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The update obligation for smart products under the EU Sale of Goods Directive: the seller's right of redress and the CISG

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Abstract

This article examines the issue of the overlap between the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and the rules governing the final seller's right of redress adopted in the European Union's (EU) 2019 Sale of Goods Directive (SGD). In this context, the article focuses on the seller's update obligation introduced by the SGD. Under the SGD, the final seller has an obligation to ensure that the consumer who purchases goods with digital elements is supplied with the updates that are necessary for the goods to perform their functions. This update obligation has been imposed on the final seller even though they are normally not the party responsible for the supply of updates. It has been assumed that the interests of the final seller are sufficiently protected if they are granted a right of redress against the persons liable in the distribution chain. However, this article argues that the right of redress may not be available to the final seller in cases in which the CISG applies to the contract based on which they purchased the goods from their supplier. Still, this article argues that, even though the text of the CISG was finalized in 1980, the Convention can accommodate the seller's update obligation as understood under the SGD. Nevertheless, the interests of the final seller cannot be satisfactorily protected because of limits imposed by Article 39(2) of the CISG.

I. Introduction

The 1980 UN Convention on Contracts for the International Sale of Goods (CISG) has been ratified by all European Union (EU) Member States, except for Ireland and Malta.[1] Thus, the CISG governs a large part of cross-border commercial sales within the EU. The relation between the CISG and EU law has been seen as relatively clear.[2] While the CISG

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1 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc A/Conf. 97/18.

2 For an overview of issues that raise doubts, see B Sandvik, 'The Battle for the Consumer: On the Relation between the UN Convention on Contracts for the International Sale of Goods and the EU Directives on Consumer Sales', (2012) 20 *European Review of Private Law* 1097; F Spohnheimer, 'Article 2' in S Kröll, L Mistelis, P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG). A Commentary* (Nomos/Hart 2018) 45–7.

governs only commercial sales contracts, the EU's legislative initiatives in the area of sales law have focused on consumer sales.[3] Both the CISG and the EU's 2019 Sale of Goods Directive (SGD)[4] use a similar approach to define their scope of application: they focus on the purpose for which the goods have been purchased rather than on whether the buyer is a commercial party. The SGD applies when the buyer 'is acting for purposes which are outside' their 'trade, business, craft or profession'.[5] The CISG, on the other hand, 'does not apply to sales of goods bought for personal, family or household use'.[6] In principle, therefore, there should be no overlap between the two pieces of legislation.

This balance, however, has been confronted by the EU legislature. Both the 1999 Consumer Sales Directive[7] (1999 CSD)[8] and the current 2019 SGD[9] include a provision on the seller's right of redress in the distribution chain—a matter that is relevant solely in transactions between commercial parties and reaches into the range of contracts governed by the CISG. The overlap between the rules pertaining to the seller's right of redress and the CISG already raised problems under the 1999 CSD.[10] Nonetheless, the issue has become even more important under the 2019 SGD, which imposed additional burdens on the final seller in transactions involving goods with digital elements.

Under the 2019 SGD, the final seller has an obligation to ensure that the consumer who purchases goods with digital elements is informed of, and supplied with, updates, including security updates, that are necessary for the goods to perform their functions.[11] This obligation has been imposed on the final seller even though they are normally not the party responsible for the provision of updates. In contrast, updates are typically supplied either by the goods' manufacturer or by a third party linked to the manufacturer. Rather than imposing the liability for the absence of updates on these parties, the EU legislature opted for a solution that is more convenient to the consumer and simplifies the process of claiming remedies for non-conformity of the goods. Imposing liability for the consequences of the lack of updates on the final seller is meant to avoid confusion that may affect the consumer when remedies can be claimed against different persons depending on the source of non-conformity.[12] It has been assumed that the interests of the final seller are sufficiently safeguarded if they are granted a right of redress against the persons liable in the distribution chain.

This article argues that the right of redress may not be available to the final seller in cases in which the CISG applies to the contract based on which they purchased the goods from their supplier. It is further argued in this article that, even though the text of the CISG was finalized in 1980, the Convention can accommodate the seller's update obligation as understood under the SGD. Nevertheless, the interests of the final seller cannot be satisfactorily

3 For instance, EU Sales Directives from 1999 and 2019 discussed below and the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22 November 2011, <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083> (accessed 01.08.2023).

4 Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, OJ L 136, 22 May 2019, <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG> (accessed 01.08.2023). The same approach was adopted in the previous Directive on Consumer Sales of 1999.

5 Art. 2(2) of the SGD.

6 Art. 2(a) of the CISG.

7 Directive 1999/44/EG of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999, <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999L0044> (accessed 01.08.2023).

8 Art. 4 of the CSD 1999.

9 Art. 18 of the SGD.

10 See, e.g.: Judgement of the French Supreme Court of 3 February 2021 (19-13.260), Commercial Chamber, ECLI:FR:CCASS:2021:CO00100, CISG-online 5513 (discussed below in Section III.A.); H–F Müller, 'Unternehmerregress im internationalen Geschäftsverkehr', (2005) 5 *Internationales Handelsrecht* 133; F–J Schillo, 'UN-Kaufrecht oder BGB? – Die Qual der Wahl beim internationalen Warenkaufvertrag—Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen', (2003) 3 *Internationales Handelsrecht* 257.

11 Article 7(3) of the SGD.

12 See D Staudenmayer, 'The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy', (2020) 2 *European Review of Private Law* 219, 231.

protected because of limits imposed by Article 39(2) of the CISG. Consequently, the negative consequences of the overlap between the CISG and the SGD could only be avoided through legislative changes.

It is accepted in this article that the CISG applies to digital elements incorporated in or interconnected with smart products. Article 1(1) of the CISG states that the 'Convention applies to contracts of sale of goods'. The concept of 'goods' is not defined in the Convention. However, it is broadly recognized that the supply of software can constitute a sale of goods for the purpose of the CISG.[13] In particular, cases in which software is contained in a tangible medium (such as a smart product) are unanimously qualified as a sale of goods under the CISG,[14] with the exception of instances in which the preponderant part of the seller's obligations consists of labour or other services (Article 3(2) of the CISG).

The article is structured as follows. The second section briefly explains the update obligation introduced in the 2019 SGD and discusses some practical consequences arising therefrom for the final seller. The third section examines the problem of overlap between the rules pertaining to the final seller's right of redress and the CISG. The fourth section investigates the extent to which the CISG can accommodate the seller's update obligation in transactions involving goods with digital elements. This section of the article offers a novel interpretation of the provisions of the CISG that reduces the negative consequences of the overlap with the SGD. The last section examines legislative solutions that could improve the level of protection of the final seller's interests and offers some concluding thoughts.

II. The update obligation in the SGD

The update obligation attached to the sale of goods with digital elements is probably the most important innovation[15] introduced by the 2019 SGD. The directive defines goods with digital elements as falling within its scope when they combine three main features:[16] (i) the goods must incorporate or be interconnected with digital content or a digital service; (ii) the digital elements must be necessary for the goods to function in accordance with the sales contract; and (iii) the digital elements must be supplied under the same contract as the goods (there is a presumption to that effect in case of doubt).[17] Examples of goods with digital elements include smart home appliances (for example, smart refrigerators), smart televisions, or smart watches.

