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The Implementation of the EU Directives 2019/770 and 2019/771 in Luxembourg

I. Introduction

The Loi du 8 décembre 2021 transposed the EU maximum harmonisation Directives 2019/770 (DCD)¹ and 2019/771 (SGD)² into the Luxembourg Consumer Code (Code de la consommation).³ As required by the two Directives, the new rules are effective as of 1 January 2022⁴ and replace previous national rules that transposed the minimum harmonisation Consumer Sales and Guarantees Directive 1999/44/EC.⁵ It is worth noting that Luxembourg decided not to ‘gold-plate’, that is enacting rules that go beyond an EU Directive’s minimum harmonisation standard, when implementing Directive 1999/44/EC.⁶ This report will thus demonstrate that the national rules transposing the Directives grant Luxembourg’s consumers new statutory protections.⁷

The underlying objectives of this report are to briefly examine the level of consumer protection prior to the adoption of the two Directives and to map subsequent changes. This includes whether Luxembourg decided to exercise its discretion regarding the optional provisions of Directive 2019/771, in particular Articles 3(5) and (7), 10(6), 11(2), 12, and 17(4) of the Directive. Section II of this report examines the personal and material scope as well as new definitions, Section III rules on conformity, liability, and burden of proof, Section IV remedies, and Section V commercial guarantees. Section VI concludes the report.

II. Scope and Definitions

The new rules were included in the Luxembourg Consumer Code and therefore only apply to business-to-consumer contracts. Both Directives have also not introduced a new concept of

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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 (hereafter Digital Content and Services Directive, short DCD).

² Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 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 (hereafter Sale of Goods Directive, short SGD).

³ Loi du 8 décembre 2021 portant modification du Code de la consommation aux fins de transposition de la directive (UE) 2019/770 et la directive (UE) 2019/771 (Journal officiel du Grand-Duché de Luxembourg, Mémorial A – n° 844 du 9 décembre 2021).

⁴ Article 24(1) of Directive (EU) 2019/770 and Article 24(1) of Directive (EU) 2019/771; Article 7 of the Loi du 8 décembre 2021.

⁵ Directive (EC) 1999/44 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 (hereafter Consumer Sales and Guarantees Directive).

⁶ Loi du 21 avril 2004 relative à la garantie de conformité due par le vendeur de biens meubles corporels portant transposition de la Directive 1999/44/CE du Parlement et du Conseil du 25 mai 1999 sur certains aspects de la vente et des garanties des biens de consommation et modifiant la loi modifiée du 25 août 1983 relative à la protection juridique du consommateur (Journal officiel du Grand-Duché de Luxembourg, Mémorial A – n° 60 du 29 avril 2004). These rules were later on included in the Code de la consommation of 2011.

⁷ An examination of the SGD and DCD is provided in Jorge Morais Carvalho, ‘Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771’ (2019) 8(5) Journal of European Consumer and Market Law 194.

the consumer and it thus remains unchanged.⁸ The material scope and limitations of the SGD's Article 3 were included in Article L. 212-1 of the Code de la consommation. Luxembourg decided to not exclude the sale of second-hand goods sold at public auction and living animals, as allowed by Article 3(5) of the Directive. Article 3 of the DCD does not provide Member States with any choices concerning the Directive's scope and it was consequently transposed as it stands by Article L. 212-12.

Article 2 of both Directives stipulate a couple of new definitions that did not yet exist at the EU and national level or (slightly) modified existing ones. Some of the terms introduced into the Code de la consommation were 'goods with digital elements' (Article L. 010-1 para. 7), 'digital service' (para. 8), 'digital environment' (para. 9), 'compatibility' (para. 10), 'functionality' (para. 11), 'interoperability' (para. 12), 'durability' (para. 13), 'personal data' (para. 14), 'integration' (Article L. 212-17 para. 1), 'price' for digital content and services (Article L. 212-12 para. 1), and 'free of charge' (Article L. 212-7 para. 1(a)). The terms 'consumer', 'seller', 'durable medium', 'public auction', and 'digital content' already existed in the old version of Article L. 010-1 and remain unchanged. Similarly, the terms 'producer' (old Article L. 212-2, now in Article L. 010-1 para. 6), 'commercial guarantee' (old Article L. 212-10), 'goods' (old Article L. 213-1 para. 1(1)), and 'sales contract' (old Article L. 213-1 para. 1(2), now also in Article L. 212-1) existed in the Consumer Code.

