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The new legal guarantee of conformity for digital contents and services

Ordinance No. 2021-1247 published on September 29, 2021^[1] transposes into French consumer law European Directives (EU) 2019/770^[2] and (EU) 2019/771^[3] of May 20, 2019 and introduces a new legal guarantee of conformity specific to digital contents and services.

The new provisions will apply as from January 1, 2022.

Ordinance No. 2021-1247 provides for the introduction in Articles L224-25-12 to L224-25-32 of the French Consumer Code of this new guarantee which is specific to digital contents and services and distinct from the “standard” legal guarantee of conformity applicable to contracts for the sale of goods (the latter being itself partially reworked by the Ordinance).

First of all, it is interesting to note that this new guarantee will apply *“to any contract by which a trader, or any person presenting himself or acting as such, provides a digital content and a digital service to a consumer, and the latter pays a price or provides any other benefit instead of or in addition to the payment of a price”* (new Article L224-25-2 of the French Consumer Code).

Consequently, these rules are also intended to apply in the context of two-sided markets where the consumer uses digital contents or services free of charge in exchange for the transmission of his/her personal data subsequently used for advertising purposes (a model frequently used by social networking platforms).

The main elements of this new legal guarantee of conformity specific to digital contents and services are outlined below.

A revised definition of conformity

New Article L224-25-13 of the French Consumer Code now provides that:

“The digital content or digital service is in conformity with the contract if it meets, in particular, where applicable, the following criteria:

1° It corresponds to the description, type, quantity and quality, in particular as regards functionality, compatibility, interoperability, or other features, as required by the contract;

2° It is fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and in respect of which the trader has given acceptance;

3° it is delivered with all accessories, including packaging, installation instructions and customer support, to be provided in accordance with the contract;

4° It is updated in accordance with the contract.”

New Article L224-25-14 of the French Consumer Code also specifies that the digital content or digital service is compliant if it meets the following criteria:

- It is fit for the use usually expected from a digital content or service of the same type;
- It possesses the qualities presented by the trader in the form of a trial version or preview before the conclusion of the contract;
- It is supplied in the most recent version available;
- In case of continuous supply, it is provided as an uninterrupted service;
- It is delivered with all accessories, installation instructions and customer support;
- It is supplied with the updates that the consumer can legitimately expect;
- It corresponds to the quantity, quality and other features, including functionality, compatibility, accessibility, continuity and security that the consumer can legitimately expect, given its nature or the public statements made by the trader.

This new definition provides useful clarifications which are tailored to the specificity of digital contents and services, particularly with regard to the criteria of functionality, compatibility, interoperability, accessibility, continuity and security.

As a significant clarification, new Article L224-25-15 of the French Consumer Code provides that failure by the trader to comply with its obligations in terms of personal data protection under Regulation (EU) 2016/679 of April 27, 2016 (known as the GDPR) and Law No. 78-17 of January 6, 1978 relating to information technology, files and freedoms (known as the French Data Protection Act) that results in non-compliance with one or more of the conformity criteria detailed in new Articles L224-25-13 and L224-25-14 of the same Code shall be deemed to be a lack of conformity.

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The content of the guarantee

New Article L224-25-12 of the French Consumer Code requires that the trader must provide a digital content or service in conformity with the contract and shall, therefore:

- be liable for any lack of conformity which exists at the time of delivery and any lack of conformity which becomes apparent within two years from the delivery of the content or service in case of one-off supply;
- be liable for any lack of conformity which appeared during the period of supply of the content or service provided for in the contract in the case of continuous supply;
- be liable for any lack of conformity resulting from the incorrect integration of the digital content or service in the digital environment of the consumer, when this integration was carried out by the trader or under its responsibility or by the consumer according to the trader's instructions.

New article L224-25-16 of the French Consumer Code addresses the rules of evidence:

- Any lack of conformity which becomes apparent within 12 months from the delivery shall be presumed to have existed at the time of delivery, unless proved to the contrary;
- In case of supply of a digital content or service during a determined continuous period, it is up to the trader to demonstrate that the content or service was in conformity during the contractual period if a lack of conformity becomes apparent within that period;
- The trader shall not be liable for a lack of conformity where it can demonstrate that the lack of conformity results from an incompatibility between the digital content or service and the consumer's digital environment where the latter was duly informed of the technical requirements for compatibility before the conclusion of the contract.

In addition to the last point, which is a welcome limitation of the trader's liability in case of incompatibility of digital contents or services with the consumer's digital environment, new Article L224-25-16 of the French Consumer Code also imposes on the consumer a duty to cooperate with the trader to determine the existence of such incompatibility, failing which the burden of proof lies on the consumer.

Implementation of the guarantee

The conditions governing the implementation of the guarantee, established in new Articles L224-25-17 to L224-25-23 of the French Consumer Code, are as follows:

- In case of lack of conformity, the consumer has the right to have the digital content or service brought into conformity or, failing that, to have the price reduced or the contract rescinded;
- The consumer is entitled to withhold payment of all or part of the price;
- Conformity shall be achieved free of charge for the consumer and without undue delay;

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- The trader may refuse to bring the digital content or service into conformity if this is impossible or if this would entail disproportionate costs, which it must justify in writing or on a durable medium;
- The price may be reduced or the contract rescinded in the following cases:

-When the trader has refused to bring the digital content or service into conformity;

-In case of unjustified delay in bringing the digital content or service into conformity or if this entails major costs or causes major inconveniences for the consumer;

-If the lack of conformity persists despite the trader's attempt to bring the digital content or service into conformity;

-In case of serious lack of conformity that justifies the reduction of the price or the immediate rescission of the contract without the consumer being required in these circumstances to request that the digital content or service be brought into conformity.

New Article L224-25-28 of the French Consumer Code usefully specifies that any period during which the digital content or service is unusable or unavailable when it is to be brought into conformity suspends the remainder of the guarantee period until it is brought back into conformity. The guarantee is also suspended in the event of negotiations between the consumer and the trader with a view to an amicable settlement.

Updates

New Articles L224-25-24 *et seq.* of the French Consumer Code, as derived from Ordinance No. 2021-1247 of September 29, 2021, define the terms and conditions governing updates which are described as *"updates or changes to maintain, adapt or upgrade the functionality of the digital content or service, including security updates, whether or not these updates are necessary to maintain the conformity of the digital content or service"*.

As such, the trader has the obligation to inform the consumer of the necessary updates and to perform such updates during a period which the consumer can legitimately expect in the case of a one-off supply or during the entire contractual period in the case of a continuous supply.

The trader shall not be liable for any lack of conformity resulting from failure to install the required updates, provided of course that the consumer has been duly informed of the need for such updates and that the failure does not result from shortcomings in the installation instructions.

Concerning updates that are not necessary to maintain the conformity of the digital content or service, these must be justified by a valid reason and authorized by the contract, without additional cost for the consumer. The consumer has the right to refuse these updates or to uninstall them if they negatively affect his/her access or use of the digital content or service. He/She can then get the contract rescinded within a maximum of 30 days, unless the update has only had a minor impact or if the trader offers him/her to keep the digital content or service without the update.

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These new provisions are public policy provisions and will apply as from January 1, 2022 to all contracts for the supply of digital content and services.

[1] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044125847> (in French)

[2] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770>

[3] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0771&from=EN>

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