

The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis

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Directive 2019/771/EU modernizes the consumer sales regime with particular attention to digitalisation. However, regarding sustainable consumption it largely maintains the status quo, which sharply contrasts with existing EU policy on sustainable development and the green ambitions heralded by the current Commission. This article critically analyses the directive's major features from the perspective of societal and regulatory trends towards more sustainable and circular consumption. In doing so, it highlights several flaws of the directive, but also possibilities for future amendments and many currently available options for Member States aiming for a sustainability-friendly transposition. Notwithstanding the criticisms we raise, the pre-existing fundamentals of European consumer sales law can, in combination with appropriate new consumer and product regulation as well as soft law, in our opinion still serve as a strong enabler of sustainable consumption. Finally, the article aims to serve as an illustration of a methodical analysis of consumer contract law from the perspective of article 11 TFEU and of the broader implications of sustainable development and circular economy policies for European private law.

1. Introduction

On 20 May 2019, the EU legislator adopted directive 2019/771/EU on certain aspects concerning contracts for the sale of goods (CSD 2019),¹ which repeals the existing consumer sales directive 1999/44/EC (CSD 1999).² Together with its twin directive 2019/770/EU on certain aspects concerning consumer contracts for the supply of digital content and digital services (SDCS 2019),³ the directive is primarily a result of the “Digital Single Market Strategy” of the previous Commission.⁴ While the CSD 2019 strengthens consumer protection and the internal market in the context of increased digitalisation,⁵ it appears to give only limited attention to another emerging trend in European consumer and contract law: sustainable consumption.

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¹ Directive of the European Parliament and of the Council 2019/771/EU of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation 2017/2394/EU and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (CSD 2019).

² Directive of the European Parliament and of the Council 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (CSD 1999).

³ Directive of the European Parliament and of the Council 2019/770/EU of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (SDCS 2019).

⁴ Commission, ‘Strategy for a digital single market for Europe’ (Communication) COM(2015) 192 final.

⁵ See for a general discussion Dirk Staudenmayer, ‘The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy’ (2020) 28 ERPL 219.

In response to the overall planetary and generational challenges of mankind, international policy has over the last few decades adopted a “sustainable development”⁶ agenda, which includes among others the long-term goal of a transition towards more sustainable consumption patterns.⁷ Sustainable consumption has subsequently been integrated in the UN consumer protection guidelines.⁸ It should be emphasized that sustainable development encompasses non-environmental goals as well, such as humanitarian and basic social, economic, and cultural rights.⁹ Consequently, sustainable consumption partially overlaps with the demand-side of a circular economy, but it is conceptually broader. The EU has supported these developments and shaped its own sustainable consumption and production policy.¹⁰ However, the actual European consumer legislation continues to be based on a model that prioritises the freedom of individual consumers to consume what and how much they want, regardless of possible social or environmental externalities.¹¹ To the extent that consideration is given to sustainable consumption, it is part of a “light touch” approach of consumer empowerment through labels and protection against untrue or misleading claims.¹² But both literature¹³ and empirical information¹⁴ suggest that the effectiveness of this approach is limited. As a result, there is a renewed call by certain scholars to transform European consumer law by more fundamentally taking into account the need for more sustainable consumption.¹⁵ Such shift would seem possible and even encouraged under primary European law, given the principle of promoting sustainable development in all Union policies enshrined in article 11 TFEU, the principle of consistency in article 7 TFEU and the Union’s goals and fundamental rights of articles 3, (3) and (5) TEU and 37 Charter. The wide-ranging environmental ambitions declared by the new European Commission¹⁶ may eventually lead to such fundamental changes in European consumer law. The Commission has already signalled in its

⁶ The “Brundtland report” defines sustainable development as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*” (UN World Commission on Environment and Development, ‘Our Common Future’ (1987) UN doc A/42/427, 41).

⁷ See UN Conference on Environment and Development Report (1992) UN doc A/CONF/151/26 (vol. I), annex I principle 8 and annex II ch 4; UNGA Res 70/1 (2015) UN doc A/RES/70/1, Goal 12.

⁸ ECOSOC Res 7 (1999) UN doc E/1999/INF/2/Add.2.

⁹ See sources in footnotes 6-8. A good consumer market illustration is the “Fairtrade” label, which refers to labour conditions, minimal quality of life and environmental protection in third world production countries (<fairtrade.net/standard> accessed 24/8/2020).

¹⁰ Commission, ‘Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan’ (Communication) COM (2008) 397 final; Council, ‘Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan – Council conclusions’ (2008) 16914/08, annex; Commission, ‘New Consumer Agenda: Strengthening consumer resilience for sustainable recovery’ (Communication) COM (2020) 696 final, 5-9.

¹¹ See regarding this dichotomy Ludwig Krämer, ‘On the Interrelation Between Consumer and Environmental Policies in the European Community’ (1993) 16 JCP 455, 457-458 and 464-466.

¹² See i.a. Regulation of the European Parliament and of the Council 2010/66/EC of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1 (Regulation 2010/66/EC); Regulation of the European Parliament and of the Council 2017/1369/EU of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1 (Regulation 2017/1369/EU); Commission, ‘Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices’ SWD (2016) 163 final, 95-109.

¹³ Thomas Wilhelmsson, ‘Consumer Law and the Environment: From Consumer to Citizen’ (1998) 21 JCP 45, 52-53. See also Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 J Law & Soc 349; Oren Bar-Gill and Omri Ben-Shahar, ‘Regulatory techniques in consumer protection: A critique of European consumer contract law’ (2013) 50 CML Rev 109, 117-119.

¹⁴ GfK and others, *Consumer market study on environmental claims for non-food products* (European Commission 2015) 75-76 <ec.europa.eu/info/sites/info/files/study_on_environmental_claims_for_non_food_products_2014_en.pdf> accessed 14/6/2020. See also regarding the lack of European progress towards SDG 12 Commission, ‘Towards a Sustainable Europe by 2030’ (Reflection Paper) COM (2019) 22 final, 101.

¹⁵ Hans-Wolfgang Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 EuCML 229, 230-231; Vanessa Mak and Evelyne Terryn, ‘Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law’ (2020) 43 JCP 227, 235-244. See also footnote 158.

¹⁶ See Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final.

most recent circular economy action plan,¹⁷ as well as in its new consumer agenda,¹⁸ that it is considering to propose amendments to the still very new CSD 2019.

Within this context, this article aims to systematically examine all main features of CSD 2019 in light of the currently pursued transition to more sustainable consumption patterns. Our comprehensive analysis reveals that the new directive indeed makes only a small contribution to sustainable consumption and that the intention of the new Commission to already propose amendments is understandable. However, it also highlights that some important transposition choices have been left to the Member States and that certain pre-existing features of consumer sales law are already capable of enabling more sustainable consumption, if the broader economic and marketing context gradually evolves which can be aided by ancillary consumer and product regulation.

2. Harmonization and scope

2.1. Maximum harmonization

The CSD 2019 is a maximum harmonization directive.¹⁹ Maximum harmonization of European consumer law has in the past been criticized by authors who pointed out that non-contractual factors constitute more important internal market obstacles, that legal competition can be beneficial, that parallel national rules will continue to exist and/or that maximum harmonization should remain limited to cross-border consumption issues.²⁰ These arguments equally apply to the CSD 2019 and, consequently, the directive appears to have at least an uneasy relationship with the principles of subsidiarity and proportionality. Such criticisms can be shared from a sustainable consumption perspective. As opposed to its predecessor, the new consumer sales directive precludes Member States from keeping or introducing additional rules which can be more sustainable than the directive's content, such as certain remedies (see sections 5.3-5.4). As a result, the CSD 2019 can in some regards even be considered as more harmful to sustainable consumption than the CSD 1999.

Fortunately, the directive establishes noteworthy exceptions to the maximum harmonization principle and confirms explicitly that several aspects fall outside its scope.²¹ Several of these examples, which present choices for Member States with sustainability consequences, are discussed below.²²

2.2. Scope of application

We raise two remarks concerning the scope of the directive.

¹⁷ Commission, 'A new Circular Economy Action Plan: For a cleaner and more competitive Europe' (Communication) COM (2020) 98 final, 5. See also European Parliament IMCO Committee, 'Towards a more sustainable single market for business and consumers' (Draft Report), 2020/2021(INI), paras 1 and 4-9.

¹⁸ Commission, 'New Consumer Agenda: Strengthening consumer resilience for sustainable recovery' (Communication) COM (2020) 696 final, 7-8.

¹⁹ Article 4 CSD 2019.

²⁰ See Michael Faure, 'Towards a maximum harmonization of consumer contract law!?' (2008) 15 MJ 433, 437-439; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 4, 21, 170 and 209. See also William Hubbard, 'Another look at the Eurobarometer surveys' (2013) 50 CML Rev 187.

²¹ See for an overview Jorge Morais-Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services: Overview of Directives 2019/770 and 2019/771' (2019) 8 EuCML 194, 194-195.

²² For further examples of national initiatives, see the various country reports on 'Sustainability, the Circular Economy and Consumer Law' published in EuCML 2020, issues 3-5.

First, trends connected to the emergence of more sustainable consumption patterns in Europe diminish the importance of the directive's subject matter. Sales of consumer goods are increasingly replaced by alternatives (such as leasing) or bundled with ancillary services. Such "servitisation" can help prolong product lifespans and close resource loops.²³ The supply of goods to be manufactured, after-sale installation services and the supply of digital content and services still fall within the scope of the CSD 2019²⁴ or SDCS 2019. But other ancillary services, such as maintenance and repair, and models without transfer of ownership such as product-lease or product-as-a-service fall outside the scope of harmonized consumer law and are mainly governed by general contract law that provides less protection to consumers.²⁵ Furthermore, the collaborative economy allows individuals to use existing products more intensively, for example through platforms for ridesharing or sharing tools with neighbours, or may allow them to resell their personal goods, like electronics or clothes. While the first category reduces the number of concluded consumer sales contracts, the second category only falls under the directive's scope if the reselling qualifies as a business activity.²⁶ The diminishing importance of the CSD 2019 is not problematic in itself. But its current rules may lead to an unnecessary perception of consumer sales as unsustainable. And the limited consumer protection and lack of harmonization outside its scope is an emerging issue, which can negatively impact new sustainable consumption models.

