protection, the one-year period is not suspended during the period of repair or replacement, but begins anew upon (re-)delivery of the repaired or replaced good. It especially favours repair as a generally ecologically most ecologically friendly remedy⁷², supporting its choice by the consumer obtaining then adequate protection. Thus, in the current wording of the SGD it would be most unclear whether in case of repair the new period for the presumption of non-conformity will apply. Less doubts would concern the replacement.

It should be added that in case of repair regarding solely the part of the sold good, the lack of conformity of any part of such good should lead to the presumption of non-conformity with regard to the whole good (alike as liability period in Article 10.1b). This also results from the difficult interaction of varied parts of the good with one another that may be difficult to be analysed by the consumer invoking lack of conformity. At the same time, it is avoiding the burden on the side of the consumer that rationalises the presumption of non-conformity⁷³.

⁶⁸ I. Bach, M. Wöbbecking: *Das Haltbarkeitserfordernis...*, *op. cit.*, p. 2673.

⁶⁹ *Ibidem*, p. 2673–2675.

⁷⁰ F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 535.

⁷¹ European Law Institute: *Response...*, *op. cit.*, p. 10.

⁷² E. Terryn: *A Right...*, *op. cit.*, p. 853.

⁷³ R. Podszun: *Procedural autonomy and effective consumer protection in sale of goods liability: Easing the burden for consumers (even if they aren't consumers). Comment on Case C-497/13 Froukje Faber v. Autobedrijf*

Article 12

Obligation to notify

Original

Member States may maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity.

Proposed amendment

Member States may maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to inform the seller **or producer** of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity.

Justification

The amendment is correlated with the introduction of direct producer's liability in Article 17a.

Article 13

Remedies for lack of conformity

Original

1. In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article.
2. In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

Proposed amendment

- 1. In the event of a lack of conformity, the consumer shall be entitled to have the goods repaired or to receive a price reduction, to have the goods replaced or to terminate the contract, under the conditions set out in this Article.**
- 2. The consumer is entitled to choose between repair or reduction by no more than 5% of the price, unless the lack of conformity is of such nature that the continued use of the good with the non-conformity is harmful for the environment.**

Hazet Ochten BV, Judgment of the Court of Justice (First Chamber) of 4 June 2015, Journal of European Consumer and Market Law 2015, No. 4, p. 152.

- (a) the value the goods would have if there were no lack of conformity;
- (b) the significance of the lack of conformity; and
- (c) whether the alternative remedy could be provided without significant inconvenience to the consumer.

3. The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2.

3. If the seller refuses to repair the goods or it is clear from the circumstances, that:

- a) the seller will not be able to repair the goods without significant inconvenience for the consumer or within a reasonable time,**
- b) or repair**
 - is impossible, or
 - imposes disproportionate costs in relation to the value of the good, or
 - is disproportionately burdensome on the environment
- c) or it cannot be expected from the consumer to accept repair due to the circumstances which are known to the seller at the time of conclusion of the contract,**
- d) or a lack of conformity appears after a maximum period of three months following the repair,**
- e) or there have been two failed attempts at repair of the same lack of non-conformity, or**
- f) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract, unless repair is possible within a reasonable time and without**

causing significant inconvenience to the consumer

the consumer may choose to receive a replacement, to terminate the contract, or to receive a proportionate reduction in the price.

4. The consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or the termination of the sales contract in accordance with Article 16 in any of the following cases:

- (a) the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement in accordance with Article 14(2) and (3), or the seller has refused to bring the goods into conformity in accordance with paragraph 3 of this Article;
- (b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity;
- (c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or
- (d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer.

5. The consumer shall not be entitled to terminate the contract if the lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller.

4. The consumer remains entitled to claim repair from the producer for a lack of conformity under Article 7 if the seller refuses to repair the goods or if the seller is unable to repair the good due to the circumstances in paragraph 3 letters (a), (b), (d) or (e). The producer may refuse to repair the good if repair is impossible, or disproportionately burdensome on the environment.

