Non-minor and Substantial Defects as Grounds for Termination in Nordic Contract Law

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By professor, dr.jur. Johan Bärlund- University of Helsinki

This article examines the termination thresholds in general contract law and consumer contract law in the Nordic region. The substantiality rule is traditionally viewed as a fundamental principle in contract law. However, the wording of the termination rule in both the old EU Consumer Sales Directive 1999/44/EC and the new EU Sale of Goods Directive (EU) 2019/771 has led to a lower threshold for termination in some Nordic countries compared to the general substantiality rule. This divergence has contributed to increased fragmentation in Nordic law.

The article is an updated version of the author's contribution to Birgit Liin et al Henrik Udsen, Jan Schans Christensen, Jesper Lau Hansen, Torsten Iversen & Linda Nielsen (eds.) "Festskrift til Mads Bryde Andersen", Djøf, pp. 385-402, under the title "Om icke-ringa och väsentliga fel som hävningsgrund i nordisk kontraktsrätt".

1. Introduction

Nordic legal literature on contract law frequently asserts that a creditor's right to terminate generally requires a substantial (or fundamental or material) breach of contract by the debtor, unless otherwise stipulated by statutory rule or contractual provision.[1] Determining when a breach is substantial remains challenging.

In Denmark, the old Nordic Sale of Goods Act of 1906 remains in force[2], and its wording regarding termination does not follow the general substantiality rule. Section 42 of the Danish Sale of Goods Act specifies that there is no right of termination in cases of immaterial defects, except where the seller has acted fraudulently. Thus, termination is possible even if the defect is immaterial in cases of fraud.[3]

In Nordic civil law, it is common to argue that the law is becoming fragmented.[4] It is not uncommon for the relationship between commercial and consumer contract law to be highlighted as an example of this fragmentation.[5] The idea of fragmentation is expressed in the assertion that consumer law has even become a separate area of law from general contract law.[6] It is precisely this relationship between general contract law and consumer contract law that has inspired my article. Art. 13(5) of the new EU Sale of Goods Directive (EU) 2019/771[7] provides that the consumer has no right of termination in the event of a defect in the object of sale "if the lack of conformity is only minor". The rule was the same in Art. 3(6) of the old EU Consumer Sales Directive 1999/44/EC.[8] This negative formulation of the requirement of a substantial breach of contract for termination has led to much discussion in the Nordic countries about how the expression should be understood in relation to the traditional rule that termination requires a substantial breach of contract.[9]

What makes the theme interesting is that the Nordic legislators have not been able to agree on a common approach to how the Directives should be interpreted and implemented in national law on this point, which has led to increased fragmentation of the legal situation in the various Nordic countries on this point. This is an example of how the Nordic countries have not complied with Art. 4 of the Helsinki Treaty.[10] This provision obliges the Nordic countries to engage in legal co-operation "with a view to achieving

1 See e.g. Mads Bryde Andersen: Grundlæggende aftaleret [Basic contract law]. Aftaleretten I. 4th ed. Copenhagen: Gjellerup 2013 pp. 121–122, Mads Bryde Andersen: Praktisk aftaleret [Practical contract law]. Aftaleretten II. 5th ed. Copenhagen: Gjellerup 2019 pp. 434–435, Jan Ramberg and Christina Ramberg: Allmän avtalsrätt [General contract law]. 11th ed. Norstedts juridik 2019 p. 255, and Johan Bärlund, Frey Nybergh and Katarina Petrell (eds.): Finlands civil- och handelsrätt – En introduktion [Finnish civil and commercial law – An Introduction]. 4 th ed. Helsinki: Talentum 2013 p. 305.

2 See Bekendtgørelse af lov om køb [Announcement of the Sales of Goods Act] LBK nr 1853 af 24/09/2021.

3 I return to the rule in the text at footnote 22.

4 Two recent contributions are Lena Sisula-Tulokas: Civilrättens splittring [The fragmentation of civil law]. In the book Severin Blomstrand, Mia Carlsson, Dag Mattsson, Anna Skarhed and Sven Unger (eds.): Bertil Bengtsson 90 år. Stockholm: Jure 2016 pp. 481–495 and Magnus Strand: EU och civilrättens splittring. Exemplet preskription och ränta vid skadestånd [EU and the fragmentation of law. The example of limitation and interest in damages]. TfR 2017 pp. 313–346.

5 Boel Flodgren: Civilrätten i ett framtidsperspektiv [Civil law in a future perspective]. SvJT 2016 p. 23–52 and especially pp. 43–44.

6 Bryde Andersen 2013 p. 37.

7 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019, pp. 28–48.

8 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, OJ L 171, 7.7.1999, p. 12–16.

9 See the references later in the article.

10 Co-operation agreement between Denmark, Finland, Iceland, Norway, and Sweden of 1962.

the greatest possible degree of harmonization in the field of private law".[11]

This article deals with the right of termination, particularly in the case of defects in the goods. The focus is explicitly on how the so-called termination threshold should be set in consumer sales. There are many indications that the termination threshold has become dependent on both the wording of the termination rule and the interpretation of the language used in the termination rule.

The question of when the right of termination arises became more topical when, in 2017, the European Commission presented a proposal for rules on consumer sales, according to which the right to termination would have been available to the consumer even in situations where the "lack of conformity is minor" if the trader totally failed to repair or replace the goods or where these measures did not lead to a proper result. Thus, the initial idea was to completely abolish the requirement of a substantiality assessment for the termination in case of a defect in the goods, which would have meant amending the rule in Art. 3(6) of the Consumer Sales Directive then in force.[12] However, the proposal of the European Commission was not realised and the rule on the right of termination remained unchanged regarding the threshold in the final Directive.

This article will analyse the relationship between termination thresholds in general contract law and consumer contract law in greater detail. This topic illustrates how easily an increasing lack of coherence can arise in the legal situation in the Nordic countries if representatives of the Nordic ministries of justice do not have the time and resources to agree upon a common interpretation of the directive or wording of the national provisions implementing the directive.

