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## Implementation of the Directive (EU) 2019/771 on the sale of goods: Upcoming amendments to the German Civil Code governing the sale of goods with digital elements and other aspects of sales contracts

On December 10, 2020, the Federal Ministry of Justice and Consumer Protection (BMJV) published a [ministerial draft bill](#) on the implementation of the directive on the sale of goods ([Directive \(EU\) 2019/771](#)) ("[Sales of Goods Directive](#)"). The Sales of Goods Directive supersedes and succeeds the directive on the sale of consumer goods (Directive 1999/44/EC), which has been implemented into the German Civil Code (*Bürgerliches Gesetzbuch*; "BGB") since January 1, 2002. In order to implement the Sales of Goods Directive, the ministerial draft bill of the new German Civil Code ("BGB-E") provides for a number of changes to German law on sales contracts. In brief, the BGB-E proposes *inter alia* the following changes:

- i. The concept of material defects and the requirements for a conformity of the goods will be reformed. The sellers' obligations become stricter. Under the current law, the parties can agree on quality criteria. If the good deviates from the agreed quality, it is defective - otherwise not. According to the BGB-E, the purchased good additionally has to meet certain objective requirements and assembly requirements in order to be defect free. I.e. even if the good complies with the agreed quality, it can nevertheless be defective. This change limits to the principles of freedom of contract. In case of b2b-sales contracts, the parties, however, are free to agree on deviations from the objective requirements. In case of b2c-sales contracts, an agreement on deviations from the objective requirements is subject to a strict form requirement.
- ii. The BGB-E contains special provisions for goods with digital elements, which only apply in case of b2c-sales contracts. The seller has to provide updates for the digital elements. For how long? The BGB-E does not say anything specific about this. The period may be longer than the two-year warranty period. This would result in an extended warranty period for the digital elements. If the seller does not fulfill its obligation to provide updates, the good will become defective. The sales contract for a good with digital elements therefore now has a continuing obligation component.
- iii. The BGB-E also provides for changes to the warranty period and the statute of limitations for b2c-sales contracts. The two-year warranty period is combined with a suspension of the expiry of the limitation period. Claims for defects become statute-barred at the earliest upon expiration of two months as from the date on which the defect becomes apparent. In the case of b2c-sales contracts,

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entrepreneurs should therefore assume a 26-month warranty period in the future.

- iv. There are also important changes regarding the consumer's rights in case of defects and his/her assertion of said rights, which, however, are not dealt with in detail in this Client Alert. For b2c-sales contracts, the BGB-E removes the consumer's obligation to set a grace period for subsequent performance vis-à-vis the seller. In the future it will be sufficient, that the consumer notifies the seller about the defect, without setting a specific grace period. Upon notification, a fictional reasonable grace period is set in motion. If this grace period lapses to no avail, the consumer may rescind the contract, demand a reduction of the purchase price and/or claim damages. Entrepreneurs will have to pay attention in the future. Consumers will be able to rescind a sales contract more easily. In the past practice, the consumers have often failed to set a grace period.

Do you want to know more? If so, you will find more detailed information on the upcoming amendments to the German law on sales contracts below.

## 1. Introduction and Background

The Sales of Goods Directive is closely related to the also recently introduced directive on digital content and digital services ([Directive \(EU\) 2019/770](#)) ("**Digital Services Directive**"). Both directives are intended to have a complementary function and an exclusive relation to one another. The [ministerial draft bill](#) on the implementation of the Digital Services Directive was already published on November 3, 2020, while the [government draft bill](#) was published on January 13, 2021.

The new directives were published in light of the growing importance of goods with digital elements and of digital products and services as well as of e-commerce. However, the Sales of Goods Directive also applies to "classic" goods without digital elements. The provisions of both directives are to be fully harmonized in the EU Member States in order to promote the proper functioning of the digital single market and to ensure a high and uniform level of consumer protection within the EU. The prior directive on sale of consumer goods only provided for a minimum harmonization. As a consequence, the EU Member States adopted different legislation, leading to a fragmentation of the consumer protection provisions. The Sales of Goods Directive and the Digital Services Directive provide for full harmonization in order to counteract this fragmentation. In doing so, the EU pursues the goal of further leveraging the potential offered by a uniform single market.

Germany is required to implement the Sales of Goods Directive in national law by July 1, 2021. The respective provisions shall be applicable to contracts that are concluded as of January 1, 2022.

