

Organic Goods and Non-Conformity on a B2B Sale of Goods under Portuguese Law

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Abstract:

This paper analyses if, on a B2B transaction, under Portuguese law, a sale of goods of non-organic or eco products, in the sense of the EU Ecolabel Regulation and Organic Products EU Regulation, can be considered non-conforming and whether the contract can be annulled. It is concluded that annulment is a possible remedy of the buyer.

Keywords:

Non-conformity; organic production; misrepresentation; mistake; ecolabel

1. Introduction

I. In a business to business (B2B) transaction,¹ where Portuguese law is applicable,² if after concluding a contract of sales of specific or determined goods³ and after its delivery,⁴ the buyer

¹ Considering the quality of the parties conducting the transaction, it is outside the scope of this paper the analysis of Portuguese and European legislation applicable to consumers, namely Decree-Law no. 84/2021, of 18 October.

² The transaction envisioned is national, thus, it does not fall under the scope of the United Nations Convention on Contracts for the International Sale of Goods, as per article 1 of the said Convention.

³ A generic sale of goods is one where performance is only determined in relation to a certain 'quantity, weight or measurement of goods of a certain kind, but is not completely determined which of the specimen of that kind will be adequate to fulfil the contractual obligations'. In the case of a specified obligation these aspects are determined. Ac TRC 10/07/2019 – Proc 3007/16.2T8LRA.C1 (Maria Teresa Albuquerque) <<https://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/acbcb75c35c64c98025845c003410ad?OpenDocument>> (accessed 8 March 2024). Both the legal regime applicable to the sale of encumbered goods (articles 905 to 912 of the PCC) and the legal regime applicable to non-conforming goods (913 of the PCC) apply to specified and determined goods. If the goods are not determined at the moment of the conclusion of the contract or if the encumbrance is supervenient, it is applicable ex vi article 918 of the PCC the provisions on contractual breaches of the PCC. Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 905.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 118-119.

⁴ This analysis is also not applicable to the sale of specific goods that at the time of the conclusion of the contract had no defects and it suffered from supervening defects. In this scenario, it is applicable the regime set out in article 918 of the PCC. Luís Menezes Leitão, *Direito das obrigações Volume III Contratos em especial* (14th edn, Almedina 2022) 130. Hence, this regime is not hereby analysed.

becomes aware that the goods were not produced in accordance with Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (Ecolabel Regulation) and/or Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products (Organic Products EU Regulation)⁵ can the goods be considered non-conforming? Can the buyer request the annulment of this contracts?

In this paper, there is only a brief reference to the remedies of the buyer, considering the intended limited scope of this analysis.

- II. This paper does not analyse the requirement to notify the seller regarding the defective goods, the claims limitation period or possible scenarios where a guarantee that the goods properly function is provided as per article 921 of Decree-Law no. 47344/66 of 25 November (Portuguese Civil Code, hereinafter referred as PCC).
- III. Considering the subject-matter of this paper, we will begin by addressing some of the contributions of European Union Law concerning the transaction of organic and ecologically friendly products (**2.**). We will then analyse whether a product that lacks these characteristics can be considered non-conforming and whether there can be a mistake or misrepresentation when acquiring the goods (**I.**). Considering the conclusions on the previous point, the buyer's remedies in this situation will be briefly described (**4.**). Finally, we will set forth the conclusions of this paper (**5.**).

2. Contributions of European Union Law to the Transaction of 'Eco-Friendly' and 'Organic' Products

- I. European Union Law has strived to regulate and promote the commercialization of sustainable goods in the European market.

The Ecolabel Regulation established a voluntary EU Ecolabel scheme (article 1) applicable to any goods or services which are supplied for distribution, consumption or use on the Community market (article 2 (1)). The EU Ecolabel criteria is based on the environmental performance of products, and it considers multiple criteria to be attributed.⁶

⁵ It is not discussed whether the goods are compliant with Regulation (EU) 2017/625 of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products that provides a set of harmonised rules to ensure that food and feed are safe [2017], OJ L 95/1 § 3.

⁶ It is considered the following: (i) 'the most significant environmental impacts, in particular the impact on climate change, the impact on nature and biodiversity, energy and resource consumption, generation of waste, emissions to all environmental media, pollution through physical effects and use and release of hazardous substances;' (ii) 'the substitution of hazardous substances by safer substances, as such or via the use of alternative materials or designs, wherever it is technically feasible;' (iii) 'the potential to reduce environmental impacts due to durability and reusability of products;' (iv) 'the net environmental balance between the environmental benefits and burdens, including health and safety aspects, at the various life stages of the products;' (v) 'where appropriate, social and ethical aspects, e.g. by making reference to related international conventions and agreements such as relevant ILO standards and codes of conduct;' (vi) 'criteria established

In said regulation, it is also set out in which situations the EU label may not be awarded to,⁷ and a procedure to apply for an EU Ecolabel is established.⁸