2. The substantiality rule as a general rule

Thus, as mentioned, one of the undisputed tenets of Nordic contract law is the rule that a substantial breach of contract entitles the creditor to terminate the contract. Many of the basic Nordic textbooks on civil law, the law of obligations or contract law state that the right of termination that may follow a breach of contract presupposes that the breach is *substantial*.[13] As a rule, substantiality is assessed from the point of view of the party affected by the breach of contract, while substantiality must be discernible to the other party.[14] In these submissions, this refers to a broad legal rule that has a wide scope of application and is often based on legislation, although the rule is also considered to cover breaches of contract that are not regulated either in the contract or in legislation.[15][16] Sometimes the rule is simply referred to as *the substantiality rule* while others describe it as "a substantive general principle of contract law" which nevertheless has the character of a legal rul.[17] In other words, the rule means that the right to terminate arises when the breach of contract is of such a nature that it can be described as substantial.

Bertil Bengtsson, in his comprehensive work on termination in the event of breach of contract from 1967, describes the substantiality rule as "*a general legal principle of a rather non-uniform nature*."[18] He sees the requirement of substantiality as a strong main rule, from which deviations can be made with good reasons, but the problem is nevertheless that "the substantiality requirement is vague in its content."[19] The requirement of a substantial breach of contract as a precondition for the creditor's right to terminate is still a strong general rule, and it is also enshrined in Art. 49 of the

11 Thomas Wilhelmsson: Det bristfälliga nordiska lagstiftningssamarbetet och Helsingforsfördraget [The lack of Nordic legislative co-operation and the Helsinki Treaty]. In the book Sten Palmgren (ed.): Lagstiftningspolitik. Nordiskt Seminarium om Lagstiftningspolitik [Legislative Policy. Nordic Seminar on Legislative Policy], Copenhagen 2005, pp. 117–127. On p. 119, Wilhelmsson argues (in translation): "The Nordic ministries (of justice) are continually guilty of violating their obligations under the Helsinki Treaty."

12 See recital 29 of the Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, COM(2017) 637 final.

13 See e.g. Mika Hemmo: Sopimusoikeus II [Contract law II]. 2nd ed. Helsinki: Talentum 2003 p. 350, Viggo Hagstrøm: Obligasjonsrett [The law of obligations]. 2nd ed. Oslo: Universitetsforlaget 2011 p. 426, Christina Ramberg: Malmströms Civilrätt [Malmström's Civil law]. 26th ed. Sockholm: Liber 2020 p. 117 and Mads Bryde Andersen and Joseph Lookofsky: Lærebog i obligationsret [A textbook on the law of obligation]. 4th ed. Copenhagen: Karnov 2015 p. 219.

14 Hemmo 2003 pp. 355–358, Hagstrøm 2011 pp. 430–433, Agell, Ramberg and Sigeman 2014 p. 126 and Bryde Andersen and Lookofsky 2015 p. 225. See also Bert Lehrberg's detailed analysis of the conditions for termination in the event of breach of contract, Bert Lehrberg: Vad är ett "väsentligt avtalsbrott"? Några synpunkter på väsentlighetskravet i det samnordiska köplagsförslaget NU 1984:5 [What is a "substantial breach of contract"? Some views on the substantiality requirement in the Nordic Sales Act proposal NU 1984:5], SvJT 1987 pp. 422–450. This rule is not without exception in Swedish law, e.g. the Land Code Ch. 4 Sec. 12 and the Consumer Sales Act Sec. 13 and 29, see Jan Hellner, Richard Hager and Annina H. Persson: Speciell avtalsrätt II. Kontrakts-rätt. Andra häftet. Allmänna ämnen [Special contract law II. Contract law. Second booklet. General subjects]. 7th edition. Stockholm: Norstedts Juridik 2020 p. 193.

15 See in particular Bryde Andersen and Lookofsky 2015 p. 219.

16 Lars Erik Taxell: Avtal och rättsskydd [Contracts and legal protection]. Turku: Åbo Akademi University 1972 p. 211, which states that (in translation) "(i)t is undisputed that it cannot be limited to certain types of contracts or breaches of contract. The rule applies to contracts in general."

17 Here translated. Thomas Wilhelmsson and Frey Nybergh: Avtal [Contracts], in Bärlund, Nybergh and 2013 pp. 257–336 and especially p. 305.

18 Bengtsson, Bertil: Hävningsrätt och uppsägningsrätt vid kontraktsbrott [Right of termination and right to cancel in case of breach of contract]. Stockholm: P. A. Norstedt & Söners Förlag 1967 p. 617. Anna Christensen: Studier i köprätt [Studies in sales law]. Stockholm: P. A. Norstedt & Söners Förlag 1970 p. 70 emphasises the importance of a review of case law in order to get a picture of how the substantiality rule is applied.

19 Bengtsson 1967, p. 622. The characterisation of the vagueness of the rule in particular is still valid despite the fact that more than half a century has passed since Bengtsson's study was published.

