Stefan Grundmann, Hugh Collins, Fernando Gómez,
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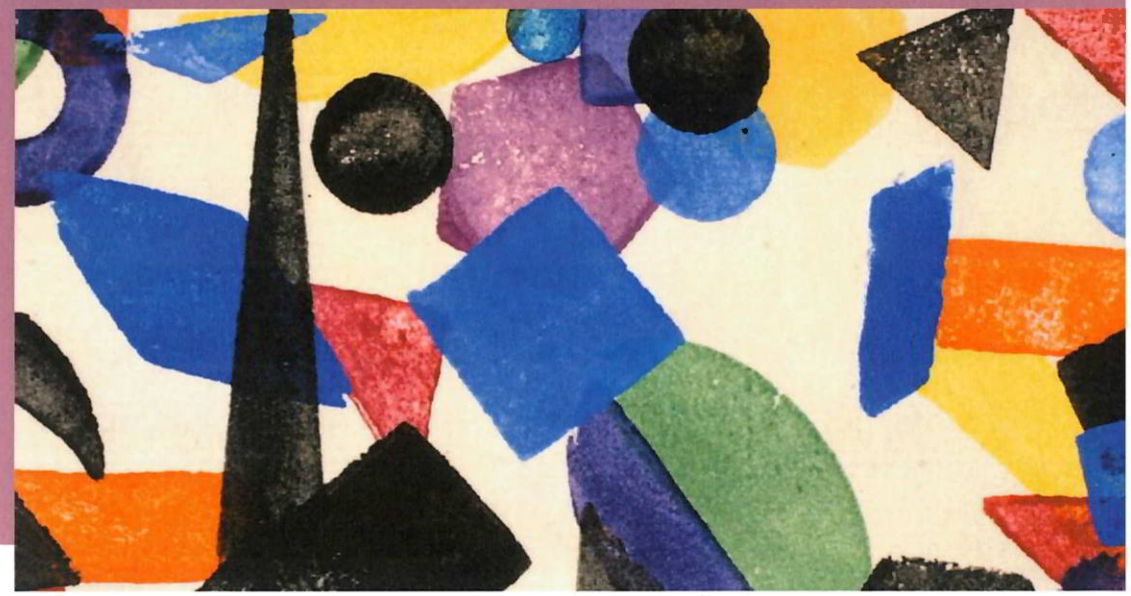
European Sales Law

Challenges in the 21st Century



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European Contract Law and Theory Series, Volume 7

EUROPEAN SALES LAW

Challenges in the 21st Century

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Stefan Grundmann
Yeşim M. Atamer

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SALES LAW IN TRANSFORMATION

Sustainability, Digitalisation, Servitisation

Yeşim M. Atamer and Stefan Grundmann

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1. INTRODUCTION

Roman law was the source of inspiration for the general sales law of most codifications in Europe in the 19th century. In parallel, but in part also an intertwined development, special sales law provisions which had evolved for merchants (business-to-business, b2b) from the Middle Ages onwards entered commercial codes, starting with the German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch, ADHGB) of 1861 (later Handelsgesetzbuch).[1] The Uniform Sales Law (1964) as well as its successor, the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980), further advanced this dichotomy by presenting a set of rules for international sales contracts in b2b relations. A next level of specialisation was reached with the advent of consumer protection policies in the 1980s. With the first EU Consumer Sales Directive (CSD) of 1999, the rules applicable between commercial sellers and consumers (business-to-consumer, b2c) were laid down.[2] It was at this stage that the Society of European Contract Law was founded and dedicated its first conference to the topic 'Sales and Trends in European Contract Law'. One of the major questions raised at that time was whether such differentiation according to the parties to the sales contract was really necessary.[3]

Twenty years later, and with the new EU Sale of Goods Directive (SGD) now in force, the division between b2b and b2c contracts remains.[4] However,

1 See S. Grundmann, 'Einleitung' in C.-W. Canaris, M. Habersack and C. Schäfer (eds), *Staub Großkommentar HGB*, 6th ed., De Gruyter, Berlin 2023 (forthcoming), paras. 17–20, 46–49, 96–100. See also (namely for the harmonisation process triggered by the ADHGB in Central and South-Eastern Europe) S. Wagner, 'Einführung' in M. Löhnig and S. Wagner (eds), *Das ADHGB von 1861 als gemeinsames Obligationenrecht in Mitteleuropa*, Mohr Siebeck, Tübingen 2018, passim.

2 Directive 1999/44/EC of the European Parliament and of the Council of 25.05.1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

3 S. Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechtsrichtlinie so ähnlich?' (2002) 202(1) *AcP* 40, passim; S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How Can the Sales Directive and the Sales Convention Be So Similar?' (2003) 14 (3) *EBLR* 237, passim.

4 Directive (EU) 2019/771 of the European Parliament and of the Council of 20.05.2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

sales law seems to be confronted with many new questions and even further fragmentation. First of all, the need for more sustainable resource usage inevitably brings sales law provisions into the limelight. Sustainable Development Goal 12 mandates states to ensure sustainable consumption and production patterns.[5] The more goods become durable the longer they can be employed.[6] Regulating the quality standards of durable goods is certainly a first step in the right direction.[7] Such provisions can enhance resource-efficient production, longer durability and the repair-friendliness of goods.[8] But enforcement of such public law requirements can also effectively be supported by sales law provisions ('private law enforcement'). If durable goods do not last as long as they are expected to because of inferior quality in general or of the design of wear parts, buyers should have remedies. Giving repair primacy among other remedies, for example, would promote the longer usage of goods.[9]

However, the lynchpin of this assumption is the liability period of the seller. Durability and a two-year liability period starting from the moment of delivery do not seem to go hand in hand. In fact, shortly after the Sale of Goods Directive came into force in 2022, the EU Commission started a new initiative proposing possible changes to the Directive, including, among others, prolonging the liability period in order to promote the sustainable consumption of goods (hereinafter the 'EU Initiative').[10] So far this Initiative has culminated in a Directive Proposal for Common Rules Promoting the Repair of Goods

5 <https://sdgs.un.org/goals/goal12> accessed 10.01.2023.

6 Durable products are not per se environmentally friendly. If the goods can be replaced by less environmentally damaging ones, then continued use might even be counterproductive; see T. Hummen and H. Desing, 'When to Replace Products with Which (Circular) Strategy? An Optimization Approach and Lifespan Indicator' (2021) 174 *Resources, Conservation and Recycling* 105704. On the other hand, studies show that, for example, short-lived washing machines, televisions or notebooks perform worse in all environmental indicators without exception, although the production phase of durable goods often involves greater energy consumption. See S. Prakash et al., *Einfluss der Nutzungsdauer von Produkten auf ihre Umweltwirkung: Schaffung einer Informationsgrundlage und Entwicklung von Strategien gegen "Obsoleszenz"*, Umweltbundesamt Deutschland, 2016, pp. 236 et seq.

7 See, e.g., A. Michel, 'The Design and Production Stage: Ecodesign Requirements' in B. Keirsbilck and E. Terryn (eds), *Consumer Protection in a Circular Economy*, Intersentia, Cambridge 2019, pp. 61 et seq.; S. Wende, 'Sustainability by Design? Nachhaltigkeitsaspekte im europäischen Produktrecht' (2022) 4 *ZfPC* 165, 172.

8 For the list of goods subject to information duties on energy savings, energy labelling and eco-design requirements, see <https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/energy-label-and-ecodesign/energy-efficient-products_en#fridges> accessed 18.01.2023.

9 See Dalhammar, Maitre-Ekern, Richter, Puentes Cociña and Milios in this volume; Tur-Sinai and Chan Grinvald in this volume.

10 European Commission, 'Sustainable Consumption of Goods – Promoting Repair and Reuse' 11.01.2022 at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 18.01.2023.

(Repair Directive Proposal).[11] This important development is flanked (if one looks at the production chain as a whole) by an EU legislative development that dates back almost a decade and is in a state of constant flux and reformulation. Its core is a duty of larger firms to exercise a certain degree of due diligence regarding ecological and ethical standards in their production chain, and to report to shareholders and public at large on the strategies of oversight taken, thus strongly linking contract law and company law in this aim.[12] Two issues are of particular importance: the question regarding the true addressees of the information (shareholders, investors, stakeholders, the public at large, including non-governmental organisations (NGOs) and regulators)[13] and the extent of the scope of due diligence obligations.[14]

Another major challenge to classical sales law provisions is posed by digitalisation. Goods with digital elements might work perfectly fine at the moment of delivery (i.e., passing of risk), but they lose their function if updates or access to some crucial services are not provided. As such, the problem is often one of durability. Whereas goods without any digital element become unusable

11 Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM(2023) 155 final. See also the accompanying Commission Staff Working Document Impact Assessment Report, SWD(2023) 59 final (IA-Report).

12 See Directive 2014/95/EU of the European Parliament and of the Council of 22.10.2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1-9 ('Non-financial Reporting Directive') and the new Directive 2022/2464 of the European Parliament and of the Council of 14.12.2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards Corporate Sustainability Reporting [2022] OJ L 322/15-80. For a conceptual account of why company and contract law should more extensively be studied together – and sustainability is now the field where this becomes highly practical – see S. Grundmann, 'Welche Einheit des Privatrechts? Von einer formalen zu einer gestaltungsorientierten Konzeption des Privatrechts' in S. Grundmann, H. Merkt and P. Mülbert (eds), *FS Klaus J. Hopt zum 70. Geburtstag am 24. August 2010*, De Gruyter, Berlin 2010, passim; S. Grundmann, 'On the Unity of Private Law: From a Formal to a Substance-Based Concept of Private Law' (2010) 18(6) *ERPL* 1055, passim.

13 See D.G. Szabó, *Mandatory Corporate Social Responsibility Reporting in the EU*, Eleven International Publishing, The Hague 2016, p. 256; D.G. Szabó and K.E. Sørensen, 'New EU Directive on the Disclosure of Non-financial Information (CSR)' (2015) *ECFR* 307, 316 et seq. and 326.

14 See the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM(2022) 71 final; C. Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) 7(2) *Business and Human Rights Journal* 291, passim. On due diligence as an instrument imposing one standard for multiple (worldwide) scenarios, see L. Smit, C. Bright, R. McCorquodale, M. Bauer, H. Deringer, D. Baeza-Breinbauer, F. Torres-Cortés, F. Alleweldt, S. Kara, C. Salinier and H. Tejero-Tobed, 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (2020) January, prepared for the European Commission, esp. pp. 200 et seq., 225; N. Bueno and C. Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) *ICLQ* 789, 789 et seq.

because of ageing components or material deterioration, goods with digital elements lack the technological update to function properly. The SGD has tried to solve the first problem by introducing durability as a requirement of conformity (Article 7(2)) and the second by burdening the seller with an ongoing update and/or service obligation (Article 7(3)). However, neither of these provisions is completely convincing as long as the time period for the liability of the seller remains two years.

The digitalisation of goods has accelerated the servitisation phenomenon;[15] that is, the idea of selling goods combined with long-term services, like predictive and/or ongoing maintenance, and repairs. Whereas in b2b contracts such after-sales service contracts are often stipulated by the parties in detail, in b2c contracts they occur (if at all) in the form of extended guarantees. The question of whether the law-maker should introduce such service obligations to keep durable goods intact therefore becomes all the more crucial. Yet, long-term statutory obligations in sales contracts inevitably blur the delineation of sales and services contracts.[16]

The aim to have goods kept usable via servitisation by an outside provider can still go further, often also slightly changing the type of interests served, and thereby blur not only the limits between different contract types, but also between contract law and property law altogether. This is the replacement of sales by a framework agreement – typically a long-term one – to have guaranteed access to the good at pre-fixed conditions (among them, availability at the moment of desired use).[17] Such a change of legal form can reach still further and leave (transfer of) property law behind altogether, even though the arrangement still aims at putting a certain (type of) good at the permanent disposal of the client and keeping it functioning properly. However, the form chosen is then purely service contract-based and includes no transfer of property or longer-term possession (not even in the form of leasing agreements) and therefore already extends beyond sales law proper (see below, section 7.2).

Sustainability, digitalisation, servitisation – all these phenomena place new burdens on the end seller. In a classical distribution chain, professional sellers act as the last link that simply 'passes on' goods without even unpacking them. They do not necessarily have specialised knowledge about the goods as well as their functioning. Of course, in traditional vertical distribution agreements, with

15 See Beale in this volume.

16 See Eggen and Heinze in this volume.

17 See Beale in this volume. See also F. Zoll, 'From a Product-Based Economy to Services? Legal Aspects of an Economy in Transition' in Keirsbilck and Terryn (eds), n. 7 above, pp. 149 et seq.; J. Hojnik, 'The Servitization of Industry: EU Law Implications and Challenges' (2016) 53 *CML Rev.* 1575, 1578 et seq.; M. Eggen, 'Digitale Inhalte und Dienstleistungen' (2021) *SZW* 470, 472 et seq.

servicing arrangements in the case of high-quality or complex goods (such as motor vehicles, computers and high-quality trademark goods), the relationship between the producer and the seller is much 'denser' and their treatment is also different, for instance, in competition law.[18] However, more generally, the obligations of the seller towards the buyer have expanded continuously over the last few decades. Starting with the liability of the seller to repair non-conforming goods and the inclusion of public statements of the producer in the objective requirements that the consumer may reasonably expect, the SGD has now also introduced a liability for omitted updates and/or digital services. It comes as no surprise that more and more opinions are voiced in favour of alternatively introducing a direct claim against the producer.[19] This seems all the more important as the consumer-to-consumer (c2c) re-sale of goods is constantly increasing.[20] In the case of durable goods, granting the consumer-buyer a direct claim against the producer might be an additional incentive to conclude secondhand sales.

Privity of sales contracts is further questioned in relation to online marketplaces which act 'only' as intermediaries, but are eminent actors in the distribution of goods, especially of small and medium-sized enterprises/producers (SMEs). The question of whether these marketplaces will be liable if the buyer does not have a solvent seller/producer to enforce its rights is significant, especially in the context of product liability,[21] as well as regarding sales law remedies.

Below the discussion will attempt to touch upon these issues briefly and to formulate some suggestions for the EU legislator.