In this regard, it is prohibited false or misleading advertising or the use of any label or logo which leads to confusion with the EU Ecolabel.⁹ If a product bearing the EU Ecolabel does not comply with the relevant product group criteria, the labelling of that product may be forbidden.¹⁰

- II. Regulation (EU) 2018/848 on organic production¹¹ and labelling of organic products aims to (among other objectives) 'provide the basis for the sustainable development of organic production and its positive effects on the environment'.¹² It is applicable to 'products originating from agriculture, including aquaculture and beekeeping'¹³ and 'to products originating from those products, where such products are, or are intended to be, produced, prepared, labelled, distributed, placed on the market, imported into or exported from the Union'.¹⁴ Said Regulation is applicable to any operator involved, at any stage of production, preparation and distribution, in activities relating to the above-mentioned products.¹⁵

Organic production pursues the general objective of contributing to the protection of the environment and the climate¹⁶ and is based on wide general principles such as the respect for nature's systems and cycles and the sustainment and enhancement of the state of the soil, of

for other environmental labels, particularly officially recognised, nationally or regionally, EN ISO 14024 type I environmental labels, where they exist for that product group so as to enhance synergies;' (vii) 'as far as possible the principle of reducing animal testing'. Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel [2009] OJ L 27/1 art 6 (3) (a) – (g).

⁷ As per article 6 (6) 'The EU Ecolabel may not be awarded to goods containing substances or preparations/mixtures meeting the criteria for classification as toxic, hazardous to the environment, carcinogenic, mutagenic or toxic for reproduction (CMR), in accordance with Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, nor to goods containing substances referred to in Article 57 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency'. Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel [2009] OJ L 27/1 art 6 (6).

⁸ Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel [2009] OJ L 27/1 art 9.

⁹ Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel [2009] OJ L 27/1 art 10 (1).

¹⁰ Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel [2009] OJ L 27/1 art 10 (5).

¹¹ 'Organic production' is perceived as 'an overall system of farm management and food production that combines best environmental and climate action practices, a high level of biodiversity, the preservation of natural resources and the application of high animal welfare standards and high production standards in line with the demand of a growing number of consumers for products produced using natural substances and processes'. Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 § 1.

¹² Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 § 17.

¹³ It refers to the products list in Annex I of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (article 2 (1)).

¹⁴ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 2 (1). Article 2 (1) also states that 'This Regulation also applies to certain other products closely linked to agriculture listed in Annex I to this Regulation, where they are, or are intended to be, produced, prepared, labelled, distributed, placed on the market, imported into or exported from the Union.'. Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 2 (1).

¹⁵ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 2 (2).

¹⁶ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 4 (a).

the water and the air, of the health of plants and animals, and of the balance between them, the preservation of natural landscape elements, the responsible use of energy and natural resources, such as water, soil, organic matter and air, among others.¹⁷

An organic product within the scope of Organic Products EU Regulation, is one that results from an organic production that uses methods that comply with said Regulation at all stages of production, preparation and distribution.¹⁸ If a product production is compliant with said Regulation, a logo may be used in the labelling, presentation and advertising of products stating that it is 'bio' and/or 'eco'.¹⁹ It is expressly established that 'no terms, including terms used in trademarks or company names, or practices shall be used in labelling or advertising if they are liable to mislead the consumer or user by suggesting that a product or its ingredients comply with this Regulation'.²⁰

Under this regulation, if an operator intends to use or to place on the market a product which is not compliant with said Regulation, but nonetheless bears terms referring to the organic production, the competent authority should conduct an official investigation in accordance with Regulation (EU) 2017/625 and it shall provisionally prohibit both (i) the placing on the market of the products concerned as organic or in-conversion products and (ii) their use in organic production pending the results of the investigation.²¹

In case there is non-compliance affecting the integrity of organic or in-conversion products throughout any of the stages of production, preparation and distribution (for example, due to the use of non-authorized products, substances or techniques, or commingling with non-organic products) competent authorities should ensure that (i) no reference is made to organic production in the labelling and advertising of the entire lot or production run concerned, and that (ii) in the event of serious, or repetitive or continued non-compliance, competent authorities shall ensure that the operators are prohibited from marketing products which refer to organic production for a given period, and that their certificate could be suspended or withdrawn, as appropriate.²²

Commission Implementing Regulation (EU) 2021/279 of 22 February 2021 lays down detailed rules for the implementation of Regulation (EU) 2018/848 of the European Parliament and of the Council on controls and other measures ensuring traceability and compliance in organic production and the labelling of organic products and sets out uniform arrangements in order for

¹⁷ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 5 (a), (b), (c).

¹⁸ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 3 (1) (2).

¹⁹ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 33 (1).

²⁰ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 30 (2) I II.

²¹ Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 art 41 (1).