CISG and in the Restatement of Nordic Contract Law § 8-11, where the substantiality requirement is described as a general principle.[20]

It is important to note, however, that the substantiality rule is not a legal principle in the sense that it would apply to a greater or lesser extent in every situation of breach of contract, but that it is a genuine legal rule that is either applied or not.[21] *Given its broad scope, many authors prefer to characterise it as a general principle of law in the sense of a legal principle or fundamental legal rule.*

In older Nordic sales and contract law literature, the substantiality rule is often expressed in negative terms: there is no right of termination if the breach of contract is immaterial. The reason for this wording is mainly the wording of Sec. 42 in the old Nordic Sale of Goods Acts. In the Danish version, the rule reads: "If the defect is considered immaterial, the buyer is not entitled to cancel the purchase unless the seller has acted fraudulently." However, the old Swedish Sale of Goods Act did not use the word "immaterial", but the word "minor".[22] According to the Swedish Academy's dictionary, the latter word also has the meaning of "inessential".[23] In the old Nordic Sale of Goods Acts, these expressions thus had the same meaning in Danish, Norwegian and Swedish, even though the Danish and Norwegian word "uvæsentlig" was equivalent in the Swedish version to the word "ringa". For *Bertil Bengtsson*, the negative wording of the Sale of Goods Act seems to be precisely the substantiality rule, although he emphasises that the statutory provisions in the Sale of Goods Act concerning termination in the event of defects otherwise provide little guidance on how substantiality is to be assessed. Nevertheless, he considers that termination requires a substantial breach of contract.[24] At the end of the book, he nevertheless summarises by stating: "breaches of contract, which in one way or another appear to be more trivial, shall not lead to termination."[25] At least to a modern reader, it seems that the threshold for termination is not particularly high according to Bengtsson.

For the reader, it is worth pointing out that Finland, Iceland, Norway, and Sweden – unlike Denmark – have in 1987–2000 enacted new Sale of Goods Acts, which have been created in Nordic legislative co-operation, and which have been inspired by the CISG. For example, the Finnish Sales of Goods Act (355/1987) contains the substantiality rule in Sec. 39(1) according to which the buyer's right of termination in the event of a defect in the goods arises "if the breach of contract is of substantial importance to him and the seller realised or should have realised this."[26]

When analysing the older Nordic sales and contract law doctrine, it quickly becomes clear that the conceptual pair "substantial" and "immaterial/minor" are opposites of each other and thus a dichotomy that lacks an alternative between breaches of contract that are substantial and those that are immaterial. Therefore, the negative wording of the substantiality rule, or in other words that there is no right of termination if the breach of contract is immaterial, does not give rise to any divergent analyses in the older doctrine.[27] The negative wording is thus not perceived as a rule with a different content compared to the positive wording of the termination rule.

To summarise, my view is that no one would hesitate to argue that the substantiality rule generally continues to have the character of a fundamental legal rule in Nordic contract law. Modern doctrine seems preferably to formulate the rule according to the pattern that the right to terminate presupposes a substantial breach of contract.

3. Implementation of the old and new EU Consumer Sales Directive

3.1. The termination rule in the Directive expresses the substantiality rule

The observation that the positive and negative wording of the substantiality rule was previously perceived to describe the same rule is worth bearing in mind when we take a closer look at how the old EU Consumer Sales Directive (1999/44/EC) was implemented in the Nordic countries in 2002. The different language versions of Article 3(6) of the old Directive contained the same linguistically negative wording as the old Nordic Sale of Goods Acts.

The Danish version of Art. 3(6) of the old Directive reads (in translation) "The consumer is not entitled to terminate the purchase if the lack of conformity is insignificant ("uvæsentlig")." The other official version of the Directive in a Scandinavian language is the Swedish version, where the provision reads: "The consumer is not entitled to terminate the contract if the lack of conformity is minor ("ringa")." One could imagine that the Norwegian version, which Norway is obliged to provide under the EEA Agreement, would have been very close to the Danish version for linguistic reasons, but we can see from this single example that the wording is similar to the Swedish version, even though the last word of the rule ("minor") in Norwegian is in the form "uvesentlig". Thus, the Norwegian version reads: "The consumer is not entitled to termin-

20 Ole Lando, Marie-Louise Holle, Torgny Håstad, Berte-Elen Konow, Peter Møgelvang-Hansen, Soili Nystén-Haarala, Ása Ólafsdóttir and Laila Zackariasson (eds.): Restatement of Nordic contract law, Copenhagen: Djøf Publishing 2016, pp. 274–275.

21 For more on the distinction between legal rules and legal principles, see Johan Bärlund: Protection of the Weaker Party in B2B Relations in Nordic Contract Law. In the work Torgny Håstad (ed.): The Nordic Contracts Act. Vol. 2. Copenhagen: Djøf Publishing 2015 pp. 83–106 and especially pp. 85–90.

22 The Swedish bill for the current Sale of Goods Act also equates the positive and negative wording, see Government Bill 1988/89:76 on a new Sale of Goods Act, p. 39.

23 Searching for the Swedish word "ringa" on www.svenska.se gives as an alternative a noun use of the word with the meaning "something insignificant or unimportant".

24 Bengtsson 1967, pp. 106–107, and Hellner, Hager and Persson: 2020 p. 192 regarding instantaneous contracts.

25 Translated here. Bengtsson 1967 pp. 617–618.

26 In Norway there is the Sale of Goods Act 13 May 1988 No 27, in Sweden the Sale of Goods Act 1990:931 and in Iceland the Act on Sales of Goods 16 May 2000 No 50.

27 This is particularly evident in Knut Rodhe: Obligationsrätt [The law of obligation]. Stockholm: P. A. Norstedt & Söners Förlag 1956 p. 429. Rodhe argues that the historical development has gone from a more extensive right of termination towards a limited right of termination, where precisely the substantiality rule has been used as an instrument to limit the possibility of termination.

ate the contract if the lack of conformity is immaterial ("uvesentlig")." The Icelandic version of the provision in the Directive speaks of a minor lack of conformity ("lítils háttar ósamræmi"). The Finnish version of Art. 3(6) of the Directive, i.e. "Kuluttajalla ei ole oikeutta purkaa kauppaa, jos virhe on vähäinen", would read in literal translation into English: "The consumer does not have the right to cancel the purchase if the defect is minor."

The Danish and Norwegian texts state that the right of termination does not exist when the lack of conformity is immaterial, whereas the Swedish and Finnish version provides that the lack must be minor. These linguistic differences are the same in Art. 13(5) of the new EU Sale of Goods Directive (2019/771). My impression is that this unfortunate linguistic difference in the various versions of the old and new Directive was a contributory factor in the national drafters' approach to the Directive's indication of where the termination threshold should lie. In the following, I will first deal with Danish and Swedish law, since the termination rule of the Directive has been implemented there as a traditional substantiality rule.

