

# Digital Consumer Contract Law And New Technologies

## Implementation Of The Digital Content Directive In Austria

by **Brigitta Zöchling-Jud\***

**Abstract:** This report deals with the implementation of the Digital Content Directive and the Sale of Goods Directive in Austria. It aims to give an overview of the current legislative progress regarding the transposition and the national status quo of

warranty regulations as well as consumer protection regulations. Finally, selected contents of the Austrian draft for the implementation of the directives are introduced and discussed.

**Keywords:** Digital Content Directive; Sale of Goods Directive; implementation; consumer protection law; warranty law; Austrian law

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### A. Status of the legislative process

1 The implementation of the Digital Content Directive (DCD)<sup>1</sup> and the simultaneous implementation of the Sale of Goods Directive (SGD)<sup>2</sup> also pose

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1 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

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 [2019] OJ L136/28.

certain challenges for the Austrian legislator. It has to be taken into account that the status of the implementation has – partly due to the COVID-19 pandemic – not yet progressed as far as originally planned by the Ministry of Justice<sup>3</sup>.

2 There is an inter-ministerial draft for the implementation of both directives, which was discussed by a working group and adapted accordingly during the spring and summer of 2020, before it was adopted in September 2020. In addition to several university professors, the working group included different stakeholders, such as the Austrian Chamber of Commerce, the Association of Consumer Information, the Bar Association, and the Judiciary. The draft is neither published nor politically agreed upon yet. Therefore, the following report has to be limited to the main features of its content, with the *caveat*, of course, that in the end everything might be different.

3 This report is based on the status of the legislative progress in November 2020.



has always triggered the warranty obligation of the provider, irrespective of the contract qualification in the individual case (sales contract, service contract, rental contract, etc)<sup>14</sup>. Case law on warranty for digital contents goes back to the 1980s<sup>15</sup>.

- 8 Finally, the implementation of the Consumer Sales Directive (CSD) 1994/44/EC<sup>16</sup> in 2002 has to be taken into account. At the time, the Austrian legislator decided to implement the directive in principle into the Austrian Civil Code (ABGB), namely by reforming the general warranty provisions<sup>17</sup>. The definition of lack of conformity, the reversal of the burden of proof, legal remedies, the limitation period, and trader's redress are regulated in the Austrian Civil Code (ABGB). Only the mandatory nature of general warranty obligations in favour of the consumer as well as some specifics, such as the incorrect installation of goods or the requirements for contractual guarantees, were implemented in the Consumer Protection Act (KSchG)<sup>18</sup>.
- 9 The CSD has therefore been over-implemented; the provisions apply irrespective of the existence of a consumer contract, irrespective of the type of contract, irrespective of whether the contract relates to a mobile or immobile object and irrespective of the physical nature of the object<sup>19</sup>. This means that

the acquisition of dysfunctional digital content is already subject to the general warranty provisions under current Austrian law.

## C. Preliminary considerations for the implementation of the DCD and the SGD

- 10 When the development and content of the DCD and the SGD became apparent at the European level, preliminary considerations were already made in Austria on how the two directives should be implemented. Naturally, it was considered to implement the directives into the Austrian Civil Code (ABGB) just like the CSD at the time and thus to over-implement them<sup>20</sup>. Once again, the idea of a uniform warranty law for everyone and everything seemed tempting. In this sense, the current government programme also sets as a goal the avoidance of legal fragmentation through the implementation of EU legislative acts in existing laws and mentions in particular the SGD and the DCD<sup>21</sup>.

## D. The plans of the Ministry of Justice

- 11 However, the plans of the Ministry of Justice point in a completely different direction. It is planned to create an independent Consumer Warranty Act (VGG), to implement both the SGD and the DCD. The provisions in the Austrian Civil Code (ABGB) are to be adapted only slightly in order to avoid inconsistencies with the planned Consumer Warranty Act (VGG). In contrast, the regulations of the DCD concerning the supply of digital content and the legal consequences in the event of delayed supply are to be implemented in the Consumer Protection Act (KSchG). The idea is to merge these provisions with the corresponding implementing provisions of the Consumer Rights Directive<sup>22</sup>, because they are dogmatically assigned

14 C.f. Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 71; Brigitta Zöchling-Jud, 'Internet der Dinge' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 276; Cf Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 71.

