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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 assesses 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 current options for Member States aiming for a sustainability-friendly transposition. Notwithstanding these criticisms, the pre-existing fundamentals of European consumer sales law can, in combination with appropriate new consumer and product regulation as well as soft law, still serve as a strong enabler of sustainable consumption. Finally, the article serves as an illustration of a sustainability-analysis of consumer contract law and of the broader implications of sustainable development and circular economy policies for European economic regulation.

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. When the concept of “sustainable development” emerged in response to the overall planetary and generational challenges of mankind,6 international policy has adopted the goal of transitioning towards more

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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).
sustainable consumption patterns.\textsuperscript{7} Sustainable consumption has subsequently been integrated in the UN consumer protection guidelines.\textsuperscript{8} Within the present context, it should be emphasized that sustainable development encompasses non-environmental goals as well, such as humanitarian and basic social, economic, and cultural rights.\textsuperscript{9} Consequently, sustainable consumption corresponds with the demand-side of a circular economy, but it is conceptually broader. The EU has supported these developments and developed its own sustainable consumption and production policy.\textsuperscript{10} However, 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.\textsuperscript{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.\textsuperscript{12} But both literature\textsuperscript{13} and empirical information\textsuperscript{14} 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.\textsuperscript{15} Such shift would seem possible and even encouraged under primary European law, given the principle of promoting sustainable development in all the Union’s policies enshrined in article 11 TFEU, the principle of consistency in article 7 TFEU and the Union’s goals and fundamental rights of article 3, (3) and (5) TEU and article 37 Charter.

The environmental ambitions declared by the new European Commission\textsuperscript{16} may lead to such more fundamental changes in European consumer law. The Commission has already signalled in its most recent circular economy action plan that it is considering to propose amendments to the still very new CSD 2019.\textsuperscript{17} Within this context, this article intends to critically examine all main features of CSD 2019 in light of the pursued transition to more sustainable consumption patterns. Our analysis reveals that the new directive indeed makes only a very small contribution to sustainable consumption and that the intention of the new


\textsuperscript{8} ECOSOC Res 7 (1999) UN doc E/1999/INF/2/Add.2.

\textsuperscript{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 August 2020).


Commission to already propose amendments is understandable. However, our analysis 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 sustainable consumption, if appropriate ancillary consumer and product regulation is adopted.

2. Harmonization and scope

2.1. Maximum harmonization

The CSD 2019 is a maximum harmonization directive.\(^{18}\) 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 that maximum harmonization should remain limited to cross-border consumption issues.\(^{19}\) 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 supported 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.\(^{20}\) Several of these examples, which present choices for Member States with sustainability consequences, are discussed below.

2.2. Scope of application

We raise two remarks concerning the scope of the directive.

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 to prolong product lifespans and closing resource loops.\(^{21}\) 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 2019\(^{22}\) 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.\(^{23}\)

\(^{18}\) Article 4 CSD 2019.


\(^{21}\) 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.

\(^{22}\) Articles 3(2)-(3) and 8 CSD 2019.

\(^{23}\) 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...
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. 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. Empirical information reveals that this rule confuses both consumers and sellers and may result in practice in even lower protection than a one year guarantee. In our opinion, an optional reduction of the guarantee period is not the correct approach. The second-hand nature of a good is 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 legal guarantee period is much more dependent on the durability of the general product type than on whether it is new or second-hand (see section 4.1). The main problem of both rules is that they signal that second-hand goods 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. An additional problem is 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”. As a conclusion, Member States should in our opinion 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

3.1. Subjective/objective conformity and sustainability


24 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.


Many claims of non-conformity related to sustainability can already be based on the more general conformity criteria of article 2(2) CSD 1999, for example when the consumer could reasonably expect better durability, when low environmental quality makes a product unfit for normal use 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 which 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” 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.

The criteria of article 6–7 CSD 2019 can contribute to combatting different types of “premature obsolescence” of goods. A symbolic milestone is article 7(1), d). This provision now explicitly confirms that goods should have the minimum “durability” which a consumer may reasonably expect. 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.

