

## Non-physical Defects in Real Property Sales Agreements

◆ *Under certain circumstances, the value of real property may decrease because of defects that do not relate to the physical characteristics of the property, but rather to non-physical characteristics relating to personal or psychological factors or external pollution factors that do not relate to its quantity or quality. The article is based on Danish law but also draws on Scandinavian legal theory and case law. All highlighted words are made by the author. The article has originally published in »Ugeskrift for Retsvæsen« (2022), pp. 39–49, under the title »Psykologisk-økonomiske faktorer som mangler i ejendomshandlen«.*

*By professor, Ph.D. Carsten Munk-Hansen – Aalborg University, Denmark*

### 1. Defect

When a performance in kind does not have the agreed or presumed actual or legal characteristics, it is said to have a defect. For real property performances, such defects may often not have been agreed expressly. Therefore, in a strict sense, they are not »contractual« though nevertheless presumed to be agreed. Examples hereof are adverse neighbourhood conditions, external pollution factors, or other factors that might impose risks of harm to human health. Such factors will often lead to a reduced market value and may therefore give rise to legal claims from buyer.

Like any other real performances, a real estate transaction is presumed to be defective when it is not in accordance with the contract.<sup>1</sup> This is certainly so if the contract requires the performance to be of a specific quality (*i.e.* a specific defect), or if it follows from generally accepted principles (based on the buyers reasonable assumptions) that the performance should have the said quality (*i.e.* general or abstract defects).

Under judge-made Danish law of obligations, a defect can either be of a physical or legal nature. Whereas a physical defect pertains to such aspects of the performance that can be seen by the eye (*e.g.* its physical characteristics, function, durability and quantity),<sup>2</sup> a legal defect means that the buyer does not obtain the agreed right to actual or legal control of the performance.<sup>3</sup> In both cases, the criteria of whether there is a defect is what is specified in the contract.

Regardless of this distinction, it may be that information that might not qualify as a »defect« under these standards, still, *in a broader sense*, may qualify as defects, because they may decrease the value of the property for other reasons. These kinds of defects are the focus for the forthcoming analysis.

### 2. Loss of value as a defect

The value of real property is determined by supply and demand. This often involves *psychological factors*, including expectations, perceived needs, aspirations, and similar considerations. In a real estate transaction, a number of elements influence upon these factors, such as the property's location (including views to the surrounding environment), the character of the property, the neighbourhood or the wider area, the physical planning applicable to the area, safety concerns (for example relating to crime risks, risks of electromagnetic radiation, or soil or water contamination), infrastructure, and other comparable circumstances.

If the buyer after the conclusion of the agreement is faced with unexpected information of this kind, such information may constitute a defect, if a loss in the property's market value can be proven – even if the property's physical characteristics remain unchanged. Case law on this issue is addressed below in sections 2.1–2.3.

To prove that the buyer has not paid the market price, may be difficult: Old houses may often be seen as unique, and the pool of potential buyers may therefore be limited. One might even say that the price is correct if there is just one buyer willing to accept the seller's price.

Similarly, the buyer's disappointment can be difficult to quantify: What a specific buyer perceives as qualities in a property will often not be accepted as such from a general viewpoint. Losses of a sentimental nature (»affektionsværdi«) or non-economic disadvantages do not justify economic claims against the seller (although there are rare exceptions). A specific buyer's mental discomfort certainly does not constitute an economic loss.

When it comes to defects in the typical understanding of the concept, the buyer must be able to prove that there has been an economic *loss* because buyers in general, *i.e.* »the market«, will be influenced by the said information. If, for example, it turns out that the

<sup>1</sup> There are no clear-cut definitions of the concept of defect. Descriptions can be found, for example, in Torsten Iversen, *Obligationsret* [Law of Obligations], Part 1, 6<sup>th</sup> edition, 2019, pp. 238–242, Mads Bryde Andersen, *Lærebog i obligationsret I* [Textbook on Contract Law I], 6<sup>th</sup> edition, 2026 pp. 94–96, Henry Ussing, *Obligationsret, Almindelig del* [Contract Law, general section], 4<sup>th</sup> edition 1967, p. 36, Viggo Hagstrøm, *Obligationsrett* [Law of Obligation], 3<sup>rd</sup> edition by Herman Bruserud, Harald Irgens-Jensen, Inger Berg Ørstavik and Ivar Alvik, 2021, pp. 136–140 and 169–176, Nis Jul Clausen, Hans Henrik Edlund and Anders Ørgaard, *Købsretten* [Sale of Goods Law], 9<sup>th</sup> edition, 2022, pp. 149–152. An opposite view is expressed by H.P. Rosenmeier, *Mangler ved fast ejendom* [Defects in Real Estate], 7<sup>th</sup> edition, 2018, pp. 27–29, who considers the concept to be independent of the contract.

<sup>2</sup> There are no clear-cut definitions of the concept of actual deficiency. Descriptions can be found, for example, in Torsten Iversen, pp. 203–213, Mads Bryde Andersen, pp. 94–95, Nis Jul Clausen *et al.*, p. 151.

<sup>3</sup> There are no clear definitions of the concept of legal defect. Descriptions can be found, for example, in Torsten Iversen, p. 354, Mads Bryde Andersen, pp. 132–138, Viggo Hagstrøm *et al.*, pp. 555–560, Nis Jul Clausen *et al.*, pp. 19, 106, 203–207 and 345–349. By contrast, H.P. Rosenmeier, at pp. 40–42, is inclined to regard the concept as synonymous with (complete) defect of title and to consider the 'more recent theory' on legal defects to concern factual defects.

purchased painting was not made by the indicated famous painter, or the antique furniture had not been owned by the renowned famous story-teller, this unexpected information will cause defects, even if the physical appearance and characteristics of the items are otherwise the same in a physical sense.

Sections 2.1–2.3 examine Danish case law on claims for defects against the seller in connection with circumstances that do not relate to the actual characteristics of the property. Section 3 compares this with other losses of value outside the property transaction, and section 4 takes a closer look at some conditions and delimitation challenges.

## 2.1 The conditions of the surroundings entail a reduction in market value

As stated above, circumstances *outside* the boundaries of the transferred property may constitute defects, even if the circumstances *do not* directly cause damage or risk of damage to the property, if they are circumstances that reduce the value of the property and are unforeseeable to the buyer. The fact that the value of the property is reduced because of such circumstances that were not foreseeable to the buyer at the time of the transaction, has thus been considered a *defect* in several cases.