## 2. Upcoming Amendments in Detail

The ministerial draft bill on the implementation of the Sales of Goods Directive in particular provides for the following amendments of the BGB:

### i. Redefinition of the concept of material defects in section 434 BGB-E

The concept of material defects and the requirements for a conformity of the goods as defined under the current section 434 BGB will be reformed. This amendment also applies to "classic" goods without digital elements and applies to both b2b-sales contracts and b2c-sales contracts.

Pursuant to section 434(1) BGB-E a good is to be considered free from material defects, if it meets the subjective requirements, the objective requirements and the assembly requirements upon passing of the risk. Currently, section 434 BGB provides for a hierarchy order (Stufenverhältnis) according to which the parties' agreement on the quality (Beschaffenheitsvereinbarung) is the primary point of reference. If the quality has not been agreed upon, the second point of reference would be the question of whether the good (1.) is suitable for the use intended under the contract and/or (2.) is suitable for the customary use and its quality corresponds to the quality that is customary in goods of the same kind and may be expected by the buyer. This hierarchy shall no longer apply under the new section 434 BGB-E. Instead, the subjective requirements, the objective requirements and the assembly requirements shall rank equally and have to be met cumulatively in order for the good to be defect free. The subjective requirements are specified in section 434(2) BGB-E, the objective requirements are specified in section 434(3) BGB-E and the assembly requirements are specified in section 434(4) BGB-E.

Sales contracts in a b2c-relationship may only deviate from these statutory requirements to a very limited extent. In order to contractually agree a deviation from the objective requirements, the consumer must be informed about this separately by the entrepreneur and must agree to the deviation expressly and by means of a separate declaration (section 476(1) sentence 2 BGB-E). Hence, a specific agreement on the deviation from the objective requirements is required. A general information, e.g. within the scope of general terms and conditions, does therefore not suffice when dealing with consumers. In case of b2b-sales contracts, however, the parties are free to agree on deviations from the objective requirements without having to comply with such specific form requirement.

The subjective requirements shall be deemed complied with if the good (1.) has the agreed quality; (2.) is suitable for the use as agreed in the contract and (3.) is handed over with the accessories as agreed in the contract and with the instructions, including assembly and installation instructions.

The objective requirements shall be deemed complied with if the good (1.) is suitable for the customary use; (2.) has a quality that corresponds to the quality customary in goods of the same kind and may be expected by the buyer in view of (a) the type of the good and (b) the public statements made by the seller or another upstream person in the supply chain, including without limitation in advertising or on the label; (3.) corresponds to the quality of a model or sample that the seller provided to the buyer prior to the conclusion of the contract; and

(4.) is handed over with the accessories including the packaging, the assembly or installation instructions and other instructions the buyer may expect to receive.

The assembly requirements shall be deemed complied with if (1.) the assembly was carried out properly or (2.) the assembly was carried out improperly, but the improper assembly was neither performed by the seller nor is based on faulty assembly instructions.

If the seller supplies a good other than the contractually agreed good, this continues to equal a material defect (section 434(5) BGB-E). The delivery of an insufficient quantity of goods shall be a case of non-conformity with the subjective requirements and fall under section 434(2) BGB-E.

ii. **Goods with Digital Elements: Introduction of an obligation to provide updates and information and special provisions on the concept of material defects**

Sections 475b et seq. BGB-E are to introduce new provisions on the purchase of goods with digital elements. These provisions, however, apply only to the sale of consumer goods, i.e. to B2C-sales contracts. Certain provisions apply to all goods with digital elements (section 475b BGB-E) and others apply specifically to goods with digital elements for which such digital elements have to be provided permanently over a certain period of time as agreed between the parties (section 475c BGB-E). Both, section 475b and section 475c BGB-E, contain specific provisions on the concept of material defects in connection with goods with digital elements and apply in addition to the aforementioned section 434 BGB-E.

Section 475b BGB-E extends the concept of material defects set forth in section 434 BGB-E to sales contracts for goods with digital elements where the entrepreneur undertakes already with conclusion of the sales contract the obligation to provide the digital elements by himself or via a third party. Scenarios in which the consumer at first purchases a good and at a later stage books certain digital elements for such good by concluding a separate contract do not fall under the sections 475b et seq. BGB-E. According to section 475b(1) sentence 2 BGB-E, goods with digital elements are goods that incorporate or are inter-connected with digital content or digital services in such a way that the absence of that digital content or digital service would prevent the good from performing its functions. Whether the entrepreneur undertakes already under the sales contract that he/she or a third party will provide the digital elements must be established by way of an interpretation of the agreement. The Sales of Goods Directive and the ministerial draft bill mention inter alia the smart TV and the smart watch as examples for goods with digital elements. If the sales contract for a smart TV provides that with delivery of the smart TV a specific video application (e.g. streaming service) will also be provided, the obligation to provide that video application is already included into the sales contract. This applies regardless of whether the digital element is already pre-installed on the smart TV or has to be downloaded and installed subsequently after the purchase. Another example a good with digital elements is the smart watch which has to be inter-connected to a smart phone. The smart watch can perform its functions only if an application (e.g. an app) is installed onto the smart phone and an inter-connection is established. The application on the smart phone is then the digital element inter-connected to the smart watch.