III. Conformity, Liability, and Burden of Proof

Previous rules on conformity, trader liability, and the burden of proof existed on the EU and national level, but the Directives may nonetheless improve the position of consumers in some ways.⁹

At a first glance, the main innovation seems to be the separation of the conformity requirement into a subjective and an objective criteria. On a substantive level, however, this is not fundamentally changing the existing regime.¹⁰ A real innovation is, for instance, that the lack of conformity can arise as a result from a violation of third-party rights (Article 10 of the DCD and Article 9 of the SGD).¹¹ Both Directives do not grant Member States any discretion regarding the implementation of the conformity requirements, and Luxembourg therefore transposed these new requirements almost word for word into the Consumer Code. Articles 6 to 9 of the DCD concern the conformity of digital goods and digital services and were implemented by Article L. 212-14 to Article L. 212-17;¹² Article 10 on the violation of third-party rights was implemented by Article L. 212-28. Articles 5 to 8 of the SGD concern the

⁸ Article 2(6) of Directive (EU) 2019/770; Article 2(1) of Directive (EU) 2019/771. This corresponds with Article L. 010-1 para. 1 of the Code de la consommation; Chapter IV of the Code de la consommation provides further clarification on the EU consumer definition (see Section 'Notion de consommateur').

⁹ In Luxembourg, these rules existed to some extent even prior to the adoption of Directive (EC) 1999/44, see Marc Elvinger, 'La Directive 99/44 du 25 Mai 1999 et le droit Luxembourgeois' (2001) 9(2) *European Review of Private Law* 309. A historical account is provided in Caroline Mahret, *Die Entstehung des luxemburgischen Verbraucherrechts* (Universitätsverlag Osnabrück 2021).

¹⁰ Jorge Morais Carvalho highlights that the key innovation is 'the functionality, compatibility and interoperability requirements for digital content and services and for goods with digital elements', see Jorge Morais Carvalho (n 7) Section 4 'Requirements for Conformity'.

¹¹ Caroline Cauffmann, 'New EU rules on business-to-consumer and platform-to-business relationships' (2019) 26(4) *Maastricht Journal of European and Comparative Law* 470-471, 478-479.

¹² Article 6 of Directive (EU) 2019/771 was implemented by Article L. 212-14 of the Code de la consommation, Article 7 of the Directive by Article L. 212-15, Article 8 of the Directive by Article L.212-16, and Article 9 of the Directive by Article L. 212-17 para. 2.

conformity of goods and were transposed by Article L. 212-2 to Article L. 212-4;¹³ Article 9 (third-party rights) was transposed by Article L. 212-10 para. 2.

Member States are, however, allowed to deviate from the rules on trader liability and burden of proof. Directive 2019/771 provides Member States with three legislative choices concerning the liability of the seller and burden of proof. The first one is provided in Article 10(3) of the Directive. It allows Member States to extend the liability of the seller beyond the minimum two-year period provided in Articles 10(1) and (2). The second legislative choice is outlined in Article 11(2) and allows Member States to provide a two-year burden of proof period instead of the mandatory one-year one. The third legislative choice concerns second-hand goods (Article 10(6)). It allows Member States to provide that the liability period is shorter in case the seller and the consumer contractually agree, but it must be at least one year. In the first and second case, Luxembourg decided not to 'gold-plate' and transposed it *ipsis verbis* into the Consumer Code (Article L. 212-5 para. 1 and para. 4). However, consumers previously only benefitted from a six-month period regarding the burden of proof (old Article L. 212-6). Concerning the third choice, the legislator decided to stick to the already existing one-year period for second-hand goods in case the seller and the consumer consent (Article L. 212-5 para. 3, old Article L. 212-6). Directive 2019/770 does not provide such legislative choices and there was thus no discretion in the implementation.¹⁴

Additional national discretion was provided regarding producer and platform provider liability. Recital 63 of Directive 2019/771 states that the direct liability of the producer for lack of conformity is not regulated by the Directive, except in case this is provided in a commercial guarantee. Article L. 212-11 of the Consumer Code now explicitly provides that the final seller can hold any intermediaries or the producer liable under the rules set out in the Civil Code. The rules of the SGD and DCD can apply to platform providers in case they fulfil the criteria of traders (Recitals 18 of Directive 2019/770 and 23 of Directive 2019/771). Furthermore, Member States are allowed to extend the scope of the provisions to platform providers that do not fall within the category of traders. Luxembourg, like a number of Member States, decided to not extend the scope.

