



CONFORMITY OF GOODS AND DIGITAL CONTENT/DIGITAL SERVICES

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WORKING PAPER 3/2020

**WORKING PAPERS
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Abstract: This paper considers the role of legal conformity requirements in consumer sales contracts, distinguishing between different levels of conformity based on subjective and objective criteria. It then critiques the conformity requirements in two recent EU Directives on consumer sales, and the supply of digital content and digital services respectively. It is critical of the maximum harmonisation standard of these directives and the inflexibility this imposes, as well as the lack of creativity in developing modern consumer-specific rules. It questions the separation into subjective and objective conformity requirements and argues that there is no room for subjective conformity requirements based on party agreement in most consumer contracts. It then critically analyses the conformity rules in both directives and discusses ambiguities, open questions, as well as positive aspects (for instance, the inclusion of new criteria such as compatibility, functionality and interoperability). It highlights the potential role of the "reasonable expectations" criterion as a way of mitigating the effects of the maximum harmonisation nature of the directives. Finally, it highlights the insufficient account that has been taken of sustainability in the development of these directives, which seems due to a desire to prioritise maximum harmonisation rather than modern, creative consumer law rules

Title: Conformity of Goods and Digital Content/Digital Services

Keywords: Consumer Contracts - Goods - Digital Content - Conformity – Quality

Resumen: En el presente trabajo examina los requisitos de conformidad jurídica en los contratos de venta al consumidor y distingue entre diferentes niveles basados en criterios subjetivos y objetivos. Luego se critican los requisitos de conformidad de dos recientes directivas de la Unión Europea sobre las ventas al consumidor y el suministro de contenidos y servicios digitales, respectivamente. Se critica la técnica de armonización máxima de esas directivas y la falta de flexibilidad que la misma conlleva, así como la falta de creatividad en la elaboración de normas modernas específicas para los consumidores. El trabajo cuestiona también la separación entre los requisitos de conformidad subjetivos y objetivos, y sostiene que no hay lugar para los requisitos de conformidad subjetivos basados en el acuerdo de las partes en la mayoría de los contratos con consumidores. A continuación, se analizan críticamente las normas de conformidad de ambas directivas y sus ambigüedades, las cuestiones pendientes y los aspectos positivos (por ejemplo, la inclusión de nuevos criterios como la compatibilidad, la funcionalidad y la interoperabilidad). Destaca el potencial que puede tener el criterio de las "expectativas razonables", como forma de mitigar los efectos de la máxima armonización de ambas directivas. Por último, destaca la insuficiente consideración que se ha dado al criterio de la sostenibilidad en la elaboración de estas directivas, lo que parece deberse al deseo de dar prioridad a la armonización máxima frente a las normas modernas y creativas del derecho del consumidor

Título: Conformidad de los bienes y los contenidos y servicios digitales

Palabras clave : Contratos de consumo - Bienes - Contenido digital - Conformidad – Calidad

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1. Introduction

The focus of this chapter is on the respective conformity requirements in the Directive on certain aspects concerning contracts for the sale of goods (“SGD”)¹ and in the Directive on certain aspects concerning contracts for the supply of digital content and digital services (“DCSD”).² A conformity requirement in respect of goods was first introduced in the Directive on certain aspects for the sale of consumer goods and associated guarantees (“CSD”)³ back in 1999,⁴ then only applicable to contracts for the sale of goods but not software/digital content. Both the new directives, formally adopted in May 2019 and due to be in force from 1 January 2022, are part of the EU’s Digital Single Market agenda⁵ and as such are intended to contribute to its creation and therefore mark an important building block for it. However, both directives are also the meagre leftovers of what started out as an ambitious project on EU Contract Law,⁶ which had already been reduced to the proposal for a Common European Sales Law (“CESL”)⁷ and which was abandoned in December 2014.⁸ CESL had, in fact, been the second attempt to reform the 1999 SGD, with an earlier proposal for reform included in the proposal for the Consumer Rights Directive,⁹ but the provisions dealing with sales contracts in that proposal were removed during the legislative process and did not appear in the final version of the Consumer Rights Directive (2011/83/EU)¹⁰ at all.

¹ Directive (EU) 2019/771; (2019) OJ L 136/28.

² Directive (EU) 2019/770; (2019) OJ L 136/1.

³ Directive 1999/44/EC; (1999) OJ L171/12.

⁴ For an interesting discussion of “conformity” in European law, see FRANCISCO DE ELIZALDE, “Should the implied term concerning quality be generalised? Present and future of the principle of conformity in Europe” (2017) 25 *European Review of Private Law* 71.

⁵ EUROPEAN COMMISSION, *Communication on a Digital Single Market Strategy for Europe* COM (2015) 192 final.

⁶ The literature on EU Contract Law is vast, but for a (slightly dated) general overview, see e.g., LUCINDA MILLER, *The Emergence of EU Contract Law – Exploring Europeanization* (Oxford University Press, 2011) or CHRISTIAN TWIGG-FLESNER, *The Europeanisation of Contract Law*, 2nd edition (Routledge, 2013)

⁷ COM (2011) 635 final, 11 October 2011. See e.g., MARTIN SCHMIDT-KESSEL (ed.), *Ein einheitliches europäisches Kaufrecht?* (Sellier, 2012); HANS SCHULTE-NÖLKE, FYRDERYK ZOLL, NILS JANSEN AND REINER SCHULZE (eds.), *Der Entwurf für ein optionales europäisches Kaufrecht* (Sellier, 2012).

⁸ European Commission, *Work Programme 2015 – A New Start* COM (2014) 910 final, Annex II, p.12.

⁹ COM (2008) 614 final. See CHRISTIAN TWIGG-FLESNER “Fit for purpose? The proposals on Sales” in GERAINT HOWELLS and REINER SCHULZE (eds.) *Modernising and Harmonising Consumer Contract Law*. (Sellier, 2009); JULES STUYCK, “The provisions on consumer sales” in HANS SCHULTE-NÖLKE and LUBOS TICHY (eds.), *Perspectives for European Consumer Law* (Sellier, 2010).

¹⁰ Directive (EU) 2011/83 on consumer rights; (2011) OJ L 304/64.

The provisions on the conformity requirement are illustrative of several wider problems with these directives. Both directives are of a maximum harmonisation standard, which not only precludes Member States from deviating from the level of consumer protection established by the directives,¹¹ but also commits the EU Member States to a particular approach in establishing consumer rights with regard to the quality of goods, digital content and digital services which leaves no room for innovation to the Member States.¹² This is particularly regrettable, because both directives are characterised by a rather traditional approach. Indeed, the very concept of “conformity” had been a feature of many legal systems before rules on consumer sales were adopted, and this concept was adopted by the EU in the CSD as it was “common to the different national legal systems”.¹³ This was particularly so because the conformity requirement was also used in the UN Convention on the International Sale of Goods (CISG) which had some influence on the drafting of the CSD.¹⁴ To simply adopt this concept on the basis that it is “common” to the Member States is indicative of a lack of creativity in developing purpose-made consumer protection rules and instead betrays the overarching desire to establish common EU rules at any cost rather than a desire to develop a modern and innovative approach to consumer protection.¹⁵ Both of the new directives still assume as the paradigm transaction a bilateral contract between a trader and a consumer, and the notion of “conformity with the contract” in its general conception presupposes negotiation and agreement on most aspects of such a contract between the parties. However, it should go without saying that the very idea of a contract agreed between a trader and a consumer is largely a figment of imagination, with the trader generally setting the terms of that contract. In doing so, the trader is channelled and limited by various legal rules which seek to protect consumers (e.g., on unfair terms¹⁶), but this does not change the general position that a consumer has hardly any influence, or none at all, over the details of the transaction. Therefore, pretending that there might be a proper agreement between a consumer

¹¹ Art.4 DCSD; Art.4 SGD.

¹² This objection to full harmonisation of aspects of contract/private law has been made for two decades: See THOMAS WILHELMSSON, “Private law in the EU: harmonised or fragmented Europeanisation?” (2002) 10 *European Review of Private Law* 77.

¹³ Recital 7, CSD. It is worth noting that this was (and is) not the case everywhere; UK Law uses the notion of an implied term that goods must be of “satisfactory quality” (s.9 Consumer Rights Act 2015). Irish Law still uses the older notion of “merchantable quality” (s.14(2) Sale of Goods Act 1893).

¹⁴ STEFAN GRUNDMANN, “Consumer Law, Commercial Law, Private Law: How can the Sale Directive and the Sales Convention be so similar?” (2003) 14 *European Business Law Review* 237. For a discussion of potential clashes, see BJÖRN SANDVIK, “The Battle for the Consumer: On the Relation between the UN Convention for the International Sale of Goods and the EU Directive on Consumer Sales” (2012) 20 *European Review of Private Law* 1097.

¹⁵ Cf. GERAINT HOWELLS, CHRISTIAN TWIGG-FLESNER and THOMAS WILHELMSSON, *Rethinking EU Consumer Law* (Routledge, 2018), esp.40-42 and pp. 340-343.

