

USER GUIDELINES

Date: 29 October 2021

Subject: The Digital Content and Digital Services Contracts Regulations, 2021 (the Regulations) that transpose and implement 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)

Introduction

The transposition and the implementation of the Directive are obligations arising under EU Law that are being abided by means of the Regulations.

The Directive introduces new consumers' rights with respect to contracts for the supply of digital content and digital services.

Background

With regard to the Directive the European Commission has explained that:

“Harmonised rules for digital content and services will reduce the costs for traders and encourage them to expand cross-border. They will no longer need to deal with contract law differences in each EU country. Consumers will know what they can expect when they buy digital content online, and that they have rights if the digital content or digital service is faulty.”
(https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en)

The purpose of the Regulations is to transpose and to implement the Directive which lays down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital service, in particular, rules on:

- (i) the conformity of digital content or a digital service with the contract;
- (ii) 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
- (iii) the modification of digital content or a digital service.

Scope

These Regulations shall apply to any contract where the consumer pays or undertakes to pay a price; or when the consumer provides personal data in exchange for a service that is provided without payment.

These Regulations define ‘digital content’ as data which are produced and supplied in digital form; and ‘digital service’ as a service that allows the consumer to create, process, store or access data in digital form, or a service that allows the sharing or for any other interaction with data in digital form uploaded or created by the consumer or other users of that service. This includes a wide range of digital products such as videos, music files, software, live streaming events, chat applications and social media.

These regulations shall not apply to contracts regarding:

- (a) 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;
- (b) electronic communications services as defined in point (4) of Article 2 of Directive (EU) 2018/1972, with the exception of number-independent interpersonal communications services as defined in point (7) of Article 2 of that Directive;
- (c) healthcare as defined in regulation 2 of the [Cross-Border Healthcare Regulations](#);
- (d) gambling services, namely, services that involve wagering a stake with pecuniary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means or any other technology for facilitating communication and at the individual request of a recipient of such services;
- (e) financial services as defined in regulation 2 of the [Distance Selling \(Retail Financial Services\) Regulations](#);
- (f) 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 are exclusively processed by the trader for the purpose of improving the security, compatibility or interoperability of that specific software;
- (g) 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;

- (h) digital content provided in accordance with the [Re-use of Public Sector Information Act](#).

The Regulations includes provisions on:

- (i) the supply of digital content or digital service obliging the trader to supply it without undue delay, under the condition that this is made available or accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose;
- (ii) subjective requirements for conformity which provides that in order to conform with the contract, the digital content or digital service shall, in particular:
- be of the description, quantity and quality, and possess the functionality, compatibility, interoperability and other features as required by the contract;
 - be fit for the particular purpose for which the consumer requires it;
 - be supplied with all accessories, instructions, including on installation, and customer assistance as required by the contract; and
 - be updated as stipulated in the contract.
- (iii) objective requirements for conformity, which are in addition to the subjective requirements, and provides that the digital content or digital service shall:
- be fit for the purposes, and be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal to the same type of content/service and which the consumer may reasonably expect;
 - where applicable, be supplied along with any accessories and instructions which the consumer may reasonably expect to receive; and
 - comply with any trial version or preview of the content/service made available by the trader before the conclusion of the contract.
- Other objective requirements refer to the trader's obligation to ensure that the consumer is informed of and supplied with updates that are necessary to keep the content/service in conformity for a period of time, including for contracts which provide continuous supply of content/service;
- (iv) incorrect integration of the digital content or digital service which shall be regarded as lack of conformity if it was integrated by the trader, or by the consumer following integration instructions provided by the trader;

- (v) the liability of the trader for any failure to supply the digital content or digital service, which provides that the trader shall only be liable for any lack of conformity that becomes apparent within two years from the time of supply, unless the contract provides for continuous supply over a period of time where for such contracts the trader is liable within the period during which the content/service is to be supplied under the contract;
- (vi) the burden of proof that shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the content/service was supplied, unless the contract provides for continuous supply over a period of time, where for such contracts the burden of proof shall be on the trader for a lack of conformity which becomes apparent within that period;
- (vii) remedies in the event of a failure to supply, or due to lack of conformity and the modalities for exercising these remedies; where in the event of lack of conformity the consumer shall be entitled to have:
- the content/service brought into conformity,
 - to receive a proportionate reduction in the price, or
 - to terminate the contract.
- (viii) In respect of personal data of the consumer, the trader shall comply with the obligations under the General Data Protection Regulation and shall refrain from using any content other than personal data, which was provided or created by the consumer when using the digital content or digital service (with a number of exceptions as provided in the Regulations);
- (ix) the modification of digital content or a digital service in instances where the contract provides that the content/service is to be supplied or made accessible to the consumer over a period of time, and the trader may modify it beyond what is necessary to maintain the digital content or digital service in conformity as provided in these Regulations; and
- (x) the right of redress in instances when the trader is liable to the consumer because of any failure to supply the digital content or digital service, or because of a lack of conformity resulting from an act or omission by a person in previous links of the chain of transactions, allowing the trader to pursue remedies against the person or persons liable in the chain of commercial transactions.

Mandatory nature

Unless otherwise provided for in the regulations, any contractual term which, to the detriment of the consumer, excludes the application of the provisions of these regulations, derogates from them or varies their effects before the failure to supply or the lack of conformity is brought to the trader's attention by the consumer, or before the modification of the digital content or digital service in accordance with regulation 18 is brought to the consumer's attention by the trader, shall not be binding on the consumer.

The regulations shall not prevent the trader from offering the consumer contractual arrangements that go beyond the protection provided for in these regulations.

Applicability

These Regulations shall apply to the supply of digital content or digital services which occurs from 1 January 2022 with the exceptions of regulations 18 and 19 relative to the modification of the digital content or digital service and right of redress (points (viii) and (ix) above), which shall only apply to contracts concluded from that date.

Penalties and Right to Appeal

Subject to the provisions of the Act regarding judicial proceedings instituted by the Director General following *prima facie* finding of infringements, the Civil Court shall impose penalties of not less than five hundred euro (€500) and not more than forty-seven thousand euro (€47,000) on any person who fails to comply with any of the provisions of these regulations.

Any person who feels aggrieved by a judgement, order, penalty or measure issued by the Civil Court, may appeal before the Court of Appeal, on any point of law and, or of fact, by means of an application filed in the registry of the Court of Appeal within twenty days from the date of the judgment of the Civil Court:

Provided that the Court of Appeal shall appoint the case for hearing by not later than six months from the judgement of the Civil Court.

Disclaimer

Since these are user guidelines, they only provide a summary of the legal instrument (the Regulations) and of the obligations therein contained. Therefore these user guidelines do not in any manner provide a replacement of the legal instrument itself. Moreover, any oversight, error or omission in these user guidelines will not exempt the users from their legal obligations, including compliance obligations, as required and established in the published legal instrument (the Regulations).

Office for Consumer Affairs within the Malta Competition and Consumer Affairs Authority Contact Details:

In case of any queries or further information please contact the Office for Consumer Affairs within the Malta Competition and Consumer Affairs Authority on the [CONTACT US FORM](#) or telephone no.: 2395 2000.