BRIEFING

Requested by the IMCO committee

European Parliament

Fighting Premature Digital Obsolescence of Consumer Goods and Consumer Rights

KEY FINDINGS

After the Digital Content Directive (DCD) and Sale of Goods Directive (SGD), some measures to improve durability and fight premature digital obsolescence were introduced by further EU legislation, but they are still not sufficient. Information about the minimum period during which the producer or the provider supplies software updates should be made available to consumers in all cases, and not only where the producer or provider makes such information available to the consumer's contractual counterparty (Article 6(1)(lc) Consumer Rights Directive (CRD)). Information about the supply of updates should also be provided, according to Article 6(1)(o) CRD, in the framework of information on the duration of the contract.

In order to avoid information overload and to increase transparency, the provision to the consumer, in a clear and prominent manner, and directly before he places his order, of an "Executive Summary" of the key information, is of utmost importance. The duty to provide a list of key information is already contained in Article 8(2)(1) CRD, regarding distance contracts to be concluded by electronic means and which place the consumer under an obligation to pay. However, in order to be fit for the digital environment, such list should be integrated at least with the information mentioned in Article 6(1)(r) CRD (functionality) and Article 6(1)(s) CRD (interoperability), as well as with information regarding the expected lifespan of digital products, and the consequences of contract termination. The same solution should be extended beyond the current scope of application of Article 8(2)(1) CRD, so that to apply to all contracts, and therefore not only to those concluded by electronic means which place the consumer under an obligation to pay.

It would be adequate to extend the legal liability period for specific categories of goods. The possibility to reduce the liability period to one year for second-hand goods should be avoided. The introduction of a direct consumer claim against the producer, the importer or the platform operator should be considered.

In case of contractually planned digital obsolescence, several grey list provisions of the Unfair Contract Terms Directive (UCTD) may come into play, and in particular Annex points (b), (c), (f), (g), (j), (k).

Unilateral modification of digital content or digital service may lead to abuses by the trader. The solution contained in Article 19 DCD, which aims to protect consumers in such a case of unilateral modification, should be extended to the SGD, in order to strengthen consumer protection also regarding goods with digital elements. The liability exemption laid down in Article 8(3) DCD and Article 7(4) SGD leaves the door open to abuses by the trader: the possible consumer's decision not to install the updates may indeed lead to the exclusion of the trader's liability for lack of conformity. For deterrence purposes, proportionality of sanctions based on Unfair Commercial Practices Directive (UCPD) violations is key.

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Taking the example of videogames, a legal obligation to keep them playable after they stop being provided cannot be configured, except for the cases in which this interruption configures a lack of conformity. In terms of restitutions, it is necessary to distinguish between contracts with fixed or with indetermined duration. The restitutions should include payments made under ancillary contracts.

The effectiveness of the UCPD and the synergy between private and public enforcement should be increased. A possible solution could be extending the sanction of the "non-bindingness" provided by Article 8(2) CRD for "Internet Cost Traps" to contracts concluded as a consequence of misleading commercial practices, at least of those in the "black list". In order to ensure effectiveness, deterrence and proportionality are key: penalties should be linked to the trader's annual turnover, and this not just for cross-border infringements. Article 13(3) UCPD should be therefore extended beyond the scope of application of Article 21 Consumer Protection Cooperation (CPC) Regulation, thereby including all unfair commercial practices, independently from their territorial reach. The forthcoming Digital Fairness Act (DFA) and the upcoming revised text of the CPC Regulation may be the best places to implement such solutions.

Planned digital obsolescence increasingly impacts our everyday life. This shatters the very basis of consumer and market law, challenges its effectiveness, and raises some crucial issues, requiring innovative solutions. EU law and Member States' enforcement show a lack of effectiveness, leaving open some fundamental questions. **Ensuring durability of digital tangible and intangible products** is also crucial for achieving more sustainable consumption behaviour, waste reduction and environmental protection. The following analysis* provides a "fitness check" of the existing instruments, and in particular of Digital Content Directive (DCD)[1], Sale of Goods Directive (SGD)[2], Consumer Rights Directive (CRD)[3], Unfair Commercial Practices Directive (UCTD)[4], Empowering Consumers Directive (ECGTD)[5], Copyright Directive (DSM)[6]. Omnibus Directive (OD)[7], Repair Directive (RD)[8], Ecodesign Regulation (EDR)[9], Unfair Commercial Practices Directive (UCPD)[10], Consumer Protection Cooperation (CPC) Regulation[11] and the forthcoming Digital Fairness Act (DFA).

