

CONSUMER CONTRACT LAW AND THE SUSTAINABILITY GOALS IN SLOVENIA: ANY ROOM FOR IMPROVEMENT?

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The Sale of Goods Directive and the Digital Content and Services Directive were transposed into the Slovene legal system with the new Consumer Protection Act in 2022. This contribution assesses whether and how sustainability goals have been internalised in consumer contract law and policy in Slovenia, particularly in the context of the changes introduced with the Sale of Goods Directive. It focuses on remedies for non-conformity of goods and services, while also examining the obligatory guarantee for technical products, which is a distinctive measure found in the Consumer Protection Act. The current state of play heavily relies on an awareness-raising model and the empowered, eco-friendly consumer, who is expected to purchase eco-friendly goods and resort to eco-friendly remedies in cases of non-conformity. These measures could be further strengthened by encouraging repair and self-repair, supporting replacement with refurbished goods, and extending guarantee periods to promote the production of more durable goods. The contribution identifies the obligatory guarantee as the most sustainability-friendly concept in Slovenian consumer sales law. In particular, it governs repair as the primary remedy and includes provisions on the availability of spare parts and access to repair services. This framework could serve as a model for the system of remedies for non-conforming goods at the EU level.

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1. INTRODUCTION¹

The European Commission opened “A new Circular Economy Action Plan” of 2020 with the statement: “There is only one planet Earth, yet by 2050, the world will be consuming as if there were three.”² Consumers play a crucial role in the circular transition as enablers of the circular economy.³ As provided by the EU’s Circular Economy Package, “[t]he choices made by millions of consumers can support or hamper the circular economy. These choices are shaped by the information to which consumers have access, the range and prices of existing products and the regulatory framework”.⁴ However, the pressing question is whether the regulatory framework in the EU is conducive to achieving sustainable developments goals, given the tension between sustainability aims and the objectives of consumer contract law, which are not always aligned.⁵

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² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan: For a cleaner and more competitive Europe, COM(2020) 98 final, 11 March 2020.

³ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Circular Economy Action Plan, COM(2019) 190 final, 4 March 2019.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Closing the Loop – An EU Action Plan for the Circular Economy, COM(2015) 614 final, 2 December 2015.

⁵ See, e.g., contributions in Keirsbilck, B.; Terry, E. (eds.), *Consumer Protection in a Circular Economy*, Intersentia, Antwerp, 2019; Mak, V.; Terry, E., *Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law*, *Journal of Consumer Policy*, vol. 43, no. 1, 2020, pp. 227–248; Mak, V.; Lujinović, E., *Towards a circular economy in EU consumer markets: Legal possibilities and legal challenges and the Dutch example*, *EuCML – Journal of European Consumer and Market Law*, vol. 8, no. 1, 2019, pp. 4–12; Mathios, A.; Micklitz, H.–W.; Reisch, L. A.; Thøgersen, J.; Twigg-Flesner, C., *Journal of Consumer Policy’s 40th Anniversary Conference: A Forward Looking Consumer Policy Research Agenda*, *Journal of Consumer*

While the traditional consumer law paradigm balances the interests of consumers, as the weaker parties, with those of businesses, sustainability can be one aspect that is weighed in this balancing exercise.⁶ This contributes to a paradigm shift in line with the horizontal clauses found in Article 11 TFEU (environmental protection) and Article 12 TFEU (consumer protection), as well as Articles 37 and 38 of the EU Charter of Fundamental Rights.⁷ A prevalent definition of “sustainability” involves three interconnected “pillars”, encompassing economic, social, and environmental (or ecological) factors or “goals”.⁸ This contribution focuses on the environmental dimension of sustainability within EU and Slovenian consumer law. The integration of sustainability goals into consumer contract law is pursued through regulation on both the supply and demand sides of the market, aiming to stimulate sustainable production and consumption.⁹ The focus is on measures encouraging sustainable choices and enhancing the durability¹⁰ of goods.

At the pre-contractual stage, examples include rules aimed at empowering consumers through information requirements (the awareness-raising model), such as mandatory general information, labelling rules, and the regulatory framework for (voluntary) green claims. During the performance stage, the emphasis shifts to guaranteeing durability through rules on remedies and time limits. In 2019, the EU adopted two directives addressing the conformity of goods, digital content, or digital services with the contract, and remedies in

Policy, vol. 43, no. 1, 2020, pp. 1–9; Kye, C., *Environmental Law and the Consumer in the European Union*, Journal of Environmental Law, vol. 7, no. 1, 1995, pp. 31–54.

⁶ Mak; Lujinović, *op. cit.* (fn. 5), p. 6; Terryn, E., *A Right to Repair? Towards Sustainable Remedies in Consumer Law*, in: Keirsbilck, B.; Terryn, E. (eds.), *Consumer Protection in a Circular Economy*, Intersentia, Antwerp, 2019, pp. 127–148.

⁷ Weingerl, P., *Sustainability, the Circular Economy and Consumer Law in Slovenia*, Eu-CML – Journal of European Consumer and Market Law, vol. 9, no. 3, 2020, pp. 129–132, and fn. 10 therein. Kiss labelled them as “poor parents” of the Charter due to their formulation as being principles rather than rights; see Kiss, A., *Environmental and Consumer Protection*, in: Peers, S.; Ward, A. (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford – Portland, 2004, pp. 247–268.