Second, like the CSD 1999, the new directive includes special rules for "second-hand goods" which seem unnecessarily confusing in light of the aim of creating a European circular economy. Article 3(5) CSD 2019 allows Member States to exclude second-hand goods sold at public auctions. The justification appears to be the limited knowledge of auctioneers regarding auctioned goods. But this equally applies to new auctioned goods. Article 10(6) CSD 2019 allows Member States to permit parties to contractually reduce the legal guarantee period to a minimum of one year in the case of second-hand goods. Empirical information reveals that this rule confuses both consumers and sellers and may result in practice in an even lower effective consumer protection than a standard one year guarantee.²⁷ There is furthermore some evidence that a reduced legal guarantee effectively discourages consumers to buy second-hand goods.²⁸ In our opinion, an optional reduction of the guarantee period on the sole basis of the second-hand nature is not the correct approach.²⁹ The second-hand nature of a good is indeed highly relevant for evaluating conformity (see section 3). It means that many defects present at the time of delivery cannot lead to liability under the legal guarantee. But the appropriate length of the guarantee period is much more dependent on the durability of

²³ Although not all "servitisation" automatically leads to increased sustainability, see i.a. Arnold Tukker, 'Eight types of product-service-system: Eight ways to sustainability? Experiences from Suspronet' (2004) 13 *Bus Strat Env* 246.

²⁴ Articles 3(2)-(3) and 8 CSD 2019.

²⁵ See regarding implications for consumer protection Bert Keirsbilck, Evelyne Terryn and Elias Van Gool, 'Consumentenbescherming bij servitisation en product-dienst-systemen (PDS)' [2019] *Tijdschrift voor Privaatrecht* 817; V. Mak, 'Consumentenbescherming bij servitisation (Een Nederlandse focus op de trend waarbij aanbieders steeds vaker diensten aanbieden naast of in de plaats van producten)' [2019] *Tijdschrift voor Privaatrecht* 779; Fryderyk Zoll, 'From a product-based economy to services?' in Bert Keirsbilck and Evelyne Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019).

²⁶ Articles 2(3) and 3(1) CSD 2019. See for relevant criteria Case C-105/17 *Kamenova* [2018] ECLI:EU:C:2018:808, para 38. See regarding the possibility to qualify intermediaries as sellers recital 23 CSD 2019, which codifies Case C-149/15 *Wathelet* [2016] ECLI:EU:C:2016:840.

²⁷ See GFK, *Consumer market study on the functioning of the market for second-hand cars, Part 1: Synthesis Report* (European Commission 2015) 94 and 98 <ec.europa.eu/info/sites/info/files/2ndhandcarsreportpart1-synthesisreport_en.pdf> accessed 14/6/2020); Katarzyna Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) *Tilburg Private Law Working Paper* 3/2020, 19.

²⁸ Denis Guiot and Dominique Roux, 'A Second-hand Shoppers' Motivation Scale: Antecedents, Consequences, and Implications for Retailers' (2010) 86 *J Retailing* 355.

²⁹ See also Fernando Gomez, 'Economic Analysis of the Directive' in Massimo Bianca and Stefan Grundmann (eds), *EU Sales Directive: Commentary* (Intersentia 2002) 71.

the general product type than on whether it is new or second-hand (see section 4.1).³⁰ We believe that the main problem of both current rules is that they signal that second-hand goods by nature have low value and limited durability, which is often untrue in specific cases, and that their buyers do not merit equal legal protection. This runs contrary to the European goal of transitioning to a more circular economy, in which reuse, maintenance and repair are primary strategies.³¹ An additional problem of these rules is in our opinion the lack of a clear definition of “second-hand”. Which duration and intensity of prior use suffice? While “repaired” goods likely qualify as second-hand, can the same be said of properly “remanufactured” (“refurbished”) goods, like furniture or electronics? The essential idea of this circular strategy is to recreate goods “as new”.³² As a conclusion, we believe that Member States should not introduce these rules if they want to fully encourage circular consumption. A tailored conformity assessment is a more appropriate and sufficient way to deal with second-hand goods.

3. Conformity from a sustainable consumption perspective

3.1. Subjective/objective conformity and sustainability

Many claims of non-conformity related to sustainability could already be based on the more general conformity criteria of article 2(2) CSD 1999, for example when the consumer reasonably expected better durability,³³ when low environmental quality makes a product unfit for normal use³⁴ or when the seller of a good promised a “Fairtrade” production process or resource origin. However, the CSD 2019 provides more detailed subjective and objective conformity criteria that can assist consumers who claim that sustainability characteristics of a purchased good are in non-conformity with the sale. Particularly important in this regard are the open-ended criteria in article 6, a), which can encompass any quality explicitly agreed upon in the sales contract, and article 7(1), d), which refers to reasonable expectations of the consumer based on the nature of the good or public statements made by or on behalf of persons in the supply chain. It is confusing that article 6, a) does not mention “durability” and article 7(1), d) does not mention “interoperability”. But the words “*and other features*” and “*including*” seem to imply that these are non-exhaustive examples of possible criteria and, in our opinion, these omissions should not be interpreted as deliberate exclusions by the legislator.³⁵

The criteria of article 6-7 CSD 2019 can contribute to combatting different types of “premature obsolescence” of goods.³⁶ A symbolic milestone but not a real novelty compared to CSD 1999 is article

³⁰ For similar reasons, we also do not argue that the legal guarantee period should be extended specifically for second-hand goods, which could create adverse effects that discourage overall sales of such goods (see Ricardo Pazos, ‘Sustainability, the Circular Economy and Consumer Law in Spain’ (2020) 9 EuCML 212, 215).

³¹ See Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final, 2-7.

³² See for the commonly accepted definition of “remanufacturing” Gillian Hatcher, Winifred Ijomah and James Windmill, ‘Design for remanufacture: a literature review and future research needs’ (2011) 19 J Clean Prod 2004, 2004.

³³ Tobias Brönneke, ‘Premature Obsolescence: Suggestions for Legislative Counter-measures in German and European Sales & Consumer Law’ (2017) 14 JEEPL 361, 365; Howells, Twigg-Flesner and Wilhelmsson (n 20) 183; Anais Michel, ‘La directive 1999/44/EC sur la garantie des biens de consommation: un remède efficace contre l’obsolescence programmée?’ [2016] REDC 207, 219.

³⁴ Klaus Tonner, ‘Sustainable Consumption, Consumer Policy and the Law’ [2011] REDC 9, 21.

³⁵ Whether these subjective or objective conformity criteria are actually applicable, should be determined on a case-by-case basis. *Contra* Staudenmayer (n 5) 237 who argues that interoperability cannot be expected by consumers on the basis of article 7(1), d).

³⁶ See regarding types of obsolescence i.a. Tim Cooper, ‘Inadequate Life? Evidence of Consumer Attitudes to Product Obsolescence’ (2004) JCP 421, 423-426; Brönneke (n 33) 59-61.

7(1), d). This provision now explicitly confirms that goods should have the minimum “durability”³⁷ that a consumer may reasonably expect.³⁸ It will be interesting to see how this requirement will be applied to different product categories and how it will interact with the various legal guarantee periods chosen by Member States (see section 4.1). An open question is whether “durability” also encompasses “repairability”. In our opinion, this should be answered affirmatively. Repairability contributes to product durability and from the perspective of the Union’s circular economy policy, standard ‘repair’ should indeed become part of the “normal use” of goods referred to in article 2(13). Articles 6, c), 7(1), c) and 8 list as additional conformity criteria the delivery of contractually agreed or reasonably expected accessories or instructions and the correctness of provided installation services, instructions or software. These are indeed often essential to avoid goods becoming prematurely obsolete and, consequently, are also relevant from a sustainable consumption perspective.

A major contribution of the new conformity criteria is their potential to curb “technological obsolescence”. This is increasingly important, because the expanding “Internet of Things” increases the number of goods subject to this risk and because electronics have a significant impact on sustainable development, particularly in terms of extraction of rare resources in conflict areas, labour conditions and electronic waste.³⁹ Articles 6, a) and 7(1), d) emphasize contractually agreed and reasonably expected “compatibility” and “interoperability”. These characteristics allow goods with digital elements to function with other hardware or software,⁴⁰ which avoids their premature replacement. Furthermore, updates contribute as well to postponing technological obsolescence. It is in this regard crucial that a seller must not only supply explicitly agreed updates,⁴¹ but that the CSD 2019 introduces an objective update obligation for all sales of goods with digital elements. The seller is obligated to inform and supply the consumer with security and other updates that are necessary to keep these goods in conformity, for the period of time when the consumer may reasonably expect this or, if a continuous supply of digital content and services is agreed, during the legal guarantee period or an agreed longer period of continuous supply.⁴² The new “update-obligation” should be read together with the possible unlawfulness of pushing consumers, without clear information and free choice, to install firmware updates that significantly reduce the performance and useful lifespan of devices. This can constitute an unfair commercial practice, as demonstrated by recent decisions of Italian and French authorities.⁴³

Additionally, articles 6-7 CSD 2019 may help combat “greenwashing” or other untrue or unverifiable sustainability claims in B2C product-markets. The Commission emphasizes in this context the potential of

³⁷ French and Dutch language versions use terms that mean both “durability” and “sustainability” (*durabilité; duurzaamheid*). Article 2(13) confirms that the directive only refers explicitly to the more limited concept of durability.