¹⁶ Directive 93/13/EEC on unfair terms in consumer contracts (1993) OJ L 95/29.

and a trader about the quality of the goods, digital content or digital services supplied by the trader bears little resemblance to the reality of most consumer transactions. Admittedly, adopting a concept known to the EU's legal systems has the benefit of familiarity and thereby facilitates their adoption and subsequent application of new EU rules at Member State level, but it is also a missed opportunity to create a more tailored system for consumer transactions, particularly those with a cross-border dimension.¹⁷

A further feature of both new directives is the close alignment between the conformity requirements applicable to goods and those applicable to digital content and digital services. Leaving aside the concerns about using a conformity requirement in the first place, taking a very similar approach to the notion of conformity in the two directives could either be lauded for maintaining a high degree of coherence between similar transactions, or criticised for failing to take sufficient account of the unique features of digital content and digital services. In order to determine which of these two views might prevail requires a detailed analysis of the elements of the conformity requirements for goods and digital content/services respectively. The focus of this contribution is a critical analysis of the conformity provisions in the new directives. Before doing so, it will be helpful to explore the reasons for, and possible designs of, a "conformity" notion for consumer transactions.

2. Why a "conformity" requirement?

Before turning to the detail of the conformity requirements in the two new directives, it is first appropriate to take a step back and to consider why there should be a "conformity" requirement, or something similar, enshrined in law at all.

Without any kind of legal conformity requirement, it would be necessary for consumer and trader to agree on the quality and other aspects of the goods or digital content/services every time a new contract is concluded.¹⁸ This would clearly be impractical as it would be a waste of time and of resources to negotiate afresh every single time a person wanted to buy something. Even if negotiation was feasible in a particular instance, the consumer's likely lack of knowledge about the goods or digital content/services and the fact that the qualities of most products supplied to consumers can only be established by using them¹⁹ would make this very challenging.

¹⁷ CHRISTIAN TWIGG-FLESNER, *A cross-border only regulation for consumer transactions in the EU* (Springer, 2012).

¹⁸ Whilst this was the historical position of the common law (*Chandelor v Lopus* (1603) Cro. Jac.4), it was abandoned a long time ago in favour of recognising a minimum expectation that goods would be saleable (in *Gardiner v Gray* (1815) 4 Camp.144, Lord Ellenborough famously said that "the purchaser cannot be supposed to buy good to lay them on a dunghill" (at p.145).

¹⁹ GILLIAN HADFIELD, ROBERT HOWSE and MICHAEL TREBILCOCK, "Information-based principles for rethinking consumer protection policy" (1998) 21 *Journal of Consumer Policy* 131.

In the context of most ordinary consumer transactions, the opportunity for proper negotiation is negligible. The purpose of a legal conformity requirement is therefore to stipulate minimum requirements about quality and fitness which goods must meet, without any need for individual negotiation.²⁰ As such a requirement has to cover a very broad spectrum of goods and digital content/services, it needs to strike a balance between setting reasonably specific requirements whilst retaining a sufficient degree of flexibility to allow for the nature of the goods and digital content/services and the specific circumstances in which a purchase is made.²¹

As far as its substantive requirements are concerned, a legal conformity requirement should establish a baseline standard which provides an objective yardstick for every transaction involving the supply of goods/digital content/digital services. The expectation is that goods/digital content/digital services will at least comply with this baseline standard. Assuming such a baseline standard has been set, the question is to what extent the parties should be permitted to deviate from this standard by agreeing on a different standard in their contract. Thus, having established an objective conformity requirement as the legal baseline standard, there is a choice to be made as to the extent to which the parties may modify this standard subjectively. The answer to this question depends on whether the objective baseline standard is regarded as merely providing a default standard to serve as a gap filler if the parties have not agreed anything specifically about the quality of the goods/digital content/digital service, or as a “mandatory” minimum requirement which cannot be lowered by any agreement between the parties. If it is regarded a default standard, then the parties have the scope to agree in their contract that the goods/digital content/digital service can be of either a lower or a higher standard than the legal baseline standard, i.e., priority would be given to a subjective conformity requirement determined solely by the terms of the contract. However, if it is regarded as a mandatory minimum requirement, then the parties could only agree to higher levels of quality in the terms of their contract, i.e., the subjective conformity requirement in the contract would increase the overall level of quality the goods/digital content/digital service would have to meet under the contract.

The choice of the respective role the objective and subjective elements of conformity should play will usually depend on the type of transaction to which they are applied. In a contract between commercial parties of comparable bargaining strength, it would be sufficient for the objective baseline standard to serve as a default rule which could be modified upwards or downwards through the terms of the contract (possibly subject to some remote control over onerous terms).²² In contrast, in a transaction between a

²⁰ The case for this was made in a seminal paper by GEORGE AKERLOF, “The market for ‘lemons’: quality uncertainty and the market mechanism” (1970) 84 *Journal of Law and Economics* 488.

²¹ In other words, a balance has to be struck between specific rules and flexible standards. On this, see e.g., LOUIS KAPLOW, “Rules versus Standards: an Economic Analysis” (1992) 42 *Duke Law Journal* 557.

trader and a consumer, the objective baseline standard should be a mandatory minimum requirement which could only be modified upwards, but never downwards.²³ One justification for this is that consumers rarely have the expertise and skills to negotiate with a trader about what levels of quality to expect from goods/digital content/digital services. An even stronger justification is the fact that many consumer transactions involve no negotiation, nor even an opportunity for negotiation, at all; in the case of online shopping, a consumer can only decide whether or not to buy whatever is offered on the website.

Generally, therefore, an objective minimum legal standard which all goods/digital content/digital services must meet is appropriate for transactions between a trader and a consumer. However, as already indicated, such a standard has to retain a degree of flexibility to permit some variation to reflect the nature of the goods (e.g., if they are new or second-hand) and other factors relevant in the particular circumstances of the transaction. Without such flexibility, the objective minimum standard would be too strict. Furthermore, if the specific item to be supplied to a consumer has a particular defect or other shortcoming which would not normally present in such an item, then it should be possible to allow the trader to disclose this to the consumer before the contract is made and thereby to exclude this defect/shortcoming when considering whether the goods meet the legal conformity requirement.

This short discussion of the different conceptions of conformity provides the context for the discussion of the substance of the conformity requirements in the new directives, which will be the focus of the remainder of this paper.

3. The Conformity Requirements in the New Directives

In this part, the conformity requirements in both the SGD and the DCSD will be examined in detail. Before turning to the specific elements of the conformity requirements, it is first appropriate to make a number of general observations about the context within which these conformity requirements operate, and to highlight a number of areas of general concern.

3.1.1 General observations

3.1.1.1 Shift to maximum harmonisation

²² The possibility for downwards modification should be distinguished from a total exclusion of the legal baseline standard with no contractually agreed substitute.

²³ It is more difficult to determine whether there should be any kind of legal minimum standard in a transaction between private individuals and, if so, whether it should be the same as that applicable in a trader-to-consumer transaction or be more restricted. This question does not need to be considered further here.

Both directives are of a maximum harmonisation standard,²⁴ in contrast to the CSD.²⁵ This means that, unless either Directive specifies otherwise in respect of a particular provision, EU Member States are not able to deviate from the requirements laid down in these directives. Although the new conformity requirements are more detailed than the previous one and might therefore be expected to cover a wide range of circumstances, the maximum harmonisation nature of both directives precludes a Member State from adding additional elements to the conformity requirements. However, even if a factor which might be relevant to establishing whether goods or digital content supplied under a particular contract is not mentioned expressly in the directives, it may nevertheless be possible to rely on such a factor by reading one of the conformity criteria to encompass this as there is a degree of flexibility retained in the different aspects of the conformity requirements. As will be seen below, some of the aspects of conformity are open-textured and are intended to be applied on the basis of the particular context of the contract.

3.1.1.2 Scope

A few short observations about the scope particularly of the SGD need to be made. The SGD only applies to “sales contracts between a consumer and seller”.²⁶ A contract is a sales contract if “the seller transfers or undertakes to transfer ownership of goods to a consumer” in return for which the consumer will pay the price of those goods.²⁷ As was the case under the CSD, contracts for “goods to be manufactured or produced”²⁸ are within the scope of the notion of “sales contract”. This limitation to certain types of supply contract is regrettable, but it is another indicator of the rather traditional approach of this Directive. In particular, the omission of contracts involving the temporary supply of goods (i.e., hire or leasing) is surprising, not least in view of the growth of the business models based on sharing, as well as the focus on the

²⁴ Art.4 SGD; Art.4 DCSD.

²⁵ The shift to maximum harmonisation in consumer law has always attracted a degree of resistance: see e.g, MICHAEL FAURE, “Towards maximum harmonization of consumer contract law?!?” (2008) 15 *Maastricht Journal* 433; PETER ROTT, and EVELYNE TERRY, “The proposal for a directive on consumer rights: no single set of rules” (2009) 17 *Zeitschrift für Europäisches Privatrecht*, 456, and HANS MICKLITZ and NORBERT REICH “Crónica de una muerte anunciada: the Commission proposal for a ‘directive on consumer rights’.” (2009) 46 *Common Market Law Review* 471. But see EWOUT HONDIUS, “The proposal for a European directive on consumer rights: a step forward” (2010) 18 *European Review of Private Law* 103.

²⁶ Art.3(1) SGD. “Consumer” and “seller” are defined in Art.2(2) and (3) SGD respectively. The term “seller” rather than the more commonly used term “trader” (which is used in the DCSD) seems surprising.

²⁷ Art.2(1) SGD.