15 Rudolf Reischauer, '§ 923 ABGB' in Peter Rummel and Meinhard Lukas (eds), *ABGB-Kommentar* (4th edn, Manz 2018) para 17; 1 Ob 531/77; 8 Ob 625/87; 5 Ob 504/96.

16 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 [1999] OJ L171/12.

17 Rudolf Welsler, 'Das neue Gewährleistungsrecht' [2001] *ecolex* 420; Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] *GPR* 115; Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] *VbR* 4.

18 Rudolf Welsler and Brigitta Zöchling-Jud, *Bürgerliches Recht II* (14th edn, Manz 2015) 96.

19 Brigitta Zöchling-Jud, 'Die Richtlinienansätze der Kommission über digitale Inhalte und Fernabsatzkaufverträge aus österreichischer Sicht' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt?* (Manz 2016) 10-11; Brigitta Zöchling-

Jud, '§§ 922-933b ABGB' in Andreas Kletečka and Martin Schauer (eds), *ABGB-ON: Kommentar* (2nd edn, Manz 2016) para 5.

20 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105.

21 Austrian Government Programme 2020 – 2024 „Aus Verantwortung für Österreich“ 31.

22 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of

to the law of delay and not warranty law. The same applies to provisions on contractual guarantees, which are already regulated in the Consumer Protection Act (KSchG) and are only to be adapted to the requirements of the new directive.

- 12 Despite the resulting legal fragmentation, I believe that the plans of the Ministry of Justice are, in principle, to be welcomed. The following aspects speak in favour of creating an independent Consumer Warranty Act (VGG)<sup>23</sup>:
- 13 First of all, it should be taken into consideration that both directives are fully harmonising and therefore the Member States are generally not allowed to deviate from the provisions of the directives. This considerably limits the Member States' scope for implementation, not only in terms of content, but also with regard to the wording used in the directives<sup>24</sup>. Any divergence of the national legislator from the wording of the directive triggers at least an enormous need for explanation to the European Commission, in the extreme case one risks an infringement proceeding. This applies in particular, if extensive and detailed directive requirements are only implemented through general clauses. It is therefore not surprising that in recent years the Austrian legislator has - quite pragmatically - begun to transpose directives with practically identical wording in special acts, as it was done for timesharing, package travel, as well as distance and off-premise contracts<sup>25</sup>.
- 14 If we now take a closer look at the wording of the directives, they are characterized by numerous definitions and detailed regulations, which contradicts an implementation in the Austrian Civil

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the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council [2011] L304/64.

- 23 See also Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105-107.
- 24 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 105; Brigitta Zöchling-Jud, 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht' in Johannes Stabentheiner, Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019) 213.
- 25 Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 103-104.

Code (ABGB). The general warranty law is composed of scarcely ten sections (and some additional warranty provisions for animals). And even though the importance of warranty and digitalisation should by no means be underestimated, it would seem strange if the Austrian Civil Code (ABGB) suddenly had to insert fifty or more provisions. A break in style would be inevitable<sup>26</sup>.

- 15 In addition, both at the level of the European Commission as well as in Austria, a certain political resistance to so-called "gold plating", i.e., over-implementation of directives, is becoming apparent<sup>27</sup>.
- 16 Finally, it must be taken into account that many provisions of the directives do not appear suitable for implementation beyond the consumer sector. This applies, for example, to the definition of non-conformity and, in particular, to the requirements for deviation from the objective requirements of contract conformity<sup>28</sup>.

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26 On the reasons that contradict an implementation in the Consumer Protection Act (KSchG) cf Nikolaus Forgó and Brigitta Zöchling-Jud, 'Einleitung' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 106; Explanatory notes to the Consumer Warranty Act Draft 4.