³⁸ See footnote 33 regarding presence under the CSD 1999. See in favour of this explicit inclusion Alberto De Franceschi, ‘Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy’ (2018) 7 EuCML 217, 219-220.

³⁹ See for example the impacts of mobile phones in Vasileios Rizos and others, *Identifying the impact of the circular economy on the Fast-Moving Consumer Goods Industry: opportunities and challenges for businesses, workers and consumers – mobile phones as an example* (EESC 2019) 10-20 and 37-48 <eesc.europa.eu/sites/default/files/files/qe-03-19-510-en-n.pdf> accessed 09/02/2021.

⁴⁰ Articles 2(8) and (10) CSD 2019.

⁴¹ Article 6, d) CSD 2019.

⁴² Articles 7(3) and 10(2) CSD 2019. See also recitals 28-31 CSD 2019.

⁴³ AGCM 25 September 2018, *Apple*, <agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf> accessed 25/8/2020; AGCM 25 September 2018, *Samsung*, <agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf> accessed 25/8/2020; *Transaction pénale* agreed by French public prosecutor, DGCCRF and Apple, communicated on 7 February 2020, <economie.gouv.fr/dgccrf/transaction-avec-le-groupe-apple-pour-pratique-commerciale-trompeuse> accessed 26/8/2020. A consumer class action has been launched in Belgium on 2 December 2020 for the same facts (see <test-achats.be/action/espace-presse/communiqués-de-presse/2020/class-action-apple> accessed 30/1/2021).

the Unfair Commercial Practices Directive.⁴⁴ But once a subjective or objective non-conformity can be demonstrated, the European consumer sales regime presents a very effective alternative instrument, which is probably used more often in practice. Given the nature of greenwashing, price reduction and termination may sometimes be the only appropriate remedies (see section 5.4). However, if repair is possible, for example in the Dieselgate cases, this should be preferred from a sustainability perspective (see section 5.2). Non-conformity claims related to sustainability are easily disputed, become rapidly technical and often represent little monetary value for individual consumers. Because of these reasons, the representative action instrument recently adopted by the Commission⁴⁵ could become essential to effectively enforce sustainable consumption based on the CSD 2019.

In conclusion, we consider the new directive's conformity criteria as a flexible framework that has the potential to support sustainable consumption. This is a result of the pre-existing broad and open scope of the conformity criteria rather than any novelties such as the explicit mention of "durability". Nevertheless, the new explicit "compatibility" and "interoperability" criteria as well as the objective "update obligation" do make an important difference in a context of increased digitalisation of consumer goods. We therefore do not support the view that the new objective conformity criteria focus exclusively on fast-moving consumption or a linear economic model. However, these sustainability merits of the conformity framework are nothing more than a potential. It will only be fulfilled to the extent that conformity conditions of actual individual consumer sales will become more sustainable. Such transition can receive support from the wider legal and factual context that surrounds consumer sales in Europe, as discussed in the next section.

3.2. Specifications through information obligations, regulation or soft law

The conformity criteria's open framework can be purposefully complemented.

First of all, a European sustainable consumption "policy mix" will likely include information obligations.⁴⁶ Sustainability information can potentially steer consumer purchase decisions. Many consumers, for example, appear to welcome information on product durability or repairability.⁴⁷ But, as discussed in the Introduction, a policy exclusively based on consumer information often fails to overcome important cognitive limitations and will fail to change on its own mainstream consumption patterns.⁴⁸ A second important function of information obligations is how they can determine liability under the eventually concluded contracts.⁴⁹ Information given by the seller can qualify as a subjective conformity requirement. And information communicated by producers, who are the cheapest cost-avoiders for most sustainability externalities and, consequentially, are best placed to be subject to sustainability disclosures, can qualify as public statements by supply chain actors according to article 7(1), d). Such statements are excluded as

⁴⁴ Commission, 'Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices' SWD (2016) 163 final, 95-109.

⁴⁵ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, [2020] OJ L 409/1.

⁴⁶ See Eléonore Maitre-Ekern, 'The Choice of Regulatory Instruments for a Circular Economy' in Klaus Mathis and Bruce Huber (eds), *Environmental Law and Economics* (Springer 2017) 315-316 and 326-328; Mak and Terryn (n 15) 229-233.

⁴⁷ LE and others, *Behavioural Study on Consumers' Engagement in the Circular Economy* (European Commission 2018) 176-180 <ec.europa.eu/info/sites/info/files/ec_circular_economy_final_report_0.pdf> accessed 25/8/2020; TNS, 'Attitudes of Europeans towards building the Single Market for green products' (2013) Commission Flash Eurobarometer 367, 106-107 <ec.europa.eu/commfrontoffice/publicopinion/flash/fl_367_en.pdf> accessed 25/8/2020.

⁴⁸ See footnotes 13-14. See also Dara O'Rourke and Abraham Ringer, 'The Impact of Sustainability Information on Consumer Decision Making' (2015) 20 J Ind Ecol 882.

⁴⁹ See Martien Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25 ERPL (2017) 25, 31-33 and 43-44.

objective conformity requirements when the seller proves that (i) he was and could not reasonably have been aware of the statement, (ii) the statement had been sufficiently corrected beforehand, or (iii) the purchase decision could not have been influenced by the statement.⁵⁰ If applied restrictively, these exclusions seem reasonable. But they can make a direct producer liability more desirable (see section 4.3). Additionally, it is important to note that sustainability disclosures act under contract law as a double-edged sword. For example, making consumers aware that a good has a short lifespan, actively precludes subsequent non-conformity claims based on this characteristic.⁵¹ Inversely, a seller might at present refrain from giving sustainability information, such as the expected product lifespan or the origin of used resources, in fear of contractual liability. Making certain disclosures mandatory, clear and comparable, can overcome some of these problems. Finally, information obligations naturally create costs that are ultimately passed on to consumers. Notwithstanding legal design and other considerations from behavioural science, it may be advisable to limit such information obligations to essential aspects that create synergies with other legal rules, such as the average expected product lifespan for potentially determining the legal guarantee period (see section 4.1), new Ecodesign or other already mandatory product regulations or crucial components of any future EU supply chain due diligence obligation for producers or importers.⁵²

Existing European information obligations that contribute to sustainable consumption, appear limited to those regarding codes of conduct, commercial guarantees, after-sale services and the existence of the legal guarantee,⁵³ the new information obligations regarding functionality, compatibility and interoperability of digital content, which will further help curb technological obsolescence (see section 3.1),⁵⁴ and the well-known European energy-efficiency and car emission labels.⁵⁵ In addition, the prohibition of misleading omissions requires sellers to provide sustainability information if such information can be considered as “material” for the consumer to take an informed transactional decision.⁵⁶ However, more comprehensive positive information obligations are expected in the future. The new circular economy action plan announces that consumers should receive “*trustworthy and relevant information on products [...], including on their lifespan and on the availability of repair services, spare parts and repair manuals*”.⁵⁷ Meanwhile, some Member States are already imposing broad sustainability information obligations. A prominent example is new French legislation that imposes information obligations on producers of certain products regarding

⁵⁰ Article 7(2) CSD 2019.

⁵¹ Thomas Wilhelmsson and Christian Twigg-Flesner, ‘Pre-contractual information duties in the *acquis communautaire*’ (2006) 2 ERCL 441, 447 and 458.

⁵² See European Parliament Legal Committee, ‘Recommendations to the Commission on corporate due diligence and corporate accountability’ (Draft Report), 2020/2129(INL).

⁵³ Articles 5(1), e), 6(1), l)-n) and 26 Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 (Consumer Rights Directive).

⁵⁴ Articles 5(1), g)-h) and 6(1), r)-s) Consumer Rights Directive, inserted by article 4 Directive of the European Parliament and of the Council 2019/2161/EU of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7.

⁵⁵ Regulation 2017/1369/EU; Directive of the European Parliament and of the Council 1999/94/EC of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars [2000] OJ L12/16.

⁵⁶ Article 7 Directive of the European Parliament and of the Council 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation 2006/2004/EC of the European Parliament and of the Council [2005] OJ L149/22.

⁵⁷ Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final, 5. See also the ongoing Commission consultation on substantiating claims regarding the environmental performance of products and businesses on the basis of “PEF” and “OEF” methods: <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12511-Environmental-claims-based-on-environmental-footprint-methods> accessed 25/8/2020).

durability, repairability and environmental/social impact, regulates the use of the term “remanufactured” and also introduces soft law instruments relevant to sustainable consumption.⁵⁸ Other countries may follow suit.⁵⁹

Secondly, consumers who argue that a delivered good does not meet contractual conformity requirements may refer to binding environmental, labour or product regulations that apply to its lifecycle.⁶⁰ A similar function may be fulfilled by relevant soft law rules, such as the European Bio-⁶¹ and Ecolabels⁶², the non-governmental “Fairtrade” label or sectoral or enterprise standards or codes of conduct. However, these rules and standards can only be invoked under the objective conformity criteria that are recognized by the directive. Article 7(1), a) refers to existing laws, standards or codes of conduct determining the fitness for normal use. This may cover chemical and product safety regulations, energy-efficiency and product durability standards and in our opinion also repairability standards, which are part of “*normal use*” in a circular economy. New Ecodesign regulations introduced in 2019 require minimal durability and repairability for certain consumer goods⁶³ and it can be expected that such circular product design requirements will expand as a result of the current Commission’s Sustainable Products Initiative.⁶⁴

Most sustainability conformity discussions, however, relate to social and environmental externalities in the production or end-of-life phases of a good, which can only fall under article 7(1), d). However, this objective conformity criterion is not entirely boundless and remains limited to two sub-categories.⁶⁵ The first consists of reasonable consumer expectations based on public statements by the seller or actors in the supply chain, for which article 7(2) provides exceptions, as discussed above. Possible examples are market communication regarding compliance with environmental or ILO-standards during production,⁶⁶ energy-efficiency and car-emission labels, or the soft law labels mentioned above. The second sub-category of reasonable consumer expectations linked to “*the nature of the goods*” is less clear. Durability, repairability and end-of-life characteristics, included in Ecodesign, waste and product safety regulation, relate to the material constitution of a good at the time of purchase and likely qualify. The same can be said of pollutant emissions produced by a consumer product during its use phase, such as the car emissions at the centre of the ‘Dieselgate’ scandal.⁶⁷ But rules and standards regarding the important environmental or social

⁵⁸ See articles 13, 15-16, 19-20, 27, 33 and 37 Law of the French Republic nr 2020-105 of 10 February 2020 relating to the fight against waste and the circular economy, JORF 0035(1) of 11 February 2020 (Law of the French Republic nr 2020-105).