5. The consumer shall not be entitled to terminate the contract **or request a replacement** if the lack of conformity is only minor. **This does not apply to termination where the repair of a replaced good has failed, is refused or is not possible due to the circumstances in paragraph 3 letters (a)–(f).** The burden of

proof with regard to whether the lack of conformity is minor shall be on the seller.

6. The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment.

7. Member States may regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies.

Justification

A right to repair has already been indicated as an important tool that can substantially contribute to increase the lifespan of consumer goods⁷⁴. Consequently, the current design of the SGD, which does not prioritize repair over replacement, can be considered suboptimal⁷⁵.

For this reason the hierarchy of repair or replacement (level 1) and price reduction or termination (level 2) needs to be amended in order to support sustainability by, on the one hand, avoiding those remedies that generate the most waste (replacement and termination) and, on the other hand, incentivising price reduction⁷⁶ and repair⁷⁷ as remedies.

Adjusting the hierarchy of remedies to first offer the consumer a choice between limited price reduction (up to 5% of price) and repair reflects an approach that aims to avoid waste⁷⁸.

One of the issues that may reduce the ecological effectiveness of the current SGD could be the lack of reference to self-repair which is claimed to be crucial for prolonging the lifetime of goods⁷⁹. Yet, also this draft does address explicitly the

⁷⁴ Sustainable consumption..., *op. cit.*, p. 3 (accessed: 16/09/2022); E. Terryn: *A Right...*, *op. cit.*, p. 853.

⁷⁵ K. Kryla-Cudna: *Sales Contracts and the Circular Economy*, *European Review of Private Law* 2020, No. 6, p. 1213; A. Michel: *La Directive 1999/44/CE Sur La Garantie Des Biens de Consommation: Un Remède Efficace Contre l'obsolescence Programmée?*, *Revue Européenne de Droit de La Consommation* 2016, No. 2, p. 228.

⁷⁶ On price reduction as ecologically friendly remedy see: F. Zoll: *Ekologiczne...*, *op. cit.*, p. 645.

⁷⁷ Often viewed as ecologically efficient remedy: E. Terryn: *A Right...*, *op. cit.*, No. 4, *passim*; K. Kryla-Cudna: *Sales...*, *op. cit.*, p. 1210.

⁷⁸ Reduction of waste production is the main goal of circular economy. K. Kryla-Cudna, *Sales...*, *op. cit.*, p. 1210; Commission, A new Circular Economy Action Plan COM(2020) 98 final, 11 March 2020, p. 12–15.

⁷⁹ Commission, A new Circular Economy Action Plan COM(2020) 98 final, 11 March 2020, p. 3.

issue of self-repair. As under the current law, here the right to repair cannot be understood as encompassing the possibility of the buyer to exercise self-repair. The reason behind said exclusion is that the environmental costs produced during self-repair can differ substantially depending on numerous variables and the legislator has limited possibility to influence the process of performing self-repair (especially if it is carried out by a consumer) so that it matches environmental standards. However, the proposed design of the remedies may indirectly encourage self-repair in cases where it is simple and inexpensive: if price reduction up to 5% of price is the remedy of the first tier, in many instances it may be reasonable for the consumer to reduce the price and repair the good herself.

In comparison to repair, price reduction is of greater benefit to the environment, yet does not provide the consumer with a good that is in conformity with the contract and thus offers the least protection of the consumer's entitlement to receive conforming goods and to uphold the trader's obligation to deliver goods in conformity with the contract. Consequently, in instances where the defective product does not fully satisfy consumers' needs, it may encourage them to lower the price of the good without one of desired functionalities and purchase another item which has this missing function. Providing limitation as to the admissible price reduction within the first tier of remedies is aimed at reducing such counterproductive effects. In addition, the limited price reduction is not admissible if the nature of the defect makes its further use burdensome for the environment (e.g. increased energy or water consumption).

Nonetheless, these two remedies are not equal with regard to their contribution to sustainability. As certain types of non-conformities may be negligible or difficult to quantify, simplifying price reduction may encourage consumers to seek this remedy rather than pursuing unnecessary repair. Since replacement is no longer a first level remedy, the transition to the second level centres around the circumstances of repair. In this respect, it is necessary to consider the environmental implications surrounding the repair⁸⁰. The repair may be possible but could place a disproportionate burden on the environment, e.g. emissions, energy, transport, which would justify a transition to the second level remedies.