²⁸ Art.3(2) SGD.

circular economy²⁹ and “servitisation”,³⁰ but also because such alternative forms of supply will be important particularly for consumers with limited financial resources. Moreover, the limitation of the SGD’s scope to the contract between seller and consumer and the implications this might have for an effective provision of a remedy, particularly where goods were bought online and from another Member State, further shows a lack of creativity. Time and again, the EU has shied away from considering extended forms of liability, such as joint producer liability³¹ or even some form of network liability.³² Whilst recital 23 SGD suggests that platform providers might be sellers in some instances, but only when acting as “direct contractual partner of the consumer”, this is merely stating the obvious and in no way departs from the exclusive focus on a seller-to-consumer contract. Furthermore, whilst the operative provisions of the Directive only refer to “conformity”, Recital 25 SGD makes it clear that “any reference to conformity...should refer to conformity of the goods with the sales contract”, which further underlines the rather traditional approach of the Directive.

A further observation about scope needs to be made, but this time in order to note a novelty: the SGD applies to goods in the established sense (“any tangible movable items”³³) but also to “goods with digital elements”. This extension reflects the fact that many goods rely on and interact with digital content or digital services to perform their functions. Goods with digital elements are defined as goods “that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions”.³⁴ This does not include goods which are purely a tangible medium carrying digital content,³⁵ but it does cover smart goods and goods which need digital content to operate.³⁶ Goods with digital elements are dealt with only under the SGD, so if there

²⁹ See EUROPEAN COMMISSION, *Communication: Closing the loop - An EU action plan for the Circular Economy* COM (2015) 614 final, and *Report on the implementation of the Circular Economy Action Plan* COM (2019) 190 final.

³⁰ VANESSA MAK and EVELYN TERRY, “Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law” (2020) 43 *Journal of Consumer Policy* (forthcoming).

³¹ Producer liability was rejected by the European Commission in its *Communication on the implementation of Directive 1999/44/EC including analysis of the case for introducing direct producers’ liability* COM (2007) 210 final, p.12. For the arguments in favour, e.g., MARTIN EBERS, ANDRE JANSSEN and OLAF MEYER (eds.), *European Perspectives on Producer Liability* (Sellier, 2009).

³² ROBERT BRADGATE and CHRISTIAN TWIGG-FLESNER, “Expanding The Boundaries of Liability for Quality Defects” (2002) 25 *Journal of Consumer Policy* 342-377.

³³ Art.2(5)(a) SGD. Water, gas and electricity put up for sale in a limited volume or a set quantity are within the scope of this definition.

³⁴ Art.2(5)(b) SGD.

³⁵ Recital 13 SGD. The DCSD applies to tangible media carrying digital content.

is a non-conformity arising from a problem with the incorporated or inter-connected digital content/service, this is treated as a non-conformity of the goods.³⁷

3.1.1.3 Subjective and objective conformity requirements

One obvious development of the conformity requirement from the CSD to the SGD and DCSD is the distinction made between a subjective and an objective conformity requirements. With regard to digital content, this is a significant development from the original proposal for the directive,³⁸ which provided for a purely subjective quality standard. This met with considerable criticism, and in the final version of the DCSD, there is the same combination of subjective and objective conformity in the DCSD as in the SGD. This new version of the conformity requirement also abandons the idea of a presumption of conformity which was the approach in Art.2(2) CSD in favour of set criteria which need to be met in all cases.

As will be seen, the subjective conformity requirement covers matters regarding the goods or digital content/services which have been specifically provided for in the contract between consumer and seller/trader, including instances where a consumer has made known a particular purpose for which the goods or digital content/service is required which the seller/trader has accepted. However, irrespective of what might be stipulated in the contract, each directive also provides for objective requirements, i.e., requirements which must be met in every instance, even where nothing specific had been agreed or written into the contract between a consumer and a seller/trader. In both directives, the subjective conformity requirement is mentioned ahead of the objective conformity requirement. This is of no substantive significance in the sense that the objective conformity requirement will always determine the requirements which the goods or digital content/service must meet in all instances and the subjective conformity requirement supplements the objective one. However, their sequencing in both directives might create the impression that the relative significance of the subjective and objective conformity requirements is reversed, even though this is clearly not the case.

Recital 25 SGD indicates that the conformity requirement is needed “to provide clarity as to what a consumer can expect from the goods and what the seller would be liable for in the event of failure to deliver what is expected”. It will be seen below that the “reasonable expectations” of a consumer are an important aspect of the conformity requirement. However, the real purpose of a legal requirement regarding the quality of goods is to provide clarity as to what the expectations in law are with regard to the

³⁶ See Recitals 14 and 15 SGD.

³⁷ On the difficulty of this, see KARIN SEIN, “What Rules should apply to smart consumer goods?” (2017) 8 *JIPITEC* 96.

³⁸ This development is discussed e.g., by KARIN SEIN and GERHARD SPINDLER, “The new Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2” (2019) 15 *European Review of Contract Law* 365 at pp.367-8.

goods. Nevertheless, Recital 26 SGD underlines the importance of the subjective conformity element. The justification for having both a subjective and objective element is to “safeguard the legitimate interests of both parties to a sales contract”,³⁹ although it does not expand on what those respective legitimate interests would be.

3.1.1.5 Parallelism between conformity requirements for goods and digital content/services

The discussion below will show that there is a high level of similarity between the conformity requirements for goods and digital content/services, both in terms of structure and substance.⁴⁰ The notion of conformity is established in the context of the sale of goods, and whilst there are some distinct features of transactions for the supply of digital content/services,⁴¹ there are good reasons for aligning goods and digital content/services as both could be characterised as something concrete, albeit not tangible.⁴² However, this approach could also be indicative of a particular policy choice in favour of promoting coherence⁴³ within the law rather than developing targeted solutions where the latter would be more suitable in tackling the specific legal issues created by the digital environment. Digital content might therefore require a more tailored conformity requirement than a slightly adjusted copy of the conformity requirement applicable to goods.⁴⁴

3.1.2 Timing of Conformity

In defining the trader’s obligation regarding the conformity of the goods or the digital content/services, it is necessary to determine the point at which compliance with that obligation should be assessed. Both directives define that point with reference to the moment when the trader provides the consumer with the goods or digital content/service. Thus, under the SGD,⁴⁵ the relevant point at which the goods must be in conformity is the time at which they are delivered to the consumer. Similarly, under

³⁹ Recital 25 SGD, final sentence.

⁴⁰ This was also the approach taken in the UK’s Consumer Rights Act 2015.

⁴¹ STOJAN ARNERSTÅL, “Licensing digital content in a sale of goods context” (2015) 10 *Journal of Intellectual Property Law and Practice* 750

⁴² SARAH GREEN, “Sales Law and Digitised Material” in DJAKHONGIR SAIDOV (ed), *Research Handbook on International and Comparative Sale of Goods Law* (Elgar, 2019).

⁴³ See e.g., ROGER BROWNSWORD, “After Brexit: Regulatory-instrumentalism, Coherentism and the English Law of Contract” (2017) 34 *Journal of Contract Law* 139, who juxtaposes an approach prioritising coherentism with regulatory interventionism.

⁴⁴ Cf. REINER SCHULZE, “Supply of Digital Content – A new challenge for European Contract Law” in ALBERTO DE FRANCESCO (ed.), *European Contract Law and the Digital Single Market* (Intersentia, 2016).

⁴⁵ Art.5 SGD.

the DCSD,⁴⁶ the relevant moment is the point of supply of the digital content/service to the consumer.

Delivery has not been defined in the SGD and this is therefore delegated to national law,⁴⁷ although Art.18 (1) of the Consumer Rights Directive (2011/83/EU) will be relevant here: this describes delivery as “transferring the physical possession or control of the goods to the consumer”. Although this is not a definition *stricto sensu*, Art.18(1) sets out what a trader has to do in order to deliver goods, and therefore, this description should be treated as a definition.

Similarly, there is no definition of “supply” in the DCSD as such, but Art.5(2) sets out what a trader needs to do in order to fulfil the obligation to supply digital content/services. Thus, to supply digital content, the trader has to make “the digital content or any means suitable for accessing or downloading the digital content”⁴⁸ available or accessible to the consumer or to a “physical or virtual”⁴⁹ facility chosen by the consumer for this. A digital service has been supplied if it is made accessible to the consumer or to a chosen virtual or physical facility.⁵⁰ Crucially, therefore, the final step of downloading the digital content onto the consumer’s device or accessing the digital content/service falls on the consumer.⁵¹ In the hybrid case of goods with digital elements, the relevant point in time is when both the physical item has been delivered to the consumer and the necessary digital content/service supplied.⁵²

Although the criteria for delivery and supply have been expressed in terms specific to the nature of goods and digital content/services respectively, they are comparable in that both focus on the point at which the seller/trader puts the consumer in control over the goods (by transferring physical possession) or the digital content/service (by making it accessible).

3.1.3 Conformity of Goods

As noted earlier, the SGD distinguishes between subjective and objective requirements of conformity. These requirements are now explored in turn.⁵³

⁴⁶ Art.6 DCSD.

⁴⁷ Recital 38 SGD. Strangely, there is no cross-reference to Art.18(1) of the Consumer Rights Directive (2011/83/EU).

⁴⁸ Art.5(2)(a) DCSD.

⁴⁹ Art.5(2)(a) DCSD.

⁵⁰ Art.5(2)(b) DCSD.

⁵¹ Cf. Recital 41 DCSD.

⁵² Recital 39 SGD.

3.1.3.1 Subjective conformity requirement

The elements of the subjective conformity requirement are found in Art.6 SGD. As discussed earlier, most of these elements would only be relevant if something about them is included in the sales contract, and to that extent, Art.6 SGD seems to do little more than to require the seller to comply with the express terms of the sales contract.

