

## Final answer on software updates

Request number:	<a href="#">116648</a>
Requested by:	Breyer Patrick
Requested for:	Breyer Patrick Office
Date of request:	30 April 2024
Answered by:	

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07/05/2024

# Final answer on software updates

Dear Mr BREYER,

The text below is in answer to your enquiry.

Please find some additional information below to our preliminary reply concerning software updates.

This section covers further EU legal acts and case law as well.

Our previous answers are attached to this version (modified sections are highlighted in yellow - Lack of conformity of software and Further case-law) which closes the reply in the system.

We trust this will be useful, but please do not hesitate to contact us again if you need further information.

Yours sincerely,

## Updates of software and consumer protection

Dear Mr BREYER,

The text below is in answer to your enquiry.

There is no specific EU regulation on electronic games (video or computer games) nor on updates of software products. Consumer protection aspects, such as the obligations to provide regular updates are dealt with in several legislative acts concerning consumer protection and digital contents.

On the Commission's website Your Europe the following information is stated related to [Products that require software to function](#):

*Special rules apply when you buy digital content like videos, music, and software apps, such as*

1. *a video game that you download once*
2. *weekly links to a news website for which you pay a subscription fee*
3. *continuous supply of cloud storage.*

**You *always have the right to a minimum 2-year guarantee* if the digital content or service turns out to be faulty, not as advertised or not working as expected. If the supplier can't fix the content or**

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service within a reasonable time, free of charge and without inconvenience to you, you can ask for a reduction in the price. **In some cases, you can terminate the contract.**

Please see below a non-exhaustive list of the relevant legal acts on video games and software updates.

### 1. [New Product Liability Directive](#)

Under the new liability directive, the definition of 'product' will be extended to digital manufacturing files and software. The directive considers as product defectiveness the lack of software updates under the manufacturer's control as well as the failure to address cybersecurity vulnerabilities.

At the Council, the COREPER confirmed the agreement on 24 January 2024. Parliament formally endorsed the new legislation during its March 2024 Plenary. The directive will now have to be formally approved also by the Council. The new rules will apply to products placed on the market 24 months after the directive comes into force.

Please see the relevant provisions in the [compromise text](#) dated 24 January 2024

*(15a) Related services and other components, including software updates and upgrades, should be considered to be within the manufacturer's control where they are integrated, inter-connected or supplied by the manufacturer itself or where the manufacturer authorises or consents to their supply by a third party,*

*(15b) In addition, once a product has been placed on the market, it should be considered to be within the manufacturer's control in so far as the manufacturer retains the technical ability to supply software updates or upgrades itself or via a third party*

*(38) In recognition of manufacturers' responsibilities under Union law for the safety of products throughout their lifecycle, such as under Regulation (EU) 2017/745 of the European Parliament and of the Council<sup>15</sup>, manufacturers should also not be exempted from liability for damage caused by their defective product when the defectiveness resided in their failure to supply software security updates or upgrades that are necessary to address the product's vulnerabilities in response to evolving cybersecurity risks. Such liability should not apply where the supply or installation of such software is beyond the manufacturer's control, for example where the owner of the product does not install an update or upgrade supplied for the purpose of ensuring or maintaining the level of safety of the product. This Directive does not itself impose any obligation to provide updates or upgrades to a product.*

### 2. [Cyber Resilience Act](#)

On 15 September 2022 the Commission presented a legislative proposal for the EU cyber resilience act (CRA), which introduces mandatory cybersecurity requirements for products with digital elements. The proposal covers a broad range of devices - products that are connected directly or indirectly to a device or network, including hardware, software and ancillary services.

The proposal aims to ensure better protection for consumers through increasing the responsibility of manufacturers by obliging them to provide security support and software updates, and providing them with information about cybersecurity of products they buy and use.

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At the Council, the Coreper confirmed the agreement in December 2023. ITRE committee approved the provisional agreement at its meeting in January 2024. The text was approved by Parliament as a whole on 12 March 2024 with 517 votes in favour, 12 against and 78 abstentions. The text still needs to be formally adopted by the Council before it can enter into force.