⁸ See Purvis, B.; Mao, Y.; Robinson, D., *Three pillars of sustainability: in search of conceptual origins*, Sustainability Science, vol. 14, no. 3, 2019, p. 681, and references therein.

⁹ See Mak; Terryn, *op. cit.* (fn. 5).

¹⁰ Recital 32 of the Sale of Goods Directive states that “durability” refers to the ability of goods to maintain their required functions and performance through normal use.

the event of a lack of such conformity – the Sale of Goods Directive (SGD)¹¹ and the Digital Content and Services Directive¹² (DCSD) (together known as the Twin Directives).

One may justifiably ask whether there is room for sustainability concerns in contract law generally, and consumer law more specifically, and whether contract law has a role to play in ensuring sustainability as a societal goal. It should be noted that sustainable consumption patterns and a circular economy are policy goals that have, to some extent, been incorporated into the SGD and the DCSD. The SGD explicitly refers to sustainable consumption in two recitals of its preamble.¹³ This contribution starts from the premise that contract law can contribute to sustainability-related policy goals and does not question its aptness in this regard. It reflects on the changes implemented in Slovenia based on the SGD and highlights potential areas for improvement in the interplay between consumer contract law and sustainability goals.

The Twin Directives were transposed into the new Consumer Protection Act (ZVPot-1)¹⁴, which entered into force on 26 October 2022 and has applied since 26 January 2023. This contribution examines how sustainability goals have been pursued through the provisions of the new ZVPot-1, in comparison to those found in the old Consumer Protection Act (ZVPot).¹⁵ The focus is on the pre-contractual stage (information requirements) and the contractual stage (modalities of the right to repair and guarantees in Slovenian consumer sales law).¹⁶ The ZVPot remains relevant even after the entry into force of the new ZVPot-1, as it applies to contracts concluded up to 25 January 2023.

¹¹ 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, Official Journal, L 136, 22 May 2019.

¹² Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Official Journal, L 136, 22 May 2019.

¹³ Recitals 32 and 48 SGD.

¹⁴ Zakon o varstvu potrošnikov, Uradni list RS, no. 130/2022.

¹⁵ Zakon o varstvu potrošnikov, Uradni list RS, no. 20/1998.

¹⁶ Parts of this examination are revised and further developed from ideas published in Weingerl, *op. cit.* (fn. 7).

2. PRE-CONTRACTUAL STAGE: THE AWARENESS-RAISING MODEL THROUGH INFORMATION REQUIREMENTS

The awareness-raising model for sustainable consumption contributes to consumer empowerment through information requirements, particularly at the pre-contractual stage. In addition to mandatory general information requirements and labelling rules, the regulatory framework for (voluntary) green claims plays a key role in empowering consumers.¹⁷

The pressing question is: to what extent are businesses required to provide product sustainability information to consumers? The list of mandatory pre-contractual information that sellers must provide to consumers is governed by the Consumer Rights Directive (CRD).¹⁸ Articles 5(1)(a) and 6(a)(1) of the CRD impose an obligation on sellers to provide all the main product characteristics. The legal framework will need to clarify when information regarding durability and reparability forms part of these main characteristics. In terms of mandatory information at the marketing stage, Article 7 of the Unfair Commercial Practices Directive (UCPD)¹⁹ prohibits so-called misleading omissions, including failures to inform consumers about durability, reparability, etc., but only when this is qualified as “material information”.²⁰

In March 2022, the Commission published a proposal for a directive amending both the CRD and UCPD to empower consumers for the green transition through better protection against unfair practices and better information.²¹ The

¹⁷ Weingerl, *op. cit.* (fn. 7), p. 130.

¹⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal, L 304, 22 November 2011.

¹⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), Official Journal, L 149, 11 June 2005.

²⁰ An example of material information in Article 7(4) UCPD is information in relation to “the main characteristics of the product”.

²¹ Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final, 30 March 2022.

proposal is based on the concept of reliable environmental information (i.e., reliable, comparable, and verifiable), which would allow market actors to make greener decisions. Moreover, it includes a proposal for a new right to information on the durability and reparability of products.

In addition to mandatory information requirements, green claims play an important role in nudging consumers toward concluding contracts for goods or services they believe to be sustainable. The UCPD Guidance defines green claims as “the practice of suggesting or otherwise creating the impression (in a commercial communication, marketing or advertising) that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services.”²² When green claims are untrue or unverifiable, this practice is known as “greenwashing”.²³ A 2021 screening of websites by the Commission and national consumer authorities found that in 42% of cases, the claims were exaggerated, false, or deceptive and could potentially qualify as unfair commercial practices under the UCPD. In 59% of cases, traders failed to provide easily accessible evidence to support their claims.

There are currently no specific EU rules on greenwashing, though the aforementioned proposal for a directive amending CDR and UCPD introduces new rules that will apply to green claims. Therefore, a safety net providing a legal basis to ensure that traders do not present green claims in ways that are unfair to consumers is found in the UCPD.²⁴ Of particular importance is Article 12

²² Commission Staff Working Document, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD(2016) 163 final, 25 May 2016, p. 95.