Transactions involving goods with digital elements tend to be very complex because such goods normally require the continuous provision of digital infrastructure, digital services, and updates to perform their functions.[18] By paying the purchase price for the goods, the buyer in fact makes an advance payment to the seller, covering not only the value of the tangible substance of the goods but also the value of the digital services and updates that will be required after the purchase (the advance payment problem).[19] Furthermore, the

[13] For a broader analysis see e.g. E Muñoz, 'Software Technology in CISG Contracts', (2019) 24 *Uniform Law Review* 281; S Green, D Saidov, 'Software as Goods', (2007) *Journal of Business Law* 161; H Sono, 'The Applicability and Non-Applicability of the CISG to Software Transactions', in C Baasch Andersen, UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing 2008) 512.

[14] Muñoz (n 13) at 286.

[15] See, for instance, R Schulze, 'Die Digitale-Inhalte-Richtlinie—Innovation und Kontinuität im europäischen Vertragsrecht', (2019) 27 *Zeitschrift für Europäisches Privatrecht* 695, 713.

[16] See Art. 2(5)(b) of the SGD.

[17] Art. 3(3) of the SGD. For a more detailed analysis of the concept of 'goods with digital elements' see, for instance, R Barceló Compte, G Rubio Gimeno, 'Supply of Goods with Digital Elements: A New Challenge for European Contract Law', (2022) 11 *Journal of European Consumer and Market Law* 81; IF Chacón, 'Some Considerations on the Material Scope of the New Digital Content Directive: Too Much to Work Out for a Common European Framework', (2021) 29 *European Review of Private Law* 517, 528 *et seq*.

[18] For a more detailed analysis, see K Kryla-Cudna, 'Contract Law and Smart Devices', in V Mak, E Tjong Tjin Tai, A Berlee (eds), *Research Handbook in Data Science and Law* (Elgar 2024) 40.

[19] C Wendehorst, 'Die neuen kaufrechtlichen Gewährleistungsregelungen—ein Schritt in Richtung unserer digitalen Realität' (2021) 76 *JuristenZeitung* 974, 975.

digital services and updates required for the goods to perform their functions are often provided not by the seller themselves but, rather, by the manufacturer of the goods or by a third party in cooperation with the manufacturer.[20] Consequently, the operability of the goods may depend on actions undertaken by parties who are not privy to the sales contract (the problem of division of liability).[21]

The 2019 SGD addresses these issues in two ways. First, it includes the supply of updates in both subjective and objective tests for conformity of the goods.[22] As long as the updates are necessary for the goods to perform their functions, the seller must ensure that the consumer is supplied with such updates even where the contract is silent on that matter.[23] Second, the SGD imposes liability for non-conformity arising from a lack of updates exclusively on the final seller. Looking at the text of the SGD more closely, however, one may note that the seller is not obliged to *supply* updates that are necessary to keep the goods in conformity for a certain period of time but merely to *ensure* that such updates are supplied and that the consumer is informed of them.[24] It follows that the obligations of the seller under the SGD encompass information duties and duties of an organizational nature rather than a provision of updates as such.[25] This nuance reflects the general phenomenon that, while the physical substance of the goods with digital components is delivered by the seller, software updates and other digital services are not. Hence, if an obligation to supply updates were imposed on the final seller, it would normally be impossible for the seller to comply with it. For these reasons, the update obligation should not be seen as an example of the 'servitization' of sales contracts—there are no services involved on the part of the seller. The update obligation is merely an instance of the allocation of risk to the final seller.[26]

Even though the seller's update obligation under the SGD is of a simple organizational nature, it is still unfeasible to perform in most cases. There are two practical reasons for this. First, to be able to inform consumers about necessary updates, the seller would need to know of such updates themselves and would at least need to have access to the consumers' contact data, possibly even several years after the goods have been purchased. Collecting such information would place a considerable burden on the final seller and could raise issues in terms of protecting consumers' personal data.[27] The manufacturer or relevant third party can often inform the consumer of necessary updates via a display on the device itself or via an online interface accompanying a digital element (for example, via a control application installed on the consumer's mobile phone). However, the final seller does not normally have access to such means of supplying information to the consumer.

Second, the final seller is normally a weaker party in the supply chain. As indicated by Michael Bridge, in most instances, 'economic power weakens the further down the chain … one goes to the point of consumption'.[28] It follows that the final seller is often not

[20] See, for instance, D Staudenmayer, 'Kauf von Waren mit digitalen Elementen—Die Richtlinie zum Warenkauf', (2019) 72 *Neue Juristische Wochenschrift* 2889, 2890; K Sein, G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services—Scope of Application and Trader's Obligation to Supply—Part 1', (2019) 15 *European Review of Contract Law* 257, 270–1.

[21] Wendehorst (n 19) at 975.

[22] The notion of 'subjective' requirements for conformity refers to arrangements that the parties have made themselves in the sales contract, whereas the 'objective' requirements refer to the conformity criteria set by the legislature.

[23] Art. 7(3) of the SGD.

[24] Art. 7(3) of the SGD.

[25] C Wendehorst, 'The Update Obligation—How to Make it Work in the Relationship Between Seller, Producer, Digital Content or Service Provider and Consumer', in S Lohsse, R Schulze, D Staudenmayer (eds), *Smart Products* (Nomos/Hart 2023) at 74.

[26] See also K Kryla-Cudna, 'The Update Obligation for Smart Products and a Circular Economy—A Chance not Taken?', in Y Atamer, S Grundmann (eds), *European Sales Law. Challenges in the 21st Century* (Intersentia 2023) 115, at 122–5; H Schulte-Nölke, 'Digital Obligations of Sellers of Smart Devices Under the Sale of Goods Directive 771/2019', in S Lohsse, R Schulze, D Staudenmayer (eds) (n 25) 58.

[27] For a more detailed discussion see Wendehorst (n 25) at 70–1.

[28] M Bridge, 'Article 4 and the Right of Redress', in MC Bianca, S Grundmann (eds), *EU Sales Directive. Commentary*, (Intersentia 2002), 183. The fact that a final seller is often a weaker party was recognised, for

in a position to influence the provision of updates and information about these updates by the manufacturer or a relevant third party. Bridge does emphasize that treating the final seller as a weaker party in all cases may be an over-simplification.[29] Indeed, in some instances, the final seller may boast significant market power and may thus be able to ensure that any updates and associated information are provided to the consumer. However, smaller retailers cannot be expected to routinely put such pressure on manufacturers or third parties.

The decision of the EU legislature to impose liability for the lack of updates on the final seller despite these difficulties is based on the assumption that the interests of the final seller are protected by the right of redress (Article 18 of the SGD). Thus, a final seller held liable to a consumer should, in turn, be able to pursue remedies from a liable party located higher up along the transaction chain. The next section of this article will argue that the right of redress may not be available to the final seller in cases in which the contract based on which they purchased the goods from their supplier is governed by the CISG.

III. The overlap between provisions on the right of redress and the CISG

1. Availability of the right of redress in contracts governed by the CISG

According to Article 18 of the SGD:

> Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission, including omitting to provide updates to goods with digital elements in accordance with Article 7(3), by a person in previous links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

A very similar provision on the right of redress was included in the 1999 CSD, although the seller's liability under this directive did not yet involve an obligation to ensure that the buyer is supplied with updates.[30] The SGD does not specify the person against whom the final seller has a right of redress, leaving this decision to a national legislature. In most cases, national regulations indicate the direct supplier as the person against whom the final seller can exercise the right of redress.[31] Hence, at least theoretically, when the final seller satisfies a consumer's claim for remedies for the lack of conformity, they can bring a recourse claim against the person from whom they purchased the goods.