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1 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, OJ L 136, 22.5.2019, pp. 1–27.

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, OJ L 136, 22.5.2019, pp. 28–50.

3 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, OJ L 304, 22.11.2011, pp. 64–88.

4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.

5 Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, OJ L, 2024/825, 6.3.2024.

6 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

7 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, pp. 7–28.

8 Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, OJ L, 2024/1799, 10.7.2024.

9 Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, OJ L, 2024/1781, 28.6.2024.

10 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, OJ L 149, 11.6.2005, pp. 22–39.

11 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, pp. 1–26.

The **objectives** of this analysis are to provide:

- an assessment of the contribution, or lack of contribution, of the current EU legislation to durability of digital products;
- an assessment of the most effective solutions at national level; and
- recommendations on the future development and possible reforms of European consumer protection legislation to ensure durability of digital products.

Durability and Supply of Updates: Functionality of DCD, SGD and their Interplay with UCTD, ECGTD, RD and EDR

A far-reaching impact of the DCD and SGD can be seen in particular through the establishment of two requirements: the duty to **inform and supply the consumer with updates**, which is provided for in DCD and SGD, both as a subjective and as an objective requirement of conformity (Article 7(1)(d), and Article 8(2) DCD; Article 6(1)(d) and Article 7(3) SGD); and **durability**, which is laid down as an objective requirement for goods in Article 7 (1)(d) SGD[12]. Furthermore, Article 16 RD replaced Article 7(1)(d) SGD, including "**repairability**" within the non-exhaustive list of qualities and other features that consumers may reasonably expect.

Reasonable Expectations, Information about Durability and Supply of Updates

Article 7(1)(d) SGD **links durability**, as one of the qualities and other features, including in relation to functionality, compatibility and security normal for goods of the same type, **to the reasonable expectations** of the consumers. However, given the complex nature of those goods, it is for the average consumer particularly difficult to understand what he may "reasonably expect".
Therefore, an **obligation of the seller to inform about the minimum durability of goods** was discussed in several Member States[13].

An indicator of a good's durability is the producer's **commercial guarantee of durability** within the meaning of Article 17 SGD[14]. If producers are able to make precise statements regarding (minimum) durability of products, it should not be considered too burdensome to impose on them a duty to inform on the **expected durability** of the product, in order to give more concrete character to the "legitimate expectations of the consumer" (cf. Article 7(1)d SGD, for physical goods; Article 7(3)a SGD, for goods with digital elements).

In the future, such information duty should encompass both the **minimum legal expectation** and the **overall expected duration** of consumer goods. This is all the more important with regard to the supply of updates for goods with digital elements.

12 Even before the implementation of the "Twin Directives", the Austrian Supreme Court of Justice assumed that a certain functional life of an object can be considered as a usually presupposed characteristic within the meaning of § 922 para. 1 ABGB (Allgemeines bürgerliches Gesetzbuch – Austrian Civil Code) (*Gewährleistung – Guarantee*), for which liability is assumed under warranty law: see Oberster Gerichtshof, 23.04.2015 – 1 Ob 71/15w – Zak 2015, 256 (256 ff.).

13 See De Franceschi/Schulze, Harmonizing Digital Contract Law – An Introduction, in De Franceschi/Schulze (eds.), Harmonizing Digital Contract Law. The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms, Beck – Hart – Nomos, 2023, p. 16.

14 Recital 25 ECGTD.

Particularly useful in this regard are the information duties introduced by Article 2 ECGTD into Article 5(1)(ed) CRD[15] and 6(1)(lc) CRD[16], **even though they are not yet satisfactory**: indeed, information about the **minimum period**, whether expressed as a period of time or by reference to a date, during which the producer or the provider provides **software updates** should be made **available to the consumer in all cases**, and not only "where the producer or provider makes the information available to the trader". Information on the provision of updates is key.