²² Council Regulation (EC) 2018/848 of 30 May 2018 on organic production and labelling of organic products [2018] OJ L 150/1 42 (1) (2).

competent authorities develop a national catalogue of measures relating to measures applicable to different categories of non-compliances.²³ In Portugal, the competent national authority is the Direção-Geral de Agricultura e Desenvolvimento Rural and the procedure in connection with said EU Regulations sets out that it may, in cases of major non-compliance of the Organic Products EU Regulation,²⁴ partially suspend the certification (which entails that the operator may not commercialize a product with reference to the biological production, for a period of 6 months)²⁵ and in critical non-compliance,²⁶ may impose that the reference to organic products is deleted in all products by a period of 6 months or the prohibition to commercialize by the operator with reference to organic production.²⁷

- III. In light of the above, it is possible to conclude that the buyer (that is not a consumer)²⁸ which acquires non-organic or eco products (without being aware of this characteristic) is not specifically protected by the set of legislation invoked.

²³ Commission Implementing Regulation (EU) 2021/279 of 22 February 2021 laying down detailed rules for the implementation of Regulation (EU) 2018/848 on controls and other measures ensuring traceability and compliance in organic production and the labelling of organic products [2021] OJ L62/6 article 8. Annex I of this Implementing Regulation sets out when the non-compliance is major, critical or minor and the measures for each category.

²⁴ The non-compliance is considered major when 'i) the precautionary measures are neither proportionate nor adequate and the controls put in place by the operator are ineffective, and/or ii) the non-compliance affects the integrity of the organic or in-conversion product, and/or iii) the operator has not corrected a minor non-compliance in time or it is repeated.' Direção-Geral da Agricultura e Desenvolvimento Rural, *P0-004- Catálogo comum de medidas em caso de incumprimento – produção biológica* <<https://www.dgadr.gov.pt/agricultura-e-producao-biologica/controlo-certificacao>>, accessed 16 March 2024 8.

²⁵ Direção-Geral da Agricultura e Desenvolvimento Rural, *P0-004- Catálogo comum de medidas em caso de incumprimento – produção biológica* <<https://www.dgadr.gov.pt/agricultura-e-producao-biologica/controlo-certificacao>>, accessed 16 March 2024 9.

²⁶ It is considered that a critical non-compliance exists when 'i) the operator has not corrected previous major non-compliances or has repeatedly failed to correct other categories of non-compliance, and/or ii) the traceability system does not provide information to locate the affected products in the supply chain and it is impossible to prohibit the placing on the market of products with reference to organic production, and/or iii) there is proven intentionality'. Direção-Geral da Agricultura e Desenvolvimento Rural, *P0-004- Catálogo comum de medidas em caso de incumprimento – produção biológica* <<https://www.dgadr.gov.pt/agricultura-e-producao-biologica/controlo-certificacao>>, accessed 16 March 2024 8.

²⁷ Direção-Geral da Agricultura e Desenvolvimento Rural, *P0-004- Catálogo comum de medidas em caso de incumprimento – produção biológica* <<https://www.dgadr.gov.pt/agricultura-e-producao-biologica/controlo-certificacao>>, accessed 16 March 2024 9.

²⁸ A proposal for a directive of the European parliament and of the council that amends Directives 2005/29/EC and 2011/83/EU relating to empowering consumers for the green transition through better protection against unfair practices and better information aims to 'tackle unfair commercial practices which prevent consumers from making sustainable consumption choices, such as practices associated with the early obsolescence of goods, misleading environmental claims ('greenwashing'), non-transparent and non-credible sustainability labels or sustainability information tools, specific rules should be introduced in Union consumer law.'. In this proposal, it is defined (and added) what an 'environmental claim' is. This concept is defined as 'any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time'. Article 6 (2) of Directive 2005/29/EC, regarding commercial practices that are considered misleading, is amended in order to include the cases where a commercial practice involves 'making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system'. Currently, this proposal has been signed by the President of the European Parliament and by the President of the Council on 28 February 2024. Commission, 'Proposal for a directive of the European parliament and of the council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against

Hence, it is important to understand whether a buyer can be protected, in these cases, under Portuguese law.

3. Can a Good that Is not 'Organic' or 'Eco' within the Meaning of EU Law Be Considered Non-Conforming or Subject to the Legal Regime on Mistake?

- I. Considering what was developed above, it is time to analyse what protection may be granted to a buyer that purchases products that it believes to be 'organic' in the sense of European Union Law, when they are not.
- II. To answer this question, it is firstly analysed whether the acquired goods can be considered non-conforming under article 913 of the PCC²⁹ (**0**), to then ponder whether this hypothesis could fall on the legal regime of mistake (Error! Reference source not found.**2**).

