

Harmonising Digital Contract Law in Sweden*

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A. Introduction

I. The Transpositions of the Twin Directives

1 The Digital Content Directive, shortened “DCD”,¹ and the Sale of Goods Directive, shortened “SGD”,² jointly named the “Twin Directives”, were enacted in 2019 with the requirement that they would be implemented by January 1, 2022. Sweden was unable to meet these expectations. The implementations turned into force May 1, 2022.

2 In Sweden, the transpositions of the Twin Directives were foremost accomplished by the enactment of the Consumer Sales Act of 2022 (hereinafter “CSA”, or “CSA of 2022”),³ by which the former Consumer Sales Act of 1990 (hereinafter “CSA of 1990”)⁴ was repealed.⁵

3 The legislative inquiry on the implementation of the Twin Directives, the first legislative step of introducing any important statute or statutory amendment in Swedish law, suggested that the directives should be enacted in a joint single act of parliament, under a name signalling its broader applicability, translatable to “the Act on Consumer Protection of Sale of Mov-

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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.

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

³ Konsumentköplagen (2022:260).

⁴ Konsumentköplagen (1990:932).

⁵ CSA of 2022, Transitional provisions, Item 3.

ables and Some Other Types of Contract”.⁶ The idea of transposing the Twin Directives in a single act was mostly met with acceptance by the majority of stakeholders⁷ and by Parliament, but not the name of the act suggested by the inquiry. Instead, it was decided to keep the old name, the Consumer Sales Act,⁸ but with a new number of enactment, due to the restructuring made.

4 Amendments were also made in five already existing acts. In four of these acts the amendments were of purely editorial character, just replacing the citations of the act of 1990 with the act of 2022.⁹ In the fifth of the acts, the Marketing Practices Act of 2008,¹⁰ some minor clarifications were made for increased linguistic coherence¹¹ with another provision in the Marketing Practices Act¹² and the Distance and Off-Premises Contracts Act of 2005,¹³ (in both of these respects being amendments resulting from the transposition of the Consumer Rights Directive, CRD),¹⁴ however without the intention to introduce any changes in substance.¹⁵

5 The Swedish implementation was not particularly “gold-plating”, i.e. offensive in terms of consumer protection where the directives left room for that. Unless the directives demanded more, the already existing level of protection was mostly kept, which sometimes already afforded better protection, but sometimes a lower level of protection than the default solution in the directives (such as placing a duty of notification of breaches of contract on consumers in the case of sale of goods). However, some gold-plating was

⁶ Legislative inquiry, SOU 2020:51, En ny lag om konsumentskydd vid köp och vissa andra avtal, p. 31 ff. A legislative inquiry is an official body, and has to assume a name for itself. The name chosen was Utredningen om nya konsumentregler [The Inquiry on New Consumer Rules], SOU 2020:51, p. 4.

⁷ Governmental bill, Prop. 2021/22:85, En ny konsumentköplag, p. 40 and 41 ff.

⁸ Prop. 2021/22:85, p. 40 and 44.

⁹ 4 § köplagen (1990:931) [§ 4 of the Sale of Goods Act of 1990; SGA], 1 § lagen (1964:528) om tillämplig lag beträffande internationella köp av lösa saker [§ 1 of the Applicable Law (International Sale of Goods) Act of 1964], 11 § produktansvarslagen (1992:18) [§ 11 of the Product Liability Act of 1992], 25 § kommissionslagen (2009:865) [§ 25 of the Commission Agency Act of 2009].

¹⁰ 22 § marknadsföringslagen (2008:486) [§ 22 of the Marketing Practices Act of 2008].

¹¹ Prop. 2021/22:85, p. 105 and 300.

¹² 22 a § marknadsföringslagen [§ 22 a of the Marketing Practices Act].

¹³ 2 kap. 3 and 5 §§ lagen (2005:59) om distansavtal och avtal utanför affärslokaler [2:3 and 2:5 of the Distance and Off-Premises Contracts Act of 2005].

¹⁴ Directive 2011/83/EU.

¹⁵ Prop. 2021/22:85, p. 300, and cf. Prop. 2001/02:134, Ändringar i konsumentköplagen, p. 90.

made, whereof some measures are worth special mention due to their importance.

6 The period of a reversed burden of proof concerning lack of conformity in goods was extended from six months to two years, with the exception of the sale of living animals.¹⁶ For goods with digital elements it is even longer, namely three years or the longer period that the digital supply continues to run. The period of a reversed burden of proof concerning lack of conformity in digital content and digital services was locked to one year in the DCD, and therefore not extendable to two years.¹⁷

7 The period of the trader's liability for lack of conformity was extended from a definitive three years from delivery to three years and two months in cases where the defect appears at the end of the three-year period.

II. Statutory Structure

8 The transposition of the Directives did not require any major restructuring of the statutes in the field of contract law, and none in intellectual property law or data protection law. The choice was between a special act on digital supply or a combined act comprising sale of goods and digital supply. As explained above, the combined one was chosen.

9 The CSA of 2022 is structurally very close to the act of 1990. The major difference is that the provisions in the new act were placed into separate chapters but without shifting the order of the provisions to any considerable extent. In this report, I will refer to provisions in the CSA of 2022 and other statutes in a condensed format.¹⁸

¹⁶ The sale of living animals is within the scope of the SGD, but Member States were free to leave that out, Art. 3(5)(b). In Sweden the CSA of 1990 included sale of living animals and this approach was maintained in the CSA of 2022, however with adjustments in relation to other goods. The reversed burden of proof concerning conformity of six months was kept for living animals. The SGD, Art. 11(1) and (2), seems only to offer either one year or two years of a reversed burden of proof. On the other hand, the sale of living animals could have been left out altogether, which probably give the Member States the mandate to freely deviate from SGD in this regard.

¹⁷ Prop. 2021/22:85, p. 162. The inquiry had proposed a reversed burden of proof of only one year for goods, partly to satisfy the objective of synchronised rules, SOU 2020:51, p. 114 f.

¹⁸ The reference 1:1 CSA means Chapter 1 § 1 of the CSA. The reference 1:3(1) CSA means Chapter 1 § 3 subpara. 1 of the CSA. The reference 1:1.1 CSA means Chapter 1 § 1 1st sentence of the CSA. The reference 1:3(2).1 CSA means Chapter 1 § 3 subpara. 2 1st sentence of the CSA. The reference 1:8–1 CSA means Chapter 1 § 8 Item 1 of the CSA.

10 There is no civil code in Sweden. This feature admits that one does not necessarily have to take into account that rules might have applicability on different hierarchical levels. Instead there are contract specific statutes with provisions more or less placed on a string. The CSA (and the Sale of Goods Act of 1990, hereinafter “SGA”) are somewhat reminding of Part III in the 1980 UN Convention on Contracts for the International Sale of Goods (hereinafter “CISG”), however even less abstract and less deductive, and thus more situation specific and inductive. (The structure looks like this: Provisions on applicability, provisions on delivery and passing of risk, provisions on defining defects, provisions on defining late delivery and remedies to that, provisions on remedies for defects, *et cetera*.) Therefore, any major restructuring was not called for. In addition, the rules of the DCD were put in the last chapter of the CSA of 2022 and the specific themes were put in the same order as for sale of goods, mostly referring to which provisions in the previous chapters apply to supply of digital content and digital services. The technique has the advantage of avoiding repetition but it also makes the chapter on DCD-implementation hard to read and hard to figure out what the rules for digital supply actually are,¹⁹ but the method used was in a legislative sense technically correct.

11 The system has become rather complex. There are these two directives that are similar, SGD and DCD, but not at all identical. There is a third directive, CRD, that comes into play at times. In SGD there are three types of goods. Goods with no digital elements, goods with digital elements with a single act of digital supply and goods with digital elements with continuous digital supply. In DCD there are also three types, namely contracts for continuous supply, for single acts of supply without a tangible medium and for single acts of supply on a tangible medium, and beside of these distinctions there is the dichotomy between payment and supply of personal data. One has to be very alert when searching for the relevant rules. On top of that, there is the Directive establishing the European Electronic Communications Code, (EU) 2018/1972, that include some contract law rules on the right to exercise termination and the effects of termination, Art. 105–107.²⁰ In addition, there is unique domestic rules. It has indeed become a complex field

¹⁹ Cf. Prop. 2021/22:85, p. 41 and 43, referring to some stakeholders’ responses.

²⁰ Implemented through 7 kap. lagen (2022:482) om elektronisk kommunikation [Chapter 7 of the Electronic Communications Act]. Some of these rules overlap with the previously adopted lagen (2014:1449) om konsumentskydd vid automatisk avtalsförklaring [Act on Consumer Protection Concerning Automatic Prolongation].

of law. So far, the CJEU adjudication in consumer sales, mostly represented by some few incremental cases on CSD and CRD matters, has been rather modest in volume. If SGD and DCD would boost CJEU case law, it would create a need for an increase of experts in the field.

B. Definitions and Scope of Application

12 The Twin Directives potentially pose some conceptual challenges. The following notions represent the most apparent ones, since they are introduced either by the Twin Directives or by some other acts of late: digital content, digital service, goods with digital elements, integration, updates, price, digital environment, compatibility, functionality, interoperability, durable medium. The enumerated notions have been dealt with in a directive compliant fashion, by simple enumeration. One cannot see any immediate impact on the surrounding law as it comes to these new notions.