As early as 1937, the Supreme Court in Denmark ruled that circumstances on a neighbouring property could constitute a defect, cf. U 1937.730<sup>4</sup>:

*U 1937.730: A land-development company, S, sold a building plot subject to a villa-restriction to a master mason, B<sub>1</sub>, who during the construction of a villa, resold it to B<sub>2</sub>. The buyers B<sub>1</sub> and B<sub>2</sub> assumed that the other plots were also sold with the same restriction. S subsequently sold the neighbouring building plot with the aim of erecting two multi-storey buildings with a facade facing the villa. B<sub>2</sub> claimed compensation for the loss of value as a direct claim against S. The Supreme Court held, among other things, that since the new was contrary to the stated condition, [S] was obliged to pay [B<sub>2</sub>], who purchased the property from [B<sub>1</sub>] compensation for the loss of value that his property had thereby suffered.<sup>5</sup> The Supreme Court did not expressly qualify that there was a defect (»mangel«), but that seems to have been assumed.*

In the case reported in U 2013.635, the Western High Court held that a permit for construction of greater height on the neighbouring property led to a significant reduction of value that gave rise to a claim for compensation from the seller:

*U 2013.635: The seller, S, sold his owner-occupied home. A partial development plan and a declaration from the developer had been registered, according to which the area was to be »open and low-rise residential« etc. Prior to the sale, the neighbouring property had been granted permission with the seller's consent to erect a roof with a 45-degree pitch (»steep roof«) with residential use of the first-floor roof space (which was made possible by the consent of all owners covered by the declaration). The High Court stated, among other things: The reconstruction of the neighbouring property has resulted in a significant reduction in the value of the property, and that [S] was aware of the planned renovation prior to the sale of his property. Since this could be of significance to a potential buyer, the Western High Court held S liable to pay damages of DKK 300,000 for having breached his duty of loyal disclosure.*

In the case reported in MAD 2017.113<sup>6</sup> the District Court held that the failure to provide information about the construction of a bypass road near the building site sold led to a defect that gave rise to compensation:

*MAD 2017.113: A municipality sold building plots for detached houses without disclosing information about a planned bypass road that could cause noise pollution. The District Court stated, among other things: The municipality's failure to comply with its duty of disclosure makes it liable for compensation for the loss suffered by the land buyers because of the interest zone reducing the value of the land. The land was thus defect because of this reduction of value. All buyers whose property was located less than 500 m from the road were entitled to compensation, while more distant properties were not considered to be affected by noise to an extent that would justify compensation.*

In the case reported in FED 2017.34<sup>7</sup>, the property boundary was different than expected. The Western High Court emphasised the risk that a buyer would have a poorer experience of privacy on the terrace because of the surrounding environment, *i.e.* a reference to a buyer's *experience*.

*FED 2017.34 (Western High Court): The property boundary was located 6 metres closer to the house than indicated by a fence. The buyers did not invoke a claim for deficiency in area (approx. 300 m<sup>2</sup>) but argued that there was now a risk of neighbouring buildings being constructed 6 metres closer to the house's terrace. The Western High Court held that since the buyers were now at risk of having a house built closer to their property than they could have expected at the time of purchase, this constituted a defect, and that the price of the property, if it had been disclosed that the boundary was approx. 6 metres closer to the house, would have been DKK 75,000 lower. The buyers were thus awarded compensation.*

The claim was not held to have been of a physical nature in the form of lack of space. The court held that it was a *defect* that a buyer was exposed to an unforeseeable risk of less undisturbed use of their own terrace, which reduced the market value.

The cases reported in U 1937.730, U 2013.635, MAD 2017.113 and FED 2017.34, held that the sellers had breached their duties of disclosure to the buyers and therefore had to pay compensation for the economic consequences of the defects that arose out of this.

None of the buyers in these cases had claimed that the purchased property did not have the physical characteristics (including physical scope) stipulated in the sales agreements. Nor was there any risk to the property's characteristics in the future. It can therefore be argued that there was no actual defect in the *narrow sense*. On the other hand, it seems reasonable to say that property was defective in a *broader sense*, given the fact that amenity value is undoubtedly a factor in pricing. If a luxury property has a view of the fjord and forest, but this view is lost, or if a holiday home is periodically affected by significant noise from an airport or highway, these are relevant facts for buyers in general and will therefore be expected to influence the value of the property (provided that the change in view is substantial, and the pollution is of a certain magnitude).

The perceived defects in the said cases stemmed from the surrounding environment and would all reduce the market value of the property. Therefore, defect took form of a presumed reduction in value.

<sup>4</sup> The Danish journal Ugeskrift for Retsvæsen 1937 pp. 730 ff.

<sup>5</sup> The same assumption is made in the Norwegian RG 1985.835 mentioned below.

<sup>6</sup> Danish collection of cases Miljøretlige Afgørelser og Domme (MAD) 2017 pp. 113 ff.

<sup>7</sup> The Danish journal Forsikrings- og Erstatningsretlig Domssamling (FED) 2017 pp. 34 ff.

If such cases of reduced value expectations shall give rise to claims for economic compensation, the general requirements under the Danish law of obligations must be met.

One of these conditions relates to the obligation of loyalty under Danish law: A seller who must understand that a critical point of information may be important to the buyer's willingness to enter into the agreement has a duty to disclose that part to the buyer.

This obligation, however, goes hand in hand with the *caveat emptor* obligation of the buyer to whom special characteristics of the sold goods are of a particular importance (e.g. his interest in a very special, undisturbed peace). Such buyer should conduct its own investigations.

In Swedish law, a case concerning noise from a neighbouring property was decided in NJA 2007.86:

NJA 2007.86 [Nytt Juridiskt Arkiv; the Supreme Court of Sweden]: The buyer of real estate cancelled his purchase and demanded a refund of the purchase price because of noise from a nearby moto-cross track. The case was heard in three instances: Uddevalla tingsrätt [District Court], Hovrätten för Västra Sverige [High Court for Western Sweden] and Högsta domstolen [the Supreme Court of Sweden], all of which believed the noise was an actual defect. This was an unforeseeable pollution for a buyer. However, there was disagreement about the assessment of the seller's duty to disclose the said information, and the buyer's duty to make his own investigations. The District Court placed particular emphasis on the fact that the seller had complained in writing to the authorities over the track. The High Court based its decision on the parties' dialogue prior to the sale, during which the seller denied that the buyer had asked about noise conditions, whereby the buyer had not fulfilled his duty to investigate. However, in the Supreme Court, emphasis was placed on the degree of the seller's failure to provide the said information. Therefore, the judgement of the District Court was upheld.