3.1.3.1.1 Fitness for particular purpose

An element which is familiar from the CSD⁵⁴ is the “fitness for a particular purpose” requirement.⁵⁵ If a consumer requires goods for a particular purpose and that purpose was made known to the seller before the sales contract was concluded,⁵⁶ then those goods must be fit for that purpose. This is, however, subject to the proviso that the seller must have accepted⁵⁷ that the goods are fit for the purpose made known. There is no indication regarding the degree of precision with which the consumer must explain the purpose for which the goods are required. This may be significant in instances where the purpose is very unusual and it subsequently transpires that the goods are not suitable for that purpose. The seller may have “accepted” that purpose as one for which the goods would be suitable, but that decision may have been influenced by whatever information about the purpose was provided by the consumer. If the lack of fitness for the particular purpose is due to factors which had not been fully made known to the seller, then it would be arguable that the seller should not be liable for the alleged non-conformity. It would therefore seem appropriate to add a gloss to this requirement that the seller’s acceptance must have been given on the basis of all the relevant essential information about the consumer’s particular purpose.⁵⁸ The degree of detail which a consumer would have to provide would vary depending on how uncommon the purpose is for which the goods are required; fewer details would be necessary where the purpose was not as uncommon. In this regard, there may be a grey area as to whether a more common purpose for which the

⁵³ This contribution does not discuss Articles 9 SGD and 10 DCSD on the impact of a violation of third-party rights on the conformity of the goods or digital content/service respectively. Both articles equate a restriction arising from such third-party rights as a non-conformity, although defer to national law where this provide a remedy of rescission or nullity in this instance.

⁵⁴ See Art.2(2)(b) CSD.

⁵⁵ Art.6(b) SGD.

⁵⁶ The phrase in Art.6(b) SGD is “at the latest at the time of the conclusion of the sales contract”, which refers to the latest point at which the consumer must make known the particular purpose for it to be part of the subjective conformity requirement.

⁵⁷ The wording of Art.6(b) SGD here (“in respect of which the seller has given acceptance”) is rather awkward and unnecessarily long-winded.

⁵⁸ In UK law, for example, there is the requirement that the consumer must have relied on the seller’s skill or judgment (see Consumer Rights Act 2015, s.10(4)), and such reliance would not be reasonable where the seller did not have important information necessary for exercise its skill or judgment.

consumer requires the goods would still be within the purview of the subjective conformity requirement, or fall under an element of the objective conformity requirement: Art.7(1)(b) states that it is an aspect of objective conformity that the goods are “fit for the purposes for which goods of the same time would normally be used”, and so there might be room for disagreement whether a particular purpose mentioned by a consumer which is not uncommon should be regarded as a “normal use” of the goods anyway or one which has to be made known to and accepted by the seller.

3.1.3.1.2 Description, Type, Quantity and Quality

In addition to this element, Art.6 SGD mentions a number of other aspects which are relevant insofar as the sales contract so requires or stipulates. Thus, according to Art. 6(a) the goods must “be of the description, type, quantity and quality” required by the sales contract. “Description” is familiar from the CSD conformity requirement.⁵⁹ This is perhaps the most fundamental aspect of conformity as it essentially requires that the goods delivered to the consumer are the goods described in the contract. There may be a question as to whether the “description” encompasses every descriptive word relating to the goods or only words which define the key features of the goods. In this regard, it must be remembered that a consumer must be given information about “the main characteristics of the goods” before concluding a contract in accordance with the Consumer Rights Directive (2011/83/EU).⁶⁰ In the case of an off-premises or distance contracts, such information becomes an integral part of the contract.⁶¹ At the same time, this information would also be part of the description of the goods and therefore subject to the remedies for non-conformity if not complied with.⁶² However, it is unclear whether “description” in Art.6(a) covers more than just the “main characteristics” of the goods. Even if it does, there would still have to be some outer limit as to which words would be relevant descriptive words so as not to allow a consumer to claim that there is a non-conformity where there the goods are not in accordance with words which are at best tangentially descriptive.

⁵⁹ Art.2(2)(a) CSD.

⁶⁰ See Arts.5(1)(a) and 6(1)(a) respectively.

⁶¹ Art.6(5) Consumer Rights Directive.

⁶² Compare the position under the UK’s Consumer Rights Act 2015: section 11(4) includes information about the “main characteristics of goods” required by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (implementing the Consumer Rights Directive) within the requirement that goods must correspond with their description and thereby makes the remedies for non-conformity available for instances when goods do not match this information (s.19(1)). Other items of information are not regarded as part of the conformity requirement and non-compliance by the trader only attracts a limited right to compensation for any resulting costs incurred by the consumer (s.19(5)).

A further question is raised by the word “type”, because it is not clear what this might mean,⁶³ other than that it is different from “description”. “Type” usually suggests a category of things (or people) with common characteristics. For instance, carrots are a type of vegetable and skinny jeans are a type of trouser. The difficulty with this term is how broadly type should be understood in the context of the conformity requirement: a carrot is also a type of plant-based foodstuff, and skinny jeans are a type of clothing. So whether goods are of the correct “type” may be context-dependent - although for the purposes of the subjective conformity requirement, the “type” will be as stated in the contract.

The express reference to “quantity” is a new but useful addition to the conformity requirement. If the wrong quantity of the goods is delivered, then this will allow the consumer to invoke (most of) the remedies for a non-conformity, although subject to the proviso in Art.13(5) SGD precluding the right to terminate where the non-conformity is only “minor”. The practical remedy for a consumer would be to ensure that the seller delivers the correct quantity, either by making-up a shortfall or by removing any excess; the difficulty may be in determining whether this should be treated as “repair” or “replacement”, even though neither remedy intuitively seems to capture what the seller would have to do.⁶⁴

A reference to “quality...as required by the contract” is also new. However, this does not mean that the required level of quality is exclusively determined by the contract as quality is also an aspect of the objective conformity requirement.⁶⁵ In the context of the subjective conformity requirement, contractually-required quality is therefore likely be relevant only insofar as the contractually-required level of quality exceeds that demanded in the objective conformity requirement. If the quality required by the contract were to be less than under the objective conformity requirement, then the latter would effectively displace the contractually-required quality in any event.

3.1.3.1.3 Functionality, Compatibility, Interoperability and other features

Art.6(a) further requires that the goods must “possess the functionality, compatibility, interoperability and other features” which might be required by the sales contract. These particular requirements are novel and reflect the fact that many goods now interact with other goods as well as software/digital content (hence the inclusion of “goods with digital elements” within the scope of the SGD). All three terms have been defined in both the SGD and CRD. “Functionality” indicates that the goods are able to

⁶³ Cf. ROBERT BRADGATE and CHRISTIAN TWIGG-FLESNER, *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (Oxford University Press, 2003), pp.60-61.

⁶⁴ As the purpose of either remedy is to bring the goods into conformity (cf. Art.13(2) SGD), this may not be particularly problematic in any case. The UK’s Consumer Rights Act 2015 contains a specific provision dealing with the delivery of the wrong quantity in s.25.

⁶⁵ See Art.7(1)(d) SGD.

perform their functions, having regard to their purpose.⁶⁶ “Compatibility” refers to the “ability of the goods to function with hardware or software with which goods of the same type are normally used, without the need to convert the goods, hardware or software”.⁶⁷ Finally, “interoperability” denotes the ability of goods to function with “hardware or software different from those with which goods of the same type are normally used”.⁶⁸ The definitions of all three terms have objective reference points to them (“purpose” and “normally used”), but in the context of the subjective conformity requirement, they would have to be read as referring to the purposes or uses specified in the contract, whether these would be “normal uses” or not, as all three are also part of the objective conformity requirement.⁶⁹ So, similar to the reference to “quality” in this context, any contractual requirements as to functionality, compatibility and interoperability can specify both what would be “normal uses” of the goods in any event (but provide greater clarity) and also specify instances where the functionality, compatibility and interoperability of the goods goes beyond what would be “normal uses”.

Finally, there is reference to “other features” which may be required by the contract. This term is not defined and could potentially be given a broad meaning to cover any other aspect of the goods not covered by the other factors mentioned in Art.6 SGD.

In addition to these aspects of subjective conformity, there are also the requirement that the goods must be “delivered with all accessories and instructions, including on installation”⁷⁰ and “supplied with updates”⁷¹ in accordance with the sales contract.

3.1.3.2 Objective conformity requirement

Article 7 SGD sets out the objective conformity requirements, i.e., those requirements which must be met in respect of every sales contract, irrespective of what is required under the terms of the contract itself. In essence, Article 7 lays down the minimum level of quality mandated in law. As will be seen, this minimum level is not a low level, and there are detailed obligations which need to be met to ensure that the goods satisfy the objective conformity requirements. Article 7 SGD is a development of the elements of conformity in Art.2(2) CSD, with several aspects added to the earlier version.

⁶⁶ Art.2(9) SGD; Art.2(11) DCSD.

⁶⁷ Art.2(8) SGD; Art.2(10) DCSD.

⁶⁸ Art.2(10) SGD; Art.2(12) DCSD.

⁶⁹ See Art.7(1)(d) SGD.

⁷⁰ Art.6(c) SGD.

⁷¹ Art.6(d) SGD.

3.1.3.2.1 Fitness for normal use

The first aspect of the objective conformity requirement is that the goods must be “fit for the purposes for which goods of the same type would normally be used.”⁷² In using the plural (purposes), it is made clear that it would not be sufficient if the goods delivered were fit for only one such purpose. In order to determine the purposes for which the goods must be suitable, Art.7(1)(a) SGD refers to the purposes for which goods “of the same type” would be “normally used”. The meaning of “type” was discussed above in the context of the subjective conformity requirement.