*Once the Cyber Resilience Act is in place, manufacturers of hardware and software will have to implement cybersecurity measures across the entire lifecycle of the product, from the design and development, to after the product is placed on the market. Software and hardware products will bear the [CE marking](#) to indicate that they comply with the Regulation's requirements and therefore can be sold in the EU.*

*The Act will also introduce a legal obligation for manufacturers to provide consumers with timely security updates during several years after the purchase. This period has to reflect the time products are expected to be used.*

### 3. [Eco-design requirements for sustainable products](#)

Ecodesign refers to the integration of environmental sustainability considerations into the characteristics of a product, and into processes throughout its value chain. The EU lacks an overarching legislative framework laying down rules for sustainable production and consumption of all products. In March 2022, the Commission submitted a proposal for a regulation on ecodesign requirements for sustainable products. The co-legislators found a provisional agreement on 5 December 2023. It was approved by Coreper on 22 December 2023, and by ENVI on 11 January 2024. The agreement was formally approved by Parliament (vote on 25 April 2024) and Council.

See the relevant provision in the EP [legislative resolution](#)

*2. Ecodesign requirements shall, where relevant, ensure based on the product parameters referred to in Annex I that products do not become prematurely obsolete, for reasons that include design choices by manufacturers, the use of components which are significantly less robust than other components, the impeded disassembly of key components, unavailable repair information or spare parts, software that no longer works once an operating system is updated or software updates that are not provided.*

### 4. [Directive \(EU\) 2019/770](#) on certain aspects concerning contracts for the supply of digital content and digital services

The directive sets out rules concerning contracts for the supply of digital content or digital services, in particular: rules on conformity with the contract; and remedies where the digital content or digital service does not conform or if there is a failure to supply. Digital content includes computer programmes and mobile applications, as well as video and audio files in digital form.

Concerning conformity the act stipulated that digital content or digital services in general must be updated as stipulated by the contract. The directive contains more detailed rules on the obligation to provide updates. See **Article 8**:

*The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time:*

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(a) during which the digital content or digital service is to be supplied under the contract, where the contract provides for a continuous supply over a period of time; or

(b) that the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, where the contract provides for a single act of supply or a series of individual acts of supply.

According to **Article 25 Review**: The Commission shall, not later than 12 June 2024 review the application of this Directive and submit a report to the European Parliament, to the Council and to the European Economic and Social Committee. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content or digital services other than that covered by this Directive, including supplied against advertisements.

### 5. [Directive \(EU\) 2019/771](#) on certain aspects concerning contracts for the sale of goods

The Directive replaced the [Consumer Sales and Guarantees Directive \(1999/44/EC\)](#). Directive applies 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. Under the Directive, the seller is liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time.

#### **Article 6 Subjective requirements for conformity**

In order to conform with the sales contract, the goods shall, in particular, where applicable:  
(d) be supplied with updates as stipulated by the sales contract.

#### **Article 7 Objective requirements for conformity**

3. In the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time:

(a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or

(b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time.

According to **Article 25 Review**: The Commission shall, not later than 12 June 2024, review the application of this Directive, including its provisions on remedies and burden of proof — also with respect to second-hand goods as well as goods sold at public auctions — and the producer's commercial guarantee of durability, and submit a report to the European Parliament, to the Council and to the European Economic and Social Committee. The report shall assess in particular whether the application of this Directive and Directive (EU) 2019/770 ensures a consistent and coherent framework for the proper functioning of the internal market with regard to the supply of digital content, digital services and goods with digital elements in line with principles governing Union policies. The report shall be accompanied, where appropriate, by legislative proposals.

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6. [Directive \(EU\) 2019/2161](#) amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules

The Directive clarifies the definition of services contract in the [Directive 2011/83/EU on consumer rights \(CRD\)](#) as including also contracts for digital services. The provision of video games may involve both contracts for online digital content and contracts for digital services. Downloadable games would normally qualify as online digital content when their use does not depend on continuous involvement of the game supplier. In contrast, online games provided in a cloud environment would qualify as digital services.

Contracts for the supply of digital content falls within the scope of the Consumer Rights Directive.

7. [Directive \(EU\) 2024/825](#) amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information

In order for consumers to take better informed decisions and stimulate demand for, and supply of, more durable goods, specific information about a product's durability and reparability should be provided for all types of goods before concluding the contract. Moreover, as regards goods with digital elements, digital content and digital services, consumers should be informed about the period during which free software updates are available.