## 2.2. Loss of value caused by subsoil issues

A contaminated building plot may be defective if owner's planned use (e.g. growing vegetables or children playing in a garden) is restricted.<sup>8</sup>

If there is contamination in the deeper soil layers and this is irrelevant to the owner's use, or if the property has been cleaned up in accordance with regulations and may be used like any other property of this type, it can be argued that there is no actual or legal defect in the narrow sense. If accurate information about the contamination leads to a *reduction* in the value of the property (when known), this is considered a defect in a broader sense in case law. The defect is a psychological factor: Buyers are less interested in acquiring properties with soil contamination, regardless of whether this may be irrelevant to the intended use of the property. This has been decided in several High Court rulings (the question has not been tried before the Supreme Court):

U 2000.234 (Western High Court): In 1978, the buyer purchased a building plot of land that had previously been used as a landfill site for, among other things, oil components, heavy metals and tar substances. The seller had cleaned up the plot in accordance with Danish legislation, but an inspection and assessment showed that the information would have a negative effect on the price that could be obtained. The seller was held liable for damages for breach of the duty of disclosure in the sale to the buyer. The damages were estimated at DKK 100,000.

MAD 2001.92 (Western High Court): A villa purchased in 1993 was found to be contaminated the following year due to heavy metals from a former landfill site. The local county municipality cleaned up the property in accordance with the legislation then in force. In 1997, the buyer claimed a proportional reduction in the purchase price from the seller S due to continued depreciation. The land was

now only contaminated to a natural background level, but there was some contamination in one place to a very limited extent and at depths greater than 1 m below ground level to a limited extent. An expert estimated a loss of market value. The district court acquitted the seller in lack of evidence of contamination, whereas the high court ordered S to pay a proportional reduction, because the contamination was seen as a defect which the buyer would be obliged to disclose in the event of a resale.

MAD 2002.185 (Eastern High Court): The buyer was informed that his villa would be cleaned up by the county municipality, because it had previously (before the building plots were divided up) been a landfill site. The buyer cleaned up the site in accordance with the legislation (with public funding) and claimed the lost market value of the property. The buyer was awarded DKK 200,000 in compensation.

MAD 2013.2501 (Western High Court): The buyer purchased a villa in January 2008. In August 2009 he was faced with a draft decision on registration as »level 2« under the Soil Contamination Act. The draft decision stated that the soil contamination was of no significance for the use of the property as a residence with a garden. The District Court held that the seller at the time of contracting should have had reason to suspect contamination from the neighbouring property (a petrol station) due to incidents in 2006. On this basis it held that the property had a defect and that the soil contamination is irrelevant to the property's use as a residential property with a garden, cannot lead to a different assessment of the amount of the loss. The district court decision was upheld by the Western High Court. Accordingly, S was ordered to pay the full clean-up costs.

In a soil contamination case, reported in MAD 2013.2609, the contamination was held to be »insignificant«. On this basis, the City Court acquitted the seller. On appeal, the Eastern High Court awarded compensation for an estimated loss of value based on the psychological aspect for buyers.

The particulars of the case were the following: A building plot was contaminated with oil in 1983, which was reported immediately. The owner took remedial measures in agreement with the municipality. The plot was later transferred several times without the contamination case being mentioned. The most recent buyer (the fifth buyer after the contamination), wanted to sell the plot in 2004, but when a potential buyer became aware of the contamination case from 1983 through his own investigations, he withdrew. The buyer sued his seller, and the claim was also pursued through recourse against the previous owners. Before the District court a technical inspection and assessment was conducted. It held that a total clean-up of the site was not relevant from an environmental or usage perspective. Another inspection and assessment statement was conducted for the High Court. It estimated the loss of value at to be DKK 1 million. The High Court stated, among other things, that in 2006, the county municipality classified the property as contaminated at »level 2« under the Soil Contamination Act (i.e. soil contamination of no significance). In 2006, the county municipality rejected the current owner's application to have the contamination removed with public funding, as the contamination does not pose a problem. As the contamination of the property was insignificant ... it had been proven that the depreciation of the property is mainly due to the psychological aspect for buyers who must live with the knowledge. The High Court thus disregarded the opinion and estimate that assessed the depreciation at DKK 1 million based on the clean-up costs and estimated the depreciation at DKK 100,000 at the time of buyers purchase in 1998.

<sup>8</sup> See, for example, the Danish Supreme Court cases reported in U 2000.2430, U 2009.1729, and U 2010.556.

*U 2014.301 (Western High Court): A buyer purchased a property that subsequently proved to be contaminated with degraded gas oil originating from a former petrol station on the neighbouring property. The contamination on the purchased property affected approx. 40 m<sup>3</sup> at depths of 1-3 m below ground level. The contamination had no impact on the use of the property. The seller knew before the sale that samples had been taken to determine possible contamination and was held liable for the clean-up costs.*

*MAD 2019.91 (Eastern High Court): In connection with planned repair work, geotechnical surveys were carried out, during which an oil smell was detected under a villa. A contamination survey was carried out, which confirmed oil contamination (registered as »level 2«, but in the lowest class, meaning that the contamination would pose no risk in its current use before the Danish environmental authorities). The cause was assumed to be leaky pipes and spillage in connection with a previously buried oil tank. The buyer demanded a proportional reduction of DKK 1 million based on the clean-up costs, but was only awarded a reduction of DKK 225,000, corresponding to the reduced market value.*

Regarding defects in the subsoil, it can thus be concluded that contamination may constitute a defect in a broad sense, even if it does not affect the buyer's specific use of the property.

In the cases reported in MAD 2013.2501, U 2014.301 and MAD 2019.91, the court found it irrelevant that contamination had no impact on use when the market value of the property had to be considered reduced.

Also, in the cases reported in U 2000.234, MAD 2001.92, MAD 2002.185 and MAD 2013.2609, the courts found it irrelevant that the land had been cleaned up in accordance with regulations when the market value of the property had to be considered reduced.

The fact that a previous polluter may have a clean-up obligation, or that a public authority may have a duty to take remedial action (see for example the case reported MAD 2001.92), or that the public sector must pay the majority of the clean-up costs (see for example the case reported MAD 2002.185), has not been given any significance in the cases. A buyer acting in good faith is not obliged to clean up previous contamination.

In all the reported cases, the property immediately had the actual characteristics that the buyer could demand: The property appears and can be used in accordance with the conditions at the time of trade. It can therefore be argued that this is not an actual or legal defect in the strict sense. It is *the market impact* of the information that qualifies it as a defect and a loss.