3.1. Non-Conformity

- I. The legal regime on the sale of non-conforming goods,³⁰ established on article 913 of the PCC, sets out a regulation on the purchase and sale of goods which are physically non-conforming.³¹

unfair practices and better information' COM (2022) <<https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52022PC0143>> accessed 5 March 2024. The Proposal for a Directive of the European parliament and of the council on substantiation and communication of explicit environmental claims (Green Claims Directive) aims to 'harmonise further the regulation of environmental claims', 'strengthen the market for more sustainable products and traders by avoiding market fragmentation due to diverging national approaches' Commission, 'Proposal for a directive of the European parliament and of the council on substantiation and communication of explicit environmental claims (green claims directive)' COM/2023/166 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2023:0166:FIN>> accessed 5 March 2024 § 4. 'Environmental claim' has the meaning defined above (amendment of Directive 2005/29/EC). In accordance with this proposal, member states should ensure that traders carry out an assessment to substantiate explicit environmental claims, as per article 3. Article 8 establishes that a certification of a product by an environmental labelling scheme must comply with several requirements. The verification of the compliance of environmental labelling schemes should be assured by a third-party conformity assessment body accredited in accordance with Regulation (EC) No 765/2008, under article 11. The breach of the obligations in said directive would be sanctioned with penalties imposed by the member states, as per article 17. Commission, 'Proposal for a directive of the European parliament and of the council on substantiation and communication of explicit environmental claims (green claims directive)' COM/2023/166 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2023:0166:FIN>> accessed 5 March 2024. The European Parliament has not yet enacted its 'first reading'. Commission, 'Proposal for a directive of the European parliament and of the council on substantiation and communication of explicit environmental claims (green claims directive)' COM/2023/166 final <<https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2023:0166:FIN>> accessed 5 March 2024.

²⁹ Considering that this paper analyses a business to business (B2B) transaction, one might consider the application of the Portuguese Commercial Code that regulates commercial sales of goods. Said provisions regulate the sale and purchase of uncertain and extraneous, sample goods, sales by account, weight or measure. Given that the hypothesis of this paper is not solved by said provisions, even if a sale of goods is commercial in the sense of article 463 of the Portuguese Commercial Code or the parties that conclude the contract are merchants, the provisions of the PCC on non-conforming and encumbered goods can be applied under article 3 of the same code since they can be applicable where the commercial code does not solve a specific situation.

³⁰ Article 913 applies to moveable or immoveable goods, tangible or non-tangible goods. António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018), 254.

³¹ Pedro Romano Martinez, *Cumprimento Defeituoso em especial na compra e venda e na empreitada* (Almedina 2015), 180; Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 153.

It is not consensual whether issues not connected with the physical characteristics of a good should also be covered by this regime. There is one legal scholar that considers that non-conformity should include a good's legal attributes, given that those could also diminish or even suppress the value of a good (with exclusion of situations that fall under the provisions applicable to encumbered goods, which, as described below, relate to attributes that affect the rights over a good).³²⁻³³ We agree with said legal scholar considering that (i) the regime aims to protect the buyer that acquires a non-conforming good and it should be protected in cases where its qualities are affected by legal issues, not covered by the encumbered goods regime, and (ii) the text of the provision does not expressly exclude this interpretation. Thus, the interpretation of what should be considered a non-conforming good should be, in our view, broad, so as to encompass all 'physical, social and legal characteristics that are apt to play the social and economic role established or assumed by the contract'.³⁴

II. Under this provision, legal scholars distinguish (i) defects from (ii) lack of qualities of the goods.

There is a defect (*vício*) when (i) the good, considering the normal standard, has a flaw that places it below the normal characteristics of the good from an objective standpoint,³⁵ or (ii) the good cannot fulfil its purpose, from a functional standpoint, even if its value remains unaffected.³⁶

A quality (*qualidade*) of the good is considered a plus in view of the normal standard. This plus is expected where (i) the parties agreed on it or where (ii) this quality should be assumed, considering the buyer's purpose when acquiring that specific good.³⁷ The seller may have assured that the good had certain qualities (expressly or impliedly). Without them, the good is considered non-conforming.³⁸ It suffices that the seller (in a spontaneous manner or in response to a question of the buyer) assures that the product has certain qualities (regardless of the party's express assumption of liability for the lack thereof in contractual provisions).³⁹ Even without proof that the seller expressly stated that the good had certain qualities, the good may be non-conforming if, analysing the relevant circumstances of the contract's conclusion, it is

³² Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 905.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 117.

³³ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 258.

³⁴ Translation of the following: 'todas as características, físicas, sociais e jurídicas que a habilitem a desempenhar o papel sócio-económico previsto ou pressuposto pelo contrato'. António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 258.

³⁵ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 252.

³⁶ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 252.

³⁷ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 253.

³⁸ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 253.

