

# News in sales law to the second

## CHANGES IN THE SALE OF CONSUMER GOODS WITH REGULATIONS FOR THE SALE OF GOODS WITH DIGITAL ELEMENTS AS EARLY AS JANUARY 1, 2022

### Executive Summary

- The Federal Government recently published a draft law<sup>1</sup> to implement the so-called "Sale of Goods Directive"<sup>2</sup> into national law. It aims to fully harmonise the law on sales within the EU and to ensure a high level of consumer protection.
- The draft law provides for comprehensive changes to the law on the sale of consumer goods. These concern its scope of application, warranty claims, the consumer's right of revocation as well as the statute of limitations and the reversal of the burden of proof at the time of a defect. In doing so, they place even greater obligations on sellers than before.
- Completely new are the regulations on the purchase of goods with digital elements within the purchase of consumer goods. Sellers are subject to obligations to provide and to update information. The envisaged time flexibility will also pose a challenge when adapting respective consumer contracts.

**With our GSK Updates on the implementation of the Sale of Goods Directive, we inform you about innovations that are being discussed in the current legislative process. In Part 1, we looked at the planned adjustments to warranty law. <sup>3</sup>This part deals with the changes in the law on the sale of consumer goods and the sale of goods with digital elements.**

<sup>1</sup> Draft law regulating the sale of things with digital elements and other aspects of the contract of sale, BT-Drs. 19/27424 of 09.03.2021.

<sup>2</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of

### 1. Introduction

20 years after the implementation of the Consumer Sales Directive, the implementation of the Sale of Goods Directive leads to further significant changes in the law on sales. The aim is to make the law on the sale of goods fit for the future.

In the following the most important changes foreseen by the current draft law regarding sales of consumer goods (cf. below under 2.) as well as new provisions for the purchase of goods with digital elements (cf. below under 3.) are presented. The new provisions must be observed as of January 1, 2022.

### 2. New law for the sale of consumer goods

The draft law provides for numerous changes in the sale of consumer goods, which are intended to protect the consumer even more comprehensively in the relationship with the seller.

#### a) Applicability of the law on the sale of consumer goods

Up to now, the strict requirements of the sale of consumer goods were not applicable in the case of publicly accessible auctions of second-hand goods. In future, this will only apply if the seller informs the consumer "clearly and comprehensively" that the provisions on the sale of consumer goods do not apply.

goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

<sup>3</sup> Our update 'News in sales law to the first' of May 11, 2021, under <https://www.gsk.de/en/news-in-sales-law-to-the-first/>.



Sellers can fulfil their obligation to inform, for example, by requiring consumers to explicitly confirm the non-applicability of the law on sales of consumer goods before participating in the auction (e.g. through a check-the-box procedure with corresponding information).

In the case of purely digital auctions, where the possibility of personal participation is excluded, the provisions for the sale of consumer goods are - as before - applicable anyway.

### b) Higher requirements for warranty exclusions

In future, a consumer can also assert rights for defects of a good if he knew of the defect of the good or did not know of it as a result of gross negligence.<sup>4</sup>

If traders want to exclude warranty claims of consumers, they can only do so with regard to so-called objective requirements sales objects must meet<sup>5</sup> (Section 476 (1) sentences 1, 2 BGB-draft). These require, for example, that the item is suitable for normal use and complies with any advertising claims.

The seller can only exclude his liability for defects if, firstly, he informs the consumer of the deviation of the item from the objective requirements before the consumer makes his contractual declaration. Secondly, both must expressly and separately agree on the deviation (Section 476 (1) sentence 2 BGB-draft). A disclaimer in general terms and conditions, the product description or by using pre-ticked checkboxes (opt-out) will therefore not be effective.<sup>6</sup> In an online shop, the exclusion of liability can be effectively implemented, for example, with a clickable checkbox (opt-in) for confirmation by the consumer.<sup>7</sup>

<sup>4</sup> To this end, the applicability of Section 442 BGB for the sale of consumer goods is excluded (Section 475 (3) sentence 2 BGB-draft).

<sup>5</sup> On the new concept of defects in sales law, cf. our GSK update 'News in sales law to the first' of May 11, 2021, under <https://www.gsk.de/en/news-in-sales-law-to-the-first/>.

### c) The consumer's right to revoke the agreement in case of defects

The draft law also strengthens consumer rights in the event the consumer revokes the contract due to a defect of the purchased good.

If the buyer wants to revoke the contract, in some cases he no longer has to set the seller a deadline for cure (Section 475d (1) BGB-draft):

- After only informing the buyer about the defect, the seller did not carry out the cure within a reasonable period of time.
- Despite attempted cure, a (possibly new) defect appears.
- The defect is so serious that it justifies immediate revocation.
- The seller refuses proper (free of charge, timely and without significant inconvenience) cure.
- It is obvious that the seller will not properly fulfill its obligation to cure.