A major question that arises in this context is whether the final seller can rely on their right to obtain redress from their supplier when the sales contract based on which they purchased the goods is governed by the CISG. A decision of the French Supreme Court of 3 February 2021 illustrates this point.[32] In this case, the claimant (the final seller), whose place of business was located in France, purchased tiling from a supplier (the manufacturer), whose place of business was located in Italy. After the final seller resold the tiling to consumers, it transpired that the tiles showed micro-abrasions. As a result, the final seller

example, by the German legislature, which introduced mandatory mechanisms ensuring the right of redress in cases where there is a need to satisfy consumers' claims. See B.T. Drucks 14/6040, 239.

29 Bridge (n 28) at 183.

30 Art. 4 of the 1999 CSD.

31 For an overview, see M Ebers, A Janssen, O Meyer, 'Comparative Report', in M Ebers, A Janssen, O Meyer (eds), *European Perspectives on Producer's Liability: Direct Producer's Liability for Non-Conformity and the Seller's Right of Redress* (Sellier 2009) pp. 3, 38, 41–3.

32 Judgement of the French Supreme Court of 3 February 2021 (19–13.260), Commercial Chamber, ECLI: FR:CCASS:2021:CO00100, CISG-online 5513. See also: Cour d'appel de Bourges, 25 November 2021, 21/00343, CISG-online 5861.

had to satisfy the consumers' claims for remedies for the lack of conformity. Subsequently, the final seller sought recourse from their supplier based on Italian[33] provisions on the right of redress transposing the 1999 CSD. However, given that both Italy and France have ratified the CISG, the applicability of the Convention came into question.

The matter proved to be critically important in this case because of the cut-off period adopted in the CISG. According to Article 39(2) of the CISG:

> the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

In the case at hand, the final seller brought the claim against the supplier after the two-year cut-off period set in Article 39(2) of the CISG. Thus, if the CISG was applicable, the final seller would not be able to claim any remedies against the supplier, even though compensation was provided to the consumers for the lack of conformity.

The French Supreme Court held that Article 39(2) of the CISG was applicable in this case. In essence, the court suggested that the cause of a recourse claim foreseen in the EU Sales Directive is the lack of conformity of the goods. This means that the recourse claim is substantially based on the same facts as the claims for remedies for non-conformity available to the buyer under the CISG. Therefore, the final seller (acting as a buyer under the CISG) cannot rely on the national provisions regulating the right of redress when the contract based on which they purchased the goods from their supplier is governed by the Convention.

The decision of the French Supreme Court is in accordance with views that have already been expressed in the academic literature. Several authors have emphasized that when the contract between the final seller and their supplier is governed by the CISG, the final seller cannot benefit from the protection offered through the right of redress foreseen in the SGD.[34] The next part of this article will examine this interpretation from the perspectives of both the Convention and the SGD.

2. Prioritizing the CISG: the Convention's text

The prioritizing of the CISG over domestic provisions on the right of redress is clearly justified from the perspective of the Convention itself. The problem of the overlap with the SGD could be solved by referring to either Article 94 or Article 90 of the CISG.

A. Article 94

Article 94 of the CISG allows states that have closely related legal rules on the sale of goods to exclude the application of the Convention in contracts concluded between parties who have their places of business in these states. Article 94(1) of the CISG provides that:

> Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. …

[33] Given that the supplier's place of business was located in Italy, Italian law was applicable in this case.

[34] See, e.g., Müller (n 10); Schillo (n 10); UP Gruber, 'Das neue deutsche Zwischenhändler-Schutzrecht—eine Benachteiligung inländischer Hersteller und Großhändler?', (2002) 72 *Neue Juristische Wochenschrift* 1180; Sandvik (n 2) at 1116; A Janssen, 'The Final Seller's Right of Redress under the Consumer Sales Directive and its Complex Relationship with the CISG', (2003) 3 *The European Legal Forum* 181. For a more general analysis of the relation between the CISG and EU law, see: UG Schroeter, 'Global Uniform Sales Law—With a European Twist? CISG Interaction with EU Law', (2009) 13 *Vindobona Journal of International Law & Arbitration* 179.

A declaration made under this provision by EU Member States could exclude the applicability of the Convention in intracommunity trade. However, declarations pursuant to Article 94 of the CISG have thus far only been made by Denmark, Finland, Iceland, Norway and Sweden. Based on these declarations, the CISG does not apply to intra-Nordic sales.[35] Consequently, national provisions on the right of redress transposing the SGD will prevail where both parties' (that is, the final seller's and their supplier's) place of business is in Sweden, Finland, Denmark, Iceland or Norway. In contrast, the SGD should not prevail when parties' places of business are located in EU Member States that did not make a declaration under Article 94 of the CISG.[36]

B. Article 90

Article 90 of the CISG indicates that in some cases, an international agreement may prevail over the CISG. This provision states that

> '[t]his Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement'.

It has been suggested that the SGD could be seen as an 'international agreement' under Article 90 of the CISG or, alternatively, that this provision could be applied in relation to the SGD by analogy.[37] However, neither of these views has received broader acceptance.[38] Article 90 of the CISG includes the phrase, 'States parties to such agreement' when referring to an 'international agreement' that should prevail over the Convention. The SGD has been enacted by the EU—a supranational organization. EU Member States are not 'parties' to the Directive as required by Article 90 of the CISG; they do not have the authority to decide on the enactment of the Directive. While the EU Treaty does constitute an international agreement in the sense stipulated in Article 90 of the CISG, the secondary EU legislation does not, because it is put into force by the EU rather than by individual Member States.[39] Thus, the SGD cannot prevail over the Convention based on Article 90 of the CISG.

3. Prioritizing the CISG: the text of the SGD

Although it is normally accepted that secondary EU legislation has priority over international conventions ratified by the Member States,[40] it has been argued that, in the specific case of the right of redress, the text of the SGD justifies the precedence of the CISG.[41] This is because Article 18 of the SGD explicitly states that 'the relevant actions and conditions

[35] For a more detailed analysis see, e.g., J Herre, 'Article 94', in Kröll, Mistelis, Perales Viscasillas (eds) (n 2) at 1181–4; UG Schroeter, 'Article 94', in I Schwenzer, UG Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) *passim*.

[36] Sandvik (n 2) at 1112. It would also not be justified to accept that the EU Member States made an *implied* reservation under Art. 94 of the CISG given their obligation to effectively implement the SGD—see Müller (n 10) at 134.

[37] See R Herber, 'Article 90', in: P Schlechtriem (ed.) *Commentary to the UN Convention on the International Sale of Goods* (OUP 1998) para 12.

[38] These views have also been partly attributed to a misleading translation of this provision used in Germany. See UG Schroeter, 'Article 90' in I Schwenzer, UG Schroeter (eds) (n 35) para 12.

[39] Schroeter (n 38) at paras 15, 18–20. More generally, on the place of EU law within the realm of international law, see B de Witte 'EU Law: Is It International Law?', in C Barnard, S Peers (eds), *European Union Law* (3rd edn, OUP 2020) 191–211.

[40] For a more detailed analysis, see, e.g., A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 1304.