In general there is a need to balance the consumer's interest in not remaining in an endless cycle of repair (and replacement) against the interest in promoting repair. Accordingly, the transition from the first tier of remedies to the remedies of replacement, termination, and proportional price reduction should be reserved for particular circumstances.

⁸⁰ On prospective positive and spillovers of the right to repair in general see: A. Meysner, J. Urios: *The 'right to repair' Addressing social and environmental spillovers in the electrical and electronic equipment sector*, Institute for European Environmental Policy 2022, p. 8–13, [https://ieep.eu/uploads/articles/attachments/bc083220-907a-4692-8389-3304aad80c86/Policy%20brief_The%20right%20to%20repair_IEEP%20\(2022\).pdf?v=63825720563](https://ieep.eu/uploads/articles/attachments/bc083220-907a-4692-8389-3304aad80c86/Policy%20brief_The%20right%20to%20repair_IEEP%20(2022).pdf?v=63825720563) (accessed: 14/09/2022).

Furthermore, if the repair was not performed by the seller (e.g. the good could not be repaired within a reasonable time or repair would generate disproportionate costs for the seller due to scarcity of spare parts on the market, or because of the technological issues — for instance repair can be performed only with the use of specialised equipment not available to the seller — could not be performed unless being disproportionately burdensome for the environment), the consumer should also be entitled to seek repair directly from the producer. However, the producer may also refuse to repair the good if said repair is impossible or disproportionately burdensome on the environment.

The second level remedies comprise replacement, termination and proportional price reduction. As price reduction is again the more environmentally friendly remedy, with replacement arguably more harmful to the environment than termination, a threshold for replacement and termination should serve as an incentive to choose price reduction. However, in the interests of consumer protection, the threshold does not apply to the remedy of termination where the non-conforming good is a replacement.

Article 14

Repair or replacement of the goods

Original

Proposed amendment

1. Repairs or replacements shall be carried out:

- (a) free of charge
- (b) within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity; and
- (c) without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods.

2. Where the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller. The seller shall take back the replaced goods at the seller's expense.

2a. Where the lack of conformity is to be remedied by replacement of the goods, the seller may provide the buyer with refurbished goods of at least the same type and quality.

2b. Article 13 applies to replacement goods.

3. Where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation.

4. The consumer shall not be liable to pay for normal use made of the replaced goods during the period prior to their replacement.

Justification

Generally, the right to repair is recently viewed not only in the context of the seller's liability for the lack of conformity regime under the SGD but as a separate, independent matter⁸¹.

It is raised that the repair should not cause significant inconvenience to the consumer so that it is preferred over replacement⁸². For this reason, imposing an obligation on the seller to provide a substitute good that can serve for the same purpose as the one undergoing repair is proposed⁸³. Under this proposal it is unnecessary to provide incentives for the consumer to opt for repair instead of replacement as the replacement is no longer available as the remedy of the first tier. Also, it should be noted that the obligation of providing a substitute good for the period of repair

⁸¹ See: aforementioned right to repair movement within the EU. Right to repair: MEPs want more durable and more easily repairable products, <https://www.europarl.europa.eu/news/pl/press-room/20220401IPR26537/right-to-repair-meps-want-more-durable-and-more-easily-repairable-products> (accessed: 17.09.2022).

⁸² The inconvenience related to repair is indicated as a mighty factor reducing its attractiveness as a remedy. Sustainable consumption..., *op. cit.*, p. 3; C. Thorun, F. Dekeulenaer: *Behavioural study on consumers' engagement in the circular economy: Final report*, 2018, <https://data.europa.eu/doi/10.2818/956512>, p. 66.

⁸³ European Law Institute: *Response...*, *op. cit.*, p. 9.

will, as a rule, entail additional environmental costs: these are not solely related to the transportation of such replacement to and from the consumer, but the seller would have to maintain replacements. Hence, introducing such obligation may substantially increase the environmental costs of this remedy.