13 Debate on the Twin Directives is not abundant in Sweden. These directives are mere drops in a large flow of laws. Nonetheless, there are two recent major doctrinal contributions concerning the interface between personal data protection law and private law.²¹ Apart from a discussion with respect to the definition of ‘price’, which is to be described later on, there has not been any recent debate concerning the notions enumerated above. One of the reasons for the lack of debate is that most of the notions are not as problematic to assess as one could suppose. Some of these notions or themes have been encountered in earlier legislative inquiries, which probably has raised the awareness of the notions and themes and thus contributed to the adaptation in the Swedish legal community.²²

14 ‘Functionality’, one of the notions mentioned, has been central in the building of the Swedish concept of defects since the introduction of the SGA and the CSA of 1990. If the product does not function it is in non-conformity, unless the malfunction depends on the buyer. The product must work during the prescription period (three years in CSA and two years in SGA) unless its expected life-span is objectively shorter, like groceries and products intended for few uses. The word functionality has been used alongside with

²¹ Chamberlain, *Integritet och skadestånd* [Privacy Torts: On the Protection of Personal Information of Swedish Law], diss. Uppsala 2021, and Kotsios, *Paying with Data. A Study on EU Consumer Law and the Protection of Personal Data*, diss. Uppsala 2022.

²² Ds 2008:55, *Bör konsumenttjänstlagen utvidgas?*, and Ds 2012:31, *App to date. Konsumenternas rättsliga ställning när varor eller tjänster betalas via telefonräkningen*, m.m.

the word durability, the latter now not in the sense of environmental effect but in the meaning of mere functionality over time, in short endurable functionality. ‘Compatibility’ and ‘interoperability’, however, which are close to functionality, have not been discussed particularly, but deviations from normal expectations would at least fall under the type of defect called ‘reasonable assumption’ or ‘subjective abstract standard’, described more in detail later.

15 ‘Integration’ might be seen as a demanding concept. In this context, apart from its connection with compatibility and interoperability, integration strongly denotes functionality after installation. Installation defects have been dealt with since the SGA and the CSA of 1990. § 21(2).1 SGA reads: “If the goods deteriorate after the risk has passed to the buyer, the goods shall be deemed to be defective if the deterioration is a consequence of a breach of contract by the seller.”²³ This was intended to cover installation defects, making the provisions on defects in the SGA applicable, instead of rules on service contracts.²⁴ A similar provision, § 20(2), was inserted in the CSA of 1990. In order to fully implement the Consumer Sales Directive 1999/44/EC, CSD,²⁵ it was thought better to express the installation defect category in a separate provision, § 16 a of the CSA of 1990: “Where, in conjunction with completion of the sale, the seller has undertaken to install the goods and such installation has been performed by the seller or a third party on the seller’s behalf, the goods shall be deemed defective as a result of defects in installation if they deviate from the provision set forth in § 16(1)–(2) or otherwise deviate from the buyer’s reasonable expectations.”²⁶ A similar wording is now found in 2:14(1).2 CSA of 2022.²⁷ The trader’s incorrect Installation will be discussed more in detail later on.

16 The notion of durable medium is readily understandable, and has been treated as such since long. When the trader has to give the consumer information or a confirmation of a contract/guarantee and its content, it is a duty to do so on a durable medium. This might be given on paper, but if it is given in digital form this has to be durable, and readable as long as

²³ Unofficial translation.

²⁴ Prop. 1988/89:76 om ny köplag, p. 96 and 139. Prop. 1989/90:89 om ny konsumentköplag, p. 109.

²⁵ 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.

²⁶ Unofficial translation.

²⁷ Unofficial translation: “If the trader has undertaken to install the goods in conjunction with completion of the sale, the liability for defects is applicable from when the installation has been performed by the seller or a third party on the seller’s behalf.”

is necessary to enable the consumer to ensure the rights of the consumer. If this duty is not fulfilled, there is a breach of contract. What type of foresight the trader must show concerning the spread and durability of the technology necessary to read the information is still to be seen. Probably it will be sufficient to show that the technology at the time of contracting was well spread and free for most non-commercial uses, and that it was possible to print or otherwise secure the information at that time. In time the trader might be considered obligated to save and at request at any time deliver all contractually relevant documents. We are most likely not there yet, compare Art. 5 of the Consumer Rights Directive 2011/83/EU, CRD, but it is a low-hanging fruit for the EU legislature to pick.

17 One of the subjects that probably are hardest to pinpoint conceptually is the distinction between ‘supply of digital content’ and ‘sale of goods with digital elements’. DCD recital 21 expresses that the SGD should apply in case of “doubt as to whether the supply of the digital content or the digital service forms part of the sales contract”. Goods with digital elements, taken by themselves, is however not that problematic. It is about movables that contain digital elements but does not entirely consist thereof, not including the “package”. If the content entirely is of a digital character, it is a digital content, falling under DCD and Chapter 9 CSA. This is so also if it is placed on a tangible medium, such as a USB stick, CD, DVD or similar.²⁸ However, it is challenging to figure out why the rules in the CRD should apply partially, namely concerning delay of digital content delivered on tangible media only and passing of risk concerning all products. Why, on the legal-technical level as well as in substance, were both the Twin Directives seen unfit to regulate the issue? Probably this was because the EU legislature would not like to reiterate any already existing rules, and the same rules were already at place, in CRD. However, that type of legal-technical logic is less convincing considering the obvious internal correlation between the DCD and the SGD, the non-existing primacy of the CRD over the DCD and the SGD, and the confusion this will cause within any relevant target group. It was less of a problem in the Swedish transposition, the rules on delay and passing of risk concerning sale of goods apply, but the Union must also consider the general public if it really wants to be embraced by it. A move towards self-sufficient acts, also including consolidation rather than confusing referrals, would be a step in the right direction.

²⁸ 1:7(2).2 CSA. DCD recital 20, most probably referring to CRD Art. 18.

18 Another issue to contemplate is the synchronisation between the rules on the sale of goods and the supply of digital content or digital services when the contract provides the consumer ownership of hardware, such as a phone or a router, and the seller at the same time supplies digital content or digital services.

19 Let say that a router is defect, which makes the digital supply impossible or disturbed. The consumer seems to have to solely rely on the rules on goods, since there is no digital component that would make the rules on digital supply applicable. Let say that the following attempts to repair or redeliver the router are fruitless. The consumer may eventually terminate the sale of the router, but what of the digital supply? In the Swedish preparatory works it was suggested – with a comparative reference to DCD Art. 3.6 – that, unless the issue is regulated in the terms of contract or in any other statute, general principles of contract law should apply.²⁹ In Swedish law that would probably give the consumer the right to terminate also the contract on digital supply. However, the legislator seems to have accepted that contract terms that prescribe severability, i.e. that the goods and the services should be handled apart, are to be tolerated. There is always a possibility to revise contract terms due to unfair terms or unfair results on the basis of § 36 of the Contracts Act³⁰ in conjunction with § 11 of the Act on Contract Terms in Consumer Relations,³¹ but the threshold of unfairness is high even in consumer contracts. This type of gap, if used by the traders, might defeat much of the purpose of protecting ordinary contractual expectations.

20 In accordance with normal legislative procedure an inquiry was established to propose how to transpose the Twin Directives into Swedish law. The inquiry delivered its report. In accordance with normal procedure, the report was remitted to stakeholders, including courts, state authorities, universities and NGOs. After having processed the replies, the Ministry of Justice amended the proposal given in the inquiry report, in accordance with normal procedure, and remitted the amended proposal to the Council of Legislation, also in course of normal procedure, consisting of three present or former Justices of the Supreme Court and the Supreme Administrative Court. The Council scrutinised the proposal and delivered its report. The Ministry of Justice then amended its proposal and issued a governmental bill before the

²⁹ Prop. 2021/22:85, p. 241.

³⁰ 36 § lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

³¹ 11 § lagen (1994:1512) om avtalsvillkor i konsumentförhållanden.

parliament. There were many parliamentary motions not to accept the bill in its entirety. Most of the motions were concerning sale of living animals. The parliamentary Committee on Justice proposed Parliament to accept the bill and to make an announcement that the Government should investigate the issue of sale of living animals further.³² Parliament voted in favor of the committee's proposal, which is most common.

21 The Council of Legislation criticised the proposed definition of 'price', and suggested it be left out altogether.³³ The Ministry of Justice let the definition of 'price' be stricken in the bill. In the CSA of 2022 there is thus no definition of the concept 'price'. The Council of Legislation had namely argued that a definition of 'price' including other types of currency would be superfluous and that the proposed definition was not suitable. It would according to the council be alien – at least as of today – that an evaluation would be made in other value units than national currencies. The fact that payment may be made in crypto currencies would not mean that the product would be evaluated in this currency; that payment may be made with a digital representation of value must be distinguished from money (currency) as means of evaluation. In short: Payment in other kinds is not price, since it is not 'money', it is only 'payment'.

22 One might add that some of the digitalisation issues have been dealt with in the Nordic commercial environments through self-regulatory measures, such as the theme of the seller's liability in case of programme updates. The mostly spread Nordic standard form contracts in the field of sale of machinery, industrial equipment and other goods used in mechanical industries, NL 17 and NLM 19, and some others either in the NL-family or using the NL-contracts as models, have in their latest generation specifically addressed the issues of the buyer's potential right to source code and potential right to updates.³⁴ The principles followed there, concerning goods with

³² Civilutskottets betänkande, 2021/22:CU3, En ny konsumentköplag, p. 1 and 26 ff. See SOU 2020:51, p. 179 ff. for an account of legislative initiatives since 2008 concerning the appropriateness to let the CSA encompass the sale of living animals.

³³ Lagrådet, Utdrag ur protokoll från sammanträde 2021–12–02, p. 2.