The perspective of this requirement seems to be that of the user, i.e., the consumer, rather than the supplier.⁷³ This may be significant in some instances: it is not uncommon for consumers to use goods for purposes for which they may not have been intended. A classic example for this is a screwdriver, which is often used to open tins of paint, even though that is not one of a screwdriver’s intended purposes. It would seem that, if consumers regularly use goods for purposes for which they may not have been intended but a particular item supplied to a consumer is unfit for such a purpose, there may be a breach of the objective conformity requirement (unless there is some kind of express disclaimer by the seller). However, Art.7(1)(a) contains an addition which was not part of the corresponding provision in the CSD,⁷⁴ according to which account should be taken of “any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct.”⁷⁵

It is immediately apparent that all of these are focusing on the perspective of the supplier, or the manufacturer, but not on the position of the consumer. There may be legal provisions, technical standards or sector-specific codes indicating what the intended purposes are to which goods might be put. As these need to be taken into account when determining whether the goods delivered to a consumer are fit for the purposes for which they are normally supplied, it would seem that the primary focus of Art.7(1)(a) is on the supply-side perspective after all, despite the wording chosen for this sub-paragraph. That said, it may be assumed that consumers would normally use goods for their intended purpose anyway, and so it is also possible to interpret Art.7(1)(a) to encompass both the purposes for which the goods are intended to be used and any purposes for which consumers normally use the goods, even if such purposes are not the normal purposes envisaged in legislation, technical standards or industry codes. From a consumer protection perspective, that would be the better

⁷² Art.7(1)(a) SGD.

⁷³ Contrast s.9(3)(a) of the UK’s Consumer Rights Act, which refers to purposes for which the goods are “usually supplied”. Here, the focus is on the supplier’s perspective and the purposes in question would be the ones for which the supplier (or rather, the manufacturer) intended to supply the goods.

⁷⁴ Art.2(2)(c) CSD.

⁷⁵ Art.7(1)(a) SGD.

interpretation of this sub-paragraph, although this might invite the objection that it would expose a seller to liability for a non-conformity arising from a failure of the goods to be fit for an unintended purposes. Whilst this would seem to be the case, there are two points which would limit a seller's exposure in this regard: first, the purpose for which consumers use the goods must be "normal use", which suggests that it would have to be both common and wide-spread. Both sellers and manufacturers can therefore be expected to be aware of this and so the risk of being liable for a non-conformity is foreseeable if the goods are not fit for such a purpose. Secondly, because the purposes to which consumers might put those goods are likely to be common and wide-spread and should therefore be known to both seller and producer, a seller could make it clear to the consumer at the time of concluding the sales contract that the goods are not fit for such a common, but not intended purpose.⁷⁶

3.1.3.2.2 Correspondence with sample or model

The second aspect⁷⁷ of the objective conformity requirement applies where the seller provided the consumer with a sample or model before the sales contract was concluded. In such a situation, the goods delivered to the consumer must be of the same quality and correspond to the description of the sample or model. Samples may be used in many every-day consumer transactions. For example, a consumer wishing to buy new curtains for their living-room will often decide on the basis of fabric swatches shown to them by the seller. Paint for home-decorating is often made available in small "tester pots" to allow consumers to see what the paint would look like in the room for which it is intended. The importance of this aspect of the objective conformity requirement is that whatever is ultimately supplied must be of the same quality as those samples and be of the same description. In the case of paint, for instance, the shade of the paint supplied to the consumer should be same as that of the sample and not a different shade.

3.1.3.2.3 Accessories, Packaging, Instructions

The third aspect of the objective conformity requirement is altogether new. It requires that the goods must be delivered with "accessories, including packaging, installation instructions or other instructions".⁷⁸ The yardstick for determining what needs to be done in order to comply with this requirement are the reasonable expectations of the consumer.⁷⁹ The wording of this is somewhat strange, in that it seems to regard packaging and various forms of instructions as "accessories". However, this is most

⁷⁶ See Art.7(5) SGD, removing from the objective conformity requirement a "characteristic of the goods ... deviating from the objective requirements...". See below.

⁷⁷ Art.7(1)(b) SGD.

⁷⁸ Art.7(1)(c) SGD.

⁷⁹ See final words of Art.7(1)(c) SGD.

likely an instance of poor drafting. In particular, linking “packaging” to a consumer’s reasonable expectations seems unusual. Surely it would have made more sense to require packaging to be suitable for ensuring that the goods will reach the consumer in the expected condition and without damage.⁸⁰ Of course, this will also be what a consumer would reasonably expect in any case, so this may not make a great difference in practice. In fact, linking packaging to the reasonable expectations of consumers might mean that packaging needs to be more than just suitable for getting the goods safely to the consumer, and could cover matters such as whether the packaging is recyclable or not.

Installation instructions were already a feature of the CSD in respect of an instance of incorrect installation.⁸¹ The reference within Art.7(1)(c) SGD adds an additional aspect, because the assessment of objective conformity now includes asking whether the goods were delivered with the installation instruction in the first place. Thus, if a consumer is required to do something to the goods before they can be used, but no instructions to guide the consumer have been provided at all, this could render the goods non-conforming. The inclusion of “other instructions”, which would cover things such as user guides and warnings, also serves as a helpful addition.

3.1.3.2.4 Qualities and features normal for goods and reasonably expected

The fourth aspect of conformity in Art.7(1)(d) contains a wide range of factors. The main requirement here is that the goods must “be of the quantity and possess the qualities and features...normal for goods of the same type and which the consumer may reasonably expect”. The preliminary point to note is that the reference to quantity in this context seems unusual, particularly as quantity is linked to what would be normal and reasonably expected by a consumer. Quantity is already part of the subjective conformity requirement, and that would be the better place for it as quantity is usually something chosen by the consumer and therefore something which is part of the agreement between seller and consumer.

The heart of this provision is that the goods must have the qualities and features which are normal for goods of the same type and which the consumer might reasonably expect. This aspect of the objective conformity requirement is a flexible test to determine whether the goods delivered to the consumer meet the consumer’s reasonable expectation as to their qualities and features. This determination will depend on the circumstances of each particular sales contract and a wider range of factors could be taken into account in establishing whether the goods meet the consumer’s reasonable expectations which regard to qualities and features. Some qualities and features are mentioned expressly in Art.7(1)(d): durability, functionality, compatibility and security. There are definitions of “functionality” and “compatibility” which were discussed earlier in the context of the subjective conformity requirement,

⁸⁰ Cf. Art.35(2)(d) of the UN Convention on the International Sale of Goods, referring *int. al.*, to “the manner adequate to preserve and protect the goods”.

⁸¹ Cf. Art.2(5) CSD.

where they are first mentioned.⁸² In contrast to Art.6(a), there is no mention of “interoperability” in Art.7(1), which would suggest that this is not intended as a feature of the objective conformity test. However, the qualities and features mentioned in Art.7(1)(d) are not exhaustive: their mention is preceded by the words “including in relation to...”, indicating that these are indicative qualities and features, and that the possibility that others could also be relevant is not precluded. Indeed, the overriding determinant for which qualities and features will be relevant is the twin test of (i) what would be normal for goods of the same type and (ii) what the consumer would reasonably expect (discussed shortly).

The express reference to “durability” in the context of the EU’s conformity regime is new.⁸³ It was included at least in part in order to promote more sustainable consumption and the circular economy.⁸⁴ “Durability” is defined as “the ability of the goods to maintain their required functions and performance through normal use”,⁸⁵ assessed with reference to what would be normal for goods of the same type and reasonably expected by a consumer. This assessment may be subject to the need for reasonable maintenance and cleaning.⁸⁶ In addition, any specific claims regarding durability made in pre-contractual information will be relevant; as will be any product-related rules regarding durability in EU law.⁸⁷ This is a welcome and much-needed addition to the aspects of conformity.

As already noted, there are two prongs to the test for determining the relevant qualities and features which the goods must possess to meet the objective conformity requirement. The first is to consider what qualities and features would be “normal for goods of the same type”. The difficulty of determining what goods of the same “type” might be was discussed earlier, and the difficulty of identifying a suitable type as the requisite comparator in the present context is even more acute.

The second prong is to ask what qualities and features a consumer might reasonably expect. This is an objective test, as confirmed in Recital 24 which states that “reasonableness should be objectively ascertained, having regard to the nature and purpose of the contract, the circumstances of the case and to the usages and practices of the parties involved.” It also confirms that the application of this test is context-sensitive and not only to be conducted as an abstract exercise, but rather as an

⁸² See above.

⁸³ Cf. Art.2(2) CSD, which does not mention durability. “Durability” has been part of the UK’s “satisfactory quality” requirement since changes were made to the Sale of Goods Act 1979 by the Supply of Goods and Services Act 1994; see now section 9 (3)(e) of the Consumer Rights Act 2015.

⁸⁴ Recital 32.

⁸⁵ Art.2(13) SGD.

⁸⁶ Recital 32.

⁸⁷ *Ibid.*

objective assessment of what would be reasonable in the particular circumstances of the sale contract at issue.

