



THOMAS M.J. MÖLLERS

Professor of Civil Law – University of Augsburg

THE WEAKNESSES OF THE SALE OF GOODS DIRECTIVE – DEALING WITH LEGISLATIVE DEFICITS

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I. – 1.1. – This paper seeks to combine sale of goods law with a number of questions on European methodology. In 2019, the European legislature adopted the Sale of Goods Directive 2019/771¹ and the Digital Content Directive 2019/770². As stated in the first article of each of these two directives, the aim is to ensure a “proper” functioning of the internal market. The adoption of both directives is based on the considerations of re-

¹ Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, OJ L 136/28 – Sale of Goods Directive.

² Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136/1 – Digital Content Directive.



maintaining competitive in world markets by overcoming the fragmentation of trade³. Joint “measures” serve to increase legal certainty between Member States, strengthen the confidence of consumers and business owners⁴ and minimise the costs of cross-border trade⁵. The legal instrument used for this purpose is full harmonisation; it creates a uniform legal framework, as Member States are not allowed to maintain or introduce diverging provisions⁶.

But do these directives live up to their aspirations? Does full harmonisation increase legal certainty and reduce costs? To this end, the directives should be examined from two methodological points of view. Has the goal of full harmonisation been achieved with lower transaction costs? Thus, the legislative technique of the European legislature must be analysed (part II). Is there a balance with economic concerns? How should the directives be handled if there are gaps? Which rules should be included if the directives are amended (part III)? This paper focuses on the Sale of Goods Directive, and concludes with summary theses (part IV).

1.2. – More than two decades ago, the European Community adopted the Consumer Goods Directive 1999/44⁷. It established a minimum level of harmonisation, and allowed Member States to have a higher level of consumer protection⁸. It was celebrated as the most important directive in European consumer law as it regulated not just a few marginal areas of law. For the first time, a core element of contract law was extensively standardised in the form of warranty law under commercial law. The German legislature used this as an opportunity to undertake a substantial revision of the German Civil Code

³Recital 1 sentence 1 Sale of Goods Directive (fn. 1). Similarly Recital 1 Digital Content Directive (fn. 2): “growth potential ... has not yet been fully exploited.”

⁴Recital 5 sentence 2 Sale of Goods Directive (fn. 1); Recital 1 sentence 1 Digital Content Directive (fn. 2).

⁵Recitals 3 and 7 Sale of Goods Directive (fn. 1); Recitals 3 and 4 sentence 1 Digital Content Directive (fn. 2):

⁶Art. 4 Sale of Goods Directive (fn. 1); this is discussed in greater detail in part II.3.3.

⁷Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees of 25 May 1999, OJ L 171/12. See also the Proposal for a Directive on the sale of consumer goods and associated guarantees of 18 June 1996, COM(95) 520 final – Proposal for a sale of consumer goods directive.

⁸Art 1(2) Consumer Goods Directive (fn. 7) and the minimum requirements clause in Art. 8(2) Consumer Goods Directive: “Member States may adopt or maintain in force more stringent provisions ... to ensure a higher level of consumer protection”.



(BGB). The Act to Modernise the Law of Obligations (SMG) adopted in 2002⁹ updated not only the law on breach of contract and the statute of limitations, but integrated into the Civil Code almost all European directives that had previously been implemented in special laws¹⁰.

The Consumer Rights Directive 2011/83 – which combined two consumer protection directives – came into effect around ten years later¹¹. However, the Commission’s attempt to harmonise all European sales law in 186 articles¹² failed in 2014 due to resistance from Member States, whereby the Commission withdrew the Proposal¹³. The European legislature then limited its harmonisation efforts to the digital single market. Just one year later, the Commission published two proposals for directives regarding the provision of digital content¹⁴ and regarding aspects of online trading and other forms of distance selling¹⁵. The Proposal for online trading was then amended in 2017 and extended to retail trading¹⁶. The EU also evaluated the existing rules under the Consumer Goods Directive by surveys of relevant stakeholders in 2015¹⁷ and 2017¹⁸ and these were then combined by the Commission¹⁹. Member States must implement the two di-

⁹ *Gesetz zur Modernisierung des Schuldrechts* of 26 November 2001, Federal Law Gazette I, p. 3138.

¹⁰ For details, see Möllers, *Europäische Richtlinien des Bürgerlichen Rechts*, JZ 2002, 121-134.

¹¹ Directive 2011/83 on consumer rights of 25 October 2011, OJ L 304/64 – Consumer Rights Directive – combined Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises and the Distance Contracts Directive 97/7 (see below fn. 45), see also the Proposal for a Directive on Consumer Rights of 8 October 2008, COM(2008) 614 final – Proposal for a Directive on Consumer Rights.

¹² Proposal for a Regulation on a Common European Sales Law (CESL) of 11 October 2011, COM(2011) 635 final.

¹³ The Junker Commission now focused on the “digital single market”, see Communication from the Commission of 16 December 2014, Commission Work Programme 2015, COM(2014) 910 final, Annex 2 Nr. 60.

¹⁴ Proposal for a Directive on certain aspects concerning contracts for the supply of digital content of 9 December 2015, COM(2015) 634 final.

¹⁵ Proposal for a Directive on certain aspects concerning contracts for the online and other distance sale of goods of 9 December 2015, COM(2015), 635 final – Proposed Online Trading Directive.

¹⁶ Amended Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods of 31 October 2017, COM(2017) 637 final – Amended Proposed Directive on online and other distance sales of goods.

¹⁷ Ipsos, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU of December 2015*– Ipsos, *Consumer market study*.

¹⁸ ICF, *Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels from March 2017* – ICF, *Costs and Benefits 1999/44/EU*.

¹⁹ Commission Staff Working Document on the Impacts of fully harmonised rules on contracts for the



rectives by 1 July 2021; these national rules then come into force as from 1 January 2022²⁰.

II. – 2.1. – 2.1.1. – Minimum harmonisation, as expressly envisaged in the Consumer Goods Directive, creates only a minimum standard at the European level²¹. The desired harmonisation is only achieved for a minimum defined scope; in excess of that, it allows a Member State to have stricter laws. Typical elements are general clauses, omissions, opt-out clauses, options, referrals to national laws and, above all, minimum clauses that allow for stricter law of a Member State²².

By contrast, full harmonisation would create a uniform and mandatory normative structure for all, with no exceptions. Common legal rules are intended to overcome the fragmentation of trade, increase legal certainty, and decrease transaction costs; the aim is to achieve a “*genuine digital single market*”²³.

2.1.2. – There are over thirty references to national law of Member States in the Sale of Goods Directive and in the Digital Content Directive. Here we mention only a few important exceptions: Already with regard to the scope of application, it is surprising that reference is made to the law of the Member States for contracts with a dual purpose, i.e. “dual use”²⁴. Member States may also provide for a longer statute of limitations²⁵, extend the reversal of the burden of proof in respect of a defect to two years²⁶ or decide whether to introduce an obligation to notify²⁷. Member States may also retain or introduce special rules for hidden defects²⁸ or an immediate right to re-

sales of goods supplementing the impact assessment of 31 October 2017, SWD (2017) 354 final – Staff Working Document Impact Assessment.

²⁰ Art. 24(1) subparas. 1, 2 Sale of Goods Directive (fn. 1); Art. 24(1) subparas. 1, 2 Digital Content Directive (fn. 23(1) (fn. 1)).

²¹ For wording, see fn. 8 above.

²² Such as Art. 8(2) Consumer Goods Directive (fn. 8).

²³ See Recital 3 Sale of Goods Directive (fn. 1) and Digital Content Directive (fn. 2). In general on the single market, see Art. 26 TFEU and above under part I.1.

²⁴ Recital 22 sentence 2 Sale of Goods Directive (fn. 1)

²⁵ Art. 10(3) Sale of Goods Directive (fn. 1).

²⁶ Art. 11(2) Sale of Goods Directive (fn. 1)

²⁷ Art. 12 Sale of Goods Directive (fn. 1) and part III.3.a)bb).