[41] Sandvik (n 2) at 1116. The author claims that '[c]onsidering the extensive reference to national law in Article 4 [of the 1999 CSD], it is, in fact, even hard to see any conflict at all between the CISG and the CSD in this regard'.

of exercise [of the right of redress], shall be determined by national law'. The CISG constitutes a part of national law in countries that have ratified it. As such, the Convention forms a part of the national legal framework within which the right of redress operates and to which Article 18 of the SGD refers.[42] Consequently—the argument follows—based on the text of Article 18 of the SGD, the CISG should prevail over the final seller's right of redress.[43]

Arguably, this interpretation of Article 18 of the SGD is slightly oversimplified. Remedial law in the EU normally falls within national procedural autonomy.[44] Hence, the text of Article 18 of the SGD simply reflects a more general feature of EU legislation. The competence of the Member States in the area of remedies is limited in a number of ways. For instance, national rules are subject to the requirements of equivalence and effectiveness, which may require that the provisions of the CISG are disapplied in certain circumstances if they don't allow for an effective remedy.[45] The extent to which the applicability of the CISG allows for an effective remedy in the context of the final seller's update obligation is addressed in the fourth section of this article.

4. Overriding mandatory rules

One should add that the conflict between the CISG and the provisions on the right of redress transposing the SGD cannot be solved by referring to the overriding mandatory provisions in the sense of conflict of laws. The concept of overriding mandatory provisions has been defined, for example, in Article 9(1) of the Rome I Regulation,[46] which states that:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

The analysis of the conflict between the rules pertaining to the right of redress and the CISG from the perspective of overriding mandatory provisions is questionable, as such, because uniform substantive law rules, in principle, take precedence over the rules of private international law.[47] In any case, even if this analysis were relevant, it would not support the prioritization of the rules on the right of redress. The reason is that the concept of overriding mandatory provisions is interpreted narrowly due to its exceptional character.[48]

[42] Sandvik (n 2) at 1116.

[43] Sandvik (n 2) at 1116, 1118.

[44] See e.g. M Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart 2000); W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501; D Leczykiewicz, '"Where Angels Fear to Tread": The EU Law of Remedies and Codification of European Private Law', (2012) 8 *European Review of Contract Law* 47.

[45] See e.g. F Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts', in P Craig, G de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 275–306; S Prechal, R Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31; J Krommendijk, 'Is There Light on the Horizon? The Distinction Between "Rewe effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter After *Orizzonte*' (2016) 53 *Common Market Law Review* 1395; A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 *European Law Review* 51. See also e.g. Case C-166/14, *MedEval*, ECLI:EU:C:2015:779, paras 32–3 in which a similar provision was examined by the ECJ.

[46] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at: <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008R0593-20080724> (accessed 01.08.2023).

[47] K Zweigert, U Drobnig, 'Einheitliches Kaufgesetz und Internationales Privatrecht' (1965) 29 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 146, 148; F Ragno, 'Article 6' in F Ferrari (ed.) *Concise Commentary on the Rome I Regulation* (2nd edn, CUP 2020) para 61.

[48] Case C-135/15, *Nikiforidis*, EU:C:2016:774, para 44.

Even in those jurisdictions in which the provisions regulating the right of redress are shaped as mandatory, the overriding nature of these provisions has been commonly excluded.[49]

Article 9(1) of the Rome I Regulation indicates that the core criterion for a provision to qualify as an overriding mandatory provision is that it must be 'regarded as crucial by a country for safeguarding its public interests'. Article 9(1) of the Rome I Regulation indicates that these interests include, for example, the 'political, social or economic organisation' of a given country. Hence, a provision that only aims to 'balance the interests of the contractual parties', such as the rules on the right of redress, cannot constitute an overriding mandatory provision.[50]

5. Conclusion

The above analysis shows that, in principle, the CISG has priority over the rules on the right of redress introduced by the SGD. The Convention could, however, be disapplied in circumstances in which it is established that it does not allow for an effective remedy. Arguably, in such instances the EU Member States are subject to two conflicting obligations under public international law, neither of which takes precedence over the other.

The next section of this article argues that the CISG, in fact, can accommodate the seller's update obligation in transactions involving goods with digital elements. Thus, the final seller is not left without a remedy in cases in which the CISG applies in place of the rules on the right of redress. Nevertheless, the protection of the final seller's interests is weakened by limits imposed by Article 39(2) of the CISG.

IV. The update obligation under the CISG

1. Reasons behind the inadequacy of sales laws to address updates

Probably the most important reason for which sales laws in many of the EU Member States could not adequately address transactions involving goods with digital elements before the enactment of the 2019 SGD[51] was related to solutions concerning the time frame relevant for the assessment of the conformity of goods with a contract. Inspired by Roman law, most European sales law regimes limit the evaluation of a seller's liability to a single point in time.[52] In such regimes, the seller is only liable for the lack of conformity that exists at the time of delivery or, alternatively, at the time of the passing of risk or conclusion of the contract.[53] Indeed, the 1999 CSD only made the seller liable for the lack of conformity that existed at the time when the goods were delivered.[54]

Although this rule may be justified in relation to the sale of traditional goods, it essentially excludes the seller's liability for a range of instances of non-conformity typical for goods with digital elements. When non-conformity results from a lack of updates that were required for goods to perform their functions, it normally emerges only after the goods have left the seller's sphere of control. Consider, for instance, the sale of a car with a built-

[49] See, e.g., Müller (n 10) at 136; G Spindler, 'Ausgewählte Rechtsfragen der Umsetzung der digitalen Inhalte-Richtlinie in das BGB. Schwerpunkt 2: Rechtsbehelfe, Beweistlastregelungen und Regress zwischen Unternehmern', (2021) 24 *MMR. Zeitschrift für IT-Recht and Recht der Digitalisierung* 528, 533.

[50] M Schmidt-Kessel, 'Article 9' in F Ferrari (ed.) *Concise Commentary on the Rome I Regulation* (n 47) at para 11. The author points out that in some cases, private law rules can be qualified as overriding mandatory provisions when they are aimed at safeguarding public interests.

[51] Despite the enactment of the new directive on consumer sales, such problems still exist in many EU Member States in relation to commercial sales contracts—see, e.g.: Wendehorst (n 19) at 975.

[52] In some jurisdictions, the seller is liable for non-conformity occurring after the passing of risk or delivery where the non-conformity is caused by a breach of their obligations. See, for instance, Finland section 21(2) of the Sale of Goods Act; Norway section 21(2) of the Sale of Goods Act; Sweden section 21(2) of the Sale of Goods Act.

[53] For an overview, see I Schwenzer, P Hachem, Ch Kee, *Global Sales and Contract Law* (2nd edn, OUP 2022) paras 31.165–31.172.

[54] Art. 3(1) of the 1999 CSD.

in navigation system.[55] Non-conformity resulting from a failure to supply the updates required for the system to show current road closures does not 'exist' at the time of delivery; it only occurs later, when the car has already been in the buyer's possession.