### 2.3. General fear or concern results in a loss of value

Where there is a generally widespread fear or concern regarding, for example, potentially hazardous installations, this may adversely affect the market and thereby lead to a loss in value. For such losses to occur, it is not decisive whether there is scientific evidence establishing a danger: What matters is whether purchasers in general – or at least a certain proportion of them – are sceptical or apprehensive about possible consequences. Fear on the part of a specific purchaser is, as a rule, a subjective sentiment that can scarcely form the basis for a claim of defect.

Such concerns about health effects may possibly be the reason why interest in purchasing a property with underground contamination, is reduced. As further discussed in section 2.1-2.2, this may even be the case, if the property has been subject to investigations and the contamination risks future noise pollution is found to be insignificant for the buyer's intended use.

This issue became topical in connection with fears of health risks associated with electromagnetic radiation from electricity and telecommunications masts. In practice, no claims for defects have

been brought against any seller in Danish case law. However, when assessing compensation for expropriation, the Danish Supreme Court has attached importance to suspicion or fear of health risks, as discussed in section 3.2.

U 1996.540 (Supreme Court): Two property owners had to tolerate a high-voltage overhead power line and a registered declaration. The case concerned depreciation due to reduced market value and increased cancer risk. The Supreme Court held that information reported in Danish newspapers on foreign studies that had raised suspicion of a health risk had led to a reduction in the value of the properties. This loss was to be compensated (assessed at approximately 14% and 11% of the cash market values, respectively).

U 1997.105 (Supreme Court): An owner had to tolerate a high-voltage overhead line and a registered declaration. The case concerned the assessment of damages, including depreciation of the property due to suspected health risks. The High Court ruling follows the reasoning pattern in U 1996.540. The Supreme Court held, among other things, that the total compensation of DKK 350,000 resulting from the High Court's decision had given the owner full compensation, including for the depreciation in value caused by the public debate on the possible health risk.

Based on the expropriation cases, it must be assumed that if a seller has not disclosed the future establishment of high-voltage power lines and transformer stations on the property, the loss of value caused by the fear of health risks may form the basis for a contractual claim against the seller.

However, since this is a *psychological factor* based upon scientific evidence, it may also change: If new scientific and widespread knowledge shows that electromagnetic radiation should not be considered a health risk, the market must be expected to adapt accordingly. However, it is not decisive that scientific experiments have been conducted that have so far been unable to document a danger, since it is the *market reaction* to the arrangement that is decisive.

A Norwegian case has decided that the risk of electromagnetic radiation was not a defect. Since, however, several other circumstances (the buyer's behaviour, etc.) played in, the court found no documentation of a reduction in value:

In the High Court decision of 21 January 2011 from Borgarting Lagmannsrett (Norwegian High Court, LB-2009-150451), the buyer invoked electromagnetic radiation and the resulting cancer risk which was allegedly caused by a transformer station in the basement. The court held that this was not a defect. On The case was appealed to the Supreme Court (Høyesterett), the question was not decided, because the buyer was found not to have complained and had not paid sufficiently).

### 2.4. Loss of value as eo ipso breach of contract

An economic loss is a prerequisite for exercising *the remedies* of compensation and refusal (i.e. when a defect has been established, the conditions for each remedy must be examined), but in cases such as those referred to in sections 2.1–2.3, there is another effect: The mere fact that something reduces the property's value is determinative of whether a defect (breach of contract) exists.

This applies to the cases reported in U 2000.234, MAD 2001.92, MAD 2002.185 and MAD 2013.2609 (in which case it was not decisive that the properties had been remediated in accordance with the applicable regulations, but rather that the properties had lost market value) and MAD 2013.2501, U 2014.301 and MAD 2019.91 (in which it was not decisive that the contamination had no significance for the use when the market value of the property was reduced). The loss requirement may also have influenced the outcome of the cases reported in U 1937.730 and U 2013.635 (unforeseeable

high neighbouring buildings) and MAD 2017.113 (unforeseeable noise pollution). A significant loss of value of the property based on new information about the environment, etc. may thus justify *cancellation*.

### 3. Depreciation in property value unrelated to a sale

#### 3.1. Compensation under neighbour law

According to Danish judge-made law, as developed over centuries, an owner may not exercise actual control, that causes neighbours (nearby properties) inconvenience exceeding certain *tolerance limit*. The sanction for violating these principles of »neighbour law« may – under the circumstances – take the form of either the imposition of remedial measures or economic compensation. The tolerance limit is determined on a case-by-case basis.

In an *obiter dictum* statement in the case reported in U 2018.1441 the Danish Supreme Court held the following:

*What a neighbour must tolerate depends on a specific assessment of the reasonableness of the nature, significance and foreseeability of the pollution in relation to the character and location of the property and the character of the area. This assessment must also consider any public law regulation of the activity causing the pollution.*

Compensation under Danish neighbour law is awarded for proved disadvantages. The financial loss caused by a disadvantage can be difficult to prove and calculate. However, compensation is often determined with reference to *the loss of value* of the affected property. Examples of successful compensation in Danish case law include the following cases:

*U 1986.143 (Supreme Court): Construction in violation of local planning regulations, taller and closer. Impaired market value.*

*U 1995.466 (Supreme Court): Sewage treatment plant. Expropriation Commission determined compensation for inconvenience based on reduced market value. No further compensation for inconvenience.*

*U 1998.1515 (Supreme Court): High-voltage power lines in the vicinity of property. Impaired market value due to suspected health risk.*

*U 1999.353 (Supreme Court): Road noise. Reduced market value.*

*U 2006.1290 (Supreme Court): Telecommunications mast on neighbouring property. Reduced market value.*

*MAD 2010.268 (Western High Court): View obstruction and shadow pollution from two dominant high-rise buildings. Reduced market value.*

*MAD 2010.1081 (District Court): Golf balls originating from a neighbouring golf course landed in the garden. Reduced market value resulted in DKK 700,000 in compensation.*

The defects discussed in section 2.1 concern inconveniences that emerged from the neighbouring properties. For such inconveniences to take the form of *defects*, the *tolerance limit* under Danish neighbour law must therefore have been exceeded.

Although the economic rights which a harmed party can claim under Danish neighbour law, and the assessment of defects are governed by different sets of rules, the two perspectives are related: It must thus be assumed that a buyer who, after the purchase, di-

scovers disadvantages in relation to neighbourly rights, should not only be required to bring a case against the neighbours, but should also be able to bring a claim for defects against the seller as the contracting party.

