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Lack of conformity of goods with the contract and sustainability issue – Directive (EU) 2019/771

ABSTRACT. *This paper analyses the provisions of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods from the sustainability perspective. In order to determine whether the legal solutions enshrined in the mentioned Directive represent a novelty, the paper also focuses on the provisions of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. This article aims to assess the contribution of Directive (EU) 2019/771 to achieving more sustainable consumption patterns. The issues covered concern the requirements of conformity, the legal guarantee period, the obligation to provide spare parts, the primary and secondary set of remedies, the commercial guarantee, and the expected future steps toward the amendments to Directive (EU) 2019/771.*

ALTHOUGH Directive (EU) 2019/771 explicitly mentions achieving more sustainable consumption patterns and a circular economy and encouraging sustainable consumption, it may be stated that these notions are not considered to a sufficient extent. Namely, the right to repair is not prioritised over the right to a replacement, while the obligation to provide spare parts is not included among the objective requirements of conformity. The opportunity granted to the Member States to allow the consumer to opt for a specific remedy if the lack of conformity appears within a period not exceeding 30 days after the delivery may be considered another example of neglecting the mentioned notions.

KEYWORDS: *consumer protection, Directive (EU) 2019/771, Directive 1999/44/EC, sustainability, more sustainable consumption patterns, circular economy.*

1. Introduction

The issues of consumer protection and sustainable development are included in the Treaty on the Functioning of the European Union. It stipulates that ‘consumer

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protection requirements shall be taken into account in defining and implementing other Union policies and activities.¹ The fundamental importance of sustainability is accentuated by the particular attention devoted to promoting sustainable development in integrating environmental protection requirements into the definition and implementation of the European Union's policies and activities.² Considering the European Union's endeavour to ensure consistency between its policies and activities,³ it may be stated that a shift toward more sustainable consumption seems possible.⁴ Concerning the consumer's legal position when the goods purchased do not conform to the contract, the first step towards the achievement of a high level of consumer protection was taken in 1999 with the adoption of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (hereinafter referred to as 'Directive 1999/44/EC'), that touched the core of consumer sales.⁵ This Directive established a basic common standard to be applied in the Member States.⁶ It is worth noting that it followed the minimum harmonisation approach, allowing Member States to adopt or maintain more stringent provisions to ensure a high level of consumer protection.⁷ Directive 1999/44/EC was repealed by Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods (hereinafter referred to as 'Directive (EU) 2019/771'). This Directive is characterised by maximum harmonisation, precluding Member States from maintaining or introducing divergent provisions in their national law, including either more or less stringent provisions aimed at ensuring a different level of consumer protection unless otherwise provided for in the same Directive.⁸ The gist of this article is the assessment of specific legal solutions contained in Directive (EU) 2019/771 from the sustainability perspective. To determine whether the contribution of the way of regulation of a particular issue present in Directive (EU) 2019/771 to the achievement of more sustainable consumption patterns represents a novelty, the provisions of Directive 1999/44/EC are considered as well. This article analyses issues such as requirements of conformity, the legal guarantee period, the availability of spare parts, the primary and secondary set of claims, and the commercial guarantee. Finally, it also includes the expected future steps in this field expressed by the European Commission and the European Parliament documents. This paper

1 Treaty on the Functioning of the European Union, Art. 12.

2 Treaty on the Functioning of the European Union, Art. 11.

3 Treaty on the Functioning of the European Union, Art. 7.

4 Van Gool and Michel, 2021, p. 137.

5 Howells et al., 2018, p. 187; Capilli, 2007, pp. 1682-1683.

6 Twigg-Flesner, 2001, p. 115.

7 Directive 1999/44/EC, Art. 8, Sec. 2.

8 Directive (EU) 2019/771, Art. 4.

aims to determine whether Directive (EU) 2019/771 brought a significant change from the point of view of sustainability.

2. Requirements of conformity

The European legislator in Directive (EU) 2019/771 introduced differentiation between objective and subjective requirements for conformity. Objective requirements apply to each sales contract, even when nothing specific was agreed upon between the contractual parties in the particular case, while subjective requirements supplement them, depending on the will of the parties expressed through the sales contract.⁹ The application of the subjective requirements for conformity directly derives from the specific relationship between the contractual parties.¹⁰ It may be stated that sustainability was taken into account in this part by explicitly referencing the notion of durability.

Primarily, Directive (EU) 2019/771 defines durability as ‘the ability of the goods to maintain their required functions and performance through normal use.’¹¹ The essence of this definition is that the goods should remain in conformity with the sales contract during a certain period following the delivery, i.e., not only at the exact moment of delivery.¹² However, it should be noted that such a definition is rather meagre since it does not contain any direct reference to the passing of time.¹³

Furthermore, the European legislator specifies, among the necessary objective requirements for conformity, that the goods shall be

‘of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility, and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.’¹⁴

In this case, assessing the notion of durability is linked to determining the nature of the goods of the same type and the consumer’s reasonable expectations. Directive

⁹ Twigg-Flesner, 2020, p. 56.

¹⁰ Mišćenić et al., 2021, p. 55.

¹¹ Directive (EU) 2019/771, Art. 2, Sec. 13.

¹² Zoll et al., 2020, p. 534; Cárcamo, 2022, p. 151.

¹³ Goldar, 2021, p. 99.

¹⁴ Directive (EU) 2019/771, Art. 7, Sec. 1 (d).

