

Latest amendments to the Consumer Code: implementation of European Directives 770/2019 and 771/2019

On 25th and 26th November 2021 Legislative Decrees 170/2021 and 173/2021 were published, respectively implementing the provisions of Directives (EU) 2019/770 (concerning **contracts for the supply of digital content and services**) and 2019/771 (concerning **sales contracts**) developed simultaneously in Europe and making amendments to Legislative Decree no. 206 of 6 September 2005 (the so-called "Consumer Code").

The provisions of both decrees will apply from 1st January 2022.

Decree no. 170 of 4 November 2021

Legislative Decree No. 170 of 4 November 2021 ("Decree 170/2021") implements Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods.

The new provisions will apply to contracts concluded after 1 January 2022.

Highlights:

Decree 170/2021 amends the former Chapter I, Title III of Part IV of the Consumer Code (entitled "*Della vendita di beni di consumo*", meaning "*Of the sale of consumer goods*") by replacing it with a new Chapter entitled "*Della vendita di beni*" ("*Of the sale of goods*"). Specifically, articles from 128 to 135 are replaced by the new articles from 128 to 135-*septies*.

The first major amendment consists in having included among the goods subject to the provisions of the Consumer Code not only consumer goods but **all kind of goods without making any distinction**. This new and broader category of goods also includes goods which were not previously taken into consideration by the Consumer Code, such as, for example, tangible movable goods incorporating or interconnected with a digital content or a digital service in such a way that the lack of such digital content or digital service would prevent the goods from performing their proper functions (so-called "**goods with digital elements**") as well as living animals.

Furthermore, **second-hand goods** are expressly included in the scope of application of the Decree 170/2021, while the material support acting exclusively as vector of the digital content is excluded, as well as the goods subject to compulsory sale or otherwise disposed of by the judicial authorities, also by delegation to the notaries, or according to other procedures provided for by law.

The definition of "*seller*" is also broadened to include **platform providers** (whether acting for purposes falling within the scope of their activity) and as the contractual counterpart of the consumer for the supply of digital content or digital services.

The new art. 129 of the Consumer Code lists the subjective and objective requirements that must necessarily be fulfilled in order to be, for the goods, deemed compliant with the sales contract, partially amending the previous provisions.

Moreover, obligations are introduced on the part of the seller and indications regarding the conduct of the consumer concerning the **updating of digital goods** as well as incorrect installation. Specifically, if the consumer fails to install updates within a reasonable period, the seller is not liable for lack of conformity resulting from the failure to update, provided that the consumer has been informed of the availability of the update and the consequences of non-installation, and the non-installation or incorrect installation is not due to deficiencies in the installation instructions.

The amended art. 133 of the Consumer Code confirms the seller's liability towards the consumer for conformity defects existing at the time of delivery of the goods and emerging within two years from such time, as well as the right to undertake direct action to invoke defects not fraudulently concealed within the term of twenty-six months from delivery of the goods.



Such a liability is also extended to goods with digital elements in case the contract foresees an ongoing supply of the digital content or service: in case the supply agreement foresees an ongoing supply lasting less than two years, the liability is extended to any conformity defect occurring within two years from the delivery of the digital goods. On the other hand, if the agreement provides for a duration of more than two years, liability covers any lack of conformity that occurs during the period in which the digital content or service is expected to be supplied.

The new art. 135 of the Consumer Code, which as we have seen will also apply to goods with digital elements, provides that in case of lack of conformity this will be presumed whether it occurs within one year from delivery of the goods (subject to proof to the contrary) extending the previous period of six months.

It is furtherly reaffirmed the consumer's right to request the seller (i) to restore conformity (choosing between repair and replacement of the goods, pursuant to art. 135-ter), (ii) to receive a proportional reduction in the price or (iii) the termination (both hypotheses provided for by art. 135-quater) of the contract in the event of a lack of conformity of the goods, under the conditions established by the new art. 135-bis of the new Consumer Code.

A new discipline applies also to the **conventional warranty**, whose content is now regulated in detail. Specifically, according to the new provisions, the conventional warranty shall include:

- a clear statement that the consumer has by law, free of charge, remedies for lack of conformity against the seller and that such remedies are not affected by the conventional warranty;
- the name and address of the guarantor;
- The procedure to be followed by the consumer to enforce the conventional warranty;
- The designation of the goods the conventional warranty applies to;
- The terms of the conventional warranty.

Legislative Decree no. 173 of 4 November 2021

Legislative Decree No. 173 of 4 November 2021 implements Directive (EU) 2019/770 on certain aspects of contracts for the supply of digital content and digital services, introducing a whole new Chapter into the Consumer Code.

Again, the new provisions will apply to the supply of digital content or services as of 1 January 2022.

Highlights:

Decree 173/2021 introduce after Chapter I, Title III of Part VI of the Consumer Code a new Chapter I-bis entitled "*Dei contratti di fornitura di contenuto digitale e di servizi digitali*" ("*Of contracts for the supply of digital content and digital services*").

According to the provisions of the newly introduced Art. 135-octies, digital content means "*data produced and supplied in digital format*", while digital service must be understood as "*1) a service enabling the consumer to create, transform, store or access data in digital format; or 2) a service allowing the sharing of data in digital format, uploaded or created by the consumer and other users of such service, or any other interaction with such data*".