²³ *Ibid.*

²⁴ Criteria for fair environmental claims are included in the updated guidance on the application of UCPD. There is also *lex specialis* that could be relied upon to combat greenwashing practices, e.g. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, Official Journal, L 376, 27 December 2006, and specific EU legislation concerning green claims (Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, Official Journal, L 198, 28 July 2017; Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, Official Journal, L 315, 14 November 2012; Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, Official Journal, L 27, 30 January 2010; Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, Official Journal, L 153, 18 June 2010; Directive 2009/72/EC of the European Parliament and of the Council of 13 July

UCPD, which governs the substantiation of claims. It requires traders to provide evidence to support their claims and to be ready to present it to competent enforcement authorities in an understandable way if the claim is challenged. This regulation is an example of an area where sustainability and consumer protection goals align. In Slovenia, this is now implemented through the new ZVPot-1, which repealed the Consumer Protection Against Unfair Commercial Practices Act.²⁵

In the European Green Deal of 2020, the Commission announced a legislative proposal on substantiating green claims, which will require companies to use standard methods to quantify the environmental footprint of their products/services. Although a public consultation was conducted in the second half of 2020, the Commission has not yet tabled the proposal at the time of preparing this contribution.

Another promising tool for reducing greenwashing is the Digital Product Passport, which will provide information about products' environmental sustainability and could enable a traceable supply chain. This is part of the proposal for a new Ecodesign for Sustainable Products Regulation, also published in March 2022.²⁶

The ZVPot-1 contains specific rules linking environmental concerns with consumer empowerment through information. This is reflected in the legal requirement to provide instructions for goods that require a specific procedure for correct use or which, if used incorrectly by consumers, could endanger users or others or pollute the environment.²⁷ Environmental concerns are further addressed by the requirements in Article 91 ZVPot-1 on the obligatory guarantee for technical products and the Environmental Protection Act, in conjunction with the Decree on the Management of Waste Electrical and Electronic Equipment.²⁸ Both these requirements were governed by the ZVPot and have been retained in the new ZVPot-1. The Administrative Court held that the market inspector lawfully withdrew from the market computers that did not comply

2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Official Journal, L 211, 14 August 2009; etc.).

²⁵ Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami, Uradni list RS, no. 53/2007.

²⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final, 30 March 2022.

²⁷ Article 33 ZVPot and Article 10 ZVPot-1.

²⁸ Uredba o odpadni električni in elektronski opremi, Uradni list RS, no. 55/2015, Article 5; Article 16 ZVPot and Article 91 ZVPot-1.

with these provisions, as they were not marked with a separate collection sign for waste electrical and electronic equipment.²⁹ The Administrative Court also found that compliance with technical regulations and requirements is in the public interest, as it serves to protect both consumers and the environment, justifying restrictions on the free movement of goods.³⁰

Relying solely on empowerment through information disclosure should be seen as just one element of EU consumer protection law.³¹ Such approaches support sustainable consumption only if consumers value more sustainable products³², which also depends on their affordability and other factors that influence sustainable behavioural change.³³ It is a (re-regulatory) approach to enhancing the durability of goods, which demonstrates the EU's and Member States' concern with achieving adequate levels of protection aligned with sustainability goals for all consumers, whether empowered or not.³⁴ This aspect is addressed in the next section.

3. CONTRACTUAL STAGE: NON-CONFORMITY, REMEDIES, AND GUARANTEES

The circular economy is based on the continuous re-use of materials and products. Therefore, at the contractual stage, the goals of sustainability can align with consumer protection through regulation that enhances the durability of goods, particularly rules concerning the choice of remedies, time limits, and legal and commercial guarantees.³⁵ The primary reason for introducing these rights in legislation has been to strengthen consumer protection against businesses, but sustainability can also play a role in this balancing exercise. This section outlines the key legislative choices made during the implementation of the CSD,

²⁹ Decision of the Administrative Court of the Republic of Slovenia (Upravno sodišče Republike Slovenije), I U 610/2011, 12 October 2011.

³⁰ Weingerl, *op. cit.* (fn. 7), p. 130.

³¹ Weatherill, S., *Empowerment is not the only Fruit*, in: Leczykiewicz, D.; Weatherill, S. (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, Oxford, 2016, pp. 203–222; for discussion on empowerment and the circular economy, see Mak; Terry, *op. cit.* (fn. 5).

³² See also Mathios *et al.*, *op. cit.* (fn. 5).

³³ Weingerl, *op. cit.* (fn. 7), pp. 130–131.

³⁴ For the discussion on the shortcomings of the empowerment agenda in EU consumer law generally, see Weatherill, *op. cit.* (fn. 31).

³⁵ See Weingerl, *op. cit.* (fn. 7), p. 131 and references therein.

comparing them with the requirements of the SGD and their transposition into the new ZVPot-1, focusing on their alignment with sustainability objectives.