27 Frank Burmeister and Erik Staebe, 'Grenzen des sog Gold Plating bei der Umsetzung europäischer Richtlinien in nationales Recht' [2009] EuR, 444, 456; Doris Liebwald, 'Europäische Rechtsbegriffe und österreichische Rechtssprache: Die Transformation von EU-Richtlinien in nationales Recht' [2013] JRP 294, 306; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2015) 215 final 8; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2016) 855 final 11; Barbara Postl, 'Deregulierung von Gold Plating' [2020] ecolex 150, 151-153.

28 See also Brigitta Zöchling-Jud, 'Verträge über digitale Inhalte' in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 212; Brigitta Zöchling-Jud, 'Vertragsmäßigkeit von Waren und digitalen Inhalten - (rechtzeitige) Bereitstellung digitaler Inhalte' in Markus Artz and Beate Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018) 123-128; Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 121; cf Herbert Weißensteiner, 'Der Mangelbegriff der WarenkaufRL' [2019] ZfRV 202-203.



- 17 In summary, the plans of the Ministry of Justice to create an independent Consumer Warranty Act (VGG) to implement the two directives are, in principle, to be welcomed.

## E. Consumer Warranty Act (Draft)

### I. Merging and systematization of the DCD and the SGD

- 18 If we take a closer look at the Consumer Warranty Act Draft, it should be noted that it implements both directives, i.e., the DCD and the SGD, in one act.
- 19 This makes it possible to make up for a shortcoming at the European level; namely, to merge parallel provisions contained in both directives and thus not only to reduce the text considerably, but also to systematize the regulatory material<sup>29</sup>.
- 20 The Consumer Warranty Act (VGG) is divided into four chapters<sup>30</sup>. Chapter 1 (“General Provisions”) contains not only the provisions on the scope, definitions and their mandatory nature, but it also merges the provisions from both directives on all questions of contract conformity. In this area, the contents of the two directives are very similar and are therefore suitable for a merger.
- 21 Chapter 2 and Chapter 3 are then devoted to the specific requirements of the SGD and the DCD (“Warranty for the sale of goods” and “Warranty and modifications for digital performances”). These chapters contain the respective regulations on the general principles of warranty – thus time limits as well as the reversal of the burden of proof – and the various remedies; in these aspects the divergences between the two directives were considered too great to be unified.
- 22 In addition, each directive contains requirements in this area that have no equivalent in the other, for example the provisions on reimbursement in the DCD and its provisions on the modification of digital content and digital services. With regard to the SGD, the numerous special regulations for goods with digital elements should be mentioned.
- 23 Finally, Chapter 4 (“Limitation period and final provisions”) is devoted to the final provisions on entry into force, transitional law and enforcement as well as the limitation period.

<sup>29</sup> Explanatory notes to the Consumer Warranty Act Draft 4 f.

<sup>30</sup> Explanatory notes to the Consumer Warranty Act Draft 5.

These provisions will then be merged and unified again for the Sale of Goods and Digital Contents.

- 24 Through this systematization, the Consumer Warranty Act (VGG) created 30 sections from 54 articles in the two directives, whereby an attempt was also made to shorten them linguistically. For example, the draft does not always mention “digital content” and “digital services” separately, but combines both under the uniform term “digital performance” (“*digitale Leistungen*”)<sup>31</sup>.

### II. Scope of application of the Consumer Warranty Act (VGG) and other warranty provisions not contained in the VGG

- 25 Both the personal and the material scope of application of the Consumer Warranty Act (VGG) are corresponding to the requirements of the two directives (Section 1 para 1 Consumer Warranty Act Draft)<sup>32</sup>. The Consumer Warranty Act (VGG) therefore only covers consumer contracts for the purchase of goods, including those yet to be manufactured, and contracts for the supply of digital performance. Regarding the remuneration, the supply of digital performance is based alternatively on payment or the provision of personal data in accordance with the requirements of the DCD<sup>33</sup> (Section 1 para 1 no 2 Consumer Warranty Act Draft).

<sup>31</sup> Explanatory notes to the Consumer Warranty Act Draft 8.