In support of the circular economy the seller should be entitled to replace the non-conforming goods with refurbished goods of at least the same type and quality⁸⁴. This proposed amendment remains in accordance with the recommendations formed pursuant to public consultations on the right to repair⁸⁵.

The system of remedies under Article 13 should also apply to replaced goods in order to ensure that the requirements regarding repair and price reduction are not circumvented.

Article 15 Price reduction

Original

The reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity.

Proposed amendment

(1) The reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity.

(2) Price reduction may not be exercised, when the continued use of the good with the non-conformity is harmful for the environment.

Justification

The remedy of price reduction can serve to prevent waste to the extent that the consumer agrees to retain the non-conforming good in exchange for a reduction in the purchase price. However, by remaining in use, the non-conformity in question could potentially increase the burden on the environment to an extent that is greater than if the good were repaired (or replaced), such as through increased water or power consumption⁸⁶. In this case, the avoidance of increased harm to the environ-

⁸⁴ K. Kryła-Cudna: *Sales...*, *op. cit.*, p. 1222; E. Terryn: *A Right...*, *op. cit.*, p. 860.

⁸⁵ *Sustainable consumption...*, *op. cit.*, p. 3.

⁸⁶ F. Zoll: *Ekologiczne...*, *op. cit.*, p. 645; F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 543.

ment takes preference over the consumer's interest in accepting a price reduction⁸⁷. In such instances, the nature of the defect cannot be considered minor — as a result if such defect appears, the consumer who is entitled to exercise their right within the second tier of remedies is allowed to terminate the contract. The reason behind granting the consumers the right to termination in such instances is that the objective of the norm is to remove goods with environmentally burdensome defects from circulation.

Article 16

Termination of the sales contract

Original

Proposed amendment

1. The consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract.

2. Where the lack of conformity relates to only some of the goods delivered under the sales contract and there is a ground for termination of the sales contract pursuant to Article 13, the consumer may terminate the sales contract only in relation to those goods, and in relation to any other goods which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods.

3. Where the consumer terminates a sales contract as a whole or, in accordance with paragraph 2, in relation to some of the goods delivered under the sales contract:

- (a) the consumer shall return to the seller, at the seller's expense, the goods; and

3. Where the consumer terminates a sales contract as a whole or, in accordance with paragraph 2, in relation to some of the goods delivered under the sales contract:

- (a) the consumer shall return to the seller, **or where appropriate to the producer**, at the seller's expense, the goods; or

⁸⁷ F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 543.

- (b) the seller shall reimburse to the consumer the price paid for the goods upon receipt of the goods or of evidence provided by the consumer of having sent back the goods.

For the purposes of this paragraph, Member States may determine the modalities for return and reimbursement.

(aa) where appropriate, the consumer may provide evidence of appropriate disposal of the goods; and

- (b) the seller shall reimburse to the consumer the price paid for the goods upon receipt of the goods or of evidence provided by the consumer of having sent back the goods to the seller **or producer, or of appropriate disposal of the good.**

Justification

In certain circumstances the return of the defective good to the seller following termination of the contract is neither cost-effective nor environmentally friendly, particularly in a cross-border context. Accordingly, where appropriate the consumer should have the possibility to return or dispose of the non-conforming good in a more cost-effective and environmentally-friendly manner. Disposal by the consumer might be especially recommendable in instances when they have access to developed infrastructure in the area (e.g. incineration plants)⁸⁸ and when the transportation costs are significant due to the distance or the nature of the good.

Article 16a

Right to damages

Where national law provides a right to damages for a breach of Articles 6, 7, 8 or 9, the requirements for a claim to damages under national law must not allow the national provisions on damages to circumvent the requirements for price reduction or termination under this Directive.

Justification

In principle the SGD is without prejudice to national laws on damages. Consequently, neither in the SGD nor in this study the scope of damages that can be

⁸⁸ Disposal of the good is one of the stages of its life-cycle which determines the level of generated environmental externalities.

compensated is not addressed. As a result, determining whether it is admissible to claim damages for social and environmental externalities produced due to the non-conformity of the good⁸⁹ remains within the Member States.