³⁹ Pedro Romano Martinez, *Cumprimento Defeituoso em especial na compra e venda e na empreitada* (Almedina, 2015), 156.

possible to conclude that the purpose for acquiring the good entails an improvement of its normal qualities.⁴⁰ To determine whether a good is apt to fulfil a certain purpose, the parties' statements when concluding the contract should be interpreted as per articles 236 to 238 of the PCC, pondering the practices between them and the agreed contractual provisions. If a good does not fulfil the intended purpose, it can't fulfil the buyer's interests and it can be considered non-conforming.⁴¹

III. Although it is not consensual amongst legal scholars whether the buyer, that is not aware of the defect, but should have been aware of it, still has the right to the legal remedies due in case of non-conformity,⁴² it is considered that there can't be a defective performance where the buyer was aware or should have been aware of the non-conformity (although the seller must provide all relevant information regarding the qualities of the good).⁴³

IV. In light of the above, when can a good, under this hypothesis, be considered non-conforming?

It does not seem that a non-organic good or one that does not carry the eco-label cannot fulfil its purpose given that it is not necessarily safe for consumption.

Relating to having a defect that diminishes its value, the good, considering the normal standard, does not have a flaw that places it below the normal characteristics of the good from an objective standpoint. In the market, multiple goods are sold and its value and quality are not necessarily dependent on being organic or not.

However, it is possible to conceive cases of non-conformity from a subjective standpoint.

⁴⁰ Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 156.

⁴¹ Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 156.

⁴² Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 158.

⁴³ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018), 257. This author argues that the price paid for the good may be an indication of the knowledge (acceptance) of the buyer of its defective state. If the buyer 'was aware or should be aware of the defect, there is no defective performance'. António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018), 257; Pedro de Albuquerque, *Direito das Obrigações – Contratos em Especial – Vol. I* (2th edn, Almedina 2019), 423. Another legal scholar states that it is demanded that the buyer is not aware, without fault, of the existence of the non-conformity. Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 132. This may occur when the non-conformity was not disclosed to him, or it could not have been detectable by an exam performed by a diligent person. Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 133. This position seems to accept the existence of a gap to be filled by article 1218 (that expressly establishes this duty to exam the works, in construction contracts). Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 158. Others refer that (i) considering that the provision makes no such restriction, and (i) that the provision intends to protect the buyer of a non-conforming good, the legal regime should be applicable to all cases in which the buyer buys a defective good (without accepting it or the lack of qualities of the good). Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 159.

The seller may have made statements concerning the qualities of the goods (i) directly to the seller, (ii) to the general public, or in its annual reports,⁴⁴ reassured in a contractual context.

In this scenario, the seller made statements concerning the 'organic' or 'eco' nature of the goods that assured the buyer of its compliance with the said regulations. Hence, it might be considered that a non-conforming good exists.

Even beyond a lack of express statements by the seller, if the buyer clearly stated what was its purpose when acquiring those goods, clarifying that being 'organic' was essential in order to be labelled and sold as such (or even resold), this plus needs to be considered when determining if the goods are non-conforming. In this sense, a case-by-case analysis is of utmost importance, considering (namely) the buyer's statements and the type of activity it pursues.

3.2. Mistake and Misrepresentation

- I. The buyer could be mistaken when acquiring the good or this mistake may be caused by the misrepresentation of the other party (or of a third party) or not. Different requirements apply in each scenario.
- II. In light of the non-conformity, the buyer may request the annulment of the contract, due to its lack of will to conclude it. Article 913 clarifies that it is possible to do so since it submits the regulation of non-conforming goods to article 905 of the PCC.⁴⁵ This article provides that it is possible to annul the contract, as long as the general requirements to annul it (established in articles 247 and following) are fulfilled. However, there is much controversy on whether the acquisition of a non-conforming good can be considered a mistake in the conclusion of the contract or a problem in its execution (a contractual breach).

According to some authors, the purchase of a defective good is a case of mistake.⁴⁶ If the sale of goods is enacted and its property over the goods is transferred, and it has a defect in the

⁴⁴ We refer to article 66-B of Decree-Law no. 262/86 of 02 September (Portuguese Companies Code), that establishes that large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year have to prepare and include in its management report a non-financial statement containing information regarding the companies evolution, performance, position and impact relating to environmental matters, social and employee-related matters, man and women equality, non-discrimination, humans rights, anti-corruption and bribery matters. Namely, it should be included in said report a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented, under said article 66-B (2) (b). Under article 66-B (11) (a) (b), public interest companies are defined on article 3 of the Legal Regime of Audit Supervision (Law no. 148/2015 of 9 September) and large companies are the ones that exceed two of the three limits as per defined on article 9 (3), determined under article 9-A of Decree Law 158/2009 of 13 July. In these reports the company may have assured that the products it produces were 100 % organic in accordance with EU Law Regulations.

⁴⁵ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 137.