²⁸ Recital 18 sentence 5 Sale of Goods Directive (fn. 1).



ject²⁹. Furthermore, large parts of warranty law are not covered by the directives: this applies for instance to claims for damages³⁰ or general contract law such as the formation and validity of the contract³¹. The analysis shows that the desired full harmonisation will not be sustained, but that numerous exceptions will be made which will remain within the regulatory scope of the Member States. The directives thus fall far short of their objective of full harmonisation³², so that in effect only a ‘rump’³³ is left. Despite its far-reaching objectives, the Directive resembles a typical minimum harmonisation with elements such as general clauses,³⁴ omissions³⁵, opt-out clauses³⁶, options³⁷, referrals to national laws³⁸ and, above all, minimum clauses that allow for stricter law of a Member State³⁹. It is thus a *fata morgana*.

2.1.3. – Full harmonisation can be considered inefficient in particular if the demarcation to the non-harmonised area is blurred. According to the wording of the Sale of Goods Directive, the freedom of the Member States to regulate the formation, validity, nullity or effects of a contract remains unaffected; but this applies only “in so far as they are not regulated in this Directive”⁴⁰. Therefore the *demarcation from national contract laws of the Member States* remains uncertain. A clarification in the recitals would have

²⁹ Recital 19, Art. 3(7) Sale of Goods Directive (fn. 1). On this ‘right to reject’ under Section 20(7) of the Consumer Rights Act 2015, see *Lilleholt*, A Half-built house – The New Consumer Sales Directive Assessed as Contract Law, 28 *Juridica International* 2019, 3, 5.

³⁰ Art. 3(6) last half-sentence Sale of Goods Directive (fn. 1), and under parts II.3.c) und III.3.

³¹ Recital 18, Art. 3(6) Sale of Goods Directive (fn. 1) and below fn. 122.

³² *Wilke*, (Verbrauchsgüter-)Kaufrecht 2022 – die Warenkauf-Richtlinie der EU und ihre Auswirkungen, BB 2019, 2434, 2447.

³³ According to *Zöchling-Jud*, Das neue Europäische Gewährleistungsrecht für den Warenhandel, GPR 2019, 115, 117; critically also *Tonner*, Die EU-Warenkauf-Richtlinie, auf dem Weg zur Regelung langlebiger Waren mit digitalen Elementen, VuR 2019, 363, 367.

³⁴ For example, Art. 7(3)(a) Sale of Goods Directive (fn. 1): “reasonably”.

³⁵ For example, Art. 3(6) Sale of Goods Directive (fn. 1): “effects of a contract” (on this, see part III.2.c)bb), “damages” (on this, see part III.2.c)aa).

³⁶ For example, Art. 10(3) Sale of Goods Directive (fn. 1): “time limits”; Art. 11(2) Sale of Goods Directive (fn. 1): period of “burden of proof”.

³⁷ Art. 12 Sale of Goods Directive (fn. 1): “Obligation to notify”.

³⁸ For example, Recital 22 sentence 2 Sale of Goods Directive (fn. 1): dual use (on this, see part II.3.b).

³⁹ See opt-out clauses in fn. 36.

⁴⁰ Art. 3(6) and Recital 18. Sale of Goods Directive (fn. 1).



been helpful here, but none was given. Therefore, there is serious dispute as to whether the law governing mistake, disturbance of the basis of the transaction⁴¹ or challenge due to fraudulent misrepresentation⁴² are covered by the full harmonisation of the Sale of Goods Directive.

2.2. – In the 19th century, German pandectism⁴³ fed the conceptual rigour and logical abstraction of the German Civil Code (BGB). The Civil Code and its concise external system is in this respect a child of pandectism⁴⁴. Systematic thinking facilitates deduction, but also aims at a consistent system of value decisions. In the meantime, the European legislature is also trying to systematise its harmonised law, the *aquis communautaire*; it is seen in the Consumer Rights Directive with the attempt to harmonise revocation rights under the Doorstep-selling Directive 85/577 and the Distance-selling Directive 97/7⁴⁵. The Draft Common Frame of Reference also aimed at systemisation⁴⁶.

Each of the directives contains 27 Articles. After purpose, objectives and definitions, the scope of both directives is explained (Articles 1 to 3) and full harmonisation is stressed (Article 4). The following articles describe the requirements for contractual conformity (Articles 6 to 8), and Article 10 stresses the liability of the seller in case of lack of conformity with the contract. Articles 13 to 16 regulate the remedies for lack of conformity with the contract. These are the known priority rights to rectification of defects, replacement delivery and, to a lesser extent, price reduction and termination of the contract.

⁴¹ Approving *Zöchling-Jud*, GPR 2019, 115, 127 on *laesio enormis*. Disapproving *Lilleholt*, 28 *Juridica International* 2019, 3, 6.

⁴² Approving full harmonisation *Gsell*, *Europäischer Richtlinien-Entwurf für vollharmonisierte Mängelrechte beim VerbraucherkauF – Da capo bis zum Happy End?*, ZEuP 2018, 501, 504 f.

⁴³ Pandectism (Pandects or Digests of the Codex Juris Civilis of Justinian) systematised Roman law and have this also been designated as the historical school.

⁴⁴ *Koschaker*, *Europa und das römische Recht*, 1947, p. 258; *Wieacker*, *Privatrechtsgeschichte der Neuzeit*, 2nd edn. 1967, p. 475 ff.

⁴⁵ Expressly in Recital 2 Consumer Rights Directive 2011/83 (fn. 11): “Those Directives have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules.”

⁴⁶ See fn. 12 above and *von Bar/Clive/Schulte-Nölke et al.* (eds.), *Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, 2009; *Jansen/Zimmermann*, *Commentaries on European Contract Law*, 2018.



The parallel structure of the two directives is also systematic; it is helpful to have the legal definitions at the beginning of the directives⁴⁷. The systematics of legislation also includes building block techniques, whereby a norm is comprised of various terms, so that only the knowledge of various norms makes the meaning of the norm accessible⁴⁸. Article 3(1) happily restates the scope of the Sale of Goods Directive as “to sales contracts between a consumer and a seller”. This is acceptable as the terms “sales contract”, “consumer” and “seller” are legally defined in Article 2(1), (2) and (3).

2.3. – 2.3.1. – Despite this flood of information, there is often a lack of the linguistic precision that characterised nineteenth century pandectism. Surprisingly, the two directives contain numerous inaccuracies and gaps. Open legal questions must be answered using the European methodology. The Court of Justice of the European Union uses Savigny’s canon of interpretation by wording, system, history and telos⁴⁹. There are also special features of European methodology: The CJEU compares the language versions of different Member States⁵⁰. Autonomous interpretation requires finding the law regardless of the prior understanding of a particular Member State⁵¹. The recitals are helpful in determining the purpose of a directive. They are part of the directive and thus have legal binding effect. They are more than the historical intent of the legislature and are used directly in interpreting the norm⁵². They are thus an important tool to determine the legislative purpose of the directive and its principles⁵³. One is now often forced to refer to the recitals, although the normative text should have clarified the open question. Again, this does not serve the purpose of a systematic structure, but rather forces those seeking the

⁴⁷ See part I.1.

⁴⁸ Möllers, *Juristische Methodenlehre*, 2nd edn. 2019, § 4 mn. 7 f.

⁴⁹ Judgment of 3.10.2013 – C-583/11P, EU:C:2013:625, Mn. 50 – Inuit Tapiriit Kanatami u.a.; Judgment of 27.11.2012 – C-370/12, EU:C:2012:756, Mn. 135 – Pringle. In greater detail Möllers, *Juristische Methodenlehre*, 2nd edn. 2019, § 4 Mn. 27 ff.