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. Articles 6, a) and 7(1), d) emphasize contractually agreed and reasonably expected “compatibility” and “interoperability”. These characteristics allow goods to function with other hardware or software, which avoids the need for premature replacements. Furthermore, updates contribute to postponing the technological obsolescence of goods with digital elements. It is in this regard crucial that a seller must not

31 Contra Staudenmayer (n 5) 237 who argues that interoperability cannot be expected by consumers on the basis of article 7(1), d).
33 French and Dutch legal language versions use terms which mean both “durability” and “sustainability” (durabilité, duurzaamheid). Article 2(13) confirms that the directive only refers explicitly to the more limited concept of durability.
34 See footnote 30 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.
35 Articles 2(8) and (10) CSD 2019.
only supply explicitly agreed updates,\textsuperscript{36} 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 the security and other updates which are necessary to keep these goods in conformity, during the period which 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.\textsuperscript{37} 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 which significantly reduce the performance and useful lifespan of goods with digital elements. This can constitute an unfair commercial practice, as demonstrated by recent decisions of Italian and French authorities.\textsuperscript{38} Additionally, articles 6-7 CSD 2019 may help combatting “greenwashing” or other untrue or unverifiable sustainability claims in B2C product-markets. The Commission emphasizes in this context the potential of the Unfair Commercial Practices Directive.\textsuperscript{39} 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. 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 currently proposed by the Commission\textsuperscript{40} could become essential to effectively enforce sustainable consumption based on the CSD 2019.

### 3.2. Specifications through information obligations, regulation or soft law

In light of European policy aiming to transition to more sustainable consumption, it is important to realize that the conformity criteria present an open framework which can be purposefully complemented. First of all, a successful sustainable consumption “policy mix” likely includes information obligations.\textsuperscript{41} Sustainability information can potentially steer consumer purchase decisions. Many consumers, for example, appear to welcome information on product durability or repairability.\textsuperscript{42} But, as discussed in the Introduction, a policy exclusively based on consumer information is too limited and will fail to change mainstream consumption patterns.\textsuperscript{43} A second important function of information obligations is how they

\textsuperscript{36} Article 6, d) CSD 2019.

\textsuperscript{37} Articles 7(3) and 10(2) CSD 2019. See also recitals 28-31 CSD 2019.


\textsuperscript{41} See Éléonore 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 Terrey (n 15) 229-233.


can determine liability under the eventually concluded contracts.\(^4^4\) Information given by the seller can qualify as a subjective conformity requirement. And information communicated by producers, who as cheapest cost-avoiders are most appropriate to be subject to sustainability disclosure, can qualify as public statements by supply chain actors according to article 7(1), d). Such statements are excluded as 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.\(^4^5\) If applied restrictively, these exclusions seem reasonable. But they can make a direct producer liability more desirable (see section 4.3). Finally, it is important to note that sustainability disclosure acts 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.\(^4^6\) Inversely, a seller might at present refrain from giving sustainability information, such as an expected lifespan or the origin of used resources, in fear of contractual liability. Making the most important disclosures mandatory, clear and comparable, can overcome this problem.

European information obligations which contribute to sustainable consumption, appear currently limited to those regarding codes of conduct, commercial guarantees, after-sale services and the existence of the legal guarantee,\(^4^7\) the new information obligations regarding functionality, compatibility and interoperability of digital content, which will further help curbing technological obsolescence (see section 3.1),\(^4^8\) and the well-known European energy-efficiency and car emission labels.\(^4^9\) In addition, the prohibition of misleading omissions requires sellers to provide sustainability information if it can be considered as “material” for the consumer to take an informed transactional decision.\(^5^0\) However, more comprehensive positive obligations are expected because 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”\(^5^1\). Meanwhile, some Member States are already imposing broad sustainability information obligations. A prominent example is new French legislation, which imposes information obligations on producers of certain products regarding durability, repairability


\(^{4^5}\) Article 7(2) CSD 2019.


and environmental/social impact, regulates the use of the term “remanufactured” and also introduces soft law instruments relevant to sustainable consumption.  \(^{52}\) Other countries may follow suit.  \(^{53}\)

Secondly, consumers who argue that a delivered good does not meet contractual conformity requirements may refer to binding environmental, labour or product regulations which apply to its lifecycle.  \(^{54}\) A similar function may be fulfilled by relevant soft law rules, such as the European Bio.  \(^{55}\) and Ecolabels  \(^{56}\), 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 which 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 regulation, 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 goods  \(^{57}\) and it can be expected that such circular product design requirements will expand.  \(^{58}\) Most sustainability conformity discussions 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 remains limited to two sub-categories.  \(^{59}\) 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,  \(^{60}\) 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. But rules and standards regarding environmental or social externalities during production and distribution, seem excluded. 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 the “reputation” of a product.  \(^{61}\) 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 preceding public statements. 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).