Therefore, it **should be included among the pre-contractual information requirements under Article 6(1)(o) CRD**, which already includes **information on** "***the duration of the contract****, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract*".
Ideally, consumers should be entitled to **expect updates for the entire expected lifetime** of the smart product[17].

In order to avoid information overload while enhancing transparency, it is of utmost importance that consumers be provided, in a clear and prominent manner, and directly before placing their order, with an "Executive Summary" of the key information. A duty to provide a list of some key information already exists under Article 8(2)(1) CRD, which applies to distance contract concluded by electronic means entailing an obligation to pay for the consumer. More specifically, such rule provides that "*if a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order*", of the information provided for in Article 6(1)(a) CRD (main characteristics of the goods or services), Article 6(1)(e) CRD (total price), Article 6(1)(o) CRD (duration of the contract and conditions for terminating the contract), Article 6(1)(p) CRD (minimum duration of the consumer's obligations under the contract).

However, in order to be fit for the digital environment, the above-mentioned list should be supplemented at least with the information referred to in Article 6(1)(r) CRD (functionality) and Article 6(1)(s) CRD (interoperability), as well as with information on the expected lifespan of digital products, and the consequences of contract termination.

The same solution should be extended beyond the current scope of application of Article 8(2)(1) CRD, so that it applies to all contracts, rather than only to distance contracts concluded by electronic means and that entail an obligation to pay.

Liability Period

In the Member States, legislative **discussions have included extending the liability period and the presumption of non-conformity** beyond what required by EU law[18], as well as **introducing a direct consumer claim against the producer or importer**[19].

15 "*for goods with digital elements, for digital content and for digital services, where the producer or provider makes the information available to the trader, the minimum period, whether expressed as a period of time or by reference to a date, during which the producer or the provider provides software updates.*".

16 "*for goods with digital elements, for digital content and for digital services, where the producer or provider makes the information available to the trader, the minimum period, whether expressed as a period of time or by reference to a date, during which the producer or the provider provides software updates.*".

17 Cf. Janssen, The Update Obligation for Smart Products – Time Period for the Update Obligation and Failure to Install the Update, in Lohsse/Schulze/Staudenmayer (eds.), Smart Products, Nomos – Hart, 2022, p. 101.

18 Explanatory Notes on the Government Draft of the GRUG (Gewährleistungsrichtlinien-Umsetzungsgesetz - Warranty Directives Implementation Act), No. 949 of the Supplements to the Stenographic Protocols of the National Council of the XXVII Legislative Period, 6 ff.; Zöchling-Jud, Austria, in De Franceschi/Schulze (eds.), Harmonizing Digital Contract Law. The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms, Beck – Hart – Nomos, 2023, p. 33 ff.

19 See § 327d BGB (Bürgerliches Gesetzbuch – German Civil Code): "*Where the trader is obliged under a consumer contract pursuant to Section 327 or Section 327a to supply a digital product, the trader must supply the digital product free from material defects and defects of title within the meaning of Sections 327e to 327g*".

Durability may be enhanced also through a more efficient regulation of the liability period and longer availability of spare parts, as is now partly provided for by the EDR.

When implementing the SGD, the **French** legislator did promote repair by introducing an **additional liability period where** the consumer opts for repair (6 months after successful repair, or 24 months in case of failed repair)[20]. According to Article 4 RD, repairers may provide the consumer with the European Repair Information Form.

At the EU level, **Article 16 RD** amended, inter alia, Article 10 SGD, by inserting a new paragraph 2a "*Where, in accordance with Article 13(2), repair takes place as the remedy to bring the goods into conformity, the **liability period shall be extended once by 12 months***". The same provision also amended Article 13 SGD with the addition of a new paragraph "2a. *Before the seller provides the remedy to bring the goods into conformity, the seller shall inform the consumer about the consumer's right to choose between repair and replacement, as well as about the possible extension of the liability period, provided for in Article 10(1a)".*

It would be adequate to **extend the legal liability period** for specific categories of goods (taking into account the different consumers expectations regarding the lifespan of an elevator, a car or a mobile phone).

It is **criticisable** that the EU legislator allows the **reduction of the liability period for second-hand goods** to a minimum of one year, not taking into consideration the previous use that has been made of them[21]. A preferable approach to be followed was adopted by **France**[22] and **Malta**[23], both of which retained in that regard the guarantee period of two years. A compromise solution was chosen by **Portugal**, where the period may be reduced to eighteen months, with the exception of reconditioned goods, which are treated as new goods[24].