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Section 475b(2) BGB-E stipulates when goods with digital elements are free from material defects. This is the case if the good, upon passing of the risk, complies with the subjective requirements, the objective requirements, the assembly requirements and, with respect to the digital elements, the installation requirements. As regards the subjective requirements for goods with digital elements, the aforementioned section 434(2) BGB-E applies. As regards the objective requirements section 434(3) BGB-E as described above applies. This means that, initially, the same requirements as those applicable to the purchase of "classic" goods apply to goods with digital elements. However, in order for the good with digital elements to remain free from material defects, compliance with the subjective requirements additionally requires that the updates, which are contractually agreed, are provided for the digital elements (section 475b(3) no. 2 BGB-E). As regards the objective requirements, it is furthermore necessary that the consumer is provided with updates, which are required for maintaining the good's conformity and that the consumer is informed about such updates during the period that he/she may expect (section 475b(4) no. 2 BGB-E). Hence, the seller has an obligation to provide updates to the consumer and has an obligation to inform the consumer about these updates at the same time. As regards the time frame in which the obligation to provide updates and information continues to exist, the draft bill states that updates and information shall be provided for a period, which the consumer may expect based on the type and the purpose of the good and its digital elements as well as in consideration of the circumstances and the type of the contract. Hence, such period is not clearly defined and must be determined by way of interpretation. The horizon of expectations of the average buyer shall determine which period for updates can be expected. According to the draft bill, the seller's statements made in advertising, the materials used in manufacturing the purchased good and its price shall be the relevant criteria. If information on the typical life cycle of a specific good is already available, it is also to be considered for the determination of the update period. In particular in case of security updates, the consumer's expectation will generally extend over a period going beyond the warranty period - according to the draft bill.

Where the consumer fails to install an update in a timely manner, the entrepreneur is not liable for a material defect resulting solely from the lack of the relevant update, provided that (1.) the entrepreneur informed the consumer about the availability of the update and the consequences of the failure to install it and (2.) the failure of the consumer to install or the incorrect installation by the consumer of the update was not caused by faulty installation instructions (section 475b(5) BGB-E).

Section 475c BGB-E covers material defects of goods with digital elements for which a permanent provision of its digital elements over a (defined or an undefined) period of time is agreed. During the agreed period, the digital elements must be provided continuously to the consumer. As an example, the ministerial draft bill mentions traffic data in a navigation system or the cloud connection for a video game console. Here, it is essential that the entrepreneur is also liable for the digital elements being free from defects during the supply period, at least, however, for a period of two years from the delivery of the good. The obligations to provide updates and information are also in place over the supply period, at least, however, for a period of two years from the delivery of

the good. The obligation to provide updates may exist for a period, which goes beyond the warranty period.

**iii. Amendments with respect to the warranty period and the statute of limitations for claims for defects in case of b2c-contracts**

The new section 475e BGB-E contains provisions on the warranty period and the statute of limitations of rights for defects in the case of b2c-contracts.

Section 475e(1) BGB-E applies to the purchase of goods with digital elements only. In general, goods with digital elements are subject to the warranty period of two years commencing upon delivery of the good if the parties have not agreed a supply period for the relating digital element. In deviation from section 438(2) BGB-E, claims for defects of the digital element become statute-barred only when, (1.) in case of a purchase of a good with digital elements for which the permanent supply of the digital elements has been agreed (section 475c(1) sentence 1 BGB-E), the statutory limitation period of two years has expired or, if the parties have agreed a supply period going beyond that period, that longer supply period has expired, or, (2.) in case the defect is caused by the violation of the obligation to provide updates according to sections 475b(3), (4) BGB-E, upon the expiry of the period for such updates.