(EU) 2019/771 also offers more indications in Recital 32, apart from acknowledging the importance of ensuring longer durability of goods for ‘achieving more sustainable consumption patterns and a circular economy.’ Namely, when assessing the durability in the sense of the objective requirement for conformity, ‘the possible need for reasonable maintenance of the goods, such as the regular inspection or changing of filter in a car’, together with ‘all other relevant circumstances, such as the price of the goods and the intensity or frequency of the use that the consumer makes of the goods’ should be taken into consideration. It can be said that the notion of durability is relatively flexible because the period in which the goods should maintain their required functions and performance depends on the nature of the specific goods and the circumstances of the case.

Regarding the subjective requirements for conformity, there is no obstacle for the contractual parties impeding them from inserting any claim concerning durability in the sales contract. Directive (EU) 2019/771 in the above-mentioned Recital 32 enables the consumer to rely on any specific durability information if it is indicated in any pre-contractual statement forming part of the contract as a part of the subjective requirement for conformity. However, it should be stressed that there is no obligation to include any specific durability information in the sales contract; it is subjected exclusively to the will of the contractual parties.

Moreover, the question arises whether the inclusion of the notion of durability can successfully combat planned obsolescence, defined as ‘a situation in which goods are deliberately made or designed so they do not last for a long period of time.’¹⁵ This practice is detrimental to the environment since it causes a substantial waste of resources and energy due to the accelerated replacement of goods coupled with population growth.¹⁶ Certain authors give an affirmative answer to this question, stating that the notion of durability encompasses ‘repairability.’¹⁷ On the other hand, some authors underline that the circumstance that the seller is not obliged to provide any specific durability information or information on the lack of planned obsolescence to the consumer mitigates the effectiveness of the public statements made by the seller, stressing the need for the creation of an index of the durability of goods.¹⁸ It is important to mention that including the notion of durability is an essential novelty since Directive 1999/44/EC did not contain this term. Nevertheless, on a practical level, introducing this notion as a part of the objective requirements for conformity cannot be considered ‘a real novelty’ but rather ‘a symbolic milestone.’¹⁹ Namely, Directive

15 <https://dictionary.cambridge.org/dictionary/english/planned-obsolescence> (accessed on 14 January 2023)

16 Michel, 2018, p. 208.

17 Van Gool and Michel, 2021, p. 138.

18 Cárcamo, 2022, p. 153.

19 Van Gool and Michel, 2021, p. 138.

1999/44/EC contained a general obligation imposed on the seller to deliver goods to the consumer that are in conformity with the sales contract, establishing a rebuttable presumption of conformity if certain prescribed requirements are satisfied.²⁰ The presumption of conformity subsisted, *inter alia*, when the goods showed the quality and performance which were considered normal in goods of the same type and that the consumer could reasonably expect, given the nature of the goods and taking into account any public statement on the specific characteristics of the goods made about them by the seller, the producer, or his representative, particularly in advertising or in labelling.²¹ Although the term durability was absent from this provision, legal theory deemed that it was implicitly covered by the consumer's reasonable expectations regarding quality.²² However, the explicit reference to durability in Directive (EU) 2019/771 is laudable.

3. Legal guarantee period

The legal guarantee period is connected to the notion of durability. The European legislator states that the seller is liable to the consumer for any lack of conformity that exists when the goods are delivered, which becomes apparent within two years of that time.²³ The legal guarantee period is longer for goods with digital elements when the contract provides a continuous supply for more than two years.²⁴ However, Directive (EU) 2019/771 permits the Member States to maintain or introduce longer time limits.²⁵ It is important to underline that this provision represents an exception from the maximum harmonisation clause. Furthermore, as stipulated by Recital 42 of the same Directive, the Member States can envisage only a limitation period for the consumer's remedies without being obliged to introduce a specific period within which the lack of conformity has to become apparent for the seller to be liable.

The chosen minimal harmonisation approach can be deemed beneficial to sustainability and a circular economy since a longer legal guarantee period may enhance the production of goods with greater durability and increase the chance that consumers will demand repairs of the flawed goods instead of purchasing new ones.²⁶ On the other hand, it can be argued that a unique two-year legal guarantee period is not appropriate for all types of goods, relatively protecting their durability.

20 Directive 1999/44/EC, Art. 2.

21 Directive 1999/44/EC, Art. 2, Sec. 2 (d).

22 Howells et al., 2018, p. 183; Twigg-Flesner, 2001, p. 120.

23 Directive (EU) 2019/771, Art. 10, Sec. 1.

24 Directive (EU) 2019/771, Art. 10, Sec. 2.

25 Directive (EU) 2019/771, Art. 10, Sec. 3.

26 Van Gool and Michel, 2021, p. 141.

It is too short for expensive products considered more durable, while it is sufficient or excessive for cheaper products.²⁷

Directive 1999/44/EC also restricted the seller's liability for any lack of conformity that became apparent within two years of the delivery of the goods.²⁸ The Member States could also extend this two-year guarantee period due to the minimum harmonisation character of the mentioned Directive.²⁹ The same argument that it was too short for more expensive, durable goods also applied to the legal solution in this Directive.³⁰ Considering this, it can be said that on a practical level, Directive (EU) 2019/771 did not bring any tangible change in this regard.