⁴⁶ See Miguel Teixeira de Sousa, 'O cumprimento defeituoso e a venda de coisas defeituosas' in Antunes Varela and others (ed) *Ab vno ad omnes 75 anos da coimbra editora 1920-1995* (Coimbra Editora 1998) 567, 567-585; Luís Menezes Leitão, *Direito das obrigações – Volume III – Contratos em especial* (14th edn, Almedina 2022) 119 - 122.

moment the contract is concluded, there is a situation of mistake that may be annulled under articles 913 and 905 of the PCC.⁴⁷

To others, in the purchase of non-conforming goods the buyer construed the contract with a content apt to fulfil its interests if adequately performed, but the good delivered does not fulfil them since it has a defect or lack of essential qualities.⁴⁸ In the case of specific goods, the parties globally represented the good and its qualities and reached an agreement in relation to those qualities.⁴⁹ If there is not a contractual provision assuring certain qualities, there is a will to acquire a specified good that has the appropriate qualities of that kind of good.⁵⁰ If the good does not have the agreed qualities, there is a breach (not a mistake): the seller cannot fulfil the contract since the specified and agreed good is not apt to fulfil what it was promised and is non-conforming.⁵¹

In cases of mistake, there is defective will from the outset, that affects the formation of the contract itself, granting the buyer the right to annul it.⁵² Said mistake could be connected to (i) the characteristics of the good (its characteristics are not characteristics of the good agreed upon under that contract, but to some other of the same kind),⁵³ or (ii) the goods' characteristics cannot be attributed to the agreed good but instead belong to another kind of good.⁵⁴ The regime connected with defective performance enshrined on article 905 of the PCC is different from the one established on articles 247 of the PCC. The first is connected to the defective performance of the sellers' obligations and the second is connected with the false representation of the reality when concluding the contract.⁵⁵ To these authors, the applicable regime on mistake is enshrined on articles 247, 248, 251 and 252 of the PCC and the buyer may not invoke article 905 ex vi 913 PCC since these articles aim to protect the buyer beyond a non-conforming good.⁵⁶

⁴⁷ Luís Menezes Leitão, *Direito das obrigações – Volume III – Contratos em especial* (14th edn, Almedina 2022) 120.

⁴⁸ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461, 470.

⁴⁹ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461,474.

⁵⁰ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461, 475.

⁵¹ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461,476.

⁵² Ana Filipa Moraes Antunes / Rodrigo Moreira, 'Artigo 905.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 161.

⁵³ Pedro Romano Martinez, *Cumprimento Defeituoso em especial na compra e venda e na empreitada* (Almedina 2015) 38.

⁵⁴ Pedro Romano Martinez, *Cumprimento Defeituoso em especial na compra e venda e na empreitada* (Almedina 2015) 40.

⁵⁵ Pedro Romano Martinez, *Cumprimento Defeituoso em especial na compra e venda e na empreitada* (Almedina 2015) 241. It should be noted that there is one author that distinguishes between before the delivery of the good by the seller and a second moment on the act of delivery or after it. If the non-conformity is detected and notified before the delivery, it can be annulled as per article 913 of the PCC (the problem is placed on the formation of the contract, there was not a breach). If the non-conformity is verified after the delivery, in its execution, there is a breach of the contract, and it can be terminated. Carlos Ferreira de Almeida, *Contratos V- invalidade* (Almedina 2018) 144.

⁵⁶ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461, 466.

In our view, this reasoning should be followed since non-conformity is an issue of the contract's execution beyond an agreement (express or implied) intended by both parties and not one of mistake.

- III. Considering the reasoning followed above, in order to analyse whether there is a situation of mistake connected to the acquisition of organic goods, articles 247 and following of the PCC should be analysed.

Under article 251 of the Portuguese Civil Code (PCC) if there is an error relating to the 'object' of the contract, it may be annulled, if the requirements set out on article 247 of the PCC are also met.

The mistake in question is one that falls under the 'object' negotiated under the contract (*objeto do contrato*), since it falls under the identity of the object, its qualities, its value and legal qualities.⁵⁷

In order to annul the contract, as per article 247 of the PCC, the mistake should be essential, in the sense that a party would not have concluded the contract or concluded a contract with certain terms without it (if, in contrast, one concludes that it would nonetheless concluded the contract if it was not mistaken, there are no grounds for annulment), and cognizant, in the sense that it is necessary that the other party was aware or could not have been unaware of the essentiality of the mistake for its counterparty.⁵⁸

Under this hypothesis, a mistake could occur if the buyer believes that the specified goods would be labelled as eco or bio (due to a misunderstanding in conversations with the seller) but the goods could never have been, due to its production process, labelled as such and nothing of the sort was agreed with the seller, it was merely an assumption of the buyer. It is admitted a scenario where the seller and the buyer spoke of a means of production that is environmentally friendly (without an express mention to the ecolabel) and the buyer (incorrectly) assumes that the good is apt to carry an eco-label, when it actually cannot. To request the annulment of the contract, the seller must have been aware or could not have been unaware of this essentiality (in abstract, this may occur if the buyer is known in the market for the transaction of these kinds of goods).