³⁴ "NL" is an acronym for "Nordiska leveransbestämmelser" (in the Swedish language version; there are Danish, Finnish, Norwegian, and English language versions as well), meaning Nordic Terms of Delivery in a popularised version of the name of the contract. The official name for NL 17 is however, in the English version, General Conditions for the Supply of Machinery and other Mechanical, Electrical and Electronic Equipment in Denmark, Finland, Norway and Sweden, NL 17 E. There are also sector specific standard form contracts that lean heavily on the NL-contracts, such as ALV 21, Allmänna leveransvillkor för leverans av grafiska maskiner samt annan mekanisk, elektrisk och elektronisk

digital elements, is that any duty to provide source codes or updates does not follow. However, the goods sold must have at least the agreed functionality also without the updates if updates are not agreed upon. If the goods do not meet these standards without the updates, the seller has to “repair” the goods, in practice by delivering the updates without cost. The same is applicable in case of sublicensing. The buyer also has the right to make such changes in software that are consistent with the intended use, but for sublicensed programmes any change of delivered software requires special agreement.³⁵

C. Formation of Contract with Personal Data as Counter Performance

I. Digital Supply as Performance

23 Relationships for the supply of digital content or digital services or the supply of goods with digital elements did not emerge with the issuing of the Twin Directives. However, there were most probably difficulties in deciding what rules would apply when the consumer’s contribution consisted only in letting the trader gather the consumer’s personal data. Were the relationships contracts at all? And even if so, were they not unilateral, or non-synallagmatic?

24 The fact that the content, service or element is digital is not at all the problematic issue in defining the relationship as contractual or bilateral/synallagmatic. In cases of monetary counter-performance there is obviously no difficulty to put the relationship into the patterns of formation of contract. Instead the challenging aspect here would have been to accept that the gathering of personal data, with or without the buyer’s knowledge or consent, was adequate counter-performance on the part of the consumer. However, once it is accepted that personal data is adequate counter-performance, it is less troublesome as regards formation. Other issues arise in relation to remedies for breach of contract, which are to be discussed later on in this report.

25 In that sense the Twin Directives themselves have not created any need of restructuring private law that was not present already. However, until the DCD, or at least the discussions leading up to the DCD,³⁶ there would

grafisk utrustning [General terms of delivery of graphic machinery and other mechanical, electrical and electronical graphic equipment], which very closely coincides with NLM 19.

³⁵ NL 17 # 5–7. NLM 19 # 7–8.

³⁶ Ds 2008:55. Ds 2012:31.

have been doubts whether these relations would classify as contracts, and the DCD has clearly made its point: Apart from the mere accepting of cookies, consumers' more or less voluntary transmissions of personal data are sufficient to be considered to create full-fledged contracts.

26 As already concluded it is sufficient to provide personal data to establish a contract. However, if the consumer would have promised to deliver its personal data but would fail to do so, it may be discussed whether that could be considered as a question of aborted contracting or a breach of contract. Probably this distinction will be of no practical importance. The trader will most probably not be able to enforce the consumer's promise to hand over its correct personal data. However, the trader may reclaim its performance to the extent that it has already been delivered and refuse to continue to perform.

II. Personal Data as Sufficient Counter-Performance Outside of The Twin Directives

27 The DCD (and the SGD, but of less factual importance) made it necessary to embrace the idea of personal data as a sole adequate remuneration for the formation of a bilateral/synallagmatic contract. However, so far this idea has been rather confined. It exists only in case of the supply of digital content/services/elements to consumers. It does not yet exist in B2B-relations, or in other parts of the contract law regime. For certain, with the Twin Directives, the idea exists when it comes to pure digital supply, when the consumer engages in internet activity. And for certain, the idea exists in sale of goods when the consumer has or has not paid money or any equivalent to receive goods with digital elements, or when supply has a tangible carrier. However, in other types of contract, such as non-intellectual services, supply of telephone services, electricity, household gas or tenancy, it is probably the opposite, when no other payment than the gathering of personal data has been done. In time, maybe soon, this may change.

III. Personal Data as Counter-Performance in B2B Contracts

28 The potential to enlarge the idea of personal data as sufficient counter-performance to create a contract in B2B relations is low. One could however, as in the provisions on end-user protection in the European Electronic Communications Code Directive (EU) 2018/1972, consider if this would be suitable for end-users in the categories microenterprises, small enterprises

and not-for-profit organisations. Without any EU initiative on the matter this is most unlikely to happen in Sweden.

D. Delivery and Conformity of Products

I. Delivery

29 The place of delivery of goods is at the seller's place of business, unless otherwise would follow from the contract, 2:1 CSA. However, this rule only states what the parties have to expect before delivery has taken place and in the absence of a subsequent agreement on the matter. If the goods are actually handed over somewhere else, that place will be deemed to be the place of delivery.

30 Delivery occurs when the consumer has taken possession of the goods. Possession can be immediate, in the meaning that the consumer itself has physical possession. Possession can also be mediate. If the consumer has given someone an assignment to fetch or to receive the goods (e.g. a family member or a transporter), that mediate possession will constitute delivery.³⁷ If the consumer has asked the seller to leave the goods in the mailbox of the consumer or on the property of the consumer, and the seller does that, delivery is deemed to have taken place.³⁸ Would the seller leave the goods by the consumer's apartment door in an apartment building, delivery has according to the preparatory works not taken place, even if this is done in accordance with the consumer's instructions.³⁹

31 For delivery of goods with digital elements supplied in a single act it is required that the goods are handed over and that the digital elements have been supplied, 2:4(1).1 CSA. If the digital supply is continuous, delivery is achieved when the supply has begun, 2:4(1).2 CSA.

32 For contracts of supply of digital content the equivalent of delivery is "supply". Supply is accomplished when the content is made available or accessible or a means suitable for access to or download of the content. A digital service is supplied when it is made available for the consumer, 9:1(2) CSA. However, for digital content on tangible media, the rules on delivery for goods without digital elements and goods with digital elements with a single act of supply apply instead, 9:1(3).

³⁷ Cf. CRD Art. 20.

³⁸ Prop. 1989/90:89, p. 70. NJA 2013 s. 524 (Den skadade dörren).

³⁹ Prop. 1989/90:89, p. 70. Cf. Hästad, p. 235.

II. Subjective and Objective Requirements for Conformity

34 The possibility for the buyer to make a claim of lack of conformity on merely objective grounds is old in Sweden. Subjective and objective requirements were already in place in the CSA of 1990, and they can be traced back to the older Consumer Sales Act of 1973.⁴⁰ These elements were in the doctrine called concrete and abstract requirements (or concrete and abstract defects or similar notions).

35 Before the implementation, the objective/abstract standard was, loosely translated, formulated as follows: “*Unless something else has been agreed upon*, the product shall comply with [the following enumeration]”. Now it is, again loosely translated, stated in the following way: “The product shall, *in addition to* what follows from § 1 [i.e. the subjective/concrete requirements], comply with [the following enumeration]”.

36 The new wording might pose problems when the consumer has knowingly bought an inferior product, such as in cases of second-hand goods not sold in auction. The subjective/concrete standard might be interpreted to be a subsidiary norm, only activated if and when the subjective/concrete standard is set higher than the objective/abstract norm. This would risk that courts and others would have to find a defect either in a deviation in the objective criteria or a deviation from a proven individual specification. Probably, however, the application in Swedish courts and consumer adjudication boards will not follow such a strict lexical interpretation, but rather still place the common intention of the parties in the forefront.

37 Swedish contract law has three broadly captioned main measures of defects. A defect is at hand if the product does not fit the specifications of the contract (concrete defect), is not suitable for its normally intended use (objective abstract defect) or is of lower quality than the buyer had reason to assume (subjective abstract defect). The subjective abstract standard is under the influence of the concrete standard. If the concrete standard seems to suggest lower quality than the general, the subjective abstract standard is lowered as well. The subjective abstract standard has the function of a general clause to the aid of the buyer. If nothing else is enough to show non-conformity, this might. The existence of the broad measures of contract compliance have had the positive systematic effect that there has been a less immediate need

⁴⁰ NJA 2020 p. 951 (Badrummet i radhuset), p. 24, referring to konsumentköplagen (1973:877), i.e. the Consumer Sales Act of 1973, and its preparatory works, probably concerning § 9.2, see Prop. 1973:138 med förslag till konsumentköplag, m.m., p. 241.

for specific standards, for example for the events of intellectual property rights or authorities' decisions limiting the buyer's use of the product.

38 The subjective abstract standard has been put to display in the core of Swedish law of contracts, namely in the main defect defining provisions of the SGA,⁴¹ the rules on sale of real property in the Land Code of 1970,⁴² amended in 1990 to lexically match the wording of the SGA, and the now repealed CSA of 1990.⁴³ The subjective abstract standard has been applied either *ex analogia* or by virtue of being a general principle by the Supreme Court in a commercial construction contract dispute in which the parties unusually enough had neglected to incorporate any standard form agreement.⁴⁴ Commercial construction contracts are under no statutory contract regulation and are almost without exception regulated with standard form contracts provided by the Swedish construction business.⁴⁵ These well-balanced agreed documents do not contain any close equivalents to the subjective abstract standard.⁴⁶ Nevertheless, or maybe therefore, the subjective abstract standard was applied in the case. The subjective abstract standard has been applied by the Supreme Court also in a consumer construction contract dispute,⁴⁷ where the then commonly used standard form consumer construction contract had been incorporated.⁴⁸ This standard form contract was the result of negotiations between the construction business and the Swedish Consumer Agency. This standard form contract, or even the closely related Consumer Services Act of 1985,⁴⁹ does not contain any direct equivalent to the subjective abstract standard. Nonetheless, by construing the standard form contract in the light of the Consumer Services Act, the SGA, the CSA of 1990 and the Land Code concerning conveyancing of real property,

⁴¹ § 17(3).

⁴² 4 kap. 19 § jordabalken (1970:994) [4:19 of the Land Code of 1970].

⁴³ § 16(3)-3.