Remedies Against Producer, Software Developer, Importer or Platform Operator

Article 10 SGD and Article 11 DCD establish the seller's liability for any lack of conformity. However, in most cases the final seller is not in a position to supply updates, as **only the producer** or the **software developer** will **be able** to do that[25].

This has prompted discussions on whether the obligations of producers should be extended. An interesting solution was chosen in **Hungary**, where – besides the contractual warranty regime – Hungarian law provides the consumer with an **additional extracontractual**, **statutory and mandatory remedy** (for repair or replacement) **directly against the producer.** Under this regime the consumer may, within two years of the product being placed on the market, require the producer to repair the defect, or, if repair is not possible within an appropriate time limit without causing harm to the consumer's interests, replace the product[26]. Since this subject matter is not covered by the SGD, such a solution is compatible with maximum harmonisation. In **Germany**, this concept is discussed under the heading of "*gewährleistungsähnliche Herstellerhaftung*"[27].

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[20] See Article L-217–13 Code de la Consommation: (French Consumer Code) "*Any goods repaired under the statutory guarantee of conformity are covered by a six-month extension of that guarantee. Where the consumer opts for repair, but the seller fails to carry it out, bringing the goods into conformity by replacement triggers, for the benefit of the consumer, a new period of the statutory guarantee of conformity attached to the replacement goods. This provision applies from the day on which the replacement goods are delivered to the consumer*".

[21] See Arroyo Amayuelas, Spain, in De Franceschi/Schulze (eds.), above fn. 13, p. 634. Rather, the UK approach should have been considered: the fact that goods are second-hand is a factor in determining whether the legal quality standard ("satisfactory quality" under Section 9 of the Consumer Rights Act 2015) has been met. This avoids fixed periods.

[22] See Borghetti, France, in De Franceschi/Schulze (eds.), above fn. 13, p. 264.

[23] See Caruana, Malta, in De Franceschi/Schulze (eds.), above fn. 13, p. 482.

[24] See Morais Carvalho, Portugal, in De Franceschi/Schulze (eds.), above fn. 13, p. 531.

[25] See Schulte-Nölke, Digital obligations of sellers of smart devices under the Sale of Goods Directive 771/2019, in: Lohsse/Schulze/Staudenmayer (eds.), above fn. 17, p. 55 f.

[26] Sections 6:178-7:170 of the Hungarian Civil Code. See Fuglinszky, Hungary, in De Franceschi/Schulze (eds.), above fn. 13, p. 348.

[27] See Schomburg, Introductory Statement, in Lohsse/Schulze/Staudenmayer (eds.), above fn. 17, p. 240.

Also in **Austria**, discussions have included introducing **a direct consumer claim against the producer or importer**[28]. In **Spain**, case law has recognised the possibility for consumers to claim contractual damages from the manufacturer[29].
Portugal has made use of the possibility referred to in Recitals 23 SGD and 18 DCD and did introduce the direct **liability of online marketplace providers** where they exercise predominant influence on the contract concluded between consumer and trader[30].
Furthermore, the non-compliance by the online marketplace provider with information duties regarding the identity of the consumer's counterparty, leads to the liability of the online marketplace as if it was a contractual partner of the professional[31].
Given that, both as regards the supply of smart goods and the supply of digital content and digital services, it is the producer or the software provider who has control over the hardware and software, **a direct consumer claim against the producer**, **the software developer, the importer**, **or the platform operator** should be considered[32]. This would generate a steering effect on the producer itself and stimulate the protection of consumer rights[33].

Limitation or Interruption of the Supply of Digital Content or Digital Services

The contractually agreed digital "obsolescence": the role of the UCTD

Contracts between businesses and consumers often contain **clauses that are not individually negotiated**. In **case of planned digital obsolescence**, further to the provisions contained in the CTD, several grey list

provisions may also come into play, and in particular **points** (**b**) [34], (**c**) [35], (**f**) [36], (**g**) [37], (**j**)[38] **and** (**k**)[39] **UCTD Annex**. In particular, if the contract contains a term allowing the seller or supplier to "alter unilaterally without a valid reason any characteristics of the product or service to be provided", such term may be considered unfair according to point (k) of UCTD Annex.

