

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 (Text with EEA relevance)

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PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

Acting in accordance with the ordinary legislative procedure⁽²⁾,

Whereas:

- (1) In order to remain competitive on global markets, the Union needs to improve the functioning of the internal market and successfully meet the multiple challenges posed today by an increasingly technology-driven economy. The Digital Single Market Strategy lays down a comprehensive framework facilitating the integration of the digital dimension into the internal market. The first pillar of the Digital Single Market Strategy tackles fragmentation in intra-EU trade by looking at all major obstacles to the development of cross-border e-commerce, which constitutes the most significant part of cross-border business-to-consumer sales of goods.
- (2) Article 26(1) and (2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, which is to comprise an area without internal frontiers in which the free movement of goods and services is ensured. Article 169(1) and point (a) of Article 169(2) TFEU provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market. This Directive aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.

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- (3) Certain aspects concerning contracts for the sale of goods should be harmonised, taking as a base a high level of consumer protection, in order to achieve a genuine digital single market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises ('SMEs').
- (4) E-commerce is a key driver for growth within the internal market. However, its growth potential is far from being fully exploited. In order to strengthen Union competitiveness and to boost growth, the Union needs to act swiftly and encourage economic actors to unleash the full potential offered by the internal market. The full potential of the internal market can only be unleashed if all market participants enjoy smooth access to cross-border sales of goods including in e-commerce transactions. The contract law rules on the basis of which market participants conclude transactions are among the key factors shaping business decisions as to whether to offer goods cross-border. Those rules also influence consumers' willingness to embrace and trust this type of purchase.
- (5) Technological evolution has led to a growing market for goods that incorporate or are inter-connected with digital content or digital services. Due to the increasing number of such devices and their rapidly growing uptake by consumers, action at Union level is needed in order to ensure that there is a high level of consumer protection and to increase legal certainty as regards the rules applicable to contracts for the sale of such products. Increasing legal certainty would help to reinforce the trust of consumers and sellers.
- (6) Union rules applicable to the sales of goods are still fragmented, although rules on delivery conditions and, as regards distance or off-premises contracts, pre-contractual information requirements and the right of withdrawal have already been fully harmonised by Directive 2011/83/EU of the European Parliament and of the Council⁽³⁾. Other key contractual elements, such as the conformity criteria, the remedies for a lack of conformity with the contract and the main modalities for their exercise, are currently subject to minimum harmonisation under Directive 1999/44/EC of the European Parliament and of the Council⁽⁴⁾. Member States have been allowed to go beyond the Union standards and introduce or maintain rules that ensure that an even higher level of consumer protection is achieved. In doing so, they have acted on different elements and to different extents. Thus, national provisions transposing Directive 1999/44/EC significantly diverge today on essential elements, such as the absence or existence of a hierarchy of remedies.
- (7) Existing disparities can adversely affect businesses and consumers. Pursuant to Regulation (EC) No 593/2008 of the European Parliament and of the Council⁽⁵⁾, businesses directing their activities to consumers in other Member States are required to take account of the mandatory consumer contract law rules of the consumer's country of habitual residence. As those rules differ among Member States, businesses can be faced with additional costs. Consequently, many businesses might prefer to continue trading domestically or only export to one or two Member States. That choice of minimising exposure to costs and risks associated with cross-border trade results in lost opportunities for commercial expansion and economies of scale. SMEs in particular, are affected.

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- (8) While consumers enjoy a high level of protection when they purchase from abroad as a result of the application of Regulation (EC) No 593/2008, legal fragmentation also negatively affects consumers' levels of confidence in cross-border transactions. While several factors contribute to this mistrust, uncertainty about key contractual rights ranks prominently among consumers' concerns. This uncertainty exists independently of whether or not consumers are protected by the mandatory consumer contract law rules of their own Member State in the event that sellers direct their cross-border activities to them, or of whether or not consumers conclude cross-border contracts with sellers without the respective seller pursuing commercial activities in the consumer's Member State.
- (9) While online sales of goods constitute the vast majority of cross-border sales in the Union, differences in national contract laws equally affect retailers using distance sales channels and retailers selling face-to-face and prevent them from expanding across borders. This Directive should cover all sales channels, in order to create a level playing field for all businesses selling goods to consumers. By laying down uniform rules across sales channels, this Directive should avoid any divergence that would create disproportionate burdens for the growing number of omni-channel retailers in the Union. The need for retaining consistent rules on sales and guarantees for all sales channels was confirmed in the Commission's Fitness Check on consumer and marketing law published on 29 May 2017, which also covered Directive 1999/44/EC.
- (10) This Directive should cover rules applicable to the sales of goods, including goods with digital elements, only in relation to key contract elements needed to overcome contract-law related barriers in the internal market. For this purpose, rules on requirements for conformity, remedies available to consumers for a lack of conformity of the goods with the contract and on the main modalities for their exercise should be fully harmonised, and the level of consumer protection, as compared to Directive 1999/44/EC, should be increased. Fully harmonised rules on some essential elements of consumer contract law would make it easier for businesses, especially SMEs, to offer their products in other Member States. Consumers would benefit from a high level of consumer protection and welfare gains by fully harmonising key rules.
- (11) This Directive complements Directive 2011/83/EU. While Directive 2011/83/EU mainly lays down provisions regarding pre-contractual information requirements, the right of withdrawal from distance and off-premises contracts and rules on delivery and passing of risk, this Directive introduces rules on conformity of the goods, remedies in the event of a lack of conformity and modalities for their exercise.
- (12) This Directive should only apply to tangible movable items that constitute goods within the meaning laid down in this Directive. Member States should therefore be free to regulate contracts for the sale of immovable property, such as residential buildings, and its main components intended to constitute a major part of such immovable property.
- (13) This Directive and Directive (EU) 2019/770 of the European Parliament and of the Council⁽⁶⁾ should complement each other. While Directive (EU) 2019/770 lays down rules on certain requirements concerning contracts for the supply of digital content or digital services, this Directive lays down rules on certain requirements concerning