⁴⁴ NJA 2013 p. 1174 (Syrisk-Ortodoxa kyrkan).

⁴⁵ The current versions of these are Allmänna Bestämmelser för byggnads-, anläggnings- och installationsentreprenader, AB 04, and Allmänna Bestämmelser för totalentreprenader avseende byggnads-, anläggnings- och installationsarbeten, ABT 06.

⁴⁶ The standards may rather be summarised as follows: In accordance with the contract or later modifications (the concrete standard), in accordance with the professional diligence of contractors in general (the objective abstract standard) and in accordance with statutory requirements (a specification of the objective abstract standard).

⁴⁷ NJA 2015 p. 1040 (De enstegstättade fasaderna II).

⁴⁸ Allmänna Bestämmelser om småhusentreprenad, ABS 95. The current version is Allmänna Bestämmelser om småhusentreprenad, ABS 18.

⁴⁹ Consumer Services Act (1985:716).

the Supreme Court found that the consumers could invoke defects based on the subjective abstract standard.

39 The SGD and the DCD do not contain any exact equivalent to the subjective abstract standard. However, the objective requirement that the products shall “be of the quantity and possess the qualities and other features ... which the consumer may reasonably expect” in SGD Art. 7(1)(d) and DCD Art. 8(1)(b) is close. Especially after the Council of Legislation’s opinion and the government’s response to that, the wording of the subjective abstract standard was more or less restored, 4:2–3 and 9:4(1) CSA.⁵⁰ If this would not be the case one could argue that buyers in commercial or private relations are afforded better protection than consumers in this particular respect. In that negative case, it would be a systemic error.

III. The Durability Requirement

40 The durability requirement is enumerated alongside other objective requirements on products in the CSA.⁵¹ As explained above, the durability requirement is of central importance, and has been so for decades in Swedish consumer contract law. As a standard, nowadays a durability of three years is expected. This does not apply to fresh produce or other products of obviously low durability, by common sense rather than statute.

41 When it comes to durability in the sense of environmental concerns and sustainability, it is different. In the transposition Sweden definitely paid attention to the durability requirement in the sense of sustainability, without over-emphasising the potency of contract law. A former inquiry on circular economy had concluded that a longer period of liability – arguing for an extension from three to five years – and a longer period of reversed burden of proof – arguing for an extension from six months to two years – could enhance durability and at the same time enhance sustainability and a circular

⁵⁰ The Council of Legislation’s statement of opinion 2021-12-02, p. 12 ff. and 35 f., maintaining that the subjective abstract measure is a well-established standard, and proposing the insertion of provisions very similar to the one that formerly stated the subjective abstract standard. In the bill, Prop. 2021/22:85, especially p. 197, the government explained that it would be better to use the wording from the CSA of 1990, and to use the expression throughout the whole act.

⁵¹ 4:2(3) CSA for goods and 9:4(1) CSA for supply of digital content and digital services. The durability requirement is elaborated in the same manner as in SGD Art. 2(13) and recitals 24 and 32, Prop. 2021/22:85, p. 250.

economy.⁵² The general period of reversed burden of proof was in the transition of the Twin Directives prolonged to two years, even if the former inquiry on circular economy had proposed an extension to only one year,⁵³ and the already existing liability period that was three years sharp from delivery was extended to a maximum of three years and two months.

42 In Sweden there are no rules on availability of spare parts and corresponding information obligations apart from the public law statutes on eco design.⁵⁴ There is no coordination between the CSA and these statutes. The eco-design penalties are public law-based only. The only type of sanction mentioned is reimbursement of public expenditures concerning testing of the products.⁵⁵

IV. Duties to Inform about and to Supply Necessary Updates

43 SGD Art. 7(3) and DCD Art. 8(2) places a duty on the trader to inform about necessary updates, which is implemented in 4:4 and 9:4 CSA. The industries will probably use standard automated reminders and replies, and this will most probably be considered to be enough on the whole. If there will be any at all consumer benefit of this requirement is still to be assessed.

44 The duty to also supply updates necessary to maintain the functionality will be interpreted in a sterner way. According to SGD Art. 6(d) and DCD Art. 7(d), as well as 4:1(1) and 9:4 CSA, the digital element, content or service shall “be updated as stipulated by the contract”. Since *pacta sunt servanda* rules, this is not novelty, but it places the burden to make the supply possible to be updated on the trader in a contract law fashion. Furthermore, in SGD Art. 7(3) and DCD Art. 8(2), implemented by 4:4 and 9:4 CSA, it is required that the trader shall ensure that the conformity of any digital element, content or service is maintained by supplying updates even if there is no mention of updates in the contract.

45 If no necessary update is made, or if an update made available is insufficient to render the product into conformity, there is a defect that the seller is accountable of. It is as simple as that,⁵⁶ and has been so in Swedish law for a

⁵² SOU 2017:22, Från värdekedja till värdecykel – så får Sverige en mer cirkulär ekonomi, p. 337 ff.

⁵³ SOU 2020:51, p. 113 ff.

⁵⁴ See first and foremost lagen (2008:112) om ekodesign [Act on Eco Design] and förordningen (2016:187) om ekodesign [Regulation on Eco Design].

⁵⁵ 17 § lagen om ekodesign [§ 17 of the Act on Eco Design].

⁵⁶ Prop. 2021/22:85, p. 200.

long time. It becomes more difficult when the consumer changes its contact information during the lifetime of the contract. What will be required by any of the parties in this respect is still to be seen.

V. The Consumer's Duty to Install Updates

46 If the trader has informed of and made an update ready to be supplied, but the consumer fails to install the update, the consumer would lose its right to invoke non-conformity according to the SGD Art. 7(4), the DCD Art. 8(3), and 4:8 and 9:4(1) CSA. One could expect that this could occur quite often, especially after vacation seasons, but that the solution nonetheless will not be that the consumer has forfeited its rights. Rather the solution will in practice probably be that the trader will have to give the current customer enough support to bring the product up to date. If the product is so frail that failure to update would render the product beyond repair, the product is probably to be considered to be defective.

47 The legal consequences of update failures due to the consumer's unstable connection, poor bandwidth, insufficient memory, server error, router malfunction *et cetera* are not clearly answered. The wordings of the directives seem to imply that the consumer bears the risk of all failures not attributable to the trader.

VI. Restricted Use Due to the Trader's Infringement of Third-Party Rights

48 The product is in lack of conformity if the consumer's use of the product is restricted due to any right that a third party may have over the product, including intellectual property rights. Legal defects like this are treated as other defects, rendering the consumer the same range of remedies, 4:12 and 9:4(1) CSA. However, the consumer is also entitled to invoke rules on invalidity, such as fraud or dishonesty in accordance with §§ 30 and 33 of the Contracts Act.⁵⁷ This will however probably not be more advantageous for the consumer than making a claim based on lack of conformity, and the provisions on invalidity generally require that the consumer can show that the trader acted in bad faith.

⁵⁷ 30 and 33 §§ lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättsens område.

VII. The Consumer's Acceptance of Specific Characteristics of the Product

49 According to SGD Art. 7(5) SGD and DCD Art. 8(5), and 4:6 and 9:4(1) CSA, the consumer's express and separate acceptance of a deviation from the objective requirements on products will result in that the product is in conformity as far that the acceptance goes. Apart from explaining that this order allows sale of second-hand products to be compliant, the governmental bill of CSA especially gives one example of a deviation from the objective requirements, namely damage on the paint of a new car.⁵⁸ If the consumer is informed about the damage and accepts it, the damage is not considered to constitute a defect. The bill also exemplified the trader's duty of information by referring to the Supreme Court case NJA 2001 p. 155.⁵⁹ The case concerned the consumer sale of a second-hand sailing boat marketed to be of "Scandinavian design". However, the boat was predominantly manufactured outside of Scandinavia, and since this particular characteristic was shown to have an impact on the market value, the boat was considered to be defective, and the consumer was granted a price reduction. By referring to previous preparatory works,⁶⁰ it was highlighted that the trader's duty encompasses clarifications on utility limits of the product as well as legal restrictions on use and risks connected to the use of the product.⁶¹ For second-hand goods, all flaws cannot be expected to be described in detail. This was exemplified with that it would not be necessary with an informed express consent of every single scratch among several scratches.⁶²

VIII. Incorrect Installation

50 If the trader, or someone on the trader's behalf, in the contract has undertaken to install the goods sold or something enabling the digital supply, and the installation is incorrect, the trader is liable for lack of conformity. The consequences are as any other lack of conformity, i.e. withholding payment, repair, redelivery, price reduction, termination and damages.

51 As already pointed out above discussing the notions of 'integration' and 'installation', installation defects were regulated already by the adoption

⁵⁸ Prop. 2021/22:85, p. 253.

⁵⁹ Prop. 2021/22:85, p. 70.

⁶⁰ Prop. 1989/90:89, p. 100.

⁶¹ Prop. 2021/22:85, p. 70 f.

⁶² Prop. 2021/22:85, p. 72 and 253.

of SGA, § 21(2), and CSA of 1990, § 20(2). However, this was not obvious for most readers, since these provisions did not mention installation at all and it only appeared indirectly, unless one consulted the preparatory works.⁶³ According to these provisions the normally critical point of time for assessing conformity, delivery (or rather the passing of risk, but which always coincides with delivery in consumer sales), should not be decisive if the goods had deteriorated after the passing of risk as a consequence of the seller's breach of contract. Incorrect installation was given as the prime example of such a breach of contract. The solution is that the risk passes to the buyer if the buyer takes possession before the seller begins the installation, but the seller is nonetheless liable under sales law for defects caused by the incorrect installation.