[28] Explanatory Notes on the Government Draft of the GRUG (No. 949 of the Supplements to the Stenographic Protocols of the National Council of the XXVII Legislative Period), 6 ff.

[29] See e.g. Tribunal Supremo, 23.07.2021, RJ 20213583. See Arroyo Amayuelas, Spain, p. 643; Villacorta, The Dieselgate before Spanish Courts, in Journal of European Consumer and Market Law, 2023, p. 128 ff.

[30] Article 44 Law Decree 84/2021 of 18 October 2021. See Morais Carvalho, Portugal, in De Franceschi/Schulze (eds.), above fn. 13, p. 536.

[31] Article 45 Law Decree 84/2021 of 18 October 2021. See Morais Carvalho, above fn. 27.

[32] Cf. Recital 12 DCD; Recital 18 and 63 SGD. See Wendehorst, The Update Obligation – how to make it work in the relationship between seller, producer, digital content or service provider and consumer, in Lohsse/Schulze/Staudenmayer (eds.), above fn. 17, p. 89. Cf. Article 5(1) RD, which already provides a producers' obligation to perform a repair. Cf. Bujalski, On Producer's Obligation to Repair Defective Goods: Direct Producers' Liability vs. Self-Standing Obligation under R2R Directive, in Journal of European Consumer and Market Law, 2024, p. 178 ff.

[33] This was already discussed a lot around the 1993 Green Paper that led to Directive (EU) 1999/44 on Consumer Sales. See already on that Bradgate/Twigg-Flesner, Expanding the Boundaries of Liability for Quality Defects, in Journal of Consumer Policy, 2022, p. 345 ff.

[34] "(b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;".

[35] "(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;".

[36] "(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;".

[37] "(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;".

[38] "(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;".

[39] "(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.".

Unilateral Modification of Digital Content and Digital Services

The unilateral modification of digital content or digital services may serve as a trojan horse for the "access" of an *ex post* non-conformity of the contractual performance.

Article 19 DCD regulates the unilateral modification of digital content or digital service, and, compared to the above-mentioned provisions of the UCTD, provides enhanced protection against unilateral modifications to the detriment of the consumer. However, **no specific provision** in this regard is contained **in the SGD and in the Member States**' **implementing rules**. This is regrettable, especially given that the unilateral modification of digital content may significantly affect the performance of goods with digital elements as well.

Therefore, the solution provided in Article 19 DCD, protecting consumers in case of unilateral modification of digital content or digital service, should be extended to the SGD in order to strengthen consumer protection also in relation to the sale of goods with digital elements.

Lack of Updates, Obsolescence and Liability Exemption

Both the DCD and the SGD contain provisions which leave the **door open to abuses by the trader**, in particular those **on the liability exemption** laid down in Article 8(3) DCD[40] and Article 7(4) SGD[41]: a consumer's decision not to install the updates supplied by the trader may indeed lead to the exclusion of the trader's liability for lack of conformity.

The above-mentioned solution may encourage misleading practices by traders. In order to prevent abusive behaviours, deterrence and proportionality of sanctions based on the UCPD are key (see below, under "enforcement issues").

Short-Term Interruptions of Continuous Supply of Digital Content and Digital Services

According to Article 51 DCD, **short-term interruptions** in the supply of digital content or a digital service **should be treated as instances of lack of conformity** where such interruptions are more than negligible or recur. Following this approach, the **Irish legislator** provided in Section 52(4) of the Consumer Rights Act 2022 that, where a continuous contract is affected by a short-term interruption in the supply of digital content or a digital service which, having regard to the type and purpose of the digital content or service and the circumstances and nature of the contract, is more than negligible or recurs, such interruption is deemed to constitute a **lack of conformity**[42]. In **Germany**, § 327e BGB is interpreted in such a way that even **short-term interruptions** are to be regarded as a lack of conformity[43].

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[40] "Where the consumer fails to install, within a reasonable time, updates supplied by the trader in accordance with paragraph 2, the trader shall not be liable for any lack of conformity resulting solely from the lack of the relevant update [...]".