18 See Commission Regulation (EU) 2022/720 of 10.05.2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4.

19 See Borghetti and Kryla-Cudna in this volume; Y.M. Atamer, 'Nachhaltigkeit und die Rolle des Kaufrechts: Eine rechtsvergleichende Übersicht zu den Regulierungsmöglichkeiten' (2022) I *ZSR* 285, 285 et seq.; C. Wendehorst, 'Direkthaftung des Herstellers, Eine Machbarkeitsstudie für die Umsetzung der neuen Gewährleistungs-RL in Österreich I and II' (2020) *VbR* 94, passim and 138, passim.; E. van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 *EuCML* 136, 142 et seq.; European Law Institute, *Response to European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse*, European Law Institute Secretariat, Vienna 2022, p. 14; H.-W. Micklitz, V. Mehnert, L. Specht-Riemenschneider, C. Liedtke and P. Kenning, *Right to Repair* (2022), Publications of the Advisory Council for Consumer Affairs, Berlin 2022, p. 55. See for the same discussion already at the time when the CSD was put into force: R. Bradgate and C. Twigg-Flesner, 'Expanding the Boundaries of Liability for Quality Defects' (2002) 25 *Journal of Consumer Policy* 345, passim; M. Ebers, A. Janssen and O. Meyer (eds), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, European Law Publishers, Munich 2009, passim.

20 See Loos in this volume.

21 See de Menech in this volume.

2. THE CHANGING TYPOLOGY OF GOODS

2.1. DURABLE GOODS

For centuries, the essential classifications in sales law regarding goods were movables vs. immovables. Mostly even in relation to the sale of high-value movables like ships, aircrafts and cars, no special rules were provided. In b2b contracts it is common that the default provisions concerning the obligations of the parties and especially the liability period of the seller for non-conformities are changed into tailor-made arrangements, whereas in b2c contracts the consumers are stuck with the default – whether they buy a car or a kilogram of tomatoes, the same provisions apply.

However, sustainability concerns are forcing us to rethink this classical dichotomy. First of all, *durable goods* as a new category need to be given particular attention. Consumer goods are mostly allocated into four main groups showing consumption breakdown by durability: durable goods, semi-durable goods, non-durable goods[22] and services.[23] Goods which can be used repeatedly during a period of time longer than one year are durable goods:

> These include furniture and household appliances (including kitchen equipment), personal transport equipment (i.e. vehicles), recreational and entertainment goods (including computers and communications equipment), other goods such as jewellery, clocks and watches, and therapeutic medical appliances and equipment.[24]

Even though semi-durable goods also last longer than one year, their expected life is often considerably shorter and their purchase price lower in comparison to durable goods.[25] Clothing and shoes would be typical examples of such goods. In 2018, 9% of household consumption in the eurozone was of durable goods.[26]

According to a study by the European Environmental Bureau, extending the average expected lifetime of a typical durable, such as a smartphone, from three years to four years would reduce 2.1 million tons of CO_2 emission per year in the European Union (EU),[27] while extending the lifetime to five years would save 5.5 million tons of CO_2 per year. When producers determine the level of

22 Consumables for everyday use, such as food, hygiene products and medicine.

23 European Central Bank, by A. Casalis and G. Krustev, 'Consumption of Durable Goods in the Euro Area' (2020) 5 *ECB Economic Bulletin* 75, 77.

24 Ibid.

25 Semi-durable goods are therefore reflected in the charts together with non-durable goods and services. See, e.g., Casalis and Krustev, n. 23 above, chart 1.

26 Ibid.

27 F. Zuloaga et al., *Coolproducts Don't Cost the Earth*, EEB, Brussels 2019, p. 5 at <https://eeb.org/wp-content/uploads/2019/09/Coolproducts-report.pdf > accessed 12.01.2023.

investment in the quality – i.e., the durability of their goods – they make (among other things and beyond cases of purposefully building elements of obsolescence into products)[28] an estimate of the average useful life of these goods, the preference change intervals of consumers and the innovation potential in the sector.[29] The quality level of the goods is economically optimal if the technical lifetime corresponds to the useful life of the product. In principle, extending the technical lifetime beyond the useful life might (even) take up ecological resources in an undesirable way (investing too much energy for a good to be discarded earlier). This means that each prolonging of the lifespan of the goods[30] has to be accompanied by measures that steer consumer choices towards durable goods and also using those goods for a longer period.[31] Introducing a special liability regime for durable goods would be one possible way to incentivise consumers. Even though there are critics of a sales law that differentiates according to the type of movables,[32] a one-size-fits-all approach does not seem to be the optimal solution (see also Recital 32 SGD).

28 Planned obsolescence is the targeted (fraudulent) incorporation of vulnerabilities into products, or their subsequent manipulation through software changes, so that the goods are no longer functional shortly after the expiry of the liability period. See Article L441-2 Code de la consommation France; S. Wrbka and L.A. DiMatteo, 'Comparative Warranty Law: Case of Planned Obsolescence' (2019) 21(4) *UPEN Journal of Business Law* 907, passim; A. Perzanowski, *The Right to Repair: Reclaiming the Things We Own*, Cambridge University Press, Cambridge 2022, pp. 56 et seq.; C. Hess, *Geplante Obsoleszenz, Rechtliche Zulässigkeit in der Lebensdauerplanung von technischen Gebrauchsgütern*, Nomos, Baden-Baden 2018, passim; C. Latzel and P. Sausmikat, 'Obsoleszenz – wirtschaftsrechtlicher Rahmen für die Gebrauchsdauer von Produkten' (2016) 37(30) *ZIP* 1420, passim; Prakash et al., n. 6 above, pp. 64 et seq. and 288 et seq.; M. Stadermann, *Rechtliche Regulierung der Produktlebensdauer*, Nomos, Baden-Baden 2019, passim.

29 See Micklitz et al., n. 19 above, pp. 13 et seq.

30 See for regulations regarding design and production Michel, n. 7 above, pp. 61 et seq.; for the revision of the Ecodesign Directive, see the Sustainable Products Initiative of the EU at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en> accessed 10.01.2023.

31 See M. Lehner, O. Mont and E. Heiskanen, 'Nudging: A Promising Tool for Sustainable Consumption Behaviour?' (2016) 134 *Journal of Cleaner Production* 166, passim; M. Lehner, O. Mont and E. Heiskanen, 'Nudging: A Tool for Sustainable Behaviour?' (2014) *Swedish Environmental Protection Agency Report* 6643; M. Gossen et al., 'Nudging Sustainable Consumption: A Large-Scale Data Analysis of Sustainability Labels for Fashion in German Online Retail' (2022) 3 *Frontiers in Sustainability* 922984, passim at <https://www.frontiersin.org/articles/10.3389/frsus.2022.922984/full> accessed 10.01.2023; E. Yoeli, 'Nudging Consumers to Purchase More Sustainably' (2022) *Harvard Business Review*, at <https://hbr.org/2022/08/nudging-consumers-to-purchase-more-sustainably> accessed 10.01.2023; S. van der Linden and E.U. Weber, 'Editorial Overview: Can Behavioral Science Solve the Climate Crisis?' (2021) 42 *Current Opinion in Behavioral Sciences* iii, passim, and Vol. 42 which is dedicated to this question.

32 See F. Faust, 'Regelungsbereich und Harmonisierungsintensität des Richtlinienvorschlags zur Bereitstellung digitaler Inhalte' in M. Artz and B. Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt*, Mohr Siebeck, Tübingen 2018, pp. 91 and 109 et seq.

2.2. SECONDHAND GOODS

A special liability regime also makes sense with regard to secondhand sales. The 1999 CSD had already introduced this category, but had shortened the minimum mandatory liability period to one year (Articles 1(3) and 7(1)) so that sellers and consumers can contractually agree to a shorter liability period. The 2019 SGD did not change this approach (Articles 3(5) and 10(6)). The EU Initiative considered extending the legal guarantee period again in order to motivate consumers to buy secondhand goods.[33] According to the EU Commission: 'Consumer bias against secondhand or refurbished goods also leads to shorter lifetimes for goods, negatively affecting the environment'.[34] However, the Repair Directive Proposal does not follow up on this policy option.[35]

2.3. REFURBISHED GOODS

Another type of goods under scrutiny are refurbished goods. In particular, their categorisation as secondhand goods, as new goods or as a new type of goods is under debate. According to Loos, refurbishment goes way beyond mere repair and cleaning: the goods are made 'as good as new' by inspection, disassembly, cleaning, repair and the replacement of defective parts by new or old parts in such a way that the original quality is again guaranteed.[36] Some trademarks already offer their refurbished old/used products for sale,[37] whereas platforms like Amazon have launched new websites for refurbished goods.[38] If these goods should be qualified as a special category separate from secondhand and new goods, regulation of the seller's obligations becomes necessary – albeit only in

33 European Commission, n. 10 above, sub-option 2A/ii.

34 Ibid., p. 2. For studies in this respect, see P. Singh and E. Giacosa, 'Cognitive Biases of Consumers as Barriers in Transition towards Circular Economy' (2019) 57 (4) *Management Decision* 921, passim. Still famous the seminal article by Akerlof, exemplifies the core problem regarding second-hand purchases as information asymmetries: G. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488, passim. However, auction sales of secondhand goods seem to constitute a signal of quality ('bought at Sotheby's'), sometimes even accompanied by a legal guarantee. See also Loos in this volume.

35 See IA-Report, n. 11 above, p. 173.

36 Loos in this volume. See also V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) 43 *Journal of Consumer Policy* 227, 236.

37 See, e.g., at <https://www.renaultgroup.com/en/news-on-air/news/re-factory-the-flins-site-enters-the-circle-of-the-circular-economy/> accessed 10.01.2023; <https://www.apple.com/ch-de/shop/refurbished/about> accessed 10.01.2023.

38 <https://www.amazon.de/Zertifiziert-Generalueberholt/b?ie=UTF8&node=10676131031> accessed 10.01.2023.

relation to one of the two other categories or, alternatively, some combination (probably closer to the regime of new goods with certain additions).[39] Besides these considerations, also giving the seller the option to replace non-conforming goods with refurbished ones if the consumer chooses a replacement is under discussion.[40] However, although the Repair Directive Proposal finds that the 'vast majority of all stakeholders agreed that providing incentives to buy and use refurbished goods is an important objective for promoting sustainable consumption'[41] it was not taken up in the Directive Proposal.

2.4. GOODS WITH DIGITAL ELEMENTS

One of the major issues that the SGD is aiming to regulate is the sale of 'goods with digital elements' (Article 2(5)(b)). The problem such goods can pose is that their proper functioning often depends on a continuous supply of software, updates and/or digital services. Even though the buyer gains property, the transferred goods require digital content or digital services in order to continue performing their contractual functions (Recital 14–15 SGD). Without these digital elements, the goods (often durable technical goods) can become worthless, and not only in exceptional cases.[42] According to Recital 21 of the Digital Contents Directive (DCD)[43] and Recital 13 SGD, the supply of digital content or digital services, which cannot be categorised as digital elements of a good, is governed by the DCD. Whenever goods are sold (and some digital elements are offered in relation with this contract), it will depend on the interpretation of the requirement that the lack of digital elements would prevent the goods 'from performing their functions' as to whether the SGD and/or the DCD will apply (Article 2(5)(b)

39 See also F. Zoll, J. Watson, K. Południak-Gierz, W. Bańczyk, G. Richter and J. Estifanos, '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' (2022) 3 Transformacje Prawa Prywatnego 109, 135.

40 European Commission, n. 10 above, sub-option 3C. See Zoll et al., n. 39 above, 145.

41 Explanatory Memorandum to the Repair Directive Proposal, n. 11 above, p. 5.

42 See C. Wendehorst, 'Verbraucherrelevante Problemstellungen zu Besitz- und Eigentumsverhältnissen beim Internet der Dinge' in *Rechtsgutachten für das Bundesministerium der Justiz und für Verbraucherschutz*, Sachverständigenrat für Verbraucherfragen beim Bundesministerium der Justiz und für Verbraucherschutz (ed), Berlin 2016, p. 62, who speaks of a 'structural erosion of property and ownership'; A. Janssen, 'The Update Obligation for Smart Products: Time Period for the Update Obligation and Failure to Install the Update' in S. Lohsse, R. Schulze and D. Staudenmayer (eds), *Smart Products*, Nomos, Baden-Baden 2022, pp. 91 and 93; A. Perzanowski and J. Schultz, *The End of Ownership: Personal Property in the Digital Economy*, MIT Press, Cambridge, MA 2018, passim.

43 Directive 2019/770 of the European Parliament and of the Council of 20.05.2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1-27.

SGD). In case software is not of such a nature that its lack prevents the goods from performing their functions, two different solutions apply: non-conformity of the good falls under the SGD, while non-conformity of the digital component falls under the DCD. In principle, the term 'functions' should be given a broader meaning, covering all contractually stipulated features, even if the lack of these digital elements would not cause a total breakdown of the goods, but only the loss of some functions, which either subjectively or objectively form part of the contract.[44] A smart car without the software for the automatic driving system would fail as a whole, whereas a watering system that can no longer be operated remotely due to a failure of the software would simply not fulfil this one feature that was contractually stipulated.[45] Subsuming both problems under the SGD by applying a broader understanding of 'goods with digital elements' is preferable as it makes it possible to apply one set of rules to the contract as a whole instead of splitting it up.[46]

In the event that digital content does not form part of goods but is 'only' supplied on a tangible medium (such as DVDs, CDs, USB sticks and memory cards) or is downloaded directly, the provisions of the SGD do not apply.[47] However, given that in practice contracts regarding the permanent transfer of software – either downloaded directly or transferred via data carrier – are often categorised as sales contracts,[48] this choice of the EU legislator can be questioned. As explained in detail by Eggen, an ebook which is downloaded and transferred to the purchaser for good, without any time limitation or even the ability of the seller to erase such a book, cannot easily be equated to a contract where the book can only be accessed through a database and access to the database expires after a certain period. Even though the Directives leave the classification of the contract, which forms the basis for the permanent software transfer, to the Member States,[49] the decision to substitute all sales law remedies with those for the supply of digital content (despite their parallelism) seems to only trigger further questions regarding the proper classification of these contracts.

44 See Heinze in this volume.

45 See Heinze in this volume.

46 See ibid.; P. Rott, 'The Digitalisation of Cars and the New Digital Consumer Contract Law' (2021) 12(2) *JIPITEC* 156, 159.

47 For the relationship between software and digital content, see C.J. Haller, *Digitale Inhalte als Herausforderung für das BGB*, Duncker & Humblot, Berlin 2019, pp. 30 et seq.

48 See Eggen in this volume. See for the CISG P.K. Wagner, 'Art. 1 CISG' in W. Ball (ed), *Beck'sche Online Grosskommentar*, Beck, Munich 2022, paras. 12 et seq.; P. Huber, 'Art. 1 CISG' in F.J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds), *Münchener Kommentar BGB*, 8th ed., Beck, Munich 2019, paras. 20 et seq.; E. Muñoz, 'Software Technology in CISG Contracts' (2019) 24(2) *Uniform Law Review* 281, 287 et seq.; and for German law, A. Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' (2019) 74(12) *JZ* 577, 578.