Hence, even if the supply of updates could be recognized as part of a conformity test in a given jurisdiction, the rules on the time frame relevant for the assessment of conformity could still exclude the seller's liability in this respect. The 2019 SGD solved this problem by modifying the traditional rule in relation to goods that require updates to perform their functions.[56]

2. Relevant time frame for the assessment of conformity under the CISG

It is submitted that similar problems do not arise under the CISG. While Article 36(1) of the CISG states that the seller is only liable for the non-conformity that exists at the time in which the risk passes to the buyer, Article 36(2) of the CISG further states that the seller is also liable for the lack of conformity occurring after the passing of risk as long as it is caused by a breach of any of the seller's obligations. Thus, the drafters of the Convention took into account that in certain circumstances, the seller's liability should not be limited to a single point in time.[57]

Both acting and failure to act may constitute a breach of the seller's obligations as understood under Article 36(2) of the CISG. Article 35(2) of the Uniform Law for International Sales (ULIS),[58] the predecessor of the CISG, referred to the lack of conformity as being 'due to *an act* of the seller or of a person for whose conduct he is responsible', the consequences of which occurred after the passing of risk. During the process of drafting the CISG, a proposal was made[59] to add the words 'or a failure to act' to the content of the provision, which eventually took the form of a more general reference to the seller's 'breach of any of his obligations'. This expression means that a seller's passive behaviour, such as the failure to ensure that necessary updates are supplied, may also justify the seller's liability for non-conformity that occurs after the passing of risk. The only requirement is that the non-conformity of goods should result from a breach of any of the seller's obligations.

The main point, therefore, is to consider whether the provision of updates that are required for goods with digital elements to operate is part of the seller's obligations under the Convention. It is argued in this article that it is, as long as such updates are necessary for the goods to perform their functions.

3. Is ensuring that updates are supplied part of the seller's obligations?

An obligation to supply updates may, of course, arise from the sales contract.[60] The parties may explicitly agree that the provision of updates will constitute part of the seller's

[55] On the legal classification of cars with digital elements under the SGD, see, e.g., JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services—Overview of Directives 2019/770 and 2019/771', (2019) 8 *Journal of European Consumer and Market Law* 197; K Sein, 'The Applicability of the Digital Content Directive and Sale of Goods Directive to Goods with Digital Elements', (2021) *Juridica International* 23, 26.

[56] See Arts 10(1) and 7(3) of the SGD.

[57] Examples indicated in the literature include a situation in which a sales contract (falling as a whole under the CISG) involves assembly obligations and components are damaged after the risk passes to the buyer (I Schwenzer, 'Article 36', in I Schwenzer, UG Schroeter (eds) (n 35) para 5). The CISG does not include more detailed rules addressing the seller's liability after the passing of risk. Arguably, most of the issues which arise in this context can be solved by the application of the general rules governing the seller's liability for non-conformity of goods, including the rules limiting the period of time during which the seller remains liable. An additional argument for including such breaches within the scope of the Convention is the content of Article 7(1) of the CISG—otherwise such situations would be governed by domestic tort or contract law which would hinder the uniformity in the application of the Convention (see I. Schwenzer, *ibidem*).

[58] Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) of 1 July 1964. The text of the ULIS is available at: <https://www.unidroit.org/instruments/international-sales/ulis-1964/> (accessed 01.08.2023).

[59] See Yearbook of the United Nations Commission on International Trade Law, 1972, Volume III, p 63, paras 39 and 40, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/034/42/PDF/V2103442.pdf?OpenElement> (accessed 01.08.2023).

[60] See Article 35(1) of the CISG.

obligations. Such an agreement may also be implied[61] when the context—such as the negotiations between the parties, the parties' conduct, or the exchanged documents, as well as usages and practices established between the parties—suggests that the buyer can expect to be provided with updates. However, it is argued in this article that, even in the absence of an agreement to that effect, an obligation to supply updates in the case of the sale of goods with digital elements arises from the objective requirements for conformity regulated by the CISG.

Article 35(2)(a) of the CISG states that the seller must deliver goods that 'are fit for the purposes for which goods of the same description would ordinarily be used'. If goods with digital elements are defined in the same way as they are in the SGD—that is, as goods that cannot perform their functions without digital content or a digital service—the seller's obligations under Article 35(2)(a) of the CISG cannot be limited to the delivery of the mere physical substance of such goods. Rather, the seller should also be expected to ensure that the digital elements required for goods to perform their functions are supplied. Otherwise, the requirements from Article 35(2)(a) of the CISG cannot be satisfied.

At the same time, it is commonly accepted that, in order for the goods to be fit for ordinary use, as required by Article 35(2)(a) of the CISG, they must be reasonably durable.[62] Goods are normally not fit for ordinary purpose if they are fit only at the moment of sale. The relevance of durability as a part of the conformity test under Article 35(2)(a) of the CISG has been confirmed in case law. In one case, for example, the parties concluded a contract for the sale of an expensive rail press.[63] The press was used by the buyer continuously for a period of three years without any sign of non-conformity. Nonetheless, after three years, it failed. The tribunal held that the press did not conform to the terms of the contract; its failure after only three years of use disappointed the reasonable expectations of the buyer. The tribunal pointed out that the buyer 'is entitled to expect a professionally designed and manufactured, major piece of machinery of the magnitude of the press to operate, if properly installed and maintained, for a considerably longer period than two-three years without serious failure'.

The requirement of durability is similarly relevant under Article 35(2)(b) of the CISG, which applies when the goods have been purchased for a particular purpose that was shared with the seller.[64] Indeed, under this provision, the buyer can expect that the goods are fit for this particular purpose not only at the moment of the passing of risk but for a certain period thereafter.[65] Hence, it is clear that even in the absence of a contractual provision to that effect, goods with digital elements can only be considered to be in conformity if they maintain their required functions and performance capacity for a reasonable period of time after the passing of risk.[66]

Traditionally, it has been accepted in many national sales laws that the requirement of durability refers to the condition of the goods at the time of sale. Under English law, for example, it has been emphasized that the relevant time for assessing the conformity of goods is the time of sale; the fact that the goods cease to operate sooner than reasonably expected could be seen as evidence of their unsatisfactory condition at the moment of sale.[67] It seems, however, that this approach is based on the assumption that the evaluation of the seller's liability is limited to a single point in time, as is the case in most domestic systems.

[61] See, e.g., S Kröll, 'Article 35', in Kröll, Mistelis, Perales Viscasillas (eds) (n 2) pp. 498–9.

[62] D Saidov, *Conformity of Goods and Documents. The Vienna Sales Convention* (Hart 2015) 126, 127.

[63] *Beijing Light Automobile Co. Ltd v Conell Limited Partnership*, Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998, available at: <http://www.unilex.info/cisg/case/338> (accessed 01.08.2023).

[64] See, e.g. Landgericht München I, 27 February 2002, 5HK 0 3936/00 ('The globes case'), CISG-online 654.

[65] Saidov (n 62) at 90.

[66] For a more detailed analysis, see Saidov (n 62) at 126.

[67] See, e.g., Lord Denning M.R. in *Crowther v Shannon Motor Co.* [1975] 1 WLR 30, 33.

Arguably, the provisions of the CISG allow for a broader interpretation, which can be supported by the drafting history of Article 36(2) of the CISG.

The ULIS stated in Article 35 that the seller is 'liable for the *consequences* of any lack of conformity occurring after' the risk has passed to the buyer, which could lead to the conclusion that the non-conformity must always exist at the time of the passing of risk and that only its *consequences* may emerge after that time.[68] Article 36(2) of the CISG, in its final version, clarified this issue by explicitly referring to the seller's liability 'for any lack of conformity which *occurs* after' the risk has passed to the buyer as long as that non-conformity results from the breach of the seller's obligations.[69] It is submitted, therefore, that, under the CISG, goods with digital elements can be considered non-conforming when they cannot be used throughout their expected lifespan because of the lack of necessary updates, even where the condition of the goods at the time of the passing of risk suggested that the requirement of durability was satisfied.