⁵⁰ Judgment of 3.4.2008 – C-187/07, EU:C:2008:197, Mn. 23 – Dirk Endendijk; Judgment of 30.5.2013 – C-488/11, EU:C:2013:341, Mn. 26 – Busse; Judgment of 16.6.2011 – C-65/09 u.a., EU:C:2011:396, Mn. 54 – Weber; Möllers, *Juristische Methodenlehre*, 2nd edn. 2019, § 4 Mn. 85 ff.

⁵¹ On the autonomous interpretation of European terms, see Judgment of 27.1.2005 – C-188/03, EU:C:2005:59, Mn. 29 – Junk; Möllers, *Juristische Methodenlehre*, 2nd edn. 2019, § 2 Mn. 71 ff.

⁵² Clearly stated Judgment of 13.7.1989 – C-215/88, EU:C:1989:331, Mn. 31 – Casa Fleischhandel: “may cast light on the interpretation to be given to a legal rule”.

⁵³ Möllers, *Juristische Methodenlehre*, 2nd edn. 2019, § 4 Mn. 177 f. and § 5 Mn. 4.



law to spend time searching for the alleged legal solution in the recitals. This can be illustrated by numerous examples.

The Sale of Goods Directive gives the buyer a right to terminate the contract if the seller has not rectified the defect or provided a replacement. But the wording of Article 13(4)(a) alternative 1 of the Directive is silent on the question of whether it is necessary for a *deadline to be set* and how long such a deadline should be. However, not setting a deadline would lead to the absurd result that the consumer could exercise the right of withdrawal even if the seller was not aware of the defect⁵⁴. Recital 50 sentence 2 of the Sale of Goods Directive now states that the seller should rectify the deficit “within a reasonable period of time”, thus implying a deadline period should be set. That the wording of Article 13 should be so imprecise is incomprehensible if only because the original version of the norm in the draft directive still spoke of setting of “a reasonable deadline”⁵⁵. One must assume an editorial error – i.e. sloppiness in the legislative procedure – because the intention of the legislature is to set a deadline but it is not reflected in the wording of Article 13 of the Sale of Goods Directive⁵⁶.

In another example, Article 13(4)(b) alternative 1 of the Sale of Goods Directive allows the consumer to terminate the contract after the seller has “tried” to rectify the lack of conformity of the goods. It remains unclear whether such a termination is possible after only one attempt at rectification or whether it requires several such attempts. Article 13 of the German-language version implies a single attempt, as do other language versions⁵⁷. The recitals clearly refer to “another attempt”⁵⁸. However, the decisive factor is the confidence of the buyer that the seller can produce the contractual condition of the goods. Here, too, it would have been helpful if this important question could already have been clarified in Article 13 of the Sale of Goods Directive, in that such a rule is legally cast in a clear rule-exception relationship: A single attempt to rectify the defect is sufficient to terminate the contract, unless the purchaser can reasonably be expected to accept a second attempt⁵⁹.

⁵⁴ *Wilke*, BB 2019, 2434, 2442: “blatant oversight with absurd results”.

⁵⁵ Art. 9(3)(b) Proposed Online Trading Directive (fn. 15) and the Amended Proposed Directive on online and other distance sales of goods (fn. 16). On the former, see *Bach*, Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte, NJW 2019, 1705, 1710.

⁵⁶ On editorial error, see *Möllers*, Juristische Methodenlehre, 2nd edn. 2019, § 6 Mn. 46 ff.

⁵⁷ German “*versucht hat*”; French “*la tentative*”; Spanish “*al intento*”; Italian “*il tentativo*”.

⁵⁸ Supported by the other language versions: German “*weiteren Versuch*”; French “*une autre tentative*”; Spanish “*vuelva a intenta*”; Italian “*un altro tentativo*”; Recital 52 sentences 1-5 Sale of Goods Directive.

⁵⁹ This is the interpretation of *Bach*, NJW 2019, 1705, 1710.



2.3.2. – It is now unfortunate if the directive sets full harmonisation as its objective, but individual provisions deviate from this aim without this being explicitly stated in the normative text. The seller is liable for any lack of conformity with the contract within two years from delivery according to Article 10(1) of the Sale of Goods Directive. Due to the full harmonisation effect of the directives, one would now assume that the concept of *delivery* must be interpreted autonomously⁶⁰ by the CJEU. But that is not the case. Recital 38 explicitly limits full harmonisation for the concept of ‘delivery’ and gives Member States the right to regulate this concept. Such a waiver of harmonisation corresponds to the former Consumer Goods Directive⁶¹. Otherwise, however, the result is surprising, because the original proposals for directives had still defined and thus harmonised the concept of delivery at the European level⁶². If full harmonisation were now to be abandoned, this would have been explicitly included in the text of Article 10 itself and not in the recitals, because otherwise the normative text would be misleading.

Another example of this is that it is not clear whether a consumer contract also exists in the case of mixed or *dual use* of contracts. Neither the legal definition of Article 2(2) nor the scope of Article 3(1) of the Sale of Goods Directive clarify this question. The Consumer Rights Directive of 2011 stipulates that in such a constellation the Directive applies in case of doubt⁶³. Recital 22 of the Sale of Goods Directive does not harmonise this question, but instead refers back to national law⁶⁴. From a formal point of view, this renunciation of full harmonisation should have been included in the normative text of the Directive – for example, in Article 3(1). In terms of content, the Sale of Goods Directive thus falls short of the standard of systematisation already achieved. This provision does not meet the objective of a coherent system.

⁶⁰ See fn. 51.

⁶¹ Recital 14 Consumer Goods Directive (fn. 7), where rules on the transfer of risk are still left to the Member States.

⁶² See in detail Art. 8(2) Proposed Online Trading Directive (fn. 15) and Amended Proposed Directive on online and other distance sales of goods (fn. 16).

⁶³ See Recital 17 sentence 2 Consumer Rights Directive (fn. 11): “However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.” Following, critically *Wilke*, BB 2019, 2434, 2435; *Zöchling-Jud*, GPR 2019, 115, 117.

⁶⁴ Recital 22 sentence 2 Sale of Goods Directive (fn 1).



2.3.3. – Despite these linguistic inaccuracies, one is conversely surprised at the scope of the directives. The two directives cover a total of 50 pages of small print in the Official Journals of the EU, of which almost 28 of the 50 pages are dominated by the respective 78 recitals of the Sale of Goods Directive and the 87 recitals of the Digital Content Directive. The recitals are thus more extensive than the actual text of the directives themselves.

When the Commission – in its efforts to systematise several directives in the Consumer Rights Directive – has combined several directives, one inevitably wonders why the sale of goods and digital content could not have been regulated in a *single directive*, and why it considered two directives to be necessary instead. As a result, the regulatory content of the normative texts and the recitals is duplicated in many areas. Such *parallel provisions* can be found in the recitals, but also in the actual normative text – for example, for the scope of application, the degree of harmonisation, the requirements for conformity with the contract, etc. A single norm text would have been sufficiently unproblematic in each case, and would then be equally applicable to the purchase of goods and digital content⁶⁵.

Many statements are repeated in the individual provisions and in the recitals⁶⁶. Systematic clarity is lacking if, for example, it is necessary to read four quite different recitals in order to understand the regulatory purpose of the obligation to update under Article 7(3) and (4) of the Sale of Goods Directive⁶⁷. The directives are criticised for being obsessed⁶⁸ with or enamoured⁶⁹ of detail – for example, in the extensive description of the objective and subjective concept of conformity in Articles 6 and 7 of the Sale of Goods Directive⁷⁰. There is thus a risk that the catalogues of criteria will remain incomplete and, due to technical developments, become outdated after a short time⁷¹. An improvement in precision is not achieved when the legislature refers to producing a ballgown or replacing filters in a car⁷². Even outside its scope, the Directive is not free

⁶⁵ *Zöchling-Jud*, GPR 2019, 115, 118, 120 refers to ‘parallel provisions’.

⁶⁶ For example, if the provision of digital content is to be decisive for the delivery of goods with digital elements, see Recital 39 sentence 1 and sentence 3 Sale of Goods Directive (fn. 1).