49 Eggen in this volume.

3. INFORMATION DUTIES

3.1. EXPLICIT AND IMPLICIT INFORMATION DUTIES IN A STANDARD SALES REGIME

Inherent in the concept of taking market expectations as the prime objective standard for establishing conformity or non-conformity is also an information duty in any case involving products that do not meet this market standard. Lower quality has at least to be disclosed (plus, under new Article 7(5) CSD, specific acceptance by the consumer of this fact is required).[50] Moreover, specific product-related information duties if properly complied with lead to binding commitments via the conformity standard. These are public announcements about such product-related features and qualities that are explicitly characterised as prime sources for defining the standard of conformity.[51] As will be discussed below, tailored information duties exist with respect to issues of durability, but also with respect to compliance with ethical standards in production processes.[52] They are also increasingly gaining in importance beyond their impact on the economic value of the goods, potentially even including a guarantee of morally acceptable production processes. Consumer preferences change over time (especially because of increasing concerns about sustainability in recent years) and imperfect information about the quality and durability of the item may lead to incorrect investment decisions. The constant stimulation of short-lived consumption could more broadly be counteracted by targeted obligations to provide information. Information regarding the lifespan, energy consumption, reparability and recyclability of an item is becoming increasingly important because market transparency has the potential to lead to more sustainable consumption.[53]

50 See S. Grundmann, 'Art. 2' in C.M. Bianca and S. Grundmann (eds), *EU Sales Directive – Commentary*, Intersentia, Cambridge 2002, paras. 26–33. See also below, section 4.3.

51 See also Art. 2(29) and Art. 8 of the Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products (COM(2022) 142 final) which introduces a product passport informing consumers among others about their repairability, as well as the proposal for a Directive on empowering consumers for the green transition through better protection against unfair practices and better information (COM(2022) 143 final, 'ECGT-Proposal'), which provides for better information on the durability and reparability of goods by way of a reparability score (Art. 2).

52 On such specific information duties, which are also durability-related, see Mak and Terryn, n. 36 above, 231 et seq.; Davola in this volume. See also below, section 4.2.

53 Dalhammar et al. in this volume. For the list of goods subject to information duties on energy savings, energy labelling and eco-design requirements, see <https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/energy-label-and-ecodesign/energy-efficient-products_en#fridges> accessed 10.01.2023. See also the ECGT Proposal, n. 51 above, Art. 2. See also the findings of the empirical study conducted in Germany regarding 'repair literacy': Micklitz et al., n. 19 above, 16 et seq., 26.

3.2. SPECIFIC INFORMATION ISSUES IN PERSONALISED SALES CONTRACTS

Market-wide offers and information, as well as more targeted market-wide information like information on sustainability features, constitutes one component of information duties. Also in sales law, this component is increasingly supplemented by more personalised offers (and information), as was already the case long before in financial services and investment advice ('know your customer'). The advent of this trend in sales law has also been motivated by the increased use of automated, data-driven technologies for crafting personalised offers and advertising, followed by sales contracts for such personalised offers and designs of goods.[54] Personalisation indeed often impacts product features and characteristics. As such, there would seem to be a risk that the comparability of offers is lowered, and observation of other consumers' behaviour and joint monitoring of products is weakened. As in investment services and advice, this might suggest an increased duty to explain the suitability of the good in the individual case. In his chapter, Davola develops this as a 'relational model for disclosures'.[55]

4. THE CHANGING CONCEPT OF CONFORMITY OF GOODS

4.1. DURABILITY AS AN ONGOING CONFORMITY REQUIREMENT?

4.1.1. Durability Requirements for Goods in General

The choice of materials, production style, design of individual parts (as well as the combination of these) and other reasons inherent in the manufacturing process can cause the reduced durability of goods. If premature or above-average wear and tear occurs without additional external influences, such as excessive use by the consumer, it must be assumed that the goods already had an inherent non-conformity at the moment of passing of risk. One of the novelties of the SGD is the introduction of 'durability' as an objective requirement for the conformity

54 See Davola in this volume; P. Hacker, 'Personal Data, Exploitative Contracts, and Algorithmic Fairness: Autonomous Vehicles Meet the Internet of Things' (2019) 7(4) *International Data Privacy Law* 266, 279; P. Hacker, *Verhaltensökonomik und Normativität, Die Grenzen des Informationsmodell im Privatrecht und seine Alternativen*, Mohr Siebeck, Tübingen 2017, §11, pp. 654 et seq.

55 See Davola in this volume.

of goods (Article 7(1)(d)) in order to 'achiev[e] more sustainable consumption patterns and a circular economy'.[56]

Recital 32 states that 'to be in conformity, they should possess the durability which is normal for goods of the same type and which the consumer can reasonably expect given the nature of the specific goods'.

The determination of the expected durability according to the usual quality will only be made possible by forming comparison groups for 'goods of the same kind'.[57] Consumer goods from different manufacturers with the same intended use and of approximately the same quality are compared with each other. Branded products must in turn be compared with other branded products. The price of the goods will also be decisive, as it is legitimate that quality expectations of the consumers are formed by the price.[58] According to Article 7(1)(d) SGD, public statements made by the seller or any other person in the contractual chain (including the manufacturer), in particular in advertising or on the label, are taken into account for the determination of such reasonable expectations. If a particular quality, such as durability or service life, is praised in the advertisement, the consumer may also put trust in its existence.[59] In the case of more sophisticated products like cars, certain parts like the brake pads or gear belts may be susceptible to faster wear; consequently, these must be replaced within the usual product life of the item. This is not in itself a durability issue. However, if it is not possible to replace these wearing parts or to repair the goods due to their design, this should constitute a breach of the durability requirement as it directly affects the lifespan of the goods.[60]

Despite the importance of introducing such durability requirements, it mostly remains a paper tiger as long as any legitimate durability expectation beyond the two-year liability period (Article 10(1) SGD) is not protected. Even if the lifetime of an average refrigerator is seven years, the consumer cannot build

56 Directive (EU) 2019/771 of the European Parliament and of the Council of 20.05.2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/33 Recital 32.

57 Atamer, n. 19 above, 290 et seq.

58 C. Hess, *Geplante Obsoleszenz, Rechtliche Zulässigkeit in der Lebensdauerplanung von technischen Gebrauchsgütern*, Nomos, Baden-Baden 2018, p. 129; Wrbka and DiMatteo, n. 28 above, 971. For the correlation of lifetime and prices for washing machines, see Prakash et al., n. 6 above, p. 107.

59 T. Brönneke, R. Schmitt and A. Willburger, 'Warenkauf – Kaufrechtlicher Mangelbegriff und Digitalisierung im Verbrauchsgüterkaufrecht' in T. Brönneke, C. Föhlisch and K. Tonner (eds), *Das neue Schuldrecht*, Nomos, Baden-Baden 2022, §4 Rn. 25.

60 Atamer, n. 19 above, 291; S. Lorenz, 'Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht' (2021) 74(29) *NJW* 2065, 2066. See also I. Bach and E-M. Kieninger, 'Ökologische Analyse des Zivilrechts' (2021) 22 *JZ* 1088, 1093. The supply of spare parts as such is not part of the concept of non-conformity. However, the discussion about the existence of corresponding secondary obligations of the seller is likely to gain momentum. See n. 74 below.

any claim on such expectancy after the two-year liability period has elapsed. This requirement does not even add much to a higher level of durability during the two-year period, as any malfunctioning or breakdown of, for example, a refrigerator during such a period would be qualified as a non-conformity in any case. The only role that the durability requirement could play would be with regard to the determination of the lifespan of semi-durable goods, like a winter coat or winter boots where quality and expectations differ according to factors such as price and whether they are branded goods, and might be shorter than two years.

4.1.2. Durability Requirements for Goods with Digital Content

The SGD does not comprise special durability requirements for goods with digital elements. Yet, in fact, the obligation of the seller to ensure that the consumer is informed and supplied with updates (Article 7(3) SGD) is to a large (and even to the largest) extent an obligation that also serves to accomplish durability of goods.[61] Even though lack of digital content or digital services does not always cause a total loss of functionality, the goods still lose a contractually fixed feature which might be of such importance for the consumer that the further usage of the goods is unthinkable (as with the watering system mentioned earlier that was bought for its remote operation feature). Therefore, the ongoing obligation to ensure updates after delivery of goods is of special importance regarding durability concerns. This primarily includes updates to maintain functionality, but also security updates. Measures against unauthorised access by third parties to data or functions are crucial.[62]

However, the timeframe of such ongoing obligations is very much up to discussion. If the parties define the duration in the contract, these stipulations have priority (Article 6(d) SGD).[63] If the parties do not provide for a timeframe, Article 7(3) SGD will be applied.[64] According to Article 7(3)(a), in a contract

61 See Kryla-Cudna in this volume; A. Hellgardt and V. Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222(2) *AcP* 163, 215; Atamer, n. 19 above, 306 et seq.

62 K. Gelbrich and D. Timmermann, 'Der Mangelbegriff im Kaufrecht nach Umsetzung der WKRL und DIRL' (2021) 41 *NJOZ* 1249, 1253.

63 See Janssen, n. 42 above, pp. 94 et seq., who is expecting at least large sellers of goods with digital elements to adapt their standard contract terms and to specify their obligations in more detail in the future. However, for the contractual shortening of the update period, the requirements of Art. 7(5) SGD have to be observed. See also A. Staudinger and M. Artz, *Neues Kaufrecht und Verträge über digitale Produkte*, Beck, Munich 2022, para. 160.

64 See also ECGT Proposal, n. 51 above, Art. 2 which proposes a change to the Consumer Rights Directive and introduces information obligations for goods with digital elements regarding 'the minimum period in units of time during which the producer provides software updates, unless the contract provides for a continuous supply of the digital content or digital service over a period of time'. However, this information has to be included only if the producer makes such information available.

for a single act of supply of goods with digital content or digital services, the consumer may expect the supply of updates for a 'reasonable time', given the type and purpose of the goods and the digital elements, and taking into account the nature of the contract and the circumstances. This will typically involve statements in advertising, the price of the goods, knowledge about the usual duration of use, the extent of the risk involved without updating and the like.[65] According to Recital 31 SGD, the obligation would normally be for the period during which the seller is liable for a lack of conformity, i.e., for two years. However, in some cases 'the consumer's reasonable expectation could extend beyond that period, as might be the case particularly with regard to security updates'. Under such circumstances, the duration of the update obligation reaches beyond the two years.[66] However, this is problematic, and it remains to be settled how exactly this extended obligation relates to the two-year liability period starting from the moment of delivery.[67]

Also, in contracts involving a continuous supply of digital content or digital service, the duration of the update obligation is unclear. If the parties have not defined anything in the contract, the timeframe of the supply obligation will be decisive. As long as the digital content or service has to be supplied, necessary updates need to be provided too. The SGD sets this timeframe at two years (Article 7(4)(b) and Article 10(2)). For example, the Austrian Consumer Warranty Act 2022 now states in §7 that in the event that a supply over an indefinite period of time is contracted for, the update requirement will last for at least two years.[68] In contrast, the German Civil Code (BGB) again seems to apply the reasonable expectations criteria in these cases. §475c BGB on continuous supply obligations refers to the reasonable expectation criteria in §475b Abs. 4 Nr. 2 BGB with regard to the duration of the supply obligation

65 Gelbrich and Timmermann, n. 62 above, 1253.

66 See also Entwurf eines Gesetzes zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags, RegE, BT-Drs. 19/27424, 33; F. Faust, '§475b BGB' in W. Hau and R. Poseck (eds), *Beck'sche Onlinekommentar*, 64th ed., Beck, Munich, para. 29; C. Wendehorst, 'The Update Obligation: How to Make it Work in the Relationship between Seller, Producer, Digital Content or Service Provider and Consumer' in Lohsse, Schulze and Staudenmayer (eds), n. 42 above, pp. 63 and 78; Janssen, n. 42 above, p. 101. In contrast, if the goods are short-lived, an update obligation might not even exist for the whole two years. See Kryla-Cudna in this volume. See also Janssen, n. 42 above, p. 100; F. Faust, '§475b BGB' in Hau and Poseck (eds), *Beck'sche Onlinekommentar*, paras 28 f., who seems to interpret the two-year period as a minimum duration. This also seems to be the approach taken in §10(2) of the Austrian Consumer Warranty Act.

67 The German legislator, for example, provides in §475e(2) BGB that claims based on a breach of the updating obligation under section 475b(3) or (4) BGB shall not become time-barred before the expiry of 12 months after the end of the period of the updating obligation.

68 For a critical take regarding this provision, see C. Wendehorst, 'Die Regelungen des VGG zu digitalen Leistungen unter besonderer Berücksichtigung der Aktualisierungspflichten' in P. Bydlinski (ed), *Das neue Gewährleistungsrecht: und einige weitere Novitäten des GRUG*, Verlag Österreich, Vienna 2022, pp. 49 and 78.

and thereby defines the timeframe for it, as well for the updates.[69] All in all the scope of the update obligation, how long it will last and how national limitation/liability periods relate to a possible extended period will certainly require further clarification by the European Court of Justice (ECJ).

The SGD does not contain any special provision regarding the update obligation for secondhand or refurbished goods. Without a contractual exception, updates will also have to be provided in these circumstances.[70] The reasonable expectations of consumers and the liability period for such goods will be decisive in ascertaining the length of the update period.

In addition to the obligation to supply updates, the seller also has a related information duty: whenever new updates are available, this has to be communicated to the consumer together with the possible consequences of not installing the updates (Article 7(3) SGD).[71] If the consumer fails to install the updates in a reasonable time or installs them incorrectly, the seller will not be liable for any resulting non-conformity (Article 7(4) SGD).[72]

4.1.3. A Continuous Obligation to Keep Durable Goods in Conformity?

What is special about the obligation to supply updates is that the classical one-off sales law obligation of the seller to deliver goods which are in conformity with the contract at the time of delivery is accompanied by an ongoing and continued obligation.[73] It is no longer the moment of passing of risk which is decisive for the ascertainment of the non-conformity of the goods; the acts and omissions of the seller after the passage of risk can also cause the goods to become non-conforming. The seller's obligations are extended by an auxiliary obligation, which is normally expected to be stipulated by the parties in their contract. In fact, in b2b contracts for the sale of, for example, a machine, it would be usual to include an accompanying maintenance, updating or service duty for a certain time period.

What is new, and constitutes a shift of paradigm is that such ongoing obligations now form part of the objective requirements in b2c contracts.[74] Whereas in a contractual setting sellers would promise such obligations mostly

69 See RegE, BT-Drs. 19/27424, 35; W. Ball, 'Art. 475c BGB' in M. Herberger, M. Martinek, H. Rüssmann, S. Weth and M. Würdinger (eds), *jurisPK-BGB*, 10th ed., Juris, Saarbrücken 2023, para. 11; T. Pfeiffer, 'Neues Kaufrecht – Die Umsetzung der Warenkaufrichtlinie in Deutschland' (2022) 5 *GPR* 223, 229.

