

Consumer's Remedies For Defective Goods With Digital Elements

by **Alberto De Franceschi***

Abstract: This paper deals with the remedies for lack of conformity under the EU Sale of Goods Directive, focusing in particular on goods with digital elements. Subject of analysis is also the related

problem of digital obsolescence and the issue of effectiveness of consumer rights.

Keywords: Sale of Goods; Goods with Digital Elements; Lack of Conformity; Consumer's Remedies; Obsolescence of Goods with Digital Elements; Effectiveness of Consumer Law; Environmental Sustainability

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A. Lack of conformity with the contract and hierarchy of remedies

1 In the event of a lack of conformity¹, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in Art. 13, dir. 2019/771/EU

(hereinafter: SGD)². In accordance with the repealed Directive 1999/44/EC on consumer sales³, as well as the Directive 2019/770/EU on the supply of digital content and digital services⁴, priority should be given to proper performance of the contractual obligations through remedying the non-conforming performance⁵.

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1 On the concept of conformity with the contracts, see e.g. C. Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', in E. Arroyo Amayuelas and S. Cámara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 49 et seqq.; W. Faber, 'Bereitstellung und Mangelbegriff', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 63 ff.; C. Wendehorst, 'Aktualisierung und andere digitale Dauerleistungen', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 141 et seqq.

2 See e.g. B. Gsell, 'Rechtsbehelfe bei Vertragswidrigkeit in den Richtlinienvorschlägen zum Fernabsatz von Waren und zur Bereitstellung digitaler Inhalte', in M. Artz and B. Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018), p. 143 et seqq.; B. Gsell, 'Time limits of remedies under Directives (EU 2019/770 and (EU) 2019/771 with particular regard to hidden defects', in E. Arroyo Amayuelas and S. Cámara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 101 et seqq.; B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), p. 157 et seqq.

3 See Art. 3(3) and (5), dir. 1999/44/EC.

4 See Art. 14, dir. 2019/770/EU.

5 See J. Morais Carvalho, 'Sales of Goods and Supply of

- 2 Therefore, as a general rule, at the first stage the consumer can only ask the trader to bring goods into conformity. Access to the secondary remedies (price reduction or termination of the contract) is only possible under certain conditions, such as: the trader refused to bring the goods into conformity or failed to remedy the lack of conformity in accordance with Art. 14, par. 2 and par. 3 SGD, or the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract (Art. 13, par. 4 SGD). However, the consumer shall not be entitled to terminate the contract if the lack of conformity is only minor (Art. 13, par. 5 SGD)⁶. Furthermore, the consumer has the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligation under the SGD⁷. The limited access to secondary remedies is instrumental not only to favour the preservation of the contract, but also to encourage a sustainable consumption and a longer product durability⁸ for the purpose of the realization of a circular and more sustainable economy⁹.
- 3 In the following, the paper analyses and compares the different remedies for lack of conformity of goods with digital elements and also assesses their coordination with other remedies provided by national laws. Furthermore, in the last part, it deals with the problem of obsolescence of goods with digital elements and the related issue of effectiveness of consumer rights (especially) in the digital environment.

Digital Content and Digital Services—Overview of Directives 2019/770 and 2019/771' (2019) 8 EuCML 200.

- 6 Cf. recital 53 SGD.
- 7 See Art. 13, par. 6 SGD: "The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment".
- 8 Recital 48 SGD.
- 9 See in this regard European Commission, *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, 11 March 2020, COM(2020) 98 final.

B. Repair and replacement

- 4 In the first instance, the consumer can choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate. Such disproportion shall be evaluated taking into account all circumstances, including the value the good would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be provided without significant inconvenience to the consumer (Art. 13, par. 2 SGD). The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate after taking into account all circumstances (Art. 13, par. 3 SGD).
- 5 Nevertheless, the seller may try to influence the consumer's choice, but always taking into account the prohibition of unfair commercial practices, and especially the provision contained in Art. 6, par. 1, lit. g UCPD, which qualifies as misleading a commercial practice, "which contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the consumer's rights, including the right to replacement or reimbursement, or the risks he may face". To exercise the right to repair or replacement an informal request to the seller shall be sufficient¹⁰.
- 6 Repair or replacement shall be carried out free of charge within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity¹¹ and without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In this regard, the SGD, differently from what provided by Art. 3 of Directive 1999/44/EC¹², determines that the seller may refuse to bring the

10 See B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 182.

11 In this regard, see recital 55 SGD, which states that: "What is considered to be a reasonable time for completing a repair or replacement should correspond to the shortest possible time necessary for completing the repair or replacement. That time should be objectively determined by considering the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement".

12 See B. Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschrift für das Privatrecht der Europäischen Union 115, 129.

goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances (Art. 13, par. 3 dir. SGD)¹³.

- 7 Lack of conformity may regard not only the material part but also the digital element. The final seller will often have no influence on the digital element and the supply of updates in conformity with the contract. In those cases, the possible remedies will often be only price reduction and termination, except the situation in which he will be able to bring a third party to directly intervene on the conformity of digital content and digital services¹⁴.
- 8 Where the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller, who shall take back the replaced goods at his own expenses (Art. 14 SGD). This provision does not find any correspondence in the dir. 1999/44/EC but does not necessarily imply that the consumer has to return the goods to the seller. This will be the case where repair or replacement has to be executed on a durable good which was installed in the consumers' premises (e.g. a lift). Here, the consumer will merely have to allow the seller or his auxiliary to have access to his premises, so that he can bring the good into conformity. Therefore, making the goods available to the seller is a prerequisite for the execution of the "primary" remedies. This does not apply if the good was destroyed due to reasons for which the consumer is not responsible¹⁵.
- 9 Similarly to directive 1999/44/EC, the SGD does not take a position regarding the place of performance of the duty to repair or replace; instead, it leaves the solution to this question up to the discretion of the EU Member States' legislators¹⁶.