⁵⁹ See e.g. Umwelt Bundesamt, ‘Weiterentwicklung von Strategien gegen Obsoleszenz einschließlich rechtlicher Instrumente: Abschlussbericht’ (2020) <umweltbundesamt.de/publikationen/weiterentwicklung-von-strategien-gegen-obsoleszenz> accessed 30/1/2021.

⁶⁰ See recital 32 CSD 2019 specifically regarding product “durability”.

⁶¹ Council Regulation 2007/834/EC of 28 June 2007 on organic production and labelling of organic products and repealing Regulation 2092/91/EEC [2007] OJ L189/1.

⁶² Regulation 2010/66/EC.

⁶³ See <ec.europa.eu/commission/presscorner/detail/en/qanda_19_5889> accessed 25/8/2020; Framework Directive of the European Parliament and of the Council 2009/125/EC of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy-related products [2009] OJ L285/10.

⁶⁴ See <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-Products-Initiative> accessed 1/2/2021; Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication COM (2020) 98 final, 3-5).

⁶⁵ See regarding the almost identical article 2(1), d) CSD 1999 Stefan Grundmann, ‘Article 2: Conformity with the contract’ in Massimo Bianca and Stefan Grundmann (eds), *EU Sales Directive: Commentary* (Intersentia 2002) 135-138; Howells, Twigg-Flesner and Wilhelmsson (n 20) 182-183.

⁶⁶ See Anna Beckers, ‘Environmental Protection meets Consumer Sales: The Influence of Environmental Market Communication on Consumer Contracts and Remedies’ (2018) 14 ERCL 157, 168-170; Hugh Collins, ‘Conformity of Goods, the Network Society, and the Ethical Consumer’ (2014) 22 ERPL 619, 625 and 634-635.

⁶⁷ Caroline Meller-Hannich and Elisabeth Krausbeck, ‘Sustainability, the Circular Economy and Consumer Law in Germany’ (2020) 9 EuCML 168, 170 referring to BGH 8/1/2019, VIII ZR 225/17, (2019) NJW 1133.

externalities that can arise during production and distribution, seem excluded.⁶⁸ COLLINS argues that a consumer's reasonable expectations regarding "*the nature*" of a good can under specific circumstances also include the absence of production process externalities, as part of a product's "reputation".⁶⁹ We agree, ethics and sustainability have become part of the value of certain products. But it appears to us that such "reputation" can only be achieved and demonstrated by at least some level of preceding public statements in that sense by either the seller or actors in the supply chain. Consequently, objective expectations regarding the absence of externalities during production and distribution need in our opinion to have been publicly communicated in order to convincingly qualify under article 7(1), d).

Finally, article 7(5) provides that there is no lack of conformity if, at the time of contract conclusion, "*the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements*" and "*the consumer expressly and separately accepted that deviation*". This is an important exception to all possible objective sustainability requirements that have been discussed above, including the update obligation', conformity with product regulation or explicitly advertised characteristics. The assumption that the consumer will be effectively protected by an explicit and separate acceptance,⁷⁰ is questionable in light of behavioural science insights. From a sustainability perspective, one can also ask whether every contractual derogation should be allowed. It would, for example, be possible to preclude contractual derogations from certain important norms, such as Ecodesign rules or respecting article 4 ECHR in the production phase and supply chain.

4. Liability: options for a recalibration in light of sustainability

4.1. Legal guarantee period

According to article 10(1), the seller is liable for any non-conformity that exists at the time of delivery and becomes apparent during the two-year legal guarantee period. The legal guarantee period is extended for digital content or services supplied continuously to goods with digital elements during more than two years.⁷¹ Article 10(3) allows Member States to maintain or introduce longer legal guarantee periods. This minimum harmonization is primarily motivated by the fear of lowering consumer protection in a number of Member States which currently apply longer legal guarantee periods. But from our perspective it is important to note that maximum harmonization of the two-year period would also have been detrimental to sustainability and circular economy.⁷² This is because longer legal guarantee periods encourage the production of goods with better durability,⁷³ which results in less environmental externalities from the production of new and disposal of old goods.⁷⁴ Furthermore, longer guarantee periods may increase the

⁶⁸ However, see also Meller-Hannich and Krausbeck (n 67) 168 referring i.a. to BGH 15/6/2016, VIII ZR 134/15, (2016) NJW 2874.

⁶⁹ Collins (n 66) 637-638.

⁷⁰ Recital 49 SDCS 2019 states regarding a parallel rule that the requirements could be fulfilled "*by ticking a box, pressing a button or activating a similar function.*"

⁷¹ See article 10(2) CSD 2019.

⁷² See Marco Loos, 'Not Good but Certainly Content: The Proposals for European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content' in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales* (Intersentia 2017) 21; Vanessa Mak and Enna Lujinovic, 'Towards a Circular Economy in EU Consumer Markets: Legal Possibilities and Legal Challenges and the Dutch Example' (2019) 8 EuCML 4, 7-8.

⁷³ See Gomez (n 29) 57-59.

⁷⁴ Admittedly, newer goods can improve energy-efficiency or may be less environmentally hazardous. But such risks are already addressed by specific EU regulations and such gains, especially in this regulated context, will not easily outweigh the externalities

chance that consumers seek repairs for their products instead of buying new ones,⁷⁵ which again prolongs the lifespan of goods (see section 5.2). It is true that longer legal guarantee periods may increase prices for certain goods.⁷⁶ But this is at least partially offset by longer product durability and availability, for which most European consumers appear to be willing to pay some higher price.⁷⁷ In conclusion, while the overall choice for minimum harmonization of this aspect can be deemed positive from a sustainable consumption perspective, it can be regretted that at least for goods with long average lifespans, such as most household and transport devices, the minimum European guarantee period has not been extended. Such extension at the European level would also help limit internal market divergences (see, however, section 2.1).

Several options exist for Member States that want to choose guarantee periods longer than two years. These may also inspire future amendments to the directive. The first approach is to uniformly extend the guarantee period, like the three-year period applied in Sweden.⁷⁸ The second approach consists of differentiated but general guarantee periods. For example, the Norwegian and Icelandic guarantees are extended from two to five years for goods considered to have a considerably longer lifespan than two years.⁷⁹ Similarly, a 2017 study proposed a European three-year guarantee period with the possibility for Member States to extend to a maximum of five years for durable goods.⁸⁰ The third approach consists of fully differentiated guarantee periods, such as currently in Finland⁸¹ or the Netherlands.⁸² The Finnish and Dutch legal guarantees are limited in time to the purchased good's expected lifespan. Consequently, consumers in these countries may claim that a non-conformity existed at the time of delivery as long this should not be attributed to wear and tear due to expiration of the good's expected lifespan. To support this assessment, soft law can indicate expected lifespans for different product categories.⁸³ Furthermore, this Finnish and Dutch model, which has now been included in a Belgian legislative proposal,⁸⁴ presents in our opinion an opportunity to better connect consumer sales law to product regulation, like Ecodesign rules which already include durability standards and are expected to be expanded in the near future.⁸⁵ Connecting the guarantee period to durability information obligations imposed on the seller or producer appears less attractive to us,⁸⁶ because it would discourage them to communicate long product durability (see section 3.2).

of replacement (see e.g. Carlos Montalvo, David Peck and Elmer Rietveld, 'A Longer Lifetime for Products: Benefits for Consumers and Companies' (2016) European Parliament Study, 41-44 and 88 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU\(2016\)579000_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf)> accessed 25/8/2020).

⁷⁵ Renske van den Berge, Lise Magnier and Ruth Mugge, 'Too good to go? Consumers' replacement behaviour and potential strategies for stimulating product retention' (2021) 39 *Curr Op Psychology* 66, 68. See also Nordic Council of Ministers, 'Circular Business Models in the Mobile Phone Industry' (2017) 62 <norden.diva-portal.org/smash/get/diva2:1153357/FULLTEXT02.pdf> accessed 30/1/2021.

⁷⁶ See ICF, *Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/44/EC* (European Commission 2017) 28-35 <ec.europa.eu/newsroom/document.cfm?doc_id=44803> accessed 25/8/2020.

⁷⁷ LE and others (n 47) 165-167; TNS (n 47) 55-58 and 108-111.

⁷⁸ §23 Konsumentköplag (1990:932).

⁷⁹ §27 Forbrukerkjøpsloven (LOV-2002-06-21-34); §27 Lög um neytendakaup (2003-03-20-48).

⁸⁰ Klaus Tonner and Rosalind Malcolm, 'How an EU lifespan guarantee model could be implemented across the European Union' (2017) European Parliament Study, 54 <[europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU\(2017\)583121_EN.pdf](http://europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU(2017)583121_EN.pdf)> accessed 25/8/2020.