4. Spare parts

Before discussing the remedies available to the consumer, the issue related to spare parts should be examined. Namely, Directive (EU) 2019/771 does not explicitly impose on the seller the obligation to provide spare parts throughout a period as an objective requirement for conformity. In Recital 33 of the same Directive, the European legislator states that sellers may make use of spare parts to fulfil their obligation to repair goods in the event of a lack of conformity that existed at the time of delivery. Moreover, it envisages that the absence of the specific obligation imposed on the seller to provide spare parts does not affect other provisions of national law obliging the seller, the producer, or other persons constituting a link in the chain of transactions to ensure that spare parts are available or to inform consumers about such availability. Therefore, the duty to provide spare parts is linked to the parties' agreement. It may be said that the fact that the European legislator did not insert the obligation to provide spare parts as part of the objective requirements for conformity demonstrates the lack of will to incentivise or prioritise repair over replacement.³¹

Albeit this kind of obligation may be desirable from the point of view of sustainability as a measure of prioritising repair, it, on the other hand, can be considered disproportionate for small entrepreneurs since it is easy to imagine that they often may not have enough space to store the spare parts for the sold goods nor may they have the necessary instruments for bringing the good into conformity by repair.³²

Conversely, Directive 1999/44/EC did not make any reference to spare parts. Thus, the mere mention of this term in Directive (EU) 2019/771 is a novelty, although without

²⁷ Cárcamo, 2022, p. 153.

²⁸ Directive 1999/44/EC, Art. 5, Sec. 1.

²⁹ Howells et al., 2018, p. 196.

³⁰ Bourgoignie, 2020, p. 35.

³¹ Cárcamo, 2022, p. 154.

³² Zoll et al., 2020, p. 536.

any practical change. Namely, taking into account the minimum harmonisation character of Directive 1999/44/EC, the Member States could introduce or maintain provisions on after-sale services or the availability of spare parts.³³ For example, the Irish Sale of Goods and Supply of Services Act of 1980 introduced an implied warranty that spare parts and an adequate after-sale service would be made available by the seller in such circumstances as stated in an offer, description, or advertisement by the seller on behalf of the manufacturer or his own behalf and for such period as stated or, if no period is stated, for a reasonable period.³⁴

5. Primary set of claims

Before examining the specific regulation of the remedies available to the consumer, the focus will be placed on repairing the goods. The repair can be considered ‘an inherently sustainable remedy.’³⁵ It can be said that, compared to other recycling methods, it is more efficient in conserving embodied energy, materials, and water, while the transportation costs needed to put the goods back into use are lower.³⁶ Moreover, the repair activity can benefit local communities, particularly small businesses and individual repairers, with the possibility of enhancing the growth of large repair providers.³⁷ However, it is important to mention that increased repairability can have a negative financial impact on specific economic sectors. It is to be expected that it can harm manufacturers’ turnover due to the reduction in the sale of new goods, which the increased production of spare parts can partially neutralise.³⁸

From the consumer’s point of view, the repair is not always the most desired legal remedy compared to its counterpart, replacement. First, the consumer may prefer the replacement because the repair requires time for its completion, during which the consumer cannot use the goods. Additionally, replacement is seldom performed simultaneously, and the consumer will get completely new goods.³⁹ The rapid development of the goods expressed through putting new products on the market in a relatively short time influencing the consumer’s will to buy them, as well as consumers’ confidence in the successful completion of the repair, is also relevant.⁴⁰ All these factors represent a notable impediment to the prioritisation of the repair

33 Bourgoignie, 2020, p. 35.

34 The Sale of Goods and Supply of Services Act (1980), Part II, Sec. 12, p. 1.

35 Van Gool and Michel, 2021, p. 14.

36 Ellen MacArthur, 2016, p. 6.

37 Deloitte, 2016, p. 67.

38 Deloitte, 2016, p. 69.

39 Van Gool and Michel, 2021, p. 144.

40 McCollough, 2009, cited in Terry, 2019, p. 854.

in a society where consumption is the most important field of life and an individual should act as 'a dissolute, recklessly hysterical consumer.'⁴¹ It is also well-known that (multinational) companies spend a large sum of money 'to whet consumers' appetites for the most recent products with the newest design features.'⁴²

Directive (EU) 2019/771 in Recital 48 stresses the fundamental importance of repairs, stating that 'enabling consumers to require repair should encourage sustainable consumption and could contribute to the greater durability of products.' However, this statement can be considered a mere homage to the sustainable benefits of the right to repair. The mentioned Directive indeed distinguishes repair and replacement as the primary and appropriate price reduction and the termination of the contract as the secondary set of claims, establishing a hierarchy of consumers' rights in the event of a lack of conformity of the goods with the contract.⁴³ Substantially, the consumer is free to choose between repair and replacement.

The consumer's liberty of choice is excluded when the chosen remedy is impossible or, compared to the other remedy, imposes costs on the seller that are disproportionate, taking into consideration all circumstances, including the value the goods would have if they were in conformity with the contract, the significance of the lack of conformity, and whether the alternative remedy could be provided without significant inconvenience to the consumer.⁴⁴ The impossibility of the chosen remedy may be legal or factual, as stated by Recital 48. It should be noted that the disproportionate nature of the costs is to be interpreted in economic terms. Although the fundamental importance of the right to repair is accentuated in the mentioned Recital 48, the reasons connected to sustainability or sustainable consumption seem not to be taken into account in this regard.⁴⁵ It can be stated that the European legislator gave precedence to the protection of the consumer over environmental protection.⁴⁶ The legal theory affirms that the explicit insertion of the environmental impact as a circumstance to be taken into account while assessing whether the remedy chosen imposes disproportionate costs on the seller would be 'a step forward.'⁴⁷ Moreover, it may also be said that the absence of the explicit obligation to provide spare parts as the objective requirement for conformity can contribute to an easier limitation of the consumer's freedom of choice due to the factual impossibility of performing the repair.