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54 See recital 32 CSD 2019 specifically regarding product “durability”.
56 Regulation 2010/66/EC.
61 Collins (n 60) 637-638.
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 which 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, 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 during production.

4. Liability

4.1. Minimum harmonization of the legal guarantee period

According to article 10(1), the seller is liable for any non-conformity which 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. 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 have longer legal guarantee periods. But maximum harmonization of the 2-year period would also have been detrimental to sustainability and circular economy. This is because longer guarantee periods encourage the production of goods with better durability, which results in less environmental externalities from the production of new and disposal of old goods. Furthermore, longer guarantee periods increase the chance of intervening repair remedies, which again prolongs the lifespan of goods. Longer guarantee periods may increase prices for certain goods. But this is offset by longer product durability and availability, for which most European consumers appear willing to pay more. In conclusion, while minimum harmonization here is generally positive, 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 could also help to limit internal market divergences.

62 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.”
63 See article 10(2) CSD 2019.
65 See Gomez (n 26) 57-59.
66 It is true that newer goods can improve energy-efficiency or may be less environmentally hazardous. But such risks are already addressed by specific regulation and such gains should outweigh the externalities 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> accessed 25 August 2020).
68 LE and others (n 42) 165-167; TNS (n 42) 55-58 and 108-111.
Several options exist for Member States 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 3-year period applied in Sweden. The second approach consists of differentiated but general guarantee periods. For example, the Norwegian and Icelandic guarantee is extended from two to five years for goods considered to have a considerably longer lifespan than two years. Similarly, a 2017 study proposed a European 3-year guarantee period with the possibility for Member States to extend to a maximum of five years for durable goods. The third approach consists of fully differentiated guarantee periods, such as in Finland or the Netherlands. The Dutch legal guarantee is limited in time to the purchased good’s expected lifespan. Consequently, a Dutch consumer 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. This model presents an opportunity to better connect consumer sales law to product regulation, like Ecodesign rules which already include durability standards. Connecting the guarantee period to durability information obligations imposed on the seller or producer appears less attractive because it would discourage them to communicate long product durability (see section 3.2). The 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. The second approach constitutes a middle ground. But we prefer the third approach, and in particular the Dutch model because of its clear benefits to sustainable consumption. It does not penalize consumption of durable goods and it discourages the production of goods which are less durable than a product type’s average lifespan. Additionally, this guarantee model can be easily adapted to gains in product durability or new Ecodesign standards. And it would ensure coherence between product regulation and consumer sales law.

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. Hence, it is helpful that the period during which appearing non-conformities are presumed to have already been present at the time of delivery is extended in article 11(1) CSD 2019 to one year. Given that some Member States currently have longer presumption periods, article 11(2) allows

70 §27 Forbrukerkjøpsloven (LOV-2002-06-21-34); §27 Lög um neytendakaup (2003-03-20-48).
72 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)).
73 Article VII.17(2) and VII.23 Burgerlijk Wetboek.
74 See e.g. the following list established by a Dutch industry group <technieknederland.nl/stream/richtlijnenaanschrijvingsmethoden> accessed 25 August 2020.
76 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.
77 See Gomez (n 26) 71.
Member States to maintain or introduce two-year presumption periods. A longer presumption period is beneficial to combatting premature obsolescence for similar reasons as 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.79 However, consumer protection and sustainability must be balanced with the interests of sellers and a longer presumption period arguably constitutes for them a bigger burden than a longer legal guarantee period. Furthermore, longer presumption periods may reflect 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.80 A possible sustainability disadvantage is a risk that longer presumption periods invite consumers to use goods less carefully (a “moral hazard”).81 In conclusion, both extending the presumption period and the legal guarantee contribute to consumer protection and sustainability. But if combining both is unrealistic, then the extension of the latter should be considered as a bigger priority from a sustainable consumption perspective.