The threshold for whether the inconvenience has exceeded the tolerance limits for bringing a claim for defects against the seller, may be difficult to establish.<sup>9</sup> A disadvantage must exceed a certain *tolerance limit* in order to trigger a legal claim under Danish neighbour law, but it must also be *unforeseeable* to the buyer in order to trigger a claim for defects against the seller.

#### 3.2. Compensation in expropriation law

In Danish law, public expropriation of private assets can only take place in return for full compensation, which means that the owner is compensated for any economic loss. Partial expropriation often raises questions about disadvantages and loss of amenity value for the remaining property. Also, loss of view, noise pollution and erected masts can both be perceived as a disadvantage that results in a loss of amenity value. If there are consequential expenses and disadvantages associated with full expropriation, or if the perceived qualities of the remaining property are impaired by partial expropriation, *compensation for disadvantages* may sometimes be awarded. For example, this may concern operating losses, loss of customers, restrictions on use, fencing and re-routing of access roads. Compensation for inconvenience must be assessed as a separate item,<sup>10</sup> but is assessed on a distinct discretionary basis. The basis for compensation is the rules of neighbour law.<sup>11</sup> Examples from practice are:

*U 1999.360 (Supreme Court): Partial expropriation for a highway. Permanent noise pollution on remaining property from traffic was to be compensated in accordance with neighbour law rules. Thus, no weight could be given to an estimate of the reduction in value. Compensation was set at an estimated DKK 100,000.*

*U 2001.2076 (Supreme Court): In a partial expropriation, a rural property was cut through by a road. The Expropriation Commission set compensation for inconvenience, including detours, at DKK 400,000. The decision was upheld by the Supreme Court (although with a dissenting opinion). An expert opinion on depreciation could not be used as a basis in this specific case, as it was based on incorrect premises.*

*U 2009.2457 (Supreme Court): A dominant high-voltage power line near a small country estate had therefore that it could hardly be sold on the open market, but only for consolidation. The Valuation Commission set the loss at DKK 1,500,000 because the circle of potential buyers was limited due to fears of health risks. The majority of the Supreme Court voted to uphold the High Court's award of compensation of DKK 1,775,000, because the sales opportunities were limited to sale for the purpose of amalgamation with another property.*

Since 1999, it has been assumed that compensation for inconvenience now requires that the neighbourly tolerance limit has been exceeded. Professor Peter Pagh has made this point with (solid) support in the Supreme Court decisions reported in U 1999.353

<sup>9</sup> Cf., *inter alia*, W.E. von Eyben, Miljørettens grundbog [Basic Textbook on Environmental Law], 1986, p. 196 *et seq.*, Orla Friis Jensen in W.E. von Eyben, Dansk Miljøret [Danish Environmental Law], 1978, p. 84 *et seq.* and Hanne Mølbeck, Jens Flensborg and Søren Højgaard Mørup, Ekspropriation i praksis [Expropriation in Practice, 2<sup>nd</sup> edition, 2019, p. 119.

<sup>10</sup> Cf. vejlovens § 115, stk. 3 [Sec. 115(3) of the Road Act] and ekspropriationsprocedureslovens § 17, stk. 4 [Sec. 17(4) of the Expropriation Procedure Act] as well as Hanne Mølbeck *et al.*, p. 120.

<sup>11</sup> Cf., *inter alia*, Orla Friis Jensen, p. 88, and Peter Pagh and Thomas Haugsted, Fast Ejendom, Regulering og Køb [Real Estate, Regulation and Purchase], 4<sup>th</sup> edition, 2022, pp. 290–295 and 719–721.

and U 1999.360, and the consideration of equality between expropriated and non-expropriated neighbouring properties.<sup>12</sup>

A documented *loss of amenity value* (market value) must be compensated, while an owner's mere perception of lost amenity value cannot be compensated as a loss. Amenity value is the value that exceeds the value of the lost area (determined based on production potential, etc.). It may, for example, relate to a scenic location or the stately appearance of buildings, just as there is talk of loss of amenity value in the case of dominance (*i.e.* a facility established after expropriation appears dominant).<sup>13</sup>

Examples of a loss of amenity value being considered a *documented loss of value* are:

*U 1974.30 (Supreme Court): A company with a petrol station and car repair shop lost two access points to a main road due to partial expropriation and instead gained access via a private shared road connected to a side road to the main road. The oil company terminated its supply agreement with the petrol station. Agreement was reached on compensation for land expropriation and temporary inconvenience, but the owner claimed loss of value. The majority in the Supreme Court held that the compensation should include the loss of turnover the business operated by the owner, was likely to suffer. This must be understood as a loss of the market value of the property because of difficult customer access.*

*U 1976.39 (Supreme Court): In a partial expropriation, a manor house was cut through by a highway. The Supreme Court held that adequate compensation had been given for the loss of land, for operational inconveniences caused, etc., but that additional compensation should be awarded for a noticeable loss due to the deterioration of the attractiveness that a well-located, well-rounded and appealing manor house could previously have had for buyers of large farms. This is compensation for loss of amenity value (market value).*

*U 1996.540 (Supreme Court): Upon expropriation, a high-voltage power line was established on the properties. There was no scientific evidence of health damage, but suspicions of this in foreign studies were reported in the daily press. According to the expert, this affected the market value. On this basis, the Supreme Court awarded additional compensation for loss of value.*

*U 1997.1070 (Supreme Court): In connection with partial expropriation for road construction, the expropriation commission set the compensation for land at DKK 252,000 and the compensation for inconvenience at DKK 323,000 (inconvenience due to forest degradation, inconvenience due to operation, loss of hunting lease income and a small amount for temporarily seized land, etc.). Based on an expert opinion, the Supreme Court increased the compensation for inconvenience by an additional DKK 200,000 for probable deterioration of the remaining property.*

Conversely, there are four judicial precedents in which a loss of amenity value was indeed found, *but no economic loss* was documented:

*U 1976.121 (Supreme Court): Partial expropriation for a highway with noise pollution, where the assessor set the loss of amenity value at DKK 490,000, but the assessment commission set this loss at DKK 132,000. The majority of the Supreme Court upheld this with because there was insufficient basis for determining that full compensation has not been provided by the amount of DKK 132,000 awarded by the assessment commission. The minority wanted to increase the compensation.*

*U 2007.1822 (Supreme Court): In the case of partial expropriation for road construction, compensation was awarded for the transfer*

*of land, the deterioration of the property and inconvenience. The owner claimed further compensation for loss of amenity value. The Supreme Court stated that it had not been proven that the property had further loss of amenity value.*

*U 2008.1678 (Supreme Court): Closure of railway crossing connecting parts of rural property. An estimated compensation of DKK 1 million was awarded, primarily for a decline in the market value of the property, which is largely due to circumstances not related to its operation. The owner's claim for additional loss of amenity value was not upheld.*

*U 1983.29/3 (Supreme Court): The majority held that it had not been proven that compensation should be increased due to the scenic beauty of the area and the opportunity for leisure activities.*

In summary, compensation for inconvenience and loss of amenity value in expropriation cases seems to be linked to a presumed economic loss, in particular as a *loss of market value* in a future sale of the remaining property.

