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Impact of the new digital purchase law on connected vehicle services

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Connected and intelligent vehicles are drivers of the digital transformation. The European legislator has reacted to the advancing digitalization and increased the level of consumer protection in the digital space with a series of legal acts. The following article is intended to provide an overview of the current innovations and to show what impact they may have on connected vehicle services.

I. The new purchase law

The year 2022 is dedicated to consumer protection. Since the beginning of the year, among other things, various significant changes have come into force in the German Civil Code (Bürgerliches Gesetzbuch - BGB).

1. "Digital" purchase law

As of January 1, 2022, the "Act Governing the Sale of Goods with Digital Elements and Other Aspects of the Sales Contract" and the "Act Implementing the Directive on Certain Aspects of Contract Law Concerning the Provision of Digital Content and Digital Services" apply. They each transpose EU directives¹ aimed at ensuring a high level of consumer protection within the EU.

The laws bring significant changes, particularly in the law on the sale of consumer goods, but also in general sales law. For example, new terms are used in the German Civil Code: Among other things, a distinction is now made between (analog) *goods*, *goods with digital elements*, and *digital products* as an umbrella term for digital content and digital services, for which different requirements will apply in the future. The *consumer contract for digital products* is a new type of contract in the German Civil Code: The newly added Section 327 et seq. BGB n. F. now contain regulations for a separate (consumer goods) sales law for digital products with their own warranty rights and some special features.

A new definition of material defects also applies to all purchased goods. According to this, an item is only free of material defects if it *cumulatively* meets the subjective requirements, the objective requirements and the assembly requirements.

Furthermore, an extended definition of material or product defects applies to both goods with digital elements and digital products. According to this, sellers also have an obligation to update their products. In the future, a product will only be free of defects if the consumer is informed about updates for the period of the product's usual use and application and if these updates are provided. In the future, a warranty case can therefore arise even if the goods were free of defects when the risk was transferred - a paradigm shift in warranty law.

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2. Omnibus Directive

As of May 28, 2022, the provisions of two other laws² apply, which are the so-called "omnibus" Directive³. The resulting changes are not limited to the German Civil Code (BGB) and the Introductory Act to the German Civil Code (EGBGB) (in particular the right of withdrawal). They also bring significant changes to the Unfair Competition Act (UWG) and the Trade Regulation Act (GewO). At the same time, the Price Indication Ordinance was fundamentally revised.

Violations of consumer protection regulations can now be sanctioned and punished as administrative offenses. The law provides for fines of up to EUR 50,000, or even higher if the annual EU turnover exceeds EUR 1.25 million, but not more than 4% of the annual turnover or up to 2 million EUR in the event that the turnover cannot be determined, Art. 246e Section 2 EGBGB⁴. This further increases the pressure on companies to check and ensure compliance with consumer law.

3. Fair consumer contracts

In addition, the *Fair Consumer Contracts Act* (partially) came into force on October 1, 2021. With this law, the German legislator has established additional consumer protection requirements that go beyond the requirements of EU law. The most important regulations relate to term agreements in general terms and conditions and termination rules. The amendments to termination rules apply from March 1, 2022, and the obligation to implement a termination button for contracts concluded online that relate to continuing obligations from July 1, 2022.

II. Effects of the legal innovations on Connected Vehicle Services

These innovations are having a significant impact on automakers, who are increasingly expanding their range of digital offerings not only to make the driving experience safer, more efficient and more comfortable, but also to create their own digital (product) world around the connected vehicle. *Connected Vehicle Services* (hereinafter also referred to as "Services") play a central role in this context, providing a wide range of additional digital functions and services for vehicles that can be connected (connected or smart cars). In most cases, the prerequisite for activating Connected Vehicle Services is setting up a user account and, if necessary, downloading a corresponding mobile app that can be used to manage the services. Finally, authentication is required and linking the vehicle to an account, which regularly requires the vehicle identification number (VIN) and possibly other verification parameters to be entered. In some cases, the services are initially

provided free of charge and then against payment of a price for a certain period, usually for one to three years (subscription model). Alternatively, they are provided permanently in return for a one-off payment of a fixed price. Paid Connected Vehicle Services can be booked by the provider on the move or online - for example, on a platform set up specifically for this purpose. The functions typically offered can be divided into the following categories: infotainment⁵, safety⁶ & service⁷, navigation⁸, comfort⁹ and electromobility.¹⁰

Depending on the offer, the consumer may be faced with the special situation that the contractual partner is not the seller of the vehicle but a third party, e.g. the "digital subsidiary" of the car manufacturer.