⁸¹ Finnish law requires consumers to notify the seller within a reasonable period after they have or should have discovered the non-conformity (§16 Kuluttajansuojalaki (1978/38)).

⁸² Article VII.17(2) and VII.23 Burgerlijk Wetboek.

⁸³ See e.g. the following list established by a Dutch industry group <technieknederland.nl/stream/richtlijnenafschrijvingsmethoden> accessed 25/8/2020.

⁸⁴ See Bert Keirsbilck, 'Sustainability, the Circular Economy and Consumer Law in Belgium' (2020) 9 *EuCML* 165, 167 referring to art 7 Proposed Federal Act to fight against organised obsolescence and to support the circular economy, 7/1/2020, Parl.Doc. Kamer/Chambre 55 0914/001.

⁸⁵ See footnote 64. Advocating in favour Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 27 *ERPL* 851, 859-860.

⁸⁶ This was suggested in European Parliament Resolution of 4 July 2017 on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)) [2018] OJ C334/60, para 27.

The aforementioned first approach has the benefit of legal certainty. But most goods have either a shorter or longer lifespan than the chosen guarantee period, which results in a cross-subsidy at the cost of consumers who buy more durable goods.⁸⁷ The second approach constitutes a middle ground, which suffers the same problem to a much smaller extent. But we advocate in favour of the third, Finnish-Dutch approach, because of its flexibility and clear benefits to sustainable consumption.⁸⁸ It does not penalize consumers who buy more durable goods and it discourages the production and sale of goods that are less durable than the average lifespan of a product type on the market. Additionally, this model of individually determined legal guarantee periods easily evolves according to gains in product durability or new Ecodesign standards, without requiring legislative intervention. And it increases the coherence between product regulation and consumer sales law. Finally, the Dutch and Finnish experiences with this model of individually seem to indicate that its inherent flexibility does not necessarily result in a lot of increased legal uncertainty.

4.2. Presumption period

It is often challenging for consumers to prove that a lack of conformity already existed at the time of delivery, especially in case of premature obsolescence which is by nature difficult to distinguish from normal wear and tear or from a normal consequence of changing external circumstances. Hence, it seems helpful for certain consumers that the period during which appearing non-conformities are presumed to have already been present at the time of delivery, is extended to one year in article 11(1) CSD 2019. Given that some Member States currently have longer presumption periods, article 11(2) allows Member States to maintain or introduce two-year presumption periods. From a sustainable consumption perspective, such a longer presumption period is valuable in the fight against premature obsolescence for reasons similar to those cited for a longer legal guarantee period (see section 4.1). Sellers and, indirectly, producers want to avoid that non-conformities manifest themselves during this period, given the high risk of ensuing liability. Because of this, it can be argued that even a one- or two-year presumption period is insufficient for many goods with longer lifespans.⁸⁹ However, consumer protection and sustainability must be balanced with the interests of sellers, for whom a longer presumption period arguably constitutes a bigger burden than a longer legal guarantee period. Furthermore, longer presumption periods will result in increased prices, although this should be nuanced because the presumption remains rebuttable and sellers are generally in a better position to deliver the required proof than consumers.⁹⁰ A possible sustainability disadvantage that should in our opinion not be ignored is the risk that longer presumption periods invite consumers to use goods less carefully (a “moral hazard”).⁹¹ This is an additional reason why it can be encouraged that Member States impose a proportional liability when consumers have contributed to a non-conformity (see section 5.1). In conclusion, both extending the presumption period and the legal guarantee towards the expected lifetime of a product type can potentially contribute to sustainability. But if combining both is unrealistic, then we believe that the extension of the latter should be considered as a higher priority if the matter is approached purely from a sustainable consumption perspective.

⁸⁷ See Gomez (n 29) 71.

⁸⁸ See also Eléonore Maitre-Ekern and Carl Dalhammar, ‘Towards a hierarchy of consumption behaviour in the circular economy’ (2019) 26 MJ 394, 417-419; Bert Keirsbilck, Evelyne Terryn, Anaïs Michel and Ivano Alogna, ‘Sustainable Consumption and Consumer Protection Legislation’ (2020) European Parliament IMCO Committee In-depth Analysis, 20-21 <europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA(2020)648769_EN.pdf> accessed 25/8/2020; Nordic Council of Ministers (n 75) 55.

⁸⁹ CEPS and Time.lex, *Introduction of a lifespan guarantee in the proposed online sales and digital content directives: Impact assessment of proposed substantial amendments* (European Parliament 2017) 5 <europarl.europa.eu/RegData/etudes/STUD/2017/610999/EPRS_STU(2017)610999_EN.pdf> accessed 25/8/2020.

⁹⁰ See Staudenmayer (n 5) 248 who argues that this asymmetry between parties is even greater for goods with digital elements.

⁹¹ See Gomez (n 29) 59-61.

4.3. Right of redress and producer liability

Section 3 demonstrated that conformity considerations regarding sustainability are in most cases controlled not by the seller but by the producer. This trend will likely intensify because of growing circular economy and sustainable production regulation.⁹² Consequently, it becomes increasingly important for sellers to enjoy an effective right of redress when they are liable for aspects falling outside their control. Like its predecessor, the directive only offers the principle of a right of redress, which is to be further determined by national law.⁹³ It is well known that sellers encounter many obstacles when exercising this right of redress. The seller's liability may not directly correspond with liability higher in the possibly international supply chain, insolvency or limitation periods may block redress and exoneration clauses may exclude or limit liability.⁹⁴ It is important to note that this is also a sustainable consumption issue. The producer is the "cheapest cost-avoider" for most sustainability risks, as mentioned above. But the legal system fails to effectively allocate liability to him.

Two possible solutions exist, which can be considered by both the European and national legislators. On the one hand, the seller's right of redress can be strengthened. Belgian law, for example, allows the seller to seek redress against every actor in the supply chain, while contractual clauses in this chain that limit or exclude liability cannot be invoked against him.⁹⁵ On the other hand, the consumer can be given the right to directly claim against the producer.⁹⁶ The Commission originally proposed in 1993 a joint but not identical liability of seller and producer.⁹⁷ The French and Belgian guarantees against hidden defects already allow such claims.⁹⁸ Direct producer liability increases consumer protection by enhancing consumers' recovery prospects and it makes sense to consumers who, when making purchase decisions, generally identify more often with a producer than with a seller. And European product liability law already allows consumers to claim against producers.⁹⁹ And notwithstanding the benefits for consumers, direct (joint) producer liability seems more effective as part of a broader European regulatory framework that aims to foster sustainable consumption and production.

Finally, it should be noted that two processes linked to combatting material and technological obsolescence, already under current consumer sales law, help close the distance between consumers and producers. First, the new update obligation of articles 6(d) and 7(3) necessarily requires a close interaction between "users" and "developers" of goods with digital elements. This corresponds with the growing vertical integration of technological consumer markets. Secondly, although the seller is responsible for the repair remedy, it is indispensable for repair that the producer provides spare parts, diagnostic information and in many cases even repair services (see section 5.2). This is a longstanding industry reality dictated by technological complexity of consumer goods and supply chain logic. But this repair-oriented cooperation now seems likely

⁹² See Commission, 'A new Circular Economy Action Plan: For a cleaner and more competitive Europe' (Communication) COM (2020) 98 final, 3-10.

⁹³ Article 18 and recital 63 CSD 2019.

⁹⁴ See Michael Bridge, 'Article 4: Right of redress' in Massimo Bianca and Stefan Grundmann (eds), *EU Sales Directive: Commentary* (Intersentia 2002) 186-193; B. Keirsbilck, 'Right of redress' in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales* (Intersentia 2017) 272-274.

⁹⁵ Article 1649^{sexies} Burgerlijk Wetboek.

⁹⁶ See Opinion of the EESC of 15 February 2018 on the Amended proposal for a directive on certain aspects concerning contracts for the sales of goods [2018] OJ C227/58, para 1.5.C and 3.4.A; European Parliament IMCO Committee, 'Towards a more sustainable single market for business and consumers' (Draft Report), 2020/2021(INI), para 1.E.

⁹⁷ Commission, 'Green Paper on guarantees for consumer goods and after sales services' COM (1993) 509 final, 86-88.

⁹⁸ See i.a. Cass.Civ.(France) 25 January 1820, S. 1820(1), 213; Cass.(Belgium) 5 December 1980, *Arr.Cass.* 1980, 382.

⁹⁹ Commission, 'Green Paper on guarantees for consumer goods and after sales services' COM (1993) 509 final, 86-87.

to expand on a mandatory basis as a result of new regulatory obligations for producers that are part of a nascent European “right of repair”.¹⁰⁰ Hence, it can be stated that even if a direct producer liability continues to be theoretically absent in European consumer sales law, other evolutions that are partially related to sustainable consumption slowly start to create such a liability in practice.

5. Remedies: towards a more sustainable hierarchy

5.1. General

The new directive preserves the existing hierarchy of remedies and codifies case law, by considering repair and replacement as co-equal primary remedies and by specifying to what extent the consumer can choose between them, under which conditions he is entitled to the secondary remedies and how all remedies are to be applied.¹⁰¹ The main difference with existing law is the maximum harmonizing character. Several remedies currently available in Member States for liability under the legal guarantee, such as immediate termination, are no longer allowed. Admittedly, the directive leaves many related aspects to the discretion of Member States, which avoids the most problematic drawbacks of maximum harmonization.¹⁰² But these transposition choices also have an impact on the sustainability of European consumption, which are generally overlooked in previous discussions on the sustainability of consumer sales remedies and which we would like to consider here as well.