Overall, about compensation for disadvantages under neighbour law (section 3.1) and for disadvantages and loss of amenity value under expropriation compensation law (section 3.2), there is a tendency for loss of market value to be decisive for the existence of a claim. This conclusion is in accordance with the assessment of claims for defects based on psychological factors, see section 2.

## 4. Conditions for establishing a defect based on psychological factors

### 4.1. Economic loss of a permanent nature

For a defect in real property due to loss of market interest to be relevant for a contractual claim for defects, the claimant must provide evidence of the alleged diminution in market value, and this diminution must be of a certain magnitude. Since real estate is often priced with a certain degree of uncertainty, the determination of these defects must presumably presuppose a *loss of value of a certain size or clarity* to establish that a defect exists. It is generally difficult to establish a minor loss of value of, for example, DKK 30,000 on a property traded at DKK 3.2 million (0.9%), since pricing is often associated with uncertainties that makes it impossible to establish conclusively the economic value of such defects.

Some cases seem to assume that a loss in value requires the disadvantage to be of a certain *permanent* nature.

### 4.2. Not foreseeable for the buyer

If changes occur in the surrounding environment, or if conditions are found near or under the property, this may only give rise for a claim for defects, if the condition *was not foreseeable* for the buyer.

In general, what is considered foreseeable depends on the nature of the neighbourhood or area, local planning regulations, etc. Where the erection of buildings or installations on neighbouring plots are foreseeable, such developments do not amount to »defects« in the general understanding of this concept in Danish law. Conversely, the subsequent establishment of unforeseeable facilities may constitute a defect.

This conclusion is in line with the assessment of whether there are actual defects in general: Characteristics that are in accordance with the agreement do not constitute a defect. The content is often determined when the agreement is made. Therefore, characteristics that can generally be expected based on the age, condition and nature of the property, *etc.*, do not constitute a defect, because they are presumed to be known by the buyer.

<sup>12</sup> Cf. Peter Pagh *et al.*, p. 790. Similarly, Hanne Mølbeck *et al.*, chapter 12.

<sup>13</sup> Cf., *inter alia*, Orla Friis Jensen, p. 95, and Hanne Mølbeck *et al.*, pp. 265 and 306.

The courts sometimes acquit the seller on the grounds that the circumstances do not conflict with what could be expected.

*U 2008.46 (Western High Court): A seller sold a holiday home with a »fjordkig« (a view to a fjord), as described in the sales listing. The view of the fjord was particularly good at the time of sale, because seller wrongfully removed trees from the neighbouring property. The District Court awarded the buyer compensation. The High Court stated, among other things, that it was obvious that the view would always depend on the vegetation on the neighbouring property (which must be considered foreseeable for the buyer) and the court therefore held that the property was not defective. However, the decision was based on several specific factors.*

Certain public institutions made for the benefit of vulnerable citizens, may cause risks of unwanted behaviour caused by these citizens. In such cases, the buyer's possibility to claim economic compensation for such risks requires clear evidence that the presence of such institutions was unforeseeable based on the nature of the area and the municipality's planning, cf. for example MAD 2017.432 and FED 1999.2311:

*MAD 2017.432 (District Court): Based on information that a temporary refugee community was to be established on the neighbouring property, the buyer terminated the purchase without notice. The District Court held that the area was a mixed area with villas and fully and semi-public institutions, that it was not unforeseeable for the buyer that such a shared accommodation facility would be established, and that there was no basis for assuming that this had any bearing on the price. The Eastern High Court (B-2758007) upheld the acquittal of the seller on 20 September 2018 (unpublished).*

*FED 1999.2311 (Eastern High Court): A seller transferred an undivided share of a villa to a buyer, who subsequently learned that a rehabilitation centre for persons with a drug addiction was to be established in a neighbouring property. The seller and the estate agent were acting in good faith. An inspection and valuation report stated that the purchase price would have been DKK 200,000 lower if this had been known at the time of the transaction. The High Court held that it had not been proven that the buyer has informed the seller about its particular expectations regarding the use of the surrounding neighbourhood and concluded that the neighbourhood was not characterised as a residential area in which the centre's activities and impact on the surrounding area differed significantly from what the buyer might expect in the area. For those reasons, there was no defect.*

The concept of foreseeability is rather elastic and can therefore lead to inconsistent case law. The case reported in U 2020.1608 may be an example of this:<sup>14</sup>

*U 2020.1608 (Western High Court): A seller had not informed the buyer that a brothel was being operated on the neighbouring property. The District Court stated that the brothel's neon signs were not visible from the property in question, that the activities and effects of the neighbouring property do not differ significantly from what one would generally expect from a neighbour. The High Court relied on expert evidence according to which the value of the property would be reduced by DKK 154,000 if a brothel is operated from the neighbouring property and by DKK 96,250 if the brothel is closed, because in that case the neighbouring property would have gained a bad reputation and fears that the brothel would reopen. The High Court then held that it appeared uncertain whether the brothel had in fact ceased its business. It further held that the activities of the neighbouring property and their impact on the surroundings, including the alleged pollution to the buyer,*

*did not differ significantly from what the buyer might have expected. Therefore, the buyer's lack of information about brothel was not seen as a defect.*

On one hand, the case can be seen as an anomaly, a deviating point of view: Most buyers would hardly expect prostitution to be conducted from the neighbouring property, even though humans are all different. The expert evidence showed that the property had lost value and that the buyer would not have purchased the property if information about the brothel had been known. The case could thus seem to have been decided rather casuistically and not so much based on principles.

On the other hand, it could be argued that the circumstances in U 2020.1608 were after all less serious in nature. The business in question was not generally of a permanent nature, and there were indications that the business was about to cease. However, in its reasoning, the court based its judgement solely on the fact that it was not unforeseeable.