<sup>32</sup> In contrast, Section 1 Consumer Protection Act (KSChG) is based on a broader definition of the term “consumer”. It also includes contracts which a natural person concludes in preparation for taking up on a business and legal entities, if they do not operate a business. Heinz Krecji, ‘§ 1 KSChG’ in Peter Rummel and Meinhard Lukas (eds), *ABGB-Kommentar* (3rd edn, Manz 2002) para 7; Peter Apathy, ‘§ 1 KSChG’ in Michael Schwimann and Georg Kodek (eds), *ABGB: Praxiskommentar* (4th edn, Lexis Nexis 2015) paras 8, 15; Rudolf Welser and Brigitta Zöchling-Jud, *Bürgerliches Recht*, vol 2 (14th edn, Manz 2015) 317; Georg Kathrein and Thomas Schoditsch, ‘§§ 1-42 KSChG’ in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *Kurzkommentar zum ABGB* (6th edn, Verlag Österreich 2020) paras 7-8.

<sup>33</sup> See Brigitta Zöchling-Jud, ‘Daten als Leistung’ in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 243; Brigitta Zöchling-Jud, ‘Vertragsmäßigkeit von Waren und digitalen Inhalten – (rechtzeitige) Bereitstellung digitaler Inhalte’ in Markus Artz and Beate Gsell (eds), *Verbrauchervertragsrecht und digitaler Binnenmarkt* (Mohr Siebeck 2018) 139.

- 26 Of course, this narrow scope of application means that there will be numerous other warranty provisions outside the Consumer Warranty Act (VGG). On the one hand, these are the general warranty provisions in the Austrian Civil Code (ABGB), which apply to all B2B and C2C contracts as well as to all contracts (including B2C) that do not fall within the material scope of application of the Consumer Warranty Act (VGG). This concerns mainly real estate sale contracts or genuine service contracts. It is planned that the provisions of the Austrian Civil Code (ABGB), which are at the “same level” of the SGD, will be slightly adapted. For instance, the term “*Wandlung*” (actio redhibitoria) is to be replaced by “termination of the contract” and the limitation period will be revised. Also, the provision on dealer’s redress (Section 933b ABGB) remains in the Austrian Civil Code (ABGB) and will be adapted content-wise.
- 27 On the other hand, there will continue to be special norms in the Consumer Protection Act (KSchG), a legal fragmentation that could, in my opinion, be avoided. Section 9 Consumer Protection Act (KschG), which regulates the mandatory nature of general warranty provisions in favour of consumers, will be preserved. This provision is relevant for contracts that do not fall within the material scope of the Consumer Warranty Act (VGG). The same applies to Section 9b Consumer Protection Act (KSchG), which provides a special norm for guarantees and is to be adapted to the requirements of the SGD. At least the last point should, in my opinion, be reconsidered.

### III. Selected Issues of the Consumer Protection Act (VGG)

- 28 This report will not give a detailed presentation of the content of the planned Consumer Warranty Act (VGG), because it essentially corresponds to the requirements of the two directives. This applies, for example, to the definition of contract conformity, including the combination of subjective and objective requirements, provisions on the burden of proof, or the consumer’s remedies. Instead, three points, which to a certain extent represent an Austrian particularity, should be highlighted:

#### 1. Digital performance and provision of personal data

- 29 As is commonly known, according to the DCD, the trader’s warranty obligation for defective digital services does not only come into effect when the

consumer pays a price, but also when personal data is provided in exchange (Art 3 para 1 and 2 DCD)<sup>34</sup>.

- 30 In such cases, in addition to the requirements of the DCD, the protection of personal data in accordance with the General Data Protection Regulation<sup>35</sup> (GDPR), which remains unaffected by the DCD and which therefore has priority, must be taken into account. The DCD therefore does not affect, for example, the consumer’s right to withdraw the consent for the processing of personal data at any time, the requirements for the voluntary nature of the consent, or the right to erasure. This of course raises the question of the legal consequences if a consumer withdraws the consent, in particular whether in such a case the trader should be given the opportunity to likewise terminate his obligation to perform. The directive seems to give the Member States discretion for the implementation.