70 Gelbrich and Timmermann, n. 62 above, 1253. See also below, section 4.3.

71 See on the content of such information Wendehorst, n. 66 above, 81–82.

72 Janssen, n. 42 above, p. 106.

73 See Heinze and Kryla-Cudna in this volume; S. Lohsse, R. Schulze and D. Staudenmayer, "Smart Products": A Focal Point for Legal Developments in the Digital Economy' in Lohsse, Schulze and Staudenmayer (eds), n. 42 above, pp. 11 and 17; R. Schulze and F. Zoll, *European Contract Law*, 3rd edn., Nomos, Baden-Baden 2022, §5 para. 47.

74 Wendehorst, n. 66 above, 68.

if they are also the manufacturers of the goods, the SGD does not make any distinction, even though the end sellers in most cases will not be in a position to supply updates or services themselves. How exactly the seller can 'ensur[e] that the consumer is informed of and supplied with' the updates or the digital services remains to be settled, as the seller will not know when updates are made available, or by whom they are served, or which of their customers is affected by such an update and therefore need to be informed.[75] It is also unclear how the end seller can legally force third parties to supply the consumer with these updates and/or services, as in most cases they will not even have a contractual relationship with the third party.[76] For the time being, it can only be hoped that software or service providers as well as producers will also be intrinsically motivated to the necessary degree to provide consumers with the necessary digital content.[77] If they do not, the liability of the seller would be for non-conformity arising due to, for example, a missing update or for an update which was unsuccessful.[78]

It will be further discussed below whether the better option might be to burden the producer with such an update duty.[79] However, what is important in the context of durable goods is that this paradigm shift of the EU law-maker could also incentivise a discussion regarding a general maintenance duty of the seller and/or the producer. Currently, sales law provisions have always distributed the risk of non-conforming goods between the parties by using time limits. The seller has to cover any lack of conformity which exists at the moment when the goods were delivered, and which becomes apparent within two years from that moment. Conversely, the buyer has to carry the risk of any adverse development, including a lack of conformity becoming apparent after these two years have passed. During the liability period, the seller has to, for example, repair the goods for free, and after the expiration of the period, the buyer has to pay for any repair. In most cases, the seller/producer is not obliged by statute to offer such maintenance options, especially in relation to spare parts.[80]

75 See. ibid., 74 et seq.

76 According to Recital 15 SGD, the fact that the consumer may have to conclude an end-user licensing agreement with the third party does not change the fact that the seller is liable for non-conformities.

77 Janssen, n. 42 above, p. 98.

78 Recital 30 SGD expressly states that the seller shall also be liable for a lack of conformity occurring due to a defective update. Regarding the date at which an update obligation is to be honoured, see, for instance, Pfeiffer, n. 69 above, 229; F. Faust, '§475c BGB' in Hau and Poseck (eds), n. 66 above, para. 6.

79 See below, section 5.1.

80 See, e.g., Frankfurt a.M. Higher Regional Court (OLG Frankfurt a.M.), Hinweisbeschluss 18.02.2019–13 U 186/17, which states that a norm establishing an obligation on the part of the manufacturer or importer vis-à-vis the end-consumer to keep spare parts available for the entire life of the goods is found neither in German law nor in EU consumer law. According to the court, such a claim also cannot be derived from an existing relationship of trust or §242 BGB. However, this issue is highly controversial; see Pfeiffer, n. 69 above, 227; W. Ernst, 'Art. 280 BGB' in W. Krüger (ed), *MünchKomm/BGB*, 9th ed., Beck, Munich 2022, para. 123; H. Sutschet, 'Art. 241 BGB' in Hau and Poseck (eds), n. 66 above, para. 102, who favours an ancillary obligation of the seller to ensure the supply of spare parts to consumers for a reasonable period of time based on the normal life expectations of the products.

Some of the recent EU Commission Regulations which have been issued based on the Ecodesign Directive[81] now stipulate not only that certain goods must function in an energy-efficient manner, but also that manufacturers or importers must provide professional repairers, appliance-specific repair and maintenance information, and spare parts for a specified period of time. Since 1 March 2021, for example, a period of at least seven years will apply to refrigerators and ten years to washing machines after placing the last unit of the model on the market.[82] The durability of these goods for this period, even after a repair, is implied. The Repair Directive Proposal follows this approach and additionally provides for an obligation of the producer (or authorised representative in the Union) to repair such goods outside the liability period of the seller upon the request of consumers for free or for a price.[83] However, these regulations only give consumers the chance to repair their durable goods and to have this repair for a more competitive price as the market will be opened to professional repairers.

By contrast, introducing mandatory regular maintenance checks for durable goods could prolong their lifespan if, for example, filters or parts would be changed and a professional control would be conducted. Remote software-driven fault diagnostic technics will probably also facilitate preventive checks. Such maintenance obligations would aim at precluding non-conformities from arising later. They could be incentivised, in parallel to the case of updates (Article 7(4) SGD), by informing the consumer that missing such maintenance checks could result in, for example, a limited liability of the seller. Obviously, the crux of such ongoing obligations would be the costs. The EU legislator has placed the burden for the costs of supplying updates on the seller, even though this obligation can last longer than the liability period. Implementing updates are certainly less costly in comparison to conducting a maintenance check. However, updates also involve an important development investment, which should not be underestimated. At the end of the day, any additional costs of updates as well as maintenance checks will be factored into the sales price and the buyers will need

81 Directive 2009/125/EC of the European Parliament and of the Council of 21.10.2009 Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Related Products (recast) [2009] OJ L 285/10–35. See also the proposal for the new Regulation of the European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC COM(2022) 142 final.

82 Regulation on Ecodesign Requirements of Refrigerating Appliances (EU) 2019/2019 [2019] OJ L 315/187; Regulation on Ecodesign Requirements for Household Washing Machines and Washer-Dryers (EU) 2019/2023 [2019] OJ L 315/285.

83 Repair Directive Proposal, n. 11 above, Art. 5.

to pay for it. But any possible increase in the price of durable goods due to such additional costs on the part of the seller/producer could be welcomed as a nudge to consumers to use their durable goods for a longer period and to make use of such maintenance checks which are offered for free.

4.1.4. *Modification of the Digital Elements of the Goods and Non-Conformity*

Digitalisation and servitisation provide the supplier of the digital elements with the chance to influence the goods even after the buyer has gained property. However, the SGD does not address the issue of modifications made to the digital elements of the goods. If, for example, a smart watch with special health features like pulse rate measurement, measurement of oxygen saturation in the blood and fall detection with an emergency alarm no longer offers the alarm feature, this would constitute a modification of performance.[84] Article 19 DCD provides for a special rule regarding the modification right of the trader only if the digital content and/or digital service is to be supplied over a period of time. In such a case, if the prerequisites of Article 19 DCD are fulfilled, i.e. especially if there is a valid reason no longer to offer that digital content/service, a modification can be made.[85] However, if such modification has a major negative impact on the consumer, they will have a right to terminate the contract free of charge (Article 19(2) DCD). The approach of the DCD is certainly suitable for a long-term relationship where both parties are also exchanging performances over a longer period. The trader has a limited right to change the content of its performance and the consumer has a corresponding right to terminate.

However, in one-off sales contracts, this particular feature is missing.[86] The consumer is making a lump-sum payment at contract conclusion, including for some future digital services that are promised.[87] In principle, the seller has no right to change the content of these pre-paid services, at least for the timespan in which the consumer has a contractual right to demand that these digital services are offered. The discussion above regarding what this exact time period may be (two years vs. reasonable expectation) is also going to be relevant in this regard. Any modification during this period could constitute a lack of conformity if it falls beyond what was contractually stipulated and could trigger the remedies in

84 See K. Sein, 'Modifications of Digital Content or Services and of Digital Elements in Smart Products – Possible Application Problems' in Lohsse, Schulze and Staudenmayer (eds), n. 42 above, pp. 111 and 115.

85 In detail, see M. Wendland, 'Art. 19 DCD' in R. Schulze and D. Staudenmayer (eds), *EU Digital Law, Article-by-Article Commentary*, Nomos, Baden-Baden 2020, paras. 9 et seq.

86 See C. Wendehorst, 'Die neuen kaufrechtlichen Gewährleistungsregelungen – ein Schritt in Richtung unserer digitalen Realität' (2021) 76(20) *JZ* 974, 982 on the question why the remedies offered in Art. 19 DCD are not suitable for sales contracts.

87 Ibid., 981.

Article 13 SGD. Should the seller stipulate in the sales contract a right to change the contract terms or the content of the offered digital service, such term will be subject to an unfair contract terms control.[88]

A modification of the digital service will only be permitted if this period has elapsed, but the service is still being provided to the consumer. Often this ongoing relationship will not be between the seller and the consumer, but between a third-party service provider (e.g., a software as a service (SaaS) provider) and the consumer. In such a case, Article 19 DCD will be relevant.

4.2. ETHICAL PRODUCTION PROCESSES AS A CONFORMITY REQUIREMENT?

The growing concern for a more sustainable lifestyle inevitably leads to a change in consumer behaviour. Shoppers might, at least as an overall trend, be willing to pay more to reduce their environmental footprint and support fair production processes. Sales of organic and ecologically sensitive products are booming. Companies show their commitment by joining corporate sustainability initiatives like the United Nations (UN) Global Compact. When making their purchasing decisions, buyers rely on information provided by the seller or manufacturer before the contract is concluded. Labels like Fairtrade, Marine Stewardship Council (MSC) and EU organic are important sales promoters. This raises the question of the extent to which warranty rights under sales law can be relevant in the event of non-conformity with certification criteria, or the production methods declared by the manufacturer.[89] These declarations would seem to be clearly more loaded with promissory content then mere advertisement that has already been characterised as 'public statement' in Article 2(2)(d) CSD, which also determine the (subjective) standard of conformity.[90] The question also becomes more relevant in the light of increasing requirements regarding corporate sustainability reporting,[91] especially if there is a clear and binding statement in the report concerning all products of the manufacturer. This statement may very well be relevant for defining conformity standards of the goods.

88 Sein, n. 84 above, p. 128.

89 Whereas in b2c constellations representative actions for the protection of the collective interests of consumers might become relevant in b2b contracts, buyers serving markets for ethically produced goods will certainly have an incentive to make use of their remedies under the contract.

90 See F. Faust, '§434 BGB' in Hau and Poseck (eds), n. 66 above, para. 112 (also on the new wording of §434 (3) sentence 1 n° 2 BGB, which is explicit in this respect).

91 See n. 11 above.

Article 7(1)(d) SGD expressly states that goods need to possess the qualities and 'other features' which the consumer may reasonably expect, 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. Even though it can be contentious under national laws whether and to what extent non-physical features of the goods (especially the production processes) can qualify for a non-conformity,[92] it seems rather unproblematic to subsume these under the objective requirements in b2c sales contracts given the open-ended definition in Article 7(1)(d) SGD. Expectations of the consumers regarding 'other features' of the goods will be formed by pre-contractual statements about ethical production processes, especially in advertising or on labelling. However, for the time being, an objective requirement according to which goods in general need to be produced corresponding to ethical standards cannot be assumed.[93] Even though durability has become such an objective requirement with the SGD, compliance with ethical standards will only become relevant for the conformity of the goods if public statements to this effect were made in the sales chain. This may also be supported by the strong likelihood that consumer preferences are still more homogeneously in favour of 'solid' durability in comparison to ethical standards being employed in the production chain, given that the preference for durability can be grounded both in ecological/ethical *and* in economic advantages.

In addition, regarding international sales contracts subject to the CISG, the issue has been gaining importance as markets for ethically produced goods are expanding.[94] It is generally accepted that such production standards can form part of the contractually defined conformity requirements.[95] But unlike the

92 For the discussions under German law, see, e.g., J. Lüttringhaus, 'Kaufrechtliche Gewährleistungsansprüche bei "ethischen" Produkten und öffentlichen Aussagen zur Corporate Social Responsibility, Zugleich ein Beitrag zur Weite des Beschaffenheitsbegriffs des §434 BGB' (2019) 1 *AcP* 29, passim.; U. Schroeter, 'Risikoberichterstattung in der "nichtfinanziellen Erklärung" Massstab, Adressaten und gewährleistungsrechtliche Publizitätshaftung' in S. Grundmann, H. Merkt and P. Mülbert (eds), *Festschrift für Klaus J. Hopt zum 80. Geburtstag am 24. August 2020*, De Gruyter, Berlin 2020, pp. 1155 et seq.; B. Grunewald, 'Verkäuferhaftung für unrichtige CSR-Berichte des Herstellers' (2021) 74(25) *NJW* 1777, passim. Under Swiss law, see Y.M. Atamer and P.M. Gerber, 'Ethische Produktionsprozesse als Merkmal der Mangelfreiheit der Kaufsache?' (2022) 11 *AJP* 1159, passim.; under the CISG, see I. Schwenzer, 'Conformity of the Goods: Physical Features on the Wane?' in I. Schwenzer and L. Spagnolo (eds), *State of Play: The 3rd Annual MAA Schlechtriem CISG Conference*, Eleven International, The Hague 2012, pp. 103 et seq.

93 Hellgardt and Jouannaud, n. 61 above, 214.

94 See, e.g., I. Schwenzer and E. Muñoz, 'Sustainability in Global Supply Chains under the CISG' (2021) 23(3) *European Journal of Law Reform* 300, 310 et seq.

95 S. Kröll, 'Art. 35 CISG' in S. Kröll, L. Mistelis and P. Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)*, 2nd ed., Beck, Munich 2018, paras. 59-61; I. Schwenzer, n. 92 above, p. 105; P. Hachem, 'Art. 35 CISG' in W. Ball (ed), *beck-online Grosskommentar zum CISG*, Beck, Munich 2022, n. 13.

SGD, the CISG does not clarify to what extent sellers are also liable for public statements made in the sales chain, especially by producers.[96] It is certainly preferable to give such statements weight when defining the standard for fitness of the goods for a particular purpose (Article 35(2)(b) CISG), as well as for an ordinary purpose (Article 35(2)(a) CISG).[97] A broad understanding of the features of the goods and therefore also of the seller's liability for statements in the sales chain would help highlight the steering function of sales law.[98] As especially in b2b constellations the purchasers' own liability for their supply chain may increasingly come into question,[99] they will have a major incentive controlling their suppliers and also enforcing remedies under sales law. This pressure on companies to keep their ethical promises and to abstain from greenwashing and bluewashing is to be welcomed.

4.3. DEFINING SUBJECTIVE REQUIREMENTS (ARTICLE 6 SGD) OR DEVIATING FROM OBJECTIVE REQUIREMENTS (ARTICLE 7(5) SGD)?

A final issue, which is prone to cause problems in practice and will need some further clarification by courts, is the relation of the subjective and objective requirements of the goods.[100] Unlike the CSD, the SGD states in Recital 29:

> [I]n order to be in conformity, the goods should not only comply with the subjective requirements for conformity but should in addition comply with the objective requirements for conformity set out in this Directive.