52 In order to loyally implement CSD Art. 2(5) it was considered better to lay down this rule in a more straightforward provision, § 16 a of the CSA of 1990, regulating installation defects singularly.⁶⁴ Furthermore, § 2(2) of the CSA of 1990 stated that the CSA of 1990 would not apply if the element of service was predominant in comparison with the element of sale of goods, and this was thought to risk confusion as to the applicability of the CSA in case of the seller's installation of the sold product.⁶⁵ In § 2–2 of the Consumer Services Act it was, and is still, stated that the act is not applicable when installation or other work is provided in order to fulfil a contract of sale of goods.

53 This has by some been construed as that the similar provision, 4:6 CSA, always results in that contracts combining sale of goods and installing the goods are to be regulated by rules on sale of goods, with no exception. So, when the contract supposes a transfer of ownership of goods combined with an "installation" of any kind, CSA is to be applied even if the element of installation is predominant.⁶⁶ However, this opinion might be questioned on several grounds.⁶⁷

⁶³ Prop. 1988/89:76 om ny köplag, p. 96. Prop. 1989/90:89, p. 109.

⁶⁴ Prop. 2001/02:134, p. 45 ff. and 83.

⁶⁵ E.g. NJA 2001 p. 138, concerning a seller's delivery and installation of a boiler ordered by a consumer, and whether the CSA of 1990 or the Consumer Services Act of 1985 would apply.

⁶⁶ Hästad, *Köprätt och annan kontraktsrätt* (2022), 233, and at 232 fn. 15 claiming that NJA 2001 s. 138 since the enactment of § 16 a of the CSA of 1990 is no longer relevant in consumer sales.

⁶⁷ Cf. Herre, *Konsumentköplagen. En kommentar* (2019), para. 2.2.2, and Johansson, *Konsumenttjänstlagen. En kommentar* (2020), para. 2.1, which do not express that all con-

54 In 1:6(2) CSA it is – as before – stated that the CSA is not applicable if the element of service is predominant. This line of reasoning is in harmony with the case law of the Court of Justice of the European Union.⁶⁸

55 In consumer construction contracts there is always an element of delivery of building material apart from “installing” the building material. The element of delivery of goods is however usually considered to be of lesser importance than the construction services provided by the contractor. The Consumer Services Act of 1985 apply to all consumer construction contracts,⁶⁹ whereas some provisions apply to the construction of new one- or two-family dwellings or extensions of such dwellings.⁷⁰ These latter provisions were adopted in 2004 and turned into force 2005, i.e. after the introduction in 2002 of the specific provision on installation defects, § 16 a of the CSA of 1990.⁷¹

56 Apart from the installation of goods that naturally comes with construction contracts there is repair of vehicles, that may include substitution of parts, which the repairer will charge for. In the original preparatory works of the Consumer Services Act, it was stated that substitutions of the motor and the gearbox of a car ought to be considered to be services rather than sale of goods.⁷²

57 In SGD recital 38 it is stated that the concept of delivery is to be regulated by domestic law only, with regard to the CRD (Art. 20). The same is stated about the place of delivery, SGD recital 56. In SGD recital 40,

sumer contracts combining transfer of ownership of goods and instalment of the goods to be governed by the CSA (of 1990), and which do not deem NJA 2001 s. 138 to have lost its relevance.

⁶⁸ CJEU, Case C-247/16, *Schottelius*, EU:C:2017:638, where the CSD was considered inapplicable in case of a renovation of a swimming pool even if the contract included minor elements of delivery of goods.

⁶⁹ 1 § första stycket 2 konsumenttjänstlagen (1985:716) [§ 1(1)-2 of the Consumer Services Act].

⁷⁰ 1 § andra and tredje stycket and 51–61 §§ konsumenttjänstlagen [§ 1(2)–(3), and §§ 51–61 of the Consumer Services Act].

⁷¹ Cf. Prop. 2003/04:45, *Stärkt konsumentskydd vid småhusbyggande*, where there was no mention at all of the then rather newly adopted § 16 a of the CSA of 1990, although other synchronising measures between the CSA of 1990 and the Consumer Services Act were contemplated, see inter alia p. 27 ff. and 77 ff. On the contrary, discussing the Supreme Court case NJA 2001 p. 138, it was assumed that in only few cases the element of sale of goods will outweigh the element of service when a sale of a house building kit is combined with the service to assemble the kit, p. 81.

⁷² Prop. 1984/85:110 om konsumenttjänstlag, p. 153. See also SOU 1979:36, *Konsumenttjänstlag*, p. 413.

however, it is stated that delivery is considered to be effectuated first when the seller has completed the installation. The CSA does not exactly follow this recommendation. It renders nonetheless a similar degree of protection, not directly by modifying the time of delivery but by other means. If the seller is in continuous control of the goods from the sale till the completion of the installation, delivery takes place first thereafter, which happens to be in line with the recommendation in SGD recital 40. On the other hand, if the consumer gains exclusive possession sometime between the sale and the seller's commencement of the installation, delivery has occurred before the installation and the risk has then passed to the consumer, 2:3 and 2:6 CSA. However, if the goods are to be installed by the seller, the liability period of three years starts to run from when the installation is completed, 4:14(1).2 CSA.⁷³ Furthermore, if the goods deteriorate after the delivery (and thus after the passing of risk) due to a breach of contract by the seller, the seller is liable for the deterioration, 4:14(3).2 CSA. If the goods deteriorate under the control of the seller, the deterioration is presumed to be caused by the seller. The seller's liability is strict, due to that the rules on lack of conformity in the CSA become applicable. The seller bears the burden of proof of that the deterioration is not caused by deficiencies in the installation but instead by something for which the consumer bears the risk.

E. Liability of the Trader

I. The Distinction of Liability between Single Acts of Supply and Continuous Supply

58 The regulation of liability of supply of digital content and digital services, including sale of goods with digital elements, differ in multiple respects, depending on if it is a single act of supply or a continuous supply. Supply of digital content on tangible media only is mostly handled as a single act of supply. These rules are of course mostly based on the Twin Directives, but with some deviations due to explicit options and pre-supposed domestic modalities.

59 For delivery of goods with digital elements it is required that not only the physical goods are handed over. The digital elements must also have been supplied to accomplish delivery, 2:4(1).1 CSA. This, however, only applies to single acts of supply. If the supply is supposed to be continuous, delivery

⁷³ Prop. 2021/22:85, p. 89 and 258 f.

is achieved when the supply has begun, 2:4(1).2 CSA. How this will function, considering delay and passing of risk for the future supply, has been questioned.⁷⁴ In my view, delays of either agreed-upon or necessary updates ought to be solved by using the rules on lack of conformity, 4:1(1) and 4:4 CSA and SGD Art. 6(d) and 7(3). Also, since the absence of a necessary update will hamper functionality, the seller would be liable for the deterioration after delivery in accordance with 4:14(3).2 CSA. However, there is no nearby legal-technical solution available to tackle the problem of the liability for costs that arise after the initial delivery. If one would follow the normal rule, 4:5 CSA, the consumer would bear all costs that arise after delivery, which in these cases would include the costs for updates. Since this is obviously not the intention of the legislator – the underlying idea implied in 4:4 CSA and SGD Art. 7(3) must be that updates are to be supplied without cost for the consumer unless agreed otherwise – one must disregard from the usual implications of delivery in this particular respect.

60 As explained above, for contracts of supply of digital content, “supply”, i.e. delivery, is accomplished when the content is made available or accessible or a means suitable for access to or download of the content. A digital service is supplied when it is made available for the consumer, 9:1(2) CSA. However, for digital content on tangible media, the rules on delivery for goods without digital elements and goods with digital elements with a single act of supply apply instead, 9:1(3) CSA.

61 The seller shall inform of and supply the consumer with updates for goods with digital elements. In cases of single acts of supply this obligation is present as long as the consumer reasonably can expect updates. In cases of continuous supply, the obligation exists for at least three years from delivery or as long as the contract runs, if that would become longer than three years, 4:4(2) CSA. In contracts for the supply of digital content and digital services these obligations remain as long as the contract runs, 9:4(2).

62 The period of liability for lack of conformity in goods is three years from delivery (and up to three years and two months as described above, and later in detail), 4:14(1) CSA. For goods with digital parts with continuous digital supply the liability might extend even longer, if the digital supply carries on longer, 4:14(2) CSA. For contracts for the supply of digital content or digital services the liability is three years for lack of conformity, concerning defects that were there originally but that appeared later, 9:7(1) CSA. This

⁷⁴ Hästad (2022), 236 fn. 28.

applies only to the supply on tangible media and other single acts of supply. For continuous supply, the liability period is as long as the contract of supply is in force, 9:7(2) CSA. The trader is liable for lack of conformity due to insufficient updates for as long as the trader is obliged to supply updates, 9:7(3) CSA.

63 The Twin Directives reverses the burden of proof for lack of conformity by placing it on the trader. In sale of goods in Sweden the period of reversed burden of proof is two years, but for goods with digital elements it is three years, 4:17 CSA.⁷⁵ For digital elements with continuous digital supply the reversed burden of proof applies during the whole contract period but at least for three years. For contracts on supply of digital content and digital services the period is one year, 9:8 CSA. For continuous supply, however, the reversed burden of proof applies during the contract period, and not shorter or any longer.

64 In case of termination of sale of goods due to a breach of contract, already performed parts shall be returned to the other party, 8:2(2).1–4 CSA. In contracts for the supply of digital content and digital services the trader shall – with exceptions soon to be accounted for – repay any payment made, 9:15(1).1 CSA. The consumer shall refrain from using the content or service, 9:17(1) CSA. Digital content supplied on a tangible medium shall be returned at the request of the trader, 9:17(2) CSA.

