The ‘New Deal’ Journey Starts Here

A Whistle Stop Tour of the Upcoming Overhaul of EU Consumer Rights

29 October 2021

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01 Overview

EU New Deal for Consumers

Widely understood:

- Digital Content Directive
- Sale of Goods Directive
- Omnibus Directive
- Representative Actions Directive
  (Xmas present 2022)

New Deal for Consumers – the EU's objectives:

1. Extension of representative actions to include claims for damages where consumers' collective interests are affected
2. Strengthening consumer rights and modernizing consumer protection

EU New Deal for Consumers

New obligations for online distribution and everything to do with digital content

Pre-contractual	Conclusion of contract	(Post-)contractual
Omnibus		**Digital Content & Sale of Goods**
1 new EU directive amends 4 existing EU directives, **minimum** harmonisation **Unfair business practices, purchase processing, right of withdrawal**		2 new EU directives, **full** harmonisation **Warranty for defects** **Termination of contract**
Transparency for ranking and user reviews Personalized pricing and transparent offers Seller information		Product changes and updates Warranty period extended Reversal of burden of proof extended
Contracts against provision of personal data equated with contracts against payment of a price **Consequences:** Information obligations and right of withdrawal; special regulations for handling personal data after the end of the contract.		
May 2022		January 2022

Affected areas in the customer journey

INFORMATION REQUIREMENTS ALWAYS AVAILABLE
- Geoblocking Regulation; Language localisation
- Privacy policy
- Imprint
- Ranking parameters
  - When search engine or online marketplace
- Verification of user reviews
  - When there are user reviews
- Dispute resolution
- Price details
  - plus original price for offers
- Contractors
  - When online marketplace

AT THE LATEST AT THE BEGINNING OF THE ORDER PROCESS
- Payment
- Delivery restrictions

AT THE CONCLUSION OF THE CONTRACT
- Delivery time
- Contact information seller
- Contact information e-mail and phone
- Guarantees; Support
- Main product characteristics
- Contract period
- Right of withdrawal
- Expiry of the right of withdrawal

ORDER OVERVIEW
- Essential product features, price, contract duration
- T&Cs
- Buy button

CONTRACT CONFIRMATION
- Confirmation of receipt of order

(POST-)CONTRACTUAL OBLIGATIONS
- In-box warranty
  - For physical goods
- Revocation/termination and data protection
- Lack of defects and legal remedies
- Freedom from defects - Portability of content
  - When service
- Product changes
  - When digital content or service
- Dispute resolution

Impressum

Blue boxes are the areas that have potential need for change

Current implementation status (Germany)

20 May 2019	Publication DCD SGD
11 June 2019	Entry into force DCD SGD
27 Nov 2019	Publication Omnibus Directive
7 Jan 2020	Omnibus Directive enters into force
Oct-Dec 2020	Draft bills German legislator
Jan/Feb 2021	Government drafts German legislator*
1 July 2021	Implementation deadline DCD SGD
28 Nov 2021	Implementation deadline Omnibus Directive
1 Jan 2022	DCD, SGD and national implementations apply
28 May 2022	Omnibus Directive and national implementations apply

Implementation of DCD and SGD: The DCD and SGD implementation bills are already final and promulgated.

Implementation of the Omnibus Directive: Implementing legislation for Omnibus Directive adopted by the German Parliament, but not yet promulgated.

*except transposition of Price Indication Directive

And other Member States?

- **Approach not really harmonized**
  So far, only a few Member States have transposed the Directives on time.

- **No "one size fits all"**
  It is becoming apparent that many Member States are making use of derogation powers (also with regard to the level of fines and the duration of the warranty period).

02 "Paying with data"

"Paying with data" I Requirements

Consumer contract for digital content / digital services

- Member States free to determine whether a contract exists (intention to be bound by law (D))
- Provision of personal data as a declaration of intent?
- Time of the conclusion of the contract? Pre-contractual information duties?

"**Providing** personal data"

- "Commitment" to provide is sufficient
- "Provide" can be active or passive
- (personal) metadata is sufficient

Data as **consideration**?