[41] "Where the consumer fails to install within a reasonable time updates supplied in accordance with paragraph 3, the seller shall not be liable for any lack of conformity resulting solely from the lack of the relevant update [...]".

[42] Howells/White, Ireland, in De Franceschi/Schulze (eds.), above fn. 13, p. 374.

[43] Schulze, Germany, in De Franceschi/Schulze (eds.), above fn. 13, p. 287.

Discontinuation of the Digital Product, which Amounts to a Lack of Conformity

Regarding remedies for lack of conformity, Article 14(2) and (3) DCD grant the trader the right to choose the means by which the digital content or digital service is brought into conformity. By contrast, Article 13(2) SGD, like former Article 3(3) CSD[44], grants the consumer the right to choose between repair and replacement as the primary remedies.

The “Stop Destroying Videogames” Initiative: Issues and Responses

The issues raised by the “**Stop Destroying Videogames**” **Initiative**[45] **highlight the tension** between the respect of intellectual property rights, the principle of contractual freedom and the protection of consumer rights. The situation under discussion underscores the need to ensure fair commercial practices, and in particular fair and transparent contractual conditions. Below, a non-exhaustive list of the practices mentioned is assessed.

“The publisher sells a copy of the video game”

In the case of mere supply of digital content or digital service, it is **not accurate to speak of** “**selling** a video game”, as in this case it is not about sales contracts, but about licence agreements: the consumer acquires not the right to ownership, but the right to use an IP protected work. In any case, information on the nature of the contract shall be given to the consumer in a clear and prominent manner before they place their order.

“The customer is not told when their game will stop working at the time of purchase” and “After and undisclosed length of time, the publisher disables the game for the consumer”

Information on end of access shall be given to the consumer before the conclusion of the contract. Information on the **duration of the supply of updates** – which is also decisive for the game’s lifespan – shall be given **before the conclusion of the contract**[46] (cf. Article 5(1)(ed) CRD[47], inserted by Article 2 ECGTD). The practices described in the heading are suitable to be qualified as unfair under points (b), (c), (f), (g), (j) and (k) **UCTD Annex**.

If the trader fails to comply with his obligations arising from contractual clauses that have passed the unfairness test, this will give the consumer access to the **remedies for non-conformity**[48]. If “*The publisher enacts countermeasures to prevent any repair of the game*”, Article 5, Article 6(1)(g), Article 8 and Article9b UCPD may in particular apply.

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[44] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

[45] See Stop Destroying Videogames, Citizens’ Initiative, available at: https://citizens-initiative.europa.eu/initiatives/details/2024/000007_en.

[46] See also the answer by Vice-President Jourova on behalf of the Commission to the Parliamentary question - P-001352/2024(ASW) of the European Parliament, available at: https://www.europarl.europa.eu/doceo/document/P-9-2024-001352-ASW_EN.html.

[47] “*for goods with digital elements, for digital content and for digital services, where the producer or provider makes the information available to the trader, the minimum period, whether expressed as a period of time or by reference to a date, during which the producer or the provider provides software updates*.”

[48] According to Article 13 ff. SGD or Article 14 ff. DCD.

Intellectual Property Law Issues

Videogames are complex goods, comprising computer programs[49], graphic and sound elements with unique creative value[50], trademarks[51], and trade secrets[52]. A key question is how to ensure the continued existence of these goods while protecting rightsholders, who have the exclusive right to decide how and for how long their product should be available. Furthermore, what legal basis within copyright law could this type of requirement establish? How should situations be treated where continued availability is no longer possible because licenses have expired, for example for music or other embedded content[53]?

However, **no mandatory licensing** is imposed **on videogames developers**, who enjoy contractual freedom in commercially exploiting their works and determining the terms of their licenses. Of course, this may be a problem if a **consumer has invested** in "buying" in game items such as loot for use by their characters. The legal framework does **not provide for exceptions covering end-of-life over copyright products**. Regarding works that are no longer commercially available, **Article 8 DSM Directive**[54] provides for the possibility of **licensing such works to collective management organisations and cultural heritage institutions**[55]. However, this provision includes a **number of conditions that may be difficult to meet for videogames,** not least the possibility for rightsholders to opt-out of the exceptions[56].

