

EU Sustainability Quest: Possibilities of Consumer Sales

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Summary. This paper analyses principal incoherence left in EU rules applicable to consumer sales against the background of the European Commission's sustainability quest, supposedly influencing every area of the Union's future life, and argues for a possible need for changes in contemporary consumer law in order to achieve a greater environmental good. It covers three key aspects where the Consumer Sales Directive might have done a better job in addressing environmental worries (i. e. legal guarantee term, assessment of remedies, and commercial guarantees), and states that these aspects were not modified to benefit the environment. The article then covers a deeper problem of conflicting aims that cannot be simultaneously upheld (i. e. fostering and curbing consumption at the same time), and challenges that in order to address environmental problems serious reconsiderations of consumer protection might be necessary.

Keywords: sustainability, consumer sales, quality guarantees.

Tvarumo paieškos ES: vartojimo pirkimo–pardavimo santykių galimybės

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Santrauka. Straipsnyje analizuojamas principinis ES taisyklių, taikomų vartojimo pirkimo–pardavimo santykiams, nederėjimas su Europos Komisijos deklaruojamu tvarumo siekiu, esą darančiu įtaką visoms Europos Sąjungos ateities gyvenimo sritims, ir teigiama, kad norint pasiekti didesnę aplinkosaugos gėrį gali reikėti pokyčių šiuolaikinėje vartotojų teisėje. Aptariami trys pagrindiniai aspektai, kuriais Pirkimo–pardavimo sutarčių direktyva galėjo geriau atliepti aplinkosaugos problemas (t. y. įstatyminės garantijos terminas, pažeistų teisių gynimo būdų vertinimas ir komercinės garantijos), ir teigiama, kad šie aspektai nebuvo pakeisti siekiant naudoti aplinkai. Toliau straipsnyje aptariama gilesnė problema, susijusi su prieštariniais tikslais, kurių negali būti pasiekta kartu (t. y. vartojimo skatinimu ir jo ribojimu tuo pačiu metu), ir keliama abejonė, kad siekiant spręsti aplinkosaugos problemas gali prireikti rimtų pačios vartotojų apsaugos persvarstymų.

Pagrindiniai žodžiai: tvarumas, vartojimo pirkimo–pardavimo santykiai, kokybės garantijos.

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Introduction

In the year 2023, it comes as no surprise to anyone that the state of our planet Earth is gradually deteriorating – the temperature is rising, the oceans and land are filling up with waste, and the natural resources will eventually be sucked dry. Accordingly, discussions and worries surrounding climate change, pollution, and waste have moved from so-called eco-warriors' (e. g. Greenpeace) corner to mainstream reality agreed upon by virtually all scientists, and a majority of Western politicians (albeit for or against it). Even such public figures as Pope Francis and King Charles III publicly decry predatory attitudes towards nature. After doing some soul-searching, the European Union (one of the largest economies in the world) is finally ready to turn towards a more sustainable *modus operandi* and this shift should be reflected in virtually all areas of life (Circular Economy Action Plan, 2015; European Green Deal, 2019; New Circular Economy Action Plan, 2020). Green transition even found its way to the top of the list of key priority areas for consumers, too (New Consumer Agenda, 2020). However, actions adopted to promote sustainability in consumer law are limited and largely voluntary, as the European Commission firmly sticks to its decades-long information paradigm¹. Such restraint from larger interventions is also reflected in the still relatively recently adopted Consumer Sales Directive² (hereinafter CSD). A rather limited extent of changes in this Directive begs the question of whether such measures are sufficient to bring about the desired shift, what other measures could have been adopted and, ultimately, is it even possible to amply engage consumer law in furthering sustainability cause in EU. Therefore, this paper focuses on consumer sales law rules and is aiming to answer whether they have been used to help Union to fulfil its environmental agenda. To achieve this, this article briefly analyses why consumer protection is (supposedly) harmonised with environmental protection, what improvements could have been done in consumer sales area with adoption of CSD, and why it might be impossible to bring about any measurable benefit to environment through consumer law rules. Among EU-adopted legal tools, the article relies on research conducted by such authors as Terryn, Mak, Zoll *et al.*, Micklitz, and others.

1. Supposed Harmony of Consumer and Environmental Protection

When the United Nations General Assembly adopted 17 interlinked Sustainable Development Goals back in 2015³, the European Union presented a Circular economy action plan. Since then, numerous EU documents somehow hinting towards sustainability⁴ and circularity of economy have been adopted. Just to name a few: Circular Economy Action Plan, European Green Deal, New Circular Economy Action Plan, and New Consumer Agenda (for 2020-2025). Legislative initiatives like Eco-design for Sustainable Products Regulation, Right to Repair, Empowering consumers for the green transition

¹ I. e. providing more information should hopefully nudge consumers towards a better, more sustainable decision. Such approach allows little to no intervention into existing legislation, and sees consumers as empowered participants of the economy and markets.

² Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

³ Notably, No. 12 was responsible consumption and production.

⁴ It is worth noting for the purposes of this article that in 1987 the United Nations Brundtland Commission defined sustainability as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” Although it is generally agreed that sustainability has three pillars – economic, social, and ecological, this article focuses on the ecological dimension of sustainability.

through better protection against unfair practices and better information, and a number of others sprung up in legislative environment previously dominated by economy growth-based approach, which enabled (and in no way attempted to curb) ever-growing consumption. Notably, all of them were underpinned with the manifestation of the same idea – no longer it is enough for EU economy to be competitive, sustainability has to be intertwined in its fabric as well. It is expected that after implementing new acts in the upcoming decades we will see a tangible change in the common market, operate in a different economic model, and seriously take environmental protection and sustainability questions in every aspect of our lives.

It goes without saying that such ambitious policy goals of completely restructuring markets and building them around sustainability cannot be reached without consumers being somehow involved in this change. After all, consumers are at the centre of European integration, their purchasing decisions make a difference on the market, also it is consumers who are indeed causing (or at least exacerbating) some of the ecological problems (e. g. the sheer volume of consumption which in return causes depletion of resources and heaping piles of waste, consumerism-driven purchasing habits of *de jour* items, the speed with which old items are replaced with new purchases, etc.). Thus, it is difficult to expect reaching sound environmental policy goals within EU market without reconciling policies of environment and consumer protection.

This idea, of course, is not entirely new, as the European Union has been acutely aware of the importance of considering environmental protection requirements in all Union's policies and activities (including consumer policy), and has emphasized it in not one, but two of its fundamental legal acts – Treaty on the Functioning of the European Union and Charter of Fundamental Rights of the European Union⁵. Given the importance of these legal acts and the duration in which they reign, one might assume that consumer protection is already in tune with nature's needs, and the environment is seriously considered whenever rules enabling "comfortable" consumption are drafted. Even more so, one might think that the clear will to shift focus towards sustainability demonstrated in recent years assures considerable efforts to incorporate these questions in each and every newly drafted legal act (which of course includes CSD, too).

Unfortunately, reality is not all that pleasing. This supposed harmony and/or compatibility has been inquired about by a number of authors in legal doctrine (e. g. Micklitz, 2019; Zoll *et al.*, 2020; Mak, Terryn, 2020), and it has been noted many years ago that interests of environment do not coincide with those of consumers. Consumers are preoccupied with carefree consumption, enabled by liberal consumer laws, whereas the environmentalists would happily curb such activity altogether in the name of nature. Accordingly, consumer law obtains the function of supporting consumption; and it is the environment that eventually takes a hit whenever legal norms that promote consumption are put in place (Wilhelmsson, 1998, p. 47; Kye, 1995, p. 32).

It is also worth noting that in the majority of EU legal acts protection of consumer's interests largely (if not entirely) trumps any environmental caution, and the overall conversation is focused on public law measures (i. e. various regulations designed to control supply side, mostly through environmental

⁵ As demonstrated in TFEU Art. 11, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. Similar approach can also be found in consumer protection as its requirements shall be taken into account in defining and implementing other Union policies and activities (TFEU Art. 12). Similarly, a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development, according to Art. 37 of the Charter. Likewise, Art. 38 of the Charter calls for Union policies to ensure a high level of consumer protection.

laws), not private law⁶. The limited scope of interventions in private law can also be traced in CSD, which has repealed and replaced the old Guarantees Directive from 1999⁷, when nobody was even talking about the importance of protecting the environment through areas not directly connected to environmental law. Although old rules were recast against the backdrop of the European Union's turn towards circular economy and chatter of impending ecological collapse, silence on sustainability issues in its adopted measures is quite deafening.

2. Consumer Sales Directive – Missed Opportunities

Although adoption of CSD was supposed to not only implement Digital Single Market strategy, but also contribute to sustainable development (as this incentive is specifically mentioned in CSD), there is only a handful of provisions hinting importance of circularity of economy and sustainability⁸ (Zoll *et al.*, 2020, p. 527). Their rather modest position in the preamble of said directive means it only has interpretative power, and it would be difficult to point out any particular regulatory changes from Guarantees Directive that were made for the sake of the environment. There are, however, at least three areas (for the purposes of this analysis) where CSD could have attempted to bring about more sustainable results in consumer sales law application. These include legal guarantee term, assessment of remedies (especially repair), and commercial guarantees.