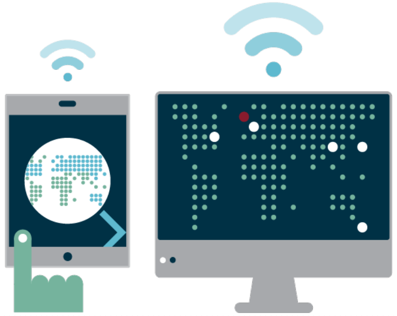
"Paying with data" I Very narrow exceptions

- No "payment with data" in case personal data is processed **exclusively**

    1. for the provision of the digital product / for the fulfilment of the service obligation (Art. 6 para. 1 p. 1 lit. b GDPR)

    2. for the fulfilment of legal obligations to identify (Art. 6 para. 1 p. 1 lit. c, e GDPR)

Follow-up problem: Further use, change of purpose
Directives apply - **pre-contractual** information obligations?



"Paying with data" I Legal consequences

Digital Content Directive

- Conformity requirements, obligation to update
- Warranty rights: Supplementary performance, withdrawal / termination
- Strict requirements for changes to digital products (Art. 19 DCD)

Omnibus Directive

- Pre-contractual information obligations
- Right of withdrawal

03 Omnibus Directive

Omnibus Directive I What is at stake?

Complements and updates four key consumer protection directives:

- 93/13/EEC – Unfair Contract Terms Directive
- 98/6/EC - Price Indication Directive
- 2005/29/EC – UCP (Unfair Commercial Practices) Directive
- 2011/83/EU - Consumer Rights Directive

Main Issues:

- Stricter and at the same time new sanctions for breaches of consumer protection
- New transparency requirements
- Revision of the Consumer Rights Directive

"An overhaul of consumer law, to give it 'more teeth' and bring it up to date"

Omnibus Directive I New sanction possibilities

- Introduction of "*effective, proportionate and dissuasive sanctions*" in particular for widespread infringements or widespread infringements with pan-EU dimension.
- Sample Sanction Criteria:
  - *Nature, gravity, extent, duration of the infringement*
  - *Consumer countervailing measures*
  - *Repeated infringement*
  - *Financial benefits / losses avoided*
- Violation of three of the amended Directives may result in GDPR-style penalties: For "widespread infringements", the maximum penalty may not be less than 4% of the Company's (or group's) annual revenue (or € 2 million if no revenue can be determined – think of start-up companies!).

"Consumer authorities will finally get teeth to punish the cheaters. It cannot be cheap to cheat".

Omnibus Directive I What is new in terms of content?

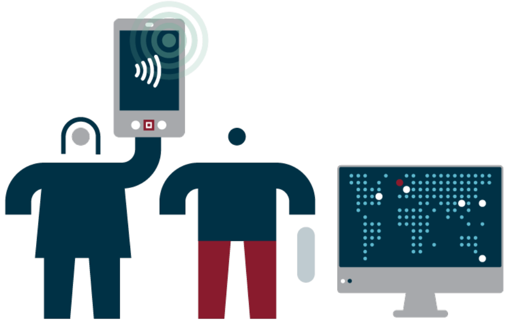
1. **"Paying with data"**
   → Provisions for contracts against payment also apply to the provision of personal data (information obligations, right of withdrawal, etc.)

2. **Introduction of 'digital services'**
   → Leads to stricter legal consequences in case of revocation for many digital products!

3. **New transparency and information obligations**
   → e.g. specifically for online marketplaces

When in doubt as to whether a contract is for services or for the supply of digital content, the (broader) provisions on the right of withdrawal for services apply.

Examples of new pre-contractual information requirements



Algorithm Transparency M

Which ranking parameters?
How are they weighed?
Who can influence this and how?

User reviews

Is it checked whether user reviews are authentic and by which mechanisms?

Seller M

Who is the seller?
Is the seller an entrepreneur?
Do consumer protection regulations apply?

M Only for online marketplaces

Examples of new pre-contractual information requirements

Product features
Information regarding interoperability & functionality of digital content and goods with digital elements

Pricing details
Is the price personalized?
Where was the price before any reduction?
Does "no price" really mean "free"?

Seller contact
Who is the actual seller and how can they be reached (by phone & email)?

04 Digital Content Directive

Digital Content Directive I Key objectives

- Establish common rules on certain requirements for contracts between traders and consumers for the provision of digital content or a digital service, in particular rules on:
  - **Conformity** of digital content or digital services
  - **Remedies** for non-compliance with these conformity requirements
  - **Stricter requirements for** the modification of digital content or digital services
- **And again:** extending the scope to contracts without payment of a price, but "against data".

Digital Content & Digital Services

As a rule:

- **One-time provision:** digital content
- **Continuing obligations:** digital services

Digital Content

"Data created and delivered in digital form."

Digital services

"Services that allow the consumer to create, process, store, or access data in digital form, or services that allow the sharing of or other interaction with data uploaded or created in digital form by the consumer or other users of the relevant service."