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contracts for the sale of goods. Accordingly, in order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for traders of digital content or digital services, Directive (EU) 2019/770 applies to the supply of digital content or digital services, including digital content supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content. In contrast, this Directive should apply to contracts for the sale of goods, including goods with digital elements which require digital content or a digital service in order to perform their functions.

- (14) The term ‘goods’ as provided for under this Directive should be understood to include ‘goods with digital elements’, and therefore to also refer to any digital content or digital service that is incorporated in or inter-connected with such goods, in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. Digital content that is incorporated in or inter-connected with a good can be any data which are produced and supplied in digital form, such as operating systems, applications and any other software. Digital content can be pre-installed at the moment of the conclusion of the sales contract or, where that contract so provides, can be installed subsequently. Digital services inter-connected with a good can include services which allow the creation, processing or storage of data in digital form, or access thereto, such as software-as-a-service offered in the cloud computing environment, the continuous supply of traffic data in a navigation system, or the continuous supply of individually adapted training plans in the case of a smart watch.
- (15) This Directive should apply to contracts for the sale of goods, including goods with digital elements where the absence of the incorporated or inter-connected digital content or digital service would prevent the goods from performing their functions and where that digital content or service is provided with the goods under the sales contract concerning those goods. Whether the supply of the incorporated or inter-connected digital content or digital service forms part of the sales contract with the seller should depend on the content of this contract. This should include incorporated or inter-connected digital content or digital services the supply of which is explicitly required by the contract. It should also include sales contracts which can be understood as covering the supply of specific digital content or a specific digital service because they are normal for goods of the same type and the consumer could reasonably expect them given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in previous links of the chain of transactions, including the producer. 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 standardised 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

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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. This should also apply if the incorporated or inter-connected digital content or digital service is not supplied by the seller itself but is supplied, under the sales contract, by a third party. In order to avoid uncertainty for both sellers and consumers, in the event of doubt as to whether the supply of the digital content or the digital service forms part of the sales contract, the rules of this Directive should apply. Furthermore, ascertaining a bilateral contractual relationship, between the seller and the consumer, of which the supply of the incorporated or inter-connected digital content or digital service forms part should not be affected by the mere fact that the consumer has to consent to a licensing agreement with a third party in order to benefit from the digital content or the digital service.

- (16) In contrast, if the absence of the incorporated or inter-connected digital content or digital service does not prevent the goods from performing their functions, or if the consumer concludes a contract for the supply of digital content or a digital service which does not form part of the contract concerning the sale of goods with digital elements, that contract should be considered to be separate from the contract for the sale of the goods, even if the seller acts as an intermediary of that second contract with the third-party supplier, and could fall within the scope of Directive (EU) 2019/770 if the conditions of that Directive are met. For instance, if the consumer downloads a game application from an app store onto a smart phone, the contract for the supply of the game application is separate from the contract for the sale of the smart phone itself. This Directive should therefore only apply to the sales contract concerning the smart phone, while the supply of the game application should fall under Directive (EU) 2019/770, if the conditions of that Directive are met. Another example would be where it is expressly agreed that the consumer buys a smart phone without a specific operating system and the consumer subsequently concludes a contract for the supply of an operating system from a third party. In such a case, the supply of the separately bought operating system would not form part of the sales contract and therefore would not fall within the scope of this Directive but could fall within the scope of Directive (EU) 2019/770, if the conditions of that Directive are met.
- (17) For the purpose of legal clarity this Directive should lay down a definition of a sales contract and also clearly define its scope. The scope of this Directive should also cover contracts for goods that are yet to be produced or manufactured, including under the consumer's specifications. Furthermore, an installation of the goods could fall within the scope of this Directive if the installation forms part of the sales contract and has to be carried out by the seller or under the seller's responsibility. Where a contract includes elements of both sales of goods and provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract within the meaning of this Directive.
- (18) This Directive should not affect national law to the extent that the matters concerned are not regulated by this Directive, in particular with regard to the legality of the goods, damages and general contract law aspects such as the formation, validity, nullity or effects of contracts. The same should apply in relation to the consequences of the