

Updating EU Consumer Law

The new Directives on
Sales of Goods & Digital Content



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Outline

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- Purpose of EU Consumer Law
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 - Sales of Goods Directive (2019/771/EU)
 - Digital Content Directive (2019/770/EU)

Starting Point of EU Consumer Law

- The purpose of the establishment of the European Economic Community (EEC) was to realise the free movement of goods, persons, services and capital and to establish an economic system based on competition
- Consumer protection was no objective in the Treaty of Rome 1957
- First Council Resolution for consumer protection and information policy, stating basic consumer rights, passed in 1975

Starting Point of EU Consumer Law

- Transactions by private individuals (consumers) play an important role for the creation and maintenance of the internal market
- Necessity of judicial harmonisation and consumer protection resulted in enacting legal rules providing a uniform minimum level of consumer protection in each Member State

Purpose of EU Consumer Law

EU Consumer Law's purpose is to guarantee and protect the autonomy of the individual, who appears in the market without any profit-making intentions, primarily against undertakings which engage actively in the market and also against Member States and the Union

Purpose of EU Consumer Law

Provided protection by

- Guarantees of consumer's freedom of choice and in decision
 - ▶ in particular by preventing fraudulent misrepresentation and by providing material information about products, services and markets
- Protection of legitimate expectations against suppliers of products and services
- Protection of special legal interests
 - ▶ e.g. health and safety of products and services
- Judicial protection and access to justice including legal protection and alternative dispute resolution mechanisms

Consumer Protection Measures

| | Regulations | Directives |
|------------------------------|---------------------------------|---------------------------------------|
| Bind | People generally (everybody) | Member States |
| Extent to which they bind | In their entirety | Result to be achieved |
| Need national measures? | No | Must have implementing measures |

EU-Directives protecting Consumer Goods and Services

- Doorstep Selling Directive (85/577/EEC)
- Package Travel Directive (90/314/EEC)
- Unfair Terms Directive (93/13/EEC)
- Timeshare Directive (94/47/EC)
- Distance Selling Directive (97/7/EC)
- Price Indication Directive (98/6/EC)
- Consumer Sales Directive (1999/44/EC)
- Service Directive (2006/123/EC)
- Consumer Rights Directive (2011/83/EU)
- Digital Content Directive (2019/770/EU)
- Sales of Goods Directive (2019/771/EU)

Notion of the Consumer

- Despite some slight differences all Directives share a common core, providing that a **consumer** is
 - a natural person
 - who is acting for purposes which are outside some kind of business, commercial or trade activity

Digital Single Market Strategy

- Digital Single Market Strategy (2014-2019) of the EU Commission aims for the best possible access to the online world for individuals and businesses
 - ↳ based on three pillars:
 - (1) **Access:** better access for consumers and businesses to digital goods and services across Europe
 - (2) **Environment:** creating the right conditions and a level playing field for digital networks and innovative services to flourish
 - (3) **Economy & Society:** maximising the growth potential of the digital economy

Digital Single Market Strategy

- Completion of the Digital Single Market Strategy (2014-2019) was identified as one of the EU Commission's 10 political priorities
- Altogether 28 legislative proposals have been agreed upon by the EU co-legislature
- Most important measures for the consumers:
 - Sales of Goods Directive (2019/771/EU)
 - Digital Content Directive (2019/770/EU)

Digital Single Market Strategy

Directives 2019/771/EU & 2019/770/EU

- prescribe new and **enhanced trader obligations** towards consumers, and describe the consumer's rights and remedies, in respect of goods, digital content and the novel category of digital services
- are **maximum harmonisation Directives**, meaning that Member States cannot deviate from their requirements unless expressly permitted by the Directives
- designed to ensure that the consumer law landscape across the EU is more consistent than it is currently, which in turn should **encourage more traders** to offer their products to consumers in other Member States, and give **consumers greater confidence** when making cross-border purchases

Directive 2019/771/EU

- **The Sales of Goods Directive** (Directive 2019/771/EU on certain aspects concerning contracts for the sale of goods) repeals Directive 1999/44/EC and relates to the sale of all kind of goods to consumers, including those products with a digital element
- Date of adoption: 20 May 2019
- Date of required implementation: 1 January 2022

Scope of Directive 2019/771/EU

- The Directive applies to B2C contracts for the:
 - sale of any (new or used) tangible moveable items (goods)
 - supply of goods to be manufactured or produced
 - sale of any goods that incorporate or are inter-connected with digital content or a digital service (e.g. smart fridges & TVs)
 - commercial guarantees
- The Directive does not apply to:
 - contracts for the supply of digital content or digital services
 - any goods sold by way of execution or otherwise by authority of law
 - any tangible medium which serves exclusively as a carrier for digital content (e.g. DVDs)

