

Bird & Bird

The 'twin' directives:
new rules on digital content
and services and consumer
sales contracts



The 'twin' directives: new rules on digital content and services and consumer sales contracts

As of 1 July 2021, Italy, like the other Member States, will adopt the provisions to comply with:

a Directive (EU) 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services;

b Directive (EU) 771/2019 on certain aspects concerning contracts for the sale of goods.

The new provisions shall apply from 1 January 2022.

Both directives are part of the EU-wide objective of achieving greater protection for consumers by establishing a digital single market on the one hand, and increasing legal certainty with regard to sales contracts on the other.

1. Contracts for the supply of digital content and services

According to Directive 770/2019, “digital content” means data which is produced and supplied in digital form. Given this broad definition, it may include computer programs, applications, video files, audio files, music files, digital games, electronic books or other electronic publications as well as any materials, documents or files in digital format.

“Digital service” means (i) a service that allows the consumer to create, process, store or access data in digital form; or (ii) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service. This category includes all cloud computing services provided to consumers (such as SaaS, PaaS and IaaS services) as well as those for audio and video sharing and other file hosting, word processing, or online games also offered through social media or other platforms.

The Directive applies to any contract for the supply of digital content/services to a consumer (including

customisation) in return for the payment of a price or the transfer of the consumer's personal data to the trader, provided that the trader processes such data solely for the purpose of supplying the digital content/services in accordance with the Directive or for the fulfilment of legal obligations, and the trader does not process such data for purposes other than those intended.

The Directive rules on:

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

The content/services not affected by the directive are the following:

- a digital content/services which are incorporated in or interconnected with goods with digital elements (e.g. the smartphone or smartwatch) and which are provided with the goods under a sales contract;
- b the provision of services other than digital services, regardless of whether digital forms or means are used by the trader to produce the output of the service or to deliver or transmit it to the consumer;
- c electronic communications services, with the exception of number-independent interpersonal communications services;
- d healthcare services;
- e gambling services;
- f financial services;

g software offered by the trader under a free and open-source licence, where the consumer does not pay a price and the personal data provided by the consumer is exclusively processed by the trader for the purpose of improving the security, compatibility or interoperability of that specific software;

h the supply of digital content where the digital content is made available to the general public other than by signal transmission as a part of a performance or event, such as digital cinematographic projections;

i digital content provided by public sector bodies of the Member States.

Pursuant to the Directive, the trader shall have complied with the obligation to supply when the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer.

New requirements of conformity of the digital content/service, both subjective (e.g. the provision of all accessories, instructions - including on installation -, and customer assistance as required by the contract) and objective (e.g. the suitability for the purposes for which digital content/services of the same type would normally be used and having the quantity, the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content/services of the same type) are introduced.

The burden of proof with regard to whether the digital content/service was supplied in accordance with the requirements of conformity described above shall be on the trader.

Where the contract provides that the digital content/service is to be supplied or made accessible to the consumer over a period of time, the trader may modify the digital content/service beyond what is necessary to maintain the digital content/service in conformity if certain conditions are met.

Such conditions include, for example, the fact that the contract allows, and provides a valid reason for, such a modification and that this modification is made without additional cost to the consumer.

Further rules are foreseen in case of incorrect integration of the digital content/service into the consumer's digital environment.

2. Sales contracts

Directive 771/2019 provides for the introduction of certain requirements concerning sales contracts concluded between sellers and consumers, in particular on:

- 1 the conformity of goods with the contract;
- 2 remedies in the event of a lack of such conformity and the modalities for the exercise of those remedies; and
- 3 commercial guarantees.

For the purpose of the Directive, contracts between a consumer and a seller for the supply of goods to be manufactured or produced are also considered as sales contracts.

In line with the "twin" Directive referred to in paragraph 1 of this alert, this Directive does not apply to:

- a contracts for the supply of digital content/services (it shall, however, apply to digital content/ services which are incorporated in or interconnected with goods with digital elements);
- b any tangible medium which serves exclusively as a carrier for digital content; or
- c any goods sold by way of execution or otherwise by authority of law.

The Directive contains parallel provisions to those provided in Directive 770/2019.

There is, for example, a reference to similar subjective and objective requirements of conformity of the goods.

The incorrect installation of the goods shall be regarded as lack of conformity of the goods in the light of circumstances similar to those identified with reference to digital content/services.

A specific matter of this Directive is the commercial guarantee, which shall integrate all the requirements introduced by the Directive and shall be provided to the consumer at the latest at the time of the delivery of the goods.

If the conditions laid out in the commercial guarantee statement are less advantageous to the consumer than those laid down in the associated advertising, the commercial guarantee shall be

binding under the conditions laid down in the advertising, unless, before the conclusion of the contract, the associated advertising was corrected in the same way or in a comparable way to that in which it was made.

As soon as the Italian lawmaker implements the Directives described in this alert, it will be necessary to check how these rules will be implemented.

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