- IV. In cases of misrepresentation, one of the parties is mistaken due to the actions of the other party, where one party deliberately induces the other to believe in something which causes the formation of the contract. In this sense, and due to the misrepresentation, if the contracting party was aware of its mistake, it would have not wanted to conclude the contract.⁵⁹

⁵⁷ António Menezes Cordeiro, *Tratado de Direito Civil II – Parte Geral – Negócio Jurídico, formação, conteúdo e interpretação, vício da vontade, ineficácia e invalidades* (5th edn, Almedina 2021) 858.

⁵⁸ Pedro Pais de Vasconcelos and Pedro Leitão Pais de Vasconcelos, *Teoria Geral do Direito Civil* (9th edn, Almedina 2019), 658.

⁵⁹ Ana Filipa Morais Antunes, 'Artigo 252.º' in José Brandão Proença and others (ed), *Comentário ao Código Civil – Parte Geral* (2nd edn, UCP editora 2023) 746.

A misrepresentation entails a voluntary conduct of the party that, by words or intentional silence or conscientious that it should have informed, makes the other party (*declarante*) mistaken or does not elucidate the other when it commits a spontaneous mistake.⁶⁰ There must be an intention or knowledge of the misrepresentation.⁶¹

It is required that: (i) the party that makes a declaration is mistaken, (ii) that the mistake was caused or dissimulated by the other party (or a third party) and (iii) that the other party (or third party) made use of trickery, suggestion, or deception.⁶²

The contract can be annulled if a party can prove that the misrepresentation was the cause of the mistake and that the contract was only concluded due to the misrepresentation (or, at least, that it was concluded due to the mistake).⁶³

In the hypothesis in question, this situation resembles or may be considered greenwashing, ie, 'when firms make misleading ESG disclosures'.⁶⁴ In the case under analysis, we are placed in the context of a specific contract, where the only reason for concluding it were the misrepresentations of the seller and assurances of its 'eco' and 'green' nature, construed with the sole purpose of making the buyer believe that they were compliant with EU Regulation or not clarifying the buyer when it expressly reveals its will to acquire these kinds of products. Under these circumstances, and depending on the fulfilment of the above-mentioned requirements, it may be possible to request the annulment of the contract.

4. Brief Description of the Buyer's Remedies

I. Considering that it is argued that non-organic products can be considered non-conforming, we now briefly mention the buyer's remedies in this situation.

It will be possible to (i) request the annulment of the contract, (ii) request the reparation or substitution of the goods, (iii) the reduction of the price, or (iv) the compensation of damages.

⁶⁰ Ana Filipa Morais Antunes, 'Artigo 252.º' in José Brandão Proença and others (ed), *Comentário ao Código Civil – Parte Geral* (2nd edn, UCP editora 2023) 747.

⁶¹ Ana Filipa Morais Antunes, 'Artigo 252.º' in José Brandão Proença and others (ed), *Comentário ao Código Civil – Parte Geral* (2nd edn, UCP editora 2023) 747.

⁶² António Menezes Cordeiro, *Tratado de Direito Civil II – Parte Geral – Negócio Jurídico, formação, conteúdo e interpretação, vício da vontade, ineficácia e invalidades* (5th edn, Almedina 2021) 873.

⁶³ Ana Filipa Morais Antunes, 'Artigo 252.º' in José Brandão Proença and others (ed), *Comentário ao Código Civil – Parte Geral* (2nd edn, UCP editora 2023) 752.

⁶⁴ Ellen Pei-Yi Yu/ Bac Van Luu/ Catherine Huirong Chen, 'Greenwashing in environmental, social and governance disclosures, Research' (2020) 52(C) *International Business and Finance*. ESG refers to the 'inclusion of environmental (E), social (S) and governance (G) criteria into investment decisions taken by companies as a manifestation of responsible or sustainable investment practices' and in a broader sense to the 'influence of environmental, social and governance criteria in organisational decision-making at any level'. Paulo Câmara, 'The systemic interaction between corporate governance and ESG: the cascade effect' (2023) Governance Lab Working Paper No. 04/2023, <www.ssrn.com> accessed 26 February 2024.

- II. The buyer may request the annulment of the contract, if it demonstrates that it acquired a non-conforming good and that the general requirements on mistake are met, under article 905 of the PCC.⁶⁵
- III. In connection with article 907, the regime is slightly different concerning encumbered good and non-conforming goods. While in encumbered goods, the seller may remedy the issue by removing any existing encumbrances or limitations, as per article 907 (1) of the PCC, the same reasoning, in our view, should not apply to non-conforming goods. In this case, as per the remission of article 913 to article 907, it is instead applicable the duty to repair or substitute the goods, referred to in article 914.⁶⁶ Hence, the buyer may request that the defect be repaired under article 914 of the PCC⁶⁷ as long as it is possible⁶⁸ and if it is not excessively onerous to do so and if the good is fungible.⁶⁹

Under this paper hypothesis, it is difficult to conceive a possible 'reparation' when the goods are already produced, after its delivery.