Although it has been stated before that consumer interests do not coincide with those of the environment, one of the rare occurrences where these interests are somewhat congruent might be the period during which the seller guarantees the quality of goods. The so-called legal guarantee period in CSD was not extended beyond two years' mark, despite all the criticism directed at its shortcomings in the legal doctrine – among other things, it is evident that a car or a washing machine has a much longer useful life than the currently prescribed two years protection⁹ (Carvalho, 2021, p. 87), which leaves consumer largely unprotected throughout the majority of such item's lifespan. A longer period is also in line with the consumer's interest to have an item of good quality for a reasonable amount of time, and with the environment's interest for goods to stay in circulation for longer, thus not becoming waste and not generating a need to manufacture and buy new items. Also, it is expected (or at least believed) that the longer term might be capable of combating the planned obsolescence problem, which has clear negative implications for both – consumers and the environment (Becher, Sibony, 2021, p. 142; Loos, 2017, p. 20–21).

⁶ The emphasis in EU studies is put on labelling of products, their duration, better waste management, or even some more innovative approaches to consumption, like collaborative economy in the form of sharing products and infrastructure (Mišćenić, 2020, p. 173), but little attention is paid to actual changes of private law rules applied in individual consumer cases and efforts to lower levels of consumption.

⁷ Which has reigned for 20 years and has neither been drafted, nor interpreted with sustainability cause in mind, which is apparent from its text and complete disregard to sustainability in courts whenever directive's rules were called into question.

⁸ (32) Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy ...; (48) As regards bringing goods into conformity, consumers should enjoy a choice between repair or replacement. Enabling consumers to require repair should encourage sustainable consumption and could contribute to the greater durability of products

⁹ Although, as Carvalho rightfully points out, this problem could be solved on the Member State level, because provision prescribing term of two years is not fully harmonised, and Member States may provide for a longer period of trader's liability or oblige provision of after-sales assistance to the consumer (even if against payment) during the expected lifetime of the goods (Carvalho, 2021, p. 87).

These hopes and considerations did not find their way to CSD's text and the seller's interest to be responsible for a rather short amount of time in comparison to the expected average lifespan of many of the goods is reflected in the legal guarantee term being left unchanged. That is disappointing because at least several options could have been adopted here – the legal guarantee term could have at least been extended or even fully linked to the average expected lifespan of goods (and in addition applied with the reversed burden of proof throughout the entirety of such period), or at least be somewhat harmonised with existing ecodesign requirements of durability (Keirsbilck, 2020, p. 167). Such adjustments would have been a welcome change not only for consumers but ultimately for the environment as well. However, hope still remains on the individual Member State level, hoping that the existing (or even increasing) variety of such term in EU incentivizes producers to produce longer lasting goods (García Goldar, 2022, p. 17) without direct interference of a state.

Another area where CSD could have been improved is the assessment of remedies when sold goods lack conformity. Here interests of consumers are clearly held above those of the environment, as even a mandatory hierarchy of remedies did nothing to prioritize more eco-friendly options. Although the available remedies remained the same (i. e. repair, replacement, reduction of a price, and rescission of a contract), a choice to stick to such a hierarchy from sustainability perspective is unsettling. First of all, it allows consumers to freely choose between repair and replacement, although it is the former that is clearly (at least in most cases) more in line with the environmental agenda and therefore should be the primary remedy whenever possible (Mak, Terry, 2020, p. 237). CSD abstains from promoting repair over replacement¹⁰ and consumer, who does not have any obligations to consume sustainably or responsibly (after all, he is an agent of his own interests, not a vessel through which environmental policy is enacted), is overall more inclined to ask for a new good instead of dealing with inconveniences that repairing an item (not to mention a repeated repair of an item) might bring about (e. g. consumer cannot use the good, repair usually takes longer than replacement with a new item at the spot would, even high-quality repairs can result in shorter lifespan than a brand new good which would be given as a replacement, the consumer might simply lose the trust of that particular item that has already broken down once, and therefore expect a new fault-free good, etc.). It is also worth noting that depending on the nature of the good, even the seller might be more inclined to claim impossibility or disproportionality of repair, if in the long run, it is more financially profitable not to go through the repair process (Van Gool, Michel, 2021, p. 144).