First, Member States can introduce or maintain a specific remedy for non-conformities appearing within 30 days after delivery.¹⁰³ In Ireland and the United Kingdom, this is an immediate termination known as the “right to reject”. It appears to encourage impulsive consumption and results in additional transports, a possible new purchase and the risk that returned goods cannot be resold or repurposed. There are therefore more sustainable alternative remedies and this option should in our opinion as much as possible be avoided by Member States. Moreover, this general consumer sales remedy is in terms of its impact comparable to the consumer’s right of withdrawal in distance and off-premise contracts, which in its current scope and mandatory nature can also be questioned from a sustainable consumption perspective.¹⁰⁴

Second, Member States can introduce or maintain remedies not specific to consumer contracts for so-called “hidden defects”.¹⁰⁵ Although the associated guarantee in French and Belgian sales law is subject to different conditions and traditionally leads to less sustainable remedies, it can be taken into account when determining the length of the legal guarantee for consumer sales contracts. It allows consumers to claim remedies for certain non-conformities after the legal guarantee has expired and, in doing so, may contribute to combatting premature obsolescence (see section 4.1). Naturally, this option is detrimental to internal market harmonization. Whether from a strict sustainability perspective the “hidden defects” guarantee should co-

¹⁰⁰ See Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final, 5. For a national law illustration, see articles L111-4, L224-67, L224-109, L224-110 and L224-111 Code de la Consommation (France), as amended by article 19 Law of the French Republic nr 2020-105.

¹⁰¹ Articles 13-16 CSD 2019.

¹⁰² See for criticism against the original proposal Fryderyk Zoll, ‘The Remedies in the Proposals of the Online Sales Directive and the Directive on the Supply of Digital Content’ (2016) 5 EuCML 250.

¹⁰³ Article 3(7) CSD 2019.

¹⁰⁴ See in the context of e-commerce Evelyne Terryn and Elias Van Gool, ‘The Role of European Consumer Contract Law in Shaping the Environmental Impact of E-commerce’ EuCML forthcoming, para IV, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3732911> (preprint) accessed 30/1/2021.

¹⁰⁵ Article 3(7) CSD 2019.

exist with the legal guarantee like in France¹⁰⁶ or should only be available to consumers after expiration of the latter like in Belgium,¹⁰⁷ depends on the sustainability of the applicable national remedies, as discussed below.

Third, consumers can withhold payment until sellers have fulfilled all their obligations. This right is subject to conditions determined by national law.¹⁰⁸ The *exceptio non adimpleti contractus* known in most Member States,¹⁰⁹ should from a sustainability perspective be available to consumers under favourable conditions, such as no unnecessarily formal requirements and, if necessary, a suspension of the guarantee period. Its added sustainability value is the ability to avoid replacement by new goods, termination and/or litigation, which are less efficient and sustainable than pressuring sellers to initially deliver and install goods in full conformity with the contract.

Fourth, Member States can regulate to what extent a contribution by the consumer to the non-conformity affects his right to remedies.¹¹⁰ Proportional allocation of liability is in those cases the preferable solution from a sustainability perspective. Otherwise, an undesirable “moral hazard” problem is created by consumers who can mistreat goods and lower their remaining value without consequences once the liability of the seller is established.

Fifth, the directive leaves it to national law to determine under which conditions the consumer can claim damages in addition to the existing remedies.¹¹¹ Generally, this can be encouraged from a sustainable consumption perspective, for example when a choice for repair has been “penalized” by significant inconvenience and delay and no temporary replacement good has been offered (see section 5.2).¹¹² An interesting question is whether the consumer can claim damages for environmental and social externalities caused by a good’s non-conformity. BECKERS, referring to the *Quelle* and *Weber & Putz* decisions, the need for effective remedies for ethical consumers and the overlap between European consumer and environmental regulation, argues that under the directive also non-financial consequences should be remedied if they belong to contractual conformity requirements.¹¹³ The underlying idea can be strongly supported, but the suggested broad interpretation of the repair and replacement remedies are in our opinion unlikely to be confirmed and would require an amendment. The current directive considers this only under the possibility of additional damages.¹¹⁴ Some national laws may provide sufficiently broad rights to damages or can be interpreted accordingly. But a personal link between damage and claimant is normally required, which means that the externalities can only be presented as “moral damage” suffered by a sustainability-conscious consumer.

Finally, Member States can determine when the legal guarantee period is suspended or interrupted.¹¹⁵ In case of settlement negotiations, a suspension is preferable for consumer protection and to avoid inefficient litigation. In case of repair and replacement, the national legislator can choose to suspend or interrupt the guarantee period in a way that promotes sustainable remedies, as discussed below.

¹⁰⁶ Article L217-13 Code de la consommation (France).

¹⁰⁷ Article 1649quater, §5 Civil Code (Belgium).

¹⁰⁸ Article 13(6) CSD 2019.

¹⁰⁹ See the notes under article III-3:401 DCFR.

¹¹⁰ Article 13(7) CSD 2019.

¹¹¹ Article 3(6) CSD 2019.

¹¹² See recital 61 and article 14 CSD 2019.

¹¹³ Beckers (n 66) 180-187.

¹¹⁴ Recital 61 CSD 2019.

¹¹⁵ Recital 44 CSD 2019.

5.2. Repair as the primary sustainable remedy

The directive does not define “repair”, but it seems that the general definition of article 1(2), f) CSD 1999 remains applicable. Hence, reparation must not bring goods in a brand-new state, like newly manufactured goods. It suffices that they reach a state that would have been initially acceptable according to the contractual conformity requirements.¹¹⁶ Because goods may have multiple latent defects, it suffices that a repair remedies all non-conformities apparent at the time of repair. A consumer should in our opinion not be able to claim secondary remedies based on article 13(4), b) CSD 2019 just because a non-conformity that was previously hidden appears only after a repair has been completed in good faith.¹¹⁷

From a sustainable consumption perspective, two additional characteristics of repair are essential. First, repair is an inherently sustainable remedy. It helps to extend the lifespan of goods,¹¹⁸ as explicitly recognized in recital 48. And it preserves resource value and energy more efficiently than other circular strategies, such as recycling.¹¹⁹ As a remedy, it creates fewer externalities than replacement by new goods, by avoiding the resource extraction, production and transport for the replacement and the likely disposal of the replaced good. Moreover, repair creates local skilled-labour jobs instead of resource extraction and production activities that often take place in other parts of the world.¹²⁰ Repair combines these sustainable and socio-economic qualities with a satisfactory result for both parties: the non-conformity is remediated and the seller’s “right to cure” is respected. Second, although theoretically equal, there are several reasons why repair is currently less attractive than replacement.¹²¹ While replacement is often completed simultaneously with the replaced good’s handover, repair normally takes longer. And during this possibly extended period, the consumer is unable to use his/her good. Furthermore, a consumer’s choice for replacement is “rewarded” by a brand-new good, with a reset lifespan.¹²² The *Quelle*¹²³ decision, now confirmed in article 14(4), prohibits charging the consumer for the normal prior use of the replaced good. In contrast to this, repair includes a quality risk. Even high-quality repairs can result in goods with shorter remaining lifespans than newly manufactured goods. Because of these stark differences, repair is in our assessment currently only attractive to a minority of consumers with strong environmental motivations or emotional connections to certain goods or in case of highly unique goods. Additionally, sellers are in the current linear economy also likely to propose a replacement or to argue that a repair is “impossible” or “disproportionate” according to article 13(2)-(3). This is because the externalities of replacement by a newly manufactured good are not reflected in its costs, repair often encounters practical and legal obstacles and mass-production abroad can have low costs compared with labour-intensive local repair.¹²⁴ This pushing by sellers towards replacements

¹¹⁶ Dirk Staudenmayer, ‘The Directive on the Sale of Consumer Goods and Associated Guarantees: a Milestone in the European Consumer and Private Law’ (2000) 8 ERPL 547, 555. See also Vanessa Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart 2009) 118.

¹¹⁷ Howells, Twigg-Flesner and Wilhelmsson (n 20) 187.

¹¹⁸ Christian Twigg-Flesner, ‘The Law on Guarantees and Repair Work’ in Tim Cooper (ed), *Longer Lasting Products* (Gower 2010) 195-196.

¹¹⁹ See Ellen MacArthur Foundation, ‘Empowering repair’ (2016) 5-6 <ellenmacarthurfoundation.org/assets/downloads/ce100/Empowering-Repair-Final-Public1.pdf> accessed 25/8/2020; Terryn (n 85) 853-854.

¹²⁰ See Deloitte, *Study on Socioeconomic impacts of increased reparability – Final Report* (European Commission 2016) 14 <europa.eu/en/publication-detail/-/publication/c6865b39-2628-11e6-86d0-01aa75ed71a1> accessed 7/2/2021.

¹²¹ See Micklitz (n 15) 236; Terryn (n 85) 854.

¹²² If a replaced good is no longer produced, has become technologically obsolete or when this is opportune from a reputational perspective, a seller may even offer improved replacement models.

¹²³ Case C-404/06 *Quelle* [2008] ECLI:EU:C:2008:231.

¹²⁴ See also John McCollough, ‘Factors impacting the demand for repair services of household products: the disappearing repair trades and the throwaway society’ (2009) 33 Int J Consu Studies, 619, 620-622; Mostafa Sabbaghi, Willie Cade, Sara Behdad and Ann Bisantz, ‘The current status of the consumer electronics repair industry in the U.S.: A survey-based study’ (2017) 116 Res Cons&Recycl 137.

rather than repairs, driven by both legal and economic circumstances, should in our opinion not be underestimated. Very few consumers are likely aware that they and not the seller enjoy the right to choose between these primary remedies and most consumers probably do not have a particularly strong preference and merely seek a general form of remediation.

