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Premature Obsolescence and European Law - Possibilities with regard to the Reform of The Consumer Sales Directive

1. Introduction

1.1. "Negligent", or better yet, "avoidable" obsolescence

This morning the focus of consideration was on planned wear and tear ('planned obsolescence'). "Planned" implies intent. Some indications suggest that such intent might exist in the case of particular products. One can argue at length whether this is indeed the case. The industry will deny this obstinately.

Whether planned obsolescence has been built into a product deliberately (i.e. approved acceptance of the detected reduction of product lifetime) or not, may play an important role in the level of public outrage. However, this subjective factor is irrelevant as far as the objectives for the protection of consumers and environment and/or resource preservation are concerned.

The only decisive point is that the lifetime of a product does not live up to what is possible and desirable.

In order to be able to solve the problem without getting lost in battles over issues of principles, it would be advisable to let go of the provocative term "planned obsolescence", thus retaining a straightforward focus of professional discourse. I think that by focussing on the question of intentional acts, the path to possible solutions is blocked.

An explicit criminal prosecution of planned obsolescence, as discussed in France, could help raise awareness of the topic but it leads the political discussion too easily into a cul-de-sac, and in my view, fails to solve the problem. A consistent path towards appropriately durable goods must start elsewhere.

Instead of using "planned obsolescence" the Consumer Commission of Baden-Württemberg speaks of "negligent obsolescence". I would like to take this one step further today and propose using the even more neutral "avoidable obsolescence".

In order to stop or at least confine avoidable obsolescence, it is not imperative to find the last cause for its existence (for instance, respective intent). Rather, it is sufficient to know the necessary framework conditions for premature wear and tear as well as those encouraging obsolescence and to stop them. Even without the need of assuming intentional acts, there are framework conditions which may not necessarily induce obsolescence but which do encourage it.

A strategy aiming to stop premature obsolescence without polarising should start precisely at this point.

1.2. Three effective legal levers against avoidable obsolescence

From a legal policy point of view, I see three key levers which could be used:

- 1. Rights of the buyer to be developed further, for which the Rights of the Consumer according to Art. 3 Consumer Sales Directive are a point of reference;
- 2. Clearly defined information requirements;
- 3. The use of instruments of the European product legislation – whereby I rather see a link with the Product Safety law than an expansion of the Ecodesign directive.

1.3. Product lifetime as measurable value – Obsolescence as term depending on evaluation

First of all, it is important to recognise that the lifetime of products as such is a measurable value. Yet, the precise parameters of the lifetime testing have to be agreed upon in order to compare lifetime data.

Premature obsolescence of products, however, is a term implying a comparison of actual and target figures and thus an evaluation. The specification of the target figure depends on the underlying objectives. In terms of legal policy the objectives of consumer protection on the one hand (what can the consumer reasonably expect?) and of sustainable economic management (“sustainability“) on the other hand, will be decisive – mutually reinforcing objectives which in practice pursue mostly but not always similar interests.

2. Premature obsolescence as lack of conformity with the contract under the Consumer Sales Directive

2.1. Rights of the consumer according to Art. 3 Consumer Sales Directive due to obsolescence

The question of the actual comparison brings me directly to the Consumer Sales Directive. In accordance with Article 2 thereof, an actual comparison also has to be made when evaluating a product’s conformity with the contract. If the product does not conform with the contract, the known rights of the consumer according to Article 3 apply.

In cases where seller and buyer have agreed no specific terms in the contract and where the target properties do not arise from the purpose that is common or known to both parties, the decisive criteria according to Article 2(2)(d) are the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect.

In Germany instead of the lack of conformity, we speak of a defect, i.e. we are dealing with the objective definition of defective goods. In establishing what is customary and what can be expected, indications of the state-of-the-art technology serving as a benchmark for comparison can be found in German legal literature and in German case law. A product can thus already be considered defective due to premature obsolescence, in particular if the state-of-the-art technology applicable to comparable products has not been observed.

In some cases known as obsolescence classics from test magazines and relevant publications, a product’s deviation from the buyer’s reasonable expectations can range from a defect to a lack of conformity of the product with the contract in European

terminology. As such, the following items have to be deemed defective and equivalent to lack of conformity in the sense of the Consumer Sales Directive:

- a vacuum cleaner whose electric motor has been equipped with much too quickly wearing carbon brushes, not complying with the state-of-the-art technology.
- a kitchen mixer, the gearbox of which - and despite the latest technology - a plastic gear is meshing with a metallic gear resulting in an avoidable wear and tear of the plastic gear.
- a device in which heat-sensitive electrolytic capacitors are installed above the transformer or other heat relevant areas, which in turn results in premature failure of the device.

2.2. Difficulties in enforcing rights of the consumer and the need for legal policy modifications

However, the rights of the consumer will more often than not be expired due to the (too) short specific limitation period of two years from the time of delivery before the defect is detected (§ 438 (1) no. 3 BGB [German Civil Code]).