Aware of this criticism, in March of 2023 the European Commission adopted a proposal for a Directive on common rules promoting the repair of goods. Article 12 of this proposal attempts to adapt in a targeted manner the harmonised conditions under which the choice between the remedies of repair and replacement can be exercised under the CSD. Although in theory consumer remains entitled to choose repair over replacement, unless repair would be impossible or it would impose disproportionate costs on the seller as compared to replacement, according to the proposal, the seller should always repair the goods where the costs for replacement are equal to or greater than the costs for repair; as a result, the

¹⁰ And to complicate matters even further, there is no explicit consideration of using refurbished or remanufactured goods as replacements when this remedy is chosen and such goods are available, thus environmental aspect in creating a circular replacement system has gone completely unnoticed. Moreover, it is not even clear from the existing jurisprudence whether such replacement would indeed be acceptable as satisfactory – different authors disagree whether previous Court of Justice of the European Union decision in *Quelle* case effectively excludes such possibility or not (Van Gool, Michel, 2021, p. 146; Zoll *et al.*, 2020, p. 540; Kryla-Cudna, 2020, p. 14–15; Mak, Terry, 2020, p. 236). Although it goes without saying that consumer generally (even if from purely psychological point of view) will more often than not be much more satisfied with a new item rather than repaired or refurbished one, this lack of consideration demonstrates another example of ignorance towards environmental interests, and a clear elevation of consumer interests.

consumer may only choose replacement as a remedy when it is cheaper than repair. Such a rule should therefore amend CSD accordingly (Right to Repair Proposal, 2023). However, this does not answer some of the pressing questions, as the Commission neither clarified who should verify whether a repair would be more affordable than a replacement, nor what methodology that party should follow for such assessments (Ganapini, 2023), thus the process might confuse consumers and end up not being all that helpful for environmental causes, if it is left up to a seller to decide whether a particular remedy suits *his* economic interests (and not the environment) better than the alternative.

One can also notice that CSD missed a chance to substantially update the somewhat antiquated commercial warranties system and at least attempt to meaningfully use them as a tool to achieve more sustainable consumer sales relations, as it neither sufficiently promoted it in the name of sustainability, nor prohibited likely situations where it may come to the detriment to the environment. Although a ‘new’ type of commercial guarantee (so-called commercial guarantee of durability, CSD Art. 17) provided by a producer of goods has an exciting name, assessment of its terms turns out to be a bit of a damp squib – it is offered (by a producer) completely voluntarily and there is no mechanism behind it to incentivise such offers. That effectively means that it is not a tool to battle planned obsolescence (as producers are neither obliged to provide such a guarantee, nor clearly state that they cannot guarantee any lifespan of their product, which in theory could deter potential consumers and therefore nudge producers to actually provide them), and it in itself does not prioritise repair over replacement.

It is worth noting that commercial guarantees have already been extensively criticised in the past due to their possibly distracting and overshadowing nature (i. e. consumers are often confused about what rights they have according to laws and what rights they get through a commercial guarantee from businesses they deal with) and CSD not only did not remedy those worries but also left a clear loophole to circumvent sustainability requirements were they to ever be (seriously) introduced in legal guarantees. In particular, as Terryn points out, commercial guarantees are even advertised as “direct replace guarantee”, “do not wait for repair but get your new product for free immediately” (Terryn, 2019, p. 862) type offer, therefore inviting to use them as a tool of competition for consumers who may not be happy with a more stringent approach towards their rights under legal guarantee. Using commercial guarantees (including those of durability) to allow easy access to new goods under replacement lacks consideration of the environment’s interests. On the other hand, overly stringent rules in commercial guarantees might backfire and deter producers from offering (and consumers – to purchase, as they are not necessarily provided for free) such guarantees altogether (Van Gool, Michel, 2021, p. 147). It is regrettable that these sustainability considerations have not reached discussions surrounding commercial guarantees and the insights of legal doctrine have not been used in their tailoring.

3. Inevitable *Cul-De-sac*?

Clearly, none of the current legislation examples from CSD described above demonstrate serious consideration of environmental interests in any of their aspects, and therefore overall efforts to involve consumer sales rules in pursuit of sustainability seem to be of a very limited scope (if any). But this is also symptomatic – consumer law (as well as consumer sales rules and all accompanying elements, including consumer image) was not created with environmental protection in mind. Actually, far from it – it was established (and still remains) as an instrument with the objective of improving the functioning of the internal market. There has been an increasing understanding that the functioning market is a growing market (Hesselink, 2016, p. 520–521). What does this growth mean to consumers? More options to exercise their right to choose, more vendors and more goods to choose from, more freedom

in access to consumption, and with a little help of consumer law – assurance that basic European-level rights will follow whatever purchase consumer makes. It is also fantastic for the economy, GDP numbers, and an overall financial assessment of the state’s success parameters.