Compared to the repealed Directive 1999/44/EC, apart from merely stressing the importance of the right to repair in terms of sustainability, Directive (EU) 2019/771 did

41 Antonić, 2013, p. 274.

42 McCollough, 2009, cited in Terryn, 2019, p. 854.

43 Directive (EU) 2019/771, Art. 13, Sec. 1.

44 Directive (EU) 2019/771, Art. 13, Sec. 2.

45 Imbruglia, 2022, p. 360; Cárcamo, 2022, p. 156; Terryn, 2019, p. 856; Zoll et al., 2020, p. 542.

46 Cárcamo, 2022, p. 156.

47 Terryn, 2019, p. 856.

not bring any novelty in this respect. Namely, Directive 1999/44/EC also gave equal merit to the rights of repair and replacement as the primary set of remedies, limiting the consumer's liberty of choice because of the same reasons as those contained in Directive (EU) 2019/771 (impossibility or disproportionality).⁴⁸ The disproportionality criterion was apparently to be interpreted in economic terms or, more precisely, in terms of disproportionate costs.⁴⁹ The sustainability issues were not taken into consideration. However, the Member States could alter the Directive's provisions due to its minimum harmonization character. For example, Croatia did not transpose the provisions limiting the consumer's freedom of choice, while the hierarchy of rights was divergent, consisting of repair, replacement, and appropriate price reduction as the primary set of claims with the termination of the contract as the sole subsidiary remedy.⁵⁰ An attractive legal solution was present in Hungary where the consumer was entitled to, *inter alia*, repair the lack of conformity himself/herself or to have it repaired at the seller's expense.⁵¹ The self-repair may be beneficial from the point of view of environmental protection since it saves transportation costs and renders the use of regenerated spare parts possible.⁵² Due to the maximum harmonisation character of Directive (EU) 2019/771, the existence of specific remedies, including self-repair, is not admissible anymore in the general consumer sales context.

Finally, the possibility of remanufacturing as a remedy available to the consumer should be examined at this point. Remanufacturing can be defined as 'the process of returning a used product to like-new condition with a warranty to match,' which 'includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly', while 'parts which cannot be brought back to original quality are replaced, meaning the final remanufactured product will often be a combination of new and reused parts.'⁵³ In this regard, the *Quelle* judgment rendered by the Court of Justice of the European Union (hereinafter referred to as the CJEU) may be relevant. In the mentioned judgment, the CJEU ruled that Art. 3 of Directive 1999/44/EC, titled Rights of the Consumer,

'is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.'⁵⁴

48 Directive 1999/44/EC, Art. 3, Sec. 3.

49 Twigg-Flesner, 2001, p. 123.

50 Meškić et al., 2010, p. 530; Petrić, 2006, p. 118.

51 Chapter VI, Sec. 6 (159), p. 2 (b) of the Civil Code of Hungary

52 Zoll et al., 2020, p. 540.

53 Vito, 2018, p. 18.

54 Case C-404/06 of 17 April 2008, para. 43.

The European legislator incorporated this solution in Directive (EU) 2019/771,⁵⁵ which stipulates that the consumer is not liable to pay for normal use made of the replaced goods during the period preceding their replacement.⁵⁶ Although the CJEU did not consider sustainability arguments, it seems that the replacement is to be performed exclusively with new goods, which implies that remanufacturing is not admissible.⁵⁷ On the other hand, there are voices in legal theory asserting that remanufacturing would be a permitted remedy if remanufactured goods had been initially acceptable under the contractual conformity requirements.⁵⁸ A preliminary question addressed to the CJEU would dispel any doubt on this subject.⁵⁹

6. Secondary set of claims

As previously mentioned, the secondary set of claims consists of the appropriate price reduction and the termination of the contract. Directive (EU) 2019/771 stipulates that the price reduction shall be proportionate to the decrease in the value of the goods that the consumer received compared to the value the goods would have if they were in conformity.⁶⁰ On the other hand, Directive 1999/44/EC did not define this remedy or provide guidance on its calculation.⁶¹ It can be said that the price reduction can be beneficial from the point of view of sustainability. Namely, it allows the contractual parties to avoid costs or externalities connected to the transportation, the performance of repair, or the management of the goods that are not in conformity with the contract.⁶² On the contrary, nothing hinders the consumer from purchasing alternative goods, causing, in that manner, new product lifecycle externalities.⁶³ Moreover, if the violation of eco-standards causes a lack of conformity, the appropriate price reduction may be ecologically inefficient. That is why legal theory recommends excluding this remedy in cases where its realisation would cause disproportionate environmental costs, leaving the consumer with the termination of the contract as the only secondary remedy.⁶⁴ It is important to underline that Directive (EU) 2019/771, as mentioned in the previous chapter, limits the consumer's freedom of choice between repair and replacement due to the disproportionate nature of the

55 Carvalho, 2020, p. 46.

56 Directive (EU) 2019/771, Art. 14, Sec. 4.

57 Terryn, 2019, p. 861.

58 Van Gool and Michel, 2021, p. 146.

59 Mak and Lujinović, 2019, cited in Van Gool and Michel, 2021, pp. 145-146.

60 Directive (EU) 2019/771, Art. 15.

61 Howells, Twigg-Flesner and Wilhelmsson, 2018, p. 194.

62 Zoll et al., 2020, pp. 542-543.

63 Van Gool and Michel, 2021, p. 146.

64 Zoll et al., 2020, p. 543.

costs, seemingly without taking into account the environmental impact. A preliminary question addressed to the CJEU on the possibility of prohibiting the use of the appropriate price reduction due to environmental inefficiency would also remove any doubt on this subject.