Sellers should pay particular attention to the first point: If they want to avoid that the buyer revokes the contract, they have to remedy the defect quickly or deliver a defect-free product already after a (simple) notice of the defect by the buyer (Section 475d (1) no. 1 BGB-draft). In this case, sellers should notify the buyer of the intended cure immediately after notification of a defect.

Another new provision is that the seller must bear the costs for the return of goods if the consumer revokes the contract (Section 475 (6) sentence 1 BGB-draft).

If the buyer revokes the contract and therefore returns the item, in future he will only have to prove that he has returned the item (Section 475 (6) sentence 2 BGB-E). Thus, the seller has to refund the purchase price to the

<sup>6</sup> Draft law regulating the sale of things with digital elements and other aspects of the contract of sale, BT-Drs. 19/27424 of 09.03.2021, pages 40 f.

<sup>7</sup> Op. cit., page 41.



buyer upon presentation of the postal delivery receipt even if the object does not arrive at the seller at all.

#### **d) Special provisions for the limitation period**

The limitation period for consumer warranty claims is adjusted in favour of buyers.

The limitation period shall not start to run before two months have elapsed after the defect has become apparent (Section 475e (3) BGB-draft). This suspension of expiry ensures that the limitation period does not end before the expiry of the warranty period.

The suspension of the statute of limitations also applies if the seller remedies a defect (rectification of the defect or new delivery) (Section 475e (4) BGB-draft). In this case, the limitation period for warranty claims begins two months after the customer has received the repaired or new item.

The suspensions of expiry serve the purpose of legal certainty. In practice, they will only become relevant if a defect only appears towards the end of the limitation period.

#### **e) Tighter reversal of the burden of proof**

The planned change in the reversal of the burden of proof will be particularly relevant in practice.

If a defect appeared within six months after delivery of the item to the buyer, the seller had to prove that the defect first appeared at the buyer's premises. The duration of this reversal of the burden of proof is to be extended by another six months to one year (Section 477 (2) BGB-

draft). This will continue to be regulated by a legal presumption. Thus, if the defect occurs within one year after delivery of the item, it is presumed that the item was already defective before delivery.

If a seller wants to avert warranty claims in the sale of consumer goods, he must be able to demonstrate and prove for a whole year that the item had been delivered free of defects to the customer. Therefore, information about the condition and the sending of the object should be kept for at least that long.

### **3. Sale of consumer goods with digital elements**

For the first time, the Sale of Goods Directive requires separate, supplementary regulations for consumer goods sales for goods with digital elements.

#### **a) Scope and delimitation**

The new provisions concern sale contracts for goods which contain digital products<sup>8</sup> or are connected to digital products in such a way that the goods can only fulfil their function together with the digital products (section 475b (1) sentence 2 BGB-draft).<sup>9</sup> Such goods are for example computers or smartphones with their pre-installed operating systems or smart watches. Various IOT products will also regularly constitute a good with digital elements.

However, contracts for the mere provision of digital products are not covered. Also excluded are contracts for goods whose function is not linked to a digital element, i.e. which also function without the digital element. Regulations on such contracts will in future be subject to the new Sections 327 et seq. BGB-draft<sup>10</sup>.

<sup>8</sup> Cf. the definition of digital products in Section 327 (1) and (2) BGB-draft: "[...] digital content or digital services (digital products) [...]". (2) Digital content means data created and made available in digital form. Digital services are services that enable the consumer to create, process or store data in digital form or to access such data, or to share or otherwise interact with data uploaded or created in digital form by the consumer or by other users of the relevant service", according to the Draft Law on the Implementation of the Directive on Certain Contractual Aspects of the Provision of Digital Content and Digital Services, BT-Drs. 19/27653 of 17.03.2021.

<sup>9</sup> Cf. also Section 327a BGB-draft according to the draft law on the implementation of the directive on certain aspects of the provision of digital content and digital services under contract law, BT-Drs. 19/27653 of 17.03.2021.

<sup>10</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning for the supply of digital content and digital services, cf. in particular Sections 327(1) sentence 1, 327a (1) BGB-draft according to the draft law implementing the



**b) In case of doubt: sellers's obligation to supply**

By selling goods with digital elements, the seller shall in future in case of doubt – i.e. if nothing else results from the interpretation of the contract – also owe the supply of the digital content or services (Section 475b (1) sentence 2 BGB-draft). This will be particularly relevant in the case of goods for which software is required. This takes into account the fact that the good is practically worthless for the consumer without the software or other digital elements. In order to supply digital content, the seller can hand it over to the consumer (e.g. on a CD), send him the corresponding access data, e.g. via a cloud solution, or provide a download.<sup>11</sup>

**c) Material defect and obligation to supply updates**

What constitutes a material defect of an object with digital elements is based on the (new) general concept of material defect<sup>12</sup>. Because the seller is also obliged to update the digital elements in the case of such objects of purchase, the concept of material defect is expanded to include this aspect.