13 In this regard see J. Stabentheiner, 'Hintergründe und Entstehung der beiden Richtlinien und die Bemühungen der österreichischen Ratspräsidentschaft um Konsistenz und Vereinfachung', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 22; B.A. Koch, 'Das System der Rechtsbehelfe', in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 185.

14 So C. Wendehorst, 'Aktualisierungen und andere digitale Dauerleistungen' in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 132.

15 See in this regard B. Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschrift für das Privatrecht der Europäischen Union 115, 129.

16 See recital 56 SGD. Therefore, it will be necessary to apply the principle stated by ECJ Case C-52/18 *Christian Füllä v. Toolport GmbH* [2019], according to which Art. 3, par. 3, dir. 1999/44/EC must be interpreted as meaning that the

- 10 The duty to repair or replace "free of charge" means free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials (Art. 2, par. 1, n. 14 SGD)¹⁷. This fundamentally reproduces the rule contained in Art. 3, par. 4, dir. 1999/44/EC. Gratuitousness represents the essential character of the so-called primary remedies. As underlined by the ECJ with regard to dir. 1999/44/EC, the trader shall bear all costs related to replacement or repair and not only those expressly mentioned in Art. 2, par. 1, n. 14 SGD¹⁸, without the possibility to ask the consumer to pay them in advance or to reimburse them at a later stage. In the case of replacing a good not in conformity with the contract, the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates. Furthermore, a seller who has sold consumer goods which are not in conformity may not require the consumer to pay compensation for the use of those defective goods until their replacement with new goods¹⁹. This said, the solution adopted in Art.

Member States remain competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, for them to be brought into conformity in accordance with that provision. That place must be appropriate for ensuring that they can be brought into conformity free of charge, within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods. In that regard, the national court is required to make an interpretation in accordance with Directive 1999/44, including, as necessary, amending established case-law if that law is based on an interpretation of national law which is incompatible with the objectives of that directive.

17 Cf. also recital 49 SGD.

18 See e.g. ECJ Case C-65/09 and C-87/09 *Weber GmbH v. Wittmer and Putz v. Medianess Electronics GmbH* [2011], par. 50.

19 See already on this point ECJ Case C-404/06 *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008], par. 31. Cf. in this regard T. Möllers and A. Möhring, 'Recht und Pflicht zur richtlinienkonformen Rechtsfortbildung bei generellem Umsetzungswillen des Gesetzgebers' [2008] *Juristenzeitung* 919 et seqq.; O. Mörsdorf, 'Verpflichtung des Käufers zur Zahlung eines Nutzungsentgelts im Rahmen der Neulieferung einer mangelhaften Kaufsache', [2008] *Zeitschrift für Wirtschaftsrecht* 1409 et seqq.; C. Herresthal, 'Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf' [2008] *Neue jur. Wochenschr.* 2475 et seqq.; H. Ofner, 'Kein Nutzungsentgelt für den Verkäufer bei Austausch der nicht vertragsgemäßen Sache' [2008] *Zeitschr. Rechtsvergl.* 57 et seqq.; C. Schneider and F. Amtenbrink, '«Quelle»: The possibility, for the seller, to ask for a compensation for the use of goods in

14, par. 4, dir. SGD refers in this regard only to the “normal use”, providing that the consumer shall not be liable to pay for normal use made of the replaced goods during the period prior to their replacement. This leaves an open door to claims by the seller if the replaceable good is in conditions which are not compatible with a “normal use”. When this is not the case, the seller may ask for compensation for the loss of value of the replaced good²⁰. As the SGD did not expressly regulate such cases, it will be necessary to refer to Member States’ national law²¹. This shall also apply when the good was meanwhile sold or modified by the consumer.

- 11 More generally, lacking a detailed regulation of replacement, it is necessary to clarify whether the substantial integrity of the good not in conformity with the contract shall be a prerequisite for replacement. In this regard, Art. 82, par. 1 of the Vienna Convention on the International Sale of Goods contains a solution: the buyer loses the right to declare the contract void or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, except when: (a) the impossibility of making restitution of the goods

replacement of products not in conformity with the contract’ [2008] *Revue européenne de droit de la consommation* 301 et seqq.; G. Schulze, ‘Kein Nutzungsersatz bei Ersatzlieferung: Anmerkung zu EuGH, Urteil vom 17.4.2008, C-404/06 – Quelle’ [2008] in *Zeitschr. für das Privatrecht der europäischen Union* 128 et seqq.; S. Lorenz, ‘Anmerkung zu EuGH, U. v. 17.04.2008 – Rs. C-404/06’ [2008] *Deutsches Auteursrecht* 330 et seq. In this sense see ECJ Case C-65/09 and 87/09 *Weber GmbH v. Wittmer and Putz v. Medianess Electronics GmbH* [2011], par. 50.