### 4.3. Emotional vs. empirical evidence

In a case against the seller, the buyer must be able to prove its claim for defects: Actual defects are often documented by an expert opinion after the expert's inspection, legal defects often by documentary evidence. There must be some empirical evidence. However, an actual defect does not have to be material. For example, odour can be a defect:

*U 1992.393 (Supreme Court): The buyer could cancel the sales agreement due to unusually strong odours caused by cats.*

*Hålogaland lagmannsretts (High Court in Norway) judgment of 19 July 2006 (LH-2006-008832): The seller failed to inform the buyer that the bodies of his deceased parents had been lying in the house for a considerable time. However, there was no duty to disclose the incident, but rather a pervasive odour of corpses in the building.*

This article deals with defects in the form of the property losing value because the market reacts to information (e.g. about the area, the subsoil, fears about the significance of certain facilities, etc.). This raises the question of whether any loss of value due to psychological factors can give rise to claims for defects. Can information about ghosts, »jordstråler« (an assumption of local geopathic radiation lacking scientific substantiation) and other beliefs give rise to claims for defects? Or can a buyer's mental discomfort about past events in the sold property, such as rape, murder or other serious crimes committed in the property, or a resident committing suicide, give rise to a claim for defects?

Based on the case law referred to above, it seems certain that the decisive criterion is *how the market reacts* to the information (which, incidentally, is not necessarily a negative impact: It is conceivable that a notorious crime committed in the property could generate particular interest). On the other hand, it cannot be assumed that one specific buyer's discomfort with the information constitutes a defect. *The feelings* that a buyer may later grow about a property that has been sold are not in themselves a defect in that property. The seller does not bear the risk of the buyer's psychological sensitivity.

One may ask whether a perception of discomfort that cannot be supported by *empirical evidence*, e.g. a buyer's experience that there are so-called local geopathic radiation on the purchased property, can constitute a defect. Even if several people may have such an experience or feeling, it seems unacceptable in terms of evidence that a group experience without support in empirical data, e.g. that the property is disturbed by claims concerning extraterrestrial life

<sup>14</sup> Mads Bryde Andersen, p. 117, treats the decision as an example of the fact that there cannot be a duty to disclose every circumstance.

and unidentified aerial phenomena, can form the basis for a claim for defects. The market's perception must be based on empirical data, for example that the fear of health effects from electromagnetic radiation is based on the installation of high-voltage or telecommunication masts.

It has been argued that there can be no duty to disclose that a murder was committed on the property a few years earlier, since such a fact is not relevant to its utility value.<sup>15</sup> It is beyond doubt that a diminished utility value may lead to a finding that an actual defect exists, or conversely, that where no reduction in utility value is present, no defect exists.

The question of the duty to disclose circumstances that »psychologically« affect the buyer, or the market is, however, controversial in Nordic, and particularly Norwegian, legal literature.<sup>16</sup>

*Professor Trygve Bergsåker is of the opinion that the history of the property may give rise to a duty of disclosure on the part of the seller. Depending on the circumstances, section 3-7 in the Norwegian Alienation Act [Avhendingsloven] may cover such matters as whether a serious crime, such as a murder, has been committed in the house, or whether a suicide has taken place there.*<sup>17</sup>

*Professor Kåre Lilleholt is of another opinion: According to him Bergsåker takes the duty of disclosure too far when he mentions things such as the property having little sun in winter and that someone previously committed suicide on the property.*<sup>18</sup>

*Associate Professor Roald Martinussen argues that it must, for example, be assumed to fall under privacy to disclose that someone has killed themselves or others on the property, so that the seller is not obliged to disclose such information.*<sup>19</sup>

*Professor Harald Benestad Anderssen holds that the assessment depends on the specific circumstances of the case. If there is a »corpse smell« in the house after the death of a human being, there is a duty to disclose, but not if it is a natural death with no consequences for the property.*<sup>20</sup>

*In a more recent publication, Harald Benestad Anderssen is more reluctant to accept such a far-reaching duty of disclosure: The fact that some buyers will feel uncomfortable living in the house when the murder, killing or rape later becomes known is irrational sentimentality that has no objective impact on the buyer's ability to use the property. He points out that the relationship between the buyer and the seller is based on a mutual understanding that the buyer is aware of the risk of such crimes occurring in the neighbourhood and notes that the situation will be particularly traumatic for the seller, and that, according to the circumstances, the information may be protected by privacy laws.*<sup>21</sup>

*Professor Hilde Hauge briefly points out at the outset that the duty to disclose information must be seen in the context of the ge-*

*neral assessment of defects and that it must therefore presuppose that the service is not contractual. She then focuses on the fact that the decisive factor is whether the seller has failed to disclose information about the history of the property to the extent that this could be perceived negatively by the buyer (regardless of whether it affects the value), that there is a countervailing consideration in the form of the protection of the seller's privacy, that the duty of disclosure in the Alienation Act (»avhendingsloven«) must be linked to the property, not the neighbourhood, etc., that there is no duty to disclose supernatural phenomena or rumours, and that it may be relevant what buyers generally expect to be informed about, which the author interprets as meaning that there is no duty to disclose completely irrelevant matters. Regarding the loss, the author also states that it is difficult to prove that the property has fallen in value due to information about historical events on the property, but that the seller has the burden of proof that it has not fallen in value when the seller has neglected their duty to disclose information.*<sup>22</sup>

In a study of the Icelandic concept of defect in relation to Nordic law Matthiasson has endorsed the view of Norwegian Bergsåker:

*Professor and Supreme Court Justice Vidar Már Matthiasson is of the same view as Trygve Bergsåker: It may even be reasonable for the seller to disclose any murders or suicides that have taken place in the property, as well as it is in relation to rats or pests or similar issues. Such matters may be of great importance, and the seller should not remain silent about them in the hope that they will not be discovered.*<sup>23</sup>

The above may appear to be a purely theoretical discussion, but the authors refer to the following cases:

*For a far-reaching duty of disclosure: Borgarting Lagmannsrett (Norwegian High Court) judgement of 28 February 2011 (LB-2010-53470): The seller had violated the duty of disclosure by not disclosing the fact that a triple murder had taken place in the property.*

*For a less extensive duty of disclosure, which presumably corresponds to the duty of disclosure under Danish law: 1) Nord-Gudbrandsdalens tingretts (District Court in Norway) judgment of 20 March 2012 (11-206754TVI-NOGU): The seller did not have a duty to disclose the »presence« of ghosts. 2) Borgarting Lagmannsrett (High Court in Norway) judgment of 21 January 2011 (LB-2009-150451), referred to in section 2.3. 3) Hålogaland lagmannsretts (High Court in Norway) of 19 July 2006 (LH-2006-008832), referred to above in this section. 4) RG 1987.987: Failure to disclose that the neighbouring apartment looked like a pigsty and was a pollution to the neighbours. 5) RG 1985.835: Failure to disclose that a tall building would be constructed in front of the property sold for its view. 6) Varberg tingsrätts (District Court in Sweden) ruling of 2 April 2009 (T 376/08): The seller had no duty to disclose information about suicide. 7) Sjuhäradsbygdens tingsrätts (District*

<sup>15</sup> Cf. Mads Bryde Andersen, p. 116.