Regarding the termination of the contract, it can be said that the obligation imposed on the consumer has significant potential environmental consequences. Namely, Directive (EU) 2019/771 obliges the consumer to return goods to the seller at the seller's expense.⁶⁵ On the other hand, the seller must reimburse the consumer the price paid for the goods upon receipt of the goods or evidence provided by the consumer of having sent them back.⁶⁶ The consumer's obligation to make restitution for the goods opens the environmental issues connected to their transportation to the seller, their subsequent disposal, diminished use, and the above-mentioned risk that the consumer will buy alternative goods, causing new product lifecycle externalities.⁶⁷ However, it may be said that the environmental issue related to the disposal of the returned goods is partly mitigated by a novelty introduced by Directive (EU) 2019/771.⁶⁸ Namely, the European legislator established a general rule for a situation when the lack of conformity concerns only part of the delivered goods. In this case, the consumer can terminate the contract solely in relation to flawed goods. The contract can be terminated in relation to other goods purchased together with the non-conforming goods as well if it is not reasonable to expect the consumer to accept to keep only goods that conform to the contract.⁶⁹ This legal solution may influence the disposal of the returned goods on a quantitative level by reducing its environmental costs.⁷⁰

Moreover, Directive (EU) 2019/771 envisages that the consumer is not entitled to terminate the contract if the lack of conformity is only minor.⁷¹ The identical provision was also contained in Directive 1999/44/EC.⁷² The lack of guidance on which lack of conformity is to be considered minor can be a source of disagreements.⁷³ The CJEU gave an important indication in Case C-145/20. Namely, the Austrian Supreme Court of Justice referred for the preliminary ruling, *inter alia*, the question of whether the

65 Directive (EU) 2019/771, Art. 16, Sec. 3 (a).

66 Directive (EU) 2019/771, Art. 16, Sec. 3 (b).

67 Van Gool and Michel, 2021, p. 146.

68 Zoll et al., 2020, pp. 543-544.

69 Directive (EU) 2019/771, Art. 16, Sec. 2.

70 Zoll et al., 2020, p. 544.

71 Directive (EU) 2019/771, Art. 13, Sec. 5.

72 Directive 1999/44/EC, Art. 3, Sec. 6.

73 Howells et al., 2018, p. 195.

equipping of a vehicle with a defeat device⁷⁴ which is prohibited under Regulation (EC) No 715/2007 because it reduces the effectiveness of emission control systems, must be regarded as minor in the sense of the above-mentioned Art. 3, Sec. 6 of Directive 1999/44/EC if the purchaser acquired the vehicle albeit he/she was aware of the presence and operation of that device.⁷⁵ Taking into account the importance of environmental protection and the need to reduce nitrogen oxide emissions from diesel vehicles to improve air quality and comply with limit values for pollution, as emphasised by Recitals 1 and 4 to 6 of Regulation (EC) No 715/2007, the CJEU ruled that the presence of such a defeat device cannot be classified as being a minor lack of conformity. Additionally, the condition that 'the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device' does not make any difference in this regard.⁷⁶

Ultimately, Directive (EU) 2019/771 does not limit the freedom of Member States to allow consumers to choose a specific remedy if the lack of conformity appears within a period not exceeding 30 days from the delivery.⁷⁷ In this case, the existence of the hierarchy of remedies is not mandatory.⁷⁸ This provision is the fruit of political compromises aiming to preserve the internal regulations of certain Member States that foresee a divergent set of remedies when a lack of conformity becomes apparent immediately after the delivery of the goods.⁷⁹ However, from the point of view of sustainability, this legal solution implying the possibility of immediate termination of the contract is not recommendable, since it seems to enhance impulsive consumption, cause additional externalities related to transportation, and raise the issue of disposal of the returned goods.⁸⁰

7. Commercial guarantee

Directive (EU) 2019/771 defines the commercial guarantee as

⁷⁴ Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information in Art. 3 (10) defines the defeat device as 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.'

⁷⁵ Case C-145/20 of 14 July 2022, para. 45 (3).

⁷⁶ Case C-145/20 of 14 July 2022, para. 95, 96 and 97.

⁷⁷ Directive (EU) 2019/771, Art. 3, Sec. 7.

⁷⁸ Pomar, 2019, p. 5.

⁷⁹ De Cristofaro, 2022, p. 9.

⁸⁰ Van Gool and Michel, 2021, p. 143.

‘any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to the seller’s legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.’⁸¹

Essentially, it is a voluntary undertaking by a seller or producer in respect of the goods.⁸² Commercial guarantees can be beneficial in terms of sustainability and circular economy if they provide for more sustainable remedies and a longer guarantee period compared to the legal guarantee.⁸³ However, regarding the length of the guarantee period, the ECC-Net Report named ‘Commercial Warranties – Are They Worth the Money’ related to the average duration of the commercial warranties for televisions, washing machines, and photo cameras showed that in this regard in a considerable number of cases, the benefits for the consumers are minor.⁸⁴ The commercial guarantee may also have detrimental sustainability effects. For example, it is known that certain companies offer a ‘direct replacement guarantee’: ‘do not wait for repair but get your new product for free immediately.’⁸⁵ Such a solution that privileges replacement over repair is, undoubtedly not sustainable.

