

## New directive on contracts for the sale of goods



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Numbers show that only 10% of EU retailers sell online to consumers in other EU countries, while differences in national contract laws are listed as one of the top barriers thereto.<sup>1</sup> Consumers on the other hand are worried about non-delivery of their order, delivery of a wrong or damaged product, or repair and replacement of a faulty product. In this regard, an inquiry showed that only 38 % of EU consumers felt confident to buy online from another EU country.<sup>2</sup>

In December 2015, the European Commission therefore proposed new contract law rules on the sale of goods, aiming for a high level of consumer protection and a clear legal framework for traders. In the meantime, the directive in question was published as Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods ('the Sale of Goods Directive').<sup>3</sup> The Directive will enter into force on 11 June 2019. Simultaneously, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services<sup>4</sup> ('the Digital Services Directive') was published. The main purpose of these directives is the same: to ensure that all market participants enjoy smooth access to cross-border sales of goods and digital content or services.

As to their respective scopes, goods with digital elements, i.e. goods with incorporated or interconnected digital content or services that would not function in the absence thereof (e.g. smartphones, smart TVs, smart fridges or smart watches), are regulated under the Sale of Goods Directive and not under the Digital Services Directive. Tangible media serving exclusively as carrier of digital content will fall under the Digital Services Directive (e.g. DVDs, USB sticks, ...). This update focuses on the Sale of Goods Directive.

Some contractual elements of the sale of goods were already harmonized by past EU legislative acts. As such, delivery conditions, distance or off-premises contracts, precontractual information requirements and the right of withdrawal, had already been fully harmonized.<sup>5</sup> Other contractual elements were only subject to minimum harmonization,<sup>6</sup> allowing Member States to go beyond

Union standards. This gave rise to legal disparities, ultimately leading to lost opportunities.

The new Sale of Goods Directive aims to fix these shortcomings by imposing maximum harmonisation. As a result, Member States can in principle no longer deviate from the requirements.

The Sale of Goods Directive imposes mandatory rules on the conformity of goods with the contract, remedies in case of lack of conformity, the modalities of these remedies, as well as commercial guarantees. Initially, the European Commission started off with high ambitions and presented a proposal with inter alia a two-year long reversal of the burden of proof (during which non-conformity is presumed to have been present at delivery), no notification limit (within which the consumer has to inform the seller of the defect), a termination right even in cases of minor defects, and an increased period of protection for second-hand goods (two years instead of one). However, none of these measures made it into the final directive (at least not in their initial form). The Sale of Goods Directive ultimately puts forward more moderate rules but will still have an impact on Member States' legislation (including Belgium) and businesses' conduct.

#### - Conformity with the contract

The Directive states that for the goods to be considered in conformity with the contract, a set of both objective and subjective requirements must be fulfilled.<sup>7</sup> The rules in question are much more detailed than those in its predecessor, Directive 1999/44/EC, and the current Belgian legislation based thereupon.<sup>8</sup> As such, the Sale of Goods Directive not only requires conformity with the description given thereto, but explicitly refers to conformity in relation to type, quantity and quality, as well as features such as durability, functionality, compatibility, interoperability, and security as well as accessories, instructions, and updates.<sup>9</sup> The latter is particularly novel and relates to goods with digital elements, where the supply of updates is required for as long as the consumer may reasonably expect, or – in case of a continuous supply of digital content/services – for at least two years, extendable by contract.<sup>10</sup> If however the consumer fails to install the supplied updates, the seller is no longer liable.<sup>11</sup>

#### - Seller's liability and burden of proof

As likewise imposed by the old Directive 1999/44/EC (and hence by Belgian legislation)<sup>12</sup>, the seller is liable for any lack of conformity that already existed at the time of delivery and becomes apparent within two years.<sup>13</sup> New is however that a lack of conformity that becomes apparent within one year of delivery is presumed to have existed at the time of delivery.<sup>14</sup>

This one year long reversal of the burden of proof is a significant extension compared to the six month period imposed by the old directive and Belgian law.<sup>15</sup>

Here, some exceptions are made to the principle of maximum harmonisation: on the one hand,

Member States can extend the seller's liability period and the period of presumption of non-conformity<sup>16</sup>; on the other hand, Member States can still require consumers to inform the seller of the lack of conformity within two months after its discovery<sup>17</sup>.