At the same time, it is detrimental to the environment which has finite resources and therefore cannot withstand ever-expanding economy and everything that comes with that – although we have only one Planet Earth, by 2050 we will be consuming as if we had three (Sinkevičius, 2020). Unfortunately, current legislative solutions in consumer law do not lead towards sustainability¹¹ and can even be blamed for facilitating consumption (i. e. consumption has been transformed into consumerism (García Goldar, 2022, p. 10) which is enabled by favourable consumer law rules), which is very problematic for Union that loudly proclaims its turn towards greener and more sustainable future. As Trentmann puts it, unless the laws of physics give way, it is difficult to see how the European project can possibly have it both ways (Trentmann, 2016, p. 560) – we cannot simultaneously say that we want less consumption for the sake of the environment, and at the same time facilitate more consumption for benefit of consumers, growth of the market, and the overall competitiveness of the EU. Consumer laws that enable unburdened consumerism are in direct conflict with achieving any meaningful improvement of sustainability, and not only new structures to effectively support sustainability were not created in newly recast consumer sales rules, but the already existing rules were also not restricted in any way for the sake of the environment.

The European Commission hopes that a “nudge” towards sustainable decision will be enough for consumers to choose environmentally friendly options – providing more information should help consumers forsake their inclination to take care of their economic interests, but in reality that is not very likely. After all, although concerned about the environment they may be, consumers care about the type of goods they purchase and the price (which is normally heftier for the “green” goods) they pay for them. Asking them to choose different goods or forego personal comfort in cases when an item turns out to be faulty leads to more fundamental questions as to how we can actually compel such behaviour through legal structure, as opposed to leaving it to *sola fide* approach in individual consumer matter.

One of the options could be seeing the consumer not only as a buyer but also as a citizen¹². After all, the consumer is never *just* a consumer, he also has a variety of different roles in society, including that of a citizen. Having air to breathe or water in a well in the future for him should be just as important as a chance to buy a slightly different version of the newest iPhone every year. However, when economic and social (environmental) interests are clearly separated, it is the interests of a consumer as a buyer that rule his purchasing decisions. In order to change that, several important elements of consumer law should be amended, first and foremost, of course, the image of a consumer, the more restrictive approach towards his right to choose and how he exercises it should be employed (if not prohibited in the name of environment altogether), and the overall structure of consumer law, its legal grounds in EU primary law and its aims (including fostering the functioning of the common market, which also means facilitating its growth) should go under serious revisions. As Micklitz puts it, consumer law has to be rethought (and maybe even re-politicised), if one takes the circular economy and sustainability seriously (Micklitz, 2019, p. 229–230).

¹¹ At best, we could see them as an effort to shift consumption from traditional to more eco-friendly track, where the goal is not to lower the levels of consumption, but to replace the items in consumption activity with “greener” options. Accordingly, providing information regarding sustainability aspect of the goods does not actually encourage not to buy at all, but simply draws attention to the “better” option.

¹² This argument regularly reemerges in legal doctrine (e. g. Wilhelmsson, 1998; Mak, Terry, 2020), although it has not yet been enacted (or even seriously considered) in practice.

But what does that leave us with? Such necessary “surgery” of consumer law might very well kill this “patient” (or at least parts of it) as we know it. It is very unlikely that the current structure (e. g. the one enacted in CSD) would be able to further a cause of sustainability, no matter how much we publicly bemoan the destructive consumerism path that we are on, and at the same time there is no political appetite to effectively curb rampant consumerism, as that would strip consumers of their rights, change market game rules, and ultimately hurt the economy. For Union striving for sustainability this might ultimately mean that public law measures are chopping the branches of unsustainable practices, while consumer protection structures keep adamantly watering their roots.

Conclusion

Consumer law in principle should be in tune with environmental protection, as the harmony of these two policies is prescribed in EU primary law. However, stark differences in their aims and Union’s persistent work towards an ever-growing common market overshadowed sustainability goals while recasting the directive, and left such important areas as the term of legal guarantee, hierarchy of remedies in case of a lack of conformity, and commercial guarantees effectively untouched. Leaving these tools behind not only does not further the sustainability goal, but also leaves room for clearly unsustainable practices to be enacted. Moreover, a consumer, who is not burdened with any other interests than his own economic wellbeing, is likely to behave in a way that is not in line with the interests of the environment, and as long as he is not recognized as a citizen first, and a buyer second, cosmetic changes (albeit being a positive step) in CSD will fall short. It is answers to deeper questions pertaining to the overall structure of consumer protection and sustainability that are necessary to further this cause in structures built for consumers.

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