⁶⁷ See recitals 28, 30, 31 and 63 Sale of Goods Directive (fn. 1); on this *Weißensteiner*, Der Mangelbegriff der Sale of Goods Directive, ZfRV 2019, 199, 206; see also part III.2.c) below.

⁶⁸ *Bach*, NJW 2019, 1705, 1711 and 1707: “proliferation of detailed descriptions”.

⁶⁹ *Wilke*, BB 2019, 2434, 2437.

⁷⁰ Similar *Graf von Westphalen*, Some thoughts on the Proposed Directive on Certain Aspects Concerning Contract for the Sales of Goods, EuCML 2018, 66, 69: “superfluous”, “nothing really new”.

⁷¹ On the Proposal for a Digital Services directive, see *Faust*, Digitale Wirtschaft – Analoges Recht – Braucht das BGB ein Update?, Gutachten A zum 71. DJT, 2016, 43 f.

⁷² Recitals 20 and 32 Sale of Goods Directive (fn. 1).



from conflicting questions. Claims for damages are expressly excluded from the scope of the Directive⁷³. But then it would be better for the legislature to remain silent. However, it goes on to say that the investor should be “entitled to claim compensation” and that “such a right to damages is already ensured in all Member States”⁷⁴. This statement is regarded as overoptimistic in the academic literature⁷⁵.

III. – 3.1. – Some of the gaps in the texts can be closed with the wording from the recitals. How should one deal with open questions? Can individual rules perhaps be condensed into legal principles? Principles of law or equivalent general legal concepts are derived from the totality of written and unwritten legal norms, and their normative claims lead to a presumption effect⁷⁶. The ECJ developed legal certainty⁷⁷, protection of legitimate expectation⁷⁸ or effective judicial protection (*effet utile*)⁷⁹ as general principles of law⁸⁰. These can help, in case of doubt, to interpret the individual provisions according to their meaning or the objective of a provision. This interpretation concept is also regularly used by the CJEU⁸¹.

⁷³ See above fn. 30.

⁷⁴ Recital 61 sentences 2 and 4 Sale of Goods Directive (fn. 1).

⁷⁵ *Lilleholt*, 28 *Juridica International* 2019, 3, 7: “over-optimistic justification” with reference to *Zimmermann*, Art. 9:501(1): Right to Damages (General) in *Jansen/Zimmermann*, Commentaries on European Contract Laws, 2018, 1435–1442. More positive *Zöchling-Jud*, GPR 2019, 115, 127.

⁷⁶ *Möllers*, *Juristische Methodenlehre*, 2nd edn. 2019, § 9 Mn. 13.

⁷⁷ Judgment of 21.09.1983 – C-205/85 u.a., EU:C:1983:233, Mn. 30 – *Milchkontor*; Judgment of 13.02.1996 – C-143/93, EU:C:1996:45, Mn. 27 – *Van Es Douane Agenten*; Judgment of 21.2.2006 – C-255/02, EU:C:2006:121, Mn. 72 – *Halifax*.

⁷⁸ Judgment of 5.7.1973 – 1/73, EU:C:1973:78, Mn. 6 – *Westzucker*; Judgment of 10.9.2009 – C-201/08, EU:C:2009:539, Mn. 46 – *Plantanol*.

⁷⁹ Judgment of 15.5.1986 – 222/84, EU:C:1986:206, Mn. 18 – *Johnston*; confirmed as an inherent principle by Judgment of 13.3.2007 – C-432/05, EU:C:2007:163, Mn. 37 ff. – *Unibet*.

⁸⁰ *Grundmann* (Ed.), *Systembildung und Systemlücken in Kerngebieten des europäischen Privatrechts*, 2000, p. 1 ff.; *Riesenhuber*, *System und Prinzipien des Europäischen Vertragsrechts*, 2003, § 18; *Jansen*, *Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht*, ZEuP 2005, 750 ff.; *Metzger*, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, 2009; *Reich*, *General Principles of EU Civil Law*, 2014; *Schulze/Ajani*, (Hrsg.), *Gemeinsame Prinzipien des Europäischen Privatrechts*, 2003; *Vogenaier/Weatherill* (eds.), *General Principles of Law. European and Comparative Perspectives*, 2017.

⁸¹ See Judgment of 5.2.1963 – 26/62, EU:C:1963:1, 7, 24, 27 – *van Gend*; Judgment of 22.12.2008 – C-549/07, EU:C:2008:771, Mn. 17 – *Wallentin-Hermann*; on this *Möllers*, *Juristische Methodenlehre*, 2nd edn. 2019, § 5 Mn. 4 ff.



3.1.1. – Article 1 of both directives refers to a *high level of consumer protection*. Compared to the previous Consumer Goods Directive, the legal position of consumers has improved in several respects: The requirements for the conformity of goods with the contract are extended by objective requirements, such as an obligation to update goods with digital content, including security updates (Article 7(3) of the Sale of Goods Directive). For the first time, defects of title are explicitly covered (Article 9 of the Sale of Goods Directive). In principle, the consumer must prove that the defect existed at the time of delivery of the goods (Article 10(1) of the Sale of Goods Directive). However, the reversal of the burden of proof that the seller and not the buyer must prove that the lack of conformity did not exist at the time of delivery of the goods is now extended from six months to one year (Article 11(1) of the Sale of Goods Directive).

The high level of consumer protection could already be found in Article 169(1) TFEU, in the former Consumer Goods Directive⁸² and six times in the recitals to the Sale of Goods Directive⁸³. Member States may even maintain or introduce (even) higher levels of consumer protection within their legislative scope⁸⁴. Such a high European level of consumer protection includes extensive information obligations on the part of the seller, the right to dissolve the contract, protection against insolvency of the business owner, facilitation of evidence, and binding law⁸⁵. An expression of the high level of consumer protection is the effective enforcement of warranty rights⁸⁶, such as their being free of charge⁸⁷: The *Quelle* case law was adopted, which where there was replacement denied compensation claims of the seller for the use of the defective goods⁸⁸. The *Weber* case, which also required the seller to bear the costs for the removal of the defective item and the installation of the subsequently delivered defect-free item, was even explicitly extended to the repair of the defect⁸⁹. Finally, a high level of consumer protection requires that Member States inform consumers about their rights⁹⁰.

⁸² Recital 23 Consumer Goods Directive (fn. 7).

⁸³ Recitals 2, 3, 5, 10 and 46 Sale of Goods Directive (fn. 1).

⁸⁴ Recital 6 sentence 3; Recital. 41 sentence 4; Recital 46 sentence 2 Sale of Goods Directive (fn. 1).

⁸⁵ *Möllers*, Europäische Richtlinien des Bürgerlichen Rechts, JZ 2002, 121, 129 ff.

⁸⁶ Expressly Art. 19 Sale of Goods Directive (fn. 1).

⁸⁷ Art. 14(1)(a) Sale of Goods Directive (fn. 1).

⁸⁸ Art. 14(4) Sale of Goods Directive (fn. 1) and in detail below in part III.2.c)aa).

⁸⁹ Art. 14(3) Sale of Goods Directive (fn. 1); Judgment of 16.6.2011 – C-65/09 u.a., EU:C:2011:396, Mn. 47 – *Weber*; *Zöchling-Jud*, GPR 2019, 115, 129.

⁹⁰ Art. 20 Sale of Goods Directive (fn. 1).

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3.1.2. – Any increase in consumer protection increases legal protection for the individual consumer, but this ultimately also *increases the price for all consumers*⁹¹. The extension of the statutory limitation period, the introduction of a reversal of the burden of proof, or the introduction of a right of withdrawal in distance selling will all increase costs for the seller. But as the seller also needs to make a profit, these costs must be passed on to all consumers. As with insurance, each person pays for the ‘damages’ suffered by the individual⁹². These economic considerations of the seller are not to be ignored, but at the same time the possibility of abuse must be limited. In the worst-case scenario, consumer protection instruments promote dominant positions of companies that stand in the way of an open market economy with free competition, as the TFEU⁹³ so vividly formulates⁹⁴. It is not the highest level of consumer protection that should be paramount in this respect, but rather the best value for money for the consumer⁹⁵.