- 20 In this regard see C. Herresthal, ‘Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf’ [2008] *Neue jur. Wochenschr.* 2475, 2476.
- 21 See ECJ Case C-489/07 *Pia Messner v. Firma Stefan Krüger* [2009], par. 30, according to which the provisions of the second sentence of Article 6, par. 1 and Article 6, par. 2 of Directive 97/7/EC on the protection of consumers in respect of distance contracts must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity²². Nevertheless, considering the different scope of application of the Vienna Convention, the abovementioned provision cannot be applied to the SGD.

- 12 In this regard one shall consider also Art. 14, par. 2, dir. 2011/83/UE (hereinafter: CRD), which provides a set of duties on the consumer in the event of withdrawal from distance contracts, stating that the consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish their nature, characteristics and functioning, and, furthermore, that the consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with Art. 6, par. 1, lit. h CRD. Extending the same principle, the eventually diminished value of the goods shall not preclude the consumer from accessing the remedies for lack of conformity according to the SGD. Otherwise, a ground for exclusion of the right to repair or replacement would be unduly introduced, thereby contrasting with Art. 13 and 14 SGD. It is worth considering that the new rules on sale of goods explicitly exclude (although only regarding replacement) the consumer’s duty to pay for the normal use of the goods before the seller brought them into conformity²³. Nevertheless, the same rule shall apply to the case of repair.

- 13 Furthermore, Art. 14, par. 3 SGD partly codified the ECJ case law relating to the dir. 1999/44/EC, by providing that where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation²⁴. In

22 See in this regard C. Fountoulakis, *sub art. 82 CISG*, in I. Schwenzer (ed), *Commentary on the Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016), par. 1 et seqq.

23 Cf. also recital 57 SGD.

24 See ECJ Case C-65/09 and C-87/09 *Weber GmbH v. Wittmer and Putz v. Medianess Electronics GmbH* [2011], par. 58-62.

any case, the seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances (Art. 13, par. 3 SGD).

- 14 Repair and replacement shall be carried out within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity (Art. 14, par. 1, lit. b SGD). Such a provision is largely unsatisfying. In the concrete case, for the purpose of the abovementioned provision it shall not be enough that the consumer informed the seller about the lack of conformity. Indeed, the “reasonable period of time” shall start from the moment in which the consumer has informed the seller about the lack of conformity, the consumer has made the goods available to the seller and has communicated to him the choice made between repair or replacement²⁵. The EU legislator stated that what is considered a reasonable period of time for completing a repair or replacement should correspond to the shortest possible time necessary for completing the repair or replacement. That time should be objectively determined by considering the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement²⁶. According to recital 55 SGD, when implementing the Directive, Member States should be able to interpret the notion of reasonable time for completing repair or replacement, by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products. Nevertheless, it does not seem appropriate that Member States follow the aforementioned provision. Firstly, it is extremely difficult to identify *ex ante* a “reasonable time” for the repair or replacement. Secondly, it also seems difficult – and it would probably generate considerable inequalities – to provide fixed periods with regard to specific categories of products²⁷. It seems therefore appropriate that the concrete identification of the “reasonable period of time” shall be left to scholars and the judicial practice.

- 15 With regard to the concept of “significant inconvenience”, already contained in directive 1999/44/EC, some commentators claimed that the notion of inconvenience shall include all inaccuracies of the performance different from the

unreasonableness of the period of time used for the purpose of repair or replace the good. According to this opinion, “significant inconveniences” should therefore exist whenever the seller, while repairing the good, was not able to fully restore the conformity of the good, as well as in the case in which he, while replacing the good, was not able to deliver to the consumer a good which is not in conformity with the contract²⁸.

- 16 However, it seems more appropriate to refer the concept of “inconveniences” to all discomforts caused by the actions necessary for repair or replacement of the good, independently from the circumstance that the conformity was or not restored. Such an interpretation seems to be confirmed also by the case law of the ECJ and by the solution currently codified in Art. 14, par. 3 SGD²⁹. In this regard, the EU legislator could have given more substance to the notion of “significant inconveniences”, by providing a maximum number of attempts by the seller to bring the good into conformity, even if the abovementioned “reasonable period of time” has still not lapsed³⁰.
- 17 The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including the significance of the lack of conformity and the value the goods would have if there were no lack of conformity (Art. 13, par. 3 SGD).
- 18 First, the remedy is impossible when the consumer asks for replacement of a good which is unique. In the case of defects of title, impossibility can be identified when goods are subject to a public restraint, or the elimination of such a restraint depends on the will of a third person. In case the seller does not have the skills or the necessary means for repairing or replacing the goods, he shall ask a third party to bring the good into conformity.

This will likely be the case with goods containing digital elements, especially updates, as in the

25 In this sense see also B.A. Koch, ‘Das System der Rechtsbehelfe’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 184.

26 So recital 55 SGD.

27 B.A. Koch, ‘Das System der Rechtsbehelfe’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 185.

28 A. Zaccaria and G. De Cristofaro, *La vendita di beni di consumo* (Cedam 2002), p. 89 et seq.

29 ECJ Case C-65/09 and C-87/09 *Weber GmbH v. Wittmer and Putz v. Medianess Electronics GmbH* [2011] par. 52-62.

30 Relating to the directive proposal, see for this solution e.g. G. Howells, ‘Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods’ in A. De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016), p. 153.

majority of cases the seller will not be able to supply them³¹.

- 19 The excessive onerousness shall be evaluated taking into account all circumstances mentioned above with regard to impossibility³². As for example regarding goods with digital elements, the hardware replacement should be considered as disproportionate if the lack of conformity is due “only” to the software and would be easily solved by means of an update to the digital element³³.