In Denmark, the implementation of the old Consumer Sales Directive led to the amendment in April 2002 of some of the sections of the old Danish Sale of Goods Act, which already applied to consumer sales. The section on the consumer's right to remedies, i.e. Sec. 78, was amended to remove the reference to the general provisions on remedies for defects earlier in the Act. Thus, Sec. 78 now contained all the conditions for the various sanctions when the goods is defect. Sec. 78(1)(4) therefore stated that termination is possible "if the defect is not insignificant".

The implementation of the new Sale of Goods Directive led to the amendment of the rules in June 2021. The old rule was moved to Sec. 78b(2): The buyer is not entitled to terminate the purchase "if the defect is insignificant".[28] According to the Directive, the seller has the burden of proof that the defect is immaterial.

An interesting feature of Danish law is that the consumer has the right to terminate the purchase in the event of a defect in the goods and irrespective of the extent and significance of the defect, if the seller fails to remedy the defect: "In accordance with the current state of the law, the right of termination is not conditional on the existence of a substantial defect."[29] *On this point, Danish law differs from the law of the other Nordic countries, where the right to termination is always subject to the independent condition that the defect is of a sufficiently serious nature.*[30] *What is interesting is that the Danish rule on this point corresponded to the rule that the European Commission had proposed to replace the Consumer Sales Directive rule.*[31]

Although the old Consumer Sales Directive was a minimum directive and the new Sale of Goods Directive is a fully harmonising directive, Denmark has been able to maintain the old rules. The Danish legislator shared the draftsman's view that the termination rule fully corresponded to the previous law.[32] Danish doctrine describes the termination rule in section 78(1)(4) as expressing the normal requirement of substantiality.[33] Substantiality is to be assessed both on the basis of an objective yardstick and from the consumer's point of view. This means that the trader must be able to understand that the defect is of such importance to the consumer that it is more serious than a defect which is immaterial to him.[34] The Danish solution is thus based on a certain requirement of visibility, i.e. that the consumer's entirely individual and subjective perceptions of substantiality are irrelevant unless the seller can get an idea of them.

When the Swedish Consumer Sales Act (1990:932) was amended following the transposition of the old Consumer Sales Directive into Swedish law, the Swedish legislator analysed the relationship between the Directive's termination threshold and the traditional substantiality rule. It was decided to require that the fault must be of substantial importance to the consumer in order for termination to be possible. The substantiality requirement is thus directly stated in Sec. 29 of the Consumer Sales Act.

The proposal for the amendment of the Consumer Sales Act states that "these are essentially corresponding regulations, which in both cases mean that as a general rule, high requirements are imposed in order to be able to enforce the restrictive termination sanction. ... The fact that the defect is not minor may thus be considered in practice to be equivalent to the defect being of substantial importance, and no amendment to the Consumer Sales Act is

28 The provison constitutes a continuation of the previous provision in Sec. 78(1)(4), see Susanne Karstoft: Kommentar til Købeloven [Commentary on the Sales of Goods Act]. In the work Michael Hansen Jensen, Lars Hedegaard Kristensen, Malene Kerzel, Peter Møgelwang-Hansen, Hans Nicolai Amsinck Boie, Mathias Rose Svendsen: Karnovs lov-samling. 5th volume 39th ed. Copenhagen: Karnov Group Denmark 2023 p. 9016.

29 Folketingstidende 2001–02, 2. samling – L 9 (oversigt): Forslag til lov om ændring af lov om køb. (Revision af regler om forbrugerkøb m.v.) [Proposal for an act to amend the Danish Sale of Goods Act (Revision of rules on consumer purchases etc.)], special justification for Sec. 78.

30 Vibe Ulfbeck: Implementering af direktivet om visse aspekter af forbrugerkøb og garantier i forbindelse hermed. Set ud fra et nordisk forbrugerbeskyttelsesperspektiv [Implementation of the Directive on certain aspects of the sale of consumer goods and guarantees in connection therewith. From a Nordic consumer protection perspective]. København: Nordisk Ministerråd (TemaNord, 2000:612) p. 62. On termination in case of immaterial defects according to the old wording of the Danish termination rules in case of defects, see Jacob Nørager-Nielsen and Søren Theilgaard: Købeloven. Med kommentarer [Act on Sale of Goods. With a commentary]. 2nd ed. Copenhagen: Gad 1993 pp. 1185–1186.

31 See Art. 9(3) in Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council. COM/2017/0637 final – 2015/0288 (COD).

32 Folketingstidende 2001–02, 2. samling - L 9: The justification for the termination provision: (in translation) "The provision corresponds to current law." Regarding the implementation of the new Sale of goods Directive, see Forslag til Lov om ændring af købeloven og lov om markedsføring, 2020/1 LF 223, chapter 3.4.2.2.2. No changes were made to the provision in 2021.

33 Nis Jul Clausen, Hans Henrik Edlund and Anders Ørgaard: Købsretten [The law on sales of goods]. 6th ed. Copenhagen: Karnov Group 2015 p. 255.

34 Karstoft 2023 p. 8984.

therefore required due to the provision of the Directive. This is also supported by other language versions of the Directive."[35]

The Swedish drafters thus started from the idea that was already prevalent in the old Nordic sales laws, i.e. that the terms "minor" and "substantial" constitute a dichotomy and are thus opposites.[36] It is worth noting that the explanatory memorandum to the bill emphasises that the threshold for termination is also high under the Directive's rules.