3.1.3. – But does the principle of a high level of consumer protection dominate, or is it only relevant when filling gaps? Or is there an opposing principle? In the recitals, the two Directives emphasise the aim “to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises”⁹⁶. So the Sale of Goods Directive speaks for the first time in the recitals of aiming to “*maintain a balance* between the rights and obligations of the contracting parties”⁹⁷. The Consumer

⁹¹ Critical thus *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edn. 2005, p. 8; *Grundmann*, Die EU-Verbraucherrechte-Richtlinie – Optimierung, Alternative oder Sackgasse?, JZ 2013, 53, 63.

⁹² *Quillien*, Contract Remedies and Cross-Subsidization, 61 S. Cal. L. Rev. 1125 ff. (1988); *Wagner*, Zwingendes Vertragsrecht in Eidenmüller/Faust/Grigoleit/Jansen/Wagner/Zimmermann (eds.), Revision des Verbraucher-aquis, 2011, p. 1, S. 29.

⁹³ For example, Arts. 119(1), 120 sentence 2, 127(1) sentence 3 TFEU.

⁹⁴ This includes, for example, the revocation of goods in distance selling, which companies like Amazon could afford more easily than smaller market participants. Also *Stiegler/Wawryka*, Umbruch der Gewährleistungsrechte beim Fernabsatz?, BB 2016, 903, 909; *Riehm*, Regelungsbereich und Harmonisierungsin-tensität des Richtlinienentwurfs zum Waren-Fernabsatz in Artz/Gsell, Verbrauchervertragsrecht und digitaler Binnenmarkt, 2018, p. 73, 77.

⁹⁵ *Grundmann*, Die EU-Verbraucherrechte-Richtlinie – Optimierung, Alternative oder Sackgasse?, JZ 2013, 53, 63.

⁹⁶ See the parallel provisions of Recital 2 sentence 2 Sale of Goods Directive (fn. 1) and Digital Content Directive (fn. 2) and part I.2 above.

⁹⁷ Expressly in Recital 53 Sale of Goods Directive (fn. 1). Other language versions: German “*ausgewogenes Verhältnis zwischen den Rechten und Pflichten der Vertragsparteien*”; French “*équilibre entre les*



Goods Directive and the preliminary drafts of the Sale of Goods Directive did not yet contain such a wording to take into account the interests of the business owner. The Sale of Goods Directive thus aims to improve the positions of both buyers *and* sellers in comparison with the Consumer Goods Directive⁹⁸. The balance must therefore be defined as a new, independent legal principle which, where appropriate, puts the interests of a high level of consumer protection into perspective.

The European legislature is thus taking account of the economic perspective of the seller. This principle is now further substantiated in favour of both parties, and in particular of the business owner: there is stress on the freedom of contract⁹⁹ of the parties. Contractual conformity consists of subjective and objective requirements, in order “to safeguard the legitimate interests of both parties to a sales contract”¹⁰⁰. Freedom of contract allows both parties to deviate negatively from the contractual condition, provided both parties expressly agree¹⁰¹. Such a negative quality agreement was not explicitly provided for in the past¹⁰², and in future will make it easier to sell used cars, for example¹⁰³. The economic interests of the seller are also taken into account. As before, rectification of defects and subsequent delivery are excluded if they would lead to disproportionately high costs¹⁰⁴. For the first time, the consumer has no right to terminate the contract if the lack of conformity is “minor”¹⁰⁵.

3.2. – 3.2.1. – It is now necessary to look at how to resolve conflicts between consumers and sellers that were not covered by the Directive. Where there are open questions, should they in future be decided in favour of the consumer? In various judgments,

droits et obligations des parties contractantes”; Spanish “*equilibrio entre derechos y obligaciones de las partes contratantes*”; Italian “*l’equilibrio tra i diritti e gli obblighi delle parti contraenti*”.

⁹⁸ *Staudenmayer*, Kauf von Waren mit digitalen Elementen – Die Richtlinie zum Warenkauf, NJW 2019, 2889, 2891.

⁹⁹ Recital 46, Recital 63 sentence. 3 Sale of Goods Directive (fn. 1).

¹⁰⁰ Recital 25 sentence 3 Sale of Goods Directive (fn. 1).

¹⁰¹ Recital 37 sentence 1 and Art. 7(5) Sale of Goods Directive (fn. 1) and Art. 8(5) Digital Content Directive (fn. 2). See for more detail part V.3.a) below.

¹⁰² Art. 2(3) alternative 1 Consumer Goods Directive (fn. 7) has been replaced.

¹⁰³ *Staudenmayer*, NJW 2019, 2889, 2890.

¹⁰⁴ For example, Art. 13(2),(3) and Recitals 48 f., 51 Sale of Goods Directive (fn. 1) and Art. 3(3)(1) and (2) Consumer Goods Directive (fn. 7). On case law, see Judgment of 16.6.2011 – C-65/09 u.a., EU:C:2011:396, Mn. 68 ff. – Weber; reserved *Zöchling-Jud*, GPR 2019, 115, 128.

¹⁰⁵ Art. 13(5) Sale of Goods Directive (fn. 1).



the ECJ had repeatedly emphasised the high level of consumer protection as the telos of the Directive – in case of doubt in favour of the consumer – *in dubio pro consumente* – with the consequence that exceptions must be interpreted narrowly¹⁰⁶. This line of argument can be reinforced by the consideration that the Directive, as secondary law, is to be interpreted in the light of primary law¹⁰⁷. And Article 169(1) TFEU, as primary law, expressly provides for such a high level of consumer protection.

3.2.2. – However, the principle of *in dubio pro consumente* is not absolute. Its scope is to be determined teleologically, i.e. according to the meaning and purpose of the law¹⁰⁸. The ECJ has restricted it, for example – with a reasonable, informed European consumer as a guiding principle¹⁰⁹. In contrast to the previous Consumer Goods Directive, the Sale of Goods Directive aims at binding *full harmonisation*. It is only outside its scope that Member States are allowed an even higher level of consumer protection¹¹⁰. The principle of the balanced rights of the contracting parties, developed for the first time for the Sale of Goods Directive, thus comes into play. As a consequence, the *high level of consumer protection already achieved must not be further increased* on outstanding issues. This is the only way to achieve a balance between the rights and obligations of the contracting parties. The principle *in dubio pro consumente* thus deliberately does not apply.

3.2.3. – These abstract considerations can now be illustrated using a highly topical legal issue. Can the seller demand compensation for use if the buyer has used the defective item for a long time? The VW diesel scandal¹¹¹ shows that the question is of immense

¹⁰⁶ Judgment of 13.12.2001 – C-481/99, EU:C:2001:684, Mn. 31 – Heiningen; Judgment of 17.4.2008 – C-404/06, EU:C:2008, 231, Mn. 36.

¹⁰⁷ Judgment of 9.3.2006 – C-499/04, ECLI:EU:C:2006:168, Mn. 32 – Werhof; see also Möllers, Juristische Methodenlehre, 2nd edn. 2019, § 2 Mn. 65.

¹⁰⁸ Möllers, Juristische Methodenlehre, 2nd edn. 2019, § 6 Mn. 40.

¹⁰⁹ For example, Judgment of 12.3.1987 – C-178/84, EU:C:1987:126, Mn. 32 – Reinheitsgebot für Bier; the European consumer model, see Judgment of 6.7.1995 – C-470/93, EU:C:1995:224, Mn. 24 – Mars; Judgment of 16.7.1998 – C-210/96, EU:C:1998:369, Mn. 31 – Gut Springenheide; Köhler/Bornkamm/Feddersen/Köhler, UWG, 37th edn. 2019, § 1 Mn. 22 ff.

¹¹⁰ See fn. 84 above.