The equal ranking of these prerequisites is also underlined in Article 5 SGD. Furthermore, according to Article 7(5) SGD, in order for a contractual exclusion of the objective requirements to occur the consumer must have been specifically informed that a particular characteristic of the goods is deviating from these requirements, and the consumer must expressly and separately accept this deviation when concluding the sales contract.[101]

96 See Grundmann, n. 50 above, Art. 2, para. 5, who pleads for the application of the approach in Art. 2 of the Consumer Sales Directive in b2b contracts too; concurring, and more extensively, see Atamer and Gerber, n. 92 above, 1164 et seq.

97 Schwenzer and Muñoz, n. 94 above, 322 et seq.

98 Hellgardt and Jouannaud, n. 61 above, 211 et seq.

99 See, e.g., the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM(2022) 71 final, Art. 22 which introduces a liability for damages in the event that due diligence requirements are not complied with.

100 See Heinze and Loos in this volume.

101 For details, see F. Faust, '§476 BGB' in Hau and Poseck (eds), n. 66 above, paras. 19 et seq.; B. Gsell, 'Informationspflichten im europäischen Verbraucherrecht' (2022) 2 *ZfPW* 130,

Tensions will especially arise in the process of distinguishing contractual stipulations regarding the nature, model and/or quality of the goods (which can also be concluded impliedly, Article 6 SGD), and stipulations excluding some features which the goods *objectively* should possess (which is only validly possible by way of an express and separate statement of the consumer, Art. 7 SGD).[102] For example, when buying a new refrigerator, the buyer will obviously have several options on offer by the same seller. The price and quality segment of the chosen refrigerator will also be decisive for the objective requirements that the same buyer 'may reasonably expect given the nature of the goods' (Article 7(1)(d) SGD). If the refrigerator belongs to a high-end segment, a longer durability will be expected. In the event that the seller wants to exclude such features, the procedure in Article 7(5) SGD needs to be followed. However, the choice for the consumer between a fridge with an energy efficiency class of D or F is left to them only, and does not mean that this fridge already deviates from a certain *objective* standard in this case, i.e. requires a particular acceptance from the consumer for exempting the seller.

The problem will become yet more challenging when buying secondhand goods. An interpretation that even for the qualification as 'secondhand' goods an express and separate acceptance of the consumer is needed would not convince.[103] These goods constitute a category of themselves – a secondhand car is not a new car which derogates from some objective requirements. Consequently, a more detailed description of the goods (e.g., the mileage of a car, the more advanced state of wear and tear of trim and upholstery) should be possible and should therefore define the genre of the goods the consumer is purchasing. Only then might the objective requirements for 'goods of the same type' kick in. However, the consumer must be informed about the fact that they are purchasing used or refurbished goods. If an average circumspect consumer can understand that they are not buying new goods, this should be enough to subject these goods to a different regime.

In relation to refurbished goods, a regulation by the EU law-maker seems to be inevitable. Amazon, for example, states on its website that these goods are 'professionally inspected' and 'rigorously tested' and are granted a 'one-year Amazon Renewed Guarantee'. Whether such goods are closer to secondhand goods or to new goods is important in terms of defining the objective requirements of conformity, the applicable liability period and also how free the parties are in defining the relevant features of the goods.

144 et seq.; R. Rachlitz, L. Kochendörfer and J. Gansmeier, 'Mangelbegriff und Beschaffenheitsvereinbarung, Zur Neufassung der §§327e, 434, 475b und 327h, 476 Abs. 1 Satz 2 BGB' (2022) 14 *JZ* 705, 713.

102 For more detail on this discussion, see e.g., Faust, n. 90 above, paras. 64–65.

103 See in detail Loos in this volume.

5. PRIVITY OF CONTRACT IN VALUE CHAINS AND NETWORKS

5.1. DIRECT CLAIM AGAINST THE PRODUCER?

The doctrine of privity of contract whereby only parties to the contract may derive rights and obligations from the contract is deeply rooted in most jurisdictions. The reason for the parties' liabilities lies in the contractual exchange of promises. In principle, no third party should have a right based on the contract and nor (even more strictly observed as a rule) should they be liable for the breach of the contract.[104] However, there are also well-established exceptions to this basic rule – either developed in case law (e.g., in Germanic legal systems, the 'contract with protective effect in favour of third parties'[105] and in English law on the grounds of public policy)[106] or based on statutes (e.g., insurance contracts).

Sales law might be a new candidate for such a statutory exception. Economic conditions have undergone fundamental changes since most of the codes on contract and sales law came into force. In particular, division of labour has led to the development of complex distribution systems. Often, the final consumer does not buy goods directly from the manufacturer, but from the retailer, who acts as the last link in a long sales chain and just 'passes on' goods without even unpacking them. Even though the distribution chain can be seen as a string of contracts from a legal point of view, from an economic perspective, these contracts constitute one single process.[107] Producers use such system of distribution only if value analysis shows that using a channel partner, despite the costs, is more profitable than distributing the goods themselves.[108] Under these

104 See, e.g., M. Bridge, *The International Sale of Goods*, 4th ed., Oxford University Press, Oxford 2017, paras. 8.67 et seq.

105 M. Hassemer, *Heteronomie und Relativität in Schuldverhältnissen*, Mohr Siebeck, Tübingen 2007, pp. 52 et seq.

106 See M. Furmston and G. Tolhursy, *Privity of Contract*, Oxford University Press, Oxford 2015, para. 3.21.

107 C. Cordes, *Originärer Direktanspruch des Endabnehmers gegen den Hersteller, Das Haftungsregime in der Warenabsatzkette*, Nomos, Baden-Baden 2013, p. 44. See for an economic rationale, based on the key principle of normative individualism, that may speak in favour of the 'juridical construction' in single contracts, S. Grundmann, 'Contractual Networks in German Private Law' in F. Cafaggi (ed), *Contractual Networks, Inter-firm Cooperation and Economic Growth*, Edward Elgar, Cheltenham 2011, pp. 111 et seq. and 129 et seq.; S. Grundmann, 'Die Dogmatik des Vertragsnetzes' (2007) 207 (6) *AcP* 718, 735 et seq.

108 The expanding volume of 'direct to consumer selling' (d2c) where the buyer is purchasing from the producer without any intermediary shows that sales channels are adjusting to changing technological means as well as profitability. For example, in 2019, d2c retail e-commerce sales in the US amounted to US$76.57 billion out of a total of US$552.1 billion retail e-commerce revenue (13.86%). In 2024 it is forecasted to grow to US$212.9 billion out of a total of US$1,281 billion retail e-commerce revenue (16.61%). See the study Digital & Trends, d2c e-commerce at <https://www.statista.com/study/107050/d2c-e-commerce/>

market conditions, privity in sales law at least needs to be discussed, and this is what the authors of this chapter did extensively.

The first set of reasons for a possible direct claim arises from the viewpoint of the commercial end-seller. The tendency to increasingly burden them with the risk of non-conforming goods reached a point where the balance between the producer and seller might need to be struck again. The objective conformity requirements of the goods have constantly broadened over the years. The seller meanwhile has to stand in for all public statements made by others in the sales chain, as these statements contribute to the legitimate expectations of the purchaser, especially if these are included in advertisements. Limiting these expectations is only possible by concluding a separate agreement with the consumer (Article 7(5) SGD). Any lack of conformity which becomes apparent within one year of the time when the goods were delivered is presumed to have existed at the time when the goods were delivered (Article 11(1) SGD). Besides, with the implementation of the CISG and the CSD, the seller is burdened in most European sales law provisions in b2c as well as b2b contracts with a repair obligation. The SGD has broadened the scope of the seller's liability yet again and has introduced the obligation 'to ensure' that the consumer is provided with the updates and necessary digital services.[109] Just like in the case of repair, the seller has mostly no knowledge regarding goods with digital elements and might not even know when and by whom updates are going to be provided.[110] Still, the seller has the duty to inform all their customers of the updates, which means that they also need to keep the necessary records for years to come. This, however, would admittedly also be the case if a direct claim were to be accepted. Even though one can expect that, just like in the case of repair services, the producer will offer the seller the necessary access to the information as well as to the networks, it could still be argued that the seller should not be the only one who is liable to the buyer. Such liability means that the seller carries the full risk of losing their right of redress due to an insolvency of the previous link, or a contractual liability limitation, or due to limitation/liability periods which have

accessed 16.01.2023 and <https://www.statista.com/statistics/272391/us-retail-e-commerce-sales-forecast/> accessed 16.01.2023. These figures must, of course, be placed into the context of the much higher overall volume (that, however, is not directly comparable as it comprises b2b, b2c and d2c transactions), and that would suggest that direct selling via digital conduits still constitutes a rather small overall fraction of the total retail volume. See US retail sales volume of US$6.58 trillion in 2021 at <https://www.statista.com/statistics/443495/total-us-retail-sales/> accessed 16.01.2023.

109 See above, section 4.1.2.

110 Wendehorst, n. 68 above, 96; C. Wendehorst, 'Verbraucherrelevante Problemstellungen zu Besitz- und Eigentumsverhältnissen beim Internet der Dinge' (2016) *Juli Wissenschaftliches Rechtsgutachten*, 72 et seq.; A. Janssen, 'Die Aktualisierungspflicht des Letztverkäufers für Smart Products: Ein neues haftungsrechtliches Damoklesschwert?' (2021) 29(4) *ERPL* 557, 557 et seq.

passed in their upstream contracts.[111] Besides, recourse along the distribution chain could lead to an unreasonable multiplication of legal disputes.[112] However, a powerful counter-argument would be – on the side of the distribution chain – that this is in the hands of this chain and network, and good arrangements do exist and constitute a competitive advantage for members of such chains. A streamlined organisation and settlement of these claims within the chain might even be hampered if claims aimed at different members would be allowed for.

Looking at the issue from the consumer/buyer's side is perhaps even more important, and constitutes the core of vulnerability concerns. There are also several reasons why a sole claim against the seller might no longer convince. A claim against the seller is good enough as long as the buyer can really enforce it. However, the seller has several defences they can bring forward against the buyer. First of all, the repair or replacement claim can be blocked if one of these (or both of them) is impossible or would impose disproportionate costs upon the seller (Article 13(3) SGD). Under such circumstances, the buyer only has the options to reduce the price or to avoid the contract. As put forward by Kryla-Cudna in this volume, the probability that such a defence is used by sellers for goods with digital elements is even higher, as the obligation to supply updates might often become impossible.[113] This would surely counteract the idea of the sustainable usage of durable goods. However, if the buyer would have a direct claim against the producer, such a defence would, in most cases, become inapplicable. An alternative, of course, could be not to accept this excuse of the seller and to interpret their obligation as to encompass the arrangement of such repair, etc. in the distribution chain (up to the producer). In distribution chains for high-value products, where detailed arrangements are made, this constitutes day-to-day practice.

Another obstacle for the buyer is the lapse of the two-year liability period starting from the moment of delivery. As already mentioned, such a period does not seem to protect the interests of the buyers sufficiently if durable goods with a much longer life expectancy are sold. Short liability periods with a fixed starting point are meaningful when a risk is distributed between the parties and both cannot be blamed for such a risk. Whereas this is true for the seller, it is certainly not true for the producer – i.e., the person responsible for the non-conformity. The same is true regarding damages claims by the buyer. In fault-based contractual liability systems, the buyer cannot enforce any damages claims against the seller as long as they are not the producer or have at least some other fault in causing

111 Hassemer, n. 105 above, pp. 116 et seq.; Cordes, n. 107 above, pp. 54 et seq.

112 Borghetti in this volume; Wendehorst, n. 19 above, 96.

113 Kryla-Cudna in this volume; H. Schulte-Nölke, 'Digital Obligations of Sellers of Smart Devices under the Sale of Goods Directive 771/2019' in Lohsse, Schulze and Staudenmayer (eds), n. 42 above, pp. 47 and 50.

the non-conformity of the goods after the production phase. Again, however, this is just a majority view in certain jurisdictions. Interpretation could also hold that fault by the producer is to be attributed to the seller as well via principles of vicarious liability[114] – i.e., that the seller is responsible for the distribution chain as a whole (and has a right to redress against the producer for this reason).

Most sales law disputes arise from a missing objective requirement of the goods – i.e., a non-conformity – which is traceable back to the production process. However, it is often pure coincidence whether the buyer shops directly from the producer or from some other seller in the sales chain. Holding the producer directly liable might be a fair response to the fact that in today's economies, buyers' choices are not dominated by who the sellers of the goods are, but by whom they are produced and/or which brand they are.[115] Consumers put trust in brand names and therefore often perceive the producer as the one responsible for any non-conformity of the goods. This trust may deserve to be protected if distribution chains do not provide for any cure. In this case, direct producer liability would serve the proper enforcement of the rules on non-conformity. Borghetti, for example, underlines in this volume that the argument that such direct liability would increase the burden on businesses is rather cynical, as it amounts to arguing that businesses should keep enjoying the economic benefits of the underenforcement of liability rules.[116] An alternative would be – via doctrinal and juridical fine-tuning – not to allow for the defences of the seller that would be welcome to them, but would weaken the position of the buyer.

The true overarching concern and overall task today is to elaborate – from legislative, doctrinal and adjudication perspectives – how a regime that properly

114 See in more detail S. Grundmann, '§278 BGB' in W. Krüger (ed), *Münchener Kommentar BGB*, 9th ed., Beck, Munich 2022, paras. 5, 23, 31, 34, 37; see also F. Peters, 'Die Erfüllungsgehilfen des Verkäufers neu hergestellter Sachen' (2010) *ZGS* 24, 24 et seq.; U. Schroeter, 'Untersuchungspflicht und Vertretenmüssen des Händlers bei der Lieferung sachmangelhafter Ware' (2010) 10 *JZ* 495, 497–499; M. Weller, 'Die Verantwortlichkeit des Händlers für Herstellerfehler' (2012) 65(32) *NJW* 2312, 2316 et seq. See most recently on the attribution via §278 BGB; M. Denga, *Zurechnung, Vom Trennungsprinzip zum Mehrebenensystem*, Mohr Siebeck, Tübingen 2022, pp. 77 et seq.; Y.M. Atamer, 'Haftung des gewerblichen Verkäufers für Schäden durch mangelhafte Ware: Ist das Verschuldenserfordernis sachgerecht?' (2011) 130 (I (4)) *ZSR* 449, passim.

115 When speaking of the 'producer', we understand this to be the manufacturer of the goods or anyone who, by putting their name, trademark or other distinguishing feature on the product presents themself as its producer. See Art. 3(1) of Council Directive 85/374/EEC of 25.07.1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29–33. If the producer is not established in the EU, liability could be distributed in parallel to Art. 3 of the current Product Liability Directive or Art. 7 of the Proposal to revise this Directive (28.09.2022, COM(2022) 495 final). This would mean that the importer and, if they are also not seated in the EU, the distributor of the product in the EU can be held liable. The new Proposal also suggests liability of the fulfilment service provider in Art. 7(3).