65 In case of termination of sale of goods with digital elements with continuous digital supply, the seller shall return any part of the price paid in advance for any period of contract that would have remained had the contract not been terminated, 8:2(2).5 with reference to 9:15(1) CSA. If the termination is due to a breach on the part of the seller, repayment shall be made for periods when the digital supply was not in conformity. This seems to oblige the seller to repay the whole payment for periods when the goods were in a state of lack of conformity, notwithstanding that the goods might have been in continued use by the consumer. However, according to 9:8(3) CSA, the consumer shall hand over any so-called natural return the goods may have given (which is unusual in consumer cases) and pay reasonable remuneration for any other benefit that the consumer has had from the goods. Furthermore, as a general rule with many exceptions, the consumer shall pay for the decreased value of the goods if the consumer is unable to return the goods substantially unaltered and undiminished, 8:4 CSA. To

⁷⁵ Prop. 2021/22:85, p. 260.

sum up, in cases of termination of sale of goods with digital elements where the digital supply is continuous, the seller may make a deduction for the consumer's use. This is in coherence with general sales law, § 65(1) SGA and CISG Art. 84(2).

66 In cases of termination of contracts for supply of digital content or digital services, the trader shall reimburse payments made in advance for periods remaining after the termination, 9:15(1) CSA. Just as in terminated sales of goods due to the seller's fault, the trader must repay the payment for periods of lack of conformity if the contract of supply is terminated due to a breach by the trader. Here, however, there is no possibility to make any deductions for the consumer's use during periods when the quality of the supply was under the level of conformity. Chapter 9 CSA makes no reference to 8:3 or 8:4 CSA.⁷⁶ This is in a way coherent with the rules on redelivery, SGD Art. 14(4), which leaves no room for deductions for use even in periods when the product functioned as it was supposed to,⁷⁷ but it is hard to explain why the effects of *termination* should differ. The Swedish legislator would probably have preferred to let the provisions on deduction for use apply to contracts for the supply of digital content and digital services, but DCD Art. 16(1) and, especially, 17(3) seems to prevent that, whereas the Swedish legislator at the same time would have been unwilling to abolish the deduction for use altogether.

II. Impossibility, Force Majeure and Changed Circumstances

67 In case of unforeseen events, the trader may be excused for its inability to perform without disturbances. The Twin Directives do not regulate matters on general contract law or damages, SGD Art. 3(10) and DCD Art. 3(6). Instead domestic rules apply.

68 As a point of departure, a party is not exempted from all of its obligations even if a burdensome event has occurred. The failure to perform is still to be treated as a breach of contract.

69 If the seller of goods proves that the failure to perform was due to an impediment beyond its control and that the trader could not reasonably be expected to have taken the impediment into account, or to have avoided

⁷⁶ 9:21 CSA refers to 8:1, 8:5(1)–(2) and 8:7 CSA.

⁷⁷ Cf. CJEU, Case C-404/06, *Quelle*, EU:C:2008:231, and Munukka, 'EG-domstolen om omleverans: Konsument ska inte betala nyttoersättning för utbytt vara' (2008–09), 20 *Juridisk Tidskrift vid Stockholms universitet*, 311.

or overcome the impediment or its consequences, the seller will be relieved from having to pay damages, 6:1 CSA. Relief is not possible if the damage is caused by a legal defect or when the performance deviates from a (commercial) guarantee, 6:1. The same applies for contracts for supply of digital content and digital services, 9:3 and 9:10.

70 The consumer may require the trader to make delivery. The trader is however relieved from the duty to deliver when there is an impediment which the trader is unable to overcome or if the performance would be unreasonably burdensome. If the impediment ceases to exist within a reasonable time, the consumer may again require delivery, 3:4 and 9:3(1) CSA.

71 These exemptions do not have the effect of relieving the trader from the breaches of contract as such.

72 Apart from rules in the CSA there is a doctrine of assumptions, which may give the trader relief. However, the prerequisites for the application of the doctrine are very narrow. § 36 of the Contracts Act may also give relief in burdensome cases, but the threshold is set high.

III. Electronic Communication Services

73 Electronic communication services fall outside of the scope of the CSA, except number-independent interpersonal communication services, 1:8–1 CSA.

74 When electronic communication services outside of the scope of CSA are bundled together with the supply of digital content or digital services that fall within the CSA, the CSA is applicable, but only to the part that would otherwise fall within the CSA. However, this does not apply for changes of terms of contract when the electronic communication service is an internet connection service or a generally accessible number-based communication service, 9:19(3) CSA. Changes of terms of contract in those bundles are exclusively regulated by the Electronic Communication Services Act.⁷⁸ Also, a breach of contract that would give the consumer the right to terminate a part of the bundle prematurely will entitle the consumer to terminate the whole bundle, 7:26 of the Electronic Communications Act, irrespective of if the breach directly concerns something regulated by Chapter 9 CSA or not.

⁷⁸ Prop. 2021/22:85, p. 185 f. Prop. 2021/22:136, p. 287 ff.

IV. The GDPR and the Twin Directives

75 In Sweden the synchronisation of the consumer contract rules in the Twin Directives with the GDPR⁷⁹ is seen in 1:9 CSA, where it is noticed that there are provisions on processing of personal data in the GDPR, in the Swedish act on complementary measures,⁸⁰ and in provisions adopted in conjunction thereof. The fact that a trader fails to comply with GDPR does not in itself activate the CSA.

F. Remedies for the Trader's Breach of Contract

I. The Remedies

76 The consumer has a range of remedies to resort to. In case of delay the consumer may withhold payment, demand performance, terminate and claim damages. In case of lack of conformity the consumer may withhold payment, demand repair or redelivery, demand price reduction, terminate and claim damages. In the following, only some of these remedies will be dealt with specifically.

II. Withholding Payment

77 The DCD leaves it to Member States to decide whether there should be a right to withhold performance.⁸¹ The SGD Art. 13(6) requires that the consumer should have such a right in case of the seller's breach of contract but allows the member States to regulate the conditions and modalities for exercising the remedy.⁸²

78 Both parties have a right to withhold performance. This applies as a general rule 1) in the original exchange, 2) in case of the other party's breach of contract and 3) after termination. I will here only give an account of the consumer's right in case of the trader's breach of contract, i.e. only 2), and only concerning the consumer's right.

⁷⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁸⁰ Lagen (2018:218) med kompletterande bestämmelser till EU:s dataskyddsförordning.

⁸¹ DCD recital 15.

⁸² See also SGD recital 18.

79 The consumer may withhold payment to secure a claim due to a breach of contract. This right is afforded both in cases of delay and lack of conformity, and both in the sale of goods and digital supply, 3:3, 5:3, 9:3(1) and 9:10(1).3 CSA. The right to withhold payment extends to as much as is necessary in order to afford the consumer security for its claim on the basis of the breach of contract. The wording of the provision has been interpreted to give the consumer a somewhat wider margin concerning the sum of monies withheld than the one that buyers have under § 42 SGA, amounting (only) to the claim.⁸³

80 It is probable that the consumer must dispatch a notice of breach before withholding payment due to a lack of conformity. The structure of the provisions seems to support that, and 5:2 CSA states that the consumer is entitled to invoke a lack of conformity only if notice is given. However, the consumer is under no obligation to make a monetary claim before withholding payment. For delays, on the other hand, it is different. The consumer has no obligation to give notice of the delay as such, why the consumer most probably is entitled to withhold payment without notice of any kind.

III. Repair and Redelivery

81 Repair and redelivery are the primary remedies in case of lack of conformity, in relation to the secondary remedies price reduction and termination, 5:8 and 9:12 CSA. This is in line with general sales law, § 37 SGA. If these remedies are not available in the specific case, for instance concerning the sale of a pet that has deceased, the secondary remedies are available. In the large majority of the cases, though, the consumer must refrain from immediately requiring price reduction or termination. The consumer may, however, resort to price reduction or termination after having given the trader the opportunity to cure the breach. A novelty in Swedish law is that the consumer has the right to price reduction or termination without any previous attempt to cure, if the lack of conformity in the light of all the circumstances is of a serious nature, 5:8(1).3 and 9:12(1).3 CSA. The consumer has the right to price reduction or termination if attempts of repair or redelivery fails, 5:8(1).2 and 9:12(1).2 CSA. The wording of the provisions might give

⁸³ Prop. 1989/90:89, p. 75. E.g. Herre (2019), para. 6.3.2 and 8.5.2. Håstad (2022), 238, puts into question whether the wording of the CSA of 2022 (and of 1990) really give consumers a wider margin but contends that case law will probably accept the statement in the preparatory works.

the impression that the consumer should always have the right to secondary remedies if the first attempt to cure would fail. However, in the preparatory works of the CSA of 1990 it was declared that the consumer normally would be entitled to resort to the secondary remedies only after two failed attempts,⁸⁴ and the preparatory works of CSA of 2022 declare that no deviation from that reasoning has been intended, specifying the need to take SGD recitals 50 and 52 into account.⁸⁵

82 The seller has the primary prerogative to choose between repair and redelivery of goods in the general SGA, whereas it has been the opposite in the CSA of 1990 since the implementation of CSD.⁸⁶ The consumer still has the primary prerogative in sale of goods, which is expressly stated in 5:4(1).2 CSA.⁸⁷ In contracts for the supply of digital content or digital services it is instead the trader that has the prerogative to choose between the two types of cure, 9:11(1).2 CSA.⁸⁸

83 The Twin Directives leave it to the Member States to decide on the places for repair and redelivery. The places of repair and redelivery are not expressly determined in the CSA. In both sale of goods and supply of digital content and digital services it must be left to the trader to decide how these remedies should be executed, as long as it is done without cost or significant inconvenience for the consumer, 5:4(3) and 9:11(3) CSA.