The comprehensive changes in the law mainly affect B2C matters, i.e. those involving consumers. Due to their predominant importance, the following explanations are limited to aspects applicable to consumer contracts and do not include B2B matters.

1. Application of the Digital Purchase Law Connected Vehicle Services

The first question is whether the provisions of the digital purchase law apply to connected vehicle services. On the one hand, the new regulations only apply to certain goods and services ("digital products", Section 327 (1) BGB). On the other hand, the question arises as to the conditions under which the regulations also apply to Connected Vehicle Services provided free of charge.

a) Digital products and differentiation from other cases

Under the rules of the new "digital" purchase law, a distinction must be made between (i) digital products and (ii) goods with digital elements. Different legal requirements apply to the respective areas. While digital products are governed by the provisions of the digital sales law pursuant to Section 327 et seq. BGB, the new regulations do not apply to goods with digital elements. Instead, the (previous) general law on sales, Section 327a (3) BGB, applies here. Practical demarcation issues arise in particular when combining the aforementioned different elements.

Goods with digital elements are goods that contain digital products or elements or are connected to them in such a way that the goods cannot be used for their intended purpose

without the digital elements (functional criterion). They are "inseparably" connected with the goods and are a mandatory part of them. In addition, the digital elements must be provided as part of the goods and services under the (same) purchase contract (contractual criterion).¹¹ If digital content and/or services are combined with goods in such a way that they are not goods with digital elements in the aforementioned sense, the requirements of the new digital sales law apply, but only for the digital content and services, but not the goods provided in parallel (keyword: "package contracts").¹²

The classification of Connected Vehicle Services leads to practical delimitation difficulties if the services are provided together with the vehicle under the (same) contract.

A classification according to the focus of the respective services¹³ is of little help. The individual services differ from manufacturer to manufacturer. The lack of uniform definitions and differences in the use of terms further complicate the distinction.

However, the following principles can help with the initial classification:

Connected Vehicle functions and services that are not concerned with the driving function of the vehicle itself, but with supporting the driving experience, are more likely to be classified as (separate) digital products - even if provided under a single contract with the vehicle. Examples would be special navigation services and map updates as well as infotainment services.

If these are basic functions in the vehicle, without which the driving function is directly impaired, they are unlikely to be separate digital products. Such functions and elements are often more likely to be classified as part of the product ("vehicle"), which as a whole is therefore subject to the provisions of the previous law of sale as a product with digital elements. One example may be software that is responsible for digitally controlled drive and assistance systems in the vehicle. Depending on its function, it is connected to the vehicle in such a way that the vehicle cannot fulfill its primary function ("safe driving") without it. Other examples could include functions for displaying information on the charging process/state of an e-car in the vehicle without which safe operation of the vehicle would no longer be possible. The same is likely to apply in the future to control elements that enable autonomous driving.

Most services offered in the Connected Vehicle Services environment are (currently) more likely to "support" the driving experience. In addition, these are often provided separately - e.g., app-based - and on the basis of separate terms of use. Thus, the classification as a digital product will often be obvious. However, it remains difficult

to draw a clear distinction. It requires consideration of the specific individual case. This applies in particular to cases in which a product (here: the vehicle) can be operated without digital components and can therefore fulfill its primary function, but only develops its full range of functions with a digital component.¹⁴

It can be said that the closer a digital function is to the driving function, the more likely it is that there will be a link within the meaning of Section 327a (3) BGB. It will be up to practice and case law to carefully observe how the regulations, which are open to interpretation, are defined. However, the existing legal uncertainties will further promote the practice of subscription-based distribution models (provision for a limited period of time).