### Lack of conformity of software

Answer provided by:

- [Directive \(EU\) 2024/825](#) empowering consumers in the green transition is not relevant to determine the EU legislation when it comes to obliging a manufacturer to keep the software working for a certain duration. The Directive goal is slightly different and aims to optimise the quantity and quality of information to be made available to the consumer on the place of sale, be it online or not.
- To determine the rules applicable, it is important to start to qualify the legal nature of software. Whilst its acquisition has been assimilated to the acquisition a good under previous EU legislation, as stressed by the Court case law (Court [judgement](#) of 16 September 2021), it appears however that when it comes to protecting consumers against a defective software, recent EU legislations have created a mixed framework.
- In general, the protection of consumers against defective software is organised by [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. The Directive defines three sets of conformity obligations to be complied with by software traders: objective conformity obligations (Article 8), and subjective conformity obligations (Article 7), the incorrect integration of digital content (Article 9). Article 11 on the liability of the trader mandates Member States to ensure that if the trader is only liable for a lack of conformity that becomes apparent within a time period after a single supply, such a period shall not be less than two years from the time of supply. As for the continuous supply of a digital content over a specific time period, the liability for a breach in conformity shall be aligned to the duration of the contract.

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4. In parallel to the question, it is important to keep in mind that softwares continue to be included in relevant EU legislation on market surveillance. For example, the digital contents, which enter into the scope of [Directive](#) (EU) 2024/825, are also subject to [Regulation](#) (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety. This concerns in particular its provisions regarding the safety recall of a dangerous product (Article 36), and the remedies corresponding to such a recall (Article 37).

5. Also, the provisional [agreement](#) reached on the proposed directive on liability for defective products will also provide specific safeguards to the natural persons, who will suffer one of the damages included at Article 5a, in relation with a defective product, which definition includes softwares.

### Further case-law

Answer provided by:

I consulted my colleagues dealing legal subjects related to consumer protection. They are not aware of any specific case on the issue mentioned in the request.

Selected cases on more general aspects of conformity of goods and commercial guarantee are listed here below:

[Case C-133/22](#) - Commercial guarantee – Specifications or any other requirements not related to the conformity of the goods sold, set out in the guarantee statement or in the relevant advertising – Undertaking by a guarantor in respect of the consumer’s satisfaction with the goods purchased – Verification that the consumer is not satisfied.

### Future developments

In January 2023, the European Parliament adopted a [Resolution](#) calling for stricter regulation of video games and their business models. The Parliament called the Commission to present a legislative proposal to adapt the current EU legal framework on consumer protection to video games, or to present a separate legislative proposal on online video games to establish a harmonised EU regulatory framework to ensure strong consumer protection.

The European Commission is currently carrying out a [Fitness check](#) of EU consumer law on digital fairness to examine whether horizontal consumer law instruments (i.e. the Unfair Commercial Practices Directive, Consumer Rights Directive and Unfair Contract Terms Directive) remain adequate for ensuring a high level of consumer protection in the digital environment. The evaluation will likely lead to a new legislative proposal for the second quarter of 2024. Please see further details on the Commission web page [Review of EU consumer law](#).

### Further reading

[Improving consumers' access to product repair BEUC position on the proposal for an EU directive on the right to repair](#), 13/07/2023

#### **3.3.4. Software updates – more clarity is needed**

*The current Sales of Goods Directive contains an obligation on sellers to provide updates, including security updates, for goods with digital elements for the period of time that consumers can*

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*reasonably expect given the type and purpose of the goods (Article 7 (3)). This period is often understood as the period for which the seller is liable for the lack of conformity unless consumers' reasonable expectation could extend beyond that period (recital 31).*

*However, the lack of legal clarity of this provision is often criticised. In order to remedy this situation, it should be clarified in the text that software updates shall be provided for the entire lifespan of the product, and in any case for a period not shorter than required by EU legislation.*

*Moreover, making sellers responsible for the updates is not logical as they have no means in practice to supply such updates. It would make much more sense to make producers directly liable for this obligation. This underlines again the need to introduce the joint and several liability of the seller and the producer.*

**BEUC Recommendation:** *The obligation to provide updates should be clarified. It should jointly fall on the seller and the producer during the entire lifespan of the product, and in any case for a period not shorter than what is required by EU legislation*

European Commission, Directorate-General for Communications Networks, Content and Technology, ***Understanding the value of a European video games society – Final report***, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2759/332575>  
***See chapter 3.2 Regulatory framework relevant to the protection of video game users***

[Public Consultation for the Fitness Check of EU consumer law on digital fairness](#), Position Paper, Video Games Europe, February 2023

[Guidance on the interpretation and application of the EU consumer rights directive](#), Commission Notice, C/2021/9314

[Digital contract rules](#), European Commission website