116 Borghetti in this volume.

serves the consumers' legitimate expectations could be shaped under a one-claim or, alternatively, under a competing-claims regime without neglecting the network-internal concerns. Consumers' (and any clients') concerns in this respect include durability and ethical concerns. If the disruption of arrangements in distribution chains in day-to-day business is a major concern as well, the discussion should also consider smart and nuanced approaches – for instance, opening up direct claims for excess cases (like intentional fraud) and leaving the normal day-to-day regime unchanged. The VW-Diesel Emission scandal, which triggered thousands of damages claims against the producer based on tort law (as claims based on contract law against the seller were time-barred),[117] is certainly one such extreme example.

In fact, there are also several laws, like the Belgian, Finish, French, Portuguese, Québecois, Spanish, Swedish, Turkish and US laws which grant the buyer a direct claim against the producer and/or anyone in the sales chain.[118] However, most of them seem to put limits on direct claims and not admit them unconditionally. Even though the issue was discussed during the drafting of the CSD, and the drafters played with the idea of introducing such a direct claim against the producer (Article 12 CSD), the SGD did not follow up on this approach. Also, the Repair Directive Proposal has not introduced this as a policy option. Thus, the discussion has unfortunately not taken place as to whether an efficient way of forcing producers to internalise the negative effects of non-conforming goods,[119] as well as of incentivising the production of more durable ones, may require a rethinking of classical patterns. Or, otherwise, where none of the extremes best serves the common good, but innovative and nuanced solutions prove superior.

Introducing a direct liability of the producer, at least for durable goods, might help in attaining a more sustainable usage of such goods. Buyers might have a higher chance of enforcing their right to repair and/or right to updates against the producer. As suggested above, a maintenance obligation of the producer for durable goods for an extended period would already lead to closer cooperation between the producer, seller and the buyer. However, it remains an open question – also requiring substantial empirical research – as to whether the latter is typically better arranged around a single point of entry, potentially at least in a large array of segments and case patterns.

117 See for an overview of the case law in Germany C. Syrbe, 'Die zivilgerichtliche Aufarbeitung des „Diesel-Abgasskandals' – ein aktualisierter Zwischenstand' (2022) 35(4) *NZV* 153, passim.

118 See for a comparative overview Ebers, Janssen and Meyer (eds), n. 19, passim; Á. Fuglinszky, 'The Conceivable Ways and Means of the Further Harmonization of European Product Liability Law: Mandatory Direct Claim against the Producer for Repair or Replacement?' (2018) 26(3) *ZEuP* 590, 596 et seq.

119 In this sense, see R. Van den Bergh and L. Visscher, 'Consumer Sales Law from an Economic Perspective' in Ebers, Janssen and Meyer (eds), n. 19 above, pp. 125 and 142 et seq.

A direct claim against the producer which would be aligned to the lifespan of the goods might also help to promote secondhand sales. Secondhand goods are either sold by one consumer to the other or, again, by a trader to a consumer. In relation to the ever-increasing c2c sales contract, the classical scheme of remedies does not seem to be of much help, given that the seller as the previous end-user has no chance to offer repair or replacement.[120] However, if the producer would be required to offer maintenance for a certain duration and would also be liable for repair in this timespan, any secondhand buyer would have a direct claim against the producer. This could incentivise secondhand sales.[121] But again, the proper solution would need to be carefully drafted, as use by a first consumer may imply misuse that itself reduces durability, and therefore problems of proof may be overwhelming.

What would seem to remain the most pressing issues in the debate about direct claims against producers are cases of fraud and long durability – the latter a mega-topic that certainly requires a multi-facetted approach in several segments or fields of law.

5.2. THE EXTENDED LIABILITY OF ONLINE PLATFORMS?

Another major focus of discussion, which will remain on the agenda, is the shape of a potential liability of online platforms with respect to non-conforming goods sold on their platform. The Digital Services Act[122] now provides in Article 6(3) that online platforms that allow consumers to conclude distance contracts with traders and that enable specific transactions in a way that would lead an average consumer to believe that the product that is the object of the transaction is provided by the online platform itself shall also be held liable. Recital 24 names as examples of such behaviour:

> [A]n online platform which fails to display clearly the identity of the trader, as required by this Regulation, where an online platform withholds the identity or contact details of the trader until after the conclusion of the contract concluded between the trader and the consumer, or where an online platform markets the product or service in its own name rather than in the name of the trader who will supply that product or service.[123]

120 However, see also Loos in this volume.

121 See Fuglinszky, n. 118 above, 609 et seq.

122 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19.10.2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

123 For a parallel approach taken in the Proposal for a new Directive on Liability for Defective Products (28.09.2022, COM(2022) 495 final) see Art. 7(6). See also European Law Institute, 'Feedback on the European Commission's Proposal for a Revised Product Liability Directive', Vienna 2022, passim. See De Menech in this volume on the pros and cons of a strict product liability approach with regard to online platforms.

However, it is disputed whether the legislature should not have gone further and should not have limited such liability to cases where the consumer is misled. As proposed by Borghetti in this volume, at least major platforms with economic strength like Amazon have control over their suppliers and their products. Therefore, they are best placed both to exclude goods which are objectively non-conforming from their platform, and to negotiate arrangements with those selling through the platform so that they indemnify the platform if the latter is found to be liable to a consumer. The arguments may be similar to those considered for direct claims against producers, with the difference that online platforms may have market power, but in many cases less insight into the qualities of the goods sold. However, online platforms may still be 'cheapest cost avoiders' for losses caused by the goods sold through them.[124] Again, wholesale solutions should be avoided.

6. LIABILITY FOR NON-CONFORMITY OF (DURABLE) GOODS AND REMEDIES OF THE BUYER

6.1. OVERVIEW

Given the above-mentioned challenges, it does not seem easy to frame a convincing liability regime for non-conforming goods in general. One of the utmost concerns of such a liability regime must certainly be to support sustainability and the attainment of a longer lifespan of durable goods. Therefore, at least for durable goods, it needs to be discussed whether a new perspective is needed. In addition to an ongoing maintenance obligation for these goods (cf. section 4.1.3 above), a longer liability period could incentivise the production of more sustainable goods. Additionally, a preferential application of the right to repair and price reduction instead of replacement or avoidance of the contract could be advisable.

The addressee of such special regime for durable goods can mainly be defined in two ways: either it is only the seller, and therefore the risk allocation in the distribution chain and network remains the same, or the producer (or anyone assumed to be the producer)[125] is liable in addition to the seller, either jointly or at least in a secondary position – i.e., whenever the claim against the seller is not possible.[126]

124 C.M. Sharkey, 'Product Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) *Hastings L.J.* 1327, passim.

125 See n. 115 above.

126 See Borghetti in this volume on how such direct liability could be construed best; Fuglinszky, n.118 above, 618 et seq.; Wendehorst, n. 19 above, 94 et seq.; M. Ebers, A. Janssen and O. Meyer, 'Comparative Report' in Ebers, Janssen and Meyer (eds), n. 19 above, pp. 3 et seq.

6.2. THE LIABILITY PERIOD AND THE BURDEN OF PROOF

6.2.1. *The Liability Period*

In 1981, Peters and Zimmermann wrote critically about the then even shorter limitation periods regarding warranty rights in the BGB:

> It is precisely the lack of durability of an object, which initially remains hidden, that is a typical, frequent and serious defect. The fact that the law imposes it on the purchaser is inconsistent if one considers it to be the purpose of avoidance and price reduction to ensure the balance of the mutual performances. The expectation regarding durability influences the price of a thing considerably. It is not clear why this expectation should be allowed to be disappointed without any sanction.[127]

Forty years later, this statement would still seem to hold true for some jurisdictions, especially as the liability period under sales law remains shorter than the general limitation periods for claims, and as the starting point is linked to the handover of the goods, and not to the moment of gaining knowledge of the non-conformity.

However, some legal systems work with longer time limits.[128] In Sweden, the time limit for warranty claims is three years from delivery.[129] In Finland, these claims can be asserted during the general limitation period – i.e., three years from the time when the buyer should have become aware of the non-conformity. The Finnish Consumer Disputes Committee states in its established decision-making practice that a product is considered non-conforming if a defect appears well before the end of its normal useful life and the seller cannot prove that the cause of the non-conformity was on the part of the buyer or was otherwise beyond the seller's control.[130] In the Netherlands, on the other hand, the limitation period for warranty claims is two years from the date of notification of the non-conformity.

127 F. Peters and R. Zimmermann, 'Der Einfluss von Fristen und Schuldverhältnissen: Möglichkeiten der Vereinheitlichung von Verjährungsfristen' in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Vol. 1, Bundesanzeiger, Cologne 1981, pp. 77, 227 et seq.

128 Cf. Atamer, n. 19 above, 295 et seq.; K. Tonner and R. Malcolm, *How an EU Lifespan Guarantee Model Could Be implemented across the EU*, Study for the European Parliament, Brussels 2017, pp. 19 et seq.; European Commission, *Study on the Costs and Benefits of Extending Certain Rights Under the Consumer Sales and Guarantees Directive 1999/94/EC*, Publications Office, Brussels 2017, pp. 13 et seq.

129 Chapter 4 §14 Konsumentköplag 2022:260.

130 Finnish Competition and Consumer Authority: 'There is no statutory time limit for the duration of the liability for defect; the consumer is entitled to expect the item to last for its normal service life in normal use'. See <https://www.kkv.fi/en/consumer-affairs/products-and-services/a-defect-in-a-product/> accessed 10.01.2023.

The consumer has legal remedies until the end of the normal life of the goods.[131] Industry associations and consumer organisations have drawn up guidelines for frequently sold consumer goods – such as mobile phones, laptops, washing machines and coffee machines – in which the service life is specified according to quality levels.[132] In Austria, according to established case law, the two-year period for warranted qualities only starts to run from the time when the non-conformity is objectively recognisable.[133] In England, Wales and Northern Ireland, the limitation period for all sales contracts – without special provisions for b2c contracts – is six years from the date of breach of contract, while in Scottish law this period is five years.[134]

Since economic systems in these countries seem to flourish despite these long or flexible periods, the arguments against extending these periods[135] do not seem to stand the test of experience. Based on the same comparative arguments and in light of the durability debate, a longer liability period, has recently been proposed,[136] or in some cases such an extension has already been carried out within the framework of the transposition of the SGD. Some EU Member States have introduced a new liability period in combination with a limitation period. Spain and Portugal, for example, provide a three-year liability period from delivery onwards for b2c sales contracts.[137] In Spain, warranty rights then become statute-barred five years after the non-conformity

131 See Art. 7:23 II BW; V. Mak and E. Lujinovic, 'Towards a Circular Economy in EU Consumer Markets: Legal Possibilities and Legal Challenges and the Dutch Example' (2019) 8(1) *EuCML* 4, 7; I. Bach and M. Wöbbeking, 'Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit?' (2020) 73(37) *NJW* 2672, 2674.

132 Operating time forecast | Techniek Nederland at <https://www.technieknederland.nl/onze-leden/waar-staan-onze-leden-voor/gebruiksduurverwachting> accessed 10.01.2023.

133 If, for example, a certain durability is warranted, the period shall only begin to run due to an implied extension of the warranty period when the non-conformity becomes apparent. See Austrian Federal Court of Justice (OGH), judgment of 20.12.2016, 4 Ob 202/16h; S. Wrbka, 'Warranty Law in Cases of Planned Obsolescence: The Austrian Situation' (2017) II *EuCML* 67, 71. A. Bischinger and K. Maximilian Weber-Woisetschläger, 'Das neue Gewährleistungsrecht (Teil I) Verbrauchergewährleistungsgesetz (VGG): Anwendungsbereich und Gewährleistung beim Warenkauf' (2021/2022) *JAP* 104, 108; B. Zöchling-Jud, 'Beweislast, Gewährleistungs- und Verjährungsfristen im neuen Gewährleistungsrecht' (2022) 18 *ÖJZ* 113, 122.

134 Consumer Rights Act 2015, Explanatory Notes, Commentary on Sections, Section 19, para. 105.

135 See for these arguments Atamer, n. 19 above, 293 et seq.; G. Rühl, 'Die Verjährung kaufrechtlicher Gewährleistungsansprüche' (2007) 207(4/5) *AcP* 614, 625.

136 R. Gildeggen, 'Vorzeitiger Verschleiss und die Verjährung von kaufrechtlichen Mängelgewährleistungsansprüchen' in T. Brönneke and A. Wechsler (eds), *Obsoleszenz interdisziplinär*, Nomos, Baden-Baden 2020, pp. 269 et seq., 278; Bach and Wöbeking, n. 131 above, 2676; Tonner and Malcolm, n. 128 above, p. 27; Bach and Kieninger, n. 60 above, 1094 et seq.; Rühl, n. 135 above, 645 et seq.; Atamer, n.19 above, 294 et seq.

137 Article 120 Ley General Para la Defensa de los Consumidores y Usuarios y Otras Leyes Complementarias (TRLGDCU, changed with Real Decreto-ley 7/2021, 27. 04. 2021); Art. 12 Abs. 2 Decreto-Lei nº 84/2021, 18. 10. 2021.

is discovered (Article 124); in Portugal, this is two years after notification of the non-conformity (Article 17). In France, although a liability period of two years from delivery applies, the limitation period of five years only begins to run from the knowledge of the non-conformity. Also, the European Commission's Initiative proposes, among other things, the extension of the legal guarantee period beyond the minimum of two years.[138] However, in the Impact Assessment Report prepared for the Repair Directive Proposal the option of extending the liability period in general or aligning it with a product's lifespan was discarded and not further analysed.[139]

Although extending the liability period would be a viable option, this would imply that the final seller would have to carry the full burden and risk of granting consumers remedies for a longer period. Given the experience of many Member States in applying longer liability/limitation periods and the fact that these have not put retail sellers at intolerable risk, this could well be acceptable. As an alternative, it could also be considered to introduce a separate liability of the producer for a period, which could be closer to the actual lifespan of the durable goods in question – for example, half or three-quarters of the time span defined by the EU Commission Regulations[140] (thus, three and a half to five years for refrigerators and five to seven and a half years for washing machines starting from the first sale of the item to a consumer). This period would also determine the duration of the maintenance obligation suggested above.[141] Introducing a direct claim against the producer would have the benefit that the liability period of two years against the seller could remain the same. The consumer would have the full set of rights against the seller in the first two years. But after this time elapses (or in parallel), at least a repair claim against the producer[142] could be granted.[143] The same rights against the producer could also be used by the new consumer in a re-sale of the durable goods. In this way, a prolongation of the liability period in b2c sale of secondhand goods would not be necessary.[144] The parties would have the freedom to stipulate a minimum of one year (Article 10(6) SGD) as the consumer would have other rights, especially a right to repair against the producer for a longer period of time.[145]

138 European Commission, n. 10 above, sub-option 3B.

139 IA-Report, n. 11 above, p. 171–172.

140 For example, Regulation on Ecodesign Requirements of Refrigerating Appliances (EU) 2019/2019 [2019] OJ L 315/187; Regulation on Ecodesign Requirements for Household Washing Machines and Washer-Dryers (EU) 2019/2023 [2019] OJ L315/285.

