

News in sales law to the first

COMPREHENSIVE CHANGES IN WARRANTY LAW AS EARLY AS JANUARY 1, 2022

Executive Summary

- The Federal Government has just published a draft law¹ that implements the so-called "Sale of Goods Directive"² into national law. Among others, this will lead to significant changes in general sales contract law.
- The amendments to the provisions of Sections 433 ff. German Civil Code (Bürgerliches Gesetzbuch – BGB) serve the full harmonisation of sales law within the European Union and are intended to create more legal certainty for buyers and sellers.
- Basically, the amendments strengthen buyer's rights under warranty law. However, sellers can certainly counter these within the permissible framework.

With our GSK Updates on the implementation of the Sales of Goods Directive, we inform you about innovations that are being discussed in sales law in the current legislative process. In Part 1, we begin with the planned adjustments to warranty law. In the next days, we will inform you about changes in the sale of goods with digital elements and new requirements for guarantees in the sale of consumer goods in our GSK Updates.

¹ Draft of a 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.

² 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 goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

1. Introduction

The partial harmonisation of the sales law within the member states of the European Union through the Consumer Goods Directive³ is now followed by the full harmonisation through the Sale of Goods Directive as adopted in 2019.

The Directive intends to close gaps in the harmonisation and to ensure the functioning of the digital European single market. To implement the Sale of Goods Directive, the German legislator has now presented a draft law with comprehensive changes also in the general sales law, which are to come into force as early as January 1, 2022.⁴

In the following, you will receive an overview of the planned, fundamental changes in the general warranty law of the sales law. We illustrate which implementation measures sellers can already prepare for. Practical adjustments are required in particular by the new definition of material defects (cf. below under 2.) and changes for the duty of cure (cf. for the reimbursement of expenses below under 3.). There are also new provisions for the providing of the objects by the buyer for cure and for the cost burden in case of a (new) delivery (cf. below under 4.).

Our GSK updates represent the current status of the proposed legislation. We will provide information on any adjustments in the legislative process on an ongoing basis in the coming months.

³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

⁴ Art. 3 Draft of a 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.



2. Extended concept of material defects

The new formulation of material defects will be one of the essential changes within the general warranty law for sales contracts. Up to now, a material defect exists if the actual condition of the sold item deviates from the agreed condition (Section 434 (1) sentence 1 BGB). Only if such an agreement does not exist, other criteria are relevant (Section 434 (1) sentence 2 BGB).

In the future, a material defect shall already exist if the object does not meet the subjective and objective requirements and, if applicable, the assembly requirements. Accordingly, the seller can no longer rely solely on what has been agreed between the contracting parties. Irrespective of this, he should in future ensure that the sold product meets further requirements.

According to the subjective requirements, the item must not only have the agreed quality.

Firstly, it must also be suitable for the use presumed under the contract (Section 434 (2) sentence 1 no. 2 BGB-draft). Therefore, in order to reduce defects, it is advisable to specify the use assumed under the contract in the purchase agreement or in product descriptions. In order to prevent contrary statements by buyers, sellers must make clear that the object is not suitable for certain uses before conclusion of the agreement.

Secondly, the object must be delivered with the agreed accessories and instructions (including assembly and installation instructions) (Section 434 (2) sentence 1 no. 3 BGB-draft). Unlike before, it is not only the defectiveness of the assembly instructions that leads to a defect, but also their absence. Therefore, sellers have to ensure that the agreed instructions and accessories are delivered. In order to avoid any doubts about completeness, the accessories and instructions to be supplied can be listed conclusively before the conclusion of the contract.

Furthermore, (additional) objective requirements apply: (i) the thing must be suitable for normal use and (ii) be of

a quality that is usual for objects of the same kind and can be expected by the buyer. The customer's expectations are also influenced by advertising statements and other information, e.g. on labels of the seller but also of the supplier and the manufacturer (Section 434 (3) no. 2 lit. b BGB-draft). If the goods do not comply with such specifications, the seller is liable. In addition, (iii) the quality of the object of sale must correspond to a sample or specimen provided in advance and (iv) the item must be handed over with accessories, packaging and instructions that can be expected (Section 434 (3) BGB-draft). These provisions can be waived. If sellers want to avoid warranty claims for non-fulfilment of the objective requirements, it is advisable to exclude their applicability and to make explicit deviating agreements on these points. In the case of contracts for the purchase of consumer goods, however, the exclusion of these provisions is only possible under further stringent requirements.⁵

Anyone who in future wants to comply with the objective requirements for an object cannot avoid to regularly check whether the quality of his products (still) corresponds to the usual quality for products of the same kind. If changes to the products cannot or should not be made, contracts have to be adapted (Section 434 (3) BGB-draft).

By the way, the definition of defects with regard to assembly requirements corresponds to the previous law.

3. Reimbursement of expenses for the installation of purchased goods

The harmonisation of the law on sales also entails adjustments to the rules on cure.

If the purchased object is defective, the buyer can – until now – only claim reimbursement of installation and removal costs if he is not aware of the defect of the item at the time of its installation (i.e. after the conclusion of the contract) (Section 439 (3) sentences 1, 2 in conjunction with Section 442 (1) sentence 1 BGB). If the defect remains undetected during installation due to gross negligence, the buyer is currently only entitled to claim for

⁵ Section 476 (1) sentence 2 BGB-draft.



reimbursement of expenses if the seller had fraudulently concealed the defect or had given a guarantee for the quality of the product.

After implementation of the Sale of Goods Directive, the buyer shall in future always be entitled to reimbursement of expenses if the item *was* installed "*before the defect became apparent*".⁶ The reimbursement of expenses shall no longer be excluded if the defect remained unknown to the buyer due to gross negligence. The provision on the buyer's knowledge of defects under the current Section 442 BGB will no longer be applicable within the framework of Section 439 (3) BGB-draft.

The application of Section 442 BGB will be completely excluded for purchase of consumer goods (Section 475 (3) sentence 2 BGB-draft).

4. Provision of the item for subsequent performance and costs for (new) delivery

In favour of the seller, the buyer shall in future not only have the responsibility, but shall be expressly obliged to make the (defective) product available to the seller for inspection beforehand in case of a request for cure (Section 439 (5) BGB). Thus, the seller might examine the alleged defects of the object and might remedy the defects (if desired).

Sellers can explicitly point out this obligation in the future and thus prevent any unjustified warranty claims from the start.

If, however, the buyer opts for the supply of a defect-free item within the scope of cure, the seller must expressly take back the defective item at his own expenses according to the draft law.

5. Outlook

We will see to what extent the current draft law will be subject to changes until the required implementation of the Sale of Goods Directive on July 21, 2021. Since it already comprises the required implementations of the Sales of Goods Directive, no fundamental adjustments are to be expected in the course of the legislative process.

Therefore, sellers can already prepare necessary adjustments to their contracts and identify sales processes in order to adapt them in time with the entry into force of the new provisions after the end of the year.

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⁶ Section 439 (3) sentence 1 BGB-draft; cf. Art. 14 (3) Sale of Goods Directive.



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