3.1. New criterion for the conformity assessment: durability

The SGD is a maximum harmonisation directive³⁶ that applies to sales contracts for goods, including goods with a digital component such as smartphones, smart TVs, or smartwatches.³⁷ Under the SGD, goods must conform with the contract.³⁸ There are two sets of revised conformity requirements: subjective requirements and objective requirements.³⁹

The objective requirements for conformity relate to the objective standards of reasonable expectation, which apply regardless of the terms of the contract. One of the sustainability-friendly novelties of the SGD is the explicit mention of durability and the reasonable expectations of the consumer as criteria for the assessment of objective conformity.⁴⁰ Article 2(13) SGD defines durability as “the ability of the goods to maintain their required functions and performance through normal use”. Thus, in order for “goods to be in conformity, they should possess the durability which is normal for goods of the same type and which the consumer can reasonably expect given the nature of the specific goods, including the possible need for reasonable maintenance of the goods, such as the regular inspection or changing of filters in a car, and any public statement made by or on behalf of any person constituting a link in the chain of transactions”.⁴¹

The assessment should also take into account all other relevant circumstances, such as the price of the goods and the intensity or frequency of their use by the consumer. Moreover, if any pre-contractual declaration forming part of the sales contract contains specific sustainability information, the consumer should be able to refer to it as part of the subjective compliance requirements.⁴²

³⁶ Article 4 SGD.

³⁷ Article 3 SGD. Parts of this examination are revised and further developed from ideas published in Weingerl, P., *Sustainability Challenges in Slovenian Private Law: A Focus on the Nature of Goods*, in: Santos Silva, M.; Nicolussi, A.; Wendehorst, C.; Salvador Coderch, P.; Clément, M.; Zoll, F. (eds.), *Routledge Handbook of Private Law and Sustainability*, Routledge, Abingdon – New York, 2024, pp. 181–182.

³⁸ Article 5 SGD.

³⁹ Articles 6 and 7 SGD, respectively.

⁴⁰ Article 7(1)(d) SGD.

⁴¹ Recital 32 SGD.

⁴² *Ibid.*

The ZVPot-1 transposed the concept of durability *verbatim*, with its definition found in Article 4 ZVPot-1. Durability as a criterion for the objective assessment of the conformity of goods is governed by Article 73(4) ZVPot-1.

According to Article 10(1) SGD, the seller is liable for any non-conformity that exists at the time of delivery and becomes apparent during the two-year legal guarantee period. The legal guarantee period is extended for digital content or services supplied continuously to goods with digital elements for more than two years. Slovenia did not opt for longer legal guarantee periods as enabled by Article 10(3) SGD. From a sustainability perspective, this could be beneficial, as longer legal guarantee periods encourage the production of more durable goods⁴³, which results in fewer environmental externalities from the production of new and disposal of old goods.⁴⁴ Moreover, as Van Gool and Michel argue, longer guarantee periods may increase the likelihood that consumers seek repairs for their products instead of purchasing new ones, which again prolongs the lifespan of goods.⁴⁵

However, it can be argued that a longer lifespan is not necessarily the most sustainable option for all goods, as one size does not fit all.⁴⁶ Some newer goods may improve energy efficiency or be less environmentally hazardous.⁴⁷ Furthermore, legal guarantee periods may increase the prices of certain goods.⁴⁸ Therefore, the EU legislator left it to Member States to decide whether they wished to introduce longer guarantee periods than those harmonised in the SGD. The Slovenian legislator did not opt for this possibility.

⁴³ Gomez, F., *Economic Analysis of the Directive*, in: Bianca, C. M.; Grundmann, S. (eds.), *EU Sales Directive: Commentary*, Intersentia, Antwerp – Oxford – New York, 2002, pp. 57–59.

⁴⁴ Van Gool, E.; Michel, A., *The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis*, EuCML – Journal of European Consumer and Market Law, vol. 10, no. 4, 2021, p. 141.

⁴⁵ *Ibid.*, referring to Berge, R. van den; Magnier, L.; Mugge, R., *Too good to go? Consumers' replacement behaviour and potential strategies for stimulating product retention*, Current Opinion in Psychology, vol. 39, 2021, p. 68.

⁴⁶ See e.g. Montalvo, C.; Peck, D.; Rietveld, E., *A Longer Lifetime for Products: Benefits for Consumers and Companies*, European Parliament, Brussels, 2016.

⁴⁷ Van Gool; Michel, *op. cit.* (fn. 44), p. 141.

⁴⁸ See ICF, *Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/44/EC*, European Commission, Brussels, 2017, pp. 28–35.

3.2. Mandatory hierarchy between the remedies

The seller is liable to the consumer for any lack of conformity that exists at the time when the goods, including goods with digital elements, were delivered and that becomes apparent within two years of that time.⁴⁹ The possible remedies for non-conformity in the SGD are the same as in the CSD: bringing goods into conformity (repair or replacement), price reduction, and termination of the contract.⁵⁰ However, the SGD introduces a mandatory hierarchy between these remedies, prioritising proper performance of the contractual obligations through remedying the non-conforming performance.⁵¹ The limited access to secondary remedies (price reduction and termination of the contract) is arguably instrumental not only in favouring the preservation of the contract but also in encouraging sustainable consumption and longer product durability⁵² in the pursuit of a circular and more sustainable economy.⁵³ In March 2023, the Commission adopted a new proposal on common rules promoting the repair of goods, which aims to support the European Green Deal objectives by reducing waste. This contribution does not yet take these new principles and objectives into consideration.