- 31 In this sense, recital (40) states that:

*“This Directive should not regulate the consequences for the contracts covered by this Directive in the event that the consumer withdraws the consent for the processing of the consumer’s personal data. Such consequences should remain a matter of national law.”*

- 32 The Ministry of Justice now wants to pass this task on to the judiciary. Reference is made to the requirement of voluntariness in Art 7 para 4 GDPR, which states that agreements are invalid if they provide for negative legal consequences for the consumer in the event of withdrawal of consent to data processing. Accordingly, the recitals state that an agreement with the content that the trader could, for instance not be held liable in the event of withdrawal of consent to data processing, would probably be invalid. Which legal consequences the withdrawal of consent by the consumer has for a contract, however, must be examined by the judiciary on a case-by-case basis, according to the respective circumstances. An explicit provision, such as a special right of termination for the trader, is not

34 Thomas Rainer Schmitt, *Gewährleistung bei Verträgen über digitale Inhalte* (Verlag Österreich 2017) 168-179 Brigitta Zöchling-Jud, ‘Daten als Leistung’ in Nikolaus Forgó and Brigitta Zöchling-Jud (eds), *Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (Manz 2018) 241.

35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

provided for<sup>36</sup>, because it would hardly be feasible to cover the various possible cases even to a certain extent and to find an appropriate and balanced solution for all these cases at a general level<sup>37</sup>. Legal uncertainty on such an important issue is therefore bound to occur.

## 2. Durability<sup>38</sup>

33 Article 7 para (1)(d) SGD includes among the objective requirements for the conformity of goods the durability which is usual for goods of the same type and which the consumer may reasonably expect. According to recital (32), the trader's liability for the durability of goods is not so much a matter of individual consumer protection as a general objective of promoting more sustainable consumer habits<sup>39</sup>. The trader's warranty obligation for the durability will complement EU product-specific legislation, which is yet to be developed<sup>40</sup>.

34 In this sense, the Austrian Federal Government has also set the goal of promoting the sustainability of products as well as avoiding planned obsolescence in its government program and has explicitly mentioned the implementation of the SGD and the DCD as a means of achieving this goal<sup>41</sup>. It is therefore not surprising that the Consumer Warranty Act (VGG) places special emphasis on durability. First of all, Section 2 para 11 Consumer Warranty Act Draft adopts the definition of Art 2 para 13 SGD: "Durability" means the ability of the goods to maintain their required functions and performance through normal use. Durability is one of the objective quality requirements according to Section 6 para 2 no 5 Consumer Warranty Act Draft.

35 However, for certain product groups, for which the issue of obsolescence appears to be particularly widespread in practice, the Consumer Protection Act (KSchG) and the Distance and Off-Premise Contracts Act (FAGG), i.e. the special acts by which the CSD was implemented, stipulate a specific pre-contractual duty of information:

36 According to Section 5a para 1 no 5 Consumer Protection Act (KSchG) and Section 4 para 1 no 1 FAGG, the trader must inform the consumer before conclusion of a contract regarding goods with digital elements or textile clothing about the minimum durability in normal use. In accordance with the requirements of the SGD, this pre-contractual information now specifies legitimate consumer expectations and – to put it simply – becomes the subject matter of the contract<sup>42</sup>.

37 Finally, the warranty period is extended for goods (including goods with digital elements) in Section 10 para 5 Consumer Warranty Act Draft. While the trader generally has to provide warranty for defects that become apparent within two years of delivery (Section 10 para 1 Consumer Warranty Act Draft), a warranty period of five years applies to goods that in normal use can be expected to have a durability that considerably exceeds two years. The trader is therefore liable if the defect becomes apparent within five years. The role model for this regulation is Section 27 of the Norwegian Consumer Sales Act.