b) Gratuitousness

While in the "old" purchase law it was not clearly regulated under which conditions free of charge goods and services are subject to the respective provisions¹⁵, the scope of application of the new Section 327 et seq. BGB is conceivably broadly defined. Pursuant to Section 327 (3) BGB, the provisions also apply if, within the scope of the consumer contract, the provision is made without payment, but the consumer provides or undertakes to provide the trader with personal data which the trader uses for purposes other than providing the service owed under the contract or fulfilling legal obligations incumbent upon him (cf. Section 312 (1a) sentence 2 BGB). It is not important that the consumer actively transmits the personal data. Even allowing the processing shall be sufficient.

At present, Connected Vehicle Services are probably (still) mainly provided free of charge. A large amount of personal data is processed as part of the provision.¹⁶ In the case that the corresponding data records are linked to a FIN, the prevailing opinion is that these are also personal data.¹⁷ Providers often use the personal data obtained in the course of providing the services for secondary purposes, i.e., all such purposes that are not directly related to the provision of services or the fulfillment of legal obligations. These may be advertising purposes (direct marketing, up-selling), but also product development and improvement purposes.

In these cases, at first glance, there is some evidence in favor of the applicability of Section 327 et seq. BGB. It is questionable what role data protection law should play. In any case, it should not depend on the permissibility of the data protection law.¹⁸ However, one could critically question whether the applicability of Section 327 et seq. BGB is also appropriate, for example, in cases where the provider has secured a separate (data protection) agreement of the data subject under data protection law for special purposes (e.g. sending a newsletter).¹⁹ Further interesting

questions of delimitation arise in connection with the constituent element of "legal obligations", including in the case of the use of personal data for the purposes of product monitoring or quality management. Here, too, it will be up to practice and case law to further sharpen the legal requirements.

2. Applicable requirements

As already discussed, consumer contracts for digital products are a new type of contract in the BGB. The newly introduced Section 327, 327a-327u BGB as well as the obligation to update in Section 327e and f BGB establish a special warranty liability for the entrepreneur.

a) Performance obligations of the contractor

The entrepreneur is obliged to provide the digital product. The rights in the event of failure to provide or delayed provision are modeled on the general law on disruption of performance and regulated in detail in Section 327c BGB.²⁰ Digital products is the generic term for digital content and digital services. Section 327 (2) sentence 1 BGB defines digital content as data that is created and provided in digital form. Examples of digital content include computer programs, applications ("apps"), video, audio and music files, digital games, electronic books and other electronic publications listed.²¹ Digital services are legally defined in Section 327 (2) sentence 2 BGB and essentially relate to everything that can be done with data in the digital space.²² Software-as-a-service, the sharing of video or audio content and other forms of file hosting, word processing or games offered in a cloud computing environment and on social media are cited as examples.²³

Connected Vehicle Services do not fit easily into these categories. On the one hand, Connected Vehicle Services, as described in section 1. a) above, are designed very differently. Secondly, there are no reliable criteria for a clear distinction between digital content and digital services.²⁴ A legally secure classification therefore seems hardly possible at present. For Section 327 et seq. BGB, this should not be decisive for the time being, since the regulations, with the exception of Section 327b (3) and (4) BGB, consistently use the generic term "digital products" and a classification in detail does not appear to be necessary. The situation is different for the provisions on the right of withdrawal, where the classification as digital content or digital service can make a considerable difference (see below under 3.).

b) Warranty rights

According to Section 327d BGB, the entrepreneur must provide the digital product free of product and legal defects. As in Section 434 et seq. BGB, the new definition of

defect applies: According to Section 327e (1) sentence 1 BGB, the digital product is free of product defects if the subjective and objective requirements as well as the integration requirements are cumulatively met at the relevant time.

Pursuant to Section 327e (2) BGB, subjective requirements essentially relate to contractual agreements, particularly with regard to functionality, compatibility and interoperability. Objective requirements, according to Section 327e (3) BGB, relate to suitability for ordinary use and the quality that is customary for products of the same type and that the consumer can expect, taking into account the nature of the digital product, including accessibility, continuity and security. Pursuant to Section 327e (3) sentence 2 BGB, objective quality also includes requirements that the consumer may expect according to public statements made by the entrepreneur or any other person in the distribution chain, in particular according to such statements made in advertising or on the label.