Moreover, Directive (EU) 2019/771 explicitly enables the producer to offer the consumer a commercial guarantee of durability for certain goods for a certain period, in which case the producer will be directly liable to the consumer for repair or replacement of the goods during the entire period of the commercial guarantee of durability.⁸⁶ This provision implies that the consumer can choose whether to request repair or replacement from the seller or the producer.⁸⁷ Additionally, the same Directive stipulates that the producer may offer the consumer more favourable conditions in the commercial guarantee of durability statement.⁸⁸ It is important to underline that the producer’s liability depends on his/her free will to offer the commercial guarantee of durability. This legal solution represents the main novelty in this respect compared to Directive 1999/44/EC, which, as mentioned before, did not contain the notion of durability.

81 Directive (EU) 2019/771, Art. 2, Sec. 1 (12).

82 Howells et al., 2018, p. 198.

83 Van Gool and Michel, 2021, p. 146.

84 ECC-Net, 2014, pp. 62-63; DiMatteo and Wrbka, 2019, p. 519.

85 Terry, 2019, p. 862.

86 Directive (EU) 2019/771, Art. 17, Sec. 1.

87 Marín López, 2019, p. 19; Cárcamo, 2022, p. 158.

88 Directive (EU) 2019/771, Art. 17, Sec. 1.

8. Future steps

The same Directive (EU) 2019/771 obliged the European Commission to review the application of this Directive, not later than 12 June 2024, including its provisions on remedies available to the consumer and the producer's commercial guarantee of durability and submit a report to the European Parliament, to the Council, and to the European Economic and Social Committee that should be accompanied, where appropriate, by legislative proposals.⁸⁹

In this regard, it is important to mention that the European Commission adopted a new Circular Economy Action Plan named 'For a Cleaner and More Competitive Europe' in March 2020. This document accentuates the crucial importance of the circular economy for citizens, stating that it will 'provide high-quality, functional, and safe products, which are efficient and affordable, last longer, and are designed for reuse, repair, and high-quality recycling.'⁹⁰ The European Commission expresses its will to include in its sustainable product policy legislative initiative, *inter alia*, proposals aiming at improving 'product durability, reusability, upgradability, and reparability, addressing the presence of hazardous chemicals in products, and increasing their energy and resource efficiency.'⁹¹ Furthermore, the new Circular Economy Plan mentions the planned future changes directly connected to Directive (EU) 2019/771, whose objective is empowering the consumer's position in the circular economy. First, the European Commission proposes revising EU consumer law to ensure that 'consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and the availability of repair services, spare parts, and repair manuals.'⁹² Additionally, creating 'a new right to repair' and considering 'new horizontal material rights for consumers' concerning, *exempli causa*, the availability of spare parts or access to repair, form part of the European Commission's agenda.⁹³

Another important document in this respect is the European Parliament Resolution of 25 November 2020 – Towards a more sustainable single market for business and consumers (hereinafter: 'The Resolution'). The Resolution in Recital H explicitly mentions the need to review Directive (EU) 2019/771 by assessing measures to create the right conditions for increasing product durability and ensuring a high level of consumer protection. The European Parliament invites the European Commission to devise a broad strategy to tackle planned obsolescence by engaging with sustainable production and consumption patterns. The mentioned strategy should, *inter alia*,

⁸⁹ Directive (EU) 2019/771, Art. 25.

⁹⁰ The Circular Economy Plan, p. 2.

⁹¹ The Circular Economy Plan, p. 4.

⁹² The Circular Economy Plan, p. 5.

⁹³ The Circular Economy Plan, p. 5.

include measures to specify the pre-contractual information to be provided on the estimated lifespan and reparability of the goods, as well as to develop and introduce mandatory labelling aimed at providing clear and easy-to-understand information to consumers on the estimated lifetime and reparability of the goods at the time of purchase.⁹⁴ It is important to stress that the estimated lifespan is to be expressed in years and/or use cycles and determined before the placement of the goods on the market utilising an objective and standardised methodology based on real-use conditions, differences in terms of intensity of use, and natural factors, among other metrics.⁹⁵ The Resolution also states that the possibility of bringing the duration of legal guarantees more into line with the estimated lifespan of the goods is to be assessed during the preparation of the review of Directive (EU) 2019/771.⁹⁶

Furthermore, the European Parliament invites the European Commission to establish a more attractive and efficient right to repair. First, the Resolution proposes significant changes related to the availability of spare parts consisting of the encouragement of their standardisation for the sake of interoperability and innovation, setting a mandatory minimum period for the provision of spare parts that should reflect the estimated lifespan of the goods and ensuring that the price of a spare part is reasonable and cost-efficient compared to the price of the whole product and that repairers and consumers have access to the necessary spare parts without unfair hindrances.⁹⁷ The European Parliament proposes the prioritisation of repair over replacement by extending guarantees or zeroing guarantee periods for consumers who decide to choose this option and by ensuring that sellers always inform consumers about the availability of this right.⁹⁸ Finally, the Resolution calls for the assessment of the ways to facilitate repairs by establishing a legal guarantee for the parts replaced by a professional repairer when the goods are not covered by legal or commercial guarantee anymore during the preparation of the review of (EU) 2019/771, as well as for encouraging Member States to introduce incentives which promote repairs.⁹⁹

It is essential to mention that the European Commission adopted two new proposals directly related to the topic of this paper, respectively, in March 2022 and March 2023 – Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (hereinafter referred to as ‘The Green Transition Proposal’) and Proposal