38 Without commenting further on this proposal, it can be said that the draft does at any rate appear to be technically improvable, as it currently raises more questions than it answers<sup>43</sup>. There is also cause for

36 In contrast, the German draft for the implementation of the DCD (Entwurf eines Gesetzes zur Änderung des Bürgerlichen Gesetzbuches und des Einführungsgesetzes zum Bürgerlichen Gesetzbuche in Umsetzung der EU-Richtlinie zur besseren Durchsetzung und Modernisierung der Verbraucherschutzvorschriften der Union [[https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE\\_BereitstellungdigitalerInhalte\\_2.pdf?sessionid=FA444FDDB2F7E0AEB08E4D544F01EA1.2\\_cid324?\\_\\_blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_BereitstellungdigitalerInhalte_2.pdf?sessionid=FA444FDDB2F7E0AEB08E4D544F01EA1.2_cid324?__blob=publicationFile&v=2)] 3 November 2020) states in Section 327q BGB that the trader has the right to terminate the contract in the event that the consumer withdraws the consent to data processing. The trader is not bound by a termination period, if he cannot reasonably be expected to continue the contractual relationship until the agreed end of the contract or until the expiry of a contractual or statutory termination period.

37 Explanatory notes to the Consumer Warranty Act Draft 9.

38 See in detail Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4, Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57.

39 Elize Rudloff, 'Der Vorschlag einer Warenhandels-Richtlinie der EU - Fortschritt auf dem Weg zu mehr Nachhaltigkeit?' [2018] VuR 323; Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 122-123; Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4.

40 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR, 115, 122; Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57, 59.

41 Austrian Government Programme 2020 – 2024 „Aus Verantwortung für Österreich“ 31.

42 Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil I)' [2020] VbR 4, 5.

43 C.f. Wolfgang Faber, 'Neues Gewährleistungsrecht und

doubt with regard to legal policy, because Austrian trade is threatened with severe discrimination. Similarly, the obligation to indicate a minimum durability date for all goods with digital elements does not seem appropriate in the light of the fact that the manufacturer will often be based abroad<sup>44</sup>. However, the political decision has not yet been made.

### 3. Warranty and limitation period

39 The last point to be addressed concerns the warranty period and the limitation period. The Consumer Warranty Act (VGG) first of all follows the provisions of the directive and distinguishes between the period in which a lack of conformity must become apparent in order to establish the liability of the trader and the period in which the consumer can enforce his rights in court. The first period is called warranty period, whilst the second is called limitation period<sup>45</sup>. With the exception of the already mentioned durability defects, the Consumer Warranty Act Draft adopts for the warranty period the specifications of the two directives, namely for goods in Section 10 of Chapter 2 and for digital services in Section 17 of Chapter 3<sup>46</sup>.

40 Regarding the limitation period, Section 27 in Chapter 4, concerning goods and digital services, stipulates uniformly that the consumer's warranty rights expire six months after the end of the respective warranty period.

41 For goods and digital services to be provided once or separately, this effectively extends the period during which the trader can be held liable up to 2.5 years after delivery or provision. For digital performances which are to be provided on a permanent basis, the trader is liable for six months after the end of the obligation to supply.

42 The extension of the limitation period to a total of 2.5 years is based on the following idea: If a defect appears just before the warranty period expires,

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Nachhaltigkeit (Teil II)' [2020] VbR 57, 60.

44 Wolfgang Faber, 'Neues Gewährleistungsrecht und Nachhaltigkeit (Teil II)' [2020] VbR 57, 59.

45 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 131; Brigitta Zöchling-Jud, 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht' in Johannes Stabentheiner, Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019) 207.

46 Defects of title are regulated separately.

thus in extreme cases after almost two years, the consumer should still have enough time to enforce his rights in court. Here, the legislative materials apply the principle of *effet utile*. In my opinion, the directives do not require such an extension<sup>47</sup>, they are, however, permitted despite full harmonisation and are likely to be the subject of political discussions.

## F. Resume

### 43 In summary and conclusion:

1. The plans of the Ministry of Justice for the implementation of the SGD and the DCD are, in principle, to be welcomed. This definitely applies to the planned system, and in particular to the creation of an independent Consumer Warranty Act.
2. The parallel preservation of special warranty provisions in the Consumer Protection Act (KSchG) should be reconsidered. This applies particularly to the provision on contractual guarantees
3. The proposals of the Ministry of Justice also contain controversial considerations of legal policy, which will certainly be the subject of political discussions in Austria.

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47 Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' [2019] GPR 115, 132.