Subjective and objective requirements are now on an equal footing. Simple negative Agreements on quality no longer have priority over objective requirements.²⁵ Pursuant to Section 327h BGB, deviations from objective requirements can now only be made if the consumer was informed before submitting his contractual declaration that a specific characteristic deviates from the objective requirements and this deviation was expressly and separately agreed in the contract.

With regard to the relevant point in time for the existence of product defects, Section 327e (1) sentences 2 and 3 BGB differentiates according to whether a one-time or permanent, i.e. time-limited, provision is owed. In the case of one-time provision, the time of provision shall be decisive in accordance with Section 327e (1) sentence 2 BGB. If the Contractor is obliged by the contract to provide the Product on a permanent basis, the Product must be free of defects throughout the provision period.

Integration requirements are governed by Section 327e (4) BGB, which essentially requires a functioning installation in the consumer's digital environment (hardware, software or network connections of all kinds) that enables the digital product to be used as intended.²⁶

Section 327i BGB provides an overview of the rights to which the consumer is entitled in the event of defects: Claim for subsequent performance according to Section 327l BGB, claim for termination of the contract according to Section 327m para. 1, 2, 4 and 5 or price reduction according to Section 327n BGB and claim for damages according to Section 280 (1) or Section 327m (3) BGB as well as reimbursement of expenses pursuant to Section 284 BGB. The individual requirements are regulated in the respective provisions.

The innovations have the particular consequence that providers must allow

themselves to be held to advertising statements about the respective service within the scope of the warranty to an even greater extent than before. A sense of proportion and a functioning process for reviewing and approving advertising statements are necessary here to avoid unpleasant surprises. Additional uncertainty is brought about by the strengthening of the objective expectation for the determination of the deficiency→.

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liability. If it is unclear what the customer's objective expectations of the product or goods are, deviating agreements may be made in individual cases. However, strict requirements apply to these, Section 327h BGB, e.g., explicit and clearly highlighted notices in the registration process in which any "deviations" are described precisely and which the consumer recognizably accepts (e.g., by clicking a separate checkbox or pressing a corresponding button).

c) Updating obligation

One of the key innovations is the obligation to provide updates for digital products. Pursuant to Section 327f BGB, the entrepreneur is obligated to provide and inform about updates that are necessary to maintain the contractual conformity of the digital product. The obligation to provide updates considerably expands the scope of the entrepreneur's obligations. Not only must the product be free of defects at a certain point in time, but it must also be kept free of defects for a longer period of time.²⁷ If the contractor does not comply with this obligation, the product does not meet the objective requirements in accordance with Section 327e (3) No. 5 BGB and is defective.

In the case of Connected Vehicle Services, which are usually provided for a certain period of time, appropriate updates, in particular security updates, must therefore be made available during the provision period (useful life). In addition, the user must be made aware of the consequences of non-installation and sufficient installation instructions must be provided to avoid further liability consequences. Against this background, it seems advisable to explain the respective process steps to the user in detail, including the legal consequences, in the terms of use of the respective services.

In the case of one-time provision, the period pursuant to Section 327f (1) sentence 2 no. 2 BGB depends on how long the consumer can expect corresponding updates based on the type and purpose of the digital product and taking into account the circumstances and the type of contract.

For most connected vehicle services, which tend to be provided on a subscription basis for a fixed period of time, this is irrelevant. For functions or services provided permanently with the vehicle, the determination is difficult. With specific reference to motor vehicles and devices integrated into them, such as navigation systems or entertainment electronics, the explanatory memorandum to the law refers to the "usual period of use". This is difficult to determine, especially in the vehicle environment, and leads to considerable legal uncertainty. Pursuant to Section 327h BGB, it is still possible to make deviating provisions in individual cases. This is unlikely to be of any help in the standardized connected vehicle services business, as deviating agreements as part of the terms of use are regularly not possible but instead will require the explicit and separate consent of the user.²⁸ These circumstances will further promote the expansion of the "subscription" models that are already widespread today.

