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# New contract law for sale of digital products to consumers

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## Introduction

The German legislature has implemented two EU directives into German law:

- the EU Sale of Goods Directive; and
- the EU Digital Content and Services Directive.

The implementation of the EU Digital Content and Services Directive introduces a quasi-new comprehensive contract law for the provision of digital products to consumers in sections 327 to 327u of the German Civil Code.

## What is a "digital product"?

Section 327(1) of the Civil Code defines "digital products" as:

- digital content – data that is created and made available in digital form (eg, computer programs, video files, audio files, music files, digital games, electronic books and other electronic publications or apps); and
- digital services – services that:
  - enable the consumer to create, process or store data in a digital form, or access such data; or
  - enable the consumer and other users of the service to share data uploaded or created in a digital form, or carry out other interactions with such data.

Examples of digital services include:

- the offering of software as a service;
- the offering of video or audio content; or
- games offered for shared use in a cloud-computing environment and in social media.

However, the terms are deliberately defined broadly so that digital offerings are covered regardless of their specific technical design.

## Scope of new section of Civil Code

According to section 327(1) of the Civil Code, the new regulations apply whenever a contract is concluded between an entrepreneur and a consumer regarding a digital product for which the consumer must pay a price. In addition to money, "payment of a price" also includes the digital presentation of a value, such as an e-coupon, or the provision of personal data by the consumer. However, the latter does not include the provision of personal data that the entrepreneur requires in order to fulfil the contract with the consumer.

Pursuant to section 327(4) and (5) of the Civil Code, the application of the new regulations also extends to contracts in which a digital product is manufactured according to the consumer's specifications and, with some restrictions, to contracts in which the digital content is provided on physical media.

There are certain exceptions to the application of the new regulations. For example, contracts for financial services or medical treatment do not fall within the scope of their application.

Pursuant to section 327a of the Civil Code, package contracts do fall within the scope of the law. "Package contracts" in this sense are consumer contracts in which, in addition to the provision of digital products, other goods or services are provided – for example, a video streaming service offered together with the sale of an electronic product. Furthermore, the regulations also apply to consumer contracts for goods that contain digital products or are connected to them. In both cases, however, the provisions generally apply only to those parts of the contract that relate to the digital products.

## New rights and obligations

The regulations introduce specific rights and obligations for the provision of digital products, including the following.

### **Duty to update**

Pursuant to section 327f of the Civil Code, the entrepreneur must ensure that, where a digital product is made available on a permanent basis, any updates necessary for the digital product to remain in conformity with the contract are provided to the consumer. In all cases of non-permanent provision of the digital product, such updates must be provided at least for a period that the consumer might expect based on the nature and purpose of the digital product and taking into account the circumstances and nature of the contract. Furthermore, the consumer must be informed about the updates.

### **Defects**

Pursuant to section 327e of the Civil Code, a new concept of "defects" applies, according to which the digital product is only free of product defects if it meets the subjective and objective requirements and, if integration is to be performed, the integration requirements as well. "Integration" in this context means the integration of a digital product into the consumer's digital environment (eg, hardware, software or network connections of all kinds), so that the digital product can be used in accordance with the requirements.

#### *Subjective requirements*

In order to satisfy the subjective requirements, the digital product must be:

- of the quality agreed in the contract, which includes compatibility and interoperability;
- suitable for the use assumed under the contract; and
- provided with accessories, instructions and after-sales service as agreed in the contract.

Further, the updates agreed in the contract must be provided during the relevant period under the contract.

#### *Objective requirements*

To meet the objective requirements, the digital product must:

- be suitable for ordinary use;
- be of a quality (including, for example, functionality, compatibility and security) that is customary for digital products of the same type and that the consumer might expect, taking into account the nature of the digital product;
- correspond to the nature of a test version or preview, if the entrepreneur has provided the consumer with such a preview before the conclusion of the contract;
- be provided with all accessories and instructions that the consumer would expect to receive; and
- be provided in the latest available version, unless otherwise agreed.

Further, the consumer must be provided with the necessary updates and must be informed about them.

#### *Integration requirements*

The digital product meets the integration requirements if:

- the integration has been carried out properly; or
- if this is not the case, the lack of integration is not due to improper integration by the entrepreneur or a defect in the instructions provided by the entrepreneur.

### **Shift in burden of proof**

Pursuant to section 327k of the Civil Code, subject to certain exceptions, a shift in the burden of proof applies, according to which in the case of a permanently provided digital product, it is presumed that the digital product has a defect if such a defect becomes apparent during the provision period. In the case of digital products provided on a non-permanent basis (eg, a one-time provision or several individual provisions), it is presumed that the digital product was defective at the time of provision if the digital product shows such a defect within one year of its provision.

This presumption shall not apply if:

- the consumer's digital environment was not compatible with the technical requirements of the digital product at the relevant time; or
- the entrepreneur is unable to make such a determination because the consumer fails to cooperate in this regard and the technical means intended to carry out such determination would cause the least interference possible for the consumer.

However, this exception only applies if the entrepreneur has clearly informed the consumer about the technical requirements for the digital environment and the consumer's necessary cooperation before the conclusion of the contract.

### **Change to digital products**

Pursuant to section 327r of the Civil Code, in the case of a permanent provision of a digital product, the entrepreneur may only make changes to the digital product if:

- the contract provides for this possibility and contains a valid reason for it;
- the consumer does not incur any additional costs as a result; and
- the consumer is informed clearly and comprehensibly about the change.

Changes that are necessary to maintain the contractual condition are excluded.

If the changes restrict the consumer's access options or impair usability, the consumer must also be informed of this within a reasonable period before the change is made by means of a durable medium.

### **Application date**

The new regulations must be applied to all consumer contracts that relate to the provision of a digital product and are concluded on or after 1 January 2022.

The new regulations must also be applied to consumer contracts that are concluded before 1 January 2022 and relate to the provision of a digital product if the digital product is provided on or after 1 January 2022. Section 327r of the Civil Code, however, will only apply if the contract with the consumer for the provision of the digital product was concluded on or after 1 January 2022.

### **What must entrepreneurs do?**

Entrepreneurs that sell digital products to consumers must adapt them and their provision to the new legal regulations. They must also adapt their contract stipulations – in particular, the general terms and conditions – to the new legal requirements.

Entrepreneurs that sell digital products intended for sale to consumers to other entrepreneurs (eg, retailers or intermediaries) are also

affected by the new regulations.

Thus, the entrepreneur that ultimately distributes the digital product to the consumer may – according to section 327u of the Civil Code – claim from its distribution partner the expenses they incur if a consumer asserts their rights (eg, due to a defect, untimely provision or breach of the obligation to update) if the distribution partner is responsible for:

- the late provision or breach of the obligation to update; or
- the defect, if it was already present at the time of handover to the entrepreneur.

This provision shall apply mutatis mutandis to the other contractual partners in the distribution chain.

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