Since a regular "update" or "upgrade" of the digital elements is indispensable for the durable functioning of these products, a material defect also exists if the seller does not provide the agreed or typical – at least function-maintaining – updates of the digital elements or does not inform the consumer about such updates (Section 475b (3) no. 2 and (4) no. 2 BGB-draft).

In order to prevent warranty claims, sellers must therefore supply their customers (e.g. software) with updates without being asked for. The frequency, the content and the period of time over which updates must be provided depend on the type and purpose of the respective object of sale. It is therefore not possible to make a general statement at this point. In order to be able to inform their customers about updates at all, sellers should – as has

long been customary – request the buyer's e-mail address and keep it up to date.

By the way, sellers may agree with customers on other provisions for updates to limit their liability for defects (Section 476 (1) 1 sentence 2 BGB-E). For example, the scope (e.g. only security updates) and the period for updates can be specified. This is strongly advisable. In the case of upgrades that adapt the digital elements of a purchased item to technical developments or expand its scope of performance, however, separate contractual amendments are recommended in each case.

Incidentally, sellers can of course pass on the obligation to update to third parties, e.g. the manufacturer.<sup>13</sup>

Consumers, on the other hand, are under no obligation to install updates that have been provided. If they do not do so, however, they are not entitled to warranty claims – at least if (i) the seller has informed them about the availability and consequences of not installing the update and (ii) the omitted or improper installation is not based on faulty installation instructions (Section 475b (5) BGB-E). Also, at this point, there is a new (standardised) obligation to inform sellers as well as the obligation to ensure that installation instructions are free of defects.

Finally, a product with digital elements is only free of defects at all if it meets the installation requirements. The installation must therefore have been carried out properly. Improper installation must not be attributable to the trader or defective installation instructions (Section 475b (6) BGB-E).

**d) Special features for permanent supply**

When purchasing goods with digital elements, the buyer is often not only interested in the transfer and acquisition of ownership of the goods themselves. He regularly also

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Directive on certain aspects of contract law relating to the provision of digital content and digital services, BT-Drs. 19/27653 of 17.03.2021.

<sup>11</sup> Section 327b (3), (4) BGB-draft according to the draft law on the Implementation of the Directive on Certain Contractual Aspects of the

Provision of Digital Content and Digital Services, BT-Drs. 19/27653 of 17.03.2021.

<sup>12</sup> Cf. footnote no. 5.

<sup>13</sup> On the right of recourse against the supplier in the event of a breach of the objective obligation to update: Section 445a (1) BGB-draft.



has a high interest in the permanent provision of the digital elements (e.g. functioning cloud connection).

If the parties agree on the permanent provision of the digital elements (often probably by implication), they should urgently specify the time period for the provision. Otherwise, the seller's obligation to update is based on the type and purpose of the product and its digital elements as well as on what the buyer may usually expect (Section 475c (1) sentence 2 in conjunction with section 457b(4) no. 2 BGB-draft).

Moreover, in the case of contracts for the permanent provision of digital elements, the Seller shall be liable for freedom from defects for the entire provision period, but for at least two years.

In addition, he must comply with his updating and information obligations for such a long time (Section 475c (3) BGB-draft).

#### **e) Special provisions for the limitation period**

The special features of the purchase of goods with digital elements require an adjustment of the statute of limitation for warranty claims:

If the digital elements are to be made available permanently, the limitation period begins at the earliest after the expiry of two years after delivery of the item or – if this is longer – after the expiry of the provision period (Section 475e (1) no. 1 BGB-draft).

If the defect is based on a breach of the updating obligation by the Seller, the limitation period shall not commence until the expiry of the respective period for updates.

#### **f) Reversal of the burden of proof**

As is the case with the sale of consumer goods anyway, a reversal of the burden of proof applies in favour of the consumer for goods with digital elements. According to this, the defect of the digital element is presumed at the time of supply if the defect occurs during the provision or

within two years of the transfer of risk (Section 477 (2) BGB-draft). The reference to the period of provision also shows the flexibility (and thus legal uncertainty) with regard to the duration of the seller's obligations.

#### **4. Outlook**

Even though changes to the draft law are still possible until the implementation of the Sale of Goods Directive on 21 July 2021, sellers can already prepare themselves for comprehensive changes to the sale of consumer goods and in particular to the sale of goods with digital elements. Especially the implementation of the obligation to update requires adjustments in contracts with consumers as well as contracts with suppliers or manufacturers. The incorporation of information obligations into the conclusion and implementation of contracts should also be addressed as early as possible.

As the market for objects with digital elements continues to grow as a result of digitalisation, the new special provisions will become increasingly relevant in practice. Therefore, further developments in the legislative process must be taken into account, as well as the usual implementation of these provisions and case law on the subject in the near future.

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