Attention should be paid to the regulations on the limitation period for claims arising from a breach of the obligation to update, which, pursuant to Section 327j (3) BGB, cannot expire before twelve months after the end of the period of time relevant for the updating obligation shall become statute-barred. Since it is difficult to determine the relevant provision period in the case of a one-time provision (see above), this logically leads to further uncertainties in determining the start of the limitation period.

The respective criteria will have to be substantiated by case law.

3. Right of withdrawal

Since connected vehicle services can be regularly "purchased" online or via mobile apps, the "e-commerce" regulations apply to distance contracts, among other things. Since May 28, 2022, new regulations on the right of withdrawal have applied specifically to digital products, which are of great practical importance.

In distance selling, the user is generally entitled to a right of withdrawal. Companies regularly have an interest in allowing the right of withdrawal to expire prematurely. In the area of digital sales law, the conditions under which this is possible depend on whether digital services or digital content are involved, Section 356 (4) and (5) BGB. Depending on whether the provision of personal data (No. 1 in each case) or the payment of a price (No. 2 in each case) is owed as consideration, the requirements vary additionally.

Pursuant to Section 356 (4) BGB, the expiration of the right of withdrawal requires, in addition to other requirements (including the user's express consent to begin providing the service), that the digital service within the meaning of Section 362 BGB has been provided in full. In the case of a continuing obligation, the service should

not be provided in full when it is first made available.²⁹ This is different for digital content: Pursuant to Section 356 (5) BGB, the commencement of performance of the contract is sufficient.

Many Connected Vehicle Services will be classified as digital services. The focus is often not on the provision of digital elements such as data or individual content (e.g., videos), but on the use of a connected service (e.g., remote services). In such cases, it will often not be possible to bring the right of withdrawal to an end prematurely in a meaningful way. Corresponding considerations only seem to make sense in cases where the digital services are either time-limited and do not exceed 14 days, or where digital content is provided. The latter is conceivable in the case of connected vehicle services, but requires concrete consideration of the individual case. In view of the strict requirements under Section 356 (4) and (5) BGB, providers of Connected Vehicle Services will carefully consider how important the early extinguishment of the right of withdrawal really is, especially in the case of services that are free of charge and can be terminated at any time, where the risk of withdrawal is likely to be significantly lower in practice.

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4. Fair consumer contracts and cancellation button

Since July 1, 2022, vendors must provide their customers with a cancellation button in the event of a continuing obligation, among other things (Section 312k BGB). The cancellation button must enable both ordinary and extraordinary cancellations on the website or in the app. The cancellation button must be clearly labeled with nothing other than the words "Cancel contracts here" or with an appropriately clear wording. It must lead the consumer directly to a confirmation page where specific information is included or can be provided. The button must be permanently available and easily accessible. Companies have further information and documentation obligations.

Since many of the Connected Vehicle services available today can be canceled at any time and appropriate mechanisms such as an "Unsubscribe" button in the app menu already exist for this purpose, the consequences of the innovations seem manageable at first glance.³⁰ However, challenges arise, among other things, where processes for the revocation (see above) and the cancellation button are implemented in parallel. A single button for both is unlikely to meet the requirements on a regular basis. Care must be taken to ensure that the processes are clearly separated from one another and transparent (e.g., through clear regulations in the terms of use). There is also

the question of where and in what form the button should be implemented, e.g. in a connected vehicle app, and which alternative labels may still be permissible. Here, too, case law will have to further tighten up the legal requirements.

III. Conclusion

The implementation of the innovations poses major challenges not only for providers of connected vehicle services. They affect all companies that sell digital products. The introduction of the new regulations breaks new legal ground. Important questions will only be clarified by case law in the coming years.

At the same time, the innovations present providers with major practical challenges. The "mere" adaptation of contractual texts is often not enough. Rather, the new regulations require a comprehensive analysis of the respective services and the implementation of concrete additional measures, such as the provision of regular updates along with sufficient information on this.