84 Repair and redelivery shall be performed without cost for the consumer, 5:4(3) and 9:11(3) CSA. This includes costs for postage, carriage, labour and material.⁸⁹ At the execution of redelivery in sale of goods, a seller is according to 5:6(1) CSA obliged to take the goods back at its own expense. This is supposed to clarify that the seller must not only deliver a new product but also has the duty to arrange for the return of the product and to pay the expenses.⁹⁰ If needed to enable repair or redelivery, the seller shall remove the defect product and install a new one or bear the costs for the removal and the installation, 5:6(2).1 CSA. This obligation only applies if the goods were installed before the defect appeared and in a manner that was consistent with

⁸⁴ Prop. 1989/90:89, p. 122.

⁸⁵ Prop. 2021/22:85, p. 267 and 269.

⁸⁶ Prop. 2001/02:134, p. 51 ff. and 85 f. Cf. the preparatory works to the CSA of 1990 before the CSD-amendments, Prop. 1989/90:89, p. 119 and 121 f., stating that the seller has (had) the right to choose between repair and redelivery.

⁸⁷ Prop. 2021/22:85, p. 107, 109 f. and 266.

⁸⁸ Prop. 2021/22:85, p. 171 f. and 287.

⁸⁹ Prop. 2021/22:85, p. 266 and 288.

⁹⁰ Prop. 2021/22:85, p. 288.

their nature and purpose, 5:6(2).2 CSA. In contracts for the supply of digital content or digital services, the same is likely to apply *mutatis mutandis*, however less elaborately expressed in statute and preparatory works, 9:11(3) CSA.⁹¹

IV. Termination

85 The Twin Directives' rules on termination differ from general contract law in some aspects, at least lexically, namely the threshold for the right to terminate, the right to terminate in case of a serious breach of contract without having to give the trader any opportunity to cure, and the burden of proof on whether the threshold is reached.

86 Based on SGD Art. 13(5) and DCD Art. 14(6) the consumer has a right to terminate the contract in case of lack of conformity, unless the trader shows that the defect is minor. The same is stated in 5:10(1) CSA. In case of supply of digital content or digital services against payment in money the rules are the same, 9:12(2) CSA. If there is no payment in money, any lack of conformity enables the consumer to terminate.⁹²

87 According to § 39(1) SGA the buyer has to prove that the defect is of substantial importance for the buyer, and that the seller knew or should have known about the importance. In § 29 CSA of 1990 the threshold was also formulated as substantial importance but without the requirement that the seller must or should have known about the importance for the buyer. Also here, the burden of proof was laid on the buyer. It is not only in sales law that the threshold for termination has been formulated as substantial importance. It is described as a general principle in the law of contracts.⁹³ The threshold "not minor" might lexically seem lower than the threshold "substantial importance".⁹⁴ However, at the implementation of the CSD Art. 3(6), where the threshold "minor" was also used, the preparatory works found the expressions to be practically interchangeable,⁹⁵ which was confirmed at the imple-

⁹¹ Prop. 2021/22:85, p. 267.

⁹² Prop. 2021/22:85, p. 289.

⁹³ E.g. Bengtsson, 'Hävningsrätten i nytt läge?' (1990–91) 2 *Juridisk Tidskrift vid Stockholms universitet*, 579, with references. Hellner et al., *Speciell avtalsrätt II. Kontraktetsrätt. 2 häftet. Allmänna ämnen* (2020), 191 ff. and 197. See also NJA 1999 s. 71 (Ambulansentreprenaden) and NJA 2001 s. 241.

⁹⁴ Hästad (2022), 263.

⁹⁵ Prop. 2001/02:134, p. 54 f.

mentation of the Twin Directives.⁹⁶ This is also supported by the fact that the expression “not minor” was often used in older statutes, such as §§ 21, 42 and 43 SGA of 1905 and §§ 3–5 CSA of 1973, and the expression was interpreted to state the same threshold as “substantial importance”.⁹⁷

88 It might be that there is no real difference between the termination thresholds, why there would be no deviation from the general law of contracts in this respect. However, the reversed burden of proof concerning the gravity of the breach is a clear deviation from the general order.

V. Damages

89 The consumer has a right to damages if any damage would occur, notwithstanding that the trader finally has performed in case of delay or that the trader has cured any lack of conformity within a reasonable time. The consumer may also combine the monetary remedies damages and price reduction, but over-compensation is not possible. Whichever damage that would remain after the price reduction is to be compensated.

90 The trader may avoid damages only if the breach of contract – delay or lack of conformity – was due to an impediment out of the trader’s control, which the trader should not reasonably have expected. Once the impediment is detected the trader must try to avoid or overcome the consequences of the impediment, and relief is given only if the consequences are found to be too economically onerous to bear, 6:1 CSA. However, in cases of legal defects and deviations from commercial guarantees, the right to damages is absolute, 6:2 CSA.

VI. Passing on Rights to Subsequent Buyers

91 In Swedish legislation there is nothing providing for a subsequent buyer to have rights against the trader, apart from some rights to damages when the subsequent buyer happens to be a member of the original buyer’s household, 6:3(2) CSA. On the other hand, case law strongly supports the rights of the subsequent buyer. In three judgments, delivered in 2015–2016, the Supreme Court found that contract terms prohibiting parties to a contract from conveying their contractual rights should not affect the acquirer of those rights, and not even if the acquirer had knowledge (was in bad faith) of that pro-

⁹⁶ Prop. 2021/22:85, p. 119 f.

⁹⁷ Cf. Hellner et al. (2020), 192.

hibition.⁹⁸ Two of these cases concerned the acquisition of guarantees, one concerning several guarantees B2C passed on to subsequent consumers,⁹⁹ and one concerning a guarantee B2B passed on to a subsequent trader.¹⁰⁰ Even if the guarantee statements did not provide any rights to subsequent buyers and, to the opposite, prohibited such acquisitions, the subsequent buyers of the properties to which the guarantees had been attached could invoke the guarantees against the guarantors. In these two cases there were no explicit transfers of the guarantees. Instead, the guarantees seem to have followed automatically with the transfers of property. In the consumer case the rights transferred was a right of repair or damages corresponding to the costs of repair.

92 From this case law one can assume that at least guarantees may be invoked by subsequent buyers. The subsequent buyer does not seem to be obliged to show an explicit acquisition of the guarantee or the rights attached to it. However, if a transfer of the guarantee or the rights within that guarantee is made explicitly, the trader will with utmost certainty not be able to avoid the claims of the subsequent buyer.¹⁰¹ One can also assume that subsequent buyers of goods should be able to invoke the statutory rights of the original buyers.

G. Commercial Guarantees

93 Nordic legal thinking opposes the idea of a “legal guarantee”. The correct concept would instead be the “liability for defects”, not having to turn to fictions. Since the decisive part of EU seems to think otherwise, Nordic lawyers are given the role to accept this terminology. Real guarantees will here therefore be called ‘commercial guarantees’, as the decisive part of EU wishes to call them.

94 Commercial guarantees are frequent in Sweden, and often not on par with the current legislative rules on liability for defects. The guarantees cannot diminish rights, only extend them. However, the Swedish consumer community is rather cynical in this respect. It does not trust guarantees, since

⁹⁸ NJA 2015 s. 1040 (De enstegstättade fasaderna II). NJA 2016 s. 51 (Pippi på is). NJA 2016 s. 288 (Betalingserklaringen). See Munukka, ‘Avtalade överlåtelseförbud’, in Bernitz et al. (eds), *Festskrift till Lars Pehrson* (2016), 285.

⁹⁹ NJA 2015 s. 1040.

¹⁰⁰ NJA 2016 s. 288.

¹⁰¹ Cf. NJA 1993 s. 222 (Fullwood) and NJA 2021 s. 622 (Länna Marks fordran).

it puts trust in the consumer legislation. Of course, a consumer might invoke a 10-year or a life-time guarantee, but the real faith is put on the legislation.

95 On the whole, there is little statutory regulation of commercial guarantees in Swedish legislation. The option to implement rules on languages in guarantee statements was not used.

96 From 4:21 CSA it follows that there is a lack of conformity if the goods do not meet the requirements in the guarantee during the period given in the guarantee statement unless the seller can show that the deviation is due to an accident or the consumer's maltreatment or abnormal use or similar. If someone else than the seller has given the guarantee, the consumer may claim that person for the remedies stipulated in the guarantee, 4:22 CSA. However, if a producer has offered the consumer a guarantee of durability, the consumer always has the right to demand repair or redelivery. If the terms of the guarantee are less advantageous than what was advertised, the terms stipulated in the advertising have priority, unless the advertising have been adjusted before the sale, 4:23 CSA. In § 22 of the Marketing Practices Act of 2008 it is *inter alia* required that guarantees are formulated in a clear and intelligible manner, and that the guarantee statement and the information is given at the time of the sale, at the latest by the time of delivery.

97 In § 23(3) of the CSA of 1990 it was also stated that the outer time limit of three years might be longer if that would follow from a guarantee or a similar commitment. The same kind of reminder is found in § 32(2) SGA. The absence of such a (redundant) statement in the CSA of 2022 makes no difference, since the same result is achieved with 4:21(1) CSA of 2022, as was already the case with § 21(1) CSA of 1990. Promises are promises, and promises are to be kept. If not kept, there will be consequences.