Article 7(1) of the CISG states that the Convention should be interpreted with regard to 'its international character and to the need to promote uniformity in its application'. The reference to the need to promote uniformity in the application of the Convention signifies that the CISG requires an autonomous interpretation.[70] To be qualified as autonomous, an interpretation cannot proceed based on the meanings assigned to particular concepts in domestic legal systems.[71] Rather, the terms and concepts used in the CISG should be 'interpreted in the context of the Convention itself … by reference to the Convention's own system and objectives'.[72] The fact that domestic legal systems usually associate durability of the goods with their condition at the time of purchase should not, therefore, be decisive in the interpretation of the concept of durability under the CISG.[73]

Hence, a seller's failure to ensure that updates, which are necessary for goods to perform their functions, are provided over a reasonable period of time, can qualify as an infringement on the requirement of durability under Article 35(2)(a) or 35(2)(b) of the CISG. Consequently, a lack of updates may entitle the buyer to claim remedies for non-conformity of the goods under the Convention. It follows that the applicability of the CISG, in place of domestic rules on the right of redress, does not leave the final seller without a remedy even in those cases in which the non-conformity of the goods results from the lack of updates.

4. The cut-off period set in Article 39(2) of the CISG

The analysis above has shown that the seller's obligation to supply updates can be justified under the CISG. However, this conclusion only partially solves the problems arising from the overlap between the CISG and the SGD. As noted above, durability constitutes a requirement for the conformity of goods under Article 35(2)(a) and 35(2)(b) of the CISG. Hence, the seller should ensure that the buyer is supplied with updates for a reasonable

[68] See Secretariat's Commentary, Article 34, para 5, p. 33, available at: <https://www.cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary> (accessed 01.08.2023).

[69] Ibid.

[70] See, e.g., F Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed?: Ruminations on the CISG's Autonomous Interpretation by Courts', in C Baasch Andersen, UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmons and Hill Publishing 2008), 134; M Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 5 *Uniform Law Review* 683; HM Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)' (1997–8) 17 *Journal of Law and Commerce* 187; RA Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21.

[71] Gebauer (n 70) at 686–7.

[72] Ibid.

[73] On the issue of *faux amis* in the interpretation of the CISG see, e.g., K Kryla-Cudna, 'Adequate Assurance of Performance under the UN Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code', (2021) 70 *International and Comparative Law Quarterly* 935.

period of time if such updates are necessary for the goods to perform their functions. The exact length of time during which the goods should maintain their functions depends on the nature of the goods and the ways in which they are normally used.[74] Thus, depending on the circumstances, the seller may be required to ensure that the relevant updates are supplied even for a period as long as several years. Yet, this requirement does not mean that the buyer will be able to claim remedies when the seller fails to perform their obligations throughout this entire period.

Article 39(2) of the CISG states that 'the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer'. It has been explained in the literature and in case law that durability, as a requirement for conformity, should be distinguished from the question of whether claims can be brought by the buyer after a certain period of time.[75] Even though it is recognized that the goods can only be fit for ordinary use if they are reasonably durable, this does not mean that the buyer is entitled to claim remedies against the seller for the entire expected lifespan of the goods.

This conclusion raises problems in the context of the overlap between the CISG and the domestic provisions on the right of redress transposing the SGD. The SGD introduces two different time frames during which the seller should ensure that updates are supplied depending on whether, under the sales contract, the digital elements are provided continuously or in a single act. If the digital content or digital service is supplied *in a single act* (such as in the case of the software embedded in a smart washing machine), the seller must ensure that the consumer is informed of and supplied with the updates that are necessary to keep the goods in conformity over a period of time that the consumer may reasonably expect.[76] The exact period of time during which the consumer may reasonably expect the updates to be supplied is assessed based on the type and purpose of the goods and the digital elements as well as the circumstances and nature of the contract.[77] It has been suggested that this period of time may significantly exceed the statutory period of liability for non-conformity in some cases. For instance, when the price of goods is high and the goods are generally seen as long-lasting (for example, in the case of a smart television or a smart refrigerator), the consumer may reasonably expect that the updates will be provided for a period of five, seven, or even a greater number of years.[78] On the other hand, the period of time during which the consumer may reasonably expect to be provided with updates will be shorter than the statutory period of liability for non-conformity in the case of some goods, such as cheap party items.[79]

[74] Saidov (n 62) at 126. In the context of Article 35(2)(b) of the CISG, the use intended by the buyer will be relevant.

[75] Kröll (n 61) at 514; *Beijing Light Automobile Co. Ltd v Conell Limited Partnership*, Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998, available at: <http://www.unilex.info/cisg/case/338> (accessed 01.08.2023).

[76] Art. 7(3) of the SGD.

[77] Art. 7(3)(a) of the SGD.

[78] Wendehorst (n 19) at 979. One author has expressed an opinion that the reasonable period during which updates should be supplied always amounts to two years; thus, it can neither be shorter nor longer than the statutory liability period. See: C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Service', Working Paper 3/2020, 25, available at <http://diposit.ub.edu/dspace/bitstream/2445/159600/4/WP_2020_3%20Christian%20Twigg_Flesner.pdf> (accessed 01.08.2023). This view does not seem convincing in the light of Arts 10(1) and 7(3) of the SGD.

[79] Wendehorst (n 19), at 979. Some authors have argued that the *minimal* period over which updates must be provided should in any case be the same as the statutory liability period. See e.g., A Janssen, 'The Update Obligation for Smart Products—Time Period for the Update Obligation and Failure to Install the Update', in S Lohsse, R Schulze, D Staudenmayer (eds) (n 25) 100; P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation' (2021) 12 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 131, 135; LK Kumkar, 'Herausforderungen eines Gewährleistungsrechts im digitalen Zeitalter' (2020) 6 *ZfPW. Zeitschrift für die gesamte Privatrechtswissenschaft* 306, 316–17. It is submitted, however, that this view conflates the issue of the durability of goods, which the update obligation is meant to serve, and the issue of the length of time during which the seller remains liable for non-conformity. There are many types of consumer

If a contract provides for a continuous supply of the digital content or digital service over a period of time, such as a continuous supply of traffic data to a navigation system,[80] the seller is liable for non-conformity that occurs within two years of the goods' delivery.[81] This liability period is also applicable to cases in which the non-conformity results from a failure to supply the necessary updates.[82] The sales contract may indicate that digital content or digital service will be supplied for a period longer than two years, in which case the seller's liability would be extended to cover the period indicated in the contract.[83]

The Directive does not specify the time within which the claim for non-conformity resulting from the lack of updates can be brought by the consumer, leaving this decision to a national legislature. For example, in the case of the German provisions transposing the directive, under section 475e(2) of the BGB, a claim against the seller becomes time-barred twelve months after the end of the update obligation. Thus, the final seller is placed in a very difficult position in cases where the contract through which they purchased goods from their supplier is governed by the CISG. In such cases, based on Article 39(2) of the CISG, the final seller's claims against their supplier will expire two years after the date on which the final seller acquired the goods, even though they may remain liable towards the consumers for several more years.