The CSD also imposed a hierarchy within its scheme of remedies, favouring repair and replacement (safeguarding contractual requirements) over price reduction and rescission (remedies modifying originally contracted rights and obligations).⁵⁴ However, it gave Member States discretion to opt for no hierarchy between the remedies in line with the minimum harmonisation approach. The Slovenian legislator opted for no hierarchy between remedies in the ZVPot, granting consumers free choice between different remedies.⁵⁵ The same system of no-hierarchy remedies also applied to the provision of services.⁵⁶

⁴⁹ Article 10(1) SGD.

⁵⁰ See Article 13 SGD.

⁵¹ Morais Carvalho, J., *Sales of Goods and Supply of Digital Content and Digital Services-Overview of Directives 2019/770 and 2019/771*, EuCML – Journal of European Consumer and Market Law, vol. 8, no. 5, 2019, p. 200.

⁵² Recital 48 SGD.

⁵³ See e.g. De Franceschi, A., *Consumer's Remedies for Defective Goods with Digital Elements*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, vol. 12, no. 2, 2021, p. 144.

⁵⁴ See Opinion of AG Mazák in *Gebr. Weber GmbH v Jürgen Wittmer*, Case C-65/09, ECLI:EU:C:2010:274, para. 78.

⁵⁵ Article 37.c ZVPot.

⁵⁶ Article 38 ZVPot.

While under the CSD, the seller could refuse the form of subsequent performance chosen by the buyer (repair or replacement) if such performance was possible only at disproportionate cost⁵⁷, this possibility was not expressly governed by the ZVPot. This rule has now been expressly implemented with the ZVPot-1 (Article 82(6)). Moreover, the ZVPot did not include the rule excluding the possibility of rescission if the lack of conformity is minor.⁵⁸ However, the Supreme Court relied on *lex generalis*, i.e. the Code of Obligations⁵⁹, to apply the principle *de minimis non curat lex* and rejected the possibility of rescission in the case of minor, insignificant mistakes or non-compliance with the contract.⁶⁰ Although the ZVPot regulation purported to give consumers a free choice of remedies, the Supreme Court's reasoning limited this choice and indirectly linked the concept of the functionality of goods to sustainability goals. The new ZVPot-1 now expressly governs this exclusion in Article 83(7).

Unlike the CSD, the SGD provides for a mandatory hierarchy between the remedies. As a primary remedy under the SGD, the consumer may still choose between repair and replacement.⁶¹ However, this framework is problematic from a circular economy perspective. It is generally believed that repair is more efficient than recycling⁶² and should take precedence over replacement to reduce environmental impact.⁶³ As a remedy, repair creates fewer externalities than replacement by new goods, avoiding resource extraction, production, and transport for the replacement, as well as the likely disposal of the replaced good.⁶⁴ Moreover, as Van Gool and Michel summarise, repair creates local skilled-labour jobs rather than resource extraction and production activities, which often take place in other parts of the world.⁶⁵ Nevertheless, the current EU framework and Slovenian legislation do not provide significant incentives for consumers to elect repair as the primary remedy for non-conforming goods.

⁵⁷ Article 3(3) CSD.

⁵⁸ Article 3(6) CSD.

⁵⁹ Uradni list RS, no. 97/2007 *et seq.*

⁶⁰ Decision of the Supreme Court of Slovenia (Vrhovno sodišče Republike Slovenije, VSRS), II Ips 1001/2008, 17 May 2012. The Supreme Court applied Article 458 of the Code of Obligations in connection with Article 37(4) ZVPot.

⁶¹ Article 3(7) SGD.

⁶² Terry, *op. cit.* (fn. 6), pp. 128–129.

⁶³ See e.g. Kryla-Cudna, K., *Sales Contracts and the Circular Economy*, European Review of Private Law, vol. 28, no. 6, 2020, pp. 1207–1230.

⁶⁴ Van Gool; Michel, *op. cit.* (fn. 44), p. 144.

⁶⁵ *Ibid.*, referring to Deloitte, *Study on socioeconomic impacts of increased reparability: Final Report*, European Commission, Brussels, 2016, p. 14.

In Slovenia, the new ZVPot-1 introduced the mandatory hierarchy between remedies through Articles 81–83. While this hierarchy should, in principle, lead to more sustainable outcomes, it has had a negative impact in certain respects. As of January 2023, consumers cannot immediately choose price reduction as a remedy for defective goods. Price reduction could provide incentives for both sellers and consumers to choose more sustainable options instead of replacement, particularly when the consumer does not wish to pursue repair (e.g., if the defect is minor and does not prevent the consumer from using the product). This remedy may lead to similar results as repair because it encourages the buyer to retain the non-conforming goods rather than exchange them for new ones.⁶⁶ From the seller's perspective, the possibility of price reduction could incentivise them to sell durable products, allowing them to retain the entire purchase price.⁶⁷

There are practical obstacles to the right to repair that may render it an inappropriate remedy in certain circumstances. For repair to be attractive to consumers, it needs to be time- and cost-effective. Even for consumers motivated by environmental and social reasons to repair their products, there are economic deterrents such as waiting times, costs, and the effort required to get their products repaired.⁶⁸ To address this, Article 82 ZVPot-1 provides that the seller bears the necessary costs incurred in establishing the conformity of the goods, particularly shipping, transport, labour, or material costs. Additionally, the right to replacement is made more attractive to consumers by ensuring that they do not have to pay for the normal use of the replaced goods before the replacement occurs.

