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Harmonising Consumer Protection in the digital context: the EU Digital Content Directive in Austria

The Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (the "**Digital Content Directive**") must be transposed into national law by 1 July 2021. Consequently, this will be the first legal framework specifically established for the supply of digital content and services in Austria and at the EU-level.

By seeking **full harmonisation** of its content, the Digital Content Directive aims at achieving a high level of consumer protection throughout the European Union on 1 January 2022, when the national implementations become applicable at the latest. The member states were hardly given any leeway for national deviations and its provisions are, in general, mandatory. This should also benefit entrepreneurs / traders according to the language of the Directive, as transaction costs due to divergent national requirements will be reduced and thus the supply of digital content and services simplified.

Scope of Application

The Digital Content Directive shall be applicable to contracts:

- concluded between businesses and consumers
- on the supply of digital content or digital services
- where the consumer either pays money or provides personal data as consideration, unless such personal data is only processed for the purpose of supplying the contractual object or compliance with legal requirements.

Digital content is to be understood as data which are produced and supplied in digital form, such as videos, music, e-books or computer programmes. **Digital Services** either allow the consumer to create, process, store or access data in digital form or share any other interaction with uploaded or created data in digital form, as in the case of apps, cloud services, social media networks or streaming services.

Digital content and services are **not covered** by the Digital Content Directive where they are incorporated in or inter-connected with tangible movable items in such a way that the absence of such would prevent the goods from performing their functions. Such "**goods with digital elements**" like smartphones or tablets are subject of the Sale of Goods Directive (EU) 2019/771.

Key Provisions

In essence, the provisions of the Digital Content Directive concern

- the supply of digital content and services,
- their conformity and
- remedies for the failure to supply or the lack of conformity.

Traders are required to **supply** the digital content or service to the consumer **without undue delay** after the contract was concluded, unless agreed otherwise. They also bear the burden of proof to demonstrate that the supply has been carried out according to the legal requirements. Such supply is considered to be fulfilled as soon as the consumer is enabled to use the digital content or service in accordance with the contract terms and no further action is required by the trader. In the event of failure to supply, the consumer is entitled to demand supply within a reasonable period of grace and, upon expiry of such, to terminate the contract.

Once supplied, digital content and services not only must conform to requirements that were **expressly agreed upon** inter alia in regard of the description, quantity, quality, functionality, compatibility and other features. They also must comply with requirements in regard of such features, that are **normal** for digital content or services of the same type and may **reasonably be expected** by the consumer. This applies similarly to the purposes of use, accessories, instructions and updates.

Following the known system of warranty remedies, consumers are entitled to demand **repair or replacement, proportionate price reduction and termination of contract** in the event of lack of conformity. Price reduction is not available where no money has been paid as consideration. Moreover, the Digital Content Directive stipulates an **obligation to install updates**. In the event the consumer fails to install provided updates within a reasonable time, the trader will not be held liable for any lack of conformity resulting solely from the lack of the relevant update.

The **warranty period** will last for at least two years in the case of a single act of supply, although precisely this aspect will not be fully harmonised. In cases of continuous supply, the warranty period will last over the entire contract period. **Innovations** are introduced by the Digital Content Directive regarding the **inversion of the burden of proof**, according to which it is the trader, who must prove conformity. While the time period for the inversion will be extended to a year in regard of a single act of supply, it will be applicable during the entire contract period where supply takes place continuously.

Outlook

The Digital Content Directive has not yet been transposed into Austrian law. Either an amendment of the Consumer Protection Act (KSchG), respectively the General Civil Code (ABGB) or the promulgation of a separate law implementing the Digital Content Directive and the Sale of Goods Directive has been envisaged. Against the backdrop that the Austrian civil law repeatedly distinguishes between contracts for pecuniary interest and gratuitous contracts, stakeholders are keen to see in particular how the Austrian legislator will handle contracts, where the "payment" is made with personal data.

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For more information about our services, please contact:



Georg Kresbach

Partner

georg.kresbach@wolftheiss.com

T: +43 1 51510 1090



Elisabeth Zhang

Associate

elisabeth.zhang@wolftheiss.com

T: +43 1 51510 1094

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Wolf Theiss
Schubertring 6
AT – 1010 Vienna

www.wolftheiss.com