In contrast, if the CISG does not apply to the contract between the final seller and their supplier (for instance, if both parties have their places of business in the same EU Member State), the final seller will benefit from much more favourable domestic rules governing the right of redress. For example, based on section 445b of the BGB, the final seller's right of redress will not expire earlier than two months from the time when they satisfied the consumers' claims. Furthermore, the final seller will be able to benefit from a reversed burden of proof[84] and will need to be offered an equivalent compensation when the right of redress is limited by contract.[85]

5. An implied agreement to exclude Article 39(2) of the CISG?

One final point that needs to be addressed is the significance of the contractual modifications of the two-year cut-off period set in Article 39(2) of the CISG in transactions involving goods with digital elements. The final part of Article 39(2) states that the cut-off period does not apply if it is 'inconsistent with a contractual period of guarantee'. Moreover, Article 6 of the CISG gives the parties a right to contractually modify the effects of any of the provisions of the CISG. It is clear, therefore, that the parties can explicitly indicate in the contract that the buyer will have a right to claim remedies within a period longer than two years after delivery.[86] Furthermore, it is evident that the seller can offer the buyer a guarantee that the goods will remain fit for their purpose or retain some qualities or characteristics for a certain period of time (the so-called 'guarantee of durability').[87] If the period of time during which durability is guaranteed is longer than two years, then it can be seen as 'inconsistent' with the cut-off period indicated in Article 39(2) of the CISG and, thus, should supersede the latter.[88]

One major problem with such contractual arrangements is that they require the buyer to have a certain level of power in negotiating a sales contract. The final seller, who, most

goods that cannot be reasonably expected to remain functional for two years. Thus, it would not be sensible to expect the seller to ensure that updates are provided over such a period of time.

80 See Recital 14 of the 1999 CSD.

81 Art. 10(2) of the SGD.

82 Art. 7(3) of the SGD.

83 Art. 10(2) of the SGD.

84 Section 477 of the BGB.

85 Section 478 (2) of the BGB.

86 See also Art. 6 of the CISG.

87 Art. 36(2) of the CISG.

88 S Kröll, 'Article 39', in Kröll, Mistelis, Perales Viscasillas (eds) (n 2) p. 609.

often, is a weaker party in the distribution chain, may not have such power.[89] Thus, contract clauses that explicitly modify the cut-off period in transactions involving smart products may not be very common, especially in cases in which the final seller is a smaller retailer.

One way to extend the period of the seller's liability in the absence of an explicit contractual agreement to that effect might be found in the history of the drafting of Article 36(2) of the CISG, which directly refers to a guarantee of durability. The history of the drafting of this provision makes it clear that a guarantee of durability does not need to be explicit but can instead be implied.[90] The 1978 New York draft of the CISG referred to an 'express guarantee' of durability. This wording, however, has been replaced in the final version of Article 36(2) by a simple reference to a 'guarantee … for a period of time'. This change unequivocally indicates that a guarantee of durability does not have to be 'explicit' but can also be implicit. It has been suggested that an implicit guarantee of durability may follow, for example, from the description of the goods, their purpose, which was revealed to the seller, or the price.[91]

Thus, one way to avoid the applicability of the two-year cut-off period from Article 39(2) of the CISG could be to assume that transactions involving goods with digital elements, in principle, include an implicit guarantee of durability. A justification for the existence of such a guarantee could be the nature of goods with digital elements—that is, the fact that they cannot perform their functions without the necessary updates; consequently, the seller could be assumed to have promised to ensure that updates will be provided throughout the normal lifespan of the goods. Arguably, such an implicit promise would allow the buyer to claim remedies from the seller even after the two-year cut-off period indicated in Article 39(2) of the CISG.

Nonetheless, it is submitted that such an approach would not be justified under the CISG. There are three fundamental reasons for this. First, although an implicit guarantee of durability is, in principle, acceptable under Article 36(2) of the CISG, it 'should not be assumed lightly'.[92] The drafters of the CISG explicitly rejected the idea that the seller can be assumed to have given an implied guarantee that goods will retain their characteristics over their normal lifespan in all cases.[93] As discussed above, durability is already recognized as a requirement for goods to conform with a contract under Article 35 of the CISG. The assumption of an implicit guarantee of durability would lead to much further-reaching consequences—for instance, to a different burden of proof.[94] Where an implicit guarantee of durability has been given, in the case of non-conformity, it is the seller who, to escape liability, needs to prove that the non-conformity occurred due to external factors not covered by that guarantee.[95] In the absence of a guarantee of durability, the burden of proof as to the cause of non-conformity is on the buyer. Considering these differences, the existence of an implicit guarantee of durability requires a clear justification based on the facts of a specific case and cannot be assumed with regard to all transactions involving a certain category of goods.

This conclusion brings about a second point—namely, that there is in fact no difference between goods with digital elements and other types of goods, considering the way in which Article 39(2) of the CISG affects the buyer's expectations. Where a sales contract involves goods of high value and long operational life, such as expensive agricultural

89 See, section II of this paper.

90 Even without the reference to the drafting history, an implicit guarantee of durability would be acceptable based on the general rules on the interpretation of contracts (Arts 8 and 9 of the CISG).

91 S Kröll, 'Article 36', in Kröll, Mistelis, Perales Viscasillas (eds) (n 2) pp. 542–3.

92 Kröll (n 91) at 543.

93 Official Records, A/CONF.97/19, p. 105, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf> (accessed 01.08.2023).

94 Kröll (n 91) at 543.

95 Ibid.

machinery, the buyer normally expects that these goods will remain fully functional for a period much longer than two years. Nevertheless, it does not mean that the seller offers the buyer an implicit guarantee to that effect going beyond the regular conformity standards set in Article 35 of the CISG.

Finally, the cut-off period set in Article 39(2) of the CISG is meant to protect the interests of the seller, and any extension of this period weakens this protection. It was explained in the Secretariat's Commentary that the aim of Article 39(2) of the CISG is:

> to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.[96]

Thus, if one accepts that the seller implicitly gave the buyer a guarantee that the goods will remain functional for their normal lifespan, one would need to assume that the seller decided not to benefit from the protection offered by Article 39(2) of the CISG. It is submitted that the mere fact that a transaction involves goods with digital elements is not sufficient to justify such an assumption.

To conclude, the negative consequences of the overlap between the SGD and the CISG can be limited when the parties have contractually amended the cut-off period set in Article 39(2) of the CISG to the buyer's benefit. Nevertheless, an agreement to that effect cannot be implied merely from the fact that the transaction involves goods with digital elements. Given that the final seller is often a weaker party in the supply chain, they may not have the economic power to bargain for explicit contractual modifications of the cut-off period set in Article 39(2) of the CISG to minimize the negative consequences of the overlap between the CISG and the SGD.

V. The way forward?

In the process of drafting the 1999 CSD, the European Commission considered introducing a direct claim for non-conformity against the manufacturer of the goods rather than imposing liability for non-conformity solely on the final seller. The solution that was ultimately adopted in the text of the 1999 CSD was described by the Commission as follows: 'This situation may also create an injustice in that the entire liability for defects ultimately resulting from an act of commission or omission on the part of another party falls upon the final sellers.' Therefore, 'it is also necessary to include a provision granting the final seller the right to pursue remedies against those responsible'.[97] The above analysis has shown that the final seller's right to pursue remedies against their supplier may be limited when the contract based on which they purchased the goods is governed by the CISG.