#### - Remedies

In addition to laying down the remedies of repair and replacement and the modalities thereof (which were essentially already embedded in the old directive)<sup>18</sup>, the Sale of Goods Directive likewise provides for a detailed description of situations which give consumers the right to terminate the contract<sup>19</sup> and the modalities thereof<sup>20</sup>. The list logically includes situations where the seller has not fulfilled their obligation to repair or replace in accordance with the Sale of Goods Directive, but also explicitly refers to situations with a severe defect or where a non-conformity re-appears after a repair or replacement attempt. As a result, if defects are recurrent or severe, consumers do not have to wait for the seller to fix the problem and can directly opt for a price reduction (while keeping the product) or for termination of the contract (while returning the product for a full refund). Contrary to the Commission's initial proposal however, the consumer is not entitled to terminate the contract in case of minor defects. <sup>21</sup>

#### - Commercial guarantees <sup>22</sup>

The Sale of Goods Directive firstly clarifies that more extensive guarantee statements made in advertising take precedence over those depicted in the commercial guarantee statement. Furthermore, a commercial guarantee statement must be provided to the consumer on a durable basis. Under the old directive, this only had to be provided if requested by consumer<sup>23</sup>. The information to be included in the guarantee statement is also designated more clearly than in the past.

The Sale of Goods Directive still leaves room for the Member States to regulate matters regarding commercial guarantees not regulated by the Sale of Goods Directive, e.g. in which language the commercial guarantee statement should be made.

#### - Enforcement <sup>24</sup>

The Sale of Goods Directive concludes by stating that Member states should allow one or more bodies to take action before courts to ensure that the provisions will be enforced. Explicit reference is made to public bodies or their representatives, consumer organisations, or professional organisations.

Member states have until 1 July 2021 to transpose the measures in question into national law.<sup>25</sup> Those measures should apply from 1 January 2022.<sup>26</sup>

- 1 See [https://ec.europa.eu/info/sites/info/files/factsheet\\_digital\\_contracts.pdf](https://ec.europa.eu/info/sites/info/files/factsheet_digital_contracts.pdf)(lastvisited15April 2019).
- 2 See [https://ec.europa.eu/info/sites/info/files/digital\\_contracts\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/info/files/digital_contracts_factsheet_en.pdf)(lastvisited15April 2019).
- 3 Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods , amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ 2019 L 136/28.
- 4 Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ 2019 L 136/1.
- 5 Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC, OJ 2011 L 304/64.
- 6 Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees , OJ 1999 L 171/12.
- 7 Articles 6-7 of the Sale of Goods Directive.
- 8 Art. 1649b is of the Belgian Civil Code.
- 9 Articles 6-7 of the Sale of Goods Directive.
- 10 Article 10(2) of the Sale of Goods Directive.
- 11 Article 7 (4) of the Sale of Goods Directive.
- 12 Art. 1649quater Civil Code.
- 13 Article 10 of the Sale of Goods Directive.
- 14 Article 11 of the Sale of Goods Directive.
- 15 Art. 5 of Directive 1999/44/EC; Art. 1649quater of the Belgian Civil Code. 16 Articles 10(3) and 11(2) of the Sale of Goods Directive respectively.
- 17 Article 12 of the Sale of Goods Directive.
- 18 Articles 13-14 of the Sale of Goods Directive.
- 19 Article 13 (4) of the Sale of Goods Directive.
- 20 Article 16 of the Sale of Goods Directive.
- 21 Article 13 (5) of the Sale of Goods Directive.