¹¹¹ See Gsell/Möllers (eds.), Enforcing Consumer and Capital Market Law in Europe, 2020.



practical importance. Volkswagen AG tried to counter consumer claims in litigation proceedings with its own claims for compensation for use ¹¹².

3.2.3.1. – The ECJ had already established *replacement* as one of four warranty rights back in 2008 ¹¹³: in the *Quelle* case, the Court *rejected* the seller's claims for compensation for use and loss of value, although the question had been left open in the Consumer Goods Directive. The Court argued that the non-attachment of value to warranty rights is important to ensure that consumers are not deterred from exercising their rights ¹¹⁴. The Consumer Goods Directive also sought to ensure effective consumer protection ¹¹⁵ and a high level of consumer protection ¹¹⁶. With Article 14(4) of the Sale of Goods Directive, the legislature now gives legal form to the *Quelle* ruling by expressly excluding claims of the seller against the consumer for *replacement* ¹¹⁷ of the goods on the basis of normal use of the goods.

But can the seller, upon *termination of the contract*, assert claims for the benefits obtained or the loss of value of the goods contrary to the contract? Or can the consumer equally claim not to have to pay compensation? This could be answered in the affirmative by using the *Quelle* case as an ideal blueprint for denying the seller's claims for compensation also with regard to the other warranty rights. Just as the question was not unambiguously clarified at the time, the question now seems to be unambiguously clarified only for replacement. The arguments put forward by the Court in the *Quelle* case – the free repair and replacement ¹¹⁸, the guarantee of effective consumer protection and the high level of consumer protection – remain valid.

¹¹² For a comprehensive discussion of German law, see *Staudinger*, Vorteilsanrechnung und Verzinsung im Dieselskandal, NJW 2020, 641 ff. with further evidence.; *Klöhn*, Nutzungsanrechnung und deliktische Zinsen im VW-Dieselskandal, ZIP 2020, 341 ff.

¹¹³ The Sale of Goods Directive (fn. 1) includes repair, replacement, termination and price reduction. The regulation of the right to damages as a further warranty right is explicitly left to the Member States according to Article 3(6) a.E. Sale of Goods Directive (fn. 1).

¹¹⁴ Art. 3(3) alt. 3 Consumer Goods Directive (fn. 7) and Judgment of 17.4.2008 – C-404/06, EU:C:2008, 231, Mn. 34 – *Quelle*.

¹¹⁵ Art. 3(3) Consumer Goods Directive (fn. 7): “without significant inconvenience” and Judgment of 17.4.2008 – C-404/06, EU:C:2008, 231, Mn. 34 – *Quelle*.

¹¹⁶ Recital 1 Consumer Goods Directive (fn. 7) and Judgment of 17.4.2008 – C-404/06, EU:C:2008, 231, Mn. 34 – *Quelle*.

¹¹⁷ Other language versions: German “*Ersetzung*”, French “*remplacement*”, Spanish “*sustitución*”, Italian “*sostituzione*”.

¹¹⁸ This provision is copied word for word in the Sale of Goods Directive, see the correlation of Art. 3(3) alt. 1 Consumer Goods Directive (fn. 7) to Art. 14(1)(a) Sale of Goods Directive (fn. 1) in the Annex of the Sale of Goods Directive.



3.2.3.2. – However, such a view should be rejected. To exclude claims by the seller for compensation for use even on termination of the contract would be contrary to Article 14(4) of the Sale of Goods Directive, which grants this privilege to the consumer only in the case of replacement for the normal use of the replaced goods. First of all, there is a gap here because the exclusion of a claim for compensation for use in the event of repair of the goods, price reduction or termination of the contract *does not result from the wording*.

The wording, limited to replacement, reflects the *historical intention* of the legislature, as the identical drafts of the Directive show¹¹⁹. The European legislature just copied the *Quelle* ruling into the legislation, but has not wanted to extend the scope of application beyond replacement.

These considerations are finally extended by the *systematic* perspective: Such an exclusion of claims for compensation for use by the seller was still in place for all warranty rights in the draft Consumer Rights Directive¹²⁰. However, this draft provision has not been incorporated into the final Consumer Rights Directive. In contrast to the *Quelle* case, the EU legislature has used the ECJ's *Weber* ruling to extend the questions of installation and removal costs not only to the replacement, but explicitly to rectification of defects¹²¹.

Finally, *teleological* considerations are decisive: Full harmonisation applies conclusively in the harmonised area, otherwise the scope remains open to the Member States. The principle of *in dubio pro consumente* may not change this threshold at the expense of the Member States. Article 3(6) of the Sale of Goods Directive gives Member States the right to regulate the “effects of contracts ... in so far as they are not regulated in this Directive.”¹²². This is confirmed by Recital 60, which explicitly gives the Member States the right to “regulate the consequences of termination... such as the consequences of the decrease of the value of the goods or of their destruction or loss.”¹²³. This is ulti-

¹¹⁹ Respectively Art. 10(3) Proposed Online Trading Directive (Fn. 15) and Amended Proposed Directive on online and other distance sales of goods (fn. 16).

¹²⁰ According to Recital 41: “Furthermore, the consumer should not compensate the trader for the use of the defective goods” and Arts. 26, 27(1) Proposal for a Directive on Consumer Rights (fn. 11). On this, see *Jud*, Verbrauchsgüterkauf in *Jud/Wendehorst*, Neuordnung des Verbraucherprivatrechts in Europa? 2009, p. 119, p. 135.

¹²¹ On Art. 14(3) Sale of Goods Directive and the *Weber* case, see fn. 89 above.

¹²² Almost word for word, Recital 18 sentence 1, 2 Sale of Goods Directive.

¹²³ Recital 60 sentence 1 Sale of Goods Directive (fn. 1). This important consideration should have been in the main body of the Directive, and not consigned to the recitals: see part II.3.a) above. Other language



mately confirmed by the *Quelle* case in which the ECJ recognised in an *obiter dictum* the right of the Member States to regulate this issue in the event of termination of the contract¹²⁴.

From a *logical* perspective, the arguments presented imply *reverse* reasoning and not an *a fortiori* conclusion¹²⁵. As a result, both the gap and the possibility of filling the gap must be denied¹²⁶. Whether the seller should continue to be allowed a claim for compensation for use or loss of value is therefore not to be resolved under European law for the termination of the contract, but rather under the national law of the respective Member State¹²⁷.

3.3. – It is to be accepted that the grand project of a Common European Law on Sales was not politically enforceable. In this respect, issues that could have been settled¹²⁸ are not really expedient. Nevertheless, it must be asked on what points the weaknesses of the current directives can be corrected *de lege ferenda*. Under Article 25 of the Directive, an update of the Sale of Goods Directive is to be made by 2024.

3.3.1. – From an economic point of view, it should be discussed whether the obligation to notify, i.e. the obligation to make a complaint¹²⁹, can be fully harmonised and thus no longer be formulated as an option.

versions are as follows: German: “*Folgen der Vertragsbeendigung zu regeln, beispielsweise die Folgen der Wertminderung der Waren oder die Folgen ihrer Zerstörung oder ihres Verlustes*”; French “*de réglementer les conséquences de la résolution autres que celles prévues dans la présente directive, telles que les conséquences de la baisse de la valeur des biens ou de leur destruction ou de leur perte*”; Spanish “*de regular las consecuencias de la terminación del contrato que no sean las establecidas en la presente Directiva, como por ejemplo las consecuencias de la disminución del valor de los bienes o de su destrucción o pérdida*”; Italian “*le conseguenze della risoluzione diverse da quelle previste nella presente direttiva, come le conseguenze della diminuzione del valore dei beni o della loro distruzione o perdita*”.

¹²⁴ Judgment of 17.4.2008 – C-404/06, EU:C:2008, 231, Mn. 38 f. – *Quelle* on Recital 15 of Consumer Goods Directive (fn. 7).

