

NEWS BRIEFING

Intellectual property law

TRANSPPOSITION INTO FRENCH LAW OF EU DIRECTIVES 2019/770 AND 2019/771

FOCUS ON THE LEGAL WARRANTY OF CONFORMITY OF
DIGITAL GOODS, CONTENT AND SERVICES

On 20 May 2019, the European Commission adopted two Directives aiming to ensure better protection of consumers, considering the growing impact of digital on the European market:

- Directive 2019/770 on the provision of digital content and services;
- Directive 2019/771 on the sale of goods, including the sale of goods incorporating digital elements.

As these two Directives are to be transposed and applied by 1st January 2022 at the latest, the French government adopted a transposition Order, published on Wednesday 29 September 2021 (Order no. 2021-1247).

The purpose of the measures is to strengthen consumer protection in the field of digital goods, content, and services, particularly with regard to the legal warranty of conformity.

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KEY POINTS

The Order introduces a legal obligation of conformity applicable to goods that include digital elements (e.g. smartphones, connected objects, home automation devices, etc.) as well as for contracts for the provision of digital content and services (e.g. streaming, purchase or rental of films, or online video games, etc.).

Such content, services and goods containing digital elements must therefore be in conformity with the description given by the professional, particularly in terms of quality, and must be fit for any purpose normally expected and any special purpose sought by the consumer which he would have brought to the attention of the professional (at the latest at the time of the conclusion of the contract) and that the professional accepted.

In the event of a lack of conformity, the consumer will have the right to have the goods repaired or replaced, and the digital content and services brought into conformity.

This must be done free of charge, without any major inconvenience for the consumer and within a reasonable period of time which may not exceed 30 days. Otherwise, the consumer is entitled to a reduction in price or to have the contract rescinded.

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KEY POINTS

The ordinance also elaborates on the updates of digital elements, content and services, specifying that they relate to all actions aimed at maintaining, adapting or evolving the planned functionalities, including security updates.

The professional shall ensure that the consumer is informed of the updates necessary to maintain the conformity of the digital items, content and services, it being specified that, subject to compliance with its obligations in terms of information and provision of updates, the professional may not be liable for lack of conformity if the consumer does not install the updates provided within a reasonable period.

It is interesting to note that this Order provides that if the professional processes personal data in the context of the contract, any breach of its obligations under the French regulations and the RGPD will be considered as a “lack of conformity”, without prejudice to the remedies provided by these regulations.

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PENALTIES AND CIVIL FINES

Order n°2021-1247 introduces a civil fine that may be applied to a professional who prevents, in bad faith, the implementation of the abovementioned legal warranty of conformity.

The amount of the fine may be up to 10% of the average annual turnover, calculated on the last three annual turnovers known on the date of the decision. A seized court may also decide to order the publication, broadcasting or display of its decision.

Administrative sanctions may also be imposed in the event of non-compliance with certain obligations.

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IMPLEMENTATIONS OF THESE PROVISIONS

It remains to be seen in practice how professionals will apply these new provisions and how the courts will assess the compliance of their practice.

The purpose of these innovations is to modernize the legal provisions currently applicable to the new uses, content and consumption of these digital elements.

In a few months, we will be able to start measuring whether and how these new measures have achieved the objective of strengthening the sustainability of goods and consumer protection.

Advant Altana's IP & Digital team remains at your disposal to answer any questions and to discuss these issues with you.

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