4.3. Right of redress and producer liability

Section 3 demonstrated that conformity considerations regarding sustainability are increasingly controlled not by the seller but by the producer. This trend will likely intensify because of circular economy regulation.82 Consequently, it becomes increasingly important for sellers to enjoy an effective right of redress when they are liable for aspects 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.83 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.84 It is important to note that this is also a sustainable consumption issue. The producer is the “cheapest cost-avoider” for most sustainability risks, 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 which limit or exclude liability cannot be invoked against him.85 On the other hand, the consumer can be given the right to directly claim against the producer.86 The Commission originally proposed in 1993 a joint but not identical liability of seller and producer.87 And the French and Belgian guarantee against hidden defects already

80 See Staudenmayer (n 26) 248 who argues that this asymmetry between parties is even greater for goods with digital elements.
81 See Gomez (n 26) 59-61.
83 Article 18 and recital 63 CSD 2019.
85 Article 1649 sexies Burgerlijk Wetboek.
allows such claims. 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 with producers than with sellers and who can already claim against producers based on product liability. As one additional advantage, direct (joint) producer liability seems more effective within a regulatory framework aiming to foster sustainable consumption. Finally, it should be noted that two processes linked to combating material and technological obsolescence, now help to close the distance between consumers and producers. First, the 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 (see section 5), it is indispensable for repair that the producer provides spare parts, diagnostic information and in many cases even repair services. This is longstanding practice dictated by technological complexity and supply chain logic. But this direct repair-relationship is now being reinforced by new regulatory obligations of producers as part of a nascent “right of repair”.

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. 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 the Member States, which avoids the most problematic drawbacks of maximum harmonization. But these transposition choices also have sustainability consequences, which need to be considered. First, Member States can introduce or maintain a specific remedy for non-conformities appearing within 30 days after delivery. 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 risk cannot be resold or repurposed. Consequently, there are more sustainable alternative remedies and this option should be avoided. Second, Member States can introduce or maintain remedies not specific to consumer contracts for so-called “hidden defects”. 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

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91 Articles 13-16 CSD 2019.
93 Article 3(7) CSD 2019.
94 It is possible to criticize for similar reasons the right of withdrawal in articles 9-16 Consumer Rights Directive. But the nature of distance and off-premise contracts seems a better general justification.
95 Article 3(7) CSD 2019.
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 coexist with the legal guarantee or should only be available to consumers after expiration of the latter, depends on the sustainability of the available 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. The exceptio non adimpleti contractus known in most Member States, 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. 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. 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. 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. 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. 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. 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 which promotes sustainable remedies, as discussed below.

96 Article L217-13 Code de la consommation (France).
97 Article 1649quater, §5 Civil Code (Belgium).
98 Article 13(6) CSD 2019.
99 See the notes under article III-3:401 DCFR.
100 Article 13(7) CSD 2019.
101 Article 3(6) CSD 2019.
102 See recital 61 and article 14 CSD 2019.
103 Beckers (n 60) 180-187.
104 Recital 61 CSD 2019.
105 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. Because goods may have multiple latent defects, it suffices that all non-conformities apparent at the time of repair are remediated. A consumer should not be able to claim secondary remedies based on article 13(4), b) just because a previously hidden non-conformity appears after a repair. From a sustainable consumption perspective, two additional characteristics are essential. First, repair is an inherently sustainable remedy. It helps to extend the lifespan of goods, as explicitly recognized in recital 48. And it preserves resource value and energy more efficiently than other circular strategies, such as recycling. 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. It combines these sustainable 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 a repair is currently less attractive than replacement. While replacement is often completed simultaneously with the replaced good’s handover, repairs normally take longer. And during this possibly extended period, the consumer is unable to use the good. Furthermore, a consumer’s choice for replacement is “rewarded” by a brand-new good, with a reset lifespan. The Quelle decision, now confirmed in article 14(4), prohibits charging the consumer for the normal use of the good before replacement. In contrast to this, repair includes a quality risk. And even high-quality repairs can result in goods with shorter remaining lifespans than newly-produced 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. Additionally, sellers are in the current linear economy also likely to propose replacements or to argue that repair is “impossible” or “disproportionate” according to article 13(2)-(3). This is because the externalities of replacement 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. 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 proposed by some authors. The conditions of article 14 to improve consumer comfort during repair, would continue to apply and could be complemented by additional rules discussed below. A 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. Second, the Court of Justice’s Quelle decision, although well-