Despite being a maximum harmonisation directive, the SGD allows Member States to govern a specific remedy known as the right to refuse if the lack of conformity becomes apparent within a period after delivery, not exceeding 30 days.⁶⁹ The Slovenian legislator included this specific remedy in Article 83(2) ZVPot-1. However, it is questionable whether this remedy aligns with sustainability goals, as it may encourage impulsive consumption, additional transports, a possible new purchase, and the risk that returned goods cannot be resold or repurposed.⁷⁰

⁶⁶ Kryla-Cudna, *op. cit.* (fn. 63), p. 1207.

⁶⁷ Weingerl, *op. cit.* (fn. 7), p. 131.

⁶⁸ Hernandez, R. J.; Miranda, C.; Goñi, J., *Empowering Sustainable Consumption by Giving Back to Consumers the 'Right to Repair'*, *Sustainability*, vol. 12, no. 3 (850), 2020, pp. 1–15.

⁶⁹ Article 3(7) SGD.

⁷⁰ Van Gool; Michel, *op. cit.* (fn. 44), p. 143.

Another exception from the maximum harmonisation directive is the possibility for Member States to retain national rules, not specific to consumer contracts, that provide remedies for certain types of defects not apparent at the time of conclusion of the sales contract.⁷¹ A rule that could fit this exception is found in the Slovenian Supreme Court's decision concerning covering purchases (a form of third-party performance).⁷² Although covering purchase is not governed by the ZVPot as an available remedy for defective goods, the Supreme Court relied on the Code of Obligations (*lex generalis*), drawing an analogy with lease contracts.⁷³ The court ruled that a consumer can repair defects at the seller's expense, even in consumer sales contracts, provided the consumer first gives the seller additional time to make repairs. This decision indirectly aligns with sustainability aims.

The ZVPot-1 also implemented the right for consumers to withhold payment until sellers have fulfilled their obligations.⁷⁴ The added sustainability value lies in the ability to avoid replacement, termination, and/or litigation, which are less efficient and sustainable than pressuring sellers to deliver and install goods in full conformity with the contract from the outset.⁷⁵

Regarding damages, the SGD leaves it to national law to determine the conditions under which consumers can claim damages in addition to the existing remedies.⁷⁶ The ZVPot-1 provides that consumers have the right to request compensation for damages from the seller "in any case", particularly reimbursement for the costs of materials, spare parts, labour, transport, and shipping, arising from non-conformity claims.⁷⁷

3.3. Commercial guarantee of durability and obligatory guarantee for technical products: prioritising repair

Besides optional commercial guarantees, governed by the CSD and SGD and implemented in the Slovenian consumer law, both the ZVPot and the new

⁷¹ Article 3(7) SGD.

⁷² Decision of the VSRS, II Ips 12/2019, 27 February 2020.

⁷³ Article 639(3) of the Code of Obligations.

⁷⁴ Article 81(2) ZVPot-1, implementing Article 13(6) SGD.

⁷⁵ Van Gool; Michel, *op. cit.* (fn. 44), p. 144.

⁷⁶ Article 3(6) SGD.

⁷⁷ Article 81(3) ZPot-1.

ZVPot-1 also govern a 1-year obligatory guarantee for technical products.⁷⁸ This guarantee must be issued by the producer. The Supreme Court of Slovenia referred to this concept as “a relic from the past”⁷⁹, as its introduction was inspired by solutions found in the Yugoslav Obligations Act of 1978, which was replaced (or rather modified, as there were only minor and no conceptual changes) by the Slovenian Code of Obligations in 2002. The new ZVPot-1 also expressly governs the optional commercial guarantee based on Article 17 of the SGD (see, e.g., Articles 89(2) and 92 ZVPot-1).

Legal remedies under the obligatory guarantee are the same as remedies for non-conformity; however, there is a strict three-level hierarchy of remedies under the framework of the obligatory guarantee. Article 97(1) ZVPot-1 designates repair as the primary remedy in this framework. Only if the goods are not repaired within 30 days (under the ZVPot, it was 45 days), the producer must replace the goods with “identical, new, and faultless” goods free of charge. Unfortunately, refurbished goods cannot replace goods presented for repair, which is regrettable from a sustainability perspective, as refurbishment can contribute to sustainability goals similarly to repair. Nevertheless, as Kryla-Cudna has noted, courts have questioned the balance between sustainability and the need to protect the buyer’s contractual interest.⁸⁰ Only if the producer fails to repair or replace the faulty product can the consumer resort to price reduction or rescission of the contract (Article 97(3) ZVPot-1). Additionally, the guarantor can provide the consumer with free use of similar goods during the repair of goods under an obligatory guarantee (Article 97(7) ZVPot-1). If the guarantor fails to provide replacement goods for temporary use, the consumer has the right to claim damages for the inability to use the goods from the moment the repair or replacement request was made until completion (Article 97(8) ZVPot-1). These remedies under the obligatory guarantee can be exercised by any contractual party (including in B2B contracts), not just the consumer (Article 97(9) ZVPot-1).