In addition to these general factors, in order to determine what a consumer might reasonably expect, Art.7(1)(d) refers first to the nature of the goods, and secondly to “any public statements made by or on behalf of the seller, or other persons in the previous link of the chain of transactions, including the producer, particularly in advertising or on labelling”. This aspect is familiar from Art.2(2)(d) CSD, where it was first introduced. It is an important recognition of the fact that advertising can have a significant influence on a consumer’s reasonable expectations regarding the qualities and features of goods. Whilst this was already a significant element in shaping consumer expectations 20 years ago when the CSD was adopted, it has become even more significant as new channels for advertising have emerged thanks to digital technology and digital business models (especially social media platforms). Moreover, the ability to use personal data linked to a consumer to target advertising at particular individuals has further strengthened the role advertising may play in shaping consumers reasonable expectations.

However, as under the CSD, there is a limitation to the extent to which public statements can be taken into account in determining a consumer’s reasonable expectations. Thus, Art.7(2) SGD excludes public statements from the objective conformity assessment if the seller can show that:

- “(a) the seller was not, and could not reasonably have been, aware of the public statement in question;
- (b) by the time of conclusion of the contract, the public statement had been corrected in the same way as, or in a way comparable to how, it had been made; or
- (c) the decision to buy the goods could not have been influenced by the public statement.”

These three exclusionary factors were already used in the CSD and so will give rise to comparable questions and issues. The opening words to Art.7(2) that “the seller shall not be bound by public statements...” immediately raise the question as to when the seller would be bound by the public statements mentioned in Art.7(1)(d) SGD. After all, there is no suggestion in the wording of that sub-paragraph that the seller would be bound by those public statements; rather, public statements can be referred to in order to ascertain what the consumer’s reasonable expectation would be in respect of the qualities and features of the goods. Whilst it is correct to say that the seller is bound more generally by the objective conformity requirement and public statements are relevant in determining the substance of the seller’s obligations in the context of a particular sales contract, this does not invariably mean that the seller should be regarded as “bound” by those public statements. To say that the seller is “bound” is to imply that these public statements become part of the sales contract, but that is not the effect of Art.7(1)(d). It would therefore have been a neater (and correct)

expression to say that “public statements will not be taken into account for establishing what a consumer can reasonably expect if the seller can show that...”, as that would capture more clearly what the purpose of these exclusions is.

The first of these is the inevitable consequence of the Directive’s focus on holding only the seller liable for the conformity of the goods and adhering to the notion of contractual liability. It also is illogical in light of the role public statements have in the context of Art.7(1)(d). Its ostensible rationale is that if a person higher up in the chain of transactions has issued a public statement of which the seller neither had knowledge, nor could reasonably have had knowledge, then such a public statement should not be relevant to the application of the objective conformity requirement. This may be justified on the basis that the seller could correct or clarify the public statement before the consumer concludes the contract if the seller is aware of the statement. However, it may be questioned whether this should matter in the first place, because public statements are only relevant to assessing the consumer’s reasonable expectations and if a consumer’s expectations have been shaped, at least in part, by a public statement regarding the goods then there seems to be no justification for undermining that expectation on the basis of a criterion which is entirely unconnected from what the consumer would reasonably expect. There is no way for a consumer to know whether public statements may or may not have been known to the seller, and the consumer’s expectations will have been shaped by the public statement irrespective of the seller’s knowledge in any case.

In contrast, the other two exempting factors are relevant to the consumer’s reasonable expectations. A public statement might contain an inaccuracy or it might give an incorrect impression regarding the qualities or features of the relevant goods. The person making that public statement can take steps to clarify or correct this, and if a correction has been provided, then the incorrect public statement should no longer be relevant to determining a consumer’s reasonable expectations regarding the goods. There can, of course, be no certainty that a consumer who had seen the original public statement may also be aware of the correction, so Art.7(2)(b) SGD provides an appropriately balanced solution: provided that the correction was made in the same way in which it was made (e.g., by an updated advertisement which makes it clear that it contains a correction), then the original statement will no longer be relevant, irrespective of whether the consumer saw the correction or not. It is also possible to correct the statement using a “way comparable to how” the public statement was first made. This invariably invites arguments as to what ways of correcting a public statement might be comparable to the way it was made in the first place. It might, for example, be applicable to advertising via a social media feed. The correction could either be effected by another advertisement using the same social media feed (“in the same way”), or by including a post on that social media feed which contains the correction (“a way comparable”). One might expect further clarification on this issue through a preliminary ruling by the CJEU.

Finally, if the seller can show that the decision to buy the goods could not have been influenced by the public statement, then it will also not be relevant to determining what the consumer might reasonably expect. It can immediately be pointed out that this exclusion also focuses on the wrong question, because it looks at the consumer's decision to buy the goods in the first place rather than the reasonable expectation as to qualities and features which the consumer may have based on that public statement. Instead, this exclusion should be available where the public statement could not have influenced the consumer's reasonable expectations regarding qualities and features. This might be the case where the public statement was clearly vastly exaggerated and could not have been intended to convey a realistic impression of the qualities of the goods (e.g., a car which is being driven upside down). It would also be the case where the seller is able to show that the consumer has never actually seen or heard the public statement at all, in which case it could not shape the consumer's reasonable expectations (nor, indeed, influence the decision to enter into the contract).⁸⁸

The problems with Art.7(2) identified above are mainly due to the inconsistency between Art.7(1)(d), which refers to public statements being taken into account to ascertain a consumer's reasonable expectations, and the fact that Art.7(2) proceeds from the premise that public statements effectively become parts of the contract in themselves and not merely indirectly via the objective conformity test. This inconsistency is more than just an instance of poor drafting; rather, it seems to be a lack of understanding of the part of the EU legislator about how the conformity test should be understood.

3.1.3.2.5 Updates to keep goods in conformity

Article 7(3) introduces a new aspect to the objective conformity requirement which is applicable only to goods with digital elements. Such goods rely on digital content and/or digital services to perform their functions. As digital content/services are notorious for requiring updates to fix bugs or to deal with security issues, an obligation to provide whatever updates are required to ensure that the goods remain in conformity with the contract has been introduced. It is important to note that Art.7(3) only deals with those updates that are required "to keep the goods in conformity", so it does not concern any updates which might introduce additional features which were not present at the time of delivery, nor envisaged under the terms of the contract.⁸⁹

⁸⁸ It should be noted that these exclusionary factors date back to some time before the adoption of Directive (EC) 2005/29 on unfair commercial practices ((2015) OJ L 149/22)), which has a bearing on what is acceptable in public statements, which in turn might influence the application of the final criterion (Art.7(2)(c) SGD).

⁸⁹ Recital 30 confirms this. See also Art.6(d) SGD, which makes "updates as stipulated by the contract" part of the subjective conformity requirement. This covers both regular updates to improve performance as well as any updates which promise additional features, if this was included in the contract.

The seller's obligation is to ensure that the consumer is informed about and supplied with those updates that are needed to keep the goods in conformity. There is no obligation on the seller either to inform the consumer about or supply the update himself, nor is the seller responsible for installing those updates in the consumer's digital environment. As the digital content/service element of goods with digital elements will often be supplied by a third party, the seller's obligation is to make sure that information about updates, and the updates themselves, can reach the consumer. A seller should be able to discharge this obligation e.g., by means of an e-mail to the consumer to inform the consumer about the existence of the update and a link to a website from which the update may be downloaded. However, in practice, there is more likely to be either an option in the digital content/service to install updates automatically, or the consumer will be made aware of the availability of an update through a notification within the digital content/service itself.

The significance of this provision is to recognise that updates must be available in the first place so as to enable the consumer to utilise the goods for however long is envisaged. Indeed, the seller's obligation under Art.7(3) is a continuing one, and the duration of this obligation is determined in one of two ways. First, where the digital content/service is supplied through a one-off act,⁹⁰ updates must be available for as long as a consumer may reasonably expect.⁹¹ Those reasonable expectations are based on the type and purpose of the goods and the digital elements, as well as the circumstances and nature of the sales contract. This permits a flexible assessment of the length of the duration of the seller's obligation under Art.7(3), rather than stipulating a set time-period. However, this has to be read together with Art.10(1) SGD which provides a general limitation of the seller's liability to any non-conformity which becomes apparent within two years from the date of delivery. It would therefore seem that a consumer's reasonable expectations could not exceed two years in those instances where the digital content/service element of the goods is supplied through a one-off act.

The situation is different where the sales contract provides for the continuous supply of the digital content or digital service.⁹² In this case, the seller's obligation in respect of updates to keep the goods in conformity is linked to the duration of the period during which the seller is generally liable for a non-conformity. The default period for goods with digital elements is also two years;⁹³ however, if the sales contract provides for a period of supply for more than two years, then the seller's liability period extends to the contractual period of supply,⁹⁴ and consequently so will the obligation to ensure

⁹⁰ Such as downloading an eBook (Recital 56 DCSD).

⁹¹ Art.7(3)(a) SGD.

⁹² Such as a two-year subscription to a cloud storage service, or indefinite social media platform membership: Recital 57 DCSD.

⁹³ Article 10(2) SGD, first sentence.

that the consumer is informed about and supplied with updates to keep the goods in conformity.