In the literature, *Johnny Herre* accepts the interpretation that the Consumer Sales Directive does not force a lowering of the termination threshold, especially when the Swedish wording is based on the fact that substantiality is to be assessed from the consumer's point of view.[37] He bases his argument on the fact that there is a difference between, on the one hand, the CISG-influenced general sales law normative basis, i.e. Art. 49 of the CISG, which requires the breach of contract to be fundamental (in its English-language form "fundamental breach"[38]), and, on the other hand, the wording of Article 3(6) of the Consumer Sales Directive, which follows the formulation that the lack of conformity is minor. However, he also points out that the majority of authors who have taken a position on the difference internationally "should" be of the opinion that the terms set the termination threshold at the same level.[39] The suggestion that legal disputes in the literature could be settled by quantitative measurements is of course unacceptable; only an open analysis, examination and weighing of the factual arguments put forward by the various authors can produce acceptable results in the legal method. One fact that speaks against Herre's view is that the terms are nevertheless different from each other. An objective reading of the terms could, in my view, set the termination threshold at different levels.

What again favours the Swedish solution is the history of the Consumer Sales Directive's creation. In the literature, one can find mention of the fact that it is the old Scandinavian sales laws' formulation that the right of termination does not exist in the event of immaterial defects that is behind the expression in the Consumer Sales Directive.[40] If this is the case, it is of course natural for Danish and Swedish lawyers to argue that the Directive contains the well-known substantiality rule. Other non-Nordic authors point to the solution in the CISG and argue that the result of the Directive's rule is the same as non-substantiality under the CISG.[41]

When a new Consumer Sales Act was enacted in Sweden in 2022 due to the implementation of the new Sale of Goods Directive, it was stated that there should be no difference in Swedish law between a defect that is of material importance to the for the consumer and a defect that is not minor. However, in the Government's view, a change should be made in the wording in order to ensure the correct implementation of the fully harmonized Sale of Goods Directive and, by extension, to contribute to a uniform application of the law in the Union. In the Government's view, it should therefore be possible, even with this change, to consider not only the objective significance of the defect but also its subjective significance for the consumer in the context of the assessment of the defect.[42] According to Ch. 5 Sec. 10(1), "the consumer may not cancel the purchase if the trader proves that the defect is minor". A change is thus the requirement that the trader must prove that the defect is minor in accordance with Art 13(5) in the new Sale of Goods Directive.

In the European literature, however, there are contributions that reject the idea that one could simply equate the substantiality rule in the CISG, among others, with the termination threshold of the Consumer Sales Directive. *Wolfgang Faber* provides a nuanced analysis by starting not only from the differences in wording but also emphasising that the higher termination threshold under the CISG can often be justified by the fact that transport costs are of a completely different magnitude in international trade than in consumer purchases. He also points out that the implementation of the Consumer Sales Directive will be influenced and complicated by the divergent preconceptions of the concept that exist in the various European legal systems, which means that it is ultimately a task for the (European Court of Justice's) case law to concretise the level of the termination threshold.[43]

The situation in Swedish law differed from the situation in the other Nordic countries in that the termination provision explicitly refers to the assessment of substantiality from the consumer's point of view. According to *Herre*, this meant that an individual assessment of the consumer's situation had be made, even if the assessment itself is based on how consumers generally perceive the situ-

35 The Swedish Government Bill 2001/02:134 Ändringar i konsumentköplagen [Amendments to the Consumer Sales Act], pp. 54–55.

36 This dichotomy has been continued in Sweden in certain usufruct situations, e.g. in the case of housing rights in Sec. 7:19 of the Housing Rights Act (1991:614) and in the case of agricultural leases in Sec. 9:17 of the Civil Code (1970:994). In both cases, forfeiture or termination as a result of a breach of contract is excluded if the breach of contract is minor. See also Hellner, Hager and Persson 2020 p. 192.

37 Johnny Herre: Konsumentköplagen. En kommentar. Under medverkan av Jan Ramberg. [The Consumer Sales Act. A commentary. With the participation of Jan Ramberg.] 5th edition. Stockholm: Norstedts juridik 2019 pp. 354–356.

38 See also Art. 25 of the CISG where there is a definition of substantial breach of contract. Björn Sandvik and Lena Sisula-Tulokas: Internationella köplagen – CISG [International Sale of Goods Act – CISG.] Helsinki: Kauppakamari 2024 p. 164 considers that one of the most difficult issues in the CISG is the assessment of what constitutes a substantial breach of contract.

39 Herre 2019 p. 354 footnote 185.

40 Dirk Staudenmayer: EC Directive 1999/44/EC on the standardisation of the law relating to the sale of goods, in Stefan Grundmann, Dieter Medicus, Walter Rolland (eds.): Europäisches Kaufgewährleistungsrecht. Reform und Internationalisierung des deutschen Schuldrechts. Cologne: Heymanns 2000 pp. 27–47 and especially p. 39 and Dirk Staudenmayer: The Directive on the Sale of Consumer Goods and Associated Guarantees – A Milestone in the European and Consumer Law. EuRPL 2000 pp. 547–564 and in particular p. 556.

41 Massimo Bianca: Article 3: Rights of the Consumer. In Massimo Bianca and Stefan Grundmann (eds.): EU sales directive: Commentary. Antwerp, Oxford: Intersentia 2002 p. 149–178 and in particular p. 166: "Thus, in terms of results, the requirement of the Directive (non-minor lack of conformity) coincides with the requirement of the CISG (non-fundamental breach)."

42 See the Swedish Government Bill 2021/22:85 En ny konsumentköplag [A new Consumer Sales Act], pp. 119–120.

43 Wolfgang Faber: Zur Richtlinie bezüglich Verbrauchsgüterkauf und Garantien für Verbrauchsgüter. Juristische Blätter 1999 pp. 413–433 and in particular pp. 427–428.

ation. It was thus an objectified assessment of the individual consumer's situation. The author also drew an *e contrario conclusion* in comparison to the corresponding provision in the Sale of Goods Act, i.e. Sec. 39 of the Sale of Goods Act, which contains a visibility criterion in terms of substantiality. Sec. 29 of the old Consumer Sales Act and Ch. 5 Sec. 10 of the new Consumer Sales Act do not mention that the substantiality must be visible to the trader, which is why Herre interprets the situation as meaning that no requirement can be imposed that the trader must be able to observe that the defect is substantial to the consumer in order for the consumer to have a right of termination.[44]

In Icelandic law, the General Sale of Goods Act (lög um lausafjárkaup) also applies to consumer purchases, so the provision in Section 39(1) that the buyer may cancel the purchase if the defect constitutes a substantial breach of contract[45] has clearly been considered to fulfil the Directive's indication that the consumer may not cancel if the discrepancy is minor.