141 See above, section 4.1.3.

142 Cf. regarding the definition of the producer n. 115 above. See also the proposal of Zoll et al., n. 39 above, 141 ff.

143 Even though the Repair Directive Proposal introduces in Art. 5 a repair obligation for some producers this is not for free. The producer may claim payment.

144 European Commission, n. 10 above, sub-option 2A/ii.

145 See also section 6.3. However, if such a direct claim should not be introduced, a longer liability period in secondhand b2c contracts should be considered. As explained in detail

The effect of any repair/replacement on the limitation or liability period was not regulated in either the CSD or in the SGD. Recital 44 SGD merely emphasises that the Member States may provide for the suspension or interruption of these periods in the event of repair, replacement or negotiations between the seller and the consumer. Whether a new or additional liability period begins with performance, or the maximum of two years remains, is still left open by the SGD. The initiative launched by the EU Commission puts up for discussion the regulatory alternative that the liability period is extended if the consumer chooses repair instead of replacement.[146] Even though this policy option was discussed in the Impact Assessment Report[147] prepared for the Repair Directive Proposal, it was not preferred and left out in the final Proposal.[148] It seems advisable to also support replacement by refurbished goods by granting a longer liability period.

6.2.2. *The Burden of Proof*

Especially in the case of complex durable goods, proving a non-conformity that existed at the moment of delivery is almost impossible due to the information asymmetry to the detriment of the consumer. Therefore, Article 5(3) CSD already provided for a reversal of the burden of proof for the first six months after delivery of the goods. With Article 11(1) SGD, this period was extended to one year. However, France, Portugal, Spain and Sweden, for example, have used the option of Article 11(2) SGD when transposing the Directive and have increased this time period to two years.[149] In the event of a reform of the SGD which extends the liability period beyond two years, the question will again arise as to how the burden of proof should be distributed between the parties.

by Loos in this volume, a comparison of the Dutch market, where such freedom was not granted to the parties, and the German market, where the seller and the consumer can agree to a shorter limitation period, does not show a larger volume of business in Germany. In fact, the Dutch market for secondhand goods seems to be even bigger, despite stricter rules.

146 European Commission, n. 10 above, sub-option 2A/i. In Germany, §475e (4) BGB stipulates that in case of repair or replacement, the limitation period is suspended, and that claims based on the asserted non-conformity shall not become time-barred before the expiry of two months after the date on which the repaired or replaced goods were handed over to the consumer. In France, on the other hand, the liability period is automatically extended by six months when the non-conforming goods are repaired. If the consumer demands repair, but the seller prefers to exchange the item, a new period starts with the handover (Art. L.217-13 CCons). In Portugal, the seller is liable for a new period of three years in the case of replacement (Art. 18 para. 6 Decreto-Lei nº 84/2021) and gets an additional liability period of six months for each repair with a maximum of four repairs (Art. 18 para. 4 Decreto-Lei nº 84/2021). In Spain, the law provides for an additional period of one year from the date of repair/replacement if the same lack of conformity is involved (Art. 122 TRLGDCU).

147 IA-Report, n. 11 above, p. 40 et seq.

148 Repair Directive Proposal, Explanatory Memorandum, n. 11 above, pp. 6–7.

149 See Atamer, n. 19 above, 298.

Given that especially for complicated durable goods with technical features, it is often the manufacturer who can ascertain the exact reason for the non-conformity, it seems advisable to distribute the burden of proof accordingly.[150] For the duration of the (extended) liability period, it should be the seller who carries the burden. Alternatively, at least an obligation could be imposed to substantiate the indications that suggest that the good was in conformity at the time of delivery and that misuse occurred afterwards. If, however, a parallel duty of maintenance and inspection were introduced on the side of the producer, it could be considered to link the reversal of the burden of proof with such maintenance. The consumer would be disburdened as long as they observe the maintenance intervals.

6.3. REMEDIES OF THE BUYER

The quest for a sales law facilitating a more sustainable usage of durable goods inevitably has to focus more on the right to repair.[151] Repair, in comparison to replacement with new goods or avoidance of the contract, supports the longer employment of the goods and therefore, in principle,[152] reduces the usage of raw materials and energy. Even though it is true that in the event of repair the consumer might no longer enjoy the feeling of possessing something absolutely new, untouched and flawless,[153] this expectation cannot be paramount if sustainability is to be taken seriously. With a new categorisation of goods as durable and non-durable, and with a special liability regime for durables that are maintained, updated and from time to time revised by the seller/producer, repair would also lose the negative connotation it has had until now. Therefore,

150 European Law Institute, n. 19 above, p. 14.

151 Dalhammar et al. in this volume; E. Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' in Keirsbilck and Terryn (eds), n. 7 above, pp. 127 et seq.; E-M. Kieninger, 'Recht auf Reparatur ("Right to Repair") und Europäisches Vertragsrecht' (2020) 28(2) *ZEuP* 264, 265 et seq.; Mak and Terryn, n. 36 above, 235 et seq.; Perzanowski, n. 28, passim. For the efforts already taken to support repair in Sweden, see C. Dalhammar et al., 'Promoting the Repair Sector in Sweden' (2020) *IIIEE* 1, 8 et seq.; C. Dalhammar, 'Sustainability, the Circular Economy and Consumer Law in Sweden' (2020) 9(3) *EuCML* 125, 127; for Finland, see J. Laaksonen et al., *From Recycling to a Circular Economy: The National Waste Plan 2030*, Ministry of the Environment, Helsinki 2018, p. 30. In France a repair index for certain electronic and electrical consumer goods was introduced in early 2021, which assesses access to information such as manuals or repair instructions, disassembly, access to spare parts and the price of spare parts. The pilot product groups are washing machines, televisions, smartphones, laptops and lawnmowers. See Ministère de la transition écologique, *The Anti Waste Law in the Daily Lives of the French People*, 2020, pp. 22 et seq. Cf. for further details <https://repair.eu/> accessed 11.01.2023.

152 See n. 6 above.

153 See. K. Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 28(6) *ERPL* 1207, 1219 et seq.

the regulatory option of the Repair Directive Proposal to limit consumers' choice of remedies by prioritising repair over replacement (Art. 12) as long as repair is cheaper or not more expensive than replacement seems promising.

However, the suggested wording of the Proposal is problematic as it does not at all take the interests of the consumer into account anymore. The application of Art. 13(2) SGD is blocked as long as repair is not more expensive than replacement. One would at least expect that consumers are 'compensated' for the sacrifice of losing all their choices by being granted an additional liability period after repair. But this is also not the case. On the other hand, the enforcement of the rule seems to be problematic too. The costs of spare parts and labour compared to the falling prices for new products can reduce the willingness to repair, especially in the case of a retailer who is not the producer and who is also not integrated into the distribution chain and after-sales services of the producer. Therefore, introducing a direct claim for repair against the producer might also be the better policy option from this perspective, as it would not overburden the seller and would still offer the consumer a quick and reliable repair option. Again, if this was made subject to first submitting the demand to the seller, this might favour well-functioning distribution chains with a proper alignment of service tasks.

A sustainable alternative to repair could also be replacement with refurbished goods.[154] This is in fact also one of the proposals of the EU Initiative (sub-option 3C). As underlined above, sales of refurbished goods will likely increase in the future.[155] Giving the seller the chance to replace with refurbished goods would pretty much mirror the idea of repair, as refurbished goods are goods which were used and returned previously, based on one of these three possibilities: a right to withdraw, a right to demand replacement, or a right to restitution because the contract was validly terminated due to non-conformity of the goods. But, as already mentioned above, the Repair Directive Proposal does not pursue this policy option.

Finally, the Repair Directive Proposal also does not take up the policy option to change the order of the remedies.[156] Given that the more sustainable remedies seem to be repair and price reduction, the better option is to have repair and price reduction as first tier remedies. This is in fact also the choice of the CISG which allows for replacement or avoidance only in cases where the breach of contract is a fundamental one (see Art. 46(2) and 49(1)(a) CISG). Given that the Repair Directive Proposal intervenes with the logic of Art. 13 of the SGD, it would seem advisable to revaluate the whole remedy structure of the SGD.

154 See Loos in this volume; Mak and Terryn, n. 36 above, 236; Kryla-Cudna, n. 153 above, 1221 et seq.; Zoll et al., n. 39 above, 145.

155 See n. 36–37 above.

156 See Zoll et al., n. 39 above, 145.

6.4. AFTERSALES SERVICES

Even if longer liability periods against the seller and/or a direct claim against the producer should be introduced, this will not encompass the whole lifespan of the durable goods in question. This means that in any case, the buyer should also have a chance to go on using their goods by letting them be repaired if a non-conformity arises after the (extended) liability period has expired.[157] However, increasing product complexity and the high integration density of modern products pose major challenges to independent, non-manufacturer repair facilities.[158] In this regard, the new approach in the above-mentioned EU Commission Regulations[159] to compel manufacturers or importers to provide professional repairers, appliance-specific repair and maintenance information, and spare parts for a specified period of time is certainly of the utmost importance.

However, the effective use of the right to repair is also strongly restricted by the intellectual property rights of the manufacturers.[160] Different problem areas need to be distinguished.[161] First of all, it must be clearly determined to what extent limits are set on the right of the consumer to repair their own item or to what extent such limits can be set by contract. Especially in the case of electronic goods, it often happens that the copyright-protected software is secured by a digital lock, so that the consumer first has to hack into it in order to be able to repair it at all. End-user licence agreements (EULAs) dictate that the consumer loses all their rights if they even break the seal on the item. Furthermore, it must be determined to what extent repairs can be offered commercially by third parties without infringing patent or trademark rights.[162] In addition, the right of these independent repairers to have fair access to spare parts must be protected under competition law. Cost-effective repair also depends heavily on the opening of the market for spare parts. This in turn has to be balanced with the design protection of the manufacturers. Since Member States were unable to reach an agreement on either the 1998 Directive on Legal Protection of Designs nor the 2001 Council Regulation on Community Designs, the issue was left to national laws at that time. However, in November 2022, the Proposal for a Directive on the Legal Protection of Designs (Recast) was published with the

157 Atamer, n. 19 above, 303.

158 See Prakash et al., n. 6 above, p. 39.

159 See n. 81–82 above.

160 Tur-Sinai and Chan Grinvald in this volume; Atamer, n. 19 above, 304 et seq.

161 In detail, see L. Chan Grinvald and O. Tur-Sinai, 'Intellectual Property Law and the Right to Repair' (2019) 88(1) *Fordham Law Review* 63, 97 et seq.; D. Beldiman, C. Blanke-Roeser and A. Tischner, 'Spare Parts and Design Protection: Different Approaches to a Common Problem' (2020) *GRUR-Int.* 673, passim.

162 J. Drexl, 'Die Reparaturklausel im Designrecht: Eine wettbewerbs- und immaterialgüterrechtlich gebotene Reform' (2020) 3 *GRUR* 234, 243.

major aim of introducing a harmonised 'repair clause' in the EU.[163] According to the proposed solution, an instant full liberalisation for new designs will occur – that is, for designs for which an application is made after the entry into force of the Directive. However, designs already granted before entry into force will continue to be protected for a transitional period of ten years. Even though a full liberalisation of the market for 'must-match' spare parts across the EU, extending it to both existing and new designs (Option 1.1 of the Proposal) would have offered a faster solution to the problem, the option chosen in the proposed Directive will certainly help to strengthen the independent repair spare parts sector and thus support the development of a circular economy.

The Repair Directive Proposal is mainly also focusing on the period after the two-year liability period of the SGD has elapsed. At this stage the Proposal seeks to enhance competition in the repair market by introducing a unified European Repair Information Form (Art. 4) which would give consumers the chance to compare offers from different repairers as the requested information form would be binding on the repairer for 30 days (Art. 4(5)). Besides, the existence of an online platform for repair, which Member States will ensure, will give consumers easy access to information regarding repairers (Art. 7). Even though the provision of repair services and their modalities are left to the laws of Member States, producers of goods for which Union legal acts provide reparability requirements (Annex II of the Repair Directive Proposal) are legally obliged to offer repair services. According to Art. 5 of the Proposal they can only be exempt of this duty if repair of the specific goods is impossible.

7. ISSUES REACHING FURTHER INTO DIGITALISATION AND BEYOND SERVITISATION

A number of issues *go beyond* the reforms made and proposed with respect to the sale of goods with digital components, changes for the sake of sustainability, and questions of structure and networks that all form the core of a 'sales law revisited'. However, these issues are also still related to this core part and thrust of the sales law reform. Two particularly interesting issues or areas that in this way are 'at the edges' of sales law revisited are not regulated (or are only indirectly regulated) at the European level. Despite being 'at the edges' of the reform, these questions are still of a more general interest. These are: (i) the issue of how to deal with contributions made by the client other than in relation to money (purchase price or the price for servitisation); and (ii) the area of service contracts that not only supplement, but totally substitute sales contracts. Both of these will be addressed in brief below.

163 Proposal for a Directive of the European Parliament and of the Council on the legal protection of designs (recast), COM(2022) 667 final, 28.11.2022.

7.1. SPECIFIC FORMS OF THE CLIENT'S CONTRIBUTION IN DIGITAL CONTEXTS

A phenomenon that is omnipresent in contracts concerning the supply of digital content or digital services, and that has been characterised as having a contractual nature in the DCD, can also occur in sales relationships, even though it appears much less frequently here. The concept of *payment via personal data* – for which the European legislature, following long discussions, did not want to use the term 'personal data as counter-performance' – has led to a contractual regime. The contractual relationship – services for personal data – is conceived as one with mutual obligations.[164] The value of personal data is given in exchange for the value of services on the internet, search engines, information platforms, contents of entertainment, etc. The main problem that had to be tackled is that these are still personal data and therefore a consumer's right to review their decision to transfer these data had to be more carefully considered and designed. The delivery of goods – as is the case in sales law – is rarely compensated in this way, but such cases are by no means inconceivable either.