Previous consulting practice has shown that not everything that is legally possible is also practical. The new requirements must be implemented quickly - if they have not already been implemented - not least in order to reduce the risk of fines and time-consuming and costly warnings from those affected and associations.

As is so often the case, the early involvement of the legal departments in the company remains the essential success factor for a legally secure setup - so that the journey starts in the right direction right away!

1)

Directive (EU) 2019/770 on certain contractual aspects of the provision of digital content and digital services ("Digital Content Directive") and Directive (EU) 2019/771 on certain contractual aspects of the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC ("Sale of Goods Directive").

2)

The "Act Amending the Civil Code and the Introductory Act to the Civil Code in Implementation of the EU Directive on Better Enforcement and Modernization of Union Consumer Protection Rules and Repealing the Regulation Transferring Responsibility for the Implementation of Regulation (EC) No. 2006/2004 to the Federal Ministry of Justice and Consumer Protection" and the "Act to Strengthen Consumer Protection in Competition and Trade Law."

- 3) Directive (EU) 2019/2161 on better enforcement and modernization of consumer protection rules. The "Onmibus" Directive adapts the Consumer Rights Directive (2011/83/EU), the Price Indication Directive (98/6/EC), the Unfair Commercial Practices Directive (2005/29/EC) and the Unfair Contract Terms Directive (93/13/EEC).
- 4) Also part of the New Deal for Consumers is the adopted Directive on representative actions for the protection of consumers' collective interests (2020/1828/EC), which introduces collective redress mechanisms for consumers (implementation deadline: 25.6.2023).
- 5) e.g.: Entertainment offerings such as music streaming and games.
- 6) e.g.: Accident and breakdown management, telediagnosis, maintenance and repair.
- 7) e.g.: Vehicle monitoring and status, remote services, parking aids, voice assistance.
- 8) e.g.: Live Traffic, map updates.
- 9) e.g.: Personal Assistant Services.
- 10) e.g.: Charging process, charging stations, optimized driving.
- 11) BT-Drs. 19/27653, p. 46.
- 12) Cf. Directive (EU) 2019/770 ("Digital Content Directive"), recital 33.
- 13) Cf. fn. 5-10 above.

- 14) Cf. *Fries*, in: BeckOGK, as of: 1.4.2022, § 327a BGB, marginal no. 14.
- 15) Cf. *Busch*, in: BeckOGK, as of 1.6.2021, BGB § 312, marginal no. 11.
- 16) On the implications for data protection law: *Kahl*, RAW 2021, p. 80.
- 17) C.f. Joint Statement by the Independent Data Protection Authorities of the Federal and State Governments and the German Association of the Automotive Industry (VDA), Jan. 26, 2015, available at <https://datenschutz.hessen.de/sites/datenschutz.hessen.de/files/content-downloads/Gemein-sames%20Papier%20DSK%20und%20VDA.pdf> (accessed July 14, 2022); further, *Kahl*, RAW 2021, p. 80.
- 18) Cf. BT-Drs. 19/27653, p. 40.
- 19) See above, i.e. BT-Drs. 19/27653, p. 40; not clearly, however, Directive (EU) 2019/770 ("Digital Content Directive"), recital 33.
- 20) Cf. BT-Drs. 19/27653, p. 50.
- 21) Cf. Directive (EU) 2019/770 ("Digital Content Directive"), recital 19.
- 22) Cf. *Schrader*, JA 2022, pp. 1, 3.
- 23) Cf. Directive (EU) 2019/770 ("Digital Content Directive"), recital 19.
- 24) *Föhlisch*, in: BeckOK IT-Recht, as of 1.4.2022, § 327 BGB, marginal no. 28.
- 25) *Schrader*, JA 2022, pp. 1, 3.

- 26) *Schrader*, JA 2022, pp. 1, 3.
- 27) *Felsch/Kremer/Wagener*, MMR 2022, pp. 18, 20.
- 28) BT-Drs. 19/27653, p. 62.
- 29) *Föhlisch*, in: BeckOK IT-Recht, Status: 1.4.2022, BGB § 356, Rn. 17.2.
- 30) The new provisions on the (permissible) term of such contracts, which have already come into force in 2021, will not be discussed here further.