So far, we lack authoritative statements by the CJEU on how to interpret Art. 3(6) of the Consumer Sales Directive or Art. 13(5) of the Sale of Goods Directive. This has led to some uncertainty as to whether the termination threshold under the Directives can be equated with the termination threshold under our traditional substantiality rule or whether the termination threshold should be lower. This uncertainty about the content of the Directives has also been a reason why two of our Nordic countries, Finland and Norway, have chosen to give the rule in the Directives a different meaning than the traditional substantiality rule. Thus, in Finnish and Norwegian law, consumer sales law contains an exception to the traditional substantiality rule as regards the possibility to terminate the contract. In the following section, I discuss the exceptions to the substantiality rule.

3.2. The termination rule in the old and new Directive provides a lower threshold than the substantiality rule

Although the substantiality rule can be seen as a clear main rule for the termination in Nordic law, there are of course exceptions to it. Even a quick glance at the exceptions makes us realise that the lion's share of the exceptions can be divided into two groups: on the one hand, there are situations where the legislator has found a need to specify the conditions for what constitutes a substantial breach of contract, and on the other hand, there are situations where the termination is so intrusive that the legislator has chosen to introduce stricter criteria for termination than those that follow from the substantiality rule. In both cases, there are often social reasons behind the need to either specify the criteria or have stricter criteria for termination.[46]

On the other hand, it is not as common to find situations where a departure from the substantiality rule seems to have been made in such a way that the threshold for termination is lower than that resulting from the substantiality rule. One could certainly imagine that the rule in Sec. 42 of the old Scandinavian sales laws that the buyer may terminate in the event of a minor defect in the goods, if the seller has acted fraudulently, is a rule with a lower threshold for termination. On reflection, however, the rule is in my view only a modification of the substantiality rule, since deceit towards the other contracting party can in itself be interpreted as a substantial breach of contract. Therefore, I do not include this situation in the cases where the termination threshold is lowered.[47]

However, it seems that in Finnish and Norwegian consumer sales law there is a genuine situation of a lower termination threshold than that resulting from the substantiality rule. In Finland, the legislator has chosen to interpret the wording of Art. 3(6) of the Consumer Sales Directive not as a negative formulation of the substantiality rule, but as an independent rule in relation to the substantiality rule. This independent rule is based on the idea that the scale of the seriousness of the breach of contract can be divided into three parts instead of the classical division into substantial and non-substantial breaches of contract. Thus, the scale of seriousness of a breach of contract includes a range describing situations that are neither substantial nor minor breaches of contract.[48] For defects in consumer goods, the idea is that the termination threshold should be lowered so that the consumer has no right of termination in the case of minor or, in other words, insignificant defects.

The termination rule for defective goods in consumer purchases is found in Finnish law in Ch. 5, Sec. 19 (1258/2001 and 1242/2021). The implementation of the Sale of Goods Directive in 2021 did not lead to changes in this part of the provision. Parliament accepted the interpretation of the legislator and according to the legislation, the consumer has no right of termination in the event of a defect in the goods if "the defect is minor". The wording of the legislation on termination before the 2001 amendment contained a normal substantiality rule: The consumer had the right to terminate the purchase "if the breach of contract is substantial". Interestingly, the explanatory memorandum to the previous rule gives an example that is also relevant to the time after the rewording of the legislation. It states:

"If, after attempted repair, the goods have an insignificant defect, termination is therefore out of the question."[49]

When the rules of the Consumer Sales Directive were to be introduced into Finnish law, the Finnish legislator assumed, without any further justification, that the Directive would clearly lower the termination threshold. The explanatory memorandum is more de-

44 Herre 2019 p. 357–358. This rule was already included in the 1990 Consumer Sales Act, see Government Bill 1989/90:89 on a new Consumer Sales Act p. 35. See also Jan Ramberg and Johnny Herre: Allmän köprätt [General Law of Sales]. 9th ed. Stockholm: Norstedts Juridik 2019 p. 187.

45 "The buyer may cancel the purchase if the defect can be attributed to gross negligence."

46 Bryde Andersen and Lookofsky 2015 pp. 218–219, Hagstrøm 2011 pp. 440–442, Hemmo 2003 pp. 350–354 and Taxell 1972 pp. 209–211.

47 See also Hagstrøm 2011 p. 443.

48 The situation will then be reminiscent of the assessment of negligence in the Tort Liability Act (412/1974), where a division into three categories is being experimented with: slight, "ordinary" and gross negligence, see e.g. Hans Saxén: Skadeståndsrätt [Tort law]. Turku: Åbo Akademi University 1975 p. 38 and Pauli Ståhlberg and Juha Karhu: Finsk skadeståndsrätt [Finnish tort law]. Helsinki: Talentum 2014 p. 98. The latter authors explicitly reject the idea that culpability could be divided into only two degrees, or in other words, gross and minor culpa.