What may constitute one of the – or indeed *the* – most salient examples is sales that are arranged as smart contracts or as sales contracts for 'smart' products (for instance, tele-commanded and increasingly autonomous devices in households), namely in areas where the service or also the contract design is still to be further developed. In these cases, the provider often bargains for the personal data that have to do with the individual use of the good during the performance of the contract, with a view to 'learning' (i.e., enhancing) the service or smart good's performance via testing with these data. In such cases, the compensation can be part of the arrangement of the price, reaching up to 100% of the purchase price. In this case, even though the contract may not fall within the ambit of the application of the DCD as well as the SGD, and so formally may be unregulated,[165] it would seem wise to apply these regimes nevertheless (albeit by analogy).

164 See METZGER, n. 48 above, 579; L. MISCHAU, 'Daten als "Gegenleistung" im neuen Verbrauchervertragsrecht' (2020) 2 *ZEuP* 335, 337 et seq.; STAUDENMAYER, n. 85 above; Art. 3 DCD, paras. 49 et seq.; Z. EFRONI, 'Gaps and Opportunities: The Rudimentary Protection for "Data-Paying Consumers" under New EU Consumer Protection Law' (2020) 57 *Common Market Law Review* 799, 805 et seq. For an overall architecture of data private law, and namely about the links of the concept of data as counter-performance to other fields of private law/regulation and interdisciplinary theory, see P. HACKER, *Datenprivatrecht – Neue Technologien im Spannungsfeld von Datenschutz und BGB*, Mohr-Siebeck, Tübingen 2022, pp. 49 et seq., 196 et seq., passim.

165 METZGER, n. 48 above, 578; MISCHAU, n. 164 above, 353; EFRONI, n. 164 above, 817 et seq.

7.2. REACHING BEYOND SALES AND SERVITISATION

The aim to have goods kept functioning via servitisation by an outside provider (see above, section 1) can still go further, often also slightly changing the shape of interests served, and thereby not only blurring the limits between different contract types (as in the case of servitisation), but also between contract law and property law in their entirety.[166] This is the replacement of sales by a (typically long-term) framework agreement to have guaranteed access to the good according to pre-fixed conditions (among them availability at the moment of desired use).[167] Property rights theory had already claimed since the late 1960s that rights can better be conceptualised by defining them as varied bundles of rights and thus as a continuum of bundles of rights to usage, transfer, exclusion, etc., and Secola had taken up this approach and interplay as the theme of one of its conferences in 2013.[168] With service contracts increasingly replacing sales contracts in the last few years, this new definition of interplay between grand traditional fields of private law has also now gained its large-scale practical field of application. A few caveats should, however, be made. Whereas consumer protection rules have traditionally focused on sales contracts, service contracts are regulated to a far lesser extent and there is less mandatory protection.[169] These lacunae can, however, not simply be filled by analogy. Although functionally increasingly similar to sales or leasing contracts with servitisation agreements, in legal terms, these pure long-term service arrangements pose new problems and conceptually a rather different set of rights and legal problems.[170] Yet, this is not to negate the important potential of this market segment, as well as with respect to sustainability concerns. Producers may take responsibility for the full life cycle costs, which creates an incentive to optimise the use of energy, to

166 See BEALE in this volume.

167 This business model, rather than buying/selling, is called 'sharing'. Examples can be found in the mobility sector in particular, where products such as car, bike and scooter sharing are already very popular today. However, the concept of sharing can also be found in the area of everyday objects – for example, there are sharing providers for toys, clothing and technical equipment. See, for example, GERMAN FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY, *Sharing Economy in the German Economy*, Berlin 2018, pp. 11 et seq. and 27 et seq., and passim.

168 See S. GRUNDMANN and S. VAN ERP (eds), 'European Contract Law and Property Rights' (2013) 9(4) *ERCL* 9, 287–454. For property rights theory, see ground-breaking: H. DEMSETZ, 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347, passim; A. ALCHIAN and H. DEMSETZ, 'The Property Rights Paradigm: The Tasks of Economic History' (1973) 33(1) *Journal of Economic History* 16, passim. A more recent synopsis can be found in A.A. ALCHIAN, 'Property Rights' in D. HENDERSON (ed.,) *The Concise Encyclopedia of Economics*, 2nd ed., Liberty Fund Inc., Indianapolis 2007.

169 BEALE in this volume; MAK and TERRYN, n. 36 above, 239.

170 See n. 16 above.

recycle materials where possible, to increase the durability and to prolong the service life of goods to ensure that they are used as intensively and for as long as possible.[171] These possibilities should be kept in mind as a background to the discussions in the chapters in this book, even though they go beyond its context.

8. CONCLUSIONS AND SUGGESTIONS FOR REVISING THE EU *ACQUIS*

European Sales Law: Challenges in the 21st Century: the challenges ahead; this topic gravitates primarily around sustainability, digitalisation and (increased fluidity between sales law and) servitisation – the three being related to each other in quite a few respects. However, they remain distinct, the first being primarily about long-termism, the second mainly about the facilitation and spreading of means, and the third focused on the tailoring of nuanced offers. Two more dimensions are primarily 'instrumental' to these three main perspectives – and these two more dimensions are (issues of) information duties and (of) chains of contracts. A number of suggestions for revising the EU *acquis* ensue from the conclusions in these five main lines of discussion.

First, sustainability is becoming omnipresent in the recent reform projects of the EU. However, the opportunity to also reflect this new paradigm in the SGD has been missed. The drafters limited themselves to two half-hearted references to sustainability in Recitals 32 and 48 and the introduction of durability as an objective criterion of conformity in Article 7(1)(d) SGD. The late rise of durability to a position of becoming an objective criterion of conformity (and expectation) is astonishing insofar as longer durability will often also foster the consumer's (material) welfare, and such an aim would seem to have already been the main focus of the legislature of the 1999 CSD. However, the late occurrence of this development is also not so astonishing, because it is inspired by recent changes in perception insofar as durability is also linked to an ecological goal (and the ecological change of paradigms). Hence, Article 7(1) SGD is grounded in two sources of legitimisation. Given that more recently the EU law-maker has decided to reach beyond and to revise the SGD and/or to introduce a separate new legislative proposal on the right to repair in order to 'empower consumers for a green transition', it seems important to make concrete suggestions as to how to achieve such an objective:

- The EU law-maker should take the opportunity to discuss whether it is time to introduce new sub-categories of goods like durables and non-durables. A form of sales law that is equally fitting for the sale of tomatoes as well as

171 Mak and Terryn, n. 36 above, 239.

automobiles is no longer appropriate. Sustainability questions are relevant for durable goods; therefore, solutions should also focus on these. In parallel, secondhand and refurbished durable goods require special regulation.

- Durability as an objective requirement of goods can only help to achieve sustainability if the consumer can also make use of a remedy during the average lifespan of these durable goods. The two-year liability period is far too short to support such efforts; a prolongation of the two-year period is of the utmost importance for durable goods.
- In parallel to prolonging the liability period, a duty could be imposed on the seller and/or producer to offer maintenance services (just like update services) for durable goods in certain intervals. Observing such maintenance intervals could at the same time be the prerequisite for the consumer to profit from such prolonged liability periods. Also, the burden of proof could be linked to such ongoing maintenance of the goods. If the consumer does not make use of the maintenance option, they would not benefit from the reversal of the burden of proof.
- If durable goods are non-conforming, the consumer should primarily be directed to the right of repair. The maintenance obligation in combination with the repair option can help to change the perception regarding the sale of durable goods: these are no longer only one-off sales contracts, but contracts with a service component. In the case of durable goods, they constitute long-term relations, albeit with a dominant exchange duty at the beginning. Replacement of non-conforming goods with refurbished ones also deserves to be promoted. Granting the consumer additional liability periods would further incentivise such remedies.
- However, even after the prolonged liability period has expired, the buyer should have a chance to get their durable goods repaired – by the producer and/or by independent repairers. The approach taken in the new-generation Commission Regulations laying down eco-design requirements for certain goods is certainly a major step in this direction, given that manufacturers or importers are obliged to provide professional repairers, appliance-specific repair and maintenance information, and spare parts for a specified period of time. However, these requirements should be expanded to cover all sorts of durable goods. The introduction of a harmonised repair clause in the Design Directive (Recast) will help to liberalise the spare part and repair market.
- The relation between Article 6 and Article 7(5) SGD is prone to cause problems in practice. Tensions will arise in particular in delineating contractual stipulations regarding the nature, model and/or quality of the goods (which can also be concluded impliedly), and stipulations excluding some features which the goods objectively should possess (which is only possible by way of an express and separate statement by the consumer). The problem will be more challenging in relation to secondhand and refurbished goods. A clarification by the legislator in this area would be welcome.

- Adherence to sustainable production procedures will become more important in the future. Under the SGD, these define the conformity standards of the goods if at least some sort of public statements in this regard has been made in the sales chain. The more sophisticated the corporate sustainability reporting requirements become, the more they may have the effect of also shaping the expectations of consumers.

Second, digitalisation constitutes one of the main triggering phenomena for the DCD as well as the SGD. Even though they both provide an important new regulatory framework for problems relating to digitalisation, there are also several questions which remain open. First and foremost, the delineation of both Directives will cause problems. Given that goods with digital elements are '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', the most crucial question will be when exactly goods can be presumed to still perform their function without the digital component. As has been suggested here as well as elsewhere in this volume, a broader understanding of 'function', covering all contractually stipulated features, seems preferable in order to subject non-conformity issues caused by digital elements to only one regime – that is, the sales law regime (and not potentially split regimes with respect to the good and the digital element). Another problematic issue, which is directly related to sustainability concerns, is the duration of the seller's update obligation. The expectations of the SGD are vaguely formulated, leaving much margin for interpretation. The better approach seems to define this obligation in relation to the prolonged liability period. If, as suggested, the liability period for durable goods would be extended to cover a longer period of their lifespan, the update obligation could easily also be linked to this period. If and for how long such an update obligation is given in the case of refurbished goods requires further clarification.

Third, servitisation and similar phenomena can be seen as the instrument of tailored offers, in the sense that the property rights theory proposed (this theory held that there are not only full exclusive rights to use, have the value *and* transfer rights of the property, as in traditional sales law, but that the bundle of rights could be shaped in more differentiated ways, adapted to the particular situation and need). When reduced rights are sufficient, less costly and (hence) desired, they can be tailored. From a legal construction point of view, this feature is probably the one in sales law of the 21st century which affects the disposition of legal fields and forms to the greatest extent. However, with respect to the values discussed above, the most striking feature of this line of arrangements is a very different one, namely that these arrangements typically promote sustainability probably more than traditional sales law with the full transfer of property does. These arrangements come in two main forms: as a sales contract accompanied

by an intensive service agreement aimed at properly maintaining long-term use (servitisation) *or* as pure long-term service contracts aimed at putting at the disposition of the client a number of same purpose goods (for instance scooters or cars), that they can find at many places in the public sphere (like streets) and that can be used at the desired time (sharing industry). In the former case, long-termism is fostered for the good sold, while in the latter case, it would seem that by internalising costs of early termination of use, suppliers all have an interest in goods being used in a long-term and efficient way. Hence, these arrangements would seem to foster sustainability in a particularly intensive manner. The suggestion that ensues from these considerations is obvious. Discussing this line of instruments in scholarship, practice and establishing a solid default regime – namely for b2c relationships – would seem to be the order of the day. In this way, a model would be established as well, which then could serve as a legitimate benchmark for assessing whether standard contract terms are too one-sided (favouring the professional side) and hence voidable.

Fourth, information duties play a role in the above three core perspectives, but would seem to be primarily of instrumental value to them. Already under the CSD, because of market average expectations being elevated to becoming a core objective criterion of conformity, an information duty was implied. Any (negative) deviation from this benchmark – market average, a rather vague benchmark, but one that is visible to all – was to be explicitly disclosed, otherwise a non-conformity was inferred. This information duty has now been modified insofar as consent by the consumer has been introduced as an additional prerequisite. In this way, consumer autonomy remains the prime goal, but consumer consent required is more 'material' in that the consumer is very well informed, as opposed to mere 'formal consent' (signing, namely in standard contract terms). Beyond this, a true extension of information duties can also be observed in two respects, which relate to the increased importance of sustainability and digitalisation:

- Below market standard can now also include ethical or ecological concerns and even concerns only related to the processes of production. The idea is to extend the duty to conform with the (albeit implicit) promises more broadly with respect to these concerns. Moreover, specific information duties on these issues, when introduced, may raise consumer awareness and thus nudge them towards making buying decisions based more on ethical and/or ecological standards.
- If offers or contract designs are more tailored to each particular customer due to the increased digital potential of personalisation, a development known mainly from investment advice is triggered – there will be more of a 'know your customer' (properly) rule. The downside of this is decreased observability and standard market expectation.

A fifth major line of discussion in this book is about new dimensions of privity of contract in the most recent developments in sales law, raising two mega-questions. The book focuses, first, on the question of the parties' responsibility – solely or primarily the seller, or also the producer (direct claim). This, of course, constitutes an eternal question. There are two opposing trends. On the one hand, production chains become longer and more atomised, hence split of labour is increased; on the other hand, direct selling from the producer via digital conduits has increased as well. The arguments in favour of direct claims are discussed from the perspective of sellers (why put the burden on them if they are not the prime responsible actors?) and from the perspective of consumers (for them, it may be easier to find and sue the producer after a certain time of use, moreover, the producer may also be financially more potent). If such direct claims were to be coupled with a change in regime – for instance, with respect to the two-year cut-off period – this may perhaps also be seen as a possibility of reform directly in the relationship to the seller.

The counter-arguments mainly revolve around the question of whether it is not the distribution chain, which is best positioned in terms of distributing the risks between the producer and seller, and streamlining a good service in relation to repair, maintenance and restitution, and that a producer guarantee remains always possible for high-value durable goods. The authors of this chapter are split on this issue. They do, however, agree that a solution would need to be nuanced, would require in-depth discussion and would need to be focused on incentives for long durability, namely good options for after-sales services and repair.

This volume also focuses briefly on (digital) platforms for the sale of goods and their potential liability for (defective) goods sold on such platforms. Article 6(3) of the Digital Services Act only regulates the rather obvious case where the platform has not made sufficiently clear that it does not (want to) act as a contract partner or does not disclose the contract partner's identity or contact details, imposing liability upon the platform in such cases. While some authors think that the legislature should have gone further (namely when platforms such as Amazon have a strong position in markets and can effectively exclude non-performing suppliers), this remains open for future discussion – a challenge ahead, with a solution hopefully based on increased experience and national case law.

FROM SALES TO SERVITISATION

Hugh Beale*

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This chapter briefly explains the phenomenon of servitisation and then explores the problems it raises for contract law, including (but not limited to) consumer contracts. The chapter considers the topics of standards and obligations, the customer's remedies, who the remedies may be used against and the question of linked contracts, pre-contractual information duties, over-indebtedness and switching to a new supplier. Many of the issues are catered for by the existing law, but there are a number of gaps and problems which could usefully be filled, though this may have to be achieved not through legislation, but through

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