With respect to all b2c-contracts, i.e. contracts on goods with and without digital elements, the new section 475e(3) BGB-E shall be introduced. This provision provides for a suspension of the expiry of the limitation period, according to which claims for defects become statute-barred at the earliest upon expiration of two months as from the date on which the defect becomes apparent. This provision is based on the Sales of Goods Directive stipulating with respect to the assertion of rights due to defects that the limitation period determined in national law must not prevent the consumer from effectively enforcing the remedies available to the consumer due to a defect. Since the initiation of measures to assert the rights in case of defects always takes some time, a provision according to which the warranty period and the limitation period coincide would undermine this requirement. For this reason, the limitation period must exceed the warranty period, which the suspension of expiration stipulated in section 475e(3) BGB-E is intended to ensure.

**iv. Extension of the reversal of the burden of proof with respect to defects**

Section 477(1) BGB-E shall extend the term of the reversal of the burden of proof for all goods to one year.

For goods with digital elements for which a permanent provision of its digital elements over a (defined or an undefined) period of time is agreed, and which show a material defect within that period of time or within two years after the delivery of the good, it is assumed by law that the digital elements were already defective within the supply period (section 477(2) BGB-E).

**v. Requirements for Commercial Guarantees**

Section 479 BGB-E provides for specific requirements for commercial guarantees granted by entrepreneurs to consumers. This provision applies to "classic" goods and goods with digital elements. Pursuant to section 479(1) BGB-E, a guarantee declaration within the meaning of section 443 BGB must be written in plain and understandable language and contain the following



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information: (1.) the note to (a) the statutory rights of the consumer in the case of defects, (b) the fact that claiming these statutory rights is free of charge for the consumer, as well as (c) the fact that these statutory rights are not restricted or affected by the guarantee; (2.) the guarantor's name and address; (3.) the procedure to be followed by the consumer for claiming the guarantee; (4.) the good to which the guarantee refers; and (5.) the provisions of the guarantee.

Moreover, the guarantee declaration must be provided to the consumer on a durable medium no later than at the time of the delivery of the good (section 479(2) BGB-E). In this context, section 479(4) BGB-E explicitly states that the effectiveness of the guarantee obligation is not affected by the entrepreneur not meeting any of the above requirements.

### 3. Prospects

It remains to be seen whether the proposals contained in the ministerial draft bill will be largely adopted. The next step would be for the German Federal Government to prepare a government draft bill on the implementation of the Sales of Goods Directive. In view of the fact that the Sales of Goods Directive provides for full harmonization and allows for few deviations only, the legislator has very limited scope for action with respect to the consumer protection provisions. It is, however, possible that the legislator might decide to refrain from restricting the applicability of the provisions on the sale of goods with digital elements to b2c-sales contracts, but to equally extend these provisions to b2b-sales contracts. Entrepreneurs should keep a close eye on the further legislative procedure since standard contracts and general terms and conditions will probably have to be revised and internal processes, in particular with respect to compliance with the new obligations to provide updates and information for goods with digital elements, will have to be reviewed and adjusted to the extent necessary.

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For further questions don't hesitate to contact our specialists:



Dr. Johannes Teichmann  
[joahannes.teichmann@bakermckenzie.com](mailto:joahannes.teichmann@bakermckenzie.com)



Dr. Ingmar A. Oltmanns  
[ingmar.oltmanns@bakermckenzie.com](mailto:ingmar.oltmanns@bakermckenzie.com)



Julia Kaufmann, LL.M.  
[julia.kaufmann@bakermckenzie.com](mailto:julia.kaufmann@bakermckenzie.com)



Dr. Ulf Wauschkuhn  
[ulf.wauschkuhn@bakermckenzie.com](mailto:ulf.wauschkuhn@bakermckenzie.com)



Katharina Spenner, LL.M.  
[katharina.spenner@bakermckenzie.com](mailto:katharina.spenner@bakermckenzie.com)

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## **Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB**

### **Berlin**

Friedrichstrasse 88/Unter den Linden  
10117 Berlin  
Tel.: +49 30 2 20 02 81 0  
Fax: +49 30 2 20 02 81 199

### **Dusseldorf**

Neuer Zollhof 2  
40221 Dusseldorf  
Tel.: +49 211 3 11 16 0  
Fax: +49 211 3 11 16 199

### **Frankfurt am Main**

Bethmannstrasse 50-54  
60311 Frankfurt / Main  
Tel.: +49 69 2 99 08 0  
Fax: +49 69 2 99 08 108

### **Munich**

Theatinerstrasse 23  
80333 Munich  
Tel.: +49 89 5 52 38 0  
Fax: +49 89 5 52 38 199

[www.bakermckenzie.com](http://www.bakermckenzie.com)

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