49 The Finnish Government Bill 360/1992 till Riksdagen med förslag till lag om ändring av konsumentskyddslagen och vissa lagar som har samband med den [to Parliament proposing an act amending the Consumer Protection Act and certain related acts], p. 64.

claratory than argumentative when the proposal states that the buyer under current law:

"has the right to terminate the purchase only if the seller's breach of contract is substantial. According to paragraph 2 of the draft law, the buyer may not terminate the purchase if the defect is minor. The new wording of the paragraph follows Article 3(6) of the Directive. According to the proposal, termination of the purchase will be considered more often than under the current law. When assessing whether the defect is minor, the significance of the defect for the buyer must be taken into account as a whole. A defect may be considered minor, for example, when it can be repaired easily and quickly. Various surface defects may also be minor in nature and their significance to the buyer may be small in relation to the purchase as a whole."[50]

In connection to the implementation of the Sale of Goods Directive it was shortly stated that the proposed provision corresponded to the current legal situation.[51]

Finnish doctrine emphasises that the legislator intended the amendment to lower the termination threshold. According to *Pauli Ståhlberg*, the lowered threshold for the right of termination is of great significance in principle, as the lowering of the threshold is a departure from the general principles of contract law.[52] According to the bill, the emphasis in the assessment should be on the significance of the error for the consumer, taking into account all factors affecting the consumer's position. The proposal speaks of an overall assessment. The practice of the Consumer Disputes Board provides examples of how the assessment has been made in individual cases.

In a case concerning the purchase of fishing line, the Finnish Consumer Disputes Board (KTN) found that the strength, i.e. the durability, of the fishing line was an essential factor in its usefulness. The consumer claimed that the durability was not as promised. According to the Board, the defect could not be considered minor. The consumer was entitled to terminate the purchase.[53] *In another case, concerning the purchase of a moped, the fault was that the moped's petrol tank was 3.6 litres instead of the 6.5 litres promised in the marketing substantial. Although the Board stated that the size of the tank is important for long journeys, the error was still no more than a minor one. The Board only granted the consumer a price reduction.*[54]

The case of the petrol tank in particular points to the difficulty of knowing exactly where the termination threshold lies in Finnish law, since the tank, which is almost half the size, seems to me to be a defect that is greater than a minor defect. The mere fact that the legislator states that the intention is to lower the termination threshold compared to the situation before the reform gives a rather vague picture of how the termination threshold should be set in concrete situations, because the threshold resulting from the substantiality rule was not easy to concretise in an individual situation either.

The reader of the Finnish bill is also struck by the suspicion that the draftsman may not have been aware of the old Nordic tradition of using positive and negative formulations of the substantiality rule interchangeably. It is also questionable how well the Finnish drafter had familiarised himself with the Danish and Norwegian language versions of the Directive, or in other words the two language versions that are obviously modelled on the wording of the substantiality rule in the old Nordic sales laws.

The situation in Norway is interesting because the Norwegian legislator chose to formulate the termination rule in negative terms: according to Sec. 32 of the Norwegian Consumer Purchase Act (21.6.2002 No 34), the consumer may, as an alternative to claiming a price reduction, demand termination of the purchase, "except where the defect is immaterial". The wording was amended in 2023 due to the implementation of the EU Sale of Goods Directive. Now the provision contains a rule on the burden of proof, as well: "unless the seller proves that the defect is immaterial". The wording thus means that, under Norwegian law, the consumer has the right to cancel if the defect is not immaterial. When reading the explanatory memorandum to the rule, one realises that non-substantial and immaterial are not intended to be synonyms of each other, as the Norwegian legislator explicitly wanted to lower the termination threshold in case of defects:

"Linguistically speaking, the threshold related to the fact that the lack of contractual conformity must not be "immaterial" seems to be somewhat lower than the threshold under the Sale of Goods Act, which requires a "substantial breach of contract". It therefore seems desirable to change the threshold for termination in the bill."[55]

50 The Finnish Government bill 89/2001 till Riksdagen med förslag till lag om ändring av konsumentskyddslagen [to Parliament proposing an act amending the Consumer Protection Act], p. 13.

51 Government bill 180/2021 till Riksdagen med förslag till lag om ändring av konsumentskyddslagen [to Parliament proposing an act amending the Consumer Protection Act], p. 57.

52 Pauli Ståhlberg: Kuluttajansuojalain tuoreitten muutosten tulkinnasta [On the interpretation of the recent changes to the Consumer Protection Act]. Kuluttajansuoja 2002 pp. 25–27 and especially p. 27. However, he argues that the interests of the trader cannot be completely disregarded when assessing whether the consumer has a right of termination, especially if the consumer's purpose is to cause damage to the trader. This follows from the general prohibition of harassment, now known in Sweden as abuse of rights. See Jori Munukka: Rättsmissbruk. En rättsfigur under framväxt [Abuse of rights. An emerging body of law], in the book Mårten Schultz, Jan Andersson, Jan-Mikael Bexhed and Lars Gorton (eds.): Stockholm Centre for Commercial Law Yearbook. 1. Stockholm, Uppsala: Iustus (Stockholm Centre for Commercial Law, 8) 2008 p. 135–164 and especially p. 145–147 on abuse of termination rights.

53 KTN 3120/36/08.

54 KTN 2261/33/06.

55 Ot.prp. nr. 44 (2001-2002) Om lov om forbrukerkjøp (forbrukerkjøpsloven) [On the Consumer Purchase Act], p. 182. This positiuon is upheld also in Prop. 49 LS (2022-2023) Proposisjon til Stortinget (forslag til lovvedtak og stortingsvedtak). Endringer i forbrukerkjøpsloven mv. (gjennomføring av nytt forbrukerkjøpsdirektiv i norsk rett) og samtykke til godkjenning av EØS-komiteens beslutning nr. 70/2021 om innlemmelse i EØS-avtalen av direktiv (EU) 2019/771 [Proposal to the Storting (proposal for legislative decision and Storting decision). Amendments to the Consumer Purchases Act etc. (implementation of the new Consumer Purchases Directive in Norwegian law) and consent to the approval of EEA Committee Decision No. 70/2021 on the incorporation into the EEA Agreement of Directive (EU) 2019/771)], p. 106.

The interpretative situation in Norwegian law is thus identical to how the Finnish legislator chose to formulate the rule, although in Swedish the word "ringa" is used instead of the word "oväsentlig". The Norwegian legislator's view that there should be a "slightly lower termination threshold" is repeated and accepted in the doctrine.[56] The lower termination threshold is also manifested in a judgment of the Norwegian Supreme Court.