My colleague Rainer Gildeggen from Pforzheim therefore demands with reference to international standards (among others, the draft regulation for a Common European Sales Law (CESL) as well as corresponding in the result the Draft Common Frame of Reference (DCFR)) a significant expansion of the limitation period, to start only when the defect is detected and ending – independently of the knowledge of this defect - not earlier than 10 years after delivery of the good (= risk transfer).

In addition, it would be correct for the purchaser to have a direct claim not only against the seller but also against the manufacturer as, to my knowledge, the French law puts it. Professor Klaus Tonner is going to present a proposal how such a regulation could be integrated into German law and similarly structured privacy rights, at the Obsolescence Conference taking place in Pforzheim at the end of the month.

Moreover, the proof that such a defect justifying rights of the consumer does exist, is hard to establish. This already applies during the first six months after delivery of the good, within which the burden of proof is reversed in favour of the buyer (Article 5 (3) Consumer Sales Directive). In Germany, this provision under European law has been largely undermined due to the not very convincing case law of the Federal Court of Justice. In my opinion, this case law is in conflict with European law. But I will not expand on this here.

German consumer advice centres have observed that after the expiry of the 6 month reversal of the burden of proof, the companies dismiss justified claims of the customers. The individual consumer then hardly stands a chance of enforcing his rights at reasonable cost. The period foreseen for shifting the burden of proof is therefore too short and the limitation of the rights of the customer regarding defects starts too early.

The low number of judgements in Germany granting rights to the consumers as a result of product degradation is therefore not surprising.

A serious problem regarding the objective definition of defective goods seems to be the formation of a comparative group. Is it possible to compare a drilling machine for home improvement with a professional one? I do not think that this is possible, even if the latter is most likely to last longer.

It will be easier if the seller or even the manufacturer makes statements regarding the durability of the product, for instance when advertising or labelling the product. In this way the statements – irrespective of whether made by the manufacturer or the seller - decisively help determine the reasonable expectation of the buyer in accordance with Article 2(2)(d) of the Consumer Sales Directive. Unfortunately, information indicating the expected lifetime of a product can rarely be found in practice. Yet, in principle manufacturers design their products for a certain lifetime and they are particularly expected to do that with technical products in accordance with the Product Safety Law the product has to be safe over the entire lifetime.

3. Expansion of the transparency obligations: minimum lifetime and usage price information

We now address the necessary transparency. If it existed, consumer rights could tie in with it. Both manufacturer and seller would be “taken by their word”. Indeed, the expected lifetime of many products is decisive information if consumers are to take an economically rational decision. Without knowing the expected lifetime, it is hardly possible to reliably estimate the economic viability of a purchase investment.

To this end, it is necessary to calculate the depreciation costs for the product, which is not possible without knowing the life or service time. A cheap vacuum cleaner, for example, which only lasts two to three years with average use could raise higher costs in the end than a device that could easily last (at considerably higher purchase costs) ten or even 15 years.

If a consumer wants to calculate the costs per kilometer travelled by car, he also needs to know the expected lifetime in order to be able to calculate the portion of the cost per kilometer associated with the depreciation costs. Therefore, the information of the expected lifetime is needed for an informed and rational purchasing decision.

There are already legal obligations in force under the current legislation to inform about a product’s lifetime. Such information requirements can be derived from Article 5(1)(a) and Article 6(1)(a) Consumer Sales Directive, according to which the information of all main characteristics of a product have to be provided. If “main characteristics” refers to the information required for an economically rational decision, then the knowledge of the lifetime must be considered such an essential fact.

The same can be derived from Article 7 of the Unfair Commercial Practices Directive (UCPD). The consumer protection institutions who have legal standing are expected to fight for relevant judgements as far as the European Court of Justice (ECJ).

In terms of legal policy it would be beneficial to provide an explicit obligation to indicate the minimum lifetime of a product, thus enabling a clear and reliable comparability. We know a corresponding obligation from food legislation in terms of the minimum durability of foodstuff. The lifetime of a product – also the minimum lifetime – is measurable without

making an evaluation necessary in the first step. Nevertheless, the framework conditions for a lifetime testing and thus for a lifetime information must be clearly defined. Wherever consumers get annoyed by fast-wearing products, such a transparency obligation will lead to obsolescent products disappearing from the market. In the event that a product turns out to be less durable in practice than indicated in the first place, classic consumer rights should apply. This also means that the defects guarantee must not expire before the indicated lifetime information expires and that the burden of proof is eased for the buyer. In this respect, the Consumer Sales Directive needs to be amended.

I would even take another clear step in terms of transparency: I would like to propose an obligation on indicating the usage price. This would correspond with the basic price information in the price indication legislation. By means of the usage price the costs to be expected per usage unit would be indicated, e.g. the costs per wash or per 100 printed sheets of paper.

4. Clear rules according to specific product groups: Using the regulatory system of the European product legislation

A far from trivial problem which however can be solved, is to determine the framework conditions for the minimum lifetime. This already begins with the definition of lifetime.

It makes a difference whether one aims at the kilometres driven in a vehicle or the operating hours of a drilling or washing machine, or at the mere calendar based period ranging from the purchase and delivery of a good up to the time when it is worn out. If the lifetime of products is to be compared, it may be appropriate in case of different kinds of products, to do this on the basis of different sizes. For certain devices this could refer to the expected number of work results (for instance the amount of washings performed by washing machines or the number of print-outs for printers).