C. Termination and price reduction

- 20 In addition to the cases of impossibility and disproportion of both primary remedies, the consumer will also have access to the remedies of price reduction and termination in cases in which: a) the seller did not carry out repair or replacement free of charge, within a reasonable period of time or without any significant inconvenience to the consumer (art. 14 SGD), or refused to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate; b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity; c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer (art. 13, par. 4 SGD). In any case, the consumer shall not be entitled to terminate the contract if the lack of conformity is only minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the seller (art. 13, par. 5 SGD).

- 21 Particularly regarding goods with digital elements, it is questionable whether a lack of conformity in the safety of digital content, whose design enhances

31 Cf. B.A. Koch, ‘Das System der Rechtsbehelfe’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 183.

32 See Art. 13, par. 2 SGD and recital 49 SGD; cf. in this regard the critical remarks by B. Gsell, ‘Rechtsbehelfe bei Vertragswidrigkeit in den Richtlinien vorschläge zum Fernabsatz und zur Bereitstellung digitaler Inhalte’ in M. Artz and B. Gsell (eds), p. 147 et seq. relating to the original directive proposal, which still did not mention the “absolute disproportion”.

33 Cf. B.A. Koch, ‘Das System der Rechtsbehelfe’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 183, fn. 139.

the risk of contamination through a virus which is suitable to damage it, may be considered as “only minor”. In the author’s opinion, such question deserves a negative answer.

- 22 Furthermore, digital content allowing third parties to access consumer’s personal data may present another lack of conformity. This defect may not be considered “only minor” as data protection is guaranteed as fundamental right according to Art. 8 of the Charter of Fundamental Rights of the European Union; therefore, its violation may never be considered “only minor”.

- 23 The operativity of the secondary remedies, both the right to price reduction and the right to termination, can be exercised by a unilateral extrajudicial declaration, by means of which the seller expresses his decision to demand the price reduction or termination³⁴.

- 24 Regarding the judicial exercise of secondary remedies, the ECJ stated, in consideration of dir. 1999/44/CE, that if a consumer seeks in legal proceedings only rescission of the contract, but such rescission cannot be granted because the lack of conformity is minor, it requires a national court to take an appropriate measure to enable the consumer to enforce his claims under the Directive. It is for national law to determine which procedural measure can be taken to achieve this. The rights of defence of the other party must, however, be taken into account in this connection³⁵. It is reasonable to affirm that such solution shall apply also to the SGD.

- 25 With specific regard to price reduction calculation, differently from dir. 1999/44/EC, which did not address the issue, the SGD contains an express regulation of such aspect, stating that it shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity (Art. 15 SGD).

- 26 However, despite the apparent clarity of the new rules on sales, the calculation of the price reduction may not be always easy for goods with digital elements³⁶. This is the case, for instance, when the

34 See Art. 16, par. 1 SGD.

35 In this sense see ECJ Case C-32/12 *Soledad Duarte Hueros v. Autociba SA e Automóviles Citroën España SA* [2013] *Foro it.*, 2013, 12, IV, c. 509.

36 T. Riehm and M.A. Abold, ‘Mängelgewährleistungspflichten des Anbieters digitaler Inhalte’ [2018] *Zeitschr. für Urheber- und Medienrecht* 87, who, with regard to cases of instant supply, qualify the future updates as “*unentgeltliche Dauerschuldkomponente*”.

price of the good was determined as a whole and it is therefore difficult to clearly assess which part of it shall be attributable to the digital content. More generally, the difference between the value of a good with a non-updated digital element and a good with an updated digital element is even more difficult to be determined than the difference between the value of two goods without digital elements. To highlight the uncertainties connected to the calculation of the price reduction, one may, for example, think of a heating system with digital elements in which one year after the delivery, a digital bug makes it possible for a third party to have access to the owner's personal data. Let's consider that the repair of such good is not possible and that replacement is disproportionate. In this example, it is questionable how the value of such defective heating system shall be determined, because it is not clear if and how the bug impacts the consumer concretely. For example, one may say that the commercialization of such system is unlawful and therefore that its value is zero; dealing with the same case, one may instead affirm that such system has only minor defects³⁷.

- 27 Furthermore, the European legislator expressly provided that where the lack of conformity relates to only some of the goods delivered under the sales contract and there is a ground for termination of the sales contract pursuant to Art. 13, the consumer may terminate the sales contract only in relation to those goods, and in relation to any other goods, which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods (Art. 16, par. 2 SGD)³⁸.
- 28 Where the consumer terminates a sales contract as a whole or in relation to some of the goods delivered under the sales contract, the seller shall bear the costs for the return of the goods (Art. 16, par. 3, lit. a SGD). As an alternative, the seller shall reimburse to the consumer the price paid for the goods upon receipt of the goods or of evidence provided by the consumer of having sent back the goods (Art. 16, par. 3, lit. a SGD). In this regard, it was rightly highlighted that such duty would include not only the delivery costs, but also all costs for the removal of goods. This solution shall be derived from Art. 14, par. 3 SGD, which regulates – with limited regard to repair and replacement – the costs of removal of the non-conforming goods, and the installation of replacement goods or repaired goods³⁹. However,

in the author's opinion, this provision shall be interpreted extensively and applied also in case of termination. In this regard, it would be appropriate that the Member States' legislators expressly clarify this aspect when implementing the SGD.