Directive 2019/770/EU

- The **Digital Content Directive** (Directive 2019/770/EU on certain aspects concerning contracts for the supply of digital content and digital services) relates to consumers paying for a digital service and digital content but also for those providing data in exchange for such service
- Date of adoption: 20 May 2019
- Date of required implementation: 1 January 2022

Scope of Directive 2019/770/EU

- The Directive applies to B2C supplies (whether or not bespoke) of digital content and digital services, where they are paid for or supplied in exchange for personal data (other than data exclusively processed by the trader in order to complete the supply or comply with legal requirements)
 - **Digital content** = data which are produced and supplied in digital form
 - **Digital services** = a service which allows the consumer to create, process, store or access data in digital form; or which allows the sharing of or any interaction with data in digital form uploaded or created by the consumer or other users of that service
- With exceptions, the Directive also applies to any tangible medium which serves exclusively to carry digital content

Scope of Directive 2019/770/EU

- The Directive does not cover digital content or services incorporated in or inter-connected with goods and sold under a sale of goods contract
- Contracts regarding the following services are also excluded from the scope of the Directive
 - non-digital services
 - healthcare
 - gambling services
 - financial services
 - supply of open-source or free software
 - electronic communications services

Upcoming changes by 01/01/2022

- New concept of digital services
- Supply of software updates
- Accessories & installation instructions
- Lack of conformity (subjective & objective)
- Deviation from conformity requirements
- Burden of proof
- Obligation to notify
- Consumer remedies
- Commercial guarantees
- Integration requirements

New concept of digital services

- **Digital Content Directive** distinguishes between
 - **digital content**
 - ▶ e.g. software, a video file or an e-book
 - **digital services**
 - ▶ e.g. software as a service and social media services

and applies to both

Supply of software updates (1)

- Both Directives require traders to supply consumers with **updates** where necessary to keep goods with digital elements (such as smartphones & smart TVs), digital content and digital services in conformity
 - ▶ duration of this obligation varies depending on context:
 - in case of a **single supply** of digital content or digital services, it will apply for the period of time that the consumer may reasonably expect
 - in case of **continuous supply** of digital content or digital service over a period of time at least for 2 years or maximum for the time during which the digital content or digital service is to be supplied under the sales contract

Supply of software updates (2)

- The **Digital Content Directive** also entitles consumers to **terminate** the contract if a modification supplied by the trader negatively impacts the consumer's access to or use of the digital content or services in a non-minor way

Accessories & installation instructions

- Goods, digital content and digital services must be delivered with all **accessories and instructions** that consumers may reasonably expect to receive, including in the case of goods, packaging and installation instructions

Lack of Conformity

- According to **Art. 5**, *„seller shall deliver goods to the consumer that meet the requirements set out in Articles 6, 7 and 8“*
- **Art. 6** sets out **subjective requirements** for conformity and **Art. 7** sets out additional **objective requirements** to presume the conformity of the consumer goods with the contract
- **Art. 8** refers to the consequences of **incorrect installation** of the goods

Subjective Lack of Conformity

(1) Description, type, quantity, quality (Art. 6 a)

- ▶ conformity is presumed if the goods are of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract

(2) Fitting particular consumer purpose (Art. 6 b)

- ▶ conformity is presumed if the consumer goods are fit for a consented, particular purpose for which the consumer requires them

(3) Accessories and instructions included (Art. 6 c)

- ▶ conformity is presumed if the goods are delivered with all accessories and instructions, including installation, as stipulated by the sales contract

(4) Updates (Art. 6 d)

- ▶ conformity is presumed if the goods are supplied with updates as stipulated by the sales contract

Objective Lack of Conformity

(5) Fitting for normal use (Art. 7 I a)

- ▶ conformity is presumed if the goods fit for the purposes for which goods of the same type are normally used

(6) Description, sample, model (Art. 7 I b)

- ▶ conformity is presumed if the goods correspond with the description given by the seller and possess the qualities of the samples or models provided

(7) Expected accessories & instructions (Art. 7 I c)

- ▶ conformity is presumed if the goods delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive

Objective Lack of Conformity

(8) Normal quality & public statement (Art. 7 I d)

- ▶ According to **Art. 7 I d** conformity is presumed if the good is *„of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.“*
- ▶ **normal quality** refers to the average quality in the particular market, unless the circumstances require a different quality

Objective Lack of Conformity

(9) Incorrect installation or installation instructions (Art. 8)