94 The Resolution, Art. 5 (a) and (b).

95 The Resolution, Art. 5 (a).

96 The Resolution, Art. 5 (e).

97 The Resolution, Art. 6 (b), (c), (d).

98 The Resolution, Art. 6 (e).

99 The Resolution, Art. 6 (f) and (g).

for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771, and (EU) 2020/1828 (hereinafter referred to as 'The Repair of Goods Proposal'). The Green Transition Proposal amends Directive 2005/29/EC by, *inter alia*, classifying a commercial practice containing false information on the product's main characteristics, such as environmental or social impact, accessories, durability, reparability, after-sale customer service, and complaint handling as misleading.¹⁰⁰ Moreover, it amends Directive 2011/83/EU obliging the seller (trader) to provide the consumer information that the goods benefit from a commercial guarantee of durability and its duration in units of time, where that guarantee covers the entire good and has a duration of more than two years when the producer makes it available. This obligation applies to both contracts other than distance or off-premises contracts and distance and off-premises contracts.¹⁰¹

The Repair of Goods Proposal primarily applies to the repair of goods purchased by consumers in case of a lack of conformity that emerges outside the seller's liability established by Art. 10, Sec. 1 of Directive 2019/771.¹⁰² However, it amends the mentioned Directive by introducing the rule stipulating that where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods to bring them into conformity.¹⁰³ This provision essentially thwarts the consumer's liberty of choice, enabling the seller to frustrate the consumer's request to replace the goods and repair them instead each time the repair costs are equal to or lower than the replacement costs. The prioritisation of the repair depends upon its economic price compared to the replacement. Substantially, the consumer can obtain replacement of defective goods only when replacement costs are lower than repair costs. This Proposal does not indicate how repair and replacement costs should be calculated.

9. Conclusion

Directive (EU) 2019/771, unlike its predecessor Directive 1999/44/EC, explicitly mentions more sustainable consumption patterns, sustainable consumption, and a circular economy. It defines the notion of durability, including it among the objective requirements for conformity and envisaging the possibility for the producer to offer the consumer a commercial guarantee of durability. The direct reference to these notions is laudable. However, the legal theory stressed that the notion of durability

100 The Green Transition Proposal, Art. 1, Sec. 2 (a).

101 The Green Transition Proposal, Art. 2, Sec. 2 (ea), Art. 2, Sec. 3 (ma).

102 The Repair of Goods Proposal, Art. 1, Sec. 2.

103 The Repair of Goods Proposal, Art. 12.

was implicitly covered in Directive 1999/44/EC by the consumer's reasonable expectations related to the quality of the goods.

Regarding other issues analysed in this paper, it can be stated that Directive (EU) 2019/771 did not bring significant novelties in terms of sustainability. First, the right to repair is not prioritised over the right to replace the goods. Sustainability or environmental impact seems not to be included among the reasons that exclude the consumer's liberty of choice between repair and replacement. At the same time, the obligation to provide spare parts is not part of the objective requirements for conformity. Moreover, the opportunity granted to Member States to allow the consumer to choose a specific remedy without being obliged to obey the hierarchy of claims and, therefore, being able to terminate the sales contract immediately when the lack of conformity becomes apparent within a period not exceeding 30 days from the delivery of the goods is not concordant with the spirit of sustainability and sustainable consumption patterns. On the other hand, the provision stipulating that, in a situation where the lack of conformity affects only some of the delivered goods, the consumer can terminate the contract solely concerning the flawed goods is considered beneficial from the sustainability perspective. Finally, the minimal harmonisation approach to the legal guarantee period permitting the Member States to maintain or introduce longer time limits can also be deemed positive in this respect. It is important to underline that the maximum harmonisation clause, which is the main feature of Directive (EU) 2019/771, precludes the Member States from altering the legal solutions toward a more sustainable model unless otherwise provided for in the same Directive.

In sum, the contribution of Directive (EU) 2019/771 to achieving more sustainable consumption patterns, compared to Directive 1999/44/EC, seems fragile and limited. The legal theory qualified it as 'ocasión perdida/lost opportunity'.¹⁰⁴ Taking into account the documents and proposals adopted by the European Commission and the European Parliament, it is to be expected that future amendments to Directive (EU) 2019/771 will bring more sustainable solutions by prioritising repair over replacement, imposing on the seller the obligation to provide spare parts, together with the obligation to give pre-contractual information on the estimated lifespan and reparability of the goods.