- 29 The SGD does not contain provisions relating to a possible duty of the seller to refund to the consumer necessary, useful or even only luxury expenditures he may have made for the returned good. In this regard, recital 60 SGD provides that the Directive should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive, such as the consequences of the decrease of the value of the goods or of their destruction or loss⁴⁰. From a systematic point of view, it is worth mentioning that, according to Art. 14, par. 4 SGD, the consumer shall not be liable for normal use made of the replaced goods during the period prior to their replacement. For reasons of systematic consistency, it seems appropriate to extend the same solution for the "normal use" made of the replaced goods during the period prior to contract termination. A further element in this direction can be found in Art. 13, par. 3, lit. d of the Proposal of a Directive on certain aspects concerning contracts for the online and other distance sales of goods⁴¹, which provided that where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract, he shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods. This proposal was not adopted in the final text of the SGD. Nevertheless, taking into account the aforementioned reflections, it can be considered that in case of termination, the consumer shall not pay for the normal use made of the goods during the period prior to the termination. This is also when the consumer asks for termination, he will have already suffered significant inconveniences caused by the lack of conformity. In this regard, to justify the request of termination a non "minor" lack of conformity is required, which in most cases already limited the significant expectations of the consumer to have access to the utilities deriving from the good.

37 So C. Wendehorst, 'Aktualisierungen und andere digitale Dauerleistungen' in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 132.

38 Recital 58 SGD.

39 In this sense B. Zöchling-Jud, 'Das neue europäische

Gewährleistungsrecht für den Warenhandel' (2019) 18 Zeitschr. für das Privatrecht der Europäischen Union 115, 131.

40 Cf. recital 15, dir. 1999/44/EC.

41 COM/2015/0635 final.

D. Time limits

- 30 Regarding time limits for remedies, the seller is responsible for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time (Art. 10, par. 1 SGD). This shall also apply to goods with digital elements without prejudice to Article 7, par. 3 SGD. In the case of goods with digital elements, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Furthermore, where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract (Art. 10, par. 2 SGD)⁴².
- 31 The rules provided by Art. 10 SGD may cause a significant fragmentation of the solutions adopted by national legal systems. Even though the aspects regulated in that provision are of crucial importance for the European economy, the EU legislator decided to adopt only a minimum harmonization approach. This emerges in particular from Art. 10, par. 3 SGD, according to which Member States may maintain or introduce longer time limits than those referred to in paragraphs 1 and 2⁴³. If, under national law, the remedies of repair, replacement, termination and price reduction are also subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of Art. 10, and which becomes apparent within the period of time referred to in those paragraphs (Art. 10, par. 4 SGD). However, Member States may only maintain or introduce a limitation period for the remedies provided for in Article 13, but ensuring that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for
- which the seller is liable pursuant to paragraphs 1 and 2 of Art. 10, and which becomes apparent during the period of time referred to in those paragraphs (Art. 10, par. 5 SGD).
- 32 Here the SGD does not clarify the meaning of the central expression “becoming apparent” of the lack of conformity, and in particular whether it refers to the objective manifestation of the lack of conformity or to the moment in which the consumer discovers the lack of conformity. From a systematic perspective (see above sub C.), it seems that the relevance shall be attributed to the objective manifestation of the lack of conformity.
- 33 Regarding the two years time limit mentioned in Art. 10, par. 1 SGD, recital 41 SGD adds, considering the national rules implementing dir. 1999/44/EC, that a large majority of Member States have provided for a period of two years, and in practice that period is considered reasonable by market participants, so that it should be maintained and should apply also in the case of goods with digital elements. Therefore, differently from what provided in Art. 5, par. 1, dir. 1999/44/EC, Art. 10, par. 1 SGD shall allow national legislators to provide a single time limit, without the necessity to insert an additional time limit, in which the consumer shall exercise the remedies provided for by the SGD.
- 34 As already provided in Directive 1999/44/EC, in the case of second-hand goods, the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period, provided that such shorter periods shall not be less than one year (Art. 10, par. 6 SGD)⁴⁴.
- 35 If the lack of conformity becomes apparent within one year of the time when the goods were delivered, it shall be presumed (*praesumptio iuris tantum*) to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity (Art. 11, par. 1 SGD). In this regard, the EU legislator provided that instead of the one-year period, Member States may maintain or introduce a period of two years from the time when the goods were delivered (Art. 11, par. 2 SGD). This contributes to the fragmentation of national solutions despite the alleged goal of full harmonization. A different rule applies to goods with digital elements where the sales contract provides for the continuous supply of the digital content or digital service over a period of time. In this case, the

42 Cf. B.A. Koch, ‘Das System der Rechtsbehelfe’, p. 208, who criticises the different regulation of this aspect in the SGD and in the dir. 2019/770/EU, as in both cases the rules regard digital content and digital services.

43 See B. Gsell, ‘Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects’, p. 103.

44 See on this extensively B. Gsell, ‘Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects’ in E. Arroyo Amayuelas and S. Camara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 101 et seqq.

burden of proof with regard to whether the digital content or digital service was in conformity within the period of time referred to in Art. 10, par. 2 SGD shall be on the seller for a lack of conformity which becomes apparent within the period of time referred to in that article (Art. 11, par. 3 SGD)⁴⁵.

- 36 Similarly to Directive 1999/44/EC, the SGD does not clarify the meaning of “becoming apparent” with the lack of conformity. In this regard, it seems reasonable to refer to the objective recognizability of the lack of conformity and not to the subjective knowledge of the consumer. This can be argued *e contrario* looking at the formulation of Art. 12 SGD which regrettably⁴⁶ allows Member States to maintain or introduce provisions stipulating that, in order to benefit from the consumer’s rights, the consumer has to inform the seller of a lack of conformity within a period of at least 2 months, referring to the date on which “the consumer detected” such lack of conformity⁴⁷.

