

# Legal Alert

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On the 22<sup>nd</sup> of May, 2019, a legislative package containing a Directive concerning contracts for the supply of digital content and digital services, and a Directive concerning contracts for the sale of goods was published in the Official Journal of the European Union.

The new package aims to adapt the European legislation to the current realities, for the purpose of increasing the level of protection granted to consumers, both for the purchase of goods and for the lawful accessing (either by paying a price, or by supplying personal data) of digital content or digital services.



## Changes at European level for the legal framework applicable from the perspective of consumer protection for contracts for the sale of goods and supply of digital content and digital services

On the 22<sup>nd</sup> of May, 2019, a legislative package incorporating a Directive concerning contracts for the supply of digital content and digital services ("**DCD**") and a Directive concerning contracts for the sale of goods ("**Directive on sale of goods**") was published in the Official Journal of the European Union.

The two directives included in the legislative package must supplement each other and aim to increase the level of protection granted to consumers in sale contracts, but also in the case of accessing (either by paying a price, or by supplying personal data) digital content or digital services.

The adoption of the two directives is part of the European Union initiative concerning the Single Digital Market, having the objective of facilitating the clients' access to goods, digital content and digital services, and increasing the consumers' confidence in electronic commerce.

The provisions of DCD and of the Directive on sale of goods are complementary, the European legislator's intention being to adapt the legislation in the field of consumer protection to the current technological realities. More precisely, consumers are granted similar rights both for accessing digital content/digital services and for purchasing products.

The transposition term for the two directives is the 1<sup>st</sup> of July 2019 and the provisions thereof shall become applicable as of 1<sup>st</sup> of January 2022.

Below we will make a short presentation of the main new elements introduced by each of the two directives:

### ***Directive on sale of goods***

The Directive on sale of goods shall repeal Directive 1999/44/EC on certain aspects of the sales of consumer goods and the ancillary warranties (transposed into the Romanian legislation by Law no. 449/2003 concerning sales of products and their associated guarantees).

It regulates the conditions under which consumers benefit from guarantee in contracts for the sale of goods, whether we are speaking of traditional goods or goods with digital elements (such as smart appliances or mobile phones).

Unlike Directive 1999/44/EC, the Directive on sale of goods classifies the conformity requirements already regulated by Directive 1999/44/EC into two categories: objective conformity requirements (which refer to a series of minimum conditions which the purchased good must meet) and subjective conformity requirements (which refer to the qualities of the good based on the contractual provisions agreed with the consumer). Also, the Directive on sale of goods introduces a new subjective conformity criterion, respectively, supplying updates according to the provisions of the sale contract (for the goods with digital elements). Practically, the seller will be obliged to offer updates for their digital content or digital service integrated into the sold good.

Also, in case of goods with digital elements, the Directive on sale of goods introduces supplementary responsibilities for the seller. Thus, the seller is obliged:

- to ensure that the consumer is informed concerning the available updates and concerning the consequences of failing to install them by the consumer; and
- to supply the updates, including security updates, which are necessary to maintain the compliance of the respective goods.

In addition, the Directive on sale of goods details the definition of **the commercial guarantee**, clearly outlining its scope. Thus, the commercial guaranty will be defined as *"any undertaking by the seller or a producer to the consumer, in addition to the seller's legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements **not related to conformity**".*

The Directive on sale of goods introduces certain modifications also to the terms applicable in this field and offers member states the possibility to introduce further amendments. Thus:

- the term in which it is presumed that the non-conformity existed at the moment of delivering the good increases from 6 months to 1 year; member states can increase up to 2 years the term in which it is presumed that the non-conformity existed;
- member states may maintain or introduce longer terms for the legal guarantee, although the legal term of guarantee remains 2 years;
- the member states can regulate terms where the consumers can exercise their rights under the guarantee (i.e., terms in which the consumer is obliged to inform the seller concerning the lack of compliance), which cannot be shorter than 2 months.

Although the corrective measures, available to the consumer in case of non-conformity (respectively, bringing the goods into conformity, proportional decrease of the price or termination of the contract), do not change compared to the current legislation, the Directive on sale of goods introduces a series of new elements, out of which we mention:

- introducing new situations in which the consumer can request the proportional decrease of the price or the termination of the contract, respectively, the situations in which:
  - non-conformity is found despite the seller's efforts to remedy it; and
  - the non-conformity is of a such severity that it justifies a price reduction or the right to immediately terminate the sale contract;
- the possibility for the consumer to terminate the entire contract when only a part of the goods are affected by the lack of conformity, but it cannot be reasonably considered that the former accepted only the goods not affected by the lack of conformity.

The Directive on sale of goods allows member states to increase the number of legal entities which may file a court action or complaint with the competent authority to ensure the application of the national provisions that implement this directive, so that to include the following:

- Public bodies of their representatives;

- Consumer protection organizations;
- Professional organizations.

### **DCD**

DCD aims to harmonize the rules applicable in the field of contracts concluded with consumers having the object of supplying digital content/digital services. It takes into account both the situation in which the digital content/digital service is supplied for a cost (respectively, in exchange of an amount of money or any other digital representation of the value owed, such as electronic vouchers or e-coupons), but also the situation when it is supplied in exchange of the consumers' personal data.

The main aspects which are regulated by DCD are:

- the conformity of digital content or digital service with the contract;
- remedies in the event of a lack of such conformity or a failure to supply the digital content or the digital services, and the modalities for the exercise of those remedies; and
- the modification of digital content or a digital service.

The conformity criteria applicable to the digital content/digital services are the same as the ones stipulated in the Directive on sale of goods.

Also, the corrective measures in case of incompliance stipulated by DCD are symmetrical with the ones stipulated by the Directive on sale of goods.

Equally, the warranty terms stipulated by DCD are similar to those provided by the Directive on sale of goods, respectively:

- 2 years for digital content/digital services supplied one time; and
- the entire duration of supplying the digital service for digital services supplied continually (such as cloud storage services).

DCD regulates the conditions in which the seller can modify the digital content or digital service (beyond what it is necessary to maintain conformity), in case the contract provides the supplying or availability to the consumer of the digital content or digital service during a specific period. Also, the consumer has the right to obtain the termination of the contract if the modification has a negative impact on the consumer's access to the digital content or digital service, except for the case when such a negative impact is of a minor nature.

Another new element introduced by DCD is the seller's obligation, in case of termination of the agreement, to make available to the consumer, at consumer's request, any kind of content which does not represent personal data, which was supplied or created by the consumer at the moment of using the digital content or digital service supplied by the seller, except for the case in which:

- it has no usefulness outside the context of the digital content or digital service supplied by the seller;
- it is connected only with the consumer's activity while using the digital content or digital service supplied by the seller;
- it was aggregated with other data by the seller and cannot be separated, or it can be separated only by disproportionate efforts.

Similarly to the Directive on sale of goods, DCD also offers member states the possibility to increase the number of legal entities which may file a court action or complaint with the competent authority for ensuring the application of the national provisions that implement it. Supplementary to the Directive on sale of goods, DCD also makes reference to not-for-profit bodies, organisations or associations, active in the field of the protection of data subjects' rights and freedoms.

For further questions regarding the aspects mentioned in this alert, please contact us.



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