However, the requirements for claiming damages under national law may be less onerous than the system of remedies provided in the Directive, thus allowing the consumer to circumvent the repair requirement. Yet, the application of the national law should not undermine achieving the goal of the Directive⁹⁰. The national laws on damages must therefore ensure that this effect is avoided in order to uphold the significance of repair in the system of consumer remedies⁹¹.

Article 17

Commercial guarantees

Original

Proposed amendment

1. Any commercial guarantee shall be binding on the guarantor under the conditions laid down in the commercial guarantee statement and associated advertising available at the time, or before the conclusion, of the contract. Under the conditions laid down in this Article and without prejudice to any other applicable provisions of Union or national law, where a producer offers to the consumer a commercial guarantee of durability for certain goods for a certain period of time, the producer shall be liable directly to the consumer, during the entire period of the commercial guarantee of durability for repair or replacement of the goods in accordance with Article 14. The producer may offer to the consumer more favourable conditions in the commercial guarantee of durability statement.

⁸⁹ E. Van Gool, A. Michel: *The New...*, *op. cit.*, p. 144; A. Beckers: *Environmental Protection meets Consumer Sales: The Influence of Environmental Market Communication on Consumer Contracts and Remedies*, *European Review of Private Law* 2018, Volume 14, p. 180–187.

⁹⁰ On the matter of the interplay between national law remedies and remedies granted under the SGD see: F. Zoll, K. Południak-Gierz, W. Bańczyk: *Sustainable...*, *op. cit.*, p. 545–546.

⁹¹ On the right to damages and the remedies for lack of conformity of the good sold, but under the Directive 1999/44: F. Zoll: *Rękojmia. Odpowiedzialność sprzedawcy*, Warszawa 2018, p. 178–195.

If the conditions laid out in the commercial guarantee statement are less advantageous to the consumer than those laid down in the associated advertising, the commercial guarantee shall be binding under the conditions laid down in the advertising relating to the commercial guarantee, unless, before the conclusion of the contract, the associated advertising was corrected in the same way or in a comparable way to that in which it was made.

2. The commercial guarantee statement shall be provided to the consumer on a durable medium at the latest at the time of the delivery of the goods. The commercial guarantee statement shall be expressed in plain, intelligible language. It shall include the following:

- (a) a clear statement that the consumer is entitled by law to remedies from the seller free of charge in the event of a lack of conformity of the goods and that those remedies are not affected by the commercial guarantee;
- (b) the name and address of the guarantor;
- (c) the procedure to be followed by the consumer to obtain the implementation of the commercial guarantee;
- (d) the designation of the goods to which the commercial guarantee applies; and
- (e) the terms of the commercial guarantee.

3. Non-compliance with paragraph 2 shall not affect the binding nature of the commercial guarantee for the guarantor.

4. Member States may lay down rules on other aspects concerning commercial guarantees which are not regulated in this Article, including rules on the language or languages in which the commercial guarantee statement is to be made available to the consumer.

Justification

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Article 17a Direct producer's liability

1. In the event of a lack of conformity under Article 7 the consumer is entitled to demand the repair of goods by the producer in accordance with Article 14 and Article 11.

2. The consumer is not entitled to claim from the seller a reduction in purchase price under Article 13(2) and repair from the producer.

3. This provision is without prejudice to a claim for damages from the producer under national law.

Justification

The provision clarifies that the consumer may seek repair directly from the producer in relation to objective non-conformities⁹². In certain circumstances, the good may need to be returned by the seller to the producer for repair. Should the consumer exercise this option, the consumer should be prevented from claiming repair from the producer and a simultaneous price reduction from the seller. However, the claim for repair of the good by the producer must not have the effect of excluding a claim for damages arising as a result of the non-conformity.

⁹² Similar postulate appears in the context of the general right to repair in the European Law Institute: *Response...*, *op. cit.*, p. 14.

Article 18

Right of redress

Original

Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission, including omitting to provide updates to goods with digital elements in accordance with Article 7(3), by a person in previous links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Proposed amendment

Justification

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Article 19

Enforcement

Original

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
 - (a) public bodies or their representatives;

Proposed amendment

- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting.