E. The further remedies enforceable by the consumer in case of lack of conformity

- 37 Differently from what dir. 1999/44/EC⁴⁸ provided, the SGD aims full harmonisation with national laws, unless otherwise provided by the same directive.⁴⁹ The Directive shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in the same directive, or the right to damages (Art. 3, par. 6 SGD). The SGD shall also not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days (Art. 3, par. 7 SGD). This leaves the question open if and

to what extent the consumer may access different remedies provided by national law⁵⁰. This requires some further reflections. First, the SGD’s aim at a “tendential” full harmonisation means that the consumer is not allowed to by-pass the system of remedies provided for in the directive to access other remedies provided by national law if the SGD remedies are.

- 38 However, the consumer will have immediate access to further remedies, different to those provided in the SGD, e.g. compensation. With specific regard to compensation, it may seem quite unclear whether this remedy can also be enforced as an alternative to remedies already provided in the same directive for counterbalancing the decreased value of the good deriving from the lack of conformity. Considering the full harmonisation character of the SGD, the compensation for such loss of value cannot be enforced while it is still possible to ask for repair, replacement, price reduction or termination. On the contrary, the compensation for other prejudices – different from those consisting in the loss of value due to the lack of conformity – caused by the lack of conformity may be enforced immediately after its manifestation and cumulatively to those provided by the SGD for the lack of conformity.

- 39 The SGD does also not affect national rules that do not specifically concern consumer contracts and provide for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract, namely national provisions which may lay down specific rules for the seller’s liability for hidden defects⁵¹. The Directive should also not affect national laws providing for non-contractual remedies for the consumer, in the event of lack of conformity of goods, against persons in previous links of the chain of transactions, for example manufacturers, or other persons that fulfil the obligations of such persons⁵². Furthermore, the SGD should not affect the freedom of Member States to allow consumers to choose a specific remedy if the lack of conformity of the goods becomes apparent shortly after delivery, namely national provisions which provide for a right for the consumer to reject goods with a defect and to treat the contract as

45 For a critic see B. Jud, ‘Beweislast und Verjährung’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 203 ff.

46 Such provision gives rise to relevant criticisms, as it favours the fragmentation of the national solutions. For a critic see also B.A. Koch, ‘Das System der Rechtsbehelfe’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 212.

47 See also B. Jud, ‘Beweislast und Verjährung’, in J. Stabentheiner, C. Wendehorst and B. Zöchling-Jud (eds), p. 209.

48 Art. 8, par. 2, dir. 1999/44/CE.

49 See Art. 4 SGD and Recital 47 SGD.

50 T. Riehm, ‘Regelungsbereich und Harmonisierungsintensität des Richtlinienentwurfs zum Waren-Fernabsatz’ in M. Artz and B. Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt*, p. 80 et seqq.

51 See B. Gsell, ‘Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects’, in E. Arroyo Amayuelas and S. Camara Lapuente (eds), *El derecho privado en el nuevo paradigma digital* (Marcial Pons 2020), p. 103 et seqq.

52 Recital 18 SGD.

repudiated or ask for immediate replacement, within a specific short period of time after the delivery of the goods, which should not exceed 30 days⁵³.

- 40 Such wide freedom attributed to EU Member States to regulate these relevant aspects may endanger the functioning of the remedy system and seems in the author's opinion not compatible with the declared goal to fully harmonize national legislations.

F. The obsolescence of goods with digital elements challenging the effectivity of consumer rights and the environmental sustainability

- 41 In the digital economy a well-known problem takes a new shape; planned obsolescence increasingly impacts everyday life, undermining the performances of our smart devices, from mobile phones to personal computers, connected cars and smart homes. This shatters the very basis of consumer law, challenges its effectiveness, and raises crucial issues that require innovative solutions. Addressing the legal implications of this phenomenon has become a necessity⁵⁴. Current sanctions and the approach of the EU legislator on this point show a lack of effectiveness, leaving open some fundamental questions. Is actual consumer law fit enough to tackle planned obsolescence? Can unfair trading law contribute to improving the effectiveness of consumer contract law in solving the problem of planned obsolescence? Other major issues concern the growing tension with the goal of achieving sustainable development and a circular economy⁵⁵; ensuring the longer durability of consumer goods is indeed crucial for achieving more sustainable consumption behaviour, waste reduction and environmental protection.

- 42 Various attempts to tackle the phenomenon of planned obsolescence have started at both national and EU levels. In some European Member States, discussions are under way concerning possible solutions.⁵⁶ For instance, in 2015 the French legislator introduced in the *Code de la Consommation*, a specific

prohibition of planned obsolescence – providing for its breach, *inter alia*, a criminal law sanction⁵⁷ – which was modified in 2016.⁵⁸ UK law also has some scope for tackling early obsolescence as the *Consumer Rights Act* already mentions durability as a criterion for the satisfactory quality test.⁵⁹

- 43 As well the SGD delivers a contribution in this direction: among the objective criteria of conformity, the EU legislator expressly lists durability (Art. 7, par. 1, lit. d SGD). This rule should be complementary to those of Directive 2005/29/EC on unfair commercial practices (especially to those on misleading commercial practices) and to those of Directive 2011/83/EU on consumer rights. In particular, European rules on unfair commercial practices play a crucial role in ensuring the effectiveness of the SGD, and specifically in tackling the phenomenon of planned obsolescence, as they cover traders' behaviour before, during and after a commercial transaction in relation to a product. Indeed, with particular regard to the practices of the major players in the global market, it seems that private law rules are not effective enough in influencing traders' behaviour to solve the above-mentioned problem.
- 44 On this point, it may be useful to observe some case law. In 2018, the Italian Competition Authority (hereinafter: ICA) fined, under two separate decisions

53 Recital 19 SGD.

54 See most recently e.g. C. Hess, *Geplante Obsoleszenz* (Nomos 2018), 29 et seq.; cf. T. Brönnecke and A. Wechsler (eds), *Obsoleszenz Interdisziplinär* (Nomos 2015).