¹²⁵ On this *Möllers*, *Juristische Methodenlehre*, 2nd edn. 2019, § 6 Mn. 83.

¹²⁶ On using the gap as a working hypothesis, see *Möllers*, *Juristische Methodenlehre*, 2nd edn. 2019, § 6 Mn. 97 ff.

¹²⁷ Also, but without justification *Bach*, *NJW* 2019, 1705, 1710; *Lilleholt*, 28 *Juridica International* 2019, 3, 7. Describing the open discussion *Zöchling-Jud*, *GPR* 2019, 115, 118, 130.

¹²⁸ In detail *Lilleholt*, 28 *Juridica International* 2019, 3 ff.

¹²⁹ Under German law, there is a *Rügeobliegenheit* and not an *Anzeigespflicht*, because one cannot be forced to comply with it, but compliance with it is only in one's own interest in order to avoid any disadvantages that might otherwise occur, see *Wolf/Neuner*, *Allgemeiner Teil des Bürgerlichen Rechts*, 12th edn. 2020, § 19 Mn. 35.

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3.3.1.1. – However, the EU Commission has so far been opposed to including an obligation to notify in the Sale of Goods Directive¹³⁰. It justifies this partly with *empirical* arguments: An obligation to notify would have little practical effect, because over 80% of buyers already notify the seller when problems with the goods arise¹³¹. And 69% of business owners stressed that waiving the obligation to notify would only lead to moderately higher costs¹³². However, these considerations are only partly persuasive. If it is consumers who predominantly report the defects, this does not argue against its introduction but in its favour – because the majority of consumers would not have to change their behaviour. When business owners from Germany and Austria speak of moderately higher costs, their statements are open to criticism because there is as yet no such obligation to notify in these Member States¹³³. In the absence of concrete experience, these figures distort the statistics. The Commission also fails to take account of the experts' statement that it is not possible to provide reliable evidence of the costs¹³⁴.

3.3.1.2. – Academic literature rejects the consumer's obligation to notify on the grounds that they are not aware of such an obligation and that it would therefore be *unreasonable* for them¹³⁵. This thesis is also shaky. According to the settled case law of the ECJ, the consumer is capable of learning and must not rely on the accustomed traditions of the respective Member State¹³⁶. The obligation of Member States to inform consumers of their rights also serves this purpose (Article 20 Sale of Goods Directive). The

¹³⁰ Recital 25 sentence 2 and 3 Amended Proposed Directive on online and other distance selling of goods (fn. 16) and Staff Working Document Impact Assessment, p. 25 (fn. 19).

¹³¹ Staff Working Document Impact Assessment, p. 25 (fn. 19) refers to 37–58%; ICF, Costs and Benefits 1999/44/EU (fn. 18), p. 58 to 84%.

¹³² Staff Working Document Impact Assessment, p. 25 (fn. 19) referring to ICF, Costs and Benefits 1999/44/EU (fn. 18), p. 58.

¹³³ See fn.143 below.

¹³⁴ ICF, Costs and Benefits 1999/44/EU (fn. 18), p. 58: “The impact of having notification obligation on ongoing compliance costs cannot however, be ascertained with certainty on the basis of available evidence.”

¹³⁵ On the earlier view *Medicus*, Verbraucherrecht und Verbrauchsgüterkauf im einem kodifikatorischen System – Bürgerrecht, Handelsrecht und Sonderprivatrecht in Grundmann/ Medicus/Rolland, Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts, 2000, p. 219, p. 228 (but see fn. 139; *Ernst/Gsell*, Kaufrechtsrichtlinie und BGB, ZIP 2000, 1410, 1426 (but see fn. 139); *Magnus*, Verbrauchsgüterkauf-RL 1999/44/EG, A 15 in Grabitz/Hilf/Nettesheim, Das Recht der europäischen Union, 40th Supplement 2009, Art. 5 Mn. 15: “unfair privileging of the seller”.

¹³⁶ See fn. 109 above.



“how” – i.e. the form of such an obligation to notify – is decisive for the question of reasonableness. The current Article 12 of the Sale of Goods Directive only requires the consumer to notify once they have detected the lack of conformity with the contract¹³⁷. This means that the consumer does not have to actively examine the goods after receipt. However, this weakest form of action – which allows the two-month period to start not from the handover of the goods but only when the buyer recognises the lack of conformity of the goods¹³⁸ – appears to be reasonable and not unfair.

The vast majority of legal literature considers the obligation to notify defects to be appropriate and in the interest of the Consumer Goods Directive¹³⁹ and now the Sale of Goods Directive¹⁴⁰. For business owners, there is an obligation to give notice of defects under UN sales law¹⁴¹ and the same applies in Germany¹⁴². *In terms of comparative law*, the USA is also known for its obligation for consumers to give notice of defects¹⁴³. The fact that the obligation to notify is already present in a clear majority of the European Member States – namely 21 out of 27 Member States – ultimately speaks in favour of full harmonisation¹⁴⁴.

Further *interest-oriented* arguments¹⁴⁵ support such a view. The duty of disclo-

¹³⁷ This corresponds to the current Article 5(2) Consumer Goods Directive (fn. 8). It was also confirmed by the Judgment of 4.6.2015 – C-497/12, ECLI:EU:C:2015:357, Mn. 61 – Faber.

¹³⁸ The Proposal for a Consumer Goods Directive (fn. 7) made the obligation to complain still subject to the condition that the consumer “has established or should have established the lack of conformity”. The final version of the Consumer Goods Directive (fn. 7) dropped the negligence aspect and was thus already a significantly weakened variant in favour of the consumer; see *Gsell* (fn. 139).

¹³⁹ *Medicus*, Ein neues Kaufrecht für Verbraucher?, ZIP 1996, 1928: when an obligation to examine is avoided; *Ehmann/Rust*, Die Verbrauchsgüterkaufrichtlinie, JZ 1999, 853, 862; *Gsell*, Die zeitlichen Grenzen der Gewährleistungsrechte des Verbrauchers nach der EU-Richtlinie zum Verbrauchsgüterkauf, 7 ERPL, 151, 163 f. (1999); *Riesenhuber*, System und Prinzipien des Europäischen Vertragsrechts, 2003, p. 487.

¹⁴⁰ *Dassbach*, Untersuchungs- und Rügeobliegenheiten im Richtlinienvorschlag über bestimmte vertragsrechtliche Aspekte des Online-Warenhandels und anderer Formen des Fernabsatzes von Waren, GPR 2016, 211, 216; *Rudloff*, Der Vorschlag einer Warenhandels-Richtlinie der EU – Fortschritt auf dem Weg zu mehr Nachhaltigkeit, VuR 2018, 325, 327.

¹⁴¹ Art. 39(1) UN Sales Law, see Proposal for a Consumer Goods Directive (fn. 7), p. 16.

¹⁴² On Section 377 Commercial Code (HGB), see *Hopt* in Baumbauch/Hopt, HGB, 38th edn. 2018, § 377.

¹⁴³ § 2-602 (1) UCC: “Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.”

¹⁴⁴ The countries that do not have it are Germany, Austria, France, Poland, Greece and Ireland, see Staff Working Document Impact Assessment, p. 25 (fn. 19).

¹⁴⁵ For such an overview, see *Möllers*, Juristische Methodenlehre, 2nd edn. 2019, § 5 Mn. 56–158.



sure has a function of preserving evidence¹⁴⁶ because the buyer must record the defect and communicate it to the seller. If the buyer does not do so, the non-existence of a defect is faked after the expiry of the period for lodging a complaint. The seller thus becomes aware of the defect at an early stage and knows that they must expect the assertion of warranty rights; conversely, the prolonged exposure to claims is avoided¹⁴⁷. This allows the seller, for example, to make contact with its own supplier¹⁴⁸. Further damage caused by defects can thus be prevented¹⁴⁹. It has just been stressed that even excessive consumer protection cannot be in the interest of buyers because it increases costs at their expense. *From an economic point of view*, the aim should be to keep the costs of consumer protection at an optimal price-performance ratio¹⁵⁰. The longer a reversal of the burden of proof exists for the defect of goods, the higher the costs for the seller and thus also for the buyer. It is therefore also in the *interest of consumers* not to unnecessarily increase the costs of exercising warranty rights.