Digital Content Directive I Subjective conformity requirements

Digital content and services must **subjectively**

- Meet the contractual requirements and have all the other characteristics described regarding
  - Quantity and quality,
  - Functionality,
  - Compatibility,
  - Interoperability;
- Be fit for an **agreed contractual purpose;**
- Be supplied with all **accessories, instructions, including installation instructions** and support instructions, in accordance with the contract; and
- Be **updated** as **specified in** the **contract**

Digital Content Directive I Objective conformity requirements

In addition, the digital content and services must objectively

- Be **fit for the purposes** for which digital content/digital services of the **same type are normally used**, taking into account any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;

- Be of the quantity and have the qualities and performance features, including in relation to **functionality, compatibility, accessibility, continuity and security, which** are **normal for** digital content/digital services of the same type, taking into account a public statement made by or on behalf of the trader, in particular in advertising;

- Be supplied together with all **accessories and instructions that** the consumer can reasonably expect; and

- Comply with any **trial or preview version of** the digital content or digital services made available by the trader prior to the conclusion of the contract.

Negative deviation from objective requirements requires explicit and separate agreement.

Digital Content Directive I Obligation to actively maintain digital content and services

Update obligation as part of the objective conformity requirements:

Providers shall ensure that consumers are informed of and provided with **updates**, including security updates, necessary to ensure the conformity of the digital content or service.

Duration:

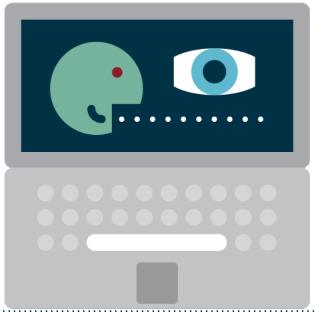
- **In the case of supply over a period of time:**
  during the contract period or the supply period

- **In the case of one-off supply:**
  for the period during which consumers can reasonably expect it

Digital Content Directive I Warranty claims

In the event of a defect in the digital product, consumers have the following **remedies**:

- Supplementary performance
- Price reduction
- Contract termination
- (compensation for damages / reimbursement of expenses)



05 Sale of Goods Directive

Distinction between DCD and SGD

Criteria for the applicability of the Sale of Goods Directive:

1. Digital element (= digital content / digital service) is contained in or associated with goods,
2. Goods cannot fulfil their functions without these digital contents or digital services **and**
3. Digital content or services are provided under a contract for the sale of those goods.

Relevance of distinction?

- Liability: SGD = Seller; DCD = Company
- SGD does not include provisions on modifications
- Duration of update obligations

Sale of Goods Directive I Goods with digital elements

- Special provisions for goods with digital elements
- A good with digital elements is an item that contains or is connected to digital content or digital services in such a way that it cannot perform its functions without that digital content or digital services.
- When purchasing a good with digital elements, it is to be assumed in case of doubt that the trader's obligation includes the provision of digital content or digital services.

Special provisions for goods with digital elements

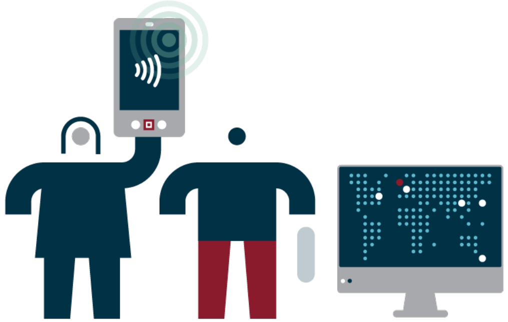
Sale of Goods Directive I Goods with digital elements

Goods with digital elements (Recital 15 SGD):

If, for example, a **smart TV were advertised as including a particular video application**, that video application would be considered to be part of the sales contract. This should apply regardless of whether the digital content or digital service is pre-installed in the good itself or has to be downloaded subsequently on another device and is only inter-connected to the good.

For example, a **smart phone** could come with a standardized pre-installed application provided under the sales contract, such as an alarm application or a camera application.

Another possible example is that of a **smart watch**. In such a case, the watch itself would be considered to be the good with digital elements, which can perform its functions only with an application that is provided under the sales contract but has to be downloaded by the consumer onto a smart phone; the application would then be the inter-connected digital element.