In the case Rt. 2015 p. 321, a Norwegian consumer had purchased a new car, which later turned out to have been newly registered in Germany and driven 737 more kilometres than stated in the purchase contract. The first judge of the Supreme Court pointed out that the determination of the termination threshold in the specific case constitutes an overall assessment of the circumstances of the case, i.e. the specific contract, the object of the purchase and the circumstances surrounding the purchase.[57]

The fact that it is a question of an overall assessment in Norwegian law also means that circumstances on the part of the trader can also be taken into account in the assessment. Norwegian law does not impose an explicit requirement of visibility, i.e. that the trader must be aware of the significance of the defect for the consumer, but even if there is not considered to be a regular requirement of visibility, the trader's lack of knowledge is not always without significance. In situations where the consumer perceives the substantiality of the defect, but the trader has not and should not have been aware of it, both the travaux préparatoires and the doctrine state that the defect must have a more significant negative impact on the consumer than where the consumer has expressly drawn the trader's attention to the substantiality, in order for the consumer to have a right of termination.[58] Thus, there is no clear rule in Norwegian law that the substantiality must be visible to the seller.

As in Finnish law, it is suspected that the Norwegian legislator did not reflect on the history of the substantiality rule and the old practice of switching freely between a positive and negative formulation of the rule. It is clear from the Norwegian bill that it was timed after the Danish and Finnish amendments had already been approved by their parliaments.[59] The Norwegian draftsman had been informed of the Finnish solution with an intended lower termination threshold, and this serves as an argument for lowering the threshold slightly in Norwegian law as well:

"The Ministry assumes that the Consumer Sales Directive makes it necessary to change the threshold for termination compared with Sec. 39 of the Sale of Goods Act. In this context, the Ministry also emphasises that, in practice, there is a relatively high threshold for terminating a purchase as a result of defects, and that a change in the wording of the Act would also make it easier to bring about a certain change in this practice. A similar change to the termination threshold as that proposed by the Ministry has been made in Finland. In Denmark, it has been decided to maintain the current law, which already corresponds to the wording of the Directive. Sweden seems to be of a different opinion for the time being."[60]

In particular, the statement concerning the situation in Danish law suggests that the Norwegian legislator did not recognise the tradition of being able to write the substantiality rule in negative terms. The situation in Norway was that in May 1988 a new Sale of Goods Act (13 May 1988, No 27) had been enacted, with a termination provision in Sec. 39 stating that the right of termination in the event of a defect presupposed a substantial breach of contract. It would therefore appear that the wording of the substantiality rule in Sec. 42 of the old Norwegian Sale of Goods Act (24 May 1907 No 2) had been forgotten by 2002, in other words 14 years after the adoption of the new Act.

4. Conclusions

My research process on the substantiality rule and the termination threshold for defects in the trader's performance in consumer sales has been exciting. My perhaps uncritical starting point based on the legislative history of Finnish law was that the implementation of the EU Consumer Sales Directive had forced member states to make a departure from the substantiality rule in favour of consumers so that the termination threshold is now lower than what the traditional substantiality rule would lead to. This is clearly how the situation has been perceived by legislators in both Finland and Norway. In Denmark and Sweden, on the other hand, the perception has been that the termination threshold is higher, or in other words that Art. 3(6) of the old Directive and Art. 13(5) of the new Directive expresses the traditional substantiality rule, although Swedish law – due to the old Directive being a minimum directive – had dropped the criterion that the substantiality must be visible to the trader in order for the consumer to have a right of termination. The implementation of the new harmonising EU Consumer Sales Directive from 2019 did not change this situation. The picture of the legal situation in the Nordic countries on this point is thus rather fragmented.

At the beginning of my article, I pointed out *that Mads Bryde* Andersen has also indicated that the difficulty with the substantiality rule is to determine when the breach is substantial or, in other words, to draw the dividing line between a breach of contract where termination is possible and a breach of contract where termination is not among the remedies available to the creditor. This distinction is equally difficult to draw in the case of a minor breach of contract and a non-substantial breach of contract.

The legal assessment of where the termination threshold is placed does not largely depend on the way the termination provision is formulated in words, as it is difficult to fit the diversity of reality into the concise description of the rule. Rather, it becomes a judgement as to whether it is a reasonable and balanced solution to make termination available to the consumer or to deny it to the consumer. A more concrete idea of where the termination threshold for defective goods in consumer purchases in the various Nordic countries lies could be obtained by a more systematic review of

56 Arnulf Tverberg: Forbrukerkjøpsloven med kommentarer [The Consumer Sales Act with comments]. Oslo: Gyldendal Norsk forlag 2008 p. 526 and Erling Selvig and Kåre Lilleholt: Kjøpsrett til studiebruk [Sales law for study use]. 5th ed. Oslo: Universitetsforlaget 2015 p. 290.

57 Rt. 2015 p. 321 paragraph 54.

58 NOU 1993:27 Forbrukerkjøpslov [Consumer Sales Act], p. 128 states this balancing act between the interests of the buyer and the seller (in translation): "Although particular emphasis must be placed on the importance for the buyer, the relationship with the seller may also be included in the assessment."

59 Ot.prp. nr. 44 (2001–2002) pp. 28–29.

60 Ot.prp. nr. 44 (2001–2002) p. 198.

the cases from the Nordic complaints boards. Such a review could possibly provide information on whether the termination due to defects is available to consumers in Finland and Norway to a greater extent than in Denmark and Sweden. My hypothesis is that we do not necessarily see such a dividing line, but that any differences in the frequency of use of the termination are due to other circumstances rather than to differences in the wording of the termination provisions. The variations in circumstances such as the nature of the good, the nature of the breach of contract and the position of the parties will most likely be so great as to obscure the possible difference between the non-substantial and substantial defects in Nordic contract law.