107 Howells, Twigg-Flesner and Wilhelmsson (n 19) 187.
110 See Micklitz (n 15) 236; Terryn (n 75) 854.
111 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.
112 Case C-404/06 Quelle [2008] ECLI:EU:C:2008:231.
114 Maitre-Ekern and Dalhammar (n 78) 419; Michel (n 29) 228; Terryn (n 75) 858.
intentioned from a consumer protection perspective, disproportionately encourages replacement and is economically unfair to both sellers and consumers choosing 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 which also takes the sustainability impact of a specific replacement and repair into account. The Norwegian Supreme Court has reportedly already followed this approach.\footnote{See Eléonore Maitre-Ekerm 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.} An explicit confirmation at the European level by an amendment would naturally present the strongest legal basis\footnote{See the restrictive phrasing of recital 48 CSD 2019.} and would in our opinion 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.\footnote{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.} This would counter repair’s waiting period and, in case of interruption, reflect the circular value of a repaired good. New French legislation 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.\footnote{Article 22 Law of the French Republic nr 2020-105.} Second, Member States can require sellers to offer a replacement good during (certain) repairs.\footnote{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.} Temporary replacement goods are already common under commercial guarantees, but can also make repair under the legal guarantee more attractive. Third, countless regulatory measures are possible which facilitate repair, such as repair-friendly Ecodesign regulation, access to spare parts and diagnostic information, offering mandatory or soft law 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”.\footnote{Commission, ‘A new Circular Economy Action Plan: For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final, 5.} But the aforementioned French law demonstrates that Member States can develop their own ambitious repair-legislation.\footnote{See articles 13, 16, 19 and 25 Law of the French Republic nr 2020-105. See also for example in Germany Umwelt Bundesamt (n 53) 3 and 14-16.} 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.\footnote{Recital 54 CSD 2019.} 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,\footnote{See also Terryn (n 75) 864-869.} 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 which 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.\textsuperscript{124} The second assumption is that replacement can only happen by goods which 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.\textsuperscript{125} An amendment is unnecessary if “circular replacements” would already be possible. A Dutch court has already twice rejected this idea with a motivation based on the aforementioned Quelle decision.\textsuperscript{126} However, Quelle does not discuss this issue explicitly and it would be interesting to submit a specific preliminary question to the Court of Justice.\textsuperscript{127} 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.\textsuperscript{128} In our opinion, replacement should be interpreted akin to repair. Consequently, the question should be whether the already used, repaired or remanufactured good would have been initially acceptable according to the contractual conformity requirements (see section 5.2). If this is the case, both a repair and a “circular replacement” remediate the cause of the seller’s liability. This interpretation is consistent with the directive’s broader theoretical framework and avoids that replacement becomes an intrinsically unsustainable remedy. Finally, consumers can be unfamiliar with repaired and remanufactured goods and may have quality concerns. To increase consumer support for these circular strategies, a replacement by a repaired or remanufactured good could be compensated by a renewal or extension of the legal guarantee period.\textsuperscript{129}

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.\textsuperscript{130} 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 installation. This can be countered by greening transportation and logistics and choosing modular installation techniques. Second, termination causes the risk of disposal or diminished use of returned goods. As discussed regarding replacement, circular strategies like reuse, repair and remanufacturing can be pursued as alternatives. Third, both termination and price reduction create the possibility that consumers subsequently buy alternative goods, which again cause new transaction and product lifecycle externalities. When this happens after price reduction, there is an increased risk that the original goods are not properly collected for circular purposes or waste processing. However, consumers may not buy alternative goods. This is especially likely after price reduction when goods lack full conformity but still offer one or more functionalities. But also termination is not necessarily followed by alternative purchases. This refers to the first circular strategy: “refuse”. An important part of current consumption is not strictly necessary or may be replaced by sharing or service-contracts (see section 2.2).


\textsuperscript{125} See Maitre-Ekern and Dalhammar (n 78) 419-420.