Several legal solutions can help closing this dichotomy between repair's sustainability potential and its current unattractiveness. First and foremost, repair can be elevated as a primary remedy above replacement, as already proposed by some authors.¹²⁵ The conditions of article 14 to improve consumer comfort during repair, would continue to apply and could be complemented by additional rules discussed below. Replacement by a new good would still be possible when repair and other more sustainable remedies (see sections 5.3-5.4) are impossible or disproportionate. We are not convinced by the argument that the consumer should also in a future, more sustainable legal framework continue to have the freedom of choice between repair and replacement based on the reasoning that a consumer may deem in certain situations that a repair does not meet his performance interest as a buyer.¹²⁶ As stated above, a well-implemented repair that meets all of the directive's conditions means by definition that all individually applicable contractual conformity requirements have been respected. If that is not possible, repair is simply unavailable as a remedy. Therefore, we see no primordial reason why an absolute choice of remedy necessarily has to be given to the consumer, who in general just seeks a satisfactory remediation and not a right to choose the method of remediation, as discussed above. Second, the Court of Justice's *Quelle* decision, although well-intentioned from a consumer protection perspective, disproportionately encourages replacement and is economically unfair to both sellers and consumers who choose repair. Consequently, we recommend that article 14(4) is reversed and that sellers can charge consumers for prior use when offering new goods as replacements. Third, the "disproportionality"-test in article 13(2)-(3) can be interpreted in a broader way that also takes the sustainability impact of a specific replacement and repair into account. The Norwegian Supreme Court has reportedly already followed this approach.¹²⁷ Perhaps this can be achieved by giving a sustainability-driven interpretation to the principle of good faith, as generally accepted in civil law jurisdictions.¹²⁸ An explicit confirmation at the European level by an amendment would naturally present the strongest legal basis¹²⁹ and would in our opinion also correctly reflect article 11 TFEU.

Additionally, many measures can undisputedly already be taken now by Member States willing to encourage repair. First, Member States can choose to suspend, extend or interrupt the legal guarantee period during repair but not a replacement.¹³⁰ This would counter repair's waiting period and, in case of interruption, reflect the circular value of a repaired good. New French legislation, for example, extends the guarantee period with 6 months after repair and offers to consumers who have chosen repair but where repair is not performed both a replacement and a renewal of the guarantee period.¹³¹ Second, Member States can require sellers to offer a replacement good during (certain) repairs.¹³² Temporary replacement goods are already common under commercial guarantees, but can also make repair under the legal guarantee more attractive.

¹²⁵ Maitre-Ekern and Dalhammar (n 88) 419; Michel (n 29) 228; Terryn (n 85) 858.

¹²⁶ See in this sense Kryla-Cudna (n 27) 6.

¹²⁷ See Eléonore Maitre-Ekern and Carl Dalhammar, 'A Scandinavian perspective on the role of consumers in the circular economy' in Bert Keirsbilck and Evelyne Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 215-216. Also arguing in favour of such expanded proportionality-test Mak and Terryn (n 15) 236.

¹²⁸ See Kryla-Cudna (n 27) 6-7.

¹²⁹ See the restrictive phrasing of recital 48 CSD 2019.

¹³⁰ Recital 44 and article 10(3) CSD 2019. See also at EU-level European Parliament Resolution of 4 July 2017 on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)) [2018] OJ C334/60, para 9.

¹³¹ Article 22 Law of the French Republic nr 2020-105.

¹³² See recital 18 CSD 2019. This was also proposed in EESC Opinion of 27 April 2016 on the Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods [2016] OJ C264/57, para 4.2.5.7.4.

Third, countless regulatory or soft law measures are possible that facilitate repair, such as repair-friendly Ecodesign regulation, access to spare parts and diagnostic information, offering repair-related information (see section 3.2) and restricting other legal and technical obstacles to repair. The Commission is currently working to create a European “right of repair”.¹³³ But the aforementioned French law demonstrates that Member States can develop their own ambitious repair-legislation.¹³⁴ Finally, national law can regulate under which conditions the seller’s repair can be performed at the seller’s expense by third parties or the consumer himself.¹³⁵ While allowing sellers to continue outsourcing repair to producers, this also offers opportunities to further stimulate the independent repair industry and “do-it-yourself repair” initiatives,¹³⁶ such as repair cafés or 3D-printing networks.

5.3. More sustainable replacement

The negative sustainability impact of standard replacements has already been discussed in section 5.2. However, this impact is based on two assumptions linked to the current linear economy, which can be overturned in order to create a more sustainable remedy. The first assumption is that goods that are replaced because of a non-conformity, are immediately disposed of. In a European circular economy, it should first be considered whether these replaced goods can be reused for other purposes, repaired or “remanufactured” (“refurbished”), before recycling and disposal are in order.¹³⁷ The second assumption is that replacement can only happen by goods that are newly manufactured on the basis of virgin resources. In contrast, it is possible to use already used, repaired or remanufactured goods for replacement. Such “circular replacement” could figure prominently in an amended hierarchy of remedies.¹³⁸

An amendment is unnecessary if “circular replacements” with remanufactured, repaired or second-hand goods would already be possible. A Dutch court has already twice rejected replacements by Apple with refurbished iPhones on the basis of a motivation inspired by the aforementioned *Quelle* decision.¹³⁹ However, *Quelle* does not discuss this issue explicitly and it would be interesting to submit a specific preliminary question to the Court of Justice.¹⁴⁰ The directive does not define “replacement”. But recital 16 CSD 1999 is conspicuously absent in the new directive, which could mean that identical goods are not always required.¹⁴¹ In our opinion, replacement should be interpreted akin to repair (see section 5.2). Consequently, the question should be whether the already used, repaired or remanufactured good would have been initially acceptable according to the contractual conformity requirements. If this is the case, both a repair and a “circular replacement” remediate in our opinion the cause of the seller’s liability. This interpretation is in our opinion consistent with the directive’s broader theoretical framework and avoids that replacement becomes an intrinsically unsustainable remedy that would run contrary to the idea of a European circular economy. We believe that this interpretation is particularly promising to enable

¹³³ Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final, 5.

¹³⁴ See articles 13, 16, 19 and 25 Law of the French Republic nr 2020-105. See also for example in Germany Umwelt Bundesamt, ‘Strategies against obsolescence’ (2017) 3 and 14-16 <umweltbundesamt.de/sites/default/files/medien/1410/publikationen/uba_position_obsoleszenz_engl_bf.pdf> accessed 25/8/2020.

¹³⁵ Recital 54 CSD 2019.

¹³⁶ See also Terryn (n 85) 864-869.

¹³⁷ See Ellen MacArthur Foundation, ‘Towards the circular economy: Opportunities for the consumer goods sector’ (2013) 33-35 <ellenmacarthurfoundation.org/assets/downloads/publications/TCE_Report-2013.pdf> accessed 25/8/2020.

¹³⁸ See Maitre-Ekern and Dalhammar (n 88) 419-420.

¹³⁹ District Court Amsterdam 8 July 2016 *Apple Retail Netherlands* ECLI:NL:RBAMS:2016:4197; District Court Amsterdam 18 April 2017 *Apple Retail Netherlands* ECLI:NL:RBAMS:2017:2519. See also Kryla-Cudna (n 27) 14; Nordic Council of Ministers (n 75) 58 for references to U.S. and a Danish case about the same “circular iPhone replacements” by Apple.

¹⁴⁰ Mak and Lujinovic (n 72) 9.

¹⁴¹ See also Howells, Twigg-Flesner and Wilhelmsson (n 20) 189.

replacements with remanufactured goods, since a properly remanufactured good means by definition that it is objectively “as good as” a good that has been newly manufactured on the basis of virgin resources (see section 2.2).

Finally, it is true that consumers can be unfamiliar with repaired and remanufactured goods and may have quality concerns.¹⁴² To increase consumer support, it seems a good idea to not only better regulate the product quality and safety of these circular strategies, but also to ‘reward’ a replacement with a repaired or remanufactured good by combining it with a renewal or extension of the legal guarantee period.¹⁴³ Notwithstanding the value of this potential extra benefit, it could also be considered to combine “circular replacements” with monetary compensation for the economic difference in resale value that may continue to exist between the original purchased good and its replacement, as proposed by KRYLA-CUDNA.¹⁴⁴ In our current linear economy, there might indeed for the time being still be a difference in actual market valuation of both goods. And such difference should be compensated in some way, given that article 14(1), a) CSD 2019 requires that replacements are performed free of charge. But we believe that this difference in market value of both goods may diminish over time, because from a purely objective point of view the repaired or remanufactured goods offered as replacements need to always comply with all contractual conformity requirements that were applicable to the original delivery, as discussed above. It is therefore important that any monetary compensation remains strictly limited to what is absolutely necessary to bridge a remaining substantial difference in actual market value, possibly taking into account the considerable benefit of an extended or renewed legal guarantee period. Too large monetary compensations may signal in a misleading way to consumers that properly repaired or remanufactured goods have by definition a lower quality of use and remaining product life, which would perpetuate the reigning linear economic model.

5.4. More sustainable price reduction and termination

The secondary role of the price reduction and termination remedies confirmed in article 13(4), seem generally laudable from a sustainable consumption perspective. Repair and “circular replacement” are more sustainable as primary remedies (sections 5.2-5.3). And both price reduction and termination can create substantial externalities. However, these externalities again rest on uncertain assumptions tied to a linear economical model.