In relation to the substitution of the non-conforming good, which is allowed as per article 914 of the PCC⁷⁰ (which is only possible beyond fungible goods),⁷¹ if the seller offers the substitution of the goods, the buyer cannot refuse them under the principle of good faith. The seller is not required to substitute the goods if it amounts to an excessively onerous performance in

⁶⁵ Manuel A. Carneiro da Frada, 'Erro e incumprimento na não-conformidade da coisa com o interesse do comprador' [1989] III O Direito 461, 481. This right is of different nature of the right to request the annulment of the contract under articles 247 and following of the PCC, since it is originated from the breach of the contract. Ibid. The remission established on article 913 and 905 of the PCC does not entail that this amounts to a mistake in the sense of articles 247 of the PCC but to establish that where the requirements to annul the contract are met, this remedy is available to the buyer. J. Batista Machado, 'Acordo negocial e erro na venda de coisas defeituosas' (1972) 215 Boletim do Ministério de Ivstiça, 5, 78. Stating that there should be a termination of the contract (and not its annulment), Pedro de Albuquerque, *Direito das Obrigações – Contratos em Especial – Vol. I* (2th edn, Almedina 2019) 436; António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 280-282.

⁶⁶ Luís Menezes Leitão, *Direito das obrigações – Volume III – Contratos em especial* (14th edn, Almedina 2022) 127. Against, stating that even though most situations will be covered by the duty to repair or substitute the good, that does not entail that the remedy of *convalescença* established on article 907 of the PCC is precluded in non-conforming goods. Ana Filipa Morais Antunes / Rodrigo Moreira, 'Artigo 913.º' in António Agostinho Guedes and Júlio Vieira Gomes (coord), *Comentário ao Código Civil – Direito das Obrigações – Contratos em Especial* (UCP editora 2023) 163.

⁶⁷ The regime renders applicable to non-conforming goods the regime on encumbered goods where the seller is obliged to 'correct' the annulment through the elimination of the encumbrances or limitations of the cancellation of registrations under article 907 of the PCC. Since this regime makes little sense on a defective goods, the seller is instead obliged to substitute or repair the goods under article 914 of the PCC. Stating that article 914 of the PCC is applicable, Luís Menezes Leitão, *Direito das obrigações – Volume III – Contratos em especial* (14th edn, Almedina 2022) 125.

⁶⁸ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 138.

⁶⁹ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 265.

⁷⁰ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 138.

⁷¹ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 139.

comparison to the benefit gained by the buyer.⁷²⁻⁷³ In the case under analysis, it seems possible to substitute the product. The seller may have in storage or in production a different set of goods that comply with Organic Products EU Regulation requirements. In abstract, multiple situations may render the substitution extremely onerous. In our view, a case-by-case analysis needs to be undertaken, in order to access if is possible to rely on this particular remedy. It should be noted that there is no obligation to repair or substitute the goods if the seller is in good faith, ie, if it was not aware, without fault, of the defect of the good.⁷⁴

- IV. There is also a right to the reduction of the price of the goods established in the contract, under article 911 (in case of non-conforming goods, by remission of article 913 (1) of the PCC).⁷⁵

If, despite of the mistake or misrepresentation, the buyer would still have acquired the good, but for an inferior price, it will only have a right to reduction of the price, in accordance with the decrease of the value.⁷⁶

Only by analysing the case at hand, will it be possible to determine whether it is possible to reduce the price, considering the will of the buyer.

- V. The buyer may also request compensation under articles 908 to 910 and 915 of the PCC, subject to the fulfilment of the requirements established on said articles.⁷⁷
- VI. Finally, it should be added that according to some, there is a hierarchy of the remedies available to the buyer: it must first correct the defect; if it is not possible, or being too onerous its correction, it must substitute the good; if both are not possible, it should reduce the price. If this is not a satisfactory remedy, it is possible to request the annulment of the contract.⁷⁸

5. Conclusion

It is possible to conclude that are some situations where there may be non-conforming goods and even situations of mistake and misrepresentation in connection with the sale of non-organic products under Portuguese law.

⁷² Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 139.

⁷³ If the seller does not comply with his duties to repair the defect or substitute the good, it could be held accountable, since it breaches its duties to suppress the defects or substitute the goods, as per article 910 of the PCC. Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 139.

⁷⁴ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 265.

⁷⁵ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 139.

⁷⁶ António Menezes Cordeiro, *Tratado de Direito Civil XI – Contratos em especial (I.ª parte) – compra e venda, doação, sociedade, locação* (Almedina 2018) 264.

⁷⁷ In relation to compensation connected with misrepresentation, in the case of mistake or breach of the obligation of convalescence of the contract, see Pedro de Albuquerque, *Direito das Obrigações – Contratos em Especial – Vol. I* (2th edn, Almedina 2019) 454-455.

⁷⁸ Pedro Romano Martinez, *Direito das Obrigações (parte especial) – contratos – compra e venda, locação, empreitada* (2th edn, Almedina 2018) 141.