The ZVPot previously governed obligatory guarantees for used goods with a guarantee period of at least one month.⁸¹ However, the ZVPot-1 did not retain this guarantee for used products, which is regrettable from a sustainability perspective.

⁷⁸ Those technical products are defined in the Regulation on goods, for which conformity guarantee shall be issued (Pravilnik o blagu, za katero se izda garancija za brezhibno delovanje, Uradni list RS, no. 14/2012). See also Weingerl, *op. cit.* (fn. 37), pp. 183–184.

⁷⁹ Decision of the VSRS, II Ips 1001/2008, 17 May 2012.

⁸⁰ Kryla-Cudna, *op. cit.* (fn. 63), p. 1207.

⁸¹ Article 19 ZVPot.

The ZVPot-1 allows consumers to rely on the right to refuse if the lack of conformity of the goods becomes apparent within a period not exceeding 30 days after delivery, even in cases involving the obligatory guarantee.⁸²

ZVPot-1 also shortens the period in which the guarantor must bring goods into conformity. For products placed on the market before 25 January 2023, the 45-day period will continue to apply. For products placed on the market later, the repair period is reduced to 30 days.⁸³ This deadline can be extended to the shortest necessary time to complete the repair or replacement, but for a maximum of 15 days. The consumer must be informed of the extension before the expiry of the original period, along with the reasons for the extension.⁸⁴

The obligatory guarantee has been a popular option for consumers seeking goods in conformity with the contract because the consumer can request repairs until the end of the guarantee period and is not required to notify the seller of lack of conformity within a specific time frame, unlike with the general conformity rules.⁸⁵ The shorter repair period under the obligatory guarantee may encourage consumers to rely on it rather than the remedies for non-conformity, which is positive from a sustainability perspective, as the obligatory guarantee framework prioritises repair and prevents consumers from choosing replacement over repair if the latter is a suitable remedy.

The obligatory guarantee is the most sustainability-friendly measure of Slovenian consumer sales law, with the exception of the rule excluding the replacement of defective goods with refurbished goods.⁸⁶ It prioritises repair as the primary remedy and includes rules on spare parts and access to repair services (see below). This framework could serve as a model for remedies system for non-conforming goods. Additionally, accompanying measures to support the right to repair could include reducing the cost of repair services (e.g., via reduced taxation of such services) and promoting self-repair.⁸⁷

⁸² Article 97(5) ZVPot-1.

⁸³ Article 97(1) ZVPot-1.

⁸⁴ Article 97(2) ZVPot-1.

⁸⁵ Article 84(1) ZVPot-1.

⁸⁶ Weingerl, *op. cit.* (fn. 7), p. 132.

⁸⁷ Bourgoignie, T., *Contribution of Consumer Protection to Sustainable Consumption*, UNCTAD Intergovernmental Group of Experts (IGE) Meeting on Consumer Protection, Geneva, 9 July 2019, p. 3, https://unctad.org/meetings/en/Contribution/cicplp4_Cont_Bourgoignie.pdf (16 April 2023). See also Terry, *op. cit.* (fn. 6).

3.4. Supporting durability: the availability of essential spare parts, access to repair services, and after-sales service

The preamble of the SGD clarifies that the Directive does not impose an obligation on sellers to ensure the availability of spare parts for a certain period as an objective requirement for conformity.⁸⁸ Nevertheless, both the ZVPot and the new ZVPot-I establish such an obligation for goods subject to special regulation,⁸⁹ as governed by the obligatory guarantee pursuant to Article 94 of the ZVPot-I. In such cases, the producer is required to provide access to repair services and supply spare parts during the guarantee period and for a minimum of three years after the expiry of that period. This can be achieved either by offering servicing directly or through a servicing agreement with a third party.⁹⁰

Thus, the ZVPot-I includes supporting measures that facilitate repair and contribute to sustainability goals – measures that are missing from the CSD and SGD frameworks.

4. CONCLUSION

Scholars have argued that modern consumer law should also focus on the protection of future generations. In September 2021, the UN Secretary-General initiated a discussion on the rights of future generations with his report “Our Common Agenda”.⁹¹ The very idea of future generations is intrinsically linked to sustainability. As Gaillard notes, it involves extending the timeframe of law to include the long-term protection of populations and species.⁹² The rights of future generations can be divided into two main categories: environmental rights (sustainable development) and bioethical rights (protection of the human condition).⁹³

⁸⁸ Recital 33 SGD.

⁸⁹ See fn. 76.

⁹⁰ Article 95 ZVPot-I.

⁹¹ The report can be found at <https://www.un.org/en/content/common-agenda-report/> (16 April 2023).

⁹² Gaillard, É., *The Rights of Future Generations, A New Legal Humanism*, ICMGLT – International Center For MultiGenerational Legacies Of Trauma, 29 November 2021, <https://icmgl.org/the-rights-of-future-generations-a-new-legal-humanism/> (16 April 2023).

⁹³ *Ibid.*

Regarding environmental rights, the existing legal concepts of the Slovenian private law fit into this paradigm only to a limited extent. The obligatory guarantee, along with rules on spare parts and access to repair services, remains the most sustainability-friendly measure of Slovenian consumer sales law. However, the rights of future generations challenge us to rethink our private law concepts and the notions of growth and development.