55 See <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0098>>.

56 See for an overview S. Wr̀bka, 'Warranty Law in Cases of Planned Obsolescence' (2017) 6 EuCML 67 et seq.

57 See as an example L213-4-1 *Code de la Consommation*: "L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement. L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300 000 € d'amende. Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits" (see <<https://www.legifrance.gouv.fr>>).

58 Art. L-441-2 *Code de la Consommation*: "Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement" (see <<https://www.legifrance.gouv.fr>>).

59 Art. 9 *Consumer Rights Act 2015*: "The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods: [...] (e) durability".

– both confirmed in 2020 –, *Apple*⁶⁰ and *Samsung*⁶¹ for unfair commercial practices concerning software updates which seriously impaired the functioning of certain models of mobile phones. The two big firms were fined 10m and 5m Euros respectively. Such decisions immediately gained worldwide resonance. In particular, the ICA ascertained that the two companies had carried out misleading and aggressive commercial practices, thereby breaching the implementing provisions of Arts. 5, 6, 7 and 8 of Directive 2005/29/EC on Unfair Commercial Practices (hereinafter: UCPD) in relation to the release of firmware updates for their mobile phones. These caused serious malfunctions, significantly reducing their performance and, as a consequence, accelerated their replacement with more recent products.

- 45 In the *Apple* case, the ICA ascertained the unfairness of two commercial practices. The first one concerned situations in which consumers who purchased iPhone 6, 6Plus, 6s and 6sPlus, were insistently asked to update their operating system to iOS 10 and subsequently to iOS 10.2.1 which modified functional characteristics and significantly reduced performance. This was done without customers being adequately informed in advance about the inconvenience that the installation of these updates might cause and giving only limited and belated advice about how to remedy these shortcomings, for example by means of a downgrading or battery substitution. In addition, it was ascertained that *Apple* used undue influence over consumers as it induced them to install a firmware update by means of insistent request to download and install updates, as well as by not providing adequate assistance to consumers who wished to restore the previous functionality of their devices. This speeded up the replacement of such devices with new iPhone's models. This practice was fined under Art. 5, 6, 7 and 8 UCPD⁶². Furthermore, the Italian Competition Authority fined *Apple* according to the implementing provision of Art. 7 UCPD for misleading omissions concerning the lack of information relating to duration, handling and costs for substitution of the iPhone 6, 6Plus, 6s and 6sPlus batteries, with specific reference to the case in which, after the above mentioned updates, the performance significantly

decreased and, as a consequence, consumers were induced to purchase a new phone instead of being appropriately informed about the opportunity to replace the battery.

- 46 In the *Samsung* case, the ICA ascertained an unfair commercial practice according to the implementing provisions of Art. 5, 6, 7 and 8 UCPD, as the trader developed and insistently suggested to customers of the Samsung Galaxy Note 4 to proceed to firmware updates based on Android's Marshmallow: such updates modified the phone's functionalities, by sensibly reducing performances and preventing consumers from assuming a conscious decision as to whether or not to install new updates to their device. Additionally, it was ascertained that *Samsung* deliberately decided not to provide assistance for the products, which were no longer under warranty, requiring high costs for repair and not providing the downgrade to the precedent firmware version, thereby intentionally accelerating the products' substitution.
- 47 Both *Apple* and *Samsung* were also required, according to Art. 27 para 8 of the Consumer code, to publish an amending declaration on the Italian homepage of their websites, with a link to the respective ICA decision.
- 48 The ICA's *Apple* and *Samsung* cases highlight fundamental criticisms concerning the effectiveness of current European consumer and market law. First of all, the decisions raise serious doubts concerning the aptitude of the existing penalties laid down in way of implementation of the UCPD for effectively tackling the challenge of planned obsolescence, especially in the digital economy. And, furthermore, they raise the question of how consumer (contract) law could be improved in order to react to and ideally prevent the above-mentioned phenomenon in the future.
- 49 Concerning the first point, it is particularly questionable whether a penalty up to 5m Euros (the maximum provided for by Art. 27 para 9 of the Italian Consumer Code, implementing Art. 13 UCPD) is sufficient to effectively dissuade tech giants like *Apple* and *Samsung* from adopting unfair practices. In this regard, Art. 13 UCPD provides that Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and that "these penalties must be effective, proportionate and dissuasive". First, from a systematic point of view, the fact that the European legislator did not provide clear harmonised penalties for breaches of unfair commercial practices opened the door to the fragmentation of national solutions resulting from the implementation of UCPD. That fragmentation impairs consistency and the realisation of an efficient EU-wide strategy against

60 See Italian Competition Authority, 25 September 2018, PS11039, *Apple*, <http://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf>.