\textsuperscript{126} 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.

\textsuperscript{127} Mak and Lujinovic (n 64) 9.

\textsuperscript{128} See also Howells, Twigg-Flesner and Wilhelmsson (n 19) 189.

\textsuperscript{129} Mak and Terryn (n 15) 236-237; Keirsbick, Terryn, Michel and Alogna (n 78) 21.

These considerations reveal 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 repair or “circular replacement” are impossible, there could be a consumer right to demand price reduction instead of replacement by a new good. Or the exclusion of termination in case of minor non-conformities could be expanded to include cases where termination creates a disproportionally negative sustainability impact.

6. Commercial guarantees: between solution and distraction

Finally, it is necessary to consider the potential and risks for sustainable consumption of commercial guarantees. Commercial guarantees can “signal” on the market the durability of a good, but this function needs to be nuanced. They can also establish direct producer liability, which is a more efficient way of allocating liability for many sustainability externalities, as discussed in section 4.3. 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. The abovementioned 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 to offer such guarantees in the first place. Other sustainable guarantees are also possible, for example, “all damage repair with temporary replacement good” or “circular replacement” offerings. 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. Commercial guarantees can naturally also have a negative sustainability impact. TERRYN gives the examples of “direct replacement, do not wait for repair” and guarantees which discourage independent repair like “warranty void if seal is broken”. 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 commercial practices legislation. Otherwise, they are completely legal. Member States can regulate commercial guarantees more restrictively. But rules which would substantially limit contractual autonomy, are unlikely and in our opinion not a sustainability priority when the legal guarantee can still be improved. However, it is possible to experiment with complementary obligations which improve market transparency. As an illustration, a European Parliament study 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). This lifespan guarantee model was not included in the directive but may inspire national legislators.

131 Article 13(5) CSD 2019.
132 See article 2 (12) CSD 2019.
135 TERRYN (n 75) 862.
136 Article 17(2), a) CSD 2019 continues to require the statement in the commercial guarantee that the consumer’s statutory rights remain unaffected.
137 Article 17(4) CSD 2019.
138 Tonner and Malcolm (n 71) 54-55. See also Keirsbilck, TERRYN, Michel and Alogna (n 78) 21.
7. Conclusion

This article critically examined the new consumer sales directive from the perspective of sustainable consumption, which is a European policy goal and growing societal trend. In this regard, the directive has three major strengths. First and foremost, its relatively open framework of subjective and objective conformity criteria can encourage and protect sustainable consumption within a changing context. Second, the choice for repair and, subject to some conditions, replacement as primary remedies, creates the possibility for consumer sales to become part of a European circular economy. However, these features were already introduced by the CSD 1999. The third strength is the new directive’s major contribution to sustainable consumption and is not coincidentally the result of its underlying “Digital Single Market” agenda. This is the set of conformity and liability rules, including the “update-obligation”, which will greatly help curbing technological obsolescence. The article also explored the many choices of Member States when they transpose the directive and consider ancillary rules. Several noteworthy initiatives already exist in some Member States, which show the potential of a multilevel creation process for regulating sustainable consumption in Europe. Other possibilities relate to the interpretation of some of the directive’s binding rules, such as considering externalities when determining the appropriateness of a remedy and allowing “circular replacements” if in accordance with applicable conformity requirements.

Notwithstanding these possibilities, the directive does not live up to existing aspirations and European institutions already acknowledge the need for amendments. The article discussed possible improvements, most notably regarding the legal guarantee period, the role of the producer and the hierarchy of remedies. But in conclusion, we would like to emphasize two points with broader consequences than the directive’s scope. On the one hand, European consumer law needs introspection. It currently focuses on the rights of individuals to boundless consumption regardless of externalities. When sustainability is more systematically taken into account, this theoretical foundation should evolve. “Consumption” itself may become the new focal point or the interests of European “consumers” may be redefined as those of “citizens” or the collective interests of all present and future consumers. On the other hand, if European contract law is to become more sustainable, it will need to be part of and optimally interact with a web of regulation which fosters sustainable economic activity. This will likely consist of Ecodesign and other product regulation, different types of soft law, new consumer, CSR and sustainable finance market information and rules which facilitate reuse, repair and remanufacturing.

139 See footnote 17.