In other cases the operating hours could be considered (e.g. a heating unit). For yet other products the time interval may apply within which the product is supposed to remain free of defects based on normal usage from time of delivery (for example with a clock or an electronic weather station).

In order to fulfil the task of defining a clear and binding target on the one hand, and also providing the necessary precision on the other hand, so that the industry can meet the requirements and legal practice receives clear guidance – also in view of fighting for consumers' rights in court - one can draw some inspiration from the European Product Safety Law.

It would be possible to imagine a provision according to which consumer goods in general are to provide information on their lifetime on the one hand, and to allow specification of further details for certain product groups in implementing acts on the other.

Here it could be further differentiated where necessary and adjusted step by step with more precise rules where the general obligation to indicate lifetime proves not to work well. The last precision could be subjected to technical standards, developed in public procurement. Like in Product Safety Law, the observation of such standards could support the presumption that the lifetime was indicated correctly.

It is also necessary to determine the framework conditions for the proposed usage price indication on the basis of which the usage costs may be calculated. Here again, regulations related to specific product groups are required, reasonably referring to the technical standardisation for last refinements.

I would like to suggest a much greater involvement of the European product legislation, either on the basis of the Product Safety Law - I believe there is a powerful case to argue here - or on the basis of the Ecodesign regulations in order to keep the phenomenon of obsolescence under control. I would like to sketch this in the following conclusion:

5. Sharpening warranty for defects, creating information requirements on minimum lifetime and "indication on usage cost" as well as incorporating a second target level in the Product Safety Law – Also a conclusion

The upcoming revision of the Consumer Sales Directive offers the possibility to tackle the topic of premature obsolescence by taking legislative action. First of all, this involves classic topics such as a mandatory prolongation of limitation periods far beyond the current minimum of 2 years and the respective prolongation of the reversal of the burden of proof in favour of the buyer. Also, direct claims against the product manufacturer should be introduced in cases of premature obsolescence.

In addition, and equally important is the introduction of precise information requirements:

- in terms of consumer goods, the general obligation to indicate the lifetime.
- in accordance with implementing acts and each time for the appropriate group of products, the indication of either a minimum lifetime of products (following the expiry date in the food sector) or, with even more impact, the obligation to indicate the usage cost (in analogy to the mandatory basic price information).

The information requirements alone are important for the consumer to be able to make an economically reasonable purchase decision. Together with suitably adapted consumer rights regarding defects, they could exercise tight control. The indications resulting from the information requirements are equivalent to contract terms and in case of non-compliance the usual consumer rights apply. Indeed, a limitation period must not start before the end of the product lifetime advertised by the manufacturer or seller (which is legally controllable) and the burden of proof must also be effectively eased in favour of the customer.

As products cannot all be lumped together, proven mechanisms of technical standardisation and their linking to government regulations need to be used in order to establish the required precision and adaptability for business. This applies to the required determination for the minimum lifetime and indication of usage costs and also to updating the state of the art technology with respect to avoiding obsolescent product construction.

It is of key interest to business (in order to prevent exorbitant claims of liability and sharp regulatory interventions) to carry out product tests involving considerable costs to identify weaknesses in terms of product safety. At the same time, the mechanisms introduced could be used to develop more sustainable and easily repairable products without great effort. To this end, a second objective could be added to the Product Safety Law next to

the protection of people and property. Accordingly, an obligation could be included in the law to design products to be as durable as possible and easy to repair.

In order to reach this goal, subsidiary measures are necessary: a product monitoring obligation could be imposed on producers requiring them to monitor the weaknesses of their products which shorten the lifetime. As there are already duties and obligations of businesses for product monitoring in accordance with the Product Safety Law and the Product Liability Law, which the industry keeps following, it is unnecessary to introduce new and independent mechanisms. Merely the objective and the tasks to be documented need to be extended.

Furthermore, an obligation could play a crucial role according to which the expected product lifetime has to be declared and which factors might limit the lifetime in normal usage e.g. a certain product component. Mandatory declarations are also known under the existing Product Safety Law and thus tie in with proven mechanisms.

It could be possible to further specify certain product groups – similar to the sector-specific directives in Product Safety Law (Machinery Directive, Toy Safety Directive, etc.).

This could allow the detection of upward (desirable) and downward (undesirable) deviations from a common standard. In cases of a certain upward deviation (for instance a regulatory service life exceeding 25% beyond the technical standard), a special seal of quality could be awarded ("Sustainable: long service life – low energy consumption").

Alternatively or in addition, falling short of the state of the art technology could be linked to certain types of sanctions, for instance the obligation to declare this weakness precisely: "Product lifetime does not correspond to the state of the art technology".

Firstly, such an array of concerted standards would acknowledge that the consumer's freedom of choice is taken seriously and that consumers are trusted to avoid ultimately overpriced, obsolescent products. Secondly, a product design in the direction of consequent sustainability would be encouraged by using existing quality assurance mechanisms.