61 See Italian Competition Authority, 25 September 2018, PS11039, *Samsung*, <http://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf>.

62 See on those provisions M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016), 10 et seqq.

unfair practices⁶³. Secondly, effectiveness and dissuasiveness can be achieved mainly through proportionality of penalties. In order to better substantiate the concept of proportionality, the penalty shall in the author's opinion be linked to the annual turnover of the trader being sanctioned for an unfair commercial practice. Rather than fixing an amount of money as the highest possible penalty, a link to annual turnover would allow the trader's size, market power and – above all – market impact to be taken into account. This would avoid both “over-” and “under-sanctioning”.

- 50 With particular regard to the practices of the major players in the global market, it seems that private law remedies are not effective enough for influencing traders' behaviour to solve the problem. Therefore, a consistent and effective EU-wide set of public law penalties would be needed. This would also ensure the effectiveness of private consumer law and encourage fair trading behaviour. It is not by chance that *Apple* significantly modified its practices in a virtuous way after the lodgement of the abovementioned Italian case, in order to comply with the provisional requirements of the ICA.⁶⁴ While the average consumer is often dissuaded from bringing a matter before a civil court, the compelling pressure generated by prospective or actual proceedings before a competition authority like the ICA (which has the power to impose public law penalties) is often sufficient to ensure a better enforcement of consumer private law rights.
- 51 A good example of this is represented by the results of the enforcement of Art. 6 para 2 lit. g UCPD, which qualifies as a misleading commercial practice deceiving or likely to deceive the average consumer in relation to their rights to replacement or reimbursement under the Consumer Sales Directive, or the risks they may face. Such rule is proving – at least in Italy – to be key in compelling businesses to acknowledge consumer rights. If the perspective of being brought before a civil court is

63 Cf. the reports on the implementation of the UCPD published in EuCML-Issues 5/2015, 6/2015 and 2/2016.

64 Cf. the example of Article L213-4-1 *Code de la Consommation*: “L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement. L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300 000 € d'amende. Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits” (see <<https://www.legifrance.gouv.fr>>). Such article has been later modified.

frequently not enough to dissuade the trader from misleading the consumer about their contractual rights, the parallel “risk” to undergo an investigation by the competition authority (with the risk of a pecuniary penalty up to 5m Euros, and especially – as this has an impact on the traders' image – of the publication of the decision or a corresponding corrective statement, according to Art. 27 para 7 Consumer code, so that the practices cease their negative effects) creates a relevant deterrence against unfair commercial practices. This synergy should in the authors' opinion be improved by the EU legislator.

- 52 A useful example in this direction can be found in Art. 2, par. 6 of Directive 2019/2161/EU, regarding the amendments to Art. 13 of Directive 2005/29/EU, where it provides that Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned. Without prejudice to that Regulation, Member States may, for national constitutional reasons, restrict the imposition of fines to: (a) infringements of Articles 6, 7, 8, 9 and of Annex I to this Directive; and (b) a trader's continued use of a commercial practice that has been found to be unfair by the competent national authority or court, when that commercial practice is not an infringement referred to in point (a).
- 53 In order to enhance the effectivity of consumer rights and, inter alia, of the durability of goods with digital elements, the rule contained in Art. 2, par. 6 of Directive 2019/2161/EU should be ideally extended beyond the scope of application of Article 21 of Regulation (EU) 2017/2394, thereby including all unfair commercial practices.
- 54 More detailed consumer contract law rules can indeed have a straight-jacket effect, especially if done on a fully harmonised basis. Also, from a consumer's perspective, additional rights may be of little use if enforcement is going to be difficult, slow, or both. The proposed amendment to the UCPD and its implementing provisions might be a better and more effective solution.

G. Concluding remarks

- 55 Regarding remedies for lack of conformity, the SGD borrows several solutions from the repealed Directive 1999/44/EC on consumer sales. In accordance with the latter as well as the Directive 2019/770/EU on

the supply of digital content and digital services, priority should be given to proper performance of the contractual obligations by bringing the goods into conformity.

- 56 The SGD does not affect the freedom of Member States to regulate aspects of general contract law, or the right to damages. This leaves the question open on if and to what extent the consumer may recur to different remedies provided by national law. In this concern, it seems reasonable that the consumer shall at least not be allowed to by-pass the system of remedies provided for in the SGD to access other remedies provided by national law if the remedies provided for by the directive are still enforceable. The EU legislator also decided to not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days, and also to determine the length of limitation periods. Also, the maintenance or introduction of an obligation to notify the detection of a lack of conformity is left in the hands of national legislators. This delivers a contribution to the fragmentation of the national solutions resulting from the implementation of the SGD, thereby impairing consistency and the realisation of an efficient EU market for goods with digital elements.
- 57 Furthermore, from a systematic point of view, the disruption brought about by the (too often planned) obsolescence of goods with digital elements shatters the very basis of consumer law, challenges its effectiveness, and raises some crucial issues that require innovative solutions. Addressing the legal implications of this phenomenon has thus become a necessity. Current sanctions and the approach of the EU legislator on this point so far show a lack of effectiveness, leaving open some fundamental questions. This offers a great chance to re-configure consumer law, enhancing its role of protecting consumers and stimulating fair market behaviour, and at the same making it an instrument for achieving the goal of more sustainable development. Consumer law has a crucial role to play in the years to come, broadening its goals from those of an instrument for just protecting consumers and regulating the market, to those of a system which also orientates and stimulates more responsible environmental behaviour by all market players.