- ▶ the seller is liable for a defect caused by incorrect installation *„the installation forms part of the sales contract and was carried out by the seller or under the seller's responsibility“* (Art. 8 a)
- ▶ the seller is liable *„intended to be carried out by the consumer, was done by the consumer and the incorrect installation was due to shortcomings in the installation instructions provided by the seller“* (Art. 8 b)
 - ↳ so-called „IKEA-clause“

Objective Lack of Conformity

(10) Updates for digital elements (Art. 7 III)

- ▶ the seller is liable to *„ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time“* that the consumer may either
 - (1) *„reasonably expect given the type and purpose of the goods and the digital elements“* (**Art. 7 III a**) or
 - (2) *„the sales contract provides for a continuous supply of the digital content or digital service over a period of time“* (**Art. 7 III b**)

Seller's Liability for Lack of Conformity

- According to **Art. 10 I**, the seller is liable to the consumer for **any lack of conformity** which exists at the **time the goods were delivered**
- According to **Art. 10 II**, in the case of **goods with digital elements**, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for **any lack of conformity** of the digital content or digital service that occurs or becomes apparent **within 2 years of the time when the goods with digital elements were delivered**

Deviation from conformity requirements

- Both Directives allow **deviation from certain of the conformity requirements** (for example, the satisfactory quality requirement) if the consumer is specifically informed of the deviation and expressly and separately accepts the deviation when concluding the contract

Burden of proof (1)

- Under the Directives, goods, digital content and digital services are presumed not to have conformed to the contract on delivery or at the time of supply if they fail to conform at any time within **one year** from delivery or the time of supply
- This time period can differ in certain cases
 - ▶ for goods, Member States can opt to extend the one-year period to two years

Burden of proof (2)

- Exceptions to the presumption:
 - under the **Digital Content Directive**, the presumption will not arise if the trader can demonstrate that the **consumer's digital environment is incompatible with applicable technical requirements**, provided the consumer has been clearly informed of such requirements pre-contract

Obligation to notify

- Member States may introduce provisions providing that, to benefit from the consumer's rights, the **consumer has to inform the seller** of a lack of conformity **within at least two months** from the date the consumer detected such lack of conformity

Consumer remedies (1)

- Both Directives set out the consumer's remedies in respect of non-conforming goods, digital content and digital services, including:
 - **Repair or replacement**
 - **Price reduction or termination of the contract**
- **Sales of Goods Directive** (Art. 13 I) sets up a **hierarchy of remedies** for the consumer in case of a deficient performance:
 - (1) choice between free of charge repair or replacement
 - (2) choice between price reduction or contract termination

Consumer remedies (2)

■ Limitations of the right to choose

- ▶ the right of the consumer to choose is limited by the reservation that repair and replacement may not be impossible or disproportionate (Art. 13 II)
 - ↳ specified and second-hand goods ordinarily cannot be replaced

■ Execution of repair & replacement

- ▶ have to be completed within a „reasonable time“ and without „any significant inconvenience“
- ▶ seller takes back replaced goods at his own expenses
- ▶ consumer shall not be liable to pay for normal use

Consumer remedies (3)

■ Price reduction

- ▶ has to be appropriate

■ Termination of the contract

- ▶ excluded „if the lack of conformity is minor“
- ▶ consumer **returns the delivered goods** to the seller at the **seller's expenses** who reimburses the consumer as soon as he received proof about return (Art. 16 III 1)
- ▶ details of the right to terminate and modalities of its execution are subject to Member States (Art. 16 III 2)
 - ↳ i.e. questions regarding the compensation for the use when the contract is terminated

Consumer remedies (4)

- **Sales of Goods Directive** does not include a short term right for consumers to **reject non-conforming goods**, but does allow Member States to introduce or maintain such a right

Commercial guarantees

- **Sale of Goods Directive** clarifies that **producers of goods** (being manufacturers, importers of goods into the territory of the EU or any person placing their name, trade mark or other sign on goods) **which offer consumers a commercial guarantee** of durability for goods will be **directly liable to consumers** under such guarantee for repair or replacement of the goods during the guarantee period

Types of digital contract where consumers benefit from protection

- **Digital Content Directive** applies where the digital content or digital services **are paid for** by the consumer **or provided in exchange for the consumer's personal data** and that data is used for purposes other than supplying the content or services or to comply with legal requirements

Integration requirements

- Under the **Digital Content Directive**, any lack of conformity resulting from the **incorrect integration of digital content or digital services into the consumer's digital environment** will be regarded as a **lack of conformity** of the content or services if the integration was done by the trader or was the trader's responsibility, or carried out by the consumer incorrectly due to shortcomings in the trader's integration instructions

Traders' obligations on termination

- **Digital Content Directive** imposes obligations on the trader on termination of a contract for digital content or digital services, including to make available to the consumer on request content created or provided by the consumer when using the digital content or digital services, subject to certain exceptions

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