As mentioned earlier, the seller only has to ensure that the consumer is supplied with updates but not that those updates are installed. The responsibility for installing those updates is placed on the consumer, which is evident from Art.7(4) SGD: this restricts the seller's liability in instances where a consumer has failed to install any update within a reasonable period of time. If, without that update, the goods are no longer in conformity with the contract, the seller will not be liable for the resulting non-conformity; however, this will only be the case if the consumer's failure to install the update is the sole reason for the non-conformity. It is a pre-condition to the seller's exemption of liability for non-conformity in this situation that the seller had informed the consumer about both the availability of the update and the consequences of the consumer failing to install the update.⁹⁵ Although the wording of Art.7(4)(a) SGD does not make this clear, the consequences in this instance, presumably, must be the fact that the goods would no longer be in conformity. A second requirement for this exemption is that the failure of the consumer to install the update at all, or to do so correctly, was not the result of any shortcomings in the instructions for installing the update given to the consumer.⁹⁶

3.1.3.2.6 Exclusions from the conformity requirement

The final element of the objective conformity requirement is an exclusionary provision in Art.7(5) SGD. This addresses a situation where a consumer was told ("specifically informed") before entering into the sales contract that there was an aspect of the goods which would render the goods not in conformity with the contract ("a particular characteristic deviating from the objective requirements for conformity"). Usually, this might cover a particular defect in the goods, or it could apply where something is missing that would ordinarily be supplied with the goods (e.g., in the case of second-hand goods⁹⁷). Its rationale is that a consumer should not be entitled to complain about a matter which would render the goods non-conforming if the consumer knew about this before concluding the sales contract. It is important to note that the consumer must have been "specifically informed", i.e., the particular defect or problem must have been identified and the consumer must have been told about it. This places the onus firmly on the seller to ensure that the consumer knows about the problem.

This is a narrower exclusionary provision than the corresponding provision in the CSD. Article 2(3) CSD excluded matters of which the consumer "was aware or could not

⁹⁴ Article 10(2) SGD, second sentence.

⁹⁵ Art.7(4)(a) SGD.

⁹⁶ Art.7(4)(b) SGD.

⁹⁷ Recital 36 SGD.

reasonably be unaware of”.⁹⁸ If a seller informed a consumer specifically about a problem, then this would mean that the consumer is aware of the problem. However, a consumer could also have become aware of a problem by other means, e.g., through an examination of the goods before entering into the contract of sale, or perhaps through widespread reports of a problem with the goods in question. This no longer appears to be relevant under the Art.7(5) SGD.

However, specifically informing a consumer about a matter affecting compliance with the objective conformity requirement is not sufficient. It is further required that the consumer must “expressly and separately” accept the “deviation” when concluding the sales contract.⁹⁹ This could mean that a consumer might have to sign a written statement confirming such acceptance, although that would add quite a heavy bureaucratic burden for the seller. However, this would not seem to be necessary. Rather, Art.7(5) seems to require that the consumer is informed and confirms expressly that he/she wishes to proceed with the sales contract only. It would not be possible to infer the consumer’s acceptance purely from the fact that the consumer completed the sales contract. Instead, there has to be some express indication (and record) of acceptance of the matter affecting compliance with the objective conformity requirement.

3.1.3.3 Incorrect installation of the goods

A further feature of the conformity requirement retained from the CSD is Art.8 SGD,¹⁰⁰ which applies to instances where the goods have to be installed. The effect of Art.8 SGD is that a non-conformity of the goods which results from their incorrect installation is regarded as a non-conformity of the goods itself. There is no definition of “installation” in the SGD. It will cover goods which have to be connected to something before they can work, such as connecting a washing machine to the water supply. However, it also seems to cover instances where goods have to be assembled before they can be used.¹⁰¹ This may not be immediately apparent from the word “installation” used in Art.8 SGD, but some support for this wider reading can be derived from the German-language version of the SGD, with the effect that both installation and assembly¹⁰² are intended to be covered by Art.8 SGD. This ambiguity

⁹⁸ Art.2(3) CSD also excluded a non-conformity which originated in “any materials supplied by the consumer.” There is no equivalent to this in the SGD.

⁹⁹ Art.7(5) final part.

¹⁰⁰ Cf. Art.2(5) CSD.

¹⁰¹ Indeed, Art.2(5) CSD was sometimes referred to as the “IKEA clause”: DIRK STAUDENMEYER, “The Directive on the Sale of Goods and Associated Guarantees - a milestone in the European Consumer and Private Law” (2000) 8 *European Review of Private Law* 547, at p.553.

¹⁰² “Montage oder Installierung” (DE). Note that the Spanish version only refers to “instalación”, and most other language versions also use just one word.

was already noted in respect of the corresponding provision in the CSD,¹⁰³ and it is unfortunate that the wording has not been clarified in the SGD.

It has also not been clarified what would make an installation “incorrect”. Presumably, it is intended to cover a situation where the installation has not been carried out in such a way that the goods can function in the intended way, or that the goods meet all the requirements as to conformity.

A non-conformity resulting from incorrect installation will only be regarded as a non-conformity of the goods themselves in one of two circumstances. First, the installation was part of the sales contract itself and therefore carried out by the seller or under the seller’s responsibility. Under Art.8(a) SGD, the focus of the seller’s installation efforts are on the outcome, i.e., on whether the goods are in conformity with the contract once installation has been carried out. It does not consider whether the seller has acted with the requisite degree of care and skill in carrying out the installation. In this regard, the effect of Art.8(a) SGD will be to require a stricter standard in the performance of a service (i.e., installation) than might otherwise be the case under national law.¹⁰⁴

The second instance when incorrect installation is regarded as a non-conformity in the goods themselves arises when the consumer was intended to carry out the installation and did do so, but the fact that the installation is incorrect was due to “shortcomings in the installation instructions” provided by the seller.¹⁰⁵ This assumes that the consumer correctly followed the installation instructions which were provided by the seller. The fact that doing so meant that the installation turned out to be incorrect means that there was a shortcoming in those instructions. This should also cover instances where the instructions were insufficiently precise and the consumer followed one of several plausible ways of interpreting those instructions. On the other hand, this provision presumably would not apply if the consumer ignored the installation instructions altogether, or if the incorrect aspect of the installation is not the result of a shortcoming in the installation instructions themselves but rather than consumer’s failure to follow the instructions correctly.

There is one new element compared to the CSD, dealing with goods with digital elements. In respect of such goods, a consumer may be required to install the relevant digital content or digital service. If this is done incorrectly because of a shortcoming in

¹⁰³ See ROBERT BRADGATE and CHRISTIAN TWIGG-FLESNER, *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (Oxford University Press, 2003), pp.64-66.

¹⁰⁴ Compare s.49 of the UK’s Consumer Rights Act 2015, which requires services to be performed with reasonable care and skill only. Note, however, that s.15 of the Consumer Rights Act follows the approach under the CSD/SGD in linking the correctness of the installation to the conformity of the goods themselves.

¹⁰⁵ Art.8(b) SGD.

the installation instructions, then this will result in the goods being regarded as non-conforming, too.¹⁰⁶

3.1.4 Conformity of Digital Content and Digital Services

Having discussed the conformity requirement in the SGD in detail, this contribution now turns to the conformity requirement in the DCSD. This discussion will be briefer, which is mainly due to the fact that the conformity requirement for digital content and digital services in the DCSD mirrors that for goods in the SGD, and most of the comments made above also apply to the DCSD's conformity requirement.

¹⁰⁶ Art.8(b) SGD, final part.

3.1.4.1 Subjective conformity requirement

Article 7 DCSD deals with the elements of the subjective conformity requirement in respect of digital content and digital services. Its wording is almost verbatim to that of Art.6 SGD discussed above, and the points made in respect of Art.6 SGD apply mutatis mutandis to Art.7 DCSD. There one difference between the two provisions is that there is no reference in Art.7(a) to a requirement that the digital content or digital service must be of the “type” required by the contract, but in view of the ambiguity of this notion noted earlier, this is not going to be a problematic omission.

3.1.4.2 Objective conformity requirement

The original proposal for the DCSD¹⁰⁷ contained a much more limited objective conformity requirement than the final version of the Directive,¹⁰⁸ with priority given to the subjective conformity requirement.¹⁰⁹ The objective conformity requirement in Art.8 DCSD closely follows the corresponding provisions in the SGD (already discussed above), although there are some variations to reflect some differences as between goods and digital content/services.

3.1.4.2.1 Fit for normal use

The first element of the objective conformity requirement is that the digital content or digital service is fit for the purposes for which the digital content/service would normally be used. The wording of Art.8(1)(a) DCSD is the same as that of Art.7(1)(a) SGD, save for the substitution of the words “digital content or digital service” for “goods”, and so the points made earlier apply to this provision, too. However, there are likely to be fewer instances in practice where digital content or digital services are “normally used” by consumers for purposes other than their intended purposes, as permitted uses will often be coded into the digital content/digital service.

3.1.4.2.2 Accessories and instructions

A further provision which largely resembles the corresponding provision in the SGD¹¹⁰ is Art.8(1)(c) DCSD, requiring, where applicable, that the digital content/service to be

¹⁰⁷ Proposal for a Directive on certain aspects concerning contracts for the supply of digital content COM(2015) 634 final. For a detailed analysis of the conformity requirement in the proposal, see SIMON GEIREGAT and REINHARD STEENNOT, “Proposal for a Directive on Digital Content - Scope of Application and Liability for a Lack of Conformity” in IGNACE CLAEYS and EVELYN TERRY, *Digital Content & Distance Sales: New developments at EU level* (Intersentia, 2017).

¹⁰⁸ See Art.6 of the proposal.

¹⁰⁹ See PAULA GILLIKER, “Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?” in TATIANA-ELENI SYNODINO, PHILLIPE JOUGLEUX, CHRISTIANA MARKOU, and THALIA PRASITOU (eds.), *EU Internet Law in the Digital Era* (Springer, 2020), esp. pp.311-313

supplied with any accessories and instructions which a consumer may reasonably expect to receive. However, unlike Art.7(1)(c) SGD, there is no reference to packaging or installation instructions in Art.8(1)(c) DCSD, although “instructions” could easily be read to include “installation instructions” if a consumer would reasonably expect to receive such instructions.