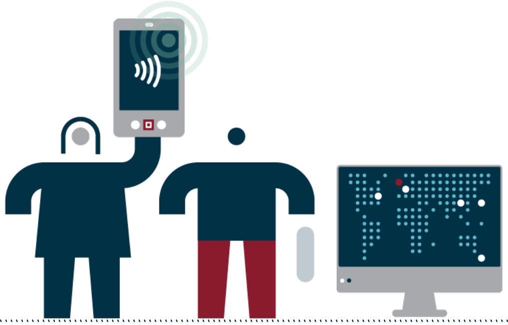


06 Data protection meets contract law

"Data portability" according to the Digital Content Directive

- "Data portability" of personal data is governed by the GDPR
- "Data portability" of non-personal data: newly regulated in Art. 16 DCD

The trader shall provide the consumer, at the consumer's request, with the [content that is not personal data and that the consumer provided or created when using the digital product provided by the trader] [after termination of the contract]. [...] The content must be provided to the consumer free of charge, without hindrance by the trader, within a reasonable period of time and in a common and machine-readable format.



"Data portability" after New Deal

Personal data

Art. 20 GDPR

- Structured, common and machine-readable format
- Upon request

Other data

Art. 16 DCD

- Common and machine readable format
- Upon request after termination of the contract
- Within reasonable time

?

- After termination of contract?
- "reasonable time"?
- Duration of the hold?
- Scope of the right and its exceptions?

07 German Act on Fair Consumer Contracts

German Act on Fair Consumer Contracts I Subscriptions

Automatic contract extension (auto-renewal) only possible…

- if the continuing obligation is extended for an indefinite period and
- the consumer can terminate at any time with a notice period of no more than one month.

In addition, the consumer's **notice period is to be a maximum of one month** in the future, instead of the current three months.

What does that mean in practice?

Monthly subscriptions can remain unchanged.

For **annual subscriptions**, the following applies:

- **Either:** Explicit contract extension (e.g. via pop-up)
- **Or:** Implicit contract extension for an indefinite period, with a termination period of one month (practically this means annual subscriptions turn into monthly subscription after the first year)

The new rules will apply companies from **1 March 2022**

German Act on Fair Consumer Contracts I Cancellation Button

- Similar to the clearly labelled "buy now" button, a "low-threshold cancellation option" will be required (Sec. 312k BGB).

- The trader must ensure that the consumer can make a declaration on the website regarding the ordinary or extraordinary termination of a contract (...) that can be concluded on the website via a **termination button**. The cancellation button must be legibly labeled with nothing other than the words **"Cancel contracts here"** or with a similarly appropriate, unambiguous wording.

- The **consumer must be able to store the termination notice**, together with the date and time of submission, on a durable medium for verification purposes, and the trader must immediately confirm the termination to the consumer in text form.

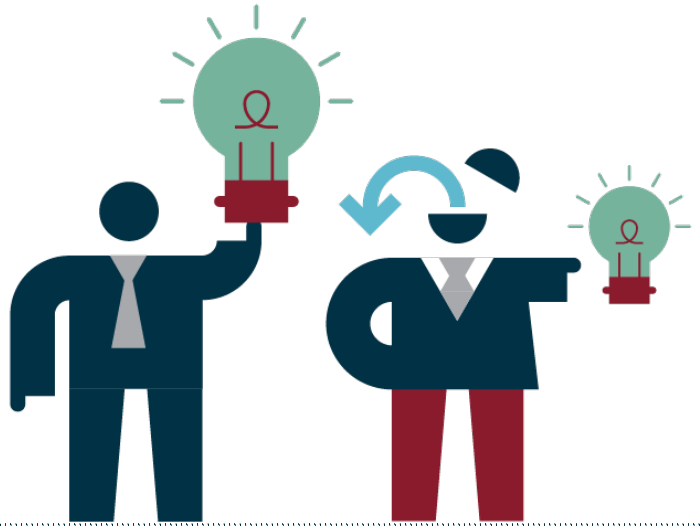
- If the trader **does not comply** with these obligations and does not provide the cancellation button properly, the consumer can **terminate for convenience at any time with no notice period**.

The new obligations will affect companies from **1 July 2022**

08 Actions

Actions

1. Get familiar with all new regulations and create awareness regarding new issues under (digital) consumer laws
2. Classify all products and services (especially under the aspect of "payment with data" and "goods with digital elements")
3. Review and adapt signup and checkout flows (especially under the aspect of "payment with data")
4. Review/redraft T&C
5. Update marketing materials and statements and the product descriptions
6. Design new policies (e.g. for updates)
7. Monitor EU-wide developments!



Any questions?

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