The SGD has been criticised for maintaining a regulatory model that prioritises individual consumer freedom – allowing consumers to consume as much as they want – regardless of social or environmental externalities.⁹⁴ The maximum harmonisation nature of the SGD has diminished the sustainability potential of remedies with its mandatory hierarchy while allowing consumers to choose between repair and replacement. As a result, the Slovenian legislator introduced the hierarchy and limited consumers' ability to resort to price reduction, even when it might be the most appropriate remedy both from a sustainability and efficiency perspective. A mandatory hierarchy of remedies could be optimal if designed similarly to the obligatory guarantee framework in the ZVPot-I, which prioritises repair as the primary remedy. It should be recognised that repair is not always the most suitable remedy, and consumers should be allowed to rely on other remedies if repair is impossible or disproportionate, as permitted by Article 2(1) of the SGD. However, if sustainability concerns are genuinely prioritised and a hierarchy of remedies is preferred, repair should be the default remedy rather than an option for consumers to choose.

Despite certain improvements that may tip the balance in favour of sustainability concerns, such as the potential for durability in conformity assessment, there remains substantial room for improvement in aligning consumer law with sustainability goals, both in the SGD and the ZVPot-I. The current reliance on the awareness-raising model and the empowered eco-friendly consumer assumes that consumers will buy eco-friendly goods and resort to eco-friendly remedies in case of non-conformity. These measures could be strengthened by promoting repair and self-repair, supporting replacement with refurbished goods, and extending guarantee periods to encourage the production of more durable goods. Beyond remedies, another measure to support product durability would be to sanction planned obsolescence as an unfair commercial practice, punishable by administrative, civil, and criminal sanctions.⁹⁵

⁹⁴ Van Gool; Michel, *op. cit.* (fn. 44), p. 136, referring to Krämer, L., *On the Interrelation Between Consumer and Environmental Policies in the European Community*, *Journal of Consumer Policy*, vol. 16, no. 3–4, 1993, pp. 457–458 and 464–466.

⁹⁵ Bourgoignie, *op. cit.* (fn. 87), p. 4.

The judiciary will also play a crucial role. The interpretation of durability as an objective requirement in conformity assessment, and the proportionality of repair as a remedy, holds significant potential for sustainability-friendly practice. A sustainability-driven interpretation of the principle of good faith will also be critical.⁹⁶ Judges have the necessary tools at their disposal in EU primary and secondary law, starting from horizontal clauses found in Article 11 TFEU and Article 37 of the EU Charter of Fundamental Rights.

In 1993, Krämer observed that “consumers, today, are better off than 20 years ago, while the environment is worse off”.⁹⁷ Recently, the EU celebrated 50 years of consumer protection, and Krämer’s observation still holds true today. As Kay highlighted, consumer law does not seek to maintain the status quo – it is not merely a neutral instrument, but must reflect its own values and promote social change.⁹⁸ The potential of consumer law to encourage and embrace sustainable consumption has not yet been fully unlocked.

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⁹⁶ See Kryla-Cudna, *op. cit.* (fn. 63), pp. 1207–1230.

⁹⁷ Krämer, *op. cit.* (fn. 94), p. 455.

⁹⁸ Kye, *op. cit.* (fn. 5), p. 45, referring also to Thierry Bourgoignie.

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Sažetak

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POTROŠAČKO UGOVORNO PRAVO I CILJEVI ODRŽIVOSTI U SLOVENIJI: IMA LI PROSTORA ZA POBOLJŠANJE?

Direktiva o kupoprodaji robe i Direktiva o digitalnom sadržaju i uslugama prenesene su u slovenski pravni sustav novim Zakonom o zaštiti potrošača 2022. godine. Ovaj rad ocjenjuje jesu li i kako ciljevi održivosti internalizirani u potrošačko ugovorno pravo i politiku u Sloveniji, posebice u kontekstu promjena koje je uvela Direktiva o kupoprodaji robe. Rad se usredotočuje na pravna sredstva za neusklađenost robe i usluga, a također ispituje obvezno komercijalno jamstvo za tehničke proizvode kao posebnu mjeru sadržanu u Zakonu o zaštiti potrošača. Trenutačno stanje se uvelike oslanja na model podizanja svijesti i osnaženog, ekološki osviještenog potrošača, od kojeg se očekuju kupovanje ekološki prihvatljive robe i uporaba ekološki prihvatljivih pravnih sredstava u slučajevima neusklađenosti. Te bi se mjere mogle dodatno ojačati poticanjem popravka i samopopravka, podupiranjem zamjene obnovljenom robom i produljenjem jamstvenih rokova kako bi se potaknula proizvodnja trajnijih proizvoda. Rad prepoznaje obvezno komercijalno jamstvo kao najprikladniji koncept za održivost u slovenskom pravu potrošačke kupoprodaje. Konkretno, uređenje obvezne garancije u slovenskom pravu predviđa popravak kao primarno pravno sredstvo te sadržava odredbe o dostupnosti rezervnih dijelova i pristupu uslugama popravka. Taj bi pravni okvir mogao poslužiti kao model za sustav pravnih sredstava za neusklađenu robu na razini EU-a.

Gljučne riječi: potrošačko ugovorno pravo, održivost, trajnost, pravna sredstva, popravak, obvezno komercijalno jamstvo

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