Interim conclusions

A **legal obligation to keep videogames playable** after they cease to be provided **cannot be established**, **except** in cases where this interruption constitutes a **lack of conformity** (e.g. regarding functionality, compatibility, interoperability, accessibility, or continuity) under the DCD or SGD[57].

A distinction must be made between contracts of **fixed or indetermined duration** (cf. Articles 14-18 DCD and Articles 13-16 SGD), and restitutions may also concern payments made under **ancillary contracts**.[58] Ensuring **compliance with precontractual information duties**, **understanding of contractual conditions,** and **effective exercise of remedies is key**.

As mentioned above, a possible solution to increase transparency would be **to supplement the list of information required under Article 8(2)(1) CRD**[59] **with those contained in Article 6(1)(r) CRD**

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[49] Cf. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, pp. 16–22.

[50] Cf. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyrights and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

[51] Cf. Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, OJ L 336, 23.12.2015, pp. 1–26.

[52] Cf. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, pp. 1–18.

[53] See Voss, Hearing of 16 April 2026, Stop Destroying Videogames, available at: https://www.europarl.europa.eu/committees/en/stop-destroying-videogames/product-details/20260407CHE13962.

[54] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, OJ L 130, 17.5.2019, pp. 92–125.

[55] For a list of the videogame museums, see https://www.esma-artistique.com/en/news/video-game-museums/.

[56] See Abbamonte, Hearing of 16 April 2026, Stop Destroying Videogames, available at: https://www.europarl.europa.eu/committees/en/stop-destroying-videogames/product-details/20260407CHE13962.

[57] In this sense, see also European Commission, Communication from the Commission on the European Citizens' Initiative (ECI) 'Stop Destroying Videogames", 16.6.2026, p. 9 f. available at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2026)4110&lang=en.

[58] Cf. European Commission, Communication from the Commission on the European Citizens' Initiative (ECI) 'Stop Destroying Videogames", 16.6.2026, p. 11, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2026)4110&lang=en.

[59] *"2. If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1)."*

(functionality)[60] and **Article 6(1)(s) CRD** (interoperability)[61], **as well as information on** the **expected lifespan** of digital products, and the **consequences of the contract termination** (currently, only the "conditions for terminating the contract" are mentioned there: see Article 6(1)(o) CRD)[62].

The same solution should be extended beyond the current scope of Article 8(2)(1) CRD so to apply to all contracts, and therefore not only to those concluded by electronic means and entailing an obligation to pay. More cooperation between publishers and cultural heritage institutions for preserving videogames should also be encouraged.

Lack of Deterrence and Effectiveness of Consumer Law

Substantive Law Issues

Misleading actions or omissions regarding the expected lifespan of a product may also constitute an **unfair commercial practice**[63], **an act of unfair competition or a breach of product safety rules**. In order to avoid abusive behaviours, the **synergy between, and the effectiveness of, UCPD and substantive law instruments** (**e.g. SGD**, **DCD**) **should be strengthened**.

The UCPD plays a crucial role in ensuring the effectiveness of consumer law and, more specifically, with regard to the matter of this briefing, in tackling the phenomenon of planned obsolescence, as it covers traders' behaviour before, during and after a commercial transaction in relation to a product[64].

Indeed, with specific regard to the practices of the major players in the global market, it seems that **substantive law rules are not sufficiently effective** to influence traders' behaviour so as to address the above-mentioned problem.

To improve durability, the ECGTD expanded the UCPD Black List to the following practices, which are now "in all circumstances considered unfair":

- "*Any commercial communication in relation to a good containing a **feature introduced to limit its durability** despite information on the feature and its effects on the durability of the good being available to the trader*" (Nr. 23f Annex I UCPD);
- "***Falsely claiming** that under normal conditions of use a good has a certain **durability in terms of usage time or intensity***" (Nr. 23g, Annex I UCPD);
- "***Inducing the consumer to replace or replenish** the consumables of a good earlier than necessary for technical reasons*" (Nr. 23i Annex I UCPD).

A possible solution could also be to extend the sanction of the "**non-bindingness**" provided by Article 8(2) CRD for "Internet Cost Traps" to **contracts concluded as a consequence of misleading commercial practices – at least of those included in the UCPD** "**black list**".