IV. Remedies

Both Directives equip consumers with several remedies in case traders fail to comply with their legal obligations. One development compared to the rules transposing the Consumer Sales and Guarantees Directive 1999/44/EC is that there is now a mandatory hierarchy between the remedies for non-conformity regarding sale of goods (Articles 13 to 16 of the SGD). Member States are allowed to let consumer choose a remedy within the first thirty days (Article 3(7) of the SGD), which was not adopted by Luxembourg. However, Luxembourg decided not to introduce a two-month notification period (Article 12 of the SGD). The remaining provisions governing remedies are mandatory and offer no discretion to Member States.¹⁵

¹³ Articles 5 and 8 of Directive (EU) 2019/770 were transposed by Article L. 212-2 of the Code de la consommation, Article 6 of the Directive by Article L. 212-3, and Article 7 of the Directive by Article L.212-4.

¹⁴ Article 11 and 12 of Directive (EU) 2019/770 was implemented into national law by Article L. 212-18 and Article L. 212-19 of the Code de la consommation.

¹⁵ Article 13 of Directive (EU) 2019/771 was implemented by Article L. 212-6 of the Code de la consommation, Article 14 of the Directive by Article L. 212-7, and Articles 15 and 16 by Article L. 212-8.

Article 13 of the DCD, implemented by Article L. 212-20 of the Consumer Code, allows the consumer to terminate the contract if the trader fails to supply the digital content or service without undue delay or as expressly agreed. Article 14 of the Directive stipulates remedies in the event of a lack of conformity (Article L. 212-21), which, as criticised in the academic debate, does not include repair or replacement.¹⁶ Para. 7 of Article L. 212-21 even provides that the consumer can withhold the entire or parts of the payment, within the limits of Articles 1134-1 and 1134-2 of the Civil Code, until the trader has fulfilled his obligations. Another novelty is that the consumer is entitled to terminate the contact if the digital content or service is modified and negatively impacts the access or use, unless it is only minor, within thirty days.¹⁷

V. Commercial Guarantees

Article 17 of Directive 2019/771 stipulates the rules on commercial guarantees, which was transposed almost *ipsis verbis* by Article L. 212-31 of the Consumer Code. However, Luxembourg exercised its discretion under Article 17(4) of the Directive to introduce a language requirement. Commercial guarantees must be provided at least in French or German, whichever the consumer prefers.

VI. Concluding Remarks

The report showed that Luxembourg's consumers benefit from an increased level of consumer protection due to the EU Directives 2019/770 and 2019/771. The previous standard was lower because Luxembourg decided not to 'gold-plate' Directive 1999/44/EC. Another observation was that the Directives allow Member States to deviate from the maximum harmonisation standard on a few occasions. As with Directive 1999/44/EC, Luxembourg decided not to maintain or introduce stricter standards in most cases. The only instances where Luxembourg's consumers benefit from a higher level of protection than under the SGD concerns the requirement to provide commercial guarantees at least in French or German, whichever the consumer prefers, the absence of a notification period for lack of conformity, and that the SGD's rules apply to the sale of second-hand goods sold at public auction and living animals. Nonetheless, the two Directives provide quite a number of innovations, especially concerning the conformity criteria and extended burden of proof period, and the new national rules transposing the Directives provide consumers with a higher level of protection.

¹⁶ Jorge Morais Carvalho (n 7) Section 5 'Liability of the Seller and Time Limits'.

¹⁷ Article 19(2) of Directive (EU) 2019/770 implemented by Article L. 212-26 para. 2 of the Code de la consommation.