First, termination requires restitution efforts, which depend on distance, the nature of goods and their possible deinstallation. This can be countered by greening transportation and logistics and by choosing modular installation techniques. Second, termination causes the risk of disposal or diminished use of returned goods. As discussed in section 5.3, circular strategies like reuse, repair and remanufacturing can be pursued to achieve more sustainable outcomes for the resources, energy and reuse value contained in these goods. Third, both termination and price reduction create the possibility that consumers subsequently buy alternative goods, which causes again new transaction and product lifecycle externalities. When this happens after price reduction, there is also an increased risk that the original but no longer used goods are not properly collected for the aforementioned circular strategies or for waste processing. However, it is also possible that consumers do not buy alternative goods. This is especially likely after price reduction when a good lacks full conformity but still offers one or more functionalities. Likewise, termination is not necessarily followed by alternative purchases. This refers to the first circular strategy: “refuse” or “avoid”

¹⁴² Ida Gävertsson, Leonidas Milios, Carl Dalhammar, ‘Quality Labelling for Re-used ICT Equipment to Support Consumer Choice in the Circular Economy’, (2020) 43 JCP 353, 356.

¹⁴³ Mak and Terryn (n 15) 236-237; Keirsbilck, Terryn, Michel and Alogna (n 88) 21; Kryla-Cudna (n 27) 15-16.

¹⁴⁴ Kryla-Cudna (n 27) 16.

new consumption.¹⁴⁵ An important part of current consumption is not strictly necessary or may be replaced by sharing or service-contracts (see also section 2.2).

This analysis reveals that not all price reductions and terminations are equally unsustainable, and this could be taken into account when recalibrating the hierarchy of remedies. For example, when a good lacking conformity still clearly offers functionality and a repair or a “circular replacement” are impossible, there could be a consumer right to demand price reduction instead of replacement by a new good. Or the current exclusion of termination in case of minor non-conformities¹⁴⁶ could be expanded to include cases where termination creates a disproportionately negative sustainability impact. These two specific proposals, furthermore, fit neatly with the observation that there are also non-sustainability reasons to prefer price reduction over termination, certainly in cases where a good still offers some functionality.¹⁴⁷

6. Commercial guarantees: between solution and distraction

Finally, it is necessary to consider the potential and risks for sustainable consumption of commercial guarantees.¹⁴⁸ Commercial guarantees can “signal” on the market the durability of a good, but this function should be nuanced.¹⁴⁹ They can also establish direct producer liability, which is a more efficient way of allocating liability for many sustainability externalities (see section 4.3). In general, commercial guarantees can theoretically be sustainable if they offer more sustainable remedies and possibly a longer guarantee period than the legal guarantee does, as discussed in the preceding sections. However, in practice this is rarely the case and, from a traditional consumer protection perspective, there are also concerns that commercial guarantees are often overpriced and may mislead consumers.¹⁵⁰

The sustainability potential is demonstrated by so-called “commercial guarantees of durability”. As a novelty, article 17(1) states that producers offering such guarantees shall during the entire period be directly liable to consumers to provide repair and replacement according to article 14 unless more favourable conditions apply. The aim of this rule, preventing interpretation issues or possibly misleading practices, can be applauded, although a more clearly defined scope would have been preferable.¹⁵¹ The aforementioned criticisms on replacement by new goods (sections 5.2-5.3) can be repeated. But imposing more restrictive conditions on commercial guarantees is always a balancing act because it may deter producers from offering such guarantees in the first place. Other sustainable commercial guarantees are also possible, for example, an “all damage repair with temporary replacement good” or a “circular replacement” guarantee offer. In our opinion, the most appropriate instrument to encourage and regulate sustainable commercial guarantees are soft law instruments, such as EU-Ecolabel, Blauer Engel, Nordic Swan or private circular economy initiatives.

¹⁴⁵ Maitre-Ekern and Dalhammar (n 88) 403.

¹⁴⁶ Article 13(5) CSD 2019.

¹⁴⁷ See i.a. Gerhard Wagner, ‘Termination and cure under the Common European Sales Law: Consumer protection misunderstood’ (2013) 50 CML Rev (2013) 147.

¹⁴⁸ See article 2 (12) CSD 2019.

¹⁴⁹ See for an overview of literature Christian Twigg-Flesner, *Consumer Product Guarantees* (Routledge 2016) 54-70.

¹⁵⁰ See i.a. Larry DiMatteo and Stefan Wrška, ‘Planned Obsolescence and Consumer Protection: The Unregulated Extended Warranty and Service Contract Industry’ (2019) 28 Cornell J L&Pub Pol 483, 518-520.

¹⁵¹ See Sanne Vandemaele, ‘Commerciële garanties in de verschillende koopregimes: Naar een uniforme regeling’ (DPhil thesis, KU Leuven 2019) 125 <limo.libis.be/index.html> accessed 25/8/2020.

Commercial guarantees can naturally also have a negative sustainability impact. TERRYN gives the examples of a “direct replacement, do not wait for repair” guarantee and guarantees that discourage independent repair activities like “warranty void if seal is broken”.¹⁵² If such guarantees (appear to) pertain to the consumer’s rights under the legal guarantee, they violate article 21 CSD 2019 and possibly also unfair contract terms and unfair commercial practices legislation.¹⁵³ Otherwise, they are completely legal.

Member States can regulate commercial guarantees more restrictively.¹⁵⁴ But rules that would substantially limit contractual autonomy, are unlikely and in our opinion not a sustainability priority if the legal guarantee can still be improved. However, it is possible to experiment with complementary obligations that improve market transparency. As an illustration, a study commissioned by the European Parliament suggested to require producers to either offer a durability guarantee or to communicate that they do not guarantee the fitness of their product during its expected lifespan (see also section 3.2).¹⁵⁵ This lifespan guarantee model was not included in the directive but may inspire national legislators. A remarkable alternative path is followed by Irish consumer law, which provides that a seller who does not explicitly disclaims his liability nor provides his own standard guarantee also becomes liable for a commercial guarantee that has been originally offered by the producer.¹⁵⁶ Such increase by default of parties who are held liable for a commercial guarantee, will only contribute to more sustainable consumption if the guarantee’s terms are more sustainable than the legal guarantee, as discussed above.

7. Conclusion

This article critically analysed the new consumer sales directive from the perspective of sustainable consumption, which is a EU policy goal and a growing societal trend. In this regard, the directive has three major strengths. First and foremost, its relatively open framework of conformity criteria can protect and encourage sustainable consumption within a changing context. Second, choosing as primary remedies repair and, subject to our proposed interpretation, replacement, creates the possibility for consumer sales to become an essential part of a European circular economy. However, both of these features were already introduced by the CSD 1999. The third strength is in our opinion the new directive’s major contribution to sustainable consumption and is not coincidentally connected to its underlying “Digital Single Market” agenda. This is the set of conformity and liability rules, including the “update-obligation”, that can help in curbing technological obsolescence.

Following the major components of the directive, the article also explored the many choices that Member States have to make during transposition and that have consequences for sustainable consumption. Indeed, not only does the directive provide notable exceptions to its maximum harmonization principle, such as the length of the legal guarantee and presumption periods. The directive also leaves countless aspects that are relevant from a sustainable consumption perspective outside its scope, such as primary remedy modalities, optional additional remedies, the rules for second-hand goods, the many regulatory possibilities to help specify contractual conformity in light of sustainability considerations and the regulation of commercial guarantees. The article also discussed some of the noteworthy initiatives that already exist in some Member

¹⁵² TerryN (n 85) 862.

¹⁵³ Article 17(2), a) CSD 2019 continues to require the statement in the commercial guarantee that the consumer’s statutory rights remain unaffected.

¹⁵⁴ Article 17(4) CSD 2019.

¹⁵⁵ Tonner and Malcolm (n 80) 54-55. See also Keirsbilck, TerryN, Michel and Alogna (n 88) 21.

¹⁵⁶ See Rónán Condon, ‘Sustainability, the Circular Economy and Consumer Law in Ireland’ (2020) 9 EuCML 218, 221 discussing art 17 Sale of Goods and Supply of Services Act 1980.

States. This analysis reveals the potential of a multilevel process for regulating sustainable consumption in Europe. Furthermore, some of the directive's binding rules that have an impact on sustainability are still open to judicial interpretation, such as the extent to which sustainable development externalities can be considered when determining the appropriateness of a remedy and the extent to which "circular replacements" are currently already possible.

Notwithstanding these possibilities, the new consumer sales directive does not live up to existing aspirations related to sustainable development and EU institutions appear to already acknowledge the need for legislative amendments.¹⁵⁷ It can be argued that the discussed deficiencies of the new directive should not be considered as real flaws, given that fostering sustainable consumption was not part of its legislative purpose. This, however, seems to run contrary to the directive's own recital 32 and to some of its provisions such as articles 7(1), d) and 17(1). Moreover, in light of the principle of integrating environmental protection and promoting sustainable development in all of the Union's policies, as enshrined in article 11 TFEU, this seems in our opinion an unconvincing retort. As discussed in this article, the harmonized EU rules on consumer sales contracts have a substantial impact on sustainable development in general and on the success of a European transition to a circular economy in particular. We believe that European consumer law can no longer ignore sustainability aspects. This requires a systematic recalibration of the current view on consumer rights and consumer protection.¹⁵⁸ As such, CSD 2019 can indeed be considered to be brand new but already outdated.

Finally, this article discussed future possibilities for improving the potential of the European consumer sales regime to foster sustainable consumption. The most notable of these possibilities concern the legal guarantee period, the role of the producer and the hierarchy of remedies. However, such important discussions should not lead us to ignore the crucial observation that, if European consumer sales law is to become more sustainable, its conformity assessment and its remedies will have to optimally interact with a wider web of regulation and a changing economic context that fosters sustainable economic development in Europe. This will likely consist of Ecodesign and other sustainable product regulation, different types of soft law, new consumer information as well as rules that facilitate and improve the perception by European consumers and sellers of reuse, repair and remanufacturing strategies.

¹⁵⁷ See footnotes 17-18.

¹⁵⁸ See for early voices in this debate Krämer (n 11); Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1991) 14 JCP 257, 285-287; Wilhelmsson (n 13). See also footnote 15.