These provisions apply not only to **chargeable services** (i.e., in those contracts in which the professional provides or undertakes to provide a digital content or service to the consumer and the latter corresponds or undertakes to correspond a price) but also to **free** (or pseudo-free) **services**, i.e., those services in which the consumer, in exchange for the service, provides or undertakes to provide personal data to the professional "*except where the personal data provided by the consumer are processed exclusively by the professional for the purpose of providing the digital content or digital service under this Chapter or to enable the performance of legal obligations to which the professional is subject and the professional does not process such data for any other purpose*." These provisions also apply "*if the digital content or digital service is developed in accordance with the consumer's specific instructions*."

The Decree 173/2021 excludes from the scope of the new provisions:

- digital content or services incorporated into or interconnected with goods with digital elements and sold together with the same (e.g., smartphones or game consoles);
- contracts concerning the provision of services other than digital services, irrespective of whether the professional uses digital arrangements or means to obtain the result of the service or deliver it or transmit it to the consumer;
- contracts for electronic communications services, except for interpersonal communications services without a number;
- contracts for health care services for services provided by health professionals to patients to assess, maintain or restore their state of health, including prescribing, dispensing and supplying medicines and medical devices, whether provided through health care facilities;
- contracts for gambling services;
- contracts for financial services;
- contracts concerning software offered by the supplier under a free and open license, where the consumer does not pay a price and the personal data provided by the consumer are processed exclusively by the professional for the purpose of improving the security, compatibility or interoperability of the specific software;
- contracts for the supply of digital content made available to the public by means other than signal transmission as part of a performance or event, such as digital cinema projections;
- contracts for digital content provided by public bodies.

The new Article 135-decies of the Consumer Code requires the professional to provide the digital content or service to the consumer without unjustified delay following the stipulation of the contract, unless otherwise agreed by the parties. The professional fulfills this obligation when the digital content or any suitable means of accessing or downloading the same is made available or accessible to the consumer, or to the physical or virtual facility chosen for this purpose by the consumer, as well as when the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer.

The new provisions also outline the obligations of the professional and of the consumer concerning updates required to maintain the conformity of the digital content or service.

Specifically, it envisages the responsibility of the professional for conformity defects occurring within 2 years from the time of supply. Likewise, the term of 26 months from the supply is maintained, as in the pre-existing discipline on defects of conformity of goods sold, as the limitation period for undertaking the action to claim defects existing at the time of supply and not fraudulently concealed.

The burden of proving the conformity of the digital content or service falls on the professional, unless he demonstrates that the consumer's digital environment is not compatible with the technical requirements of the digital content or the digital service and has informed the consumer of such requirements in a clear and comprehensible manner prior to the stipulation of the contract.

A duty for the consumer to cooperate in order to ascertain whether the cause of the lack of conformity lies in the consumer's digital environment is also provided for, failing which the burden of proof is reversed.

There is also a right of recourse in favor of the professional against the subjects belonging to the contractual distribution chain **within one year** of the performance of the service, in the event of non-delivery of a digital content or service or in the event of a lack of conformity.

In the event of failure to supply the digital content or service, art. 135-septiesdecies provides that the consumer may terminate the contract whether, having requested the professional to comply, the latter again fails to provide the digital content or service.

Finally, on the subject of "**modification of the digital content or digital service**" the decree provides that if the digital content or service is provided or made accessible to the consumer for a certain period the professional is allowed to make changes, other than those required to maintain compliance. The consumer has the right to withdraw from the contract if such changes adversely affect the consumer's use or access to the digital content or service, unless those negative consequences are negligible. In this case, the consumer has the right to withdraw from the contract free of charge **within thirty days** from the date of receipt of the information or, if later, from the moment when the digital content or the digital service has been modified by the professional.

As a result of the introduction of the above-mentioned changes to the Consumer Code, companies will be required to comply with the newly introduced provisions conforming their terms and conditions of sale and supply.

This article is written for informational purposes. It is not intended to be an exhaustive legal opinion concerning the Consumer Code. For any further information and specific insights please contact: Roberto Camilli (Roberto.Camilli@bdo.it), Gabriele Ferrante (Gabriele.Ferrante@bdo.it) and Sofia Ferri (Sofia.Ferri@bdo.it).

Contacts:
BDO Law S.r.l. Sta

Milano
Viale Abruzzi, 94

BDO is one of the leading international auditing and business consulting organizations with over 97,000 highly qualified professionals in more than 167 countries. In Italy, BDO is present with approximately 1,000 professionals with an integrated structure that ensures widespread coverage of the country.

The Law Alert is published with the intention of keeping clients updated on developments in the legal field. This publication cannot, under any circumstances, be associated, in part or in full, with any opinion expressed by BDO. Despite the care with which it is prepared, BDO cannot be held responsible for any inaccuracies or omissions in the document. The editing of this publication was completed on December 21, 2021.

BDO Law S.r.l. Sta, a company between lawyers, is a member of BDO International Limited, a company limited by guarantee, and is part of the international BDO network of independent firms. BDO is the brand name used by the BDO network and its individual independent member firms.

© 2022 BDO (Italy) - Law Alert - all rights reserved.