<sup>16</sup> The presentation begins with Trygve Bergsåker's point of view, as the other authors take this as their starting point (although it may seem inconsistent that the latest edition of his book was published later than some of the other authors' books).

<sup>17</sup> Cf. Trygve Bergsåker, *Kjøp av fast eiendom, med kommentarer til avhendingsloven* [Purchase of real estate, with comments on the Alienation Act], 6<sup>th</sup> edition, 2023, p. 233.

<sup>18</sup> Cf. Kåre Lilleholt, *Avtale om ny bustad* [Agreement on New Housing], 2001, p. 136, note 186.

<sup>19</sup> Cf. Roald Martinussen, *Avhendingsrett: innføring i eiendomskjøpsrett* [Right of disposal: introduction to property purchase law], 2007, pp. 137–138.

<sup>20</sup> Cf. Harald Benestad Anderssen, *Avhendingsloven med kommentarer* [the Alienation Act with comments], 2008, p. 146.

<sup>21</sup> Cf. Harald Benestad Anderssen, *Mangler ved omsetning av boliger* [Defects in the sale of homes] PhD thesis, 2016, pp. 357–359.

<sup>22</sup> Cf. Hilde Hauge, *Opplysningsplikt om historiske hendelser ved salg av boligeiendom* [Duty to disclose historical events when selling residential property], in Birgit Liin, Hans Henrik Edlund, Susanne Karstoft and Torsten Iversen (eds.), *Festskrift til [Festschrift to] Palle Bo Madsen*, 2021, pp. 157–172.

<sup>23</sup> Cf. Vidar Már Matthiasson, *Fel i fastighet: undersökning av fel begreppet i den isländska lagen om fastighetsköp nr 40/2002 (FKPs) i nordisk kontext* [Defects in real estate: examination of the concept of defects in Icelandic real estate purchase law no. 40/2002 (fop) in a Nordic context], *Research challenges for real estate law, an anthology* (eds. Margareta Brattström and Peter Strömgen), 2010, p. 65 (126).

*Court in Sweden) ruling of 5 November 1993 (T 200/92): The seller had no duty to disclose information about a murder committed on the property during the previous owner's period of ownership.*

The Norwegian discussion concerns, in particular, the extent of the seller's *legal duty to disclose information* under section 3-7 in the Alienation Act [»avhendingsloven«]. Some authors even seem to discuss the statute's duty of disclosure without assessing its connection to the constitution of a defect.<sup>24</sup>

There are legal systems that accept a very extensive duty of disclosure. In California, there is a duty to disclose deaths in the property in the last three years, unless the cause of death was AIDS:

*The Civil Code of the State of California, section 1710,2:*<sup>25</sup>» (a) (1) *Subject to subdivision (d), an owner of real property or his or her agent, or any agent of a transferee of real property, is not required to disclose either of the following to the transferee, as these are not material facts that require disclosure:*

(A) *The occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property.*

(B) *That an occupant of that property was living with human immunodeficiency virus (HIV) or died from AIDS-related complications.*«

Emotional factors constituting a breach of contract have also been discussed in relation to the international sale of goods. Scholars such as Professor Christina Ramberg have examined emotional factors (particularly linked to the added value of brand names), especially in connection with CISG Articles 3(2), 8(2) and (3), 9(2), 25, 35(2)(a) and (b), 38, 39, 46, 49, 50, 72, 74 and 77.<sup>26</sup>

#### 4.4. The limits of »psychological defects«

With a view to the case law discussed above, the question arises whether there is a minimum threshold for when psychological factors can give rise to a defect claim following the purchase of real property. Whether a *de minimis* deviation from the expected can be so insignificant that it cannot trigger defect rights.

If the circumstances could trigger a right for the buyer to claim compensation for defects, such a right would presume that the seller were in breach of a *duty of disclosure* to reveal the said circumstances.

Does the seller have a duty to disclose if, for example, they are aware of

- That the owner can hear some noise from a distant shooting range if the owner is on the terrace, if the wind carries the sound to the property, and if there are shooting exercises on that day?
- That a homeowner further down the road has a son who drives like a madman and has endangered the lives of others?
- That a neighbour, a flat owner, plays the trombone until 3 a.m. every other night?
- That a mentally ill neighbour collects scrap metal at a height of 4 metres, but at the time of sale was involuntarily committed, which is why the family had just cleared the property?
- That a neighbour holds noisy parties most weekends?
- That a neighbour does not take good care of his garden pond, which is why there is a strong smell of decay at times?

Based on the case law presented in the foregoing, it must be assessed whether the circumstances go beyond what is *foreseeable* for a buyer. It must also be assumed that the information implies a *loss of commercial value*. It is probably a prerequisite for determining a loss of value that the disadvantage or circumstance is of a certain *duration* and is not merely linked to behaviour over a short period of time.

Furthermore, the limits of the duty to disclose information may be affected by specific circumstances *at the time of the transaction*: A seller who has received a specific enquiry from the buyer may have an additional duty to disclose information about the specific circumstances, and failure to provide an honest answer or an appropriate reservation may entail liability for damages. Also, a seller who provides the buyer with specific information that is likely to influence the buyer's interest in the purchase may be held liable if the information proves to be incorrect.

<sup>24</sup> However, as mentioned above, Hilde Hauge has briefly stated that there must be a defect, without this issue appearing to be given any significance in the subsequent analysis.

<sup>25</sup> The Code was adopted in 1872. The specific article was amended in 1988 and 2016, among other years.

<sup>26</sup> Emotional Non-Conformity in the International Sales of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct in Boundaries and Intersections 5th Annual MAA Schlecht Riem CISG Conference, Ed I Schwenzler & L Spagnolo, Eleven, 2014, pp. 71–94.