Justification

###

Article 20

Consumer information

Original

Member States shall take appropriate measures to ensure that information on the rights of consumers under this Directive, and on the means to enforce those rights, are available to consumers.

Proposed amendment

Member States shall take appropriate measures to ensure that information on the rights of consumers under this Directive, and on the means to enforce those rights, are available to consumers. **In particular, Member States should take appropriate measures to increase the environmental awareness of consumers in relation to sales law.**

Justification

Further consumer education to increase the environmental awareness in sales law is to be welcomed. In many cases ecologically sensitive information may diversely relate to the characteristic of the goods. On one hand, it will likely be shared by the producers or sellers, due to their advertising value or resulting possibilities to preclude liability (e.g. short lifespan); on the other hand, it may thus be avoided due to potential liability resulting from it (e.g. long lifespan). Mandatory disclosures may therefore be welcome⁹³.

For instance, the Member States should take appropriate measures to inform consumers about the environmental burden resulting from the termination of the contract or the replacement of the goods. Such environmental awareness could also have a potential knock-on effect in other areas of sales law, such as the right of withdrawal in distance and off-premises contracts, and contribute to the broadening the ‘informed consumer’ benchmark.

⁹³ European Law Institute: *Response...*, *op. cit.*, p. 17; E. Van Gool, A. Michel: *The New Consumer...*, *op. cit.*, p. 140.

Article 21
Mandatory nature

Original

Proposed amendment

1. Unless otherwise provided for in this Directive, any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer.

2. This Directive shall not prevent the seller from offering to the consumer contractual arrangements that go beyond the protection provided for in this Directive.

2. This Directive shall not prevent the seller from offering to the consumer contractual arrangements that go beyond the **levels of consumer and environmental** protection provided for in this Directive.

Justification

Although the provision represents a restriction on the freedom of contract, it is necessary to avoid contractual of the provisions and approaches of the SGD that serve to improve the contribution of sales law to environmental protection. At the same time, it should not lead to lowering the consumer protection even if environment is protected. Also, it is not admissible to contractually avoid the ecological requirements set by the SGD even if beneficial for the consumer. Therefore, it is admissible to contractually go beyond the consumer protection within the environmental protection level provided by the SGD, or beyond the environmental protection within the consumer protection level provided by the SGD, or beyond both.

Articles 22–27
[...]

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Słowa kluczowe: dyrektywa 2019/771, zrównoważony rozwój, naprawa, efektywność ekologiczna, gospodarka o obiegu zamkniętym, nowelizacja dyrektywy 2019/771, zmiana dyrektywy 2019/771, ekologiczne prawo konsumenckie.

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PROPOSAL OF ECOLOGICALLY EFFICIENT CONSUMER
SALES LAW. AMENDMENT OF 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

S u m m a r y

Protecting the environment and the role of sustainability is becoming a global issue. Consumer law has been identified as a regulatory area which can have a substantial influence over the degree of adverse environmental impact of commerce. Consequently, the European Commission strives to adjust the EU legal framework to effectively contribute to the development of ecologically efficient behaviour on the consumer market. The EU legislator has acknowledged the need for a holistic approach to the greening of consumer law, but the attention of the legislator has tended to focus on specific issues (i.a. discussion on planned obsolescence) and chosen institutions (i.a. repair).

In contrast to focusing purely on one specific aspect of consumer sales law, we pursue a holistic revision of the recent Sale of Goods Directive 2019/771 (SGD) with the aim to illustrate how this Directive could be revised to be ecologically efficient.

We have identified areas in the SGD which require regulatory attention if they were to align with the ecological efficiency considerations. We revised and redrafted the current SGD provisions to improve the Directive's contribution to sustainable development. This has resulted in rephrasing of certain provisions (such as conformity requirements) but also fundamentally reshaping the design of certain EU approaches, especially the hierarchy of remedies and direct producer's liability.

Keywords: directive 2019/771, sustainability, right to repair, ecological effectiveness, circular economy, revision of SGD, amendment of SGD, greening consumer law.