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[60] *"where applicable, the functionality, including applicable technical protection measures, of digital content;".*

[61] *"where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;".*

[62] *"the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;".*

[63] Cf. Autorità Garante della Concorrenza e del Mercato, 25 September 2018, *Apple* (PS11039) and *Samsung* (PS11039). Cf. De Franceschi, Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy, in Journal of European Consumer and Market Law, 2018, p. 217 ff.

[64] See European Commission, "Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market" of 29.12.2021' 84 ff.

As regards the "sale" of smart goods, as the effect of planned obsolescence is effectively to deprive a consumer of the long-term use of a product, in order to avoid such phenomenon, the **type of contract should be reclassified as a form of "hire**" or "lease".

Overall – whether in relation to the sale of smart products or the provision of digital content and services – there should be **clarity that consumers acquire only temporary use or access for a certain period**. This should be **combined with "end of service" obligations** such as take-back obligation, as well as a **data preservation and transfer obligations**.

Enforcement Issues

According to Article 13 UCPD, Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and "these **penalties must be effective**, **proportionate and dissuasive**".

From a systematic point of view, the fact that the European legislator did not provide harmonised penalties for breaches of the prohibition of unfair commercial practices has led to **fragmentation of national solutions** Effectiveness and dissuasiveness can be achieved through **proportionality of penalties**, which should be **linked to the annual turnover of the trader** being sanctioned. This would allow the size, market power, and above all market impact of the trader to be taken into account and would help **avoid both "over" - and "under sanctioning**". In relation to the practices of major global market players, current remedies do not appear to be sufficiently effective to influence traders' behaviour so as to address the above-mentioned issue[65].

Article 6(2)(g) UCPD qualifies as misleading a commercial practice deceiving or being likely to deceive the average consumer in relation to their rights to replacement or reimbursement under the SGD, or the risks they may face. This synergy should be improved by the EU legislator and the reference contained in **Article 6(2)(g) UCPD should be extended to other legislative instruments** (e.g. the DCD). When implementing Article 19 SGD and Article 21 DCD, some Member States (e.g. Belgium) did enable either public bodies, consumer organizations or professional organizations to take action, partly as a consequence of a broad implementation of the Omnibus Directive (OD).

Article 2(6) OD introduced Article 13(3) UCPD, which provides that "***Member States shall ensure that when penalties are to be imposed in accordance with Article 21 CPC Regulation****, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the* ***maximum amount of such fines being at least 4 % of the trader's annual turnover*** *in the Member State or Member States concerned*".

There is no EU requirement to introduce such fines for purely domestic infringements. However, **when implementing the DCD and the SGD**, both the **Belgian and the French legislators have provided for a wider application of such fines** to guarantee a coherent national sanctioning system. Under **Belgian** Law, the above-mentioned fines can be imposed **also for purely domestic cases**[66]. The **French** legislator introduced a fine, which may be imposed on the trader who obstructs in bad faith the implementation of the guarantee of conformity applying to contracts for the sale of goods or to contracts for the supply of digital content or services. The imposition of the fine can be requested before the court by the Ministry of Finance, consumer associations, the public prosecutor or the consumer himself.

65 Cf. AGCM, 25 September 2018, *Apple* (PS11039) and *Samsung* (PS11039), where, for a misleading commercial practice consisting leading to planned digital obsolescence led to the imposition of the maximum available pecuniary sanction (at that time, 5M Euro, and now, since 2023, 10M Euro).

66 See Keirsbilck/Terryn, Belgium, in De Franceschi/Schulze (eds.), above fn. 13, p. 90.

The amount of the fine "can be no higher than 300,000 €", but it can be increased, in proportion to the benefit derived from the illegal practices, **up to 10% of the trader's average annual turnover**, based on the last three annual turnovers known at the date of the decision.

Another sanction provided by the French legislator consists in enhanced refunds[67]. The **solutions chosen by the Belgian and the French legislators shall be welcomed**. In order to enhance the effectivity of consumer rights, to combat premature obsolescence, and to ensure the durability of material and immaterial goods, Article 13(3) UCPD **should be extended beyond the scope of application of Article 21 CPC Regulation, thereby including all unfair commercial** practices. An **increased synergy between private and public enforcement** would be also key to ensure higher effectiveness.

[67] See Borghetti, France, in De Franceschi/Schulze (eds.), above fn. 13, p. 274.

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