104 Goldar, 2021, cited in Cárcamo, 2022, p. 158.

Bibliography

- Antonić, S. (2013) "Pink tranzicija u Srbiji – šest teza za razumevanje naših kulturnih prilika [Pink Transition in Serbia – six theses for concerning our cultural situation], *Kultura*, 2013/140 pp. 272-292. doi. 10.5937/kultura1340272A
- Bourgoignie, T. (2020) "Sustainable Consumption and Obsolescence of Consumer Products" in Do Amaral Junior, A., De Almeida, L., Klein Vieira, L. (eds.) *Sustainable Consumption the Right to a Healthy Environment*, Cham: Springer Nature Switzerland AG, pp. 27-48. doi: 10.1007/978-3-030-16985-5_3
- Capilli, G. (2007) "Las garantías en la venta de bienes de consumo", *Anuario de derecho civil*, 60(4), pp. 1679-1728.
- Cárcamo, R. B. (2022) "Garantías en las ventas de consumo y economía circular: ¿El inicio de un nuevo paradigma?", *Revista de Derecho Civil*, 9(2), pp. 141-186.
- Carvalho, J. M. (2020) "Introducción a las Nuevas Directivas sobre Contratos de Compraventa de Bienes y Contenidos o Servicios Digitales" in Amayuelas, E. A., Lapuente, S. C. (eds.) *El derecho privado en el nuevo paradigma digital*, Madrid: Colegio Notarial de Cataluña, pp. 31-48.
- De Cristofaro, G. (2022) "Il recepimento della Direttiva 2019/771/UE nel diritto italiano. Le opzioni fondamentali del legislatore nazionale. I limiti "soggettivi" ed "oggettivi" posti all'ambito di operatività della nuova disciplina" in De Cristofaro, G. (ed.) *La nuova disciplina della vendita mobiliare nel codice del consumo*, Torino: G. Giappichelli Editore, pp. 1-34.
- Deloitte (2016) *Study on Socioeconomic impacts of increased reparability – Final Report*. Prepared for the European Commission, DG ENV.
- DiMatteo, L. A., Wrbka, S. (2019) "Planned Obsolescence and Consumer Protection: the Unregulated Extended Warranty and Service Contract Industry", *Cornell Journal of Law and Public Policy*, 2019/28, pp. 483-544.
- ECC-Net (2014) *Market study: Commercial warranties: Are they worth the money?* [Online]. Available at: <https://www.eccbelgium.be/publications> (Accessed: 13 January 2023).
- Ellen MacArthur Foundation (2016) *Empowering Repair* [Online]. Available at: <https://emf.thirdlight.com/link/cm1ae9odloe1-s53z5b/@/preview/1?o> (Accessed: 12 January 2023).
- Goldar, M. G. (2021) "Propuestas para garantizar modalidades de consumo y producción sostenibles", *Revista de Fomento Social*, 76(1), pp. 91-114. doi: 10.32418/rfs.2021.299.4582
- Howells, G., Twigg-Flessner, C. and Wilhelmsson, T. (2018) *Rethinking EU Consumer Law*, London and New York: Routledge, Taylor & Francis Group. doi: 10.4324/9781315164830

- Imbruglia, D. (2022) “La sostenibilità dei rimedi consumeristici nella Direttiva 771/2019/UE e oltre”, *Actualidad Jurídica Iberoamericana*, 2022/16, pp. 354-371.
- Marín López, M. J. (2019) “La Directiva 2019/771/UE, de 20 de mayo, sobre contratos de compraventa de bienes con consumidores”, *Centro de Estudios de Consumo*, 2019, pp. 1-19.
- Meškić, Z., Zdraveva, N., Dabović-Anastasovska, J., Gavrilović, N. (2010) “Consumer Sales Directive (99/44)” in: *Civil Law Forum for South East Europe – Volume III – VII EU Consumer Contract Law*, Cavtat: Forum za građansko pravo za jugoistočnu Evropu, pp. 518–550.
- Michel, A. (2018), “La directive 1999/44/CE sur la garantie des biens de consommation: un remède efficace contre l’obsolescence programmée?”, *Revue européenne de droit de la consommation*, 2016 (2), pp. 207-236.
- Mišćenić, E., Kunda, I., Petrić, S., Butorac Malnar, V., Vrbljanac, D., Winkler, S. (2021) *Europsko privatno pravo – posebni dio [European Private Law – Special Part]*, Zagreb, Školska knjiga.
- Petrić, S. (2006) “Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima” [Liability for Material Defects According to the New Law on Obligations], *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 27(1), pp. 87–128.
- Pomar, F. G. (2019) “El Nuevo derecho europeo de la venta a consumidores: una necrológica de la Directiva 1999/44”, *Indret: Revista para el Análisis del Derecho*, 2019/4, pp. 1-7.
- Terryn, E. (2019) “A Right to Repair? Towards Sustainable Remedies in Consumer Law”, *European Review of Private Law*, 27(4), pp. 851-874. doi: 10.54648/erpl2019044
- Twigg Flesner, C. (2020) „Conformity of Goods and Digital Content/Digital Services“ in Amayuelas, E. A., Lapuente, S. C. (eds.) *El derecho privado en el nuevo paradigma digital*, Madrid: Colegio Notarial de Cataluña, pp. 49-78.
- Twigg-Flesner, C. (2001) “The EC Consumer Sales Directive: a lot still to do”, *Canterbury Law Review*, 8(1), pp. 113-128.
- Van Gool, E. and Michel, A. (2021) “The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis”, *Journal of European Consumer and Market Law*, 4/2021, pp. 136-148. doi: 10.2139/ssrn.3732976
- Vito (2018) *Repairability criteria for energy related products – Study in the BeNeLux context to evaluate the options to extend the product life time – Final Report*, ? [Online]. Available at: https://www.benelux.int/files/7915/2896/0920/FINAL_Report_Benelux.pdf (Accessed: 13 January 2023).
- Zoll, F. A., Południak-Gierz, K. M., Bańczyk, W. K. (2020) „Sustainable consumption and circular economy in the Directive 2019/771“, *Правоведение*, 64(4), pp. 526-550. doi: 10.21638/spbu25.2020.406

Legal Sources

- Act V of 2013 (Civil Code of Hungary)
- Circular Economy Action Plan – For a Cleaner and More Competitive Europe
- Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees
- Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods
- Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information
- Resolution of the European Parliament of 25 November 2020 – Towards a more sustainable single market for business and consumers
- The Irish Sale of Goods and Supply of Services Act (1980)
- Treaty on the Functioning of the European Union

Decisions of the CJEU

- Case C-404/06 of 17 April 2008
- Case C-145/20 of 14 July 2022

Other Sources

- <https://dictionary.cambridge.org/dictionary/english/planned-obsolescence> (accessed on 14 January 2023)