H. Intermediaries and Online Platforms

98 Sweden did not specifically address online sale platforms in the legislation, but platforms may be seen as sellers of goods or traders supplying digital content or digital services within the scope of the CSA. Some platforms in Sweden voluntarily assume responsibility as sellers within their terms of contract, such as the largest second-hand intermediary for motor vehicles.¹⁰²

99 Apart from that, businesses may fall under the scope of the CSA even if they are not deemed to be acting on their own behalf, under what is called

¹⁰² <https://www.kvd.se/villkor/privatperson>, last visited 2022-08-20.

förmedlingsköp, “intermediary sale”. Business intermediaries have joint and several liability with the seller, if the seller is a private person.¹⁰³ This is the case when a private person sells to another private person with a business as an intermediary, 1:4 CSA, with the effect that the CSA in its entirety applies. The intermediary does not need to act in the capacity of a mandatary, i.e. having authority to sell on the behalf of the private seller.¹⁰⁴ The brokerage itself is sufficient, but if the intermediary only has put the parties in contact with each other, without having any impact on the terms of contract, the CSA does not apply.¹⁰⁵ Not only the intermediary is liable under the mandatory rules of the CSA, but also the private seller. The intermediary will most often have a right of redress against the private seller.¹⁰⁶

100 The “intermediary sale” phenomenon might only be applicable to sale of goods, where it absolutely also has its greatest importance. The actual provision speaks only of a “seller”, i.e. a private person acting as a seller, and not as a “supplier”. However, the sale of digital content in tangible media, such as second-hand CDs and DVDs, would probably be deemed to fall under the CSA, if brokered by a professional.

I. Time Limits

I. Obligation to Notify of Defects

101 Consumers have had an obligation to give notice of defects since the Sale of Goods Act of 1905, § 52(1).¹⁰⁷ Since the implementation of the CSD, Art. 5(2), a minimum time limit of two months from when the consumer detected the lack of conformity apply, § 23(1).2 CSA of 1990.

102 In compliance with the option given in SGD Art. 12, it was considered best to keep the notification duty without major modifications in

¹⁰³ This is the case even if the business has informed the buyer that the seller is a private person. Cf. CJEU, Case C-149/15, *Wathelet*, EU:C:2016:840, where the business would be deemed to be seller under the CSD only if the business had failed to inform the buyer of that the seller was a private person.

¹⁰⁴ Prop. 1989/90:89, p. 30 f. and 61. The current rule is the same as § 1(2) CSA of 1990, Prop. 2021/22:85 p. 54 and 238. Its origin is § 1(2) CSA of 1973, but then it was required that the business actually acted in the capacity of mandatary, SOU 1972:28, Konsumentköplag, p. 8 and 60, and Prop 1973:138, p. 162 f.

¹⁰⁵ Prop. 1989/90:89, p. 61.

¹⁰⁶ Prop. 1989/90:89, p. 61.

¹⁰⁷ 52 § första stycket lagen (1905:38 s. 1) om köp och byte av lös egendom.

the CSA of 2022, 5:2(1).3 CSA.¹⁰⁸ In fact, case law confirms that consumers have a duty to notify of breaches also in the absence of directly applicable statutory support.¹⁰⁹ However, there was no room for adopting an obligation to notify in case of supply of digital content or digital services, including digital content on a tangible medium. The legislator stated that this was “unfortunate”.¹¹⁰ In electronic communication service contracts, with the exception of number-independent interpersonal communication services, the consumer has a duty to notify of breach of contract, 7:17(2) of the Electronic Communications Act.¹¹¹

103 The consumer must in sale of goods, including sale of goods with digital elements, give notice within a reasonable time from when the consumer ought to have discovered the defect, 5:2(1).1 CSA. The period of notice may therefore start to run even if the consumer has not yet discovered the defect. However, the minimum period of two months starts to run only after the consumer has in fact discovered the defect. This means that the consumer’s right may be time-barred only when both of these time-limits have been passed, i.e. the reasonable time from when the defect objectively should have been discovered and two months from when the consumer actually discovered the defect.

104 The consumer is relieved from its obligation to give notice if the seller has acted dishonestly or with gross negligence, 5:2(3) CSA. This does not mean that the consumer may wait with its complaints for an indefinite time,¹¹² but it certainly means that the time-limit is prolonged.

105 The outer time limit for the seller’s liability for defects of three years after delivery in the CSA of 1990 was kept for sale of goods, 4:14(1)–(2) CSA. If goods with digital elements have a continuous digital supply the liability period is at least three years, but longer if the supply extends past that. In contracts for the supply of digital content or digital services the period is also three years, 9:7(1) CSA, but this only applies to single acts of supply. For

¹⁰⁸ Prop. 2021/22:85, p. 94 ff.

¹⁰⁹ NJA 2018 p. 127 (Flyget från Antalya). For an analysis and comparison with opposing Norwegian case law, see Rødvei Aagaard, ‘Om att (inte) uppställa reklameringsregler på okodifierat område och om nordisk rätts(o)likhet’ (2020–21) 32 *Juridisk Tidskrift vid Stockholms universitet*, 711.

¹¹⁰ Prop. 2021/22:85, p. 167 f., where a reference to DCD recital 11 is made.

¹¹¹ 7 kap. 17 § andra stycket lagen (2022:482) om elektronisk kommunikation.

¹¹² Cf. Prop. 2004/05:13, Distans- och hemförsäljningslag m.m., p. 103 f., Prop. 1989/90:89, p. 116, and NJA 2017 s. 1195 (Skogssällskapet).

continuous supply the liability period ends with the end of contract unless agreed otherwise, 9:7(2) CSA.

106 Even if the three-year period was kept, a prolonging modification was made. The three-year time limit in § 23 CSA of 1990 was construed as an absolute time bar, even when the defect did not appear until the very end of the period of liability. However, in the CSA of 2022 the absolute time limit is two months after the expiry of the liability period. This means that a claim must not be made within the liability period, but instead within two months of the expiry of the liability period, 5:2(2) and 9:10(2) CSA. This two-months rule applies to all liability periods for defects.

107 In case of the trader's dishonesty or gross negligence the outer time limits do not apply, 5:2(3) and 9:10(2).2 CSA. These rules will not give the consumer the right to wait with its claims in eternity, but they will break through the statutory time limits.

II. The Trader's Right of Redress

108 A right of redress is considered to follow from the general law of obligations of Sweden,¹¹³ as a general principle.¹¹⁴ Therefore no provision was deemed necessary at the implementations of the CSD¹¹⁵ or the Twin Directives.¹¹⁶

109 As pointed out earlier, the key question is rather whether the seller's period of notice toward the seller's supplier should be linked to the consumer's notice of breach of contract.¹¹⁷ As of now, there are no rules on this, and none are to be expected in the near future.

¹¹³ A provision on redress is found in 2 § andra stycket lagen (1936:81) om skuldebrev [§ 2(2) of the Act on Promissory Notes]. The provision is considered to express the main rule in Swedish law, NJA 2009 p. 221. It states that if one of several debtors has paid the creditor more than the debtor owed visavi another debtor, the debtor that has paid may claim the other debtors for what they are due to pay.

¹¹⁴ Cf. Unnersjö, *Regress*, 2021, p. 188, and NJA 2012 p. 804.

¹¹⁵ SOU 1995:11, *Nya konsumentregler. Preskriptionstid. Garantier m.m. Borgenärsskydd*, p. 181. Prop. 2001/02:134, p. 55. See however dissenting inquiry expert Inger Soldéus, arguing for a mandatory right for sellers to exercise redress, SOU 1995:11, p. 201 f.

¹¹⁶ SOU 2020:51, p. 162 f. Prop. 2021/22:85, p. 220 f.

¹¹⁷ Cf. Sandstedt, 'Artikel 4 konsumentköpsdirektivet och skandinavisk export – om oväntade och tvingande regressfallor' (2005) 141 *Tidskrift utgiven av Juridiska Föreningen i Finland*, 295.

J. Final Words

110 The Twin Directives bring a multitude of achievements for the European collective of consumers. In some aspects the Twin Directives are forwarding even Nordic consumers' positions. It has happened before that EU consumer contract law achieve more than the existing Nordic consumer contract law, especially through the CSD's rules on a reversed burden of proof and, very much so, the minimum notice period of two months.

111 The first and foremost achievement is of course that the contracts of digital supply of any kind has been dealt with in a contract law fashion. When looking back twenty years from now, we will not be able to understand how we could do without this set of rules.

112 Another novelty this time is that a termination of contract may be acceptable even if the consumer has not given the trader the opportunity to cure the breach of contract, if the performance of the trader has been seriously bad. I believe that this idea is already a part of Swedish law, but with no hard evidence thereof outside of long-term contracts. Must you, is the question, give the performing party a second chance after a failed attempt that give the impression that the performing party is lacking in its ability, without invoking rules on invalidity or the like?¹¹⁸ Hopefully the surrounding Swedish law of contracts will adapt to this, and announce that the right to terminate exists as a primary remedy in cases of lost trust in the counterparty also in momentary contracts.

113 The Twin Directives are on the same march that CSD and CRD and its forerunners started. However, the Union's goal of creating clear-cut and simple rules¹¹⁹ has, to a deep level of disappointment, not been met. Ask any

¹¹⁸ Compare NJA 2016 s. 222, where a contractor had both used wrong material for flooring and failed to plaster the sub-floor in a professional manner, works performed when the consumer and his family were on vacation. After returning home, the consumer notified the contractor of its complaints. The contractor admitted the defects and promised to cure them. Early in the morning, unannounced, the contractor's craftsmen rang the door-bell, ready to cure. The consumer explained that it was not possible to let the craftsmen in at that time. The consumer also demanded guarantees of that the cure would be safe for him and his family and that the works would be performed correctly this time. The Supreme court found that the consumer was in its right to waive cure at that unannounced point of time. However, the latter demands for guarantees were seen as ill-founded, and the consumer lost the right to remedies. With a right to direct termination in case of serious breaches, the consumer would probably have won the case.

¹¹⁹ SGD recital 13. DCD recital 20.

of the involved EU legislators, besides possibly some few civil servants at the EU Commission, and they will not know what provision will be applicable on what type of consumer contract.