It has been argued in this article that the CISG can accommodate the seller's obligation to ensure that updates are supplied for a reasonable time in the case of transactions

[96] Secretariat's Commentary, Article 37, para 5, p. 35, available at: <https://cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary> (accessed 01.08.2023).

[97] COM(95)520 final, Art. 3, para 5. A similar position was adopted by the ECJ in Joined Cases C-65/09 and C-87/09, *Gebruder Weber GmbH v Jürgen Wittmer* and *Ingrid Putz v Medianess Electronics GmbH*, EU:C:2011:396, para 58, where the court emphasized that: 'The fact that the Directive makes the seller liable to the consumer for any lack of conformity which exists at the time the goods are delivered (see *Quelle*, paragraph 40) is thus compensated by the fact that the seller can, in accordance with the applicable rules of national legislation, pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary.' For a recent analysis of this issue, see Y Atamer, S Grundmann, 'Sales Law in Transformation: Sustainability, Digitalisation, Servitisation', in Y Atamer, S Grundmann (eds), *European Sales Law. Challenges in the 21st Century* (Intersentia 2023) 2, at 25–30.

involving goods with digital elements. This obligation, however, does not safeguard the interests of the final seller entirely because of limitations imposed by Article 39(2) of the CISG. Arguably, these limitations may not constitute a sufficient justification for a national court to disapply Article 39(2) of the CISG based on the fact that it does not allow for an effective remedy. The effectiveness test under the *Rewe/Comet* formula[98] requires the court to set aside a national rule imposing conditions and time limits that make it 'impossible in practice to exercise the rights which the national courts are obliged to protect'.[99] National time limits are usually found acceptable under the *Rewe/Comet* test, even if they are not favourable to the innocent party.[100]

The negative consequences of the overlap with the SGD could be minimized by a change of the length of the cut-off period set in Article 39(2) of the CISG. Admittedly, the EU Member States constitute just a fraction of the countries that ratified the Convention. Thus, the consequences of the overlap with EU legislation may not be seen as a sufficient reason to modify the CISG. However, they may constitute at least one argument to be considered in discussions on the need to revise Article 39(2).[101]

Solutions available at the EU level are rather limited. Arguably, the consequences of the overlap between the CISG and the SGD cannot be avoided if the seller remains liable towards the consumer for two years or longer,[102] as is currently the case under the SGD. This situation is due to the fact that the two-year warranty period set in Article 10(1) of the SGD and the two-year cut-off period set in Article 39(2) of the CISG do not fully overlap. The period set in Article 10(1) of the SGD starts from the date on which the goods are delivered to the consumer. The cut-off period set in Article 39(2) of the CISG, on the other hand, is calculated from the day on which the goods are handed over to the final seller. There is normally a period of time when the goods are in the final seller's possession before being sold to the consumer. This lack of overlap proves to be significant in practice, as shown in the decision by the French Supreme Court discussed above. At the same time, the reduction the seller's liability set in the SGD to a period shorter than two years seems unlikely because it would weaken the protection offered to consumers.

Some authors have argued, in a different context, that the EU legislature could consider introducing a direct claim for damages that a final seller could bring against the goods' manufacturer when they incur a loss as a result of satisfying consumers' claims.[103] The argument follows that if such a claim were designed as extracontractual, it would not be affected by the applicability of the CISG.[104] It is submitted, however, that this view is too optimistic. Although the CISG itself is silent on the matter of concurrent remedies, and case law in principle does not pre-empt concurrent tort law claims,[105] the courts have tended to

98 Case C-33/76 *Rewe* [1976] ECLI:EU:C:1976:188; case C-45/76 *Comet* [1976] ECLI:EU:C:1976:191.

99 Case C-33/76 *Rewe* [5].

100 See e.g. Case C-260/96 *Spac* [1998] ECR I-04997; case C-231/96 *Edis* [1998] ECLI:EU:C:1998:401; case C-591/10 *Littlewoods Retail* ECLI:EU:C:2012:478. However, see case C-377/17 *Cogeco Communications* ECLI:EU:C:2019:263 where a national provision imposing a three-year limitation period was considered incompatible with the principle of effectiveness. In this case, the limitation period started running before the injured party was aware of the identity of the liable person and did not include any possibility of suspension or interruption.

101 Problems arising from the cut-off period set in Art. 39(2) of the CISG have been discussed in the literature. See, for example: R Gildeggen, A Willburger, 'Was tun mit Art. 39 Abs. 2 CISG? Überlegungen zur Neuinterpretation einer problematischen Regelung', (2019) 19 *Internationales Handelsrecht* 45; R Gildeggen, A Willburger, 'Art. 39 Abs. 2 CISG als Problem bei internationalen Einkaufsverträgen', (2016) 16 *Internationales Handelsrecht* 1.

102 According to Art. 10(3) of the SGD: 'Member States may maintain or introduce longer time limits than those' indicated in the directive.

103 M Illmer, JCM Dastis, 'Redress in Europe and the Trap under the CESL', (2013) 9 *European Review of Contract Law* 109, 130.

104 Ibid.

105 See UNCITRAL, Digest of Case Law on the CISG (2016), Article 5, para 4, available at: <https://www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf> (accessed 01.08.2023).

accept that the decisive factor in this regard is the substance of a given rule. One court, for example, emphasized that 'a tort that is in essence a contract claim and does not involve interests extending independently of contractual obligations … will fall within the scope of the CISG regardless of the label given to the claim'.[106] The views expressed in the literature have been divided.[107] Nevertheless, some authors have claimed that 'domestic rules that turn on substantially the same facts as the Convention must be displaced by the Convention; any other result would destroy the Convention's basic function to establish uniform rules',[108] and some authors have expressly emphasized that domestic tort law cannot be used 'to displace Art. 39 limitations'.[109] Thus, a direct, extracontractual claim for damages that the final seller could bring against the manufacturer cannot be seen as an effective instrument to tackle the problem of the overlap between the SGD and the CISG discussed in this article.[110]

Finally, the EU Member States could consider making a declaration under Article 94 of the CISG. Arguably, domestic provisions transposing the SGD can be seen as 'the same or closely related legal rules' across EU Member States 'on matters governed by' the CISG. This solution, however, is not supported in this article. Declarations made under Article 94 of the CISG would destroy the fundamental function of the Convention, which is to establish uniform rules for cross-border sales. Given the well-documented benefits arising from the unification of transnational sales law and the great success of the Convention thus far,[111] the exclusion of its applicability in intracommunity trade certainly could not be seen as a sensible step forward.

106 *Electrocraft Arkansas, Inc v Super Electric Motors, Ltd et al*, US District Court for the Eastern District of Arkansas, 23 December 2009, CISG-online 2045. See also *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, US District Court for the Southern District of Ohio, 26 March 2009, CISG-online 1880.

107 For an overview, see J Ribeiro, 'Article 5', in Kröll, Mistelis, Perales Viscasillas (eds) (n 2) pp. 97–9.

108 JO Honnold, HM Flechtner, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (5th edn, Kluwer Law International 2021) 96–7.

109 Ribeiro (n 107) at 99.

110 One should note that the matter of a direct claim against the manufacturer would be assessed differently in the area of product liability, which is excluded from the scope of the CISG as stated in its Article 5.

111 See, e.g., UG Schroeter, 'Has the UN Sales Convention achieved its key purpose(s)?', in D Saidov (ed.), *Research Handbook on International and Comparative Sale of Goods Law* (Elgar 2019) 59–76.

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