These arguments are finally supported by *considerations of fairness*. The right of withdrawal in distance selling is already subject to the risk of abuse. The buyer purchases several similar products, only to test them for two weeks. Since consumers may exercise the right of withdrawal without any legal reason, they can try out the goods for two weeks and then return them. All consumers pay for this abuse. A similar risk exists where the consumer is aware of the lack of conformity of the goods, but nevertheless makes full use of the two-year limitation period in order to exercise the warranty rights. Such consumers are rewarded by law for opportunistic actions – we call this “moral hazard”¹⁵¹. The potential for abuse could at least be reduced by an obligation to notify if one assumes that the buyer must prove that the notification was made in good time¹⁵². Final-

¹⁴⁶ On the interests of preserving evidence under Section 377 HGB, see *Hopt* in Baumbauch/Hopt, HGB, 39th edn. 2020, § 377 Mn. 32.

¹⁴⁷ For the obligation to notify (*Rügeobliegenheit*) under Section 377 HGB, BGH of 13.5.1987 – VIII ZR 137/86, BGHZ 101, 49, 53.

¹⁴⁸ *Dassbach*, GPR 2016, 211, 215.

¹⁴⁹ *Dassbach*, GPR 2016, 211, 215.

¹⁵⁰ See fn. 4.

¹⁵¹ *Dassbach*, GPR 2016, 211, 216.

¹⁵² *Gsell*, Die zeitlichen Grenzen der Gewährleistungsrechte des Verbrauchers nach der EU-Richtlinie zum Verbrauchsgüterkauf, 7 ERPL (1999), 151, 163 f.; for another perspective, see *Riesenhuber*, System und Prinzipien des Europäischen Vertragsrechts, 2003, p. 487 which assumes that consumers will rely on the fact that the defect has not previously been found.



ly, the establishment of conformity with the contract after a rapid notification to the seller also serves the general legal concept of *peace under the law*¹⁵³.

3.3.2. After these economic considerations, we now submit an environmental argument. Articles 13 to 16 of the Sale of Goods Directive sets out the four known warranty rights of rectification of defects, replacement, price reduction and termination of the contract. As before, priority is given to rectification of defects and replacement, with the consumer choosing between these two types of remedy (Article 13(2)), but the seller may reject these options if the costs are disproportionate (Article 13(3)). With the start of the Commission under President von der Leyen, the European Union has now committed itself to sustainability. This covers not only climate change¹⁵⁴, but also the life cycle of goods¹⁵⁵. The destruction of returned goods is also to be avoided¹⁵⁶. The Sale of Goods Directive seeks in Recital 48 sentence 2 to “encourage sustainable consumption and ... contribute to greater durability of products.” In this respect, it would have made sense for the Sale of Goods Directive to clearly state the *priority of repair*, i.e. not to give the consumer the right to *choose* between rectification of defects or replacement¹⁵⁷.

The very wording which gives the *consumer* the right to choose between repair or replacement speaks against such priority of the right to repair¹⁵⁸. It could be argued that a teleological reduction at the expense of the consumer’s right to choose would also run counter to the interest in a high level of consumer protection¹⁵⁹. For such a teleological

¹⁵³ As under the Proposal for a Consumer Goods Directive, p. 16 (fn. 7).

¹⁵⁴ Communication from the Commission of 11.12.2019, The European Green Deal, COM(2019) 640 final.

¹⁵⁵ Communication from the Commission of 11.12.2019, The European Green Deal, COM(2019) 640 final, p.9: “The circular economy action plan will also include measures to encourage businesses to offer, and to allow consumers to choose, reusable, durable and repairable products. It will analyse the need for a ‘right to repair’”; see also High-Level Group on Energy-Intensive Industries, Masterplan for a competitive transformation of EU energy-intensive Industries, enabling a climate-neutral circular economy by 2050.

¹⁵⁶ Application by Bündnis 90/Die Grünen of 9.1.2020, Ressourcen schonen, Vernichtung von Waren stoppen, BT-Drs. 19/16411, referencing the Study by the University of Bamberg, available at <http://www.retourenforschung.de/info-retourentacho2019-ausgewertet.html>.

¹⁵⁷ Critical of current law, but without making demands *de lege lata*, see *Tonner*, Die EU-Warenkauf-Richtlinie, auf dem Weg zur Regelung langlebiger Waren mit digitalen Elementen, VuR 2019, 363, 365.

¹⁵⁸ The wording of Article 13(2) Sale of Goods Directive (fn. 1) corresponds to Art. 3(1)(1) Consumer Goods Directive (fn. 7).

¹⁵⁹ See part I.2 above.



reduction, however, it could be argued that consumers ultimately get what they agreed from the outset, even through repair: a contractual, defect-free item. A *company* could also argue that the remedy is disproportionate¹⁶⁰. This objection could be countered by a narrow interpretation of the concept of “disproportionate costs”. Thus, the objection of destroying the goods more cheaply than repairing them would no longer be accepted and the sustainability mentioned in Recital 48 would be put into practice. Such a result would also be in line with the case law of the CJEU, according to which exceptions must be interpreted strictly in order to achieve the objectives of the Directive¹⁶¹. In addition, the EU Commission and the Member States could already now educate consumers on prioritising the rectification of defects.

IV. – The Sale of Goods Directive and Digital Content Directive aim at full harmonisation in order to increase legal certainty and consumer confidence and minimise the costs of cross-border trade.

2. The European legislature must improve its legislative technique.

a) The lack of full harmonisation threatens above all to raise difficult demarcation questions as to whether or not a problem is covered by the scope of the Directive. The directives now resemble a rump containing typical elements of minimum harmonisation.

b) The law is imprecise, often even misleading, because many rules are found only in the recitals and not in the normative text. As a result, one is surprised that so many words can be written about so relatively little content. The actual normative text could easily have been set out in ten pages. It is reminiscent of the legislative ‘information overload’ that already plagues capital markets law¹⁶². Imprecise rules increase transaction costs and affect legal certainty. The Latin principle *non multa, sed multum* applies: fewer but more precise laws would have been better.

3.a) Interpretation requires working with legal principles: these include a high level of consumer protection as well as a balanced relationship between the rights of both contracting parties as a legal principle.

¹⁶⁰ The intent is for disproportionately *high costs*, see *Wilke*, BB 2019, 2434, 2441.

¹⁶¹ See Judgment of 13.12.2001 – C-481/99, EU:E:2001:684, Mn. 31 – Heinzinger; see also *Möllers*, Juristische Methodenlehre, 2nd edn. 2019, § 4 Mn. 140 ff., § 5 Mn. 18.

¹⁶² *Möllers*, Europäische Gesetzgebungslehre 2.0: Die dynamische Rechtsharmonisierung im Kapitalmarktrecht am Beispiel von MiFID II und PRIIP, ZEuP 2016, 325, 332 ff.; *Simons*, Gesetzgebungskunst, AG 2016, 651 ff.

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b) In concrete terms this means, for example, that the principle *in dubio pro consumente* does not apply, but in the event of gaps is limited by the principle of a balanced relationship. As a result, the seller is not entitled to any claims for use or destruction of the defective item only in the case of replacement, but in the case of termination of the contract the seller can still assert these claims for compensation under national law.

c) *De lege ferenda*, the option clause to notify the seller of the lack of conformity should be abandoned and the clause should be fully harmonised on a mandatory basis for all Member States. Such an obligation to give notice of defects is reasonable for consumers in the case of obvious defects and already corresponds to the legal situation in most Member States. For reasons of sustainability, the consumer's right to choose between replacement and repair must be interpreted strictly and the repair must be given priority. The same applies if the seller wishes to invoke disproportionality.