3.1.4.2.3 Trial version or preview

A third aspect of objective conformity of digital content/services is relevant for instances where the trader made available a trial version or preview of the digital content or digital service before the contract was concluded. In such a case, Art.8(1)(d) requires that the digital content/service supplied to the consumer has to comply with the trial version or preview. In essence, this provision is an adaptation of the provision dealing with instances where a consumer sees a sample or model of the goods before concluding the contract. Whether such a direct adaptation is appropriate may be open to debate, because a trial version or preview may include features which the consumer may decide not to acquire.

3.1.4.2.4 Qualities and performance features normal for goods and reasonably expected

Finally, Art.8(1)(b) DCSD mirrors Art.7(1)(d) SGD in requiring the digital content or digital service to “be of the quantity and possess the qualities and performance features ... normal for digital content or digital services of the same type and which the consumer may reasonably expect”. One variation is that Art.8(1)(b) refers to “performance features” rather than just “features”, which is appropriate in the context of digital content/services. There are also a number of indicative qualities and performance features, which have also been tailored to digital content and digital services. They are: functionality, compatibility, accessibility, continuity and security. Some of these (functionality, compatibility and security) are also mentioned in Art.7(1)(d) SGD and are defined in the same way in both directives. There is no reference to durability here, although there are separate provisions dealing with updates which could be understood as akin to durability.¹¹¹

Neither “accessibility” nor “continuity” have been defined in the DCSD. It may be assumed that “accessibility” is intended to mean that the consumer can access the digital content or digital service, e.g., where this is only accessed on-line and not installed directly on the consumer’s device. In a similar vein, “continuity” will relate to the ability of a consumer to access a digital content or digital service at any point during the contract period.

¹¹⁰ Art.7(1)(c) SGD.

¹¹¹ Note that s.34(3)(d) of the UK’s Consumer Rights Act 2015 mentions durability as a relevant factor for establishing whether digital content is of satisfactory quality.

In establishing the qualities and performance features a consumer is reasonably entitled to expect, it is necessary to consider what would be normal for digital content/services of the same type and what a consumer might reasonably expect. As is the case under Art.7(1)(d) SGD in respect of goods, the reasonable expectations of a consumer are determined with reference to the nature of the digital content or digital service as well as any public statements made about the digital content or digital service by the trader or on its behalf, or other persons in the chain of transactions. The points made in the discussion of these elements in the context of Art.7(1)(d) SGD also apply here and need not be repeated. Similarly, some public statements will not be taken into account in the circumstances set out in Art.8(1)(b)(i)-(iii), which mirror those in Art.7(2) SGD; again, the same critique made above applies here.

3.1.4.2.5 Updates

All digital content and digital services require regular updates. Some are essential to keep the digital content/service operating as it should and to deal with security issues, whereas others might be intended to add additional features or improve the digital content/service in some way. The role of updates is recognised in Art.8(2) DCSD in that the trader is put under an obligation to ensure that the consumer is informed of and supplied with updates. In substance, Art.8(2)(b) DCSD follows Art.7(3)(a) SGD with regard to the period of time during which the trader is under this obligation where the digital content/service is supplied in a single act. Article 8(2)(a) DCSD provides that where the digital content or digital service is to be provided continuously over a period of time, the trader's obligation persists throughout this period (which could be indefinite, but will often be based on subscription periods).¹¹²

3.1.4.2.6 Other elements of conformity

As digital content or digital services are often not just provided through a one-off act (in contrast with the delivery of goods, which happens once only) but provided continuously over a period determined in the contract of supply, Art.8(4) DCSD provides that the digital content/service must be in conformity throughout the contractual supply period. There is also no limit to the period during which the trader will be liable for a non-conformity during the contractual supply period.¹¹³

Also, Art.8(6) DCSD requires that the digital content or digital service must be supplied to the consumer in the most recent version which is available at the time the contract for the supply of the digital content has been concluded. However, the parties may agree otherwise, so this is not an absolute requirement.

¹¹² There is no liability period in the case of digital content or a digital service supplied continuously, and therefore a trader would be liable for a lack of conformity which becomes apparent at any point during the period of supply (Art.11(3) DCSD).

¹¹³ Art.11(3) DCSD.

3.1.4.2.7 Exclusion from conformity assessment

Finally, Art.8(5) DCSD excludes from the objective conformity requirement matters which the consumer was specifically informed about. It is substantively the same as Art.7(5) SGD, discussed earlier.

3.1.4.3 Incorrect integration of the digital content/digital service

It was seen earlier that, in respect of goods, Art.8 SGD deals with circumstances where goods need to be installed before they can be used and something goes wrong during that process, rendering the goods themselves not in conformity with the contract.

With digital content and digital services, there is often the need for a consumer to take steps to ensure that the digital content/service is available on the consumer's devices. Whilst this is also commonly referred to as "installation", or "download", the DCSD uses the term "integration" in Art.9 DCSD. This provision uses Art.8 SGD on incorrect installation of goods as a template to provide for instances where there is an "incorrect integration of the digital content or digital service into the consumer's digital environment". Where this occurs, the digital content or digital service will be regarded as not in conformity in the same two circumstances applicable in the case of goods, i.e., where the digital content/service was integrated by the trader or under its responsibility;¹¹⁴ or where the consumer was to integrate the content and the incorrect integration resulted from a shortcoming in the integration instructions.¹¹⁵ As Art.9 DCSD follows the same pattern as Art.8 SGD, the comments made earlier regarding that provision also apply here.

4. Discussion and Conclusions

The analysis of the conformity requirements in section 3 has revealed a range of questions about the precise meaning and scope of the conformity requirements in both the SGD and the DCSD. These questions are particularly important in view of the maximum harmonisation nature of both directives and the much-reduced scope for any kind of flexibility in defining requirements for conformity in national law. That said, there is some flexibility inherent in the objective conformity requirement in either Directive, particularly when it comes to determining what might be relevant qualities and features a consumer can reasonably expect.¹¹⁶ This flexible and context-dependent aspect of the objective conformity requirement will be a useful and important route for national courts to invoke factors not expressly mentioned in determining whether goods or digital content/services meet the objective conformity

¹¹⁴ Art.9(a) DCSD.

¹¹⁵ Art.9(b) DCSD.

¹¹⁶ Art.7(1)(d) SGD and Art.8(1)(b) DCSD respectively.

requirement in a specific case. In particular, the “reasonable expectations” criterion might be regularly deployed for this purpose.

In one regard, this may become a crucial way of using the objective conformity requirement to align the requirements of the directives, and especially of the SGD, with concerns regarding the environment and sustainability. Sustainability is alluded to twice in the recitals to the SGD: first, durability is described as “important for achieving more sustainable consumption patterns and a circular economy”.¹¹⁷ Secondly, the right to repair “should encourage sustainable consumption and could contribute to greater durability of products”. Both are encouraging, if “very timid”,¹¹⁸ signs that the importance of sustainability is recognised in the context of consumer policy. However, as Recital 33 makes clear, durability and the right to repair do not entail any obligation on a seller that they must keep spare parts as part of the objective conformity requirement (although national law might provide for such an obligation by other means). This is a missed opportunity to take a small but essential step in aligning an aspect of consumer law more closely with the wider issues of sustainability and the circular economy. Somewhat paradoxically, refraining from any kind of obligation regarding spare parts seems out of step with the possibility of using new digital technology, especially 3D-printing, to make spare parts on demand and thereby reduce the number of defective goods which might simply be thrown away.

Both directives will have attained their objective of providing a set of contract rules to facilitate the Digital Single Market, and their maximum harmonisation nature will mean that the same substantive obligations will apply throughout the EU. If a criterion for success is to get common rules into place, then that has been achieved. However, if the criterion for success is the creation of a set of rules that is contemporary and consumer- focused rather than being based on “old technology”, then both directives are found wanting. A consequence of maximum harmonisation focusing on black-letter rules is that these rules must be as clear as possible to facilitate consistent interpretation and application. This is particularly so where failure to implement correctly could attract sanctions in the form of infringement proceedings and periodic penalty payments. This demands rigour in terminology and definitions. Ultimately, it might reveal that maximum harmonisation at the technical rule level is doomed to fail.

This is not to dismiss the importance of the DCSD in ensuring that all Member States have a common approach towards conformity and remedies in respect of digital content and digital services, which is an important step forward despite the criticism that can be made with regard to the substance of the conformity requirement. At the same time, the DCSD does not resolve the perennial question of how to classify a transaction involving the supply of digital content or digital services, and “the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis

¹¹⁷ Recital 32.

¹¹⁸ JORGE MORAIS CARVALHO, “Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directive 2019/770 and 2019/771” (2019) 8 *EuCML* 194 at p.198.

contract, should be left to national law”.¹¹⁹ Determining the legal classification of such a supply transaction would not have any implications for the introduction of a conformity requirement as such, but could still affect other rights and duties arising in respect of whatever classification is adopted at national law.

In the final analysis, the conformity requirements in both new directives are a strong indicator of some of the central flaws of EU consumer law: an obsession with maximum harmonisation, limits on the extent to which EU can legislate, and a general lack of creative thought on the part of the legislators. Consumers might have "reasonably expected" better quality.

5. Literature

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